

FEATURE

THE PAST, PRESENT AND FUTURE OF INTERNATIONAL LAW: A CRITICAL THIRD WORLD APPROACH

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I INTRODUCTION

A third world approach to international law, or TWAIL as it has come to be known, represents in general an attempt to understand the history, structure and process of international law from the perspective of third world states.¹ A *critical*

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¹ For a discussion on the use of the terms 'third world' and 'third world peoples', see B S Chimni, 'Third World Approaches to International Law: A Manifesto' in Antony Anghie et al (eds), *The Third World and International Order: Law, Politics and Globalization* (2003) 47. Recent critics allege that 'the notion of a Third World, even in a limited or reinvented form, is intellectually and conceptually bankrupt, while politically Third Worldism has already lost any relevance or legitimacy it once had': Mark Berger, 'After the Third World? History, Destiny and the Fate of Third Worldism' (2004) 25 *Third World Quarterly* 9, 31. The critical third world approach rejects this understanding. It posits that the term 'third world' retains its uses as a basis for analysing the existential condition of third world peoples, given the common history of subjection to colonialism and neo-colonialism. There is certainly the need to take cognisance of the diversity that characterises the 'third world'; but there is no denying the unity forged by a common past and present.

third world approach goes further and gives meaning to international law in the context of the lived experiences of the ordinary peoples of the third world in order to transform it into an international law of emancipation. It has as its primary goal the shaping of an international law that offers a life of dignity for the poor and oppressed in the third world. It is amidst this hope that I take a sweeping look at the past, present and future of international law.

The thread that will bind the disparate fragments, and it cannot be more than this, is the broad theme of the alienation of international law from the peoples of the third world. I use the term 'alienation' to denote aspects of the estranged relationship between individuals, societies and nature, regulated by international law under capitalism as it has evolved since the 16th century. When I speak of the future of international law, I will, besides touching upon the transformation of international law into internal law and the emergence of a Global State, make a few remarks on the role of international lawyers in addressing this alienation. First, however, let me turn to the past of international law.

II THE PAST

The road to the future, it is said, winds its way through the past. It explains why the history of international law has been the subject of uninterrupted examination by third world scholars in the post-colonial period. There is a clear realisation that, in order to transform the present and future of international law, the past must be understood in all its complexity.

As the decolonisation process gained strength in the middle of the last century, third world scholars began to challenge the parochial and celebratory history of international law written by Western scholars. In the 1960s and 1970s, scholars such as R P Anand, Judge T O Elias, Judge Nagendra Singh, S P Sinha, J J G Syatauw and others undertook this invaluable critical task.² Some Western scholars such as C H Alexandrowicz, for several years a Professor of International Law at Madras University in India, joined hands and produced pioneering work. His book, *An Introduction to the History of the Law of Nations in the East Indies*, remains a seminal text to dispel the idea that the non-Western world was unfamiliar with international legal practices in the pre-colonial era.³ It

Further, the 'third world' is not to be viewed as an all-or-nothing category, which impels inflexible coalitions that yield few gains in diplomatic practice, especially in the post-Cold War period. It is amenable to 'new forms of collective action' that can play an effective role in shaping ongoing policy debates and effectively intervening in international negotiations. This flexibility has been successfully deployed, for example, in the ongoing Doha Round of trade negotiations. There has been 'cognitive and institutional adaptation' as a result of reflection upon past failures, particularly the failure of the intractable positions in the pursuit of a new international economic order: Andrew Hurrell and Amrita Narlikar, 'A New Politics of Confrontation? Brazil and India in Multilateral Trade Negotiations' (2006) 20 *Global Society* 415, 421, 424.

² See, eg, R P Anand, *New States and International Law* (1972); T O Elias, *New Horizons in International Law* (1978); Nagendra Singh, *India and International Law: Ancient and Mediaeval* (1973); S P Sinha, *New Nations and the Law of Nations* (1967); J J G Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961); James Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law* 184.

³ C H Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (1967) 10, 114, 137.

forms an integral part of the collective project, first, to contest the understanding that international law was simply a product of European Christian civilisation.⁴

The historical task was, second, undertaken to show how the development of international law since the 16th century was linked to the colonial project. The rules of international law in crucial areas, such as laws relating to the acquisition of territory, recognition, state responsibility and state succession, were shaped by the necessities of colonialism.⁵ The alienation of international law from the peoples of the third world was epitomised in the civilisation/barbarian divide that made them and their territory into objects of international law.⁶ If third world peoples ever metamorphosed into subjects of international law, it was only ever to surrender sovereignty to colonial masters.⁷ The moment of empowerment was the moment of complete subjection. It was a time of absolute alienation of third world peoples from international law. Death, destruction, pillage, plunder and humiliation are the key words that best capture the relationship between third world peoples and international law in this period. The relationship between colonialism and nature was no different in essence. Imperialism subjugated both peoples and nature in equal measure.

The historical critique in the early post-colonial period, whether of the provincial history of international law or its complicity with colonialism, was not undertaken simply to repudiate international law. It was part of an effort to produce *universal* international law.⁸ Thus, for example, Judge Weeramantry in his dissenting opinion in the *Nuclear Weapons* advisory opinion case recorded at length the strong presence of international humanitarian laws in non-Western cultures, arguing that this recognition greatly strengthened their normative pull.⁹ A quarter century earlier, in his separate opinion in the *Barcelona Traction* case, Judge Ammoun noted that '[t]he development of international law cannot ... have as its sole or principal object the protection of ... international economic activities of the industrialized Powers'.¹⁰ He urged a move to 'universalism', with international law adapting itself 'to avoid confrontation between peoples' in order to realise 'common ... ideals of prosperity and peace'.¹¹ Contrast these sentiments with the fact that, for Western states, 'universality' is a device that is

⁴ Ibid 10–11.

