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Some Newly Emergent Geographies of Injustice: Boundaries and Borders in International Law

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ABSTRACT

This conversation examines the relationship between the boundaries and borders in international law and the production of geographies of injustice through the lens of the colonial epistemologies, especially of private international law in the face of mass social disasters like the archetypal Bhopal catastrophe. I also address the languages and logics of coloniality and postcoloniality, as states of consciousness and social organization, under the complex and contradictory unity of neoliberalism.

INTRODUCTION

In this conversation, I focus on how geographies of human rightlessness are produced through law and jurisprudence. The Anthropocene era now upon us challenges almost all basic premises of human coexistence, though that constitutive notion is not free of anxieties.¹ There is, however, no doubt that popular science, global environmental policy and activism,² and the media capture something

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1. Technically, the International Commission on Stratigraphy is still working out whether the term “Anthropocene,” originally proposed by Paul Crutzen and Eugene Stormer, constitutes a new and autonomous geological time, or an extension of the Holocene period of time (which lasted over eleven thousand years). See Paul J. Crutzen, The “Anthropocene,” in EARTH SYSTEM SCIENCE IN THE ANTHROPOCENE: EMERGING ISSUES AND PROBLEMS 13, 13–16 (Ehlers et al. eds., 2006); Paul J. Crutzen, Geology of Mankind, 415 NATURE 23 (2002).

2. On December 12, 2015, 195 countries arrived at the final twelve-page document of the Paris Agreement (the fuller title being the Paris Agreement under the United Nations Framework Convention on Climate Change) to reduce emissions as part of the method for reducing greenhouse gas. The members agreed to reduce their carbon output "as soon as possible" and to do their best to keep global warming "to well below 2 degrees C." Already,
important when they suggest that the emission of greenhouse gases and climate change exert "a decisive influence" on "the state, dynamics, and the future of the Earth system." The popular readings as well as new global social-change theory are not clear on what "responsibility" for social and political action this may entail. Regardless of what geologists

187 nations had submitted, well before the Conference, detailed national plans for how they will contain the rise in greenhouse gas emissions (core commitments of the Paris deal). This "ambitious and balanced" scheme (in the words of French foreign minister Laurent Fabius, the plan was a "historic turning point" in the goal of reducing global warming. The Agreement will not become binding on its member states until fifty-five parties who produce over 55% of the world's greenhouse gas have ratified the Agreement. Each country that ratifies the agreement will be required to set a voluntary target for emission reduction, though it remains to be seen whether some countries, especially the United States, will agree to do so, in the light of—in the words of U.S. Secretary of State John Kerry—"a victory for all of the planet and for future generations," and—in the words of President Obama—"We have set a course here. The world has come together around an agreement that will empower us to chart a new path for our planet, a smart and responsible path, a sustainable path." See Alister Doyle and Barbara Lewis, With Landmark Climate Accord, World Marks Turn from Fossil Fuels, REUTERS (Dec 13, 2015), http://www.reuters.com/article/us-climatechange-summit-idUSKBN0TV04L20151213.

Alertly, and adroitly, many environmental and climate change proponent NGOs, and others, have begun to criticize the Paris Pact, on various grounds: the voluntary character of the treaty commitments (primarily through "Intended Nationally Determined Contributions" (INDCs)), the relative absence of third party enforcement, the ambivalence towards, or even the disappearance of, the principle of "common but differentiated responsibility," and even the projected pace of treaty finalization (the "global stocktake," which revisits the national goals to "update and enhance" them every five years beginning in 2023). No doubt the fine print of this deal will be subjected to critical analyses in the near future; already a minority of academics have sounded a note of caution against an international treaty. See Jane McAdam, Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer, 23 INT'L J. REFUGEE L. 2 (2011). Drawing on field work in Tuvalu, Kiribati, and Bangladesh, and maintaining a distinction between "legal" and "political" benefits, McAdam "queries the utility—and, importantly, the policy consequences—of pinning 'solutions' to climate change-related displacement on a multilateral instrument, in light of the likely nature of movement, the desires of communities affected by it, and the fact that a treaty will not, without wide ratification and implementation, 'solve' the humanitarian issues." Id. See also Jane McAdam and Ben Saul, An Insecure Climate for Human Security? Climate-Induced Displacement and International Law, in HUMAN SECURITY AND NON-CITIZENS: LAW, POLICY AND INTERNATIONAL AFFAIRS 357 (Alice Edwards & Carla Ferstman eds., 2010).

3. These terms originate from the language of the working group established to study the potential of the Anthropocene as a new geological era. See Working Group on the 'Anthropocene': What is the 'Anthropocene'? - Current Definitions and Status, Subcommission on Quaternary Stratigraphy, SUBCOMMISSION ON QUATERNARY STRATIGRAPHY (May 5, 2015), http://quaternary.stratigraphy.org/workinggroups/anthropocene/.

will eventually do with the Anthropocene, Naomi Klein has recently spoken on behalf of many by calling us to think of our planet anew—as a planet in distress; as a world where political and ideological borders and boundaries make no sense, and old loyalties need to be overthrown and replaced with a newly configured and urgent ethic of life for all.5 Perhaps this means that we must, with Jacques Derrida, rethink the question of responsibility as response-ability6—as openness to the suffering of the other, or, more precisely, to the face of the other, as Emmanuel Levinas used to say.

