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Deconstructing Development

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DECONSTRUCTING DEVELOPMENT

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and JON H. SYLVESTER†

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INTRODUCTION

To accept the necessity for development, one must first accept one's relative inferiority and inadequacy and the need to evolve and advance towards something else.¹

Globalization is said to be the defining convention of the new millennium.² For the Third World, however,³ development is the most important concept in the international system, for it is development that defines and locates the Third World within the

¹ Gustavo Esteva, *Development*, in THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER 6 (Wolfgang Sachs ed., 1992).

² See, e.g., GLOBALIZATION AND THE CHALLENGES OF THE NEW CENTURY: A READER (Patrick O'Meara et al. eds., 2000); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000); ANTHONY GIDDENS, Runaway World: How Globalization Is Reshaping Our Lives (1999); GLOBAL FORTUNE: THE STUMBLE AND RISE OF WORLD CAPITALISM (Ian Vasquez ed., 2000); JOHN EATWELL & LANCE TAYLOR, GLOBAL FINANCE AT RISK: THE CASE FOR INTERNATIONAL REGULATION (2000); THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999); KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY (1999); ADAIR TURNER, JUST CAPITAL: THE LIBERAL ECONOMY (2001); NOREENA HERTZ, THE SILENT TAKEOVER: GLOBAL CAPITALISM AND THE DEATH OF DEMOCRACY (2001).

³ This article will use the terms Third World or Southern nations to identify what is commonly referred to as the developing world. The Third World was initially an ideological category, and a political strategy connoting nonalignment with either the "First" or "Second" World. It also has a "political geographic content" in that it describes "certain spaces or regions of the world possessing distinctive demographic, economic and political characteristics in comparison with the First or Second Worlds." The Third World also identifies those nations and regions that were historically subjected to colonialism. Finally, the Third World has been defined in terms of a certain set of images including: "poverty, squalor, corruption, violence, calamities and disasters, irrational local fundamentalism, bad smell, garbage, filth, technological 'backwardness,' or simply lack of modernity." See Keith Aoki, *Space Invaders: Critical Geography, the "Third World" in International Law and Critical Race Theory*, 45 VILL. L. REV. 913, 925 (2000) (quoting Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, in THIRD WORLD LEGAL STUDIES – 1998–99, at 1 (2000)). Therefore, while the term Third World may be somewhat problematic, it is a more constructive term than developing, underdeveloped or undeveloped nations. For a more detailed discussion and analysis of the term "Third World," see Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 WIS. INT'L L.J. 353, 355–62 (1998).

international community.⁴ Whether praised or excoriated, defended or condemned, “development” shapes and dominates most thinking about Third World nations.⁵ Indeed, the peoples and nations of the world have come to be characterized in terms of their development or lack thereof. Development has evolved into an essentially incontestable paradigm with such a powerful hold on our collective imaginations that it is almost impossible to think around it.

Since the advent of “development” in the early 1950s, Third World nations have demanded more meaningful assistance from monetarily richer countries and more control over their political and economic destinies. Their demands have been largely rejected and/or ignored, and the assistance that has been made available has been accompanied by countless conditions. These conditions have often yielded disastrous results, including ever-mounting debt for numerous Third World governments and increasing deprivation for the very people the development project purports to assist.⁶ Even when measured in terms of its own stated goals and objectives, development has, for the most part, failed.⁷ As “experts” have promulgated widely varying and often

⁴ Some argue that globalization is “little more than a repackaging of development.” For example, O’Hearn maintains that after a decade of discipline through debt and disinvestments, the neo-liberal regime is even more powerful as it now forces developing states themselves to agree that the market is the most rational way to do things correctly. Denis O’Hearn, *Tigers and Transnational Corporations: Pathways from the Periphery?*, in *CRITICAL DEVELOPMENT THEORY: CONTRIBUTIONS TO A NEW PARADIGM* 117 (Ronaldo Munck & Denis O’Hearn eds., 1999).

⁵ Esteva, *supra* note 1, at 7 (noting that even when development is disparaged or critically appraised, the focus is generally on its ever-changing content or its implementation – never on the concept itself).