⁵ See, eg, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) 98–9, 209–10.

⁶ Ibid 113–14.

⁷ As Anghie notes, in this period 'the only occasion when native "sovereignty" or "personality" is bestowed or recognised is in a context where that personality enables the native to transfer title, to grant rights — whether trading, to territory, or to sovereignty itself': *ibid* 105.

⁸ One move was to treat non-Western international law and European international law not as binary opposites, but as part of an interactive historical process that can contribute to the creation of a universal international law. This project had its earliest echoes in Latin America. There, for example, Alejandro Alvarez 'sought to invent, as regards the discipline of international law, a rhetoric of particularism, namely an alternative but authoritative voice that echoes a distinctively Latin American archive, a memory to invoke and legacy to transmit': Arnulf Becker Lorca, 'Alejandro Alvarez Situated: Subaltern Modernities and Modernisms That Subvert' (2006) 19 *Leiden Journal of International Law* 879, 918.

⁹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 478.

¹⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 290.

¹¹ *Ibid* 288.

adopted or rejected in relation to the demands of dominance. Be it international humanitarian laws, the latest instance being in Iraq, or international economic laws that codify only the rights of transnational corporations,¹² the Western world embraces a *divisive universalism*.

A History as Foundational Critique

The dismal experience of the vast majority of third world peoples and states in recasting colonial international law as universal international law in the last six decades has compelled a new generation of scholars to revisit the history of international law in a bid to find answers. The new scholarship offers a *foundational critique* of the history of international law. In this view, the early scholarship tended to treat the colonial encounter as marginal to the story of international law.¹³ In contrast, Anghie, in his recent book *Sovereignty, Imperialism and the Making of International Law*, situates the colonial project at the very heart of international law.¹⁴ He ably demonstrates how international law continually reproduces a 'dynamic of difference' that characterised the colonial civilised/barbarian distinction.¹⁵ Doctrines ranging from the minimum standard of civilisation to the current idea of good governance all testify to this reality.¹⁶

It is therefore not easy to rid modern international law of its retrograde doctrines and practices. Thus, for instance, the doctrine of sources of international law poses an insurmountable obstacle to inaugurate a new international law. I recall in the 1970s a sense of bewilderment among third world scholars that resolutions, adopted by the United Nations General Assembly after long deliberation by a predominant majority of states and peoples, could not bring about any change in the body of international law. Judge Bedjaoui consequently termed the doctrine of sources 'legal paganism', observing that it turned 'law into a new religion centred on itself'.¹⁷ Alienation is thus inscribed at the very heart of international law.

The failure of the first generation of third world scholars to capture the intimate relationship between colonialism and international law also meant, on the other side, the omission to critique the post-colonial state as it was only imagined as an agent of emancipation. The early scholarship ignored, to borrow the words of Partha Chatterjee, 'the world of differences, of conflict, of the struggle between classes' in the post-colonial state.¹⁸ It did not, therefore, come to grips with the fact that many post-colonial states soon came to play a

¹² See generally Antony Anghie and B S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict' in Steven R Ratner and Anne Marie Slaughter (eds), *The Methods of International Law* (2004) 185; Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *The Yale Law Journal* 443.

¹³ Anghie, above n 5, 36.

¹⁴ In Anghie's words, 'the colonial confrontation is central to an understanding of the character and nature of international law': *ibid*.

¹⁵ *Ibid* 37.

¹⁶ James Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Projects in International Law' (1999) 5 *Buffalo Human Rights Law Review* 107.

¹⁷ Mohammed Bedjaoui, *Towards a New International Economic Order* (1979) 100.

¹⁸ Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse?* (1986) 161.

comprador role. It also did not notice the linguistic shift in the 1970s, assigning permanent sovereignty over natural resources to states instead of peoples.¹⁹ Nor did this early scholarship understand the significance of the attacks in the 1960s and 1970s by repressive states against working class movements that demanded, among other things, greater democratisation of international relations and law. Unsurprisingly, therefore, it did not protest the subversion of the democratically elected Allende regime in Chile. In short, the failure of early third world scholarship to pinpoint the class and gender divides within, and its inability to grasp the growing collaborative character of the third world elite, meant that its belief that colonial international law would metamorphose into an international law of emancipation was naively optimistic.

It is not intended by these indictments to give international law's neglect and dominance of the non-Western world a pure form. Indeed, such a depiction would only denigrate the historical struggles of the colonial peoples to regain their independence. Likewise, it would be to overlook the subsequent struggles of the poor and marginal sections in the third world to evolve an international law of welfare. The deeper critique only points to the *internal* constraints that are written into the body of international law and need to be understood in their historical cultural fullness before they can be overcome. The problem is underlined by the most recent episode of the invasion of Iraq. It brings to the fore the failure of international law either to divest itself of its colonial origins or to find effective ways of dealing with authoritarian post-colonial states.

Yet legal nihilism cannot be the answer. A pure critique with its stress on inescapable domination loses its edge. It only disarms the poor and marginal peoples of the third world vis-à-vis the imperial project. The language of international law is not structurally apologetic, leaving no room whatsoever for the emancipation project.²⁰ Such a suggestion, despite its radical tone, is status quo oriented. International law can be, and has been, to whatever degree, effectively deployed on behalf of the poor and the wretched of the earth.²¹ The key words today are free and fair elections and international human rights law. At the same time though, international law has to come to terms with the growing alienation of third world peoples in the present world order and the role of international law in sustaining it.

