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Viewing International Legal Fragmentation from a Third World Plane

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PANEL B-1: THINKING CRITICALLY ABOUT DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW
RÉFLÉCHIR DE FAÇON ÉCLAIRÉE SUR LA DIVERSIFICATION ET L'EXPANSION DU DROIT INTERNATIONAL

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Chair/*Modératrice*: Doris Buss*

VIEWING INTERNATIONAL LEGAL FRAGMENTATION FROM A THIRD WORLD PLANE: A TWAIL PERSPECTIVE

Obiora Okafor**

I. Introduction

First of all, I want to thank Doris Buss for organizing this panel and for inviting me to participate in what promised to be, and has in fact been, an interesting conceptual and critical examination of an important international legal question. Having said that let me go straight ahead to the introduction of the paper itself.

There seems to be widespread agreement in the literature that the international legal order has become "increasingly fragmented" especially since the end of the cold war.[1] Symposia and conferences have been

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1 See G. Hafner, "Pros and Cons Ensuing from Fragmentation of International Law" (2004) 25 Michigan Journal of International Law 849. See also A. Fischer-Lescano and G. Tuebner, "Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" (2004) 25 Michigan Journal of International Law 999 at 1000-1001; P.S. Rao, "Multiple Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation" (2004) 25 Michigan Journal of International Law 929 at 930-934; M. Koskenniemi and P. Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 Leiden Journal of International Law 553; P-M. Dupuy, "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice" (1999) 31 New York University Journal of International Law and Politics 791; J. Charney, "The Impact on the International Legal System of the growth of International Courts and Tribunals" (1999) 31 New York University Journal

convened to discuss the subject; including of course this 34th Annual Meeting of the Canadian Council of International Law.[2] The International Law Commission (ILC) has also devoted much of its time to the study of what it sees as the "difficulties" arising from the fragmentation of the international legal order.[3] International lawyers seem to take this issue quite seriously.

But how fragmented is international law in reality? If fragmentation can indicate the dis-aggregation of a coherent whole, in what ways and from what particular perspective(s) has it seemed either coherent or whole, or both? If fragmentation can connote rupture or production, to what extent has fundamental rupture or adequate production actually occurred in the international legal order? From which standpoint does such rupture seem fundamental or appear to be present at all? From what plane of observation does the extent of normative production that has occurred in the international legal order appear either extensive or significant? Does fragmentation mostly pose risks, difficulties, and problems for the international legal order; as opposed to largely helping to ensure adequate autonomy, fairness and participation in that order (qualities that many see as "good")?

What insights are revealed or highlighted about the fragmentation of the international legal order, or the lack thereof, when some of the formative experiences and consequent anxieties that are shared across almost all of the so-called third world[4] are more firmly written or spoken into the

of International Law and Politics 697; I. Brownlie, "The Rights of Peoples in Modern International Law" in J. Crawford, ed., *The Rights of Peoples* (Oxford: Oxford University Press, 1988) 1 at 15; B. Simma, "Self-Contained Regimes" (1985) 16 Netherlands Yearbook of International Law 111 at 135; and P. Weil, "Towards Relative Normativity in International Law" (1983) 77 American Journal of International Law 413 at 429.

2 See also Symposium, "Is the Proliferation of International Courts and Tribunals a Systemic Problem?" (1999) 31 New York University Journal of International Law and Politics 679.

3 For example, see the *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. GAOR, 55th Session, Supp. No. 10, at 237, U.N. Doc. A/CN.4/L.628 (2002) (hereafter "ILC Report").

4 For a most useful approach to understanding the meaning of the expression *the third world*, see B. Rajagopal, "Locating the Third World in Cultural Geography" (1998-1999) Third World Legal Studies 1 (arguing that the concept should not be inflexibly moored to a fixed geographical location). For a highly insightful description of third world voices as a "chorus of voices that blend, though not always harmoniously, in attempting to make heard a common set of concerns," see K. Mickelson, "Rhetoric and Rage: "Third

mainstream discourses on international legal fragmentation? Does much of the discourse on fragmentation tend to displace or occlude important third world concerns and marginalize their shared historical experience of subordination? In any case, does TWAIL (that is, critical third world approaches to international law)[5] analysis lead us to tell stories about the desirability or otherwise of international legal fragmentation that are displaced in these mainstream? These are the main issues that are dealt with in this paper.

In order to systematically develop its main arguments, the paper is organized into five sections; this introduction included. In section II, some of the major senses in which international legal fragmentation has been understood are briefly examined before settling on the particular understandings of fragmentation that animate this paper. In Section III, the allure of the propositions that the international legal order should overcome its fragmentation and therefore become more unified and homogeneous is discussed. In section IV, a TWAIL optic is deployed to show that contrary to the dominant orientation of the literature, in some senses, what the international legal order requires is more, and not less, fragmentation. An alternative and critical reading of the fragmentation phenomenon is therefore suggested. Section V concludes the paper.

