Liberal Legal Internationalism: A History (and Present) of Double Standards

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In late August 2012, Archbishop Desmond Tutu pulled out of the Discovery Invest Leadership Summit in Johannesburg to which he was scheduled to attend as an invited speaker. The prod for his 11th hour withdrawal was the likely (and eventual) participation of former British Prime Minister Tony Blair who was also slated to speak at the same event. With a mix of contrition and conscientiousness, Tutu declared his unwillingness to share the stage with an individual responsible for spearheading an invasion that 'destabilised and polarised the world a greater extent than any other conflict in history.'[i]

Hyperbole aside, the full version of Tutu's statement stresses several points regarding the double-standards of international law that even a casual observer is surely all-too familiar with:

'On what grounds do we decide that Robert Mugabe should go the International Criminal Court, Tony Blair should join the international speakers' circuit, bin Laden should be assassinated, but Iraq should be invaded, not because it possesses weapons of mass destruction, as Mr Bush's chief supporter, Mr Blair, confessed last week, but in order to get rid of Saddam Hussein…

…in a consistent world, those responsible for this suffering and loss of life should be treading the same path as some of their African and Asian peers who have been made to answer for their actions in the Hague.' [ii]

With the key pretext for the invasion of Iraq nowhere to be found, Blair has placed much stock in the overthrow of former Iraqi President Saddam Hussein as a type of ex-post-facto vindication of the assault: 'Hussein's slaughter of his political opponents, the treatment of the Marsh Arabs and the systematic torture of his people make the case for removing him morally strong.'[iii] While he does not disavow the seemingly calculated canard of weapons of mass destruction – 'the basis of action was as stated at the time' – Blair does again seek to highlight the *prospective* value of the invasion – 'I would also point out that despite the problems, Iraq today has an economy three times or more in size'[iv] – as cover for the disturbing state of the nation which, after a decade of UN sanctions and a protracted British-American occupation, is looking more like Mesopotamia than it did when the British last saw fit to occupy the region.

Upon closer examination, the dust-up between Tutu and Blair provides a window into competing perceptions of the purpose and practice of international law. Their contrasting viewpoints, I suggest in this brief article, are borne of the distinct trajectories international law has taken for the First and Third World respectively. They also transcend a variety of jurisprudential trends observable across the history of international law.

Pursuing Universal Morality(ies) Through International Law

With colonial ambitions as compass, burgeoning European powers set forth to conquer much of the *New World*. Until that point, historical mandates for conquest were drawn from the Pope who, as divine vicegerent, commanded authority over the entirety of God's kingdom including the lands of believers and heretics alike. In the 16th century, however, a Catholic theologian and jurist of minor fame challenged the alleged universality of papal authority,

restricting the Pope's jurisdiction to Christian lands. He then set about developing a new system to mediate the colonial encounter and the novel legal problems that arose as a result: who or, more to the tone of the time, what were the Indians? Did they possess rights? Could they own land? Were they sovereign?[v]

Answers to these questions, Antony Anghie explains, laid the groundwork for *jus gentium* or the law of nations. Exhibiting forms of social organisation caused Vitoria to conclude that the Indians were in possession of *reason*, binding them to a hitherto unknown – but all-knowing – universal system of natural law. Like the Spaniards now engaging them, the Indians could avail themselves of the rights to travel, sojourn and proselytise, as far away as Granada if they fancied. Nor should they anticipate any obstruction from their hypothetical hosts if they made their way to Spanish shores for, in addition to a negative duty not to interfere with the avowal of these rights, both Indians and Spaniards alike were bound by a positive duty to bring non-conforming societies in line with their mutual obligations. In practice, this meant that societies who resisted either settlement or conversion were, in Vitoria's language, subject to war, captivity, enslavement and death.[vi] The inability of the Indians to avail themselves of any of these rights and the actuality of Spanish colonial ambitions and efforts were, it seemed, of little consequence. As equal members of the law of nations, they too *could* do unto the Spaniards as the Spaniards were doing unto them and this possibility alone was sufficient.

Equality, however, only went so far. On the question of sovereignty – were they Indians sovereign? – Vitoria reverts to the doctrinal Christian supremacist starting point he began by challenging. He argued that sovereignty was dependent on two additional rights: the right to wage a *just* war and to acquire title. With tautological vigour, Vitoria concluded that only Christians could wage a just war 'otherwise even Turks and Saracens might wage just wars against Christians, for they think they are thus rendering God service',[vii] paving the way for the lawful annexation of Indian lands. Within this particular manifestation of the law of nations, European political subjectivity stood as universal *moral* objectivity.