III THE PRESENT

A *The Divided Self*

Permit me then to turn to the world of contemporary international law. It is today weaving together the life of nations in ways that are unprecedented in scope and depth. Indeed, an emerging transnational capitalist class, constituted by the transnational fractions of the national capitalist classes, seeks to unify the

¹⁹ See Anghie, above n 5, 211–13, 216–22.

²⁰ Anghie is therefore compelled to conclude that he 'believe[s] that the Third World cannot abandon international law because law now plays such a vital role in the public realm in the interpretation of virtually all international events': *ibid* 318.

²¹ Chimni, 'Third World Approaches to International Law', above n 1, 62–3.

world market through the instrument of international law.²² It views the production of a unified global economic space as a historical task, very much like the European national bourgeoisie did in producing a national economic space in the 18th and 19th centuries.²³ The transnational capitalist class is well on the way to realising its goal with the aid of international law. But it is reproducing an international law that remains a divided self.

B Globalisation of Alienation

This divided self reveals an inability to deal with the global spread of alienation, an effect of inhumane social relations that underlie contemporary international relations.²⁴ In the *Economic and Philosophic Manuscripts*, young Karl Marx indicated four kinds of alienation: the alienation of human beings from nature; the alienation of humans from their own productive activity; the alienation of human beings from their 'species being'; and the alienation of humans from each other.²⁵ I deploy these broad categories of alienation to depict the injustice that marks the body of modern international law, whose principal victims are the global environment and the global poor. Let me take each category in turn.

The violence against nature represents a growing crisis of our times. The problem of global warming has come to symbolise this crisis. Today, the intrinsic and sacred unity between man and nature is subjected to market fundamentalism, leading to the dysfunctional commodification of nature. Ideally, the intrinsic relationship between man and nature should help realise full human potentiality. But this is difficult in an interaction that objectifies both humans and nature in the pursuit of profit. Both are today mere means for the rapid advancement of an unrepentant global capital. Unsurprisingly, international environmental law is unable to seriously respond to the global ecological crisis.²⁶ It works with an empty concept of sustainable development that is filled with the greed of global capital.²⁷ International environmental law cannot therefore bring about change in skewed global consumption patterns, which is so necessary if genuine sustainable development at the global level is to be pursued. For otherwise, as has been observed, two more planet earths will be needed to

²² William Robinson and Jerry Harris, 'Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class' (2000) 64 *Science and Society* 11; Leslie Sklair, *The Transnational Capitalist Class* (2001); B S Chimni, 'An Outline of a Marxist Course on Public International Law' (2004) 17 *Leiden Journal of International Law* 1.

²³ Gary Teeple, 'Globalization as the Triumph of Capitalism: Private Property, Economic Justice and the New World Order' in Ted Schrecker (ed), *Surviving Globalism: The Social and Environmental Challenges* (1997) 15, 15–16; Fernand Braudel, *The Structures of Everyday Life: The Limits of the Possible* (Siân Reynolds trans, 1985) 513–14 [trans of: *Les structures du quotidien: le possible et l'impossible*].

²⁴ As one student of global society notes, 'alienation is turning from being chiefly a domestic malaise into a transnational one, and it is on this level that alienation will have to be treated': Amitai Etzioni, *From Empire to Community: A New Approach to International Relations* (2004) 5 (emphasis omitted).

²⁵ Karl Marx, *Economic and Philosophic Manuscripts of 1844* (1959); See also Istvan Meszaros, *Marx's Theory of Alienation* (3rd ed, 1972) 14.

²⁶ Karin Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers' (2000) 11 *Yearbook of International Environmental Law* 52, 53.

²⁷ B S Chimni, 'The Principle of Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation' (1998) 38 *The Indian Journal of International Law* 208, 216–17.

provide development for all.²⁸ But consumption has paradoxically become, as I shall note presently, a principal way to overcome alienation in the age of globalisation. In the event, international environmental law cannot actualise the principle of common but differentiated responsibility to ensure that the poor in the third world realise their aspirations of a minimum standard of life. International environmental law, to put it differently, is today subordinated to corporate interests, which dictate the high consumption patterns in rich countries. It cannot, therefore, bring about an accordant relationship between humankind and nature.

A second form of alienation results from the lifeworld of the real producers of goods and services being placed in a situation of constant existential uncertainty. Labour flexibility has today become the mantra for global capital. It has in fact become 'a universal panacea'.²⁹ The policy of labour flexibility has meant increasing labour dislocation resulting in the physical and mental destruction of workers and their families.³⁰ This is particularly true when the flexibility policy is implemented in third world countries with no form of social security in place. But, in the profit calculus that frames the debate on labour flexibility, the sacrifice of labour is acceptable.³¹ Firms of course do not have to meet the same fate. International economic law tends to protect the interests of the corporate actor.³² For example, producers faced with import pressure due to increased international trade are provided safeguard relief under World Trade Organization law.³³ On the other hand, as Trebilcock and Howse note, WTO law is unwilling to heed the argument that

a *worker's* right to adjustment assistance in the case of trade-induced displacement would, on both efficiency and ethical grounds, be a superior alternative to the right to safeguard relief presently accorded to *firms* under import pressure.³⁴

²⁸ WWF, *Living Planet Report 2006* (WWF Report, 2006) 2–3 <http://assets.panda.org/downloads/living_planet_report.pdf> at 18 October 2007.

