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RHETORIC AND RAGE: THIRD WORLD VOICES IN INTERNATIONAL LEGAL DISCOURSE

KARIN MICKELSON*

That is the partial tragedy of resistance, that it must to a certain extent work to recover forms already established or at least influenced or infiltrated by the culture of empire.

Edward Said¹

I. CHALLENGING CONVENTIONAL VIEWS OF THE THIRD WORLD AND INTERNATIONAL LAW

There is no coherent and distinctive "Third World approach" to international law; this appears to be the conventional view among international legal scholars. While no one would deny that particular issues have triggered similar responses from the so-called Third World countries,² the standard view expressed is that these disparate strands do not weave together into any sort of pattern. While for convenience they might be lumped together under the "Third World" rubric, they constitute little more than a series of *ad hoc* responses to discrete issues. Even those who would admit the existence of a pattern tend to deny its distinctiveness. To the extent that a broader Third World approach to international law is recognized at all, it is ordinarily characterized as essentially reactive in nature.³

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¹ EDWARD S. SAID, *CULTURE AND IMPERIALISM* 210 (1993).

² For an anthology that examines a number of these issues see *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW: AN INTRODUCTION* (Frederick E. Snyder & Surakiart Sathirathai eds. 1987). For early discussions of the impact of the Third World on international law see Georges N. Abi-Saab, *The Newly Independent States and the Rules of International Law*, 8 *HOW. L.J.* 95 (1962); Jorge Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 *INT'L ORG.* 38 (1961); A.A. Fatouros, *International Law and the Third World*, 50 *VA. L. REV.* 783 (1964). See also Tunku Sofiah Jewa, *The Third World and International Law*, 4 *J. MALAYSIAN & COMP. L.* 215 (1977). A bibliography that covers most of the early literature is *The Third World and International Law: Selected Bibliography-1955-1982* (1983).

³ Early on, for example, Wolfgang Friedmann argued that any difference in the approach taken by the "underdeveloped countries" could be explained in terms of their lack of economic and political clout. "In the present--as it has done in the past, and will do in the future--a status of economic under-development will produce certain attitudes and approaches toward international law, which will change or even be reversed as the underlying condition changes.": *The Position of Underdeveloped Countries and the Universality of International Law*, 2 *COLUM. J. TRANSNAT'L L.* 78, 79 (1963). The same basic view seemed popular twenty years later; see, for example, PATRICIA BUIRETTE-MAURAU, *LA*

Such a view is characteristic even of those scholars that are most sympathetic to Third World concerns. Richard Falk, for example, has maintained that "even the most explicitly anti-Western" work by non-Western international legal scholars "has relied on Western approaches in a relatively uncritical manner," a state of affairs that he attributes both to Western dominance of international law scholarship and the Western training many of these scholars received.⁴ As a consequence, according to Falk, "the emergence of distinctive modes of thought and analysis failed to accompany the process of decolonization, or even to follow upon it."⁵ Falk notes the tendency of most Third World international law scholars to "avoid any ideological imprint" on their work, a tendency that he ascribes to the desire to make that work "scientific in a Western sense."⁶ Falk draws an analogy between this characteristic of Third World writing and the work of Soviet scholars, which "was pragmatically oriented towards enabling Soviet bloc participation in the prevailing debates in Western international law circles."⁷

This view is not limited to Northern scholars. Falk's remarks are found in the preface to a recent (1993) work by B.S. Chimni on contemporary approaches to international law and world order.⁸ Chimni asserts that Third World approaches to the area have remained at the level of critique rather than proposing alternatives:

While international lawyers from the Third World have challenged, often with success, Western perceptions of the history and content of international law and pointed to the inequitable nature of the body of rules bequeathed from the past, they have failed to propose and articulate an alternative approach which is inclusive and internally consistent. In fact the matter has not received sufficient consideration. It is, therefore, not unusual to see a Third World scholar speaking of rejecting rules which are prejudicial to the interests of developing countries embracing a theory of international law and world order which seeks to justify and protect the status quo and has little to say on the situation of the developing world. This

PARTICIPATION DU TIERS-MONDE A L'ELABORATION DU DROIT INTERNATIONAL 199-202 (1983), arguing that the Third World has been concerned with making international law more responsive to its interests, rather than challenging its fundamental assumptions.

⁴ Richard Falk, *Preface* to B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 9, 9 (1993).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 10.

⁸ See Chimni, *supra* note 4.

eventually leads him to assume positions which strengthen that which he had set out to fight.⁹

This paper sets out to question the conventional view of the Third World and international law. Can one in fact identify a unifying set of characteristics of Third World legal discourse? While not denying the essentially pragmatic drive of many scholars working in the area, is it possible to distinguish some unifying theme or themes that go beyond a purely *ad hoc* and reactive response? To put it in Falk's terms, can one identify "distinctive modes of thought and analysis" characteristic of a Third World approach to international law? In the analysis that follows, I begin by exploring various usages of the term "Third World," and explain the way in which it is used in this paper. I then sketch out Third World approaches to the subject areas of international economic law, human rights and the environment, each of which is followed by an examination of a text by a Third World writer: *Towards a New International Economic Order*, by Mohammed Bedjaoui, longtime Algerian diplomat and current judge of the International Court of Justice;¹⁰ "Le droit au developpement comme un droit de l'homme," by Keba M'Baye, first President of the Supreme Court of Senegal and an influential figure in the development of the African Charter on Human and Peoples' Rights;¹¹ and "Development and Environment: The Case of the Developing Countries" by R.P. Anand, Professor of International Law at Jawaharlal Nehru University.¹² This is followed by an examination of the common features of these texts that might be said to characterize an overarching "Third World approach" to international law. The paper concludes with an exploration of why it may be meaningful and useful to attempt to delineate such an approach.

II. WHAT IS THE THIRD WORLD?

[T]here is an important sense in which a country has to decide for itself that it is a member of the Third World. For some Third World countries are richer, or more industrialized, than others; and in segregated societies a man who is trying to 'pass' into the dominant community distances himself as much as possible from his relatives

⁹ *Id.* at 19.

¹⁰ See MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (United Nations Educational, Scientific and Cultural Organization, 1979).

¹¹ See Keba M'Baye, *Le droit au developpement comme un droit de l'homme*, 5 *REVUE DES DROITS DE L'HOMME* 505 (1972).

¹² See R.P. Anand, *Development and Environment: The Case of the Developing Countries*, 24 *INDIAN J. INT'L L.* 1-19 (1980).

and traditional friends.¹³

Julius Nyerere

As noted above, this paper seeks to extrapolate a "Third World approach" to international law from a consideration of a selection of texts by Third World writers. A logical starting point, then, is the question: what is the Third World? In light of recent developments, this question is of more than merely academic interest. Given its origins in the East-West polarity that for so long dominated the mainstream conceptualization of the international system, the meaningfulness of a designation like "Third World" has been called into question with the end of the Cold War.¹⁴

The term "Third World" has a number of different usages. In a purely descriptive sense, "Third World" is frequently used interchangeably with other terms such as "less-developed," "developing," or "underdeveloped" countries, and, increasingly, "the South." The referent are the countries of Africa, Asia, and Latin America that have traditionally been classified as lagging behind the "West," "North," "First World" or "developed countries" in terms of economic growth and indicators of economic prosperity. Building on this quasi-geographical rubric, another layer is frequently added--that these countries are the marginalized within international society.¹⁵ According to Julius Nyerere:

[T]he Third World consists of the victims and the powerless in the international economy ... Together we constitute a majority of the world's population, and possess the largest part of certain important raw materials, but we have no control and hardly any influence over the manner in which the nations of the world arrange their economic affairs. In international rule-making we are recipients not participants.¹⁶

¹³ Julius K. Nyerere, *South-South Option*, in *THE THIRD WORLD STRATEGY: ECONOMIC AND POLITICAL COHESION IN THE SOUTH* 9, 10 (Altaf Gauhar ed. 1983).

¹⁴ For general discussions of the implications of the end of the Cold War for the Third World, see GUY ARNOLD, *THE END OF THE THIRD WORLD* (1993); *THE NEW WORLD ORDER AND THE THIRD WORLD* (Dave Broad & Lori Foster eds. 1992).

¹⁵ The coining of the term "Third World" itself is generally credited to French demographer Albert Sauvy, who attempted to draw a historical analogy to the "Tiers Etat" within French society--the marginalized and oppressed among the population--in an article titled *Three Worlds, One Planet*, in the Paris newspaper *l'Observateur* on August 14, 1952. It is important to bear in mind that the term was not used in a derogatory sense by Sauvy himself. In a book published posthumously, he expressed concern that the translation of "Tiers Monde" into "Third World" involved a loss of the historical resonance of the phrase, as "tiers" became "troisieme." See ALBERT SAUVY, *LA TERRE ET LES HOMMES: LE MONDE OU IL VA, LE MONDE D'OU IL VIENT* 41 (1990).

¹⁶ Nyerere, *supra* note 13, at 10.

At another level, "Third World" could also be used to designate a political coalition, much like any other grouping of States in pursuit of common goals.¹⁷ From this perspective, the focus would likely be on the role played by more-or-less formal groupings such as the "Non-Aligned Movement"¹⁸ and the Group of 77¹⁹ in international fora such as the United Nations General Assembly, the United Nations Conference on Trade and Development, and particular international conferences. Finally, the "Third World" is sometimes conceptualized as a form of "social movement"--an international protest of the weak against the strong, or the poor against the rich.²⁰ In some instances the analogy has been drawn with a particular form of social movement, such as trade unionism. Nyerere, for example, has argued, "[t]he Third World, in its relations with the North, is like a trade union in its relations with employers. It is trying to make unity serve as a compensating strength so as to create a greater balance in negotiations."²¹

All of these characterizations of the "Third World" have been criticized. The validity of the term in a descriptive sense has increasingly been called into question given the growing diversity among the various countries that have been lumped together under this label, leading some to suggest that we distinguish between a "new" Third World and an "old"

¹⁷ Such an approach is reflected in works such as ROBERT A. MORTIMER, *THE THIRD WORLD COALITION IN INTERNATIONAL POLITICS* (2d. Ed. 1984). Marc Williams, who has written about various aspects of Third World involvement in international relations, has stated that the "Third World coalition is essentially a political coalition. Efforts to depict the Third World as an economic or political concept mistakenly attempt to reduce political behaviour to a non-political explanation." Marc Williams, *Re-articulating the Third World Coalition: The Role of the Environmental Agenda*, 14 *THIRD WORLD QUARTERLY* 7, 9 (1993).

¹⁸ The origins of the Non-Aligned Movement--and hence of Third World cooperation--are frequently traced to the 1955 Bandung Afro-Asian Solidarity Conference. The resulting "Bandung Declaration" restated and reemphasized the importance of the fundamental principles of the United Nations Charter, but also proclaimed a number of principles that were to become recurring themes in Third World discourse: a denunciation of colonialism and demand for decolonization, a call for dialogue between North and South in relation to economic issues, with an emphasis on the need to promote economic development, and an assertion of the need to avoid military alliances with the superpowers. See *Asian-African Conference: Final Communique, Bandung, April 18-24, 1955*, in *THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES* (Odette Jankowitsch & Karl P. Sauvart eds. 1978). These principles, among others, were to form the ideological foundation of the Non-Aligned Movement when it was formally constituted in 1961. See generally "The Anatomy of the Movement", *id.*; Mortimer, *supra* note 17, at 6-23.

¹⁹ See the discussion of the development of the G-77 *infra* Section III A 1.

²⁰ This is an approach explored by political scientist Robert L. Rothstein. See Robert L. Rothstein, *Limits and Possibilities of Weak Theory: Interpreting North-South* 44 *J. INT'L AFFAIRS* 159 (1990).

²¹ Nyerere, *supra* note 13, at 12. Similarly, Mortimer notes, "It is not surprising that a world divided into rich and poor states should reproduce the concept of solidarity historically associated with working-class movements," although he goes on to emphasize that the analogy is somewhat problematic given that "State interests are more complex than individual interests, and power is much more diffused throughout the state system than in an industrial relationship or even a national political system." Mortimer, *supra* note 17, at 2.

Third World.²² The portrayal of the Third World as a political coalition is somewhat problematic because of the relatively shaky and fractured nature of the alliances,²³ and its failure to account for the often profound differences between Third World countries.²⁴ The portrayal of the Third

²² JAMES H. MITTELMAN & MUSTAPHA KAMAL PASHA, *OUT FROM UNDERDEVELOPMENT REVISITED: CHANGING GLOBAL STRUCTURES AND THE REMAKING OF THE THIRD WORLD* 23 (1997). "Rather than nullify the concept of the Third World, these changes suggest that there is a 'new Third World' comprised of all the countries that have graduated above the mid-point on the scale of global competitiveness (Brazil, China, Korea, Taiwan, and so on) and an 'old Third World' made up of all the rest." *Id.*

²³ The G-77 has been characterized by ongoing differences of opinion along economic, political, and regional lines. In *Third World Cooperation: The Group of 77 in UNCTAD* (1991) Marc Williams distinguishes three types of cleavages within the G77: "ascriptive (different levels of development, and the differing structures of economies); attitudinal (ideology and preferences); and behavioural (activities within UNCTAD and membership in other organisations and groupings)" *Id.* at 99; *discussed further* at 99-101. For a discussion of the differences between some of the Latin American countries in regard to the NIEO, see JEFFREY A. HART, *THE NEW INTERNATIONAL ECONOMIC ORDER: CONFLICT AND COOPERATION IN NORTH-SOUTH ECONOMIC RELATIONS, 1974-77* (1983) at 89-102. The Non-Aligned Movement suffered from considerable internal ideological tensions almost from the very beginning of its existence. A major source of controversy was the ongoing attempt by Cuba to reinterpret "non-alignment" as being consistent with a generally favorable disposition towards the Soviet bloc. For a concise, albeit somewhat slanted, account of these tensions see M. Jusuf Ronodipuro, *Non-Aligned Movement, Conceived in Bandung and About to be Reborn in Jakarta*, in *INTERNATIONAL FORUM INDONESIA, NON-ALIGNED MOVEMENT IN A CHANGING WORLD* (1992). The end of the Cold War, in particular, has led to a questioning of its relevance and even its very *raison d'être*. At its two most recent summits, held in Jakarta, Indonesia in 1992 and Cartagena, Colombia, in 1995, the Movement underwent considerable internal debate regarding the proper direction and focus of its efforts. Out of these debates has emerged (at least on paper) a renewed commitment, a reaffirmation that what the Movement had sought all along was not a path that steered a middle ground between Western and socialist bloc models but a path that built on certain core values which were defined not in opposition to the stances of the two Cold War antagonists but in pursuit of an autochthonous set of values and ideals. As Secretary-General Boutros Boutros-Ghali stated in his remarks to the thirty-fifth anniversary meeting of the Movement in 1996, "Now is the time for a renaissance of non-alignment. Even though the cold war is no more, and even though decolonization is nearly complete, our goal of a just, peaceful and equitable global order is far from being realized." *The renaissance of Non-Alignment can transform international relations, Secretary-General tells NAM Commemorative Meeting*, U.N. PRESS RELEASE SG/SM/6064.

²⁴ See, e.g., Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 *SOCIAL AND LEGAL STUDIES* 337 (1996). Otto takes issue with what she terms "[t]he nativist strategy of claiming to represent a coherent international Third World viewpoint and ethic," stating: "In the global context, the championing of Third World difference made powerful claims to advocating a non-hegemonic, socially just, cooperative world community. In reality, the assertion of a univocal non-European identity relegated incommensurable Third World voices to the position of alien." *Id.* at 353. It is highly doubtful, however, whether those involved in the coalition ever saw it as "univocal." The comments of Julius Nyerere when he was awarded the "Third World Prize" are instructive: "The establishment and annual award of the Third World Prize does, by implication, make a number of controversial statements. First, it asserts that there is such a thing as a Third World. Secondly, it asserts that the Third World is conscious of its existence as a diverse unity, and of its condition as a victim of exploitation. And, thirdly, this Prize is an assertion that the Third World is involved in the affairs of mankind, and has rights within the larger community. The Third World Prize is thus a declaration of pride in ourselves, and gives notice of our intention to become controllers of our own destiny." Nyerere, *supra* note 13, at 9. Gayatri Chakravorty Spivak has also pointed to the "strategic" use of the notion of the Third World:

If the 'third world' is used as a mobilizing slogan for the developing nations, that's fine, but that is rather different from essentialism. That is in response to specific policies of exploitation. In the arenas where this language is seriously used, each country comes

World as social movement, while in many ways the most appealing because of its emphasis on justice, suffers from a similar tendency to lose sight of differences both between and within Third World countries, as these are constructed (and homogenized) as the "disadvantaged."²⁵ Moreover, such an approach would tend to de-emphasize concerns about statehood and sovereignty, which are widely viewed as a key dimension in Third World thinking.²⁶ Given these difficulties, some scholars and commentators have responded by using "Third World" simply as a convenient signifier for a complex set of realities.²⁷ Such a response, however, runs the risk of overlooking the important role that the Third World has played within the international system. Moreover, as Robert Young has noted:

Everyone feels the need nowadays to qualify the term 'Third World,' stating quite correctly that it should not be taken to imply a homogeneous entity. The inadequateness of the term, however, insofar as it offers a univocal

asserting its difference. They really do know it's strategic. That is a strategy that changes moment to moment, and they in fact come asserting their differences as they use the mobilized unity to do some specific thing.

OUTSIDE IN THE TEACHING MACHINE (1993) at 13. This could be regarded as an example of Spivak's well-known notion of "strategic essentialism," and is characterized as such in PETER CHILDS & PATRICK WILLIAMS, AN INTRODUCTION TO POST-COLONIAL THEORY 160 (1997). However, it is not entirely clear that she has this in mind in this particular passage.

²⁵ For example, Mittelman and Pasha note that "[a] Third Worldist perspective gives the impression that only the advanced countries are the oppressors, neglects important differences within underdeveloped nations, and ignores the role of the locally dominant strata in these nations." Mittelman & Pasha, *supra* note 22, at 23. While there is no doubt that the elite/non-elite divide is particularly notable in many Third World countries, I would question the tendency of some Northern commentators to seize upon this feature to deny the ability of any so-called "elite" figure to speak for or about the Third World. Many of those same commentators seem to have some difficulty seeing the elitism within their own societies, and the privileged positions they themselves occupy.

²⁶ Consider, for example, the statement regarding sovereignty in Wang Tieya, *The Third World and International Law*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 955, 969 (Ronald St. J. Macdonald & Douglas M. Johnston eds. 1983):

The road to sovereignty for Third World nations was not an easy one. For most of them, independence came only after bitter struggle. For this reason, sovereignty is considered sacred and inviolable. Its preservation is the focal point of all their activities. It is only by tenaciously upholding sovereignty that the new nations can preserve real self-government; protect their legitimate rights and interests on the basis of equality; eliminate colonial oppression and exploitation; and avoid having to suffer from them again.

Id. See also ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990), who also characterizes the preoccupation with sovereignty as fundamental to an understanding of Third World approaches to the international system, albeit for different reasons: "[the] value of sovereignty to Third World governments... is extremely high because it is virtually the only source of their status and privileges." *Id.* at 176.

