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THE THIRD WORLD APPROACHES TO INTERNATIONAL LAW

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Introduction The threat of recolonisation is haunting the third world. The process of globalization has had deleterious effect on the welfare of third world peoples. Three billionaires in the North today hold assets more than the combined GNP of all the least developed countries and its 600 million people International law is playing a crucial role in helping legitimize and sustain the unequal structures and processes that manifest themselves in the growing north-south divide. Indeed, international law is the principal language in which domination is coming to be expressed in the era of globalization. It is displacing national legal systems in their importance and having an unprecedented impact on the lives of ordinary people. Armed with the powers of international financial and trade institutions to enforce a neo-liberal agenda, international law today threatens to reduce the meaning of democracy to electing representatives who, irrespective of their ideological affiliations, are compelled to pursue the same social and economic policies. Even international human rights discourse is being manipulated to further and legitimize neo-liberal goals. In brief, the economic and political independence of the third world is being undermined by policies and laws dictated by the first world and the international institutions it controls.

Unfortunately, TWAIL (third world approaches to international law) has neither been able to effectively critique neo-liberal international law or project an alternative vision of international law. The ideological domination of Northern academic institutions, the handful of critical third world international law scholars, the problems of doing research in the poor world, and the fragmentation of international legal studies has, among other things, prevented it from either advancing a holistic critique of the regressive role of globalising international law or sketching maps of alternative futures. It is therefore imperative that TWAIL urgently finds ways and means to globalize the sources of critical knowledge and address the material and ethical concerns of third world peoples.[1]

This paper seeks to take a small step in that direction. It presents a critique of globalising international law and proposes a set of strategies directed towards creating a world order based on social justice. The aim is to initiate a debate on the subject rather than to make a definitive statement. The paper is divided into five further sections. Section II considers whether it is still meaningful to talk about a "third world". Section III discusses the different ways in which the relationship between State and international law is being reconstituted in the era of globalization to the distinct disadvantage of third world States and peoples. Section IV examines the ideology of globalising international law. Section V looks at the theory and process of resistance to unjust and oppressive international laws. Section VI identifies certain elements of a future TWAIL agenda. Section VII contains brief final remarks. [2]

It is very often argued that the category "third world" is anachronistic today and without purchase for addressing the concerns of its peoples. Indeed, from the very inception it is said to have 'obscured specificity in its quest for generalizability'. The end of the cold war (or the demise of the second world) has only strengthened the tendency towards differentiation. According to Walker, the "great dissolutions of 1989" shattered all cold war categories and 'as a label to be affixed to a world in dramatic motion the Third World became increasingly absurd, a tattered remnant of another time . . .'

It can hardly be denied that the category "third world" is made up of 'a diverse set of countries, extremely varied in their cultural heritages, with very different historical experiences and marked differences in the patterns of their economies . . .' But too much is often made of numbers, variations, and differences in the presence of structures and processes of global capitalism that

continue to bind and unite. It is these structures and processes that produced colonialism and have now spawned neo-colonialism. In other words, once the common history of subjection to colonialism, and/or the continuing underdevelopment and marginalization of countries of Asia, Africa and Latin America is attached sufficient significance, the category "third world" assumes life.[3]

In any case, the diversity of the social world has not prevented the consolidation and articulation of international law in universal abstractions. Today, international law prescribes rules that deliberately ignore the phenomena of uneven development in favor of prescribing uniform global standards. It has more or less cast to flames the principal of special and differential treatment. In other words, the process of aggregating in international law a diverse set of countries with differences in the patterns of their economies also validates the category "third world". That is to say, because legal imagination and technology tend to transcend differences in order to impose uniform global legal regimes, the use of the category "third world" is particularly appropriate in the world of international law. It is a necessary and effective response to the abstractions that do violence to difference. Its presence is, to put it differently, crucial to organizing and offering collective resistance to hegemonic policies.[4]

International institutions also play an important role in sustaining a particular culture of international law. These institutions 'ideologically legitimate the norms of the world order', co-opt the elite from peripheral countries, and absorb counter-hegemonic ideas. International institutions also actively frame issues for collective debate in manner which brings the normative framework into alignment with the interests of dominant States. This is also done through the exercise of authority to evaluate the policies of member States. The knowledge production and dissemination functions of international institutions are, in other words, steered by the dominant coalition of social forces and States to legitimize their vision of world order. Only an oppositional coalition can evolve counter-discourses which deconstruct and challenge the hegemonic vision. The alternative vision needs to respond to the individual elements that constitute hegemonic discourse.