²⁹ Louise Amoore, *Globalisation Contested: An International Political Economy of Work* (2002) 23. Amoore identifies three kinds of flexibility: 'Functional flexibility implies that working tasks and practices can adapt to changes in demand on the production process'; '[n]umerical flexibility is a labour market "textbook" term for the capacity of an employer to expand or contract the workforce in line with demand. This is said to be achieved through a variety of mechanisms such as working time flexibility, casual and part-time working, subcontracting and outsourcing and the use of temporary contracts or agency staff. The underlying imperative is that traditional employment relations must be dissolved via, for instance, the relaxation of dismissal, redundancy and benefits regulations'; and 'pay flexibility (read cost flexibility)': 27–8 (emphasis in original).

³⁰ Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd ed, 2005) 317.

³¹ *Ibid* 318.

³² See, eg, Taivankhuu Altangerel, 'The Principle of Balance: Balancing Economic, Environmental and Social Factors in International Economic Law' (2004) 1 *Manchester Journal of International Economic Law* 4, 14.

³³ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1A (*Agreement on Safeguards*) 1869 UNTS 154. See also Trebilcock and Howse, above n 30, 300–20.

³⁴ Trebilcock and Howse, above n 30, 319 (emphasis in original).

Even when there is a willingness of third world states to provide adjustment assistance to workers, they simply lack the resources to do so.³⁵ The insistence in the Doha Round of trade negotiations that third world states drastically reduce tariff barriers means the further erosion of resources that could be used to provide adjustment assistance to workers.³⁶ Thus, international economic law is not geared to address the problems of dislocation and alienation of the working classes, especially in the third world. When it does attempt to address critical issues, such as child labour, it is turned around by powerful segments of global capital to protect its own interests. This inversion of original intent is a defining feature of a world dominated by capital. To give another instance of such inversion, the environmental crisis is used by developed countries to protect inefficient domestic industry by raising non-tariff barriers to third world goods in the name of environment protection.³⁷

A third form of alienation, of humans from their 'species being', is a function of growing consumerism, which has today become 'a form of life'. In the era of liquid modernity, as the sociologist Bauman characterises today's world, all life is consuming life.³⁸ In 'liquid life' you are 'measured, evaluated, praised or denigrated by the standards appropriate to consumer life'.³⁹ In such a world, human potential is expressed through what a person possesses and consumes.⁴⁰ This way of life contrasts with notions of 'good life' that stress cooperation in social life with a focus on the intimate relationship between producer and consumers, and the need for ethical relationship between them. Contemporary international law, however, promotes a notion of 'good life' that turns both self-actualisation and the real producer into a commodity. Thus, its focal point is facilitating the circulation of commodities and services in the name of consumer choice. It explains the centrality that the WTO has acquired in global life. On the other hand, international law is unable to guarantee that the basic needs of humanity are met. The right to food, for example, remains an empty gesture towards the global poor.⁴¹ Likewise, the right to health has been subverted by

³⁵ Ibid 316–20.

³⁶ See, eg. Martin Khor, Third World Network, *The WTO's Doha Negotiations and Impasse: A Development Perspective* (2006), available from <<http://www.twinside.org.sg>> at 18 October 2007; Nagesh Kumar and Kevin Gallagher, Research and Information System for Developing Countries, *Relevance of 'Policy Space' for Development: Implications for Multilateral Trade Negotiations* (RIS Discussion Paper, March 2007) [4] <http://www.ris.org.in/dp120_pap.pdf> at 18 October 2007.

³⁷ See B S Chimni, 'WTO and Environment: The *Shrimp-Turtle* and *EC — Hormone* Cases' (2000) *Economic and Political Weekly* 1752.

³⁸ Zygmunt Bauman, *Liquid Life* (2005) 9.

³⁹ Zygmunt Bauman and Keith Tester, *Conversations with Zygmunt Bauman* (2001) 116.

⁴⁰ 'Money's properties are my properties and essential powers — the properties and powers of its possessor. Thus, what I *am* and *am capable* of is by no means determined by my individuality': Marx, above n 25, 130 (emphases in original).

⁴¹ Article 11 of the *International Covenant on Economic, Social and Cultural Rights* recognises 'the right of everyone ... [to] adequate food': opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('ICESCR'). See also Philip Alston and Katarina Tomaševski (eds), *The Right to Food* (1984).

subjecting it to the fundamentalist logic of the market.⁴² My reference here is, of course, to the consequences flowing from the WTO *TRIPS Agreement*.⁴³

The final form of global alienation is the alienation of humans from fellow humans. We live in a world that is increasingly devoid of sentiments of solidarity with the deprived and oppressed, especially with distant Others. Take, for instance, the treatment by the West of asylum seekers in the post-Cold War period. A *non-entrée* regime has been constructed in utter disregard of the letter and spirit of international refugee law. The *ad nauseam* talk of human rights does not today translate into entry rights for asylum seekers. The ongoing clash between the humanity of victims and the rights of sovereign states to exclude reflects the estrangement of international law from its final subjects. The closing of legal channels of movement has meant a rapidly growing industry in the smuggling of human bodies. An alienated international law has responded with a treaty (what else?) to deal with it,⁴⁴ a problem more readily resolved by the expression of solidarity with those who have lost a world. This is yet another example of the disturbing inversion of priorities.