The theory and practice of international law have witnessed several paradigm shifts: from Westphalian to post-Westphalian statehood, from feminist to postmodern images of the state, and from visions of colonialism and imperialism to visions of universal equal human rights and global justice. As global citizens, we ourselves have witnessed many transitions: from the colonial to the postcolonial; from the bourgeois to socialist; from the first to a second, third, and a fourth world; from classical liberalism to contemporary “neoliberalism”; from global wars of terror to global wars on terror. The social invention of international, supranational, and regional organizations and the idea of human rights have radically changed the world’s expectations from, and experiences of, international law, relations, and organizations. International law no longer merely talks in the languages of positive law; it also converses in the languages of human rights and justice. To fully understand these changes is a huge task for which an inquiry into the changing “boundaries of statehood” provides a new and interesting prism. In this context, we must recall that boundaries and borders are set not just by changing historical realties but also by conceptual distinctions. The latter delineate both the empirical and the juridical in the very concept of the state in international law.7 The late Westphalian-era Montevideo Convention on Rights and Duties of States defined statehood in terms of

5. See generally Naomi Klein, This Changes Everything: Capitalism vs. the Climate (2014). There are many ways to read this admirable work, which is designed to foster activist knowledge, legality, justice, and solidarity among suffering and struggling peoples of the earth. It is especially important as conveying a vivid description of the tactics pursued by neoliberal markets and governments—especially job blackmail, “desperation” as means to predation, and “total control.” See id. at 388–488, for sage counsel.


the following attributes: (a) a defined territory, (b) a permanent population, (c) an effective government, and (d) independence, or the right "to enter into relations with other states." This definition eminently suited the state practice of the customary "family of nations" approach adopted by Europe and United States of America and was not abandoned until the scattered decolonization of the Third World.

Before the process of European integration, which the Montevideo Convention reflected and codified, a key ingredient of "the state" was "effective government"—a condition that, by definition, was lacking in most countries subject to colonization and Western imperialism. We have only to mention, by way of an example, the long state practice attesting to the constitutive nature of state recognition. As has been provocatively observed,

[t]he crisis of the modern nation state is that the exception is everywhere becoming the rule. We increasingly live in a time where populations' ontological status as legal subjects is suspended. The failure of laws that govern citizenship marks a decisive turning point in the life of the modern nation-state and a definitive emancipation from the naive notions of "people" and "citizen."


9. Postcolonial states were definitionally incapable of effective government because decolonization per se robbed decolonized states of their capacity for effective governance and because effective governance was itself defined in such a way as to exclude postcolonial states.

Territoriality and jurisdiction are the very bases of international law, international organizations and institutions, and lived international life. Even in a post-Westphalian era, territorial boundaries and borders are often treated as constitutive facts in the formation of "national" identities and cultures. However, the boundaries and borders of modern international law are mostly colonial in origin, and the principle of self-determination is not merely averse to, but has also generated, many boundary disputes in the Third World. While the idea of a world without borders has resurfaced as an idea of justice, the human rights plights of immigrants and refugees continue to tell chilling stories about states' lethal sovereignties.

But it is no longer tenable to maintain that states are fully sovereign subjects of international law, while the people enclosed in their borders are mere objects of international law. States as political entities are surrounded everywhere by nonstate actors. While these actors vary generally in size, resources, agenda, and impact, and particularly in their disposition or capacity to influence future events, many of them (including multinational corporations and human-rights social-action groups) wield power and influence previously unimagined. Against this background, the article focuses on the production of new geographies of injustice, the ways of their creation and perpetuation, and the means of resistance against them. It explores the following related issues concerning the production, distribution, exchange, and consumption of spaces and places: the role of private international law in the production of places of human rightlessness; and the role of postcoloniality (in particular Third Worldism) as a mentality of the legal and political organization of space. These two themes are conceptually and normatively related though distinct; intersecting as well as relatively autonomous.

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I. GEOGRAPHIES OF INJUSTICE

The notion of “geographies of injustice” emerged in the early nineties from a group of interdisciplinary scholars at the University of New York Law School’s Centre for Study of Law and Society. David Harvey coined a sister term, the “geographies of difference,” to describe colonial and capitalist geographical knowledge production.12 Harvey furnished the insight that politics, democratic or otherwise, consist of control over and production of “space,” requiring students of politics to study and understand how “places get erected into permanencies within the flux and flow of capital circulation.”13 This understanding of politics as a struggle for control and mastery over things and people through the acquisition and maintenance of power is contrasted with an understanding of the “political” as the art of resistance to power and as the language of hope. “Geographies of injustice,” in an allied way and across a range of transformations and interventions, arise out of the many contradictions of capitalism, especially those that are “moving,” that is, that are “not stable or permanent but perpetually changing [their] spots”; and those moving contradictions “morph[ ] into a contradiction that necessarily gets internalized within anti-capitalistic politics.”14 Put another way, if modern human rights norms and standards provide benchmarks for governance and development, it is their betrayal in practice which gives and restores their normative strength.15

Many forms of tyranny and ideas concerning governance and development have one thing in common: that peculiar set of arrangements and institutions of injustice, which have at their core the willful denial of basic human and social rights that causes and perpetuates conditions and circumstances of human rightlessness. It produces aggregates of worst-off peoples, often regarded as “disposable”

13. HARVEY, supra note 12, at 295.
15. See generally UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2013) (discussing the nature of human rights, the myths embedded in them, and the contemporary effects that globalization has on the human rights movement); Niklas Luhmann, A SOCIOLOGICAL THEORY OF LAW (Martin Albrow ed., Elizabeth King & Martin Albrow trans., 1985) (exploring the concept of law in the context of a general theory of social systems and its role in solving societal problems).
or "pre-social," that emerge variously in the changing faces of development as a means of inclusion and exclusion, and consensus as well as dissensus on the nature of justice and injustice in society. The "arts of governance" (as Michel Foucault once termed them) render the suffering of these peoples invisible. And yet these very peoples possess the dialectical powers of struggle and resistance from which the new political springs. It is paradoxical but true that the present neoliberal era, like all others, is marked by a dialectic between the powerful and the powerless. While this dialectic is situated in space as well as time, it is customary to conceptualize it in terms of history rather than geography, though the spatial turn in the social sciences and the law has partly reversed this tendency.

