A Critique of International Law from a Postcolonial Perspective

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< INDEX >

I. Introduction

The discipline of international law has addressed the question of colonialism as persistently and directly as any other. In the 1950's and 1960's, de-colonization was the buzzword in the international community. Within the framework of the United Nations, the 1960 General Assembly Resolution 1514 (XV), entitled "the Declaration on the Granting of Independence to Colonial Countries and Peoples" , cogently expressed the *zeitgeist* of that period. The principle of self-determination, a core concept incorporating decolonisation into the international normative arena, has firmly established itself as one of the fundamental legal (not merely political or ethical) principles of international law. There was even an attempt at conceptualizing as an international crime "a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment

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or maintenance by force of colonial domination".[2)]

On the surface, such state of affairs might give one the impression that within the discipline of international law the question of colonialism has been fully addressed and effectively resolved at least at a normative level. Of course, there was (and still is) a heated controversy over neo-colonialism. However, this question tends to be approached from a non-normative perspective. That is, neo-colonialism is generally regarded as a problematic belonging to international economics or politics rather than to international law where colonialism has already become a thing of the past. It seems that the only remaining task for international lawyers would be to narrow the gap between the colonial or neo-colonial reality and the post-colonial normativity, i.e., the present-day international law which has transcended or decisively outgrown the colonial orientation of traditional international law. From such a vantage point, international law itself is not susceptible of any criticism or intervention from a post-colonial perspective.

What I would like to argue in this article is that beneath the placid veneer of post-coloniality of contemporary international law there is an undercurrent of practices, which make painfully obvious that the umbilical cord of contemporary international law is still firmly linked to the colonial outlook of the past. Despite the boisterous rhetoric declaring the attainment of post-colonial universality by contemporary international law, it remains very much a Euro-centric discourse geared towards exclusion or suppression of others' voices "incommensurable with, and disruptive of, European hegemony".[3)]

In the present article, I will first discuss the question of how Europe's others were excluded or suppressed from the arena of international law at an ontological level (II). I will go on to argue that in the present-day international law the same exclusionary practice takes place in a subtler fashion, i.e., on the epistemological plane (III). In presenting this argument, I will analyze jurisprudence of international tribunals including the International Court of Justice with particular reference to cases relating to territorial disputes in a non-European setting. As for the problematic of complicity of Europe's others in the production of Euro-centric international legal discourse, I will conduct a critical analysis of the international legal education in Europe and East Asia (IV).

II. Banishing Europes Others to the Realm of Non-Existence

2) *Yearbook of the International Law Commission 1976*, vol. II part 2, p. 75.

3) Dianne Otto, Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference , in Eve Darian-Smith and Peter Fitzpatrick (eds.), *Laws of the Postcolonial* (Ann Arbor: The University of Michigan Press, 1999), p. 173.

In this section, I will argue that in the latter half of the nineteenth century and the early twentieth century, that is, in the heyday of colonialism or imperialism, the other(s) of Europe was excluded from the participation in the discourse of international law at an ontological level. In other words, through the employment of various conceptual tools (notably, recognition), the others of Europe were deprived of subjectivity on the international plane, leaving Europe the only entity or self unencumbered by any alterity. This strategy was possible only against the backdrop of overwhelming superiority of European power, military or otherwise. This was a most radical way of suppressing different voices. Successfully carried out, this strategy does away with the bearers of different voices themselves.

I will attempt to show how this strategy of excluding the others of Europe in an ontological way worked within the framework of traditional international law. In so doing, I will analyze theories of two well-known international legal scholars, who were active in the latter half of the nineteenth century, i.e., de Martens and Lorimer.

The starting point of their argument was the (often unstated and widely shared) premise that a normative system called international law was possible only among peoples or nations with common or at least commensurable culture and interests. According to de Martens, one can talk of international law only in an international community which "l'on ne peut imaginer sans la solidarité des intérêts et l'analogie des tendances entre les nations".[4] International law was "l'ensemble des principes qui règlent les rapports des nations entre elles pour la poursuite de leurs buts de culture communs".[5]

Thus, international law was conceptualized to be a system not open to "social experience and consciousness" which was not "commensurable with the dominant European knowledge frame".[6] Now the question was how the traditional Euro-centric international law established its relationship with the others of Europe. Instead of considering them different but equal others and thereby engaging in "dialogical encounter", it employed a number of conceptual tools which enabled Europeans to view their relationship with the others in a strictly hierarchical manner. The notion of civilization was one of them and was given articulate treatment in leading scholarly works of the day. For instance, de Martens discussed the question of the relations between civilised and uncivilised or semi-barbarous peoples with a particular zeal. According to him,

4) Fedor Fedorovich de Martens, *Traité de droit international*, trans. Alfred Léo (Paris: Chevalier-Marescq et cie, 1883), p. 239.

