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A Just World Under Law: A View From the South

B.S. Chimni

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A JUST WORLD UNDER LAW: A VIEW FROM THE SOUTH*

B.S. CHIMNI**

INTRODUCTION 199
I.THE GROTIAN MOMENT 201
II.CHANGING STRUCTURE OF INTERNATIONAL LAW 203
III.THE EMERGING GLOBAL STATE AND SOVEREIGN STATES 207
A. EMERGENCE OF A NASCENT GLOBAL STATE 207
B. ROLE OF THE TERRITORIAL STATE 209
IV.TWO INDIAS AND TWO WORLDS 210
V.GLOBAL JUSTICE IN THE ERA OF TRANSITION 212
A. GLOBAL NOT DOMESTIC JUSTICE 212
B. CONCEPT OF JUSTICE 213
1. Claims for Recognition 215
2. Claims for Redistribution 216
3. Claims for Representation 217
CONCLUSION 219

INTRODUCTION

Good evening. I wish to begin by thanking the American Society of International Law ("ASIL") and the International Legal Studies Program of American University Washington College of Law for inviting me to deliver the Eighth Annual Grotius Lecture. I consider it a special honor and privilege, for it is the auspicious occasion of

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** Vice Chancellor, West Bengal National University of Juridical Sciences, Kolkata, India.

celebrating a hundred years of the American Society of International Law.[1]

In my lecture today I address the subject of "A Just World Under Law," the theme for this year's ASIL meeting, from a TWAIL, that is, a third world approach to international law perspective. The TWAIL perspective is advanced by a group of scholars who share the common minimum aspiration of looking at the history, structure, and process of international law and institutions from the standpoint of the peoples of the third world, in particular its poor and marginal sections.[2]

A central question today from a TWAIL perspective is how to create a global law of welfare. At present, international law is unable to seriously respond to the expectations of a vast majority of the peoples of the third world both in terms of maintaining global order and, despite its exponential growth in recent years, promoting global justice. On the one hand, contemporary international law is unable to prevent the unlawful use of force against third world states and peoples, and on the other hand, global poverty and inequality has become a scourge of our times and ranks, according to Nelson Mandela, "alongside slavery and apartheid as social evils."[3]

I will argue that the international law that has emerged in the last three decades, in particular since the end of the Cold War, has been shaped by an emerging transnational capitalist class to realize its interests. The prescription and enforcement of these international laws has required the construction of a nascent Global State that is constituted by a range of international institutions and global social

1. Comprised of four thousand members from over one hundred countries, ASIL's mission is "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice." ASIL—Overview, http://asil.org/aboutasil/index.html (last visited Oct. 7, 2006).

2. *See* Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L LAW 77, 79 (2003) (recognizing that "TWAIL scholars seek to transform international law from being a language of oppression to a language of emancipation" for third world communities).

3. U.N. DEVELOPMENT PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2005: INTERNATIONAL COOPERATION AT A CROSSROADS: AID, TRADE AND SECURITY IN AN UNEQUAL WORLD 4 (2005), *available at* http://hdr.undp.org/reports/global/2005.

processes, and is backed by the commanding monopoly of Western states over the use of organized force. The emergence of a nascent Global State has meant that *a global class divide is overlaying the North-South Divide* creating *a complex map of global fractures.* I examine some of these developments and touch upon the possible consequences by looking at the intricate case of India. I then go on to explore the idea of global justice to identify some principles and practices that will help establish a global law of welfare.

Let me however begin by noting that the task that confronts international lawyers today is not very different from that which Hugo Grotius had to perform in his day.[4]

I. THE GROTIAN MOMENT

We live today in a time of profound transition. We are moving from a sovereign state system to a global system of governance presided over by, as I contend, an emerging Global State. Hugo Grotius also lived in a time of transition, in his case from a feudal to a bourgeois world order.[5] The demise of the feudal system, we all know, led to the emergence of a sovereign state system in Europe.[6] If Grotius is often described as the founder of international law, it is because he grasped the essence of this transition and constructed an international law for the age of sovereign states that combined the values of reason and realism.[7] The Grotian task awaits us all today in

4. *See* Richard Falk, *The Grotian Quest, in* INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 36, 36–42 (Richard Falk et al. eds., 1985) (explaining that Grotius, a Dutchman who lived in the late sixteenth and early seventeenth centuries, "attempted, whether wittingly or not . . . to provide the foundation for a new normative order in international society"); Christopher Weeramantry, *Opening Tribute to Hugo Grotius*, 14 AM. U. INT'L L. REV. 1515, 1516–20 (observing that Grotius envisioned a legal order that "derived its rationale and moral strength from the parallel relationship between states, rather than a vertical relationship between states and a higher order").

5. *See* Falk, *supra* note 4, at 37–38 (noting that Grotius lived in an era characterized by religious and political turmoil due to the decline of the feudal system and the church's political power, and the rise of monarchical power and the sovereign nation state).

6. *See* Hersch Lauterpacht, *The Grotian Tradition in International Law, in* INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE, *supra* note 4, at 10, 14.

