

## Third World Approaches to International Law: A Manifesto

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### 1. Introduction

The threat of recolonisation is haunting the third world.<sup>1</sup> The process of globalization has had deleterious effect on the welfare of third world peoples. Three billionaires in the North today hold assets more than the combined GNP of all the least developed countries and its 600 million people<sup>2</sup> International law is playing a crucial role in helping legitimize and sustain the unequal structures and processes that manifest themselves in the growing north-south divide. Indeed, international law is the principal language in which domination is coming to be expressed in the era of globalization.<sup>3</sup> It is displacing national legal systems in their importance and having an unprecedented impact on the lives of ordinary people. Armed with the powers of international financial and trade institutions to enforce a neo-liberal agenda, international law today threatens to reduce the meaning of democracy to electing representatives who, irrespective of their ideological affiliations, are compelled to pursue the same social and economic policies. Even international human rights discourse is being manipulated to further and legitimize neo-liberal goals. In brief, the economic and political independence of the third world is being undermined by policies and laws dictated by the first world and the international institutions it controls.

Unfortunately, TWAIL (third world approaches to international law) has neither been able to effectively critique neo-liberal international law or project an alternative vision of international law. The ideological domination of Northern academic

\* I would like to thank Antony Anghie for his comments on an earlier draft of the paper. The usual caveat applies. First published in: Antony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (Eds), *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff Publishers, 2003).

<sup>1</sup> The word “recolonisation” is being *inter alia* used to indicate first, the reconstitution of the relationship between State and international law so as to undermine the autonomy of third world States and to the disadvantage of its peoples. Second, the expansion of *international* property rights which are to be enforced by third world States without possessing the authority to undertake the task of redistribution of incomes and resources. Third, the relocation of sovereign economic powers in international trade and financial institutions. Fourth, the inability of third world states to resist the overwhelming ideological and military dominance of the first world.

<sup>2</sup> See UNDP, *Human Development Report* (1999).

<sup>3</sup> We adopt here the definition of domination offered by Thompson: “We can speak of ‘domination’ when established relations of power are ‘systematically asymmetrical’, that is, when particular agents or groups of agents are endowed with power in a durable way which excludes, and to some significant degree remains inaccessible to, other agents or groups of agents, irrespective of the basis upon which such exclusion is carried out.” See J. Thompson, *Ideology and Modern Culture*, in *The Polity Reader in Social Theory* (1994) 133 at 136.

institutions, the handful of critical third world international law scholars, the problems of doing research in the poor world, and the fragmentation of international legal studies has, among other things, prevented it from either advancing a holistic critique of the regressive role of globalising international law or sketching maps of alternative futures. It is therefore imperative that TWAIL urgently finds ways and means to globalize the sources of critical knowledge and address the material and ethical concerns of third world peoples.<sup>4</sup>

This paper seeks to take a small step in that direction. It presents a critique of globalising international law and proposes a set of strategies directed towards creating a world order based on social justice. The aim is to *initiate a debate* on the subject rather than to make a definitive statement. The paper is divided into five further sections. Section II considers whether it is still meaningful to talk about a “third world”. Section III discusses the different ways in which the relationship between State and international law is being reconstituted in the era of globalization to the distinct disadvantage of third world States and peoples. Section IV examines the ideology of globalising international law. Section V looks at the theory and process of resistance to unjust and oppressive international laws. Section VI identifies certain elements of a future TWAIL agenda. Section VII contains brief final remarks.

## 2. End of the Third World?

It is very often argued that the category “third world” is anachronistic today and without purchase for addressing the concerns of its peoples.<sup>5</sup> Indeed, from the very inception it is said to have ‘obscured specificity in its quest for generalizability’.<sup>6</sup> The end of the cold war (or the demise of the second world) has only strengthened the tendency towards differentiation.<sup>7</sup> According to Walker, the “great dissolutions of 1989” shattered all cold war categories and ‘as a label to be affixed to a world in dramatic motion the Third World became increasingly absurd, a tattered remnant of another time . . .’<sup>8</sup>

It can hardly be denied that the category “third world” is made up of ‘a diverse set of countries, extremely varied in their cultural heritages, with very different historical experiences and marked differences in the patterns of their economies . . .’<sup>9</sup> But too much is often made of numbers, variations, and differences in the presence of structures and processes of global capitalism that *continue to bind and unite*. It is these structures and processes that produced colonialism and have now spawned neo-colonialism.

<sup>4</sup> Our political referents “third world” or “third world peoples” is “not there in some primordial, naturalistic sense” or “reflect a unitary or homogeneous political object”. See H. Bhabha, *The Location of Culture*, at 26 (1994). There is the class and gender divides, among others, to be reckoned with.

<sup>5</sup> See J. Ravenhill, *The North-South Balance of Power*, 66:4 *International Affairs* 731 (1990). See also M. Berger, *The End of the ‘Third World’*, 15:2 *Third World Quarterly*, 257–275 (1994).

<sup>6</sup> See S.N. Macfarlane, *Taking Stock: The Third World and the End of the Cold War*, in L. Fawcett and Y. Sayigh (Eds.), *The Third World Beyond the Cold War: Continuity and Change* 15, at 21 (1999).

<sup>7</sup> *Id.*

<sup>8</sup> See R.B.J. Walker, *Space/Time/Sovereignty*, in M.E. Denham and M.O. Lombardi (Eds.), *Perspectives on Third World Sovereignty: The Postmodern Paradox* 13, at 15 (1996).

<sup>9</sup> See P. Worsley, *The Three Worlds: Culture and World Development* 306 (1984).

In other words, once the common history of subjection to colonialism, and/or the continuing underdevelopment and marginalization of countries of Asia, Africa and Latin America is attached sufficient significance, the category “third world” assumes life.

In any case, the diversity of the social world has not prevented the consolidation and articulation of international law in universal abstractions. Today, international law prescribes rules that deliberately ignore the phenomena of uneven development in favor of prescribing uniform global standards. It has more or less cast to flames the principal of special and differential treatment.<sup>10</sup> In other words, the process of aggregating in international law a diverse set of countries with differences in the patterns of their economies also validates the category “third world”. That is to say, because legal imagination and technology tend to transcend differences in order to impose uniform global legal regimes, the use of the category “third world” is particularly appropriate in the world of international law. It is a necessary and effective response to the abstractions that do violence to difference. Its presence is, to put it differently, crucial to organizing and offering collective resistance to hegemonic policies.

Unnecessary importance is often attached to the end of the cold war. The growing north-south divide is sufficient evidence, if any were needed, of the continuing relevance of the category “third world”. Its continuing usefulness lies in pointing to certain structural constraints that the world economy imposes on one set of countries as opposed to others. At one point, the arrival of the newly industrializing countries was seen to be a definitive pronouncement on the inadequacy of the category “third world”.<sup>11</sup> But their fate in the financial crisis of the late nineties reveals that the divide between these countries and the rest is not as sharp as it first appeared. Furthermore, as critics of the category “third world” concede, the alternative of multiplying the number of categories to cover distinctive cases, may not be of much help. Worsley himself recognized that ‘we can all think of many difficulties, exceptions, omissions, etc. for any system of classifying countries, even if we increase the number of worlds.’<sup>12</sup> Crow has aptly pointed out in this context that ‘a typology which has as many types as it has cases is of limited analytical value since it has not made the necessary move beyond acknowledgement of the uniqueness of each individual case to identifying key points of similarity and difference’.<sup>13</sup>

However, the presence or absence of the third world, it is worth stressing, is not something that is either to be dogmatically affirmed or completely denied. It is not to be viewed as an either/or choice in all contexts. The category “third world” can coexist with a plurality of practices of collective resistance. Thus, regional and other group identities do not necessarily undermine aggregation at the global level. These can coexist with transregional groupings and identities. In the final analysis, the category

<sup>10</sup> The principle has been replaced in different legal regimes by the idea of transitional periods or its extension to least developed countries. Where special and differential treatment has been granted to all third world countries the obligation has been cast in soft law language.

<sup>11</sup> See N. Harris, *The End of the Third World: Newly Industrializing Countries and the Decline of an Ideology* (1987).

<sup>12</sup> See *Development* in P. Worsley (Ed.), *The New Introducing Sociology 2* (1987).

<sup>13</sup> See C. Graham, *Comparative Sociological and Social Theory: Beyond the Three Worlds 8* (1997).

“third world” reflects a level of unity imagined and constituted in ways which would enable resistance to a range of practices which systematically disadvantage and subordinate an otherwise diverse group of people. This unity can express itself in diverse ways. How the internal unity of the “third world” is to be maintained amidst a plurality of individual concerns and group identities can only be determined through practical dialogue which abandons a damaging *a priori*ism. There is, to put it differently, no substitute for concrete analysis of particular international law regimes and practices to determine the demands, strategy and tactics of the third world.

