9

COUNTER-HEGEMONIC INTERNATIONAL LAW: RETHINKING HUMAN RIGHTS AND DEVELOPMENT AS A THIRD WORLD STRATEGY

Balakrishnan Rajagopal*

I. Introduction

It is a challenging time for Third World international lawyers and others who believe that international law is a core component of world order based on global justice. To start with, traditional Third World coalitions of States – such as the Non-Aligned Movement (NAM), the G-77 and other groupings – have lost almost all relevance as geopolitical groupings, despite their formal presence in certain global settings such as World Trade Organization (WTO) meetings. During the heyday of multilateralism at the UN during the 1970s, these States actively relied on international law to promote their interests and correct the imperial biases that they saw in the 'old' international law. Indeed, the very meaning of the term 'Third World' has now been destabilized. Vast differences in levels of economic and political power between Third World States have exacerbated collective action problems and created new coalitions. In addition, the term 'Third World' includes not just States defined by political economy, geography, historical experience or general 'backwardness', but also non-state actors of various kinds including social movements.[1] The Third World has burst out of the seams of the Westphalian structure, if ever it was wholly within it. The politics of 'international' law-making and implementation has shifted dramatically to become a contentious terrain of cultural politics where the State is but one

---

* B.L. University of Madras; LL.M., Washington College of Law, The American University; S.J.D., Harvard Law School. Ford Associate Professor of Law and Development and Director, Program on Human Rights and Justice, MIT, Cambridge. Most recently, he is the author of *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003; Spanish 2005; Foundation Press South Asia, 2005). This chapter was previously published as 'Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy', in *Third World Quarterly*, Issue 5, 2006.

1 Balakrishnan Rajagopal, "Locating the Third World in Cultural Geography", *Third World Legal Studies,* 1998-99, pp. 1-20.

actor. This is so, despite what appears to be a return to State-centrism after 9/11. The nature of this complex 'Third World' engagement with international law – of resistance, allure, exploitation and cooptation – has significantly affected the content and structure of modern international law and raises profound challenges of history, theory and method for the whole discipline of international law.[2]

To make it worse, fundamental challenges to international law have been raised by the triple challenges of globalization, global fundamentalist networks and the strategic position of the US towards global norms and institutions, especially through its 'war on terror'.[3] Combined together, these new developments raise the specter of the return to even an 'imperial' international law[4] which legitimates the exercise of raw power by the US. Indeed, the traditional 'levelers' of power in international relations, such as international institutions, may themselves now be unavailable for safeguarding the interests of the Third World due to their evolution as tools of imperial governance.[5] The central challenge faced by international law is whether the current trends will end up formalizing and reinforcing a 'hegemonic' international law[6], or whether there is still some potential for making international law into a counter-hegemonic tool.[7] In this essay, I shall argue that it is indeed possible to imagine, at the very least, a co-existence of counter-hegemonic international law alongside hegemonic international law, but that this requires a serious reconsideration of past tactics and even goals. In particular, I believe that the Third World's reliance on the traditional sources of cosmopolitan discourses in international law, such as human rights or development, needs to be seriously rethought. In the past, these fields of the 'new' international law (i.e., post World War II),

---

2 This paragraph summarizes some of the main themes elaborated in greater length in my book, Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003).

3 Richard Falk, "International Law and the Future", *Third World Quarterly*, Issue 5, 2006.

4 Antony Anghie, "The Evolution of International Law: Colonial and Post-Colonial Realities", *Third World Quarterly*, Issue 5, 2006.

5 B.S. Chimni, "International Institutions Today: An Imperial Global State in the Making", *European Journal of International Law,* Vol. 15, no. 1, 2004.

6 Detlev Vagts, "Hegemonic International Law", 95 *American Journal of International Law*, October 2001, pp. 843-848; Jose Alvarez, "Hegemonic International Law Revisited", *American Journal of International Law*, vol. 97, October 2003, pp. 873-888.

7 I use the terms hegemony and counter-hegemony in a Gramscian sense, and not in the sense of raw domination through power alone which is countered by power. For an explanation, see Rajagopal, note 2, chapter 1.

provided the principal means for the use of international law by the Third World in the cause of global justice. The discourse of human rights provided a powerful weapon in the arsenal of the Third World against colonialism, the fight against apartheid in South Africa, the struggle of the Palestinian people and numerous self-determination movements. It now continues to provide a limited shield in the hands of social movements, NGOs and victims, especially against the abuses and violence associated with globalization, and the war on terror. But, the human rights discourse has also turned out to be a core part of hegemonic international law, reinforcing pre-existing imperial tendencies in world politics. In this new hegemonic version, human rights could be said to be continuing some dark strands of its own imperial history. The Third World, in all its complexity, needs to internalize the uncomfortable fact that the human rights discourse is part of the problem of global hegemony and the absence of global justice. However, as I shall argue, this should not lead to the dismissal of human rights, but rather to a search for the radical democratic potential in human rights that can be appreciated only by paying attention to the pluriverse of human rights, enacted in many counter-hegemonic cognitive frames. In this new approach, official and sanctioned human rights discourse becomes one of many languages of resistance, enacting a cultural politics at many scalar levels.