7. The essence of the Grotian quest is, as Richard Falk has reminded us, that "it is normatively grounded and future oriented, synthesizes old and new, and cherishes continuities while welcoming discontinuities." Falk, *supra* note 4, at 41.

a period when revolutionary changes are visiting the international system.

The past here can be a guide to the future in terms of what can go wrong. A central feature of the Grotian world of international law was, as Hersch Lauterpacht noted, "the subjection of the totality of international relations to the rule of law."[8] But the meaning of rule of law varied depending on whether you were a fully sovereign state or a state that had parted with a slice of its sovereignty. The historian Anthony Pagden has pointed out how Grotius insisted that "[s]overeignty beyond Europe, unlike sovereignty within Europe, was . . . very much a divisible notion and was to remain so within all subsequent conceptions" of relationship with the non-Western world.[9] Grotius was a genius, but also a product of his times. It is therefore useful to remind ourselves here that Grotius was, to use the words of one scholar, "among the architects of early modern colonial rule."[10]

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8. Lauterpacht, *supra* note 6, at 30.

9. Anthony Pagden, *The Empire's New Clothes: From Empire to Federation, Yesterday and Today*, 12 COMMON KNOWLEDGE 36, 41 (2006).

10. Peter Borschberg, *Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting* Mare Liberum *(1609)* 34 (Inst. of Int'l Law & Justice, Working Paper No. 2005/14, 2005), *available at* http://www.iilj.org/papers/documents/2005.14Borschberg_001.pdf. According to Borchberg:

> The divisibility of sovereignty in Grotius has captured the imagination of several researchers and is recognized by a growing number of scholars, including the present author, to have significantly strengthened the legal foundations for European colonial rule in Asia and the New World. All peoples are originally free; they are even free to irreversibly sign away their liberty of choice and sovereign rights at the stroke of a pen!

Id. (footnote omitted). Therefore, Borschberg notes that Grotius "should not merely be simply labeled 'prince of peace,' 'champion of reconciliation,' or early advocate of the 'freedom of maritime navigation' as he has been for much of the twentieth century. Such views have served to distort beyond recognition Grotius' standing among the architects of early modern colonial rule." *Id.* (citation omitted). Further, Richard Tuck writes that "[i]n the critical struggle between humanist and scholastic over the right to inflict violence on barbaric peoples, Grotius (contrary to his popular reputation) supported its infliction—and . . . went on in *De Iure Belli ac Pacis* to make his support for it even more explicit." RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 89 (1999); *see also* Edward Keene, *The Dualistic Grotian Conception of International Society* (Dec. 18–20, 2000) (BISA Annual Conference), *available at* http://www.leeds.ac.uk/polis/englishschool/keene00.doc.

The legal relationship of empire that evolved in the colonial era also included a federation idea that was defeated somewhat by the distance of colonial territories.[11] But, as Pagden points out, "[b]y the time Robert Seeley came to write *The Expansion of England* in 1883, . . . modern technologies of communication had [made it] . . . possible to envisage a truly 'Greater Britain,' one that would, constitute a global state."[12] The ideas of divisibility of sovereignty and a Global State are still with us and are indeed gaining ground.[13] However, contemporary modes of divisibility of sovereignty are more complex. The slice of sovereignty that is parted with today finds a non-territorial home. The ideas of federation and a Global State are embodied in a collective of international institutions and formal and informal global social networks.

While the emerging *non-territorial Global State* I suggest is imperial in character, it can be transformed into a *Global Welfare State* if only the international community can adhere to certain basic principles and practices that in my view constitute the idea of global justice, and to which I will return in the last segment of my presentation.

II. CHANGING STRUCTURE OF INTERNATIONAL LAW

Before turning to identifying the international institutions and networks that constitute the basic building blocks of an emerging Global State, I wish at first to indicate the essence of recent developments in the world of international law in two crucial areas. That is, international economic law and international human rights law, as these are decisive in contrasting ways for the emergence of the non-territorial Global State. Developments in international

11. *See* Pagden, *supra* note 9, at 41 (describing the challenges faced by European colonial powers in exerting rule as one empire over diverse and faraway colonies).

12. *Id.* at 44–45.

13. *See* John Agnew, *Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics*, 95 ANNALS ASS'N AM. GEOGRAPHERS 437, 441 (2005) (citing exceptions to the concept of "absolute, indivisible sovereignty exercised equally by all states," such as the shared sovereignty between China and Hong Kong, the emergence of the European Union as a supranational body, and the increasing power of international institutions).

economic law are critical as these lay the foundations of a global economy over which the imperial Global State presides. International human rights law, on the other hand, contributes to the emergence of the Global State through uniting global peoples in a language that is coming to be universally shared and frequently deployed in the struggle to secure a global law of welfare from the international institutions that constitute the emerging Global State.

