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Teaching, Research and Promotion of International Law in India: Past, Present and Future*

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'Words are deeds' Wittgenstein.

I. INTRODUCTION

THE ongoing process of globalization, contrary to popular understanding, is not a spontaneous process. There has been decisive state intervention in favor of globalization.¹ Among other things, States have adopted international treaties and established international institutions to encourage and shape the globalization process. Relying on a unique combination of historical circumstances which has seen the neo-liberal model gain unprecedented acceptance among the third world ruling elite, the dominant North has been able to determine the form and content of these treaties and institutions. The changing constellation of power, knowledge and international law needs to be understood if third world peoples are to inject the process with equity. It has, among other things, thrown up new challenges for the teaching and research of international law in third world countries.

With this background, this paper intends to reflect on what has been, what is, and what needs to be done in relation to the teaching and research of international law in post-colonial India. The paper is divided into four further parts. Part II considers the approach to international law scholarship in India in the first decades after attaining

* The original version of this paper was written in response to an invitation from the Singapore Society of International Law (SSIL) and Foundation for the Development of International Law in Asia (DILA) to participate in a Conference on Teaching and Research of International Law in Asia held in Singapore from 30 to 31 July, 2001. I would like to thank Thio Li-ann for her comments on the draft of this paper.

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1 As Carnoy and Castells note, '...without decisive state intervention, globalisation could not have taken place. Deregulation, liberalisation, and privatisation, both domestically, and internationally were the institutional basis that paved the way for new business strategies with a global reach'. Martin Carnoy, and Manuel Castells, 'Globalisation, the knowledge society, and the Network State: Poulantzas at the millennium', (2001) *Global Networks* no 1, 1-19 at p 5.

independence in 1947. It looks at what its central features were its strengths and weaknesses. The past needs to be visited in order to see whether the intervention of Asian international law scholarship was effective and, while deriving strength from its successes, also learn from its mistakes. In other words, there is a need to turn to the past in search for answers to the dilemmas of the present. Part III turns to contemporary developments relating to the process of globalization *viz*, its principal features, and the tasks it sets for international law scholarship in India and the third world in general. Part IV identifies the problems that confront the teaching, research, and promotion of international law in India. Part V contains some final remarks.

II. FIRST DECADES OF INTERNATIONAL LAW SCHOLARSHIP IN POST-COLONIAL INDIA

Let me then turn to the first decades of scholarship in international law in India.² To begin with, what were its major features? I shall recount six.³ First, it indicted colonial international law for legitimizing the subjugation and oppression of Asian peoples. Second, it emphasized that Asian states were not strangers to the idea of international law, whether or not individual communities in the pre-colonial era were, strictly speaking, sovereign States in the modern sense. Third, it argued that there was nothing in the cultural traditions of Asian peoples that prevented them from participating fully in the contemporary international legal process. Fourth, it recognized that the complete rejection of international law was not a feasible option; reform, rather than repudiation was the strategy adopted by Asian international lawyers. Fifth, it believed that more international law was better than less and that the expansion of the scope of international law would be beneficial for the Asian countries as they could finally participate in shaping the law to reflect

2 The comments to follow are part of a larger essay entitled 'International Law Scholarship in Post-Colonial India: A Report' (mimeo).

3 For a sample of writings from which these have been drawn see Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India* (Firma KL Mukhopadhyay, Calcutta, 1958); Nagendra Singh, *India and International Law: Ancient and Medieval* vols I and II (S Chand and Co Pvt Ltd, New Delhi, 1973); S Prakash Sinha, *New Nations and the Law of Nations* (AW Sijthoff, Leyden, 1967); RP Anand, *New States and International Law* (Vikas, New Delhi, 1979); Rahmatullah Khan, 'International Law – Old and New', (1975) 15 *Indian Journal of International Law*, *New Horizons of International Law and Developing Countries*; RP Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoff Publishers, The Hague, 1983).

the aspirations of third world peoples. Sixth, it prescribed a global coalition strategy to bring about changes in the rules of international law.

What were the strengths of this approach? There were several. First, it recorded the contribution of Asian peoples to the evolution and development of international law. Second, it showed realism in recognizing that only reform and not revolution was possible in the sphere of international law. Third, it was correct in believing that a global coalition of Third World states alone could provide the counter-power to seek concessions from powerful states. Fourth, it rightly contended that the fact that the vast majorities of peoples lived in the third world must be reflected in the body of contemporary international law.

