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Protecting the future of international law discourse: Taking into account the peculiarities of emerging societies

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Abstract

The emergence of international law was hinged on the need for state relations to be managed on the premises of certain acceptable doctrines. Such laws were either hard laws or soft laws. It represented the views and the wills of a few countries that were seen as powerful though influenced by the early writings of scholars like Socrates, Aristotle and Grotius. International laws at earlier stages operated on a supra national level; however, with the recent wave of globalization and its impact on all aspects of world existence; scholars like Slaughter argue that international law is tending towards representing national laws. This is against the backdrop driven by the desire to create stability in the international system. It becomes imperative that international law must become part of the laws of nations to curb the emerging challenges to world peace. International law as it is today still represents the colonial powers that had the liberty and ability to partition the rest of the present developing world among them. It is therefore important to reiterate the fact that if the future of international law must be guaranteed the need to take cognizance of the peculiarities of the developing economies must not be overlooked. It is therefore advanced that the continued neglect of peculiarities of developing nations in the development of international law portends a clog in the development of international law in achieving its objectives.

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The importation of international norms by developing countries is especially problematic because they have so little input into international norms and institutions. Developing countries are receivers of international law, not makers of international law. Such norms may be of questionable legitimacy in these societies, and may be inappropriate policy choices in countries at a different stage of economic development than more developed western countries.¹

1.1 Introduction

The Universal Declaration of Human Rights was necessitated by events that occurred during the first and second world wars. Subsequently, the Covenant on Civil and Political Rights; and Covenant on Social, Economic and Cultural Rights all came into effect. The development of international law norms can be broadly classified into binding ones alternatively known as the hard laws and non binding legal norms that are treated as soft laws. While the hard laws and soft laws receive different approaches from the international community, it is noted that the effect is more or less the same. The important factor to be noted is that whether hard or soft; reliance is hardly ever had to peculiarities of developing economies in Africa and other emerging nations in other continents.²

The need to understand the emergence of international law as the dictates of the developed western nations and its imposition on developing economies like Africa is important because it provides strong premises for appreciation. The major events that influenced the international law instruments mentioned above were events that had

¹ Kelly Patrick J International Law and the Shrinking Space for Politics in Developing Countries Law and Rights: Global Perspectives on Constitutionalism and Governance (2008) Vandepas Publishing, Widener Law School Legal Studies Research Paper No. 08-31.

² For a detail discuss on hard and soft laws generally see Kenneth W. Abbott and Duncan Snidal (2000). Hard and Soft Law in International Governance. International Organization, 54, pp 421-456 available at http://journals.cambridge.org/abstract_S0020818300441111(accessed May 2, 2016).

affected the early European and American histories.³ At the particular time the majority of the African Continent was largely colonised.⁴ This meant that African societies had no role to play in the fashioning of the international law discuss. As posited by Joireman:⁵

This occurred for two distinct reasons. First, throughout the entire colonial experience, indigenous peoples were forced to live with a particular system, either the continental civil codes or British common law. At independence, such experience of a national legal system as existed was of that designed by the continental European powers or the British. Therefore, just as newly independent colonies chose to keep the languages of the metropolises for the conduct of governmental activities, so too they retained the legal and other political institutions left behind.

With the gradual end of colonial rule in Africa, the new nations were subsequently admitted into the fold of the United Nations. The new African nations therefore had to merely subscribe to the dictates and discourses of international law as evidenced by the laws of the colonial powers that administered each colony.⁶ The mere subscription without deliberation is attested to by the fact that ‘international law was alienated from

³ “On October 24, 1945, in the aftermath of World War II, the United Nations came into being as an intergovernmental organization, with the purpose of saving future generations from the devastation of international conflict. United Nations representatives from all regions of the world formally adopted the Universal Declaration of Human Rights on December 10, 1948. United Nations representatives from all regions of the world formally adopted the Universal Declaration of Human Rights on December 10, 1948” available at <http://www.humanrights.com/what-are-human-rights/universal-declaration-of-human-rights.html> (accessed May 15, 2016). However, this claim of participation from all the regions of the world is faulted by the authors considering the disposition of most developing economies at the time in question. In Africa, most countries were still under the colonial governance of the British, the French or German/ Portuguese. In addition, the clam that small states also participated in the process that led to the coming into force of the UDHR is faulted because in the same account, the roles played were stated to be clearly second tier roles. See generally Susan E. W, Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights, Human Rights Quarterly, Volume 23, Number 1, February 2001, pp. 44-72 .

