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and order paradigm that appeals to law as a moral fix, when in fact law is also responsible for this morass.

INTERNATIONAL LAW AND ITS DISCONTENTS: RETHINKING THE GLOBAL SOUTH

*By Balakrishnan Rajagopal**

I.

I have much to agree with in the remarks of Professor Otto and Professor Santos—particularly their focus on the postcolonial and the distinction between Freud and Stiglitz in thinking about discontents.

I want to make three interrelated arguments: first, international law's discontents have always been its peripheries, whose relationship to the core of international law has been historically captured by the TWAIL scholarship; second, this periphery (which, following current conventions, I shall call "the global South") is itself a complex arena now, not solely defined by victimhood but by a hegemonic and a counter-hegemonic global South which are themselves in tension; and third, that the rise of complexity and tension within the global South is symptomatic of the general crisis of the global economic and political system, symbolized most recently by the global economic crisis, but in fact much deeper and much longer in duration. This crisis could be both a moment of opportunity and challenge for international law, but that depends on which global South ends up having influence on the evolution of international law and how it relates to the hegemonic global North.

Perhaps the most important critique of modern international law has been the charge that it is a Eurocentric regime, which has helped to erect and defend a world of deep injustice characterized by violence, exploitation, and inequality. This critique, which we can term as one coming from the Third World, or from the perspective of the cognitive and material justice issues raised by taking the Third World seriously, is what I want to talk about.

In terms of international law, the various elements of this critique can be discussed under the rubric "Third World Approaches to International Law" (TWAIL).¹ I will divide these generations of critique into two: TWAIL I and TWAIL II (and may continue as future versions).

TWAIL I began around the turn of the 20th century with the articulation of the Calvo and Drago doctrines; a critique of imperialism; the rise of Japan; the establishment of administration of colonies under international control instead of under colonial powers; the call for a new welfarist function for international law; and a rethinking of international law as administration. This picked up in momentum after World War II and decolonization when developing countries began challenging core elements of traditional international law. The scholarly work by Mohammed Bedjaoui, RP Anand, TO Elias, and many others, infused by the spirit of Bandung, outlined the main elements of this critique in academic terms, but what gave it global historical importance was the resistance posed by the people of the former colonies. These scholars were exercised by their desire to turn international law from its Eurocentrism toward more universality, and more legitimacy.

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¹ The literature on TWAIL is by now voluminous. For a recent summary, see James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 *TRADE L. & DEV.* 26 (2011).

I would characterize this tradition, following the Freud-versus-Stiglitz framing for this panel, as the Stiglitzian version of international law, because, like Stiglitz—who believes that it is the failure of globalization to benefit everyone equally that is the problem and therefore we should work to make globalization work for all—TWAIL I believed that it is the failure of international law to be truly universal that contributed to all its moral and political failure, and therefore we need to make it truly universal. Legal doctrines such as PSNR (permanent sovereignty over natural resources) or the sources doctrine were articulated in a way that shows this to be the case.

If we contrast this with TWAIL II, there is a very interesting shift from Stiglitz to Freud. There is a shift from looking at international law's absence as the source of all problems, to looking at international law's presence as an often unwitting but sometimes conscious instrument of injustice. TWAIL II is committed to the objective of democratizing the international legal system and making it work in a just manner, even as it has abandoned the faith that TWAIL I reposed in key ideological assumptions such as the central role of the nation-state and its ability to bring about outcomes that benefit humanity as a whole as well as that of the planet. This loss of faith is a characteristic of TWAIL II.

My objective is to come from this perspective in thinking about the nature of the discontents in international law, which differ from the nature of the discontents in TWAIL I.

TWAIL II began with a critique of the world system as an exploitative one in which the poor, weak, and vulnerable have no chance unless they can engage in collective action. This can be traced for inspiration all the way back to the Haitian revolution. More recently, we can look to the 19th-century labor movement, the women's movement, and the anti-colonial revolutions stretching into the post-World War II period and overlapping in important ways with TWAIL I in its moments of "state formation" as a result of collective action through social movements, and picking up in momentum after decolonization, especially from the 1970s. The work by scholars like Abdullahi An-Na'im, Richard Falk, V.S. Mani, Judge Weeramantry, Upendra Baxi, B.S. Chimni, Issa Shivji, and many others extended and transformed the critique of TWAIL I, while often sharply differing from TWAIL I, but maintaining its core commitment to equality and justice in international relations. TWAIL II was both a response to the limits and promise of TWAIL I as well as a response to the change in global historical and structural conditions of changing economic, political, and cultural power, and the transformation of the role of the main participants in the system—states, transnational corporations, transnational networks, inter-governmental organizations, NGOs, and transnational social movements.

II.

