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International Laws and the Discontented: Westernisation, the Development and the Underdevelopment of International Laws

Gbenga Oduntan

*The bombs are made in London but the bombing is in Congo
The bombing na for Togo...
The jets are built in Germany but the air raid na for Freetown
Cocoa dey grow for Nigeria, Cocoa dey grow for Ibadan,
but we dey buy chocolate from Belgium...
Gold beaucoup Kinshasa but they store this gold for Swiss banks...
It doesn't make any sense to we at all
at all at all at all, at all¹*

Introduction

This article examines certain aspects of contemporary international laws, broadly construed, that threaten the fairness and equitable conduct of the regulation of international relations. It considers the hypothesis that there is a deliberate stultification of the progressive development of public international law, international commercial law, and indeed, nearly all aspects of international regulation by a group of privileged states. It seeks to present evidence of the manifestation of the sectional and parochial interests of the developed western states in the corpus of 'international laws', in a general sense, and to expose the discourse by which universal interest is sacrificed on the altar of maintenance of western hegemony. This includes an enquiry into the means and strategies deployed in the 19th and 20th centuries

¹ Excerpts from the lyrics to 'The Bombs', in Calabash Afrobeat-Poems by Ikwunga (Rebisi Hut Records, October 2004).

to make international laws serve western interests, and indeed, to permanently work against the interests of the vast majority of newer states, in order to perpetuate their subjugation. The article presents the theory that, as a result of an intricate web of strategic engagement and disengagement with the discourse, diplomacy, and the actual process of legislation of international laws, the specific regimes of public international law, international trade law and international commercial law have been unable to achieve their true potentials for the common good of mankind. The argument is that the potential of these regimes to beneficially regulate international affairs in a much more wholesome manner has been deliberately left in a state of underdevelopment through the strategic actions and inactions of economically powerful occidental states — ‘the West’. It is also argued that this state of underdevelopment is designed to be permanent, or will become permanent, unless steps are taken in due course to reverse the democratic deficit that pervades the making and implementation of international laws.

It is important to introduce certain terms and concepts that will be used throughout this essay. These are the concepts of ‘proto international law’, westernisation and hegemony. The holistic treatment of international laws under various spheres of international regulation (as expressed in the system of international treaties, laws, customs, usages, diplomacy and the jurisprudence of international courts) may be summed up under the suggested terminology: proto international law. Proto international law in this sense includes, but is not limited to, public international law (the law of nations). The concept is suggested as a useful category to encompass all the fields of international regulation, whether public or private, as well as the principles and doctrines contained therein. The aim is to remove the need to maintain strict differentiation between laws that regulate international affairs, as is customary in legal writing. Proto international law is, therefore, shorthand for international laws.² The consideration of the general field of proto international law is required because the methods and strategies through which the westernisation of international laws and its underdevelopment is achieved are very similar

² The terms ‘proto international law’ and ‘international laws’ are used interchangeably in this paper. The difference between international law and international laws is that the former refers to the field of public international law, while the latter is the same as proto international law.

and deserve closer enquiry as holistic phenomena. The enquiry of this article, therefore, is into the fairness and legitimacy of proto international law.

It must be conceded *ab initio* that any serious attempt to define or lay out in precise terms what the terms westernisation and hegemony convey is a considerably difficult and perhaps potentially diversionary task.³ Yet, it is necessary to describe at least the senses in which the concepts will be employed in an article like this. Hegemony is seen as the possession and/or preponderant use of authority and/or control of one state or a group of states over another or others. The word 'hegemony' in English appears to have emerged from the Greek word '*hegemonia*', which denotes 'leadership' and, therefore, agrees with the Yoruba '*awon asiwaju orile ede*' ('leader states') as well as '*ajulo*' ('greater than or more than the norm'). Yet, there is a sense in which the word 'hegemony' connotes negative senses, and acknowledges the functions of political realism, suzerainty and unabashed exercise of power (Kingsbury 1998: 414; Wiarda 1982: 11). Westernisation, according to our conceptualisation, involves progressive or regressive 'attribution' and characterisation of the people of Europe and North America in terms of customs, institutions, practices and legal development.⁴ In terms of geographical spread, it is used to refer to the entire western Europe and the Americas, but in a sense, it refers to those economically successful and/or militarily powerful states of Europe and North America, and similarly successful states of Eastern Europe and Asia, such as Japan (Franck 1997: 624; Sucharitkul 2005: 6).

For some observers, the permanent members of the Security Council constitute a collective hegemony. The process of adapting international regulation toward western hegemony has been technically managed, but there are features of this process that many find increasingly unattractive (Vagts 2001: 843–48; Morgenthau 1985). The idea of hegemony has perhaps always been a reality of international relations. What has changed is that the very legal fabric of international organisation and legality is now subjected to hegemony

³ In this article, westernisation is used as an attribute of the 'West', which is also used interchangeably with a number of similar appellations, such as occidental states, developed or advanced states and the North, as is to be found in the context of politico-legal literature.

⁴ In this way it differs from the pedestrian or dictionary sense of western hemisphere, the hemisphere of the earth that contains the Americas.

in an unprecedented manner. Detlev Vagts considers it appropriate to ask ‘whether there is such a thing as hegemonic international law (HIL)’. He concludes, ‘there can be, and has been, such a thing as HIL’ (Vagts 2001: 843).⁵ Although it is very easy for any commentator to get bogged down in defining these two concepts, and they in many ways present semantic quandary, denying the existence of hegemony and westernisation in current international law and international relations is a more difficult task than accepting their existence. The concepts have found ample expression in political discussion,⁶ legal literature,⁷ judicial pronouncements⁸ and critical literature.⁹

This article, thus, not only examines the proposition that international law is not only unrepresentative of the interest of the majority of states, but also seeks to expose the means and methods by which the law of hegemony is maintained. It highlights the history of modern international law and the exclusionary tactics employed to capture the agenda. The article argues that the denial of membership of the empire of law to the vast majority of states up to 1920 was an injustice and a fracturing of the natural history of international law. This tactic has since then been supplanted by various means of strategic engagement and disengagement with epistemic discourse

⁵ See also the treatment of the balance of power and of hegemony in Oppenheim 1905: 75, 134.

⁶ See Bolton 2000: 48. In 1979, the General Assembly attempted to rein in the manifestations of hegemony by passing a resolution entitled ‘Inadmissibility of Hegemonism in International Relations’, which was opposed by the United States and a few other members. GA Res. 34/103 (Dec. 14, 1979). See also Morgenthau 1985.

⁷ Vagts speaks persuasively of Hegemonic International Law or HIL (2001: 848); see also Morgenthau (1985: 75, 134, 185, 292). For the interactions between the erstwhile Soviet Empire and the hegemonic powers, see McWhinney 1964.

⁸ Lord Justice Gibbs will appear to have taken judicial notice of the concept of ‘the West’ in *R. (on the application of Bancoult) v. Secretary of State for the Foreign and Commonwealth Office* [2001] Q.B. 1067 discussed below, *infra* note 60.