Similarly, the discourse of development, which has provided the political basis for Third World engagements with international law, needs to be seriously rethought. Development and the Third World were invented together in the post World War II period. Development discourse provided not only the ideological foundation for post-colonial States, it provided the politics for a wave of international legal reform in areas ranging from law of the sea, trade law and humanitarian law. The older Third World strategy consisted of a reliance on the idea of development to argue for changes in the world political economy and international law.[8] But globalization, and the replacement of modernization with democratization, has led to the impossible ballooning of the development idea on the one hand and to its retreat, crisis and partial collapse on the other. The content of development has now expanded to include every goal that is seen as desirable for the Third World, from poverty alleviation, democratization, rule of law, human rights,

---

8 An example would be Mohammed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979). For an analysis of Third World attitudes towards economic governance, see James Gathii, "Third World Approaches to International Economic Governance", *Third World Quarterly*, Issue 5, 2006.

environmental sustainability to anti-corruption, with the result that the idea has come to assume a hegemonic function. This is so because the very indeterminacy and capaciousness of the term development invites its deployment for myriad purposes. Instead of abandoning the idea of development however, I argue that its radical democratic possibilities, revealed most acutely by the post-development critics, could provide a new global politics that leads to a reformulation of existing international law along cosmopolitan lines.[9] Even if this reformulation is fragmentary and ad-hoc, it is probably all that is possible at this current moment in world history.

II. Human Rights

The idea that human rights can be hegemonic can strike its core believers as nothing less than sacrilege. The self-image of human rights discourse is that of a post-imperial discourse, unsullied by the ugly colonial politics of pre-1948 when the Universal Declaration of Human Rights (UDHR) initiated the modern human rights movement. In this self-image, the new international law of human rights effectively superseded the old international law of colonialism.[10] On the other hand, one could argue that a true historical reading of the role played by the international human rights corpus in anti-imperial struggles (a task yet to be performed thoroughly) may reveal several uncomfortable facts, such as 1) that the UDHR did not apply directly to the colonial areas and was subjected to intense maneuvering by Britain at the drafting stage to prevent its application to its colonies despite Soviet pressure[11]; 2) anti-colonial struggles were hardly ever taken up for scrutiny at the UN Commission on Human Rights before many Third World States came on board in 1967, when membership was enlarged, and even then remained tangential on the agenda formally; 3) the successful characterization by the British of anticolonial nationalist revolts in places such as Kenya and

---

9 Major works on post-development include Wolfgang Sachs (ed.) *Development Dictionary: A Guide to Knowledge as Power* (London: Zed Books, 1992); Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, N.J.: Princeton University Press, 1995); Majid Rahnema and Victoria Bawtree (eds.) (1997) *The Post-Development Reader* (London: Zed Books, 1997). For an argument that stresses the radical democratic possibilities of post-development theory, see Aram Ziai, "The Ambivalence of Post-Development: Between Reactionary Populism and Radical Democracy', *Third World Quarterly*, vol.25, no.6, 2004, pp.1045-60.

10 Louis Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States", *American University Law Review,* vol. 32, 1982, p.1.

11 Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

Malaya as 'emergencies' to be dealt with as law and order issues, and thereby avoid the application of either human rights or humanitarian law to these violent encounters[12]; 4) the main anti-imperial strand of the human rights discourse – the critique of apartheid in South Africa and Israeli policies in Palestinian territories using human rights terms by the Third World during the 1960s to 1980s - remained tangential to the mainstream HR discourse coming from the west; 5) it is certainly the case that very little of the mainstream human rights scholarship acknowledges that human rights discourse influenced or was influenced in any significant way by anti-colonial struggles after WWII though, as Ignatieff notes, the core beliefs of our time, such as the idea of human equality and self-determination, are the result of the anticolonial revolt against empire.[13]

So, if it can be said that sanctioned human rights discourse has no significant history or self-image of being anti-imperial, can we by extension also suggest that it is in fact hegemonic? Despite critiques coming from cultural relativists, at least since the 1970s, that human rights discourse is a hegemonic western discourse, the expansion of the political use of human rights discourse was also in a counter-hegemonic mode during the 1980s in a range of democratic struggles ranging from Eastern Europe to Latin America. Social movements of indigenous peoples and others relied on human rights discourse to challenge repression, displacement and violations of their rights. In addition, hegemonic humanitarian interventions by the UN or regional organizations, such as the series of interventions that occurred during the 1990s, were not common (with the possible exception of Congo in 1965). Indeed, due to the politics of the Cold War, the UN or western human rights groups did not support military interventions that were believed by many to have had humanitarian motives such as India's military action in East Pakistan in 1971, Vietnam's invasion of Cambodia in 1979 and Tanzania's overthrow of Idi Amin of Uganda in 1979. The western human rights groups maintained a strict attitude of neutrality towards the use of force, which continues to some extent even today, for example by Amnesty International and Human Rights Watch, but with a very different hegemonic result. Undoubtedly, given the imperial history of human rights and its

---

12 Rajagopal, note 2, pp. 176-182. See also Giorgio Agamben, *State of Exception* (University of Chicago Press, 2005) for an argument that emergency has become a normal mode of governance.

13 Michael Ignatieff, "The American Empire: The Burden", *New York Times Magazine*, January 5, 2003.

complicity with Western political agendas, human rights discourse was also in a hegemonic mode. But, it is not readily apparent how human rights could be seen only as hegemonic until the 1980s, as counter-hegemonic uses of human rights co-existed with hegemonic uses.