But there is a need to be alert to the politics of critique of the category “third world”. To misrepresent and undermine the unity of the Other is a crucial element in any strategy of dominance. From which flows the suggestion that the category “third world” is irrelevant to the era of globalization. It represents the old divide and rule strategy with which third world peoples are exceedingly familiar. Such a policy seeks to prevent a global coalition of subaltern States and peoples from emerging through positing divisions of all kinds. Thereby, the transnational elite seeks to subvert collective modes of reflection on common problems and solutions.

Critique is not the only weapon that hegemonic States deploy against the unity of the third world. Dominant States also take direct measures to weaken the third world coalition. Thus, for example, the North did not take kindly in the past to the Bandung spirit.<sup>14</sup> As Samir Amin writes:

Is it just accidental that a year later, France, Britain, and Israel attempted to overthrow Nasser through the 1956 aggression. The true hatred that the West had for the radical third world leaders of the 1960s, Nasser in Egypt, Sukarno in Indonesia, Nkrumah in Ghana, Modibo Keita in Mali, almost all overthrown at about the same time (1965–1968), a period which also saw the Israeli aggression of June 1967, shows that the political vision of Bandung was not accepted by imperialist capital. It was thus a politically weakened non-aligned camp that had to face the global economic crisis after 1970–71. The West’s absolute refusal to accept the proposal for a New International Economic Order shows that there was a real logic linking the political dimension and the economic dimension of the Afro-Asian attempt crystallised after Bandung.<sup>15</sup>

One could add to the above list names (Lumumba, Che Guevara, Allende) and left movements (Indonesia, Nicaragua, Angola) that have been at the receiving end of Northern subversive strategies.<sup>16</sup> Billions of dollars have been spent to undo regimes and movements not favourable to the dominant States. It has prevented an effective third world coalition from emerging as a counterweight to the unity of the first world.

It is left to emphasize that our understanding of the category “third world” diverges sharply from that of its ruling elite. The latter scrupulously overlook the class and gender divides within. Furthermore, in the era of globalization, the ruling elite in the third

<sup>14</sup> In 1955 an Asian African Conference was held in Bandung in Indonesia. “The importance of Bandung was that for the first time a group of former colonial territories [29 States attended] had met together without any of the European powers, and all those taking part . . . this was an assertion of their independence.” See P. Willets, *The Non-Aligned Movement: Origins of a Third World Alliance* 3 (1978). Later came the non-aligned movement which had its roots in Bandung.

<sup>15</sup> See A. Samir, *The Social Movements in the Periphery: An End to National Liberation*, in S. Amin et al. (Eds.), *Transforming the Revolution: Social Movements and the World-System* 96, at (1990).

<sup>16</sup> See P. James and V. Steve, *The Decline of Revolutionary Politics: Capitalist Detour and the Return of Socialism*, 24 *Journal of Contemporary Asia* 1, at 1 (1994).

world is coming to be an integral part of an emerging transnational ruling elite that seeks to establish the global rule of transnational capital on the pretext of pursuing “national interests”. The welfare of the peoples of the third world does not have priority in this scheme of things. Thus, there is an obvious dialectic between struggles inside third world countries and in external fora. There can be little progress on one front without some progress in the other. At the same time, a global coalition of the poor countries remains a viable model of collective resistance. For the aspirations of the people, despite the emergence of the non-governmental organizations, is still most effectively represented by the State in international fora. But the third world State has to be compelled through peoples struggles to engage in collective action.

### 3. State and International Law in the Era of Globalization

The State is the principal subject of international law. But the relationship between State and international law continually evolves. Each era sees the material and ideological reconstitution of the relationship between state sovereignty and international law. The changes are primarily driven by dominant social forces and States of the time. The era of globalisation is no exception to this rule. Globalisation is not an autonomous phenomenon. It is greatly facilitated by the actions of States, in particular dominant States.<sup>17</sup> The adoption of appropriate legal regimes plays a critical role in this process.<sup>18</sup> The on going restructuring of the international legal system is not entirely dissimilar to the one that saw capitalism establish and consolidate itself in the national sphere. In that case the State ‘shaped itself around pre-existing political structures, inserting itself among them, forcing upon them whenever it could, its authority, its currency, its taxation, justice and language of command. This was a process of both infiltration and superimposition, of conquest and accommodation’.<sup>19</sup> In this case what is at stake is the creation of a *unified global economic space* with appropriate international law and international institutions to go along. Towards this end, international law is coming to define the meaning of a “democratic State” and relocating sovereign economic powers in international institutions, greatly limiting the possibilities of third world States to pursue independent self-reliant development. These developments seek to accommodate the interests of a transnational ruling elite which has come to have unprecedented influence in shaping global policies and law.

Mapping the changes which are visiting the relationship between State and international law and grasping the consequences of the metamorphosis is the most crucial task before third world international law scholars. For the transformed relationship between State sovereignty and international law may have far reaching consequences for the peoples of the third world. Attention may be drawn in this regard to *some*

<sup>17</sup> See B. Jones, *The World Upside Down? Globalisation and the Future of the State* 4 (2000), Carnoy, Martin and Castells, Manuel, *Globalisation, the Knowledge Society, and the Network State: Poulantzas at the Millennium*, 1 *Global Networks* 1, at 5 (2001).

<sup>18</sup> *Id.*, at 63.

<sup>19</sup> See F. Braudel, *Civilization and Capitalism 15th–18th Century*, Vol. II, 513 (1979).

of the major *overlapping* developments that are redefining and reconstituting the relationship of State and international law and institutions, albeit with *differential impact on third world States and peoples*.

First, international law is now in the process of creating and defining the “democratic State.”<sup>20</sup> It has led to the internal structure of States coming under the scrutiny of international law. An emerging international law norm requires States to hold periodic and genuine elections. However, it pays scant attention to the fact that formal democracy excludes large, in particular marginal groups, from decision making power.<sup>21</sup> The task of “low intensity” democracies, from all evidence, is to create the conditions in which transnational capital can flourish. To facilitate this, the State (read the third world State) has seceded, through “voluntary” undertaken obligations, national sovereign economic space (pertaining to the fields of investment, trade, technology, currency, environment etc.) to international institutions that enforce the relevant rules.<sup>22</sup> But despite the relocation of sovereign powers in international institutions, international law does not take global democracy seriously. Global or transnational systems of representation and accountability are yet to be established. In brief, international law today operates ‘with a set of ideas about democracy that offers little support for efforts either to deepen democracy within nation-states or to extend democracy to transnational and global decision-making’.<sup>23</sup>

Second, international law now aspires to *directly* regulate property rights. A key feature of the new age is the *internationalization of property rights*. By “internationalization of property rights” is meant their specification, articulation and enforcement through international law or the fact that the change in the form and substance of property rights is brought about through the intervention of international law. There are a series of overlapping legal developments/measures through which international property rights are being entrenched: (a) the international specification and regulation of intellectual property rights; indeed, as one observer notes, ‘TRIPS [i.e., Agreement on

<sup>20</sup> See T. Franck, *The Emerging Right to Democratic Governance*, 86 *American Journal of International Law* 46, at 46 (1992).

<sup>21</sup> See J. Crawford and M. Marks, *The Global Democracy Deficit: an Essay in International Law and its Limits*, in D. Archibugi et al. (Eds.) *Re-imagining Political Community: Studies in Cosmopolitan Democracy* 72–90, at 80 (1998).

<sup>22</sup> With respect to the WTO two points need to be made as regards the “voluntary” nature of the obligations undertaken under the Final Act of the Uruguay Round of Trade Negotiations. First, the negotiations leading to the adoption of the agreements constituting the Final Act lacked transparency and the practice of green room consultations left a large number of third world countries effectively out of the negotiations. Second, the entire set of agreements were offered as a single undertaking. Therefore, States could not choose the agreements it wished to accept. This was justified on the ground that the Final Act represented a package deal that would unravel if the pick and choose policy were permitted. However, it is now clear that the third world countries gained little from the Uruguay Round agreements undermining the legitimacy of the single undertaking practice. It explains the launch of the Doha round of trade negotiations as a development round. So far as the system of conditionalities recommended by international financial institutions is concerned their acceptance is voluntary in the most tenuous sense. For the fact of the matter is that third world countries have little choice but to abide by them.

<sup>23</sup> *Id.*, at 85. That is, until their absence manifests itself in internal or international wars, and the gross violation of human rights which accompany them, when international law is brought back in to reconstruct formal democracy.