⁹ Note the arrogation of the ‘we’ as a standard for approval and as representative of westernised conduct or as, systemic description of the north Atlantic, explored by Gayatri Chakravorty Spivak (2003: 17, 88, 365). Note also the aggregation of Europeanisation with hegemony, and the creation of ‘the others’, explored by Edward Said (1995: 7, 8, 86–89).

which is used to occupy the advantageous higher ground, not only in public international law, but in all possible areas of the organisation and application of knowledge in international regulation — proto international law. The article strives to identify certain strategies of underdevelopment of proto international law — such as the highly effective application of carrot and stick stratagems, resort to the ‘game theory’ and other cooperative synchronisation of interests — that typify the actions of the western states. It discusses the effective arrogation of authorship and the liberal use of the ‘power of inscription’. It further argues that this level of privileged inscription has helped codify biases in the development of international regulation and concretised hegemony in the corpus of proto international law. Finally, the article concludes on the note that the imperatives of liberating proto international law from underdevelopment are very clear and constitutes the task that must be achieved by scholars, politicians, statesmen, and all those interested in the decolonisation of law the world over.

Was International Law ever ‘Law’?

We must begin by examining a central question relating to the public face of the international regulatory frame work technically identified as public international law. Only when this question has been successfully discharged can the rest of our enquiries be meaningful and deemed worthy of legal analysis. The question whether international law is law is one which has persisted in the discipline for decades. The case of the positivists is that international law, like natural law, is ‘nonsense upon stilts’ and merely comparable to areas like the laws of fashion. However, contemporary global society operates as though international law exists — shaping its interests and demanding obedience, very much like the ‘holy spirits’ of religious belief that are thought to control every aspect of the existence of individuals and states.

International law is the body of legal rules which apply between sovereign states, and such other entities as have been granted legal personality. The term ‘international law’ was coined by Jeremy Bentham as far back as the 19th century, but he was trying to describe something which had existed prior to that time and was synonymous with the ‘law of nations’. Hobbes and Pufendorf had no problem in concluding quite simply that international law was not ‘law’. John Austin’s positivist analysis also denied that international law had any quality of ‘law’. In his view, law was the body of rules for human conduct enforced by a sovereign political authority on members

of an independent political society from which it received habitual obedience. A breach of the sovereign command was followed by sanctions. The sovereign himself/herself, being politically superior, would owe obedience to no other superior authority. Having defined his subject in this way, he was concerned with positive law as what the law is, and not what it ought to be. Austin, thus, had no problem in coming to the conclusion that international law was in fact 'law improperly so called', and at best, 'positive morality'. He proceeded to rank it alongside law by analogy, constitutional law and laws of fashion (Austin 2005: 38).

There are enough reasons, however, to dispel the notion that international law is not law. To begin with, the problem with Austin's view is that it was obviously limited by the experiences and realities of the era in which it was formulated. What distinguishes international law from international relations, generally, is that it is a distinctive mode of discourse because of the rules, the procedure and the process which it employs in dealing with questions. Even the formulation of questions in a dispute of a political or social nature between peoples and states is affected by the input of knowledge about international law. Thus, Anthony D'Amato contends that international law is best described as an autopoietic system of norm generation and norm recognition (D' Amato 2003: 338; Samore 1958: 41–43). Every state does accept the existence of international law as something that is distinct from every day international intercourse. That acceptance of the reality of international law is important in refuting the proposition that international law is not law. Indeed, it is a correct observation that 'no historical example has been found of a state choosing total international outlawry' (*ibid.*).

States have developed a 'law habit', as noted by a host of writers, including Hans Morgenthau, James Brierly and Malcolm Shaw (Morgenthau 1985: 312–13; Brierly 1963: 41–42, 68–76; shaw 2003: 1288; Shawarzenberger 1952: 3). The great majority of the rules of inter-national law are generally observed by all nations without actual compulsion, for it is generally in the interest of all nations concerned to honour their obligations under international law. Even where an administration continues seemingly unscathed, the display of an egregious attitude to international law eventually begins to corrode public confidence in the political regime and produce both predictable and not-so-easily predictable, political and social consequences. By the third anniversary of their controversial invasion of Iraq, both

the UK and the US had witnessed a trebling of military desertions. Military lawyers and campaigners have suggested that significant levels of disaffection over the legality of the occupation of Iraq were responsible for the extraordinary levels of discontent within the military ranks, as typified in high profile desertions and the growth of the so-called 'refuseniks'.¹⁰ Recruitment to the British army, particularly the Territorial Army, also suffered a downward slide largely due to perceptions of the unpopularity and illegality of the invasion (Greenwood 2006).

Perhaps the best evidence in favour of the legal value of international law is that it is accepted and treated as part of the law of the land in many national constitutions. Thus, Gray J. said in the *Paquete Habana*, 'International Law is part of our law and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination'.¹¹ The British Lord Chancellor, Talbot, also said in *Buvot v. Barbuit's Case* "the law of nations in its fullest extent is and forms part of the law of England."¹² Certainly, international institutions, including the UN and the International Court of Justice (ICJ), treat international law as legally binding and not just as a set of ethical rules or regulations. In any case they owe their very existence to the precepts and rules existence of international law.

Public International Law as Hegemony

It may, thus, be considered today that the never ending dispute as to whether international law is law was, in fact, artificially kept alive for the last 400 years, representing the era of the modern international system. The question has, however, acquired a new and potent dimension in the sense that the focus of enquiry is: should international law, as we know it, continue to exist, in light of the emergent contradictions of the last quarter-century, which continue to expose grave inequities and biases in the system. Thus, although treaties are still being made and respected, and international courts and tribunals continue to

¹⁰ A quote attributed to Malcolm Kendall-Smith, an RAF Officer who was successfully court-martialled and jailed for his refusal to return to his duties in Iraq, <http://www.stopwar.org.uk/StoptheWar-Kendall-Smith.htm> (accessed 27 May 2006). See also Carrell 2006.

¹¹ 6. 175 US 677 at 700.

¹² (1737) Cas. Temp. Talbot 281.120; 10 (1735) 25 E.R. 777.

hand out judgements more honoured in their observance rather than in their breach, there is much evidence to show that enquiry into the 'mythology of modern law' ought to be extended to international law as well. Legal philosophers like Peter Fitzpatrick, adopting a post modernist approach, have, in recent times, correctly insisted that enquiry into what law does and is supposed to do is of primary importance to legal scholars (see Fitzpatrick 1992, 2001). The results of such enquiry arguably form the basis of determination of the legitimacy of systems of law, and this approach must be brought to bear more seriously to the field of international law

Critical scholarship in international law, however, also agrees that international law and international commercial regulations generate laws of domination, reflecting westerncentricity and an expression of a 'masculinist/machoist' ordering of the international system (Lissitzyn 1963). Such critical views have also been expressed by judges on the bench of the ICJ. Judge Amman in the Barcelona Traction case noted that 'certain customs of wide scope became incorporated into positive law when in fact they were the work of five or six powers'.¹³ Any serious inquiry into this particular issue would reveal this reality even in the practice of the major international and national courts and tribunals. Whether it be the *Trendtex* case, where the plea of sovereign immunity was held not to avail the Central Bank of Nigeria against a company in England,¹⁴ or recent commercial arbitrations, developing states have repeatedly been short-changed. The justice meted out to them by foreign courts and international arbitral tribunals is questionable. Where *lex lata* is sufficiently in favour of an African state as against its western counterpart, development

¹³ Case concerning Barcelona Traction, Light and Power Co. (Belgium v. Spain), ICJ Rep. [1958], 308. Materials on all ICJ cases are available online at: <www.icj-cij.org> (accessed 1 April 2009). For wider perspectives on this issue, see the following: Mansell, Meteyard and Thomson, 1995: 1–27 Sinha 1996; Grovogui, 1996. As James Thuo Gathii puts it: '[A] major research theme that unites this diverse anti-colonial intellectual tradition is its primary focus on arguing about the limits within which the newly independent nations of Africa would embrace an international law that was Eurocentric in its geographic origin' (1998).