When complexity is a problem, and when it is not, needs to be analyzed by abandoning the faith that law is that which brings order to complexity, which is an erroneous assumption about the way law relates to other domains, whether social, economic, or political. The fear of complexity and the desire for simplicity comes at a time, conveniently, when the so-called simple world order policed by the Euro-American alliance during the post-World War II period has become shakier than ever. In global economic relations, even a shift from G-8 to G-20 is seen as complexity. Rather than looking at complexity as chaos and therefore as a problem to be repressed, or looking at complexity as a sociological fact—which it is in an unremarkable sense—I believe that we should look at complexity as opportunity.

I suggest that complexity could lead to a more democratic and more innovative vision of international law.

A good example of where this might occur is through the new geopolitical constellation called BRICS—Brazil, Russia, India, China, and South Africa. The term BRICS was coined by a Goldman Sachs economist in 2001 to capture the power shift in global economic relations from Northern economies to the large economies of the South. But the constellation has taken shape thanks to the efforts of BRICS countries themselves, especially after the global economic crisis of 2008. They have held summits since 2009, their economic interactions including trade have strengthened, and they have tried to coordinate policy on issues like Libya, Syria, and Iran with partial success. This year they met in New Delhi. The most interesting outcomes of their agenda are contained in the Sanya Declaration adopted by the BRICS countries in China in April 2011,² which spells out a different vision for international relations from the current U.S.-dominated world system, a vision that perhaps bears more similarity to the original vision of the UN Charter. For instance, the Sanya Declaration pronounces that “We share the principle that the use of force should be avoided. We maintain that the independence, sovereignty, unity and territorial integrity of each nation should be respected”—with no nod to emerging principles on the use of force like R2P. The New Delhi meeting resulted in an announcement to create closer financial integration starting with the creation of a benchmark equity index derivative shared by the stock exchanges of the five BRICS nations (which would be cross-listed, so they can be bought in local currencies), as well as a BRICS Development Bank modeled on the Brazilian development Bank BNDES, and a possible competitor to the World Bank (which can extend credit guarantees in local currencies). In the Sanya Declaration, the BRICS countries also make it clear that they will pursue diversification of world currencies, including the possibility of replacing the U.S. dollar as the world’s reserve currency with SDR or some other basket of currencies. These are significant steps to reform global economic governance, although they could turn out to be hegemonic as well. Importantly, the BRICS countries are pursuing reform of global governance on two tracks—one that pushes for greater voice for them in existing institutions such as the Bretton Woods institutions, and one that explores alternatives to the existing system itself.

As this example shows, complexity is not always to be feared because it could very well lead to some positive consequences for existing global governance, which most agree, is broken.

III.

On the other hand, BRICS does not constitute the global South, nor does it represent it, although it could potentially influence the direction of the global South and the role of international law in its governance. The rise of BRICS is not the same as the rise of international law’s peripheries, or a sign that international law is now fully listening to its discontents. The idea that the South is a monolith is an assumption shared by TWAIL I, but abandoned by TWAIL II. In fact, the South is a site of significant tension and contestation within itself, both between nation-states that constitute it, as well within the states—between those who govern and those who are governed.

TWAIL I, and to a lesser extent TWAIL II, were shaped by the sensibility that the South was weak and the North was strong. TWAIL I had a nation-state-centric, territorial approach to thinking about North and South, while TWAIL II has attempted to move beyond that to a cultural geography of North and South. It necessarily follows that one must distinguish

² Available at <http://www.bricsindia.in/thirdSummit.html>.

between a hegemonic South and a counter-hegemonic South, for each is capable of authoring very different kinds of international law. These are not essentialized categories, but are subject to shifting meanings over time, and a hegemonic South could be part of progressive changes in world order as the BRICS proposals indicate, or they could be problematic for the weak and vulnerable. It is not automatically the case that the rise of BRICS would lead to progressive or regressive international law.

To take human rights as an example, it is unclear how BRICS approach them and how the world would look if BRICS run it. In the Sanya Declaration of 2011, there is not a word on human rights. One could contrast that to the Bandung Declaration of 1955, when the Third World entered world politics as a collective of states. That declaration specifically committed itself to a world order based on international law and approved the Universal Declaration of Human Rights. Contrary to that, the Sanya Declaration disapproves of the use of force and calls for respect for the sovereignty and territorial integrity of nation-states, following a rather well-worn and simple conception of obligations under the UN Charter. It does not pause to consider circumstances under which a legitimate right to self-defense, including resistance to invasions, occupations, and threats, could be available. These are troubling aspects.

It is also not clear if BRICS countries behave significantly differently towards weaker, smaller countries, compared to powerful Northern states. The massive investments in land in African countries by China, India, and others, has the potential to undermine African people's access to land, their livelihoods, and their food security. China's commercial relations with African countries and its massive investments in infrastructure such as hydropower, do not indicate a script that is significantly different from the one followed by Western countries. It follows best practices of the World Bank in hydropower projects, for example. Therefore, it is not clear how different a BRICS-dominated world would be or if it would lead to an entirely new and fairer world order based on international law. But the rise of the Rest, in the form of BRICS and others, or in the form of global social movements, may aid in building counter-hegemonic possibilities in international law. These tendencies within the global South may themselves occasionally be in conflict, but may also assist each other in offering alternatives to the hegemonic international law that we are living with. It is important always to think beyond the possibilities of change offered by BRICS to that offered by global civil society. Such expansion in the horizon of possibilities is essential for resolving many of the today's problems in global governance, in areas as wide-ranging as international economic governance and use of military force, to governance of the world food system. In all of this, it is important to ask who wins and who loses, as we reckon with complexity and discontent in international law.

