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## Theoretical Challenges to TWAIL with the Rise of China: Labor Conditions Under Chinese Investment in Pakistan

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### ABSTRACT

*This Article challenges the presumptions of Third World Approaches to International Law (TWAIL) scholarship by examining the rise of China, a “non-European” country, in the global economic*

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*order. Is Chinese capital separate from structurally-entrenched global capital often considered Western? Is China going to use the already established hegemony of “universal” and “positivist” international legal regimes to further global exploitation, marginalization, and exclusion? Will the dependent state and local elite of the Third World countries resist such exploitation? This Article reflects on these questions by addressing labor conditions under Chinese investment in Pakistan. It is evident from labor conditions research under the China-Pakistan Economic Corridor (CPEC) in Pakistan that China, along with coercion, exploitation, and active avoidance of the established legal regime also uses the logic of international legal regimes for its legitimacy. This Article posits that resistance to CPEC will not come from the parasitic military-bureaucratic state of Pakistan, but if at all, from the working class itself in its embryonic form. Indeed, this Article argues that working-class representation in the dependent state is insufficient to provide distributive justice from international legal regimes. Thus, while this Article retains the theoretical propositions of “Third World” and “state,” I argue that the point of resistance must be shifted from the “state” to the working people of the Third World.*

#### INTRODUCTION

As a body of work, TWAIL challenges the “positivism,” “universality,” “Eurocentrism,” and Westphalian assumptions of international law through which exclusion, marginalization, and exploitation of the colonized “uncivilized,” “non-sovereign,” and “others” happened in the era of colonization. TWAIL further claims that the recolonization of the Third World is underway in this age of neoliberal globalization through international legal regimes, such as intellectual property under the World Trade Organization, or the War on Terror, and so on.<sup>1</sup> The current generation of TWAIL scholars has resisted such recolonization for the last two decades.<sup>2</sup> The point of resistance to this thrust of international legal regimes is the “Third World,” which is represented by the “states” of these countries, as the subject of international law. It is problematic that individuals, even

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<sup>1</sup> See B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L COMM. L. REV. 3, 3 n.1 (2006).

<sup>2</sup> See *infra*, the writings of Anghie, Chimni, Rajagopal, Ghattii, and Okafor discussed in this Article, which illustrate this resistance.

those of the Western world, are not the subject of international law.<sup>3</sup> This is particularly poignant when it comes to the Third World people who are victims of a severe lack of representation in their own countries. TWAIL scholars are tangentially critical of the class nature of Third World states, but in their theoretical propositions still put their hopes on these states to resist international legal regimes.<sup>4</sup>

However, TWAIL has not yet addressed the question of the rise of “non-European” and “Third World” countries such as China (and to some extent India) that have a rising share in the world economy and are exploiting other Third World countries in Africa, Latin America, and now Pakistan, Sri Lanka, Malaysia, and Laos.<sup>5</sup> How should legal scholars and practitioners respond when these “victims” of the past are using the same international legal regimes that they have resisted? Moreover, when necessary, these “Third World states” also blatantly avoid international legal regimes, such as core labor conventions, in order to exploit local populations. The main aim of this Article is to broaden the scope of TWAIL as a “way of thinking” by addressing the issue of rising non-European economic powers. This Article does this through internal critiques of TWAIL’s basic theoretical propositions concerning the “Third World” and its “states” from the vantage point of resistance to international legal regimes.<sup>6</sup>

Scholar Bertell Ollman is right to say that “what we understand about the world around us is determined by what the world is, who we are, and how we conduct our study.”<sup>7</sup> “Who we are” means choosing a

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<sup>3</sup> This Westphalian assumption is creating a legitimacy crisis for international law. See A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 R. INT’L STUD. 2 133, 133–50 (2001).

<sup>4</sup> See especially Chimni, *supra* note 1, at 3.

<sup>5</sup> For the best illustration of Chinese investment in Africa, see generally Ching Kwan Lee, *THE SPECTER OF GLOBAL CHINA: POLITICS, LABOR, AND FOREIGN INVESTMENT IN AFRICA* (2017). For Chinese investment in Latin America, see generally Xiaofang Shen, *Private Chinese Investment in Africa: Myths and Realities*, 33 DEV. POL’Y REV. 83, 88 (2015); Ruben Gonzalez-Vicente, *Mapping Chinese Mining Investment in Latin America: Politics or Market?*, THE CHINA Q. 209; FROM THE GREAT WALL TO THE NEW WORLD: CHINA AND LATIN AMERICA IN THE 21ST CENTURY, 35–36 (Mar. 2012).

<sup>6</sup> After World War II, the term was used for the countries of Africa, Asia, and Latin America in unequal terms of trade in global market. See LEFTEN S. STAVRIANOS, *THE GLOBAL RIFT: THE THIRD WORLD COMES OF AGE* 32 (1981); see also Winston E. Langley, *The Third World: Towards a Definition*, 2 B.C. THIRD WORLD L.J. 1, 27 (1981). For how TWAIL defines Third World, see, e.g., Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT’L L.J. 353 (1998).

<sup>7</sup> See Bertell Ollman, *DANCE OF THE DIALECTIC: STEPS IN MARX’S METHOD* (2003).

vantage point (the point *to* view and not the point *of* view). For Gramsci, Marxism is “the philosophy of praxis,” and his ideas cannot be separated from the need of practical action.<sup>8</sup> In this tradition, TWAIL also believes in the role of the intellectual (their legal scholars) as a “political actor,” and “animator of praxis,” which involves his “reflection, agitation, and transformative action.”<sup>9</sup> But what I want to add is that this vantage point of resistance to the local elite of these countries can illustrate how the institutional arrangements and rearrangements of international legal regimes are marked with compromises, whereas standing with the working class and the marginalized social groups of the Third World allows us to see structures through the helplessness of their eyes.

This Article attempts to look at international law regimes from the vantage point of the people of the Third World, using the concrete example of labor conditions under the China-Pakistan Economic Corridor (CPEC) in Pakistan and the emerging discontent and resistance around this investment.<sup>10</sup> While doing so, this Article will add to the literature of TWAIL on the rise of China by examining China’s practices as containing both continuity of and challenges to the international hegemonic agenda. This Article thus adds to the understanding of the concept of hegemony, its relation to international legal regimes, and China’s place in it. This is needed to articulate a coherent counter-hegemony by TWAIL scholars.

Before starting, it is important to mention certain strengths and shortcomings of this Article. What theoretically informs this Article is my teaching of international law from the perspective of the South. Practically, I also bring extensive insights from my ongoing research on labor, specifically labor conditions under CPEC. I was also engaged as a legal expert in the *Baldia Factory Fire* case in Karachi, Pakistan, where garments were manufactured for a German retailer, KiK, which informs my understanding of the legal complexity of labor regimes in

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<sup>8</sup> Robert W. Cox, *Gramsci, Hegemony and International Relations: An Essay in Method*, 12 MILLENNIUM: J. INT’L STUD. 162, 163 (1983).

<sup>9</sup> For the objectives of the Cairo Conference, see Richard Falk, *Foreword: Third World Approaches to International Law (TWAIL) Special Issue*, 37 THIRD WORLD Q. 1943 (2016); see also THIRD WORLD APPROACHES TO INTERNATIONAL LAW: ON PRACTICE AND THE INTELLECTUAL (Usha Natarajan et al. eds., 2017).

<sup>10</sup> CPEC is China’s investment in a number of projects in Pakistan, valued at more than \$60 billion. For Chinese investment in Pakistan, see GOV’T OF PAK. MINISTRY OF PLAN., DEV. & REFORM, *Long Term Plan for China-Pakistan Economic Corridor (2017–2030)*, <https://www.pc.gov.pk/uploads/cpec/LTP.pdf>.

Global Value Chains (GVCs).<sup>11</sup> Nonetheless, the phenomenon of CPEC is new and is changing very fast. I refer to CPEC labor conditions as illustrative in this theoretical paper and not in terms of a systematic case study. Therefore, many times facts may seem to be asserted and not demonstrated. While China's rise and its Belt and Road Initiative (BRI) are being discussed by writers extensively, this Article is limited to a singular, but substantial, part of the project: CPEC. This Article does not look into the overall political, social, and economic changes in Pakistan under CPEC, and is instead limited to labor conditions. TWAIL is also not substantially concerned, as I analyze a few theoretical assumptions of TWAIL, namely its idea of Third World "states," resistance to international legal regimes, and its understanding of global capital.<sup>12</sup> These concepts are re-evaluated from the perspective of resistance to international legal regimes and not their problems as ontological and anthropological terms.<sup>13</sup> Within TWAIL, I am engaging with Chimni as a standard manifestation of TWAIL in the old political economy tradition; Anghie from the colonial/imperialist history of international law; Rajagopal for bridging the old political economy of Chimni with the postmodernist, post-structuralist and postcolonial perspective; and finally, Okafor and J.M. Gatti for the methodology of TWAIL.<sup>14</sup>

Part I of this Article deals with Chinese investment under CPEC in Pakistan and the relevance of TWAIL's perspective on the nature of Chinese capital and hegemony. How is Chinese capital separate from

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<sup>11</sup> I am currently writing an article about labor conditions in Pakistan under CPEC. I am also writing a paper titled "Sociology of Global Supply Chain Law," in which I analyze the downward linkages of the GSC. Previously, I wrote a legal opinion on tort and damages in a case as a legal expert engaged by Geulen & Klinger Rechtsanwälte and the European Commission for Constitutional and Human Rights (ECCHR). This case is pending adjudication in Germany against a German retailer, KiK, about Pakistan's biggest factory fire—where 265 workers died in 2012.

<sup>12</sup> This Article discusses the concepts from the writings of many authors. *See, infra*, Anghie, Chimni, Rajagopal, Ghattii, and Okafor.

<sup>13</sup> *See* Begoña Aretxaga, *Maddening States*, 32 ANN. REV. ANTHROPOLOGY 393, 393 (2003). *See, e.g.*, the critique on the concept of state and third world from an anthropological perspective.

<sup>14</sup> For a specific position on these issues, see ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (1st ed., 2005); *see also* Chimni, *supra* note 1, at 3. For postmodernist intervention on TWAIL, *see generally* BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003). For methodology, *see generally* Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 INT'L COMM. L. REV. 371 (2008).

structurally entrenched Global Capital (Western) and the consequent established hegemony of international legal regimes? Part II addresses how labor in CPEC projects in Pakistan can seek guidance from TWAIL's understanding of counter-hegemony to resist undergoing exploitation and exclusion. Part III suggests how the aims of TWAIL for a representative and equitable international law are promising, but its reliance for resistance on Third World states and their local elites is not sufficient in this age of neo-liberal globalization. Finally, the Article concludes that taking the vantage point of new class-based and other social movements engaged in resistance can ensure a truly representative state locally, and only this can ensure distributive justice in negotiations of international legal regimes.

## I

### CHINESE INVESTMENT UNDER CPEC IN PAKISTAN AND RELEVANCE OF TWAIL'S PERSPECTIVE

From its inception, most of TWAIL's work has been confined to defending itself and proving its existence separately from mainstream international law.<sup>15</sup> While correctly pointing out the colonial origins of international law, TWAIL scholars repeatedly redefined the origins of their own thinking in postcolonial history, periodizing TWAIL scholarship into multiple generations.<sup>16</sup> In this process, TWAIL developed from being "a way of thinking" into a body of knowledge in

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<sup>15</sup> For a critique of the Third World from postmodernist perspective, see J.M. Walker, *Space/Time/Sovereignty*, in *PERSPECTIVES ON THIRD WORLD SOVEREIGNTY: THE POSTMODERN PARADOX* 13 (M.E. Denham & M.O. Lombardi eds., 1996). For a cultural critique, see generally Homi K. Bhabha, *THE LOCATION OF CULTURE* (2d ed., 2004). For the argument of NICs, see generally NIGEL HARRIS, *THE END OF THE THIRD WORLD: NEWLY INDUSTRIALIZING COUNTRIES AND THE DECLINE OF AN IDEOLOGY* (1987). Feminists have also criticized the "South" trend of international law for preserving the basic, mainstream concept of statehood. These feminists also find it radical and only talk about economic disparity. See, e.g., Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379 (1999). For a direct critique of TWAIL, see John D. Haskell, *TRAILING TWAIL: Arguments and Blind Spots in TWAIL*, 27 CAN. J. L. & JURIS. 383 (2014); Philip Alston, *Remarks on Professor B. S. Chimni's A Just World Under Law: A View From the South*, 22 AM. U. INT'L L. REV. 221, 221–36 (2007).

<sup>16</sup> Most of the writings of these authors include one section explaining "What is TWAIL?" See, e.g., Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 79–87 (2003); see also Makau Mutua, *What is TWAIL?*, 94 PROCEEDINGS OF ANNUAL MEETING (AM. SOC. INT'L L.) 31 (2000); Antony Anghie, *What is TWAIL?: Comment*, 94 PROCEEDINGS OF ANNUAL MEETING (AM. SOC. INT'L L.) 39, 39–41 (2000).

international law with a distinct theory and methodology.<sup>17</sup> Although the intellectual, theoretical, and methodological endeavor of TWAIL is vital, its main case for the “Third World” and “states” was always contested by the Right as well as the Left.<sup>18</sup> Chimni, Anghie, Baxi, and Rajagopal very succinctly defended the existence of the Third World historically and based on the emerging needs of struggle against re-colonization under neoliberal legal regimes of international law.<sup>19</sup> But why is there a need for Third World unity, and against whom? An analysis of the nature of current global capital and the Third World’s place in its composition and formation is missing from TWAIL’s theory. As a result, TWAIL literature is weak on the analysis of the current imperialism or empire or nature of capitalism.<sup>20</sup> This problem now haunts us when someone seeks guidance from TWAIL to understand the rise of Chinese capital or global capitalism, as this Article addresses.