But, there were many weaknesses that characterized the approach. Let me focus on three that have *continuing relevance*. First, the end of colonialism was equated with the end of an international relations based on exploitation and violence. It failed to see that the structures that had spawned colonialism remained in place, now assuming new forms. This made Asian international law scholarship unduly optimistic of the possibility of restructuring international law to meet the aspirations of its peoples. The optimism was sustained by developments such as the adoption of the Programme and Declaration of action on a New International Economic Order and the Charter of Economic Rights and Duties of States. But these initiatives floundered on the rock of neo-colonialism.⁴ Meanwhile, the immense faith which was placed in the instrument of international law to facilitate the nation-building process in the post-colonial period created the climate for the *rapid expansion of international law*. But when the expansion became a reality it was not to empower but to prevent the independent self-reliant development

4 By neo-colonialism is meant here the phenomenon of imperialism without colonies. Broadly speaking, it may be understood as the totality of economic and political relationships between the developed first world and the underdeveloped third world that prevents the latter from pursuing the path of independent self reliant development. At the economic level, neo-colonialism means 'the *structural constraints* arising from the dialectics of interaction between the advanced capitalist world and the Third World, an interaction that involves the terrains of both technology as well as consumer demand, which restrict the pace of Third World development.' (Emphasis added). Prabhat Patnaik, *Accumulation and Stability under Capitalism* (Clarendon Press, Oxford, 1997) p 201. It is also, secondarily, about the transfer of surplus from the third world to the first world. Thus, for example, the trade between the North and the South continues to be characterized by unequal exchange. The structural economic constraints, and the transfer of surplus, are sustained through an ideology of domination and the politics of manipulation, threats and intervention.

of third world states. Today, every aspect of international and national life has come to be disciplined on behalf of hegemonic states. Concerns spanning from the vast oceans and Space to core economic policies to intimate aspects of the lives of individuals are now regulated by an international law that does not connect with the fate of the poor and marginalised in the third world. To put it differently, more attention should have been paid to deep structures in the matrix of which international law was being developed.

This takes me to its second weakness *viz*, the use of positivist methodology in both teaching and research. It prevented all such excursions into the world of deep structures. The task of the international lawyer was confined to addressing the normative phenomena. Any concern with the world beyond rules was deemed illegitimate. It is perhaps important to recall here, as Anghie has so brilliantly confirmed, that positivism is integrally linked with colonial practices.⁵ Therefore, the continuing use of positivist western text books to teach international law or using the positivist methodology to research is a bit baffling. It is true that the positivist method was often combined with historical reflections. But it never led to questioning the basic structure of international law. It was perhaps felt that there was no *internal* relationship between positivism and colonial international law and that it could therefore equally serve a progressive master. But this was to misunderstand the nature of the beast. It requires no great leap in imagination to show how today the concept of 'good governance' is playing, for instance, the same role as the idea of 'civilization' did yesterday.⁶

The positivist approach also failed to come to grips with the nature and character of international institutions. In order to make sense of the functioning of international institutions, we need to locate them within the larger social order, in particular the historical and political contexts in which they originate and function. Such an approach contends that only when a coalition of powerful social forces and States is persuaded that an international institution is the appropriate form in which to defend their interests, is it brought into existence, albeit

5 Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (1999) 40 *Harvard International Law Journal* 1-80.

6 Antony Anghie, 'Universality and the Concept of Governance in International Law', in EK Quashigah and OC Okafor eds, *Legitimate Governance in Africa* (Kluwer Law International, The Netherlands, 1999) pp 21-40; James Thuo Gathii, 'The Limits of the New International Rule of Law on Good Governance', *ibid*, pp 207-231.

through State action. Further, it survives only if it continues to serve these interests.⁷ But a positivist methodology with its focus on formal legal texts occludes the possibility of arriving at this understanding.

Finally, it prevented Asian international law scholars from exploring the sources of indeterminacy in international law. Positivism assumes that rules of law can be objectively identified and interpreted. On the other hand, as the practice of powerful states diverged from the ideal of the rule of law, often using the interpretative device, it generated avoidable cynicism and pessimism, undermining the study of international law in Asia.

The third weakness was that the first generation of international law scholarship represented the post colonial State as standing above conflicts and classes and the role of the intellectuals was viewed as supporting this State in its nation building tasks. This had several consequences. First, it excluded a focus on the violence of the State at home and led to the initial neglect of international human rights law. Second, it led to the bureaucratization of international law. International law-making became the preserve of government officials and governmental thinking. It meant the exclusion of the academia and civil society from any participation in the determination of the negotiating positions of States. Third, it excluded consideration of the impact of international legal structures on the lives of ordinary men and women. Consequently, the resistance of ordinary peoples to the policies of international law and institutions did not become an integral part of the discourse of international law scholarship. This was truly unfortunate.

III. CONTEMPORARY TRENDS AND FUTURE AGENDA FOR RESEARCH

Meanwhile, since the early eighties, capitalism entered the phase of globalization. It was now, in contrast to the earlier decades, the turn of the advanced capitalist countries to seek changes in the body of international law. What were the changes sought and actualized by the developed world? Let me mention nine. First, of course, it involved the complete rejection of the proposals which had emerged in the seventies in the form of a Program and Declaration of action on NIEO. Second, the developed world called for the adoption of legal instruments to free transnational capital of spatial and temporal constraints. Hundreds

7 Craig N Murphy, *International Organization and Industrial Change: Global Governance since 1850* (Polity Press, Cambridge, 1994) pp 25 and 44; and Robert W Cox with TJ Sinclair, *Approaches to World Order* (Cambridge University Press, Cambridge, 1996).