²⁷ See, e.g., introduction to RETHINKING THE THIRD WORLD: CONTRIBUTIONS TOWARD A NEW CONCEPTUALIZATION xv (Rosemary E. Galli, ed. 1992). Galli asserts, "The term *Third World* appears in the text for convenience only," noting that while the countries of Asia, Africa and Latin America share some commonalities, "the differences rather than similarities between countries are primary and demand attention." *Id.*

description of an extremely heterogeneous section of the world, also means that a suitable alternative general category cannot by definition be produced. In this situation, abject apologies in some respect remain complicit with the patronizing attitudes from which they attempt to disassociate themselves.²⁸

The characterization that is utilized in this paper sees the Third World as occupying a historically constituted, alternative and oppositional stance within the international system.²⁹ The "Third World" terminology itself may appear out-of-date, but its very contingency, involving an insistence on history and continuity, may in fact be one of its strengths. Such an approach does not deny the existence of differences between and within Third World countries, nor does it underestimate the importance of such differences. It speaks of the Third World not as a bloc, but as a distinctive voice, or, more accurately, as a chorus of voices that blend, though not always harmoniously, in attempting to make heard a common set of concerns. From this perspective, the relative disadvantage experienced by Third World countries is seen not only in descriptive but in normative terms, as an intolerable situation that demands a response. To self-identify as part of the Third World, then, involves a choice to take a stand in a struggle in which what is sought is not merely a more equitable distribution of resources, or a reshuffling of existing power relations. While such goals have been part of Third World demands, they do not capture the fully revolutionary nature of the alternative sought: a fundamental rethinking of international relations.

Such a portrayal draws on elements of all the characterizations mentioned above: the quasi-geographical dimension is maintained, the importance of the work of political groupings is acknowledged, and the attention to justice posited by the social movement characterization is emphasized. There may be numerous pitfalls to this characterization as well: losing sight of diversity, yet again, and also romanticizing the struggles waged.³⁰ Nevertheless, I would argue that in a time when many speak of the

²⁸ ROBERT YOUNG, *WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST* 11 (1990).

²⁹ Young, citing Frantz Fanon, suggests that the term "Third World" be seen "as a positive term of radical critique even if it also necessarily signals its negative sense of economic dependency and exploitation." *Id.* at 12. It should be noted, however, that Young focuses on the oppositional stance of the Third World, without necessarily taking into account its articulation of alternatives. Thus, while acknowledging that the Third World involved "revolutionary ideals of providing a radical alternative to the hegemonic capitalist-socialist power blocks of the post-war period," he makes the somewhat puzzling statement that "The Third World as a term needs to retrieve this lost positive sense—even if today the political order has changed so that to some extent the various forms of Islamic fundamentalism have taken over the role of providing a direct alternative to First and Second World ideologies." *Id.*

³⁰ See Mittelman & Pasha, *supra* note 22, at 23.

end of the Third World, it is of the utmost importance to explore and come to terms with this alternative approach to the international system. This is all the more important when one considers that the concerns articulated under this rubric have by no means ceased to be relevant. As one author has noted:

[T]he Third World, as an analytical concept, is likely to retain its usefulness so long as the world continues to be riven by serious economic and political disparities. The end of the Cold War has not been accompanied by a fundamental alteration in the international economic system...Similarly, the new political dispensation has not steered international relations in the direction of greater democratization...In these circumstances, the existence of the Third World is based not so much on shared memories and common aspirations as on a sense of what is equitable and just. For so long as inequity in international relations exists there will be differing perspectives on, and interpretation of, economic and social reality between the wealthy and the poor, between the powerful and the weak.³¹

In particular, identifying a Third World approach as a theoretical position within international legal discourse means reclaiming a voice that has long been there, but to which very little serious attention has been paid. It is essential to bear in mind that the Third World approach to international law must be seen as lying at the intersection of two different discourses. One is the discourse of traditional international law and international legal scholarship. Here, it is part of the story of the development of international law. The other discourse is that of decolonization: the full, broad panoramic view of a history of oppression and transformation. Here, it can be seen as a part of the story of anti-colonial and post-colonial struggle.³² In some

³¹ Cedric Grant, *Equity in international relations: a Third World perspective*, 71 INT'L AFFAIRS 567, 569-70 (1995).

³² The debt I owe to the body of scholarly literature broadly labeled as "postcolonial theory" or "postcolonial studies" is obvious; it has been a source of both insights and inspiration. For anthologies that provide overviews of this extremely rich and diverse field see COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER (Patrick Williams & Laura Chrisman eds. 1994); COLONIAL DISCOURSE/POSTCOLONIAL THEORY (Peter Hulme et al. eds. 1994); and THE POST-COLONIAL STUDIES READER (Bill Ashcroft et al., eds. 1995). For a concise overview of some of the major figures and debates in this field, see Childs and Williams, *supra* note 24. I would argue that many of the insights derived therefrom are particularly applicable to the interpretation of legal discourse, although I am cognizant of the controversy that surrounds the area. For examples of some of the concerns raised see Aijaz Ahmad, *The Politics of Literary Postcoloniality*, 36 RACE AND CLASS 3:1 (1995); Arif Dirlik, *The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism*, 20 CRITICAL INQUIRY 328 (1994); Benita Parry, *Problems in Current Theories of Colonial Discourse*, 9 OXFORD LITERARY REVIEW 7 (1987); and *Resistance Theory/Theorizing Resistance, or Two Cheers for Nativism*, in COLONIAL

ways, a Third World approach to international law is the untold part of both these stories; that which has remained somewhat marginal, while not entirely overlooked.³³

Finally, it is worth noting that what Nyerere says about Third World countries could also be said about scholars. Writing from a Third World perspective involves a degree of commitment, both to an oppositional stance and to an alternative viewpoint. This is not to imply that there is some form of "authentic Third Worldness," but only to acknowledge that nationality is not destiny. There have been many scholars who, despite surface "qualifications" of place of birth or citizenship, would regard the "Third World" label as either irrelevant to their professional, theoretical or methodological stance or outright offensive. Similarly, there are scholars who do not claim to speak with a Third World voice yet share many of the same commitments.

III. PARTICULAR THIRD WORLD APPROACHES

A. Economics

1. Generally

A Third World approach to international law is perhaps most visible in the context of international economic law, and particularly in the debates surrounding the proposals for a New International Economic Order ("NIEO") in the 1970s.

In the period immediately following decolonization in the 1950s and early 1960s, there was widespread faith in the notion that political independence and formal legal equality would permit the new States of Africa and Asia to achieve autonomy. This reliance on formal legal and political formulas quickly gave way to a realization that the obstacles to self-determination were considerably more formidable than had been anticipated. The focus on structural impediments in the international economic system arose most notably in the context of the formation of the United Nations Conference on Trade and Development ("UNCTAD") in 1963 and the coalescing of the "Group of 77" at the first session of UNCTAD in 1964. This shift in emphasis was accompanied by the

DISCOURSE/POSTCOLONIAL THEORY, *supra*, at 172.

³³ Thus, two separate questions could be asked. On the one hand, how does international law fit into the story that the Third World tells about itself? On the other, how does the Third World fit into the story that international law tells about itself? While I have chosen to focus on the former, the latter is an equally important area, ripe for analysis. The work that has begun to be undertaken by scholars such as Anthony Anghie is an important step in addressing it. See, e.g., *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOCIAL AND LEGAL STUDIES 321 (1996).

broadening of the Third World coalition to include the Latin American countries, reflecting a recognition that although those countries had achieved political independence much earlier than their African and Asian counterparts, they remained marginalized within an international economic system that limited their ability to enjoy sovereign equality. The similarities of experience between countries engaged in the process of dismantling the legacy of colonialism, as well as an ongoing struggle to assert some degree of political and economic autonomy, was to result in what is widely regarded as a remarkable degree of cohesiveness of this very informal coalition up to the present day.³⁴ The "Joint Declaration of the Seventy-Seven Developing Countries Made at the Conclusion of the United Nations Conference on Trade and Development" stated that the unity of the group had grown out of the common experiences in facing the basic problems of development and a common interest in developing a new policy for trade and development. It went on, however, to assert that this unity needed to be maintained and strengthened in order to bring about change in the international economic field, concluding:

The injustice and neglect of centuries needs to be redressed. The developing countries are united in their resolve to continue the quest for such redress and look to the entire international community for understanding and support in this endeavor [Brit.].³⁵

The formal purpose of UNCTAD was to promote international trade as a vehicle for economic development. In order to carry out that task, however, it was seen as necessary to make UNCTAD "a coordinating center [Brit.] in the U.N. system in respect of international development policy."³⁶

³⁴ It is worth noting that despite the predictions regarding the "end of the Third World" referred to in the previous section, many commentators have noted that this has not translated into an erosion of Southern cohesiveness in international fora. For example, in an article published in the late 1980s, Keisuke Iida concluded that G-77 "solidarity," defined in terms of its "capacity to reach and maintain common policy positions" was actually stronger in the 1980s than in the 1970s. Keisuke Iida, *Third World Solidarity: the Group of 77 in the UN General Assembly*, 42 INT'L ORG. 375, 394 (1988). More recently, Steven K. Holloway and Rodney Tomlinson have noted that the end of the Cold War did not bring about any significant change in the North-South polarity in the United Nations, although they note that some of the traditional trouble spots have disappeared and predict that a new pattern of alignments may be emerging. See Steven K. Holloway & Rodney Tomlinson, *The New World Order and the General Assembly: Bloc Realignment at the UN in the Post-Cold War World*, 28 CANADIAN J. OF POLITICAL SCIENCE 227 (1995). Similarly, Soo Yeon Kim and Bruce Russett analyzed voting in the General Assembly in 1991-93, and concluded that the North-South split is dominant. See Doo Yeon Kim & Bruce Russett, *The New Politics of Voting Alignments in the United Nations General Assembly*, 50 INT'L ORG. 629 (1996).

³⁵ In *THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE GROUP OF 77*, 19 (Karl P. Sauvant ed. 1981).

³⁶ Williams, *supra* note 24, at 58.

Thus, in the sixties and early seventies, the G-77 was able to use the UNCTAD forum to attempt to influence the development of international economic policy on a broad scale.³⁷ The issues dealt with included setting targets for official development assistance and negotiating preferential tariffs for goods originating in developing countries.³⁸ The issue of fair commodity pricing was a central concern. The first Secretary-General of UNCTAD, Raul Prebisch, who served from 1963-1969, was a well-known Argentine economist who had also served as Director of the United Nations Economic Commission for Latin America ("ECLA").³⁹ Prebisch pioneered the concept (later known as the Prebisch-Singer thesis) about the deterioration of terms of trade between the industrialized countries and the developing countries. According to traditional theory, developing countries, like all countries, could best pursue development through concentrating on those areas in which they had comparative advantage, in their case, primarily the production of raw materials. According to Prebisch, however, the cost of manufactured goods produced by the developed countries rises at a much faster rate than the cost of the raw material inputs supplied by the developing countries. The gap between "core" and "periphery" is thus not only maintained but actually increases over time.⁴⁰ The Integrated Programme for Commodities, aimed at bringing both stability and equity to commodity prices, became one of the major focuses of UNCTAD.⁴¹

The proposals for a NIEO must thus be seen as representing the culmination of a decade-long process of attempting to articulate an alternative to the mainstream approach to the international economic system.⁴² When the President of Mexico, Luis Echeverría, proposed the

³⁷ See generally, Williams, *id.*; ROBERT L. ROTHSTEIN, *GLOBAL BARGAINING: UNCTAD AND THE QUEST FOR A NEW INTERNATIONAL ECONOMIC ORDER* (1979). See also KARL P. SAUVANT, *THE GROUP OF 77: EVOLUTION, STRUCTURE, ORGANIZATION* 29-54 (1981); Mortimer, *supra* note 17.

³⁸ For a discussion of the development of the Generalized System of Preferences see Williams, *supra* note 24, at 109-132.

³⁹ For a discussion of Prebisch's role and some of the ensuing controversy see *id.* at 43-45.

⁴⁰ This thesis was highly criticized. For a succinct overview, see Prabirjit Sarkar, *The Prebisch-Singer Hypothesis of Terms of Trade Deterioration--Some Skeptical Questions and Recent Findings*, in *RESEARCH AND INFORMATION SYSTEM FOR THE NON-ALIGNED AND OTHER DEVELOPING COUNTRIES, RAUL PREBISCH AND DEVELOPMENT STRATEGY* 82 (1987). Some of the criticisms were somewhat unsatisfactory, however. Consider, for example, the statistic mentioned by Bedjaoui, that Tanzania had to produce five tons of sisal to buy a tractor in 1963, while in 1970 ten tons were needed. See Bedjaoui, *supra* note 10, at 35. Many economists would argue that the tractor of 1963 is not the same tractor as the one of 1970; technological improvements render the comparison invalid. The fact remains, however, that if what you need is a basic tractor but the only one available is a deluxe model, there is no real choice. The consumer is king as long as he or she is a First World consumer.

⁴¹ See Williams, *supra* note 24, at 133-163; Robert L. Rothstein, *Regime Creation by a Coalition of the Weak: Lessons from the NIEO and the Integrated Program for Commodities*, 28 *INT'L STUDIES QUARTERLY* 307 (1984).

⁴² It must also be understood in the context of ongoing attempts to articulate alternatives to mainstream approaches to economics. Prebisch, for example, has referred to the errors "made by some economists of the centers when appraising through narrow dogmas the problems of the periphery." *Capitalism: The Second Crisis*, in *THE THIRD WORLD STRATEGY: ECONOMIC AND POLITICAL COHESION*

elaboration of a "Charter of Economic Rights and Duties of States" at the third session of UNCTAD in 1972, he argued that the work carried out in UNCTAD needed to be taken further. Economic cooperation, he argued, should be removed "from the field of good faith and [moved] ...to the legal sphere."⁴³ The immediate impetus for the NIEO initiative, however, appears to have been the dramatic impact of the Organization of Petroleum Exporting Countries ("OPEC") during the first oil crisis of the early 1970s. To a limited extent, there was a hope among developing countries that OPEC might provide a model for similar commodity arrangements, but this was tempered by the realization that petroleum offered unique opportunities for bringing pressure to bear on the North. What was more important, however, was the demonstration that collective action was capable of success.⁴⁴ The oil crisis was thought to represent a watershed in South-North economic relations.⁴⁵

It is undisputed that the NIEO proposals represented a high point in Third World optimism about their power within the economic system. What is sometimes overlooked, however, is another source of optimism, perhaps equally as important: a faith that the Third World spokespersons had both in the adaptability of the system and the receptiveness of their First World counterparts to considering a fundamental change in orientation. There is an obvious tension here. In the flexing of newfound economic muscle, there seems to be the tacit or explicit confidence that the North will now be forced to listen. At the same time, however, one senses running through much of the literature a trust that once the North has listened, the fairness and necessity of the proposals will become abundantly clear. For example, in a 1974 address to a joint session of the American Society of International Law and the Section on International Law of the American Bar Association, Emilio Rabasa, the Secretary of Foreign Relations of Mexico, pointed out

IN THE SOUTH 1, 1 (Altaf Gauhar ed. 1983). The "dependency" theorists went even further in this type of analysis; see Mittelman & Pasha, *supra* note 22, at 43-46; Hart, *supra* note 23, at 10-12. Dependency theory is believed to have had a significant impact on the NIEO proposals; see, e.g., CRAIG MURPHY, THE EMERGENCE OF THE NIEO IDEOLOGY 105-112 (1984); ROBERT A. PACKENHAM, THE DEPENDENCY MOVEMENT: SCHOLARSHIP AND POLITICS IN DEVELOPMENT STUDIES 191-93 (1992).

⁴³ Quoted in Emilio O. Rabasa, *The Charter of Economic Rights and Duties of States*, *ASIL Proceedings* 302 (1972) at 302. One of the resolutions of the Conference established a working group to draw up a draft text of a charter. See UNCTAD III Resolutions, reproduced in Sauvart, *supra* note 35, at 252-3.

⁴⁴ Mortimer notes, for example, that the OPEC model could not be directly applied, "but it was suggestive of a strategy of broader collective action that had gradually been taking shape in Third World conferences. More than the model, it was the symbol of Third World assertion that encouraged the developing States to utilize the Non-Aligned Movement and the Group of 77 as instruments of collective pressure." Mortimer, *supra* note 17 at 3.

⁴⁵ I will be using the term "South-North" throughout this paper, along the lines suggested by Ivan Head in *ON A HINGE OF HISTORY: THE MUTUAL VULNERABILITY OF SOUTH AND NORTH* 14 (1991). Head expresses a preference for "South-North" as a more accurate reflection of the current state of the international system; he asserts that "North-South" is misleading, "for it lends weight to the impression that the South is the diminutive." *Id.*

that the proposals for a NIEO were based on the fundamental notion of interdependence in the international system,⁴⁶ which has both moral and practical consequences. He stated: "[t]he problems that face the less privileged countries of this world ...are common enemies of humanity and that is why the Mexican initiative [the Charter] has evolved into a common cause, a universal desire for comprehension and solidarity so as to consolidate economic international justice."⁴⁷

From this perspective, the new system was to be in everyone's interest. Thus, the *Declaration on the Establishment of a New Economic Order*,⁴⁸ which spoke of the need to "redress existing injustices" and "eliminate the widening gap between the developed and the developing countries,"⁴⁹ also emphasized that "the interests of the developed countries and those of the developing countries can no longer be isolated from each other...the prosperity of the international community as a whole depends upon the prosperity of its constituent parts."⁵⁰ The Preamble to the *Charter of Economic Rights and Duties of States*, passed by the General Assembly in 1974,⁵¹ provided, "it is a fundamental purpose of the present Charter to promote the establishment of a new international economic order, based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems."⁵² While some have argued that the bulk of the duties in the Charter were imposed on developed States,⁵³ most of the duties were not in fact phrased in those terms.⁵⁴ Moreover, while the major focus was on economic issues, the Charter included references to environmental

⁴⁶ See Rabasa, *supra* note 43, at 303.

⁴⁷ *Id.* at 303-4.

⁴⁸ See G.A. Res. A/3201 (S-VI) (May 1, 1974), reprinted in *INTERNATIONAL ECONOMIC LAW: BASIC DOCUMENTS 406-7* (Philip Kunig et al. eds. 1989).

⁴⁹ *Id.* at 406.

⁵⁰ *Id.*

⁵¹ See G.A. Res. A/3281 (XXIX) (December 12, 1974), reprinted in Kunig et al., *supra* note 48, at 407-16.

⁵² *Id.* at 408.

⁵³ See, e.g., Richard B. Lillich, *Economic Coercion and the 'New International Economic Order': A Second Look at Some First Impressions*, 16 VA J. INT'L L. 233, 241 (1976). Similarly, Norbert Horn argues that the notion of "non-reciprocal preferential treatment" embodied in the NIEO documents is both unrealistic and inconsistent with the developing countries' general tendency to "safeguard the principle of reciprocity in international relations in order to protect their sovereignty and their position as equal partners." Norbert Horn, *Normative Problems of a New International Economic Order*, 16 J. OF WORLD TRADE LAW 338, 340-41 (1982).

⁵⁴ Andres Rozental argues that while the Charter reflected the view the developed countries should "show special consideration" for the developing countries, it also involved the undertaking of duties on the part of the developing countries themselves: in exchange for more equitable treatment, "the developing States would agree to the formulation of rights and duties binding them in relation to the developed countries." Andres Rozental, *The Charter of Economic Rights and Duties of States and the New International Economic Order*, 16 VA J. INT'L L. 309, 317 (1976).

protection,⁵⁵ human rights⁵⁶ and social justice.⁵⁷

Much of the legal commentary on the NIEO focused exclusively on the most controversial areas; in particular, on the vitriolic debates regarding expropriation and standards of compensation.⁵⁸ On a broader level, however, the enterprise as a whole was criticized for its breadth and confrontational character. In a piece entitled "Lessons of the Failure of NIEO," Thomas Franck took issue with the "one-sided" nature of the demands, and questioned the decision to "permit this accumulated agenda of demands to create so disadvantageous a bargaining strategy."⁵⁹ Along similar lines, Robert Rothstein, a political scientist who has written a great deal on the role of developing countries within the international system, appeared perplexed by the short-sightedness of the stance taken.

Rather than focusing on a strategy of persuasion that rested on mutual interests, the search for consensual knowledge and technically sound proposals and a clear sense of what the opposition could see as in its interests, the focus was on a strategy of confrontation and a demand for the acceptance of *biased and controversial principles*.⁶⁰ (emphasis added)

⁵⁵ See Kunig et al., *supra* note 48, at 409 (Preamble); Article 30, at 415.

