

THE THIRD WORLD AND INTERNATIONAL ORGANISATIONS: SETTING THE AGENDA

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We are at a point in our work when we can no longer ignore the empires and the imperial context in our studies.

- Edward Said¹

ABSTRACT

International Organisations are intrinsically related to the development of the international legal system. However, International Relations, despite being a discipline that is relevant to all peoples and states, traces its origins to the heart and height of imperialism. Imperialism is characterised by practices of exclusion and is the very antithesis of universal recognition. 'Third World' peoples, in their engagements with International Organisations (IOs), remain as mere passive participants or disrupters in the conversation on development, human rights and neo-liberalism.

Using a framework of Constructivist International Relations (IR) theory and Third World Approaches to International Law (TWAAIL), this paper seeks to map out past engagements between TWAAIL and IOs, and questions the ideas of statehood and sovereignty as bedrocks of International Law. It argues that the norms, policies, practices and law created by IOs are a product of phallogocentric, Eurocentric domination. IOs

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¹ EDWARD W. SAID, CULTURE AND IMPERIALISM 5 (1994).

straddle a world of law and politics characterised by the rise of a highly influential, pervading class independent of State interests, and with its own practices and policies. The suggestion in this paper is that in order for the Third World to articulate its own legal status and political obligations, and to have a voice in the structuring and functioning of IOs, a change in the vocabulary of resistance and reconstruction must arrive from a non-colonialist standpoint - not from Europe, but from the lived realities of Third World peoples. Unless international organisations are subject to a consciously political analysis, there is little scope for Third World peoples to determine their own legal and political choices, and have a say in the structuring and functioning of these organisations.

I. INTRODUCTION

In Ari Folman's *Waltz with Bashir*,² the protagonist's friend explains to him the workings of the human mind: if a person is shown a series of pictures that supposedly form a part of their memory (but in fact, the pictures have elements that are concocted), they would begin to believe that they actually experienced the memory as concocted. International Organizations, in a manner, represent the distance between a memory (a historical fact, in this case) and a 'created' memory (how the historical fact is represented). In generating policies, bureaucratic decisions and specialized codes, International Organisations have a bearing on the development and understanding of the international legal system itself.

The 'memories' that International Organisations (IOs) learn from (if memories are factual narratives from the past) are culturally and historically

² Ari Folman, 'Waltz With Bashir', Sony Classics (2008).

selective. International Organisations cajole and confirm practices that belong to this ‘created memory’ that is neither owned by the State enforcing it, nor in possession or control of its beneficiaries and not even, perhaps in their interest. Through these ‘memories’, IOs generate knowledge – technical, bureaucratic, specialized ‘guidelines’, advisories, treaties, and general comments. This knowledge is generated in the course of a narrative of power - engendered and protected by it. Marginalised peoples are excluded from the process that creates this dominant narrative. ‘Third World’ peoples, in their engagements with IOs are almost invariably only passive participants in, or disrupters in this great conversation on development, human rights and neo-liberalism.

Colonialism is a continuing project. Its modes have been relocated, but not its behaviour.³ The binary narratives of colonial oppression and the ‘civilizing burden’ are always constructed from the White Male’s perspective: it differs only to the extent that the eyes belong to the British Soldier or the sympathetic Portuguese Missionary.⁴ The supposed supremacy of the Europeans over non-Europeans and ‘people of colour’ is deeply entrenched in the formal institutions of the international legal order.

TWAIL scholars have, over the years, deliberated extensively on the international legal system and its ‘material effects on the third world’⁵.

³ Jina Moore, *The Peacebuilders: Making Conflict Resolution Permanent*, CHRISTIAN SCIENCE MONITOR (July 5th, 2015), <http://www.csmonitor.com/World/Global-Issues/2011/0402/The-peacebuilders-Making-conflict-resolution-permanent>.

⁴ JOHN PARKER & RICHARD RATHBONE, *AFRICAN HISTORY: A VERY SHORT INTRODUCTION* (2007).

⁵ Makau Mutua, *What is TWAIL?*, 94 ASIL Proc. 39 (2000).

However, IOs appear as mere reference points, and most authors tend to look at the law as a vehicle for neo-colonial politic.⁶ Only Chimni⁷ has boldly explored the place that International Institutions (a term broader than simply IOs to include structures that are not strictly ‘organisations’) occupy, how they have reached a position where their influence has continued to rise, and have entered realms that were hitherto exclusive to the domain of the ‘sovereign state’.

Constructivism⁸ offers important tools that can be deployed by TWAIL scholars to understand better the role that international institutions play in norm-generation and how actors respond to it. Constructivist scholars have offered meaningful and wide readings of the role that international institutions and organisations play. Nonetheless, little scholarship exists on the question of the Third World. Some attempts, however, are being made both by TWAIL scholars⁹ and Constructivist theorists¹⁰ to address this gap.

