

WHAT MAY THE 'THIRD WORLD' EXPECT FROM INTERNATIONAL LAW?

UPENDRA BAXI

1. Prefatory Remarks

Three keywords formulating the thematic of this essay raise some profound concerns concerning the diverse forms of existence of the Third World, different symbolizations of 'international law' and role of normative and existential expectations within these. Each one of these raises difficult questions of construction and validation.

Incommensurable histories and diverse visions of international futures inhere in the very act of naming the 'Third World'. Narrative coherence, if not integrity, thus remains always at stake in naming worlds and telling stories about them. On one narrative plane, the pre-histories of the Third World-- the myriad itineraries of the European Enlightenment's 'civilizing missions' fraught with the forces and contradictions of colonial global capitalism-- determine its eventual emergence. From this follow at least two different readings. First, the historically formed and fractured constellation of special or strategic interests of the non-European community of states may make terminal sense within the markers of narrative entrenchment of some 'universal'/ universalising histories of the 'West'. Second, and related, being thus constituted always as a residue of the savage practices of power, embodied in histories of colonialism, imperialism, and neo-colonialism, the Third World remains a vehicle, vessel, and visage of global domination. On this reading, Third World (and now post-socialist) state formative practices and insurgent struggles emerge either as the clones of a resurgent First World or as 'outlaws' always entirely worthy of sustainable, and fierce, repression.

On other register, the Third World emerges through practices of resistance and struggle by the colonially constituted subject peoples that offer the best possible readings of the critique of the European Enlightenment and of the universalising form of capitalism. In addition to the complex corpus of Mahatma Gandhi and Frantz Fanon, just two additional references should here suffice: Dadabhai Naroji's *Poverty and Un-British Rule in India* and Walter Rodney's *How Europe Underdeveloped Africa*. In this understanding, far from merely constituting a 'population explosion', as it were, that disrupts the Westphalian conceptions of sovereignty and international law, what matters is the emergence of 'Third Worldism' as the project of ideological resistance to 'the imperialism of the Same' (to borrow a luminous phrase from Levinas). It offers histories of mentalities of self-determination and self-governance, based on the insistence of the recognition of radical cultural and civilizational plurality and diversity. As an ideological formation, of world historic pertinence, Third Worldism actively survives the obituaries at the demise of the Third World as a distinct geopolitical entity. It spawns many a genre of postcolonial, and even postmodernist, thought practices; more critically, it renews people's struggles within the spaces of the postcolonial and postmodern.

Critical one-wordlist narrative gestures find some redeeming potential in the visionary, even utopic, elements in some enunciations of Third Worldism. These imagined, from the Mahatma to Mandela, the ends of self-determination, beyond mere transferrals of power from the colonizers to the colonized, as prefiguring a commonwealth of moral sentiment respecting the spiritual dignity and ethical equality of all human beings. One-wordlists posit large histories that celebrate constructions of common 'humanity' of all earth peoples and of 'our common future' undaunted by the effective histories of power and domination, and unfazed by the catastrophic practices of the politics of mass cruelty. These readings commemorate histories of millennial struggles challenging boundaries and borders, force and fraud, terror and treachery of the regimes of *Realpolitik*. In this, they suggest constantly the need for the reinvention of our common insurgent humanness. One-wordlist readings further suggest powerfully that all politically organized communities remain coequal strangers to the tasks of

effective promotion and protection of human rights, ‘sustainable development’, global peace and justice, necessarily situated within and across the hegemonic flows sovereign power. The dominant metaphor of the World Social Forum—‘Other Worlds are Possible’ – suggests the crumbling of the triadic despoliation ruthlessly entailed in the imageries of the three worlds. This genre combats the voguish talk concerning *de-politicised* post- Fordist multitudes as well as reframes the narratives of Third World as a community of globally constituted subaltern peoples – the *politicised multitudes*-- engaged necessarily in infinite labours of resistance.

On yet another narrative pathway, Third Worldism marks the unfinished histories of practices of ‘subaltern cosmopolitanism’ and ‘localized globalism’ (to evoke the phrase- regime of Bouaventura de Sousa Santos). These entail many a dire confrontation within the heavily globalized Third World state formative practices described in staggeringly vast metaphors such as ‘nation-building’, or ‘integration’, rationality reform of the postcolonial/postsocialist governance practices, developmentalism, *just* (as opposed to *merely*) *good* governance and the global futures of human rights. Unsurprisingly, such narratives resist any surrender to the call of caricature that so curiously aspire to the status of ‘critiques’ of Third World and its peoples.