⁵⁶ "Respect for human rights and fundamental freedoms" is included among the fundamental principles which govern economic, political and other relations among States, pursuant to Chapter I. *Id.* at 409.

⁵⁷ Chapter I refers to the "promotion of international social justice," and Article 7 refers to the responsibility on the part of every State to ensure the "full participation of its people in the processes and benefits of development." *Id.* at 411. The Charter also included reference to a number of other issues and was criticized because of this. Charles Brower, for example, argued that the document was something of a "shopping list, with a lot of diverse provisions having no logical relationship to the subject matter of the Charter." He goes on to mention articles relating to "apartheid, law of the sea, environment and disarmament"; most if not all of which would now be regarded as intertwined with economic concerns. Panel: *The Charter of Economic Rights and Duties of States*, (1975) ASIL PROCEEDINGS 225, 234.

⁵⁸ The controversy surrounded Article 2(2)(c) of the Charter, which provided that "appropriate" compensation should be paid in cases of nationalization or expropriation, and that any controversy should be settled under the "domestic law of the nationalizing State." See M.S. RAJAN, *The Attitude of the Developed States, in SOVEREIGNTY OVER NATURAL RESOURCES* 86-100 (1978); Lillich, *supra* note 53, at 242-43; Gillian White, *A New International Economic Order?*, 16 VA J. INT'L L. 323, 330-31 (1976). F.V. Garcia-Amador argued that the "Third World" approach to expropriation, reflected in the Charter and involving a repudiation of the traditional rules of state responsibility for injury to aliens, had to be distinguished from the "Latin American" approach, which had sought simply to avoid the abuse of diplomatic protection of nationals. F.V. Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1, 9-10 (1980). Garcia-Amador rejects the argument raised by the G-77 that the Charter provisions did not, in fact, represent a repudiation of international responsibility regarding expropriation. See *id.* at 39-40.

⁵⁹ Thomas Franck, *Lessons of the Failure of NIEO*, PROCEEDINGS OF THE FIFTEENTH ANNUAL CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW 82, 94 (1986).

⁶⁰ Robert L. Rothstein, *Limits and Possibilities of Weak Theory: Interpreting North-South*, 44 J. OF INT'L AFFAIRS 159, 174 (1990).

Franck explains this weakness in terms of the "artificial unity" of the Third World coalition; they had to stick to their "shopping list" because it represented nothing more than the aggregate of demands of all the individual members of the coalition.⁶¹ Rothstein, in turn, adds to this analysis the charges of confusion and ambiguity regarding the Third World platform.⁶² In either case, the breadth of the NIEO vision is regarded as a major failure.⁶³ Such characterizations are consistent with a caricaturing of the NIEO initiative as a whole as being simply concerned with "getting a bigger piece of the pie."⁶⁴ What they fail to grasp, however, is the extent to which the Third World regarded the very exercise of articulating a vision for a New International Economic Order as requiring the boldness and "extremism" the authors criticize.

2. Mohammed Bedjaoui

Such is the backdrop to Mohammed Bedjaoui's 1979 book, *Towards a New International Economic Order*.⁶⁵ Bedjaoui examines what he terms the "international order of poverty," but he also explores the "poverty of the international order"; the two, as he sees it, cannot be separated.

The book begins with a scathing indictment of the existing system which looks with equanimity upon the impoverishment of the majority of the world's population. "Underdevelopment ravages three-quarters of the world,"⁶⁶ Bedjaoui points out; "[t]he scale of the imbalances is perfectly well-known, and makes the head swim. The disparities are constantly growing."⁶⁷ Bedjaoui quotes Malthus as saying:

If a man born into a world fully occupied cannot obtain from his parents the subsistence he is entitled to demand, and if society has no need of his work, he has no right to claim the smallest scrap of food. In fact he is *de trop*.⁶⁸

⁶¹ Franck, *supra* note 59, at 95.

⁶² See Rothstein, *supra* note 60, at 174.

⁶³ This is not to say that the NIEO initiative escaped criticism on the opposite basis. For example, Edward McWhinney has argued that "the two basic demands made by the third world--raw material cartels and immunity of foreign investments from the protections of classical international law--seem hardly sufficient in themselves as the basis of a viable world economic order." Edward McWhinney, *The International Law-Making Process and the New International Economic Order*, CANADIAN Y.B. INT'L L. 57, 69 (1976).

⁶⁴ See, e.g., Harold K. Jacobson et al., *Revolutionaries or Bargainers? Negotiators for a New International Economic Order*, 35 WORLD POLITICS 335, 367 (1983).

⁶⁵ See Bedjaoui, *supra* note 10.

⁶⁶ *Id.* at 24.

⁶⁷ *Id.* at 26.

⁶⁸ *Id.* at 45.

Bedjaoui raises the question of whether the Third World is itself *de trop* within the international system, a system which appears to be unable to find room for it--either in the material sense of resources or in the intellectual sense of accommodating alternative approaches.

Bedjaoui explores many of the issues that still haunt us: deterioration of the terms of trade, the power of multinational firms, the structural inequality inherent in the international monetary system, and the "crushing indebtedness of the underdeveloped countries."⁶⁹ These are the kinds of issues that can be dealt with statistically, but if this is the expectation Bedjaoui disappoints; his concerns are larger, more diffuse; his sympathies engaged.

When discussing the terms of trade, for example, Bedjaoui cites statistics but only as an illustration of an unequal exchange: constantly increasing quantities of energy and raw materials must be delivered for the same amount of product from the industrial countries.⁷⁰ It would be easy to dismiss this by merely viewing it as a variation or perhaps even a reiteration of the Prebisch-Singer thesis. However, Bedjaoui is speaking not for a theory but for a vision. He sees the deterioration of the terms of trade not as an economic fact to be confirmed or debated, but rather as "the new form of slavery of modern times."⁷¹

Similarly, the power of the multinational firm is not merely great, not merely substantial; it is "Faustian."⁷² Again drawing a historical analogy, Bedjaoui boldly states that the multinationals are the chartered companies of modern times.⁷³ He makes the point that the power of multinational companies can stand comparison with that of some industrialized States.⁷⁴ But again, Bedjaoui is not interested in mere statistics, but in the magnitude of the power imbalance and its potential and actual abuse.

Bedjaoui's comments on the international monetary system

⁶⁹ *Id.* at 41. Third World debt has greatly expanded since the time Bedjaoui was writing. A recently published book contains the following summary. See Mittelman & Pasha, *supra* note 22, at 26:

The mature capitalist countries have lent the underdeveloped world over half a trillion dollars. Debt service of all third world countries increased from 13.3% of exports of goods and services in 1970 to 20.4% in 1990. The greater the burden of debt service, the more the capacity to repay diminishes. Current borrowing continues at a gallop just to defray the cost of old loans, let alone to meet current needs. Faced with huge balance-of-payment and budget deficits, most countries had no choice but to acquiesce to conditions set by international institutions.

Id.

⁷⁰ See Bedjaoui, *supra* note 10, at 35-36.

⁷¹ *Id.* at 35.

⁷² *Id.* at 20 and 36.

⁷³ See *id.* at 36.

⁷⁴ For a recent discussion of the accelerating power of multinational corporations due to the dismantling of almost all barriers to the international movement of capital, as compared with the relative immobility of labor, see WILLIAM GREIDER, ONE WORLD READY OR NOT (1997).

obviously reflect the conditions at the time of writing,⁷⁵ when inflation was a basic problem throughout the world, but his central concerns are not confined to temporary conditions such as inflation or the problems inherent in one or another type of exchange mechanism. Instead, he focuses on the equity of the system. He makes the point, still valid today, that the system can be viewed as an "exclusive club of the great nations running the world."⁷⁶

Having examined these features of the "international order of poverty," Bedjaoui turns to the "poverty of the international order." Here, again, he minces no words. He refers to an "international law of indifference" that has historically upheld a "predatory economic order" based on the exploitation of the weak in the interests of the powerful.

The judicial order set up by the former international society gave the impression of neutrality or indifference. But the laissez-faire and easy-going attitude which it thus sanctioned led in reality to legal non-intervention which favored the seizure of the wealth and possessions of weaker peoples. Classic international law in its apparent indifference was *ipso facto* permissive. It recognized and enforced a "right of dominion" for the benefit of the "civilized nations." This was a colonial and imperial right, institutionalized at the 1885 Berlin Conference on the Congo.⁷⁷

A variety of legal doctrines served this overarching purpose: the recognition of unequal treaties, the use of diplomatic protection to safeguard "the civilized countries' privileges through the interests of their nationals."⁷⁸ Regardless of form, "[i]nternational law made use of a series of justifications and excuses to create legitimacy for the subjugation and pillaging of the Third World, which was pronounced uncivilized."⁷⁹ International law is thus portrayed as wholly enmeshed in the colonial and imperial enterprises.

To keep in line with the predatory economic order, this international law was thus obliged simultaneously to assume the guise of: a) an oligarchic law governing the

⁷⁵ He focuses on the inequities involved in having the U.S. dollar as reserve currency, a situation that no longer exists. See Bedjaoui, *supra* note 10, at 40-1.

⁷⁶ *Id.* at 41.

⁷⁷ *Id.* at 49.

⁷⁸ *Id.*

⁷⁹ *Id.*

relations between civilized states, members of an exclusive club; b) a plutocratic law allowing these states to exploit weaker peoples; c) a non-interventionist law (to the greatest possible extent), carefully drafted to allow a wide margin of laissez-faire and indulgence to the leading states in the club, while at the same time making it possible to reconcile the total freedom allowed to each of them...This classic international law thus consisted of a set of rules with a geographical basis (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law).⁸⁰

Bedjaoui is not content to relegate this indictment to the past. He traces the continuities between the exploitation that existed historically as a result of colonial domination and that which persists in the current system despite a shuffling in the identity of the dominant players.

[International law] had ceased to be a European law only to become a law of the great powers, thanks to the policy of the exclusive clubs both within and without the international organisations. While it may in principle no longer have been serving political colonization, it did not cease for all that to be a means of economic domination and an excuse for it. In actual fact, it modified only the form, not the substance of domination. The latter has been more subtly introduced into the legal rules governing the economic relations between developed and developing countries.⁸¹

What is required, then, is to question the very foundations of the legal system that upholds the existing economic order. International law, Bedjaoui seems to be saying, can no longer maintain the appearance of impartiality or neutrality; to the extent that it purports to do so, it remains indifferent both to human suffering and to its own historical complicity with injustice. Bedjaoui argues instead for an international law of participation "genuinely all-embracing and founded on solidarity and co-operation, [which] must give great prominence to the principle of equity (which corrects injustices) rather than the principle of equality."⁸²

⁸⁰ *Id.* at 50.

⁸¹ *Id.* at 59-60.

⁸² *Id.* at 127.

Thus, what is required is a new way of thinking about law, a new kind of law, and, most important of all, a new way of making law. It is this last element that Bedjaoui emphasizes, viewing it as a necessary condition for the achievement of the first two. It requires going beyond traditional sources of international law such as custom and treaties. He concludes, "[t]he surest way to meet, legally speaking, the challenges made by the inevitable establishment of the new economic order, would be to concentrate on standard-setting activities...."⁸³ But standard setting activities, faced with the necessity of going beyond traditional sources, would inevitably move in the direction of the resolution. Bedjaoui fully understands the appeal that the speed and flexibility of the resolution have for the Third World when contrasted with customary law, but his stance towards the latter is based on its nature as well as its efficacy. He characterizes it as "backward looking, conservative because static, iniquitous in its content, ponderous in its formation."⁸⁴

While critics maintain that "the legislative function of the United Nations is incompatible with independence and sovereignty," it can be argued that the resolution at the very least constitutes the expression of the will of the international community.⁸⁵ Bedjaoui acknowledges that the essential difference between international law and domestic law resides in the acknowledgment or lack of acknowledgment of "majority rule"⁸⁶ and accepts that "until now, there has been no real international legislator capable of imposing the decision of the majority on the minority."⁸⁷ However, he asserts, "a distinction should be drawn between the compulsory nature of the resolution which is beyond doubt, and its enforceability, which may be questionable. Sanction and obligation must not be confused."⁸⁸ Moreover, he sees the Third World initiatives as aimed not only at moving towards greater democracy in the international system, but also at changing the orientation of that system. Thus, he approvingly quotes the response of the Director-General of UNESCO to the accusation by the industrialized countries that the Third World, because of its numerical strength, constituted an automatic majority:

Certain expressions such as "automatic majority" lose all their meaning. During its history, the United Nations has seen several dominating groups; however, perhaps none of these pose to the community of nations questions so

⁸³ *Id.* at 129.

⁸⁴ *Id.* at 137.

⁸⁵ *Id.* at 178.

⁸⁶ *Id.* at 132.

⁸⁷ *Id.*

⁸⁸ *Id.* at 179.

basically linked to the dignity of man, to justice and equity, as the group of the developing countries when it proclaimed the need to establish a new international economic order....⁸⁹

Nonetheless, Bedjaoui is fully aware of the political aspects of the struggle to get Third World concerns not so much raised as acted upon in international fora. He mentions the counterattacks of the industrialized States to the perceived threat of Third World power, involving measures ranging from the subtle "maintenance and co-opting" of Third World differences to threats of discontinuing contributions to international institutions and even withdrawing therefrom.⁹⁰ Bedjaoui even comments on extreme cases of economic aggression and political destabilization, such as U.S. involvement in the 1973 coup against the democratically elected government of Salvador Allende in Chile.⁹¹ Throughout, however, he emphasizes the need to understand the reactions against Third World initiatives in context.

The traditionalists lament the politicization of international law, for which they hold the Third World responsible. They diagnose a "crisis in law," whereas in fact what they are talking about is a crisis in their own conception of law. Like the philosopher of antiquity who looked for a man in the crowd, they are seeking a kind of law, "their" international law, which they no longer recognize in the movement which is causing it to change, and so they talk of a "decline" of law itself.⁹²

There is a poignancy in reading this book now, as we approach the turn of the millennium. Writing in the late 1970s, Bedjaoui already enjoyed the benefit of a degree of hindsight. By the time of his book, it was clear that the NIEO initiative had stalled. Bedjaoui discusses this, but refuses to see it as anything other than a temporary setback. What Bedjaoui could not have anticipated, of course, was that the NIEO was doomed; that the debt problem would turn almost overnight into a debt crisis, and that the heyday of optimism regarding the power of Third World solidarity was over, as attention turned towards negotiating conditions of survival. Nevertheless, lest anyone think that the situation with which Bedjaoui was so concerned is now a matter of historical interest, it is worth noting that Erskine

⁸⁹ *Id.* at 146.

⁹⁰ *Id.* at 150-56.

⁹¹ *See id.* at 151.

⁹² *Id.* at 107.

Childers, in a speech at the University of London in 1993, characterized the situation in the 1990s in the following terms:

There are severe, potentially catastrophic economic inequities between the North and the South which the G-7 powers have very largely ignored since the 1970s, *which have not conveniently gone away*, only become steadily worse. In 1960 the richest one-fifth of the world's population enjoyed thirty times the income of the poorest fifth; by 1989 the richest fifth was receiving sixty times the income of the poorest...The ratio of 20:80 or worse dominates our world today...The 80% majority of humanity in the South get the 20% or less scraps from the tables of the affluent...Among them, some 1.2 billion people now live in absolute poverty, on the very margins of survival itself and with more driven down into this condition every day, 40% more in the last twenty years.⁹³

B. Human Rights

1. Generally

One could attempt to sketch out a Third World approach to many different aspects of international human rights law. One might argue, for example, that at a basic theoretical level the most notable impact of the Third World has been in questioning the universality of human rights and arguing for attentiveness to cultural, social and historical particularities.⁹⁴ However, for present purposes a Third World approach will be examined in the context of one specific concept: that of the controversial and somewhat elusive "right to development."⁹⁵

Scholars have identified references to a right to development as far back as the process leading to the adoption of the Universal Declaration of Human Rights.⁹⁶ In the 1940s, Ecuador submitted a draft version of the

⁹³ Quoted in Geoffrey Grenville-Wood, *An Agenda for United Nations Reform*, in UNITED NATIONS REFORM: LOOKING AHEAD AFTER FIFTY YEARS 2-23, 15 (Eric Fawcett & Hanna Newcombe eds. 1995).

⁹⁴ For a recent illuminating discussion of some of the very complicated debates in this area see Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996). See also HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE: A QUEST FOR CONSENSUS (Abdullahi A. An-Na'im ed. 1992).

⁹⁵ An excellent overview of the evolution of the right to development and the surrounding controversy is Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HUM. RTS. Y.B. 3 (1988).

⁹⁶ See Philip Alston, *The Right to Development at the International Level*, in THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL 99, 100 (Rene-Jean Dupuy ed. 1980). See also F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT 49-50 (1990).

"Declaration of Rights and Duties of States" that included a reference to States having "a right to peaceful and secure development."⁹⁷ However, the call for the recognition of a right to development gained prominence in the 1960s as part of the overall Third World questioning of the inequities of the existing international order. In 1966, speaking to the General Assembly, the Foreign Minister of Senegal stated:

Not only must we affirm our right to development, but we must also take steps which will enable this right to become a reality. We must build a new system, based not only on the theoretical affirmation of the sacred rights of peoples and nations but on the actual enjoyment of these rights.⁹⁸

The package of ideas that formed the proposals for a NIEO included a duty to cooperate in development efforts.⁹⁹ Article 17 of the *Charter of Economic Rights and Duties of States*, for example, provided that "[i]nternational cooperation for development is the shared goal and common duty of all countries."¹⁰⁰ The notion of a right to development, then, was a logical corollary. This was a crucial aspect of the NIEO proposals, with their overarching aim to bring development to the forefront of the international agenda.¹⁰¹

The first comprehensive treatment of the right to development as a human right has been attributed to Keba M'Baye, a Senegalese jurist who discussed the concept in his 1972 inaugural lecture for the International Institute of Human Rights in Strasbourg, "Le droit au developpement comme un droit de l'homme."¹⁰² M'Baye was Chairman of the U.N.

⁹⁷ Quoted in Alston, *supra* note 96, at 100.

⁹⁸ *Id.* at 101.

⁹⁹ See generally, Wil D. Verwey, *The New International Economic Order and the Realization of the Right to Development and Welfare - A Legal Survey*, in Snyder & Sathirathai, *supra* note 2, at 827-32. See also Garcia-Amador, *THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT*, *supra* note 96, at 50.

¹⁰⁰ *Charter of Economic Rights and Duties of States*, in Kunig et al., *supra* note 48, at 413.

¹⁰¹ See TASLIM OLAWALE ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 238-241 (1983). Elias argues that the right to development constitutes a crucial link between the New International Economic Order and human rights. For a critique of his treatment of this connection see Surakiart Sathirathai, *An Understanding of the Relationship Between International Legal Discourse and Third World Countries*, 25 *HARV. INT'L L.J.* 395, 407-9 (1984).