of bilateral investment protection treaties (BITS), the Agreement on Trade related Investment Measures or TRIMS, the establishment of MIGA under the auspices of the World Bank, and the coercive working of international monetary law are steps in this direction. Third, it called for the *internationalization* of property rights with the Agreement on Trade related Intellectual Property Rights (TRIPS) with its prescription of global uniform standards marking the beginning of the global property epoch. Fourth, it sought to reshape international monetary law and practices to restructure global capitalism to allow continued Northern domination. As one observer has put it, '...international power has increasingly determined the 'value' of all currencies in the last instance.'⁸ Fifth, it prescribed an international law of sustainable development which seeks to redefine property rights in favour of Northern States. For, when industrial countries developed, 'global private rights were granted to polluters; now, developing countries are asked to agree to a redistribution of those property rights without compensation for already depleted resources.'⁹ Sixth, international institutions were empowered to ensure the effective implementation of the rules which promote the interests of transnational capital. The WTO being the embodiment of such thinking. Seventh, an international law of distribution based on market ethics was given shape. Thus, for example, there is the rejection of the special and differential treatment (SDT) principle which calls for preferential treatment to be given to developing countries. Eighth, changes were initiated in the relevant international legal regime to enable the strict control of voluntary and forced migration. While capital and services became mobile the same can not be said of human bodies. Ninth, human rights discourse was used to legitimate neo-liberal norms and intrusive intervention into the internal and external affairs of States.

These developments, I believe, have stacked the rules of the game against the third world countries. However, I do not wish to suggest that the process of globalization is an *inherently* iniquitous process. But it is undeniable that at present it is having a deleterious effect on the welfare of third world peoples as a whole. Three billionaires in the North today hold assets more than the combined GNP of all the least developed countries and its 600 million people. International

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- 8 Christain Marazzi, 'Money in the World Crisis: The New Basis of Capitalist Power', in Werner Bonefeld and John Holloway eds, *Global Capital, National State and the Politics of Money* (St Martin's Press, London, 1995) pp 69-92 at p 73.
- 9 P Uimonen and J Whalley, *Environmental Issues in the New Trading System* (Macmillan Press Ltd, London, 1997) p 66.

law, there is little doubt, is playing a crucial role in helping legitimize and sustain the growing North-South divide. Clearly, then, international law scholarship needs to draw forceful attention to the material and ethical concerns of those who are at the receiving end of the extant world order. What then should be the task and approach of international law scholars in India and Asia?

A. *Taking International Law Seriously*

First, the Asian international law community needs to recognise that international law now seeks to displace municipal law in regulating core aspects of sovereign economic and political space. It is no longer a law which concerns itself with some select issues of war and diplomacy but aspires to control and regulate central aspects of economic and political life inside a sovereign State. International law is today the chosen instrument for the spatial extension of capital. To put it differently, imperialism did not die a natural death with the end of colonialism. The fact that there is the talk of re-colonisation (albeit mostly in the context of Africa) is direct evidence of this fact.¹⁰ There is a continuum in the history of international capitalist expansion from the sixteenth century onwards that the collapse of 'actually existing socialism' accelerated and deserves the attention of international law experts.

B. *Doing International Law as if People Mattered*

Second, we need to do international law as if peoples mattered. The voices of ordinary peoples should be brought to bear on the international law making process. The Statist (or positivist) conception of international law has distanced it from the lives of ordinary people. This distancing has taken place in three ways. First, non-state actors have little influence in the international law making process. Second, it excludes consideration of the impact of international legal structures on the lives of ordinary men and women. Presently, whether a farmer commits suicide, or workers are retrenched, or a patient dies because an essential drug has been priced out of reach owing to the operation of international economic laws, never seems to be of much concern to the international lawyer. Third, their resistance to the policies of international law and institutions has not become an integral part of the discourse of

10 See Richard Gott, 'The reconquest of Africa' *New Statesman*, 15 January, 2001, pp 51-52; 'Commentary: Bringing Imperialism Back In', (1999) *Review of African Political Economy*, No 80, pp 165-169 at 165. From the latter article, as would be evident, I have borrowed the title of this section.

international law. There is an urgent need to record and tell the story of resistance to the violence of international legal structures as a central concern of international law. What I mean by the words 'integral' and 'central' is that the story of resistance should not be told separately from the routine discourse of international law. Such a step would radicalize international law through breaking down contrived disciplinary boundaries.

C. Bringing Gender In

Third, we need to bring gender in. Post colonial international law scholarship in India and the region has been blind to the concerns of women. This is despite the fact that women played a crucial role in the national liberation struggle, as well as in the nation building process after independence. The situation in this respect has not been different from mainstream international law. It has spawned 'a narrow and inadequate jurisprudence' that has legitimated the unequal position of women around the world.¹¹ Given the fact that both feminist and third world scholarship address the question of exclusion by international law, there is a serious possibility of building a coalition, of course without merging differences, against mainstream Northern scholarship. Therefore, we should collaborate with feminist approaches to reconstruct international law to address the concerns of women and other marginal and oppressed groups.