Third Worldism lenses complicate acts of reading the normative mass (or as radical critics would have it, the anomic *mess*) named ‘international law’-- its corpus, genera, and texts. Such readings pose some profound challenges to the ‘legalized hegemony’ of the ‘Great Powers’ in relation to its other (the enemy or the outlaw)¹. The collective presence of the non-Euroamerican states and peoples poses intransigent problems for the conventional divisions between ‘classical’, ‘modern’, and the ‘postmodern’ international law. No longer remain acceptable the lead stories, or the master narrative frames, that emplot, reductively, Third World peoples as ‘things’/ ‘trajectories’/ ‘vectors’ and ‘objects’ of power. Indeed, their fractured radical collective agency often shakes the ‘ground beneath the feet’ (in a Salman Rushdie metaphor) of many a corrupt national and global sovereign and the latter’s hegemonic sponsorship of

¹ Gerry Simpson, *Great Powers and Outlaw States* (Cambridge, Cambridge University Press, 2004).

visions of *unjust peace* and *just war*. Further, these readings make space for the acknowledgement of the multitudinous, yet specific, popular authorship of the norms and standards of international law and human rights beyond the contingent ‘necessities’ of vicissitudinous diplomatic histories. These practices of reading assiduously archive the histories of people’s resistance to ‘corporate Neanderthalism’, the histories of many gulag regimes, inherent in the onward march of global capital from Agent Orange, Bhopal to Ogoniland, and beyond² in ways that contribute to a renaissance of contemporary international law.³ Thus, upon overcoming of the initial post-traumatic disorders that arise from juxtaposing, in some stark terms, Kofi Anan with Ken Saro Wiwa⁴, we also begin to perceive the sites of international law as spaces for endless negotiation of the creationist radical popular authorship of international law with the production of its sustainable (one step forward but several steps backward) renovation. The crucial point here concerns the histories and futures of ‘compossibility’ (to evoke not altogether an antiquarian Leibniz phrase) of the different orders of authorships. Manifestly, the constantly changing landscapes of Third World intrusions on classical and modern paradigms of international law complicate analysis and evaluation.

Understanding compossibility also entails the grasp of several formats of juridical resistance offered by Third World states and peoples⁵. The nooks and crannies of international adjudication, in its myriad forms, offer here *embarrassment de riches*. The International Court of Justice Advisory Opinions/Rulings illustrate this with momentous diversity: witness the declaration concerning the illegitimacy of recourse to unilateral force in the *Nicaragua Case*, the enactment of ‘geographical Hegelianism’ in relation to

² Upendra Baxi, ‘Mass Disasters, Multinational Enterprise Liability, and Private International Law,’ 276 *Recueil des cours* 391-427 (2000, The Hague. The Hague Academy of international law and Martinus Nijhoff).

³ See Upendra Baxi, *The Future of Human Rights* 272-302 (2006, Delhi, Oxford University Press; 2nd edn.).

⁴ I have in view here the world historic contrast between the prose of the Global Compact and the Secretary General’s Report named *In Larger Freedom* with the Declaration of Bill of Rights of the Ogoni Peoples and the allied genre of the Zapatista declaration enshrining the rights of the earth peoples.

⁵ See, generally, Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements, and Third World Resistance* (2003; Cambridge, Cambridge University Press)

territorial disputations concerning the postcolonial boundaries and borders⁶, the failed production of the normative outlawry of nuclear weapons of mass destruction, and the performance outlawing the Israeli West Bank Wall.⁷ On a different adjudicative dossier, one archives the intra-Third World contestations before the World Trade Organisation Dispute Panel, the NAFTA adjudicative formats, and the workings of the World Bank Dispute Panel⁸, not to mention further an entire realm of arbitral happenings concerning the role –responsibilities of the host state and the community of foreign investors.⁹

The further insertion of the third framing category of ‘expectations’ poses some troublesome interrogatories. Whose expectations may we count as, after all, constituting the order of the ‘Third World’ expectations? Once upon a Cold War time, the ‘revolution of rising expectations’ threatened the global management of ‘developed’ as well as the newly emergent postcolonial world. Unsurprisingly, the forces of global capitalism now harvest, in a hyper-globalizing world, this revolution as a promise for ‘universal’ democracy, peace, and freedom! Further, as we note later, all kinds of manifold normative disjunctions between expectations on the one hand and events, experiences and engagements, render difficult the narrative emplotments of the histories of their ‘general course of expectations’ (as Jeremy Bentham long ago luminously phrased this) that form the anterior histories of international law, relations, and organization. In what ways may we differentiate the orders of expectations of the community of the Third World *states* from the insurgent community expectations of *peoples* on the crowded landscapes of so normatively abstract and historically pliable category as ‘international law’? And in what ways may we tell the stories concerning the

⁶ James Theo Gathii, ‘Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations’ in Anthony Anghie *et.al.* Ed. *The Third World and International Order: law, Politics, and Globalization* 75-116 (2003, The Hague, Martinus Nijhoff).

