THIRD WORLD APPROACHES TO INTERNATIONAL LAW AND THE PERSISTENCE OF THE QUESTION OF PALESTINE

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Concept Paper

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Introduction

There is little question that the contemporary mainstream scholarly treatment of the evolution, content and praxis of public international law continues to regard the discipline as universal in character; culturally, socially, economically and politically neutral in both substance and effect. Despite the wide variety of challenges made to this view following the Second World War, particularly during the period of decolonization, as the twenty-first century opens we are still expected to treat as axiomatic the proposition that this value-free system of law operates on the basis of universal norms which are unaffected, indeed completely isolated from, considerations of power as between the dominant and subaltern actors in the system. This proposition is as true in respect of the law governing international development and trade as between the developed and developing worlds, as much as it is the law governing the use of force in the age of the so-called "global war on terror".

Of course, it is folly to conceive of any law, most particularly public international law, as the reflection of anything other than the society of which it is a creation. It is in this sense that the nature of international law must not only be understood as a system of rules and norms upon which the international "society" of states is based, but also as a legal narrative deeply rooted in, and therefore shaped by, the historical, political, cultural and economic milieu in which it was constituted – that of the European imperial age – and then replicated in the post-colonial international institutions developed following the First World War, most notably the League of Nations,[1] the United Nations[2] and the Bretton-Woods institutions.[3] Modern public international law is best understood not as a neutral value-free normative framework for governing relations between sovereign equals and various non-state actors, but rather as an innovation of its founding European principals who used (and continue to use) it to further, rather than merely to regulate, their own hegemonic interests over the non-European societies they sought to control. One is reminded of Mohammad Bedjaoui's[4] oft quoted observation that classic international law "consisted of a set of rules with a geographical bias (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law)."[5]

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[1] *See*, for instance, Art. 22 of the League of Nations Covenant, describing various colonies and territories "inhabited by peoples not yet able to stand by themselves" and a resulting "sacred trust of civilization" requiring that "the tutelage of such peoples should be entrusted to advanced nations", namely the Mandatory European powers.

[2] *See* R.H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990).

[3] *See* M. Chossudovsky, *The Globalization of Poverty: Impacts of the IMF and World Bank Reforms* (London: Zed Books, 1997).

[4] Of the Advisory Board.

[5] *As quoted in* D. Otto. "Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference" 5:3 *Social & Legal Studies* 337 at 339.

In the past decade and a half, there has emerged a school of critical legal discourse on public international law under the style Third World Approaches to International Law (TWAIL), which "rejuvenates the opposition to aspects of international law expressed by Third World states and intellectuals" in the 1950s, 60s, and 70s, and "attempts to sharpen such opposition in the era of globalization."[6] Although scholars within the TWAIL school are not uniform in their ideology or approach, at their core they are united in their common "opposition to the unjust global order" currently prevailing.[7] In order to situate contemporary TWAIL scholarship against the work of the decolonization-era scholars, Antony Anghie and Bhupinder Chimni have distinguished between what might be called TWAIL I and TWAIL II scholarship.[8] TWAIL I scholars laid heavy emphasis on critiquing the genealogy of modern international law and the Euro-centric assumptions at its heart, while at the same time adopting a "non-rejectionist stance" towards various of its key doctrines which could be put to good use in bolstering the positions of newly independent states, such as the actual application of the principle of sovereign equality of states and the principle of non-intervention in the internal affairs of states.[9] TWAIL II scholars, on the other hand, have adopted a framework critical of the deference paid by the TWAIL I generation to the newly independent post-colonial state and its right to "non-intervention", thereby giving rise to "powerful critiques" of "the Third World nation-state, of the process of its formation and its resort to violence and authoritarianism" against the very populations such states were theoretically created to emancipate and represent.[10] From a theoretical perspective, TWAIL II scholarship borrows from post-colonial deconstructionist methodologies of scholars such as Edward Said, Homi Bhabha and Gayatri Chakravorty Spivak.[11] As Anghie and Chimni note, using these approaches the TWAIL II school has examined "more closely" than its predecessor "the extent to which colonial relations had shaped the fundamentals of the discipline", in that "[r]ather than seeing colonialism as external and incidental to international law, an aberration that could be quickly remedied once recognized," colonialism must be understood more drastically as "central to the formation of international law."[12] The deconstruction of the "use of international law for creating and perpetuating Western hegemony" once complete, the new generation of TWAIL scholarship sets out, ultimately, to "construct the basis for a post-hegemonic global order",[13] conceiving of hegemony broadly to include not only former European imperial masters, but also Third World nationalist elites given to abuses of authority, plunder and subordination of their own populations, suggestive of Franz Fanon's reflections on the "pitfalls of national consciousness."[14]

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[6] D.P. Fidler, "Revolt Against or From Within the West? TWAIL, the Developing World and the Future Direction of International Law" (2003) 2 Chinese J. Int'l. L. 29, at 30.

[7] *Id*. (citing M. Mutua, "What is Twail?", 94 ASIL Proceedings (2000), 31.

