# Chapter 9

# Infusing Decoloniality into the Pedagogy of International Law at South African Tertiary Institutions

***Swikani Ncube***[1]
*Faculty of Law,*
*University of Johannesburg*

***Jentley Lenong***[2]
*Faculty of Law,*
*University of Johannesburg*

## Abstract

The complicity of the regime of international law and the Global North in legally justifying and sustaining colonial projects is patent. Decoloniality – as the new logic and milieu of power composed and comprehended in the aftermath of colonialism – challenges the benevolence of contemporary international law pedagogy. A plethora of research occupies this theme, although the resultant findings have not found their way into the teaching of international law at South African universities. This chapter proposes a framework that informs the necessary pedagogical transformation for the incorporation and teaching of decoloniality in the international law curriculum at tertiary institutions in South Africa. To achieve this objective, the chapter poses questions, answers to which we hope will contribute

1 LLB, LLM, LLD. Senior lecturer in the Department of Practical Business Law at the University of Johannesburg.
2 LLB, LLM. Lecturer in the Department of Practical Business Law at the University of Johannesburg.

to the process of conceptualising an "African University appropriate" pedagogy of international law. The overarching question is: Does decolonisation in the teaching of international law involve infusing African philosophies such as *Ubuntu* into the process of teaching, or does it call for a reconfiguration of the very foundations upon which the teaching material is based? A secondary question to this is: Can the pedagogy be decolonialised without first decolonising the stratified nature of international law and international relations? The assertion that, in teaching international law, "deciding where to begin is as difficult as deciding where to end" suggests that there are multiple perspectives to international law and the presentation of "universal" cornerstones must be questioned, if not resisted. Indeed, the "universality" of international law has not only been challenged but has been proven to be a fallacy. In assessing this layered conclusion, the presentation of Europe's preferences as "universal" has been the easiest bias to call out. Beyond that, critical questions on, for example, grounding international law in global history, localised and sub-regional approaches, and the production of knowledge continue to invite debate. To this end, the chapter also asks if the focus on overlooked histories of international law as the approach of Third World Approach to International Law (TWAIL) scholarship has been instructive in conceptualising a decolonised pedagogy.

## 1. Introduction

The "universality" of international law has not only been challenged but has been proven to be a fallacy. However, in this layered conclusion, the presentation of Europe's preferences as "universal" has been the easiest bias to call out. Beyond that, critical questions such as grounding international law in global history, localised and sub-regional approaches, and the production of knowledge continue to invite debate. The assertion that, in teaching international law, "deciding where to begin is as difficult as deciding where to end",[3] contextualises the

3 Attar and Abdelkarim "Decolonising the curriculum in international law: Entrapments in praxis and critical thought" 2021 Law and Critique 42-42.

multiplicity of the "international" in international law. However, because the Eurocentrism and imperialistic nature of international law can no longer be ignored, there is a pressing obligation on South African universities to revisit their pedagogical approaches to the discipline. As a contribution to that discourse, this chapter proposes a framework that informs the necessary pedagogical transformation for incorporating and teaching decoloniality in the international law curriculum at tertiary institutions in the country. To achieve this objective, the chapter poses questions, answers to which we hope will contribute to the process of conceptualising a "South African university appropriate" pedagogy of international law. The overarching question is: Does decolonisation in teaching international law involve infusing African philosophies such as *Ubuntu* into the teaching process, or does it call for a reconfiguration of the very foundations upon which the teaching material is based?

The chapter is presented in five parts. After the introduction, Part 2 sketches the current South African discourse on decoloniality. To achieve this, we draw on national debates on the decolonisation and deracialisation of land ownership patterns in the country, decolonising the judiciary and finally, the #RhodesMustFall and #FeesMustFall movements that engulfed South African public universities in 2015-2016. Part 3 discusses the fallacy of universalism in international law and further turns to the question of rationality in vindicating the discipline. Part 4 responds to the question: Why a decolonised pedagogy of international law? Part 5 outlines proposed approaches to teaching international law at South African universities that can potentially aid the decolonisation agenda. Part 6 is the conclusion.

## 2. Decolonisation: The South African discourse

### 2.1 The Fallist movements

As centres of knowledge production, universities serve as spaces of ideological contestation as well as mirrors of society's – and a country's – politics, systems, and progression or regression in the pursuit of excellence. In this matrix, academics and students

combine – not by choice, but by virtue of their positions – to shape conversations and influence outcomes. Such was the case with the Fallist movements that engulfed public universities in South Africa in 2015 and 2016. The genesis of these movements is traced to an incident at the University of Cape Town (UCT) in March 2015, where a student threw human excrement at the statue of Cecil John Rhodes, which stood on the university's grounds.[4] This act, framed as a rejection of racism and colonialism, drew significance from the history of the man whose statue was being defiled.[5] And so, the #RhodesMustFall (#RMF) movement was born – and, with-it, numerous demands that struck at the core of these higher education institutions' (HEIs) management, policies, and content and methods of teaching. Later in 2015, an offshoot movement gained prominence under the name #FeesMustFall (#FMF). Unlike the former, this movement, as the name suggests, had a singular objective: implementing free education across all public universities. Inevitably, these Fallist movements sparked an academic stampede, as various perspectives anchored on demands articulated by student activists made their way into published work. Our understanding of that period and the students' demands is enhanced by the publication of several first-hand accounts by student leaders at different universities.[6] Even more, we have perspectives from "the other side", as two of the vice-chancellors at the time have also penned their views.[7]

The #RMF movement forced the country to confront issues of race, exclusion, decolonisation, and the influence of class on

4 Maylam "Student 'Fallism' in South Africa, 2015–16: Some diverging analyses" 2020 *Journal of Southern African Studies* 1237 1238-1239.