⁶ For a detailed discussion of the debt crisis in sub-Saharan Africa, see Jon H. Sylvester, *Impracticability, Mutual Mistake and Related Contractual Bases for Equitably Adjusting the External Debt of Sub-Saharan Africa*, 13 *Nw. J. INT’L L. & Bus.* 258 (1992); see also *infra* Part II. B and accompanying text. For a discussion of World Bank and IMF programs, see *infra* Part II. A.

⁷ Of course this is not to say that each and every development project has been a failure. Nonetheless, “[b]y the beginning of the 1990s, most people in sub-Saharan Africa were poorer than they had been thirty years before. With a population of about 500 million, nearly 300 million are living in absolute poverty. In developing countries as a whole, nearly 800 million people do not get enough food, and about 500 million are chronically malnourished. Almost, one-third of the population of developing countries – about 1.3 billion – lives below the poverty line. The infant mortality rate, at about 350 per 100,000 live births, is about

contradictory theories and strategies, it has become increasingly apparent that they do not in fact know how to achieve the objectives that ostensibly define their expertise.⁸

This article does not contend, however, that the experts need only devise the appropriate strategy, nor does it simply critique micro-development, civil participation, market-led development, sustainable development, gender and development or other current variations in an exceedingly long list of variations on the development theme. We do not assert that money is all that is needed,⁹ or that industrialized countries need only assume their responsibility to bring civilization to the desperate masses of the Third World.¹⁰ Rather, we challenge and interrogate the very concept of development. Development is a set of practices and beliefs that are part of the Western political and cultural imagination, despite being presented as universal, natural and inevitable. The development paradigm comprises a pervasive and largely unquestioned set of interlocking ideological assumptions that must be exposed and then questioned. It presumes a universal and superior way of ordering society, and that all societies are

nine times higher than that in 'advanced countries.'" Ray Kiely, *The Crisis of Development*, in GLOBALISATION AND THE THIRD WORLD 24 (Ray Kiely & Phil Marflect eds., 1998). See also Uma Kothari & Martin Minogue, *Critical Perspectives on Development: An Introduction*, in DEVELOPMENT THEORY AND PRACTICE CRITICAL PERSPECTIVES: CRITICAL PERSPECTIVES 4-5 (Uma Kothari & Martin Minogue eds., 2002).

⁸ See *infra* Part II. B and accompanying text.

⁹ Full funding would not necessarily mean that development would ever achieve its intended results, although it could mean an improvement in what has been termed "basic needs," such as minimal health care, potable water and the like. Achieving even these modest goals, however, would not be a certainty, given how projects are chosen and funded. See, e.g., William Easterly, *The Cartel of Good Intentions*, 7/1/02 FOREIGN POL'Y 4049 (contending that for a variety of reasons, large, flashy projects are the projects most often funded, while those that assist with simple tasks such as maintaining infrastructure are ignored).

¹⁰ This is not to absolve industrialized countries of their share of blame for the gross inequalities in the international community; for the disarray of destroyed societies and cultures; or for the poverty, violence and degradation that has accompanied the development project. One criticism of the postmodern view of development is that it encourages affluent countries to disengage, and does nothing to assist the billion or more people who are living in absolute poverty; that it would leave those people to their own devices. David Simon, *Development Revisited*, in DEVELOPMENT AS THEORY AND PRACTICE: CURRENT PERSPECTIVES ON DEVELOPMENT AND DEVELOPMENT CO-OPERATION 17 (David Simon & Anders N rman eds., 1999). This is a fair argument that deserves serious attention. See *infra* notes 431-34 and accompanying text for a response to this contention.

to advance toward the same goal. Local and indigenous cultures, economies, self-concepts, and ways of existing are largely without value in this discourse (notwithstanding recent attempts at “local participation”), for the entire development project is premised on its subjects “developing” into something else – and that something else is the West.¹¹ Thus, in the name of modernization, cultures have been destroyed, communities uprooted or eradicated, and whatever sovereignty emerging nations possessed has virtually disappeared.¹²