[8] A. Anghie & B.S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 Chinese J. Int'l. L. 77, at 79.

[9] The authors identify five arguments central to the TWAIL I scholarship, as follows: (1) an indictment of "colonial international law for legitimizing the subjugation and oppression of Third World peoples"; (2) emphasis that "Third World states were not strangers to the idea of international law"; (3) belief "that the contents of international law could be transformed to take into account the needs and aspirations of the peoples of newly independent states"; (4) emphasis on "sovereign equality of states and" the principle of "non intervention" as protection from renewed imperial interference; and (5) the inauguration of "a New International Economic Order", aimed primarily at "regaining control" over Third World resources and marshalling them to maximize the benefit to indigenous, newly independent societies. See *Id*. at 80-82.

[10] *Id*. at 83.

[11] *See*, for instance, E.W. Said, *Orientalism* (New York: Pantheon, 1978) and *Culture and Imperialism* (New York: Alfred A. Knopf, 1993); H. Bhabha, *The Location of Culture* (London: Routledge, 1994); and G.C. Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA: Harvard University Press, 1999).

[12] Anghie & Chimni, *supra* note 8 at 84.

[13] Fidler, *supra* note 6 at 31.

[14] F. Fanon. *The Wretched of the Earth*, trans. Constance Farrington (New York: Grove Press, 1963) at 148.

The Persistence of the Question of Palestine and TWAIL

Whereas the apparent difference between the work of TWAIL I and TWAIL II scholars as reflected above is directly related to the shifting sands of the historical, political, economic and cultural backdrops that respectively inform both – decolonization and the drive for Third World independence on the one hand; neo-imperialism, globalization and Third World despotism on the other – there is at least one setting where these two historical paradigms might be said to exist almost simultaneously, thereby providing contemporary TWAIL scholarship with perhaps its most unique and fertile ground for greater scholarly development and inquiry: Palestine.[15]

This ground was well described by John Strawson in volume XIII of the *Palestine Yearbook of International Law*, where he identified Palestine as a "particular victim" of the heritage of "international law as rooted in its colonial origins."[16] Citing a "train of legal instruments which sweeps through the last nine decades from the Balfour Declaration onwards through the League of Nations Mandate, the UK's Order-in-Council, the United Nations Partition Resolution, Security Council Resolution 242, the Oslo Agreements and the Road Map", Strawson demonstrates that international law "has constructed the Palestinians as peripheral", and that "[l]aw has played a major role in pushing Palestine and the Palestinians to the political and territorial margins."[17]

Littered with examples of how the intersection between empire, colonialism and law operated to unmake the place and its indigenous people, Palestine's uniqueness is that it has yet to be granted any respite from this cruel and tragic course. On the contrary, to the foundation of the British Mandate, the establishment of a European Jewish settler colony, the UN partition of Palestine into Jewish and Arab states, the near complete ethnic cleansing and dispossession of the indigenous Palestinian Arab majority, the establishment of the state of Israel in the place of that majority, and Israel's 40-year prolonged foreign military occupation of the rest of Palestine (namely the West Bank, including East Jerusalem, and Gaza Strip, or Occupied Palestinian Territory (OPT)), has been added a lumbering and uneven diplomatic process, which despite the promise of an historic settlement based on two states, has in fact enabled Israel to consolidate, not relinquish, it *de facto* and *de jure* annexation of Palestinian land, including some would argue with the participation since 1993 of the Palestinian leadership. Whereas in 1976 there were just over 3,000 Jewish colonial settlers in the OPT,[18]

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[15] One is here reminded of Edward Said's views concerning the almost metaphysical nature of Palestine as an idea around which Third World liberation could rally:

> No one who has given his energies to being a partisan has ever doubted that 'Palestine' has loosed a great number of other issues as well. The word has become a symbol for struggle against social injustice. […] There is an awareness in the nonwhite world that the tendency of modern politics to rule over masses of people as transferable, silent, and politically neutral populations has a specific illustration in what has happened to the Palestinians – and what in different ways is happening to the citizens of newly independent, formerly colonial territories ruled over by antidemocratic army regimes. The idea of resistance gets content and muscle from Palestine; more usefully, resistance gets detail and a positively new approach to the microphysics of oppression from Palestine. If we think of Palestine as having the function of both a place to be returned to and of an entirely new place, a vision partially of a restored past and of a novel future, perhaps even a historical disaster transformed into hope for a different future, we will understand the word's meaning better.

See E.W. Said. *The Question of Palestine*, 2nd ed. (New York: Vintage Books, 1992), at 125.

[16] J. Strawson, "British (and International) Legal Foundations for the Israeli Wall: International Law and Multi-Colonialism" (2004/2005) 13 Pal. YB. Int'l. L. 1, at 2.

[17] *Id*.