II. PRIVATE INTERNATIONAL LAW AND THE PRODUCTION OF DIFFERENTIAL PLACE

There are many ways to understand the "dull compulsion" of law, but we need to first turn to the geographies of law and rightlessness. While much has been written of late about the former, we need to

16. Michel Foucault referred to the questions that "exploded" the European discourse in the sixteenth and seventeenth centuries as centering upon "[H]ow to govern oneself, how to be governed, how to govern others, by whom the people will accept being governed, how to become the best possible governor." See Michel Foucault, Governmentality, in THE FOCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87 (Graham Burchell, Colin Gordon, & Pete Miller eds., 1991). For Foucault, the performance of biopolitics required that "one never governs a state, a territory, or a political structure. Those whom one governs are people, individuals, or groups." See Michel Foucault, Security, Territory, Population: Lectures at the Collège de France, 1977–1978, at 122 (Arnold I. Davidson ed., 2007).


19. Compare Foucault, supra note 18 (detailing neoliberalism from the eighteenth to twentieth centuries), with Harvey, supra note 12 (detailing the space, place, and geography of difference).


21. See, e.g., Eve Darian-Smith, Laws and Societies in Global Contexts: Contemporary Approaches (2013) (situating socio-legal perspectives into global contexts and traditions). See generally Nicholas K. Blomley, Law, Space, and the Geographies of Power (1994) (arguing that the geographies of law have a profound, and often
augment the latter. Here I engage with the doctrine and practice of private international law (PIL), my first love in law. The dominant Euro-American discourse, which hardly allows any space for Southern voices, is marked by a certain kind of epistemic social contract which contains several fundamental stipulations. Being private law, PIL must serve the overwhelming need to pursue uniformity, certainty, and predictability ("decisional harmony"). Being private makes PIL immune to the higher reaches of the discourses of jurisprudence (grappling with the conditions for the production of what Jürgen Habermas calls

oppressive, impact on individuals and proposing new ways to monitor this impact); Harvey, supra note 12; Harvey, supra note 14; Boaventura de Sousa Santos, Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges, EUROZINE (June 29, 2007), http://www.eurozine.com/articles/2007-06-29-santos-en.html (arguing modern Western ideology divides the "human" from the "sub-human"); Boaventura de Sousa Santos, If God Were a Human Rights Activist: Human Rights and the Challenge of Political Theologies, 2009 L. SOC. JUST. & GLOBAL DEV. (March 11, 2009), http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2009_1/santos/santos.pdf (contending that pluralist and progressive theologies may produce more ambitious, counter-hegemonic human rights struggles); José-Manuel Barreto, Epistemologies of the South and Human Rights: Santos and the Quest for Global and Cognitive Justice, 21 IND. J. GLOBAL LEGAL STUD. 395 (2014) (exploring human rights theory through the lens of Santos' philosophy); Walter D. Mignolo, The Geopolitics of Knowledge and the Colonial Difference, 101 S. ATLANTIC Q. 57 (2002); (arguing that the geopolitics of knowledge organizes around diversification through the history of colonial and imperial differences); Edward Soja, Afterword, 48 STAN. L. REV. 1421 (1996) (offering a critical geographical perspective on the redefinition of law and borders); Robert R.M. Verchick, Critical Space Theory: Keeping Local Geography in American and European Environmental Law, 73 TUL. L. REV. 739 (1999) (discussing the legal significance of geography in relation the environmental issues of transborder waste transportation and judicial standing).

22. A comprehensive history of the politics of naming the field of "private international law" or "conflicts of laws" is yet to be written. All I wish to assert here is that even when primarily the handiwork of jurists, private international law is an instrument of colonial and postcolonial hegemony and now neoliberal dominance. See, e.g., A. Claire Cutler, New Constitutionalism, Democracy, and the Future of Global Governance, in CRITICAL PERSPECTIVES ON THE CRISIS OF GLOBAL GOVERNANCE: REIMAGINING THE FUTURE 89 (Stephen Gill ed., 2015) (arguing that the relationship between the private and public sectors be viewed through the lens of democracy and capitalism); Scott Sinclair, Trade Agreements and Progressive Governance, in CRITICAL PERSPECTIVES ON THE CRISIS OF GLOBAL GOVERNANCE: REIMAGINING THE FUTURE 110 (Stephen Gill ed., 2015) (discussing governance through international means such as through trade, boundaries, and regulation).

23. I was taught in Bombay to learn rules and doctrines and, later, to critically and comparatively analyze them in Berkley (under the guidance of Albert Ehrenzweig). I began to approach private international law from the perspective of comparative social theory of law and jurisprudence much later. It was David Harvey's work that directed me to more fully attend to the production/reproduction of space through the doctrines of private international law.
"legitimate law"),

political theory (notably, issues of consent and obligation), and ethics (whether deontological or consequentialist). Being international law, PIL largely disregards the human rights of the individual, as its doctrines and practices are almost wholly concerned with "comity" among nations. Only very recently have these aspects begun to be addressed in terms of ethics and political theory. Yet on both sides of the Atlantic, benign indifference rather than active intellectual insurgency greets the challenges arising from such critique.