The concept of development privileges certain societies, cultures and institutions, while disparaging others; it is grounded in defining the “Other” as incompetent, inferior and in need of transformation. That most “undeveloped” people are people of color only reinforces the Western view of the developing world as essentially dysfunctional, for it comports with American views of brown and black people in the United States. For Europeans the development project continues the colonial civilizing mission.¹³ Taking up where colonialism and the “White man’s burden” left off, the development project provides the legal and moral justification for substantial interventions in the affairs of those who have been categorized as underdeveloped.¹⁴ It justifies and supports the economic and political status quo and the imbalance of international power, and it renders the underdeveloped powerless, for it is the developers who name subjects,

¹¹ Majid Rahnema, *Towards Post-Development: Searching for Signposts, a New Language and New Paradigms*, in THE POST-DEVELOPMENT READER 384 (Majid Rahnema & Victoria Bawtree eds., 1997) [hereinafter Rahnema, *Towards Post-Development*].

¹² For a discussion of the ways in which development has stripped many Third World states of significant aspects of their sovereignty, see *infra* Part III; see also Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903 (1997) [hereinafter Gordon, *Saving Failed States*].

¹³ *Saving Failed States*, *supra* note 12. Development confirms and validates racial hierarchy, which explains in part why after the disintegration of the USSR, Eastern Europe and the former Soviet Republics – whether industrialized or not – were immediately understood to be in a different global category than the developing Third World. Ruth Gordon, *Racing U.S. Foreign Policy*, 17 NAT’L BLACK L.J. 1 (2003) [hereinafter Gordon, *Racing U.S. Foreign Policy*]; cf. Kothari, *supra* note 7, at 8 (maintaining that “the development project is expansionist and has found new territory” for with the triumph of neoliberalism, development has broadened its breadth to include the transitional economies of Europe and the former Soviet Republics).

¹⁴ *Saving Failed States*, *supra* note 12, at 934.

problems and solutions. The objective in the following pages is to construct and then deconstruct the concept of development, and to question whether development is so fundamentally flawed that it should be abandoned in favor of a post-development paradigm.

Part I constructs the theory of development, beginning with the discovery of global poverty after the Second World War. It establishes how poverty is in some respects socially contingent, and how the notion of global poverty suddenly homogenized and problematized the lives of the majority of the world's peoples. With the impending Cold War and the disintegration of colonial empires as crucial backdrops, industrialized nations set out to eradicate poverty and bring the benefits of modernization to the impoverished masses of the newly de-colonizing world, and thus development as we now know it was born. From its inception, development was informed and shaped by the meta-narrative of modernization, which is explored as the primary theoretical foundation for the undertakings that were to follow.¹⁵ Law and development is also analyzed as the legal manifestation of modernization theory and as an additional theoretical underpinning of development.

Part II explores how development has been constructed in practice. It begins with the international financial institutions that form the institutional edifice of the development project with particular emphasis on the World Bank and the International Monetary Fund. It then focuses on the succession of often-contradictory economic experiments and development theories that have emanated from these and other institutions. Development theories have run the gamut as sustainable development, micro-development, women-centered development, endogenous development, appropriate development, "Basic Needs," and both state and market-led development have all had their days in the sun.¹⁶ What began as economic growth to

¹⁵ See *infra* Part I. C and accompanying text; Kothari, *supra* note 7, at 7–12.

¹⁶ Some development strategies such as micro-development, participation, and sustainable development began life as "alternative development" strategies. These alternative theories have been institutionalized and absorbed into mainstream development theory and in the process watered down and stripped of any semblance of their sometimes-radical origins. As reconstituted, they reproduce the same power relationships found in conventional development theory and practice. Moreover, even these "alternative theories" generally originate in the West

eradicate poverty evolved to include “enhancing participatory democratic processes”, “enlarging choices”, “affording the opportunity to develop to one’s fullest potential”, “participation in decisions affecting one’s life”, and affording the “means to carry out national development goals and promote economic growth, equity and national self-reliance”.¹⁷ One consistent theme, however, is that the development project has grown ever larger and more comprehensive. More disturbingly, international financial institutions now determine policy in many Third World countries – much in the way colonial powers once did.¹⁸ Yet, despite myriad inconsistencies and the well-documented pain and disasters that have resulted from their strategies, these institutions and the concept of development enjoy continuing and largely uncritical support within the international community.