⁴ It is argued by Chimni that the works of scholars like T.O Elias and R.P Anand point to the reality of the fact that International Law as it is known today was hugely linked to colonial project. He therefore advances the fact that for emerging nations, the importance of engaging in deliberative political discussion in further entrenching various norms of international law is very important. See Chimni BS The past, present and future of international law: a critical third world approach (2007) Melbourne Journal of International Law Vol. 8.

⁵ Sandra Fullerton Joireman (2001). Inherited legal systems and effective rule of law: Africa and the colonial legacy. The Journal of Modern African Studies, 39, pp 576 doi:10.1017/S0022278X01003755

⁶ Sandra Fullerton Joireman (2001). Inherited legal systems and effective rule of law: Africa and the colonial legacy. The Journal of Modern African Studies, 39, pp 592 doi:10.1017/S0022278X01003755

developing world epitomised in the civilisation/barbarian divide that made them and their territory into objects of international law'.⁷ Current discourses of international law today call to question some controversial and a new form of dimensions on how the African traditions must relate with the teachings of international law.⁸

The formation of the Organisation of the African Unity (O.A.U) which has metamorphosed into the African Union (AU)⁹ meant that several points of departure have become evident¹⁰ in the discourse of international law suggesting the need to take into consideration African perspective in conflict resolution before reliance on other options.¹¹ As developing economies emerge in Africa and in the wake of purported African renaissance; this discourses form major issues to be looked at. It is therefore based on this that, this paper will attempt to advance the importance of heeding the peculiarities' of these new notions and analyse the urgency of inculcating them in the new study of international law.

2.1 International law and the African Continent

⁷ Chimni BS The past, present and future of international law: a critical third world approach (2007) Melbourne Journal of International Law Vol. 8.

⁸ Roy R.C, Stephen C.C & Steiner B; (eds) Perspectives on Africa: A reader in Culture, History and Representations (2010) Blackwell Publishing, (United Kingdom) p55. See also Ibhawoh B Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State * Human Rights Quarterly, Volume 22, Number 3, August 2000, pp. 838-860.

⁹ The O.A.U made way for the A.U on after some discredits which among many others meant that the O.A.U was merely carrying out the dictates of the colonial powers. The A.U was conceived to provide a more African perspective to issues concerning African States. See generally Naldi GJ 'The African Union and the Regional Human Rights System' in Malcolm Evans and Rachel Murray (2008) (2nd eds) The African Charter on Human and Peoples' Rights The system in Practice, p.1, Cambridge University Press.

¹⁰ For the divergent views and concerns of the O.A.U at formation see generally Umozurike U.O, The African Charter on Human and Peoples' Rights the American Journal of International Law Vol. 77 No 4, October 1983.

¹¹ Sesay A & Omotosho M Try Africa First', The African Union and Conflict Management in Africa: Opportunities and Challenges (2011) Centre Point Journal Vol. 14 No 1.

It is agreed that ‘the scramble for Africa, and the most active period of colonization, lasted less than a century...the colonial experience represents but a brief moment from the perspective of today, this moment is still charged and controversial’.¹² The controversies are shown in the numerous philosophies that eroded the African way of thinking and laced the terrain with new ways of thinking that were shown in international law norms. It must be taken into cognisance that most international institutions and players embrace international treatise to dictate the pace of events either in dispute resolution or relations between states.¹³

The impact of this therefore meant that for African to be effectively controlled by the colonial powers there had to be an imposition of legal systems.¹⁴ Thus, ‘Everywhere the colonial metropolises established their own systems of law and dispute resolution, disregarding pre-existing mechanisms of conflict resolution as primitive or appropriate for ‘natives’ only’.¹⁵ As a weak component in the equation between states, African had no voice in the shaping of events. The formation of agencies like the UN Security Council does not include any African State as a permanent member.

African States are the quickest to subscribe to new conventions and treatise while the major funding states do not subscribe to same treatise.¹⁶ It is the view of the authors that the trend of developing nations subscribing to several international instruments be it on monetary or human rights policies is hinged on the level of control that the

¹² Roy R.C, Stephen C.C & Steiner B; (eds) *Perspectives on Africa: A reader in Culture, History and Representations* (2010) Blackwell Publishing, (United Kingdom) p55.

¹³ Kenneth W. Abbott and Duncan Snidal (2000). *Hard and Soft Law in International Governance*. International Organization, 54, pp 421-456.

¹⁴ Cerna C. *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts* *Human Rights Quarterly* 16 (1994) 740-752. Cerna reiterates the fact the values in the UDHR and other documents does not represent the values in domestic legal frame work.

¹⁵ Joireman S.F. *Inherited legal systems and effective rule of law: Africa and the colonial legacy* (2001), *The Journal of Modern African Studies*, 39, pp 571-596.