II. On the Various Conceptions of International Legal Fragmentation

As it has been used in the literature, the expression international legal fragmentation can denote one or more of the following:

1. Sub-disciplinary Fragmentation: This refers to the compartmentalization of international law into separate and increasingly autonomous fields of study: such as international criminal law, international trade law, international environmental law, international human rights law, international humanitarian law, international law of development, and so on.[6] This kind of fragmentation does not require further explanation or illustration.

World Voices in International Legal Discourse" (1998) 16 Wisconsin International Law Journal 353 at 360.

5 For detailed explanations of the nature of TWAIL scholarship, see M. Mutua, "What is TWAIL?" (2000) ASIL Proceedings 31; J. Gathiii, "Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory" (2000) 41 Harvard International Law Journal 263; K. Mickelson, ibid; and O.C. Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2003) 43 Osgoode Hall Law Journal 171at 174-180 (Hereafter referred to as "Newness").

6 See I. Brownlie, supra note 1at 15; and P.S. Rao, supra note 1 at 933-934.

2. Intra-normative fragmentation: This refers to the dis-aggregation of the corpus of international legal norms into two or more kinds. For example, in his famous decades-old piece in the American Journal of International Law, Prosper Weil worried to some extent about the effect on the unity of international legal norms of the jus cogens versus non-jus cogens distinction.[7] In Weil's view, "the graduated normativity of normative acts is a notion so elusive as to escape comprehension."[8] This distinction constitutes one kind of intra-normative fragmentation. Another sort of intra-normative fragmentation is signified by the less virile but still prevalent distinction in international human rights law between civil/political rights and economic/social rights obligations.

3. Inter-normative fragmentation: This refers to the reality of separate but overlapping bodies of international legal norms/decisions that govern the same subject-matter.[9] A good example is the overlapping governance or co-governance of human rights issues by both regional institutions and their UN counterparts. For example, the UN human rights committee (on the one hand) and the African human rights system (on the other hand) have both prescribed bodies of norms that govern the same subjects-matter, e.g. the right to secession, freedom of movement, and the right to shelter. To which body of norms should a state party to both the UN and the African system look to as the source of its obligations in respect of such subjects-matter; especially if the one is more expansive in its grant or definition of rights than the other? In the specific instance of the right of an identifiable minority group to secede from an already established state, the language of Article 20 of the African Charter on Human and Peoples' Rights (ACHPR) is on its face far more permissive than the wording in Article 1 of the [UN] International Covenant on Civil and Political Rights (ICCPR).[10] Should an African ethnic group in search of secession claim this right under the ACHPR when it is not at all clear that the ICCPR grants it? Similarly, international trade rules can conflict or collide with international environmental rules over the harvesting of a certain kind

7 See P. Weil, supra note 1at 429.
8 Ibid.
9 See B. Simma, supra note 1 at 135-136.
10 See the *African Charter on Human and Peoples' Rights*, 17 June 1981, (1982) 21 I.L.M. 58; and *the International Covenant on Civil and Political Rights*, 19 December 1966, (1967) 6 I.L.M. 368. See also O.C. Okafor, "Entitlement, Process, and Legitimacy in the Emergent International Law of Secession." (2002) 9 International Journal of Minority and Group Rights 41 (Hereafter referred to as "Entitlement").

of fish or marine mammal;[11] and international treaty or customary law on sovereign/diplomatic immunity can conflict or collide with international human rights obligations to bring perpetrators of gross human rights abuses to justice.[12]

4. Institutional Fragmentation: This denotes the proliferation of international courts and tribunals; the collisions that can consequently occur in their institutional jurisdictions; and the lack of a hierarchy among these international courts and tribunals that can serve to resolve these jurisdictional collisions. Fischer-Lescano and Tuebner have remarked on what they see as the "explosive expansion" of independent and globally active, yet sectorally-limited courts, quasi-courts and other forms of conflict-resolving bodies. [13] To convey a sense of the immensity of this proliferation, these two scholars have also cited the Project on International Courts as having identified 125 such bodies as at the year 2004.[14] As importantly, one norm/hierarchy-based conflict between a decision of the International Court of Justice (ICJ) and that of the International Criminal Court for the former Yugoslavia (ICTY) has already ended with the ICTY explicitly asserting its status as an autonomous judicial body without a hierarchical relationship to the ICJ.[15] In this sense, the fear that many have expressed about institutional fragmentation is that the decisions of alternative judicial institutions on the same subject-matter can become so divergent as to create important difficulties for those who wish to know the precise state of the international law on that specific issue. This kind of fragmentation is of course intimately linked to inter-normative fragmentation.