¹⁰² See M'Baye, *supra* note 11. All commentators seem to acknowledge the importance of M'Baye's contribution, although the characterization of the degree of innovation involved varies considerably. For example, Raul Ferrero states that M'Baye "was the first to articulate the concept of the right to development as a human right at the international level." Raul Ferrero, *THE NEW INTERNATIONAL ECONOMIC ORDER AND THE PROMOTION OF HUMAN RIGHTS UN.Doc. E/CN4/Sub.2/1983/24/Rev.1* at 27, para. 190; Jack Donnelly credits M'Baye with the "first serious proposal of an international human right to development.": Jack Donnelly, *The 'Right to Development': How Not to Link Human Rights and Development*, in *HUMAN RIGHTS AND DEVELOPMENT IN AFRICA* 261, 261 (Claude E. Welch & Ronald I. Meltzer eds. 1984); Antonio Cassese describes M'Baye as having

Commission on Human Rights in 1977 when the Commission adopted a resolution which specifically mentioned the right to development, recommending that a study be undertaken on the subject.¹⁰³ Scholarly debate on the existence and scope of a right to development as a human right continued in the late 1970s and into the 1980s; during that time it was frequently identified as part of a "third generation" of human rights, referred to as collective rights or solidarity rights.¹⁰⁴ Regardless of its classification, the concept represented an attempt to expand the traditional understanding of international human rights law. According to Hector Gros Espiell:

[The] right to the full development of the individual--which has made it possible to describe the right to development as a fundamental human right--is a basic one which at the same time conditions and implies the right to development of developing States and peoples. The progress of the latter is justified in as much as development serves to improve the economic, social and cultural circumstances of every human being.¹⁰⁵

Not surprisingly, the proposals for a right to development triggered considerable controversy. Much of the controversy centered around its dual individual/collective aspects, and its inclusion of a broader range of duty-holders. While traditional human rights have included group rights

"eloquently taken up and elaborated upon" the idea of the right. ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 368 (1986); while Philip Alston simply mentions the title of M'Baye's lecture and goes on to note his subsequent influence in the treatment of the right to development by the Human Rights Commission: see Alston, *supra* note 96, at 813. M'Baye himself mentions other initiatives, such as the proposal by the Commission on Justice and Peace, in Algeria, that the Universal Declaration of Human Rights be completed through the proclamation of a right to development. See M'Baye, *supra* note 11, at 126.

¹⁰³ See Human Rights Commission Resolution 4 (XXXIII) of 21 February 1977. This move was criticized on the basis that this new right was accepted with little discussion by the Commission and with no basis in academic theory. See, e.g., Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT'L L.J. 473, 492 (1985); Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 612 (1984).

¹⁰⁴ Among the other rights mentioned in this category were rights to environment and peace. See the discussion in Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307 (1982); Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435 (1981).

¹⁰⁵ Quoted in Ferrero, *supra* note 102, at 27. See also Hector Gros Espiell, *The Right of Development as a Human Right*, 16 TEX. INT'L L.J. 189 (1981). Stephen P. Marks has given the following definition of the right: "[The right to development] is the individual right to benefit from a development policy based on the satisfaction of material and nonmaterial human needs and to participate in the development process, and the collective right of developing countries (and peoples not yet having exercised their right to self-determination) to succeed in establishing a new international economic order, that is, in eliminating the structural obstacles to their development inherent in current international economic relations." Marks, *supra* note 104, at 445.

(particularly among the economic, social and cultural rights) a right to development held by a State against other States seemed to lack the essential characteristics of a human right properly so called. Thus, the question of whether the right to development could be classified as a true "human right" was hotly contested. For example, in a 1985 article provocatively entitled "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" Jack Donnelly argued that no "right to development" can be extrapolated either from international legal standards or moral considerations.¹⁰⁶ While recognizing the "quite proper, even essential desire to link human rights and development,"¹⁰⁷ he argued that "the right to development is neither philosophically or legally justified nor a productive means to forge such a linkage."¹⁰⁸ He went on to characterize the right to development as a delusion "not merely ...of well-meaning optimists, but a dangerous delusion that feeds off of, distorts, and is likely to detract from the urgent need to bring together the struggles for human rights and development."¹⁰⁹

Apart from philosophical objections, perhaps the most significant concern relating to the right to development was that it might be invoked as a right that must be balanced against other human rights. Thus, some commentators evoked the specter of oppressive Third World regimes justifying internal oppression as a result of their particular balance between civil and political rights and the right to development.¹¹⁰ This concern appears to have been invoked by the United States when it withdrew from the Working Group of Governmental Experts on the Right to Development in December of 1987, citing among its many objections the fact that "some of the most vociferous proponents of the right to development denied their citizens the opportunity to develop themselves in every possible way."¹¹¹

The scholarly and political controversy surrounding the right to development did not prevent it from being recognized in a number of international fora. The culmination of this process came in 1986 when the General Assembly adopted the "Declaration on the Right to Development,"¹¹² in which the right to development was proclaimed to be "an inalienable and universal right," pertaining to individuals and peoples.¹¹³ The Resolution was adopted by a vote of 146 to 1, with six abstentions. The

¹⁰⁶ Donnelly, *supra* note 103.

¹⁰⁷ *Id.* at 477.

¹⁰⁸ *Id.* at 478.

¹⁰⁹ *Id.* For a further critique of this linkage, see Donnelly, *supra* note 102, at 274.

¹¹⁰ Alston discusses this criticism in *The Right to Development at the International Level*. See Alston, *supra* note 96, at 108-109.

¹¹¹ Cited in Alston, *supra* note 95, at 22.

¹¹² See *Declaration on the Right to Development*, GA Res. 41/128 UN GAOR, 1986, Supp. No. 53, U.N. Doc. A/41/53 (1986) 186.

¹¹³ Article 1 of *Declaration on the Right to Development*. *Id.*

United States cast the sole dissenting vote. In the years since, other concerns have impacted on the formulation of the right to development.¹¹⁴ Perhaps most notably, in response to environmental concerns, the right to development has come to be qualified as the "right to environmentally sound and sustainable development" or the right to "eco-development."¹¹⁵ Such formulations reflect the view of many commentators that to posit an unqualified right to development implies a perpetuation of the patterns of exploitation that have led us to the current environmental crisis.¹¹⁶ Principle 3 of the Rio Declaration on Environment and Development, for example, states that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."¹¹⁷ Furthermore, much of the academic commentary on the concept has tended to go beyond an "external" South-North focus to highlight domestic issues of participation in the development process--what might be called an "internal" South-North focus.¹¹⁸ When the right to

¹¹⁴ The right to development has been the ongoing subject of scrutiny within the United Nations system. For example, in response to a 1989 Human Rights Commission Resolution, the Secretary General convened a "Global Consultation on the Right to Development as a Human Right" and a report was issued which purported to expand and explain the scope of the right. See, *Question of the Realization of the Right to Development, Global Consultation on the Right to Development as a Human Right: Report Prepared by the Secretary-General Pursuant to Commission on Human Rights Resolution 1989/45* UN Doc. E/CN.4/1990/Rev.1 (Sept. 26, 1990). For a concise summary of the results of the Consultation, see *Commentary: Global Consultation on the Right to Development*, 44 INT'L COMMISSION OF JURISTS REV. 33 (1990). Most recently, an "intergovernmental working group of experts" was established in accordance with Human Rights Commission Resolution 1996/15 of 11 April 1996, and charged with the task of elaborating "a strategy for the implementation and promotion of the right to development." The group issued a progress report on its first session on 22 January 1997, E/CN.4/1997/22. Online access to a number of U.N. documents on the right to development is available through the United Nations Human Rights Website, at <http://193.135.156.15/html/menu2/10/e/rtd_doc.htm>. For a relatively recent overview of scholarly approaches to various aspects of the right to development, see THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW (Subrata Roy Chowdhury et al. eds. 1992).

¹¹⁵ See, e.g., Nagendra Singh, *Right to Environment and Sustainable Development as a Principle of International Law*, 29 J. OF THE INDIAN LAW INSTITUTE 289 (1987); Harald Hohmann, *Environmental implications of the principle of sustainable development and their realization in international law*, in THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW, *supra* note 114, at 273.

¹¹⁶ For a discussion of some of the philosophical tensions underlying this juxtaposition of sustainability and development, see Nigel Dower, *Sustainability and the right to development*, in INTERNATIONAL JUSTICE AND THE THIRD WORLD 93 (Robin Attfield & Barry Wilkins eds. 1992).

¹¹⁷ *Rio Declaration on Environment and Development*, UN.Doc. A/CONF.151/15/Rev. 1, 3 I.L.M. 874 (1992). A recent U.N. report notes that Principle 3 "represents the first time that the right to development has been affirmed in an international instrument adopted by consensus". *Rio Declaration on Environment and Development: application and implementation: Report of the Secretary-General to the Commission on Sustainable Development*, UN.Doc.E/CN.17/1997/8 (10 February 1997) <[gopher://gopher.un.org/00/esc/cn17/1997/off/97-8.EN](http://gopher.un.org/00/esc/cn17/1997/off/97-8.EN)>. However, the report goes on to note that the United States stated that it "does not, by joining consensus...change its long-standing opposition to the so-called 'right to development'". For the United States, development "is not a right.. it is a goal..." *Id.* at note 15.

¹¹⁸ See Konrad Ginther, *Participation and Accountability: Two Aspects of the Internal and International Dimension of the Right to Development*, (1992) THIRD WORLD LEGAL STUDIES 55. For critiques of the right to development that focus on the exclusion of women's concerns see Marilyn Waring, *Gender and International Law: Women and the Right to Development*, 12 AUSL. Y.B. INT'L L.

development was affirmed in the Vienna Declaration of the Second World Conference on Human Rights, held in 1993, it was in terms that reflect many of the points of contention identified above.¹¹⁹

There is a danger in oversimplifying the debates concerning the right to development. They have raised a number of fundamental questions regarding the nature of rights, the identity of both right-holders and duty-holders, and the definition of development itself. However, it is not inaccurate to say that the arguments most frequently raised by Northern commentators and governments against the recognition of this right, many of which were technical and legalistic, did not confront the kinds of concerns that were coming to the fore through the articulation of development needs through human rights discourse. A fundamental theme running through the debates was whether or not the right to development fit into the discourse of "human rights." A different question remained unasked by most Northern scholars: if the right to development fits uncomfortably within human rights discourse, does this not call the discourse itself into question?

2. Keba M'baye

This question can be seen as the underlying theme in Keba M'Baye's 1972 speech. M'Baye begins by anticipating many of the objections that will be brought to the recognition of the right to development: development refers to a group and is therefore collective, while human rights generally deal with the "isolated individual";¹²⁰ human rights are inherent in human nature and in conformity with reason, and thus absolute, while development

177 (1992); Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 *AUSL. Y.B. INT'L L.* 190 (1992). Charlesworth criticizes international lawyers whose engagement with the right to development "has not extended to the skewed notion of development on which it is based." Charlesworth, *supra*, at 203.

¹¹⁹ The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights...

While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgment of internationally recognized human rights. States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development.

Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.

United Nations World Conference on Human Rights, Vienna, 14-25 June 1993, *Vienna Declaration and Programme of Action*, reprinted in 14 *HUM. RTS L.J.* 352, 354 (1993). Paragraph 11 of the Vienna Declaration reproduced the formulation in Principle 3 of the Rio Declaration.

¹²⁰ M'Baye, *supra* note 11, at 505.

is an essentially relative concept.¹²¹ However, he says, to speak of development as a human right has little to do with these types of considerations.

And yet the international conscience, I would say the generosity of men, that is not burdened by categories or logic, but rather is concerned with well-being and justice, has forged this new idea: the right to development.¹²²

After a brief discussion of the distinction between a "right to development" and the "law of development,"¹²³ M'Baye turns his attention to the notion of development itself. He begins with what was, at the time he was writing, a fairly conventional definition of development in terms of economic growth,¹²⁴ but quickly proceeds to add a series of qualifications: the problems of development are different from one country to another;¹²⁵ it is necessary to envisage development not as an end, but as a means;¹²⁶ growth is a necessary but not a sufficient condition for the achievement of development.¹²⁷ He elaborates:

To understand real development, we must introduce the notion of real improvement in standard of living. It is not a matter of each individual living more but living better. The civilization where production and consumption constantly increase, inevitably leads, as we know today, to a civilization condemned to contradictions and chaos. The wise men of my native Saloum understand that well when

¹²¹ See *id.*

¹²² *Id.* at 506.

¹²³ It is here, rather than in his discussion of the right to development itself, that M'Baye raises some of the issues that were later to cause the most controversy. First, M'Baye asserts that meeting the challenge of development requires a different kind of law than that found in a developed society, where law can merely reflect existing customs and mores. It must, in fact create "a new man through mental transformation." Thus, M'Baye clearly indicates that development requires a departure from traditional cultural and moral standards—thus invoking the spectre of simply imposing an alien development model on all societies. On the other hand, as he goes on to state, a law for development must also be distinguished from the classic liberal model—the Western model, although M'Baye does not put it in those terms—"by creating a socio-political system wherein individual rights are temporarily limited for the benefit of the general interest." He elaborates, "Within the framework of a law of development, the classical equilibrium between liberty and social order is broken, because the needs of order get the upper hand over the need to provide liberties." However, M'Baye then goes on to clarify the relationship between the individual and the group that development entails. He emphasizes that while development always has a collective character, the indicators used to determine the level of development of any given society or group refer to the situation of individual. *Id.* at 506-08.

¹²⁴ See *id.* at 508-09.

¹²⁵ See *id.* at 510.

¹²⁶ See *id.*

¹²⁷ See *id.* at 511.

they say "The stomach is a sac of limited capacity."¹²⁸

"Economic growth must be accompanied by socio-cultural progress; that means, in the simplest possible terms, that we must give it a human dimension."¹²⁹ This human dimension includes "moral and spiritual as well as material and practical" aspects.¹³⁰ M'Baye also acknowledges the need to rethink development in terms of its environmental effects.¹³¹ While a shift away from the prevailing culture of consumerism would doubtless be desirable, he emphasizes that in the meantime "the underdeveloped countries perceive their destitution as an injustice."¹³² Thus, M'Baye acknowledges the limitations of the standard definition of development, argues for a holistic one, and raises the possibility of a radical redefinition, but operates on the assumption that "development will continue to be perceived as a good and as a human right."¹³³

M'Baye then turns to the justifications for the right to development, which he separates into two broad streams: political-economic reasons and moral imperatives.¹³⁴ The former arise as a result of the benefits traditionally enjoyed by the North in its relations with the South, "advantages that entail certain corollary obligations."¹³⁵ M'Baye divides these advantages into three categories: economic, strategic, and political. In all three, he emphasizes historical relations of domination and control and the persistence of those relations despite surface changes in formal status.¹³⁶ M'Baye is also careful to note the ways in which what little assistance is provided to developing countries is seen in terms of the interests of developed States themselves. For example, in the economic sphere, M'Baye notes that development assistance is "in many cases little more than a disguised export subsidy," designed to improve the underdeveloped countries' ability to act as a market

¹²⁸ *Id.*

¹²⁹ *Id.* at 512.

¹³⁰ *Id.* at 513.

¹³¹ See *id.* at 514. He mentions the Club of Rome and the "new thesis of zero growth," wondering whether it will lead to a questioning of the "feverish search for ever greater consumption."
Id.

¹³² *Id.* at 514.

¹³³ *Id.*

¹³⁴ See *id.* at 515.

¹³⁵ *Id.*

¹³⁶ In the economic realm, for example, M'Baye begins with colonialism: "The colonial adventure of the Europeans has led them into contact with foreign peoples to establish with them relations of domination in which the justification has been sought in racial, moral, and religious differences; that economic interest has been maintained up to our day." *Id.* The colonies were fashioned to be sources of raw materials and cheap labor; despite their change in formal status, the States of the southern hemisphere remain charged with the same tasks. Similarly, in the political realm M'Baye notes that Northern States seek a form of electorate for their ideologies, and emphasizes that these bilateral relations, whether originating during colonialism or during the Cold War, represent an attempt to ensure the southward expansion of Northern ideologies. See *id.* at 518-19.

for the finished or semi-finished products of the developed world.¹³⁷ Similarly, to serve their strategic interests, and primarily to avoid direct conflict among themselves, the developed countries find allies in the underdeveloped world. They use these allies as mouthpieces for certain controversial views "or, in extreme cases, to fight their battles by proxy."¹³⁸ That, M'Baye asserts, "explains the generosity with which arms and all military materials are furnished to the underdeveloped countries, a generosity which contrasts greatly with the parsimony in relation to aid for development."¹³⁹

The political realm offers an illustration of different forms of self-interest. M'Baye distinguishes between two types of political justifications. The first involves a variation on the strategic theme: Northern States seek a different kind of ally, a form of "electorate" for their ideologies.¹⁴⁰ Aid, from this perspective, is provided for the purpose of obtaining political loyalty.¹⁴¹ The second is less narrowly self-interested. It relates to the need to maintain "public international tranquillity."¹⁴² The deep division between South and North creates a sense of injustice that poses an increasing threat to international stability.¹⁴³ Thus, from this perspective, raising the standard of living in underdeveloped countries "could appear in the eyes of the rich countries as a form of life insurance...in which the premiums are paid in the form of loans, grants and assistance."¹⁴⁴ The difficulty, M'Baye notes, is that the rich countries "want to pay it at a lower rate, which means that the risk is barely covered."¹⁴⁵

M'Baye concludes this discussion of the political-economic justifications for the right to development, based on the advantages enjoyed by the North, by asserting that all are inadequate: they have not been acted upon, or have been actively denied.¹⁴⁶ In fact, these so-called "justifications" are anything but; they seem, if anything, to provide a justification for a right to development only by outlining the inadequacies of the existing international system and its presuppositions, thus setting the stage for the invocation for a different way of thinking about international relations. And, in fact, M'Baye suggests that part of the reason these "justifications" have failed to provide an adequate foundation for the right to development is

¹³⁷ *Id.* at 515.

¹³⁸ *Id.* at 518.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 518.

¹⁴¹ *See id.* at 518-20.

¹⁴² *Id.* at 520.

¹⁴³ M'Baye acknowledges that "war in the classic sense of the term" may not be likely between South and North, but insists that the consequences of conflict are extremely serious nonetheless, and must be taken into account. *Id.*

¹⁴⁴ *Id.* at 521.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 522.

because up to the present time, "the essence of relations between States have been based on purely material considerations."¹⁴⁷ M'Baye asks: "[i]s there not another way to embark upon the coexistence of nations? Is it not time to have recourse to something else?"¹⁴⁸

The discussion of moral justifications for the right to development opens by foregrounding the notion of responsibility. Given their power in the system and their utilization of that power to their own advantage, the rich countries of the North should assume responsibility for the consequences of their actions.¹⁴⁹ M'Baye acknowledges the responsibility of the underdeveloped States themselves, and mentions some of their failures.¹⁵⁰ However, he insists that many of these be seen as the effects rather than the causes of underdevelopment.¹⁵¹ This discussion of responsibility is brief but essential to M'Baye's argument; it provides both a link to the previous sections and a foundation for the more abstract discussion to come.

M'Baye then turns to what he regards as "the true justification for the right to development, its very foundation":

In this task, the word that naturally comes to mind: solidarity. It is not a matter of calculating the eventual gains or losses, of hoping for advantages or fearing difficulties. It is simply a matter of returning to that which must be at the center of all conduct, of all human politics: man himself....¹⁵²

He goes on to discuss the basic condition of humanity as involving freedom and the acknowledgment of the freedom of others.¹⁵³ However, freedom has to mean something concrete:

What does freedom in effect mean for him that will die of hunger? The rights of man and of the citizen, have no meaning for the men who stagnate in famine, sickness, and ignorance.¹⁵⁴

As participants in a common humanity, it is incumbent upon us all to try to "conquer the egoism of peoples by an aspiration towards the

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 522-23.

¹⁵¹ *See id.* at 523.