¹⁴ *Trendtex Trading Corp v. Central Bank of Nigeria (Trendtex)*, [1977] Q.B. 529; 2 W.L.R. 356, [1977] 1 All E.R. 881, [1977] 1 Lloyd's Rep. 581.

of the law is arguably accelerated to reverse the advantage.¹⁵ When *lex feranda* is postulated in the interest of justice by African states, the formal and substantive qualities of international law are affirmed. This trend is particularly disturbing when the courts in issue are international courts such as the ICJ and the Permanent Court of Arbitration (PCA). The tendency also prompted Judge Ajibola to attest in his Separate Opinion to the Territorial Dispute (Libyan Arab Jamahiriya/Chad) that it appeared as if territorial issues relating to Africa were constantly being judged from Eurocentric eyes.¹⁶

There are substantial reasons to hold the view that events which took place since the 16th and early 17th centuries, as accentuated by the practice of colonialism, have given certain states an easier ride in international trade, military affairs and the use of technology, among other fields. Indeed, feminist legal theory is beginning to wake up to the skewed functioning of international law.¹⁷ The enormity of the task it will entail to strike a better balance in this area of public international law has been described as follows:

This phenomenon does not emerge as a simple gap or vacuum that weakens the edifice of international law and that might be remedied by some rapid construction work. It is rather an integral part of the structure of

¹⁵ Note the eagerness of Lord Denning to depart from precedent in favour of finding liability for the Central Bank of Nigeria in the *Trendtex* case: 'Ought we not to act now? Whenever a change is made, some one some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood . . . I would use of international law the words, which Galileo used of the earth: "But it does move." International law does change: and the Courts have applied the changes without the aid of any Act of Parliament.' See Lord Denning's judgment, *supra* note 24.

¹⁶ Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 13 February 1994, Separate Opinion of Judge Ajibola, para. 8, available at: <www.icj-cij.org/icjwww/icasess/idt/idt_ijudgments_idt_ijudgment_19920203_separateAjibola.pdf> (accessed 1 April 2009).

¹⁷ Feminist legal theorists like Hilary Charlesworth and Christine Chinkin reveal the double standards of international law in assessing the legitimacy of the state. For instance, the entity of Southern Rhodesia and the Bantustans of South Africa were denied recognition basically because they were founded upon the ideology of racial discrimination. However, the systematic exclusion of women from participation in the institutions of government and decision-making has not triggered similar consequences. (Charlesworth and Chinkin 2001: x). See also Miller 1991: 70).

the international legal order, a critical element of its stability. The silences of the discipline are as important as its positive rules and rhetorical structures (Miller 1991: 70).

Particularly convincing is the suggestion that the silences of the discipline are as important as its positive rules and theoretical foundations. This issue will be elaborated upon below, but the conclusion we must reach at this stage is that public international law is law and the reasons for its being considered as law are also the basis upon which other parts of the proto international law are 'law'. The deficiencies of the part (public international law) and the sum of the parts (proto international law)' discussed throughout this essay, only go to show that there is something worth saving for the good of all states and humankind.

Strategies of Underdevelopment of Proto International Law

It is observable that the hegemonic advantages possessed and exercised by Western powers are derived from the deployment of a set of strategies. The first and most successful strategy that the West has used to capture international law is to lay claim to authorship of the system. Malcom Shaw displays the full attributes of this intellectual aggrandisement in its best traditions when he writes 'The foundations of international law (or the law of nations) as it is understood today lie firmly in the development of western culture and political organisation'. Scholars from the developing world are usually more circumspect in drawing attention to the earlier origins of international law, which predate its acceptance in the western countries of Europe (See Umozurike 1993: 7–9; Okeke 1986, 1997: 328; Diop 1991; Latouche 1996).

While it is true that much of the content of modern international law is dictated by the demands of western interests, it is not true in any sense at all that it is the European or western mind that is uniquely compatible with the idea of international laws.¹⁸ It is indeed

¹⁸ According to this view, international law reflects a particular way of perceiving the world, in which even the most fundamental premises on which the system is based, such as the principle of sovereignty and the *pacta sunt servanda* principle, are so inherently western that it may be said they were developed merely to ensure the smooth running of western interests and business.

possible to say that, just as entire continents were acquired by force and through various strategies, international laws necessarily became a desirable high ground to be controlled as a means of direction of the subjugated in the international system. Furthermore, the direction of international law making, its policies and decision-making mechanisms had to be hijacked in furtherance of the colonial and imperial agenda, respectively. Interestingly, the mythology of the inherent exclusivity of international law to European tradition and ideals is actively promoted among European legal writers. Perhaps even more interesting is the perception that, in the absence of traditional empires, certain European writers and thinkers appear to have settled for a new claim to authorship as well as an arrogation of the right to inscribe. Hence, the so called 'idea of European International Law' (Orakhelashvili 2006: 316).

Certain observations may be made at this stage. First, assertions that international law is a European tradition are 'not only conceptually flawed but . . . also unsupported by evidence. The origins of international law lie outside Europe, and at no stage of its development has international law been a truly European system' (*ibid.*: 315). Second, it is important to note that the concept of the exclusivity of international law to European thinking is an engineered falsehood, conveniently deployed as part of the general imperial project of western Europe in the past few centuries. There is incontrovertible evidence that the predominant position, from as far back as the 7th century until the 19th century, even among European classical writers, was that international law is universal, based on natural law, and is applicable to all nations. The writings of Hugo Grotius,¹⁹ Francisco de Vitoria²⁰ and Emer de Vattel (de Vattel 1916: 4–6) clearly express the organic nature of international law, as arising from the shared universal values and traditions of various human civilisations. The classical European writers also perceived public international law, not as a law of domination, but as a law of order, and the means of avoidance of anarchy

¹⁹ Grotius himself treated international law as universal and secular. See Nys 1894: 151–159; Nussbaum 1954: 86; Orakhelashvili 2006: 316.

²⁰ Francisco de Vitoria pleaded that non-Christian nations in America were not to be treated as objects of conquest, but ought to be regarded as nations with legitimate princes, and that wars could only be waged against them for just causes (de Vitoria 1917: i-vii, 87).

and strife. It was realised that European imperialism had the potential to create both. Third, the idea that international law had a specifically European character was most actively and fully developed in and around the 19th century, on cue for the acceleration of an ongoing imperialist project of subjugation of other independent peoples and continents who were largely unaware of the full intentions of European rulers. It was at such a stage that the ‘satanic verses’ of European jurisprudence were penned by the likes of Henry Wheaton (1886: 17–18), John Westlake (1904: 40) and James Lorimer, who amplified imperialistic thinking into what was regurgitated as facts. Lorimer wrote:

The sphere of plenary political recognition extends to all the existing States of Europe, with their colonial dependencies, in so far as these are peopled by persons of European birth or descent; and to the States of North and South America which have vindicated their independence of the European States of which they were colonies. The sphere of partial political recognition extends to Turkey in Europe and Asia, and to the old historical States of Asia which have not become European dependencies — viz., to Persia and the other separate States of Central Asia, to China, Siam, and Japan. The sphere of natural, or mere human recognition, extends to the residue of mankind, though here we ought, perhaps, to distinguish between the progressive and non-progressive races. It is with the first of these spheres alone that the international jurist has directly to deal. [However, he] must take cognisance of the relations in which civilised communities are placed to the partially civilised communities which surround them. He is not bound to apply the positive law of nations to savages, or even to barbarians, as such; but he is bound to ascertain the points at which, and the directions in which, barbarians or savages come within the scope of partial recognition. In the case of the Turks we have had a bitter experience of extending the rights of civilisation to barbarians who have proved to be incapable of performing its duties, and who possibly do not even belong to the progressive races of mankind (1883: 101–2).²¹

²¹ Such unbecoming inscriptions of ‘otherness’ are also found in other unexpected quarters. Hegel had occasion to vituperate: ‘The Negro, exhibits the natural man in his completely wild and untame state. We must lay aside all thought of reverence and morality — all that we call feeling — if we would rightly comprehend him; there is nothing harmonious with humanity to be found in this type of character . . . They have no knowledge of the immortality of the soul . . . the devouring of human flesh is altogether consonant with the general principles of the African race’ (Hegel in Poliakov 1974: 241): For further discussion of the inscription of the ‘Other’, see Manganyi 1985: 152.