#### ***A. The Rise of China and TWAIL’s Understanding of Global Capital and “Empire”***

How does TWAIL’s available theoretical understanding help us analyze the nature of Chinese capital or capitalism, or inform us concerning Chinese investment in relation to labor in Pakistan?

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<sup>17</sup> TWAIL was not considered as a distinct stream of international law because it has no method. See, e.g., Steven R. Ratner & Anne-Marie Slaughter, *Symposium on Method in International Law*, 93 AM. J. INT’L L. 291 (1999); see further Okafor, *supra* note 14. There are many other articles defending TWAIL as a distinct way of thinking about international law. See generally Rao Qasim Idrees et al., *How Logistics Investment Arrangement is a Key Concern to China-Pakistan Economic Corridor (CPEC)? A Legal and Policy Analysis of CPEC Logistics Investment Model and Future Challenges for Pakistan*, 8 INT’L J. ASIAN SOC. SCI. 1059 (2018).

<sup>18</sup> For a mainstream critique, see Alston, *supra* note 15; see also Hilary Charlesworth, *Feminist Critique of International Law and its Critics*, 13 THIRD WORLD LEGAL STUD. 1, 2. For a radical critique, see Charlesworth, *supra* note 15, at 2; see also Ediberto Román, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law*, 33 U.C. DAVIS L. REV. 1519, 1519–45 (2000).

<sup>19</sup> For a forceful defense, see Upendra Baxi, *What May the “Third World” Expect from International Law?*, in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 13 (Richard Falk et al. eds., 2008); see generally Balakrishnan Rajagopal, *The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 LEIDEN J. INT’L L. 345 (2005).

<sup>20</sup> See generally ANGHIE, *supra* note 14; see also B. S. Chimni, *Anti-Imperialism: Then and Now*, in VASUKI NESIAH ET AL., GLOBAL HISTORY AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 35–48 (2017).

Let us first understand certain features of Chinese investment under CPEC in Pakistan in relation to labor. First of all, CPEC is in the process of evolving, from road and rail infrastructure, to energy, to stock exchanges, to special economic zones (SEZs), and from mining (extractive industry), to agriculture.<sup>21</sup> This is unlike the modernization projects of the 1960s where projects were first designed and later funded by the World Bank, such as the Indus Waters Treaty between India and Pakistan and the building of mega dams.<sup>22</sup> CPEC projects are both designed and implemented at the same time.<sup>23</sup> The sheer number of industries and sectors involved in CPEC is vast and ever changing.<sup>24</sup> But so far, CPEC is mainly confined to the construction of roads and power projects, which were initially coal power plants.<sup>25</sup> Chinese representatives do not promise one hundred percent clean projects.<sup>26</sup> The road construction employed mostly cheap contract labor.<sup>27</sup> But the changing nature of CPEC entails that labor composition, along with the nature of work conditions, will change in different sectors. Public sector State-Owned-Enterprises (SOEs) of China are mostly investing in CPEC.<sup>28</sup> This means that the problematic practices of China's own

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<sup>21</sup> GOV'T OF PAK. MINISTRY OF PLAN., DEV. & REFORM, *supra* note 10.

<sup>22</sup> The Indus Waters Treaty is a deal brokered in 1960 by the World Bank between India and Pakistan for the distribution of water from the Indus rivers system. To compensate for the shortage of water, the World Bank arranged loans for Pakistan to build mega dams like Tarbela and Mangla.

<sup>23</sup> SHAHID JAVED BURKI INST. OF PUB. POL'Y, *The State of the Economy: China-Pakistan Economic Corridor Review and Analyses* (2017), <http://www.sjbipp.org/publications/AR/reports/AR-10-17.pdf>.

<sup>24</sup> See GOV'T OF PAK. MINISTRY OF PLAN., DEV. & REFORM, *supra* note 10, at 14–24.

<sup>25</sup> One can see twenty-one such infrastructure projects as opposed to eight on the official CPEC website. CHINA PAK. ECON. CORRIDOR, *CPEC-Energy Priority Projects* (2017), <http://cpec.gov.pk/energy>.

<sup>26</sup> See Lian Tong, *CPEC Industrial Zones and China-Pakistan Capacity Cooperation*, STRATEGIC STUD. 174, 174–84 (2015), [http://issi.org.pk/wp-content/uploads/2015/12/Liang-Tong\\_3435\\_SS\\_41\\_20142015.pdf](http://issi.org.pk/wp-content/uploads/2015/12/Liang-Tong_3435_SS_41_20142015.pdf).

<sup>27</sup> Our research and 2018 field work on Lahore Orange Line shows an endless chain of subcontracting with cheap labor. See the forthcoming paper, Muhammad Azeem & Hiba Akbar, *Research Agenda for a Postcolonial Labor Law Theory? Labor Conditions Under CPEC* (publication forthcoming).

<sup>28</sup> Based on our findings of CPEC projects researched for labor conditions. For example, China Huaneng Shandong Power Generation working in Sahiwal Coal Power plant is one of the five largest state-owned electric utility enterprises of China. Similarly, China Gezhouba Group Co. Ltd working at Neelum Jhelum power project is a private company, but the major shareholder of the company (40.8%) is state-owned by the China Gezhouba Group Corporation. See *China Gezhouba Group Co Ltd*, BLOOMBERG, <https://www.bloomberg.com/profile/company/600068:CH> (last visited Apr. 3, 2019). Power China

labor legal regimes and practices will be reflected in Pakistan.<sup>29</sup> The Chinese state is also actively behind this investment.<sup>30</sup> This creates direct pressure on the host government to curb dissent and resistance as opposed to letting market mechanisms handle industrial relations.<sup>31</sup> Finally, China's quest for raw materials and cheap labor can be seen in this investment in Pakistan, contrary to the alleged and oft-discussed objectives of CPEC as the New Great Game or solution to the "Strait of Malacca" dilemma.<sup>32</sup> So far, Chinese investment in Pakistan is labor-intensive, capital-intensive, and environmentally obsolete.<sup>33</sup> Cheap labor and extraction of raw material is not only the core of colonial history and exploitation, but also of Chinese investment as recent academic literature on China's economic role in Latin America and Africa illustrates.<sup>34</sup>

In the existing literature on the nature of Chinese capital, world systems theorists consider Chinese capital part of the world capitalist

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Resources working at Port Qasim power plant is also a private subsidiary of state-owned Power Construction Corporation of China Ltd.

<sup>29</sup> For labor conditions and struggles in China, *see generally* CHRIS KING-CHI CHAN, *THE CHALLENGE OF LABOUR IN CHINA: STRIKES AND THE CHANGING LABOUR REGIME IN GLOBAL FACTORIES* (2010); Chris King-chi Chan & Elaine Sio-leng Hui, *The Development of Collective Bargaining China: From "Collective Bargaining by Riot" to "Party State-Led Wage Bargaining"*, *CHINA Q.* 217, 221–242 (2014); Chloé Froissart, *Negotiating Authoritarianism and Its Limits: Worker-led Collective Bargaining in Guangdong Province*, *32 CHINA INFORMATION* 1, 23–45 (2018); CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT* (2007); CHING KWAN LEE, *GENDER AND THE SOUTH CHINA MIRACLE: TWO WORLDS OF FACTORY WOMEN* (1998); PUN NGAI, *MADE IN CHINA: WOMEN FACTORY WORKERS IN A GLOBAL WORKPLACE* (2005).

<sup>30</sup> Tong, *supra* note 26, at 181.

<sup>31</sup> For example, the wages of dock workers in Port Qasim berth 3 and 4 have been stopped by the Chinese company for the last eight months. Chinese companies do not want to make workers permanent. Interview with workers 1 to 10 and Deputy Gen. Sec. of the Port Qasim Workers Union (registered) for the forthcoming paper. *See* Azeem & Akbar, *supra* note 27.

<sup>32</sup> Eighty percent of Chinese crude oil imports pass through a small strait en route. This spans from the Middle East to Angola. China has no other viable route. Chinese President Hu Jintao called it "the Malacca Dilemma" in 2003.

<sup>33</sup> Based on our field work for the forthcoming paper. *See* Azeem & Akbar, *supra* note 27.

<sup>34</sup> For analyses of Chinese state interests in Africa, *see generally* CHRIS ALDEN, *CHINA IN AFRICA* (2007); PHILIP SNOW, *THE STAR RAFT: CHINA'S ENCOUNTER WITH AFRICA* (1st ed., 1988). For a review of China's south-south policy with reference to African nations, *see generally* Alex E. Fernández Jilberto & Barbara Hogenboom, *Developing Regions Facing China in a Neoliberalized World*, *23 J. DEVELOPING SOCIETIES* 305, 305–39 (2007).

system.<sup>35</sup> In contrast, some analyses consider Chinese capital as one of the varieties of capitalism around the globe.<sup>36</sup> These analyses stick to institutional features of different forms of capital. Similarly, analyses concerned only with economic aspects of capitalism focus on centralized control of the Communist Party and Chinese state over politics and economic institutions in China.<sup>37</sup>

Some analyses, which not only discuss the nature of Chinese capital but also explore its relationship with labor, are worth mentioning here. One is the work of Ho-fung Hung (2016), which shows Chinese capital with its particularities and also its embeddedness and relation with world capital.<sup>38</sup> Fung's main argument is that Chinese development is dependent on global capital and free trade, hence it should not be taken as an alternative to the global neocolonial order.<sup>39</sup> He extensively showed the exploitation of Chinese labor in its development.<sup>40</sup> For Fung, foreign direct investment (FDI) took off in China because of cheap labor in late 1970's, and by the 1980's, there was a deliberate attempt to destroy rural self-sufficient economies in China to make the supply of cheap labor to urban centers possible.<sup>41</sup>

Another very special work related to our analysis is that of Ching Kwan Lee (2017). She divides capitalism in Africa into global capitalism (Western) and concludes profit motives are the driving force behind this capital.<sup>42</sup> She contrasts this with Chinese capital, which is more concerned with strategic growth, according to Kwan Lee.<sup>43</sup> China

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<sup>35</sup> See, e.g., GIOVANNI ARRIGHI, *ADAM SMITH IN BEIJING: LINEAGES OF THE TWENTY-FIRST CENTURY* (1st ed. 2007).

<sup>36</sup> EAST ASIAN CAPITALISM: DIVERSITY, CONTINUITY, AND CHANGE (Andrew Walter & Xiaoke Zhang, eds., 2012); Ben Ross Schneider, *Hierarchical Market Economies and Varieties of Market Economy in Latin America*, 41 J. LAT. AM. STUD. 553, 553–75 (2009); Andreas Nölke & Arjan Vliegenthart, *Enlarging the Varieties of Capitalism: The Emergence of Dependent Market Economies in East Central Europe*, 61 WORLD POL. 670, 670–702 (2009).

<sup>37</sup> Nan Lin, *Capitalism in China: A Centrally Managed Capitalism (CMC) and Its Future*, 7 MGMT. & ORG. REV. 63, 63–96 (2010); Neil Fligstein & Jianjan Zhang, *A New Agenda for Research on the Trajectory of Chinese Capitalism*, 7 MGMT. & ORG. REV. 39, 39–62 (2010).

<sup>38</sup> See generally HO-FUNG HUNG, *THE CHINA BOOM: WHY CHINA WILL NOT RULE THE WORLD* (1st ed., 2015).

<sup>39</sup> *Id.* at 10; see also Ho-fung Hung, *Rise of China and the Global Overaccumulation Crisis*, 15 REV. INT'L POL. ECON. 149, 149–79 (2008).

<sup>40</sup> *Id.* at 69–70.

<sup>41</sup> HO-FUNG HUNG, *supra* note 38, at 69–70.

<sup>42</sup> KWAN LEE, *supra* note 5, at 12.

<sup>43</sup> *Id.* at 12–13.

likes to secure the supply of raw materials, even at the expense of declining profits. Lee's demonstration of the difference between global capital (Western) and Chinese capital in Zambia is well made, but it ignores the connection between the two "capitals." Even if both are different, how important is this difference when it comes to labor? Her own observations clearly illustrate this. She writes at several points that there is no difference between global capital (Western) and Chinese capital in exploiting labor, despite both giving different bargains to the workers.<sup>44</sup> When falling copper prices prompted a crisis, Chinese employers offered "stable exploitation" by giving job security, because they did not want to interrupt the supply of raw materials to the industries in China. Meanwhile, Canadian companies fired workers, but tried to give the rest appropriate wages.<sup>45</sup> In either case, workers suffered.