A more comprehensive commentary comes from *Empire*¹¹; *Empire* is a study in how imperialism has merely found different and more complex forms of continuing the project of exploitation, hegemony and domination.

⁶ *Ibid.*

⁷ B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 E.J.I.L. 1, 1-37 (2004).

⁸ Nicholas Onuf, *Worlds of Our Making: The Strange Career of Constructivism in IR*, in VISIONS OF INTERNATIONAL RELATIONS: ASSESSING AN ACADEMIC FIELD (Donald J. Puchala ed., 2002).

⁹ See, for example, Ibrónke Odumosu, *ICSID, Third World Peoples and the Re-construction of the Investment Dispute Settlement System*, UNIVERSITY OF COLUMBIA, (July 4th, 2015), https://circle.ubc.ca/bitstream/handle/2429/23482/ubc_2010_spring_odumosu_ibironke.pdf?sequence=1.

¹⁰ Laura Landolt, *(Mis)Constructing the Third World*, 25 Third World Quarterly 3, 579–591 (2004).

¹¹ MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE*, (1st ed., 2001).

Here, Hardt and Negri explore the theoretical renegotiations of the definition of sovereignty – its relocation from the nation-State to the broader ‘Empire’ in it, which includes structures, organizations, persons and ideologies - Chimni calls it the “Transnational Capital Class (TCC)”.¹²

This paper presents a brief review of TWAIL scholarship on International Organisations – some scholars have seen them as sites of possible resistance¹³, others such as Chimni and Mutua have been cynical. This is followed with a far more critical analysis of the working of IOs, and how TWAIL scholars have responded to it – whether it is the substantial basis of the ‘sovereign nation state’ theory, and the question of the material effects of the practices of IOs. To this, a constructivist analysis of norm diffusion, of the interactional theory of international law, and an understanding of the role that IOs play in the third world are necessary. The paper is aimed at presenting a view of how international organisations are historically grounded in practices not inclusive of the concerns of Third World peoples, and continue to remain so in their functioning today.

This broad framework is primarily informed by what is seen as the ‘structure of international argument’¹⁴- the idea that the colonisers of Europe assumed the burden of ‘civilising’ the peoples they colonised. Edward Said observes, “There was virtual unanimity that [...] one race deserves and has

¹² *Supra*, n. 7.

¹³ Upendra Baxi, *What May the 'Third World' Expect from International Law?*, 27 *Third World Quarterly* 5, 713-725 (2006).

¹⁴ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 356 (2005).

consistently earned the right to be considered the race whose main mission is to expand beyond its own domain.”¹⁵ It also relies immensely on the concept of artificially created ‘sovereign nation states’ that are, in most instances, colonial legacies of people-hood. At the heart of this argument is the questioning of sovereignty itself – who has it, who is it granted by, who is it denied to? Anghie states that Europe is the subject of sovereignty while Non-Europe is its object.¹⁶ For non-Europeans, gaining sovereignty is more about alienation than empowerment.¹⁷

The paper argues that any resistance ‘within’ international legal systems is limited in scope unless it suspends the use of a colonial vocabulary to articulate against institutional ‘plunder and subordination’¹⁸. It is necessary to relocate the definitional quality of the ‘third world’ from the post-colonial *state* to the post-colonial *peoples*. It also becomes necessary to identify the fluidity of the new imperialism - from erstwhile colonial or dominant industrial states to wider institutions and structures. The global ‘North’ does not operate merely as a monolith collective of States; agreeably, these States face a set of similar concerns, however, it is necessary to locate the operation of Chimni’s TCC or Hardt’s and Negri’s Empire. *Empire* is ominous in its oft cited quote:

¹⁵ Edward W. Said, *Secular Interpretation, the Geographical Element and the Methodology of Imperialism*, in AFTER COLONIALISM: IMPERIAL HISTORIES AND POSTCOLONIAL DISPLACEMENTS 30 (Gyan Prakash ed., 1995).

¹⁶ *Supra*, n. 14 at 102.

¹⁷ *Supra*, n. 14 at 108.

¹⁸ *Supra*, n. 5.

“The spatial divisions of the three Worlds (First, Second, and Third) have been scrambled so that we continually find the First world in the Third, the Third in the First, and the Second almost nowhere at all. Capital seems to be faced with a smooth world - or really, a world defined by new and complex regimes of differentiation and homogenization, deterritorialization and reterritorialization”¹⁹

Traditionally, the Third World has been defined in opposition to the First World. What the ‘North’ is not, the ‘South’ is; the ‘First’ is ‘developed’, the ‘Third’ is ‘developing’. This oppositional definition still relies on the language of sovereign statehood and the rhetoric of ‘national interest’. The post-colonial sovereign state continues to colonise other peoples by territorial annexations, subjugating indigenous communities, and denying the very self-determination that it had claimed for itself. In more ways than one, these ‘old forms of sovereignty’²⁰ were just means of empowering the First World in the Third.

