

# **International Law and the Third World**

Reshaping Justice

*Edited by*

**Richard Falk,  
Balakrishnan Rajagopal &  
Jacqueline Stevens**

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Published 2008 by Routledge-Cavendish  
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada  
by Routledge-Cavendish  
270 Madison Avenue, New York, NY 10016

*Routledge-Cavendish is an imprint of the Taylor & Francis Group, an informa business*

© 2008 Edited by Richard Falk, Balakrishnan Rajagopal, Jacqueline Stevens

Typeset in Times by KnowledgeWorks Global Limited, Chennai, India  
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

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*British Library Cataloguing in Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloging in Publication Data*

Falk, Richard.

International law and the Third World/Richard Falk, Jacqueline Stevens, Balakrishnan Rajagopal.  
p. cm.

1. International law—Developing countries. 2. Developing countries—Foreign relations. I. Steven Jacqueline, 1962. II. Rajagopal, Balakrishnan. III. Title. KZ1237.F35 2008

341—dc22

200704859

ISBN 10: 0-415-43978-7 (hbk)

ISBN 13: 978-0-415-43978-7 (hbk)

ISBN 10: 0-203-92651-X (ebk)

ISBN 13: 978-0-203-92651-2 (ebk)

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# Introduction

RICHARD FALK, BALAKRISHNAN RAJAGOPAL &  
JACQUELINE STEVENS

This volume arose out of a special issue of the *Third World Quarterly* devoted to critically exploring the past, present and future relevance of international law to the priorities of the countries, peoples and regions of the Third World or the South.<sup>1</sup> It is also a contribution to international law scholarship by scholars outside the North American and European mainstream, building on previous work by scholars both within and outside the Third World who take the South seriously as an object of regulation, repression, fantasy and faith in international law.<sup>2</sup> During the last 50 years there has been a proliferation of international law, including new treaties, international and hybrid adjudicatory bodies, international institutions and legal mechanisms of cross-border trade, finance and investment. Less clear is whether this proliferation of international law has translated into greater well-being for the peoples and countries in the South.

In what many would consider to be the most important political event of the twentieth century, European colonial rule and empires, some dating from the fifteenth century, were formally ended over several decades beginning in the 1940s. Since then, the countries that emerged from the former colonial territories, now constituting a major part of the South, have acquired greater economic, political and military power. Their share of world trade has grown tremendously and countries such as Brazil, China, South Africa and India have emerged as major powers in international economic relations.<sup>3</sup> While the United States remains militarily the strongest nation in the world, it is also geopolitically weaker than it used to be in many different respects, partly due to the rise of the South and partly due to the self-inflicted damage caused by its ill-considered military adventurism and neo-liberal economic policy since the end of the Cold War, especially accelerating since 9/11 and the Iraq intervention.

Simultaneously, while the rise of some countries in the South has been phenomenal, there is also increasing evidence that the people in these countries are not equally benefiting from this rise,<sup>4</sup> and in addition the fate of other smaller countries in the South, especially in Africa, continues to hang in the balance. Grinding poverty easily co-exists with tremendous affluence, and the political dynamics of this inequality continues to produce resistance from the poor, producing what Partha Chatterjee aptly calls 'the politics of

the governed’—forms of governance which are intricately connected to the mass politics of the ‘street’.<sup>5</sup> Despite the increased territorialisation of the nation-state in some contexts—i.e. the fortifications and increased arrests of undocumented aliens in the United States, the restrictions on refugee movement in war zones of the Middle East and Africa, and the restrictions on the movement of documented travellers globally—there are concerns about practices that go back to the days of medieval imperialism as a result of the rise of global economic and political institutions and an increasing deterritorialisation of the nation-state as well as that of resistance to it.<sup>6</sup> The uneven and instrumental recognition of human rights and sovereignty compel questions about how international law matters to the South. Gone are the days when the Third World consisted of a group of states—such as the G-77 group—and it was possible to argue that international law must enable those states to fulfil their moral and material functions in order to be seen as minimally just. One could then advocate for new doctrines of international law (such as permanent sovereignty over natural resources) and even argue for an expansion of the sources of international law beyond treaty and custom.