⁷ See, Moshe Hirsch, ‘The Impact of the Advisory Opinion On Israel’s Future Policy: International Relations Perspective *Journal of International Law & Relations* 1-2: 319-344 (2003).

⁸ Daniel Bradlow, ‘Private Complaints and International Organizations: A Comparative Study of the Independent Institutional Mechanisms in International Financial Institutions,’ *Georgetown Journal of International Law* 36: 403-468 (2005); Sol Picciotto, ‘The WTO’s Appellate Body: Legal Formalism as a Legitimation of Global Governance,’ *Governance: An International Journal of Policy Administration, and Institutions* 18:477-503(2005) .

⁹ See Peter Muchlinski, ‘Caveat Investor? The Relevance of Conduct of the Investor Under the Fair and Equitable Treatment Standard’ (2005, on file with the author).

extant international law norms and *mores* as either authentically responsive or as disfiguring, or even erasing, people's authorship?

In foregrounding these questions, in rather rough-hewn ways, I here take only a problematic proverbial first step in the journey of a thousand miles.

11. Some Puzzles Concerning The Category 'Third World'

Even that first step remains hazardously cluttered in the present moment and milieu, which proceeds to read the histories of the making of the Third World ahistorically, when the apperceived disutility of the conventional description, or of the politics of naming, are said to exhaust the historic pertinence of the underlying phenomena. Thus, the descriptive category 'Third World,' shaped coequally by decolonization struggles and the global politics of the Cold War, stands already pronounced otiose upon the privileged endings of these histories¹⁰.

The gifted raconteurs of a new 'ontological terrain of globalization' in the *Empire* thus insist that the once-upon-a-time Third World framing category now becomes otiose because the 'spatial divisions of the three worlds... have been scrambled so that we continually find the First World in the Third, the Third in the First, and the second almost nowhere at all'¹¹. This eminently quotable observation also programmes encyclopaedic varieties of genesis amnesia. Long before the three worlds category attained descriptive provenance, this scrambling, on their own evidence, and otherwise,

¹⁰ It is never wholly clear what the abounding narratives of these endings fully signify. The Cold war indeed has ended as far as relations among the communities of states constituted by the two super-power rivalries. But continues in many a different way in the postcolonial killing fields. See, notably, Peter Hallward, 'Option Zero in Haiti,' *New Left Review* 27: 23-47 (2004.) The Cold War still persists in relation to the regime of the United States sanctions against Cuba. It is unnecessary to multiply examples. From the standpoint of suffering peoples and violated humanity, the formal ending of the Cold War remains far from reassuring. Nor are 'endings' of the Old Cold War servable form the beginnings of the New Cold War.

¹¹ Michael Hardt and Antonio Negri, *Empire* (2002, London, Routledge) at p. xiii, and pp. 263-64.

had already historically occurred through the formative practices of colonialism and imperialism which inextricably inserted the First World of (insufficiently) civilized nations into the lived realities of the (relatively more fully civilized) subjugated and oppressed colonial peoples¹². Further, as is well known, the enforced Diasporas of the labouring classes, under conditions of slavery or slave-like labour, made the Old Empire fully viable, even as it now also serves the ends of the New Empire.

The ever-proliferating literature concerning the 'Third World' remains rife with two deft conceptual moves. A first ontologically pessimist move insists that there *never* existed any such phenomenon, that its willed insistence (its coming into being) remains always an artefact of thought that closes the 'doors of perception'. Ironically, such practices of nihilistic plenitude also raise in turn, *faux de mieux*, radical doubts concerning the existence of the old and new First and Second Worlds. A second move variously converts the framing category in terms of massive histories of disappointment with what now Hardt and Negri now so distinctively, even expediently, configure as 'Third Worldism,' Gayatri Spivak as 'failed decolonization,' and the policy phrase – regime of the hegemonic powers, with a plenitude of terrorist accuracy, as 'rogue states' and with episodic expedient moderation as 'failed' or 'crisis' states'¹³.