The most fundamental changes today are taking place in the domain of international economic law. The social class that is leading the transformation of international economic law, in contrast to the emerging bourgeoisie in the time of Grotius, is an emerging transnational bourgeoisie. It is comprised of groups that own the leading worldwide means of production as embodied principally in transnational corporations and private financial institutions.[14] Transnational capital sees a borderless world economy as its field of operation leading to the globalization of national production and financial systems. Its third world component plays the role of a junior partner with the crucial task of legitimizing the vision of global capital in its own world. There is also support for this vision in a growing *global middle class* that hopes to benefit from the ongoing globalization process.

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14. It is worth adding here that the issue of whether a transnational capitalist class has emerged and the consequences flowing from international laws and institutions it supports are two distinct questions. We may differ on the consequences depending on the ideology, methodology, and perception one adopts, but the emergence itself is a neutral issue that has to be empirically determined. *See* William I. Robinson & Jerry Harris, *Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class*, 64 SCI. & SOC'Y 11, 11–54 (2000); *see also* Roger Burbach & William I. Robinson, *The Fin De Siecle Debate: Globalization as Epochal Shift*, 63 SCI. & SOC'Y 10 (1999). For debate on the emergence of a transnational capitalist class see LESLIE SKLAIR, THE TRANSNATIONAL CAPITALIST CLASS (2001); Jerry Harris, *The Conflict for Power in Transnational Class Theory*, 67 SCI. & SOC'Y 329 (2003); BERCH BERBEROGLU, GLOBALIZATION OF CAPITAL AND THE NATION-STATE (2003). My own conclusion that a transnational capitalist class is emerging comes from the study of international legal materials that show how a new international legal architecture has emerged in the last quarter of a century. *See*, B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, ECON. & POL. WKLY., Feb. 6, 1999, 337–349; B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004) [hereinafter *International Institutions Today*].

The essence of the changes taking place in the world of international economic law then is the creation of a *unified global economic space*. It is again pertinent to recall here that in the long period of transition from feudalism to capitalism in Europe, that is, from the 17th to the 19th centuries, what was witnessed was the creation of *unified national economic spaces*. At the political level it was accompanied by the creation of a sovereign state system. The process of creation of a unified global economic space is likewise seeing the emergence of a Global State, albeit it will coexist with the territorial state in an extended period of transition.

The *unified global economic space* is being established through a range of international law instruments that include international trade law as embodied in World Trade Organization ("WTO") texts and international monetary law as prescribed by international financial institutions. The key development here is the prescription of *minimum uniform global standards*. That is to say, irrespective of the sovereign territory on which transnational capital operates it is increasingly governed by the same set of norms or norms that possess family resemblance. For example, every WTO member state has to abide by the norms governing intellectual property rights as embodied in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").[15] Some states merely get a longer transition period in which to implement them.[16] The examples can easily be multiplied.

The emergence of a *unified global economic space* may also be conceptualized in terms of the growing *internationalization of property rights* through the medium of international law. Indeed, the phenomenon of internationalization of property rights is crucial to the creation of a *unified global economic space*.[17] By

15. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1, Apr. 15, 1994, 1869 U.N.T.S. 299, 301.

16. *See id.* arts. 65–66, 1869 U.N.T.S. at 327–26. It is my view that the prescription of uniform global standards is depriving third world states from adopting international laws suitable to their stage of development.

17. One way of grasping the fundamental nature of the changes visiting international economic law is to contrast it with the aspirations of third world countries contained in the 1974 Program and Declaration of Action on a New International Economic Order ("NIEO"). The program for NIEO consisted of a number of elements that included adopting international commodity agreements with price stabilization mechanisms, calling for the preferential treatment of third

internationalization of property rights, I mean that the change in the form and substance of property rights is brought about through the intervention of international law. Thus, the international specification and regulation of intellectual property rights marks the inauguration of a *global property age*.[18] The internationalization of property rights is also taking place throughout the world through the privatization of state owned property, public utilities, and services ranging from water to education and health, through the medium of international monetary law whose norms are implemented as conditionalities by international financial institutions.

I now turn to denoting the essence of developments in international human rights law. The past few decades have seen the rapid evolution of international human rights law and consciousness. There has been a swift expansion in legal texts and agencies, both governmental and non-governmental, and scholarship concerned with human rights.[19] The essence of the expansion of the domain of human rights is the creation of a *global human rights space* that parallels the *global economic space*.

In normal course the two spaces would complement each other to create a global law of welfare. But international human rights law cannot deliver on its promise today, for the global economy is controlled by states and social forces that do not take human

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world countries in GATT, revising the Paris Convention on Industrial Property to take into account third world countries concerns, drafting two codes of conduct on transnational corporations and transfer of technology to place certain duties on transnational capital, and changing the international norms of state responsibility governing the nationalization and expropriation of property. In each of these areas, third world states have either accepted legal regimes with antithetical contents or abandoned the projects of reform. This turnaround has come because of the adoption of neo-liberal policies by third world states critical to the creation of a unified global economic space that meets the interests of the emerging transnational capitalist class. *See generally* Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/RES/3201 (S-VI) (May 1, 1974); Progamme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), U.N. Doc. A/RES/3202 (S-VI) (May 1, 1974).