It is, therefore, necessary to analyse IOs as straddling a world of law and politics, characterised by the diminishing of state-sovereignty, the rising on the one hand of ‘relocated sovereignty’ and on the other, a fragmented, autonomous and *expert* bureaucracy, increasingly independent of State interests and with its own practices and policies. International laws, institutions and practices converge to impinge upon the independence of third world nations in favour of transnational capital and powerful States.

¹⁹ *Supra*, n. 11.

²⁰ *Ibid.*

Unless international organisations are subject to a consciously political analysis, there is little scope for Third World peoples to determine their own legal and political choices, and have a say in the structuring and functioning of these organisations. This paper aims to draw attention to the manner in which international organisations can be so analysed through a view of existing literature on the interaction between IOs and the Third World.

I

The challenge of TWAIL today is to carry that struggle forward, and to realize that the script of resistance and liberation is a historical continuum, taken sometimes in small, localized, and painful steps.

– Makau Mutua²¹

II. TWAIL SCHOLARSHIP ON INTERNATIONAL ORGANISATIONS

TWAIL as an intellectual movement of academics, is relatively young. Nonetheless, TWAIL scholars across the board – from Nyamu²² to Baxi²³, have read various Third World political resistances as part of the aforementioned ‘historical continuum’²⁴ that goes back to the anti-colonial movement. The Non-Aligned Movement, Jawaharlal Nehru’s *Panchsheel*²⁵

²¹ *Supra*, n. 5.

²² Celestine Nyamu, *How Should Human Rights and Development Respond to Culture*, 41 Harv. Int’l. L. J. 381 (2000).

²³ *Supra*, n. 13.

²⁴ *Supra*, n. 5.

²⁵ *Panchsheel* refers to the Five Principles of Peaceful Co-existence, first enunciated in the Agreement on Trade and Intercourse between the Tibet region of China and India signed on April 29, 1954.

and the vocal resistance of Julius Nyerere and Dewi Sukarno²⁶ are all significant points on this continuum.

Our critique of IOs stems from Anghie's reading of the colonialist roots of 'sovereignty'²⁷ and Koskenniemi's argument on the politics of international legal rhetoric: that it could be used as a double edged sword, to 'apologize' for power and to simultaneously hold an aspirational quality for itself, as a 'utopia'.²⁸

[...]While the way international law is spoken, and thus applied, reflects the profoundly inequitable constellation of power today, it also offers avenues of resistance and experimentation.[...] Though it often empowers the “wrong” people and justifies the “bad” decision, this is by no means necessarily the case [...] every law is a “politics”, it is likewise true that every politics can become known, and effective, only as “law”, including above all a law that liberates some actors to decide in accordance with their preferences. The question is [...] by which law or whose law [?] Which is why the assumption that there might be a sphere of “pure” non-law (of politics, economics, strategy, etc.) is ideological.²⁹

In other words, as Baxi quotes the World Socialist Forum: “other

²⁶ Usha Natrajan, *TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring*, 14 Oregon Rev. of Int'l. L. 177, 179 (2012).

²⁷ See generally, *Supra* n. 14.

²⁸ MARIITI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).

²⁹ *Ibid.*

worlds are possible”.³⁰ The ‘politics’ that is to be ‘legalized’ must be reached through a radical departure from Eurocentric international law³¹ that masquerades as a universal principle.³²

III. A HISTORICAL APPROACH

The historical study of Third World resistance to Western or Northern hegemony has been analysed with little criticality, except in instances of rhetoric. Very little is spoken or written about the Third World subject and how she responds to the hegemonic domination of the international legal order. We identify two trends on why this historical resistance has been unable to channelize itself into a transformative, broad and diverse international legal order. The first is the continuous obsession with the colonial construct of a nation-state with bestowed sovereignty. The second is the consistent march of the Empire (or the TCC). Together, they have come to not only represent the erosion of our traditional understanding of sovereignty, but have also caused the displacement of a language of rights and equity that was local, empowering and emancipatory.

The historical narrative of third world encounters with International Organisations has been situated in the broader reconstructionist history of the United Nations and in the context of the cold-war.³³ However, this

³⁰ *Supra*, n. 13 at 714.

³¹ International law “is in its origin essentially a product of Christian civilisation.”, L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 4 (Arnold D. McNair ed., 1928).

³² Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *Harv. Int’l L.J.* 1 (1999)

³³ Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law* 3(1) *Trade L. & Dev.* 103 (2011).

reconstruction is lacking: where does one situate the UN Partition plan for the State of Israel?³⁴ Who can constitute the ‘third world’? The Palestinians? Or the Jewish refugees who had survived yet another wave of European anti-semitism? The merits of the partition plan or the narratives of Israeli “Independence” or the Arab ‘*Nakba*’ occupy and require another analysis; what is necessary for this reading, however, is that we understand the meaning of this ‘decision’.