However, the end of the Cold War marked the birth of a new hegemonic role for human rights. As the US announced the Panama invasion as a pro-democratic one in 1989, the new-found mood of consensus at the UN Security Council led the UN and the human rights groups to more aggressively pursue humanitarian intervention to stop massacres or deliver food supplies in Somalia, the Balkans, Kosovo, Haiti and elsewhere, though often nothing was done, as in Rwanda. In the economic sphere, the World Bank and the IMF, as well as several bilateral agencies embraced a market-friendly conception of human rights, with which they reworked their entire mandates, abandoning their earlier hostility towards human rights discourse.[14] In this new hegemonic role for human rights, it began to be seen as the language of military intervention, economic reconstruction and social transformation – a totalizing discourse. It is in this totalizing sense that I suggest that we should approach the question of whether human rights can be hegemonic or counter-hegemonic. In other words, as we better understand the connections between the security and other domains, we can perhaps have a better sense of how human rights discourse fits into a global politics of resistance that underpins counter-hegemonic international law.

Since empire is, in its fundamentals, constituted by violence, we should begin with war. If war is a continuation of politics by other means as Clausewitz said, the wars after 9/11 against Afghanistan and Iraq must be looked at in this perspective. In other words, the spheres of security and economy are not so separate but are rather interpenetrated. For instance, the political momentum that the US gained from being the 'victim' of 9/11 clearly enabled it to push for concessions in trade negotiations in Doha and elsewhere. The US Trade Representative, Robert Zoellick wrote an article immediately after 9/11, arguing that the war against terror is a war for free trade.[15] In April 2002, (then) National Security Advisor Condoleezza Rice described September 11, 2001 as an "enormous opportunity" and said

---

14 See Upendra Baxi, "What May the Third World Expect from International Law?", *Third World Quarterly*, vol. 5 2006 for a critique of the market-friendly conception of human rights.

15 Robert Zoellick, "Countering Terror With Trade," *Washington Post*, 20 September 2001.

America "must move to take advantage of these new opportunities".[16] Whatever sympathy and legitimacy that the US had gained due to the attacks of 9/11, the US had no more moral cards left to play after the Iraq war began, in the Cancun trade negotiations and to pressurize developing countries into a deal. This, among others, led to its failure, unlike in Doha where Robert Zoellick, the USTR, Pascal Lamy, the European trade Czar and Michael Moore, the WTO Director General, relied on the 9/11 sympathy wave to resurrect the trade negotiations that had collapsed after the 1999 Seattle protests and launched new trade liberalization. Indeed, the reaction by the US to the events of 9/11 cannot simply be analyzed using the terrorism lens, but needs to take into account the political economy of the international order, wherein the ruling classes had been shaken by the rapid and massive opposition on the ground across the globe, as exemplified by the series of mass protests since 1999 in Seattle, and coinciding in 2001 with the massive anti-corporate globalization protests in Genoa, Italy, just a few weeks before the attacks of 9/11. Indeed, the Italian Prime Minister, Silvio Berlusconi, immediately compared the 9/11 attackers to the protestors in Genoa, in a telling sign of how the ruling classes perceived the links in the threads of resistance.[17]

Empire is not a geographical concept in the sense of being co-equivalent with the US and its outliers, but is a hegemonic concept, with a widely variable composition that includes globalization. Therefore, however tempting it may be to interpret the US-led war on Iraq as an instance of the consolidation of or the beginning of empire (as many including Niall Ferguson[18] and Michael Ignatieff[19] have) or its decline (as Immanuel Wallerstein[20] has), we should not fall into that trap. In fact, the term 'empire' is less helpful than the term hegemony in understanding the historical patterns of domination and the role of international law in it. This is simply because the role of law in international order is not simply a matter of the most powerful countries imposing it on the rest; it is also a matter of the rest of the world internalizing the necessity and legitimacy of domination through law. An analysis that focuses excessively on 'empire' tends to offer a simple and misleading analysis of the nature of power in international relations. It is

---

16 Quoted in John Pilger, "Lies and more lies", *Outlook* on the Web, October 1, 2003.

17 Steven Erlanger, "Italy's Premier Calls Western Civilization Superior to Islamic World", *The New York Times*, 27 September 2001.

18 Niall Ferguson, "The End of Power", *Wall Street Journal*, June 21, 2004.

19 Ignatieff, note 12.

20 Immanuel Wallerstein, *The Decline of American Power*, (W.W. Norton, 2003).

useful to understand that hegemony preceded the post 9/11 wars, and is a complex form of ordering power across territories and peoples that does not rest only on military force. And no matter how the US comes out of the mess in Iraq, hegemony will continue. Consequently, the effort to restrain the arbitrary use of force, including the emerging problem of what to do about the single hegemon in international law, does not have to rest solely on stronger norms and institutions in the security area. Rather, as economic and cultural power is so closely tied to military power, a holistic analysis is needed. In other words, Seattle and Cancun will have their impact on the security sphere as well. Therefore, it is important to appreciate the role of human rights discourse in constituting and resisting hegemony in this broad sense.

In using this explicitly Gramscian terminology of hegemony and counter-hegemony, I am arguing, as I have argued elsewhere, that forms of counter-hegemonic power may encompass all the various forms of resistance – wars of movements, passive resistance, wars of maneuver etc. In other words, it is legitimate to use international law as an explicit counter-hegemonic tool of resistance and it does get used in such a manner. For the human rights discourse, this means that it could be engaged in counter-hegemonic struggles across a range of areas from anti-war to market access for agricultural products of poor countries. In the context of the Iraq war, this translates as willingness, for instance, to take a position on the legality of the war itself if that appears likely to form an important part of the counter hegemonic struggle. None of the western human rights groups did this, and in fact, still do not take a position against the war itself. When millions of people marched across the globe on February 15, 2003 against the war, when most states around the world opposed the war, and when poll after poll in countries whose leaders had decided to support the war showed that an overwhelming majority of the people opposed it, it was a moment of counter hegemonic opportunity when international law could not escape being part of the political struggle. Yet, its capacity to meet that challenge was revealed to be woefully inadequate, partly due, I would argue, to the self-imposed limits of human rights discourse itself.