We observe similar effusions toward the natural law based character of international law in statements by Tutu and Blair, as well as inferences about the universal validity of European morality from the former prime minister specifically. While Tutu condemns '[t]he *immorality* of the United States and Great Britain's decision to invade Iraq in 2003, premised on the lie that Iraq possessed weapons of mass destruction',[viii] Blair defends his action with equal moralistic bravado: '…[Hussein's actions] make the case for removing him morally strong.'[ix] Nor was this the first time Blair flashed universal morality in support of his position. In 2003, appearing before the American Congress to make the case for the invasion, Blair described the 'fight' as one not for 'Western values' but 'universal values of the human spirit'.[x]

We see both men utilising notions of morality to make their respective cases. While their religious credentials may help explain this inclination – Tutu is a retired Anglican bishop and Blair a born-again Catholic – Vitoria's reasoning confirms that international law has long been steeped in ethnocentric moral aspirations. To Vitoria, to the extent the Indians possessed reason, they fell within the ambit of jus gentium. However, to the extent they were not Christians and might resist becoming so, they fell outside the sovereigntist embrace and were thus deserving of untold viciousness. Two centuries later, Robert Ward, a British jurist and member of the House of Commons, while recognising an assortment of *laws of nations* among varied civilisations, hastened to deny to all but the European articulation the legitimacy of law.[xi] Ignorance, ignominy and barbarity among non-Europeans, he declared, was the basis of their exclusion. Drawing upon a rich tradition, Blair makes similar claims, seemingly indifferent to the many moralities opposed to both the specific action as well as the general sense of entitlement upon which the former was based. In international law, some moralities consistently appear more equal than others.

From Moral to Instrumental

Neither Tutu nor Blair ends there, however, with each drawing upon the positivist strand of international legal reasoning to further buttress their claims. Tutu, for his part, bemoans the double standards of the International Criminal Court, calling for zeal of the variety displayed toward Charles Taylor, Joseph Kony, Saif Qaddafi and sundry Africans, this time in the investigation and prosecution of Blair. Consistency is a critical characteristic of a legal framework, promoting greater compliance and deeper confidence – or compliance *through* confidence – in the

relevant law(s). Indeed, from a positivist perspective, all who fall within the law's jurisdiction are equally subject to the law's application.

Blair, too, seems equally moved by positivist reasoning, albeit for entirely different reasons. He initially defends himself by restating his *belief* in the case that was made about the presence of weapons of mass destruction on Iraqi soil: 'to repeat the old canard that we lied about the intelligence is completely wrong as every single independent analysis of the evidence has shown.' While he follows with the moral argument discussed above, he returns to the allegation of his supposed deception once more: 'But the basis of action was as stated at the time.'[xii] The phrasing of this last sentence is most revealing, reiterating his belief – *at that time* – in the evidence presented (and since disproved).

From a criminal law vantage point, the burden of proof that dominates in most Western legal systems – and by extension in the international legal regime – is *reasonable doubt*. In practice, this means that a defendant need only raise reasonable doubt to defeat a charge presented against them. As is often the case in rape, perjury or fraud trials, one of the more common defences is the sincerity claim: at the time, *I genuinely believed* that she consented, that I was using my own credit card or that the evidence presented to the UN Security Council about mobile laboratories and Nigerian yellow cake was authentic.[xiii]

While geo-politics form the core of international legal happenings, due to the contributions of John Austin and other 19th century legal thinkers, international law is also denoted by a positivist streak.[xiv] Positivism is a clever way of eliciting buy-in in a community of *equally* sovereign states. This is an important distinction with national legal systems: while compliance can be compelled domestically, enforcement is clearly problematic in the international realm. The doctrine of voluntarism was conceived to sidestep this particularity, encouraging states to sign on *voluntarily* while committing to respecting a refusal to do so. The positivist strand has triggered the proliferation of tribunals and courts in the last decade as more and more states come to favour the consistency quality that can be drawn from – or read into – the majesty of The Hague and other international criminal legal institutions.

While his comrade-in-ideology, former American President George Bush Jr, may be secure – the United States is not party to the Statute of the International Criminal Court, effectively inoculating him from its jurisdiction – the situation for Blair is a little more precarious as the United Kingdom is a fervent supporter of the institution. Blair is fully aware that should the winds of global power shift unfavourably (read BRIC), then gaol may no longer be such an unlikely destination, hence the claim made *ad nauseam* that the basis of the action was as stated at the time. Of course, a quick glance at the prosecutorial practices of the ICC or of special tribunals in general reveals that since the days of Nuremberg, not a single European has ever been brought before an international court for countless violations of international law, international humanitarian law, international criminal law and the Geneva Conventions committed against the Third World during the postcolonial period. With this partiality as backdrop, I presume Blair is unlikely to interrupt his speaker schedule over Tutu's beckoning.

What's Good for the Gander...

