1

Towards an introduction

> Whose peace are we talking about? Peace on what terms? Peace in whose interests? And peace negotiated by which individuals or groups? In one sense, everybody wants peace; it is just that they want their own version of peace.
>
> David Keen[1]

International law and postcolonial peace

A perception prevails that no matter the vast expanse of international legal transformations in the past century or so, international law, as a discipline and operative mechanism, remains largely entrapped in layers of normative and institutional inadequacies.[2] For the most part, the inadequacies have been manifested in a crisis of method and dispute about the basis, legitimacy and relevance of international law to Third World struggles, particularly aspects of those struggles preoccupied with the searching enquiries on the quest for peace and progressive social transformations.[3] The traditional narrative of international law had long been perceived to have an inclination for the dominance and consolidation of values shaped by a certain mindset, one which assumes that those values are neutral, just and universal. The claim to universalism and impartiality often tends to feed into the proposition that international law is invisible to, and isolated from, the dynamics of power in the interfaces between hegemonic and subaltern elements in international society.

[1] D. Keen, 'War and Peace: What's the Difference?' in A. Adebajo and C. L. Sriram (eds.), *Managing Armed Conflicts in the 21st Century* (London: Frank Cass, 2001), p. 18.
[2] See M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005); B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Delhi: SAGE Publications Ltd, 1993).
[3] See A. Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press, 1986), p. 1.

These assumptions, though, and the rationale upon which they are framed, continue to be contested. After all, law as an instrument for social change is often a mirror image of the very society that determines its content, praxis and operational hierarchy. Contemporary international law is no exception. Its history suggests that as a discipline, it duly initiates the reproduction of norms and values, conceptualised from the viewpoint of Western civilisation and political culture, which in its relation with non-European societies often arrogates a sense of dominance with a tincture of abrasive quality. The narrative of dominance underpinning some of international law's foundational values conditions a sense of universalism, seen by some as a kind of departure point which limits the scope for alternative thinking. As Edwin Burrows observes,

> We generally assume that we know, from ... observation, what is universally human. But a little scrutiny will show that such conclusions are based only on experience with one culture, our own. We assume that what is familiar, unless obviously shaped by special conditions, is universal.[4]

For some, though, international law's foundational precepts and claims to universalism seem too presumptuous to provide solutions to the needs and concerns of the Third World. The challenges to dominant inclinations of international law have been construed on the premise that the history of international law has been a struggle, most of which conjures an imagination of disempowerment of institutions and cultures of non-European societies, ultimately reducing them to what Upendra Baxi calls 'geographies of injustice'.[5] The scale and scope of these disjunctures are such that a renewal of international law on terms sensitive to, and reflective of, Third World struggles and settings would appear sensible. Yet, despite significant progress, not much has been achieved on this front, partly because the advocacy and advocates of international law are frozen in what Peter Goodrich calls 'a tenuous twilight zone between academic homelessness and practical professional insecurity' and often 'peddling a variant form of positive law where it is plausible, most needed and most unwelcome'.[6] The neglect of both the practitioner

[4] E. Burrows, *Flower in My Ear: Arts and Ethos on Ifaluk Atoll* (Seattle: University of Washington Press, 1963), p. 421.

[5] U. Baxi, 'Geographies of Injustice: Human Rights at the Altar of Convenience' in C. Scot (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001), p. 197.

[6] P. Goodrich, 'On the Relational Aesthetics of International Law: Philosophy of International Law', *Journal of the History of International Law*, 10 (2008), 321–341 at 322.

and what ought to be practised has culminated in 'the inclusion of international law within the identity of the self, so that it merely serves as a boundary of the self and as a weapon against the other'.[7] The implication has been to deny voice and obscure the other view, that 'there are practical alternatives to the current status quo of which, however, we rarely take notice, simply because such alternatives are not visible or credible to our ways of thinking'.[8]

