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SYMPOSIUM ON 150 YEARS OF THE INSTITUT DE DROIT INTERNATIONAL AND THE INTERNATIONAL LAW ASSOCIATION

THE INSTITUTE OF INTERNATIONAL LAW AND THE COLONIAL PHENOMENON

*Georges Abi-Saab**

This essay examines the activities of the Institute of International Law (the Institute or IIL) during its 150 years of existence, dealing directly or indirectly with the colonial phenomenon. It distinguishes between two major periods of roughly equal length: first the period between the years 1873 and 1945; and second, the period from 1945 to the present. These correspond to two important periods of international relations: the second wave of colonial expansion and its remnants and the regime of mandates following World War I, on the one hand, and the era of the United Nations Charter, the promotion of human rights, self-determination, and decolonialization, on the other hand.

1873–1945, the Era of the Second Wave of Colonial Expansion and Its Remnants, the System of Mandates

The Institute was founded by eleven eminent, mostly European jurists gathered in Ghent (Belgium), at the invitation of Professor Rolin-Jaequemyns, who adopted its Statutes on September 10, 1873. Nine of them were from Europe and two from the Americas: one from the North, the other from the South, the Argentinian Calvo. Article 1, Section 2 of the Statutes describes the Institute's primary purpose and function as "promot[ing] the progress of international law: (a) by striving to formulate the general principles of the subject, in such a way as to correspond to the legal conscience of the civilized world." And throughout the first half of its existence, the Institute served as the oracle and articulator of the dictates of "the legal conscience of the civilized world."

This mission description reflects the spirit of the times and the worldview (*Weltanschauung*) of the Institute's founders. Noteworthy is the radical distinction it makes between the "civilized world"—composed of European nations or nations of European extraction which considered themselves mutually and exclusively as the bearers of this "legal conscience"—and the rest of humanity. Only the former were full subjects of international law.

As for the rest of humanity, while some authors considered it as a whole outside the ambit of international law, others envisaged an intermediate category, thus responding to the nagging contemporaneous question, namely, where to situate those "Eastern countries" (whether of the Near, Middle, or Far East), which had been known by, and were in contact with, Europeans since Antiquity, but were not considered by them as partaking in this

* *Honorary (Emeritus) Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Switzerland.*

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common "legal conscience." James Lorimer, a founding member of the Institute, in his *Institute of International Law* (1883), argued that these states fell in the category of "barbarian humanity";[1] Franz von Liszt, another Institute member, in his treatise *Völkerrecht* (1889) likewise divided peoples and states into "civilized," "semi-civilized" (which corresponds to Lorimer's "barbarian humanity"), and "uncivilized" (which Lorimer called "savage humanity"). He considered the "semi-civilized" to be "part of the international community only insofar as they are bound by treaty with the civilized states."[2]

Indeed, the Eastern countries that remained beyond the direct grasp of colonialism concluded numerous treaties with the European powers, which they would later decry as "unequal" because of the high price they had to pay for their recognition as partial or second-class subjects of international law. Such treaties provided access to Eastern countries' markets and natural resources for European co-contractors, while granting European citizens in the East exorbitant privileges of extraterritoriality in the form of the regime of capitulations. The Institute set out to examine precisely this problem of "the applicability of European customary international law to the Eastern countries" at its first session in Geneva in 1874, subsequently narrowing this topic to the study of the regime of extraterritoriality in favor of Europeans in Eastern countries.

As for Lorimer's "savage humanity" and von Liszt's "uncivilized," they were outside the ambit of international law as subjects but could be the object of international relations or rules, i.e., the object of wars, negotiations or bargaining. Their territories were considered as vacant or masterless lands, *terra nullius*, totally ignoring the human communities that inhabited them and the chiefs with whom certain European countries had nevertheless concluded agreements. These territories were therefore objects of appropriation by the "civilized nations," in good conscience, as the latter were thus accomplishing a "civilizing mission."