5 Cecil John Rhodes was an ardent believer in British imperialism. See generally Thomson *Cecil John Rhodes* (1947).

6 Godsell and Chikane "The roots of the revolution" in Booysen (ed) *Fees Must Fall: Student revolt, decolonisation and governance in South Africa* (2018) 68; Ramaru "Black Feminist reflections on the Rhodes must fall Movement at UCT" in Kwoba, Chantiluke, and Nkopo (eds) *Rhodes Must Fall: The struggle to decolonise the racist Heart Empire* (2018); and Nkopo "Of. Air. Running. Out" in Kwoba, Chantiluke, and Nkopo (eds) *Rhodes Must Fall: The struggle to decolonise the racist Heart Empire* (2018) 159.

7 Jansen *As by Fire: The End of the South African University* (2017); Habib *Rebels and Rage: Reflecting on #FeesMustFall* (2019).

both students and staff. For Ramaru, a student activist at UCT, they wanted, amongst other things, the ditching of a Eurocentric curriculum as well as the perception that white academics are superior.[8] For Athinangomso Nkopo, whose account captures events at the University of the Witwatersrand (Wits), amongst their demands were "some Biko in the curriculum" and equality between staff of different races.[9] In a volume edited by Malose Langa, contributors zoom in on protests at nine universities and record student demands as well as incidental developments.[10] From these, we gain invaluable insights into how students framed their demands. More importantly, the chapter by Vilakazi reminds us that these movements were by no means homogenous across HEIs.[11]

What is clear, however, is that these protests were not a sudden event. At UCT, for example, questions surrounding the institution's questionable relationship with racist tendencies were already part of the institutional transformation discourse before March 2015. Significantly, the question "If UCT is not racist, why is Cecil John Rhodes's statue still there?" had been posed three years earlier.[12] However, the significance of this observation does not lie in its potential to correct a factual error. Instead, it lies in what it tells us about the future. If the protests – to the scale seen during 2015 and 2016 – had been simmering since the dawn of democracy, they equally did not disappear with the fizzling out of the protests. Consequently, the question of decolonisation within HEIs remains as topical today as it was in 2015. What this means is that there is an obligation on all stakeholders to continuously inquire into what decolonisation means to their clients, the students, and further craft plans to achieve that decolonisation – as defined. One student activist tells us that although they had differing ideas about what decolonisation is, the movement enabled them to have conversations about what it meant to them

8 Ramaru (n 4) 151.
9 Nkopo (n 4) 159.
10 Langa (ed) *#Hashtag: An analysis of the #FeesMustFall Movement at South African universities* (2017).
11 Vilakazi "Tshwane University of Technology: Soshanguve Campus protests cannot be reduced to #FeesMustFall" in Langa (n 8) 49.
12 Godsell and Chikane (n 4) 57.

and how they could achieve it.[13] This admission tells us that the conversation on decolonisation is an ongoing one, and as HEIs attempt to respond to student demands – while at the same time remaining loyal to their core business – a localised meaning of a decolonised university will have to be found.

### 2.2 The land question

Land ownership patterns, and the occupancies of land-based spaces in South Africa, are steeped in colonialism, and by extension its concomitants, like racism. As McCusker, Mosely and Ramutsindela observe, "[t]he trajectory of land policy and group dynamics is embedded in the broader political history of the country".[14] Part of that history is vividly captured by Tembeka Ngcukaitobi's *The Land is Ours*.[15] In it, he narrates the dispossession of natives, particularly the Xhosa in the Eastern Cape and the San in the Cape, and further demonstrates the close correlation between the coloniser's appetite for the land, as well as that which lay beneath it – the minerals.[16] Consequently, the fight for independence hinged on two claims: political independence and the legal entitlement to determine the land ownership policies of the country. In its African Bill Of Rights in 1923, the African National Congress (ANC) pronounced as one of its five principles, the entitlement of Africans to their land as "children of the soil" who "have a God-given right to unrestricted ownership of the land".[17] It is for this reason that at independence, the ANC (led by Nelson Mandela) sought to move on addressing land ownership disparities through a Reconstruction and Development Programme (RDP)[18], which identified land redistribution, land restitution, and land tenure reform as strategies to address the injustices of the past. Three years later, in 1997, the Department

13 Ramaru (n 4) 150.
14 McCusker, Mosely and Ramutsindela *Land reform in South Africa: An uneven transformation* (2015) 40.
15 Ngcukaitobi *The land is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (2017).
16 Ngcukaitobi (n 13) 11-38.
17 Ngcukaitobi (n 13) 4.
18 The African National Congress (ANC) "The Reconstruction and Development Programme – RDP" 1994.

of Land Affairs published the White Paper on Land Reform, which adopted the same strategies as those outlined in the RDP.[19]

The conversation on decolonising land ownership patterns in the country is necessary. In her review of Ngcukaitobi's *The Land is Ours*, Brown notes that "[i]n the context of current debates surrounding land reform and land redistribution," the book "provides a timely evidentiary record of the deliberate and violative removal and dispossession of black South Africans from the land".[20] For Madlingozi, the book "is a timely and valuable contribution…to discussions about the role of law in the 'radical trans-formation' or 'decolonisation' of society".[21] Indeed, at independence, black South Africans occupied only 13% of the national land.[22] While this was not alarming at the time, Yanou comments that it presented the new government with a pressing and potentially explosive problem.[23] However, the fact that this pattern still persists more than 25 years after independence has induced a sense of disappointment, despondency, and anger amongst black South Africans. When the Department of Rural Development and Land Reform released its Land Audit Report in 2018 – which showed that whites occupy 72% of all agricultural land, while blacks have a mere 4%[24] – proponents of land expropriation without compensation were invigorated and accusations of dereliction of duty were levelled against the ANC. Fearful of losing political capital, the ANC had, at its policy conference the previous year in 2017, adopted a resolution to

19 Department of Land Affairs (DLA) "Department of Land Affairs White paper on Land Policy" 1997 (hereafter "White Paper on Land Reform").

20 Brown "Tracing the origins of South African constitutionalism" 2019 *South African Journal of Science* 115 115.

21 Madlingozi "South Africa's first black lawyers, amaRespectables and the birth of evolutionary constitution – a review of Tembeka Ngcukaitobi's *The land is ours: South Africa's first black lawyers and the birth of constitutionalism"* 2018 *South African Journal on Human Rights* 517 517.