Some of the disjunctures in the orientation of international law have the tendency to reproduce patterns of behaviour with some far-reaching implications, as experiences in postcolonial Africa have shown. Ever since decolonisation crystallised into self-rule, there has emerged what is referred to as 'postcolonial statehood'. The period facilitated closer encounters between international law and Africa through the concepts of sovereign equality, non-interference and territorial integrity. But these encounters and their trappings appear to have brought little to celebrate. Sovereignty occupies a contradictory position in the dynamics of these encounters. As the brainchild of the Treaty of Westphalia and configured through the European model of the nation state, it is the framework upon which international society is built. It is the source of legitimacy and the guarantor for the protection of the common interest of states. Moreover, sovereignty had also historically been seen as an antidote to interference in the domestic affairs of states. Whilst the benefit of this Westphalian ethos is essential, its related obligations are far more nuanced. They require strength to impose presence, legitimacy and conformity.

The postcolonial African state has, however, largely struggled to fulfil its most basic of obligations. In fact, the majority of its recent history has been a story of distress and contrasting ironies. It has been riddled with upheavals ranging from economic collapse and political turbulence to armed conflicts. Some of its defining futures have emerged from the rocky exercise of nation-building, whilst others emanated from the consequences and fissures of the immediate aftermath of decolonisation struggles. Yet in spite of all these, the postcolonial state and its formal apparatuses continue to be the primary mediums through which

[7] A. Carty, 'The Implosion of the Legal Subject and the Unravelling of the Law on the Use of Force: American Identity and New American Doctrines of Collective Security' in H. Kochler (ed.), *The Use of Force in International Relations: Challenges to Collective Security* (Vienna: International Progress Organization, 2006), p. 106.

[8] B. S. Santos, 'Epistemologies of the South: Reinventing Social Imagination'. Paper presented at the Staff-Student Seminar, School of Law, University of Warwick, 12 April 2010, 1–51 at 1.

international law's approaches to conflicts and peacebuilding are conceived. Andrew Linklater has suggested that the failure of theorising the world outside the state makes the 'modern political imagination profoundly impoverished'.[9] This impoverished imagination implies that the recurrent attributes of violence and conflicts have posed considerable challenges on the structures and instruments of international law. The actuality of these consequences remains a reference point for the quest for international and endogenous mechanisms for approaches to conflict and peacebuilding.

The traditional focus and ambition of international law in its encounters with postcolonial Africa have been the provision of normative and institutional frameworks through which international order could be maintained and interstate relations conducted. But the core of the framework mainly regulated states' behaviour on the international stage through sets of responsibilities, entitlements and reciprocal obligations. The focus has meant that violence of a type that erupted within the domestic affairs of states was largely outside the remits of international regulatory structures. It was assumed, however, that once states were at ease and in peace with each other, the cross-cultural dialogue arising from such mutual conviviality and encounters would encourage the promotion of peace within domestic boundaries. Perhaps two factors helped shape this assumption. The first was the idea that strong interstate relations could provide an incentive for the promotion of peace within the respective internal jurisdictions. The second factor had to do with the privilege and benefit accruing from sovereign equality. States' claim to sovereign statehood was consolidated by their ability to exercise effective control of internal borders. But despite these efforts, the frequency and intensity of violence and conflicts continue unabated, culminating in considerable human suffering.

There is, then, a strong basis for alternative thinking – that considers and engages propositions from Third World perspectives on international law and their relevance to the need for conceptual recasting of approaches to violence and conflicts. This is particularly compelling given that a significant part of postcolonial African statehood has been characterised by the eruption and reoccurrence of violence and conflicts. And for the most part, too, the encounters between international law and

[9] A. Linklater, 'Community' in A. Danchev (ed.), *Fin de Siecle: The Meaning of the Twentieth Century* (London: I. B. Tauris, 1995), p. 178.

postcolonial African statehood have provided little respite, especially in offering viable approaches to confronting these conflicts. It is perhaps due to this bifurcation between international law and African postcoloniality that achieving peace through viable peacebuilding frameworks has become a challenge and an aspiration worthy of vigorous pursuit. What then are the alternatives? Is wholesome recasting of contemporary international law approaches to internal conflicts necessary? Are any such efforts bound for Albert Camus' supposition of an 'interminable tension resigned to only proposing to diminish suffering' given that the 'injustice and the suffering of the world will remain'?[10] Or is this perhaps the basis for the quest for the searching enquiries for alternatives?