Part III turns to legal constructions of development and the seriatim attempts by Third World nations, over the past fifty years, to use international law in the pursuit of development. These efforts began with the demand for Permanent Sovereignty Over Natural Resources, and then turned to broader demands for a New International Economic Order. When these failed, Southern nations asserted a Right to Development, seeking to incorporate development into the burgeoning rights discourse. Reparations are the most recent evolution in the campaign for economic justice, as some Third World nations now demand compensation for the exploitation and crippling consequences of slavery and colonialism. To the extent that these initiatives sought to establish legal obligations for the West, they have been unsuccessful. As this section demonstrates, international law has only reinforced and reproduced the economic and political inequities present in the international economic system.

Part IV turns to deconstructing the discourse of development, demonstrating that it is a method of conceptualizing the

and are then imposed on the Third World. Kothari, *supra* note 7, at 9–10. See also *infra* notes 149–59 and accompanying text.

¹⁷ Michael Cowen & Robert Shenton, *The Invention of Development*, in *POWER OF DEVELOPMENT* 7, 28 (Johanthan Crush ed., 1995).

¹⁸ Of course the level of control varies, given that some Third World countries are larger, and more politically and economically powerful than others. Thus, this is not to suggest that all Third World countries are homogenous or indistinguishable from each other.

world that, in turn, shapes the world.¹⁹ Although portrayed as a neutral and universal concept, development is planned, directed and controlled by specific international and national institutions that act in ideological concert and reflect the views and interests of certain communities, societies and cultures. This ideology creates and defines the “Other” while providing the legal and moral rationale for interventions that locate and cement the Third World on the lower rungs of the international system. Development is the product of a particular perspective and that perspective problematizes and homogenizes the majority of humanity. Deconstructing this discourse suggests that it is at least possible to imagine a post-development world and to perceive the people of the Third World in a fresh light.

Given the failures of development, the power relations it engenders, and its generally negative and degrading view of non-Western peoples and cultures, Part V attempts the very difficult task of envisioning a different approach to thinking about the world. No new meta-narrative or grandiose strategy to replace the development paradigm is proposed, for the aim is to reject, rather than substitute, meta-narratives.²⁰ Nor is the objective to glorify and resurrect Third World traditions, for tradition is seldom faultless and idyllic.²¹ Third world peoples have had varied and complex encounters with development, and these experiences must not be over-simplified.²² Our objective is to begin to envision approaches that accord agency to the people development presumes to assist. We hope that these alternative visions can somehow give voice to the local, including the voice to embrace, transform, reject or otherwise engage the West and the entire modernization project. We believe the West must abdicate some of the power it has presumed and to begin to re-imagine

¹⁹ ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 12–14 (1995).

²⁰ This article takes up the bold challenge posed by Professor Tayyab Mahmud in his brilliant article: *Postcolonial Imaginaries: Alternative Development or Alternatives to Development?*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 25 (1999), and critically examines the post development literature.

²¹ Kiely, *supra* note 7, at 24 (criticizing the anti-development critique as romanticizing pre-colonial cultures that may never have existed).

²² On problems with marginalizing and representing the other, see Uma Kothari, *Feminist and Postcolonial Challenges to Development*, in DEVELOPMENT THEORY AND PRACTICE CRITICAL PERSPECTIVES, *supra* note 7, at 48–50.

the lives and agency of others, and in the process perhaps reject often unarticulated but crippling assumptions about “the Other.”²³ The objective is to pose different questions, to let others pose questions, to learn to listen and to actually hear the responses of others rather than assuming that the answers are already known.

I. CONSTRUCTING DEVELOPMENT IN THEORY

A. THE BIRTH OF A PARADIGM

It is difficult to imagine a world without development, for it seems as if development has always been one of the fundamental criteria by which nations and peoples are defined. In fact, however, the contemporary concept of development has a quite short history.²⁴ Notions of progress and growth have been part of Western discourse for well over a hundred years and, more generally, since the enlightenment. “Development” as it is currently construed (i.e., modernization and national economic growth), however, is essentially a post-World War II phenomenon.²⁵ In 1949, President Harry Truman proposed a “fair deal” aimed at improving the lives of people inhabiting the underdeveloped areas of the globe. In his now famous Point IV Program, he declared:

More than half the people of the world are living in conditions approaching misery. Their food is inadequate, they are victims of disease. Their economic life is primitive and

²³ On constructing “the Other” in opposition to self, see EDWARD W. SAID, *Orientalism* 1–8 (1994).

