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978-0-521-81646-5 - International Law from Below: Development, Social Movements, and Third World Resistance

B. Rajagopal

Excerpt

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Introduction

This book chronicles the complex relationship between international law and the Third World, during the twentieth century. It does so by suggesting that it is impossible to obtain a full understanding of this complex relationship unless one factors in two phenomena: first, a focus on development discourse as the governing logic of the political, economic, and social life in the Third World; and second, an appreciation of the role of social movements in shaping the relationship between Third World resistance and international law. The suggestion in this book is that dominant approaches to international law are deficient because they neither take development discourse to be important for the very formation of international law and institutions, nor do they adopt a subaltern perspective that enables a real appreciation of the role of social movements in the evolution of international law. The central concern then is: how does one write resistance into international law and make it recognize subaltern voices? In particular, international law has been crucially shaped during the twentieth century by the nature and the forms of Third World resistance to development. This has happened at at least two levels: first, substantial parts of the architecture of international law – international institutions – have evolved, in ambivalent relationship with this resistance; second, human-rights discourse has been fundamentally shaped – and limited – by the forms of Third World resistance to development. The focus on these two areas of international law – international institutions and human rights – is simply due to the centrality of these areas of law in modern international law, that is, from the League of Nations. By showing that the central aspects of modern international law cannot be understood without taking due account of the impact of development and Third World social movements, this work challenges traditional narratives of how international legal change has come about and how one might understand the place of law in progressive social praxis. I argue that international law needs to be fundamentally rethought if it is to take the disparate forms of Third World resistance seriously.

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At a fundamental level, this work is an attempt to explore how international law relates to the ‘base,’ how the functional and pragmatic cosmopolitan relates to ‘culture,’ to the Other across the barrier of civilization and rationality. International law has traditionally not concerned itself with this relationship except to repress/suppress the existence of such relationships. But, it now seems urgent to abandon such narrow views as partial, partisan, and ideological. International law is no longer a marginal discipline that figures occasionally in diplomatic disagreements about war and peace. Rather, it is now an ensemble of rules, policies, institutions, and practices that directly and indirectly affects the daily lives of millions of people all over the world, in the areas of economy, environment, family relationships, and governmental performance. Yet, extant approaches to international law do not seem to ask the elemental question of for whom international law exists. Rather, the mainstream – both the apologist and the utopian¹ – seem to function within specific paradigms of western modernity and rationality, that predetermine the actors for whom international law exists. These include political actors such as state officials, economic actors such as corporations and cultural actors such as the atomized individual who is the subject of rights. This actor-based approach of international law simply privileges what happens in certain institutional arenas. While that may be important for some purposes, most of the people in the Third World live and interact in non-institutional spaces: in the family, the informal economy, and non-party political spaces. This dynamic is of great relevance at the beginning of the twenty-first century due to the rapid mobility of people and capital across borders and the resultant overlapping and interchangeability of identities and values, a dynamic that is sometimes partially captured by the word “globalization.” International law, either in its statist realist version, or in its cosmopolitan liberal version, falls short of providing a viable framework for thinking about these issues. It is suggested that a social movement perspective may assist in developing that framework, but only at the cost of a fundamental rethinking of international law.

At a second level, this work investigates how Third World resistance is analyzed within international law. Extant approaches look at Third World resistance in purely statist terms, for example as it manifested through the Third World coalition at the UN in the 1960s and 1970s. In my view, this is no longer an adequate or accurate way to analyze patterns of Third World resistance to international law. Patterns of the Third World’s interaction

¹ These refer to the framework adopted in Koskeniemi (1989).

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with international law have changed significantly and can no longer be analyzed within the statist paradigm alone. Nor can such patterns be analyzed through the liberal rights paradigm alone, as the rights paradigm is also a statist one, and, besides, it overlooks the continuing relevance of public action to international law's relationship with the Third World. The attempt here to use a social movement perspective to analyze Third World resistance to international law is the first known attempt to systematically engage with changing patterns of the Third World's interaction with international law.

Thirdly, this work seeks to displace development as a progressive Third World narrative. Traditionally, international law scholarship – both utopian mainstream and previous Third World approaches – saw development in positive, glowing terms due to its supposed potential to assist in the nation-building project or to promote liberal objectives. Instead, I approach development discourse as a particular ensemble of norms, practices, and institutions in which there is a general loss of faith in the Third World exhibited most clearly through the agitations of social movements. This is in large part due to the realization among social movements and progressive intellectuals that it is not the lack of development that caused poverty, inflicted violence, and engaged in destruction of nature and livelihoods; rather it is the very process of bringing development that has caused them in the first place. As such, social movements seek to construct alternative visions of modernity and development that constitute valid Third World approaches to international law. The mainstream and past Third World approaches must be questioned for rendering such alternative practices invisible. In this sense, this book is not concerned with traditional topics such as 'international development law.' Rather, it is more concerned with the role of international law in shaping the ideas and practices in the field of development and with the role of ideas and practices in the field of development in shaping international law.