IV. QUESTIONING THE SOVEREIGN NATION-STATE

The creation or non-creation of a sovereign state is an imperialist function and has its roots deeply entrenched in colonial domination.³⁵ Such a conception of a nation state is seen as ‘illegitimate in the eyes of certain sub-state groupings’³⁶. The broader argument is that statehood – and the host of baggage that it constitutes – is a conception that is Eurocentric and visualises the need to constitute persons as ‘citizens’ in order for their rights to be recognized³⁷. This statehood is not that of self-determining peoples. Instead, boundaries, structures and legal obligations are determined by colonising powers that do not “belong” to the territory or culture, but control it nonetheless.³⁸

³⁴ GA Res. 181 (II), *Future Government of Palestine*, U.N. Doc. A/RES/181(II) (1947).

³⁵ Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT’L L. 1 (2011).

³⁶ *Ibid.*

³⁷ Audrey Macklin, *Who Is the Citizen’s Other? Considering the Heft of Citizenship*, 8 Theoretical Inquiries in Law, 333-366 (2007).

³⁸ Frantz Fanon, *Concerning Violence*, ZERO ANTHROPOLOGY, (July 5th, 2015) <http://zeroanthropology.net/2009/03/12/frantz-fanon-concerning-violence/>.

The United Nations has acted just as the erstwhile colonial powers wished for it to act, and not as a corporate body with the democracy of its participants. The creation of the nation-state, a power vested in the erstwhile coloniser, now shifted to a body of States that simply took over as the new mode: from the East India companies, to King Leopold's excesses in the Congo, to the more complex, more difficult to locate body of international lawmaking. Hence, legitimacy now came to be bestowed not by victories in warfare, but by the discourses of 'international' law producing bodies. It is evident that the intractability of the conflict in Palestine (and much of Africa and the Levant) owes much to the denial of voices and erasing of agencies.³⁹ The project of colonialism merely donned the new robes of an international organisation while it continued to remain a project of 'plunder'⁴⁰, and of constituting the 'native' as a mere object, with little agency and no voice.⁴¹

This obsession with statehood and sovereignty is also at the witness stand in the history of two important UN Conventions: the 1954 and 1961 Conventions on Statelessness and the 1951 Convention on Refugees. The necessity to impose a *legal obligation* upon States to show concern for 'stateless' persons and 'refugees' stems from European notions of the necessity of citizenship in order for rights to exist, and for States to ensure that fleeing persons are protected.⁴² The premise behind this obsession with statehood crumbles when we see how Third World communities and peoples

³⁹ See generally, Judith Butler, *Is Judaism Zionism?*, in DECONSTRUCTING ZIONISM: A CRITIQUE OF POLITICAL METAPHYSICS, (Gianni Vattimo & Michael Marder eds., 2014).

⁴⁰ *Supra*, n. 5.

⁴¹ *Supra*, n. 38.

⁴² *Supra*, n. 28.

have continued to host massive refugee influxes even without being part of States that are signatories to the Convention on Refugees.⁴³ The most number of 'Stateless' persons are found today in the artificially created post-colonial states.⁴⁴ As colonialism left the confused legacy of having to combat nationality and citizenship as separate categories, the heterogeneity caused some groupings to always be categorised as the 'other'.⁴⁵ While earlier citizenship was a varied, diverse and organic question, it now transformed into one of State Recognition and became conditional upon notions left by the coloniser.⁴⁶

While some have lauded the doctrines of self-determination and equality of states in the UN Charter as successes of the Third World, there is little acknowledgment of the inherent Eurocentrism of the Charter: whether it is the phallogocentric notion of a 'civilized state' or the creation of the UN Security Council as a superior, enforcing body, the only merit of whose permanent membership is victory in war. It is of little surprise, then, that the small victory that was the UN Charter's 'equality of states' doctrine and the recognition of state autonomy over economic affairs⁴⁷ would soon be eroded by the Bretton Woods system⁴⁸. Under this new system, policies would be decided by a vote that was allotted according to the capital that State parties

⁴³ RANABIR SAMADDAR, *REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA, 1947-2000* (2003).

⁴⁴ M. Gibney, *Statelessness and Citizenship in Ethical and Political Perspective*, in *NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW* (A. Edwards & L. van Waas eds., 2014).

⁴⁵ *Supra*, n. 26.

⁴⁶ *Supra*, n. 4.

⁴⁷ U.N. Charter art. 1, para. 3; art. 55; art. 56.