²⁴ The origins of development are quite complex, but a unitary meaning seemed to congeal around the end of the Second World War. Development came to signify indefinite growth, maturity and the capacity to grow without end. This expectation was based on a number of developmental hypotheses including “the omnipotence of technique, the asymptotic assumption relating to science, the rationality of economic mechanisms, and the presumption of social engineering as a prerequisite for growth.” Michael Watts, “A New Deal in Emotions”: *Theory and Practice and the Crisis of Development*, in *POWER OF DEVELOPMENT*, *supra* note 17, at 44, 49–50.

²⁵ For an extensive discussion of the concept of development before 1949, see Cowen & Shenton, *supra* note 17, at 27; Watts, *supra* note 24, at 44. The mandate system and later the trusteeship system were also precursors of development. *Id.* See also *Saving Failed States*, *supra* note 12, at 940–53, on the mandate and trusteeship systems.

stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas.²⁶

Truman's declaration profoundly changed the manner in which the people of what would eventually become the Third World were viewed. In a sense, he created the "underdeveloped world,"²⁷ and in the West this new perception of self and "the other" found immediate acceptance.²⁸ "Billions of diverse and complex peoples were suddenly identified, homogenized and defined as backward, miserable victims" who would be rescued by the West.²⁹ This perspective continues to define the development project.

Truman also proposed that the industrialized world should undertake to alleviate the newfound poverty in the underdeveloped world, but this call to action was a self-interested one on the part of the United States. Many American policy makers thought that if poor countries were not liberated from their poverty, they would be vulnerable to "communist subversion".³⁰

²⁶ ESCOBAR, *supra* note 19, at 3.

²⁷ Truman's plan facilitated the establishment of numerous "international institutions, professions, organizations whose existence was dedicated to development. Development was industrialized." Watts, *supra* note 24, at 44-45.

²⁸ Esteva, *supra* note 1, at 10. Indeed, "as a neocolonial discipline, the authoritative discourse of development reproduces unequal relations by assuming the power to label groups of people . . . in development we have constructed an entity called the Third World." KOTHARI, *supra* note 22, at 38.

²⁹ Esteva, *supra* note 1, at 9.

³⁰ In 1956, John Foster Dulles stated that defeat in the contest for development of the underdeveloped countries "could be as disastrous as defeat in the arms race." CHRONICLE OF THE 20TH CENTURY 776 (Clifton Daniel ed., 1992). Indeed, the introduction to a development economics textbook used in the U.S. in the early 1960s made the point rather bluntly: "the Cold War is not going very well for the Western World. Soviet or Chinese influence is infiltrating into many of the underdeveloped countries, in Asia, Africa, and Latin America." 11 STEPHEN ENKE, ECONOMICS FOR DEVELOPMENT (1963), *quoted in* 1 DEVESH KAPUR, THE WORLD BANK: ITS FIRST HALF CENTURY 144 n. 10 (Brookings Institute 1997). The World Bank was pressed into service to address this problem. See also *infra* notes 94-95 and accompanying text discussing how the Cold War helped shaped World Bank policies. See also ESCOBAR, *supra* note 19, at 34; Pierre de Senarclens, *How the United Nations Promotes Development Through Technical Assistance*, in THE POST-DEVELOPMENT READER, *supra* note 11, at 190 (Noting that just as the Marshall Plan was to contain the communist threat in Europe, economic aid became part of American political strategy. The Cold War thus animated and colored the development project, as anti-communist credentials became a condition for assistance.).

Consequently, bringing “progress” to the Third World was an integral part of the struggle against the Soviet Union and international communism.³¹ The development paradigm also originated within the context of collapsing colonial empires and a global economy dominated by the United States.³² As a result, the U.S. had a profound influence on the funding, objectives and approaches of the international financial institutions established at the end of the Second World War. These institutions – mainly the World Bank and the International Monetary Fund – are at the center of development theory and practice.³³ Completing this scenario were Western beliefs in the ultimate superiority of Western culture, values and people, and the explicit and implicit racism that often persuaded the United States and former colonial powers that they had the right to intervene in politically weaker, poorer and darker countries. Development provided the legal and political means, as well the moral justification for interventions that under other circumstances would probably have been considered impermissible.³⁴

B. THE DISCOVERY AND QUANTIFICATION OF GLOBAL POVERTY

If President Truman discovered global poverty, then the World Bank quantified it in 1948 by defining countries with an annual per capita income below \$100 as poor. Two-thirds of the world’s peoples were instantly impoverished.³⁵ Once annual per capita income was the gauge, the discernment of global poverty

³¹ Senarclens, *supra* note 30.