C *The Alienation of Discipline*

What is more, the alienation of international law manifests itself, and this is a crucial point, in an alienated discipline, characterised by a formalism that sees a dominant majority of international lawyers not speaking on behalf of subaltern peoples. Contemporary international lawyers fail to address the issue of exploitation and objectification of individuals and groups in the same way that colonial international lawyers failed to address the destruction and objectification of entire societies. The neglect is odd in the wake of the fact that, as the philosopher Charles Taylor notes, the ‘affirmation of ordinary life’, understood ‘to designate the life of production and the family’, has become ‘one of the most powerful ideas of modern civilization’.⁴⁵ Yet in the discipline of international law, ordinary life is marked by its absence. But perhaps it is not as odd as it appears in the first place. Capitalism from its very inception has been the constant companion of modernity and now post-modernity. Its essence is a divided self and society. So, even as modernity and post-modernity call for the celebration of ordinary life, capitalism negates the conditions in which ordinary life can find fulfilment. Imperialism merely carries this act of negation to its

⁴² Article 25 of the *Universal Declaration of Human Rights* includes the right to an ‘adequate standard of living for health and well-being’: opened for signature 15 February 1967, 590 UNTS 71 (entered into force 20 February 1967). Similarly, art 12 of *ICESCR*, above n 41, recognises ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.

⁴³ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995), annex 1C (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) 1869 UNTS 299 (*TRIPS Agreement*). See generally Joseph Stiglitz, *Making Globalization Work* (2006) 103–32.

⁴⁴ *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55th sess, 62nd plen mtg, Annex II (*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*), Agenda Item 105, UN Doc A/Res/55/25 (15 November 2000).

⁴⁵ Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (1989) 13–14. Indeed, as Taylor continues, ‘[i]t underlies our contemporary “bourgeois” politics, so much concerned with issues of welfare, and at the same time powers the most influential revolutionary ideology ... Marxism, with its apotheosis of man the producer’: at 14.

logical conclusion, ensuring the misery and invisibility of the ordinary lives in dominated societies. If in recent years the international lawyer has come to respond to the everyday life of people, it is through international human rights law.⁴⁶ But the usefulness of the language of rights is severely constrained by a global economy that continually produces dependent economies.⁴⁷ Furthermore, the vocabulary of rights has been coopted and deployed by global capital to promote a conception of 'good life' that furthers its interests. Contemporary international law thus remains a divided self. This alienated self is today also a fragmented self. International law has now come to be broken into self-enclosed legal regimes such as international trade law, international environmental law, international humanitarian law and so on. It has become the mirror image of humanity divided by global capitalism to extend its dominance.

IV THE FUTURE

This brings me to the subject of the future of international law from the perspective of third world peoples or the global poor.

A *Fragmentation versus Unity*

An important way the future of international law is coming to be debated in the literature of international law is whether the ongoing fragmentation of international law is a threat to its perceived virtues of unifying humankind to achieve order and justice. The fissured body of international law is viewed by many as a stumbling block to promoting a peaceful and just world.⁴⁸ The inevitable contradictions, in which a fragmented international law can come to be mired, may pose insurmountable obstacles. Thus, for example, should international trade law promote the free movement of goods and services or environment protection? On the other hand, the lament of the lack of integrity of contemporary international law is seen by some as the anxiety of traditional international lawyers who cannot come to terms with a world that has dramatically changed.⁴⁹ Fragmentation, in this view, simply has to be lived with and reforms sought in separate functional spaces.⁵⁰ Fragmentation is merely the existential condition of international law in a postmodern world.⁵¹

From the perspective of third world peoples, fragmentation results in an alienated international law, produced by the separate and different logic of specialised regulatory spheres.⁵² For a human is a complex whole, a

⁴⁶ As Taylor notes: 'What is peculiar to the modern West ... is that its favoured formulation [of the] principle of respect' — the other central principle of modernity — 'has come to be in terms of rights. This has become central to our legal systems — and in this form has spread around the world': *ibid* 11.

⁴⁷ See Tony Evans, *The Politics of Human Rights: A Global Perspective* (2nd ed, 2005).

⁴⁸ See Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 554–6.

⁴⁹ See Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, 1004.

⁵⁰ Koskenniemi and Leino, above n 48, 575.

⁵¹ *Ibid* 556.

⁵² See, eg, Pemmaraju Sreenivasa Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation?' (2004) 25 *Michigan Journal of International Law* 929, 933.

non-divisible economic, political and social self. Consequently, the concerns of ordinary people may fall between the fractures that mark the separate regulatory spheres. Thus, for instance, how do subaltern classes use international human rights law to humanise international trade law? As Teubner puts it:

The fragmentation of world society into autonomous subsystems creates new boundaries outside society between subsystem and human being and new boundaries inside society between the various subsystems.⁵³

These boundaries can only be blurred with a unity, based on solidarity that understands the alienation and pain of victims of fragmented international law.

But the flaw within the current celebration of fragmentation and its criticism is that both perspectives reify the concepts of fragmentation and unity. The concepts of fragmentation and unity are perceived as *things* and not part of a historical *process* that can be reconciled at a different site. Formal logic, to put it differently, rules out the unity of opposites. It helps disregard the fact that the future may see a fragmented international law reunite to reflect the interests of the transnational capitalist class.⁵⁴ In other words, the earlier unity has necessarily to split to create a new unity. The nostalgia for a lost world blinkers a generation of international lawyers to the new configuration of global social forces that drives both fragmentation and unity. If a new unified international law that is responsive to the fate of global subalterns is to be created, it is imperative to imagine suitable alternative futures.