Trade-Related Aspects of Intellectual Property Rights] marks the beginning of the global property epoch<sup>24</sup>; (b) the privatization of State owned property through the medium of international financial institutions and international monetary law; (c) the adoption of a network of international laws that lift constraints on the mobility and operation of the transnational corporate sector;<sup>25</sup> (d) the definition of sustainable development in a manner which implies the redistribution of property rights between the first and the third worlds,<sup>26</sup> and also, subject to some conditions, the regulation of process and production methods;<sup>27</sup> and (e) the metamorphosis of the area of common heritage of humankind (be it the domain of knowledge, environment or specific geographical spaces such as the seabed) into a system of corporate property rights.<sup>28</sup>

<sup>24</sup> See J. Braithwaite and P. Drahos, *Global Business Regulation* Cambridge: Cambridge 63 (2000). For the text of the Agreement on TRIPS, see WTO The Results of the Final Act of the Uruguay Round of Multilateral Trade Negotiations Geneva 365 (1994).

<sup>25</sup> A whole host of international laws seek to free transnational capital of spatial and temporal constraints. This has been achieved, or is in the process of being achieved, first, through hundreds of bilateral investment protection treaties between the industrialized and third world countries. By 1999, 1857 BITS were concluded (up from 165 at the end of the seventies and 385 at the end of eighties), a predominant number of which were concluded between the industrialized world and the third world countries, see UNCTAD, *Bilateral Investment Treaties 1959 to 1999* 1 (2000). Second, the Agreement on Trade Related Investment Measures took a number of measures in this direction viz. local content and balancing requirements cannot be imposed on foreign capital. For the text of the agreement see WTO, *The Results of the Final Act of the Uruguay Round of Multilateral Trade Negotiations* (1994). Third, there are soft law texts such as the World Bank Guidelines on Foreign Investment (1992), which recommend that constraints on the entry and operation of transnational capital be limited. (For text see UNCTAD, *International Investment Instruments: A Compendium* vol. I – Multilateral Instruments 247 (1996). Fourth, there is the proposed negotiation of a multilateral agreement on investment on the agenda of Doha round of trade negotiations. See WTO, WT/MIN (01)/DEC/W/1, 14 November 2001 – Ministerial Conference, Fourth Session, Doha, 9–14 November 2001: Ministerial Declaration. Fifth, a Multilateral Investment Guarantee Agency (MIGA) has been established under the auspices of the World Bank to insure foreign capital against non commercial risks. (For the text of the agreement establishing MIGA see UNCTAD, (1996), at 213). Sixth, there is the September 1997 statement of the IMF Interim Committee endorsing a move towards capital account convertibility despite all evidence showing the grave consequences for the economies embracing it. This is in contrast with original obligations contained in the 1944 Articles of Agreement which called for the “avoidance of restrictions on payments for current transactions” see J. Bhagwati, *The Capital Myth*, *Foreign Affairs* 7 (May/June 1998). Finally, mention needs to be made of the fact that the Draft Code of Conduct on Transnational Corporations which imposed certain duties – respect for host country goals, transparency, respect for environment etc. – has been abandoned (for the text see UNCTAD, (1996), above at 161. And the UN Centre for Transnational Corporations which was bringing some transparency to the functioning of TNCs was shut down in 1993.

<sup>26</sup> For ‘as industrial countries developed, global private rights were granted to polluters; now, developing countries are asked to agree to a redistribution of those property rights without compensation for already depleted resources’, see P. Uimonen and J. Whalley, *Environmental Issues in the New Trading System* 66 (1997).

<sup>27</sup> See Uimonen and Whalley, *id.* See also B.S. Chimni, *WTO and Environment: The Shrimp-Turtle and EC-Hormone Cases*, *Economic and Political Weekly* 1752–1762 (May 13, 2000), *WTO and Environment: Legitimization of Unilateral Trade Sanctions*, *Economic and Political Weekly* 133–140 (January 12–18, 2002).

<sup>28</sup> See G. Teeple, *Globalization as the Triumph of Capitalism: Private property, Economic Justice and the New World Order*, in T. Schrecker (Ed.), *Surviving Globalism: The Social and Environmental Challenges* 15–38, at 15 (1997).

Third, at the level of circulation of commodities, international law defines the conditions in which international exchange is to take place. It is a truism that ‘markets cannot exist without norms or rules of some sort, and the ordering of market transactions takes place through layers of rules, formal and informal’.<sup>29</sup> In this regard, international law *inter alia* lays down rules with regard to the sales of goods, market access, government procurement, subsidies and dumping. Many of these rules are designed to protect the corporate actor in the first world from efficient production abroad even as third world markets are being pried open for its benefit. Thus, the rules of market access are now sought to be linked to the regulation of process and production methods in order to allow first world States to construct non tariff barriers against commodities exported from the third world.<sup>30</sup> Likewise, the rules on anti-dumping are designed to protect inefficient corporations in the developed home State.<sup>31</sup> On the other hand, some forms of market intervention are frowned upon. Thus, international commodity agreements which seek to stabilise the incomes of third world countries from primary commodity exports are actively discouraged.<sup>32</sup>

Fourth, international law increasingly requires the ‘detritorialization of currencies’ subjecting the idea of a “national currency” to growing pressure. The advantages of monetary sovereignty are known. It is, among other things, ‘a possible instrument to manage macroeconomic performance of the economy; and [. . .] a practical means to insulate the nation from foreign influence or constraint’.<sup>33</sup> The first world is today using international financial institutions, and the ongoing negotiations relating to the General Agreement on Trade in Services (GATS), to compel third world States to accept monetary arrangements, such as capital account convertibility, which are not necessarily in their interests.<sup>34</sup> Thus, it will not be long before capital account convertibility becomes the norm, despite its negative consequences for third world economies.<sup>35</sup> The loss of monetary sovereignty, as the East Asian crisis showed, has serious fallouts for the ordinary people of the third world. Their standards of living can substantially erode overnight.

<sup>29</sup> See D. Campbell and S. Picciotto, *Exploring the Interaction Between Law and Economics: the Limits of Formalism*, 18 *Legal Studies* 249–278, at 265 (1998).

<sup>30</sup> See B.S. Chimni, (2000) and (2002), *supra* note 27.

<sup>31</sup> See B.M. Hoekman and M. Kostecki, *The Political Economy of the World Trading System: from GATT to WTO* 174 (1995).

<sup>32</sup> See B.S. Chimni, *International Commodity Agreements: A Legal Study* (1987), *Marxism and International Law: A Contemporary Analysis*, *Economic and Political Weekly* 337–349, at 341 (February 6, 1999).

<sup>33</sup> See B. Cohen, *Money in a Globalized World*, in N. Woods (Ed.), *The Political Economy of Globalization* 77, at 84 (2000).

<sup>34</sup> See C. Raghavan, *GATS may result in Irreversible Capital Account Liberalization* (2002), online <<http://www.twinside.org.sg/>>: that monetary relations can be used coercively like all other economic instruments should come as no surprise. According to Kirshner: “monetary power is remarkably efficient component of state power . . . the most potent instrument of economic coercion available to states in a position to exercise it” (cited by Cohen, *supra* note 33, at 87). It is the coercive element that concerns third world states and distinguishes their situation from the relinquishment of monetary sovereignty by States of the European Union (EU). For the text of GATS see WTO 1994: 325.

<sup>35</sup> See Bagwati, *supra* note 25, at 7–12.

Fifth, the internationalisation of property rights has been accompanied by the internationalisation of the discourse of human rights. Human rights talk has come to have a pervasive presence in international relations and law. This development has been variously expressed: ‘a new ideal has triumphed on the world stage: human rights’;<sup>36</sup> ‘human rights discourse has become globalized’;<sup>37</sup> ‘human rights could be seen as one of the most globalized political values of our time’.<sup>38</sup> The fact that the omnipresence of the discourse of human rights in international law has coincided with increasing pressure on third world States to implement neo-liberal policies is no accident; the right to private property, and all that goes along with it, is central to the discourse of human rights.<sup>39</sup> While the language of human rights can be effectively deployed to denounce and struggle against the predator and the national security state, its promise of emancipation is constrained by the very factor that facilitates its pervasive presence viz., the internationalisation of property rights. This contradiction is in turn the ground on which intrusive intervention into third world sovereign spaces is justified. For the implementation of neo-liberal policies is at least one significant cause of growing internal conflicts in the third world.<sup>40</sup>

Sixth, labor market deregulation prescribed by international financial institutions and international monetary law has caused the deterioration of the living conditions of third world labor. Deregulation policies are an integral part of structural adjustment programs. They are based ‘on the belief that excessive government intervention in labor markets – through such measures as public sector wage and employment policies, minimum wage fixing, employment security rules – is a serious impediment to adjustment and should therefore be removed or relaxed’.<sup>41</sup> The growing competition between third world countries to bring in foreign investment has further led to easing of labor standards and a “race to the bottom.”<sup>42</sup> In the year 2000, nearly 93 developing countries had export processing zones (EPZs), compared with 24 in 1976.<sup>43</sup> Women provide up to 80 per cent of labor requirements in EPZs and are the subject of economic and sexual exploitation.<sup>44</sup> The United Nations Secretary-General himself

<sup>36</sup> See C. Douzinas, *The End of Human Rights: Critical Legal Thought At the Turn of the Century* 1 (2000).