5) Fedor Fedorovich de Martens, La Russie et lAngleterre dans lAsie Centrale , 11 *Revue de droit international et de droit comparée* (1879), p. 237.

6) Otto, *supra* note 2, p. 161.

whereas international law was possible among civilised nations, there was no notion of community of interests among barbarous peoples. Between civilised nations and uncivilised or barbarous peoples, no principles of reciprocity existed such as that which underlay the relations among civilised nations. Consequently, their relations could not be put on the positive legal basis.

This does not mean that no legal principles whatsoever could be applied to their relations. It was the law of nature, "immutable and eternal rules for the intercourse of mankind" deriving from the nature of things, which found application in relations between European and uncivilized states.[7] As a result, "in Asia, where international relations exist only *de facto*, without their being determined by the received principles of International Law, European diplomacy [was] much freer in its action and less hampered by the control of enlightened public opinion".[8]

After all, according to de Martens, the mission of the nations of Europe consisted in "spreading among Eastern peoples and tribes correct notions of justice, and initiating them in those eternal and beneficent principles which have placed Europe in the van of civilisation and humanity".[9]

Thus, there existed incommensurable or unbridgeable difference between Europe and her others. And this difference, rather than being treated on an equal footing, was placed in a strictly hierarchical relationship through the medium of allegedly universal notions such as Christianity or civilization. In this process, relationship between Europe and the others was shoved into a naturalized or de-juridicised space where not law but force was the regulatory medium.

The strategy of excluding the others of Europe at an ontological level attained a heightened sophistication by the employment of the concept of recognition. James Lorimer can be adduced as the scholar who successfully carried out the combination of the concepts of civilization and recognition. In Book 2 of his textbook entitled "The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities", after observing that "[N]o modern contribution to science seems destined to influence international politics and jurisprudence to so great extent as that which is known as ethnology, or the science of races",[10] he went on to put the question "whether, in the presence of ethnical differences which for jural purposes we must regard as indelible, we are entitled to confine recognition to those branches of alien races which consent to separate themselves from the rest, and, ostensibly or professedly, to accept our

7) De Martens, *Russia and England in Central Asia* (London: W. Ridgeway, 1879), p. 24.

8) *Ibid.*, p. 26-27.

9) *Ibid.*, p. 15.

10) James Lorimer, 1 *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edinburgh and London: W. Blackwood and Sons, 1883), p. 93.

political conceptions".[11] Faithful to the positivistic tendency of social Darwinism, he divided humanity into "three concentric zones or spheres that of civilised humanity, that of barbarous humanity, and that of savage humanity".[12] To these three zones or spheres corresponded three stages of recognition "plenary political recognition, partial political recognition, and natural or mere human recognition" respectively. [13]

Partial recognition subsists between civilised and semi-barbarous States. The partiality of recognition consisted in that, even when diplomatic relations had been established between them, a civilised State enjoyed the privilege of consular jurisdiction or, as in the case of Egypt, mixed courts within the territory of a semi-barbarous State. In contrast, between civilised and savage nations, there was no question of political or jural recognition. In this case, only natural or human recognition could come into consideration. Lorimer's notion of natural or human recognition, as in the argument by de Martens, has the strong negative connotation of the absence of the protection provided by positive international law. He went so far as to say that "*Colonisation, and the reclamation of barbarians and savages*, if possible in point of fact, are *duties* morally and *jurally inevitable*; and where circumstances demand the application of physical force, they fall within necessary objects of war".[14]

Again one can see here the naturalisation or de-juridicisation of relations between Europe and her (savage) other. These barbarians and savages, despite their undeniable existence or presence at a physical level, are denied any political (and by extension, legal) recognition on the normative plane. Rather than being considered meaningful alterity which can "infect" European selfhood, they are subjected to the epistemic violence of denying personality or subjectivity to those others judged to undershoot the standards set by Europe alone.

III. Suppressing the Dissonant Voices of Others

11) *Ibid.*, p. 98.