The emerging literature, however, typifies more forthright and robust thinking:

The idea of European international law as developed by its proponents has from the outset been a racist idea that misrepresented the real character of international law. As is clear, universal international law is possible both from naturalist and positivist perspectives. International law has always been universal both because its natural law element inherently implies universality as upheld by classical writers, and also because state practice as an aspect of positive law has consistently supported its universality (Drakhelashvili 2006: 347; emphasis added).

International law, rather than being European in origin, was indeed a victim of European aggression, machination and imperialism. This determined the decidedly exclusive character international law acquired among the European states. It also accounts for the abusive character of the 'international law' that permitted colonialism, wars of aggression and genocides in the 17th to 20th centuries. For many generations, international law receded into and was reduced to no more than the public law of Europe. As a commentator put it:

There could be no law as between entities that do not want the others to exist, that wanted to exterminate other populations or absorb their territories. There was hardly any law between the colonialists and the colonised, between extremist religionists and others that wanted to convert or destroy, much as there might have been hortatory guidelines for their destruction (Casesse 2001: 25–27).

Classical international law, therefore, existed in patches, as between certain rich and powerful states. And it was not until the end of the 18th century that it was extended to include the rebel European colonies which gained independence in North and South America. Turkey became the first non-Christian nation allowed to be considered subject to international law, around the mid 19th century. It was the advent, in 1920, of the League of Nations that made it possible for international law to apply automatically to 'any' state which chose to become a member.

The underreporting of the contributions of developing states to international laws, particularly in the last century (despite its relative recentness), is symptomatic of the 'editing' of international legal history syndrome afflicting legal literature. But perhaps more remarkable is the largely ignored story of the contributions of erstwhile civilisations

and great empires to the development and practice of international law, international commercial relations and diplomacy. The role of Islamic civilisation in ‘midwifing’ modern international law is largely ignored by all but the most meticulous writers on the topic. The history of international law goes back into antiquity — to ancient Egypt, China and India. By the 15th century BC, the states of the Middle East — Egypt, Babylon, the Hittite Kingdom, the Mitanni and the Assyrian Empire-maintained contact. The kingdom of Ghana lasted from 300 to 1087 AD and conducted international trade with Morocco. The king of Portugal exchanged ambassadors with the kings of Benin and the Congo (See Umozurike 1993; Okeke 1986). In Europe, both Canon law and Roman law had considerable influence on the development of international law during the feudal period. The Renaissance of learning, the Reformation and the discovery of the New World followed feudalism in Europe. Writers of that period, such as Bodin and Machiavelli, drew inspiration from Roman law, Canon law and National law. The Dutch Hugo Grotius was outstanding among them as he was the first to complete a comprehensive treatise on international law — *De Jure Belli Ac Pacis* (1625), which earned him the recognition that persists today as the father of international law (See Grotius 1925). In his *Mare Liberum* (1609), he maintained that international law applied to all people and was not bounded by religious or racial limitations (Grotius 1609).

Arrogation of Authorship and the Power of Inscription

One of the most underreported facts of academic legal literature is the near total monopoly that western writers, scholars, diplomats and statesmen have in recording the history of international relations and the evolution of the international legal order. This monadic control affords the western states the near singular advantage of cultivating the international legal agenda, as well as opportunities to nurture, amend and abrogate principles of international law in accordance with western regional and group expediencies. At the root of such considerable influence is a deliberate arrogation of the power to declare, to define and to recognise. This influence, in its purest form, is expressed in Anglo-Saxon scholarship, and is guarded jealously through the processes of economic, diplomatic and political hegemony. Little or no compromises are required to keep this base structure of power — a structure that is carefully maintained in the various fora of international legal scholarship (books, journals and online publications)

and in the law-making processes of international relations, among them the processes effected by the main international institutions, whether regulating public international law or international trade law (for example, the International Law Commission, the International Chamber of Commerce).

Another means by which this essentially unfair hegemony is maintained is simply by retaining the 'upper hand' with respect to the inevitable struggle decrease as to what the international system of laws should continue to recognise, or decide to amend, or denounce and abrogate. This hegemony is retained across the board with respect to most issues of international concern, whether it is the right to host major sporting events²² or the recognition of World Heritage Sites.²³ In many cases, by the time the international community decides to address international inequities through legislation and regulation, the battle has already been lost because the rudimentary tools of reasoning that could be employed to discuss the topic, issue or subject area and the pertinent concepts have already been settled through pre-existing definitions that form the pool of the expression of international laws (See Nairn 1975).²⁴ Interestingly, this reality has not attracted significant attention in the writings of scholars from the global south either. The project of westernisation of knowledge has advanced so far and is so gripping in its dispersal that a writer laments of the African scholars, 'the blinders of colonialism had so profoundly warped intellectuals' views of the African past that we had the greatest difficulty, even among Africans, in gaining acceptance for ideas that are today becoming common place' (Diop 1991: 2).²⁵

²² The Fédération Internationale de Football Association (FIFA) recently banned international matches from being played at more than 2,500 metres above sea level, citing medical concerns, while the Andean nations — including Bolivia, Ecuador and Peru — remain opposed to the idea (Carol 2007).

²³ Out of the 138 states parties that have their cultural and natural heritage listed on the World Heritage List, only 33 of these states are from Africa, the very cradle of mankind. See Garba 2006.

²⁴ In this sense, the whole globalisation project becomes simply a set of conceits and, according to Terry Eagleton, the rationale for the defence of westernisation is based on 'bigoted and obtuse' approach to other cultures. See Terry Eagleton's review of *The Prophets Of Prosperity* in the *New Statesman*, (2006).

²⁵ Sadar perhaps summed it up best when he lamented that Eurocentricism is not simply 'out there' in the West, but 'also here in the non-West' (1999: 44).

It is hardly possible to overexaggerate the advantages given to the West by the strategic position of formulating hundreds of significant definitions and concepts that form the bulk of issues and doctrines known to international legal regulation. This reality is persuasively captured by Z. Sadar, in relation to the inherent and aggressive influence of the task assumed by those who undertake to establish definitions. He insists that definitions in reality belong 'to the definers — not the defined'. Thus, he suggests that the very basis of many of the concepts that are held up as sacrosanct in international relations have been constructed for the benefit of the definers and, as such, have the added function of working against the interest of 'the others'. In this case, the bulk of the underprivileged states of the south really ought to recognise the imperative need for a systematic and comprehensive re-evaluation of even the most basic assumptions and definitions within *lex lata* in various fields of the proto international law. The real power of the West, Sadar persuasively asserts, is not located in its economic muscle and technological might:

Rather, it resides in its power to define. The West defines what is for example, freedom, progress and civil behaviour; law, tradition and community; reason mathematics and science; what is real and what it means to be human. The non-Western civilisations have to accept these definitions or be defined out of existence (1999: 43–44).