A final statement by Blair can be explained through the pragmatist strand of international law that emerged during the neoliberal era.[xv] While Tutu admonishes Blair for immorality, global polarisation, suffering and loss of life, the former primer minister hits back by highlighting improvements to the Iraqi economy and increased foreign investment. In this instance, Blair is applying the pragmatist strand seeking to counter-balance, perhaps offset, the human toll with allusions to economic growth. Of course, to the Third World, the links between political and economic rights have always been self-evident but to have them made in such uncouth tones is unlikely to appease any of the *wretched of the earth*.[xvi]

There is little doubt that the Iraqi economy has grown between 2003 and 2012. What Blair leaves out, however, including a decade of crippling economic sanctions and a bombing campaign (*shock and awe*) that annihilated whatever remained of social institutions, infrastructure and industry developed during the 60s, 70s and 80s, is potentially of relevance in the accuracy and validity of his claim. There is more. Queer in its own regard, the presumptuousness and ethno-chauvinism inherent in Blair's balancing act has unfortunate but palpable roots in

international law. Whether Francisco de Vitoria, Lord Coke, Justice Marshall, Bush Jr. or Blair, James Gathii provides striking evidence of the 'genealogical similarity' between their respective pronouncements on international law.[xvii] No matter the context, each of them rationalised 'European conquest and acquisition of non-European territory and resources', always buttressed by the self-satisfaction of a just cause.[xviii] Highly racialised and racist arguments, Gathii asserts, effectively sanctioned 'the disregard not only of private property rights, but also of the lives and dignity of [Third World] people.'[xix] Indeed, Blair tactically omits the array of free market policies implemented throughout Iraq post-invasion, all of which have sought to facilitate foreign ownership of domestic resources and prospects, suggesting that economic growth in Iraq does not necessarily indicate improved Iraqi prosperity.[xx]

Liberal Imperialism or A New Legal Order?

The way forward, I admit, is a little murky. International law today is as rife with double standards as it was nearly five centuries ago when Vitoria sought to legitimise colonial conquest. There is, Edward Said remarked, 'always appeal to power and national interest in running the affairs of lesser peoples'.[xxi] Tellingly, a similar view was expressed by Samuel Huntington, hardly a sympathiser with Third World causes, when he described '[h]ypocrisy, double standards, and "but nots"' as 'the price of universalist pretensions.'[xxii] While seemingly spoken with a soupcon of contrition, even a cursory read of the text from which this quote was lifted – Clash of Civilizations – reveals a more celebratory than remorseful character. Whether or not Blair drew any inspiration from Huntington is uncertain. What is plain as day however is the contribution of Robert Cooper, senior British diplomat and former prime ministerial adviser, to Blair's thinking.

In the year prior to the Anglo-American coalition invaded Iraq, Cooper published an article in The Observer, a renowned British newspaper, detailing what he termed the new liberal imperialism.[xxiii] Laden with the usual self-congratulatory bluster about benevolence and lifting all boats, Cooper proceeded to celebrate with dizzying candour both the absence of equality in international law and the importance of preserving double-standards:

'The challenge to the postmodern world is to get used to the idea of double standards. Among ourselves, we operate on the basis of laws and open cooperative security. But when dealing with more old-fashioned kinds of states outside the postmodern continent of Europe, we need to revert to the rougher methods of an earlier era – force, pre-emptive attack, deception, whatever is necessary to deal with those who still live in the nineteenth century world of every state for itself. Among ourselves, we keep the law but when we are operating in the jungle, we must also use the laws of the jungle.'[xxiv]

This article on double standards in international law could have saved both reader(s) and author much time had I opened and closed with Cooper's statement for it reveals, with far greater persuasiveness than any historical data I can point to, the extent to which liberal legal internationalism is anything but liberal, legal or international. Of course, there is nothing new in Cooper's proposal. Vitoria's community of nations, Robert Ward's standard of civilisation or Blair's universal values of the human spirit establish, in the words of Brett Bowden, international law's implication 'in a long-running universalizing Western imperial project.'[xxv] Anghie takes this point a step further – perhaps to its logical conclusion – proclaiming international law to be 'mired in the history of subordinating and extinguishing alien cultures.'[xxvi] While these statements may seem overly provocative and potentially anachronistic, when preceded by the pleas of both Cooper and Blair, the indictments read more *modern* than does international law.