12) The expression three concentric zones or spheres clearly shows that Lorimer viewed international society of the nineteenth century as being composed of the European centre and the peripheries. For a detailed discussion of the formation of the peripheries in traditional international law, see Antony Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law , 40 *Harvard Journal of International Law* (1999), pp. 1-80.

13) Lorimer, *supra* note 9, p. 101.

14) James Lorimer, 2 *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edinburgh and London: W. Blackwood and Sons, 1884), p. 28. (emphasis added)

In the period of de-colonization and thereafter, that is, in the post-1945 period, the option of excluding colonial alterity at the ontological level was no longer tenable. With the emergence of de-colonisation as the *zeitgeist*, the number of peoples or nations attaining the full membership of international society rapidly multiplied. A good measure of this phenomenon is the increase in membership of the United Nations. In 1945 when the Charter of the United Nations was adopted, there were only 51 original members. Largely as a result of widespread de-colonisation, the number reached 189 as of the end of 2000. It can be said the objective of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples has been all but accomplished at least at the formal level. It is no longer possible to deprive Europe's others of their international legal personality (or de-personify Europe's others) for the alleged lack of civilisation or other universal standards. At least at the ontological level, Europe's others are entitled to the same treatment as is accorded to Europe.

Does this development signify that international law as a discursive system has been "de-centred" or liberated from its Euro-centric bias of the past? In other words, has international law of the post-1945 period become an arena where an uncoerced and rationally motivated fusion of different horizons (that is, the horizons of Europe and her others) takes place? How are different voices of Europe's others treated in contemporary international law? Are they regarded as valuable raw materials with which to radically reformulate or reconstruct the selfhood/identity of modern international law in constant consideration of the others' alterity?

A careful reading of history of international law of the post-1945 period shows that Europe, after being forced to renounce the strategy of ontological exclusion, has resorted to a subtler and less violent tactic of suppressing her others at the epistemological level. Now, non-European peoples and nations enjoy full membership in the international community. However, their discourse on international law, if judged to be incommensurable with the dominant normative view of Europe undergirded by an alleged universal applicability, is relegated to the realm of irrelevance or dismissed as an incomprehensible clamor. In the realm of international law, Europe's others have become full-fledged persons, but persons without voice. They have vocal cords. They make sounds (noises, rather), but no articulate and comprehensible voices which can be channeled into the process of international normative communication.

I will attempt to show this point by analyzing jurisprudence of international tribunals concerning territorial disputes that took place in non-European settings. Let me first discuss the Eritrea-Yemen arbitration relating to a territorial dispute between the two states over a few groups of islands in the Red Sea. The basic facts of the dispute are as follows.[15]

Eritrea, which had achieve independence from Ethiopia in 1993, and Yemen were in dispute over territorial sovereignty over groups of islands in the Red Sea between their respective coastlines. In late 1995, the dispute escalated into military confrontation and occupation of several islands. Both States concluded an Agreement on Principles on 21 May 1996, by which they undertook to settle their dispute peacefully and to conclude an arbitration agreement to that end. The Agreement provided that " ··· concerning questions of territorial sovereignty, the Tribunal shall decide in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles". The Arbitration Agreement was concluded on 3 October 1996 and provided for the establishment of a five-member tribunal.

The arbitration tribunal consisted of five international lawyers of high reputation. Two of them (Robert Jennings, Rosalyn Higgins) were British, two (Stephen Schwebel, Keith Highet) were American. The remaining member of the tribunal was Ahmed Sadek El-Kosheri, who was Egyptian by nationality. Consistent with the relevant provision of the Agreement on Principles that laid particular emphasis on historic titles, the main arguments of both states were built around that concept.

Eritrea's claim to a historic title over the islands was based on its position as a successor State to Italy and then to Ethiopia. Eritrea based its historic title on the colonial activities of Italy in the region between World War I and World War II. This "historic consolidation of title on the part of Italy during the inter-war period that resulted in a title to the islands", Eritrea went on to assert, was "effectively transferred to Ethiopia as a result of the territorial dispositions after the defeat of Italy in the Second World War".[16] Thus, rather ironically, Eritrea based its territorial claim to these islands on the activities of its former colonial masters.

In contrast, Yemen's argument based on a historic title derived not from others but from its former self known as *Bilad el-Yemen*. This argument was summarised by the Tribunal as follows.