At a theoretical level, this book builds on the insights of postcolonial theory, poststructuralism, postmodernism, critical race theory, critical development theory, and critical Third World scholarship loosely identified by the acronym TWAIL (Third World Approaches to International Law). Methodologically, it adopts an eclectic mixture of an internal critique (based on discourse analysis) and an external critique (bringing insights and evidence from outside international law, buttressed by a case study and several examples of social movements). The work itself falls into a genre of scholarship that straddles established fields including international law and law and society, a new kind of socio-legal international

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legal scholarship that attempts to offer thicker descriptions of legal transformations. Two limitations must be noted. First, it does not claim to do a complete mapping of all the critical moments of Third World resistance to international law, but only those moments that are considered crucial. Second, it does not chart out all the relevant social movements that have ever had an impact on international law,² but only those that are relevant to my inquiries, for example in the area of environment. It must also be noted that this is not a book on the role of NGOs and non-governmental networks in international law; rather, its major purpose is to contest particular ways of explaining international legal change. In the final analysis, the work on social movements in the Third World and their complex relationship with global political and legal change is born out of a search for culturally legitimate forms of resistance that nevertheless do not fall into the trap of nativism.

The following chapters expand and build upon these and related themes. Part I offers an introduction to the question of theorizing resistance as an analytical category in international law and an analysis of the ways in which ‘development’ was received by international lawyers after World War II. Part II explores four critical moments of international institutional expansion: the Mandate system of the League of Nations, the establishment of UN development agencies and their expansion by the Third World coalition in the 1960s and 1970s, the expansion of Bretton Woods institutions, and the evolution of post-Cold-War institutions to promote democracy and peace. All of these cannot be understood, I suggest, without an appreciation of how the ideology of development was deployed and how the Third World resisted it. In the course of these evolutions, the nature of Third World resistance underwent many changes as well, from anticolonial nationalist to statist, to that of social movements. Part III offers a critique of human rights discourse as the sole approved discourse of resistance and an analysis of the fundamental theoretical challenges that social movements pose for international law. I illustrate the arguments made in this Part with a case study of the Working Women’s Forum, India’s largest women’s movement. Part IV concludes with some reflections on the challenges that confront international lawyers if they wish to build an international law that takes the resistance of social movements seriously. A central conclusion is that while the most important aspects of cosmopolitan international law of the twentieth century have

² A prominent example is the peace movement of the nineteenth and twentieth centuries, which has had a profound effect on humanitarian law.

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been ineluctably shaped by Third World resistance including through social movements, it has repressed and excluded this resistance from the story of its formation. A call to write that resistance into international law – a task undertaken here – should ideally lead to a fundamental rethinking of how global change at the present time can be achieved and what role, if any, international law should play in that process.

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PART I

International law, development, and Third World resistance

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Writing Third World resistance into international law

Provided the imperial power is itself prepared to set the pace for self-government and does not have to be forced out by pressure from below, the legacies of the past can quickly be transformed from a serious handicap in world affairs into a priceless diplomatic and political advantage.¹

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.²

There are several themes that run through this book which attempt to rethink Third World resistance to international law. Let me outline some of them here. First, a straightforward Saidian theme:³ when international law, as a cultural category, encounters resistance, it can engage with it only by adopting certain unchanging essences of western or Third Worldness, as well as images of legitimacy and redemption. The result of this can be seen in the ways in which certain types of resistance are chosen as legitimate and certain other types are not in international law, and the power that makes this choice possible. This can be seen, for example, in the invisibility of Third World environmental movements to progressive Third World legal scholarship or in the attribution of the success of public enterprises (town and village enterprises or TVEs) in China to kinship ties (rather than economic rationality) by the World Bank.

Second, just as colonialism as a system sanctioned legitimacy to only certain forms of anticolonial resistance (mild nationalism), only certain forms of resistance in the Third World have been granted legitimacy. The main filter through which Third World resistance is admitted to be legitimate is the discourse of human rights. Indeed, human rights has emerged as the sole approved discourse of resistance. I do not claim that resistance through rights is not legitimate or that other forms of resistance

¹ Kenneth Younger, former minister of state in the Foreign Office of Great Britain, "The colonial issues in world politics" in Creech Jones (1959) 53.

² Said (1993) 210. ³ Said (1978).

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are more 'authentic' and therefore more legitimate. I merely point out the ideological/imperial character of this exercise of power by the discourse of rights, and explore if alternative forms of resistance through the praxis of social movements may recode resistance in international law.

Third, I am interested in the relationship between resistance and institutions. This is very important for law, as it is the language of institutions. I explore this theme at two levels. First, I examine whether it is more useful to study in greater detail the systemic nature of resistance. Many, if not most, social movements shape and are shaped by the environment in which institutions and their politics develop. This is true even if these movements 'fail,' due to unintended consequences as well as intended but unrealized consequences. For example, environmental, human rights, and other movements have driven the evolution of the agendas of the World Bank, and trade unions and women's movements have fed off each other in India. Another way of stating this is that resistance continues even after successful institutionalization of its goals – nationalism does not represent the final fruit of anticolonial struggle. But law pays no attention to this dynamic, preferring to view institutions as functional embodiments of legal rationality and resistance as an aberration and in need of repression. It seems to me that law and institutions very much depend on resistance.