There are two components to hegemony which must be analytically distinguished so as to better organize resistance to it. The first is the moral case for hegemonic interventions, which gives it legitimacy. The second is the institutionalization of hegemony, especially through the UN Security Council and other agencies, but including other institutions such as leading

human rights groups which serves to entrench domination. On both counts, I would suggest that the human rights discourse and the leading spokespersons for human rights have shown their failure to stop the consolidation of hegemonic international law, and have been complicit in it.

A counter-hegemonic international law, one would think, starts from the human rights discourse, the pre-eminent global moral discourse of our time. Instead, human rights – or to be accurate, a broad language of 'freedom' – has become the foundation for a hegemonic international law. Quite remarkably, the arguments put forward by empire mongers[21] such as Ignatieff and Ferguson is that almost all their arguments have been produced in one form or another by liberal political thinkers in England during the heyday of classical liberalism and empire, the late 18th and 19th centuries.[22] Then, as now, thinkers such as James Mill, J.S.Mill, J. Bentham, Sir Henry Maine, Lord Thomas Macaulay, Sir James Fitzjames Stephen and others argued in various ways that the empire – especially British dominion over India – was morally and politically justified. This startling fact, that apostles of ideals such as political equality and pluralism would defend the legitimacy of a political order that rested on a negation of their very principles, is still not fully grappled with. But it is now undeniable, as Uday Mehta[23] has convincingly shown, that the liberals justified the British empire – as current liberals have done in supporting the global wars since the end of the Cold War and since 9/11. And they did so not for partisan or ideological reasons, but for universal principles of civilizational progress. The well-known remark of Marlow in Joseph Conrad's *Hear of Darkness* captures this well, while addressing the "conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than

---

21 I don't mean that hegemonic international law has been supported only by empire-mongers. Another important stream of hegemonic international law thinking has come from 'constitutional hegemonists', who are senior US officials and conservative international lawyers interested in asserting the primacy of US interests and using US power to that end. See John Bolton, "Is There Really "Law" in International Affairs?", *Transnational Law & Contemporary Problems,* vol. 10, 2000, p. 1; Symposium, American Hegemony and International Law, *Chicago Journal of International Law*, vol. 1, 2000, p. 1; Eric Posner & Jack Goldsmith, *The Limits of International Law*, (New York: Oxford University Press, 2005). For a critical review of this book, see Balakrishnan Rajagopal, Review, *Ethics & International Affairs*, vol. 19, no.3, pp.106-109, 2005.

22 For an alternative reading, that recovers less-known enlightenment thought that offered a critique of empire, see Sankar Muthu, *Enlightenment Against Empire* (Princeton, NJ: Princeton University Press, 2003).

23 Uday Mehta, *Liberalism and Empire* (University of Chicago Press, 1999).

ourselves": "What redeems it is the idea only. An idea at the back of it; not sentimental pretense, but an idea; and an unselfish belief in the idea – something you can set up, bow down before, and offer sacrifice to".[24] The liberals could believe in this idea due to the following reasons. First, they believed themselves to be superior – in knowledge, in morals, in political organization, in military might and in science. Second, because they could have such a belief in superiority, they could judge the rest of world as deficient, their life forms as provisional. Third, they could decide on a teleological direction that these deficient life forms should take in order to become universal, and that is by following the liberal model. Whether it is education, health, or establishing a police force, the liberals thought they knew what to do and that it was superior to other ways. The discourse of human rights, with the attendant discourses of good governance and development, offers techniques, goals and methods for realizing this vision.

When we look at the rhetoric of the US-led coalition towards Iraq, the parallels are striking. After trying and failing to sell the war on various grounds – that Iraq was behind the 9/11 attack, that Iraq was about to develop weapons of mass destruction (WMDs) and use them or share them with Al Qaeda, - the only ground that has remained intact and that remains the basis for the hegemonic intervention in Iraq, is the human rights one - that the world and the people of Iraq are better off because Saddam Hussein is gone. Thus it was of no surprise that the Iraq war was termed 'Operation enduring freedom' or that President Bush has talked incessantly of spreading freedom.

But it is also the key argument underlying those of human rights academics and groups, that due to the horrendous nature of the Saddam Hussein regime, intervention was justified – or at least tolerable when considering the alternative. Thus, as indicated already, Ignatieff has argued that an'empire lite' may be a good idea from a human rights standpoint. This is based, as far as I can see from his published writings, on three arguments: that the natives must be saved from themselves; that multilateral approaches to ensure human rights do not work; and that the US can be trusted because of qualities that can be defined as American exceptionalism in a Tocquevillian sense – positive qualities that spring from its deeply democratic and decentralized character that makes it unlikely to be a bad imperialist unlike other countries who cannot be similarly trusted. In several ways, the

---

[24] Joseph Conrad, *Heart of Darkness*, (New York: Penguin Books), p.74.

first argument is remarkably close to the 19th century argument about why the West needed to establish colonialism in the interest of civilization and is therefore on the wrong side of history. The second argument about the failure of multilateral solutions seems unfair when it is often because of US intransigence that the multilateral institutions were, and are paralyzed. The third argument that the US can be trusted – or at least more than other countries such as the Chinese - is also very close to the British liberal opinion in the 19th century, an immaculate conception of the self that runs through hegemonic interventions in the nonwestern world.