TWAIL's literature on this issue of post-Cold War global capitalism correctly points out that under the neoliberalism of the 1990's, rules and policies dictated by international institutions were undermining the economic and political independence of the Third World.<sup>46</sup> TWAIL's manifesto called it the "re-colonization" of Third World states and "domination" rooted in emerging new international legal regimes that displaced "national legal regimes."<sup>47</sup> The TWAIL manifesto confines itself to the relation of Third World with Western countries under these new legal regimes, and there is almost no analysis of global capital and new imperialism.<sup>48</sup> Added to this is the rather random use of the term "empire" by many TWAIL writers, which is different from imperialism and is a kind of de-territorialized capitalism.<sup>49</sup> Recently, Chimni engaged with the issue of imperialism anew. As opposed to a de-

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<sup>44</sup> *Id.* at 78.

<sup>45</sup> *See id.*; see also Ching Kwan Lee, *Raw Encounters: Chinese Managers, African Workers and the Politics of Casualization in Africa's Chinese Enclaves*, 199 *THE CHINA Q.* 647 (2009).

<sup>46</sup> Chimni, *supra* note 1.

<sup>47</sup> *Id.*

<sup>48</sup> Anghie's analysis is also confined to history of imperialism. *See* ANGHIE, *supra* note 14. Okafor and J.M. Gatti wrote on military aspect of imperialism in the pretext of War on Terror.

<sup>49</sup> Vasuki's article and her half-hearted use of this term led her straight to disappointment with this analysis when it comes to resistance/Hardt and Negri empire. Vasuki Nesiah, *Resistance in the Age of Empire: Occupied Discourse Pending Investigation* Rule 8, in RICHARD FALK ET AL., *INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE*, 199–219 (2008).

territorialized and de-centered empire and nationless state resistance against it, Chimni correctly pointed out how the locus of resistance against imperialism is still a nation state.<sup>50</sup>

Thus, although TWAIL literature correctly points out the chronic disease of colonization/recolonization to the independence of Third World countries and its symptoms of new emerging legal regimes, TWAIL scholarship is weak on the causes of this disease, namely the very nature of global capitalism in relation to local capital. This has led to a problematic understanding of “Third World” and its “states,” which will be expanded on later.

As far as the nature of relations of capitalism in Pakistan with Chinese investment is concerned, one thing can be said with certainty—the historic, dire sort of dependency relations of Pakistani capitalist classes are evident in CPEC.<sup>51</sup> The nature of Pakistani capital, its local dimensions, and the military’s share is well documented.<sup>52</sup> There are concerns by academics on the lack of indigenous thinking in privatization policies of the energy sector and the banking sector.<sup>53</sup> In CPEC, although Chinese firms earn huge profits at the stage of designing machinery and technical knowhow, construction and subsidiary work are given to Pakistani firms.<sup>54</sup> Many local construction companies grew at a tremendous rate under CPEC projects.<sup>55</sup>

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<sup>50</sup> Chimni, *supra* note 20, at 41.

<sup>51</sup> Pakistan is continuously pushing for joint ventures in CPEC. For example, the Adviser to Prime Minister on Commerce, Textile Industry, Production and Investment, Abdul Razak Dawood said that under the CPEC, the country would now prefer to enter into joint ventures with Chinese companies to increase the industrial base. See Parviaz Ishfaq Rana, *Joint Ventures Under CPEC Needed to Increase Industrial Base: Dawood*, DAWN, <https://www.dawn.com/news/1461555> (last updated Feb. 3, 2019).

<sup>52</sup> See Shahid-ur Rahman, *Who Owns Pakistan: Fluctuating Fortunes of Business Mughals*, ISLAMABAD (1997), <http://www.scribd.com/doc/125960792/Who-Owns-Pakistan>; AYESHA SIDDIQA, *MILITARY INC.: INSIDE PAKISTAN’S MILITARY ECONOMY* (2007); ANITA WEISS, *CLASS, CULTURE AND DEV. IN PAKISTAN: THE EMERGENCE OF AN INDUSTRIAL BOURGEOISIE IN PUNJAB* (1991).

<sup>53</sup> See Kamal Munir & Natalya Naqvi, *Privatization in the Land of Believers: The Political Economy of Privatization in Pakistan*, 51 *MODERN ASIA STUD.* 6, 1695–1726 (2018); see also Kamal Munir & Salman Khalid, *Pakistan’s Power Politics*, 47 *ECON. & POL. WKLY.* 25, 24–27 (2012).

<sup>54</sup> In construction for the Orange Line Lahore (OLL), a mass transit project, local labor built all the cement infrastructure. Chinese engineers installed track, electricity and ducting. In an interview, a Pakistani engineer said that he only pulled cables and connections made by the Chinese engineers. Based on our 2018 field work for the forthcoming paper. See Azeem & Akbar, *supra* note 27.

<sup>55</sup> For example, Habib Construction Services Ltd (HCS) and Pak Japan Trading Company HSC, established in 2009, has completed projects worth Pak rupees 34 billion in six years. Its main project is the construction of the Orange Line Metro Bus Line in Lahore.

Meanwhile, Pakistan's "Military Inc."<sup>56</sup> is taking on construction of certain parts of CPEC and permits for choice SEZs. There is some trickle down for local businesses, but its benefits do not reach the labor class.<sup>57</sup>

In sum, Pakistan's local elite is inseparable from Chinese capital. It is open to future TWAIL scholars to ponder the relation of Chinese capital with global capital (or "empire"). There may be friction between local capital and global capital, but they are joined by ideological and political dimensions of international regimes. This consensus is called hegemony. Is CPEC a part of global hegemony, or does it have its own hegemonic agenda?

### ***B. Problematizing TWAIL's Concept of Global Hegemony and China's Place in It***

Rajagopal correctly points out that the "term 'empire' is less helpful than hegemony—empire is imposing whereas hegemony is giving consent."<sup>58</sup> To describe hegemony in very simple terms, one can say that the dominant class in a country not only rules through coercion, but also seeks the consent of the dominated. In case of more than one dominant class, the hegemonic class includes other dominant classes in its hegemonic agenda, forming a "historic bloc."<sup>59</sup> Gramsci's idea of hegemony at a local level is used by international legal scholars to understand global domination.<sup>60</sup> Rajagopal rightly used the idea of hegemony to understand new international legal regimes. He reached the idea of "historic bloc," but did not deconstruct or even explain historic bloc in his theoretical proposition.<sup>61</sup> The actual problem is how to apply Gramsci's ideas to the global order. Gramsci's ideas can help us to understand world order, but one must be mindful about two

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See *Habib Construction Services*, TUUGO.PK, <https://www.tuugo.pk/Companies/habib-construction-services/12400016180> [hereinafter HCS].

<sup>56</sup> AYESHA SIDDIQA, *MILITARY INC.: INSIDE PAKISTAN'S MILITARY ECONOMY* (2007).

<sup>57</sup> During our visits and interviews on all CPEC projects, especially the Sahiwal Coal Power Plant and the Neelum-Jhelum Power Project, the presence of local contractors and their share in CPEC profits were obvious. See e.g., details of growth of local company, HCS, *supra* note 55.

<sup>58</sup> SIDDIQA, *supra* note 56.

<sup>59</sup> ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* (Q. Hoare and G.N. Smith eds. and trans., 2012).

<sup>60</sup> Rajagopal, *supra* note 19, at 345–87.

<sup>61</sup> For example, Rajagopal discussed all concepts of Gramsci except the "historic bloc" in the theoretical introduction of his book. See RAJAGOPAL, *supra* note 14, at 17–21.

aspects: (1) that Gramsci's ideas were always related to his own historical context, and (2) he was adjusting them to specific circumstances. Therefore, one cannot use Gramsci's ideas in abstraction.

Furthermore, hegemony is a connection of power with social relations, whereas world order is a relation between states.<sup>62</sup> When it comes to world order, hegemony is the periods when an order is imposed by one state on other states.<sup>63</sup> This not only regulates inter-state conflicts, but it also requires a globally conceived civil society. That is, there is a need to bring together social classes of all countries under a mode of production of global extent, which can penetrate into all countries and can subordinate other modes of productions.<sup>64</sup> From the above description, it is clear that not only is China's and India's production linked to the global free market economy, these countries and other Third World countries have a global capitalist class.

There has therefore emerged a global capitalist class of the Third World itself.<sup>65</sup> Chimni also pointed out the emergence of new global capitalist class in the Third World, but insisted on its resistance as a "contradictory pulls and pressures against imperialism."<sup>66</sup> Though for him, this dispute is not economic but political (power).<sup>67</sup> How is the economic and political separated? Just because China is part of the market economy does not mean that it is not offering an alternative hegemonic agenda.<sup>68</sup> This would be too reductive, i.e., reducing the struggle over hegemony *within* the dominant classes or within the dominant economic powers to a struggle over a very abstracted "market economy." The question of hegemony is always a question of *who* leads, and there may be serious challenges within the "historic bloc" about which class or class fraction leads (e.g., Eighteenth Brumaire of

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<sup>62</sup> Robert W. Cox, *Gramsci, Hegemony, and International Relations: An Essay in Method*, 12 MILLENNIUM: J. INT'L STUD. 2, 162 (1983).

<sup>63</sup> *Id.* at 171.

<sup>64</sup> *Id.*

<sup>65</sup> For more on the Third World global capitalist class, see Jerry Harris, *Statist Globalization in China, Russia and the Gulf States*, 73 SCIENCE & SOCIETY 6 (2009); for transnational capitalist class, see Leslie Sklair, *The Transnational Capitalist Class* (2000); see also WILLIAM K. CARROL, *THE MAKING OF TRANSNATIONAL CAPITALIST CLASS: CORPORATE POWER IN THE 21ST CENTURY* (2010).

<sup>66</sup> Chimni, *supra* note 20, at 35, 37–38.

<sup>67</sup> *Id.* at 38.

<sup>68</sup> Though President Xi refuted that China will ever seek hegemony, see *China Will "Never Seek Hegemony," Xi Says in Reform Speech*, DAWN (Dec.18, 2018).

Bonaparte), which may have severe implications.<sup>69</sup> In my mind, the parameters of the market, the political and cultural implications of the market, the *military* implications of the market, and *who gets to dominate which markets* are very important questions. The above issues drive inter-imperialist rivalries and the ways in which they divide the world between them, or rather, how they are now dividing markets within countries and nations between them. This lines up with questions around the so-called Beijing Consensus or Beijing Model that are currently nascent questions but might become more salient if, and as, contradictions develop. We can say with confidence that regardless of which hegemonic power prevails (e.g., Holland vs. Britain vs. France, or Britain vs. Germany around WWI, or Britain vs. U.S.A. around WWII), certain things, especially with regard to labor, will remain the same or get worse.

One cannot deny that hegemonic class makes a “historic bloc” with the global elite classes at a global level. But there is a need to add three very important and subtle points at this stage. One is that “an historic bloc cannot exist without a hegemonic social class.”<sup>70</sup> Second, when a hegemonic class did not run the state by itself, it used landed aristocracy in England, Junkers in Prussia, and Napoleon I in France.<sup>71</sup> But in this situation, the reigning class recognizes the hegemonic structures of civil society as the basic limits of its political action.<sup>72</sup> The third point to remember is that international organizations act as the mechanisms of hegemony.<sup>73</sup> These organizations are not the product of hegemonic order but give it legitimacy by embodying the rules of hegemonic world order. Above all, these organizations have two important functions. One, they co-opt the local elite of developing countries, and second, they absorb counter-hegemonic ideas.<sup>74</sup>

For Pakistan, international hegemonic order unfolded historically, and China has changed the historic dependency relations of Pakistan

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<sup>69</sup> After the 1851 coup in France, Napoleon Bonaparte established a dictatorship. A complex web of social relations and class alliances of industrialists and aristocrats was created, with the conflict of different social interests manifesting themselves in this dictatorship. These industrialists and aristocrats were united behind him. See Karl Marx, *Eighteenth Brumaire of Louis Bonaparte*, <https://www.marxists.org/archive/marx/works/1852/18th-brumaire/>.

<sup>70</sup> Cox, *supra* note 62, at 168.

<sup>71</sup> *Id.* at 163.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 385–424.

<sup>74</sup> *Id.* at 172.

with the West, particularly the United States. I have dealt with this question in detail elsewhere, detailing how Pakistan's weak ruling landed and capitalistic elite could not control the country's unruly populace.<sup>75</sup> Like many other Third World postcolonial countries, previous colonizers used civil-military bureaucracy as their seat of power to advance their hegemonic agenda.<sup>76</sup> Therefore, different military regimes in Pakistan, through constitutional and democratic maneuvering, compelled local landed and capitalistic classes to join the "historic bloc" led by U.S. imperialism.<sup>77</sup> These dire dependency relations between Pakistan and the global capital's (Western) political and ideological hegemony from old developmentalism of modernization are still evident in initiatives around "good governance," rule of law, and constitutionalism.<sup>78</sup> This newly established hegemony of changed developmentalism is all about soft infrastructure like judicial reforms and improved service delivery, not roads and dams.