Attempts to redirect the PIL tradition to issues of human, and human rights, violations remain fragmented and contested. Some progress is visible, for example, in conflicts of family law, where it is no longer considered just or appropriate to follow archaic maxims like "the domicile of the wife follows that of her husband," which for a long time enabled the flourishing of an extraordinary regime of "limping" marriages and "quickie" divorces. Generally, however, significant obstacles impede progress. The indeterminate category of "public policy" has often been recruited to terminate long-held patterns of PIL-sustained legality. But public policy cannot "trump" competing claims as rights do. Moreover, judges take only half-seriously the general doctrinal understanding that "public policy" should be invoked as a way to avoid the application of foreign law or the recognition of a foreign judgment only where the foreign system has produced juridical content which is repugnant to, not simply different from, the fundamental legal values of the forum. The much-vaunted distinction between "repugnance" and "difference" cannot support absolute multinational enterprise liability (urged by India in the Bhopal case) because such Southern "difference" will almost always generate Northern "repugnance." Further, less formalistic and more policy-oriented (and occasionally human-rights-friendly) decisions have not led to any profound changes in the dominant tradition. The mainstream view still holds that the protection, promotion, and preservation of human rights should not be pursued via private international law—a discipline already heavily burdened by doctrinal twists and turns in pursuit of what are considered its core objectives (uniformity, certainty, and predictability or "decisional harmony").

The mainstream view has served rather well the needs of colonial capitalism and the interests of foreign investors in these halcyon days of globalization. However, the processes of globalization of law embody, in complex and contradictory ways, not just the power of global capital, but also the power of resistance to it. It is the latter which makes many

aspects of the dominant PIL tradition problematic in its fashioning regimes of impunity for human wrongs committed in the course of international trade and business. The dominant tradition increasingly confronts challenges to its legitimacy, especially in cases of mass disasters and socially disastrous toxic torts. Yet this social criticism continues to remain external to PIL doctrine, and is liable to summary dismissal from an internal standpoint. Human rights and social activists have begun, at least since the Bhopal catastrophe, to understand that the inner dynamic of PIL constitutes an obstacle to the promotion, protection, and preservation of human rights. But the mystery and mystique of PIL protect the epistemic insularity of its constructs: *forum non conveniens*, comity, jurisdiction *in personam* and *in rem*, *professio juris* stipulations, *lex fori*, *lex loci delicti*, and even the seemingly flexible "public policy." These are coated in a historical and dogmatic opacity as yet impermeable to an activist gaze. It is small consolation for activist communities that these constructs also mystify PIL practitioners, who light many a candle at their shrines.

One thing remains clear: cursing the heart of conflict-of-laws darkness by way of human rights lamentation does not quite seem to help its eminent practitioners or advance causes dear to human-rights and social-activist constituencies, at least not yet. The field's epistemic insularity, nurtured by the PIL practitioners since the Middle Ages, has

been geared towards creating a province of law that is capable of providing a series of pragmatic answers to specific problems posed by transborder movements of capital, and by human movement that occurs largely as some kind of byproduct of the structures of capital flow and resulting wealth allocation. Since these structures and flows cause "mass torts" that affect the life chances and quality of life of First World denizens, conflicts' pragmatism entails incremental doctrinal innovation, both at the level of lex fori application and of the international treaty regimes, especially under the auspices of the Hague Conference initiatives to codify private international law. One must, indeed, remain grateful for these small PIL mercies.

PIL is inherently and overwhelmingly spatial, conditioned by space and in turn constitutive of it, though not quite so recognized by scholars and courts. It is important to return to its default setting, the "spatial fixes" it builds on in order to reinforce its conceptual universe. PIL hermeneutics remains tethered to the idea of separate but equal spheres of state sovereignty. This already determines the limits of PIL justice, which cannot reach "an overaccumulation of capital within a particular geographical area" and "the uneven insertion of different territories and social formations into the capitalist world market." Thus arise the geographies of injustice peculiar to PIL adjudication. The protection of the interests of global capital, however internally conflicted, requires that tort liability be localized at the place of the commission of injury and be governed by the law of that place (the lex loci delicti).


is the country of the state where the factory or the plant is located, often in the global South. Toxic and hazardous industry and production by entrepreneurs from the world’s affluent regions, and increasingly located in the world’s low- and middle-income regions, thereby receives a PIL incentive and bonus. The legal liability for harm caused by these activities is judged by the judicial institutions of “host” countries and by their legal standards, usually underdeveloped for a whole range of reasons which cannot be fully explored here.

Rather than being the product of a fair-minded and decent theory or practice, PIL adjudication reinforces the social vulnerability of victims of human rights violations caused by the greater forensic ability and the unconstitutional staying power of global corporations. To complete the picture, add to this unconscionably lower damage awards to the violated as compared with those awarded to similarly-situated victims in the developed countries under the PIL determination of the substantive laws applicable to the dispute. This arrangement is scarcely affected by the growth of new technologies. The more routine are the planned, cost-efficient corporate investment practices, fully sensitive only to the burdens that the insurance industry may “legitimately” bear, which authorizes risks that result in the kinds of social disasters and mass torts of which the Bhopal catastrophe is the archetype.