18. John Braithwate and Peter Drahos term it "the beginning of the global property epoch." JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 63 (2000).

19. It has indeed become "a universal discourse." HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, at v (1996).

suffering and the language of rights seriously, in particular the implementation of economic, social, and cultural rights. An important obstacle here is the priority assigned to international property rights. The debate on the right to health and intellectual property rights in the WTO exemplifies the tensions between human rights and property rights.[20]

The result is a growing resistance movement the world over to realize the potential of human rights. For the language of human rights facilitates in myriad ways the empowerment of the global poor and marginal sections. The social movements, using modern means of communication, have engendered a global human rights consciousness that treats poverty and oppression anywhere as its own concern. On the other hand, the current conflict between international economic law and international human rights law has dictated the need to establish adequate institutional structures to defend the interests of global capital. These structures constitute the emerging imperial Global State.

III. THE EMERGING GLOBAL STATE AND SOVEREIGN STATES

A. EMERGENCE OF A NASCENT GLOBAL STATE

The eternal lament about international law that it cannot be enforced represented a serious crisis for rising transnational capital. For while a global unified economic space could be constituted through a network of international laws, there was no Global State to ensure that these laws were observed. There was an urgent need to create or strengthen institutions that could enforce norms that facilitated the globalization of trade, production, and finance. This role has been assigned to key international economic institutions like the WTO, the World Bank, and the International Monetary Fund

20. For the text of the Declaration on the TRIPS Agreement and Public Health, see World Trade Org. [WTO], Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002). On its legal implications, see James Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health under the Vienna Convention on the Law of Treaties*, 15 HARV. J.L. & TECH. 291 (2002).

("IMF"), the principal building blocks of an emerging Global State.[21] Thus, for example, the WTO not only establishes a compulsory dispute settlement mechanism, but also backs it with an effective system of sanctions.[22] The international financial institutions, on the other hand, flex their international law muscle by using the power of money. There are, in addition, a number of regional institutions and bilateral mechanisms that embed and support this enforcement system. Finally, Western states representing core interests of global capital possess a de facto *monopoly* over the use of organized force, a critical component of the emerging Global State. For where need be, the unification of global economic space can take place through the threat or use of force.

There are also global processes at work that are extending and deepening the social reach of the emerging Global State without displacing the territorial state. For instance, there has come into existence a global network of legislators, judges, bank officials, and police officials trying to collectively address common global problems.[23] The networks are a first step in aggregating functional processes at a global level, so necessary for the formation of a Global State. However, given the dominant influence of global capital today the most important effect of global networks is, as one observer has noted, "the creation of a global bourgeoisie with a set of similar elite-class views."[24] In other words, the critical impact of global networks is the advancement of the normative and enforcement agenda of global capital.[25] These networks tend to weaken democratic authority

21. For a descriptive analysis of how these economic institutions construct and perpetuate the emerging Global State, see *International Institutions Today*, *supra* note 14, at 6–9.

22. *See* WTO, Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1 (Dec. 11, 1996), http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm; *see also* Understanding the WTO: Settling Disputes – A Unique Contribution, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

23. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); *see also* Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 288 (2004).

24. Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1272 (2005) (reviewing ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004)).

25. *See id.*

and accountability in third world states as they often bypass duly established democratic institutions.[26] The networks divide and relocate sovereignty in unaccountable social bodies and processes that constitute the Global State as if it were by stealth.[27]

B. ROLE OF THE TERRITORIAL STATE

It may be worth asking at this point, what is the role of the sovereign state in this scheme of things, setting aside for this purpose the difference between Western and Third World states? For the foreseeable distant future, the territorial state will coexist with the emerging Global State. A principal reason is that the vision of transnational capital is at present challenged by competing social forces and interests. In fact, a significant task of the territorial state is to mediate between transnational capital, national capital hurt by globalization, and subaltern classes. The mediation will take place in the matrix of strategic interests, the need to maintain rule of law, and the demands of electoral democracy.

The other critical task of the territorial state is gate keeping. In the age of accelerated globalization, migration and asylum policies are in a significant way coming to constitute the sovereign state.[28] Indeed, the distinction between insiders and outsiders is critical to its survival in the long run. On the other hand, there is the "unstoppable diversity" of societies.[29] The territorial state will have to resolve the tensions that

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26. *See id.* at 1301–03.

27. But, I must add that when a democratic and just Global State is established, government networks also hold out the potential for taking the democratic agenda forward.

28. *See* NEVZAT SOGUK, STATES AND STRANGERS: REFUGEES AND DISPLACEMENTS OF STATECRAFT 57–100 (1999).