IV.

The final issue I want to address concerns the nature of the latest global economic crisis as an instance of complexity, its management, and its impact on the TWAIL agenda about democratizing global governance. Here we should begin by acknowledging that a real power shift and rebalancing in economic relations has been under way for some time, from the Euro-American-Japan triad to BRICS. As Angus Maddison has pointed out, Asia represented more than half of the world's output for 18 of the last 20 centuries.³ One way of looking at the rise of China as the world's second largest economy, then, is that it is simply a restoration of how things were before colonialism gave a temporary strategic advantage to the small

nations of Europe. That perspective is also compatible with the understanding of the current economic crisis as the mistake of a few isolated actors, a few bad apples.

Instead of viewing the onset of the current crisis as a moment of sudden revelation of the rise of the Rest and the decline of the West highlighted by the deeds of a few bad apples, I would submit that we need to ask questions about the real nature of the crisis, and would propose the following.

The global crisis is a crisis of development itself—not just of growth but the broader idea that a constant improvement in living standards and even happiness is possible through technology, science, and rational thought, and this is realized through an increase in wealth.

The idea that the crisis is due to mistakes committed by a few bad apples—Lehman Brothers or overleveraged banks or spendthrift Greeks or Irish—is a mistaken understanding of the root of the problem. Rather, it has to do, borrowing from Joseph Schumpeter, with a process that I will call “destructive creation.” Schumpeter, of course, is famous for his theory of “creative destruction” to describe the process of economic innovation in capitalism which destroys old structures and creates new ones and would, he argued, eventually lead to its demise.⁴ I want to flip this over—following a more accurate Marxist reading of “creative destruction,” following David Harvey⁵ and others, that in fact development process is more accurately described as destructive creation. To create anything of value, it needs to destroy what existed before; in relying on the idea of scarcity (which is at the heart of economic theory), the process of development in fact leads to a ceaseless accumulation, consumption, and destruction of resources. Every act of creation of value in the economy now involves more destruction than creation. Following this reasoning, my first reaction to the current economic crisis is that it is structural and not exceptional.

This is a crisis of utopia—from below and above, and pragmatism has not worked as an alternative. In this new order, the crisis of utopia leads to a crisis of the normative and institutional foundations of global order.

Indeed, what the crisis has done is to leave us with a set of challenges for international order and international law. Now it is clear, for example, that the international monetary system is poorly governed, if governed at all. Yet the new hegemonic South has no more capacity or will to change the governance of this system, as the status quo is tolerable, while everyone would resist real change. Therefore we end up with a “coping while coasting” strategy. The IMF has reinvented itself as a necessary institution after the crisis, armed with new powers and more resources, even though it utterly failed to predict, warn, or engage in any meaningful “surveillance” as it is mandated to do under its Articles. The colonial vestige of Europe and the United States appointing the heads of the Bretton Woods institutions even continues without challenge. Private markets—those which caused the worldwide financial meltdown, including bond traders, hedge funds, and, of course, credit rating agencies—are not governed by international law at all, but only by weak national regulators who lack competence and independence. We are back to business as usual.

The crisis indicates that we are running out of options. The model of economic development and globalization, which is dominant today, is based on a process of “destructive creation,” which is not morally, economically, or environmentally sustainable. A search for alternatives

³ Cited in Robert Zoellick, *The End of the Third World? Modernizing Multilateralism for a Multipolar World*, Speech given at the Woodrow Wilson Center for International Scholars (Apr. 14, 2010), available at <http://web.worldbank.org/Wbsite/External/News/0,,contentMDK:22541126~pagePK:34370~piPK:42770~theSitePK:4607,00.html>.

⁴ JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 82–85 (1975) (orig. pub. 1942).

⁵ David Harvey, *Neoliberalism as Creative Destruction*, 610 *ANNALS AM. ACAD. POL. & SOC. SCI.* 21–44 (2007).

in international law must begin by critiquing these foundational assumptions, which permeate the legal order that defends development and globalization. As Immanuel Wallerstein asked recently,⁶ “After development and globalization, what?” There is broad recognition of the inherent limits of an economic model that is based on scarcity, unending accumulation, and unending consumption, instead of human well-being and happiness. There are signals coming from stressed civilizations and a stressed planet that the path we are on is unsustainable. This is my second conclusion about the nature of the current global economic crisis.

⁶ Immanuel Wallerstein, *After Development and Globalization, What?*, 83 Soc. FORCES 1263 (2005).