22 Department of Rural Development and Land Reform *Land Audit* (2013) 8.

23 Yanou *Dispossession and Access to Land in South Africa: An African Perspective* (2009) 49.

24 Department of Rural Development and Land Reform *Land Audit Report 2017: Phase II: Private Ownership by race, gender and nationality* (2018).

pursue the amendment of the property clause and to make provision for land expropriation without compensation.[25] In February 2018, an Economic Freedom Fighters (EFF) motion calling for Parliament's Constitutional Review Committee to consider possible amendments to section 25 was adopted with the support of the ANC, as attempts are made to redress the land ownership imbalance. A thorough account of developments since is beyond the scope of this chapter; suffice to say that a bill for the 18th amendment to the country's constitution has been drafted.

Iyer and Calvino are kind when they say that land reform has stagnated.[26] Rather, the dominant conclusion is that the ANC has failed dismally, and the question of land reform has been politicised.[27] While we agree with the observation that the government has failed, we are not persuaded that the issue has suddenly become politicised. In our view, land ownership has always been political and until such a time that the patterns reflect the demographics of the country, what began with the "original sin" (the initial dispossession) will remain political and polarising. As noted in the White Paper, "a sound land policy is one of South Africa's preconditions for the attainment of peace, reconciliation and stability".[28]

## 3. The politico-judicial standoff

Over the years, the doctrine of separation of powers has taken centre stage in South Africa as the judiciary has increasingly been called upon to adjudicate matters that present a delicate balance

25 Mkokeli "The EFF is in Charge – The ANC follows us: Malema has Ramaphosa 'where he wants him'" 2018 *Timeslive* https://www.timeslive.co.za/sunday-times/business/2018-08-20-eff-is-in-charge-anc-follows-us-malema-has-ramaphosa-where-he-wants-him/ (10-11-2022). See also Ntsholo "Mainstream Media's shockingly antagonistic attitude to the EFF" 2018 Daily Maverick https://www.dailymaverick.co.za/opinionista/2018-03-29-mainstream-medias-shockingly-antagonistic-attitude-to-the-eff/ (10-11-2022).

26 Iyer and Calvino "Expropriation as an effective tool for land reform: a legislative perspective" in Akinola, Kaseeram and Jili (eds) *The new political economy of land reform in South Africa* (2020) 26.

27 Akinola, Kaseeram and Jili (n 24) 2.

28 White paper on Land Reform (n 17) 22.

between law and politics. In exercising their judicial review mandate, the country's courts have made pronouncements that have elicited strong disapproval from the legislature and the executive, and with it, a charge of judicial overreach. Initially, only the ANC complained that their mandate to govern was being impeded. As then-President Jacob Zuma put it, the opposition was using the courts to "co-govern" without a mandate.[29] As more and more politicians expressed displeasure with the judiciary, an unprecedented meeting between the president and the country's then-chief justice was called.[30]

However, the charge of judicial overreach against the judges of the apex court soon came from one of their own. In *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*, the chief justice, in a dissenting judgment, labelled the position adopted by his colleagues a "textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament".[31] Predictably, this aroused much debate, both political and legal. Although the dissenting judgment had no practical consequences at law, it played into the hands of those who had for a long time accused the courts of encroaching into spaces constitutionally reserved for other arms of government.

While the charge of judicial overreach is significant, it pales in comparison when pitted against claims that, in fact, above all else, what the judiciary needs is decolonisation. It must be noted in this context that because of the history of the country, judicial transformation is a constitutional imperative. In its guidelines on the appointment of judicial officers, section 174(2) provides that the "racial and gender composition of South Africa must be considered". That said, the call for decolonising the judiciary looks beyond transformation, and suggests that

29 Gallens "Zuma slates opposition for challenging 'majority' decisions in courts" 2017 News24 https://www.news24.com/News24/zuma-slates-opposition-for-challenging-majority-decisions-in-courts-20170630 (10-11-2022).

30 O'Reilly "Meeting between the President and Chief Justice" 2015 September *De Rebus* 12.

31 *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) par 223.

structural challenges demand more than just racial changes to how the judiciary is constituted. Writing in 2008, Wesson and Du Plessis argued that in addition to racial considerations, "judicial transformation must incorporate changes in the manner in which judges are appointed...[and] the underlying attitudes of the judiciary must change".[32] Their reference to attitudes leans towards decolonisation. While the racial distribution is easy to ascertain and perhaps correct, the attitude element is impossible to measure and, therefore, not easy to address.

In January 2022, the ANC's Lindiwe Sisulu penned an open letter in which she directed serious accusations at the judiciary, particularly the judges of the apex court. However, unlike in previous accusations that centred on race, she took aim at black judges, questioning their allegiances and making reference to colonised mindsets.[33] The gravity of the allegations prompted a response from then-Acting Chief Justice Raymond Zondo, who, at a press briefing, accused her of making statements that were devoid of facts but pregnant with insults.[34] Despite pressure from the president to apologise, Sisulu stood her ground and refused to apologise.[35] Her party's then-secretary general, Jessie Duarte, defended her, asserting that Sisulu had a right to freedom of expression.[36] The same Duarte had in 2021 been forced to apologise to Judge Zondo for penning an opinion piece in which she questioned the value of the inquiry that he chaired and its role

32 Wesson and Plessis "Fifteen years on: Central issues relating to the transformation of the South African judiciary" 2008 *SAJHR* 187-192.

33 Sisulu "Lindiwe Sisulu: Whose law is it anyway?" 2022 *Mail and Guardian* https://mg.co.za/opinion/2022-01-08-lindiwe-sisulu-whose-law-is-it-anyway/ (08-11-2022).

34 Ferreira "Sisulu 'crossed line' and must withdraw 'insult' to judiciary – Zondo" 2022 *Mail and Guardian* https://mg.co.za/politics/2022-01-12-sisulu-crossed-line-and-must-withdraw-insult-to-judiciary-zondo/ (08-11-2022).

35 Ferreira "Sisulu rejects Ramaphosa's apology in her name" 2022 *Mail and Guardian* https://mg.co.za/politics/2022-01-20-sisulu-rejects-ramaphosas-apology-in-her-name/ (08-11-2022).