⁴⁸ *Supra*, n. 22.

held and not on a ‘one state, one vote’ basis. The consequence, specifically of the World Bank, the International Monetary Fund and more recently the World Trade Organization has been the erosion of State autonomy, an ‘internationalization of property rights’⁴⁹, structural adjustment programs, expert, neo-liberal bureaucratic regimes, and an overwhelming, overarching operation of a free market system.⁵⁰

What most TWAIL scholars in their analysis identify with concern is that these organizations are undemocratic - they have had the consequences of eroding state sovereignty and autonomy, and that they have pushed for neo-liberal reforms. However, very little has been written to comprehend its very *material* effects on third world peoples. This has also begun to change; Nyamu has documented the paradigms of Human Rights and development and how they have approached the question of gender equality and culture⁵¹. She argues that the articulation of international human rights and developmental efforts have concentrated on indigenous cultures as a barrier to achieving gender equality without actually affording it an opportunity to play a role in the progressive realization of the purpose. In fact, international organizations have caused the introduction of a patriarchal system where none might have existed.⁵² While Nyamu does not explore the roots of such

⁴⁹ *Supra*, n. 7.

⁵⁰ Thomas Sankara, *Speech on Foreign Debt at the OAU*, July 1987 (5th July 2015) <https://www.youtube.com/watch?v=DfzoToJEnu8>.

⁵¹ *Supra*, n. 5.

⁵² Nyamu gives the example of the right to property as an important agenda of a Structural Adjustment Program, whereas earlier, societies did not necessarily conceive the idea of a private property, they were now supposed to register their possessions in the name of the male member of the household.

a privileging of ‘neutral’ and ‘global’ values of gender justice independent of local cultural contexts, it is definitely worthwhile to read its meaning: the historic dialectic that existed in Europe and much of the West concentrated on a binary of ‘religion’ (‘culture’ in Third World contexts) and ‘progress’. Western thought hence, seeks to generalise its own experiences in all the other territories to which it takes its ‘civilizing’ mission. Culture, under this mission, was seen as a barrier to progress and it was to be ignored, removed or replaced. In this process, the South’s experience of reinventing and renegotiating its culture was disregarded.⁵³

Nyamu’s broader argument is that the discursive practices of international human rights are ‘a state-oriented discipline that focuses on rights violations within the public sphere, particularly state violations of civil and political rights.’⁵⁴ Chimni similarly discusses the privileging by international institutions of civil and political rights over economic, social and cultural rights.⁵⁵ Such ahistorical, acontextual approaches have been constantly furthered, not only by the Bretton Woods institutions, but also by human rights institutions.⁵⁶

V. THIRD WORLD EXPERIENCES WITH INTERNATIONAL ORGANISATIONS

Before concluding this section, it must be acknowledged that

⁵³ PAULLA A. EBON, PERFORMING AFRICA 20 (2002).

⁵⁴ *Supra*, n. 22.

⁵⁵ *Supra*, n.7.

⁵⁶ CLAUDE E. WELCH JR., NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE 77 (2001).

encounters of the Third World with International Organizations are, in fact, routine. Sometimes, these encounters have widespread effects of domination, pillage and denial of agency, but on a general, every day basis, they are far more complex. For instance, the UNODC appreciated Iran's countering of its 'drug problem'⁵⁷, while another arm of the same organization sought to limit the state practice of awarding death penalties.⁵⁸ As Koskenniemi argues, the meaning of international law is unstable because "In the practice of States and international organizations these are every day overridden by informal political practices, agreements and understandings. If they are not overridden, this seems to be more a matter of compliance being politically useful than a result of the 'legal' character of the outcomes".⁵⁹

The drug control 'carrot and stick' policy is also reflected in Nyamu's argument: practices of IOs are generically Eurocentric in their production of norms, and rarely ever factor in local cultures and practices in this good/bad classification that they follow.

Third World experiences with international organisations are hence, graded. While resistance to all other international law is possible, IOs represent permanent law-generating and norm-creating mechanisms that make it difficult for the Third World to effectively adopt modes of resistance.

⁵⁷ UN Envoy Praises Iran's High Drug Combat Capabilities, IRAN DRUG CONTROL HEADQUARTERS REPORT (July 5th, 2015) http://dchq.ir/en/index.php?option=com_content&view=article&id=1031:un-envoy-praises-iran-s-high-drug-combat-capabilities&catid=364&Itemid=1138.

⁵⁸ Faraz Sanei, *Don't praise Iran's war on drugs*, Guardian, August 5, 2011, (July 5th, 2015) <http://www.theguardian.com/commentisfree/2011/aug/05/iran-war-on-drugs-international-law>.

⁵⁹ *Supra*, n. 28 at 3.

Through appropriation and the illusion of choice, they delay and ignore the concerns of the suffering.⁶⁰

VI. DEFINING THE ‘THIRD WORLD’

The definitional options that have been exercised on articulating, dismissing and discussing the meaning of ‘The Third World’, all vary only in the details. Mutua’s definition of the Third World as a “set of geographic, oppositional and political realities that distinguish it from the west” emphasises the “historical experiences across virtually all non-European societies that have given rise to a particular voice”; however, it is an insufficient explanation of the international hegemonic regime. An oppositional or even geographic situating of the third world is restrictive, undemocratic and exclusionary. Where, for instance, would one locate the post-socialist states of Central Asia and Eastern Europe? Such definitional challenges are best overcome by a specific emphasis on what Okafor calls “common historic experiences.”⁶¹ The emergence of Third World-ism is simply explained by Baxi through three different and connected registers: colonialism of the past and capitalism of the present, the Third World as a “vehicle, vessel and visage” of global domination and third, most importantly, through “practices of resistance and struggle by colonially constituted peoples”.⁶²

The continuing project of colonialism is difficult to explain through a

⁶⁰ Jose Alvarez, *Have IOs Improve Treaty-making*, in INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2006).