China's CPEC makes inroads into these hegemonic ideas using classic developmentalism and fear of backwardness.<sup>79</sup> "Pakistan desperately needs a more developed industry" and has "no other alternatives."<sup>80</sup> If increasing population and urbanization is left unattended, it will become "a pool vulnerable to radicalization and even terror recruitment."<sup>81</sup> Dominant arguments for the Chinese investment is a strategic one. CPEC is presented as a game changer<sup>82</sup> and a fate

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<sup>75</sup> See MUHAMMAD AZEEM, LAW, STATE AND INEQUALITY IN PAKISTAN: EXPLAINING THE RISE OF THE JUDICIARY 43–102 (2017).

<sup>76</sup> Janowitz appreciated the role of militaries in the Third World in managing their affairs. See M. JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT, (1960). For literature emphasizing military's superiority as a socio-economic modernizer, see S.P. HUNTINGTON, THE POLITICAL ORDER IN CHANGING SOCIETIES (1968); A. STEPAN, THE MILITARY IN POLITICS: CHANGING PATTERN IN BRAZIL (1971).

<sup>77</sup> See AZEEM, *supra* note 75 at 3–42.

<sup>78</sup> See Muhammad Azeem, *Judiciary as an Ideological State Apparatus, Systematic Production of Judicial Discourses, and Consciousness of the Legal Subject in Pakistan*, in STATE, SOCIETY AND DEMOCRACY (Saif & Amen Jaffer eds., 2019) (publication forthcoming; on file with authors).

<sup>79</sup> Tong, *supra* note 26.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See Proceedings of International Conference on CPEC Held at GC University, Lahore (Dec. 2015), [http://ps.gcu.edu.pk/?page\\_id=14533](http://ps.gcu.edu.pk/?page_id=14533) [hereinafter Proceeding on CPEC]; Rashida Haq & Nadia Farooq, *Impact of CPEC on Social Welfare in Pakistan: A District Level Analysis*, PAK. INST. OF DEV. ECONOMICS 32ND ANNUAL GENERAL MEETING AND CONFERENCE (2016); Riaz Ahmad & Hong Mi, *China-Pakistan Economic Corridor and Its Social Implication on Pakistan: How Will CPEC Boost Pakistan's Infrastructures and*

changer.<sup>83</sup> Another very “foreign policy-oriented” version is the Strait of Malacca dilemma.<sup>84</sup> A popular security perspective pits China-Pakistan against United States-India.<sup>85</sup> Apart from the accuracy of the above arguments, one common thread in all of them is that in Chinese investment, political and geostrategic concerns override market rules.<sup>86</sup> Additionally, in all of these theories, Chinese hegemony comes with coercion. Therefore, any resistance against CPEC is taken as a security threat, a conspiracy initiated at the behest of United States-India.<sup>87</sup>

How is China adjusting to the already established neoliberal hegemonic agenda in Pakistan? As one sees globally, Chinese investment comes without any conditions of democracy, human rights, or good governance. Rather, Chinese investment initially went to countries with bad governance, abysmal records of human rights, and low environmental and social safeguards.<sup>88</sup> China sometimes uses international legal and policy initiatives of international institutions to get legitimacy. For example, President Xi claims to lead the environment movement to increase Chinese participation in peace missions as well as arranging peace talks with the Taliban.<sup>89</sup> Therefore, Chinese investment in Pakistan not only fits within established “recolonized” legal regimes, but it can also step outside of or violate these wherever needed with the help of local Pakistan elites, despite these elites being “Western.” For example, the Chief Justice of Pakistan met the Chinese Chief Justice on his visit to China in 2017.<sup>90</sup> The

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*Overcome the Challenges?*, 8 ARTS AND SOC. SCIENCES J. 2, (2017); SHAHID JAVED BURKI, *supra* note 23, at 3.

<sup>83</sup> Tong, *supra* note 26.

<sup>84</sup> ALOK RANJAN, INDIA’S OPTIONS 12 (2015); Xia Yunjiao & Zhao Guowei, *Strengthening Energy Cooperation Between China and Pakistan Through CPEC*, Proceedings on CPEC, at 114; SHAHID JAVED BURKI, *supra* note 23, at 44, 60.

<sup>85</sup> RANJAN, *supra* note 84.

<sup>86</sup> Gonzalez-Vicente, *supra* note 5.

<sup>87</sup> See GOV’T OF PAK. MINISTRY OF PLAN., DEV. & REFORM, *supra* note 10, at 7; see also Tong, *supra* note 26.

<sup>88</sup> DAVID DOLLAR, CHINA AS A GLOBAL INVESTOR, CHINA’S NEW SOURCE OF ECONOMIC GROWTH: REFORM, RESOURCES AND CLIMATE CHANGE, VOL 1. (Liang Song, et al. eds., 2016).

<sup>89</sup> In his speech for the 19th Communist Party Congress, President Xi made environmental protection a flagship project of the government. See *President Xi’s Speech Had 89 Mentions of “Environment,” Just 70 of the Economy*, BLOOMBERG NEWS (Oct. 18, 2017), <https://www.bloomberg.com/news/articles/2017-10-18/in-xi-s-vision-for-china-environment-edges-out-economy>.

<sup>90</sup> See Haseeb Bhatti, *CJP Nisar Meets Chinese Counter-Part in Beijing*, DAWN (May 24, 2018), <https://www.dawn.com/news/1409719>.

Chinese Chief Justice was keen to develop a separate legal mechanism related to CPEC cases.<sup>91</sup> After repeated requests from China, the National Judicial Policy Making Committee headed by the Chief Justice of Pakistan asked the high courts and lower judiciary to stop granting *ex parte* stay orders in CPEC-related projects.<sup>92</sup> In the inaugural speech of the Eighth Judicial Conference, the Chief Justice of Pakistan not only praised CPEC but highlighted the need to tackle hindrances in the flow of FDI.<sup>93</sup>

TWAIL's approach thus far is to open TWAIL to ask the correct questions about the rise of China and its hegemonic agenda. Even without knowing the exact answer, it can lead us to re-evaluate some of the basic theoretical assumptions of TWAIL. Is Chinese capital part of the hegemonic agenda (political and ideological) of the West, despite it being based on deformed and distorted Marxism and Maoism? How is the role of the Pakistani elite as a "reigning class" different in this hegemony (due to the Chinese fraction of global capital) than under the Western hegemony of rights and good governance? Do both countries of the Third World pose a challenge to the international hegemony of international legal regimes? What is the "Third World" in that case?

### *C. TWAIL's Understanding of the "Third World"*

TWAIL scholars rightly rigorously defended the term "Third World" while accommodating critiques as well.<sup>94</sup> Mainstream international law and race and gender scholars contested the term "Third World" as used by TWAIL scholars from the very beginning. It was attacked as undermining diversity and cultural and gender differences among the Third World itself and making it seem like the now-emerging Newly Industrialized Countries (NICs) are not Third World.<sup>95</sup> Chimni vigorously defended the term in its historical context and class struggles.<sup>96</sup> He is quite correct in pointing out its viability

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<sup>91</sup> Khudayar Mohla, *CPEC Litigations: There Must Be No Complacency: CJ Tells Judges*, BUS. RECORDER (Feb. 4, 2018), <https://fp.brecorder.com/2018/02/20180204341068/>.

<sup>92</sup> Khaleeq Kiani, *Judicial Body Tells Courts Not to Issue Stay Orders on CPEC*, DAWN (May 7, 2018), <https://www.dawn.com/news/1406124>.

<sup>93</sup> Haseeb Bhatti, *CJP Praises CPEC, Highlights Need to Tackle Hindrances in Flow of Foreign Direct Investment*, DAWN (May 5, 2018), <https://www.dawn.com/news/1405605>.

<sup>94</sup> The best defense of this sort is Rajagopal, where he accommodated postmodernist and poststructuralist critique of the term "Third World." See Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 THIRD WORLD L. ST. 1–20 (1998–99).

<sup>95</sup> See HARRIS, *supra* note 15.

<sup>96</sup> Chimni, *supra* note 1.

through resistance of people inside the Third World.<sup>97</sup> The class nature of the Third World is also pointed out and criticized by Anghie, but not strongly emphasized.<sup>98</sup> One can see Anghie's and Chimni's most nuanced expression of this urge when they explain that international law is Third World peoples' acceptance of, as well as resistance to, its rules, and is not the interpretation by the courts and ratification by states.<sup>99</sup> Anghie and Chimni, therefore, add this understanding to the mission of TWAIL scholars to transform international law from the language of said experience of Third World people to a language of their emancipation.<sup>100</sup> Baxi also defended the use of the term "Third World" and its existence.<sup>101</sup>

Rajagopal pleaded the case of "Third World" in the face of accusations of essentialism by postmodernists and post-structuralists.<sup>102</sup> He kept it as a polemical and counter-hegemonic term.<sup>103</sup> Along with new subjects like NGOs, Rajagopal wants to keep "Third World" as a subject which is the product of concrete historical and political contestations. It still represents global hierarchical ordering.<sup>104</sup> So what should we make of the accusation of essentialism? For this, Rajagopal brings Dipesh Chakrabarti, Gayatri Spivak, and Judith Butler as authorities to retain some kind of positivist essentialism as a "provisionality."<sup>105</sup> In this strategy, dispersed and fragmented social movements and class struggles come together in the Third World and resist and author "international law from below."<sup>106</sup> Interestingly, however, what is most problematic about Rajagopal's theoretical proposition is that it does not take into account the state. Whereas Chimni's "Third World" is represented by the local ruling elite and its state in international legal regimes, Rajagopal's Third World goes to the other extreme without "state" and its "local elite." Rajagopal relies only on dispersed and fragmented social

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<sup>97</sup> *Id.* at 5–7.

<sup>98</sup> Anghie & Chimni, *supra* note 16.

<sup>99</sup> *Id.* at 77–103, 78–79.

<sup>100</sup> *Id.*

<sup>101</sup> Baxi, *supra* note 19.

<sup>102</sup> Rajagopal, *supra* note 94.

<sup>103</sup> *Id.* at 3.

<sup>104</sup> *See id.* at 5; *see also* Rajagopal, *supra* note 19.

<sup>105</sup> Rajagopal, *supra* note 94, at 5.

<sup>106</sup> RAJAGOPAL, *supra* note 14.

movements.<sup>107</sup> Both these cases are problematic from the perspective of resistance. In Rajagopal's case, local elites representing Third World states lack the representation of their people, have a dependent character, and either do not resist or compromise.<sup>108</sup> In Chimni's case, fragmented and dispersed social movements without any relation to or participation in their respective states are either helpless or used by international legal regimes to pressure Third World states.<sup>109</sup> In the recent phenomenon of donor-based civil society and social movements, these entities openly represent interests of international institutions in certain cases.<sup>110</sup>

This forces us to rethink TWAIL's problematic understanding of the state, which Rajagopal is trying to avoid. But before we move ahead, Fanon can help us to correctly understand the role of the Third World elite without abandoning the Third World or its states.<sup>111</sup> Students of colonial history and its current forms treat Fanon's seminal works as a manifesto of decolonization. These works are not only a ruthless critique of the ruling elite of these newly independent countries, but they are also an imagination of a Third World and its struggles without this elite.

#### *D. TWAIL's Understanding of the "State"*

When it comes to international legal regimes, the state is the subject of international law. In this context, Chimni is right in defending the role of the state against the extensive literature that has emerged in favor of a non-interventionist state in the name of critical thinking about the withering away of the state, the state as fiction, and the state as a construct, etc.<sup>112</sup> Chimni argued that the state is still a viable concept and a reality.<sup>113</sup> But an analysis of the state, especially the post-colonial state and Third World state, is missing in Chimni's work as well as in almost all the TWAIL literature. Analysis of Chimni's work

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<sup>107</sup> *See id.*

<sup>108</sup> Rajagopal, *supra* note 94, at 10.

<sup>109</sup> Chimni, *supra* note 20, at 43.

<sup>110</sup> Maha Abdelrahman, *In Praise of Organization: Egypt Between Activism and Revolution*, 44 DEV. & CHANGE 569 (2013); Seung-Ook Lee et al., *Mad Cow Militancy: Neoliberal Hegemony and Social Resistance in South Korea*, 29 POL. GEOGRAPHY 359 (2010).

<sup>111</sup> FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Constance Farrington trans., 1967).

<sup>112</sup> *See* Begoña Aretxaga, *supra* note 13.

<sup>113</sup> Chimni, *supra* note 1, at 7.

is confined to the relationship of the state to emerging international legal regimes.<sup>114</sup> This relation is also unidirectional, not dialectical, talking about recolonization. This is the actual point this paper is continuously trying to force, i.e., how the elite of the Third World and its states are being accommodated by the Global Capital. Third World states like BRICs countries, being a hierarchical order within the Third World itself, are getting favorable terms of trade and investment, leaving out the rest of Sub-Saharan Africa and other Third World countries.<sup>115</sup> As already pointed out, Chinese capital is backed by the Chinese state.<sup>116</sup> No other country is diplomatically more active than China in backing its capital.<sup>117</sup> How the Pakistani postcolonial state and its elite, with its dependent nature, is resisting and accommodating Chinese influence under CPEC will be addressed in the next part.