In all four types of international legal fragmentation referred to above the concern expressed in the literature has primarily related to what may be

11 See *Tuna/Dolphin Cases*. For more on this case, see on-line: http://www.ictsd.org/html/tuna_dolphin.htm (26 October 2005). See also B. Kingsbury, "The Tuna-Dolphin Controversy, The World Trade Organization, and the Liberal Project to Reconceptualize International Law" (1994) 5 Yearbook of International Environmental Law 1.
12 For a full-text report of the decision in the Pinochet Case, see BBC News, on-line:http://news.bbc.co.uk/hi/english/static/pinochet_ruling/pino1.htm (visited 26 October 2005). For the story of the attempt to extradite him to Spain and his claim of sovereign immunity, see BBC News, on-line: http://news.bbc.co.uk/1/hi/world/americas/1209914.stm (visited 26 October 2005).
13 See A. Fischer-Lescano and G. Tuebner, supra note 1 at 1000-1001.
14 Ibid.
15 See also Ibid at 1045.

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13 See A. Fischer-Lescano and G. Tuebner, supra note 1 at 1000-1001.
14 Ibid.
15 See also Ibid at 1045.

referred to as subject-matter or material fragmentation. But of these four categories, it is the last two types that interest us the most in this paper.

However, the paper will also allocate co-equal focus to another dimension of international legal fragmentation that cannot be easily reduced to subject-matter or material forms, but is implied in the spirit underlying the subject-matter. This is what I will refer to in this paper as the fragmentation (or the lack thereof) of the international legal mind/optic. In this sense, a key question that will be addressed is: even if the international legal order is in fact disturbingly fragmented in terms of the organization, configuration or patterning of its subject-matter or decision-making hierarchy, is it in fact significantly fragmented in the sense of the incoherence of its organizing or dominant mind/optic?

It should be noted at this stage though that as the theme of this panel, of this conference, and of the report of the ILC on the question of international legal fragmentation, suggests,[16] the concept of international legal fragmentation (be it of the subject-matter or mind/optic kind) has also been broadly understood in the literature in terms of the "diversification and expansion" of that order. As such, those who have accused international law of being fragmented have also tended to suggest that its norms and the institutions that apply them are for one reason or the other, either too diversified, too expanded, or both. It is these last two terms that will frame our understanding and discussion of international legal fragmentation in the rest of this paper.

III. The Allure of Unity and Homogeneity in the International Legal Order

While exceptions do exist,[17] the discourse on the diversification and expansion of the international legal order tends to be couched in terms of the risks posed by this phenomenon to the unity of international law.[18] As they have been portrayed in the literature, the risks to the international legal order that are posed by this increasing diversification and expansion of international legal norms and institutions include the resultant lack of conceptual-doctrinal consistency in the content of international legal

[16] See *ILC Report*, supra note 3.

[17] For example, Fischer- Lescano and Tuebner have argued that there is little that we can do about international legal fragmentation since it is driven by and reflects the underlying social fragmentation of our world. See A. Fischer-Lescano and G. Tuebner, supra note 1 at 1046. Similarly, Hafner and Rao have each separately argued that fragmentation does have some good effects. See G. Hafner, supra note 1at 859; and P.S. Rao, supra note 1 at 929 and 960-961.

[18] See A. Fischer-Lescano and G. Tuebner, supra note 1 at 1001.

norms, rules and decisions; the lack of a clear hierarchy of such norms, rules and decisions; and the lack of an effective international judicial hierarchy.[19] All of these point to the problem of creating order, consistency, predictability and reliability in the interpretation of legal obligations by those affected by these obligations; qualities that are said to contribute greatly to the authority and legitimacy of the more ideal domestic legal systems; and to which the international legal order ought to aspire as a result.[20]

It is thus argued, explicitly or impliedly, that given the significant risks that are eventually posed to the authority and legitimacy of international legal order by this diversification and expansion of international legal norms and institutions, international legal unity should be our disciplinary aspiration and increasing homogeneity the beacon that guides us to that place. These are important arguments, of course.

This then is the allure of unity, unification and homogenization in the international legal order: that the presence of less conceptual-doctrinal inconsistency, more clarity regarding the hierarchy of norms, and a much more effective international judicial hierarchy in that legal order, would lead that order much closer toward its own unity, and as such ensure significant increases in the authority and legitimacy of international law and institutions.

While acknowledging the power and importance of this line of argumentation, the rest of the paper is devoted to demonstrating the limitations of this position from the perspective of TWAIL. In the end, a derivative third world-focused argument is made in praise of relative fragmentation and against the "totalizing tendencies" that are often evident in the orientation of the international legal order. This argument draws on, but extends well beyond, Fischer-Lescano and Tuebner's global legal pluralism.[21] It is argued in the end that the homogenizing tendencies in the international legal order are, at the very least, as much a threat to the authority and legitimacy of international legal order as the incoherence of international legal norms, doctrines, institutions, and decisions.