In this way, self-censorship contributes to the postcolonial marginalisation of the south. Propping up this system of advantages often takes the form of publishing censorship, refusal to commission new editions of certain works and confining such revolutionary works or those contradicting the norm to lesser known publishing houses, and even refusal to stock certain works in libraries. Among the many petty strategies deemed necessary, what Barry Buzan suggests is the need of powerful western states 'to see themselves, and be accepted by others in rhetoric and behaviour, as having this rank' (2004: 69). This is also why Sadar considers it as evident that:

[t]o understand Eurocentrism we must thus have to deconstruct the definitional power of the West. Eurocentricism is located wherever there is defining influence of Europe, or more appropriately, the generic form of Europe — 'the West'. Wherever there is the West, there is Europe, and Eurocentrism is not usually that far behind . . . As a civilisation, the West is of course everywhere: the Western civilisation is not located in a geographical space but in these days of globalisation it envelops the globe

with its desires, images, politics and consumer and cultural products. As a worldview, the West is the dominant outlook of the planet (1999: 44).

The building blocks of the current situation were carefully laid out in the whole colonial project; the desire to reach such a situation was precisely one of the impetuses that drove the project of colonialism and imperialism in the first place. In a sense, it is one of the remaining spoils of the wars of colonial empire-building and imperialist expansion. Roy Grinker and Christopher Steiner correctly identify the process of writing and representing as a tool of the imperialist project, and align themselves with the impeccable reasoning of the anthropologist Johannes Fabian, who wrote:

Colonial expeditions were not just a form of invasion; nor was their purpose inspection. They were determined efforts at in-scription. By putting regions on a map and native words on a list, explorers laid the first and deepest foundations for colonial power. By giving proof of the 'scientific' nature of their enterprise they exercised power in a pure subtle form — as the power to name, to describe, to classify (1986: 24).

Yet, the advantage of definitional power is not just a reality of historical fortunes. It is, in fact, part and parcel of a continuing strategy which seeks to retain the advantages of global dominance, whether acquired through colonialism, as in the case of the older European nations, or the sheer economic and political dominance of the newer or emerging western powers that are both within and outside Europe. The strategy is a characteristic of the collective empire retention mentality and ideology that ties together the hegemonic north, one that is particularly pronounced in the strategy of western European states with an extensive colonial history.

While western writers attribute concepts which, by common sense alone, would certainly have occurred in other cultures and civilisations to strictly western origins, they are quick to emphasise the necessary universal origins of other significant concepts and ideas.²⁶ For instance, with respect to the celebrated ancient Chinese text,

²⁶ According to such thinking, the received wisdom is that democracy is the original product of Greek thinking, the 'rule of law' could only have been the product of the thinking of A.V. Dicey, and the idea of 'separation of powers' could only have been the product of the mind of Baron de Montesquieu.

Sun Tzu (translated as *The Art of War*), a military treatise reputed to have pertinent application in economics, law and many other fields, a commentator quickly notes:

The wisdom of this book is profound human knowledge, something to which every one of us has access. It does not belong to any proprietary group, Chinese or Western . . . Such abilities grow naturally from our native capacities to see, hear, think and interact with the world . . . the wisdom found in this text is not a foreign import but is instead a natural flowering of common human faculties (See Sunzi 2002: x, xiii, xiv).

This claim to universalist roots was proclaimed despite the author's statements, that the Sun Tzu emerged from the oral tradition sometime in the 4th century BC, at a time when Chinese models of governance, warfare, morality and social organisation were experiencing extreme dislocation. In other words, the precise socio-economic conditions of a civilisation at this time popularised a system of thought, ideas or concepts, though this does not preclude us from understanding the universalistic impetus or origins for the precise set of ideas propounded. We indeed agree with this analysis. Our thesis, however, is that this is exactly why most other concepts, claims and ideas to which western states and civilisation lay authorship, especially in the social sciences and particularly in all the areas of international regulation and relations, have such a universalistic root. It is patently inadequate and unfair to let authorship claims upon them continue unchallenged. This reasoning is particularly apt since nearly all major concepts in law, ethics and religion are, in western texts, traced only as far back as early Greek civilisation. It is as though the contributions of other human civilisations prior to the height of Greek civilisation are not worth mentioning or there was no evidence that they existed. The enthusiasm with which ideas and fields of thought are linked to European origins defies the logical fact that the collective human heritage of legal thinking needs to be celebrated and acknowledged. In tracing the epistemic origins of international laws, the origins of European legal thinking ought to be traced with equal vigour, beyond their Roman and Greek origins, to Egypt, Indian nations and Chinese civilisations, among others. It falls on the likes of Diop, however, to highlight the necessary points of reference in submissions such as follows:

In so far as Egypt is the distant mother of western cultures and sciences, most of the ideas that we call foreign are oftentimes nothing but mixed up, reversed, modified, elaborated images of the creations of our African

ancestors, such as Judaism, Christianity, Islam, dialectics, the theory of being, the exact sciences, arithmetic, geometry, mechanical engineering, astronomy, medicine, literature (novel, poetry, drama) architecture, the arts etc (1991: 3).

In other words, the Foucauldian ‘history of western knowledge’ appears to be incomplete without reference, at the very least, to its African origins (Foucault 1994: 15). This considered, it is ironic that Africa has turned out to be arguably the most scorched of the ‘three dependent continents’.²⁷

Strategic Engagement and Disengagement with Epistemic Discourse

It would seem natural that the very states to benefit most from the position of things in international law would be the most reluctant to proclaim lacunae or upset the cart. Wherever substantial advantages have been secured, changes to the legal regime are resisted with vigour. In reality, unstoppable changes continue, formerly poor countries inexorably develop against odds and the unexpected vicissitudes of life do change existing advantages that are enjoyed by certain countries. In such circumstances, the developed states endeavour to continually reinvent the law in their own favour. A common strategy to secure desirable change in the law is one whereby powerful states declare that the law as it is stands does not govern a prescribed set of circumstances. Commonly, a new direction is charted, with disregard of the desirable principle *caveat humana dominandi, quod omnes tangit ab omnes approbatur*,²⁸ and changes are forcefully dictated by the powerful state(s). This phenomenon arguably explains recent attempts at rewriting the IMF regime²⁹ and the so-called restructuring of the United Nations by the same parties that have decided the course

²⁷ To borrow the terminology of Jean Ziegler, in his book *Switzerland Exposed* (1978: 10). For a chronicle of the conveniently forgotten atrocities committed by colonial powers within the last hundred years, note the story of Belgium in Congo. See Hochschild 1999.

²⁸ That is to say, what concerns all must be approved by all.

²⁹ Note the deep scepticism of civil society groups to the strategic review of the Bretton Woods System: see Bretton Woods Project (2006); see also World Vision (2006). This memorandum crucially notes that ‘Capital has flowed “uphill” from poor to rich countries’, and that globalisation is not an ‘actorless’ phenomenon without victims. Written evidence to the Select

of international financial history so far.³⁰ Where the rules cannot be changed to serve national interests the most powerful simply opt out of systems of law which are of universal importance. The US, in this manner, exempts itself from the International Criminal Court,³¹ the UN Law of the Sea Convention³² and the Convention on the Rights of the Child.³³

The strategy of deliberate inaction is also discernible in areas where technological improvements and breakthroughs place a few powers and their close allies in a much more formidable position *vis-à-vis* other states. A series of arm-twisting techniques are employed to either change the agenda or ignore the complaints of a few states.

committee is available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmtrasy/875/875we01.htm> (accessed 3 April 2009). For more information on the Bretton Woods Projects, an independent NGO established by a network of UK based NGOs, see www.brettonwoodsproject.org/about (accessed 3 April 2009).