D. Overcoming the Problem of Fragmentation: The Need for Theory

Fourth, we need to overcome the problem of fragmentation of international legal studies brought about by its rapid expansion. There is a tendency towards specialization which prevents the small community of Asian international law scholars from either advancing a holistic view of contemporary international law or sketching maps of alternative futures. We need to 'theorize back' or to globalize the sources of theoretical knowledge.¹² In other words, it is imperative that we critically engage dominant Northern theories of international law and present our own perspectives. For an unequal system not only generates norms and institutions but 'also sustains ideas which legitimate it. Such a dominant ideology justifies the existing order of power relations indicating the

11 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A feminist analysis*, (Manchester University Press, Manchester, 2000) p 1.

12 Arjun Appadurai, 'Globalization and the research imagination', (1999) *International Social Science Journal*, no 160 at pp 229-238.

benefits accruing (or accruable) to all principal parties including in particular the subordinate or less favored'.¹³

Two explanations are however in order here. First, it is not our suggestion that Northern theories are necessarily collusive with Northern hegemony. But to the extent they are complicit in legitimizing and sustaining neo-imperialist practices they need to be challenged. Second, the standpoint from which the Northern theories are contested will inevitably vary with individual scholars. It would be readily recognized that our political referents and priorities, be it 'the people' or 'Asian peoples' or the 'third world' or 'women' 'are not there in some primordial, naturalistic sense' or 'reflect a unitary or homogeneous political object'.¹⁴ These need to be specified and imaginatively worked into operational categories of international law. Since the individual responses would diverge, it is necessary that we should also read and engage each other. It is tragic that we hardly know of each others work.

E. *Setting Your Own Agenda*

Fifth, let us set our own agenda in teaching and research. I am not saying anything new when I say that today the agenda for research is set in the North. Why is this? As Kennedy of Harvard Law School candidly observed recently: 'The ideas about international law popular at a given moment in some countries are more influential than those popular in others simply because some countries are more powerful money, access to institutional resources, relationships to underlying patterns of hegemony, and influence – is central to the chance that a given idea will become influential or dominant within the international law profession'.¹⁵ Thus, we are told what is worth doing and what is not? Who are good scholars and who are bad? Some of the so-called good scholars are very distinguished names but I always wonder why I should look up to someone who has nothing to say to the situation of my people. I think we need to fight this trend. We need to support our scholarship in all ways. We need to set our own agenda. What should this be? Permit me to identify a few elements by way of illustration.

13 Robert W Cox, 'Ideologies and the New International Economic Order: Reflections on some recent literature', (1970) 33 *International Organization*, pp 257-302 at p 259.

14 Homi K Bhabha, *The Location of Culture* (Routledge, London, 1994), p 26.

15 David Kennedy, 'What is New Thinking in International Law', (2000) *Proceedings of the American Society of International Law* 104-126 at 121.

*F. Impose Duties on International Property Holders:
Transnational Corporations*

The key agent of globalization is the transnational corporation. It is the principal beneficiary of the increased mobility that international law permits and the phenomenon of internationalization of property rights. In this respect, there is an urgent need to make the transnational corporate sector responsible in international law. It is perhaps worth recalling here that the Draft Code of Conduct on Transnational Corporations (TNCs) and the Draft Code on Transfer of Technology have yet to be adopted. We therefore need to think of ways of ensuring, for example, that no more Bhopals take place, and if God forbid they do that the victims receive justice. The steps to establish 'justice based norms'¹⁶ could include: (i) the adoption of the draft code of conduct on TNCs; (ii) monitoring of voluntary codes of conduct adopted by TNCs to improve their public image; (iii) use of shareholders rights to draw attention to the needs of equity and justice in TNC operations; and (iv) the imaginative use of domestic legal systems to expose the oppressive practices of TNCs.¹⁷

G. Focus on the Responsibility of International Institutions

It was earlier observed that international institutions were becoming very powerful actors in international relations. It calls for challenging certain assumptions in relation to them. For example, it is generally assumed that international institutions are agents of democracy and human rights. However, the policies prescribed by a number of them (IMF/World Bank and WTO) undermine democracy and are an important element in the causal chain leading to the gross violation of human rights.¹⁸ In a recent report submitted to the United Nations Human

16 M Sornarajah, 'Power and Justice in International Law', (1997) 1 *Sing J Int'l & Comp L* 28-68 at 62.

17 John Madeley, *Big Business Poor Peoples: The Impact of Transnational Corporations on the World's Poor* (London: Zed Books, 1999) pp 168-180. For practice related to the use of domestic legal systems to make TNCs accountable see The Irene Report (2000) *Controlling Corporate Wrongs: The Liability of Multinational Corporations: Legal Possibilities, Strategies and Initiatives for Civil Society* <http://elj.warwick.ac.uk/global/issue/2000-1/irene.html>

18 It has been persuasively argued in recent years that the structural adjustment programmes prescribed by the IMF and World Bank created the wider environment in which internal conflict broke out in countries such as Rwanda and Former Yugoslavia. See Anne Orford, 'Locating the International: Military and Monetary interventions after the Cold War', (1997) 38 *Harvard International Law Journal* 443-485; Michel Chussodovsky, 'Economic Reforms and Social

Rights Commission, Oloka-Onyango and Udigama have documented the problems and concerns with particular international institutions from the perspective of third world peoples.¹⁹ Yet, these institutions are not held responsible in international law for their illegal acts. Thus, a key issue which needs to be addressed in the coming years is how to make, for instance, the international financial institutions accountable in international law for their policies and actions. A correlative of international institutions possessing legal personality and rights is responsibility which is 'a general principle of international law'. It is concerned with 'the incidence and consequences of illegal acts'.²⁰ Sadly, the law on the subject of responsibility of international institutions is undeveloped. There is, in other words, an urgent need to evolve and adopt in the coming decade a legal instrument, even a non-binding one, which articulates the principles and norms governing the responsibility of international institutions.