¹⁵² *Id.*

¹⁵³ *See id.*

¹⁵⁴ *Id.* at 524.

universal."¹⁵⁵ While charity is important, the sense of it as an obligation "is imposed on our hearts and on our spirit within the circle in which we live."¹⁵⁶ M'Baye speaks of a trend towards an ever greater expansion of that circle:

But little by little the family circle grows from the person to the family then to the people, to the small town, to the country.... Today, the dimension is towards the universal. This process of the march of man towards total solidarity may be considerably slowed by the barriers of race, religion, or of other kinds. But it is necessary that the egoisms end by succumbing little by little as the conception of society grows.¹⁵⁷

Recent history has shown a trend towards this expansion, but a tension remains: "The society of man is in crisis because it aspires to the universal but is still tortured by egoisms. Vanquished at the level of regions ... these egoisms appear at the level of international society."¹⁵⁸

This was not always the case. There was an upsurge of solidarity following the Second World War, which gave rise to "acts of generosity that were not only of a moral but a juridical value."¹⁵⁹ For this reason, M'Baye argues against those who have called for the completion of the Universal Declaration of Human Rights through the proclamation of a right to development.¹⁶⁰ He regards this as unnecessary, and hints that it might even be counterproductive: "[I]t is hardly useful to encumber ourselves with a new proclamation, as if it were a matter of creating a new right. *The right to development is already inscribed in international law.*"¹⁶¹ M'Baye reads the United Nations Charter as providing for this right, both "as a consequence of the renunciation of the normal attributes of classical sovereignty and as an extension of the duty to cooperate."¹⁶² M'Baye also cites the Universal Declaration of Human Rights, with its inclusion of economic and social rights,¹⁶³ and the proliferation of institutions and agencies dedicated to development.¹⁶⁴

Thus, the right to development is a legal right, one that is linked with all other fundamental human rights: "They are necessarily linked with

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 524-25.

¹⁵⁸ *Id.* at 526.

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ *See id.*

the right to life, to live well and always better, therefore to develop oneself."¹⁶⁵ However, M'Baye questions whether the right to development has gained by its move from morality to law, and laments the tendency to act as if this "promotion were an end in itself."¹⁶⁶ In any event, he states:

[I]t is now generally admitted...that there is an inherent correlation between the enjoyment of human rights and economic development. The enjoyment of human rights is not possible without economic development. In the same way, there can be no development without the enjoyment of human rights. There exists between them a cumulative dialectical process.¹⁶⁷

M'Baye purports to end his speech with an examination of the content of the right to development, but in fact uses this last section to detail its hollowness. Here, he mentions the disappointments encountered by the Third World in UNCTAD, and the failed hopes of the First Development Decade.¹⁶⁸ However, M'Baye goes on to question whether this situation can persist indefinitely. After citing statistics predicting an ever-increasing gap between developed and underdeveloped countries, he notes, "Technical progress will make the planet small, putting at the doors of the rich the groveling multitude of the Third World, more angry than ever, more than ever revolted by an injustice resented more and more as a provocation."¹⁶⁹ Whether or not one predicts an apocalyptic confrontation, it appears undeniable that "the banquet of the rich will at least be polluted (to use a word that resonates today) by the harmful "miasmes" of those that were not invited, but whose presence will surely spoil the festivities."¹⁷⁰

In the meantime, aid is diminishing,¹⁷¹ Third World debt is growing, and production in the industrial and agricultural sectors lags behind population growth.¹⁷² Because of all this, M'Baye says, some have suggested that the Third World is "underdeveloping," explaining his choice of

¹⁶⁵ *Id.* at 528.

¹⁶⁶ *Id.* at 529.

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* at 530-32.

¹⁶⁹ *Id.* at 533.

¹⁷⁰ *Id.*

¹⁷¹ *See id.* At UNCTAD I, the rate of 1% of GDP was decided upon as a target for development assistance; eight years later, M'Baye notes, the actual rate is 0.34%, "which is equivalent to barely 20% of the sums that the developed states devote to advertising. Calculated in dollars it represents 3 billion versus 280 billion for defence expenditures, which is 100 times more." *Id.* M'Baye also notes that according to the estimates of Robert McNamara of the World Bank, in 1975 only Sweden and Norway will have passed the 0.7% level. More than twenty years later, Sweden and Norway represent a full half of the four countries that meet or exceed the 0.7% target (the other two are Denmark and the Netherlands). *See, Aid and Other Financial Flows in 1996*, OECD NEWS RELEASE (June 19, 1997) <http://www.oecd.org/news_and_events/release/nw97-57a.htm>.

¹⁷² *See M'Baye, supra* note 10, at 533.

terminology throughout the paper: "[This] explains why I have spoken to you about 'underdeveloped countries' and not 'developing countries', thereby avoiding to make myself an accomplice of the hypocrisy which consists in turning one's face from reality."¹⁷³

M'Baye ends somewhere between despair and hope. Speaking to a French audience, he attempts to cast his argument in accessible terms. The plight of the Third World is presented in terms of a familiar and powerful image of man condemned by the gods to unceasing and ultimately futile labours:

Like Sisyphus, condemned to always roll to the summit of a mountain a rock that persists in hurtling down the slope, the Third World is every day starting out on new chimerical enterprises.¹⁷⁴

What will it take to create a world of solidarity? M'Baye expresses hope in the "restless youth of today, in its generosity and solidarity."¹⁷⁵ However, his primary appeal is to a national "tradition of equality and universality," and its invocation in international fora such as UNCTAD.¹⁷⁶ Given the historical allusions throughout, M'Baye's finale is somewhat jarring. It is tempting to regard this as a mere concession to his audience, an attempt to end on a positive note after having taken them through a litany of Western excesses and follies. It must be recognized, however that this reiterates and underscores a recurring theme in M'Baye's presentation: an appeal to common values and, most important of all, to a common humanity.

C. Environment

1. Generally

*Globalism, in the form of Western solutions to environmental problems, has suddenly emerged as a medicine for ecological disease in the South. The history that is being forgotten is that it was the emergence of an earlier globalism, in the form of colonialism, that created the setting for environmental degradation in the Third World.*¹⁷⁷

Vandana Shiva

¹⁷³ *Id.* at 534.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Vandana Shiva, *Globalism, Biodiversity and the Third World*, in *THE FUTURE OF PROGRESS, REFLECTIONS ON ENVIRONMENT AND DEVELOPMENT* 47, 47 (1992).

If there is one story that international environmental law tells of itself, it is that of "newness." The field has antecedents, but not precedents. Its antecedents are traced to late nineteenth and early twentieth century conservation treaties, but a clear line of demarcation is drawn between the pre-environmental and environmental eras.¹⁷⁸ The former is said to be characterized by an instrumental focus on purely economic and anthropocentric values; the latter reflects an understanding of the importance of environmental preservation in and of itself. While international environmental lawyers do not deny the basically instrumental nature of most of the norms in their discipline, they persist in seeing, in these norms, an embryonic awareness of a non-anthropocentric approach, one that values nature for its own sake.

In contrast to this emphasis upon the "newness" of the subject matter of international environmental law, the Third World approach to environmental issues is marked by an insistence on historical continuity: the links to processes of colonial expansion and domination. Regardless of how one defines the "environmental crisis," it is largely the product of industrialization, beginning with the period of the Industrial Revolution in 19th century England, but more specifically associated with the massive wave of industrial development following the end of the Second World War. As such, it is inextricably linked with the processes of colonialism and imperialism which provided much of the inputs that fueled the process of industrial development in Europe and North America.¹⁷⁹ Many would argue that to lose sight of those connections in attempting to address environmental problems, is to reproduce that same colonialist mentality. As one writer has put it:

[T]he debate on the environment has been turned around to try and restrain developing countries, in the name of the common good, from now doing all those things which the developed countries did with such abandon in the past in their efforts to attain their present levels of production and consumption. It is as if a referee has suddenly appeared and decided that all countries should be deemed to be starting from scratch in the race to save the environment, no

¹⁷⁸ See, e.g., ALEXANDRE KISS AND DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 33-41 (1991).

¹⁷⁹ This linkage between colonialism and industrial development was emphasized by Karl Marx and Friedrich Engels in the *Manifesto of the Communist Party* in 1848: "The discovery of America, the rounding of the Cape, opened up fresh ground for the rising bourgeoisie. The East-Indian and Chinese markets, the colonization of America, trade with the colonies, the increase in the means of exchange and in commodities generally, gave to commerce, to navigation, to industry, an impulse never before known.... Modern industry has established the world market, for which the discovery of America paved the way." *THE COMMUNIST MANIFESTO* 10-11 (Samuel H. Beer ed., AHM Publishing, 1955).

allowance being made for the head start that some countries had enjoyed and the distance they had already covered.¹⁸⁰

Or, as others have put it more bluntly, "By advancing the environmental agenda the North has once more concentrated on its own interests and has called them 'globalism'."¹⁸¹ In light of this history, the Third World approach has tended to reflect a deep-seated concern that efforts to protect the global environment not take the form of "eco-imperialism," where there is less interest in developing common solutions than in imposing Northern standards on the rest of the world. It favours an interpretation of environmental responsibilities that takes into account differential impacts on countries and peoples that have not enjoyed the benefits of development.¹⁸²

Despite such concerns, however, the environmental area has also been regarded as a unique opportunity for the Third World. Because "the environment knows no boundaries," the North cannot insulate itself from environmental degradation in the South. Thus, the environment represents a Southern bargaining chip--a chance for the South to capitalize on Northern concern (both concern for the environment itself and concern for self-preservation) in order to reach some of the objectives that demands for economic justice or human rights had failed to achieve.¹⁸³ In the words of one scholar, this could represent an opportunity to "re-articulate the Third World coalition."¹⁸⁴

South-North tensions were already evident in the process leading up to the 1972 Stockholm Conference on the Human Environment.¹⁸⁵ A widely held view appeared to be that concern for the environment was concern about pollution; since pollution was the result of industrialization, it did not represent an immediate concern for developing countries. It required considerable efforts on the part of the United Nations, developed countries, and, in particular, the Secretary-General of the Conference, Maurice Strong,

¹⁸⁰ NASSAU A. ADAMS, *WORLDS APART: THE NORTH-SOUTH DIVIDE AND THE INTERNATIONAL SYSTEM* 204-05 (1993).

¹⁸¹ NEIL MIDDLETON ET AL., *THE TEARS OF THE CROCODILE: FROM RIO TO REALITY IN THE DEVELOPING WORLD* 5 (1993).

¹⁸² See generally, Gunther Handl, *Environmental Protection and Development in Third World Countries: Common Destiny--Common Responsibility*, 20 N.Y.U. J. INT'L L. & POL. 603 (1988); John Ntambirweki, *The Developing Countries in the Evolution of an International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905 (1991).

¹⁸³ See, e.g., Williams, *supra* note 17.

¹⁸⁴ *Id.*

¹⁸⁵ On Third World approaches to the Stockholm Conference, see generally Tim E.J. Campbell, *The Political Meaning of Stockholm: Third World Participation in the Environment Conference Process*, 8 STAN. J. INT'L STUD. 138 (1973); PETER STONE, *DID WE SAVE THE EARTH AT STOCKHOLM?* 100-21 (1973); A. Mpazi Sinjela, *Developing Countries Perception of Environmental Protection and Economic Development*, 24 INDIAN J. INT'L L. 489, 496-99 (1984).

to muster developing country support for the initiative.¹⁸⁶ At the Stockholm Conference, the speech of Indian Prime Minister Indira Gandhi was regarded by many as encapsulating the differences in perception between South and North. Poverty, according to Mrs. Gandhi, was the worst form of pollution:

The rich countries may look upon development as the cause of environmental destruction, but to us it is one of the primary means of improving the environment of living, of providing food, water, sanitation and shelter, of making the deserts green and the mountains habitable.

We do not want to impoverish environment [sic] any further...[but] we cannot forget the grim poverty of large numbers of people.

When they themselves feel deprived how can we urge the preservation of animals? How can we speak to those who live in villages and in slums about keeping the oceans, rivers and the air clean when their own lives are contaminated at the source. Environment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology.¹⁸⁷

Mrs. Gandhi acknowledged the responsibility of the developing countries in protecting the global environment, and spoke of the need to take into account environmental factors in the developmental process. However, she lay a large part of the responsibility on the shoulders of the developed countries to provide support for an alternative form of development that would avoid the worst excesses of their own history.

The developmental dimension of environmental protection continued to dominate Third World approaches to the environmental area throughout the 1970s and early 1980s. The link between environment and development became a central part of mainstream discussions of the environmental crisis in the late 1980s, in the course of the work of the World Commission on Environment and Development (also known as the Brundtland Commission in honour of its chair, Gro Harlem Brundtland of

¹⁸⁶ As one element in this process, a meeting of experts on Environment and Development was held in Founex, Switzerland in 1971. The meeting that has been described as being "long on economists but short on the ecological side"; the majority of participants were either from developing countries or worked in the development area. This background ensured that the focus was squarely on interrelatedness between environmental and developmental concerns. Because of this, the resulting "Founex Report" played a crucial role in coalescing developing country support for the Conference initiative, and ensuring their participation. See Stone, *supra* note 185, at 102-103.

¹⁸⁷ Quoted in Anand, *supra* note 12, at 10.

Norway), and the publication of its report, *Our Common Future*.¹⁸⁸ With its popularization of the term "sustainable development," defined as development that would "meet the needs of present generations without compromising the ability of future generations to meet their own needs,"¹⁸⁹ the Commission foregrounded concerns about both "intergenerational" and "intragenerational" equity. Despite attracting considerable criticism,¹⁹⁰ the language of sustainable development quickly became a touchstone of political discussions of environmental protection.

In the period leading up to the 1992 "Earth Summit" (officially known as the United Nations Conference on Environment and Development, or UNCED) the South-North dimension--or, to be more precise, its characterization as South-North conflict--came to dominate accounts both in the media and the scholarly literature.¹⁹¹ Throughout the UNCED process, the point that was continually emphasized is that environment and development are not merely interrelated but inseparable: we cannot speak meaningfully of one without the other¹⁹². While few were willing to take issue with this at the theoretical level, there continued to be considerable resistance to building this recognition into concrete responses to environmental problems. The tensions were evident not only in the preparatory sessions but at the Earth Summit itself. If Indira Gandhi's statement could have been seen as emblematic of the developing country approach at Stockholm, one sees a very different type of approach being taken by Prime Minister Matathir Mohamad of Malaysia at Rio:

The poor are not asking for charity. When the rich chopped down their own forests, built their poison-belching factories and scoured the world for cheap resources, the poor said nothing. Indeed they paid for the development of

¹⁸⁸ See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* (1987).

¹⁸⁹ *Id.*

¹⁹⁰ The criticism came from a wide variety of sources, ranging from those who saw it as little more than a slight variation on the standard (and environmentally destructive) development model to those who saw it as "eco-imperialism". For a thoughtful critique see Ronnie D. Lipschutz, *Wasn't the Future Wonderful? Resources, Environment and the Emerging Myth of Global Sustainable Development*, 2 *COLO. J. INT'L L. & POL'Y* 35 (1991). For a discussion of some of the dangers inherent in the fuzziness of the term see Sharachandra M. Lele, *Sustainable Development: A Critical Review*, 19 *WORLD DEVELOPMENT* 607 (1991).

¹⁹¹ See, e.g., MARIAN A.L. MILLER, *THE THIRD WORLD IN GLOBAL ENVIRONMENTAL POLITICS* 8-9 (1995); RODNEY R. WHITE, *NORTH, SOUTH AND THE ENVIRONMENTAL CRISIS*, 179-80 (1993); LAWRENCE E. SUSSKIND, *ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS* 42 (1994). For a general discussion, see Rance Panjabi, *The South and the Earth Summit: The Development/Environment Dichotomy*, 11 *DICK. J. INT'L L.* 77 (1992).

¹⁹² For an overview of the developing country approach to UNCED see Chris K. Mensah, *The Role of the Developing Countries*, in *THE ENVIRONMENT AFTER RIO: INTERNATIONAL LAW AND ECONOMICS* 33 (Luigi Campiglio et al. eds, 1994). For a critical assessment of the Rio process from the perspective of developing countries, see Middleton et al., *supra* note 181.

the rich. Now the rich claim a right to regulate the development of the poor countries. And yet any suggestion that the rich compensate the poor adequately is regarded as outrageous. As colonies we were exploited. Now as independent nations we are to be equally exploited.¹⁹³

South-North issues have continued to feature prominently in the years since UNCED. At the Earth Summit Plus Five, a special session of the United Nations General Assembly held in June 1997, leaders and envoys from 173 countries came together to evaluate the progress since Rio. The "Programme for the Further Implementation of Agenda 21," adopted by the session, states: "We acknowledge that a number of positive results have been achieved, but we are deeply concerned that the overall trends for sustainable development are worse today than they were in 1992."¹⁹⁴ Given its emphasis on the provision of "adequate and predictable financial resources" for the implementation of Agenda 21, the document notes a disturbing fact: "Regrettably, on average, ODA [official development assistance] as a percentage of the GNP of developed countries has drastically declined in the post-UNCED period, from 0.34 per cent in 1992 to 0.27 per cent in 1995," adding, on a rather jarring note of optimism, "but ODA has taken more account of the need for an integrated approach to sustainable development."¹⁹⁵ The official round-up press release from the United Nations acknowledges the disappointment in the results of the meeting, attributing the lack of major breakthroughs to "North-South differences on how to finance sustainable development globally."¹⁹⁶ The accounts in the media were less diplomatic, noting that many heads of government from developing countries simply refused to attend; one source cites Prime Minister Mahathir Mohamad's reason as being his disappointment with the results of Rio, "the backpedaling and fudging."¹⁹⁷

On the surface, the impact of the South-North dimension on the development of international environmental law is clear. The concept of "common but differentiated responsibilities" has evolved as an important feature of most environmental treaty regimes. Moreover, such regimes almost invariably include provisions dealing with financing mechanisms and technology transfer, aimed at facilitating developing country

¹⁹³ U.N. Conf. Rep. A/CONF.151/26/Rev.1 (Vol. III) at 233.

¹⁹⁴ Advance unedited text of *Programme for the Further Implementation of Agenda 21 Adopted by the Special Session of the General Assembly 23-27 June 1997* <gopher://gopher.un.org:70/00/ga/docs/S-19/plenary/ES5.TXT>, at para. 4.

¹⁹⁵ *Id.* at para. 18.

¹⁹⁶ *Earth Summit Review Ends with Few Commitments* <<http://www.un.org/ecosocdev/geninfo/sustdev/es5final.htm>>.

¹⁹⁷ Charles J. Hanley, *Taking environmental stock, five years after Rio Summit* (June 22, 1997) <<http://www.bergen.com/morenews/earth199706223.htm>>.

participation and implementation.¹⁹⁸ Any account of international environmental law that did not cover these developments would be quite obviously incomplete. Moreover, the Third World influence could be said to be increasing. In the aftermath of UNCED, the theoretical link between environmental protection and meeting the legitimate developmental aspirations of the peoples of the world can now be said to be beyond question.¹⁹⁹ The various international environmental regimes emerging from the UNCED process, or in the post-UNCED era, represent attempts to translate such theoretical consensus into actual practice.

However, it could be argued that there remains a deep-seated unwillingness on the part of many international environmental lawyers to confront the South-North dimension as a central, if not the central, debate regarding the conceptual foundation of their discipline. All too frequently, the view taken is that international environmental law has had to respond to Third World concerns, but that those concerns have not been embraced as in part defining the discipline itself. The gradual process of accommodation of Third World concerns has been helpful up to a point. Many would argue, however, that what is required in the long-term is an integration of Third World concerns.

It is not difficult to understand why the First World and the Third World appear to be at loggerheads. The essential linkage from the point of view of the former is to undeniable and pressing biophysical realities: species loss, freshwater contamination, ozone depletion, to name only a few. The latter, while not denying these realities or the necessity of a response, insists that links also be drawn to economic, social, cultural and historic realities. Environmental challenges and their solutions, from this perspective, cannot properly be understood without taking into account a wide range of other factors.

2. R.P. Anand

An examination of some of these factors is found in a 1980 article by R.P. Anand, "Development and Environment: The Case of the Developing Countries."²⁰⁰ Anand begins by foregrounding the fragility of the ecosphere, and the hubris and greed that threaten humanity's very existence:

¹⁹⁸ For a survey of these developments, see Ntambirweki, *supra* note 182. Both of the UNCED conventions, on climate change and biodiversity, included such provisions.

¹⁹⁹ See, e.g., *Rio Declaration on Environment and Development*, UN. Doc. A/CONF.151/15/Rev. 1, (1992) 3 I.L.M. 874, Principles 3-7.

²⁰⁰ See Anand, *supra* note 12.