This dichotomous vision of the world was reflected in both the Institute's composition and the issues on which it chose to focus its work. During the first seventy-five years of its existence, the Institute was essentially composed of European members. It was only after World War II that the first African member, the Egyptian Abdelhamid Badawi Pasha, who chaired the Legal Commission at the San Francisco Conference, was elected in 1947, when he was already a Judge of the International Court of Justice. He was followed, at first slowly, by other Afro-Asian members and, in more recent times at a quickening pace, along with women, starting with the election of Professor Suzanne Bastid in 1948.

As to its activities, the Institute's dichotomous vision of the world enabled it, also in good conscience, to be a "fellow traveler," and even for some aspects the guide, of the second wave of colonial expansion. In particular, the Institute played an important role in the "Scramble for Africa," through its significant activities both before and after the Berlin Conference of 1884–1885. For example, in its studies, the Institute specified and elaborated the conditions of occupation of territories in order to avoid "colonial wars," in their contemporaneous sense of wars between colonial powers, over the territories to be colonized (see the resolution entitled "Draft international declaration concerning the occupation of territories," adopted at the 1888 Lausanne session). Similarly, the Institute played an important role in relation to the creation and recognition of the "Congo Free State" (see the Address to His Majesty Leopold II, King of the Belgians, Sovereign of the Independent State of the Congo, adopted at the 1885 Brussels session, thanking the King of Belgium for his humanitarian and civilizing effort through the creation of the Congo Free State).

[1] The Greek etymology of "barbarian" (unlike the lay English understanding of the word today) suggested (inferior) foreignness/otherness rather than an untamed wildness.

[2] The quotation is from Antonio Truyol y Serra, *L'expansion de la société internationale aux XIXe et XXe siècles*, 116 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 150 (1965).

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The Institute thus debated and addressed the different positions of colonial states, yet did so without questioning the fact of occupation. Like others at this time, the Institute did not question the legitimacy of occupation, but rather attempted to define the conditions marking its effectiveness.

The outbreak of World War I marked an end to the nineteenth century in the political-historical sense, which extended "from Vienna to Versailles." The war brought in its wake profound upheavals, such as the collapse of the Austro-Hungarian, Ottoman, German, and Russian Empires, and the propagation of new ideas of importance for our subject, such as the right of peoples to self-determination, which appeared for the first time in an official document among the Fourteen Points of U.S. President Woodrow Wilson.

And yet these upheavals and new ideas were not reflected in the Institute's activities, with the exception of the system of mandates that was institutionalized in Article 22 of the League of Nations Covenant to cover the former Arab dependencies of the Ottoman Empire, as well as Germany's former African colonies. In debating the legal nature of this new system, the more skeptical among the Institute's progressive members considered it to be simply colonialism by another name. The optimists, on the other hand, emphasized its transitional character. Some of them proposed the extension of the objective of the "A" mandates system, which was self-determination, to the other two categories of "B" and "C" mandates.[3] Others called for the strengthening of the control of the League of Nations over the management of the Mandatory Powers while others still recommended the extension of this regime to all colonies. But none of these suggestions found a place in the final resolution adopted at Cambridge in 1931, which merely clarified and codified the regime of mandates, as contained in Article 22 of the Covenant, without adding anything. Once again, the Institute was content to lag behind the evolution of international law, merely reflecting legal developments that had already taken place rather than questioning or attempting to guide them.

Another opportunity for the Institute to address the colonial phenomenon arose with the adoption of the Declaration of the International Rights of Man at its New York session in 1929. Indeed, *prima facie,* this Declaration, which recognizes "everyone" as possessing certain human rights, can be read as covering all human beings without distinction. However, the clarifications of the rapporteur and the comments of the members at the time of the Declaration's adoption left no doubt as to the Institute's intention to exclude from the ambit of the resolution colonial or mandated peoples.[4]

In sum, throughout the first half of its existence, the Institute remained faithful to its dichotomous vision of the world, consisting of the "civilized" world and the rest of humanity, which provided the basis of and justification for the colonial phenomenon.

1945 to the Present, the Era of the Charter of the UN, Human Rights, Self-Determination, and Decolonization

The aftermath of World War II provided an opportunity for the Institute to shift its approach to the colonial phenomenon. Indeed, the adoption during the Lausanne Session of 1947 of the resolution entitled "Fundamental Rights of Man, as the Basis for the Restoration of International Law" augured a new era for the Institute: the abandonment of its dichotomous vision of the world, with its double standards, and the emergence of a truly universal conception of human rights. This, in turn, would have allowed it to apprehend the collective dimension of these rights; for how can the individual fully enjoy his civil and political rights if he cannot participate in

[3] *See* Covenant of the League of Nations, Art. 22 (Apr. 28, 1919).