<sup>37</sup> See G. Teubner, *The King's Many Bodies: The Self-Destruction of Law's Hierarchy*, *31 Law and Society Review* 763, at 770 (1997).

<sup>38</sup> See R.A. Wilson, *Introduction* in R.A. Wilson (Ed.), *Human Rights, Culture and Context: Anthropological Perspectives* 1 (1997).

<sup>39</sup> See B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 291 (1993).

<sup>40</sup> See A. Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 *Harvard International Law Journal* 443–485 (1997). See also OAU Report of the International Panel of Eminent Personalities asked to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (2000), online: <<http://www.oau-oua.org/Document/ipep/ipep.htm>>.

<sup>41</sup> L.L. Lim, *More and Better Jobs for Women: An Action Guide*, Geneva: ILO 19–20.

<sup>42</sup> See J. Oloka-Onyango and D. Udigama, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*, E/CN.4/Sub.2/2000/13, 15 June 2000, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-Second session, para 34.

<sup>43</sup> *Id.*, para 35.

<sup>44</sup> *Id.*, para 35.

has pointed to 'adverse labor conditions as a major factor contributing to the increased feminization of poverty.'<sup>45</sup> The position of migrant labor in the first world is not very different from that of working classes in deregulated labor markets of the third world. There are increasing restrictions on their rights within European Union and the United States.<sup>46</sup>

Seventh, the concept of jurisdiction is being rendered more complex than ever in the past. Among other things, digital capitalism threatens to make 'a hash of geopolitical boundaries' and reduce the ability of third world States to regulate transnational commerce.<sup>47</sup> There is, in the era of globalization, an intersection of jurisdictions which gives rise to multiple (or concurrent) and extra-territorial jurisdiction to a far greater extent than before. Where international law does not penetrate national spaces, powerful states put into effect laws that have an extraterritorial effect; third world States have little control over processes initiated without its consent in distant spaces.<sup>48</sup> There is, therefore, a legitimate fear among third world States of 'a tyranny of sameness' or the 'extension transnationally of the logic of Western governmentality'<sup>49</sup> The fear is accentuated by the fact that international laws are being increasingly understood in ways that redefine the concept of jurisdiction. Thus, for example, international human rights law is being interpreted to delimit sovereign jurisdiction in diverse manner, as is reflected in developments ranging from the Pinochet case to armed humanitarian interventions.<sup>50</sup> While these developments have a progressive dimension they can easily be abused to threaten third world leaders and peoples unless they are willing to accept the dictates of the first world.

Eighth, there has been a proliferation of international tribunals that subordinate the role of national legal systems in resolving disputes. These range from international criminal courts to international commercial arbitration to the WTO dispute settlement system (DSS). It is not the greater internationalisation of interpretation and enforcement of rules that is problematic but its differential meaning for, and impact on, third world States and peoples. The neglect of the views and legal systems of societies visited by internal conflict in the setting up of ad hoc international criminal tribunals, even as the United States refuses to ratify the Rome Statute, is an instance of such practices.<sup>51</sup> Take also the differential impact of the WTO DSS. It was accepted in the belief that a rule oriented and compulsory DSS would protect the interests of third world countries. This expectation has been belied because, among other things, the substantive rules themselves are biased in favour of the first world, and have therefore not yielded the

<sup>45</sup> *Id.*, para 39.

<sup>46</sup> *Id.*, para 28.

<sup>47</sup> See D. Schiller, *Digital Capitalism: Networking the Global Market System* 72 (1999).

<sup>48</sup> See M. Shaw, *International Law*, 3 ed. (1997) and B. Chimni, (2002), *supra* note 27.

<sup>49</sup> See J. Weiner, *Globalisation and the Harmonisation of Law* 195 and 188 (1999).

<sup>50</sup> See B.S. Chimni, *The International Law of Humanitarian 103 Intervention*, in *State Sovereignty in the 21st Century* 103–132 (2001, New Delhi: Institute for Defense Studies and Analyses).

<sup>51</sup> See B. Rajagopal, *The Pragmatics of Prosecuting the Khmer Rouge*, *Yearbook of International Humanitarian Law*, Vol. 1, 189–204 (1998) and *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 *Harvard International Law Journal* 531–578 (2000).

expected gains in terms of market access.<sup>52</sup> Second, the third world countries lack the expertise and the financial resources to make effective use of the DSS. Third, the WTO Appellate Body has interpreted the texts in a manner as to upset the balance of rights and obligations agreed to by third world States. For example, the subject of trade-environment interface has received an interpretation that was never envisaged by third world States. With the result that their exports are threatened by unilateral trade measures taken by first world States.<sup>53</sup>

Ninth, the State is no longer the exclusive participant in the international legal process even though it remains the principal actor in law making. The globalisation process is breaking the historical unity of law and State and creating ‘a multitude of decentered law-making processes in various sectors of civil society, independently of nation-states’.<sup>54</sup> While this is not entirely an unwelcome development, the “paradigmatic case” of ‘global law without the state’ is *lex mercatoria*, revealing that the transnational corporate actor is the principal moving force in decentralised law making.<sup>55</sup> The practices of *lex mercatoria* include standard form contracts, customs of trade, voluntary codes of conduct, private institutions formulating legal rules for adoption, intra firm contracts and the like.<sup>56</sup> Some of these practices do not raise concerns for third world countries. Others however deserve our attention for several reasons. First, there is the lack of a “public” voice in the emergence of corporate law without a State. Second, corporations take advantage of their “inner legality” to avoid tax and other liabilities. Thus, for example, intra-firm transactions are used to avoid paying taxes and respecting foreign exchange laws of many a third world country. Third, the internal legal order may be used to, among other things, present a picture of law and human rights observance when the contrary is true. Such is, for example, the case with voluntary codes of conducts that are adopted by transnational corporations.<sup>57</sup>

<sup>52</sup> See UN A/CONF. 198/3, 1 March 2002: Monterrey Consensus on Financing for Development, paras 26–38 UNGA (2001) A/CONF. 191/12, 2 July 200: Brussels Declaration on Least Developed Countries para 6.

<sup>53</sup> See B.S. Chimni, *supra* note 27. On problems relating to international commercial arbitration see M. Sornarajah, *The Climate of International Arbitration*, 8:2 *Journal of International Arbitration* 47–86, at 79 (1991) and *Power and Justice in Foreign Investment Arbitration*, 14 *Journal of International Arbitration* 103–140, at 103 (1997).

<sup>54</sup> See Teubner *supra* note 37, at xiii.

<sup>55</sup> *Id.*, at 3 and 8.

<sup>56</sup> In response to criticism that *lex mercatoria* is still dependent on the sanctions of national courts, Teubner writes that ‘it is the phenomenological world construction within a discourse that determine the globality of the discourse, and not the fact that the source of use of force is local’. See Teubner, *supra* note 37, at 13.

<sup>57</sup> Global laws without the State are, more generally, ‘sites of conflict and contestation, involving the renegotiation and redefinition of the boundaries between, and indeed the nature and forms, of the state, the market, and the firm’. See S. Picciotto and J. Haines, *Regulating Global Financial Markets*, 26:3 *Journal of Law and Society* 351–368, at 360 (1999). Thus, for example the work of the Basle Committee has been crucial in regulating the liquidity and solvency of banks in individual jurisdictions in the United States and the European Union; see J. Wiener, *Globalisation and the Harmonisation of Law*, Chapter 3 (1999). The work of the Committee led to legislation (the Foreign Bank Supervision Enhancement Act of 1991) being enacted by the US to incorporate the guidelines suggested by it and which may lead to the exclusion of third world banks from operating there.

Tenth, there is the refusal to affirmatively differentiate between States at different stages of the development process. International law today articulates rules that seek to transcend the phenomena of uneven global development and evolve uniform global standards to facilitate the mobility and operation of transnational capital. There is no longer space for recognizing the concerns of States and peoples subjected to long colonial rule. Poor and rich states are to be treated alike in the new century and the principle of special and differential treatment is to be slowly but surely discarded. Equality rather than difference is the prescribed norm. The prescription of uniform global standards in areas like intellectual property rights has meant that the third world State has lost the authority to devise technology and health policies suited to its existential conditions. But since capital now resides everywhere, it abhors difference, and globalised international plays along.<sup>58</sup>

Eleventh, the relationship between the State and the United Nations is being reconstituted. There is the trend to turn to the transnational corporate actor for financing the organization. The corporate actor also has come to play a greater role within different UN bodies.<sup>59</sup> Its growing influence and linkages is being used by the corporate actor to legitimize its less than wholesome activities. As Onyango and Udigama warn, ‘a danger exists of such linkages being exploited by the latter, while only paying lip-service to the ideals and principles for which the United Nations was created and to which it continues to be devoted. Moreover, because the actors who are being linked up with have considerably more financial and political clout, there is a danger that the United Nations will come out the loser’.<sup>60</sup> What may be called the *privatization of the United Nations system* reduces, among other things, the possibility of the organization being at the center of collective action by third world countries.

