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

B. Rajagopal

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INTERNATIONAL LAW FROM BELOW

Development, Social Movements, and Third World Resistance

The emergence of transnational social movements as major actors in international politics – as witnessed in Seattle in 1999 and elsewhere – has sent shockwaves through the international system. Many questions have arisen about the legitimacy, coherence and efficiency of the international order in the light of the challenges posed by social movements. This groundbreaking book offers a fundamental critique of twentieth-century international law from the perspective of Third World social movements – the first ever to do so. It examines in detail the growth of two key components of modern international law – international institutions and human rights – in the context of changing historical patterns of Third World resistance. Using a historical and interdisciplinary approach, Rajagopal presents compelling evidence challenging current debates on the evolution of norms and institutions, the meaning and nature of the Third World as well as the political economy of its involvement in the international system.

B. RAJAGOPAL is the Ford International Assistant Professor of Law and Development and the Director of the Program on Human Rights and Justice at the Massachusetts Institute of Technology, Cambridge, MA. He served with the United Nations in Cambodia for many years as a human rights lawyer and has been a legal and human rights advisor to international organizations and non-governmental organizations. He has published many scholarly articles in leading law journals.

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ABBREVIATIONS

AAA	American Anthropological Association
ADB	Asian Development Bank
ASEAN	Association of Southeast Asian Nations
BWIs	Bretton Woods Insitutions
CIDA	Canadian International Development Agency
DANIDA	Danish Agency for Development Assistance
DRD	Declaration on the Right to Development
EAD	Electoral Assistance Division of the United Nations
EBRD	European Bank for Reconstruction and Development
ECLA	Economic Commission for Latin America
ECOSOC Res.	Resolution of the Economic and Social Council of the United Nations
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
FAO	Food and Agriculture Organization
FTAA	Free Trade Area of the Americas
GAOR	United Nations General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICNW	Indian Cooperative Network for Women
IDA	International Development Agency
IFC	International Finance Corporation
IFES	International Foundation for Election Systems
ILO	International Labor Organisation
IMF	International Monetary Fund
JVP	Janata Vimukti Peramuna

LTTE	Liberation Tigers of Tamil Eelam
MIGA	Multilateral Investment Guarantee Agency
NABARD	National Bank for Agriculture and Rural Development
NADB	National Development Bank
NAFTA	North American Free Trade Agreement
NAM	Non Aligned Movement
NAPHR	National Action Plan on Human Rights
NATSR	National Alliance for Tribal Self Rule
NBA	Narmada Bacho Andolan
NED	National Endowment for Democracy
NFF	National Fishworkers Federation
NIEO	New International Economic Order
NOVIB	Netherlands Organization for International Development Cooperation
NUWW	National Union of Working Women
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of the Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice
PCN	Process of Black Communities
PMC	Permanent Mandates Commission
PSNR	Permanent Sovereignty over Natural Resources
SERNAM	Servicio Nacional de la Mujer
SIDA	Swedish International Development Agency
SIDBI	Small Industries Development Bank of India
SUNFED	Special United Nations Fund for Economic Development
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNFPA	United Nations Population Fund
UNHCHR	United Nations High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNGA Res.	Resolution of the United Nations General Assembly
UNICEF	United Nations Children's Fund
UNSG	United Nations Secretary General

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ABBREVIATIONS xi

UNTS	United Nations Treaty Series
USAID	United States Agency for International Development
WHO	World Health Organization
WTO	World Trade Organization
WWF	Working Women’s Forum

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PREFACE AND ACKNOWLEDGMENTS

The role of non-state actors, particularly NGOs and social movements, has become more important in international relations and in domestic policy. The well-known protests against the World Trade Organization in Seattle in 1999 and against other global economic institutions since then have firmly introduced social movements into the debate on global governance. The violent attacks against targets in the US on September 11, 2001, have even introduced the idea of networks of non-state actors into analyses of peace and security. Indeed, recent work in several disciplines including international relations, comparative politics, sociology and anthropology has attempted to come to grips with these new phenomena.¹ Despite this, legal scholarship in general, and international legal scholarship in particular, have been slow to respond to these changes. Despite recent work in law and society that examines the importance of social mobilization for legal transformation,² international legal scholarship has remained largely isolated from this body of work. A principal purpose of this book is to fill this gap by systematically addressing the role of social movements in international legal transformation.

However, this is a hard task. There are two ways of seeing and interpreting international legal transformation – from above as most lawyers do when they focus on formal sources, judicial opinions, and treaties exclusively – or from below when we focus on the lived experience of ordinary people with international law when they encounter international institutions, frame their demands in international legal terms, and network for influencing international or domestic policy. The latter genre of work is not usual in international law, partly because there is no tradition of socio-legal research in international law as there is in domestic law. Therefore, “thicker” descriptions of how norms and institutions evolve – for instance, through ethnography – are not common. But it is clear that there is a greater need for such scholarship in international law now more

¹ See e.g., Keck and Sikkink (1998). ² See e.g., Epp (1998); Rosenberg (1991).