B *Transformation into Internal Law*

Meanwhile, the new unity that is being brought about by the transnational capitalist class is slowly transforming international law into internal law. Hans Kelsen noted decades ago ‘what has heretofore been a distinctive system of law [ie international law] would give way to a system of law the centralisation of which is but a synonym for the appearance of a world state’.⁵⁵ In this scheme of things, sovereign states will in future turn into administrative units of a Global State. The response of contemporary international law to the phenomenon of terrorism reveals such a trend. As Costas Douzinas points out:

Because terror is not a nation, the war on terror appears as police action, as the war of law. It makes us imagine the world as one, through normative, legal, and moral regulation, and the enemies as outlaws. The terrorist as criminal shares the one legal order and as evil-doer repudiates our common ethics.⁵⁶

It indicates, as he elaborates, ‘the emergence of a global sovereign, for whom boundaries and borders no longer hinder its action’.⁵⁷ But even beyond terrorism, as Anne-Marie Slaughter and William Burke-White contend, ‘the future of

⁵³ Gunther Teubner, ‘The Anonymous Matrix: Human Rights Violations by “Private” Transnational Actors’ (2006) 69 *Modern Law Review* 327, 341.

⁵⁴ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003); Joel Trachtman, ‘Book Review: *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* by Joost Pauwelyn’ (2004) 98 *American Journal of International Law* 855.

⁵⁵ Hans Kelsen, *Principles of International Law* (2nd ed, 1967) 242.

⁵⁶ Costas Douzinas, ‘Postmodern Just Wars and the New World Order’ (2006) 5 *Journal of Human Rights* 355, 368.

⁵⁷ *Ibid.*

international law is domestic'.⁵⁸ Indeed, international law has to 'transform and buttress domestic political institutions' if the challenges of the 21st century are to be met.⁵⁹ While the distinction between domestic and international law may coexist for some time, it will blend in several areas of regulation.⁶⁰ At the helm will be international institutions, to which sovereign powers will be relocated.⁶¹ The emerging global law will, in the final analysis, be backed by the monopoly over the use of force possessed by dominant global social forces. The view that law has necessarily to be conceived in relation to a centralised structure — in this case, a Global State — and that a view of legal pluralism that neglects this is simply making the meaning of 'law' incomprehensible, is dogmatic.⁶² There is certainly a link between law and governance or government, but not in the same way as in relation to a nation-state. Global law is, after all, a negotiated order between sovereign states, even as it establishes, at a functional level, structures that perform the functions of state organs. Thus, for instance, global economic law is today presided over by the WTO, International Monetary Fund and the World Bank.

C Character of Emerging Global State and Law

The issue then is not whether the future of international law is domestic or whether a Global State will emerge. The issue is what the nature and character of that law and the Global State will be. While Slaughter believes that international law will essentially play a benign role bolstering democratic institutions and progressive practices,⁶³ critics worry that international law turning domestic will mean that an imperialist global law will prevail.⁶⁴ In the circumstances, there is an understandable scepticism about the nature of the future Global State.⁶⁵ The central issue is, as Douzinas notes, how does one prevent the 'symbolic global space of law' from becoming part of a 'global community of empire'?⁶⁶

⁵⁸ Anne-Marie Slaughter and William Burke-White, 'The Future of International Law Is Domestic (or, The European Way of Law)' (2006) 47 *Harvard Journal of International Law* 327, 350.

⁵⁹ *Ibid* 352.

⁶⁰ Fischer-Lescano and Teubner, above n 49, 1006; Andreas Paulus, 'Commentary to Andreas Fischer-Lescano & Gunther Teubner — The Legitimacy of International Law and the Role of the State' (2004) 25 *Michigan Journal of International Law* 1047, 1048.

⁶¹ B S Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1, 1–2.

⁶² See Simon Roberts, 'After Government? On Representing Law without the State' (2005) 68 *Modern Law Review* 1, 17.

⁶³ Slaughter and Burke-White, above n 58, 328.

⁶⁴ See, eg, Kenneth Anderson, 'Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks' (2005) 118 *Harvard Law Review* 1255, 1272; Jose Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 *European Journal of International Law* 183.

⁶⁵ As Kwame Anthony Appiah notes in his recent work:

A global state would have at least three obvious problems. It could easily accumulate uncontrollable power, which it might use to do great harm; it would often be unresponsive to local needs; and it would almost certainly reduce the variety of institutional experimentation from which all of us can learn.

Cosmopolitanism: Ethics in a World of Strangers (2006) 163.

⁶⁶ Douzinas, above n 56, 368–9.

D *Tasks before International Lawyers*

If an international law of empire is to be resisted, international lawyers will have to — in my view — perform four critical tasks. The first task is to revisit the history of international law, for the past of the present and the past of the future offer crucial clues to the democratic shaping of international law. The second task is to explore the relationship between international law and global justice.⁶⁷ The third task is to ensure that alternative conceptions of ‘good life’ are safeguarded by international law. The final task is to critique all forms of violence, be it domestic or international violence, or violence against humans or nature. Let me take each in turn.

1 *Revisiting History of International Law*

In many ways the future of international law will be determined by how its constantly expanding past is interpreted. It is no accident that recent years have seen a revival of studies in the history of international law. However, even today, as Martii Koskeniemi laments, ‘the treatment of the role of law in imperialism and colonialism has been left for political historians’.⁶⁸ The history of international law cannot be neglected at a time when it threatens to become internal law, which is the same as global law.