The quest for alternative approaches to conflicts

Ever since the emergence of the post-war international legal order, the social, political and legal structures of Third Word states have been framed by and subject to the normative and philosophical underpinning of this order. The nature of this existence has been defining both in methods and outcome. Perhaps nowhere is this more manifestly visible than in the encounters between international law's approaches to peace and the social conditions of African postcoloniality. This is most evident in the context of internal conflicts in Africa where the approaches have been largely unable to engender appropriate frameworks for the achievement of durable peace. And for decades there was little scope for optimism on this front, particularly in that the ethos and institutions of postcolonial Africa remained for the most part conditioned by the dynamics of the contemporary international legal order. The implication of the dominance of contemporary approaches to conflicts has been that the advancement of alternative non-European approaches has been either circumscribed to irrelevance or considered incongruent with the institutional and normative configuration of international law. Its origin, though, lies also in the very vocabulary of colonial legitimation which was, as Ali Mazrui notes, replete with 'references to the "order", "law" and "peace" which the imperial umbrella had [presumed to have] afforded the areas it covered'.[11]

[10] A. Camus, *The Rebel* (London: Penguin Books Ltd, 1978), pp. 266–7.
[11] A. A. Mazrui, *Towards a Pax Africana: A Study of Ideology and Ambition* (London: Weidenfeld and Nicolson, 1967), p. 147.

Joseph Chamberlain made this central to the articulation of the idea of Pax Britannica in 1897:

> In carrying out this work of civilization we are fulfilling what I believe to be our national mission, and we are finding scope for the exercise of those faculties and qualities which have made us a great governing race ... In almost every instance in which the rule of the Queen has been established and the great Pax Britannica has been enforced, there has come with it greater security to life and property, and a material improvement in the condition of the bulk of the population.[12]

Over a hundred years later, Tony Blair, the former British Prime Minister, came close to reinforcing Chamberlain. The 'best defence of our security', he said, 'lies in the spread of our [liberal international law] values. But we cannot advance these values except within a framework that recognises their universality.'[13]

Thus, dominant peace advocacy had generally conceptualised peace and peacebuilding in the context of Eurocentric thinking. The imperative to challenge the dominance of international law approaches to conflicts and interpretations of peace has become increasingly palpable. Indian political theorist Vrajenda Raj Mehta has, for instance, argued against the adoption of neo-liberal democracy as a model for development, peacebuilding and a prescription for social stability in India and the Third World.[14] He locates the model's shortcoming in its unidimensional view of human life and society. According to Mehta, the antidote to this non-representative ascription to universalism is for non-European communities to rediscover their own path to self-fulfilment, given that their 'broken mosaic cannot be recreated in the image of the west'.[15] Mehta goes on to advocate for an indigenous process of social transformation which he describes as 'a process towards increasing self-awareness in terms of certain normatively defined goals ... largely defined by [a] society's own distinct history and way of life'.[16]

From an African viewpoint, a similar work of significance is Emmanuel Hansen's edited volume on African perspectives on peace and development.[17]

[12] J. Chamberlain, cited by Mazrui, *Towards a Pax Africana*, p. 148.
[13] See 'PM Warns of Continuing Global Terror Threat, 5 March 2004', cited in P. Sands, *Lawless World: The Whistle-blowing Account of How Bush and Blair are Taking the Law into their Own Hands* (London: Penguin Books, 2006), p. 1.
[14] V. R. Mehta, *Beyond Marxism: Towards an Alternative Perspective* (New Delhi: Manohar Publications, 1978).
[15] *Ibid.*, p. 92. [16] *Ibid.*, p. 104.
[17] E. Hansen (ed.), *Africa: Perspectives on Peace and Development* (London: Zed Books, 1987).