Yemen has asserted an historic or "ancient title" running back in time to the middle ages, under which the islands are asserted to have formed part of the *Bilad el-Yemen*. This ancient title predated the several occupations by the Ottoman Empire, asserts Yemen, and reverted to modern Yemen after the collapse of the Ottoman Empire at the end of the First World War.[17]

15) The text of the Award of the Arbitral Tribunal on the Eritrea-Yemen Arbitration (hereinafter, Award) appears at pp. 1-141 of the 114 International Law Reports. See also Nuno Sérgio Marques Antunes, The Eritrea-Yemen Arbitration: First Stage The Law of Title to Territory Reaverred , 48 *International and Comparative Law Quarterly* (1999), pp. 362-386; Constance Johnson, Eritrea-Yemen Arbitration , 13 *Leiden Journal of International Law* (2000), pp. 427-446.

16) Para. 115 of the Award.

Confronted with the opposing claims, the Tribunal concluded that neither party's argument based on historic titles was persuasive. In the end the Tribunal's decision placed primary reliance on the principle of geographical propinquity with secondary resort being made to a survey of recent displays of functions of state and governmental authority.[18]

This case raises a number of interesting questions relating to the law of territorial acquisition. In this article, I am not interested in those questions. What compels my attention in this case is the way the voice of modern European international law drowns or trumps that of the international normative order that was operative in the region in question. As can be clearly seen in the quotation above, Yemen's claim based on historic titles requires one to explore a realm unfamiliar to international lawyers trained in the European tradition of international law, including the four western members of the arbitral tribunal in this case. To be able to correctly assess the merits of Yemen's claim, one needs to have a clear understanding of international law of the Islamic world, a preeminent and persistent other of Europe for a long time. One of the central questions is the status of Yemen within the Islamic regional order, more specifically, whether Yemen retained its "sovereignty" in spite of the Sublime Portes having declared Yemen to be one of the *vilayets* falling under Ottoman rule.[19]

This question of great delicacy was not approached from within the Islamic system of international law obtaining in the relevant period. Instead, the Tribunal seems to engage in cramming or pressing the Islamic reality of the late nineteenth century into a heterogeneous and extraneous system of modern international law. In so doing, the Tribunal makes a liberal use of modern international law concepts such as "territorial sovereignty", "jurisdiction", "title", "suzerains" and so on. Among these, the notion of "territorial sovereignty" assumes a prominent significance. According to the Tribunal, this concept, which was "practically ignored" by "classical Islamic law concepts",[20] came to have substantial juridical consequences for the situation in the Red Sea with the "reception" of modern international law by the Ottoman Empire around 1875. The ensuing reasoning of the Tribunal proceeds from the (unproven) premise that after 1875 the Islamic system of international law was "modernised" or more correctly "Europeanised" with the result that it was perfectly appropriate to structure the discourse on the Islamic international law with the employment of international legal terms and concepts of modern international law.

17) Para. 116 of the Award.
18) For a detailed discussion of this question, see paras. 451-507 of the Award.
19) Para. 119 of the Award.
20) Para. 130 of the Award.

Proceeding from this premise, the Tribunal held that both Eritrea and Yemen, including the islands in dispute, was under the territorial sovereignty of the Ottoman Empire. In its interpretation and application of this concept, the Tribunal brings into high relief the exclusionary aspect of territorial sovereignty.[21] As a concept originating from, among others, the Roman law notion of dominium, the right of use, benefit from and dispose of a thing to the exclusion of the other persons, the right of territorial sovereignty could not co-exist with other local or traditional legal regimes which obtained in the region. The reified and essentialised concept of territorial sovereignty obliterates or wipes out indigenous and sub-sovereign (also, sub-European, pre-modern and sub-civilisational) legal relations. This is what the Tribunal meant when it observed that "it is difficult to see what could have been left of such a title after the interventions of the Ottoman *sovereignty* which was generally regarded as *unqualified*".[22] In this light, it is not surprising to see the Tribunal saying, in rejecting the Yemen's argument based on the theory of revision, that "the chain of titles was necessarily interrupted and whatever previous merits may have existed to sustain such claim could hardly be invoked" after the introduction of the concept of territorial sovereignty into the Islamic system of international law.[23]