⁶¹ Obiora Chinedu Okafor, *Newness, Imperialism, And International Legal Reform In Our Time: a TWAIL Perspective*, 43 (1,2) Osgoode L. J., 171-191, 179 (2005).

⁶² *Supra*, n. 13.

mere North-South, or anti-West definitional paradigm. Instead, it becomes necessary to identify the Third World as Hardt and Negri have: as having been scrambled across the world – so that we end up routinely discovering the third world in the first and the first in the third. This is a reality that cannot be wished away merely by identifying it in the post-colonial narrative; it must be identified in the age of the Empire/TCC: globalized economies, relocated sovereignty and newer, more comprehensive and more complex political projects. The oppositional quality of the Third World, then, is the historical continuum: it stands in opposition to the colonial past and the continuation of imperialist domination. However, its oppositional quality is not merely against the erstwhile colonial rulers, but against the colonial project itself. And while the concern of many TWAIL scholars has been that the neo-liberal state might witness an erosion of sovereignty in favour of international institutions and the TCC⁶³, it shouldn't make us nostalgic “about sovereignty of the past”⁶⁴.

II

To a large extent, the models that had presided over the birth of a nation state were simply dusted off and repropounded as interpretive schema for reading the construction of a supranational power. The domestic analogy thus became the fundamental methodological tool in the analysis of international and supranational forms of order

- Hardt and Negri⁶⁵

⁶³ *Supra*, n. 7.

⁶⁴ *Supra*, n.11.

⁶⁵ *Supra*, n.11 at 25.

What is important is the existence of a group of states and populations that have tended to self-identify as such—coalescing around a historical and continuing experience of subordination at the global level that they feel they share—not the existence and validity of an unproblematic monolithic third-world category [...] Now, if these states tend to complain about similar things, and speak to similar concerns, it is of course undeniable that, as contingent and problematic as any style they wish to assign to their grouping is, or can be, that grouping—that sense of shared experience—does exist and has been repeatedly expressed.

- Okafor⁶⁶

VII. A CONSTRUCTIVIST APPROACH

Constructivism is the youngest entrant in IR theory.⁶⁷ Its greatest contribution has been in identifying norms that have diffused across states in manners and modes that are distinct from the traditional understanding of power and state interests.⁶⁸

The Interactional Theory of International Law seeks to relate the two concepts of Lon Fuller's 'moral law' and the constructivist world-view of international relations. Both hold that law is not so much a generation of a *grund norm* or an outcome of a Sovereign authority. Law, (in Fuller's case) and 'norms' (in the constructivist opinion) are constantly constructed and reconstructed when actors interact and agree upon the rules, and hence, Fuller would argue that law enables not so much governance as it ensures 'communication'. Law provides the context within which this communication

⁶⁶ *Supra*, n. 61.

⁶⁷ *Supra*, n. 8.

⁶⁸ *Ibid.*

takes place. The image of law as a set of rules imposed by power structures in a top-down approach is rejected. The interactional theory of international law assumes, at the most basic level, that relevant actors should be able to participate in the decision making process regarding norms and rules, because it is precisely in the interaction between actors that law arises.⁶⁹ The Law can only be legitimate when it is applicable similarly to everyone – and more importantly, when the subjects of the Law accept it as binding.⁷⁰

The promise of constructivism exists, not so much in its emphasis on international institutions or in its emphasis on norms, but in the *kind of norms* that it emphasizes on – unlike the traditional IR theories, it opens up prospects for a gendered, racial, cultural and religious identification of interaction between states⁷¹. Tickner argues, for instance, that the First World operationalizes the male/female binary when it interacts with the Third World. The Third World is symbolised by the emotional, the unstable and the weak, while the First World is characterised by order, security and rationality.⁷² This analysis provides insights into the kind of interactions that might operate in international organizations between States, or the kind of decisions that the UNSC might make. The Third World, then, represents ‘nature’ that is to be controlled, made to behave and obey. The First World

⁶⁹ E. Hey, *Sustainable Development, Normative Development and the Legitimacy of Decision making*, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 19 (Niels M. Blokker & N.J. Schrijver eds., 2003).

⁷⁰ Jutta Brunnee Toope & Stephen J., *International Law and Constructivism: Elements of an International Theory of International Law* 39 Colum. J. Transnat'l L. (2000).