36 *The South African* "More Sisulu drama! Jessie Duarte Slams 'attacks' on Lindiwe Sisulu" 2022 https://www.thesouthafrican.com/news/lindiwe-sisulu-jessie-duarte-anc/ (08-11-2022).

in a democratic system.[37] In addition, she was recorded expressing reservations about former President Jacob Zuma appearing before Judge Zondo at the same inquiry, remarking that "it's not like we can't see what's wrong with Zondo".[38] Similarly, the ANC in KwaZulu-Natal has accused judges of being influenced by factors outside the environment of the courts, adding that "the judiciary seems not to have transformed beyond employment equity".[39] The South African Communist Party's (SACP) Blade Nzimande has also weighed in, warning that the country is at the risk of becoming a judicial dictatorship.[40]

A call for a transformed judiciary has also come from within. In 2021, embattled Western Cape Judge President John Hlophe said, "any judiciary which is still white male-dominated can never be construed as legitimate. It will continue to be regarded as a judiciary which was imposed to serve the interests of the white minority government".[41] This criticism towards his colleagues added to the debate on the state of the judiciary and its contribution to the broader transformation of the country. Although his troubles with the Judicial Services Commission (JSC) have been used to discredit him,[42] that a judge had previously

37 Khoza "Jessie Duarte apologises to Zondo for her comments in opinion piece" 2021 *TimesLive* https://www.timeslive.co.za/sunday-times/news/2021-02-14-jessie-duarte-apologises-to-zondo-for-her-comments-in-opinion-piece/ (08-11-2022).

38 Madisa "Leaked audio reveals how Jessie Duarte advised Jacob Zuma not to appear before state capture inquiry" 2021 *Sowetan Live* https://www.sowetanlive.co.za/news/south-africa/2021-04-13-listen-leaked-audio-reveals-how-jessie-duarte-advised-jacob-zuma-not-to-appear-before-state-capture-inquiry/ (11-11-2022).

39 Tandwa "ANC KwaZulu Natal slams Zondo, NEC and judiciary in organisational report, defends Zuma" 2021 *Mail and Guardian* https://mg.co.za/politics/2022-07-24-anc-kwazulu-natal-slams-zondo-and-judiciary-in-organisational-report-defends-zuma/ (10-11-2022).

40 Du Plessis "Nzimande slams judicial dictatorship" 2011 *News24* https://www.news24.com/News24/Nzimande-slams-judicial-dictatorship-20111217-2 (11-11-2022).

41 Mchunu "Judiciary is white male dominated says John Hlophe" 2021 *IOL* https://www.iol.co.za/mercury/news/judiciary-is-white-male-dominated-says-john-hlophe-79b41a2e-1883-4bcc-ab13-62c999b28a25 (10-11-2022).

42 Thamm "The rise and (slow) fall of John Hlophe the judge who almost took the judiciary down with him" 2022 *Daily Maverick*

resigned for making racist remarks meant that his views could not just be dismissed with contempt. Three years earlier, in 2017, Judge Mabel Jansen resigned from the bench after racist remarks made in a private conversation were shared on social media, prompting widespread condemnation.[43] This chapter does not attempt an appraisal of the judges in whose direction an accusatorial finger has been wagged. Instead, we simply acknowledge that those accusations have been made and that the decolonisation of the judiciary is part of the broader national conversation on ridding the country of pre-independence systems, cultures, privileges, and prejudices.

## 4. International law and the fallacy of universality

### 4.1 The rationality of decoloniality of international law

International law as a discipline has not embraced rationality. Some scholars have even argued that rational choice analysis has been resisted in the field.[44] How, then, does decoloniality impact rationality within international law and consequently as a legitimate scientific endeavour? Some see its normativity as sufficient to legitimise its existence, while others believe it can only be rationally underpinned within a legal positivist paradigm. For Green, international law's very existence and force depend on its immanent rationality.[45] Such an approach firmly attaches it to the state and negates elements of universal humanity. Consequently, the approach is utilitarian in nature, but only for the utility of the state. It would be challenging to elevate concepts such as human rights into such an approach as it would depend

https://www.dailymaverick.co.za/article/2021-09-08-the-rise-and-slow-fall-of-john-hlophe-the-judge-who-almost-took-the-judiciary-down-with-him/ (11-11-2022).

43 SA Government "Justice and constitutional development on Judge Mabel Jansen resignation" 2017 https://www.gov.za/nr/speeches/justice-and-constitutional-development-judge-mabel-jansen-resignation-5-may-2017-0000 (09-11-2022).

44 Keohane "Rational choice theory and international law: Insights and limitations" 2002 *The Journal of Legal Studies* 307-307.

45 Green "The precarious rationality of international law: Critiquing the international rule of recognition" 2021 *German Law Journal* 1613 1613-1634.

largely on a perfect union amongst all nation states for it to exist within international law legitimately. A further challenge, as observed by Orford, is how international law has aligned with the shifting ideals of the scientific method.[46] We argue, in this regard, that universal principles in international law should form the basis for comprehending the field's scientific rationality. Theoretical international law would then be the vehicle that ultimately leads to the production of universally applicable law. Through such an understanding, the scientific body of knowledge produced by international law as universal laws should not be *ad hoc.* Instead, it should be just, rigid, and lasting in addressing the complexities underlying human-international law relations.

However, the relationship that previously colonised societies have with international law is arguably schizophrenic. On the one hand, international law evidences reform, democratisation, and the introduction of human rights; on the other, it maintains global hegemony in its application and institutions. Consequently, teaching international law in previously repressed societies denotes voiding it of the lived experiences and localised cultural and contextual reason and thought. For example, in reflecting on Descartes's separation between reason or subject and body, Quijano and Ennis postulate that "... in Eurocentric rationality, the body was fixed as the object of knowledge, outside of the environment of subject/reason".[47] Thus, to argue for rationality in the way we perceive and conceptualise decoloniality of international law cannot be premised on producing a singular manner by which this process should be understood.