The historical turn is, therefore, here to stay. The attention to the history of international law, it is worth mentioning, is crucial to both the hegemonic and emancipatory projects. For the hegemonic project, there is a functional need to generate a common understanding of the past, of what is now called *global history*, which promotes and projects the ongoing capitalist globalisation process far into the future.⁶⁹ For the emancipatory project the point is how to prevent global capitalism’s worst effects and shape a humane future. The history of international law may, thus, assume two trajectories in the coming years.

The first possibility is that it may come to terms with the dark past of international law. International law’s role in legitimising and sustaining colonialism and non-territorial imperialism will come to be recognised. The story of resistance to colonial and neo-colonial international law will become an integral part of the story of international law. The everyday life of people and international law will, thus, come to be firmly intertwined. This history will also be a post-human history. It will consider ‘humankind as one among many

⁶⁷ B S Chimni, ‘A Just World under Law: A View from the South’ (2007) 22 *American University International Law Review* 199; Philip Alston, ‘Remarks on Professor B S Chimni’s “A Just World under Law: A View from the South”’ (2007) 22 *American University International Law Review* 221; Benedict Kingsbury, ‘The International Legal Order’ (Working Paper No 1, Institute for International Law and Justice, New York University School of Law, 2003) 20, available from <<http://www.iilj.org/papers/2003papers.html>> at 18 October 2007.

⁶⁸ Martti Koskeniemi, *The History of International Law Today* (2004) [7] <<http://www.helsinki.fi/eci/Publications/MHistory.pdf>> at 18 October 2007.

⁶⁹ See Patrick O’Brien, ‘Historiographical Traditions and Modern Imperatives for the Restoration of Global History’ (2006) 1 *Journal of Global History* 3, 4.

organic and non-organic beings existing on the earth'.⁷⁰ The project of emancipation will then find a home in the *new* history of global law.⁷¹

A second approach may be the telling of the history of colonialism and imperialism in ways that downplay their destructive nature and character. Indeed, this telling may find a virtue or two in colonialism and the politics of empire. The accusations of the violence of imperialism in this case will be balanced with the achievements of empire.

Thus, one may see either the emergence of a democratic global history of international law or a global history scripted by scholars who share the vision of empire. The latter narrative can only further embed an international law of alienation and reproduce a world of injustice and violence. International lawyers cannot but choose.

2 Engaging with Issues of Global Justice

The next task of international lawyers will be to learn the grammar of global justice. It will require far greater engagement with the discourse of global justice than is seen at present. There are again at least two broad approaches that will confront the student of international law. The first is an approach that views the end of international law as merely the production of global order in a sovereign state system with certain minimum moral and legal obligations owed to societies in crisis. This approach, espoused by, among others, John Rawls, Michael Walzer, David Miller, Thomas Nagel and Mattise Risse, is anachronistic in a world that has been radically transformed. The international, as I have noted, is rapidly becoming internal. It is the foundation on which the second approach, associated with the names of Charles Beitz, Thomas Pogge, Iris Marion Young, Nancy Fraser, Onora O'Neill and others, argues the case for an egalitarian Global Law of Peoples. But this battle for an egalitarian Global Law of Peoples will be a long and hard one and international lawyers will again have to choose. In short, the discussion of global justice, like global history, will assume a critical edge in the near future.

Those of us who believe in the idea of global justice must place at the centre of a Global Law of Peoples the welfare of 'we the peoples of planet Earth'. A strong argument has to be made out for restructuring global economic relations. International economic law has to be rescued from the clutches of the corporate actor. There is, at the same time, the need to frame what Lord Wedderburn calls '[g]lobal labour law' to protect social rights and hard-won labour standards of working people.⁷² On the political plane, some form of global citizenship has to be imagined if an alienated international law is to transform into an international

⁷⁰ Ewa Domanska, 'The Material Presence of the Past' (2006) 45 *History and Theory* 337, 338.

⁷¹ This prospect is not unimaginable. Take, for example, the proposed changes in the secondary school history curriculum in Britain. It is reported that '[f]or the first time, the story of the Raj in India will also be told from the Indian nationalist perspective and through the eyes of those who resisted the British occupation'. The hope is that a democratic global history will engender a democratic history of international law: Hasan Suroor, 'Revisiting the Raj, Warts and All', *The Hindu* (India) 4 January 2007, available from <<http://www.thehindu.com>> at 18 October 2007.

⁷² Lord Wedderburn, 'Common Law, Labour Law, Global Law' in Bob Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (2002) 19, 54.

law of emancipation. Perhaps the unique figure of the refugee holds the key here. As the Italian thinker Giorgio Agamben notes, at present 'a permanent status of man in himself is inconceivable for the law of the nation-state'.⁷³ Thus, as we saw, the refugee is kept out in the name of the citizen. In the future, the gulf between man and citizen reflected in the figure of the refugee needs to be bridged. There is much work for an international lawyer here.

3 *Preserving Alternative Notions of 'Good Life'*

A third task of international lawyers in the future is to labour to provide a safe haven for plural understandings of 'good life'. International law cannot be home to a unitary conception of 'good life' purveyed by global capital, even when it is appropriated and lived in diverse ways. The existing diversity of unity has to be replaced by the diversity of diversity. On the other hand, admittedly, what is an authentic life is difficult to answer. As Michel Foucault and others have shown, a particular conception of 'good life' may be wedded to particular forms of domination.⁷⁴ There may, thus, be unacceptable versions of plurality. International law must find ways of supporting acceptable alternative conceptions of meaningful life as a response to growing alienation. We must be able to speak of plural ends of history.