⁷¹ Ted Hopf, *The promise of Constructivism in International Relations Theory*, in 23(1) Internat'l Security, 171-200, 196 (1998).

⁷² Ann Tickner, *You Just Don't Understand: Troubled Engagements Between Feminists and IR Theorists*, 41(4) Internat'l Studies Quarterly, 611-632 (1997).

sees international law as a tool to control, punish, sanction and extract obedience. This divide serves to maintain the image of the 'other' and creates the context for the development of MDGs, indices, IMF SAPs, etc. on the one hand, and on the other – the perpetuation of an 'emotional Third World'. The Third World is hence prevented from narrating its own experiences and bringing to the table its own solutions.

However, constructivist experience in the Third World context is far more complex. The Constructivist approach provides us with tools to analyse the interaction between the North and the South by enabling a reading of international affairs through what Rajagopal calls "the local"⁷³: peasant, feminist, workers and anti-racism movements. However, Landolt⁷⁴ argues that constructivism's emphasis on a 'unique adaptation of liberal theory, censorship of material factors, elite focus and tendency to assume a unitary state' harms a more accurate identification of norm diffusion. The fact that constructivists have concentrated immensely on the diffusion of women's suffrage, human rights and gender justice questions in explaining "norm diffusion" from the North to the South is an instance of this lack of criticality. Another problem that western constructivism poses is that of reading norms where they do not exist - motivations of the North towards aid and poverty alleviation – were not driven by any impetus to rectify past injustices, but in order to ensure an indemnity of security against the

⁷³ Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions*, 41(2) Harv'd Int'l L. J. 529 (2000).

⁷⁴ *Supra*, n. 10.

“disparity in welfare”⁷⁵. Landolt also critically explains the constructivist analysis of IOs:

*In practice this approach assumes that Western norms such as liberal democracy, free markets and human rights diffuse among states by means of a profoundly independent international social structure, rather than being projected from the domestic level. Constructivism thus assigns greater autonomy to international organisations (IOs) and transnational actors than do other liberal approaches, and both of these actors are essentially severed from state interests.*⁷⁶

Efforts have now been made to rectify the interaction between TWAIL, Constructivist theory and International Institutions. One of the first attempts has been an understanding of the post-colonial ‘development paradigm’ through the lenses of constructivism and TWAIL to identify the ‘influence of particular international organizations, states and actors which perpetuate dominance by the minority’.⁷⁷

Okafor also identifies ‘newness’ in the light of the UN anti-terror reforms in the post-9/11 era.⁷⁸ This newness is nothing but a manner of foregrounding the suffering (and the privilege) of one state and pushing it down other states as policies. What this offers is another perspective of how

⁷⁵ MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996).

⁷⁶ *Supra*, n. 10.

⁷⁷ Marsha Cadogan, *Deconstructing Intellectual Property Right Laws link with the Politics of International Relations in Jamaica: the Developing Country Narrative* (July 5th, 2015) <http://www.mcgill.ca/humanrights/events/cohen-seminars-international-law>.

⁷⁸ *Supra*, n. 61.

IOs have prioritised the suffering and concerns of one State and used them to cause the ‘subtle displacement of third-world suffering from internationalist consciousness.’ The broader point in this paper is that it does not matter what vocabulary is used to access the language of international domination and subjugation – sovereignty, statehood, the empire, global governance, globalization or mere inevitability – some States, peoples specifically, will be displaced at the cost of the others.

III

VIII. CREATING SPACES FOR THE THIRD WORLD

The possibility of a creation of a more democratic, normative, intersubjective international order exists only as long as TWAIL politics locates these factors as *independent* of the existing international legal framework, using a vocabulary and language that does not rely on a colonial legacy. While intersubjectivity and constructivism might contribute in the interim and in a manner that might inaugurate the scope of resistances in the instant international legal order, it does little to deconstruct and remake the international order in a manner that is more just and focuses more on peoples movements, on third world *peoples* and not artificially constructed ‘sovereign states’.

However, intersubjectivity is indicative of the kind of norms it has produced in the international legal order. Malcolm X’s influence went far beyond the United States of America’s anti-racism movement; at one time he was an icon for the citizens of newly born States free from colonialism, across the African continent. In the interspersed between the Third and

First Worlds, Malcolm X symbolized the First when he attended the Organization for African Unity (the forerunner for the African Union) as a representative the Organization of Afro-American Unity.⁷⁹ The interspersion is also evident in the lawsuit seeking reparations that the CARICOM has instituted against its erstwhile colonial ruler, Great Britain;⁸⁰ this is evidently a result of Kenya's successful attempt at claiming reparations from Great Britain over its colonial past in the country.⁸¹

IX. FIGHTING THE MARCH OF THE EMPIRE

Norm generation, then, is a question of how the communicative actions of States are responded to, understood or acted upon by other actors.⁸² Even heavily bureaucratized bodies, and not just International Organisations or Intergovernmental organisations, are spaces where Third World countries can and have exercised their agency to resist the Empire. One instance of TWAIL pragmatism *within* International Organizations is the use of the World Trade Organization's dispute settlement mechanism, which witnessed an interesting ruling in *US-Gambling*⁸³ where Antigua and Barbuda, a small and vulnerable economy, was permitted to suspend the Intellectual Property Rights protections of the United States and in effect "legalize

⁷⁹ MALCOLM X, AUTOBIOGRAPHY OF MALCOLM X, Ch. 18 (1965).