IV. In Praise of Relative Fragmentation:

The question that arises therefore is: how fragmented is the international legal order in reality? How much diversification and expansion has actually occurred within this order? Is the problem that too much

[19] Ibid, at 1002.

[20] Ibid. See also G. Hafner, supra note 1at 851-855.

[21] Ibid, at 1045-1046.

diversification and expansion has already occurred, or is the real problem that we have not yet had enough of that phenomenon? And is the answer dependent on the kind of diversification and expansion that is in issue? Are the questions asked more varied and the results different when we write or voice the third world's shared experience of economic, political and social subordination into the debate?

Viewed from a third world plane, it appears that the international legal order has experienced far less diversification and expansion than is commonly supposed and is in fact not nearly as fragmented as it can often appear from other perspectives. Viewed from this plane, the international legal order still appears to be quite coherent in respects that are important to most third world peoples. Worthy of note in this connection is that, as will be shown below, the international legal order has not experienced nearly enough diversification and expansion in its production and deployment of subjects-matter, subjects/categories, and meaning. What is more, that order has definitely not experienced enough diversification and expansion in the character of its organizing mind/optic (what can be referred to as the spirit or soul of the law). As such, the international legal order continues to help create, foster, maintain, and deploy a core/periphery distinction that has for centuries legitimized both the privilege and advantage of the first world and the marginalization and disadvantage of the third world. These points are easily illustrated, and will be discussed in sequence.

Insufficient Diversification and Expansion in the Regulation of Subject-Matter

The overall point here is that the international legal order has still not diversified and expanded enough as to regulate, or sufficiently regulate, a number of subject-areas, the effective regulation of which are key to the success of the third world's continuing struggle for global social, economic, and political equity. Three examples will serve to illustrate this point.

The first example is that, on the whole, the international legal order has eschewed much more than it has embraced the regulation (what more the prohibition) of those harmful activities that some transnational corporations have too often conducted in the third world. Despite their increasing power within the globe, these actors are still largely free, in a largely unregulated zone of impunity, to perpetrate extremely harmful activities in the third world.[22] And this is so in spite of the touted

[22] See S. Agbakwa, "A Line in the Sand: International (Dis)Order and the Impunity of Non-State Corporate Actors in the Developing World" in A. Anghie, *et al*, eds., *The Third World and International Order: Law, Politics, and Globalization* (Leiden: Martinus Nijhoff, 2003) at 1.

availability in a few countries of certain domestic or transnational tort remedies.[23] The most obvious legal technique that has been deployed to frustrate the use of such domestic remedies is the invocation of the forum non conveniens doctrine in private international law.[24] This doctrine of "inconvenient forum" is more often than not read as dictating against the trial of a lawsuit against a TNC in its home country or in another country in which it does business.[25] For most third world peoples, the choice of such a foreign venue is often because the third world litigant finds it extremely difficult to litigate in her or his own country or is likely to be awarded much more adequate financial compensation in the chosen first world forum. This choice of forum is rendered nugatory when the inconvenient forum doctrine is applied in this way.[26] In any case, even if touted domestic or transnational remedies do not in the end turn out to be illusory in all cases, the point is that the international legal order does not as yet provide for the effective regulation of serious harms caused in the far weaker third world countries by TNCs. The so-called global compact does not even pretend to have legal credentials, and is in an important sense an explicit admission of the deliberate choice at the international level not to attempt to impose effective legal obligations on TNCs.[27]

The second example is that the form of global usury that has helped to cripple the economies of far-too-many third world countries remains largely unregulated under international law.[28] At the very least,

[23] See C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001).

[24] See U. Baxi, *Mass Torts,* "Multinational Enterprise Liability and Private International Law" (1999) Recueil des Cours 297 at 340.

[25] Ibid. This is generally so despite occasional victories, such as that of a third world plaintiff in *Wiwa v. Royal Dutch Petroleum (Shell),* United States Court of Appeals for the Second Circuit, Docket Nos. 99-7223[L], 99-7245[XAP], 2000 U.S. App. LEXIS 23274, 14 September 2000, on-line: http://www.earthrights.org/shell/appeal.shtml (visited 26 October 2005). In a huge victory for the plaintiffs, the US Court of Appeals on September 15, 2000 reversed the district court's *forum non conveniens* dismissal, concluding that the United States is a proper forum.

[26] Ibid.

[27] For the text of the ten principles of this global compact, see http://www.unglobalcompact.org/Portal/Default.asp? (visited 26 October 2005).