That approach is no longer adequate for answering the question of what international law must do to be minimally just. The Third World coalitions of the old days no longer hold together, for example as judged from their record in the WTO negotiations in the Doha Round, where neither the G-77 nor newer ad hoc coalitions, such as G-21, have been able to negotiate on behalf of the Third World. More importantly, the record of the post-colonial state in the Third World itself has in fact revealed it to be a predatory one, and post-colonial development has been shown to be pathological, which has tremendous adverse consequences for the poor in those countries. The Westphalian foundations of international law seem oddly inadequate in explaining the nature of power, legitimacy, effectiveness or even resistance in international relations. Nation-states in the Third World are increasingly unable to rule effectively over their economies, populations or territories, while transnational actors such as the WTO or global financial markets radically alter the accepted meanings of authority or effectiveness. The meaning of legitimacy is also being sought to be defined by a new global ethic of human rights, with its own logics of power. One question that emerges concerns the criteria for evaluating the success of the nation-state and its norms of sovereignty. One might compare the vast differences in domestic law and political institutions among countries worldwide, note the success with which some countries determine hereditary populations specific to their borders and be impressed by the degree to which territorialisation of sovereignty has created autonomous political economies. Or one might consider the manner in which powerful corporations and states impose their interests transnationally, which indicates that the exercise of power and of resistance to it are increasingly incomprehensible within the territorial. Westphalian structures of international law.<sup>7</sup> What is the role of international law at a time of de-reterritorialisation, declining European and American power and the rise of Southern countries while being accompanied by the domination and resistance of the governed?

This volume begins with the premise that the production of more international law cannot automatically be assumed to be in the interest of the South, or to produce a legal system that is minimally just. Such a supposition needs to be critically interrogated and empirically established case by case. A distinguished group of authors from around the world pursues this task in this volume. While their writings show the diversity of approaches to the question of how relevant international law is to the future of the South—now being considered in all its de-territorialised richness—they also reveal some consistent themes, which run through most of the chapters.

A first theme is the recognition of the importance of colonial history as a formative element in the making of international law, including how particular doctrines and institutions of international law have been shaped by the colonial encounter, as well as how power relations continue to be structured to produce outcomes harmful to the most disadvantaged peoples and countries in the world. This is in contrast to mainstream treatments of international law which do not take history, let alone colonial history, very seriously in explaining the nature and function of international law. Antony Anghie's chapter thoroughly explains the way in which the foundational doctrine of old international law, that of sovereignty, was shaped by the colonial encounter in ways that continue to reverberate in modern international law after 9/11 in the so-called war on terror. Liliana Obregón's chapter on Latin American engagement with international law reveals how complex and ambivalent it was, simultaneously affirming universality while maintaining difference with the Euro-centric international law at the turn of the twentieth century, in a process that she calls 'creolization'. Many other authors also treat colonial history and its legacy as the background in their own chapters, including that of Baxi, Falk, Rajagopal, Okafor, Shalakany, Mgbeoji, Elver, Gathii and Nesiah.

A second theme of this volume is that the very idea of the Third World needs to be rethought in its relation to international law in order to render the latter minimally just. Traditional analyses of international law consider the Third World (to the extent that they do at all) as a collection of post-colonial states united by a commitment to development. In this volume, authors advance the argument that the very idea of development needs to be critically analysed for its ideological character and the Third World needs to be reconfigured. Many issues in international law that are often described as North–South issues—such as climate change or human rights—assume a very different dimension under this type of analysis. Upendra Baxi's chapter offers a complex reading of the history of the various uses and abuses of the term 'Third World', and analyses its 'decomposition' at various sites including struggles for self-determination, and contestation over development planning or governance. Many other authors pursue this line of reasoning, including Rajagopal, Stevens and Okafor. In a telling example of a post-Westphalian approach, Elver calls attention to the difficulties of resolving fresh water scarcity in a world where the political boundaries of states do not always coincide with the boundaries of water resources. Related to this theme is the idea that Third World engagements with international

law are historically contingent and have ranged widely over the previous decades. Gathii shows how this resulted in different Third World approaches to international economic governance, each with different philosophies and stakes.

A third theme that runs through the essays in this volume is the structuring role of resistance in shaping international law doctrines and institutions, and the need to recognise this role as part of a move towards making international law protect justice. Traditional international law scholarship rarely, if ever, considers the role of resistance as a formative element in the making of its doctrines, institutions and norms. Normative change is traditionally explained by a coincidence of interests or power, while institutional change is explained by functionalist needs or global community values. But the contours of justice, as protected by international law, are ineluctably shaped by resistance from social movements, transnational networks and local state formations. The evidence behind this is empirically robust, while the normative implications of taking the resistance of the 'Other', 'subaltern' seriously, are significant. It allows one to ground judgments of the international Court of Justice in a global democratic praxis, for instance.<sup>8</sup> Balakrishnan Rajagopal pursues this line of reasoning in his chapter to ask what it would take to pursue a 'counter-hegemonic international law' and argues that the task must begin by critiquing past strategies of 'progressive' Third World legal strategies through human rights or development discourse.<sup>9</sup> Vasuki Nesiah aptly reminds us in a similar vein that resistance strategies in an age of empire may run the danger of legitimising empire itself by turning away from the historical and denying ideological conflict. Several other authors, including Falk, Okafor, Mgbeoji Chinkin and Charlesworth draw attention to the role of resistance by those who are left out of the imperial embrace of traditional international law.