### 4.2 A new rationality of a decolonised pedagogy of international law

In exploring the value of a decolonised pedagogy of international law, the focus is to analyse one of the primary research questions: Can the pedagogy be decolonised without first decolonising

46 Orford "Scientific Reason and the discipline of international law" 2014 *European Journal of International Law* 369-370.

47 Quijano and Ennis "Coloniality of Power, Eurocentrism, and Latin America" 2000 *Nepantla: Views from South* 533 533-580.

the stratified nature of international law and international relations? Implicit in this question is the hegemonic nature of international law. Third World Approach to International Law (TWAIL) scholarship developed as an approach to deconstruct and introduce Third World value systems into the reasoning of international law. On the question of whether it truly offers a viable alternative within mainstream Western legal studies of international law, the answer is complicated.[48]

However, this prompts another question: Does this constitute a legal development or just the accommodation of a novel perspective on the teaching of international law? A frequently overlooked aspect of the decolonisation debate common to both international law and other disciplines is the question of legal development. Should the decolonisation pedagogy not be considered as natural on the path of enlightenment in the progressive development of the discipline? That a lacuna exists within the experiences and practices of previously colonised societies should naturally be the impetus for legal development which should include the notions of law and justice. Consequently, one would consider that the inclusion of a decolonised pedagogy of international law is a natural concomitant of legal developments in international law.

Concurrent to this is the dual nature or shared responsibility to develop the law both by the previous colonisers and the colonised. In reflecting on the American legal perspective of law and development, Friedman aptly takes the stance that "[i]gnorance about the relationship between law and development is not solely a problem of law in Third World countries".[49] He argues that a shared ignorance exists about the general relationship between legal systems and social systems. Legal development in international law, particularly, is in a constant state of distilling aspects germane to the legal norm and those touching on social norms. Friedman concedes that "[t]he legal missionaries abroad are merely exotic versions of legal missionaries inside our own country, reforming, arranging, codifying, and revamping the law

48 Attar and Tava "TWAIL Pedagogy – Legal Education for Emancipation" 2009 *Palestine Yearbook of International Law* 7-10.
49 Friedman "On legal development" 1969 *Rutgers Law Review* 11-13.

in a vacuum of theory".[50] Consequently, the need to appreciate the dual nature or shared responsibility is necessary and unavoidable for international law. One can assert that not considering decoloniality would remain a constant limitation in teaching international law, leading to distrust and legal uncertainty.

## 5. Why a decolonised pedagogy of international law?

The idea of formally interrogating the teaching of international law globally was first proposed at a regional meeting of the International Law Association (ILA) in Taiwan in 1998 by Professor Fred Soons, who was the ILA Director of Studies.[51] Consequently, the Committee on Teaching of International Law (CTIL) was established as a result of the positive outcomes of the deliberations during that session. In the following years, the work of the CTIL focused on seven themes, amongst them the *raison d'etre* of the international law course, new teaching techniques, and the place of international law in curricula: How do we ensure adequate attention to international law in university curricula?[52]

The work of the CTIL exposes that the teaching of international law has generally been overlooked, and a *laissez-faire* approach was followed, where the expert dictated the orientation of teaching and learning. This approach was further justified by a need to proliferate the presence of international law beyond academia. Different universities and institutions approach the teaching of international law in a variety of ways. The immediate consequence of this reveals the differences in outcomes flowing from this approach, and at the same time it produces challenges that are primarily similar.

50 Friedman (n 47) 13.
51 Botha and Gamble "Report of the International Law Association Committee on the Teaching of International: Hague Conference" 2010 1-2.
52 See Charesworth "Circular to ILA Members" 1999 *International Law Association*. See also Gamble "Preliminary Report of the Committee on the Teaching of International Law" ILA *Report of the Sixty-ninth Conference, London* 2000 1 208.

One of the challenges to moving away from the *laissez-faire* approach to teaching international law is the impact broadly on academic freedom. The differences in ideological and philosophical grounding between experts and different contexts do not lend themselves to normative rules or the objective advancement of theoretical frameworks. In the context of communities with a history of repression, the teaching of international law might be more focused on it being a mechanism of socio-political change, whereas in the Global North, the emphasis might be more on the procedural and practical application of international law within its institutions and other relevant forums. The ILA Committee on the Teaching of International Law, for instance, concluded in its 2010 report that although diverging views exist around establishing guidelines and best practices, it remains paramount that "[w]e must teach".[53]

In South Africa, the constitutional imperative to apply international law attaches practical consequences to the call for decolonised international law. In section 33, the country's Constitution[54] obligates our courts to interpret legislation in a manner consistent with international law.[55] For this reason, Botha argues that "[w]here international law is an integral/important part of the municipal legal system...a teacher has a positive duty to equip students for the use of international law in general practice".[56] However, a simple response to the question of why a decolonised pedagogy of international law would be valuable is that African universities and the contents and methods of teaching were established by Europeans to further their own interests, hence there is a need to create an Afrocentric

53 Botha and Gamble (n 49) 4.
54 Act 108 of 1996.
55 Indirect recognition of international law is further entrenched within the South African Constitution under s 231, which relates to international agreements, and s 232, that makes customary international law part of the law of the republic and notes the supremacy of the constitution or an act of parliament in relation to customary international that is inconsistent with it.
56 Botha "Teaching international law in South Africa ten years into democracy: Notes and comments" 2004 *South African Yearbook of International Law* 243-249.

university.[57] As Asante puts it, colonisation was not only about physical territory, but intellectual territory as well. Consequently, the process of decolonisation is incomplete if the centres of knowledge production and ideological contestation remain steeped in Eurocentrism.[58]

## 6. Conceptualising a decolonised pedagogy of international law at South African universities

### 6.1 Introductory comments

The #RMF movement, as well as other calls for decolonisation, are unique in that they only present demands, and do not prescribe, with sufficient clarity, how the said decolonisation can or should be undertaken. The second leg of decolonisation strategies is important, as it directly links to the outcomes of attempts at decolonialisation. In this section, we identify and develop three approaches to the teaching of international law that can contribute to its decolonisation. The first is the regionalisation or sub-regionalisation of content, the second is the infusion of an *Ubuntu* approach in making sense of concepts and their application, and the last is the infusion of a decolonisation scholarship in the teaching of the module.