At the second level, I note the somewhat tragic reality that resistance must work, to some extent, within the parameters established by that which is being resisted. This has the constant danger of making resistance a cooptive/coopted enterprise. Progressive Third World scholarship is aware of this danger and attempts two ways to deal with it: first, scholars reject the parameters set by that which is being resisted, in favor of a culturally 'authentic' way of resistance. Certain proponents of strong cultural relativism in human rights, as well as many social movement theorists, take this approach as they seek to counterpose alternative visions of modernity to that of the hegemonic discourse which is being resisted. A second approach would be to treat resistance and its antithesis as mutually overlapping, constitutive, and a dialectic, and therefore to show that the object of resistance is not as imperial and internally strong as it appears. These are the Saidians. I trace both tendencies of Third World resistance to international law.

The fourth theme is the idea that resistance is not merely always a reaction to hegemony, but is in fact a complex multitude of alternative visions of social relationships and therefore, of human history. This theme

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is based on two propositions about the nature of resistance: first, I reject the absolute wall of separation between resistance and forms of hegemony. Another way of stating this is that there is no such thing as an absolute modern v. tradition, primitive v. advanced, or developed v. underdeveloped dichotomy. Second, viewing forms of resistance as various valid ways of conceiving the world rejects the dogma that to be legitimate resistance must either work within existing theories of human liberation or formulate an entirely new ‘universal’ paradigm that is applicable across time and space. Yet, this is precisely how legal scholarship works. An example would be Abdullahi An-Na’im’s contrived attempt to fit Islam into a human rights framework.⁴

Resistance as an analytical category in international law

Traditional international law did not concern itself with the resistance of mass action unless it was directed at the creation of states in the form of movements that asserted the right to self-determination. Even in such cases, international law usually left the murky terrain and ‘returned’ only to welcome the victor as the legitimate representative of state sovereignty.⁵ This doctrinal position enabled European and American colonial empires to defeat the legal claims of Third World anticolonial nationalist movements for independence under international law. No matter how much ‘resistance’ the natives posed – for example the Mau Mau rebellion in British Kenya – international law had no vocabulary for understanding and accommodating it. This enabled the colonial authorities to treat anticolonial resistance as criminal acts and deal with them through law-enforcement measures, especially through the doctrine of emergency. Indeed, traditional international law was notorious for the ease with which it sanctioned violence against non-western peoples. As Professor Anthony Anghie has emphasized about nineteenth-century positivism,

⁴ An-Na’im (1990) 17. For an entirely different take on the issue of universality of human rights and its relationship to culture, see Panikkar (1982). An-Na’im is not without ambivalence: in later publications, he has taken a strong relativist perspective. See An-Na’im (1992) 37.

⁵ See *Aalands Islands Case*, *Official Journal of the League of Nations*, Supp. No.3 (1920), 6 (stating that, when a state undergoes transformation or dissolution, its legal status is uncertain). For a trenchant critique of this case and self-determination doctrine, see Berman (1988). See also Rajagopal (1992) 666–74.

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The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these peoples, presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission – the discharge of the white man's burden.⁶

The hope that formal political independence for the colonized territories will quickly lead to the creation of a new international law was dashed as the efforts by the newly independent countries to create a New International Economic Order (NIEO) in the 1970s ground to a halt.⁷ During the last couple of decades, it has become increasingly hard to place much hope in the capacity of Third World states to act as real guarantors of the democratic aspirations of the masses in the Third World, as state sovereignty has been parceled out up (to international institutions such as the World Trade Organization – WTO – and Bretton Woods institutions) and down (to market actors and NGOs). The idea of development, with its catching-up rationale, that provided the motivation for nation-building in the post-War period, has come to be seen as an ideological enterprise with profoundly dangerous implications for the most vulnerable and voiceless in society. In addition, the Third World state has come to colonize all life spaces in civil society and has effectively championed the interests of the global elite that runs the world economy. The democratic deficit experienced by global governance processes has been exacerbated due to the democratic deficit of Third World states that act as the agents of the globalitarian class. The reformist sensibility in international law during the post-War period, which revolved around a commitment to individual human rights, and an expanded concept of international development including the law of welfare, also failed to reverse the rot in the system. As I argue in later chapters, the idea of human rights has proved to be blind to the tremendous variety that human-rights struggles take in the form of social movement resistance in the Third World, while the idea of development has proved to be associated with the containment of mass resistance (especially anticommunist peasant) and a destructive modernity. The post-War 'settlement' of the colonial question through the grant of political sovereignty did not end mass movements in the Third World. Instead, this resistance took myriad other forms through social

⁶ Anghie (1999) 7.

⁷ This took the form of a number of UN General Assembly resolutions and declarations whose legal status was contested by western international lawyers. See United Nations (1974a), United Nations (1974b). On the NIEO, see Bedjaoui (1979).