At any rate, Third Worldism stands now presented as an ideological configuration that self-destructs itself in an era of the New Empire. This brief essay provides no space at all for any finely nuanced archival, and critique, of hyper/post globalizing scholarship. Nor is it possible here to trace the itineraries of this ideological construct at its various decomposing sites manifest, for example, in the struggles for self-determination, struggles against imperial postcolonial state-building practices, contestation over development planning, constitutionalism, and governance (the latter inclusive of politics of mass protest against economic, foreign, and defence policies). From the days of *panchshila* to

¹² See, in particular, Kevin C. Dunn, 'Africa's Ambiguous Relation to the Empire', in Paul A. Passavant & Jodi Dean *Empire's New Clothes: Reading Hardt and Negri* 143-162 (2004, London, Routledge).

¹³ Altogether conveniently, and mystifying some causal lineages amnesia concerning the histories of so recent a past as furnished by the various phases of the Cold War Occasionally, the evils of the Third World almost remain entirely articulated as combustible forces of 'crony capitalism' and volatile 'ethno-nationalism', which possess the power to set the 'world on fire': see Amy Chua, *The World on Fire: How free Market Democracy Breeds Ethnic Conflicts* (2003, London, Random House).

the post- WTO Doha Round moment, this ideology presents itself in different historical contexts. Yet, metanarratives continue to present its unity in terms of some key characteristics.

A third, and related, move insists upon the *mimetic* rather than *originary* character of the practices forming the decolonization/anti-imperial struggles. Thus, postcolonial discourse is often viewed (in Partha Chatterjee terms) as ‘derivative discourse,’ which remains ‘original’ only in terms of deviation from or corruption of the classical liberal political theory.¹⁴ Against the mimetic reading of Third Worldism, I propose a reading that accentuates its originalism. This crystallized a world-historic norm that inagurally ousted, and also further outlawed the claims of Divine Right to Empire, whether by conquest and forms of belligerent occupation. It also gave rise to new normative conceptions of constitutionalism as set of relationships among four distinct, but related, notions: governance, rights, development, and justice. No state formation (conceived here as a politically organized moral community) ever fully achieves a right balance among these four relationships; what remains important is the initial vitality of this discursive pursuit that modified both the received liberal and socialist heritage.

De-emphasising the mimetic, and elevating the originality, of the ideology of Third Worldism still needs to confront the difficult distinction depicted by Hardt-Negri type contrasts between ‘emancipation’ and ‘liberation.’ Emancipation refers merely to the ‘entry of new nations and peoples into the imperial society of control, with its new hierarchies and segmentations’ whereas ‘liberation’ to the processes of ‘destruction of boundaries, ... reappropriation of space, and the power of the multitude to determine the global circulation and mixture of individuals and populations.’ In this perspective then the ‘destruction’ of the Third Worldism marks new historic portents where ‘the most

¹⁴ This focusing on a select set of national movement leadership insufficiently cognises the diverse ideological commitments and conflicts animating decolonization/ anti-imperialism struggles and collapses the enormous diversity of the mission and the methods of achieving and preserving national independence which persist in different forms in the postcolonial era. Thus, even Ranajit Guha at times bemoans the ‘mediocre liberalism’ of the founders of Indian democracy.

wretched of the earth become the most powerful being...'¹⁵. However, this incredibly *Empire* stylised discourse needs several reality checks via, for example, Robert Young's *Postcolonialism*, and the two trilogies -- Gunnar Myrdal's *The Asian Drama*, a trilogy that inaugurated the discourse concerning the 'soft states' and Immanuel Castells' *The Information Age: Economy, Society, and Culture* – here not even to breathe a sigh concerning Immanuel Wallerstein inspired world system genre. The narrative plot thus indeed thickens.

Myrdal severely brought home the venality and corruption of postcolonial South Asian governing elites, *as if* this was an independent causal variable. The Castells trilogy shifts the scenario, in part, in some grounded overviews of the histories of postcolonial African state formative practices, enriched in the main by the distinction between state-formative practices of *prebandlerism* from those of the *predatory state*.¹⁶ *Prebandlerism* (signifying here 'concentration of political power at the top,' 'political patronage,' and 'systematic government corruption'¹⁷) remains expediently thought as a signifier of the Third World, and now the fatefully recomposed Second World. However, in the full gaze of comparative sociology of governance all this variously illustrates the universal flourishing of corrupt sovereign.

The heady mix of prebandlerist state formations then marks the narratives of Third World, and the Old and New second world formations, in all their fatal regime fascination towards state predation understood as 'ruthless' governmental repression. Careful scholarship remains precociously uncertain concerning the origins of this potent 'combinatory mix'. Put another way, the obituary writers of the Third World/ Worldism do not quite help us to decipher the legacy of the hugely mercantilist practices of colonial occupation and 'governance' and the various histories of the Cold War, from the more

¹⁵ Manuel Castells, *End of Millennium*, Blackwell Publishers (Oxford, Blackwell, 1998) p. 363. This work is hereafter cited as 'Castells'.