The state is a fiction and a construct when it does not represent its people. But it is a reality when it is used as an instrument, as a security state, and for market ends by the hegemonic agenda and the local elite. The state exhibits its relative autonomy and accommodates the concerns of marginalized people when subalterns are organized and have launched historic struggles.<sup>118</sup> Therefore, representation is the key for viability of the state. The state changes as a result of the struggles of the marginalized, and in turn can change international legal regimes. Neither position, i.e., that of Chimni (to take Third World State as granted), nor that of Rajagopal's Third World (without states), can take us anywhere in resisting international legal regimes.<sup>119</sup> The former has historically ended in compromises, whereas the latter has relied on spontaneous struggles and could not produce its own struggles.<sup>120</sup>

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<sup>114</sup> See generally *id.* (Manifesto of TWAIL).

<sup>115</sup> See Soma Basu, *India Compromises on WTO Deal*, DOWN TO EARTH (Jul. 4, 2015), <https://www.downtoearth.org.in/news/india-compromises-on-wto-deal-42989>. BRICs is a grouping of newly advanced economically developed countries, such as Brazil, Russia, India, and China.

<sup>116</sup> ALDEN, *supra* note 34; SNOW, *supra* note 34; Jilberto & Hogenboom, *supra* note 34.

<sup>117</sup> Bates Gill & James Reilly, *The Tenuous Hold of China Inc. in Africa*, 30 WASH. Q. 37, 42 (2007).

<sup>118</sup> I have explained the above-mentioned instrumental and relative autonomous aspects of a postcolonial state like Pakistan in my forthcoming article. See Muhammad Azeem, *State as a Political Practice: Pakistan's Postcolonial State Beyond Dictatorship and Islam*, THIRD WORLD Q. (Forthcoming, accepted subject to revisions).

<sup>119</sup> See positions of Chimni and Rajagopal. Chimni, *supra* note 1, at 3; see also Rajagopal, *supra* note 94.

<sup>120</sup> This is particularly true in the face of a severe crisis of capital since 2008. The exception to this is the "Occupy Wall Street" movement, which itself is the illustration of

These movements cannot be taken as a deliberate strategy to resist international legal regimes. A coherent theoretical practice and theory of resistance will have to accommodate these movements as well as the Third World and its states. These cannot be rejected at the outset because states are the subjects of international law, and social movements are also successful in raising their concerns in international organizations. The only issue is the *place* of local elites in the theory of counter-hegemony and practice of resistance by the Third World. This leads us to critically engage with the practice of resistance and theory of counter-hegemony by TWAIL scholars.

## II

### TWAIL'S UNDERSTANDING OF RESISTANCE, COUNTER-HEGEMONY, AND LABOR IN CPEC IN PAKISTAN

Are the Pakistani state and ruling elite going to resist exploitative relations under CPEC investment? If yes, to what extent? In case of insufficient resistance by the Pakistani state, and its elite, keeping in mind its chronic dependency relations, who is going to resist? What will be the nature of counter-hegemony (ideological and political struggle)? How can TWAIL guide us in this regard?

Pakistan's political and social science literature is quite detailed when it comes to the landed and capitalist elite. It accurately points out the weak voice of these classes in running the affairs of the country. In this literature, an omnipresent and omnipotent military is deciding the fate of the country, complete with its own "rationality," but a "bad rationality" in the Weberian sense because it has deviated from an "ideal" separation of power due to postcolonial realities.<sup>121</sup> Even the Marxist postcolonial state theorists, like Hamza Alavi, could not escape this liberal understanding of state.<sup>122</sup> In contrast, I have dealt with this issue elsewhere<sup>123</sup> and have shown the class nature of the Pakistani

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its own failures. See Vasuki Nesiiah, *Resistance in the Age of Empire: Occupied Discourse Pending Investigation*, in *INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE* (Richard Falk et al. eds., 2008).

<sup>121</sup> For examples of journalistic and policy accounts, see ANATOL LIEVEN, *PAKISTAN: A HARD COUNTRY* (2011); HUSAIN HAQQANI, *PAKISTAN BETWEEN MOSQUE AND MILITARY* (2005); MALEEHA LODHI, *PAKISTAN: BEYOND THE 'CRISIS STATE'* (2011); STEPHEN COHEN & TARIQ FATEMI, *THE FUTURE OF PAKISTAN* (Stephen P. Cohen ed., 2011).

<sup>122</sup> Hamza Alavi, *The State in Post-Colonial Societies: Pakistan and Bangladesh*, 74 *NEW LEFT REV.* 59 (1972).

<sup>123</sup> Azeem, *supra* note 118.

state. It shows how Pakistani civil-military bureaucracy has acted as a seat of power of global capital (Western) for its hegemonic agenda. The landed and capitalist classes acted as the reigning classes in the “historic bloc” for the hegemonic class.<sup>124</sup> From modernization theory’s Green Revolution to the privatization of the 1990s, to the current CPEC, these classes are the beneficiaries of deepening capitalist relations in Pakistan.

Former Prime Minister Nawaz Sharif (2013–2017), an industrialist and representative of top Pakistani business houses, launched CPEC. Its projects were being subcontracted to Pakistani companies during its first phase and focused on infrastructure and power generation.<sup>125</sup> Sharif was disqualified on corruption charges in 2017, and it seems that irregularities in CPEC projects will soon surface, implicating local business classes.<sup>126</sup> Now, when CPEC is moving to the manufacturing phase with SEZs, which are vital for local industry, therefore, local industry is raising concerns about trade deficit.<sup>127</sup> In spite of a trade deficit with China, the Secretary of Commerce of Pakistan supported a free trade agreement with China.<sup>128</sup> Ehsan Malik, CEO of the Pakistan Business Council (a think tank and advocacy body of largest businesses of Pakistan), opposed this and warned that Chinese imports should not be allowed to kill local industry.<sup>129</sup> The Free Trade Agreement (FTA)

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<sup>124</sup> I have explained the nature of this “historic bloc” in Pakistan in my forthcoming article. *See id.*

<sup>125</sup> *See* LONG TERM PLAN FOR CHINA-PAKISTAN ECONOMIC CORRIDOR (2017–2030), *supra* note 10.

<sup>126</sup> Chief Minister of the Punjab province, Shahbaz Sharif, was implicated in a corruption scandal with the Chinese company, Jiangsu Yabaite Technologies Co. Ltd. China’s Security and Regulation Commission (CSRC) banned the company from working in Pakistan. *See CSRC Slaps Lifetime Ban on Chinese Company for Fraud: Report*, PAK. TODAY (Dec. 21, 2017), <https://www.pakistantoday.com.pk/2017/12/21/csrc-slaps-lifetime-ban-on-chinese-company-for-fraud-report/>. In addition, recently a firm owned by the advisor to the Prime Minister on Economic Affairs along with a Chinese company was awarded a R300-billion project to build Mohmand Dam, which stirred controversy. *See Firm Owned by PM Aide Set to Win R300b Mohmand Dam Contract*, EXPRESS TRIBUNE (Jan. 1, 2019), <https://tribune.com.pk/story/1879191/2-company-owned-government-adviser-set-win-mohmand-dam-contract/>.

<sup>127</sup> Younus Dagha, *In Growing Relations with China, Don’t Opt for Protectionism*, DAWN (May 13, 2018), <https://www.dawn.com/news/1407359/in-growing-relations-with-china-dont-opt-for-protectionism>.

<sup>128</sup> GOV’T OF PAK.: MINISTRY OF COMMERCE, <http://www.commerce.gov.pk/>.

<sup>129</sup> Ehsan Malik, *CEO, Pakistan Business Council’s Speech at the Pakistan Business and Economic Summit, Karachi 22nd October 2016*, THE PAKISTAN BUSINESS COUNCIL (Oct. 24 2016), <https://www.pbc.org.pk/news/ehsan-malik-ceo-pakistan-business-councils-speech-at-the-pakistan-business-and-economic-summit-karachi-22nd-october-2016/>.

with China was later delayed due to industry concerns.<sup>130</sup> Any resistance by the local elite will therefore only be to the extent of this trade deficit.

As already discussed, the hegemonic agenda of global capital (Western) in Pakistan is always carried out through the military bureaucracy.<sup>131</sup> The military bureaucracy not only serves the interests of the hegemonic class but has emerged as a self-interested group over time. Other classes or groups do the same. For example, the Pakistan Business Council (of whom Asad Umar was Chairman and now is Federal Minister of Finance, Revenue, and Economic Affairs) also strongly represents Western multinationals. So, their concern for protecting Pakistani industry is also actually protecting their subsidiaries and their markets in Pakistan from Chinese competition.

How might these state formations change under the influence of new Chinese investment and strategic relations? First, CPEC seems to be part of the existing overall hegemonic agenda of global capitalism in Pakistan. Chinese capital can only be taken as a fraction of overall capitalist development in Pakistan. None of the classes in the “historic bloc,” namely the local Pakistani capitalist class, Chinese capital, or global capital disagree on the market economy, complete with its ideological and political manifestations of democracy, human rights, and good governance. The only divergence is in the Chinese fraction of capital under CPEC in Pakistan; China may, in the name of “non-interference” in the internal matters of Pakistan, let dictatorial regimes prevail.<sup>132</sup> This is in opposition to the pretentious pressure of global capital that asks for human rights and democracy.

What about the omnipresent Pakistani military establishment as a seat of power of the hegemonic agenda? The military and its corporations, Frontier Works Organization (FWO) and National Logistics Cell (NLC), are not only getting contracts under CPEC but the military is also providing security to CPEC projects.<sup>133</sup> There are

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<sup>130</sup> Khalid Hasnain, *FTA with China Delayed Due to Industry Concerns*, DAWN (Apr. 5, 2018), <https://www.dawn.com/news/1399667>.

<sup>131</sup> I have explained the detail of the role of the Pakistani military as a seat of power for the hegemonic agenda in my forthcoming article. See Azeem, *supra* note 118.

<sup>132</sup> Chinese investment in Africa and Latin America is only in the countries with a bad record of governance. See Dollar, *supra* note 88; see also Chris Alden & Martyn Davies, *A Profile of the Operations of Chinese Multinationals in Africa*, 13 S. AFR. J. INT'L AFF. 83, 89 (2006).

<sup>133</sup> *National Logistics to Run Dhabeji Special Economic Zone*, DAWN (May 16, 2018), <https://www.dawn.com/news/1407981>.

already strong and further deepening strategic relations of the Pakistan military with China.<sup>134</sup> It spans from manufacturing conventional arms to fighter jets, to satellite launching.<sup>135</sup> Moreover, the Pakistan military has deployed 15,000 army personnel for the protection of CPEC, including 24-hour radio surveillance along the Khunjerab Pass that connects China to Pakistan-administered Gilgit-Baltistan.<sup>136</sup> There may be resistance from local elite and military, but will it reach to the extent of protecting the rights of Pakistani labor? Looking at history, chances appear remote.

The regionalists and ethnic minority nationalists from Sindh, Balochistan, and Khyber Pakhtunkhwa provinces have traditionally resisted the centralized dictatorial regimes of Pakistan. These ethno-nationalists joined hands with Socialists (the Old Social Movements of Chimni's scheme) during the Cold War. But the class question has long been abandoned by these nationalists. Now, their nationalist struggle under CPEC is largely limited to getting a larger share of CPEC projects for their regions and asking the government and China to let CPEC routes go through their regions.<sup>137</sup> Furthermore, the struggles of these nationalists and regionalists are limited to the old nationalism of World War II, that is, bourgeois-led national liberation, and have not touched the level of land rights—right to development and environmental concerns of this age.<sup>138</sup>

The self-acclaimed sole savior of the nation, the judiciary, is immersed head-to-toe in the so-called good governance paradigm of the international financial institutions (IFIs).<sup>139</sup> It has dedicated itself to what it and the IFIs see as the sole predicament of the country, i.e.,

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<sup>134</sup> For the detail of this relation see SHAHID JAVED BURKI INST. OF PUB. POLICY, *supra* note 23, at 24–28.

<sup>135</sup> See, e.g., Tong, *supra* note 26, at 180.

<sup>136</sup> *15,000 Military Personnel Protecting CPEC*, DAWN (Feb. 21, 2017), <https://www.dawn.com/news/1316040>.

<sup>137</sup> Syed Ali Shah, *Balochistan Assembly Adopts Resolution Against Meagre Provincial Share in CPEC*, DAWN (Dec. 21, 2018), <https://www.dawn.com/news/1452812>; KAISER BENGALI, CHIEF MINISTER'S POLICY REFORM UNIT GOV'T OF BALOCHISTAN, CHINA-PAKISTAN ECONOMIC CORRIDOR? THE ROUTE CONTROVERSY (2015).

<sup>138</sup> I have dealt with this issue in my Urdu book, MUHAMMAD AZEEM, PAKISTAN: MARXITHORYKODARPASH CHALLENGES AUR PAKISTANI INQALABKI THEORY KAY KHUDDOKHALL [PAKISTAN: CHALLENGES TO MARXIST THEORY AND CONTOURS OF A REVOLUTIONARY THEORY] (2017).

<sup>139</sup> See MUHAMMAD AZEEM, *Good Governance by the Judiciary—2000s*, in LAW, STATE AND INEQUALITY IN PAKISTAN: EXPLAINING THE RISE OF THE JUDICIARY 213 (2017).

corruption.<sup>140</sup> I have shown historically and empirically that the judiciary has served as a crucial link in the reproduction of the state and political inequality in Pakistan.<sup>141</sup> One cannot expect a different role of the judiciary which is simply a part of the corporate practice of global capital. The judiciary has no hesitation in serving Chinese capital.