With the suppression of indigenous and local voices of the Islamic international law, the monophonic voice of European international law is privileged. More correctly, it is the only voice audible in the discourse of international law. In reading the award on the dispute between Eritrea and Yemen, one is struck by the overwhelming importance accorded by the Tribunal to international legal acts couched in modern European legal clothing, in particular, the 1923 Treaty of Lausanne, the 1927 Rome Conversations and the 1947 Treaty of Peace with Italy. Most of the crucial factual ascertainments are made on the basis of European materials.[24] Inadvertently exposing itself to the criticism from feminist legal scholars,[25] the Tribunal engages in the public/private distinction in connection with the evaluation of the legal significance of exercise of criminal or civil jurisdiction on the islands in dispute. Despite the fact that "[t]he owner and crew members both informed the local official, who is known as the *Aq'il* Sheikh of the Fishermen, and the Department was notified by the *Aq'il*", this customary law system of arbitration of Yemen is regarded by the Tribunal as containing "elements of private justice and

21) Paras. 132, 143, 147, 150, 445.
22) Para. 445. (emphasis added)
23) Para. 125.
24) For instance, see paras. 134-141.
25) For a detailed discussion of feminist approaches to international law and a criticism of the public/private distinction in international law, see Hilary Charlesworth, Christine Chinkin and Shelley Wright, Feminist Approaches to International Law , 85 *American Journal of International Law* (1991), pp. 613-645.

being of an essentially private character".[26]

The other of Europe, in this case Islam, is subjected to double suppression. When lying outside the framework of European epistemology, lived experiences of the other of Europe in the normative field are dismissed as an incommensurable and incomprehensible background noise. The Tribunal's sense of insurmountable distance between Europe's modern self and its medieval Islamic other is divulged when it talks of "the sheer anachronism of attempting to attribute to such a tribal, mountain and Muslim medieval society the modern Western concept of a sovereignty title".[27] Therefore, in the resolution of disputes involving the "modern Western concept of territorial sovereignty", the normative practice and experiences of sub-modern agents cannot be factored into. Reification and rigidification of the concept of territorial sovereignty does not leave room for other indigenous legal relations to cohabit the normative realm of Europe.

Another form of suppression is triggered when the practices and experiences of Europe's others are appropriated or co-opted by Europe. In this case, rather than being understood on their own terms, lived experiences of the others of Europe are rehashed and transformed out of their shape to fit the epistemological framework of Europe, which is not formed in an ideological vacuum but strongly reflects "the interests guiding and constituting cognitive processes" of Europe.[28] Being coerced into envisioning and forming their normative lifeworld in the image of Europe, the other of Europe is subjected to the "epistemic violence of forcing its commensurability" with the allegedly universal selfhood of Europe.[29]

Thus, the other of Europe is confronted with an unenviable choice. It can either fall under the province of irrelevance by staying outside the so-called universal (in fact Euro-centric) international legal order or strengthen the European selfhood by castrating its alterity or domesticating it in the image of Europe. Either way, the other of Europe is marginalized beside the overarching presence of the European self.

VI. Reducing Oneself To Europe's "Sub-Self"

What makes the present picture more complicated is the fact that the persistence of coloniality

26) Paras. 338, 339.
27) Para. 446.
28) Jürgen Habermas, *Knowledge and Human Interests*, trans. Jeremy J. Shapiro (Boston: Beacon Press, 1971), p. 211.
29) Otto, *supra* note 2, p. 167.

in the present-day international law was not made possible by a unilateral and forcible imposition of the colonially tainted *weltanschuung* on the others of Europe. Europe's others are also involved in "coauthoring" and sustaining a positional superiority of Europe without much self-reflection. Given the complicity of non-European nations in the creation and maintenance of the Euro-centric discourse of international law, one needs to articulate a subtle approach which factors into the element of "self-other entwinement" underlying the West-oriented international law rather than simply dismissing the existent discourse on international law as something purely extraneous or imposed from outside.

To drive home this point, I will analyse the way the discipline of international law is being studied and taught in European and non-European countries. The analysis will show the factor of self-other entwinement clearly at work in producing and perpetuating the Euro-centric view of international law.

In connection with international law education in European countries, two problems can be singled out for our discussion. The first problem is that most western states approach modern international law in a communicatively irrational manner.[30] It is a matter of public knowledge that modern international law has its roots in "public law of Europe" (*droit public européen*) of the 19th century. A large part of general or customary international law now claiming universal validity was created when many states of the contemporary world were non-existent. There was only an insignificant amount of input from the non-western countries in the formation of modern international law. Consequently, it lacks the element of symmetry or reciprocity.