¹⁶ See Peter Lewis, 'From Prebandlerism to Predation: The Political Economy of Nigeria', *Journal of African Studies* 34:79-103 (1996).

¹⁷ Castells, 98.

specific innovation of the Gulag-type regime governance/ state predation against co-nationals as a coequal constitutive feature of *all* the three Worlds.¹⁸

Perhaps, then, the recurrent constitution of the First World marks the world historic extraversion of predation, that is predation with impunity against non-nationals, now enhanced in the production of practices of catastrophic mass cruelty embodied in the practices of ‘authoritarian post- Fordism.’¹⁹ If so, as concerns state predation generally, Giorgio Agamben’s reminder expresses a universal truth: there is simply no head of government, and one may add the regime, who may escape indictment from crimes against humanity²⁰. Surely, the dis-invention of even the descriptive category the Third World marks, as notably Arturo Escobar brings home²¹, may never be fully grasped outside its differential reproduction of the scattered hegemonies of its associated normative cohorts including the international financial institutions, multinational corporations, and the discipline and punish type regimes of the First World formats of human rights diplomacy and now the patterns of privatisation of development aid.

The rites of passage summing now forms of intellectual and activist fatigue with the so-called demise of Third World/ Worldism now celebrate the creationist discourse concerning the ‘rise of the Fourth World’. The appropriative move in Manuel Castells remains hugely instructive. In its inceptive/conceptive moment, the Fourth World articulated the voices of suffering, and rightlessness, of the indigenous peoples of the earth (some already facing extinction)²² that so vitally critique forms of colonial,

¹⁸ As seen now in the unfolding histories of the two ‘terror’ wars: see for the distinction, and the literature cited in, Upendra Baxi, “The ‘War on Terror’ and the ‘War of Terror’: Nomadic Multitudes, Aggressive Incumbents, and the ‘New’ International Law” *Osgoode Hall Law Journal* 43:7-44 (2005.) Global and national governance practices amidst the two ‘terror’ wars now unfortunately illustrate by installing the status of ‘rogue,’ ‘outlaw,’ or ‘enemies of civilization’ regimes and even the communities of peoples, as if these states, societies, and peoples alone and singularly answered this description!

¹⁹ See George Steinmetz, ‘The State of Emergency and the Revival of American Empire: Toward an Authoritarian Post- Fordism’ *Public Culture* 15: 323-45 (2003.)

²⁰ Giorgio Agamben *Means Without End: Notes on Politics* (2000, Minneapolis, Minnesota University Press).

²¹ Arturo Esobar, *Encountering Development: The Making and the Unmaking of the Third World* (1995, Princeton, Princeton University Press).

²² So vitally signified by the labours of the UNPO (unrepresented nations and peoples organization.)

postcolonial, and postmodern state predation. In Castells, two textual moves accomplish the emptying of the 'geopolitical meaning' of the Third World. First, Castells invites understanding in terms of the vexatious materiality of informational capitalism, under which auspices the Fourth World emerges, rather starkly, as 'multiple back holes of social exclusion throughout the planet.'²³ Second, the 'power' of 'identity movements spills over the various fractured historic notions of minority rights to many a different estates of struggle.²⁴ The passional logics and emotional intelligence of peoples in struggle and communities of resistance remain obscured in state-centric critiques of Third Worldism and also to some extent in the new discursivity concerning the making of the Fourth World.²⁵

111. Third World Contribution to the Making of International law

The emergence of the 'Third World' reinscribes its peoples as inaugural actors on a world historic scene, severally puts last nails in the coffin of the much vaunted 'truth' of Hegelian lie concerning the impossibility of history, and therefore of future, outside the old and new 'Europe'. The Third World states and peoples wrest away the authorship of international law norms, standards, and values from charismatic priesthood of the European Enlightenment thinkers. Their struggles inscribe a germinal principle of the right to self-determination, almost entirely unbeknown to classical international law; delegitmate apartheid racism as a founding category enshrined in the colonial

²³ Castells, 164

²⁴ Waged by peoples living with disabilities, the lesbigay transgender communities, politically incarcerated peoples (detunes) everywhere, and the globalized communities of the stateless peoples and of migrant workers, including the victimage of sex- trafficking global trade.