H. *Democratization of Decision-Making in International Institutions*

The absence of democratic functioning also characterises the international financial institutions which have come to exercise unprecedented influence on the lives of ordinary people in the third world. To take

Unrest in Developing Countries', *Economic and Political Weekly* (1997) 19 Jul 1786-1788; OAU Report of the International Panel of Eminent Personalities asked to investigate the 1994 Genocide in Rwanda and the Surrounding Events (2000) <http://www.oau-oua.org/Document/ipep/ipep.htm>, Executive Summary.

At a more disaggregated level, the policy prescriptions ('conditionalities') resulting in the devaluation of currency, the removal of subsidies and wage freeze has *inter alia* meant the denial of the right to food and health to the vast majority of the population. The track record of IMF policies is well documented. Apart from the above references see also Gregory Palast, 'IMF's Four Steps to Damnation', <http://www.zmag.org/CrisesCurEvts/Globalism/imfpalast.htm>; Waldon Bello (with Shea Cunningham and Bill Rau) *Dark Victory: The United States, Structural Adjustment, and Global Poverty* (Pluto Press, London, 1994); Giovanni Andrea Cornea eds, *Africa's Recovery in the 1990s: From Stagnation to Human Development* (St Martin's Press, New York, 1992); *The Other Side of Adjustment: The Real Impact of World Bank and IMF Structural Programs* (Development Gap, Washington DC, 1993); Dharam Ghai ed, *The IMF and the South: The Social Impact of Crisis and Adjustment* (Zed Books Ltd, London, 1991); Giovanni Andrea Cornea, Richard Jolly and Frances Stewart eds, *Adjustment with a Human Face* (Clarendon Press, Oxford, 1987).

- 19 Joe Oloka-Onyango, and Deepika Udigama, *The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights* UN Doc E/CN.4/Sub.2/2000/13, 15 June 2000, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-Second session.
- 20 Ian Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 1999) 4th ed, pp 701 and 433.

the case of the IMF, the decision making process in it is based on a system of weighted voting which excludes its principal users, the poor world, from a say in the policy making. The third world voice is not heard even as the policies of the Fund inflict enormous pain and death on the people who inhabit it. Nearly 5 billion people or 80 per cent of the world's population live in the third world. Despite constituting an overwhelming majority of the membership, the Third World countries as a whole have a voting share of around 30 per cent in the IMF. Without the OPEC countries (who act as creditor states in the institution) this share is reduced to about 20 per cent. The voice of those using the IMF therefore needs to be enhanced. The alternative criteria for achieving this result must therefore be urgently explored.²¹

1. Regulating Hypermobile and Marauding International Finance

International finance is today the dominant fraction of international capital. Its hyper-mobility has become a threat to the sovereignty of States and peoples. From the law of capital account convertibility to the liberalisation of services to the work of the Basle Committee, international monetary law and practices are being redesigned. The question Asian scholars need to ask is whether these developments are in the interest of its peoples? In this context they also need to address the trend of private international law making by bodies like the Basle Committee. What is worrisome in this respect is the absence of transparency and the lack of a 'public' voice in the emergence of law without State participation. In other words, the privatisation of law-making threatens to take away the right of the ordinary citizen to intervene in the process and be heard and does not take into account the socio-economic context in the third world countries.²²

21 See in this context Richard Gerster, 'Proposals for Voting Reform within the International Monetary Fund', (1993) *Journal of World Trade* no 3 at pp 121-133.

22 For example, if one accepts the fact there is no single global financial market but that 'globalized finance consists of local markets, rooted in different socio-economic structures, patterns of savings and investment, and regulatory traditions', then it is necessary to consider the impact of global financial de-regulation and re-regulation on third world countries. Thus, the US and EU could use, within the context of liberalized financial markets, their domestic financial legislation as a device of protection and avoid fulfilling obligations under GATS and Decision on Financial Services. See generally, Sol Picciotto, and Jason Haines 'Regulating Global Financial Markets', (1999) 26 *Journal of Law and Society* No 3, 351-368 at 355.