A fourth, closely related theme of the book is the idea that traditional Westphalian international law is deeply ideological and hegemonic, which is itself now sought to be replaced by an imperial international law in a return to its 'roots'. At the heart of this theme is the critique of nation-state the actor through which Westphalian and imperial projects of international law have sought to universalise their reach. Richard Falk points out in his chapter that Westphalian international law was partially superseded by the epochal events of the twentieth century from World Wars I and II decolonisation, globalisation and the war on terror. As alternatives he recommends a post-Westphalian, law-oriented system, either regional or global, in which the political behavior of the nation-state matters less than that of civil society actors. Jacqueline Stevens offers a trenchant critique of the nation-state idea in her chapter and recommends abandoning the nation while retaining the state. The critique of the nation-state and the capacity of a Westphalian system to produce and maintain ideological domination and hegemony are shared by many authors, including Baxi, Anghie, Rajagopal Gathii and Okafor. Gathii calls attention to the way Third World scholars in the TWAIL (Third World Approaches to International Law) tradition describe the operation of hegemony through the idea of 'regime bias', that

domination is reproduced through hegemonic legal interpretations of facially neutral legal principles and rules.

A fifth theme of this volume consists of the belief that international law is not an alternative to other narratives of justice, whether drawn from religion or secular ideologies like nationalism, but is simply one more terrain on which contestation over the contours of justice take place. This is most clearly visible in the chapters of An-Na'im and Shalakany. An-Na'im argues persuasively that the so-called conflict between Islam and the West should not be seen as a primordial one between religion and law, but should instead problematise the artificial divide between the idea of a 'perfect' law and an 'imperfect' religion. Instead, he suggests that one should broaden the inquiry to focus not just on religious identity but also on historical and contextual factors relating to socio-economic and political relations between Islamic and Western countries. Shalakany brings forth the startling observation that 'rule of law' has become a common platform in Egypt among judges, corporate lawyers, human rights advocates, Western aid institutions and Muslim Brotherhood activists bent on bringing about an Islamist interpretation of Egypt's identity. Analysing the 'rule of law' reforms in Egypt from the late-nineteenth century, he establishes the contingency of secular reform, as well as the complex interplay between law and religion in national identity struggles. In contrast, traditional international law narratives tend to emphasise law as a 'modern' alternative to 'traditional' religion, thus seeing a cosmic struggle between the two in the post-9/11 period. Many other authors including Obregón and King-Irani also stress the contingent and historical nature of international law in diverse cultural contexts.

In any volume of this kind, it is inevitable that there are also tensions which run throughout the volume between different chapters. For instance, we are aware of a tension between those who believe that international law—or some version of a global legal system—is an important part of establishing justice, and others who believe that international law in any form may be incurably tainted by colonialism, beset by ideology and hegemony, and may in the end legitimise the very structures that produce injustice in today's world. Thus, An-Na'im's attempt to ground the Shari'a in international human rights law may be contrasted with the critique of Anghie, Rajagopal and Nesiah, and with the agnosticism of Shalakany. Such tensions illustrate the complexities of how law can shape justice in today's rapidly changing world.

To conclude, it is evident that from the times past, international law has provided the powerful with a series of instruments by which to exploit and control the weak, and even provided legal cover for colonial rule. As is the case with the manipulation of domestic law to suit powerful, particular interests, international law has too often been the province of the strong, and unfriendly to practices associated with the rule of law and justice. But we also believe that international law, as with all law, is a two-edged reality and, with political and moral imagination, can be used advantageously by the weak to resist the plunder and invasions of the strong. Domination by

the powerful has always produced resistance, and international law has been crucially shaped by it. The struggle against colonialism and economic imperialism was waged not only on battlefields and through diplomacy, but also in arenas where new norms of legitimacy were established. The United Nations, despite its frequent subservience to geopolitical manipulations, lent an aura of legitimacy to the anti-colonial and anti-apartheid movements, and helped confirm the legality of Third World claims to sovereignty over natural resources and foreign investments. International law has also been a very useful tool in the hands of a global civil society and social movements in making concrete progress towards equity, democratisation and accountability. And by so doing, it has managed to reconnect selectively international law with some important issues of global justice.