²⁵ Among the protean forms of Third World people's resistance, which ambush, disorganize, fragment and fracture hegemonic great powers, perhaps the construction of the body as a site of struggles against domination remains significant. The rebellious sought (in the words of Fanon) 'to embody history in his [her] person'. Very different histories signifying the individual body as a global social text are offered by Mohandas Gandhi, Martin Luther King Jr., Nelson Mandela, Aung Suu Sui Kyi, the self-immolating Buddhist monks in Viet Nam, the Palestinian peoples, and those that now invent the technologies of suicide bombing. I here summarily suggest that historical narratives of Third World need to more fully grasp the practices of disembodiment by the hegemon, and re-embodiment by the subaltern. This task still awaits Foucauldian labours.

foundations of international relations, organization, and law; and further enrich making of the law and jurisprudence of contemporary human rights. Indeed, some of the most fecund expansions of contemporary law thus emanate from foundational action-thinkers as far otherwise apart as Gandhi and Fanon. Their residuary legatees subsequently articulate the languages of ‘the common heritage of (hu)mankind’ (reaching now so far as to claim permanent sovereignty over genomic resources), peaceful and friendly relations among states, the New International Economic Order, the (aborted) New World Information Order, social, economic, and cultural rights, and the human right of development of all states and peoples. The stylised discourse marking the much- beloved distinction between the Westphalian’ and ‘post- Westphalian’ international law and orderings may never fully exhaust these radical acts of authorship of contemporary international law. Obviously any endeavour aiming at reading Third World expectations from international law remains stillborn without a scrupulous hermeneutics of retrieval of these precious archives of the Third World people’s authorship of contemporary international law normativity/discursivity. No longer viable remains the framing category international law as the signifier of ‘the law of nations’, its normative ruses (sources/ resources) that aspire to ‘govern’ the conduct of states in times of peace as well as war, even when its Other – the law of peoples— remains difficult of enunciation.

To be sure, grand narrative traditions of the rise and growth of international law remain typically concerned with its ‘lawness’ (that is, its obligatory character (given the diffuse nature of enforcement and its manifest, when compared with national legal orders, lack of centralization of means of coercive implementation), the changing nature of its subjects (this now most certainly includes sovereign and equal states and international/ supranational organizations), and its sources (that is, legitimate grounds of the production of its norms and standards, and even its values.) In this standard narrative, only stable patterns of belief and behaviour animating the conduct of states (custom), and obligations undertaken by formally concluded bilateral or multilateral agreements (treaties)²⁶ and the rather episodic acts of international adjudication remains

²⁶ International law honours the writings of the ‘publicists’— freestanding thinkers/ scholars-- even now as a ‘subsidiary’ source of international law under the Statute of the International Court of Justice. But their prior role in production of its values, standards, and norms has been immense. Postcolonial and postmodern publicists, in the recent times, have critiqued their classical predecessors for Eurocentric bias, overt and covert residues of a

decisive for the stories of words that bind. However, no longer may the re-make of contemporary international law further be understood merely as the history of the *law of nations* to the entire exclusion of *the law of peoples*.

Further, despite some discomfiture, we need recourse to the gifted discourse of the Soviet jurist Pashukanis concerning the distinction between the ‘political’ law and the ‘technical’ regulation. Facile thought practices that instantly dismiss this distinction also render themselves render ineligible for any serious understanding of the contribution of Third World peoples and states to the making of the technical regulation on such diverse terrains such as trade and commerce, transport and communications, sustainable environment and natural resources including of the seabed and ocean floor and the diverse regimes of satellite communications and intellectual property law.²⁷ Nor are to be ignored the contests over the ‘technical’ over the ‘political’ element that constitute disagreements over the statistical, even econometric, and rather arcane languages of ‘benchmarks’ and ‘indicators’ now differentiate between the developing and least developed societies, the middle and low-income countries, the highly and less so indebted ones, the UNDP indicators, the Globalization Index, or more recently the turgid prose of the MDG, and the variety of genera, texts, and corpuses of international development aid conditionalities. Further, as already noted, Third World practices of resistance articulate themselves increasingly in the technical dimension of dispute resolution and commercial arbitration. Thus the premature dire predictions concerning the end of Third Worldism find their uncanny nemesis on these sites.

global epistemic racism, deeply ingrained biases of a universal patriarchy and civilizational superiority. Even so, the renovation of contemporary international law normativity does not altogether decry the role of publicists.

More important, we need to acknowledge fully the production of new global social meanings of ‘international law’ made possible the by politicised multitudes. To take one among many examples, the several hundred thousand peoples of the world who globally protested the early intimations of the Iraq war, were able to register people –oriented versions and visions of the UN Charter-based proscriptions concerning ‘justifications’ for recourse to ‘preemptive’ use of collective force. New histories of international law must surely more fully acknowledge the already several fecund sites for its renaissance provided by insurgent global counter-publics.

²⁷ See specially, John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000.)