[28] See O.C. Okafor, "Receiving the Headian Legacy: International Lawyers, South to North Resource Transfers, and the Challenge of International Development" (forthcoming in the Canadian Yearbook of International Law) (hereafter referred to as "Headian Legacy"); O. Obasanjo, "Address to the World Social Summit", Geneva, Switzerland, 2000, on-line:

international law is, as currently constituted, hostile to the idea of relief from this form of global debt usury.[29] Global creditors have for decades now continued to enjoy a form of international legal impunity in the extent to which they can profit excessively from third world debt.[30] This is one of the factors that has fostered a net outflow of resources from the third world to the first world; when in fact what is required in the interests of global equity is a net inflow of resources from the far richer first world to the much poorer third world.[31] Yet, as traditionally insensitive to the cause of third world development as it has been, international law has in general eschewed the regulation of this problem.[32] Given the nature of our historical experience of norm creation at the international level, it is not unreasonable to argue that were the first world to be afflicted by the kind of massive debt problem that currently afflicts the third world, international law would have rapidly diversified and expanded into that area so as to more tightly circumscribe the ability of global creditors to reap excessive profits in the stated way. One need only think carefully about the way in which intellectual property rights were infused into international trade law, and the fact that the regulation of this question served to plug a leak in the financial pockets of those in the richer countries that held or expected to hold the lion's share of patents over certain innovations, to arrive at a similar conclusion.[33] The richer countries tend to be able to exercise the kind of influence that is usually needed to draw international law's foot firmly into such a contentious field of regulation. While commendable, the current agitations for limited debt relief and G8 proposals to offer a limited amount of such relief to a few third world countries do not amount to the international legal regulation (what more prohibition) of this form of global usury.[34] As such, it is clear

http://www.un.org/socialsummit/speeches/296nig.htm (visited 23 September 2005), at 4.

29 See T. Lothian, "The Criticism of the Third Word Debt and the Revision of Legal Doctrine" (1995) 13 Wisconsin International Law Journal 421 at 455-462.

30 Ibid.

31 See I. Head, "South-North Dangers" (1989) 68 Foreign Affairs 71 at 78; and O. Obasanjo, supra note 28 at 4.

32 See I. Head, "The Contribution of International Law to Development" (1987) 25 Canadian Yearbook of International Law 29 at 30.

33 See J. Gathii, "The Legal Status of the Doha Declaration on TRIPS and Public Health under the Vienna Convention on the Law of Treaties" (2002) 15 Harvard Journal of Law and Technology 291 at 294.

34 See G8 Finance Ministers' Conclusions on Development, London, 10-11 June 2005, at 4-5, on-line: http://www.hm-treasury.gov.uk/otherhmtsites/g7/news/conclusions_on_development_110605.cfm (visited 26 October 2005); and the Conclusions of the Gleneagles Meeting of the G8 Heads of States, 6-8 July 2005, on-line: http://www.g8.gov.uk/servlet/Front?pagename

that the international legal order still exhibits a regulatory gap in this area. The law has yet again failed to expand into this area to give succour to the poor and impoverished third world peoples who desperately need it.

The third and last example here is the relative failure of international (trade) law to expand quickly enough into, and deal effectively with, the trade-distorting agricultural subsidies that the far richer first world countries have maintained in the global trading system for decades while urging and coercing third world countries to effectively open up their own countries to imports from these far richer countries.[35] The extent of this agricultural subsidy has been estimated at $300 billion (a massive figure that basically equals the total economic output from all of Africa).[36] Yet, while the farms to which these subsidies have been directed are really marginal to the economic output and prosperity of the first world countries that tend to hand them out (largely the EU, the USA and Japan), these subsidies have the end effect of reducing the incomes of a great many third world countries quite significantly.[37] It is of course important to realize that the maintenance of a national agricultural productive capacity is as sensitive an issue in the first world as it is in the third world. For it is difficult to see how any responsible government can willingly preside over the elimination of its country's agricultural sector. However, apart from the fact that the removal of these trade-distorting subsidies may not necessarily lead to the devastation of every kind of farmer or farm sector in the rich first world states, the point is that given the overall scheme of international trade, these first world countries cannot continue to maintain these subsidies while coercing the weaker third world countries into opening its markets in areas that are equally sensitive to them. While the Doha Development Agenda (DDA) for 2006 under the aegis of the World Trade Organization (WTO)[38] signals the growing diversification and expansion of international (trade) law into this important area, this expansion is definitely as yet inchoate. What is more, it is occurring far too

=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1119518698846 (visited 26 October 2005).

35 See J.J. Steinle, "The Problem Child of World Trade: Reform School for Agriculture" (1995) 4 Minnesota Journal of Global Trade 333 at 334. See also R. Bhala, "Challenges of Poverty and Islam Facing American Trade Law" (2003) Saint John Journal of Legal Commentary 471 at 472-473.

36 See O. Obasanjo, supra note 28 at 4.

37 See also O. Obasanjo, "Keynote Address to the Governing Council of the International Fund for Agricultural Development," 19-20 February 2002, on-line: http://www.ifad.org/events/gc/25/speech/obasanjo.htm (visited 26th September 2005) at 3 (hereafter referred to as "IFAD Address").