In retrospect, it is quite astonishing that the signs of an intensification of hegemonic international law were not taken seriously and acted on by human rights activists and proponents. Indeed, the consolidation of a hegemonic international law could be clearly seen in the changing nature of US security, economic and humanitarian policies, and the intensification of unilateral, *a la carte* approach to international law by the United States, even before the attacks of 9/11. However, the human rights groups did not prepare for this emerging reality by changing the way they normally do business, either through forming new tactical alliances with the peace movement or engaging in other high profile campaigns. Perhaps it was due to the fact that there is nothing new about the US acting contrary to international law. It could be seen in the US Senate's reservations to the League of Nations Covenant, which demanded, as Cecil Hurst, the then legal advisor to the British Foreign Office remarked, "To accept now the reservations desired by the United States Senate would inevitably give rise to the impression among the other signatories of the Treaty of Peace, and more especially among the smaller Powers, that there is to be one rule for the United States and one rule for rest of the World…".[25] The US ended up not ratifying the Covenant. The infamous Connally amendment excluded from the US' acceptance of the jurisdiction of the International Court of Justice, matters within its domestic jurisdiction, 'as determined' by the US, thus effectively gutting the substance of compulsory jurisdiction. Twenty years after the UN Charter, Dean Acheson told the American Society of International Law that no legal issue arises when the US responds to a challenge to its power, position and prestige. The record of the US war in Indo-China during the 1960s and 1970s shows an eerie similarity with the Iraq war, raising questions about the

---

[25] Memorandum by Cecil Hurst, Legal Advisor to the British Foreign Office, on the American Reservations to the Peace Treaty, 18 November 1919, DBFP Series 1, vol. V, no. 399.

ability of the international community to learn from its mistakes when the culprits are hegemonic States. Some striking similarities include: a manufactured *casus belli* (attack by North Vietnam); a broad resolution of the Congress authoring all necessary force (Gulf of Tonkin resolution); the use of excessive and disproportionate use of force; the justification of a blatantly illegal war (the bombing of Cambodia) using broad arguments about commander-in-Chief authority; the elbowing aside of the UN; and the total impunity of all of the leaders for the conduct of the war.[26] Before launching the Iraq war, the Secretary of State Colin Powell said as much at the World Economic Forum in Davos – that "when we feel strongly about something, we will lead". In other words, the idea that there is one rule for the US and one rule for the rest of the world, the pattern of hegemony, is deeply ingrained.

In the light of this record, what did the leading human rights groups do? Did they critique the moral case for hegemony and war, at the vanguard of the anti-imperial struggle worldwide? Instead, the publicly-stated position of leading western human rights groups such as Human Rights Watch – and to some extent Amnesty International - was that they had no opinion on the decision to wage war itself, but only insisted that if fought, it should be in accordance with international humanitarian norms. This position ended up offering a veneer of legitimacy to the Iraq war, to the extent that the only remaining justification for the Iraq intervention – after all others have collapsed – is the human rights one, that it was good to remove Saddam Hussein by force. The refusal to take a position on the use of force makes little sense when the same groups have not hesitated to endorse the use of force for humanitarian inventions in a number of other instances.

The failure by western human rights to subject war making to human rights scrutiny has many reasons, but a major one is the basic fault line between human rights groups and the peace movement, whose origins lie in the divisions of the Cold War when human rights groups refused to join in the condemnation of war in general, preferring to see the anti-war and peace movement as soft while they provided the hard glinting edge of liberal humanitarianism. That is no longer sustainable, in the light of the global

---

[26] See the symposium issue in the *American Journal of International Law*, vol. 65, no.1, January 1971 for a discussion of the legality of the Cambodia operation, especially the lead article by Richard Falk. The comment by Robert Bork illustrates the strong similarity between 'constitutional hegemonists' of the 1960s and now.

politics of resistance from below, which provides the politics of human rights. In this politics, resistance to war is a central component.

Current human rights discourse and practice has a choice, a fork in the road, as Kofi Annan put it with regard to the UN: it can either insinuate itself within hegemonic international law or it can serve as an important tool in developing and strengthening a counter-hegemonic international law. By ignoring the history of resistance to imperialism, by endorsing wars while opposing its consequences, and by failing to link itself with social movements of resistance to hegemony, the main protagonists of the western human rights discourse are undermining the future of human rights itself.

III. Development

Development has always been a hegemonic idea in that it has always been clear about who needs to be developed, who will do the 'developing', how and in which direction. The idea of development has a complex history but there is general agreement that the growth of that idea coincided with the independence and post-colonial nationalism of States in the Third World. It is also now understood that development means much more than economic development, though the latter is a crucial component of it. The meaning of development is well articulated by one of its foremost experts, Joseph Stiglitz, the former Chief Economist of the World Bank, while explaining the implications of the World Bank's new Comprehensive Development Framework, a new paradigm supported by the World Bank. Stiglitz sees development as a "transformative moment" which involves a "movement from traditional relations, traditional ways of thinking, traditional ways of dealing with health and education, traditional methods of production, to more 'modern' ways".[27] In this Manichean world of tradition versus modernity, Stiglitz underscores that there will always be resistance by the traditional or change into the modern. But he is confident that through participatory processes, this resistance can be overcome. This understanding of participation is from the perspective of the governing classes, who see it as

---

[27] Joseph Stiglitz, Towards a New Paradigm for Development: Strategies, Policies, Processes, 9th Raul Prebisch Lecture delivered at the Palais des Nations, Geneva, October 19, 1998, UNCTAD; Reprinted as Chapter 2 in *The Rebel Within*, Ha-Joon Chang (ed.), London: Wimbledon Publishing Company, 2001, pp. 57-93.

a technique of governance, and not as a practice of democracy or a right of citizenship as seen by the governed population.[28]

Once defined this way, development comes to include everything that is seen by the ruling classes as desirable or necessary for the catching up of the Third World with the West: economic growth, poverty alleviation, anti-corruption and transparency, environmental sustainability, and even democracy and freedom/rights. The ideology of 'catching up' is itself a complex notion: an aspiration as well as a program. As aspiration, is it normative in content and aims to provide substance to the international legal ideal of sovereign equality of States, contained in the UN Charter. As a program, the ideology of catching up provides the architecture for nationalism and helps the State to define the goals in its pursuit.