111. TOWARDS UNDERSTANDING THE LOGICS OF EXPECTATIONS

These preliminary remarks at least profile some alternate inscriptions of the orders of expectations of the Third World states and peoples on the bodies of international law. It already enshrines some ‘core’ expectations of the ‘Third World’ states such as rather easily named expectations of: continual fuller respect for the principle of equal sovereignty of all states, non-aggressive international relations limiting the use of force by a state or a coalition of states firmly within the discipline of the United Nations Charter, and global justice via the progressive development of international law, its structures and processes.

However, naming the ‘core’ expectations also invites attention to those thus instantly rendered ‘peripheral’. In some ways, the former signify regimes of ‘hard law’, the words of law that *bind*, and the latter the regimes of ‘soft’ international law, the words that merely *aspire*.²⁸ All this reframes the indeterminate histories of duality constituting the relation between ‘law’ and ‘expectations’. I have elsewhere contested Bentham’s narrative of ‘core’ expectations in terms of the trade –offs, and costs, of satisfaction of dominant over the repressed peripherally constituted ‘subaltern’ heterogeneity²⁹. Niklas Luhman³⁰, who never read Bentham, insightfully suggests a distinction. While contingent/ existential collapse with disappointment, normative expectations survive, and even grow stronger, in the face of disappointment. Put another way, the more they stand violated, the greater becomes their moral strength³¹

²⁸ See, in the peculiar context of the European Community law, David M. Trubek and Louise G. Trubek, ‘Hard and Soft Law in the Construction of Modern Europe: The Role of Open Method of Co-ordination’ *European Law Journal* 11:343-364 (2005). I offer a somewhat different take concerning how ‘soft’ law stands hardened and in turn the ‘hard’ law stands softened: see Upendra Baxi, ‘Politics of reading Human Rights: Inclusion and Exclusion within the Production of Human Rights,’ in Saladin Meckled –Garcia and Basak Çali (Ed.) *The Legalization of Human Rights* 182-200 (2006, London, Routledge).

²⁹ Upendra Baxi, Introduction to Jeremy Bentham *The Theory of Legislation*, pp. xviii-xxlii (1975 Bombay, N.M. Tripathi,).

³⁰ Niklas Luhman, *Sociology of Law* (1985, London, Routledge).

³¹ Of course, there also exist some trends of reversal. The ‘hard regime’ proscribing use of unilateral or coalitional force outside the purposes and principles of the United Nations Charter now stands altogether softened by the recourse to the so-called right to pre-emptive use of force by the hegemonic nations against the ‘outlaw’ states, peoples, and communities, categories that all too often encapsulate unprincipled and standardless use

In this sense, the widely reflected practices of Third Worldism crystallize the crises, as well as the resilience, of normative expectations congealed so creatively in the constitutive regimes of ‘soft’ international law – from the United Nations Declaration on Social Progress to that concerning the Right to Development, and beyond— which by the power of reiteration become incrementally ‘hard’ and in the same process by also softening the ‘hard. International law perforce constantly straddles these conflicted realms, now poignantly expressed via human rights languages, logics, and paralogs.³²

Any inventory of histories of resilient normative expectations surely must include the accomplishments of:

- The historic movement for equal rights of women that now flourishes as an order of normative expectations, notably under the auspices of the CEDAW
- The worldwide movement against official practices of torture, cruel, inhuman, and degrading treatment
- The articulation of human rights of the forgotten peoples: namely, the indigenous peoples and among them especially those communities threatened with cultural and physical extinction
- The global civil society induced transformation of the regimes of social, economic, and cultural rights, once upon a time entirely subject to practices of indifferently willed ‘progressive implementation,’ into a major agenda of global developmental policy concern³³.

of some ‘Star wars’ type deployment of immensely weaponry of mass destruction that no longer respects even the canons of international humanitarian law and jurisprudence.

³² Once upon a time thus the expectation of self-determination from the colonial yoke was considered ‘soft’; it has now hardened in the common article two of the Covenant on Civil and Political Rights and the Economic, Social, and Cultural Rights. Likewise, normative outlawry of all forms of racial discrimination, intolerance, and xenophobia remained ‘soft’ law, which has now increasingly hardened.

³³ See, notably, the discourse concerning the Millennial Development Goals and the draft United Nations Norms concerning the human rights responsibilities of multinational corporations and other business entities. For an analysis of the former, see Philip Alston, ‘Ships Passing in the Night: The Current State of Human Rights and Development Debate seen through the Lens of the Millennial Development Goals’ *Human Rights Quarterly* 27: 755-829(2005).