In sum, the meaning of the reconstitution of the relationship between State and international law is the creation of fertile conditions for the global operation of capital and the promotion, extension and protection of internationalised property rights. There has emerged a transnational ruling elite, with the ruling elite of the third world playing a junior role, which guides this process. It is seeking to create a global system of governance suited to the needs of transnational capital but to the disadvantage of third world peoples. The entire ongoing process of redefinition of State sovereignty is being justified through the ideological apparatuses of Northern States and international institutions it controls. Even the language of human rights has been mobilised towards this end. If this trend has to be reversed in terms of equity and justice, the battle for the minds of the third world decision-makers and peoples has to be won. In brief, the

<sup>58</sup> The meaning of the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November, 2001 is far from clear. See WTO, WT/MIN (01)/DEC/W/2, 14 November 2001 – Ministerial Conference, Fourth Session, Doha, 9–14 November 2001: Declaration on the TRIPS Agreement and Public Health (2001). Albeit, there is clear recognition that the TRIPS Agreement ignores its impact on public health.

<sup>59</sup> See B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, Economic and Political Weekly 337–349 (February 6, 1999).

<sup>60</sup> See J. Oloka-Onyango and D. Udigama, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights* E/CN.4/Sub.2/2000/13, 15 June 2000, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-Second session (1999).

changing constellation of power, knowledge and international law needs to be urgently grasped if the third world peoples have to resist recolonisation.

#### 4. Ideology, Force, and International Law

There is the old idea, which has withstood the passage of time, that dominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised. Force is only used when absolutely necessary, either to subdue a challenge or to demoralize those social forces aspiring to question the “natural” order of things. The language of law has always played, in this scheme of things, a significant role in legitimizing dominant ideas for its discourse tends to be associated with rationality, neutrality, objectivity and justice. International law is no exception to this rule. It legitimizes and translates a certain set of dominant ideas into rules and thus places meaning in the service of power. International law, in other words, represents a *culture* that constitutes the matrix in which global problems are approached, analyzed and resolved. This culture is shaped and framed by the dominant ideas of the time. Today, these ideas include a particular understanding of the idea of “global governance” and accompanying conceptions of state, development (or non-development) and rights.

The process through which the culture of international law is shaped is a multifarious one. Academic institutions of the North, with their prestige and power, play a key role in it. These institutions, in association with State agencies, greatly influence the global agenda of research.<sup>61</sup> Third world students of international law tend to take their cue from books and journals published in the North. From reading these they make up their minds as to what is worth doing and what is not? Who are good scholars and who are bad, or, which is the same, what are the standards by which scholarship is to be assessed? It is therefore important that third world international lawyers refuse to unquestioningly reproduce scholarship that is suspect from the standpoint of the interests of third world peoples. Progressive scholars in particular need to be careful. For, ‘cultural imperialism (American or otherwise) never imposes itself better than when it is served by progressive intellectuals (or by ‘intellectuals of color’ in the case of racial inequality) who would appear to be above suspicion of promoting the hegemonic interests of a country [and one may add system] against which they wield the weapons of social criticism’.<sup>62</sup>

International institutions also play an important role in sustaining a particular culture of international law. These institutions ‘ideologically legitimate the norms of the

<sup>61</sup> Thus, it is well pointed out, “the ideas about international law popular at a given moment in some countries are more influential than those popular in others simply because some countries are more powerful; money, access to institutional resources, relationships to underlying patterns of hegemony, and influence – is central to the chance that a given idea will become influential or dominant within the international law profession.” See D. Kennedy, *What is New Thinking in International Law?*, ASIL Proceedings of the 94th Annual Meeting, 104–125, at 121 (April 5–6, 2000).

<sup>62</sup> See P. Bourdieu and L. Wacquant, *On the Cunning of Imperial Reason*, 16 *Theory, Culture & Society* 41–58, at 51 (1999).

world order', co-opt the elite from peripheral countries, and absorb counter-hegemonic ideas.<sup>63</sup> International institutions also actively frame issues for collective debate in manner which brings the normative framework into alignment with the interests of dominant States. This is also done through the exercise of authority to evaluate the policies of member States.<sup>64</sup> The knowledge production and dissemination functions of international institutions are, in other words, steered by the dominant coalition of social forces and States to legitimize their vision of world order. Only an oppositional coalition can evolve counter-discourses which deconstruct and challenge the hegemonic vision. The alternative vision needs to respond to the individual elements that constitute hegemonic discourse.

#### 4.1. *The Idea of Good Governance*

Today, globalising international law, overlooking its history, and abandoning the principle of differential treatment, legitimizes itself through the language of blame. The North seeks to occupy the moral high ground through representing the third world peoples, in particular African peoples, as incapable of governing themselves and thereby hoping to rehabilitate the idea of imperialism.<sup>65</sup> The inability to govern is projected as the root cause of frequent internal conflicts and the accompanying violation of human rights necessitating humanitarian assistance and intervention by the North. It is therefore worth reminding ourselves that colonialism was justified on the basis of humanitarian arguments (the civilizing mission). It is no different today.<sup>66</sup> The contemporary discourse on humanitarianism not only seeks to retrospectively justify colonialism but also to legitimize increasing intrusiveness of the present era.<sup>67</sup> Indeed, as we have observed elsewhere, 'humanitarianism is *the* ideology of hegemonic states in the era of globalization marked by the end of the Cold War and a growing North-South divide.'<sup>68</sup> Overlooked in the process is the role played by international economic and political structures and institutions in perpetuating the dependency of third world peoples and in generating conflict within them.

#### 4.2. *Human Rights as Panacea*

The idea of humanitarianism is framed by the discourse of human rights. Its globalization is a function of the belief that the realm of rights, albeit a particular vision of

<sup>63</sup> See R.W. Cox, *Gramsci, Hegemony and International Relations: An Essay in Method*, in S. Gill (Ed.), *Gramsci, Historical Materialism and International Relations* 49–66 (1993).

<sup>64</sup> See B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, *Economic and Political Weekly* 337–349 (February 6, 1999).

<sup>65</sup> See F. Furedi, *The Moral Condemnation of the South*, in C. Thomas and P. Wilkins (Eds.), *Globalization and the South* 76–89, at 79 (1997).

<sup>66</sup> See A. Anghie, *Universality and the Concept of Governance in International Law*, in E.K. Quashigah and O.C. Okafor (Eds.), *Legitimate Governance in Africa* 21–40, at 25 (1999) and J. Gathii, *Good Governance as a Counter-Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 *Buffalo Human Rights Law Review* 107–177, at 107 (1999).

<sup>67</sup> *Id.*, at 78.

<sup>68</sup> See B.S. Chimni (2000), *supra* note 27, at 244.

rights, offer a cure for nearly all ills which afflict third world countries and explains the recommendation of the mantra of human rights to post-conflict societies.<sup>69</sup> Few would deny that the globalization of human rights does offer an important basis for advancing the cause of the poor and the marginal in third world countries. Even the focus on civil and political rights is helpful in the struggle against the harmful policies of the State and international institutions. There is a certain dialectic between civil and political rights and democratic practice that can be denied at our own peril. But it is equally true that the focus allows the pursuit of the neo-liberal agenda by privileging private rights over social and economic rights. Thus, for example, the preamble to the TRIPs text baldly states that ‘intellectual property rights are private rights’. It does not, on the other hand, talk of the right to health of individuals or peoples;<sup>70</sup> indeed, the Doha declaration on the TRIPs agreement and public health had to be insisted upon for this very reason.<sup>71</sup> The argument here is not rooted in ‘an excessively narrow, proprietary conception of rights’,<sup>72</sup> but rather on the continuous failure to realize welfare rights. It is this failure that gives rise to the belief that the language of civil and political rights mystifies power relations and entrenches private rights. This belief is strengthened by the fact that official international human rights discourse eschews any discussion of the accountability of international institutions such as the IMF/World Bank combine or the WTO which promote policies with grave implications for both the civil and political rights as well as the social and economic rights of the poor. Finally, there are the wages of taking civil and political rights too seriously. There is ‘the violence that underpins the desire of rights’, of realizing rights at any cost.<sup>73</sup> Wars and interventions are unleashed in its name.