³² “At the end of the Second World War, the United States controlled approximately 70% of the world’s gold and foreign exchange reserves and 40% of industrial output.” Kiely, *supra* note 7, at 26.

³³ ESCOBAR, *supra* note 19, at 32 (noting that “1945 marked a profound transformation in world affairs” as the United States assumed the “undisputable position of economic and military preeminence, placing under its tutelage the entire Western system”).

³⁴ ESCOBAR, *supra* note 19, at 28; Gordon, *Racing U.S. Foreign Policy*, *supra* note 13, at 1.

³⁵ ESCOBAR, *supra* note 19, at 23–24; Majid Rahnema, *Poverty*, in THE DEVELOPMENT DICTIONARY, *supra* note 1, at 161.

became “a comparative statistical operation,”³⁶ and entire nations were regarded as poor because of their overall income.³⁷ “Poor countries” came to be defined as those lacking the “wealth of more economically advantaged nations,”³⁸ and because industrialized countries were the points of reference, the gap was enormous.³⁹ Eradicating global poverty, as well as the expanding disparity between industrialized and unindustrialized countries, became an important challenge facing the international community.⁴⁰ Of course, it is entirely plausible to maintain that President Truman and the World Bank were only stating the obvious, and articulating the willingness of the United States to lead Western countries in tackling a very real problem. It can also be argued, however, that in certain significant respects poverty itself is a social construct, and in some senses an invention.⁴¹ While most definitions of poverty emphasize a lack of something or some deficiency, such definitions only demonstrate the basic relativity of the concept, for if poverty is defined as lacking the necessities of life, it must be asked what is necessary, and who is to determine necessities.⁴² In the end, this question was answered by defining

³⁶ ESCOBAR, *supra* note 19, at 23 (quoting Wolfgang Sachs, *The Archaeology of the Development Idea*, 23(4) INTERCULTURE 1–37 (1990)). The origins of standard of living and the projection of global poverty are relatively new constructs that are “encased in development plans, foreign aid reports and national accounts data building in part on the Keynesian revolution.” Watts, *supra* note 24, at 51.

³⁷ Rahnema, *supra* note 35, at 161.

³⁸ ESCOBAR, *supra* note 19, at 23.

³⁹ Senarclens, *supra* note 30.

⁴⁰ *Id.* During the decades following the Second World War and throughout the decolonization era, the idea of “convergence” – that the gap between the rich and the poor would shrink – dominated thinking about development. There clearly has been no such convergence and the entire idea appears to have been discarded. See generally Lant G. Pritchett, *Forget Convergence: Divergence, Past, Present, and Future*, 33 FIN. & DEV. 2 (1996); Jeffrey Williamson, *Globalization, Convergence, and History*, 56 J. ECON. HIST. 277 (1996). For example, during the last two decades, China and India have experienced faster income growth than the world’s rich countries. Nonetheless, it would require another 100 years of growth at rates higher than those of the U.S., for China and India to reach *today’s* level of average income in the U.S. Nancy Birdsall, *Life is Unfair: Inequality in the World*, 98 FOREIGN POL’Y 76 (1998).

⁴¹ Rahnema, *supra* note 35, at 158 (detailing the many ways in which a variety of cultures define and perceive poverty).

⁴² *Id.* at 159. See also Ivan Illich, *Needs*, in THE DEVELOPMENT DICTIONARY, *supra* note 1, at 88.

necessity in reference to the West; Third World nations and peoples were found to be sorely lacking.