- **The sustainable development movements that articulate concerns for alternate planetary futures.**

To this initial listing one may further add diversely formed, and sustained, Third World/ peoples' normative expectations from contemporary international law, which may further notably include the following, with a margin of appreciation for reiteration:

- *The expectation of coequal discursive dignity* characterized by some rather straightforward doctrines of respect for the sovereign equality of states³⁴
- *The expectation of territorial non –aggression*, most notably codified in the First Gulf War in relation to Kuwait but otherwise ever so fully betrayed now in the current discourse concerning the justification for ‘pre-emptive’ wars
- *The expectations for gender equality and justice*, symbolized by the motto ‘women’s rights are human rights’
- *Expectations of global reparative justice* that symbolically and materially redress past wrongs³⁵
- *Expectations concerning duties of assistance* from States which have demonstrably and systemically benefited in the past by recourse to colonial rule/ imposition³⁶
- *Expectations concerning authentic global confessional politics rupturing forms of diplomacy of human rights*; through a global tribunal that investigates and acknowledges the ravages of global capitalism manifest in the brutal and genocidal practices of colonialism³⁷ and further the Cold War, and the post Cold War, practices equally if not more, profiteering from of the orders of human rights, and human, abuses and violations

³⁴ See notably Bhupinder Chimini, ‘Third World Approaches to International Law: A Manifesto’ in Anthony Anghie *et.al.* Ed, *The Third World and International Order: law, Politics, and Globalization* 47-74 (2003, The Hague, Martinus Nijhoff).

³⁵ See, Janna Thompson, *Taking responsibility for the Past: Reparation and Historical Justice* (2004, Cambridge, Polity Press).

³⁶ Differently articulated by John Rawls, Charles Beitz, and Thomas Pogge.

³⁷ Notably proffered by Bouaventura de Sousa Santos, *Towards a New Commonsense: Law, Science, and Politics in the Paradigmatic Transition* (2000, New York, Routledge).

- *Expectations concerning the redressal of the variegated forms production of new forms of human rightlessness produced by the regimes of ‘stateless peoples’ and further embodied and embedded fully in the policies and practices of violent social exclusion of ‘multicultural’ policies*
- *Expectations concerning human-rights based practices of globally envisioned/ enforced human ‘development’ practices and policies, in ways that expose and also mitigate the languages of empowerment, which still reproduce unspeakable horrors of mass global impoverishment*
- *The incredibly complex planetary future sustaining orders of expectation that insist the acts/ performances of global diplomacy and politicking ought after all be held within the logics and languages of sustainable development that collectively arrests the sceptre of unguided nuclear proliferation, and of internationally and impartially verified potential of chemical and biological weapons of mass destruction, in ways that promote and protect grounded respect for the ethic of global citizen collective action*
- *The fair versus the free trade expectations that expose the violence of the dominant regimes of internationally negotiated/ mandated trade/ investment policies, and suggest some non- aggrandizing modes of global, and national, economic development policy postures*
- *Expectations of equal respect for ‘microscopic’ minorities and the forgotten peoples such as the indigenous peoples, peoples living with disabilities, peoples constituted by different sexual orientation, and the nomadic and food-gathering peoples now continually threatened with extinction*
- *Expectations of subjecting market fundamentalisms at the altar of human rights responsibilities.*

IV. TOWARDS A CONCLUSION

The insurgent question haunts: How may we ever read Third World ‘expectations’ from ‘international law’? Radical’ reductive reading habits/ *habitus* may of course instantly dismiss even the posing of this question as mystifying performatives sheer romantic fables. Even so, more responsive and responsible remain endeavours that

accord epistemic due process to an order of expectations towards the making of a post-imperial international law³⁸.

That manifold/ multiplex politics of desire survives, I think, the searching gaze of reasoned scepticism offered as early as by Fredrick Nietzsche at a decisive critical moment for the European Enlightenment, and the genre of American pragmatist thought from John Dewy and William James, and now in our own times revived by some so formidable residuary legatees as Richard Rorty and Stanley Fish. This genre enwombs, in the deepest contemporary moment of human despair, immiseration, and now ‘terror’ of a new Empire, the resilience as well as the fungibility of a new ‘politics of hope’, of the uncanny and heady mix of forms of politics of intergovernmental and activist desires. Is it probable that some intransigent, and novel, readings of Third Worldism may engage more tenaciously, fully, and differentially, the struggles and tasks directed at the removal of globally produced and continually fostered structural injustices? Perhaps, *not*: though even this deeply agnostic conclusionary gesture ill serves what Walter Benjamin fecundly named as framing the tasks of ‘future memory’.

³⁸ See, Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004, Cambridge, Cambridge University Press).