³⁰ Many reviews of the UN administrative system have been undertaken by the UN itself since 1997, the latest being the Investing in The United Nations for a Stronger Organization Worldwide: Secretary-General's Report on Management Reform [A/60/692] in March 2006; the Comprehensive Review of Governance and Oversight was delivered to the Secretary-General in July 2006; the Review of the UN Internal Justice System in July 2006; and Recommendations of the Panel on System-Wide Coherence, November 2006. However, the most important reforms from the perspective of states are those that will deal with the functioning of the Security Council and the powers and functions of the organisation. Note the call by the Secretary General for changes to the Security Council itself. Unfortunately, it is in these areas that the leading western powers are set to prevent progressive change and are trying to emasculate the organisation, while presenting a discourse of reform (Press Conference, SG/SM/8855, 8 September 2003 and Address to the General Assembly, SG/SM/8891, GA/10157, 23 September 2003). Luck 2005: 407. We do not, however, share Luck's apparent scepticism of the need for change. He characterises the Secretary-General's call for changes to the Security Council as a 'puzzling disregard for the history and politics of the world organisation'.

³¹ Rome Statute of the International Criminal Court, 2187 UNTS. 90, entered into force 1 July 2002 (Schabas 2004: 701, 719–20).

³² 21 ILM (1982) 1261; Misc 11 (1983), 8941; 1833 UNTS 3 (1994); Brownlie 1983: 129.

³³ Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

The law is allowed to stultify long enough for there to be sufficient grounds to claim that a rule of law has now emerged to protect the favourable *status quo*, either by acquiescence, or under 'instant customary law'. Examples of this include the spatial demarcation boundary plane question between airspace and outer space.³⁴ Similarly, a myriad of important legal issues regarding the surveillance of national territory from outer space are left unanswered. Meanwhile, the states with requisite technology forge ahead in securing important advantages through this key technology, such as through remote sensing and other military applications. The right to privacy is one that is commonly recognised by all legal systems. The individual is protected in most human rights instruments, national and international, from abuses and infringements on his or her right to privacy. Legal jurisprudence in this area continues to be fine tuned in an expansive manner. The right of corporations not to have their industrial secrets spied upon and exposed is equally protected in most developed commercial regimes. Yet, there is silence on the right of nations to their 'aerial privacy', in terms of a freedom from sovereign and commercial visual intrusion. State secrets that are visible from space include natural resources, archaeological sites, military installations and industrial technology, among many others.³⁵

The most direct threat to state privacy, however, comes from deliberate space flights over state territory with the intention of spying. This may take the form of low orbital flights or the exploitation of the allowance made in air law for the operation of pilotless aircraft over

³⁴ The situation is such that: 'There is no universally agreed precise legal, technical or political definition of either the boundaries separating airspace from outer space or of the term outer space itself. See The Minister of State, FCO, Hansard, H.C., vol. 546 W.A. 66, 23 July 1993; the representatives of Canada, Great Britain, the United States and some other Western states have traditionally expressed opinions during the legislative work at the United Nations Committee on the Peaceful Uses of Outer Space: 'it is not possible at the present time to identify scientific or technical criteria, which would permit a definition of outer space, See UN Doc A/AC. 98/2 passim. See also Piradov 1986: 183–184.

³⁵ Invaluable archaeological artefacts and sites may be identified from space and something as basic as a simple Google search from space has produced accurate identification of important Roman era ceramic artefacts. See Adam 2005.

national territory.³⁶ The impending possibility for misunderstanding and abuse is reflected in the current use of American pilotless espionage planes in the prosecution of the so-called 'war on terror' or 'Operation Enduring Freedom'.³⁷

Whenever it becomes impossible to ignore an international problem that was created by the direct malfeasance of powerful western interests, a 'born again' attitude is adopted to the pertinent issue, socio-legal policy or sensitive international problem. Recent 'Damascusian' conversions towards environmental friendliness by the very states that powered their own industrial development by a disregard for the global environmental impact are representative of such selective and opportunistic action and inaction towards international regulation (Braithwaite and Drahos 2000: 262–67). The loudest calls against environmental damage arising from economic development that will be recorded in history would appear to be those against developing states like Brazil, China and India. These will occur without any serious admittance of mistakes or, indeed, reparations by the very states that have directly caused the depletion of the ozone layer and damaged the earth, perhaps beyond repair.³⁸

Similarly, it has become clear since the early 1970s that the phenomenon of stolen capital flight is one of the principal causes of

³⁶ Article 8 of the Chicago Convention (1944) prohibits pilotless flights without special authorisation by that state and in accordance with the terms of such authorisation. It may, however, be noted that operators in the developed states conduct the vast majority of pilotless flights, including earth satellite launches. Probably because incidents of interference with civil aviation in this manner are not common and have not led to disputes, there is also an assumption which works in the favour of the developed states that, in the case of earth satellite launches, prior permission of the underlying states is a dispensable criterion. See generally Cheng 1960.

³⁷ Note is taken of the shooting of suspected Al Qaeda terrorist suspects in Yemen via a pilotless predator American spy plane in November 2002. See generally Oduntan 2003.

³⁸ The Brazilian President, Lula da Silva, was quite pointed in exposing this paradox when he stated, 'If you look at the world's forests 8000 years ago or 2000 years ago Brazil still has 68% of its forests. Europe has only 0.3% of its original forests. Don't try to put the blame on developing countries for the planets pollution. 65% of the planets pollution is from developed countries, interview on Hardtalk BBC, 4 June 2007. Hard talk interviews are available at <http://news.bbc.co.uk/1/hi/programmes/hardtalk/default.stm> (accessed 7 June 2007).

underdevelopment. The stolen wealth of developing states over the last half century has found safe haven in the banks and financial institutions of western states. No meaningful regime of prevention was created to stop the problem, and discussions to stem the practice are a very recent development. The international practice of money laundering was also pressed to the advantage of western economies (Petras 2001). Countries of the Southern Hemisphere have been systematically defrauded in this way for decades. Those which have experienced high profile Swiss banking scandals, or have tried to recoup their losses with very little or no cooperation from the Swiss, include Ethiopia, Honduras, Vietnam, Cambodia, Panama, Bolivia, Algeria, Nigeria, and Kenya (Ziegler 1978: 45–57). Rather than heeding the moral imperative to report the suspicious movement of massive sums from the coffers of other friendly states which were largely impoverished, radical governments were conveniently branded communist and many were subjected to covert operations by western intelligence agencies. This often resulted in violently conducted changes of government, engineered from abroad (Cf. Ullman and Wade *et al.* 1996; see also Zeigler 1978).

As a result of the clear link between international money laundering and the funding of international terrorism and other major criminal activities which target the western states, the need to prevent these activities has finally, in the last five years, received better international attention (Buchanan 2006; See also Peel 2006; 33, 43). Many treaties have, thus, been brought into existence over the last few years (Carr 2006: 577–78; See also Redfern and Shimoli 2006; Guha 2006). In this changed climate, some developing states, including Nigeria and Kenya, have successfully traced and repatriated some of their stolen funds. In the case of Nigeria, an estimated 5 billion dollars — stolen by one single dictator Ibrahim Abacha, and siphoned off to dozens of western banks, including the UK and Switzerland — is currently being traced and partially repatriated.