Consequently, the actual hope for resisting legal regimes that limit the ability of the Pakistani state to maneuver comes from the people of Pakistan. TWAIL's analysis has reached this point over time, but it needs more detailed deliberation.

### *A. Resistance of the Dominated Classes, Subalterns, and the Marginalized in International Law*

From the writings of many TWAIL scholars, including Chimni and Baxi, one thing is certain: they are fixated on the moment of the Bandung Conference and the Non-Aligned Movement. For such scholars, Gandhi, Nehru, Mandela, and even Castro and Zhou Enlai are on one continuum of resistance, despite their reliance on different class forces in their respective countries.<sup>142</sup> The Bandung Conference was a historical event and had lots of emotional, psychological, and inspirational effects for the newly independent and colonized countries of the Third World.<sup>143</sup> Fortunately, TWAIL scholars recently published an insightful collection of contributions on this topic by the most prominent scholars on this topic. It is important to understand how TWAIL looked at it after seventy years. No doubt, the writers themselves are aware of the mythical accounts of the Bandung Conference and the inaccuracies of its accounts. For these TWAIL authors, if Westphalia serves as the creation of the myth of international law, the Myth of Bandung is a *counterpoint*.<sup>144</sup> BRICs can be seen as a continuation of Bandung and how the myth inspired current scholarship and practice.<sup>145</sup> Writers also raised the issue of smaller countries left behind by BRICs but did not answer this. Why did these writers fail to address this issue? The answer to this question about “Bandung to

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<sup>140</sup> In 2017, Pakistan's judiciary disqualified the sitting prime minister in the Panama Leaks case and derailed the whole democratic process. *See Khan v. Nawaz Sharif*, (2017) PLD (SC) 265 (Pak.); (2017) PLD (SC) 692.

<sup>141</sup> AZEEM, *supra* note 75.

<sup>142</sup> Chimni, *supra* note 20; *see also* Baxi, *supra* note 19.

<sup>143</sup> *See* Chimni, *supra* note 20, at 14.

<sup>144</sup> *See id.* at 16 (emphasis added).

<sup>145</sup> *See id.* at 28.

BRICs” goes to the core of the theoretical issues of the Third World and its states.

There were two projects in Bandung: one, that of erstwhile national bourgeoisie of Third World countries, and second, that of the working classes and the marginalized people of these countries.<sup>146</sup> Without any role of the latter in contemporary politics, BRICs can be, and actually is, the continuity of the former project. It is worthwhile here to reopen Bandung to analysis in relation to this Article.

Critique of Bandung came immediately after the conference.<sup>147</sup> Borrowing from Samir Amin, Bandung was a product of left-wing radical critique and not the idea of nationalist leaders like Nehru and Sukarno.<sup>148</sup> Communists were talking about inequality and oppression, which was immediately unleashed in Third World countries, whereas, the “nationalist” leaders were avoiding this topic and were concerned only with questions of economic backwardness and equality with the West.<sup>149</sup> Although the Bandung Conference was not clear about imperialism, it had a consensus on “developmentalism” under a nation state developmentalist paradigm, which was carried in all initiatives like the *Resolution on Permanent Sovereignty and Natural Resources* (1962), the *Declaration of the Establishment of New International Economic Order* (NIEO) (1974), and the *Declaration on the Right to Development* (1986).<sup>150</sup> Gerard Greenfield pointed out the Conference’s support for capitalism.<sup>151</sup> In that sense, the Bandung conference was a status quo-oriented gathering.<sup>152</sup> Instead of making a “United Front” against racism, neocolonialism, and imperialism, it was divisive and undermined the Third World’s ability to fight U.S. imperialism and reaffirmed the legitimacy of U.S. imperial ambitions.<sup>153</sup>

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<sup>146</sup> See Samir Amin, *The Countries of the South Must Take Their Own Independent Initiatives*, in PIONEER OF THE RISE OF THE SOUTH 71 (2014).

<sup>147</sup> GEORGE MCTURNAN KAHIN, *THE ASIAN-AFRICAN CONFERENCE, BANDUNG, INDONESIA, APRIL 1955* (1956).

<sup>148</sup> Amin, *supra* note 146, at 71–74.

<sup>149</sup> Arif Dirlik, *The Bandung Legacy and the People’s Republic of China in the Perspective of Global Modernity*, 16 INTER-ASIA CULTURAL STUD. 615, 621 (2015).

<sup>150</sup> Chimni, *supra* note 20, at 21–22.

<sup>151</sup> Gerard Greenfield, *Bandung Redux: Imperialism and Anti-Globalization Nationalisms in Southeast Asia*, in 41 SOCIALIST REG. 2005: THE EMPIRE RELOADED 166 (Leo Panitch & Colin Leys eds., 2005).

<sup>152</sup> Dirlik, *supra* note 149, at 616.

<sup>153</sup> *Id.* at 617.

The next decade after the Bandung Conference clearly showed that the issue is not only colonialism but “national” bourgeoisie as well.<sup>154</sup> Therefore, national liberation movements in the 1960s represented both the unfolding of the Bandung Movement and its negation.<sup>155</sup> To conclude, when the Second World of socialism and the Third World of national liberation is gone, what is left as a concrete reality from the ashes of the project is the working class and marginalized people of these countries.

What is the relation of the above account with the current rise of China under consideration in this Article? Suffice it to say that a few years before Bandung, China emerged as a giant revolutionary. In fact, Bandung 205 was a show of China’s BRI.<sup>156</sup> As the Burmese delegate’ observed, while “it was terrible to be ruled by a Western power . . . it was even more so to be ruled by an Asian power.”<sup>157</sup>

These Bandung leaders and their struggles were anchored in the broader Left, which Chimni called the Old Social Movement (OSM). However, there are certain problems with this foundation. First, the role of the erstwhile local bourgeoisie in Third World countries does not need explanation.<sup>158</sup> Even the class-based movements which aligned with mainstream progressive regimes became corrupt and lost their rigor in the struggle for an alternative to capitalism. That is why Chimni’s advocacy for these OSMs is with respect to their historical reference only. He has not given a single example of new class-based social movements that can be presented as an alternative to mainstream neoliberal globalization. There are very strong such movements in India and Nepal that have met unprecedented success. These movements are against global capital and the local elite as well.<sup>159</sup>

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<sup>154</sup> *Id.* at 621.

<sup>155</sup> *Id.*; see also SAMIR AMIN, DEPLOYMENT AND EROSION OF THE BANDUNG PROJECT (2015); see also SAMIR AMIN, REREADING THE POSTWAR PERIOD: AN INTELLECTUAL ITINERARY (1994).

<sup>156</sup> Dirlik, *supra* note 149, at 623.

<sup>157</sup> *Id.* at 624–25.

<sup>158</sup> Törnquist studied Indian and Indonesian noncapitalist development strategies and outcomes and the role of local capitalist class. See OLLE TÖRNQUIST, WHAT’S WRONG WITH MARXISM? ON CAPITALISTS AND STATE IN INDIA AND INDONESIA (1989). Vivek Chibber found that in India, state intervention was purely supportive, doling out subsidies and offering protectionism to emerging sectors, and gradually the capitalist class started gaining influence over the state. See VIVEK CHIBBER, LOCKED IN PLACE: STATE-BUILDING AND LATE INDUSTRIALIZATION IN INDIA (2003).

<sup>159</sup> For example, India’s Naxalite or Maoist movement has received considerable scholarly attention. At least fifty scholarly articles and books have been published on this topic since 2007. See the detail of these works in Alpa Shah & Dhruv Jain, *Naxalbari at Its*

Chimni also mentions the New Social Movements (NSMs), but when it comes to “new” OSMs, he briefly discusses one specific case but not the movement itself.<sup>160</sup> Nevertheless, Chimni’s argument that these class-based movements are a site of alternative politics is valid.

Chimni presents NSMs as forces of resistance. These movements are based on gender, ecology, peace, and LGBTQ causes. However, Chimni is reluctant to recognize these movements as being fully counter-hegemonic because they are often backed by IFIs and similar donors and skeptical of class-based movements.<sup>161</sup> In contrast, Rajagopal relies on NSMs but mainly indigenous ones<sup>162</sup> such as the Zapatistas in Mexico, the *Narmada Bachao Andolan*, and the National Alliance for Tribal Self-Rule in India. He dissociates himself from the “statist” and “actor-based” approaches to international law.<sup>163</sup>

How do these two approaches within TWAIL translate themselves into theory and practice? Chimni’s OSMs have been historically co-opted by the local elites of the Third World, and relying on them leads Chimni to nonviolent reforms, even to the extent of bringing Gandhism into international law.<sup>164</sup> In contrast, Rajagopal’s social movements may not accept this “abstract non-violence” folder as far as the radical nature of the struggles he relied upon is concerned.<sup>165</sup> Rajagopal correctly and painstakingly proposes a counter-hegemony built around these movements to resist the hegemonies of international law. He connects these stateless, dispersed, and fragmented social movements by a provisional strategy. But the coherence of his ideological and theoretical position is weak in this proposition. He identifies many counter-hegemonies like G-20 countries’ and G-77 countries’ counter-hegemony. This point begs some explanation.

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*Golden Jubilee: Fifty Recent Books on the Maoist Movement in India*, 51 MOD. ASIAN STUD. 1165, (Jul. 2017).

<sup>160</sup> Chimni, *supra* note 20; Nandini Sunder v. State of Chattisgarh (2011).

<sup>161</sup> Chimni, *supra* note 1, at 19–23.

<sup>162</sup> He does not use this term.

<sup>163</sup> Rajagopal, *supra* note 19, at 345–87.

<sup>164</sup> See B.S. Chimni, *The Self, Modern Civilization, and International Law: Learning from Mohandas Karamchand Gandhi’s “Hind Swaraj or Indian Home Rule,”* 23 EUROPEAN J. INT’L L. 4, 1159–73 (2012).

<sup>165</sup> India’s *Narmada Bachao Andolan* (NBA) was a peaceful movement. In contrast, the Zapatista have declared a war against the Mexican government. They describe their struggle as indigenous and against neoliberalism, denying the titles of left-wing liberation and socialist militant group.

“Hegemony is like a pillow: it absorbs blows and sooner or later the would-be assailant will find it comfortable to rest upon.”<sup>166</sup> It seems to me that Rajagopal’s reliance on G-20, G-77 etc. as a counter-hegemony is a comfort to rest upon on the hegemony. No doubt Rajagopal’s inclusion of nuanced postmodern, poststructuralist, and postcolonial concepts in the TWAIL’s way of thinking is laudable. But we inherited a problem from Gramsci himself: he did not mention the word counter-hegemony but told us to some extent how to build it.<sup>167</sup> From Gramsci’s writings, it is obvious that *counter-hegemony* is to be built by a *would-be hegemonic class*, which for him is the working class. The working class is to form a new “historic bloc” with other classes. Organic intellectuals play a role in this process (which in our case are international law scholars from the South connected with NSMs and OSMs).<sup>168</sup> Because these intellectuals do not control the state (“state” as a political practice in Gramscian terms) in their own countries, and they do not control superstructure of international institutions, there is no possibility of a war of maneuver. That is why counter-hegemony is a war of position (praxis in TWAIL’s terms), locally and globally, against international hegemonic order. In its current make up, international organizations are connected with local fractions of the hegemonic class (global capitalist class of Third World countries). These organizations have a base in Third World countries because they are connected with passive revolution. Therefore, a significant change in international order is possible through changes in national structures. However, it can only be brought by a new historic bloc. The possibility for these historic blocs is found locally. In the meanwhile, what should be done with the international organizations?

We have discussed in the previous section how Chinese capital and the local Pakistani landed capitalist elite are in the same “historic bloc” as the Global Capital, though with a contradictory unity. TWAIL is not wrong in relying on these contradictions in international legal regimes and on getting favorable terms of trade and investment for the people of Third World countries. But when it comes to counter-hegemony, it can only be rooted in the political and ideological agenda of the dominated classes—the excluded and marginalized social groups. All other resistances and contradictions should fall around the interests of

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<sup>166</sup> Cox, *supra* note 8, at 173.

<sup>167</sup> Noaman G. Ali, *Reading Gramsci Through Fanon: Hegemony Before Dominance in Revolutionary Theory*, 27 RETHINKING MARXISM: J. ECON., CULTURE & SOC. 241, 241–57 (2015).

<sup>168</sup> See RAJAGOPAL, *supra* note 14, at 21.

the dominated in a coherent struggle and theoretical proposition. This is illustrated by the resistance of workers under abysmal work conditions in CPEC projects in Pakistan.

### ***B. CPEC, Labor, and Contours of Counter-Hegemony in Pakistan***

As discussed, Pakistan's dominant classes are cooperating with the interests of Chinese capital under CPEC. Where they resist, they only do so to the extent of maximizing their share of the pie. On the other hand, the working class has been defeated in the established hegemonic relations of the neoliberal market economy since the 1980s.<sup>169</sup> The gap between the deepening of market reforms and precarious labor conditions and the working-class organization is huge in Pakistan, which makes this model of development unsustainable. The pace of CPEC may bring the boiling point closer than expected, because labor conditions are not even an afterthought in CPEC. Here, let us turn to the extant labor conditions in Pakistan.