### 4.3. *Salvation Through Internationalisation of Property Rights*

In recent years, a particular form of State (the neo-liberal State) has come to be touted as its only sensible and rational form. It has been the ground for justifying the erosion of sovereignty though relocating it in international institutions. What this has permitted is the privatization and internationalization of collective national property. In order to understand the on going process, the State needs to be understood in two different ways. First, ‘states are clearly institutions of territorial property’.<sup>74</sup> As Hont explains, ‘holding territory is a question of property rights, and states, including

<sup>69</sup> See B. Chimni, *Post-conflict Peace Building and the Repatriation and Return of Refugees: Concepts, Practices and Institutions* (forthcoming in 2002).

<sup>70</sup> Even when the question of health is mentioned, as in article 8 of the TRIPs text, it is subject to the rights of the patent holders.

<sup>71</sup> For the text of the declaration see WTO, WT/MIN (01)/DEC/W/2, 14 November 2001 – Ministerial Conference, Fourth Session, Doha, 9–14 November 2001: Declaration on the TRIPs Agreement and Public Health. (2001).

<sup>72</sup> See K. Baynes, *Rights as Critique and the Critique of Rights: Karl Marx, Wendy Brown, and the Social Function of Rights*, 28 *Political Theory* 451–468 (2000).

<sup>73</sup> See C. Douzinas, *The End of Human Rights: Critical Legal Thought At the Turn of the Century* 315 (2000).

<sup>74</sup> See I. Hont, *The Permanent Crisis of a Divided Mankind: ‘Contemporary Crisis of the Nation State’ in Historical Perspective*, in J. Dunn (Ed.), *Contemporary Crisis of the Nation State?* 166–231 (1995).

‘nation-states’, are owners of collective property in land . . .’<sup>75</sup> It explains why third world diplomacy has, through various resolutions relating to “natural resources”, emphasized ‘the function of sovereignty as a demarcation of property rights within international society’.<sup>76</sup> This has begun to change under the ideological onslaught which declares that the internationalization of property rights is the surest way to bring welfare to third world peoples. The idea of sustainable development has also been deployed towards this end. Second, the State is to be understood ‘as a social form, a form of social relations’.<sup>77</sup> It allows the debunking of the concept of “national interest” and the insight that the third world ruling elite is actively collaborating with its first world counterparts in entrenching the process of privatization and internationalization of property rights in its own interest. This process is legitimised through the ideological discrediting of all other forms of State. Such thinking needs to be contested in a bid to safeguard the wealth of third world peoples. The permanent sovereignty over “natural resources” must vest in the people.

#### 4.4. *The Idea of Non-development*

In recent years it has been argued that “development” itself is the trojan horse and that the ideology it embodies is responsible for third world peoples and States being willingly drawn into the imperial embrace.<sup>78</sup> It is suggested that the post-colonial imaginary has been colonised allowing the major organising principle of Western culture, that is ‘the idea of infinite development as possibility, value and cultural goal’ to be implanted in the poor world.<sup>79</sup> If only the third world countries were to choose non-development (of whatever local variety), its people would be spared much of the misery that they have suffered in the post-colonial era. The general idea here is to displace the aspirations of third world peoples and scale down development to more tolerable levels. This would help avoid the burden of sustainable development from falling on the North and help sustain its high consumption patterns.

To be sure, the post colonial era has witnessed the massive violation of human rights of ordinary peoples in the name of development. But it is particular kind of development policies that are responsible for these violations and not development *per se*. It is development through structural adjustment programs or neo-liberal policies that need to be indicted, rather than the aspirations of the people to be able to exercise greater choices and a higher standard of life. The uncritical celebration of all that is non-modern is merely a way of obstructing the development of third world countries.

<sup>75</sup> *Id.*, at 173.

<sup>76</sup> See D.L. Blaney and N. Inayatullah, *The Third World and a Problem with Borders*, in Mark E. Denham and Mark Owen Lombardi (Eds.), *Perspectives on Third World Sovereignty: The Postmodern Paradox* 83–102, at 91 (1996), and N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997).

<sup>77</sup> J. Holloway, *Global Capital and the National State*, in Werner Bonefeld and J. Holloway, (Eds.), *Global Capital, National State and the Politics of Money* 116–141 (1995) and R. Palan, J. Abbott, and P. Deans, *State Strategies in the Global Political Economy* 43 (1999).

<sup>78</sup> See A. Escobar, *Anthropology and Development*, 154 *International Social Science Journal* 497–515, at 497 (1997).

<sup>79</sup> See J. Tomlinson, *Cultural Imperialism: A Critical Introduction* 156 and 163 (1991).

Such celebration also risks romanticising oppressive traditional structures in the third world. It is somehow to be the fate of the poor, the marginal, and the indigenous or tribal peoples to preserve traditional values from destruction, while the elite enjoys the fruits of development, often in the first world. What is perhaps called for is a critical approach that recognises the discontents spawned by modernity without overlooking its attractions over pre-capitalist societies.<sup>80</sup>

#### 4.5. *The Use of Force*

Powerful States, it is being argued, exercise dominance in the international system through the world of ideas and not through the use of force. But from time to time force is used both to manifest their overwhelming military superiority and to quell the possibility of any challenge being mounted to their vision of world order. On such occasions, dominant States do not appear to be constrained by international law norms, be it with regard to the use of force or the minimum respect for international humanitarian laws. The US intervention in Nicaragua and the Gulf War and the NATO intervention in Kosovo are just a few examples of this truth. Thus, peace in the contemporary world is in many ways the function of dominance.

### 5. The Story of Resistance and International Law

The critique of dominant ideology is necessary if the interests of third world peoples is to be safeguarded. But it has to go hand in hand with a theory of resistance. The critique has to be integrally linked to the struggles of people against unjust and oppressive international laws. Among other things, it has to be recorded and brought to bear upon the international legal process. A proposed theory of resistance has to avoid the pitfalls of *liberal optimism* on the one hand, and *left wing pessimism* on the other. The first view believes that the world is progressively moving towards a just world order. It believes that more law and institutions are steps in this direction, in particular imaginative ways of securing enforcement of agreed norms and principles. The second view completely rejects this narrative of progress. It only sees ‘the endlessly repeated play of dominations’.<sup>81</sup> In this view ‘humanity installs each of its violences in a system of rules and thus proceeds from domination to domination’.<sup>82</sup> This understanding is tied to radical rule scepticism: ‘Rules are empty in themselves, violent and unfinalized; they are impersonal and can be bent to any purpose’.<sup>83</sup> This pessimistic understanding is (couched in the vocabulary of political realism) also shared by the ‘back to the future’ themes that have emerged in the post cold war era.<sup>84</sup> There is room here for a third view

<sup>80</sup> *Id.*, at 144.

<sup>81</sup> See M. Foucault, *Nietzsche, Genealogy, History*, in Paul Rabinow (Ed.), *The Foucault Reader* 76–100, at 85 (1984).

<sup>82</sup> *Id.*, at 86.

<sup>83</sup> *Id.*

<sup>84</sup> See J. George, ‘Back to the Future’?, in Greg Fry and Jacinta O’Hagan (Eds.), *Contending Images of World Politics* 33–48 (2000).

that hopes to occupy the vast intermediate space between liberal optimism and left wing pessimism. This view does not subscribe either to the facile view that humankind is inevitably and inexorably moving towards a just world order or the idea that resistance to domination is an empty historical act.

A key issue from the perspective of a theory of resistance is the question of agency. More specifically, it is about the role of old social movements (OSMs) in ushering in a just world order. Increasingly today, the story of resistance is coming to be identified with new social movements (NSMs) in the third world.<sup>85</sup> The NSMs arrived on the scene in the North in the 1970s with a focus on individual issue areas: women's movement, ecology movements, peace movement, gay and lesbian movements etc.<sup>86</sup> They began to make their presence felt in the South a decade later. The collapse of 'actually existing socialism' and the subsequent marginalization of class based movements led to a marked presence of NSMs. The rapid growth of non-governmental organisations (NGOs) with their ability to reach out through using modern means of communication contributed greatly to this presence. The NSMs, generally speaking, tend to view with suspicion OSMs with their accent on class based struggles.