Carrot and Stick Stratagems

The hegemony of western interests through the manifestation of international laws is maintained in equal degree by the use of soft and hard glove measures. Soft glove tactics include the use of economic aid,³⁹ selective application of existing laws, the resort to secretive legal

³⁹ Descriptions of soft power are said to include ‘the ability to entice and attract’ that ‘arises in large part from our values’ (Nye 2002: 5).

processes,⁴⁰ propaganda and misinformation wars,⁴¹ distancing the venues of international diplomacy from the developing world, etc. Hard glove measures are used in state practice to undemocratically affect international laws and international relations. Strategies here include various bullying tactics, such as the orchestration and sponsoring of illegitimate regime changes in the developing world, the use of force, the threat and use of massive technological advantages — no fly zones,⁴² gun boat diplomacy — and outright war.

The strategy of outright coercion of weaker states to accept a course of action in the international system is one which is rarely attested to, especially by the very states that deploy this strategy. However, examples include the ‘shock and awe’ and ‘with us or against us’ discourses of the George Bush led United States government (See Ullman and Wade *et al.* 1996). This strategy delivers the obedience of weaker states to hegemonic interests in the 21st century, in much the same brutal way as it did in the preceding two centuries. A writer noted of the reaction of many African leaders in the immediate aftermath of the September 11 terrorist attacks, after the sabre-rattling pronouncements of the US administration:

Mr. Bush picked up his phone to receive pre-arranged messages of support from African leaders, one after another. Everyone was told to fall in line. ‘You are either with us or with terrorists’. No African leader could dare say anything even remotely close to what the Iranian leader said: ‘We’re neither with you nor with the terrorists!’ Iran was promptly included in the axis of evil (Shivji 2002).

Both the Iraqi invasion and the Afghanistan campaigns reveal clearly that American imperialism, like all previous forms of imperialism,

⁴⁰ The British government, in 2004, resorted to the secretive ‘royal prerogative’ principle to thwart the legal achievements of the indigenous colonial people of the Chagos Islands in a high court judgment which had restored the very principle of human rights set out in the Magna Carta. See Pilger (2007).

⁴¹ In response to scholarly estimates in the reputable *Lancet* that up to 650,000 Iraqis had lost their lives to the Anglo-American invasion of Iraq, the governments of both the UK and the US unleashed a furious campaign of denial, in which the figures were debated (Horton 2007).

⁴² Probably no instance supports the disregard for international consensus in the shaping of air law better than the creation and expansion of the practice of so-called *no fly zones* in Iraq by the United States, United Kingdom and France. See also Ministry of Foreign Affairs of Cuba 1996.

unapologetically tends towards fascism. When this fascism is combined with brutality on the scale and cynicism witnessed in recent American led wars, the consequences for all humanity are certainly devastating.

If carrot and stick strategies do not work, voices of dissent from the developing world are simply ignored, even where their vital economic interests may be at stake. An account of discussions of the stabilisation of green house gas emissions at the Rio Convention provides an example.⁴³ Philippe Sands describes the ease with which the wishes of developing states, some with very large populations, can be sidelined and compromised (2006: 85–86).

When the stick element in hegemonic control is wielded, as determined by the powerful few, not even the might of the World Court is allowed to interfere with the policy. The question as to whether the ICJ will judicially review the actions of the political organs of the United Nations is one which is being asked with increasing frequency.⁴⁴ Scholars from the developing states have, however, vociferously canvassed for a fairer position, insisting that the World Court can and should judicially review the political instruments of the UN, which have often become bullying tools (See Akande 1997: 314, 376–77).

The Great Western Club and its Game Theory Cooperative Philosophy

The game theory principle was introduced primarily as a doctrine within the field of theoretical economics. Yet, this principle, arguably, also has applications within the fields of international law and international relations. It can be used to explain the behaviour of the leading western states in their interactions and engagements with the rest of the world. There is little doubt that the western powers rely on each other in the creation of the perfect conditions for an unequal world. This was true of the colonial period, and continues unabated as a general principle of relations with the developing world, till date. Very few limits exist in terms of the human or legal interests of other states

⁴³ United Nations Framework Convention on Climate Change (Rio de Janeiro, 1992). 31 ILM 849 (1992).

⁴⁴ This question arose in relation to issues surrounding the Lockerbie dispute. See Request for the Indication of Provisional Measures Order of April 14 1992, Official Documents, AJIL, vol. 86, July 1992, pp. 638–67; ICJ Rep. [1992], pp. 3, 114.

or peoples that may be sacrificed in furtherance of the cooperative game behaviour of the powerful states. Justice Gibbs takes judicial notice of this philosophy in his judgment concerning the emptying and ‘unpeopling’ of Chagos Island by the UK, in favour of the creation of US military bases, and in gross violation of the principles expressed in Articles 8 and 13 of the Universal Declaration of Human Rights, (UDHR),⁴⁵ as well as the provisions of the Magna Carta:⁴⁶

It is unarguable that the purposes of the BIOT Order and the Ordinance were to facilitate the use of Diego Garcia as a strategic military base and to restrict the use and occupation of that and the other islands within the territory to the extent necessary to ensure the effectiveness and security of the base. Those purposes were (or could at least reasonably be described as) of great benefit to the United Kingdom and the western powers as a whole.⁴⁷

A strategy in the creation of hegemony by the western European nations, and later on applied by the USSR as well, was to create an impression of danger and instability in the minds of the leaders and the people of lands. There would suddenly be many dangers ‘out there’ from others, even if the danger was really that of the Europeans themselves losing the privileged access they desired. The cooperative game stratagem was taken to its nadir in colonial history during the so-called partitioning of Africa.

In the period of the Cold War, international politics was conducted under the presumption that there was a constant danger of encroachment from the other ideological camp. The strategy involved:

[t]alking disarmament while relentlessly building up their own armaments to dazzling levels; prodding and aiding allied countries to do the same, though on a necessarily more modest scale; making the world more dangerous; compelling even nonaligned countries to keep their defences

⁴⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 adopted 10 Dec. 1948.

⁴⁶ Article 39 of the 1215 version; Article 29 of the next versions. Sir Paul Gore-Booth, senior official at the Foreign Office, wrote to a diplomat in 1966: ‘We must surely be very tough about this. The object of the exercise is to get some rocks which will remain ours . . . There will be no indigenous population except seagulls’ (*BBC News* 2000).

⁴⁷ *R. (on the application of Bancoult) v. Secretary of State for the Foreign and Commonwealth Office* [2001] Q.B. 1067.

high — this is how peoples and governments of the lesser powers have experienced superpower politics after the war (Myrdal 1981: 87).

The entire developing world has been induced into massive spending on defence, a situation which clearly suits the defence industry of the West and serves to improve western economies, just as it increases flashpoints across the globe.