Diverse acceptable notions of 'good life' can be sustained only through giving pride of place to the principle of international cooperation, which, at least since the adoption of the 1970 *Friendly Relations Declaration*,⁷⁵ is a basic principle of international law. It is interesting that the principle is little studied and has had little legal impact.⁷⁶ This may seem a strange indictment at a time when there are innumerable forums in which states are collectively addressing global problems. But these moments of cooperation are informed by *power*, rather than *justice*. The idea of cooperation urgently needs to be married to deliberative democracy that allows good argument, and not power, to prevail. It may, inter alia, require us to amend the *Vienna Convention on the Law of Treaties*⁷⁷ to establish an international law of negotiation that does not tolerate any form of coercion.⁷⁸ There is also a need to give the international law of cooperation a non-statist content. The effort must be to link the principle to the struggles of the global poor, for the principle of cooperation cannot be given content without taking into account the struggles of those who live its consequences. In brief, the international law of cooperation awaits an imaginative reformulation.

⁷³ Giorgio Agamben, European Graduate School Faculty, *We Refugees* [3] (Michael Locke trans, 2006) <<http://www.egs.edu/faculty/agamben/agamben-we-refugees.html>> at 18 October 2007.

⁷⁴ See also Taylor, above n 45, 100.

⁷⁵ *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, UN Doc A/2625 (XXV) (24 October 1970) ('*Friendly Relations Declaration*').

⁷⁶ The Friedmann announcement, more than four decades ago, of the arrival of an international law of cooperation still awaits fulfilment: see Wolfgang Friedmann, *The Changing Structure of International Law* (1st ed, 1964).

⁷⁷ Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁷⁸ In the context of WTO negotiations, see B S Chimni, 'The World Trade Organization, Democracy and Development: A View from the South' (2006) 40 *Journal of World Trade* 5, 14–19.

4 *Mobilising Legal Resources against Violence*

A final task before international lawyers is to mobilise all the resources of international law to purge global life of violence to humans or nature. But violence cannot be abolished by fiat. Violence has to be shed in our social relations or it will be displaced to the external world. What it entails is no mystery, that is, the reform of inhumane global capitalism. Yet international law cannot await such a state of affairs. It must continuously argue the case against violence. International lawyers should thus, for example, jettison attempts to reformulate the law relating to the threat or use of force to further imperial projects.

At the same time, there is a need to critique and array against *all forms of violence* presenting itself as resistance. The alienation of international law is today often marshalled on behalf of sectarian and violent outlooks. A mirror image of the Other is often seen as the answer for treating the alienated self. Eschewing violence is not simply good strategy: it is the only way of creating a just world under law. International law must incorporate the lesson of history that social transformations *brought about or sustained* by violence have either collapsed or are in crisis, whereas social revolutions brought about by non-violence have thrived, overcoming serious challenges. Thus, the revolutions brought about by Mohandas Gandhi, Martin Luther King Jr and Nelson Mandela have survived trials whereas the Soviet revolution, for example, has been confined to history. Those who have resisted brute power not with violence, but with the power of their humanity, have won a more enduring victory for themselves.

V FINAL REMARKS

Allow me some final observations in conclusion. The critical tasks I have identified for the international lawyer will have as their eventual goal nothing short of the peaceful transformation of the emerging global relations of production, consumption and distribution. Such a transformation will help overcome the alienation of international law from the poor and marginal sections in the third and first worlds. But this will not happen at once. I would, therefore, like to concretise these tasks in terms of the structural, interstitial and diffusive transformations of international law.⁷⁹ *Structural transformations* involve the shaping of new laws and institutions that help embed cooperative and ethical forms of global social relations. *Interstitial transformations* anticipate the accretion of progressive practices in existing international laws and institutions that, among other things, help address the problem of fragmentation. And

⁷⁹ These categories have been adapted from an article by Erik Olin Wright, which refers to 'ruptural, interstitial and symbiotic' transformations: 'Compass Points: Towards a Socialist Alternative' (2006) 41 *New Left Review* 93, 122.

diffusive transformations involve the articulations and disseminations of critical international law scholarship.⁸⁰

All three forms of transformation require that the discipline of international law be transfigured. International lawyers must, going beyond human rights law, consistently engage with the existential world of the global poor and oppressed. Ordinary life must become the focus of the entire discipline of international law. Today international lawyers overly respect contrived disciplinary boundaries that exclude concern with the impact of international law on everyday life. As a result, complicated hundred-page law review articles often do not have a word for the condition of humankind and the global poor, or their resistance to oppressive international laws and institutions. It is time that the abstractions of international law are rooted in the empirical world of ordinary life and its travails. These would yield insights and judgements that can then be deployed to shape international laws and institutions that benefit humanity. In short, international lawyers must work towards, to use the words of Bauman, 'making the human world somewhat more hospitable to humanity'.⁸¹ That is the essence of the critical third world approach to international law.

⁸⁰ But what is the precise role of critical scholarship? In an article by Terry Eagleton, Noam Chomsky points out that 'the conception of an intellectual as one who speaks truth to power is mistaken on two counts. For one thing, power knows the truth already; and for another thing, it is not power, but its victims, who need the truth most urgently'. Eagleton adds to this that 'power does not need to be told the truth because it is in some ways irrelevant to it': Terry Eagleton, 'On Telling the Truth' [2006] *Socialist Register* 269, 277.

⁸¹ Bauman, above n 38, 14.