With almost blind faith in his ability and power to conquer nature, equipped with ever-increasing knowledge of science and technology, in his endless pursuit to get more and more conveniences to make his life ever-more comfortable man has been unwittingly, and for a long time unknowingly, destroying his life's support system.²⁰¹

In these opening paragraphs Anand does not distinguish between levels of responsibility: "Man" has brought about the present crisis. The reality of environmental degradation is presented in stark terms, with pollution and population pressures at the forefront. And no one can afford to ignore this reality: "It is generally realized now that the problem of environmental pollution is a global problem which concerns all states irrespective of their size, stage of development, or ideology."²⁰²

Having set out this common responsibility and common challenge, however, Anand shifts to the description of another reality--or, more accurately, another aspect of the same reality. In terms that presage the evocative opening of the Brundtland Report ("The Earth is one but the world is not"), Anand writes:

Despite all these interdependencies--in biosphere and technosphere alike--and realization that we do indeed belong to a single system, and our survival depends on the balance and health of the total system, it is important to remember that our world is deeply divided...With the "blessings" of science and technology, while one part of mankind has reached a level of prosperity which the previous generations would have found difficult to imagine, the benefits of science and technology have not really reached the two-thirds of humanity. Not only is the gulf between the rich and poor wide enough, but it has been widening through the last several decades...With a few notable exceptions, the so-called developing countries are not developing fast enough--while the rich Western countries are developing at a much faster rate. While the rich countries are risking the health of their peoples by over-consumption, and endangering the planet by over-industrialization and industrial pollutants, two-thirds of humanity is groaning under the unbearable weight of abject poverty. Two out of every three people alive today have

²⁰¹ *Id.* at 1.

²⁰² *Id.* at 4.

only a marginal existence struggling against the four curses of our times: hunger, poverty, ignorance and chronic ill health.²⁰³

Meanwhile, due to those same technological wonders, the peoples of the South are becoming fully aware of the contrast between their lives and those of the privileged denizens of the North.²⁰⁴ This awareness gives rise to a demand for change: "People know that they do not have to be hungry and poor; they want education and freedom; they want food and shelter; they want bicycles, refrigerators, movies, radios, *and they want them now.*"²⁰⁵

The dilemma, of course, is that the planet simply cannot accommodate these demands. It is here that Anand seems to step back from his original position, with its invocation of common responsibility. Here are the true roots of the problem: "It is generally believed that the present eco-crisis has been provoked by the explosion of population and technology. But the real damage, it is admitted, has been done by the rich countries."²⁰⁶ It is common knowledge that the poor do much less damage to the environment--they consume less and generate less waste--which has led some to say that the developing countries should learn from the mistakes of the West and avoid industrialization, a prescription that Anand restates with heavy irony: "For the survival of mankind the poor developing countries should remain in a state of underdevelopment because if the evils of industrialization were to reach them, life on the planet would be in jeopardy."²⁰⁷

Anand emphasizes that developing countries are also experiencing environmental problems, and are concerned about them, but he insists that "they are not and cannot be convinced of the logic of non-development."²⁰⁸ Anand seems to imply that environmental concerns have to undergo a form of translation: "The two-thirds of humanity who are barely surviving on the margin of life cannot equal the passionate alarm of the industrialized countries over the declining quality of the environment *unless environmental issues can be equated with developmental issues.*"²⁰⁹ (emphasis added) As for those who counsel against industrialization and development, Anand contextualizes the reception of this sage advice in terms of historical and economic realities, in terms that leave little doubt as

²⁰³ *Id.* at 4-5.

²⁰⁴ *See id.* at 5-6.

²⁰⁵ *Id.* at 5.

²⁰⁶ *Id.* at 6.

²⁰⁷ *Id.* at 8.

²⁰⁸ *Id.* at 9.

²⁰⁹ *Id.* "Life is short and their requirements are real and immediate. Questions of poverty and indignity, of economic underdevelopment and lack of opportunity, naturally weigh more heavily and urgently than a vague threat of ecologic disaster. Poverty, they feel, is the greatest source of pollution."
Id.

to his own views:

There is already a widespread feeling that the rich industrialized countries are responsible for the poverty of the third world. All through the long period of colonial domination their economics were exploited and resources wasted for the benefit of the imperialist power. Although political colonialism has more or less finished, the traditional international economic relations, based on the domination of the poor by the rich and exploitation of the developing by the developed countries, still continues. By a virtual control of the raw material markets, and almost a monopoly on manufactured goods and capital equipment, the rich countries are in a position to drain the resources of the third world. As a result of this situation the richer part of mankind is destined to become richer while the poorer part founders in destitution and [is] doomed to become poorer, unpolluted by industry and untarnished by affluence.²¹⁰

Anand emphasizes that developing countries cannot ignore the environmental costs of development.²¹¹ They should learn from the experience and the mistakes of the industrialized countries.²¹² He clearly rejects the suggestion that environmental concerns can simply be set aside until developmental objectives have been achieved.²¹³ Moreover, he acknowledges that international cooperation to address global environmental problems is essential.²¹⁴ However, Anand emphasizes that this environmental imperative has its limits: "While the developing countries must cooperate in saving the biosphere, they cannot and will not do it at the cost of their development."²¹⁵ Anand expresses the hope that the growing recognition of environmental interdependence will lead to a recognition of other forms of interconnectedness and a new vision of global community.

In this task, international law has an important role. Anand insists that "International law must draw its life and vitality from the facts of international life," and must reflect the increasing awareness of the

²¹⁰ *Id.* at 10.

²¹¹ *See id.* at 13.

²¹² *See id.* at 14.

²¹³ *See id.*

²¹⁴ *See id.* at 16.

²¹⁵ *Id.*

artificiality of borders and boundaries.²¹⁶ He outlines the limitations of traditional international law in protecting the ecosphere, and emphasizes the need for "an effective body of global environmental law."²¹⁷ But the challenge to international law is, of course, only part of a broader challenge to the international community, one that cannot be avoided or postponed. Anand's last heading neatly encapsulates this: "Cooperation, a Historical Necessity." Humankind has made mistakes throughout history, but we cannot afford to make a mistake now, about this issue:

No one nation, or even group of nations, can, acting separately, avoid the tragedy of increasing divisions between the wealthy north and the poverty-stricken south of our planet. No nation, on its own, can offset the risk of deepening disorder. Nor can any nation or nations, acting singly or in a group--rich or poor--avoid the risk of environmental destruction or doom...Unless we conquer our divisions, our greeds, our inhibitions, and our fears, they will conquer us. It has become clear more than ever that the environmental issues are intrinsically linked with all the other factors in contemporary world politics. We require not only a new perception of man's relationship with the natural world, but of man's relationship with man. The problems of the rich cannot be seen in isolation from those of the poor. Indeed, in all respects we inhabit only one world. The new ecological imperative can certainly give mankind a new vision and incentive for cooperation at various levels. The idea of common world-wide policies and strategies seems strange, visionary and utopian at present because world institutions are not backed by any sense of planetary community and commitment. It is only now being realized that the human society can hope to survive in all our prized and cherished diversity provided we can achieve our ultimate loyalty to our single, beautiful, but vulnerable planet, earth.²¹⁸

Thus, Anand ends as he began, with an invocation of the vulnerability of the planet. There is a tension here, which Anand does not attempt to resolve. At one level, his frequent invocations of the "ecological imperative" might seem to detract from his compelling portrayal of the misery of the

²¹⁶ *Id.*

²¹⁷ *Id.* at 18.

²¹⁸ *Id.* at 18-19.

developing world. But the import of his overall approach is clear: we ignore one or the other at our peril.

IV. A DISTINCTIVE THIRD WORLD APPROACH?

A. Introduction

An examination of the preceding three texts reveals a number of common themes and concerns, although the tension between Third World approaches and mainstream approaches takes a somewhat different form in each of the areas discussed. This is not to deny significant differences between these authors. Between Bedjaoui and Anand, for example, there doubtless exists a chasm as wide in parts as that separating them from their First World counterparts. Nevertheless, these three authors share a sense of anger at a system that appears indifferent to Third World concerns; an anger that frequently wells into outrage at the injustices perpetrated. Their various approaches remain grounded in certain fundamental concerns, of which three are particularly striking:

- an emphasis on interconnectedness of subject areas, illustrated by an unwillingness to draw rigid boundaries between various areas of the law (such as economics, human rights, or the environment).
- an emphasis on considerations of morality, ethics and justice; in other words, an unwillingness to separate law from wider concerns or to define law in a narrow "legalistic" fashion.
- an emphasis on history, typified by an unwillingness to look at any problem as ahistorical or to separate the law from the historical context within which it developed.

Let us consider each of these features in turn, and how they are reflected in the texts referred to above. It should be borne in mind, however, that while separating out these components is useful for the purpose of analysis, it is inconsistent with their deployment within a Third World approach. They are themselves intertwined. Historical arguments are heavily dependent upon considerations of ethics or justice; ethical arguments build upon a historical basis; the emphasis on interconnectedness of subject areas is frequently bolstered by resort to historical and ethical concerns.

B. Features

1. Interconnectedness

Interconnectedness takes at least two specific forms. On the one hand, there is an emphasis on the interconnectedness of subject areas: an insistence that it is impossible to understand one area without taking others into account. On the other, there is an insistence on linking the various legal responses to those areas; thus, concepts such as self-determination of peoples, sovereignty over resources, and the right to development are seen as interrelated and interdependent.²¹⁹ Underlying both is a vision of the fundamental interconnectedness of South and North.

The fact that interconnectedness of subject areas has become a commonplace should not obscure the remarkable consistency with which it has been raised by Third World commentators, since at least the 1960s. The intertwining of economic issues, human rights and environmental concerns is evident in all three writers considered here. Both M'Baye and Anand, for example, bring economics into their discussions of human rights and environment, referring not only to the general economic order with its inequities vis-à-vis the developing countries but also to specific concerns such as the deterioration of the terms of trade and Third World indebtedness.²²⁰ This in itself may not be particularly surprising; there is a tendency, after all, to portray Third World approaches as being not merely preoccupied with economic considerations but entirely focused on them. What is noteworthy, however, is that Bedjaoui discusses the need to understand development in terms that encompass concerns about social justice and environmental integrity. Well before the term "sustainable development" became a commonplace, Bedjaoui asserts the importance of thinking of development in a different way, one that is sensitive to environmental considerations among others:

It has been rightly said that, with the challenge to the old order, the notion of world development has taken on a new strength and rationality. Development must not disregard the obligations that link present generations to those of the future. The people of today are accountable to the people of tomorrow for the type of development, and hence the type of society they bequeath to them. In particular, they must seek economic methods which will not exhaust non-renewable resources, pollute the environment or endanger

²¹⁹ M'Baye states, for example, "The free disposal of riches and natural resources is no more and no less than the corollary of the principle of self-determination of peoples. To be matters of their own destiny, implies that one is master of the soil and of that which it conceals." M'Baye, *supra* note 11, at 528.

²²⁰ M'Baye alludes to this in particularly evocative terms: "The deterioration of the terms of trade pursue their task of international pauperization". *Id.* at 533.

life on our planet.²²¹

Along similar lines, M'Baye argues that development has to be seen as "an expression of the totality of man responding to his material needs (nutrition, clothing, shelter) at the same time as his moral requirements (peace, compassion and charity)."²²²

The interconnectedness of legal responses is perhaps most clearly illustrated by the concept of the right to development itself, which has played an important conceptual role in each of the areas surveyed. In fact, one could trace its migration from the economic realm, through human rights, into the environmental area. In each of these areas, the right to development can be seen as expressing fundamental Third World concerns; from one area to the next, it carries with it the specific form that those concerns take in each. Thus, in its environmental incarnation the right invoked maintains its human rights as well as its economic dimensions.

Philip Alston, one of the most insightful commentators on the concept, has suggested that the demands for the recognition of the right to development need to be seen as an attempt to step beyond the rigid boundaries that have sometimes characterized mainstream approaches to international human rights law. As he puts it:

[T]he reasons underlying the emergence of demands for the recognition of new human rights can be understood only in light of some of the deficiencies which have tended to characterize much work over the past forty years of the principal intergovernmental institutions as well as the academic community in the field of international human rights law...[T]he advocacy of the right to development has been viewed, *inter alia*, as a way to foster (or perhaps provoke) a greater effort to examine human rights issues in a much wider context than has traditionally been the case, to encourage interdisciplinary analysis of human rights problems and to highlight the inadequacy of the existing tendency within international organizations to confine explicit concern with human rights to specialist organs such as the Commission on Human Rights.²²³

²²¹ Bedjaoui, *supra* note 10, at 72. Bedjaoui criticizes the United Nations for sometimes losing sight of the cultural dimension of development--but only after having noted that "This vision of an overall, integrated development, in which every country and not only those of the Third World would need to participate, was already glimpsed by the United Nations a quarter of a century ago: resolution 642(VII) of 1952 referred expressly to 'integrated economic and social development.'" *Id.* at 73. He also notes that UNESCO has attempted to combat this tendency.

²²² M'Baye, *supra* note 11, at 513.

²²³ Alston, *supra* note 95, at 6-7.

Arguably, Alston's insights are equally applicable to the economic and environmental areas: the calls for a recognition of a right to development pose a similar challenge to traditional divisions and boundaries. In the economic area, to speak in terms of rights at all is introducing an element of normativity that sits uncomfortably with the highly process-oriented, fundamentally liberal agenda which is concerned with equal opportunity rather than distributive outcomes. Similarly, in the environmental area, the call for the right to development--even in its "new" environmentally-friendly form-- requires a confrontation of the developmental dimension of environmental protection, and the aspect of intragenerational equity. In each of these areas, the emphasis on interconnectedness can explain much of the South-North tension. In the human rights context, for example, Northern governments and commentators expressed concern about the theoretical coherence and potential abuse of the concept, while their Southern counterparts rejected legalistic arguments in favour of arguments that built upon interrelatedness to other subject areas.

Alston mentions the need for "interdisciplinary analysis;" however, what seems to be invoked by the writers considered here is something beyond interdisciplinarity, more along the lines of "transdisciplinarity," which has been defined as involving "conceptual frameworks that transcend the narrow scope of disciplinary world views, metaphorically encompassing the several parts of material handled separately by specialized disciplines."²²⁴ In many instances the need for a "transdisciplinary" approach is advocated in terms of the interrelationship between the various sub-disciplines of international law, but on occasion there is also the suggestion that such an approach requires a different understanding of the role of law itself, a call for its expansion while at the same time maintaining its fundamentally normative foundation. M'Baye, for example, asserts that development is a new challenge for lawyers,²²⁵ and acknowledges that meeting that challenge requires a rethinking of traditional disciplinary boundaries.²²⁶ However, he also appears to suggest that it is precisely because their colleagues, in disciplines such as economics, are avoiding normativity that lawyers must take a role.

The overall vision of interconnectedness of the international community as a whole is a fundamental feature of these texts. Each of these writers maps a world deeply divided, yet ultimately joined. The form of

²²⁴ JULIE T. KLEIN, *INTERDISCIPLINARITY: HISTORY, THEORY AND PRACTICE* 66 (1990). Klein notes elsewhere that many scholars have argued that social science research in and on developing countries must of necessity be interdisciplinary in nature. *See id.* at 45-46.

²²⁵ Indeed, he begins by "apologizing" to his audience for his topic, indicating its awkwardness for a lawyer. Development, he says, is a domain that belongs to the science of economics or sociology and not to Law. M'Baye, *supra* note 11, at 505.

²²⁶ *See id.* at 506.

interconnectedness postulated, of course, varies according to the area. Bedjaoui argues for a recognition of the ways in which international economic relations inevitably draw States closer together.²²⁷ M'Baye asserts the need to see our moral community as one gradually expanding towards the universal. Anand goes beyond the standard environmental invocation of the unity of the planetary ecosphere in order to ask whether this unity and "interdependence" must have implications for our understanding of human community:

It is hoped that an increasing understanding of planetary interdependence and the earth's natural systems on the part of the rich nations can help strengthen the vision of human family and encourage them to help and aid the poor nations in their efforts to protect and improve their part of the global household. The global concern for human environment and the new ecological imperative may reawaken the concern for elimination of poverty all over the globe which has been extremely tardy so far. The central theme of our age is interdependence--the interdependence of all the elements which sustain life on this planet; the interdependence of man with these elements; the interdependence of natural physical systems with man's needs and aspirations; and most important, man's interdependence with man.²²⁸

For all of these writers, interconnectedness appears intuitively obvious, whether seen from the point of view of a shared history, a common humanity, economic links, or ecological unities. All raise the spectre of international instability if these connections are not acknowledged and acted upon. And yet each implicitly acknowledges that the mere fact of interconnectedness is in itself insufficient to bring about an international system that functions on the basis of that understanding.

2. Justice

The emphasis on the relationship between law and justice, morality or ethics has been an obvious feature of Third World approaches to international law.²²⁹ All three of the writers surveyed build their ethical arguments on what they perceive and portray as the reality of the Third

²²⁷ See Bedjaoui, *supra* note 10, at 244.

²²⁸ Anand, *supra* note 12, at 16.

²²⁹ See, e.g., Emmanuel G. Bello, *International Law and the Developing Nations: the Pursuit of Rights and Justice*, 15 THE IRISH JURIST 263 (1980).

World: a reality of failed hopes and suffering. All three seem to invoke justice as the ineffable, while emphasizing the injustice that is the reality.

The injustice either partly lies in or is exacerbated by the stark contrast between South and North. M'Baye asserts:

Poverty finally risks dividing the world into two blocs, that of the powerful minority and that of the immiserated majority. The sentiment of injustice that it creates and maintains will become more and more deep-rooted, such that it is at least wise to fear an explosion.²³⁰

Bedjaoui speaks of the "scandals of poverty and inequality,"²³¹ and seems to indicate that the two are interrelated. He cites statistic after statistic in an effort to get across the magnitude of the contrast:

Production of dog foods in the United States represented in 1967 about the equivalent of the average income per man in India for each dog in America...The amount of food wasted by the Americans in one year, and thrown into their dustbins, would be sufficient to feed all the countries of the immense African continent for a month.²³²

Having delineated the misery of hundreds of millions in the developing world for whom poverty is a basic fact of existence, Anand also draws the contrast between affluence and destitution, and, more importantly, highlights the awareness of that contrast:

In the present shrinking world society, a growing number of these poor are waking up to the realization how the people in the rich countries are living. As the image, ways of life and consumer habits of the rich countries, impressive evidence of prosperity, not to say of opulent living, of their people are transmitted to the remotest corners of the third world by the transistor, the satellites and the world-wide TV, ambitions to imitate them naturally arise and they awaken new aspirations.²³³

If the chasm between South and North constitutes injustice, an

²³⁰ Elsewhere, he also asserts, "That which makes the poverty of the South intolerable is the injustice that comparison with the situation of the North makes flagrant." M'Baye, *supra* note 11, at 517.

²³¹ Bedjaoui, *supra* note 10, at 72.

²³² *Id.* at 31.

²³³ Anand, *supra* note 12, at 5.

appeal to justice is seen as providing a potential bridge. At the most basic level, these authors persist in appealing to a common understanding of justice as fairness. Such arguments are frequently historically grounded. If history is overlooked, demands for development assistance, for example, can be portrayed as requests for a "hand-out;"²³⁴ if history is foregrounded, such demands take on a very different appearance. The appeal is not merely to charitable sentiments.²³⁵ Such assistance also constitutes redress -- a rendering of historical accounts. M'Baye expresses this in the clearest possible terms: regardless of whether these events took place in the past, their effects continue to be felt:

[The rich countries] are responsible because they are the authors of international events and their consequences. Since these events have been launched with their own interests as the sole consideration.. it is clear that if they profit from the advantages they should at least partake of the inconveniences. They decide about peace or war, the international monetary regime, the conditions of international relations, impose ideologies, etc. etc. They do and undo the knots of politics and the world economy. What would be more natural than that they should assume the responsibility for the events and the state of affairs of which they are the authors?²³⁶

"The harm that they cause should be the responsibility of those that

²³⁴ See, e.g., George P. Smith, *The United Nations and the Environment: Sometimes a Great Notion?*, 19 TEX. INT'L L.J. 335, 337-38 (1984).