Secondly, despite the accelerated internationalization or globalization of our every-day life, the normative impact of international law remains very marginalized. Although most states pay lip-service to the importance and effectiveness of international law, they are at the same time at pains to prevent international law from penetrating domestic legal life against their wishes. This is clearly shown in the relation of international and national (domestic) law. A number of states formally or factually support the so-called "dualism", in particular with respect to treaties, according to which international law (in particular, treaties) acquires effectiveness and validity on the domestic plane only after being "transformed" into national law in accordance with constitutional or legal procedures. Under this theory, the normativity of international law in the domestic field stands or falls depending on the will of the state concerned. This is redolent of international legal positivism of the 19th century which sets great store by the *voluntas* of

30) For a detailed discussion of communicative rationality in law, see Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Cambridge, Massachusetts: MIT Press, 1996). See also Mathieu Deflem (ed.), *Habermas, Modernity and Law* (London and Thousand Oaks, California: Sage Publications, 1996).

individual states in relation to the formation and application of international law.

The method of international legal education in leading western states, in particular the United States and Great Britain, reinforces the voluntarist or solipsistic conception of international law. In the United States and Great Britain, international law textbooks are based mainly on court decisions, municipal legislation and executive practice of their own. One gets the impression that students are taught an international law as interpreted and understood by their countries. This is well shown in the alternative expression for international law that is in wide currency in the United States: foreign relations law of the United States. This expression gives one the impression that in the United States international law is a kind of domestic law applied in the external relations of that country. One is instantly reminded of the German expression for international law which was widely used in the 19th century: *das äußere Staatsrecht* (external state law, i.e., domestic law applied to the external relations of a state).[31] It is evident that such an approach to international law education cannot be conducive to the attainment of inter-subjectively recognized and shared system of international legal norms.

A contrary problem exists in non-western countries in respect of international law education. In most of these countries, research and education of international law takes an uncritically exegetic approach to Euro-centric modern international law. To cite an example, one of the leading international law scholars of Japan points out the "persistent tendency toward passivism" of Japanese scholars, who have been overwhelmed by the abundance of [western] materials and have merely settled for passive translation and explanation of these materials.[32] He also observes that "from the very beginning, international law has been something that the Japanese must learn, accept and behave in accordance with. They have tried to import, introduce and digest it. It is something given, not something that the Japanese can create or contribute to." Although this statement relates to the teaching and research of international law in prewar Japan, as he admits, "[Eurocentrism and passivism] are still affecting the teaching and research of international law in todays Japan."[33]

The same Eurocentric and passive (or self-effacing) approach to the teaching and research of international law is easily found in other non-western states. Let me take up the example of Korea. Most leading Korean textbooks of international law meticulously discusses and summarizes

31) For instance, Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (Frankfurt am Main: Suhrkamp, 1970), p. 497 (§ 330).

32) Yasuaki Onuma, Japanese International Law in the Postwar Period Perspectives on the Teachig and Research of International Law in Postwar Japan- , 33 *Japanese Annual of International Law* (1990), p. 43.

33) *Ibid.*, Japanese International Law in the Prewar Period Perspectives on the Teaching and Research of International Law in Prewar Japan- , 29 *Japanese Annual of International Law*(1986), p. 42.

jurisprudence and doctrine originating from western states and scholars. However, there is a curious silence on the international legal problems concerning Korea. As a "divided State" Korea faces a whole array of international legal problems of a *sui generis* character, in addition to other international question of a general nature. In Korean textbooks, it is with some difficulty that one can find discussions of Korean practice or jurisprudence relating to international law. What little discussion on Korean practice and jurisprudence is often relegated to footnotes. To a greater extent than in Japan, international law is presented as something to be uncritically accepted and adhered to. It is something given to or imposed on us extraneously.

Such a self-effacing or passive approach to international law contributes to the perpetuation of the Euro-centric character of modern international law. In the absence of any "significant other" claiming for recognition (in Hegelian terms, engaging in the "struggle for recognition"), the prevailing international legal system sees no reason or need to get self-reflective and look beyond the Euro-centric positive international law for any source of inspiration. The ideal type of international law as a normative system, which is inter-subjectively recognized and whose legitimacy is internalized by its addressees, remains an extremely remote ideal under such circumstances. A rationally motivated and reflexive consensus cannot be achieved between ego-centric and altro-centric (or ego-effacing)[34] subjects.