⁸⁰ Philip Sherwell, *Caribbean states demand reparations from European powers for slave trade*, Telegraph, 11th March, 2014.

⁸¹ Jason Straziuso & Gregory Katz, *UK Announces Compensation For Kenyans Abused During 1950s Mau Mau Rebellion*, Huffington Post, 6th June, 2013 (5th July, 2015) http://www.huffingtonpost.com/2013/06/06/uk-kenya-compensation_n_3395764.html.

⁸² *Supra*, n. 28.

⁸³ WTO Dispute No. DS285, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 28th January 2013.

piracy”⁸⁴. Another poignant example lies in Thomas Sankara’s refusal to pay debts to imperialist European powers. Debt for him was a form of neo-colonialism, where the colonisers changed the vocabulary to call themselves ‘technical assistants’. He calls for his country, Burkina Faso, to abstain from the payment of debts imposed on them during a time of European economic crisis, and speaks against the power and influence exerted by the IMF and the World Bank.⁸⁵ Rafael Correa would, 21 years on, also make a similar argument in refusing to pay illegitimate foreign debts imposed on Ecuador.⁸⁶

In order for the Third World to be able to articulate its own political and legal obligations at the international level, we must go beyond the First/Third Worlds as solid, non-fluid identities and move to spaces whose existence is not contingent on geographical or colonial histories, but of ‘common suffering’ as a category that is self-identifying and based on resisting the project of the Empire. And for this, it must include the Indigenous First Nations of the American continent as it must include the Jarawa of the Andamans. The exclusion is to be of Chimni’s TCC: that class of persons that is above sovereign statehood; where they reside is of little relevance, but they do control the flow of information, decision making, education and the policies of States. Resistance, then, must be universally targeted against this wide class of persons.

⁸⁴ *US warns Antigua and Barbuda over 'piracy site' plan*, BBC, 29th January, 2013 (5th July, 2015) <http://www.bbc.com/news/technology-21247683>.

⁸⁵ *Supra*, n. 50.

⁸⁶ Emmanuel Santos, *Ecuador’s Rising Struggle*, Socialist Worker, December 18, 2008 (July 5th, 2015) <http://socialistworker.org/2008/12/18/ecuadors-rising-struggle>.

The diverse Arab Spring⁸⁷ movements and NGOs such as Survival International, Anonymous, Independent Diplomat, etc. resist this transnational class by more ‘internationalism’ and less ‘globalization’. These NGOs have fought on the basis of solidarity and not on the basis of taking over the agency of local struggles, along the lines of the “reconstructionist space” that Attar and Miller⁸⁸ saw as an empty space that had one emancipatory contribution: the ALBA initiative. ALBA (The Bolivarian Alliance for the Americas) is aimed at striking a major blow against US hegemony, the IMF, the World Bank, ‘free’ trade through the imposition of neo-liberal capitalism, and neo-liberalism in general. This has been the closest response to fighting the ‘vocabulary of oppression’. TWAIL scholars have elaborated on this need to change the Eurocentric, imperialist language of oppression that continues to pervade through the influence that these very same powers exert over International Organisations.

Mutua identifies three threads of Third World scholars in International Law: the first is the ‘betraying class’ - scholars who identify themselves with the current order and live by it. The second are the ‘creative reconstructionists’ and the third are those who believe in the radical idea of ‘another world’.⁸⁹ He believes that the second class that seeks to resist hegemony from *within* the system isn’t as harmful as the first. There can be no ‘total change’ in the formation of international normative practices unless

⁸⁷ *Supra*, n. 22.

⁸⁸ Mohsen al Attar & Rosalie Miller, *Towards an Emancipatory International Law: The Bolivarian Reconstruction*, 30(3) *Third World Quarterly* (2010).

⁸⁹ *Supra*, n. 5.

an emancipatory language replaces that of colonialism, order and power. It is necessary that the new international legal order responds to this with a necessarily deliberative, humane, decentralized international organization. Our energies, then, must be spent on identifying peoples' movements that want to witness the erosion and replacement of undemocratic IOs with people based, equitable bodies that concede *more* and hold back *less*.⁹⁰

⁹⁰ Paraphrased from Arundhati Roy's famous phrase "more democracy, not less". See, ARUNDHATI ROY, AN ORDINARY PERSON'S GUIDE TO THE EMPIRE (2004).