29. The phrase "unstoppable diversity" is that of Charles Taylor. *See* Charles Taylor, *Democracy, Inclusive and Exclusive*, *in* MEANING AND MODERNITY: RELIGION, POLITY, AND SELF 181, 186 (Richard Madsen et al. eds., 2002). As the Canadian political philosopher James Tully notes, "[c]ultures, are not internally homogeneous. They are continuously contested, imagined and reimagined, transformed and negotiated, both by their members and through their interaction with others." JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 11 (1995). Another esteemed author surmises that "the struggle for recognition between states will have the same outcome as that between individuals, collective identity formation and eventually a [world] state." Alexander Wendt, *Why a World State Is Inevitable*, 9 EUR. J. INT'L REL. 491, 493 (2003).

come with it in the long period of transition to a fully evolved Global Community and State.

IV. TWO INDIAS AND TWO WORLDS

It is time to return to understanding the consequences of the ongoing transformation of international economic law and institutions and the emergence of a nascent Global State. In this regard allow me to look at the complex case of India rather than recite known facts about global poverty and inequality. In the past few years, India has caught the imagination of the world. Its economy has picked up and is projected to grow at eight to ten percent per year.[30] It is among the favored destinations for foreign investors. The liberalization of the economy since 1991 has unleashed creative energies that are rapidly transforming the economy. The Information Technology sector in particular has made a mark in the world and is the source of the outsourcing controversy in this country.[31]

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30. *See* International Monetary Fund [IMF], *IMF Executive Board Concludes 2005 Article IV Consultation with India*, at 3, Public Information Notice (PIN) 06/17 (Feb. 21, 2006) (concluding that "[w]ith an acceleration of the reform process, India would be able to achieve sustained economic growth of 8–10 percent, in line with the objectives of the authorities").

31. Incidentally, the Indian IT industry is an integral part of the emerging transnational capitalist class. It is, in the words of Upadhya,

> distinguished by its close integration into the global economy and its relative autonomy from the 'old' Indian economy dominated by the public sector and a nationalist capitalist class. For this reason, the IT elite differ sharply in their ideological orientation from the established business class, many of whom (represented by the 'Bombay Club') oppose unbridled globalisation. In contrast to the old bourgeoisie, the IT business class emerged within the global economy and a liberalised environment, and . . . is already highly transnational in its composition. The entry of multinationals in the IT industry, far from posing unwelcome competition to domestic firms . . . has produced synergies that have helped it to grow. For these reasons, members of the transnational IT business class are, for the most part, outspoken votaries of globalisation.
>
> . . . [T]he IT industry and its leaders have had a disproportionate impact on public policy, both directly by forging links with the state, and indirectly as icons of a 'resurgent India.'

Carol Upadhya, *A New Transnational Capitalist Class? Capital Flows, Business Networks and Entrepreneurs in the Indian Software Industry*, ECON. & POL. WKLY., Nov. 27, 2004, at 5148.

On the other hand, political commentators in India often use the metaphor of Two Indias. The first rich, mobile, and technologically savvy, strong votaries of the ongoing liberalization and globalization process. The other poor and marginal, deprived of even basic health and education services, an integral part of the growing global poor. The Two Indias coexist within the world's fastest growing market democracy.

The government contends, and not entirely without merit, that economic growth will lead to the reduction of poverty and inequality. The problem is that it has not yet happened. The UNDP's *Human Development Report 2005* states that "overall the evidence suggests that the pick-up in growth has not translated into a commensurate decline in poverty."[32] India ranks 127 on the Human Development Index.[33]

Will future growth rates translate into equity for the poor and marginal sections? It is interesting that even in economic literature there are no ready answers to the question as to what kinds of institutional structures make equitable growth possible.[34] Indeed, crucial questions relating to the character of the state and the nature of leadership remain relatively extraneous to economic analysis.[35]

International law literature follows suit. Thus, for instance, the nature of global social forces that influence states, international law, and institutions remain mostly unexamined. It may then well be the case, as I have argued, that the Indian State is deprived of policy tools necessary to promote equitable growth by an emerging Global State. Poverty and inequality are not, in other words, the outcome of problematic indigenous policies alone, but in critical ways are a product of policies prescribed and enforced by international institutions. Therefore, despite its commitment to reforms with a human face, and an active human rights movement pressing it, the Indian State may not be able to deliver. In other words, polyarchy or the phenomenon of low intensity democracy may become the bane of India as of other third world states. Only those sections whose fates

32. UNDP, *supra* note 3, at 30.

33. *See id.* at 221.

34. *See* Ravi Kanbur, *Growth, Inequality and Poverty: Some Hard Questions*, 58 J. INT'L AFF. 223, 227 (2005) (explaining that "[t]here is substantial variation in institutional structures . . . across cases of success and failure") (citation omitted).

35. *See id.*

are linked with global capital may eventually benefit from the ongoing changes in international economic laws and institutions. What it means in the final analysis is that the world is today coming to be divided into two worlds that of the Global Rich and that of the Global Poor. Though it needs to be added that the population that lives on less than a dollar a day is nearly entirely present in the third world, injecting a strong North-South dimension to the divide between the Global Rich and the Global Poor.

V. GLOBAL JUSTICE IN THE ERA OF TRANSITION

How do we change all this? What principles of justice should be used to democratize the emerging Global Law and State? What principles of global justice can address both the *global geographical and class divides*?