Thus, far from being a set of technocratic policies that seek to effect some sectoral changes in the economy and only indirectly affect social, political and cultural processes of life, this vision of development sees itself as a cultural politics, a cultural economy and a rigid teleological blueprint for changing the world. This notion of development as a *weltanschauung* is not new, however. Rather, it has a rich history and evolution. But to trace this history and evolution is beyond the scope of this essay, and I can only focus on those aspects of this story that are relevant to the understanding of how development provided the politics behind the Third World's encounter with international law, and how this has produced a hegemonic international law. The impossible ballooning of the content of development has meant a corresponding explosion of international legal norms and institutions to deal with the 'new' problems of the Third World.

But even as that has occurred, development has also faced many crises, partial collapse and retreat. In the immediate post-World War II years and extending until at least the 1960s, development enjoyed a certain robustness, due to its association with postcolonial nationalism and the greater ability of Third World States to engage in international politics that supported their development agendas. For the two super powers, the idea of development was also a crucial tool for establishing patron-client relationships with Third

---

[28] Balakrishnan Rajagopal, "The Problem with participation: Governance, Civil Society and the Circle of Democracy", Paper presented at the Conference on 'Participatory Governance: A New Regulatory Tool?', 9-10 December 2005, International Institute for Labor Studies/International Labor Organization, Geneva. For an astute analysis of this distinction, see Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia University Press, 2004), p. 69.

World regimes. For the West, development was also a tool for containing the resistance from the country-side, to prevent Third World States from becoming populist or communist. But by the early 1990s, it was apparent that development, as an idea, had run its course. As a prominent assessment of development put it in the early 1990s,

> "The idea of development stands like a ruin in the intellectual landscape. Delusion and disappointment, failures and crimes have been the steady companions of development and they tell a common story: it did not work. Moreover, the historical conditions which catapulted the idea into prominence have vanished: development has become outdated. But above all, the hopes and desires which made the idea fly, are now exhausted: development has grown obsolete."[29]

This double move, a failure of the moral and political appeal of the idea, as well as the disillusionment with it in practice, is crucial. It meant that the loss of faith in development, was accompanied by the loss of faith in its Siamese twin: postcolonial nationalism. The disillusionment with development in practice yielded two contrary responses: one was to tilt in favor of the market, abandoning the leading role that the State played in the economy under older development models. The other response was a radical democratic practice by social movements, which also revealed a deep distrust of the State, but also of the violence and centralization of the market. These multiple responses to the failure of development have yielded multiple, and often contradictory responses that reverberate through international law.

A possible objection to the failure of development is the record of the East Asian States, and now (many would say) China and India, which have achieved statistically impressive results in wealth creation, poverty reduction and the improvement in the standard of living, as measured by traditional development indicators, by following the dictates of development. A full rebuttal of this objection is not possible here but I will note that the success of the East Asian and other late industrializing countries was achieved by expressly violating most of the recommendations of development experts and institutions, and through such devices as public-private associations, close associations between industry and government, and even 'illegal' actions such as poaching of workers and smuggling of machinery.[30] Most, if not all

---

29 Sachs, note 9, p.1.

30 Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002), pp. 18-19.

of these measures are now banned by international legal rules including bilateral or multilateral investment treaties. As Ha-Joon Chang and Alice Amsden have conclusively shown, virtually none of the late developers followed any of the conventional wisdom about development to achieve what they did, including by establishing 'institutions' first.[31]

What has been the impact of these and other changes in the meaning and practice of development, as outlined above, on international law and other modes of transnational legal governance? International law has traditionally not concerned itself with development, choosing to focus its attention on classic questions such as the preservation of order between states. International legal scholarship has certainly not focused on the impact of the changes in the meaning and practice of development on the legal field. The impact of these changes in development have not even been explicitly fore grounded in other transnational modes of legal governance, such as the diffusion and transplantation of legal forms across countries, broadly theorized under the name of 'law and development'. Instead, legal scholarship treats 'development' as though it has a self-evident, obvious core of meaning, overlooking the fierce debates within the development profession and its changing complexity.

This can be seen, for instance, in the debates surrounding the Doha 'Development' Round of talks of the WTO, where 'development' is equated with an agreement on policies that favor developing countries, through better market access for their goods in rich countries, and the removal of export and other subsidies by rich countries for their agricultural exports. Yet this view of development fails to acknowledge the plurality of means and ends which are subjects of intense disagreement in the field of development. It is time, I argue, to make explicit the politics of development in the practice of states and international/transnational organizations and in the evolution of international and other transnational norms. The politics of development is complex, consisting of many layers like an Onion, from colonialism, postcolonial nationalism, the constitution of the apparatus of development, mass resistance outside the State, continuing imperialism and various forms of resistance to it. Recovering this politics is an important step towards assessing the relative merits and demerits of legal and institutional reforms because it tells us what is at stake, and who will win or lose from particular

---

31 Id. Alice Amsden, *The Rise of "The Rest": Challenges to the West from Late Industrializing Economies* (Oxford University Press, 2003).

reforms. Put differently, the use of the term 'development' cannot serve as a proxy for distributional issues in international law, as is often assumed; rather, what is needed is an unpacking of the politics behind the idea of development itself.