38 For the text of the WTO's Doha Development Agenda, see on-line: http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (visited 26 October 2005). See also G8 Finance Ministers' Conclusions on Development, supra note 34 at 1.

slowly than would likely have been the case had the relevant agricultural subsidies been handed out by the much weaker third world countries. Again, the world's experience with the introduction of intellectual property rights into the WTO regime supports this conclusion.

Thus, although international law has tended to diversify and expand into subject-matter zones that are more often occupied and guarded by the much weaker third world countries (e.g. the opening of third world markets to western imports; the constriction of intellectual property freedoms in the third world; etc), the law has tended to avoid or side-step similar but as necessary expansions into the zones that tend to be defended by the far more influential first world states (e.g. the effective international regulation of TNCs, the regulation or prohibition of global usury, and the elimination of trade-distorting export subsidies). In sum, at least in this sense, what is required seems to be more – and certainly not less – diversification and expansion in the international legal order.

Insufficient Diversification and Expansion in the Construction of Undesirable Subjects and in the Production of Legal Meaning

The overall point that is made in this section is that the international legal order has still not diversified and expanded enough both in terms of the ways in which it constructs the identities of the undesirable legal subjects that it seeks to discipline and the character of the legal meanings that it helps produce. On the whole, the international legal order still tends to construct these undesirable subjects and produce these legal meanings in ways that tend to occlude, discount, and reproduce the broadly shared third world experience of subjugation and disadvantage in the global system. This is a function of international law's inadequacy in terms of its mind/optic fragmentation. Two examples will serve to illustrate this point.

The first example concerns the biased production of meaning and categories that is legitimized by international law with regard to the construction of the identity of those that are classified as terrorists. Thus far, the terrorist has been constructed in the international legal order in ways that tend to occlude from effective legal cognition, and displace from the zone of significant legal regulation, the state-based and other forms of terrorism that have been, and continue to be, visited on certain third world communities by those who control the reins of military power in a number of the far more powerful first world states. If terrorism has been largely understood as the deliberate or reckless targeting of civilians or non-combatants with violence primarily in order to achieve political ends,[39]

[39] This is the sense in which that term was used by the highly respected internationalist, Professor Richard Falk, in his book on the subject. See R. Falk, *The Great Terror War* (New York: Olive Branch Press, 2003). For an excellent overview of the historical attempts to define this term, see I. Mgbeoji, "The Bearded Bandit, The Outlaw Cop, and the Naked Emperor: Towards a North-South (De)Construction of the Texts and Contexts of International Law's (Dis)Engagement with Terrorism" (2003) 43 Osgoode Hall Law Journal 105.

then it is most incongruous that international law has failed to find effective ways to identify and include the kinds of deliberate (or at least reckless) targeting of civilians or non-combatants that were perpetrated by at least one superpower during its proxy and more direct wars in Angola, Mozambique, El Salvador, Guatemala, Afghanistan, and now Iraq.[40] While much Third World versus First World disagreement remains as to the precise scope of the term terrorism, as Ikechi Mgbeoji has correctly put it, the construction of the identity of the terrorist and the production of legal meaning about terrorism has historically tended to reflect "international law's preoccupation with the fears of the West," while occluding and discounting the anxieties felt by most third world states about being visited with the kinds of state-sponsored terrorism originating from certain elements in some of the far more powerful first world states.[41] The list (and indeed the imaginary) of states that sponsor terrorism almost never includes the powerful western regimes that sometimes perpetrate forms of state-sponsored terrorism. That list almost always reads like an exclusive rendering of the usual third world suspects. In this way is the myth subtly perpetrated that the only real terrorists in business around the globe are those who commit atrocities against Western interests and allies. This myth is in turn internalized and reproduced by international law in the course of its biased production of meaning regarding the nature of terrorism, as well as in its construction of the identity of the terrorist.

The second example concerns the bias exhibited by international law with regard to the production of meaning about human rights violations and the construction of the identity of human rights violators. In this case, the particular concern here is with international law's relationship to the resolution of enduring historical injustices. In its construction of meaning and in its production of the undesirable legal subject styled "the human rights violator," international law has been virtually steadfast in helping to render almost impossible the correction of many such enduring historical injustices; especially when these continuing harms have been visited on third world peoples by powerful first world interests. This is why virtually any significant attempt to undertake fundamental land reforms in Southern Africa are easily and uncritically stigmatized (especially in the influential Western media and in many global institutions) as anti-human rights dispossessions of the current occupiers of such real property (who have

[40] See O.C. Okafor, "Newness" supra note 5 at 183-185.