A. GLOBAL NOT DOMESTIC JUSTICE

Before I say something about the idea of global justice, a word at first on the possible objection that the creation of a "just world" is not the task of international law at all and that its role should be confined to simply ensuring a "world under law."[36] However persuasive this argument was in the past, it is not sustainable today when the "world under law" possesses a scope and depth that occludes the possibility of building what I term *justice in one country*. The fates of all societies have today come to be linked in ways that no longer allow any state to postulate and implement what may be termed a domestic theory of justice. The choice in many ways is now reduced to either global justice or domestic injustice of one kind or another. The idea of an emerging Global State is important here as its absence, or the lack of some form of global sovereignty, is said to preclude, as Thomas Nagel has recently argued, the idea of global justice.[37] It is, as I have contended, no longer the case.

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36. *See* TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 255–77 (1983) (distinguishing between an international system where states simply conform to the laws of international society and an international system where states attempt to distribute wealth and power equitably).

37. Nagel acknowledged that:

> Some would argue that the present level of world economic interdependence

B. CONCEPT OF JUSTICE

I now turn to explore the idea of "justice" beyond the suggestion that justice today can only be conceptualized as global justice.[38] I believe, following Nancy Fraser, that there are three kinds of legitimate claims that constitute the idea of global justice which can help establish a global law of welfare in the matrix of international human rights law. These are claims for redistribution, claims for recognition, and claims for representation.[39]

In the case of claims for distributive justice what is involved is global political economy, and in the case of claims for recognition the remedy is cultural change.[40] While the former implicates global relations of production, the latter involves global relations of recognition.[41] The claims for recognition involve, as Habermas

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already brings into force a version of the political conception of justice, so that Rawls's principles, or some alternative principles of distributive justice, are applicable over the domain covered by the existing cooperative institutions. This would be a very strong result, but I believe that it is not the case, precisely because such institutions do not rise to the level of statehood.

Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 137 (2005) (footnote omitted). According to Nagel, "international governance falls far short of global sovereignty, and is ultimately dependent on the sovereignty of separate states." *Id.* at 138.

38. *See id.* at 113 (". . . concepts and theories of global justice are in the early stages of formation, and it is not clear what the main questions are, let alone the main possible answers").

39. *See* Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*, *in* CULTURE AND ECONOMY AFTER THE CULTURAL TURN 25, 25 (Larry Ray & Andrew Sayer eds., 1999) [hereinafter *Social Justice in the Age of Identity Politics*] (suggesting that there are two types of claims for social justice: those seeking a more equitable distribution of resources and those calling for a greater recognition of and respect for the differences that exist between cultures); Nancy Fraser, *Reframing Justice in a Globalizing World*, 36 NEW LEFT REV., Nov–Dec. 2005, at 1, 6–7 (recognizing a third type of claim seeking the fair and equal representation of all members within a community).

40. *See Social Justice in the Age of Identity Politics*, *supra* note 39, at 27.

41. *See id.* at 28. Fraser notes that

> [b]ivalently oppressed groups . . . suffer both maldistribution and misrecognition *in forms where neither of these injustices is an indirect effect of the other, but where both are primary and co-original.* In their case, neither the politics of redistribution alone nor the politics of recognition alone will suffice. Bivalently oppressed groups need both.

clarifies, "struggle for the recognition of collective identities . . . within the community of peoples."[42]

A third set of justice claims relates to the claims for representation. Among the basic problems that confront humankind today is that crucial social and economic policies are negotiated and adopted at the global level while these are implemented at the national level.[43] It raises complex issues related to the meaning of "representation" and how far democracy deficit informs existing international institutions that constitute the emerging Global State.

There is also, it deserves emphasis, an intimate relationship between the three claims for recognition, redistribution, and representation, explaining why I go beyond simply articulating the claims for redistribution where principles of global justice are concerned. For instance, the claims for global distributive justice will be difficult to realize unless the claims for recognition and representation are addressed. Misrecognition, for example, may eliminate the possibility of realizing claims for redistribution, and representation. Thus, in his seminal work *Imperialism, Sovereignty and International Law,* Antony Anghie demonstrates how international law continuously reproduces the structure of the "civilizing mission" that informed the colonial project.[44] Anghie's work raises the crucial issue as to whether it is possible at all in the circumstances to create an international law that is not imperial?[45] Misrecognition in other words appears to greatly reduce the possibility of creating a global law of welfare.

I believe that while modern international law has been structured to legitimize and sustain domination, the different phases of imperialism since the sixteenth century must be distinguished. That is, if we are not to reach the pessimistic conclusion that it is not

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Id. at 31. As Fraser points out, gender, race, class, and sexuality all represent bivalent social differentiation both at the national and the global levels. *Id.* at 31–33.

42. Jurgen Habermas, *Struggles for Recognition in the Democratic Constitutional State, in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 107, 117 (Amy Gutman ed., Sherry Weber Nicholsen trans., 1994).