¹⁶ For instance the United States is the largest contributor to the International Criminal Court and yet they are not signatories to the Rome Statute establishing the International Criminal Court.

developed economies exercise over these governments. This argument is contrary to the position that such hasty ratifications are based on the drive to show regional compliance or competition.¹⁷

The most recent of this is the Rome Statute of the International Criminal Court. All situations before the court till date all emanate from Africa. However, the indictment of President Omar Al Bashir of Sudan and President Uhuru Kenyatta has elicited several calls of boycott from African States.¹⁸ The AU in recent times has sought the back down of African States from the ICC and has introduced a criminal chamber in the African Court of Human and Peoples Rights. The introduction of the Gacaca system in the trials following the aftermath of the Rwandan genocide represents another deviation in an African perspective to the ways of conflict resolution.¹⁹ The impact of policies like the Structural Adjustment Programmes (SAP) initiated by the Breton woods intuitions ensured that social services like education and health took the back foot in African countries.²⁰

¹⁷ This argument is advance in contradiction of the position of Simmons in advancing compliance with their regional states as a major basis for subscription. See generally Simmons B.A., *International Law and State Behavior: Commitment and Compliance in International the American Political Science Review*, Vol. 94, No. 4 (Dec., 2000), pp. 819-835.

¹⁸ It is not the authors views that the perpetration of acts of impunity is acceptable by any dint, however, this example is used in this instance to underscore the importance that in the discussion of the future of international law; the opinion of emerging developing economies must be accommodate so as to ground equal ownership of the various norms that are laid out to dictate relations between states either in terms of human rights, trade relations or other forms of international cooperation's among states.

¹⁹ The effectiveness of the Gacaca have remained a question of discuss among the various scholars of transitional justice. See for instance Herrmann J A critical analysis of the transitional justice measures incorporated by Rwandan Gacaca and their effectiveness available at http://eprints.jcu.edu.au/25972/1/25972_Herrmann_2012.pdf (accessed May 23, 2016).

²⁰ Duze C.O Educational policies/programmes' effect on attrition rates in primary schools in Nigeria, *International Journal of Education Administration and Policy Studies* Vol. 4(2), 38-44, February 2012.

3.1 The Emerging Perspectives

The establishing of international norms has been argued develop in four major premises. It is either discussed; deliberated; natural or protested.²¹ The identified four premises provide a basis for emerging African as a developing economy to be able to add its own voice to new perspectives on the teaching international law.

This is further important as majority of developing nations are now opportune to have emerging legal minds and legal institutions that provide various perspectives peculiar to each society; occasioned by the ability to adapt and change its perception of various international law doctrines.²² The question therefore is how these peculiar thoughts maybe inculcated into the present discourse of international law?

The question of universalism of international law doctrine to a large extent still takes into cognisance the interest of the already developed economies. It is paramount therefore, that there must be a deviation from this stance of protection of only transnational corporations or interest of the so called sovereign ideas of the super powers to also include the peculiarities of African states.²³ For instance in international trade and investment, the question of trademarks and the manufacturing of generic brands of medications remained issues of controversy in several Africa countries. This led to the enactment of the Trade Related aspects of Intellectual Property Rights (TRIPS) agreement that introduced lots of restriction on the abilities of emerging economies in Africa.²⁴ In the dimension of trade liberalisation, the dictates of the

²¹ MB Dembour What are Human Rights? Four Schools of Thought, Human Rights Quarterly, Vol. 32, No.1 February (2010) 1-20.

²² Sandra Fullerton Joireman (2001). Inherited legal systems and effective rule of law: Africa and the colonial legacy. The Journal of Modern African Studies, 39, pp 576 doi:10.1017/S0022278X01003755

²³ Chimni BS The past, present and future of international law: a critical third world approach (2007) Melbourne Journal of International Law Vol. 8.

²⁴ Musungu S. F Access To Art And Other Essential Medicines In Sub-Saharan Africa: Intellectual Property and Relevant Legislations, available <http://apps.who.int/medicinedocs/documents/s18248en/s18248en.pdf> (accessed May 27, 2016)

developed economies also supersede that of the developing one. Consequently, the primacy of the protection of the interest of the ‘developed’ world still trumps that of the developing world to a very large extent. This is evidence by the reality that ‘Most observers insist that the various GATT reforms that were intended to help developing countries failed to insulate them from the “power politics” of the system’.²⁵

4.1 The Need for adapting Emerging Perspectives

The dire need to ensure the inclusion of peculiar perspectives in the discus of international is well captured by Joireman by stating that ‘we need more indigenous, scholarly assessments of the effectiveness of law and legal systems in Africa, and for that matter in the rest of the developing world, in order to determine which institutions and strategies work best...’.²⁶ Taking into cognisance the challenges that may accrue to the revising of several international law instruments that dictate the teaching of international law presently, it is argued that the peculiar African needs be treated as soft laws. This is advanced on the basis that ‘soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own’.²⁷

In addition, as Chimni rightly puts it, the need is more so very important at this time considering:²⁸

Musungu argue argue that “Despite major medical breakthroughs there are still significant inequalities in the health status of people between developed and developing countries as well as within developing countries”. See also Elbeshbishi A.M TRIPS and Public Health What Should African Countries Do? Available at <http://www.uneca.org/sites/default/files/publications/49.pdf> (accessed May 23, 2016).