The extant regime of conflictual tort liability presents and provides an inestimable subsidy for doing hazardous business abroad (that is, in the global South). Conflict of laws thrives amidst the realms of “real” and “imagined” geographies. The “real” space of mass disasters, the constitutive geographies of injustice, is at once local and global. It is local in terms of the violation of actually existing human beings, and in terms of the events and environments that shape their suffering; it is global in its production of spaces and structures of suffering of global scope. In contrast, the abstract conceptual geography of PIL creates a distinctive space of its own through the invocation of what I have called “the three Cs” (competence, comity, and convenience), which bear little

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28. Consider how, for example, PIL adjudication generated a whole new order of thought and practice concerning choice of law and venue for adjudication when confronted by air crashes and disasters, given the possibility of maintaining a dual (let alone multiple) conflicts regime of tort liability at high altitudes. As a result, a new public international law regime emerged, partially obviating the PIL anarchy. For example, the Space Objects Convention now determines the liability arising out of falling satellites or other objects launched in outer space, almost wholly removing the issues arising from traditional private international theory and practice. But, these are exceptional happenings.

or no relation to the empirical global and local spaces of mass
disasters.\textsuperscript{30}

Much has changed in the theory and practice of the law, but the
theory and practice of PIL largely remain cocooned in some sort of
"time-warp." PIL adjudicatory practice in relation to mass torts has not
quite been able to emerge from its colonial episteme into a world
radically decolonized, at least at the formal level. The doctrinal
formation of PIL has been similarly unable to grasp the reality of a
"global risk society" that hazardous industries pose risks that do not
respect national boundaries or ideological frontiers, and ensure no
specific immunities for the overdeveloped societies. The trinity of
disasters that occurred within the space of twenty-three months in
1984–1986 (Bhopal, Chernobyl, and the Sandoz conflagration) fully
illustrate this fact.

The risks thus posed by global industries menace human rights
everywhere, but this has not been a major concern of the dominant
discourse. This is demonstrated by the successful invocations by
multinational corporations of the doctrine of \textit{forum non conveniens}, even
in the context of the supposedly human-rights-friendly United States
Alien Torts Act.\textsuperscript{31} The colonial episteme, exemplified in its pure state by
AV Dicey's argumentation in 1896,\textsuperscript{32} resonates as late as 1982 in a
British court's oft-quoted description of foreign plaintiffs suing in the
United States courts: "As a moth is drawn to a light, so is a litigant
drawn to the United States."\textsuperscript{33} Alien victims suffering from grievous
corporate negligence and harm stand assimilated to "moths." This
entomological jurisprudence denies the victim's agency and dignity,
being genetically programmed first to victimhood by predatory global
capital and ultimately to denial of justice by Euro-American courts. The
"light" to which the "moths" flock, and which ultimately destroys them,
is the glow of PIL orthodoxies. Of course, when the victims of
multinational predation are conationals, that "light" suddenly provides
an illuminating arc of justice, as in the Agent Orange case where the
laudable desire to accomplish justice for the American Vietnam war


\textsuperscript{31} \textit{But see} Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1672 (2013) (Breyer,
J., concurring); Ingrid Wuerth, \textit{The Supreme Court and the Alien Tort Statute: Kiobel v. Royal
\textit{Kiobel} in detail).

\textsuperscript{32} \textit{See} ALBERT VENN DICEY, \textit{Lectures on the Relation Between Law and Public
Opinion in England During the Nineteenth Century} (Richard VandeWetering ed.,
2008).

\textsuperscript{33} Smith Kline & French Labs. Ltd. v. Bloch, [1983] 1 W.L.R. 730 (A.C.) at 733 (Eng.).
veterans led Judge Weinstein to even deny the existence of independent legal systems of sovereign states.\textsuperscript{34} Thus, the famous hypothesis of “cultural lag,” according to which the adaptive technology of common law (here PIL) lags behind human violation caused by technological development,\textsuperscript{35} But it would be a major error to regard this simply as a problem of the law’s vaunted cultural lag. Rather, this lag is itself an integral part of PIL’s original intent.

The Bhopal catastrophe\textsuperscript{36} offers a cameo of the impunity of multinational corporations. We need to think of the Bhopal catastrophe in terms of cross-border nomadic practices of multinational corporate “terror.” The United Nations has now begun to describe “terrorism” as a political project in which nonstate, yet state-like, actors deploy asymmetrical and indiscriminate violence against innocent civilians with the aim to overawe lawfully elected governments or to transform state policies.\textsuperscript{37} As we condemn insurgent violence everywhere on the planet, we should begin to think of ways in which “terrorist” forms of corporate governance may at least be held answerable to indictments of crimes against humanity. Warren Anderson does not compare with Osama bin Laden, yet those suffering from Bhopal are indeed close cousins of the victims of the September 11, 2001 World Trade Center attacks and of the November 11, 2008 Mumbai attacks. How may we name and think through the commonalities and differences between these critical events for the benefit of a suffering humanity in a hyperglobalizing world? As Marx wrote in 1850, profound social transformation occurs only at the point of confluence of two events:

\textsuperscript{34} See generally In re Agent Orange Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985) (litigation arising out of Vietnam veterans’ exposure to Agent Orange herbicide).

\textsuperscript{35} See William Ogburn, Cultural Lag as Theory, 41 SOCIOLOGY & SOCIAL RESEARCH, 167; see also WILLIAM OGBORN, ON CULTURE AND SOCIAL CHANGE (1964).