*J. Filling the Empty Concept of Sustainable Development
with Progressive Content*

Few concepts in recent years have found as ready acceptance as that of sustainable development. The reason for its widespread acceptance is its indeterminate character: it is an empty concept and means all things to all people. It also relies on a we-are-all-sinners approach. As the Brundtland Commission report put it: 'It is not that there is one set of villains and another of victims'.²³ Thus, the historical relationship between the expansion and accumulation of capital and environmental degradation is left unconsidered. The thesis also glosses over the possibility that the world has already been transformed into a zero-sum game for development. Unless existing consumption patterns in the North change, the South will have to sacrifice its developmental future in order to ensure global sustainable development. In this regard we should emphasize the need for intra-generational equity and ensure that foxes are not put in charge of chickens.²⁴ However, the rejection of the Kyoto Protocol by the United States shows that it is unwilling to accept the fact that the industrialized countries are primarily responsible for global climate change.²⁵

*K. Expose the Neo-Liberal Content of Contemporary
Human Rights Discourse*

Today, human rights law and discourse are omnipresent. It is often not appreciated that it is 'now used to lend legitimacy to the practices of powerful economic actors'.²⁶ Its focus on civil and political rights,

23 *Our Common Future: The World Commission on Environment and Development* (Oxford University Press, Oxford, 1987) p 47.

24 The Rio Declaration on Environment and Development strikes the right balance in stating that 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of *present and future* generations'. Emphasis added. For the text of the Declaration see Najmul Arif ed, *International Environmental Law: Basic Documents and Select References* (Lancers Books, New Delhi, 1996) p 25.

25 '... our focus here should not be the past...' stated Frank E Loy, US. Under Secretary of State for Global Affairs and Head of the US Delegation to the Sixth Session of the Conference of the Parties to the UN Framework Convention on Climate Change, at The Hague, 21 Nov 2000 (on file with the author). See also in this regard the closing statement of Paula J Dobriansky, Under Secretary of State for Global Affairs, to the Seventh Session of the Conference of Parties to the UN Framework Convention on Climate Change at Marrakech, Morocco, 9 Nov 2001. The text of the statement is available at <http://www.state.gov/g/oes/climate/index.cfm?docid=6050>.

26 Tony Evans, 'Citizenship and Human Rights in the Age of Globalization', (2000) 25 *Alternatives* 415-438 at p 415.

individualism and a limited State brings centre-stage the rights of property holders. The North, on the other hand, is not serious about economic and social rights. For example, little has been done to give substance to the right to development, declared by the UN General Assembly in 1986 as 'an inalienable human right'.

Human rights discourse also justifies the use of force against States that defy the dominant powers in the international system. The post-colonial State we would all agree does not always respect the human rights of its people. At the same time, the violation of human rights cannot be the pretext for powerful states to freely intervene into the internal affairs of states. What is therefore called for is a balanced approach to the idea of rights and sovereignty, which even as it condemns the violence of the post colonial State, does not, in the background of the colonial experience and continued imperialist intrusions, reject the emancipatory dimensions of the doctrine of sovereignty. The balance is easier to suggest than to work out in practice. It calls for greater attention to the subject in terms of both research and teaching.

L. Plea for the Mobility of Human Bodies

Finally, while capital and services have become increasingly mobile in the era of globalization, labor has been spatially confined despite the contrary urgings of consistent free trade economists. But what is even more disturbing are recent developments in the advanced capitalist world in relation to the institution of asylum. For here we are talking of the *forced* migration of people *ie*, of individuals and groups fleeing untold misery and suffering. Since the early eighties, there has been a concerted attempt in the North to dismantle the liberal international refugee regime which was established after the Second World War. In particular, the post Cold War era has seen a whole host of restrictive practices being put in place to prevent refugees fleeing the underdeveloped countries from arriving in the West. It has led to (Western scholars like) Falk and others charging the North with constructing global apartheid.

IV. THE TEACHING AND RESEARCH OF INTERNATIONAL LAW IN INDIA: CERTAIN PROBLEMS

Let me now turn to the whole range of problems which confront the teaching, and research of international law in India.

First, there is the absence of teachers specialized in international law. The International Legal Studies Division of the Jawaharlal Nehru University, New Delhi is the only department in the whole country

solely devoted to the teaching and research of international law. In law schools, generally speaking, the person teaching international law is also called upon to teach a number of other law subjects. Moreover, in a large number of law schools different teachers could be asked to teach international law in different years, reducing the possibility of a sustained interest in international law. In the absence of continuing familiarity with international law materials, it is not surprising that few teachers publish in the field. This trend is compounded by the fact that there is little professional pressure to demonstrate publication proficiency.

Second, the teaching and research of international law is considerably hampered by the dismal state of law school libraries. Some law schools do not receive a single journal of international law. Others are better off, but only in a very relative sense. Thus, the Jawaharlal Nehru University library subscribes to only a handful of journals of international law. In the last decade or so a large number of law journals have stopped being subscribed to as the University Grants Commission (UGC) has reduced funds to the universities. Book collections are also dated with few new books on international law being purchased. One must, nevertheless, mention that those teaching and researching international law in New Delhi are much better off than their colleagues elsewhere in the country as they can complement their institutional libraries with that of the libraries of the Indian Society of International Law (ISIL) and the Indian Law Institute (ILI). Yet, many of us have to assemble personal collections in areas of interest to us. This is done mostly by requesting colleagues elsewhere in the world for reprints of their writings.