²⁵ Busch ML & Reinhardt E, Developing Countries and General Agreement on Tariffs and Trade/World Trade Organisation Dispute Settlement (2003) Journal of World Trade 37(4) 719.

²⁶ Sandra Fullerton Joireman (2001). Inherited legal systems and effective rule of law: Africa and the colonial legacy. The Journal of Modern African Studies, 39, pp 593 doi:10.1017/S0022278X01003755

²⁷ Kenneth W. Abbott and Duncan Snidal (2000). Hard and Soft Law in International Governance. International Organization, 54, pp 423 doi:10.1162/002081800551280

²⁸ Chimni BS The past, present and future of international law: a critical third world approach (2007) Melbourne Journal of International Law Vol. 8.

The dismal experience of the vast majority of third world peoples and states in recasting colonial international law as universal international law in the last six decades has compelled a new generation of scholars to revisit the history of international law in a bid to find answers.

The African Charter on Human and Peoples' Rights' became the first regional instrument to include both duties and obligations on States and individuals.²⁹ The African Charter on the Rights and Welfare of a child also recognizes duties and obligation place on the child.³⁰

Thus, bring the peculiar perspectives of developing economies in Africa will warrant the reconceptualization of or taking into account of certain views. As captured by Mutua:³¹

A thorough understanding of the meaning of human rights, and the complicated processes through which they are protected and realized, would seem to link inextricably the concepts of human rights, peoples' rights, and duties of individuals. Individual rights cannot make sense in a social and political vacuum, devoid of the duties assumed by individuals. This appears to be more true of Africa than any other place.

While the positive aspects of the perspectives of emerging societies is not claimed to have the sole answer to ensuring that the advancement of international law is assured, it provides a veritable basis for comparison and the choice for best practices. What is important therefore is that the views of the society's largely in Africa that were not hearkened to in the early discuss of international law receive some consideration. It is opined that this will enhance ownership of values that are advanced to be the guiding principles of state relations and individual affairs. According to Mutua, failure to take

²⁹ Okere B.O, The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems Human Rights Quarterly Vol. 6 No 2, May 1984.

³⁰ Chirwa, D. M. "The merits and demerits of the African Charter on the Rights and Welfare of the Child." The International Journal of Children s Rights 10.2 (2002): 157-177.

³¹ Mutua M.W The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties VIRGINIA JOURNAL OF INTERNATIONAL LAW Vol. 35:340

into account these peculiarities will result in the emerging rejection of some of the values of international law. Mutua rightly argues ‘that the transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa’.³²

5.1 Conclusions

Originally international law administered relations between states and treatment of one’s states national by another; it also sought to ensure the peaceful resolution of conflicts between states.³³ The changing trends in the scope of international law necessitates the inclusion of hitherto perspectives that during the early days of international law development were either non-existent or too weak to be reckoned with.

The first premise of conclusion is to underscore the fact that the question is not just as it affects the outcome of international law and the emerging states or including the peculiarities of the developing systems but rather the nature of the laws that are anticipated.³⁴

The authors are not oblivious of the challenges that confront the present discourse of international law to adapt the peculiarities of developing economies especially with the attendant facilities that this process requires; especially institutions and funding.³⁵ Thus

³² Mutua M.W The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties VIRGINIA JOURNAL OF INTERNATIONAL LAW Vol. 35:342.

³³ Burke-White W & Slaughter A.M, The Future of International Law is Domestic (or, The European Way of Law) 327 Harvard International Law Journal Volume 47, Number 2, Summer 2006 (47 Harv. Int’l L.J. 327 2006) downloaded from Heinonline September 30, 2013.

³⁴ Chimni BS The past, present and future of international law: a critical third world approach (2007) Melbourne Journal of International Law Vol. 8.

³⁵ For the challenges that this process may require see generally Merryman JH Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement The American Journal of Comparative Law, Vol. 25, No. 3 (Summer, 1977), pp. 457-491.

it is important that the present deliberation begin to accommodate the views of developing economies as this is the only means through which ownership of the future of International law discuss can be claimed by actors.