[4] For example, the rapporteur noted that "in the mind of the Commission, the natives of the colonies are not covered by [certain articles] of the draft." New York Session, Deliberations on the Declaration of the International Rights of Man, 35(II) Institut De Droit International Annuaire 125 (1929).

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determining the political destiny of the community to which he belongs? This recognition would also have allowed the Institute to take part in the implementation of the right of peoples to political and economic self-determination.

However, at no time during the 1960s and 1970s, the "golden age" of the decolonization process, did the Institute seek to keep pace with, or even recognize, the profound changes that the international community was undergoing during that period as a result of the massive advent of new actors within it. The Institute could, for example, have acted as an incubator for new rules regarding decolonization, or it could have interpreted and refined the rules already laid down in the relevant legal instruments, such as the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (UN General Assembly Resolution 1514) or the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (UN General Assembly Resolution 2625).

Yet the Institute neither anticipated, nor accompanied, nor even merely registered and codified decolonization after the fact. Its interest in the political self-determination of peoples was only incidental and fragmentary, and came rather late. It was not until 1975 that the term "decolonization" appeared in one of its resolutions on intervention in civil wars (ironically, to exclude it from the ambit of that resolution). It was only at the 2015 Tallinn Session, in a resolution entitled "State Succession in Matters of State Responsibility," that the Institute finally recognized the specificity of the decolonization process and attributed to it its own legal effects.

With regard to the economic dimension of the right of peoples to self-determination, an essential element in completing the process of decolonization, the Institute (or rather several of its members, including some rapporteurs) proved to be less timid and showed greater attention to the new issues that emerged in the wake of the arrival of the former colonized peoples onto the international scene. For example, rapporteurs drafted resolutions and reports on issues such as the status of foreign capital in developing states and the most-favored-nation principle in international trade relations.

However, these expressions of goodwill did not lead to the adoption of resolutions on the need to take into consideration the positions of developing countries in general, or in future regulations. When it came to concrete solutions, majorities in plenary tended to fall back on past positions.

Concluding Remarks

The *Centennial Book* published by the Institute in 1973[5] did not contain any contribution on decolonization or on the right of peoples to self-determination and their permanent sovereignty over natural resources, even though the process of decolonization and the normative work of the United Nations that underpinned it were almost complete (notwithstanding the extremely negative remarks of Sir Gerald Fitzmaurice on the principle of the right of peoples to self-determination in his essay entitled "The Future of Public International Law and of the International Legal System in the Circumstances of Today").[6] This essay, and the larger chapter from which it is drawn, represent an attempt to fill that gap, and provide an analysis of the Institute's activities during its first 150 years relating to the colonial phenomenon.

This analysis has shown that the results are at best mixed. During the first half of its existence, the Institute's Eurocentric view of the world was reflected in both its membership and its work. The Institute did not question the colonial enterprise, but instead contributed to its legitimation.

The second half of the Institute's existence coincided with the era of the UN Charter, human rights, self-determination, and decolonization. During these years, the Institute debated issues of great importance to newly

[5] Institut de Droit International, Livre du centenaire 1873–1973—Evolution et perspectives du droit international 473 (1973).

[6] *Id.* at 42–44, 232–35 (see also ch. 12).

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independent states, such as economic self-determination, but draft resolutions addressing them were either not adopted or watered down.

It is hoped, however, that with the rejuvenation of its membership and the broadening of its representation from all parts of the world, the Institute will regain the initiative it once had in order to express in legal terms the new felt needs and values of an international community finally embracing all of humanity. Such a turning point can be perceived in the Institute's recent activities and interests concerning the global challenges and risks of a world that is becoming more and more complex and alarming, including, for example, the Resolution on Pandemics adopted in 2021, or the current Commissions on "Natural Disasters and International Law," "Distributive Justice and Sustainable Development," and "The Place of Social Justice in International Law."

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