All too often, under the guise of poverty, far too many members of the United Nations have refused to take responsibility and, instead, have sought unrestricted support from others in order to compensate for their own errors of omission and commission...Opportunism cannot admit to an unabated 'no-strings' redistribution of wealth from rich to poor. Rather, opportunity comes from initiative, hard work, and self-respect.

Id. It is noteworthy that Smith's language draws heavily on domestic discourse regarding the unwillingness of disadvantaged groups to "take responsibility".

²³⁵ See in contrast Thomas Franck's characterization in *Lessons of the Failure of NIEO*, *supra* note 59, at 89-90. Referring to the decline in development assistance in the 1960s, which he characterizes as part of the backdrop to Third World demands in the 1970s, Franck asserts: "Whether justified or not, this should have signalled an exhaustion of the postwar philanthropic spirit, an exceptional phenomenon that, in the best of circumstances, could not have been expected to continue indefinitely. *The publics of Western states had been sold on aid to developing nations not as restitution for the inequitable international system and its attendant evils, but to permit the Third World to enter the game and play by the prevailing rules on the theory that they, like the devastated nations of postwar Western Europe, could 'recover' with massive inflows of funds--both charitable and investment--and become full-fledged players at the existing tables.*" *Id.* (emphasis added).

²³⁶ M'Baye, *supra* note 11, at 522.

provoked them; this is an elementary principle of justice."²³⁷ Speaking to a European audience, M'Baye states this in terms of the analogy with the most immediate impact:

I got out of a trip to Germany, in 1970, the clear feeling that the Germans of today, including the youngest among them, still feel remorse [about] Hitlerism. But there are in the past of the colonial peoples acts of a moral impact as heavy as Hitlerism: there were slavery, forced labour, and colonialism with its many miseries...Who can ever evaluate the harm that the raids of tens of millions of young and healthy men and women could have caused to Mali or to Dahomey?²³⁸

However, there is a different understanding of justice that emerges in these texts--or that underlies them, almost submerged. The notion of justice as fairness itself constitutes a stepping stone towards this broader vision, what one might call a prophetic vision of justice, hinted at in appeals to solidarity and a common humanity. Decolonization continues to play a significant symbolic role. The moment of decolonization--a decolonization of the spirit and the mind for both the colonizer and the colonized--is frequently deferred to a time that is yet to come.²³⁹ Thus, Anand speaks of the need for "not only a new perception of man's relationship with the natural world, but of man's relationship with man,"²⁴⁰ and Bedjaoui cites UNESCO on the need "to redefine international reality."²⁴¹ M'Baye, who sees the notion of the right to development itself as an outgrowth of a concern with "well-being and justice" on the part of what he calls the "international conscience," raises the possibility that in the future "the reticence of this second half of the 20th century toward universal solidarity will seem to be one of those absurdities that the past often shows to the following generations." But, he asks, "at what price will this philosophy be realized?"²⁴²

The insistence upon the connection between law and morality, of course, is by no means confined to Third World writers. It is the defining characteristic of the traditional natural law approach as well as countless

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ One finds a clear articulation of this view in Frantz Fanon, with his invocation of the "new man" and the responsibility of the Third World to show the way towards a different way of being. FRANTZ FANON, *THE WRETCHED OF THE EARTH* 311-16 (Constance Farrington, trans., Grove Press, 1963).

²⁴⁰ Anand, *supra* note 12, at 19.

²⁴¹ Bedjaoui, *supra* note 10, at 75-6.

²⁴² M'Baye, *supra* note 11, at 525.

variants.²⁴³ The authors dealt with here are aware of and draw on these linkages; for example, M'Baye criticizes the "narrowness of philosophical positivism," and speaks of a resurgence of natural law thinking--albeit one that takes a different form.²⁴⁴ The invocation of the natural law tradition is consistent with a broader commitment to universality. Whether labeled as justice, equity, fairness or morality, an appeal to an ethical universal appears to underlie all three texts. And yet, there is a tension, for all carry memories of "civilizing missions" and are acutely aware of universality's oppressive potential.²⁴⁵ They maintain a faith in the notion of universality while refusing to lose sight of its past and potential abuses.

One could characterize this as stemming from an inability on the part of these writers to extricate themselves from Western narratives. While such a view would be accurate up to a point, it is also important to note the ways in which the universality being invoked is of a somewhat fluid and tentative nature.²⁴⁶ These writers emphasize the concrete, the unique, the situated: part of the value in the universal is that it creates spaces within which the particular can resonate. Moreover, the commitment to universality on the part of these writers cannot be read in isolation from the equally strong resistance to the pseudo-universal.²⁴⁷ There is an insistence that we not fall into the trap of assuming that universality can be easily achieved.²⁴⁸ This is evident in the emphasis placed on developing truly inclusive

²⁴³ For a discussion of the "fusion of law and morality" in the work of early international legal scholars, including Grotius, see David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986).

²⁴⁴ "Natural law was awakened at the same time as the feeling of solidarity at the end of the war. It is true that it was a natural law of a new style, different in its conception from that of the 18th century. It is still constituted by immortal laws, but they are more than the principles of direction and an ideal of justice." M'Baye, *supra* note 11, at 526. Similarly, Anand has argued elsewhere that the triumph of positivism was detrimental to the Third World: "One important consequence of the positivist philosophy was the development of Eurocentrism in legal and political thinking and regionalization of international law." R.P. ANAND, *INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES* 15 (1987).

²⁴⁵ Naturalist assumptions were used to legitimate the colonialist enterprise, as explored by Anthony Anghie in his treatment of Francisco de Vitoria. See, *Francisco de Vitoria and the Colonial Origins of International Law*, *supra* note 33.

²⁴⁶ For example, universality plays the most significant role in M'Baye's piece, which is not surprising when one considers that universality is the supposed foundation of human rights. M'Baye speaks of universal ethical values--which, in the end, he regards as the fundamental justification for the recognition of the right to development. He also refers to universal civilization. In discussing the moral justifications for the right to development, M'Baye throws out a veritable list of eminent Western philosophers: Heidegger, Nietzsche, Descartes, Kant. According to M'Baye: "None better than Kant could come to our aid in the search for an ethic of development, because it must be a categorical imperative." M'Baye, *supra* note 11, at 523. And yet, M'Baye reiterates on a number of occasions that development must be seen in context: "[D]evelopment must be a perpetual questioning of received values, and a permanent work in progress of values appropriate to each nation..." *Id.*

²⁴⁷ I borrow the reference to "pseudo-universalism" from Anthony Carty. Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66, 67 (1991). I use it, however, in a different sense.

²⁴⁸ See Satya P. Mohanty, *Colonial Legacies, Multicultural Futures: Relativism, Objectivity, and the Challenge of Otherness*, 110 PMLA 108 (1995).

frameworks for addressing and resolving global problems.

3. History

*It is a question of the Third World starting a new history of Man, a history which will have regard to the sometimes prodigious theses which Europe has put forward, but which will also not forget Europe's crimes, of which the most horrible was committed in the heart of man...*²⁴⁹

Frantz Fanon

I end with history, the feature most fundamental to anything one could label a Third World approach to international law. Historical arguments take a number of forms. One that has surfaced in each of the subject areas dealt with here is the insistence on seeing particular problems and their solutions in historical perspective. This involves a focus on tracing lineages and identifying connections, and frequently involves an insistence on continuity despite surface changes or disruptions. Two other forms of historical argument will be dealt with here: a focus on the historical development of law and, perhaps most notable of all, an invocation of history *per se*.

The first form, the focus on the historical development of international law and particular legal doctrines, is probably the most straightforward and is certainly the best known. Among the texts considered here, we see this explored most extensively in Bedjaoui,²⁵⁰ for whom an insistence on history translates into a focus on the Eurocentricity of the international legal system, and its complicity in the colonial and imperial enterprises it served:

Until the League of Nations came into being, this international law was simply a European law, arising from the combination of regional fact with material power, and transposed as a law dominating all international relations. The European states thus projected their power and their law onto the world as a whole. Here we come to the real nature of the so-called "international" law, to its substance and even to the reality of its existence. As it had been formed historically on the basis of regional acts of force, it could not be an international law established by common

²⁴⁹ Fanon, *supra* note 239, at 315.

²⁵⁰ However, Anand has dealt with this at length in some of his other writings. See, e.g., *Influence of History on the Literature of International Law*, in INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES, *supra* note 244, at 1.

accord, but an international law given to the whole world by one or two dominant groups. This is how it was able to serve as a legal basis for the various political and economic aspects of imperialism.²⁵¹

In asserting that international law served the colonial and imperial interests of the powerful States, Bedjaoui makes many of the standard arguments raised by the new States; for example, that customary law reflected the interests of the dominant powers.²⁵² More importantly, however, he implies that international law itself bears a colonial imprint. Its development in fact, cannot be separated from the colonial encounter:

[T]he consistency of the system required that the freedom of action allotted by international law to a "civilized state" should be matched by the same freedom for any other civilized state. This accepted international law was thus obliged to assume the essential function of reconciling the freedom of every state belonging to the family of "civilized nations" with the freedom of all the other states in the same family.²⁵³

Thus, rather than seeing notions of sovereignty as deriving from an overarching philosophical system, Bedjaoui insists in seeing their development as an outgrowth of specific political and historical realities. In the historical matrix of a norm, one finds an essential element of its meaning.

Not surprisingly, Bedjaoui also emphasizes the need to understand Third World approaches themselves in historical context. He is concerned about the tendency to interpret the "interdependence" of the international community as requiring Third World States to give up a sovereignty they never really had an opportunity to enjoy:

Clarifying these concepts and determining their present and future role seems all the more necessary because they are readily being used as weapons to fight the idea of national sovereignty as it is being claimed by the Third World,

²⁵¹ Bedjaoui, *supra* note 10, at 50.

²⁵² "A brief historical overview shows that custom was formerly the essential source of international law, which was devised having regard to the requirements of the European nations. By nature it has always been antidemocratic. It was created in accordance with the needs of the powerful nations, and the others submitted to it." *Id.* at 135. This is a well-known Third World position on customary law, which underlies the preference for treaties as a law-making source.

²⁵³ *Id.* at 49-50.

particularly in respect of lasting sovereignty over the national wealth and resources of each State. For example, an attempt is being made to set "international cooperation" in opposition to "sovereignty" until they become irreconcilable, by offering the Third World a drastic choice between sovereignty which excludes it from the benefits of co-operation and co-operation which is conceived of as an alienation of its sovereignty, and by denying the opportunities for fruitful reconciliation which this opposition between the two concepts conceals.²⁵⁴

Bedjaoui appears to be pointing to the need to understand the Third World concern with notions such as sovereignty over resources as being historically based and formulated; subject to reinterpretation, no doubt, but still grounded in a particular historical reality.

One can read in Bedjaoui the implicit assertion that a historical perspective on law is in itself an alternative to the mainstream approach, a rejection of a mainstream "defence mechanism":

We are now witnessing the challenge from the Third World to a small "syndicate of states" which for several hundred years has projected "its" dominating law onto the international scene, imposing it as "the" international law governing the whole world. The increasing questioning of this law, through the mere calling for a new economic order different from the one on which the law still rests, inevitably called into play various kinds of defence mechanisms, *the strangest of which is the claim that the law is immutable. A new religion--law for law's sake--was born.*²⁵⁵ (emphasis added)

Thus, to argue that law is not immutable--that it can, does and must change in response to changing circumstances--is a first step towards understanding how those changes serve the interests of some States rather than others. As such, it is a prerequisite to making the system more responsive to the needs of States who have hitherto been excluded.

The second form of historical argument, the invocation of history *per se*, is less obvious, yet perhaps even more important. History is omnipresent, constantly invoked in order to explain perceptions or bolster

²⁵⁴ *Id.* at 245.

²⁵⁵ *Id.* at 98.

claims.²⁵⁶ It is a history that looks back to a past that has yet to be forgotten and forward to a future as yet unimagined. One might go so far as to say that understanding Third World approaches to international law requires coming to terms with history, both with the historical hindsight that is "the enabling condition for oppositional theory,"²⁵⁷ and with the crucial role that hope for the future plays.

In looking back to the past, there is no doubt that the colonial encounter appears as a dominant theme. Paraphrasing Ortega y Gasset, one might say that the Third World does not have a nature; it has a history.²⁵⁸ This is not to say that the colonial encounter "defines" a nation or people,²⁵⁹ but that the encounter does define its "Third Worldness". This goes to the heart of the tension between how the Third World is portrayed in the mainstream--usually as weak and dependent²⁶⁰-- and how it portrays itself: as disadvantaged, rather than inherently weak or inferior, and as vulnerable, due to that relative disadvantage that results at least in part from historical circumstances and inequities. An equally important theme, however, is the extent to which the colonial encounter also constituted the First World. There is an insistence in all of these writers on seeing how the Third World,

²⁵⁶ Albert Memmi asserted that "the most serious blow suffered by the colonized is being removed from history." ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 91 (New York: Orion Press, 1965). A great deal of energy in anticolonial and postcolonial scholarship has been dedicated to reclaiming a place in history. In the legal sphere, such an approach might be said to characterize the work of scholars such as T.O. Elias and Anand, both of whom have asserted the existence of a precolonial set of norms which might be said approximate international law's notions of sovereign equality. See TASLIM OLAWALE ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* 3-15 (Richard Akinjide ed. and rev., 2nd rev. ed., 1988), in which he discusses relations between African empires and kingdoms, concluding that "there is some evidence of the high degree of the knowledge and the practice of diplomatic law as then known in Europe and Asia" *Id.* at 15. See also the evaluation of the existence of international legal relations between non-Europeans during the pre-colonial period in Anand, *supra* note 244, at 2-4. In recent years, there has been heightened awareness of the way in which attempts to "recover history" may involve the imposition of Eurocentric patterns. Thus, for example, the "Subaltern Studies" group in India has engaged in an ongoing questioning of the ways in which historiography of the early nationalist period, which attempted to plot the "history of the nation" involved an elite perspective and excluded the role of subordinated groups within society. See Gyan Prakash, *Subaltern Studies as Postcolonial Criticism*, *AMERICAN HISTORICAL REVIEW* 1475 (1994). Some commentators have gone so far as to argue that any attempt to "write history" is inescapably Eurocentric; see, e.g., Dipesh Chakrabarty, *Postcoloniality and the Artifice of History: Who Speaks for 'Indian' Pasts?* 37 *REPRESENTATIONS* 1 (1992).

²⁵⁷ ALI BEHDAD, *BELATED TRAVELERS* 3 (1994).

²⁵⁸ Ortega y Gasset remarked, "Man, in a word, has no nature; what he has is -- history." ORTEGA Y GASSET, *HISTORY AS A SYSTEM: AND OTHER ESSAYS TOWARD A PHILOSOPHY OF HISTORY* 217 (1961).

²⁵⁹ Aijaz Ahmad has criticized post-colonial criticism for a tendency to view the colonial encounter in this fashion: "[I]n periodising our history in the triadic terms of precolonial, colonial and postcolonial, the conceptual apparatus of 'postcolonial criticism' privileges as primary the role of colonialism in that history, so that all that came before colonialism becomes its own prehistory and whatever comes after can only be lived as infinite aftermath." Ahmad, *supra* note 32, at 7.

²⁶⁰ As Mittelman and Pasha note, "For a very long time the 'Third World' has appeared to Western observers as a bundle of problems, with violence and suffering being fixed signs of its naturalized state." Mittelman & Pasha, *supra* note 22, at 251.

its resources and peoples, were harnessed in the drive to create the modern Western industrialized state--and thus played an essential role in the achievement of Western privilege. This is a move from seeing the Third World as essentially marginal within the international system to seeing it as an integral part of that system.²⁶¹

This shift is accompanied by a certain tension in the portrayal of the unfolding of history that these Third World scholars invoke. At least two different versions or visions emerge. At times "History" is the "universal" (or at least global) unfolding of a narrative that supersedes and joins together diverse peoples and nations. In a purely legal sense, the narrative becomes one of an essential continuity between traditional international law and the "new" States who, through the operation of the doctrines of self-determination of peoples and of decolonization, are now ready to take their places as full participants in the international system. The doctrine of sovereignty is portrayed as undergoing a logical and inevitable evolution that culminates in the postcolonial era, such that colonialism itself can be regarded as a temporary disruption of normal relations between sovereign equals.²⁶² The future, from this perspective, is to bring the full realization of the Enlightenment narrative in an international realm of sovereign equals engaged in cooperation towards common ends. "True" equality becomes the future ideal. At other times, however, a different and subversive history is inscribed in the margins of the Western metanarrative.²⁶³ At such times, an overarching narrative of "History" appears to be utilized and justified only to the extent that it provides space for innumerable other "histories" that

²⁶¹ Such a move is consistent with a recurring theme in postcolonial studies, which insists on highlighting the extent to which core and periphery constitute each other. In *CULTURE AND IMPERIALISM*, for example, Edward Said makes this clear--and spells out the challenge it entails:

If these ideas of counterpoint, intertwining, and integration have anything more to them than a blandly uplifting suggestion of catholicity of vision, it is that they reaffirm the historical experience of imperialism as a matter first of interdependent histories, overlapping domains, second of something requiring intellectual and political choices. If, for example, French and Algerian or Vietnamese history, Caribbean or African or Indian and British history are studied separately rather than together, then the experience of domination and being dominated remain artificially, and falsely, separated. And to consider imperial domination and resistance to it as a dual process evolving towards decolonization, then independence, is largely to align oneself with the process, and to interpret both sides of the contest not only hermeneutically but also politically.

Said, *supra* note 1. See also Antony Anghie, "The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case, 34 HARV. INT'L L.J. 445, 505 (1993), in which Anghie mentions the possibility of discussing the relationships between the United Kingdom and Australia, and Nauru and Australia, in terms of "overlapping, reinforcing and interpenetrating relationships."

²⁶² In sharp contrast, see Anghie's comments regarding the continuity of colonialist assumptions into the post-colonial era; Anghie, *supra* note 261, at 447-49.

²⁶³ Homi Bhabha has remarked, "The struggle against colonial oppression not only changes the direction of Western history, but challenges its historicist idea of time as a progressive, ordered whole." HOMI BHABHA, *THE LOCATION OF CULTURE* 41 (1994).

have hitherto been excluded.

C. Generally

The telling has not been easy. One has to convey in a language that is not one's own the spirit that is one's own. One has to convey the various shades and omissions of a certain thought movement that looks maltreated in an alien language. I use the word 'alien', yet English is not really an alien language to us... We are all instinctively bilingual, many of us writing in our own language and English. We cannot write like the English. We should not. We cannot write only as Indians.

Raja Rao²⁶⁴

The three themes identified above can be seen as representing key characteristics of a Third World approach to international law that maintains a substantial degree of coherence and continuity over time and subject matter. Why, then, has there been the tendency to deny the existence of such an approach? It is worth returning here to the thoughtful critiques of Falk and Chimni. It will be recalled that Falk's major criticism was the lack of "distinctive modes of thought and analysis"; Chimni pointed to the failure on the part of Third World scholars "to propose and articulate an alternative approach which is inclusive and internally consistent." Let us consider each of these in turn.

On the surface, the themes identified above constitute little more than variations on standard Western themes, and their deployment by Third World writers is fully consistent with that of mainstream scholars. As noted previously, for example, the concern with justice and equity ties in with a long-standing natural law tradition; the emphasis on interconnectedness and contextualization is a commonplace, the preoccupation with history hardly less so. What then, makes this distinctive?