Covering a spectrum of postcolonial security dilemmas, the volume's contributors variously tease out the imperatives of an African perspective to a peace paradigm. The formulations, which range from development-related peace to regional economic integration, centre on certain visions that attempt to depart from dominant international law peacebuilding conceptions and methodologies. Hansen's departure point is that although the notion of peace is acclaimed as a universal desideratum, perspectives on its attainment are varied and contingent on a social group's history and material conditions.[18] In whatever perspective the quest for peace is articulated, Hansen argues, it must encompass the primacy of physical security, material prosperity, political efficacy and the satisfaction of human existence.[19] According to Hansen, the approach that actually prevails is what he calls the 'establishment perspective' consolidated through a kind of Western European thinking that 'sees minimalist conflict management as a sufficient condition, or the only sufficient condition of peace'.[20]

Since the volume's publication, there have been significant transformations which have exacerbated the challenges of postcolonial peace on the one hand, whilst on the other, reignited interest in the quest for alternatives. Although these transformations have not entirely restructured the conceptual and methodological approaches to violence and conflicts in Africa, they nonetheless presented some space and possibilities for the quest for alternative thinking on three fronts. First, the Cold War, a system that legitimised and institutionalised armed conflicts as means of addressing political and ideological grievances, has ceased to exist. This had the double effect of exposing many African states that relied on the patronage of superpower rivalry, and providing the opportunity for the beginning of some form of transformation in countries caught up in violence and proxy wars. It is this enduring, and in some ways defining, character of the Cold War that led some to suggest that it was for Africa more than just a Cold War.[21] Second, the Organisation of African Unity (OAU), which epitomised both post-independence African political order and a frame of reference for continental legal order, has been replaced by a new organisation, the African Union (AU).

[18] E. Hansen, 'Introduction' in E. Hansen (ed.), *Africa: Perspectives*, p. 1.
[19] *Ibid.*
[20] *Ibid.*, p. 5.
[21] John Paul Lederach holds the view that whilst the Cold War provided a means of survival for some African states, it was far from 'cold' given that a significant portion of conflicts during that time were proxy wars. See J. P. Lederach, *Building Peace: Sustainable Peace in Divided Societies* (Washington, DC: United States Institute of Peace, 1997), p. 9.

Throughout its existence the OAU's approaches to conflicts were embedded in a framework conceptualised through the prevailing international legal architecture, which shielded possibilities for viable alternatives outside of that order. Soon, the OAU was overcome by rapidly shifting developments in Africa and collapsed thereafter; this collapse provided an opportunity for reform. Third, there has been considerable consolidation of instruments of power with the diffusion of the traditional role of the state through the abrasive embodiments of globalisation. These changes have triggered the need for a renewal in the approaches to, and perception of, peace and peacebuilding in Africa.

But for this normative and institutional renewal to happen there is a need to fashion an approach that is inclusive in its orientation for the construction of appropriate peacebuilding models. The imperative to do so is accentuated by the fact that in the realm of peacebuilding the 'critical task ahead cannot be limited to [merely] generating alternatives', but requires, in effect, 'an alternative thinking of alternatives'.[22] The alternatives are especially poignant given that in much of international law's early encounters with non-European nations, a 'sociology of absences'[23] emerged in which Africa was 'constituted as an intrinsically disqualified being'.[24] The plausibility of this alternative thinking is conditional to moving beyond what Boaventura de Sousa Santos calls 'abyssal thinking'. By this he implies a knowledge system which comprises 'visible and invisible distinctions, the invisible ones being the foundation of the visible ones'. The distinctions generate radical lines with two realms: 'this side of the line' and 'the other side of the line'. According to Santos, the resulting divisions are such that the other side of the line 'vanishes as reality, becomes nonexistent, and is indeed produced as nonexistent'.[25]

Thus the calls for alternative approaches and thinking are motivated by the understanding that dominance and universalism are not ideal departure points, yet both have been strongly associated with, and the

[22] B. Sousa Santos, 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges', *Review*, XXX(1) (2007), 45–89 at 63.

[23] B. Sousa Santos, 'A Critique of Lazy Reason: Against the Waste of Experience' in I. Wallerstein (ed.), *The Modern World-System in the Longue Durée* (Boulder, Colo.: Paradigm Publishers, 2004), p. 158.

[24] B. Sousa Santos, J. A. Nunes and M. P. Meneses, 'Introduction: Opening Up the Canon of Knowledge and Recognition of Difference' in B. Sousa Santos (ed.), *Another Knowledge is Possible: Beyond Northern Epistemologies* (London: Verso, 2008), p. xxxv.