At the same time, as with the backlash against efforts by the South to legislate 'a new international economic order', it was not possible to move effectively in the direction of global economic reform such that would help rectify North/South inequities, and especially taking into account the de-territorialised nature of North/South in international economic relations. Market forces and neoliberal ideology prevailed, generating a world economic dynamic, generally labelled 'globalisation', biased towards the rich both within and between countries, leading to widening disparities and miniscule progress in overcoming the massive poverty that remains concentrated in the Third World. It was also not possible to end or even civilise great power hegemony and their continuation of imperial 'great games'. Past efforts by the South to legislate against intervention or create global accountability mechanisms for curtailing aggressive war, such as the International Criminal Court, have been thwarted. These defeats are part of a long history of domination by the North and resistance by the South, in which international law has, and will continue, to play a major role.

We are conscious of the historical moment that seems to include a crisis of global governance beyond the capacities of a world of sovereign states. In such a setting, the global war on terrorism has been understood as a new hegemonic project to assert dominance over the South while keeping the world economy tilted to favour the North. One reason for efforts at dominance may be to control resources, but other motives, including partisan national interests, also play a role. The world order alternatives to global hegemony at this stage seem to be some combination of changing geopolitical power balance, forms of regionalism, global civic activism (as giving rise to a global civil society), and normative commitments to counter-hegemonic readings of human rights, ecological sustainability and the global rule of law, especially with respect to the use of force.

It is our hope that this volume will encourage debate and dialogue on the topics covered. What unifies the disparate contributions to this volume is a dual commitment that connects international law with prospects for global justice, and imagines how international law in the future might be made to serve the cause of social progress and moral evolution for the planet as a whole, but especially for the peoples of the Third World.



## Notes

- 1 In this volume, we use these two terms interchangeably to mean that the Third World (or the South) can be understood in many ways—as nation-states, peoples or regions—and not only as a Westphalian structure. See n. 2 below.
- 2 Previous work on international law and the Third World includes Bedjaoui, M., *Towards a New International Economic Order*, 1979; *Third World Attitudes Towards International Law* (F. Snyder & S. Sathirathai, eds), 1987; Anghe, A., Chimni, B. S., Michelson, K. & Okafor, O. (Eds), *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff), 2003. The latter volume is part of a new generation of Third World scholarship loosely organised under the name of Third World Approaches to International Law (TWAIL). This volume is also a contribution to that genre of scholarship. One of the distinguishing characteristics of this new stream of scholarship is its move away from a Westphalian understanding of the Third World. See, e.g. Mutua, M., What is TWAIL? *Proceedings of the American Society of International Law*, 94, 2000, p 31.
- 3 See Amsden, A., *The Rise of 'the Rest': Challenges to the West from Late Industrializing Economies* Oxford University Press, 2003.
- 4 According to the Asian Development Bank, income inequality has sharply increased in 15 of the 21 countries it studied over the last decade, during a period of unprecedented economic growth in these countries. Quoted in (2007, August 11–17) *The Economist*, p 36. The biggest increases were found to be in China, Nepal and Cambodia, with India and South Korea close behind. See also Collier, P., *The Bottom Billion*, Oxford University Press, 2007.
- 5 Chatterjee, P., *The Politics of the Governed: Reflections on Popular Politics in Most of the World* Columbia University Press, 2004.
- 6 See Chimni, B. S., International institutions today: an imperial global state in the making, *European Journal of International Law*, 15 (1), 2004, pp 1–37.
- 7 This was a central motif of Hardt and Negri's work, *Empire*, which was seen to decline in significance because of 9/11 and the re-instantiation of a militarised state system in international relations: see Hardt, M. & Negri, A., *Empire*, Harvard University Press, 2000. For a recent sophisticated analysis of transformations in foundational concepts of territory, authority and rights as a result of globalisation see Sassen, S., *Territory, Authority, Rights: from medieval to global assemblages*, Princeton University Press, 2006. See also Baxi, Falk and Stevens in this volume.
- 8 See, e.g. Falk, R., The nuclear weapons advisory opinion and the new jurisprudence of global civil society, in R. Falk, *Law in an Emerging Global Village*, 1998, pp 165–188.
- 9 See also Rajagopal, B., International law and social movements: challenges of theorizing resistance *Columbia Journal of Transnational Law*, 41, 2003, p 397.