The Idea of Good Governance

Today, globalising international law, overlooking its history, and abandoning the principle of differential treatment, legitimizes itself through the language of blame. The North seeks to occupy the moral high ground through representing the third world peoples, in particular African peoples, as incapable of governing themselves and thereby hoping to rehabilitate the idea of imperialism. The inability to govern is projected as the root cause of frequent internal conflicts and the accompanying violation of human rights necessitating humanitarian assistance and intervention by the North. It is therefore worth reminding ourselves that colonialism was justified on the basis of humanitarian arguments (the civilizing mission). It is no different today. The contemporary discourse on humanitarianism not only seeks to retrospectively justify colonialism but also to legitimize increasing intrusiveness of the present era. Indeed, as we have observed elsewhere, 'humanitarianism is the ideology of hegemonic states in the era of globalization marked by the end of the Cold War and a growing NorthSouth divide.' Overlooked in the process is the role played by international economic and political structures and institutions in perpetuating the dependency of third world peoples and in generating conflict within them

Human Rights as Panacea

The idea of humanitarianism is framed by the discourse of human rights. Its globalization is a function of the belief that the realm of rights, albeit a particular vision of rights, offer a cure for nearly all ills which afflict third world countries and explains the recommendation of the mantra of human rights to post-conflict societies. Few would deny that the globalization of human rights does offer an important basis for advancing the cause of the poor and the marginal in third world countries. Even the focus on civil and political rights is helpful in the struggle against the harmful policies of the State and international institutions. There is a certain dialectic between civil and political rights and democratic practice that can be denied at our own peril. But it is equally true that the focus allows the pursuit of the neo-liberal agenda by privileging private rights over social and economic rights. Thus, for example, the preamble to the TRIPs text baldly states that 'intellectual

property rights are private rights'. It does not, on the other hand, talk of the right to health of individuals or peoples; indeed, the Doha declaration on the TRIPs agreement and public health had to be insisted upon for this very reason. The argument here is not rooted in 'an excessively narrow, proprietary conception of rights', but rather on the continuos failure to realize welfare rights. It is this failure that gives rise to the belief that the language of civil and political rights mystifies power relations and entrenches private rights. This belief is strengthened by the fact that official international human rights discourse eschews any discussion of the accountability of international institutions such as the IMF/ World Bank combine or the WTO which promote policies with grave implications for both the civil and political rights as well as the social and economic rights of the poor. Finally, there are the wages of taking civil and political rights too seriously. There is 'the violence that underpins the desire of rights', of realizing rights at any cost. Wars and interventions are unleashed in its name.

Salvation Through Internationalisation of Property Rights

In recent years, a particular form of State (the neo-liberal State) has come to be touted as its only sensible and rational form. It has been the ground for justifying the erosion of sovereignty though relocating it in international institutions. What this has permitted is the privatization and internationalization of collective national property. In order to understand the on going process, the State needs to be understood in two different ways. First, 'states are clearly institutions of territorial property'. As Hont explains, 'holding territory is a question of property rights, and states, including 'nation-states', are owners of collective property in land . . .' It explains why third world diplomacy has, through various resolutions relating to "natural resources", emphasized 'the function of sovereignty as a demarcation of property rights within international society'. This has begun to change under the ideological onslaught which declares that the internationalization of property rights is the surest way to bring welfare to third world peoples. The idea of sustainable development has also been deployed towards this end. Second, the State is to be understood 'as a social form, a form of social relations'. It allows the debunking of the concept of "national interest" and the insight that the third world ruling elite is actively collaborating with its first world counterparts in entrenching the process of privatization and internationalization of property rights in its own interest. This process is legitimised through the ideological discrediting of all other forms of State. Such thinking needs to be contested in a bid to safeguard the wealth of third world peoples. The permanent sovereignty over "natural resources" must vest in the people.

The Idea of Non-development

In recent years it has been argued that "development" itself is the trojan horse and that the ideology it embodies is responsible for third world peoples and States being willingly drawn into the imperial embrace. It is suggested that the post-colonial imaginary has been colonised allowing the major organising principle of Western culture, that is 'the idea of infinite development as possibility, value and cultural goal' to be implanted in the poor world. If only the third world countries were to choose nondevelopment (of whatever local variety), its people would be spared much of the misery that they have suffered in the post-colonial era. The general idea here is to displace the aspirations of third world peoples and scale down development to more tolerable levels. This would help avoid the burden of sustainable development from falling on the North and help sustain its high consumption patterns.[5]

To be sure, the post colonial era has witnessed the massive violation of human rights of ordinary peoples in the name of development. But it is particular kind of development policies that are responsible for these violations and not development per se. It is development through structural adjustment programs or neo-liberal policies that need to be indicted, rather than the aspirations of the people to be able to exercise greater choices and a higher standard of life. The uncritical celebration of all that is non-modern is merely a way of obstructing the development of third world countries.[6]

Such celebration also risks romanticising oppressive traditional structures in the third world. It is somehow to be the fate of the poor, the marginal, and the indigenous or tribal peoples to preserve traditional values from destruction, while the elite enjoys the fruits of development, often

in the first world. What is perhaps called for is a critical approach that recognises the discontents spawned by modernity without overlooking its attractions over pre-capitalist societies.