There is no doubt that development has occupied a central place in the evolution of international law and institutions especially during the last 60 years. The growth of international institutions owes it to development, as international institutions were first fashioned by the West to govern the populations of the Third World during the colonial period, and have continued to perform that function with increasing levels of complexity. The link between colonialism and development is now increasingly recognized in development studies and international law.[32] In the field of international economic law, the connections are obvious. The final declaration of the Doha Round of talks in Hong Kong on the WTO mentions the word development at least 33 times[33], and senior WTO officials have made strenuous efforts to make the case that trade is good for development – or some would say that WTO has gone so far as to argue that trade is development.[34] The legitimation of the trading regime often seems to rest on its ability to contribute towards the fulfillment of the goals of development, however it is defined. In the field of international law relating to use of force, paradigmatic changes have repositioned the law in a tighter embrace with development. One way this has happened is through the redefinition of the field of security, which has been enmeshed with the field of development, as can be evidenced from the recent report of the UN Secretary-General on the notion of 'larger freedom'.[35] The notion of human security[36] has had a major impact on the redefinition of security and led to consequences in the field of law. The recent establishment of the UN Peace building

---

32 Uma Kothari, "From Colonial Administration to Development Studies: A Post-Colonial Critique of the History of Development Studies" in *A Radical History of Development Studies* (Uma Kothari ed., 2005), pp.47-66; Balakrishnan Rajagopal, note 2.

33 Ministerial Declaration, WTO/Min(05)/Dec, 22 December 2005, available at http://www.wto.org/English/ thewto_e/minist_e/min05_e/final_text_e.htm

34 Dani Rodrik, "The Global Governance of Trade as if Development Really Mattered" (Paper, Harvard University, July 2001) available at http://www.ukglobalhealth.org/content/Text/rodrikgovernance.PDF.

35 Report of the Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights For All*, A/59/2005, 21 March 2005.

36 See *Human Security Now*, Report of the Commission on Human Security, 2003.

Commission[37], changes in US bilateral aid spending oriented more towards governance, and the retheorizing of the relationship between lagging development goals such as the low status of women in Arab societies and the need for social change through use of force,[38] provide evidence of the impact of development on the law of force. Humanitarian and human rights law have also submitted themselves to the regime of development. The attempted revival of the right to development at the UN[39], the increasing popularity of rights-based approaches to development favored by multilateral and bilateral agencies, the redefinition of development itself in terms of freedom towards 'comprehensive development' by the World Bank,[40] the increasing popularity of economic and social rights as panacea for the ills of economic globalization, are but some of the many ways in which ideas and practices from the field of development have influenced the evolution of human rights law. Private international law, including the laws of foreign investment, and other transnational modes of legal governance including the import and export of legal forms across borders, provide evidence that ideas from the field of development, such as the importance of institutions, are having a major impact on their content. The focus on rule of law, formalization of informal property rights, and the establishment of independent judiciaries, which are part of the standard repertoire of legal changes recommended through law and development initiatives, are derived from the work of recent development theorists who have emphasized the role of institutions as the key to economic growth and development.[41]

---

37 U.N. Security Council Resolution 1645, S/RES/1645/2005; U.N. General Assembly Resolution 60/180, A/RES/60/180, 30 December 2005.

38 In the run-up to the Iraq war, the UN Development Program in the Middle East published some very suggestive and useful reports, linking the backwardness of Arab societies, as indicated by the status of its women, with the need for modernization, which was immediately picked up by the war mongers to encourage 'willing' Arabs to collaborate in the use of force against Iraq. See UN Development Program, Arab Human Development Report (2002). For a commentary, see, Thomas Friedman, 'The Arabs at the Crossroads', New York Times, 3 July 2002.

39 See for example, the five reports submitted by the Independent Expert on the Right to Development at the UN Commission on Human Rights, Dr. Arjun Sengupta, available athttp://www.unhchr.ch/huridocda/huridoca.nsf/FramePage/rightdevelopment+En?OpenDocument.

40 See Amartya Sen, *Development As Freedom* (1999); World Bank, Comprehensive Development Framework, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/STRATEGIES/CDF/0,,pagePK: 60447~ theSitePK:1405 76,00.html.

41 See e.g., Douglas North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990); World Bank, *World Development Report: Building*

Indeed, any changes deemed necessary in the Third World, are now justified in the name of development.

The coalescing of different, often contradictory agendas, under the name of development, and the highly ideological role that development has performed since its inception, make it clear that it is a prime source of hegemonic international law. A first and primary source of this hegemonic international law is the idea of 'catching up', that underlies the sovereign equality of States. A principal second source is the doctrine of sovereignty, which rests on ideas of developmental nationalism. A third source consists of international institutions which mediate the troublesome relationship between States with radically different levels of power, creating the illusion of a 'level playing field' which creates and maintains a hegemonic consensus. A fourth source consists of ideas of good government such as freedom, democracy and accountability, which are also supported by those who are the victims of the violence of development. But their very responses in terms of international legality create a hegemonic consensus in favor of the existing international legal order, even as they open up limited opportunities for counter-hegemonic politics. Such are the limits of counter-hegemonic international law. Finally, two recurring themes of development have had an enduring impact on shaping hegemonic international law. One is the continuity between colonialism and development, as I have noted. The other is the continuous history of the dialectic between developmental techniques of administration and control of population and resistance, and the politics of the governed – to use Partha Chatterjee's term. One cannot be understood without the other. For example, the evolution of the World Bank or the UN as international institutions, cannot be understood only through a Westphalian framework of State interests, power and cosmopolitanism. Rather, it needs to undertake a deeper analysis that recognizes the relationship between institutional evolution, Statist ideologies, and resistance on the ground, all from a historical perspective.