What may be required is to look beyond surface similarities of language and themes to see how these are specifically deployed within Third World discourse. If one draws an analogy between legal language and language more generally, postcolonial theory offers valuable insights, as the epigraph above illustrates. Some theorists have noted that in many instances, the only language available to the colonized is that of the colonizers, posing a dilemma: "The crucial function of language as a medium of power demands that post-colonial writing define itself by seizing

²⁶⁴ Raja Rao, *forward* to KANTHAPURA, quoted in BILL ASHCROFT ET AL., *THE EMPIRE WRITES BACK, THEORY AND PRACTICE IN POST-COLONIAL LITERATURES* 61 (1989).

the language of the centre and re-placing it in a discourse fully adapted to the colonized place."²⁶⁵ Two distinct processes have been identified: first, "abrogation," which "involves a rejection of the metropolitan power over the means of communication," and second, "appropriation and reconstitution," which is "the process of capturing and remoulding the language to new usages."²⁶⁶

Applying such an analysis to the Third World writers considered here, a process of "abrogation" could be said to be involved in the initial focus on identifying and rejecting the Eurocentricity and bias inherent in the traditional understanding of the international legal system.²⁶⁷ This might also be reflected in the early emphasis on creating zones of autonomy for Third World States into which international law would not intrude, and denying the applicability of traditional doctrines such as those relating to the formation of customary norms.²⁶⁸ A process of "appropriation and reconstitution," on the other hand, might be reflected in the attempt to view the international system as capable of serving an alternative vision, through the NIEO initiative, the right to development, and other mechanisms.²⁶⁹

If the Third World writers have such an alternative vision, however, does it amount to "an alternative approach which is inclusive and internally consistent"? Again, at first glance, arguably not. The processes of abrogation, appropriation and reconstitution are not neat and simple; constant tensions are at work. First and foremost, there is the ambivalence which the writers share. All of them implicitly, if not openly, identify their

²⁶⁵ *Id.* at 38. See also Spivak, *supra* note 24, at 280-81; Said, *supra* note 1, at 243-45. Of course, some postcolonial writers chose to reject English as a medium of communication; perhaps the best known proponent of this approach is Ngugi wa Thiong'o. See NGUGI WA THIONG'O, *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* (1986). See also Memmi's comments in this regard, *supra* note 256, at 104-111.

²⁶⁶ Ashcroft et al., *supra* note 264, at 38. Such an analysis is particularly useful in identifying the ways in which language can "bear the burden" of articulating a wide range of experiences, even if surface similarities are striking. See the discussion *id.* at 39.

²⁶⁷ This would correspond to what Chimni acknowledges to be the frequently successful Third World challenges to "Western perceptions of the history and content of international law" and their assertion of the "inequitable nature of the body of rules bequeathed from the past." Chimni, *supra* note 4, at 19.

²⁶⁸ It might also be said to be reflected in what is frequently seen as the statist orientation of Third World approaches. The explanation for the statist orientation of many postcolonial Third World States is, of course, far more complex than can be adequately dealt with here. This tendency stems in part from the historical conditions in which these States struggled to establish themselves, with the paradoxical result that they became "at once a reflection of and a reaction against" their colonial predecessors. W.H. Morris-Jones, *Shaping the Post-Imperial State: Nehru's Letters to Chief Ministers, in IMPERIALISM, THE STATE, AND THE THIRD WORLD* 220, 220 (Michael Twaddle, ed. 1992).

²⁶⁹ In the context of a discussion of a philosopher-commentator's "appropriation" of a philosophical text, Eliot Deutsch notes, "Appropriation is a creative retaining and shaping of a content that is made one's own. It is not a passive receptivity, but a dynamic engagement: what is appropriated gets changed in the act of changing the bearer of it." Eliot Deutsch, *Knowledge and the Tradition Text in Indian Philosophy, in INTERPRETING ACROSS BOUNDARIES/NEW ESSAYS IN COMPARATIVE PHILOSOPHY* 165, 172 (Gerald James Larson & Eliot Deutsch eds. 1988).

work as part of an ongoing struggle against a system which in many aspects reproduces a colonialist history that they repudiate, thus placing themselves within a tradition of resistance. However, all appear to be conscious of being part of another tradition, that of international law itself, a tradition not wholly unworthy of reclamation. All have attempted, with varying degrees of success, to render their arguments intelligible to their disciplinary colleagues--stretching the boundaries, but attempting to avoid stepping wholly outside them. Their interventions in the discourse are marked by this ambivalence,²⁷⁰ by what might almost be regarded as divided and displaced loyalties. One sees this in the attempts to maintain a standpoint that is external both to the Third World and to the international legal tradition, that occupies a shifting middle ground. In describing the Third World, for example, Anand uses terms such as Fanon's famous "wretched of the earth," the "disinherited majority" of the world";²⁷¹ always in quotation marks, as if seeking to distance himself from the rhetorical excess, despite feeling the need to invoke it.

This ambivalence about their relationship to the legal tradition is mirrored by an ambivalence regarding the possibility of using law to bring about fundamental change.²⁷² Third World writers are frequently characterized as having tremendous faith in the ability of law in general, and international law in particular, to institute social justice. Yet these writers are well aware of the ways in which law has been made to serve the interests of the powerful, and there is something quixotic in their attempts to transform what is perceived as an essentially oppressive discourse into a liberatory one.

Ambivalence is not the only factor in the apparent failure to articulate an alternative approach. There is something else at work here that deserves mention. These authors appear to operate on the basis of the

²⁷⁰ This, again, is consistent with what has been theorized about post-colonial writing more generally. For example, Ashcroft et al. point out:

[I]n one sense all post-colonial literatures are cross-cultural because they negotiate a gap between 'worlds', a gap in which the simultaneous processes of abrogation and appropriation continually strive to define and determine their practice. This literature is therefore always written out of the tension between the abrogation of the received English which speaks from the centre, and the act of appropriation which brings it under the influence of a vernacular tongue, the complex of social habits which characterize the local language...

Ashcroft et al., *supra* note 264, at 39. *But see* Ngugi wa Thiong'o, *supra* note 265, at 28. "Colonial alienation takes two interlinked forms: an active (or passive) distancing of oneself from the reality around; and an active (or passive) identification with that which is most external to one's environment. It starts with a deliberate disassociation of the language of conceptualisation, of thinking, of formal education, of mental development, from the language of daily interaction in the home and in the community." *Id.*

²⁷¹ *Id.* at 10.

²⁷² Bedjaoui demonstrates this tension most clearly. On the one hand, he asserts that law does not make reality but reflects reality. On the other hand, much of his book is based on the assumption that one can use law to *change* reality. *See* Bedjaoui, *supra* note 10, at 108-110.

possibility of transforming international society, and indeed might otherwise have found their work difficult to justify. In the end, however, they reject the idea of an alternative model that will simply be set up in place of the existing system. Their focus is on process, on creating structures and a normative foundation for bringing about a just international order. Thus, Bedjaoui poses the contrast between international law as "*status quo* law," on the one hand, but does not pose an alternative Third World model on the other. Instead, he speaks of a "general strategy for participation' by all states, including the new ones, in the gradual elaboration of a new law, incorporating the concerns and interests of all parties."²⁷³

D. Advantages

Any attempt to posit the existence of a Third World approach to international law doubtless involves a number of pitfalls. Perhaps the most significant has already been mentioned, that is the possibility of losing sight of differences between and within the tremendously diverse entities that fall under the "Third World" rubric. There is also the danger of losing sight of the unique characteristics of Third World approaches to particular issues. While I have attempted to sketch out an overarching approach, it is important to acknowledge the very different ways in which dominance and resistance have operated in each of the sectors -- economic, human rights, and environmental -- dealt with herein, as well as in the myriad other sectors in which Third World scholars, activists and governmental officials have worked.

I would argue, however, that the dangers are outweighed by the potential benefits of grappling with a distinctive Third World approach and the challenge that it poses to the mainstream conceptualization of international law. At a practical level, there is the potential to combat the tendency that Richard Falk identified a few years ago as being noteworthy of the immediate post-Cold War period, namely, the "strong and conscious disposition to appropriate international law as a hegemonic instrument of the North, especially the United States."²⁷⁴ Given this tendency, which if anything appears to be growing stronger, a respectful consideration of alternative approaches--indeed, the willingness to consider that such alternatives exist--is vital. In terms of legal doctrine itself, the Third World approach expands the debate about particular legal issues or areas by forcing a confrontation with the full panoply of historical, political, economic and cultural debates which surround them, and thus offers an enriched understanding of the discipline as a whole. Finally, the theoretical benefits

²⁷³ *Id.* at 134.

²⁷⁴ Falk, *supra* note 4, at 11.

are particularly notable. Whether or not one agrees with the ends sought, or regards the undertaking as successful, the reweaving of international law that is reflected in the Third World approach to international law, with its appropriation and redefinition of traditional legal concepts, is certainly worthy of consideration by anyone interested in exploring alternatives to the status quo.

It should also be recognized that merely accepting the possibility that there may be a distinctive Third World approach entails fundamental challenges. For Northern scholars, it requires a scrutiny of their own assumptions, of the way in which their reading of the discipline obscures or illumines the South-North dimension. Such a cautionary approach is rendered all the more urgent when one considers that even recent international legal scholarship that questions disciplinary boundaries and the distinction between law and politics, and that problematizes the ahistoricism of much of international law, nevertheless has a disconcerting tendency to overlook or even trivialize Third World concerns.²⁷⁵

²⁷⁵ For example, we see passing reference to Third World approaches in such important works of international legal theory as MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989) and HILARY CHARLESWORTH ET AL., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). The reference in Koskenniemi comes at the conclusion of his chapter on sovereignty:

In this Chapter I have attempted to explain what is involved in the truistic claim that international law is a Western heritage. I have argued that the international legal argument is constructed upon pluralistic and individualistic ideas which I associated with the liberal doctrine of politics. The idea of social conflict as a conflict between individual (sovereign) rights is a conceptual matrix relative to the historically specific intellectual climate of Europe from the seventeenth century onwards. It is a paradox that many writers or statesmen who most deplore the Western intellectual heritage are most anxious to universalize it under a rigid international system of sovereign equality. They simultaneously undermine the intellectual principles of their own cultures. For an international law of sovereign equality is a law of religious and ideological pluralism, moral skepticism, economic instrumentalism and legal objectivism. These values are fundamentally alien to the values professed by many writers and statesmen. For better or for worse, reliance upon the classical law of sovereign equality entails accepting the liberal doctrine of politics. *And accepting that doctrine will either mean that one's professed national values should not be taken too seriously or that one's use of the common legal language is based on error or something less than good faith.*

See Koskenniemi, *supra*, at 129-30 (emphasis added). Koskenniemi, of course, is not explicitly addressing any alternative Third World approach to international law; the reference to "writers and statesmen," in fact, is couched in carefully neutral terms. Nevertheless, the message which comes across (at least to this reader) is that the Third World preoccupation with sovereignty reflects either a form of intellectual colonization, or a self-interested ploy. The possibility that a concern about sovereign equality on the part of Third World countries or writers might in fact reflect an alternative conception of sovereignty that is the product of an entirely different "historically specific intellectual climate," and ought to be dealt with as such, appears to be overlooked.

Charlesworth et al. illustrate a somewhat different approach. They acknowledge the existence of a Third World challenge to the dominant conceptualization of international law, and go so far as to characterize it as "fundamental". Charlesworth et al., *supra*, at 618. In fact, they draw a linkage between the exclusion and marginalization of women in the international legal sphere and the treatment of developing countries, and even raise the question of whether "women's voices and values [are] already

Even more fundamental, however, is the challenge posed to those of us who, in one way or another, locate ourselves within the stream of Third World approaches. It is a challenge to remember our roots, to choose whether or not to take a place within what might be said to be a Third World tradition. It involves a realization that to question the hegemonic discourse of international law is to take a place in a long line of those who have, in a variety of ways and not always successfully, challenged the marginalization of their nations and peoples.²⁷⁶ I do not propose an unquestioning and unswerving fealty to that tradition. There is no doubt that previous generations of Third World scholars had their weaknesses and failures, and that these need to be analyzed and understood. An attention to history, after all, will require that we turn our attention to the historical context in which Third World approaches themselves were envisaged and articulated, with all the limitations that entails.²⁷⁷ Participation in and commitment to any

present in international law through the medium of the Third World." *Id.* at 616. However, that linkage is quickly discarded—without having dealt spent more than a few lines discussing the Third World "alternative"—and the focus shifts to a critique of the lack of concern for feminist perspectives on the part of developing nations. Arguably, this amounts to little more than paying lip service to Third World approaches.

I should note that these references to the Third World are minor aspects of both these works. However, the very fact that these kinds of quick dismissal are perceived as acceptable is indicative of a broader problem. I should also note that I find the work these scholars are doing quite fascinating and a rich source not only of critique but of transformative potential within the international sphere, and I mention these qualms not in order to point fingers, but in order to illustrate how pervasive the marginalization of Third World approaches really is.

²⁷⁶ The type of approach required is captured in the Vision Statement of the recently-formed Third World Association of International Law:

We are a network of scholars engaged in international legal studies, and particularly interested in the challenges and opportunities facing 'third world' peoples in the new world order. We understand the historical scope and agenda of the dominant voice of international law scholarship as having participated in, and legitimated global processes of marginalization and domination that impact on the lives and struggles of third world peoples.

Members of this network may not agree on the content, direction and strategies of third world approaches to international law. Our network, however, is grounded in the united recognition that we need democratization of international legal scholarship in at least two senses: (i) first, we need to context international law's privileging of European and North American voices by providing institutional and imaginative opportunities for participation from the third world; and (ii) second, we need to formulate a substantive critique of the politics and scholarship of mainstream international law to the extent that it has helped reproduce structures that marginalize and dominate third world peoples.

Thus we are crucially interested in formulating and disseminating critical approaches to the relationships of power that constitute, and are constituted by, the current world order. In addition, we appreciate the need to understand and engage previous and prevailing trends in third world scholarship in international law.

To realize this vision, this network commits itself to the promotion of constructive dialogue among international scholars from diverse regions of the third world.

²⁷⁷ See Henry Louis Gates Jr. on the need to read Frantz Fanon "with an acknowledgment of his own historical particularity, as an actor whose own search for self-transcendence scarcely exempts him from the heterogenous and conflictual structures that we have taken to be characteristic of colonial

tradition requires something less than blind faith, but far more than dispassionate and disconnected critique.²⁷⁸

V. POSTSCRIPT: RHETORIC REVISITED, RAGE RECLAIMED

Third World discourse is frequently labeled "rhetoric," as in exaggerated, pompous, intended to appeal to the emotions rather than the intellect. And rage has been a constant companion for those who were engaged in attempting to challenge a system that they saw as complicit in the ongoing marginalization and oppression of their countries and peoples, a system over which they felt they had no control and in which they did not even have a voice. Rhetoric and rage: the Third World has expressed its rage at its reality, and has done so in terms that are labeled rhetorical.

When I first embarked on this project, I felt that I had to overcome both: the silencing that can come when our views are marginalized and our rage chokes us. I sought to prove that Third World approaches to international law were not in fact rhetorical--that they were characterized as such in order to defuse the threat they posed to the hegemony of international law.

It may be, however, that "rhetoric" is an inescapable aspect of our work, perhaps its defining characteristic. Rhetoric challenges the determinacy of law; opens the mind to possibilities; widens the focus beyond a narrow consideration of technical and legalistic issues. Rhetoric creates space to articulate alternatives.²⁷⁹ This paper itself is a rhetorical intervention. It seeks not necessarily to prove the existence of a distinctive Third World approach, so much as to question (and perhaps even destabilize) the prevailing view that no such approach exists. It does not seek to impose a mold on the plurality of Third World voices in international fora or international legal scholarship. Rather, it argues that identifying the commonalities between these voices has both theoretical and practical advantages at this particular historical juncture.

Attempting to get beyond rage has its own dangers. It may be that the only way to control the rage is to lose sight of the reality, a reality that

discourse." HENRY LOUIS GATES, JR., *Critical Fanonism*, 17 *CRITICAL INQUIRY* 457, 470 (1991).

²⁷⁸ According to Wilson Harris, "[I]f tradition were dogma it would be entirely dormant and passive but since it is inherently active at all times, whether secretly or openly, it participates the ground of living necessity by questioning and evaluating all assumptions of character and conceptions of place and destiny." WILSON HARRIS, *TRADITION, THE WRITER AND SOCIETY* 46 (1967).

²⁷⁹ Rhetoric in the classical sense, of course, focuses on its persuasive function, but the interpretive function of rhetoric has recently been the focus of considerable attention. See, e.g., *RHETORICAL HERMENEUTICS* (Alan G. Gross & William M. Keith eds. 1997); *RHETORIC IN THE HUMAN SCIENCES* (Herbert W. Simons ed. 1989). For discussions of the interface between rhetoric and the law, see, for example, *Symposium: Law and Rhetoric in Public Discourse*, XVII *LEGAL STUDIES FORUM* 347-435 (1994).

demands a response. For the basic reality of the international system remains, the reality that Bedjaoui, M'Baye and Anand, among countless others, cried out against: that 20 percent of the world's population consumes 80 percent of its resources; that approximately one-fifth of the world's population lives in conditions of absolute poverty, defined as the state of lacking the bare essentials of human existence -- food, shelter, clothing, basic medical services. This is the reality that informs Third World approaches to international law, that forms the foundation of the challenge that it poses.

Perhaps part of the difficulty lies in attempting to describe that reality in conventional legal language. It lies so far beyond the realm of the comprehensible that people in the West can only catch glimpses of it on their television screens, fleeting images during the evening news. How do we translate such a reality? It may be that our only recourse is to rhetoric, and to the imagination. Much has been written on this, but I go back to my own tradition to find the words. In his Nobel Prize acceptance speech Gabriel García Márquez referred to the reality of Latin America:

A reality not of paper, but one that lives within us and determines each instant of our countless daily deaths, and that nourishes a source of insatiable creativity full of sorrow and beauty, of which this roving and nostalgic Colombian is but one cipher more, singled out by fortune. Poets and beggars, musicians and prophets, warriors and scoundrels, all the creatures of that unbridled reality have had to ask a little of our imagination, for our crucial problem has been a lack of conventional means to render our lives believable. This, my friends, is the crux of our solitude.²⁸⁰

García Márquez acknowledges that if those that are part of this reality face such difficulties, it may not be difficult to understand that "the rational talents of this side of the world...should have found themselves without a

²⁸⁰ *The Solitude of Latin America*, translation of Nobel Lecture by Marina Castaneda, in GABRIEL GARCÍA MÁRQUEZ AND THE POWERS OF FICTION 87, 89 (Julio Ortega ed. 1988). I have modified Castaneda's translation in order to more accurately reflect the original Spanish:

Una realidad que no es la del papel, sino que vive con nosotros y determina cada instante de nuestras incontables muertes cotidianas, y que sustenta un manantial de creación insaciable, pleno de desdicha y de belleza, del cual este colombiano errante y nostálgico no es más que una cifra más señalada por la suerte. Poetas y mendigos, músicos y profetas, guerreros y malandrines, todas las criaturas de aquella realidad desaforada hemos tenido que pedirle un poco a la imaginación, porque el desafío mayor para nosotros ha sido la insuficiencia de los recursos convencionales para hacer creíble nuestra vida. Este es, amigos, el nudo de nuestra soledad.

valid means to interpret us. It is only natural that they insist on measuring us with the yardstick that they use for themselves..."²⁸¹ Understandable, and natural, but fundamentally damaging: "The interpretation of our reality through patterns not our own serves only to make us ever more unknown, ever less free, ever more solitary."²⁸²

What does a voice call upon us to do? To listen, but not only to listen. It would help, García Márquez acknowledges, if Europeans "reconsidered their way of seeing us." But, he continues, "Solidarity with our dreams will not make us feel less alone, as long as it is not translated into concrete acts of legitimate support for all the peoples that assume the illusion of having a life of their own in the distribution of the world."²⁸³

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 90.