[41] See I. Mgbeoji, supra note 39 at 110.

close kinship affinities in the powerful Western countries) rather than being lauded and celebrated as the pro-human rights righting of blatantly sustained historic wrongs that have been visited on the population of these third world countries. [42] Proposals have even been made for international human rights and other international law norms to be invoked in aid of the "victims" of land re-distribution in such cases; or in the alternative for these bodies of norms to be re-configured to admit of such invocations.[43] In this warped and perverse logic, the human rights violators become those who fight to reclaim their land from those who benefited from the theft of such property by invaders and colonialists, and not the colonialists and invaders themselves. The colonialist and invaders (and their successors-in-title) are thus transformed into the legitimate victims. Similarly, it is this kind of logic that explains why the authoritarian (if deft) General Pervez Musharaf of Pakistan has been re-admitted to the Commonwealth as a reward for his support of the US and British led wars in Afghanistan, while the similarly authoritarian President Robert Mugabe of Zimbabwe remains expelled from that body.[44] And that is why international law has had little to offer to the African populations in Zimbabwe, Namibia and South Africa who have struggled (with little success) for nearly a century now for the restoration of their land rights and for justice. Instead, the doctrine of inter-temporal law (positing that the contemporary illegality of an action is to be judged by its permissibility – presumably under what was the invader/colonialist's laws – at the time it occurred), is too often invoked unfairly to de-legitimize these struggles and discount the voices of suffering that scream for justice in the relevant third world locales.[45] This is so regardless of the fact that this doctrine was made by the invading Europeans, in a colonial-minded Europe of the time, for the benefit of Europeans of yesterday, today and tomorrow. This is so despite the fact that this doctrine seeks, in part, to legitimize European colonial and other interests in the third world. Here, as almost always, international law continues to reproduce the usual preoccupation of international relations with banishing the fears, defending the interests, and reflecting the perspectives of the Western world. True to its dominant strain, the law basically discounts the fears and perspectives of the subaltern third world.

[42] See J. Shirley, "The Role of International Human Rights and the Law of Diplomatic Protection in Resolving Zimbabwe's Land Crisis" (2004) 27 Boston College International and Comparative Law Review 161 at 165-171.

[43] Ibid

[44] On Pakistan's re-admittance to the Commonwealth, see *The Hindu*, on-line: http://www.hindu.com/2004/05/23/stories/2004052306000800.htm (visited 26 October 2005). On Zimbabwe's suspension from that body and consequent decision to pull out of it, see BBC World, on-line: http://news.bbc.co.uk/2/hi/talking_point/3303759.stm (visited 26 October 2005).

[45] On the doctrine of inter-temporal law, see I. Brownlie, *The Rule of Law in International Affairs* (The Hague: Martinus Nijhoff, 1998) at 152.

How then can we seriously suppose that the international legal order's mind/optic has been diversified or expanded enough? Clearly it has not. Coherence is more evident here than rupture.

Thus, in sum, at least in the two ways that have been illustrated above, the international legal order has tended to infect the meanings and subjects it produces with pro-Western biases that largely disadvantages third world peoples within the global system. The underlying, if significantly biased, coherence of the international legal mind/optic is therefore evident. As such, rather than more unity, what seems to be needed here is more fragmentation: that is, much more diversity and expansion in the mind/optic of the law. Were this to occur, the law would be led to construct more diversified identities for its undesirable subjects and to produce more diverse forms of legal meaning.

Continuing Re-Configurations and Enduring Coherences

The point that is entailed by the discussion in the last two sub-sections is that, in at least one sense, despite all the compartmentalization, re-patterning and re-configuring that has taken place in the matrix of international law (as part of its process of diversification and expansion) some underlying and harmful coherences still endure. For one, the international legal order's historical preoccupation with diversification and expansion into subject areas that interest and/or benefit the more powerful first world states, while closing its eyes and mind far too often to the need to regulate certain other subject areas that interest most third world states, has been extensively illustrated in this paper. Similarly, the bias that is too often exhibited by the international legal community in its construction and identification of undesirable legal subjects (such as "the terrorist" and "the human rights violator") has been illustrated in this paper as well. What both cases show is that, at least in these senses, rather than truly fragment, the international legal order has in fact remained largely coherent at its core.

In both cases, the international legal order has continued to exhibit an underlying and fundamental, but nevertheless problematic, coherence as to who the paradigm-creators and paradigm-receivers of the international legal order are or have been. In both cases, the international legal order has continued to cohere around its tendency to become preoccupied with soothing the fears, furthering the interests, and maintaining the global privilege of the far more powerful first world states. In these ways has the international legal order also helped create and reproduce the problematic and harmful core/periphery distinction that has both reflected and framed the historical subordination of the third world within the global system.

As such, the otherwise important focus of many international lawyers on the normative and institutional diversification and expansion of the international legal order risks contributing to the masking of the continuity and endurance of these underlying coherences. An excessive focus on dealing with the question of fragmentation in the ways in which it is usually framed in our discipline can lead to the occlusion of the ways in which the re-configurations that have undoubtedly occurred have in most cases still left almost all of the third world in the same kind of subordinated position: with far less agency, participation, and power in the global system than they ought to have under most theories of global fairness.