The linkage between military aggression, defence spending and economic fortunes of the developed states is quite clear. Almost all local authorities in the UK (86 out of 88) hold investments in the world's largest weapons companies. Public money and council pension funds are invested into producing weapons of mass destruction, including the so-called Trident nuclear missiles. Three in five councils in the UK invest in companies manufacturing munitions and cluster bombs or their components.⁴⁸

The game scenario, as it operates among the western powers, also permits for 'hegemony among the hegemonies', particularly as regards the primacy of the United States as a superpower.⁴⁹ It requires that even other European states should recognise the position that, as is true of all hegemonic arrangements, the manifestation of the western game theory as described here is corrosive of its patrons as much as its intended and collateral victims. Europe, for instance, at a time during the Cold War became home to 'tactical nuclear weapons not needed in Europe neither for deterrence nor for defence' (Myrdal 1981).⁵⁰ The western European states have had no option but to comply with this near suicidal policy despite traditional unease by European elites

⁴⁸ For details of the investments based on figures released under the UK Freedom of Information Act, see Norton-Taylor 2006. Fuller analysis is available at the website of the Campaign Against the Arms Trade, (CAAT) www.caat.org.uk (accessed 3 April 2007).

⁴⁹ 'No power on earth is stronger than the United States of America today. None will be stronger than the United States of America in the future. This is the only national defense posture which can ever be acceptable to the United States' — Richard Nixon, address to a joint session of Congress, 1 June 1972 immediately on his return from Russia after SALT I (Nixon 1972). Vagts also convincingly accounts for this reality in the statement, 'Hegemony can obviously vary in degree, ranging from empire to first among equals, Vagts 2001: 848.

⁵⁰ As Myrdal further notes convincingly, 'the United States does not need to have these weapons in Europe. If it maintains its strategy of using its nuclear

and escalating dangers to their populations. The threat of Europe becoming the front of a nuclear showdown in an American-led Cold War has resurfaced again in the 21st century.⁵¹

Where participating western states 'go hunting together', the economic and strategic returns are usually very significant. Witness, however, the exclusion of French and German companies from the lucrative contracts arising out of the rebuilding of Iraq after the US led military invasion, to which the former states objected. Comparison may be made with situations where there is agreement between the western powers. Witness here also the significant business and compensatory rewards accrued in favour of the US, UK, France and Germany, as a result of the international sanctions maintained against Libya. Ironically, the African states, upon whom the burden fell to respect the air blockade and other economic sanctions levied against Libya, have derived no benefits as a result of the maintenance of sanctions against a neighbouring state.⁵²

Concluding Remarks: The Imperatives of Liberating Proto International Law from Underdevelopment

Acceptance of the Focauldian, Chomskian, Shivian and Fitzpatrickian invitation to a cynical view of the nature and exercise of power in the international system is not necessarily an invitation to chaos and anarchy. The underdevelopment of international laws is a deliberate

strength to defend Western Europe, it need only detach some of its submarines, equipped with nuclear warheads on ballistic missiles, targeted and ready to fire in case of an attack against Western Europe. That should be sufficient to deter any such attack, (1981: 106). When, in September 1949, the Soviet Union exploded its first atomic bomb, it had successfully joined issues in military terms with the US, and the latter began to abandon the idea of an automatic deployment of its nuclear deterrence. In its place, it appeared to shift the front of a possible war to Europe, with the placement and planned use of thousands of tactical nuclear weapons (*ibid.*: 90).

⁵¹ Vladimir Putin, the Russian president, recently threatened to respond to the US proposals to establish missile defence bases in central Europe by targeting nuclear missiles at European cities. See Wagstyl, 2007; Sevastopulo, Dinmore and Dombey 2007.

⁵² See Oliver 2003. See also Order of 10 September 2003, ICJ Press Release 2003/29, <www.icj-cij.org> (accessed 1 April 2009) Franks 2004; *BBC News* 2004; Koppel and Labott 2004; Federal Republic of Germany (n.d.).

ploy of the rich and powerful states to keep them in subservience to sectional interests. The underdevelopment referred to here is also meant to be a permanent state. The international culture of respect for proto international law must, however, not be allowed to continue to serve sectional or hegemonic interests. The idea implicit in legal and political literature that the absence of hegemony would be tantamount to an invitation to chaos is flawed to the extent that it invites the proposition that the status quo must continue, despite gross and inescapable inequities.

The constant erosion of confidence in the fairness of proto international law may, in fact, snowball into anarchical phases in international relations in the 21st century, just as it did in the 20th century. Like the metaphorical Humpty Dumpty, the pieces of proto international law may prove impossibly difficult to assemble together again. If demands for change continue to be resisted by hegemonic forces in regard to the reordering of *proto international law*, then one of two things will occur: first, the system of proto international law will become so corrupted as to effectively collapse. The possible scenarios include a collapse of international peace and security and, in economic terms, a collapse of international trade and markets. Second, it may well be that developing states, after a sustained and unprecedented campaign, will successfully seize the agenda, and a fairer proto international law will gradually take shape.

Demand for greater democratisation in the making of international law and in the conduct of international diplomacy is a consistent position of political leaders from developing states. The Brazilian President had occasion to forcefully assert:

I respect each country and their president but I also want them to respect my country, Brazil . . . I understand that the five permanent members of the UN Security Council do not want any change but we need to convince the world that there is no reason Latin America should not be represented on the Security Council, or that Africa should not be represented or that important countries like India, Germany and Japan should be members . . . I am confident that we'll manage to reach an agreement.⁵³

The creation of groupings like the Group of 20 is apposite to the extent that it signifies the political, if not legal, recognition of Fast Developing

⁵³ Luiz Inacio Lula da Silva, President of Brazil, interview on Hardtalk BBC 4 June 2007.

States (FDSs), and increases the chances of democratisation of international trade and development.⁵⁴ Yet, care must be taken to empower all sovereign states and their peoples and regions, particularly the so-called Least Developed States (LDSs), so that they may meaningfully contribute to the debate and processes of challenging manifest unfairness in contemporary international trade.⁵⁵ In other words, focus should not be on emerging markets alone, but must include lesser and least developed states. These states must be allowed to reflect their own peculiar positions, despite their inability to seize the diplomatic agenda.

In the 21st century, international laws remain an expression of power to subjugate and control the vast majority of states and their peoples to the interests of a few. International power may thus be seen as the basis of a 'pernicious influence' that corrupts both the bearer and the audience it is inflicted upon. The discontent of the 'discontented' (states, writers, NGOs, freedom fighters, global anti-corruption activists, Africanists, anti-globalisation activists etc.) is rising to a crescendo. It is the responsibility of all legal thinkers, and not only the less powerful, to challenge this state of affairs. The silent desperation of the developing world is mirrored in the words of Turkish poet Nazim Hikmet:⁵⁶

You know, my love, that Switzerland is called the silent strong-box,
full of fortunes that have been abstracted from somewhere or
something else . . . Why have I written all this to you about
Switzerland? Perhaps out of envy for that little garden amid the
desert of Blood. After all, have not the flowers in that little garden
been — are they not still? — watered by our blood flowing in the
desert?

⁵⁴ Germany, which was part of the so-called Group of 4 that made a bold diplomatic effort to secure UNSC seats; see *Economist* 2005.

⁵⁵ Representing around two-thirds of the world's population and 90 per cent of world gross domestic product, the G-20 is uniquely placed to tackle issues of significance for the international economy and monetary system. Materials on the G-20 are available at <http://www.g20.org/> (accessed 28 March 2003).

⁵⁶ For the life and times of this interesting poet, visit http://www.cs.rpi.edu/~sibel/poetry/nazim_hikmet.html (accessed 22 July 2007). The growing movement against trade injustices and inequities in the international system is treated in Clark 2007 and Stiglitz 2002.

And in the peaceful snowy nights of Switzerland
Do the stars glitter –
Watered by our tears?
(Nazim Hikmet 1902–1963)
En passant par la Suisse ⁵⁷

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⁵⁷ Excerpts cited in Ziegler (1978: 39).

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