The Use of Force

Powerful States, it is being argued, exercise dominance in the international system through the world of ideas and not through the use of force. But from time to time force is used both to manifest their overwhelming military superiority and to quell the possibility of any challenge being mounted to their vision of world order. On such occasions, dominant States do not appear to be constrained by international law norms, be it with regard to the use of force or the minimum respect for international humanitarian laws. The US intervention in Nicaragua and the Gulf War and the NATO intervention in Kosovo are just a few examples of this truth. Thus, peace in the contemporary world is in many ways the function of dominance.[7]

Conclusion

International law has always served the interests of dominant social forces and States in international relations. However, domination, history testifies, can coexist with varying degrees of autonomy for dominated States. The colonial period saw the complete and open negation of the autonomy of the colonized countries. In the era of globalization, the reality of dominance is best conceptualized as a more stealthy, complex and cumulative process. A growing assemblage of international laws, institutions and practices coalesce to erode the independence of third world countries in favor of transnational capital and powerful States. The ruling elite of the third world, on the other hand, has been unable and/or unwilling to devise, deploy, and sustain effective political and legal strategies to protect the interests of third world peoples.

Yet, we need to guard against the trap of legal nihilism through indulging in a general and complete condemnation of contemporary international law. Certainly, only a comprehensive and sustained critique of present-day international law can dispel the illusion that it is an instrument for establishing a just world order. But it needs to be recognized that contemporary international law also offers a protective shield, however fragile, to the less powerful States in the international system. Second, a critique that is not followed by construction amounts to an empty gesture. Imaginative solutions are called for in the world of international law and institutions if the lives of the poor and marginal groups in the third and first worlds are to be improved. It inter alia calls for exploiting the contradictions that mark the international legal system. The economic and political interests of the transnational elite are today not directly translatable into international legal rules. There is the need to sustain the illusion of progress and maintain the inner coherence of the international legal system. Furthermore, individual legal regimes have to offer some concessions to poor and marginal groups in order to limit resistance to them both in the third world and, in the face of an evolving global consciousness, in the first world. The contradictions which mark contemporary international law is perhaps best manifested in the field of international human rights law which even as it legitimizes the internationalization of property rights and hegemonic interventions, codifies a range of civil, political, social, cultural and economic rights which can be invoked on behalf of the poor and the marginal groups. It holds out the hope that the international legal process can be used to bring a modicum of welfare to long suffering peoples of the third and first worlds.

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HISTORY OF INTERNATIONAL LAW – A NECESSARY BASIS FOR INTERNATIONAL LAW

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Introduction

Today, the urgent need to study the problems of the origin and formation of international law is already evident. In recent years, international legal science has increasingly expressed its views on the insufficient study of this area of legal theory. However, most authors limit themselves only to the assertion of the need for an appropriate analysis. But even such statements concern either the history of international law, beginning with the New Time, or the ancient period, but only not such aspects as the origin of the international proto-right and its primary formation. As a result, the history of international law is the least developed branch of his theory. And to the period and peculiarities of its formation in antiquity, science in general turned less than anything, dating it to the appearance of a rather late epoch (a period of the European Middle Ages or even the 19th and 20th centuries).

There are several reasons for this state of science. First, international law itself became a recognized legal system at a rather later time. Secondly, in the theory of law, certain tendencies prevailed, which do not allow to fully reveal its essence (for example, exaggerated positivism and normativism, eurocentrism, etatism). These and other problems have for a long time conditioned the absence of the history of international law as a separate branch of science and to this day determine the absence of independent studies on the history of international legal doctrines.

Such a situation with the study of origin and the ancient period of the formation of international law can be traced to the example of the Roman jus gentium. This branch of Roman law has long been considered the direct predecessor of classical (European) international law, since Roman law itself and Roman legal civilization were the basis for the formation of a European civilization. Scientists also argued that during the formation of jus gentium already existed state. This was in accordance with the ethical vision of law, namely, the conviction that it was formed as a result of state lawmaking. However, jus gentium researchers criticized this approach, for example, V.E. Grabar` believed that jus gentium as a precursor of international law arises in the process of intertribal communication.

The existence of international law in non-European regions and in the previous historical stages (before the period of antiquity) was denied. At the same time, it was the interaction of these peoples (the ancient Egyptians, the Hittites, the peoples of the Middle East, China, India, etc.) that formed and formed international law. Therefore, the author selected a comparative legal method for studying the formation and formation of international legal norms, principles and ideas in various regions of the Ancient World.

Invaluable value for understanding the processes of historical formation and the formation of international law have authentic sources of international legal regulation of antiquity. So, since the second half of the XIX century, thanks to archaeological excavations, the scientific world has become aware of the diplomatic archives of ancient Egypt, Mari, Ugarit, the Hittite state, etc. The