Third, there is the absence of a quality textbook in international law. The result is a reliance on textbooks written in the North, in particular British textbooks.²⁷ These obviously have few references to the practice of third world countries, leave aside India. By and large, however, at the graduate level, few students tend to read even these textbooks for they are difficult both in terms of form and content. Students tend to rely on 'made easy' textbooks which are of extremely poor quality and reveal little appreciation of the structure and process of international law. Indeed, these textbooks suffer from the worst of all worlds malady. For much of their material is shoddily borrowed from foreign textbooks and therefore do not connect with the existential

27 These include Ian Brownlie, *Principles of Public International Law*; Malcolm Shaw, *International Law*; and DJ Harris, *Cases and Materials on International Law*. However, without doubt the most well known volume is the Australian scholar JG Starke's textbook on international law.

realities in which the student is located. What are sorely needed are textbooks written for the beginner and advanced students taking into account State practice of India and that of the third world countries in general.

Fourth, there is the problem of the growing digital divide. Few students have access to the internet. Unfortunately, the universities are being starved of funds and are therefore not in a position to make access possible to students. There is also the problem of a one-sided flow of information *ie*, from the North to the South. This has meant that the Indian student who has access is exposed to a vast array of materials from the North shaping her thinking on international law issues. The lopsided traffic of information is extremely worrisome when you take into account the fact that other than a few international law journals published in the region, most of them originate in the North. Hegemony, as we know, is maintained not through force but through the language of ideas. In this regard, thought should be given to setting up web sites where contemporary issues are debated from a third world perspective.

Fifth, there is still the 'colonial' structuring of international law courses. The discipline of international law has conventionally been divided into 'international law of peace' and 'international law of war', a division which is rarely questioned. Written into this neat division is the suggestion that the body of rules which constitute the 'international law of peace' are not implicated in colonial violence. Contrast this to the fact that the entire colonisation process was justified on the basis of doctrines which form an integral part of the law of peace *viz*, the doctrines relating to the acquisition of territory.²⁸ Indeed, one can advance the claim that there is no aspect of the 'international law of peace' which is not implicated in colonial violence. In other words, the history of 'international law of peace' is inextricably tied to Europe's spatial extension to the non-European world; a separate history of 'international law of peace', untainted by the colonial project, cannot be constructed.²⁹ It is also erroneous to interpret the decolonization

28 Even the later ideas of mandates and trusteeships were 'forms disguising, by means of a verbal fiction, a colonialist practice and doctrine...'. Separate opinion of Judge Ammoun, *Barcelona Traction, Light and Power Company Limited*, Judgment, *ICJ Reports*, 1970 pp 287-333 at 309.

29 As Edward Said points out in the cultural context, 'studying the relationship between the 'West' and its dominated cultural 'others' is not just a way of understanding an unequal relationship between unequal interlocutors, but also a point of entry into studying the formation and meaning of Western cultural practices themselves'. Edward W Said, *Culture and Imperialism* (Alfred A Knopf, New York, 1993) at 191.

process as having purged international law of peace of the practices of domination and violence associated with colonialism. In brief, the curriculum needs rethinking.

Sixth, the fact that career options are limited in international law has meant that often the best students do not pursue international legal studies even when they pursue their post graduate or doctoral degrees. In India, apart from the teaching profession, the choice is limited to joining the Asian-African Legal Consultative Committee (which has its headquarters in New Delhi) or the Legal and Treaties Division of the Ministry of External Affairs (which requires five years research/work experience) or taking up a teaching assignment with the ISIL. But since vacancies in these organizations are few and far between these opportunities are hardly enough to attract people to international legal studies. There is the alternative of joining the bar but cases which raise international law issues are rare. While in the post-liberalization phase (that is, since around 1991) several leading law firms have turned their attention to international law practice, the numbers of young persons recruited are still few.

V. HURDLES IN THE PROMOTION OF INTERNATIONAL LAW

The consciousness of the importance of international law has perhaps grown in the academia and among state institutions and the intelligentsia in recent years. However, it is insufficiently realized that international law and institutions are coming to compete with, or even displace, national laws and institutions in their importance. Indeed, international legal studies continues to hover in the margins of universities and law schools. Several reasons account for this state of affairs. First, in India there is very little interaction between international law scholars and the government. Seldom is their views sought on any matter of importance. The apathy of the State can be traced to several factors. First, there is the colonial mind set which leads decision makers to have little confidence in their own researchers. The belief is that any European or North American international lawyer is better than an home grown one. Second, the bureaucratization of international law has meant that those dealing with international law matters within the government believe that there is little to gain from consulting academics. There is the constant refrain that the work being done in universities is far removed from the real world of international law. It is in part a defensive reaction against the absence of individual recognition for government officials whose work has per force to assume an anonymous form. In part it is also due to the fact that international law is said to be all about State practice and therefore those in charge of articulating or implementing it believe that they

alone do international law, and not those who, for instance, give expression to the concerns of civil society. Third, flowing from the fact that the significance of international law has yet to fully dawn on the political class and the bureaucracy, there is the complete absence of long term planning in terms of how international law can be used to protect 'national interests'. This has translated into a neglect of international law scholarship. It has also meant that the State is unwilling to expend resources on the promotion of international law.