The OSMs emerged in the nineteenth century when the working class became sufficiently organised to harbour the ambitions of capturing state power. The key date perhaps is 1848 as the 'revolution in France marked the first time that a proletarian-based political group made a serious attempt to achieve political power and legitimise worker's power (legalisation of trade unions, control of the workplace'.<sup>87</sup> The globalisation process with the increased mobility of capital and the intensification of both inter-state and intra-state international trade has meant 'huge movements' into the global labour force.<sup>88</sup> According to Harvey, 'the global proletariat is far larger than ever and the imperative for workers of the world to unite is greater than ever'.<sup>89</sup> There is the growing numbers of unemployed in the North that has been witnessing jobless growth. Of course, '... the bulk of the Reserve Army of capital is located geographically in the peripheries of the system'.<sup>90</sup> It is made up of the enormous mass of urban unemployed and semi-employed, as also the large mass of rural unemployed.<sup>91</sup> In other words, never before has the slogan of 'workers of the world unite' has meant so much to so many.

It is however not entirely surprising that class-based struggles are coming to be neglected by NSMs as the OSMs have failed to reach out to them. The privileging of

<sup>85</sup> See B. Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 Harvard International Law Journal 531–578 (2000).

<sup>86</sup> See I. Wallerstein, *Antisystemic Movements: History and Dilemmas*, in S. Amin, et al. (Eds.), *G. Transforming the Revolution: Social Movements and the World-System* 13–54, at 41 (1990).

<sup>87</sup> *Id.*, at 16.

<sup>88</sup> See D. Harvey, *Spaces of Hope* 42 (2000). And China is not alone in this. The export-oriented garment industry of Bangladesh hardly existed twenty years ago, but it now employs more than a million workers (80 per cent of them women and half of them crowded into Dhaka). Cities like Jakarta, Bangkok, and Bombay, as Seabrook (1996) reports, have become Meccas for formation of a transnational working class – heavily dependent upon women – living under conditions of poverty, violence, chronic environmental degradation, and fierce repression'. See Harvey at 42.

<sup>89</sup> *Id.*, at 45.

<sup>90</sup> See Amin, *supra* note 15, at 99.

<sup>91</sup> *Id.*

non-class struggles is also encouraged by the transnational ruling elite for it prevents effective opposition to its neo-liberal policies. After all, global strategies and concentrated power cannot be fought by decentralised means and forms of resistance. In the circumstances, what we need to do is ‘to preserve what has been gained from struggles of the 1850–1950 period (both the concrete institutions and the intellectual understanding) and add to it a strong dash of daring new approaches derived from the post-1945 experience’.<sup>92</sup> It calls for a dialogue between new and old social movements for, as Wallerstein notes, ‘all existing movements are in some ghetto’.<sup>93</sup> What is required is ‘a conscious effort at empathetic understanding of the other movements, their histories, their priorities, their social bases, their current concerns’.<sup>94</sup> Their need to be strategic alliances not only in the short but also in the medium term.

Of course, there is also the necessity to think about long term goals. On our part, we would like to revisit the idea of socialism. Socialism should not be seen as a fixed ideal or a frozen concept. It should today be perceived as expressing the aspirations of equality and justice of subaltern peoples. *The ideal is to be realised through non-violent means and should exclude all manner of dogmatic thinking and undemocratic practices.* The ideal of *democratic socialism* would be actualised *by way of reform and not revolution and would not exclude reliance on market institutions.* It would be realised through the collective struggles of different oppressed and marginal groups. The identity and role of these groups, as we have noted above, is not fixed in history. New identities of oppression emerge and vie for space with other groups. If this understanding is accepted then we need ‘an international political movement capable of bringing together in an appropriate way the multitudinous discontents that derive from the naked exercise of bourgeois power in pursuit of a utopian neoliberalism’.<sup>95</sup> This calls for ‘the creation of organisations, institutions, doctrines, programs, formalised structures, and the like, that work to some common purpose’.<sup>96</sup> There is, in other words, a need to build a movement that cuts across space and time, involving NSMs and OSMs in every struggle, to form a global opposition force that can challenge those transnational social forces which bolster the regime of capital at the expense of peoples interests.

Today, from Seattle to Genoa we are witnessing an upsurge of sentiment against the neo-liberal form of globalisation. New forms of struggle have been invented to mobilise people against the injustices of globalisation. There has been adroit and imaginative use of digital space to create a global public sphere in which the evolving international civil society can register its protest. While the sentiments that are expressed have no unified outlook, and are in fact riddled with contradictions, the significance of the protest cannot be disregarded. If these protests can draw in the OSMs, and the latter respond to it and present a *united* front, there would be much to cheer about. Albeit, in terms of framing a theory of resistance we need to distinguish between those demands that are not so good for third world countries and those that are. Thus, for

<sup>92</sup> See Wallerstein, *supra* note 86.

<sup>93</sup> *Id.*, at 53.

<sup>94</sup> *Id.*, at 52.

<sup>95</sup> See Harvey, *supra* note 88, at 49.

<sup>96</sup> *Id.*

example, the demand for bringing in labour standards into WTO is inimical to the interests of third world countries as it would be used as a device of protection by the North.<sup>97</sup>

From the standpoint of TWAIL, it is necessary first, to make the story of resistance an integral part of the narration of international law. There is perhaps a need to experiment with literary and art forms (plays, exhibitions, novels, films) to capture the imagination of those who have just entered the world of international law. Second, we need to strike alliances with other critics of the neo-liberal approach to international law. Thus, for instance, both feminist and third world scholarship address the question of exclusion by international law. There is therefore a possibility of developing coherent and comprehensive alternatives to mainstream Northern scholarship. In other words, we should collaborate with feminist approaches to reconstruct international law to address the concerns of women and other marginal and oppressed groups. Third, we need to study and suggest concrete changes in existing international legal regimes. The articulation of demands would assist the OSMs and NSMs to frame their concerns in a manner as to not do harm to third world peoples.

## 6. The Road Ahead: *Further* thoughts on a TWAIL Research Agenda

Identifying the future tasks of TWAIL is severely constrained by the protocols of what are acceptable goals and what is deemed good academic work. It compels the academia to playing a self-fulfilling role as the protocols, in a manner of speaking, shame individual academics into imagining only certain kind of social arrangements. For those who accept the protocols are held up as models of clear thinking. On the other hand, a variety of social and peer pressures are brought to bear on dissenting academics to neutralize their critical energies. Even eminent personalities are unable to be bold and courageous in evaluating contemporary trends and imagining alternative futures. Thus, for instance, Falk writes of the report *Our Global Neighborhood* produced by the Commission of Global Governance: ‘Its most serious deficiency was a failure of nerve when it came to addressing the adverse consequences of globalization, a focus that would have put such a commission on a collision course with adherents of the neo-liberal economic world picture’.<sup>98</sup> In contrast, we would urge critical third world scholars to willingly court “irresponsibility” if that is what it takes to boldly critique the present globalization process and project just alternative futures. The commitment to ushering in a just world order has of course to be translated into a concrete research agenda in the world of international law. In addition to the ideological and substantive tasks already identified, we list below *some* subjects that deserve the attention of third world scholars.

<sup>97</sup> See S. Gopal, *American Anti-Globalization Movement*, Economic and Political Weekly, (August 25, 2001) page 3226–3233.

<sup>98</sup> See R. Falk, *Global Civil Society and the Democratic Prospect*, in B. Holden (Ed.), *Global Democracy: Key Debates* 62–179, at 170 (2000).

### 6.1. *Increasing Transparency and Accountability of International Institutions*

International law, we have argued, does not today promote democracy either within States or in the transnational arena. Those who seek to contest the present state of the relationship between State and international law need to identify the constraints imposed on realizing democracy in the internal and transnational arenas and push forward the global democracy agenda. The steps leading to global democracy will not conform to a neat model. Instead, it will be the result of slowly increasing the transparency and accountability of key actors like States, international institutions and transnational corporations. There is much work that needs to be done in this respect. Thus, for example, a correlative of international institutions possessing legal personality and rights is *responsibility*. It is 'a general principle of international law' concerned with 'the incidence and consequences of illegal acts', in particular the payment of compensation for loss caused.<sup>99</sup> There is a need to elaborate this understanding and develop the law (either in the form of a declaration or convention) on the subject of responsibility of international institutions. This would allow powerful institutions such as the IMF, World Bank and WTO to be made accountable, among others, to the global poor.<sup>100</sup> Towards this end, there is also an urgent need to democratize decision-making within international institutions such as the IMF and the World Bank for they have come to exercise unprecedented influence on the lives of ordinary people in the third world.<sup>101</sup> This calls for solutions that temper the desire for change with a strong dose of realism.

### 6.2. *Increasing Accountability of Transnational Corporations*

There are several steps that can be taken to make the transnational corporations (TNCs) responsible in international law. The steps could include: (i) adoption of the draft United Nations code of conduct on TNCs; (ii) the assertion of consumer sovereignty manifesting itself in the boycott of goods of those TNCs that do not abide by minimum human rights standards; (iii) monitoring of voluntary codes of conduct adopted by TNCs in the hope of improving their public image; (iv) the use of shareholders rights to draw attention to the needs of equity and justice in TNC operations; (v) the imaginative use of domestic legal systems to expose the oppressive practices of TNCs; and (vi) critique of bodies like the International Chambers of Commerce for

<sup>99</sup> See I. Brownlie, *Principles of Public International Law*, 4th ed., 701 and 433 (1990).