What then, if any, is the way forward? I return to Edward Said, whom I quote at length (with a minor edit), for his appeal captures the essence of Third World aspirations with such eloquence and precision that it deserves to be read and re-read, as well as being wallpapered to Blair's cell should he every find himself in gaol:

'The world today does not exist as a spectacle about which we can be either pessimistic or optimistic, about which our "texts" can be either ingenious or boring. All such attitudes involve the deployment of power and interests. To the extent that we see [Blair] both criticizing and reproducing the imperial ideology of his time, to that extent we can characterize our own present attitudes: the projection, or the refusal, of the wish to dominate, the capacity to damn, or the energy to comprehend and engage with other societies, traditions, histories.'[xxvii]

Cooper and Blair, Europe and the United States, the IMF and the World Bank, may want the Third World to beseech their tutelage but such is not always the wish of the Third World, at least not as their wishes have been communicated through the Non-Aligned Movement, the Third World project, the Five Principles of Peaceful Co-existence, the New International Economic Order and sundry Third World political, legal, social, cultural and, indeed, moral movements launched over the decades. While many of these have had their epitaphs written, when considered alongside the brutally chauvinistic thoughts and actions of the First World, no other outcome was indeed possible.

And yet, despite these defeats, the Third World trudges on. The World Social Forum brings people(s) together, the Bolivarian Alliance of the Americas codifies their aspirations and *certain* Third World nations pursue these aspirations with the resolve that prevailed during the decolonisation era. While Tutu may wish to see Blair hauled before the ICC, we should not expect First World institutions to turn on their patrons. Instead, we should move forward by drawing strength from the leadership of the Third World in its refusal to dominate or to damn and from its courage in seeking to comprehend and engage with others; whether the First World or its international legal instrument is up to such *moral* aims remains, history evidences, far murkier than the way forward.

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[i] Desmond Tutu, "Why I Had No Choice But to Spurn Tony Blair" (2 September 2012) The Observer, available at http://www.guardian.co.uk/commentisfree/2012/sep/02/desmond-tutu-tony-blair-iraq [Tutu, Spurn Tony Blair].

[ii] Ibid.

[iii] Toby Helm, "Tony Blair Should Face Trial Over Iraq War, Says Desmond Tutu" (2 September 2012) The Observer, available at http://www.guardian.co.uk/politics/2012/sep/02/tony-blair-iraq-war-desmond-tutu [Helm, Trial Over Iraq War].

[iv] Ibid.

[v] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 22 [Anghie, *Imperialism*].

[vi] Ibid. at 24.

[vii] Ibid. at 26.

[viii] Tutu, Spurn Tony Blair, supra note 1.

[ix] Helm, Trial Over Iraq War, supra note 2.

[x] Cited in James Gathii, *War, Commerce, and International Law* (Oxford University Press, Oxford, 2010) at 33 [Gathii, *Commerce*].

[xi] Brett Bowden, "The Colonial Origins of International law. European Expansion and the Classical Standard of Civilization" (2005) Journal of the History of International Law [Bowden, Colonial Origins].

[xii] Helm, Trial Over Iraq War, supra note 2.

[xiii] Incidentally, even the American envoy dispatched to Niger reached a different conclusion that Blair: Joseph C. Wilson, "What I Didn't Find in Africa (6 July 2003) The New York Times, available at http://www.nytimes.com/2003/07/06/opinion/what-i-didn-t-find-in-africa.html?pagewanted=all&src=pm.

[xiv] Antony Anghie, "The Evolution of International Law: colonial and postcolonial realities" (2006) 27:5Third World Quarterly 739 at 740 [Anghie, The Evolution of International Law].

[xv] Ibid. at 741.

[xvi] See e.g. Mohsen al Attar and Ciaron Murnane, "The Neoliberal Challenge to the Pursuit of Human Rights" in Jeffrey F. Addicott et al. (eds), *Globalization, International Law, and Human Rights* (Oxford University Press: Oxford, 2010).

[xvii] Gathii, *Commerce*, supra note 25 at 33.

[xviii] Ibid at 31 and 142.

[xix] Ibid at xx.

[xx] Ibid. at 39.

[xxi] Edward W. Said, *Culture and Imperialism* (New York: Vintage Books, 1993) at xxiii [Said, Culture and Imperialism].

[xxii] 'Hypocrisy, double standards, and "but nots" are the price of universalist pretensions. Democracy is promoted, but not if it brings Islamic fundamentalists to power; nonproliferation is preached for Iran and Iraq, but not for Israel; free trade is the elixir of economic growth, but not for agriculture; human rights are an issue for China, but not with Saudi Arabia; aggression against oil-owning Kuwaitis is massively repulsed, but not against non-oil-owning Bosnians. Double standards in practice are the unavoidable price of universal standards of principle.'

[xxiii] Robert Cooper, "The New Liberal Imperialism" (7 April 2002) The Observer, available at http://www.guardian.co.uk/world/2002/apr/07/1.

[xxiv] Ibid.

[xxv] Bowden, Colonial Origins, supra note 11 at 23.

[xxvi] Cited in ibid. at 23.

[xxvii] Said, Imperialism , supra note 21 at xx.

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