### 6.2 Regionalising and sub-regionalising the substance of international law

In one of her contributions to the decolonisation discourse, Bhambra credits the foundations of postcolonial studies to Said, Bhabha, Spivak, Quijano, Mignolo, and Lugones.[59] Crucially, these are drawn from the Middle East, South Asia, and South America. Latching onto this disregard of African scholars, Ndlovu-Gatsheni challenges Bhambra's outlook and argues that contributions

57 Asante "Reconstituting curricula in African universities: In search of an Afrocentric design" in Alvares and Faruqi (eds) *Decolonising the University: The Emerging Quest for Non-Eurocentric Paradigms* (2011) 44.

58 Asante (n 55) 45.

59 Bhambra "Postcolonial and decolonial dialogues" 2014 *Decoloniality, Knowledges and Aesthetics* 115 115-120.

by black African scholars such as Cheikh Anta Diop, Edward Blyden, Leopold Sedar Senghor, Kwame Nkrumah, and Ngugi wa Thiong'o deserve recognition for their scholarship on various aspects of decoloniality.[60] The irony in Bhambra's contribution is that, while she is a proponent of decolonisation, she disregards African voices, proving, in the process, that the stratification of knowledge still places Africa and Africanness at the bottom of the pyramid. Similarly, that Ndlovu-Gatsheni felt compelled to highlight this anomaly is no doubt a result of his positionality as a black African scholar with an interest (bias) in seeing his continent and that which it produces accorded some recognition and, above all, respect.

Having demonstrated the Eurocentric and Americanised nature of international law, we argue that, for South African Universities, regionalising and sub-regionalising the substance of international law may aid in the decolonisation of the subject. This we borrow from Burgis-Kasthala and Schwöbel-Patel, who refer to it as the "localisation" strategy.[61] In implementing this localisation strategy, the rationale is to defer to locally relevant scholarship as well as historical events with which students can relate. As Burgis-Kasthala and Schwöbel-Patel tell us, because place matters, "the first step must entail a consciousness about history, particularly histories of repression and resistance".[62] Amaya-Castro is of a similar persuasion. In his view, one's cultural, socio-economic, and ideological-political characteristics matter because "it contributes to how you perceive 'the international' and its relevance in general as well as in concrete situations".[63] Take, for example, a lecture on international organisations. While reference to the United

60 Ndlovu-Gatsheni "The cognitive empire, politics of knowledge and African intellectual productions: reflections on struggles for epistemic freedom and resurgence of decolonisation in the twenty-first century" 2021 *Third World Quarterly* 882 882-883.

61 Burgis-Kasthala and Schwöbel-Patel "Against coloniality in the international law curriculum: Examining decoloniality" 2022 *The Law Teacher* 485-502.

62 Burgis-Kasthala and Schwöbel-Patel (n 59) 500.

63 Amaya-Castro "Teaching international law: Both everywhere and somewhere" in Sainz-Borgo *et al* (eds) *Liber Amicorum in Honour of a Modern Renaissance Man His Excellency Gudmundur Eiríkson* (2017) 522.

Nations system as well as regional organisations such as the European Union (EU), the Organisation of American States (OAS), the Association of Southeast Asian Nations (ASEAN) and the League of Arab States (LAS) is necessary, greater emphasis must be placed on the African Union (AU) and the Southern African Development Community (SADC) as attempts at creating forums for addressing mutual interests for African and Southern African states. That way, a South African student of international law can relate to SADC's deployment of troops to Mozambique's Cabo Delgado region in 2021 to quell an Islamic terrorist insurgency or South Africa's active participation in conflict prevention efforts on the continent and the region. The argument here is not that presenting international solidarity through the lens of the UN (United Nations) system would prejudice the students; instead, it is that students can recognise themselves and their surroundings in the taught material and are able to move beyond abstract constructions.

Commenting on the teaching of international law in Latin America, Restrepo and Prieto-Ríos point to the lack of local content as well as relevance as factors perpetuating a Eurocentric disposition and thereafter question the role of international law scholars in the region.[64] If one were to respond to their question, the answer would be that the role of scholars in that region is to look closer to home when planning lectures and prescribing sources. For example, Burgis-Kasthala and Schwöbel-Patel suggest that when lecturing on self-determination and statehood, "one could consider a contextual entry into the topic, beginning with struggles for statehood, including, but without being limited to, the case studies of the Kurds, Biafra, and Palestine as well as the struggle for indigenous sovereignty in Australia".[65] On this point, they point to Ardill, who adopts a First Australian Scholarship approach in his analysis and deconstruction of

64 Restrepo and Prieto-Ríos "*Educación del derecho internacional en Bogotá: un primer diagnóstico a partir del análisis de los programas de clase y su relación con las epistemologías de no conocimiento*" 2017 *Revista Drecho Del Estado* 53 53, as quoted in Burgis-Kasthala and Schwöbel-Patel (n 59) 500.

65 Burgis-Kasthala and Schwöbel-Patel (n 59) 501.

Australian sovereignty.[66] For a South African scholar considering a contextual entry into the topic of statehood, examples abound. In addition to external examples on the continent, one can begin with the Bantustans policy under apartheid and the legal implications of legal instruments such as the Bantu Homelands Citizenship Act.[67] Even more, one can use the Afrikaner separatist town of Orania in the Northern Cape as an entry point. The desire for a "Volkstaat", an Afrikaner ethno-state, presents a perfect platform for interrogating issues of population, territory, and self-determination. Needless to say, there is also ample scholarship on the town, motivations behind its existence, and its future in an independent South Africa.[68]

In an assessment of the #RMF movements at UCT and Oxford University, Sunnemark and Thörn observe that, as the "movement became dispersed from one locality to another, demands…were by necessity rearticulated and transformed in relation to new local, national, and global contexts".[69] This observation underscores the centrality of localised perceptions and interpretations of phenomena that may, from the outside, seem homogeneous. However, the wisdom in exalting local processes is best illustrated in international peace and security studies. The scholarship on conflict prevention and resolution reflects a settled consensus that, in responding to armed conflicts and situations of heightened political tensions, the broader international community must, where possible, defer to regional and sub-regional organisations. This preference is justified by the reasoning that because of their proximity to conflict areas, regional and sub-regional organisations enjoy a better appreciation of structural causes of conflict in that

66 Ardill "Australian sovereignty, indigenous standpoint theory and feminist standpoint theory" 2013 *Griff L Rev* 315 315.