Labor conditions in Pakistan prior to CPEC were abysmal. A recent report submitted by the Pakistan Workers Confederation (PWC) paints an alarming picture. Workers at small and medium enterprises are rarely ever registered, and the owners of these enterprises show they employ less than twenty to avoid enforcement of the minimum working standards under *The Industrial and Commercial Employment (Standing Orders) Ordinance, 1968*.<sup>170</sup> There are only fifty permanent workers for every 500 contractual workers in the country.<sup>171</sup> If employers are compelled to declare a greater number of workers in big industrial units, then they cap labor demands by establishing compromised

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<sup>169</sup> In Pakistan, during privatization under the International Monetary Fund's Structural Adjustment Policy (SAP) since the late 1980s, there has been a deliberate attack on organized trade unions. During my research for labor conditions under downward links of Global Value Chain in textile and garments in Pakistan, I noticed in my interviews that other than objective hurdles for organizing, there is fear and defeat among workers at a psychological level. I wrote the paper *SOCIOLOGY OF GLOBAL VALUE CHAIN (GVC) LAW* for the Law & Society Conference in Toronto, 2018.

<sup>170</sup> See *Industrial and Commercial Employment (Standing Orders) Ordinance, § 1(4)(a)*, (Ordinance VI of 1968).

<sup>171</sup> See MUHAMMAD YAKUB & SHAUKAT CHAUDHRY, *GSP+ SCHEME AND CHALLENGES FOR IMPLEMENTATION OF LABOR STANDARDS IN PAKISTAN* 4 (2015) [hereinafter Urdu Version]; see also Saroop Ijaz, "No Room to Bargain": *Unfair and Abusive Labour Practices in Pakistan*, HUMAN RIGHTS WATCH (Jan. 23, 2019), <https://www.hrw.org/report/2019/01/23/no-room-bargain/unfair-and-abusive-labor-practices-pakistan>.

“pocket” or “yellow” labor unions.<sup>172</sup> In 2013, there were 1,905 unions registered as Collective Bargaining Agents with a total membership of 1.8 million out of 60 million of the workforce (33% of the population).<sup>173</sup> Of this small number of unions, it is unknown how many are genuine.<sup>174</sup> Any attempt to make a genuine union is thwarted by the employers, because organizing workers are fired. If workers manage to keep unionization secret, the Registrar Office of National Industrial Relations (NIRC) often leaks news of the union to the employers, and then workers are fired through back-dated termination letters.<sup>175</sup> Then the burdensome, expensive, and extensive litigation starts. Workers frequently find themselves implicated in trumped-up criminal charges. Added to this hardship is the fact that social security is not available to workers, and there is a weak system of labor inspection.<sup>176</sup> In fact, labor inspection was banned until a factory fire in Ali Enterprise in Karachi killed<sup>177</sup> more than 250 workers in 2012.<sup>178</sup> In 2014 alone, 2.3 million, or four percent, of the workforce was affected by accidents.<sup>179</sup> Finally, workers face a very biased and incompetent judiciary. There is a systematic attack on already established public sector trade unions by expanding legislation that bans trade unions in particular sectors and through the proliferation of Export Processing Zones where labor laws do not apply or are severely weakened.<sup>180</sup> As far as labor conditions under CPEC in Pakistan are concerned, our field research in a sample of projects revealed dire conditions.<sup>181</sup> Labor conditions in these projects are even worse than

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<sup>172</sup> Urdu Version, *supra* note 171, at 18.

<sup>173</sup> *Id.* at 19.

<sup>174</sup> *Id.*

<sup>175</sup> Interview with Saad Chaudhry, Youth Representative of Pakistan Workers Federation. Chaudhry told of many instances of secrecy breaches by the registrar office of National Industrial Relations Commission (NIRC) (2017).

<sup>176</sup> Urdu Version, *supra* note 171, at 39.

<sup>177</sup> *Id.* at 38.

<sup>178</sup> See *Muhammad Jabir v. KiK Textilien und Non-Food GmbH* (Dortmund Regional Court, Germany, Civil Division, 2015).

<sup>179</sup> Urdu Version, *supra* note 171, at 9.

<sup>180</sup> Data based on report submitted to European Commission, *see id.*; for more on labor conditions in Pakistan, see Kamal Munir et al., *The Abject Conditions of Labor in Pakistan*, 87 INT'L LABOR & WORKING CLASS HISTORY 1742 (2015).

<sup>181</sup> Based on our 2018 field work for the forthcoming paper. See Azeem & Akbar, *supra* note 27. Field work was conducted among workers for the energy projects, (Sahiwal Coal Power Plant, Jhampir Wind Power Project, Port Qasim Coal Power Plant), infrastructure projects such as the Orange Line Rail in Lahore, and dock workers at Port Qasim, Berth 3 and 4, which are operated by a Chinese company.

the conditions described above. To put it bluntly, after interviewing twenty-two workers from different villages who work in the Sahiwal Coal Power Project, one comes away feeling that “there are no labor laws followed in this project.”<sup>182</sup> This is exacerbated by the “security state” paradigm around CPEC. Any objections to CPEC are deemed to be security threats against Pakistan.<sup>183</sup> Furthermore, there is no tradition of challenging Chinese firms within China or regionally, as was done in the European Union after the Rana Plaza incident in Bangladesh and Ali Enterprise fire case from Karachi, Pakistan.<sup>184</sup> Who is going to resist these conditions and change international legal regimes to hold Chinese companies accountable for labor practices in Pakistan? How can TWAIL guide us?

In Pakistan, Chimni’s OSMs would be the class-based movements led by the conventional “Left” in Pakistan. They did tremendous work to organize and advance the cause of labor rights in Pakistan during 1960–70s.<sup>185</sup> But Pakistan, as a frontline state during the Cold War, went through dictatorial regimes and religious militancy imposed by the hegemonic bloc.<sup>186</sup> This drew most of the energy and struggles of the OSMs away from labor and into “big politics” for the restoration of liberal democracy to fight against and save itself from religious extremism. So, OSMs in Pakistan were natural allies of ethno-nationalist elites and liberal democratic forces like Benazir Bhutto in Pakistan, with almost no exception.<sup>187</sup> Thus, workers’ organized resistance could not represent labor politics. Rather, OSMs’ politics was “tailism” of the big politics for liberal democracy—meaning the interests of labor were always subordinated to the agendas of landed or capitalist elites seeking democracy. So, when it came to CPEC, OSMs’

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<sup>182</sup> *Id.*

<sup>183</sup> See *Long Term Plan for China-Pakistan Economic Corridor (2017–2030)*, *supra* note 10, at 7.

<sup>184</sup> *Muhammad Jabir v. KiKTextilien und Non-Food GmbH* (Dortmund Regional Court, Germany, Civil Division, 2015).

<sup>185</sup> This is evident from recent books of left leaders. See, e.g., SYED JAMAL NAQVI, *LEAVING THE LEFT BEHIND* (Humair Ishtiaq ed., 2014); ABID HASAN MINTO, APNI JANG RAHAY GI (Our Struggle Will Continue) (2016); KAMRAN ASDAR ALI & SURKH SALAM: *COMMUNIST POLITICS AND CLASS ACTIVISM IN PAKISTAN 1947–1972* (2015).

<sup>186</sup> Books illustrative of this descriptive fact include HUSSAIN HAQQANI, *PAKISTAN BETWEEN MOSQUE AND MILITARY* (2005); see also SHUJA NAWAZ, *CROSSED SWORDS: PAKISTAN, ITS ARMY, AND THE WARS WITHIN* (2008).

<sup>187</sup> This is evident from recent books of left leaders. See, e.g., NAQVI, *supra* note 185; MINTO, *supra* note 185; KAMRAN ASDAR ALI, *supra* note 185.

traditional ally, the ethno-nationalist elite, are staking out their share in CPEC rather than resisting it. Meanwhile, the Left's forces are divided amongst themselves, mostly in favor of CPEC due to their training under the teleological developmentalism of Orthodox Marxism, i.e., the view of the state-led development of the Soviet Union and China as being inherently progressive, because it developed the forces of production.<sup>188</sup>

Traditionally, the trade union movement was connected with or strongly influenced by the Left. With the Left's weakening after the Cold War, the trade union movement could not sustain itself. This was a local phenomenon that was exacerbated by the funding of international institutions to NSMs in Pakistan. By the late 1980s, IFIs and social democratic donor agencies from Europe started supporting and funding informal labor movements like those of bonded labor and child labor.<sup>189</sup> This was happening while the labor movement was collapsing under SAPs and privatization. Later donor agencies started funding different trade union factions disproportionately. This led to the new trend of "NGO trade unionism," where trade unions are encouraged to work on a project-to-project basis, much like traditional NGOs.<sup>190</sup> This added to research quality and international representation of labor issues but at the cost of militancy and real democratic representation of the trade union movement. This has created the current situation where active trade unions either starve and compromise with management or get funding from donor agencies for their day-to-day activism.<sup>191</sup>

One example is sufficient to demonstrate the OSMs' lack of resistance to the international legal regimes. While TWAIL scholars in the early 2000s, after 9/11, were exposing the imperial nature of the

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<sup>188</sup> See Aasim Sajjad Akhtar, *The China-Pakistan Economic Corridor: Beyond the Rule of Capital*, 70 MONTHLY REV. 2 (2018).

<sup>189</sup> In particular, the activism focuses of Human Rights of Pakistan (HRCP) and Bonded Labor Liberation Front (BLLF).

<sup>190</sup> These are called "labor movement-oriented NGOs," which are different from "social-service oriented NGOs" or "legal rights-oriented NGOs." Whereas "labor movement-oriented NGOs" are active in Pakistan, they are under severe attack in China. See Anita Chan, *The Relationship Between Labor NGOs and Chinese Workers in an Authoritarian Regime*, 9 GLOBAL L.J. 1, 1–18 (2018); Chris King-Chi China, *Class or Citizenship? Debating Workplace Conflict in China*, 42 J. CONTEMPORARY ASIA 2, 308–27 (2012).

<sup>191</sup> Interview with Saad Muhammad, Chairman, Pakistan Workers Federation Youth Committee and Titular Member, ITUC Youth Committee (World Body) (Jul. 18, 2018).

War on Terror,<sup>192</sup> OSMs and their affiliated Left in Pakistan were on the bandwagon of the American “War on Terror,” supporting the attack on Afghanistan. Elsewhere, I have systematically engaged with the problematic position of the Left since 9/11 in more detail.<sup>193</sup> For labor regimes, the irony is that all the hopes of trade unions are placed upon the ILO to compel local elite governments and the “Third World state” of Pakistan to follow labor conventions. ILO has been the expression of a “global hegemony in production relations” since the Versailles Treaty in 1919 as a response to Bolshevism.<sup>194</sup> The United States is presenting its discourse of industrial relations, freedom of the trade union, and freedom of collective bargaining as ILO’s dominant ideology.<sup>195</sup> American “tripartitism” is an ideology of non-antagonistic class relations with labor bureaucratic representation and control. It is an expression of state corporatism. It co-opted middle class and blue-collar labor along with white-collar labor, which roughly constitutes half of the labor force.<sup>196</sup> It leaves out non-union women and minority people (called duality of labor in the United States).<sup>197</sup> The United States still contributes twenty-two percent of ILO’s regular budget.<sup>198</sup> Trade unions and the Left took this value of tripartitism as inherently good.

Our fieldwork on labor conditions under CPEC informed us that foreign-funded trade union NGOs have no plan or even a study on CPEC.<sup>199</sup> They may be waiting for funding from international

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<sup>192</sup> J.M. Gatti, *Assessing Claims of the Emergence of a New Doctrine of Pre-Emptive War Under the Doctrine of Sources*, 43 OSGOODE HALL L.J. 67 (2005).

<sup>193</sup> Muhammad Azeem & Noaman G. Ali, *Zarb-e-Azb and the Left: How Pakistani Progressives Lost Their Way and Finding It Again*, TANQUEED, (Sept. 2014), <https://www.tanqeed.org/2014/08/zarb-e-azb-and-the-left-on-imperialisms-materiality/>.

<sup>194</sup> Cox, *supra* note 8 at 385–424, 387 (citing HAROLD BUTLER, CONFIDENT MORNING 175 (Faber & Faber, 1950)).

<sup>195</sup> For industrial relations as American ideology of labor, see JOHN DUNLOP, INTERNATIONAL RELATIONS SYSTEM (1958); *see also* CLARK KERR ET AL., INDUSTRIALISM AND INDUSTRIAL MAN (1960).

<sup>196</sup> *Labor and Hegemony*, *supra* note 194 at 390.

<sup>197</sup> *Id.* at 385–424, 390, 394.

<sup>198</sup> This contribution is valued at \$95 million. *See International Labour Organization (ILO): Background in Brief*, EVERYCRSREPORT.COM (Aug. 5, 2015), <https://www.everycrsreport.com/reports/R44165.html>.