Given the centrality of colonialism and development in producing the architecture of modern international law, and their impact on substantive areas of law, a critical approach to international law must begin by closely interrogating the meaning, purpose, goals and means of development itself. This is not what one sees in international and other transnational legal

---

Institutions for Markets (2002); Christopher Clague, *Institutions and Economic Development: Growth and Governance in Less Developed and Post-Socialist Countries* (Johns Hopkins University Press, 1997).

scholarship, such as 'law and development', where the meaning of development is rarely, if ever, critically engaged in all its historical complexity. I would suggest that to be relevant to the Third World, a critical approach to development is a key component of international law as a political project. This is not only because the politics of development has changed dramatically from the 1960s when development provided the politics for a transformation of international law; it is also because, development itself has come under unprecedented crisis, and the very meaning of the Third World has become de-centered. Through such a critical approach, one can recover multiple strands in the history of the evolution of development which have radically different implications for the rules and institutions of international law. Traditional development interventions had the twin goals of control of the masses and controlled modernization through limited industrialization. It would be of interest to uncover these themes in the effort to build a counter-hegemonic international law.

IV. Conclusion: Prospects for a Counter-Hegemonic International Law in a Hegemonic World

The prospects for the transformation of international law into a purely counter-hegemonic tool, capable of aiding the weak and the victims and holding the powerful accountable, are bleak on its own. On the other hand, I would argue that international law is only a small (though important) part of counter-hegemonic power in the world today. The future of the world – its ability to deal with problems of peace, war, survival, prosperity, planetary health and pluralism – depends on a range of factors including the politics of the 'multitude' as Hardt and Negri call the governed. The stakes in legal reform between an agenda dictated by elite politics alone and an agenda shaped by mass politics, have never been higher. I have argued in this essay that for such a task to begin, we must begin by fundamentally rethinking the shibboleths of the past, especially those that have provided the language of emancipation and justice. Chief among them are the ideas of human rights and development. The record on whether this rethinking is actually taking place, is not very encouraging.

The alternatives include the growth of regional international law that provides a counter-balance to the hegemonic international law. The developments in the Inter-American system provide some hope of this actually happening if the political dynamism of that system could be buttressed by better-performing regional economic arrangements such as MERCOSUR. But in the end, regional systems are bound to remain weak,

and still be subjected to the fundamental weaknesses of the Westphalian system including the centrality of the State and its ideologies of development and human rights.

A second alternative is to replace the current multilateral system, based on co-existence, with an alliance of hegemonic powers acting in concert.[42] This would include the US acting together with a coalition of regional powers such as India, China, Brazil and Germany, united by ideology (mainly consisting of democracy). This seems unlikely to work despite new strategic alliances emerging between the US and India and other States. The clashing State interests are likely to remain salient, while the hegemonic and hierarchical nature of this alliance will deepen the rift between a hegemonic and counter-hegemonic international law, each with own source of political power.

A third option includes the emergence of a new front of Third World States overtaking in importance, older coalitions such as G-77. A recent example of this was the G-21 group of States in WTO negotiations in Cancun. Led by a new coalition of large Southern democracies, India, Brazil and South Africa, – the ostensible G-3 – this motley coalition did not last very long due to severe political pressure from the US and other Western countries. It seems to have become inactive since July 2004, when two of the leaders of this coalition, India and Brazil, were successfully co-opted by the West into a new negotiating group, thereby preventing the emergence of any Bandung-like solidarity.

A fourth option for a counter-hegemonic international law includes the emergence of coalitions of smaller States and social movements, forming tactical alliances with larger States in particular negotiations, while increasing the prominence of sub-state actors in international law more broadly. Some of this happening; there was an alliance between small African and other States and social movements in the Cancun WTO negotiations over the cotton trade issue; there is the emergence of city-level political activity in international law, as seen in the adoption by the City of San Francisco of the CEDAW Convention (not ratified by the US) into its city code. But these examples remain too few and do not seem capable of creating the global politics needed for a counter-hegemonic international law.

---

42 Tom Farer, "Toward an Effective International Legal Order: From Coexistence to Concert?", *Cambridge Review of International Affairs*, vol. 17, no.2, July 2004, pp. 219-238.

A fundamental requirement for a counter-hegemonic international law is to develop a critique of the fetishism of institutions. This is important for two reasons: first, to prevent an institutionalization and consolidation of hegemony; and second, in that process, prevent dissipation of much of the resistance to it. As Jose Alvarez has argued, it is very important not to equate hegemonic international law with US unilateralism. Rather, one must pay close attention to how multilateral mechanisms such as the UN Security Council are also being used to strengthen hegemonic international law.[43]

Some of these new experimentations in counter-hegemonic international law engage in critical deployments of hegemonic discourses such as human rights or development. This only indicates that the course available for counter-hegemonic international law is not entirely outside the hegemonic framework that already exists. That reality may be both the limit and promise of international law.

---

[43] Jose Alvarez, note 6.