67 the Bantu Homelands Citizenship Act 26 of 1970.

68 See, for example, Veracini "Afterword: Orania as settler self-transfer" 2011 *Settler Colonial Studies* 190 190-196; De Beer "Exercise in futility or dawn of Afrikaner self-determination: an exploratory ethno-historical investigation of Orania" 2006 *Anthropology Southern Africa* 105 105-114; and Jooste *Afrikaner self-determination: A current appraisal* (1994) 1 1-139.

69 Sunnemark and Thörn "Decolonizing higher education in a global post-colonial era: #RhodesMustFall from Cape Town to Oxford" 2021 *Review of Education, Pedagogy, and Cultural Studies* 53-54.

locality and are, therefore, better placed to craft a response. If the regionalisation of responses to conflict is acceptable in that context, this should be reflected in the content of international law at South African HEIs.

Localising international law is central to the identity of South African HEIs and the students that they produce. For example, if a well-travelled African living somewhere outside the continent is blindfolded and flown around for days and thereafter taken to a religious gathering where Zulu hymns are being sung, they would assume that they are in KwaZulu-Natal, or at the very least somewhere in South Africa. Similarly, if that individual was taken to a gathering where, instead of Zulu, the hymns are in Swahili, they would be forgiven for thinking they are somewhere in East Africa. Similarly, the character of the international law curriculum in our universities must suggest not only that they are African HEIs but that they are Southern African and, above all, South African HEIs.

The inclusion of regional and sub-regional perspectives is a task that rests on academics who teach international law at our local HEIs. As Gutto remarked in 2011, "...but we continue saying our curriculum has not changed. Who is going to change it if we do not?"[70] Because prescribed textbooks and other material on international law seldom (if ever) include sub-regional and regional occurrences in sufficient detail, it is incumbent upon these academics to supplement their sources with scholarship from other fields of study such as history, international relations, geography, and economics.

## 6.3 Infusing African philosophies in the teaching of international law: An *Ubuntu* perspective

As an African philosophy, *Ubuntu* embodies an aggregate of values. At the core of its existence is the Nguni phrase "*umuntu ngumuntu ngabantu*", a secondary formulation which has been loosely translated to mean "I am because you are". As Ramose explains,

70 Gutto "Decolonising the law: Do we have a choice?" in Alvares and Faruqi (eds) *Decolonising the University: The Emerging Quest for Non-Eurocentric Paradigms* (2011) 212.

*Ubuntu* literally means humanness, with the latter embodying communal harmony and an entrenched sense of belonging.[71] Because of its versatility, *Ubuntu* has found application in diverse contexts, from jurisprudence[72] to philosophy.[73] Applying the concept to decolonising research, Seehawer states that, as a research paradigm, *Ubuntu* comprises "philosophical assumptions about the nature of social reality (ontology), ways of knowing (epistemology), and ethics and value systems (axiology)".[74] However, *Ubuntu*'s strength lies in its close equivalence to human rights, particularly human dignity, equality, freedom, and access to socio-economic rights. In this context, however, *Ubuntu* is seen as superior and a true reflection of an African conception of right and wrong. On this basis, Murithi has proposed the "*Ubuntufication*" of human rights, a departure from our current understanding and interpretation of human rights towards a paradigm dominated by Africanness.[75] Accepting that *Ubuntu* is distinct from the body of universal human rights as presently codified, Mathabane proposes it as a solution to America's racial troubles,[76] a proposal which suggests that this would be an adoption of "something" currently not practised in the American society.

However, despite its seemingly virtuous character, *Ubuntu* is not without its critics. *Ubuntu* scholar Metz identifies three common objections to its characterisation as a viable African philosophy, namely that it is vague, over-emphasises group thinking or collectivism, and that because of its pastoral societies'

71 Ramose *African philosophy through Ubuntu* (1999) 67.
72 Mokgoro "Ubuntu and the law in South Africa" 1998 *Buffalo Human Rights Law Review* 15 15–23
73 Ramose (n 69).
74 Seehawer "Decolonising research in a Sub-Saharan African context: exploring Ubuntu as a foundation for research methodology, ethics and agenda" 2018 *International Journal of Social Research Methodology* 453 453-466.
75 Murithi "A local response to the global human rights standard: the *ubuntu* perspective on human dignity" 2007 *Globalisation, Societies and Education* 277-278.
76 Mathabane *The Lessons of Ubuntu: How an African philosophy can inspire racial healing in America* (2018) 7-22.

roots, it is unsuited for a modern state.[77] On ambiguity, Mboti asks, "What exactly is *Ubuntu*?",[78] a question which builds on Matolino and Kwindingwi's argument that, in truth, *Ubuntu* "has become anything to anyone who so wishes to deploy it",[79] with the result that it has lost relevance. They argue that the project of *Ubuntu* simply ought to reach its end.[80] Their view prompted a response from Metz, who, in defence of a philosophy that he has propagated for a while, asserts that, on the contrary, *Ubuntu* has just gotten started.[81] For Allais, Metz romanticises *Ubuntu* and presents it as something it is not.[82] She says this in response to his suggestion that *Ubuntu* presents an African single value ethical theory.[83]

The relevance of *Ubuntu* to decolonisation is, therefore, twofold. The first is as an African single value ethical theory as espoused by Metz,[84] and the second is as an epistemology as suggested by Seehawer.[85] As an ethical theory, *Ubuntu* finds application in, for example, rationalising the proscription of so-called international crimes. There are arguments that human rights are a Western imposition, an assertion defended with reference to the composition of delegates who drafted the Universal Declaration of Human Rights, an instrument that has attained customary international law status.[86] Mutua even proceeds to propose what he terms "a more extended understanding of human rights, one that takes into account alternative ways of thinking about and articulating human