\textsuperscript{36} See sources cited supra note 25.

when thinking humanity remains capable of suffering and the suffering humanity begins to think.\textsuperscript{38}

III. THIRD WORLDISM

My second theme is “Third Worldism,” both as a form of social organization and as a state of consciousness. This is a vast theme with many complex histories, and I only briefly highlight a few features. The complex social organization of colonialism was framed mainly by European colonizers—their missionaries as well as their mercenaries—who expropriated lands, territories, resources, and people for their own ends and the ends of an overseas empire. This wave of conquest globalization\textsuperscript{39} led to different narratives of combined and uneven development. Not merely was conquest globalization held justified (in terms of means-end rationality) and justifiable (as spreading emancipation and human rights among the conquered and colonized), but also gradually but determinedly linked to an emerging order of international trade and commerce and the discipline of “free” market competition.

The Third World was also constituted in part by the histories of the Cold War.\textsuperscript{40} The Westphalian era is marked by several things long familiar to historians and international lawyers.\textsuperscript{41} First, a slow,

\textsuperscript{38} The precise words from Karl Marx in the letter to Arnold Ruge are as follows: “The longer the time that events allow to thinking humanity for taking stock of its position, and to suffering mankind for mobilising its forces, the more perfect on entering the world will be the product that the present time bears in its womb.” See KARL MARX & FRIEDRICH ENGELS, Letters from the Deutsch-Französische Jahrbücher, in 3 MARX AND ENGELS COLLECTED WORKS, 1843-1844 (1844).


\textsuperscript{40} See, e.g., EDUARDO GALEANO, OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT 75–78 (Cedric Belfrage tran., Serpent’s Trail 2009) (1971) (detailing the negative impact that the Cold War conflict between the United States and the Soviet Union had on the economy of Cuba); VIJAY PRASHAD, THE DARKER NATIONS: A PEOPLE’S HISTORY OF THE THIRD WORLD (Howard Zinn ed., 2007) (describing the globalizing conditions of numerous postcolonial nations following the second World War); VIJAY PRASHAD, THE POORER NATIONS: A POSSIBLE HISTORY OF THE GLOBAL SOUTH 78–79 (2012) (showing the impact of the machinations of the Cold War on the economy of the Global South).

\textsuperscript{41} See generally THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fassbender & Anne Peters eds., 2012) (discussing the evolution of, as well as the key dates and historical figures involved in, the changing discourse within international law).
meandering, but sure consolidation of European state sovereignty as extended outwards towards overseas territorial possessions. Second, as an emanation of this sovereignty, the emergence of colonial international law that applied only as long as the “civilized nations” consented to it. Third, the redrawing of territorial boundaries and borders during the Age of Empire, without even a show of consent of affected peoples, and the reign of unequal treaties. Fourth, the colonial re-invention of the practices of desubjectification, reflected in the category of “disposable peoples,” conceptions of conquest and settlement, and the divine right to rule the non-Euro-American other. Fifth, the withholding of the Enlightenment universals (such as freedom and rights) from the colonized peoples, who were infamously described by Charles de Gaulle as “dust of the empire.” Finally, the flourishing of colonial governance and development that produced and reproduced the loyal subject and the docile colonial body—by force of arms as well as by hegemonic rule. Biopolitical power, as we now know it, was invented and nearly perfected during colonial regimes.

It is only with the practices of resistance in the course of the wars of independence and national liberation movements that the real history of the principle of self-determination began. The inchoate proclamations and enunciations of aspirational and enforceable human rights did not overcome the “Third World's” desire for freedom. This was not a pale imitation of the Western ideologies of liberal rule. The process of decolonization of territories from foreign yoke (as, for example, the U.N. narratives of associate members) has a long history and is by no means complete. That process emerges as a more complex story when we include the histories of popular militant, and even armed, protests by insurgent subjects and by predatory state sovereigns against boundaries and borders drawn by colonial powers: the inner history of self-determination movements deserves as much historical attention as the boundary disputes among the formerly colonial states.

I call particular attention to “Third Worldism” as a state of social consciousness surviving political decolonization by the imperial

powers. 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 profound challenges to the “legalized hegemony” of the “Great Powers” in relation to their Other (the enemy or the outlaw). The collective presence of the non-Euro-American states and peoples poses intransigent problems for the conventional divisions between “classical,” “modern,” and “postmodern” international law. No longer acceptable are the lead stories, or the master narratives, that reductively emplot the colonized and imperialized 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 Salman Rushdie’s phrase) of many a corrupt national and global sovereign and of the latter’s hegemonic visions of unjust peace and just war. Further, these readings make space for acknowledging the multitudinous, yet specific, popular authorship of the norms and standards of international law and human rights beyond the contingent “necessities” of vertiginous diplomatic histories. Assiduously archived remain the histories of peoples’ resistance to “corporate Neanderthalism” and the onward march of global capital from Agent Orange and Bhopal to Ogoniland and beyond in ways that contribute to a renaissance of contemporary international law. Thus, upon overcoming the initial post-traumatic disorders that arise from juxtaposing, in stark terms, Kofi Anan and Ken Sari Wiwa, we also begin to perceive the sites of international law as spaces for endless negotiation of the radical popular authorship of international law.

The Third World has different avatars but, phoenix-like, Third Worldism remains the resurrection of people’s struggles and histories. The crucial point here concerns the histories and futures of “compossibility” (to evoke Leibniz) 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. Third Worldism as a history of mentality, as an embodied experience and wisdom, and as a political consciousness lives on even as the Second World has vanished, the

44. See generally Upendra Baxi, What May the ‘Third World’ Expect from International Law?, 27 THIRD WORLD Q. 713 (2006) (examining the meaning of the terms “Third World” and “international law”).