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than at any other time. This book is a modest contribution to such an effort. It describes how the growth of modern international law (especially international institutions and human rights, its two most cosmopolitan achievements of the twentieth century) is a product of an ambivalent and complex interaction between international law and social movements of people in the Third World faced with a process of enormous transformation unleashed in their territories called “development.”

The telling of this story is also targeted at the ideological and political structure of standard narratives about how international legal transformation happens. In this traditional analysis, legal change is either “internal,” driven by the structure of norms, the function of institutions, and the interests of states. Or legal change is “external,” driven by changes in community values, interests, or power. In either case, this story-telling has been characterized by two major sets of bias: a bias towards the West, rarely treating the Third World as a maker of legal transformation; and a bias towards the elites in legal transformation, ignoring the importance of the role played by ordinary people. This book challenges these sets of bias and argues that it is impossible to understand how international law and institutions have evolved in the modern period (since the League of Nations) without taking Third World social movements, into account. To that extent, this study is also a contribution to a tradition of Third World scholarship in international law. But it is also a challenge to traditional Third World scholarship in international law that remained focused on the state, by examining the relation between states, social movements, and international norms and institutions.

This book is the outgrowth of my doctoral dissertation at Harvard Law School submitted in June 2000, but reflects several years of engagement with the themes presented here during my human rights and legal work with the United Nations. Writing this book would not have been possible without the help of a very large number of individuals. First among them is David Kennedy, my doctoral supervisor, whose personal encouragement to “return” from the field of activism and undertake the arduous task of writing a doctoral thesis, is gratefully acknowledged. More than that, his scholarship has provided a singular inspiration for my work and challenged me to engage in critical reflection in a way that I myself would never have imagined possible.

This work also importantly benefited from the guidance of my doctoral committee consisting of Amartya Sen, William Fisher, and Joseph Singer as well as detailed criticism from the external reader, Richard Falk. I thank them all for their critical, yet constructive, comments and support.

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PREFACE AND ACKNOWLEDGMENTS

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I wish to thank the network of scholars assembled under the acronym “New Approaches to International Law,” whose important work has provided the ideal setting for developing my arguments. Thanks to David Kennedy and Duncan Kennedy for introducing me to this remarkable group. I also wish to thank the network of international legal scholars who have collectively pursued “Third World Approaches to International Law,” whose work has been important and inspiring, and into which genre this book falls.

I have also benefited greatly from the comments and criticism of some fellow Third World travelers including Anthony Anghie, Bhupinder Singh Chimni, James Gathii, Amr Shalakany, Hani Sayed, and Celestine Nyamu. In no particular order, the following individuals have had a major influence on this work and with whom I have had the pleasure of discussing many of the themes presented here: Nathaniel Berman, Duncan Kennedy, Gerald Frug, (the late) Abe Chayes, Henry Steiner, Lucy White, Frank Michelman, Martha Minow, Anne-Marie Slaughter and William Alford. I thank them all for their generosity. Martti Koskenniemi and Jan Klabbers provided detailed criticism and comments on the whole manuscript and I am particularly grateful to them. Martti’s work has been singularly inspiring for mine. I am also deeply grateful to the detailed comments of the two anonymous reviewers of Cambridge University Press on the whole manuscript.

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Harvard Law School as a Senior Fellow in 1997–98, the students in the “Economic development and international institutions” seminar at University of Oklahoma Law School in fall 1998 that I taught as Crowe and Dunlevy Visiting International Professor, the students in the summer seminar on international law at the University of Helsinki Faculty of Law in 2000 and the students in my “Law, social movements and public policy” course at MIT. The work on this book was supported by several fellowships: the Samuel Morse Lane Fellowship, the Senior Fellowship and the Reginald Lewis Fellowship, all at Harvard Law School and the Soros Justice Senior Fellowship. I thank them all.

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“From Resistance to Renewal: the Third World, Social Movements and the Expansion of International Institutions,” *Harvard International Law Journal* 41(2) (Symposium Issue on International Law and the Developing World: a Millennial Analysis, Spring 2000), 529.

“International Law and the Development Encounter: Violence and Resistance at the Margins,” 93rd American Society of International Law Proceedings (1999), 16.

This book is dedicated to my wife, Anu and our children, Mekala and Muhil, whose love and affection in the face of my obvious failings makes all the work so important. Finally, this book and all my work would not have been possible without the love and support of my mother, Kalyani, and the faith of my father, S. R. Balakrishnan, who inspired the love of law and scholarship in me.