[18] A. Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories 1967–1988", in E. Playfair, ed., *International Law and the Administration of Occupied Territories* (Clarendon: Oxford University Press, 1992) at 66.

today the number is approximately 450,000 and continues to grow.[19] While the colonial settlement has continued (inclusive of Israeli-only roads and infrastructure, the complete military and economic siege of Palestinian areas, especially the impoverished Gaza Strip, the widespread destruction and/or expropriation of Palestinian property, and the near decimation of the Palestinian economy), the weak and divided Palestinian Authority scrambles for conditional international aid in the way of "developing" the "state" of Palestine, even as its disaffected population increasingly questions its arguably collaborative role in the continuing fragmentation and conquest by Israel of the OPT with the help of an international community ever prepared to foot the bill (over USD 10 billion in international "aid" since 1993) instead of investing the requisite amount of political will in helping to solve the conflict. It is no wonder that Prof. John Dugard[20] has denounced Israel for acquiring "some of the characteristics of colonialism and apartheid" in its occupation of the OPT, and has criticized the international community, including the UN, for allowing this "failure" to persist as it has.[21] Indeed, examined through the TWAIL lens, this failure can only be regarded a larger symptom of Palestine as the only remaining place on Earth where the collision between empire, colonialism and law continue to wreak havoc with millions, a wound which continues to fester as the Last Colonial Problem in the age of the so-called post colony.

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The *Palestine Yearbook of International Law* will devote volume XV (2008) to the subject of TWAIL critiques of international law, with a partial focus on the persistence of the question of Palestine. The Yearbook is jointly published by the Birzeit University Institute of Law and Martinus Nijhoff publishers. Since 1985, it has established itself as the leading English-language international law journal in the Arab World, and is the principal source of information on public international law and the question of Palestine. In addition to articles by leading scholars, researchers and practitioners alike, the Yearbook offers a wide array of key legislation, court decisions, book reviews and other relevant legal materials translated from the original Arabic and Hebrew languages.

[19] *The Humanitarian Impact on Palestinians of Israeli Settlements and other Infrastructure in the West Bank*, United Nations Officefor the Coordination of Humanitarian Affairs (July 2007).

[20] UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since June 1967.

[21] Prof. Dugard stated the following: "The Occupied Palestinian Territory is of special importance to the future of human rights in the world. Human rights in Palestine have been on the agenda of the United Nations for 60 years; and more particularly for the past 40 years since the occupation of East Jerusalem, the West Bank and the Gaza Strip in 1967. For years the occupation of Palestine and apartheid in South Africa vied for attention from the international community. In 1994, apartheid came to an end and Palestine became the only developing country in the world under the subjugation of a Western-affiliated regime. Herein lies its significance to the future of human rights. There are other regimes, particularly in the developing world, that suppress human rights, but there is no other case of a Western-affiliated regime that denies self-determination and human rights to a developing people and that has done so for so long. This explains why the OPT has become a test for the West, a test by which its commitment to human rights is to be judged. If the West fails this test, it can hardly expect the developing world to address human rights violations seriously in its own countries, and the West appears to be failing this test. The EU pays conscience money to the Palestinian people through the Temporary International Mechanism but nevertheless joins the United States and other Western countries, such as Australia and Canada, in failing to put pressure on Israel to accept Palestinian self-determination and to discontinue its violations of human rights. The Quartet, comprising the United States, the European Union, the United Nations and the Russian Federation, is a party to this failure. If the West, which has hitherto led the promotion of human rights throughout the world, cannot demonstrate a real commitment to the human rights of the Palestinian people, the international human rights movement, which can claim to be the greatest achievement of the international community of the past 60 years, will be endangered and placed in jeopardy." See Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, 29 January 2007, UN Doc. A/HRC/4/17, at para. 63.

In devoting the next volume of the Yearbook to TWAIL critiques of international law, the Editorial Board seeks not only to situate the *Yearbook* within the wider scope of the Third World theoretical inquiries on international law currently making their mark within the literature, but also to highlight the uniqueness of Palestine as the Last Colonial Problem in the age of the so-called post-colony; at once, a physical setting whose colonization continues despite the theoretical operation of the "normative framework" of international law, and an almost metaphysical setting that provides perhaps the richest intellectual soil within which to continue the cultivation and development of TWAIL approaches.[22]

The topics of discussion are open, and may include the following:

- Theoretical surveys of TWAIL scholarship;
- TWAIL approaches in the international legal academy, pedagogy, etc.
- TWAIL analyses of the jurisprudence of the International Court of Justice;
- TWAIL and the "global war on terror" (incl. with regard to Hamas opposition Palestinian groups);
- TWAIL and international human rights law;
- TWAIL and international humanitarian law;
- TWAIL and the interwar experience of Palestine 1915-1945 (Sykes-Picot to end of Mandate);
- TWAIL and a critical assessment of the role of the UN in the (or any aspect of) Question of Palestine;
- TWAIL, the law of international development and the Palestinian Authority; etc.

[22] The Editorial Board is particularly mindful of the powerful critique articulated by Anghie and Chimni on "TWAIL and the Politics of Knowledge", where "what counts as acceptable scholarship in the field of international law" remains set by the "standards" of "Northern scholars and Northern institutions", discarding with little to no consideration the "enormous body of work" emanating in the Southern (developing or Third) world and its institutional resources, including law schools, journals and publishers. See Anghie & Chimni, *supra* note 8 at 87.