77 Metz "Ubuntu as a moral theory and human rights in South Africa." 2011 *African Human Rights Law Journal* 532 532-559.
78 Mboti "May the real *Ubuntu* please stand up?" 2015 *Journal of Media Ethics* 125 125-147.
79 Matolino and Kwindingwi "The end of ubuntu" 2013 *South African Journal of Philosophy* 197 197–205.
80 Matolino and Kwindingwi (n 77) 197-205.
81 Metz "Just the beginning for Ubuntu: Reply to Matolino and Kwindingwi" 2014 *South African Journal of Philosophy* 65 65-72.
82 Allais "Humanness and Harmony: Thad Metz on *Ubuntu*" 2022 *Philosophical Papers* 203 203-237.
83 Allais (n 80).
84 Metz "The motivation for 'Toward an African moral theory'" 2007 *South African Journal of Philosophy* 331 331–335.
85 Seehawer (n 72) 453-466.
86 An-Na'im *Universal rights, local remedies: implementing human rights in the legal systems of Africa* (1999) 24.

dignity".[87] Because of these limitations on the concept of human rights, we argue that a South African student, or any African for that matter, is likely to comprehend the concept of entitlements (rights) better if these are wrapped in *Ubuntu* as opposed to the Western language of human rights. As presently understood and taught, human rights are a Western concept. Their application in, for example, slavery and colonialism pit one foreign concept again another. Similarly, definitions of and epistemological approaches to international crimes have their foundations in the concept of human rights. To Africanise these concepts, how about explaining genocide, war crimes, aggression, and crimes against humanity through the prism of *Ubuntu*? Without digressing from the conclusion that these are abhorrent crimes, the need for their prevention as well as the prosecution of perpetrators can be grounded in African philosophies: "I am because you are", therefore, "I will not exterminate", "I will not discriminate", and "I will not destabilise communal harmony". Similarly, an *Ubuntu* entry point would perfectly explain the twin concepts of *jus cogens* and obligations *erga omnes*. The latter, as obligations owed to the broader international community, embodies the essence of *Ubuntu* – communal harmony.

In his views on reconstituting the curricula in African universities, Asante proposes questioning inherited myths as well as basing knowledge "on those values and virtues that have sustained African societies through the ages".[88] *Ubuntu* is one such embodiment of African values and virtues. Further, because indigenous concepts have traditionally featured as examples of barbaric and repugnant practices inconsistent with civilisation,[89] infusing *Ubuntu* into the teaching of international law presents an alternative view, showcasing indigenous philosophies as consistent with natural justice and good conscience. Apart from explaining these Western concepts through *Ubuntu*, South African

87 Wa Mutua *Human rights: a political and cultural critique* (2002) 3.
88 Asante (n 55) 46.
89 Anwana "Decolonising the law curricula at universities of technology: Students' perspective on content" 2022 *South African Journal of Higher Education* 59-62. See also Hewitt "Decolonizing and indigenizing: Some considerations for law schools" 2016 *Windsor Yearbook of Access to Justice* 65-70.

universities can also see how an *Ubuntu* approach to issues such as foreign policy, refugee protection, and international peacebuilding can contribute to making the world a better place. Qobo and Nyathi have already suggested an *Ubuntu* approach to foreign relations,[90] while Richmond has advanced a similar argument about reconstructing post-conflict societies.[91]

### 6.4 Infusing decoloniality scholarship in the teaching of international law

In addition to using Africa and Southern Africa as specific entry points into international law lectures, the teaching of international law must include debates and discussions on the decolonisation scholarship that focuses on the field. The passive approach of localising content must be augmented with a pro-active approach, which places the Eurocentric nature of international law on the table and invites debate. As outlined above, African universities were created by the colonisers to further an agenda,[92] and that agenda was anti-African. This historical reality must be made known to students enrolling at South African universities. For students of international law, the role of international law in undoing or perpetuating this fact must be dissected.

## 7. Conclusion

This chapter sought to propose a "South African university appropriate" approach to teaching international law. To do this, it demonstrated the relevance of the decolonisation debate at institutions of higher learning. Further, it drew on other national conversations on land ownership and the decolonisation of the

90 Qobo and Nyathi "Ubuntu, public policy ethics and tensions in South Africa's foreign policy" 2016 *South African Journal of International Affairs* 421 421–436.

91 Richmond *The Transformation of Peace* (2005) 127-148; Richmond and Franks *Liberal Peace Transitions: Between Statebuilding and Peacebuilding* (2009) 181-215; Paris "Saving liberal peacebuilding" 2010 *Review of International Studies* 337 337-365; and Ginty *No War, No Peace: The Rejuvenation of Stalled Peace Processes and Peace Accords* (2006) 108-131.

92 Asante (n 55).

judiciary. In the main, the contribution is not a call for the demise of international law as we understand it, nor is it an endorsement of TWAIL as an appropriate remedy to the Eurocentrism of international law. The proposed approach outlined above proceeds from an understanding that a shift in the pedagogy of international law is necessary. This shift must go beyond a seat at the table or considering perspectives from the Global South and other excluded jurisdictions. Our view, therefore, is that merely continuing on a path of inclusivity is inadequate.

For this reason, we have argued for three pedagogical changes that may aid in Africanising the international law curriculum at South African HEIs. In arguing for the localisation of the content and contextual entry points, we noted that this would enable students to identify with the discipline and to see their world in the taught material. On the question of African philosophies, we have demonstrated that an *Ubuntu* approach to deconstructing concepts and explaining terms would be a fitting decolonisation strategy, as *Ubuntu* is widely accepted as an African philosophy, and the values it espouses can be a substitute for notions of human rights generally. Finally, the chapter argued for the inclusion of decolonisation scholarship in the teaching of international law – not to replace Eurocentrism entirely, but to unequivocally challenge its characterisation as universal and to expose students to racist foundations on which universities, as spaces of knowledge production, are anchored.