It is in this sense that the historic penchant within our discipline to succumb to the powerful allure of unity and to prescribe homogenization in place of fragmentation poses a continuing risk to the already shaky legitimacy of the international legal order; at least in the eyes of most third world states and peoples.[46] For as Antony Anghie has demonstrated, in each epoch since the time of Vittoria and the Spanish conquest of the natives of the Americas, the historical drive of the international legal order toward homogenization and unity – toward the "inclusion" of the third world other – has at the very same time turned out to mask the coherence of a simultaneous drive toward the subordination of that same third world other.[47] This reality has not escaped either third world peoples or TWAIL scholars, hence their deep-rooted skepticism about the homogenization and unification of the international legal order.[48]

What is more, the underlying social fragmentation of our world (that is both within and between states) dictates the necessity of a minimum measure of fragmentation in the international legal order that seeks to regulate that very world. As Fischer-Lescano and Tuebner have stated, it is impossible to divorce the "fundamental, multi-dimensional fragmentation of global society itself" from the debate about international legal fragmentation.[49] Without a good amount of international legal fragmentation we would not have the adequate level of autonomy in regional institutions (such as the regional human rights systems and intervention mechanisms). We would also not have sufficiently de-homogenized conceptions of international law (such as the kind of

46 For a discussion of this tendency to homogenization in relation to statehood, see O.C. Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (The Hague: Martinus Nijhoff, 2000).

47 See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 13-31 and 310.

48 See O.C. Okafor, "Newness" supra note 5 at 179.

49 See A. Fischer-Lescano and G. Tuebner, supra note 1at 1004.

"common but differential obligations"[50] for third world states that can be found in aspects of international trade law and international environmental law). This kind of fragmented structure speaks much better to the third world's shared experience of subordination, poverty and disadvantage, than any over-romanticized notions of ever-increasing unity. These ostensibly fragmentation-creating normative and institutional approaches allow far more autonomy, participation, and power in the hands of these third world states than would be the case under more unitary or unified models of international legal ordering. For portions of the world that have continued to suffer and resist their subordination and poverty for centuries, the values of autonomy, participation, and power look fundamentally positive. This is even more so because this kind of differentiation also makes for the creation of more norms and institutions that are tailored to the particular viewpoints and needs of third world states.[51]

In the end though, the point is that the insistence on the unity of the international legal order does, at the very least, pose as much of a threat to the legitimacy of that order as does its doctrinal incoherence and its lack of an effective judicial hierarchy for the arbitration of such normative inconsistencies. Beyond this risk that it poses, the unity of the international law is also simply too high an expectation in reality.[52]

V. Conclusion

I am thus in agreement with Fischer-Lescano and Tuebner that "future endeavours [scholarly or practical] need to be restricted to achieve [sic] weak compatibility between fragments."[53] Indeed, despite the unifying effects of globalization, it is reasonable to expect that in the coming years, even more fragmentation will, and ought to, occur.[54] Yet, as Fischer-Lescano and Tuebner have noted, the aspiration to unity in the literature on international law's fragmentation has almost always entailed the endorsement of more or less hierarchical solutions to the presumed

50 See P.S. Rao, supra note 1 at 939 and footnote 11. See also J. Ntambirweki, "The Developing Countries in the Evolution of an International Environmental Law" (1991) 14 Hastings International and Comparative Law Review 905 at 910-911. An example of this is Principle 7 of the *Rio Declaration on Environment and Development*, Rio de Janeiro, 3-14 June 1992, on-line: http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163 (visited 26 October 2005).

51 See G. Hafner, supra note 1 at 859-860.

52 See A. Fischer-Lescano and G. Tuebner, supra note 1at 1045.

53 Ibid, at 1045.

54 Ibid, at 1004.

pathology of diversification and expansion in the international legal order.[55]

As we have shown, because it too often betrays the unmistakable and enduring coherence of material and mind/optic patterns that help keep the third world in a subordinated position in the global system and too often fails to take into account and address the third world's justified anxieties about the homogenization of our life-world, increasing the operation of normative, institutional, or mind/optic hierarchies within the international legal order is unlikely to foster the deepening of the ultimate values that the advocates of unity seem to want to promote. These values are the increase in the authority and legitimacy of international law. In fact, this drive toward unity may in some important senses tend to negative the struggle to entrench these very values in the international legal order.

For the reasons offered in this paper, weak compatibility or relative fragmentation – rather than ever-increasing homogenization and unification – is the more viable path to a more widely accepted and fairer international legal and social order in which third world actors can become more like the subjects and less like the mere objects of international law.

[55] Ibid, at 1002.