<sup>100</sup> See A. Anghie, *Time Present and Time Past: Globalization, International Financial Institutions and the Third World*, 32:2 *New York University Journal of International Law and Politics* 243–290 (2000).

<sup>101</sup> To take the case of the IMF, the decision making process in it is based on a system of weighted voting which excludes its principal users, the poor world, from a say in the policy making. The Third World voice is not heard even as the policies of the Fund inflict enormous pain and death on the people who inhabit it. Nearly 4.4 billion people or 78 per cent of the world's 1990 population live in the Third World. Despite constituting an overwhelming majority of the membership the Third World countries as a whole had a voting share of approximately 34 per cent in the IMF in the mid-nineties. See R. Gerster, *Proposals for Voting Reform within the International Monetary Fund*, *Journal of World Trade* 121–133 (1993). Without the OPEC countries (who act as creditor states in the institution) this share is reduced to 24 per cent.

pursuing the interests of TNCs to the neglect of the concerns of ordinary citizens.<sup>102</sup> All these measures call for the critical intervention of international law scholarship.

### 6.3. *Conceptualizing Permanent Sovereignty as Right of Peoples and not States*

Research needs to be directed towards translating the principle of permanent sovereignty over “natural resources” into a set of legal concepts which embed the interests of third world peoples, as opposed to its ruling elite. In the past, the Program and Declaration of action for a New International Economic Order and the Charter of Economic Rights and Duties of States were statist in their orientation. While it is true that the State is, in terms of international demarcation of territories, an institution of collective property, the ultimate control over this property is to vest with people. From this perspective, there is a need to address the difficult question of how to give legal content to peoples sovereign rights? There is often in this respect the absence of appropriate legal categories and are difficult to implement in practice. Thus, for example, Article 8(j) of the Convention on Bio-Diversity calls for empowering local communities.<sup>103</sup> Yet it has not easy to implement the provision given the absence of clarity about the legal definition of local communities.

### 6.4. *Making Effective Use of Language of Rights*

There is the need to make effective use of the language of human rights to defend the interests of the poor and marginal groups. The recent resolutions passed by different human rights bodies drawing attention to the problematic aspects of international economic regimes offers the potential to win concessions from the State and the corporate sector.<sup>104</sup> The implications of these resolutions need to be analysed in depth and brought to bear on the international and national legal process. A second related task is to expose the hypocrisy of the first world with respect to the observance of international human rights law and international humanitarian laws.

<sup>102</sup> See the Irene Report, Controlling Corporate Wrongs: The Liability of Multinational Corporations: Legal Possibilities, Strategies and Initiatives for Civil Society, (2000), online: <<http://elj.warwick.ac.uk/global/issue/2000-1/irene.html>> See also J. Madeley, Big Business Poor Peoples: The Impact of Transnational Corporations on the World's Poor 169–180 (1999).

<sup>103</sup> Article 8(j) of the Convention on Biological Diversity, 1982 states:

Each Contracting Party shall, as far as possible and as appropriate:

....

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; . . .

For the text of the Convention see N. Arif, *International Environmental Law: Basic Documents and Select References* 279 (1996).

<sup>104</sup> E/CN.4/Sub.2/2000/7, Commission on Human Rights: Sub-Commission on the Promotion and Protection of Human Rights – The Realization of Economic, Social and Cultural Rights: Intellectual Property Rights and Human Rights, 17 August, 2000. Para 3 of the resolution ‘reminds all Governments of the primacy of human rights obligations over economic policies and agreements’.

### 6.5. *Injecting Peoples Interests in Non Territorialised Legal Orders*

From the standpoint of the development of international law, the emergence of global law without the State is both empowering and worrisome. The trend needs to be analysed from a peoples perspective. The process is empowering in as much as it can be used by progressive OSMs and NSMs to project an alternative vision of world order through the production of appropriate international law texts. Much work needs to be done in this direction. At the same time, there is a need to explore ‘the tension between the *geocentric* legality of the nation-state and the new *egocentric* legality of private international economic agents’ in order to ensure that the interest of third world peoples are not sacrificed.<sup>105</sup>

### 6.6. *Protect Monetary Sovereignty Through International Law*

A great deal of research needs to be directed towards finding ways and means to protecting the monetary sovereignty of third world countries. Third world States are presently doing so *inter alia* through the creation of capital controls (e.g., Malaysia after 1997), tax on financial transactions (Chile), prescription of a fixed period of stay before departure, a regional monetary fund etc. But there is a need for a new financial architecture that more readily responds to the anxieties of third world States and peoples. This calls for the informed intervention of international law. But the role of the international financial market and institutions in eroding the monetary sovereignty of third world countries is little understood even today. Indeed, few areas cry out for more attention than international monetary and financial law. This situation needs to be immediately corrected.

### 6.7. *Ensuring Sustainable Development With Equity*

There is an urgent need to shape an integrated response to global environmental problems. In this context, ‘the whole question of constructing an alternative mode of production, exchange, and consumption that is risk reducing and environmentally as well as socially just and sensitive can be posed’.<sup>106</sup> From an international law perspective, the empty concept of sustainable development needs to be filled with legal content that does not stymie the development of the third world countries.<sup>107</sup> At the moment, the North is exploiting all forums to avoid what Jameson calls the “terror of loss.”<sup>108</sup> It explains, for example, the approach of the Bush administration to the Kyoto protocol. In other words, there is a need to ensure that the burden of realising the goal of sustainable development is not shifted to the poor world or used as a tool of protection.

<sup>105</sup> See J. Robe, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in G. Teubner (Ed.), *Global Law Without a State* 45–79 (1997).

<sup>106</sup> See Harvey *supra* note 88, at 223.

<sup>107</sup> See B. Chimni, *Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation*, 38 *Indian Journal of International Law* 208–217, at 216 (1998).

<sup>108</sup> See M. Hardt and K. Weeks, (Ed.), *The Jameson Reader* 167 (2000).

### 6.8. *Promoting the Mobility of Human Bodies*

While capital and services have become increasingly mobile in the era of globalization, labor has been spatially confined. More significantly, in the realm of forced (as opposed to voluntary) migration the first world has, through a series of legal and administrative measures, undermined the institution of asylum established after the second world war. The post Cold War era has seen a whole host of restrictive practices which prevent refugees fleeing the underdeveloped world from arriving in the North.<sup>109</sup> A sustained critique of these practices is called for. It will, among other things, prevent the first world from occupying the moral high ground.

## 7. Conclusion

International law has always served the interests of dominant social forces and States in international relations. However, domination, history testifies, can coexist with varying degrees of autonomy for dominated States. The colonial period saw the complete and open negation of the autonomy of the colonized countries. In the era of globalization, the reality of dominance is best conceptualized as a more stealthy, complex and cumulative process. A growing assemblage of international laws, institutions and practices coalesce to erode the independence of third world countries in favor of transnational capital and powerful States. The ruling elite of the third world, on the other hand, has been unable and/or unwilling to devise, deploy, and sustain effective political and legal strategies to protect the interests of third world peoples.

Yet, we need to guard against the trap of legal nihilism through indulging in a general and complete condemnation of contemporary international law. Certainly, only a comprehensive and sustained critique of present-day international law can dispel the illusion that it is an instrument for establishing a just world order. But it needs to be recognized that *contemporary* international law also offers a protective shield, however fragile, to the less powerful States in the international system. Second, a critique that is not followed by construction amounts to an empty gesture. Imaginative solutions are called for in the world of international law and institutions if the lives of the poor and marginal groups in the third and first worlds are to be improved. It *inter alia* calls for exploiting the contradictions that mark the international legal system. The economic and political interests of the transnational elite are today not directly translatable into international legal rules. There is the need to sustain the illusion of progress and maintain the inner coherence of the international legal system. Furthermore, individual legal regimes have to offer some concessions to poor and marginal groups in order to limit resistance to them both in the third world and, in the face of an evolving global consciousness, in the first world. The contradictions which mark contemporary international law is perhaps best manifested in the field of international human rights

<sup>109</sup> See B. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 1:4 *Journal of Refugee Studies* 350–374 (1998) and First Harrell-Bond Lecture *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13:3 *Journal of Refugee Studies* 243–262 (2000).

law which even as it legitimizes the internationalization of property rights and hegemonic interventions, codifies a range of civil, political, social, cultural and economic rights which can be invoked on behalf of the poor and the marginal groups. It holds out the hope that the international legal process can be used to bring a modicum of welfare to long suffering peoples of the third and first worlds.