45. Although the term is capable of many interpretations, see particularly, SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006); JOSÉ MEDINA, THE EPISTEMOLOGY OF RESISTANCE: GENDER AND RACIAL EPISTEMIC INJUSTICE, AND THE SOCIAL IMAGINATION (2013).

Third World is disappearing, and the Fourth World of indigenous peoples acquires unusual salience in international law and relations.

The gifted raconteurs of a new “ontological terrain of globalization” in the Empire, as Hardt and Negri rightly maintain, insist that the once-upon-a-time framing category of “the Third World” 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.”47 This observation also programs encyclopedic varieties of genesis amnesia. Long before the “three worlds” categorization attained descriptive prominence, this scrambling had already occurred through the formative practices of colonialism and imperialism themselves, which inextricably inserted the First World of (insufficiently) civilized nations into the world of subjugated and oppressed colonial peoples. Further, as is well known, the enforced diasporas of the laboring classes under conditions of slavery or slave-like labor made the old empire fully viable, even as they now also serve the ends of the new Empire.

The ever-proliferating literature concerning the “Third World” remains rife with two deft conceptual and narrative moves. The first consists of denying that there ever existed a so-called Third World. Ironically, such denial raises, faute de mieux, radical doubts concerning the existence of the old and new First and Second Worlds. The second move concedes the fragmented historical reality of the Third World, especially during the many phases of the Cold War, but articulates deep disappointment with “Third Worldism”49 as “failed decolonization.”50 At any rate, Third Worldism stands now presented as an ideological configuration that self-destructs in an era of the new Empire. How far hyperglobalization is a “war on plurality” (as Bourdieu suggested in a

49. See Hardt & Negri, supra note 47, at xiii, 263–64; Kevin C. Dunn, Africa’s Ambiguous Relation to Empire and Empire, in Empire’s New Clothes: Reading Hardt and Negri 143 (Paul A. Passavant & Jodi Dean eds., 2004) (critiquing Hardt’s and Negri’s narrative in Empire as exhibiting core elements of Eurocentric thought).
classic article in *Le Monde*)\(^{51}\) and how far it authorizes the politics of identity is a question awaiting an answer; so too is the vexed relationship between claims of justice and those of identity.\(^{52}\) It is not possible here to trace the ideological itineraries of “identity” at its various decomposing sites, including struggles for self-determination and against imperial postcolonial state-building, as well as contestation over development planning, constitutionalism, and governance (which comprises the politics of mass protest against economic, foreign, and defense policies). From the days of Panchshila to the post-Doha Development 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 on the mimetic rather than originary character of the practices forming the decolonization and anti-imperial struggles. Thus, postcolonial discourse is often viewed as a “derivative discourse” which remains “original” only as a deviation from, or as a corruption of, classical European liberal political theory.\(^{53}\) Against this mimetic reading of Third Worldism, I propose a reading that accentuates its originary character. This stands crystallized in a world-historical norm that first ousted, and then normatively outlawed, the claims of divine right to empire by conquest and belligerent occupation. It also gave rise to new normative conceptions of constitutionalism as a 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 notions; what remains important is the initial vitality of this discursive pursuit that modifies both the received liberal and socialist heritage.

De-emphasizing the mimetic and elevating the original nature of Third Worldism still needs to confront the difficult distinction 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” refers 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.”\(^{54}\) From this

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\(^{52}\) See BAXI, *supra* note 15, for a related discussion of the human rights dimension.


\(^{54}\) HARDT & NEGRI, *supra* note 47, at 363.
perspective, then, the "destruction" of Third Worldism portends a time when "the most wretched of the earth become the most powerful beings." However, this incredibly Empire-stylized discourse wants several reality checks. Myrdal brought home the venality and corruption of postcolonial South Asian governing elites, as if this were an independent causal variable. The Castells trilogy shifts the scenario, in part, with some grounded overviews of the histories of postcolonial African state formation, largely enriched by the distinction between state-formative practices of prebendalism and those of the predatory state. Prebendalism (signifying here the "concentration of political power at the top," "political patronage," and "systematic government corruption") remains expediently thought of as a signifier of the Third World, and now of the fatefuly recomposed Second World. However, in the full gaze of the comparative sociology of governance, this illustrates the universal flourishing of the corrupt sovereign. The heady mix of prebendalist state formations marks the narratives of the 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 about the origins of this potent "combinatory mix." Put another way, the obituary writers of the Third World and Third Worldism do not quite help us to decipher the legacy of the deeply mercantilist practices of colonial occupation and "governance," or the various histories of the Cold War, as coequal constitutive features of all the three Worlds.