43. *See* Manuel Castells, *Global Governance and Global Politics*, 38 PS, POL. SCI. & POL. 9, 10 (2005).

44. ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 313 (2005).

45. *See id.* at 317.

possible at all to create a just world under law. A differentiated history recognizes, for instance, the significance of the historical struggles of the formerly colonized peoples to overthrow the yoke of colonialism. At the levels of claims for recognition, redistribution, and representation decolonization had a deep impact. This does not negate the existing reality of domination but it would be mistaken to believe that nothing changed with decolonization. What is necessary today is to frame the claims for recognition, redistribution, and representation for a new age.[46] I can do no more than mention some principles and practices that should inform each of these different claims to help establish a global law of welfare or a just world under law.

1. Claims for Recognition

The first principle with respect to claims for recognition is that international law must safeguard, to use the expression of Habermas, "the other of otherness."[47] All peoples and cultures deserve our respect, albeit within the confines of evolving international human rights law. Reproducing the civilizing mission or misrepresenting the Other can only translate into violence and reduce the possibility of accepting claims for redistribution and representation.

The claims for recognition rest on an epistemological foundation that assumes fallibility and corrigibility. This understanding was fundamental to that great apostle of non-violence Mahatma Gandhi.[48]

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46. Once the thesis that a nascent Global State has emerged is accepted the different claims can justly be advanced. For as Nagel points out:

> If we look at the historical development of conceptions of justice and legitimacy for the nation-state, it appears that sovereignty usually precedes legitimacy. First there is the concentration of power; then, gradually, there grows a demand for consideration of the interests of the governed, and for giving them a greater voice in the exercise of power. The demand may be reformist, or it may be revolutionary, or it may be a demand for reform made credible by the threat of revolution, but it is the existence of concentrated sovereign power that prompts the demand, and makes legitimacy an issue. . . .

Nagel, *supra* note 37, at 145.

47. *See* Andrew Linklater, *Marxism*, *in* THEORIES OF INTERNATIONAL RELATIONS 129, 147 (Scott Burchill et al. eds., 2001) (quoting JURGEN HABERMAS, THE PAST AS FUTURE 119–20 (1994)).

48. Mahatma Gandhi emphasized the "fundamental and inescapable fact of human life that all knowledge was partial and corrigible." BHIKHU PAREKH,

To put it differently, the principle of non-violence in dealing with the Other is the most fundamental tenet that needs to be observed to establish a just world under law. It, among other things, calls for adherence to the principles and norms on the prohibition of the threat or use of force contained in the U.N. Charter.

A second principle is that we must take all human suffering equally seriously. For instance, the egregious violation of international humanitarian laws that the world is witnessing today is in great part due to misrecognition. The sufferings of Others is somehow less suffering. Needless to add there are no innocent parties here.

A third principle should be that we must not propose a settlement to others that we ourselves would be unwilling to accept if the situation were reversed.[49] The idea of empathy that underlies this principle embodies the essence of the claims for recognition by seeing the self in the Other.[50]

Incidentally, the idea of accepting the claims for recognition at the global level needs to be brought to bear on international law scholarship in a very elementary sense. Western scholarship, with honorable exceptions, still does not take cognizance of the contribution of third world societies and scholars to the evolution and development of international law.[51]

2. *Claims for Redistribution*

Where claims for redistribution are concerned, the first principle I would propose is that third world peoples must not be denied

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COLONIALISM, TRADITION AND REFORM: AN ANALYSIS OF GANDHI'S POLITICAL DISCOURSE 173 (rev. ed.1999).

49. This is an observation Elihu Root, first president of ASIL, U.S. Secretary of State, and winner of the Nobel Prize for Peace in 1912, made to James Brown Scott (among the founders of ASIL) while reviewing legal memoranda at the State Department. *See* Frederick L. Kirgis, *The Formative Years of the American Society of International Law*, 90 AM. J. INT'L L. 559, 567 (1996).

50. *See generally* Wendt, *supra* note 29, at 511.

51. For example, in his separate opinion in the *Gabcikovo-Nagymaros Project* case between Hungary and Slovakia, Vice-President Christopher Weeramantry had to go to great lengths to record the contribution of the non-Western world to the ideas and practices of sustainable development. *See* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 88 (Sept. 25) (separate opinion of Vice-President Weeramantry).

economic policy options that the developed world has exercised or is exercising. Take the principle of free trade. A historically contingent application must acknowledge that the United States, for example, never practiced free trade as it was developing and that U.S. industries were among "the most protected in the world until 1945."[52] The United States and European Union continue to indulge in protectionism even today. The agriculture sector is an obvious example. In the circumstances it is indefensible that third world countries are being compelled to open up markets at the cost of the welfare of the poor and marginal groups in these countries.

A second principle of redistributive justice would call for establishing the practice of social audit of international economic laws, in particular to assess their impact on the global poor. To put it differently, the primacy of international human rights law over economic laws, in particular those which internationalize property rights, should be recognized.[53]

The third principle I would propose is that humanitarian assistance should be provided to all those in need without discrimination and not be used to advance non-humanitarian ends.