<sup>199</sup> For example, the Orange Line Metro Train in Lahore was a site of horrible labor practices. No OSM or NSM worked on or vocalized the issue. The sole legal challenge to it was on heritage grounds. *See Kamil Khan Mumtaz v. Government of Punjab* (Lahore High Court and Supreme Court of Pakistan, 2015). This is also based on interaction and some

institutions or social democratic parties in Europe to decide when and to which extent Chinese capital is to be resisted. It is no secret that these donor projects always come with strings attached. Traditional trade unions have neither the capacity nor the will to engage in relevant research and advocacy.<sup>200</sup> To our surprise, the ILO office in Pakistan told us that they do not have any study, policy, or material on this issue either.<sup>201</sup> To sum up this discussion, most of the organized labor forces, whether they fall within the category of OSMs or NSMs (“trade union NGOs” in this case), are either not ready to resist or unable to resist the deteriorating labor conditions under CPEC. The lack of labor protections as a condition of CPEC and international legal regimes, as well as the lack of forums in China to hold Chinese firms accountable may lead to an even greater race to the bottom on labor conditions for corporations of Global Capital than what already exists.

However, this does not mean that there is no resistance by workers in CPEC projects. In the Tarbela Dam Terminal IV extension project, Pakistani workers were able to form a trade union that successfully advocated for better work conditions.<sup>202</sup> Similarly, dockworkers at Port Qasim Berth 3 and 4, working for a Chinese company, have been on strike for the last three months for their legal rights.<sup>203</sup> Workers at the Sahiwal Coal Power Plant resisted against delayed payments of even the minimum level of wages. But their struggle could not be heard outside these facilities due to three layers of security in that enclave.<sup>204</sup> Above all, my extensive fieldwork on labor conditions in the downward links of the Global Supply Chain in the garment industry in Pakistan also shows strong discontent, bitterness, and anger among Pakistani laborers. After a group interview of ten factory workers, I was compelled to add another dimension about this anger and lack of resistance from workers to my findings. It seems to me that these workers carrying mixed feeling of defeat, intense fear, and

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work with Maryam in 2016, an activist who alone launched this legal struggle without any participation from the Left OSMs.

<sup>200</sup> Interview with Shaukat Chaudhry, Joint Secretary Pakistan Workers Confederation (PWC) (Jan. 2018).

<sup>201</sup> Informal discussion with Saghir, Program Coordinator, ILO, Islamabad, Pakistan (Apr. 2018).

<sup>202</sup> Interviews with Aslam Adal, Pakistan Workers Federation (Feb. 2018).

<sup>203</sup> Interview with Bacha Khan and other members of Port Qasim Workers Union at Karachi (Nov. 2018).

<sup>204</sup> Moving from the outside toward the plant, layers of the local police, Pakistan Rangers (paramilitary force) and the plant’s own private security. Based on our 2018 field work for the forthcoming paper. See Azeem & Akbar, *supra* note 27.

helplessness. They always burst into anger at the end of the interview, by which time they are comfortable with us as interviewers. This suggests that there is a boiling lava of labor unrest underneath an eroding layer of Global Capital, and a disregard of labor standards under Chinese investment is going to further deteriorate the situation very fast. That said, the concluding part of this Article will add a few propositions to the theoretical understanding of TWAIL. One may use these theoretical interventions as a framework to analyze the phenomenon of the rise of China and consequent changes in international legal regimes.

### III

#### SOME THEORETICAL ADVANCES FOR TWAIL'S RESISTANCE

One can admire Martti Koskenniemi's belief in indeterminacy and his intellectual caution against suggesting unnecessary "prescriptiveness," but TWAIL cannot stay away from all possible forms and forums where international legal regimes can be challenged, and coherent struggle should be launched. Borrowing from China Mieville, "conflict is the birth place of law."<sup>205</sup> We need to go to every place of conflict, be it a conflict of the Third World against the West in international legal regimes, a contradiction of Third World states and its people, or a direct confrontation of social movements (NSMs) with international legal regimes. TWAIL should be at all the places where isolation and opposition of the interests of Third World peoples are beginning. It should engage with all historical and contingent claims at the point of contestation before laws become consensus or the norm. But at each stage, keeping in mind the problematic nature of the Third World and the tendencies of its State and elite to compromise, resistance should be advanced, contested, debated, and won from the perspective of the people of the Third World. What should be the principle of struggle for these Third World people?

What is TWAIL's conflict with Eurocentric positivist and universal nature of international law? TWAIL claims that Eurocentrism caused and is causing exclusion, marginalization, and non-representation of Third World countries in international forums. This, in turn, is causing unequal distribution of world resources by ensuring the flight of capital

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<sup>205</sup> MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989); MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW (2011).

and resources from the Third World. If this is the case, representation and distribution should be the guiding principles of resistance against international legal regimes. Non-representation of Third World people occurs at international forums, but its actual process and reasons started at the local level. Taking the example of Pakistan, its main issue is weak democracy and dictatorial regimes deciding the fate of the country in international regimes.<sup>206</sup> This lack of depth and breadth of democracy is because of the structural reality of unequal distribution of land and wealth, which results in the inability of laborers or peasants to think about winning elections. This analysis is true about most of the countries of the Third World with only slight variations.

Lack of representation and unequal distribution of resources may not be true for other areas of international law, but it cannot be denied in the case of labor law. Unlike private law, which is based on corrective justice, labor law is concerned with distributive justice.<sup>207</sup> But there are two complicated aspects to this issue. First is ILO as a mechanism of hegemony which has already been discussed. Second is the role of the local elite in this regard. Chimni correctly pointed to the issue of land reform as a structural issue not on the agenda of ILO. But he did not tell us how it is important, for local change leads to international legal change.<sup>208</sup> This point is very illustrative of the nexus of international institutions (ILO in our case) and local reigning classes. Whereas the American corporate statism and its industrial relations ignore structural issues like land reforms in developing countries,<sup>209</sup> avoidance of land reforms in a country like India shows how Bandung leadership was comfortable with this hegemonic idea.<sup>210</sup>

Above all, distribution is the domain of the legislature and not that of the judiciary or legal forums. What if the legislature does not have a single representative of the working class, as is the case of Pakistan? How can one then expect such a state to get any gain for the workers of the Third World? Instead, Third World states do not want to hear about labor conditions in trade and investment negotiations in

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<sup>206</sup> Democracy in Pakistan is not weak because of a strong military, but because it does not represent actual people and hence is always dependent on the establishment. See my forthcoming article on a state theory of Pakistan. See Azeem, *supra* note 118.

<sup>207</sup> Alan Bogg, *Labor, Love and Futility: Philosophical Perspectives on Labor Law*, 33 INT'L J. COMP. LAB. L. & INDUS. REL. 1, 7–37 (2017).

<sup>208</sup> Chimni, *supra* note 50, at 42.

<sup>209</sup> Cox, *supra* note 8, at 172.

<sup>210</sup> Land reforms were promised in India during the freedom struggle but not given. See Chimni, *supra* note 20, at 42 (citing D. Bandyopadhyay, *Does Land Still Matter*, ECON. & POL. WEEKLY (Mar. 2, 2008)).

international legal regimes and bilateral treaties. In fact, they bank on an unlimited supply of cheap labor to boost terms of trade, as with Pakistan under CPEC. For example, in WTO negotiations, the Third World countries themselves insisted on not including labor conditions. Historically, the European Union and United States continuously pushed to have labor conditions under the General Agreement on Tariffs and Trade (GATT) as well. But in the First WTO Ministerial Meeting in 1996, held in Singapore, even the ILO was not allowed to speak because developing countries did not want labor discussed. Third World states maintained that the ILO, not the WTO, should be kept as the forum for discussion on labor standards, as claimed by the declaration. There were no serious attempts to include labor standards as a part of multilateral WTO framework until 2009. Now, the European Union has different preferences for core labor standards as a part of its bilateral free trade agreements (FTAs) than the United States and Canada. As far as the CPEC-related FTA between Pakistan and China is concerned, there was no discussion on labor standards except for vague promises of a number of jobs for Pakistanis.

The above Bilateral Investment Treaties (BITs) are bypassing local as well as international labor legal regimes. The United States and European Union are a part of twenty and thirty such bilateral FTAs, respectively.<sup>211</sup> Japan is also part of fourteen such agreements.<sup>212</sup> There are also an increasing number of stand-alone BITs, forty of which the United States is a party to and fifty-two of which the European Union is a party.<sup>213</sup> Pakistan has forty-eight BITs, including one with China, since 1989.<sup>214</sup> Currently, disputes go to the World Bank's International Centre for the Settlement of Investment Disputes.<sup>215</sup> Pakistan is thinking to establish a different mechanism to facilitate Chinese

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<sup>211</sup> Fredrick Mayer & Nicola Phillips, *Outsourcing Governance: States and the Politics of Global Value Chain World*, 22 *NEW POL. ECON.* 2, 138–40 (2017).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Statement of Dr. Muhammad Raheem Awan, Secretary of the Law and Justice Commission of Pakistan, see *Judicial Body Asks Courts Not to Issue Stays in CPEC-Related Cases: Report*, PAKISTAN TODAY (May 7, 2018), <https://www.pakistantoday.com.pk/2018/05/07/judicial-body-asks-courts-to-not-issue-stay-orders-on-cpec-related-projects-report/>.

<sup>215</sup> See Rao Qasim Ali Khan, *CPEC Investment Court—An Investment Protection and Dispute Resolution Mechanism for the China Pakistan Economic Corridor*, *THE CORP. L. DECISIONS J.*, 1–18 (2018). China has recently announced it will set up a China International Commercial Court (CICC) within its judicial structure of Supreme People's Court (SPC). See Siyi Lin, *China's International Commercial Court Under the Belt and Road Initiative*, *INT'L COMPANY & COMM. L. REV.* 1, 1–8 (2018).

investors and revise BITs. Additionally, Pakistan is considering establishing special courts to hear CPEC-related disputes. Now, Third World countries in these agreements are tied directly to the dominant positions of the United States, European Union, or Japan, the governance of labor and environment is increasingly being handed over to the “private governance” of standards, protocols, certificates, and labeling by corporations.<sup>216</sup> These so-called Private Compliance Initiatives (PCIs) and efforts to push labor standards into voluntary corporate social responsibility are reducing the effectiveness of international forums and the “public governance” of labor standards by states.<sup>217</sup> The Bangladesh Accord is a typical example of this type of distrust of “public governance” and superimposing “private governance.”<sup>218</sup> This is a clear reflection of the increased market power of multinational corporations.<sup>219</sup>

While Western countries are leaving multilateral legal regimes and are busy in trade wars,<sup>220</sup> the struggle of the people of the Third World is needed. But it must be from the vantage point of the resistance of its people, and not from an abstract notion of national interests that actually represent the local elites. First, a proper resistance to bilateral trade and investment regimes is only possible against the local elite as a main party to these agreements. Second, the best forums to challenge these agreements are international legal regimes and pushing for change to assure distribution and representation.

Why are labor conditions the key example for the principle of representation and distribution for struggle against international legal regimes? Labor is not an issue like clean drinking water or environment, but rather is a political entity. Its very presence in the legislature is a direct test for the quality of democracy and the position of the countries in international legal regimes. One can easily see the difference of degree of quality of democracy and equality as indicators of representation and distribution between Scandinavian countries and the United States.

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<sup>216</sup> Mayer & Phillips, *supra* note 211, at 134.

<sup>217</sup> See generally WILLIAM MILBERG & DEBORAH WINKLER, *OUTSOURCING ECONOMICS: GLOBAL VALUE CHAINS IN CAPITALIST DEVELOPMENT* (2013); Barrientos & Sally Smith, *Do Workers Benefit from Ethical Trade? Assessing Codes of Labor Practice in Global Production Systems*, 28 *THIRD WORLD Q.* 4 (2007).

<sup>218</sup> After Bangladesh’s Rana Plaza disaster, an independent and legally binding agreement was signed between brands and trade unions designed to work toward a safe and healthy Bangladeshi Ready-Made Garment Industry. This is called the Bangladesh Accord.

<sup>219</sup> WILLIAM MILBERG & DEBORAH WINKLER, *supra* note 217, at 115.

<sup>220</sup> See, e.g., ongoing U.S.-China trade war as well as U.S.-Canada tariff disputes.

### CONCLUSION

In conclusion, resistance from the vantage point of the people of the Third World should be the focus of TWAIL in this phase of struggle against international legal regimes as well as bilateral trade and investment treaties. For this, TWAIL's conceptions of the "Third World" and its "states," though always contested, are still valid theoretical formations. The only aspect that needs reconsideration is the lament that the celebrated Third World leadership of Bandung is not around. The compromising character of the ruling elite of these countries in international legal regimes needs explanation. Therefore, while supporting Third World states against recolonization of new international legal regimes, the interests of the *people* should not be ignored. States do not always seamlessly represent their people. A struggle for democratic representation of these people in their own countries provides a foundation for some bold stances in international legal regimes' negotiations. Fanon's dream of decolonization, which taught us to rightly distrust local elites, is yet to be realized. The peoples' struggle and the consequent changing character of the state can assure a changed nature of international legal regimes. My theoretical proposition here is different from Chimni's, which relies on OSMs under the leadership of local elites and is still caught up in the nostalgia of Bandung. It is also different from the dispersed, fragmented, and stateless social movements of Rajagopal's work.

Therefore, representation is the key for viability of the state, and the state changes as a result of struggles of the marginalized, and in turn, can change international legal regimes.