Second, there is the absence of inter-disciplinary work. Consequently, international law scholars have been unable to reach out and converse with their social science colleagues. There is the felt absence of a 'common language' in which fruitful dialogue can take place. On the other hand, social scientists have been little exposed to the vocabulary and dynamics of international law, and are impervious to its growing significance for their own work. It continues to be viewed as a somewhat exotic and marginal discipline which has little to say to them. Although in recent years leading political philosophers and social scientists (for example, John Rawls) in the world have turned their attention to international law it has escaped the notice of their counterparts at home.³⁰

On the other hand, a whole host of reasons account for the lack of appreciation among the general public of the role of international law. First, of course, is the perception, not altogether off the mark, that States and not individuals are the subjects of international law. It tends to encourage a general lack of concern till the consequences of international law begin to impinge on their every day life. While it has increasingly begun to do so, and resistance to its consequences is becoming a reality, it has not yet encouraged greater interest in the international legal process. This is because of the belief that the language of international law is difficult to access. Second, there is the belief the language of international law is structurally apologetic; it is merely used to retrospectively justify any act of omission or commission. This view derives strength both from the actions of the powerful North and through comparing and contrasting international law with internal law. Third, there is the general neglect of international legal events by the media, albeit in recent years developments in international environmental law and international trade law have received

30 John, Rawls, 'The Law of Peoples', (1993) 20 *Critical Inquiry* 37-68; Fernando R Teson, 'The Rawlsian Theory of International Law', (1995) 9 *Ethics and International Affairs*, 79-101.

some attention. Finally, there is the failure of international law scholarship to do and articulate international law in a manner which makes it accessible and relevant to the ordinary public.

A. *Ways of Promoting International Law*

Several steps could be taken to take international law to the ordinary people. First, there is a need to introduce students to the subject of international law at the school level.³¹ This would allow citizens with secondary education to have some knowledge of the field. Second, there is the need for organizing public lectures, workshops etc to enlighten the general public about contemporary international law issues as well the process and structure of international law. The ISIL, established in 1960, is playing a useful role in this regard.³² It has introduced diploma courses in international human rights law, humanitarian and refugee law, international trade law and international environmental law. However, it is still insufficiently sensitive to the needs of the general public and has failed to devise innovative ways of teaching and communication. If it is to successfully introduce the ordinary citizen to the world of international law, it must be based on a better understanding, then displayed at present, of their needs and concerns and through the production of appropriate materials which are absent at present. Third, different art forms (street plays, exhibitions, novels) can be used to disseminate knowledge of and about international law. There is a vast potential here that remains unexplored. Fourth, effective use needs to be made of the print media through writing columns, letters to the editor *etc.* The public sphere needs to be better utilized to acquaint the general public with developments of international law. Fifth, political parties need to be approached to raise international law issues in their normal discourse and include their particular concerns in this regard in their election manifestos.

I cannot close this section without some reference to the manifestations of power play that have often characterized inter-personal relations in the world of international law in India. It manifests itself both within the academia and in the relationship between the academia and the international law bureaucracy.³³ This is truly unfortunate. The international law community in India, for that matter of the entire third world, is a very small one. It is therefore important to express our solidarity

31 Christopher Pinto made an eloquent plea for this at the Conference.

32 It publishes the *Indian Journal of International Law*.

33 For a comment on the academia and the bureaucracy see Rahmatullah Khan, 'India and International Law', (1996) *World Focus*, Nos 202-204, 47-48 at 48.

with each other, albeit without compromising on our diverse perspectives. We need to understand that it is only collectively that we can bring our weight to bear on the discourse of international law today dominated by Northern scholarship and at the same time gain recognition for our individual work. In short, we need to work with each other rather than against each other.

VI. CONCLUDING REMARKS

I am aware that what I have articulated is just one perspective of international law scholarship and its problems in post colonial India. There are alternative interpretations possible of both the past and the present. Thus, there are those who associate the globalization process with opportunities alone and truly believe that history offers no alternative paths to global capitalism. I believe otherwise. But my deepest hope is that international law can be made to serve the cause of democracy within nation-states as well as in the transnational arena. At present, however, international law operates 'with a set of ideas about democracy that offers little support for efforts either to deepen democracy within nation-states or to extend democracy to transnational and global decision-making'.³⁴ We need to advance the global democratic project by bringing our collective imagination to bear on it. Of course, advance towards this goal runs up against the obstacle of 'uneven distribution of those resources for learning, teaching and cultural criticism which are most vital for the formation of democratic research communities which could produce a global view of globalisation'.³⁵ Consequently, we also need to urgently think of ways and means to democratise knowledge production and dissemination at the global level.

34 James Crawford, and Susan Marks, 'The Global Democracy Deficit: an essay in International Law and its Limits', in D Archibugi *et al* eds, *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Polity Press, Oxford, 1998) pp 72-90 at 85.

35 Appadurai, *op cit*, p 229.