3. Claims for Representation

Let me turn to the claims for representation. There is growing consensus that key international institutions suffer from democracy deficit. It is also being conceded in this context that the institutions of representative government do not consume the meaning of democracy.[54] The relationship between the individual will and the general will of society is coming to be structured and mediated in complicated ways at the global level.[55] Sectional interests are often

52. Ha-Joon Chang, *Kicking Away the Ladder: The "Real" History of Free Trade*, FOREIGN POL'Y IN FOCUS, Dec. 2003, at 6; *see* B.S. Chimni, *The World Trade Organization, Democracy and Development: A View From the South*, 40 J. WORLD TRADE 5, 11 (2006).

53. *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Hum. Rts., *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. Doc. E/CN.4/Sub.2/2000/13 (June 15, 2000).

54. *See* SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS 140–141 (2000).

55. As Phillip Allot has noted, "the problem of the connection between the will of the individual citizen and the general will of society is not resolved by the idea

given universal expression. To put it differently, the emerging transnational ruling elite that has the greatest influence over the emerging Global State cannot be seen as representing the interests of the global populace. Other structures may therefore need to be put in place. Thus, the first principle I propose is the practice of some form of direct global democracy symbolizing a *global political space* that parallels the creation of a *global economic space.*[56]

A second principle I would recommend is to make procedural justice central to the principle of international cooperation. For claims for representation cannot even be advanced if the fundamentals of discourse ethics are not adhered to, as for example is the case in the WTO negotiations.

A third principle I suggest is that in view of the growing role of international institutions as building blocks of an emerging Global State their responsibility in international law be clearly defined.[57] The International Law Commission is presently seized of the matter and will hopefully work towards this goal.[58]

The fourth principle is that global populations adversely affected by international laws and policies must have a say in the institutions that prescribe and enforce them. The international financial institutions with their weighted voting system are a case in point. There is in this regard also a need to support ongoing scholarly efforts to develop principles of global administrative law to increase participation, transparency, and accountability of global networks and bodies.[59]

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of representation." Phillip Allot, *The Emerging International Aristocracy*, 35 N.Y.U. J. INT'L L. & POL. 309, 320 (2003).

56. *See* Richard Falk & Andrew Strauss, *Globalization Needs a Dose of Democracy*, INT'L HERALD TRIB., Oct. 8, 1999, *available at* http://www.iht.com/articles/1999/10/05/edandy.t.php# (proposing an international grassroots campaign to create the first "Global People's Assembly" in order to organize the emerging international order along democratic lines).

57. *See,* Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243 (2000).

58. *See* U.N. General Assembly, Int'l L. Comm'n, *Third Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/553 (May 13, 2005).

59. For a comprehensive examination of global administrative law, see Benedict Kingsbury et al., *The Emergence of Global Administrative Law* (Inst. of Int'l L. & Just., Working Paper No. 2004/1, 2004) *available at*

CONCLUSION

It is time to ask who will be the agents of global justice? Who will voice these claims for recognition, redistribution, and representation? What social forces will in short help establish and sustain a global law of welfare?

Each historical epoch produces its agents of resistance. The contemporary era is no exception. The forces of resistance consist of the old and new social movements within the third and first worlds. What is emerging is a complex internationalism that combines local, regional, and international social movements to forge what Castells calls a "global movement for global justice."[60] As history unfolds there will be many moments of progression and regression and unexpected turns and twists. But as long as these global forces of resistance *strictly adhere to the norm of non-violence*, for violence only begets injustice and violence, a global law of welfare can be created. If this sounds utopian we only need to remember that not many thought that India would win its freedom from colonial rule through non-violent means or predicted the peaceful end of apartheid in South Africa.

In conclusion, it would be interesting to imagine what the world will look like when the ASIL celebrates two hundred years of its existence. Will a full-blown Global State have arrived? Will it be a confederation of territorial states or a unitary World State? Eventually the global community like the national one is an imagined community. It is socially constructed once the material conditions for it exist as they do today. The great philosopher of language Ludwig Wittgenstein wrote that "to imagine a language means to imagine a life-form."[61] Conversely, to imagine a new form of life, in this case a democratic and just Global Community and State requires inventing a new vocabulary. In other words, we international lawyers need to

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http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf. For a critique from a third world perspective, see B.S. Chimini, *Cooption and Resistance: Two Faces of Global Administrative Law* (Inst. of Int'l L. & Just., Working Paper No. 2005/16, 2005), *available at* http://www.iilj.org/papers/documents/2005.16Chimni.pdf.

60. Castells, *supra* note 43, at 12.

61. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 7e (G.E.M. Anscombe trans., 3rd ed. 2001).

avoid being captive of the past in imagining alternative futures. Meanwhile, in my view, we need to assist the ongoing global movement for global justice in whatever ways we can to ensure that hegemonic states and classes accept the idea of a global law of welfare. Thank you.