55. Id.
56. See generally ROBERT J. C. YOUNG, POSTCOLONIALISM: AN HISTORICAL INTRODUCTION (2001). Arguably, the two germinal trilogies—first, 1-3 GUNNAR MYRDAL, ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS (1968), which inaugurated the discourse concerning the "soft states," and second, 1-3 MANUEL CASTELLS, THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE (1999), which inaugurated the discourse concerning the "information age"—need to be supplemented by Immanuel Wallerstein-inspired world system genre. See YOUNG, supra note 56, at 110–12.
58. This is now seen in the unfolding histories of the two “terror” wars. See Upendra Baxi, The “War on Terror” and the “War of Terror”: Nomadic Multitudes, Aggressive Incumbents, and the “New” International Law: Prefatory Remarks on Two “Wars”, 43 OSBOODE HALL L.J. 7, 9–10, 34–43 (2005). Without denying considerations of collective human security in counter-insurgency operations, it can be maintained that global and national governance practices amid the two “terror” wars now unfortunately celebrate the status of “rogue,” “outlaw,” or “enemies of civilization” regimes and even communities of peoples—as if these states, societies, and peoples alone and singularly answered this description!
In place of the old global Southern solidarity, there now exist regional arrangements to harvest the benefits of contemporary globalization. In fact, large regional economic actors, arrangements, and networks now flourish which find irksome the earlier identity common to Third World nations. A division has emerged between the developed developing countries and the less developed ones, reinforced by the scattered hegemonies of the international financial institutions, multinational corporations, the "discipline and punish" regimes of First World human rights diplomacy, and the privatization of development aid. The intellectual and activist fatigue with Third Worldism is accompanied by a new creationist discourse celebrating the "rise of the Fourth World."

The appropriative move in Manuel Castells remains hugely instructive. In its inceptive or conceptive moment, "the Fourth World" articulated the voices of suffering, and rightlessness, of the indigenous peoples of the earth (some already facing extinction) that so vitally critique forms of colonial, postcolonial, and postmodern state predation. In Castells, two textual moves accomplish the emptying of the "geopolitical meaning" of the Third World. The first is the emergence of the Fourth World under conditions of informational capitalism, as "multiple black holes of social exclusion throughout the planet." Second, the "power" of "identity politics" spills over the various fractured historic notions of minority rights to many different estates of struggle. The passional logics and emotional intelligence of peoples in struggle and communities of resistance remain obscured in state-centric critiques of Third Worldism. Nevertheless, the contributions of Third Worldism to international law, international organizations, and international relations are immense and ongoing.

CONCLUSION

It may be argued that if there ever was a Third World, it does not exist anymore. It may never have existed in the first place. However, it is said to have dissipated today after the end of the Cold War and the advent of globalization and neoliberalism. Despite many flickers of the old Third World solidarity, that World does not exist today as a counterhegemonic bloc exercising any normatively disproportionate influence in reshaping international law, relations, and organization.

60. See id. at 164.
61. See id. at 164–65.
62. This discussion was previously published in Baxi, What May the "Third World" Expect from International Law?, supra note 44, at 716–19.
But there is little doubt that Third Worldism (as I describe it) as a state of consciousness does exist. Rather than representing the voices of political elites and states, Third Worldism is increasingly found in insurgent social movements of the impoverished in the global South and North alike. The impoverished rise in protest against deprivations and denials of basic human rights both against the national states and the international community, and however short-lived they are, these struggles affect the structures of dominant power and governance. We encounter a greater difficulty with regard to the first theme—law as an instrument of the production of places of human rightlessness. If it is a geographical truism that the production, distribution, and consumption of places and spaces is the primary function of the law, then we must also concede that any act of lawmaking, whether colonial, postcolonial, or neocolonial, can contribute to the creation of new geographies of injustice. Further, we must not shy away from the fact that the liberal legal formation is as much about the provision of collective human security as it is about controlling the production of space. However, conceding this geographic and juristic truism does not mean that the places thus produced as objects of governmentally and "development" preclude alternate imaginations of legality and justice.


64. These alternate imaginations of legality and justice include human rights, especially in the form of rights to come and of rights claimed but not yet here. Jacques Rancière demonstrates how human rights discourse may avoid both imperialism and colonialism by advocating the emancipatory political. JACQUES RANCIÈRE, THE
PHILOSOPHER AND HIS POOR (Andrew Parker ed., John Drury et al. trans., Duke Univ. Press 2003) (presenting a left critique of Pierre Bourdieu); Jacques Rancière, Who Is the Subject of the Rights of Man?, 103 S. ATLANTIC Q. 297 (2004) (discussing the shift in human rights toward the right of Western nations to humanitarian intervention). These alternate imaginations of legality and justice also include the human right to have rights. See, e.g., HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM, 278–79, 292, 299–300 (1994); PEG BIRMINGHAM, HANNAH ARENDT AND HUMAN RIGHTS: THE PREDICAMENT OF COMMON RESPONSIBILITY 35–69 (2006); see also ALISON KESBY, THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW (2012) (arguing that the plight of stateless people in the interwar period points to the existence of a “right to have rights”); cf. D. Asher Ghertner, Rule by Aesthetics: World-Class City Making in Delhi, in WORLDING CITIES: ASIAN EXPERIMENTS AND THE ART OF BEING GLOBAL 279 (Ananya Roy & Aihwa Ong eds., 2011) (examining the codification of urban spaces in India and its effect on residents); NIRAJA GOPAL JAYAL, CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY (2013) (mapping the history of Indian citizenship); STEPHEN LEGG, SPACES OF COLONIALISM: DELHI’S URBAN GOVERNMENTALITIES (2007) (examining the residential, policed, and infrastructural landscapes of New and Old Delhi under British Rule); ANUPAMA ROY, MAPPING CITIZENSHIP IN INDIA (2010) (tracing the unfolding of citizenship though the Citizenship Act of India, as well as the Act’s connection to other laws); D. Asher Ghertner, Analysis of New Legal Discourse Behind Delhi’s Slum Demolitions, 43 ENV'T & POL. WKLY 57 (2008) (analyzing recent court documents in cases that find slums to be illegal); Usha Ramanathan, Illegality and the Urban Poor, 41 ENV’T & POL. WKLY 3198 (2006) (arguing that the Indian judiciary has significantly contributed to the illegal status of housing for the urban poor).