[25] Sousa Santos, 'Beyond Abyssal Thinking', 45.

operating dynamics of, the historical determinants of international law. This culminated in the beginning of a paradigmatic shift. Whilst the shift was not entirely totalising in its bearing, it nonetheless produced certain social conditions that facilitated a renewed engagement with internal conflicts in postcolonial Africa. One such potential alternative proposition is the normative framework underpinning the institutions of the African Union and its Constitutive Act. Formally launched in 2002, this framework has been perceived as representing a milestone in the evolution of a particular kind of legal and philosophical peacebuilding disposition, and the beginning of a narrative of Africa's norms formulation agenda. Such optimism springs from the perceived potential of the Constitutive Act in providing avenues for recasting approaches to internal conflicts in Africa. This book explores this potential and its meaning for Africa's quest for a peaceful and progressive social order. Although the inspiration for the African Union's transformation comes from a number of dimensions, it is in part an admission that conventional international law approaches to conflicts have had little or no impact in postcolonial Africa. The reasons for this owe as much to the particularity and configuration of the international order as to the complex attributes of internal conflicts in Africa.

Argument and focus of the book

This book explores the encounters between international law and postcolonial internal conflicts in Africa, and gauges the extent to which an alternative approach to conflict and peacebuilding can be conceptualised from the Constitutive Act of the African Union. It examines the perceived limitations in the philosophy and structural configuration of international law, and from this synthesis draws its principal claim that international law's treatment of internal conflicts and the postcolonial peace problematic in Africa not only exposes a multitude of dilemmas, but equally raises critical questions as regards the utility of its approaches. The incongruence and the questions this generates partly hover around the relevance and capabilities of current approaches conceptualised through the normative frame and institutional ordering of international law. This necessitates a conceptual recasting, one that may potentially be done through the emerging integrated normative and institutional framework embedded in the Constitutive Act of the African Union. In this instrument, there appears to emerge a window of opportunity through which such recasting of the

approaches to African postcolonial peace and conflict problematics could be conceived and articulated.

The relevance of the Constitutive Act as a potential outlet for alternative propositions is located in its three-tier integrated approach to conflicts. These are Article 4 non-indifference, norms formulation and localisation and the binary of social integration and interdependence. Of course, this is not to suggest that the Constitutive Act personifies, in its totality, a robust challenge to the dominance of neo-liberal international approaches to peace, but that it was conceived in the backdrop of the loss of faith in some of the principles and institutional settings of international law, opening in effect, an opportunity for the possibility of an alternative. Although there are still limitations and patterns of tension in the emerging African Union's legal architecture, the Constitutive Act provides, nonetheless, a narrative and conceptual essence that attempts a departure from, and alteration of, aspects of international law's foundational ethos which for long conditioned postcolonial African legal orders, especially in relation to the practices and ideals of peacebuilding. The perceived departure, it is argued, represents a kind of reorientation that may potentially constitute parameters of what could be an African-induced recharacterisation of international law approaches to internal conflicts.

But, of course, as this normative and legal architectural vision variously remains *entrapped* in the evolving norms of the African Union, it is at risk of being overburdened by neo-liberal international law, thereby remaining unrealised. The book suggests that the capacity of the African Union to fulfil the Constitutive Act's philosophy and evolving practices in peacebuilding would hinge on its ability to appropriate a life of its own, one that constructs its frame of reference from Pan-African principles and matters of social justice and integration. The benefits of doing so are many. Besides the possibility of avoiding the pitfalls of the OAU, such approach will avail the African Union considerable scope in shaping a genuine endogenous legal space capable of constructing an inclusionary approach to durable and sustainable peace. Research on this, though, is thin, despite the increasing international engagement with, and academic interest in, the structures, institutions and legal instruments of the African Union. Moreover, most of the emerging studies and perspectives hinge largely on the implementation of the African Union's interventionist mechanism, with an almost disproportionate emphasis on a particular dimension of intervention. The dearth of research beyond this is lamentable, providing, however, space for this