Under the present system of international law education, the idealized image of the European international law tends to subvert non-European international law's image of its own self, reducing it to a state of "sub-self" constantly aspiring toward fulfillment in the European model. It is to be noted that creation and maintenance of the Euro-centric discourse of international law (or colonization of the international normative consciousness of Europe's others) is not unilaterally imposed, but is "co-authored".

V. Concluding Remarks

In this article, I have tried to show that the post-1945 international law, to say nothing of the so-called traditional or "classical" international law, still remains "hostile to the recognition of difference and bent on incorporating and submerging otherness in the vortex of [European] selfhood",[35] despite all the lofty and high-sounding announcements that we have firmly arrived at

34) These expressions do not have any moral connotation.

35) Fred Dallmayr, *Beyond Orientalism: Essays on Cross-Cultural Encounter* (State University of New York

the post-colonial stage at least on the international normative plane. I have also ventured an analysis of the strategies of excluding Europe's others at various levels, in particular, ontological and epistemological. In so doing, I also argued that Europe alone is not responsible for this state of affairs but that the others of Europe are complicit in the creation and maintenance of a discourse that pushes them off to the margins or peripheries of the normative realm of international law.

Supposing that the hegemonistic and exclusionary (colonial) character of modern international law has become transparent, what is to be done by international lawyers aiming to go beyond colonialism in international law? One has to, first of all, make the participants in the international normative discourse aware of the inevitable presence and the constructive role of the otherness, alterity or difference in international law. In this sense, one needs to pay attention to new approaches proposed by some scholars. For instance, Onuma Yasuaki, a Japanese international lawyer, has articulated what he terms an "intercivilisational approach or perspective" to international law and productively applied it to human rights and other global issues.[36] Albeit not an international legal scholar, Raimundo Panikkar proposed an approach he termed "diatopical hermeneutics", which is worthy of close attention by international lawyers. According to him:

Diatopical hermeneutics is the required method of interpretation when the distance to overcome, needed for any understanding, is not just a distance within one single culture or a temporal one, but rather the distance between two (or more) cultures, which have independently developed in different spaces (topoi) their own modes of philosophising and ways of reaching intelligibility along with their proper categories.[37]

A question that springs to ones mind when discussing an intercivilisational or diatopical approach to international law is how one is to deal with the thorny issue of universality or universalism. Is it to be denunciated as a discursive tool that is too colonially contaminated and carries the constant danger of being abused by Europe? A post-colonialist commentator seems to subscribe to this view when she observes that an emancipatory strategy needs to reimagine

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Press, 1996), p. 48.

36) For instance, Onuma Yasuaki, Toward an Intercivilizational Approach to Human Rights , in Joanne R. Bauer and Daniel A. Bell, *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), pp. 103-123.

37) Raimundo Panikkar, Eine unvollendete Symphonie , in Günther Neske (ed.), *Erinnerung an Martin Heidegger* (Pfullingen: Neske, 1977), p. 175; Raimundo Panikkar, What is Comparative Philosophy Comparing? , in Gerald J. Larson and Eliot Deutsch (eds.), *Interpreting Across Boundaries: New Essays in Comparative Philosophy* (Princeton: Princeton University Press, 1988), p. 130. As cited in Dallmayr, *supra* note 34, p. 61.

community as networks of multiplicitous, contradictory, and dynamic social processes always enabling change for the better rather than as a vision of an ideal authentic society, which relies on the erasure of difference.[38]

It is submitted, however, that one should not *a priori* privilege or transcendentalise difference or otherness. Experience shows that human life has some elements that are susceptible to uncoerced universalisation. True, any intellectual claim to universality should be subjected to a rigorous examination in the light of its own linguistic specificity and sources of authority. However, universality itself cannot and should not be dismissed as inherently false or imperialistic.[39] Repudiation of the concept of universality itself would be a commission of the epistemic violence of forcing incommensurability. A postcolonial approach to international law can and should embrace, not a negative and exclusionary universality, but a positive universality that is multivocal and polyphonic.

38) Otto, *supra* note 2, p. 170. (emphasis original)

39) Lydia H. Liu, *Translingual Practice: Literature, National Culture, and Translated Modernity China, 1900-1937* (Stanford: Stanford University Press, 1995), p. 7.

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