Once problematized, poverty became the defining characteristic of the Third World, and the “agreed” solution was economic growth and development.⁴³ Indeed, the Third World increasingly became part of a “system of thought and practice where particular interventions to eradicate poverty became central to the world order.”⁴⁴ While traditional responses to poverty were based on “the pluralistic, culturally established and holistic perceptions of each particular space, post-war programs of action represented a universalistic, one-track, income-based and culturally lacking recipe for abstract solutions.”⁴⁵ The perception of a global economy that would save the world’s poor “reinforced and legitimized pauperizing economic and political systems,” and led the victims of these systems to view their particular situation in the same terms.⁴⁶ As more people came to trust that poverty could be eradicated through adopting (and, more recently, *integrating into*) a “modern economy,” the search for modes of life and social organization based on simplicity, or on voluntary or moral forms of poverty were devalued and discredited.⁴⁷

People now identified as impoverished may have viewed themselves and their place within their respective communities quite differently before the advent of “development,”⁴⁸ as most societies had found ways of “defining and treating poverty that

⁴³ ESCOBAR, *supra* note 19, at 24.

⁴⁴ This assumption justified the basic tenets of intervention: poverty was too global and delicate a matter to taken out of the hands of professionals and institutions that were trained and empowered for this purpose; programs had to be charted in terms of economic resources and needs; and the agents that would be primarily responsible for designing and executing such strategies would be governments and other institutions. Rahnema, *supra* note 35, at 164. Professor Rahnema explains that anti-poverty programs claim to be based on an assessment of needs, but that within the global context, needs are identified in an abstract manner. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 163. Thus impoverished wage earners focused their struggles on limited objectives such as raising income. Labor unions were utilized while informal and formal community organizations that had traditionally assisted the poor were disregarded and ignored. *Id.*

⁴⁷ *Id.*

⁴⁸ ESCOBAR, *supra* note 19, at 24.

accommodated visions of community, frugality and sufficiency.”⁴⁹ Professor Nanda Shrestha, writing of “becoming a development category,” describes one such different vision.⁵⁰ Without romanticizing the pre-development period, Professor Shrestha paints a complex picture of his village, his family and his life in 1940s Nepal. He begins by describing life in Nepal before “development,” where his family was extremely poor by World Bank standards. Nonetheless, neither his family nor others in the village thought that people were lesser beings because of their poverty. This is not to say that life was idyllic and indeed he notes elements of a type of caste system, which he does not defend. Yet, Professor Shrestha also observes a sense of responsibility and a community that protected even the very poor, such as his family, from utter destitution.

While most traditional societies rejected the idea that poverty necessarily reflected personal inadequacy, this belief was a major component of the new international value system.⁵¹ Within this new paradigm, economic poverty was perceived and acted upon as a disgrace and a scourge.⁵² Accordingly, with development, the poverty experienced by Professor Shrestha and his family became a problem to be solved, and development experts were thought to have the solution. All that the Nepalese brought to the table was summarily discarded by those who assumed that the culture, knowledge, wisdom, insight and judgment that Nepalese villagers brought to their own lives and existence was for the most part worthless. In some ways the villagers came to believe this of themselves, as the Nepalese began to want to be like the developers. In the end, development plans and strategies did not actually lessen poverty, but they did diminish self-sufficiency and a sense of community, as functions that

⁴⁹ Rahnema, *supra* note 35, at 163; Illich, *supra* note 42, at 88.

⁵⁰ Nanda Shrestha, *Becoming a Development Category*, in *POWER OF DEVELOPMENT*, *supra* note 17, at 266. Except where noted, this account of life in Nepal before and after development is from this fascinating chapter by Professor Shrestha.

⁵¹ Rahnema, *supra* note 35, at 163.

⁵² *Id.*

were formerly the collective responsibility of the community were now left to the developers.⁵³

The purpose of this account is not to romanticize poverty or to champion non-Western societies per se, nor is it to suggest that societies and cultures are fixed and impervious to change. It is also understood that there are concrete aspects to poverty; that poverty and want are not entirely socially constructed. It is only to suggest that people existed and lived before the West came to their rescue, and they may have devised a variety of internal mechanisms to deal with those who had less, even if those mechanisms were imperfect.⁵⁴ The possible value of such indigenous knowledge was not even considered as the Western concept of development was deployed. Poverty was the singular factor by which the development project categorized peoples that were actually distinct, varied and in many instances quite self-sufficient. As poverty became their defining characteristic, development became the obvious solution, to be pursued by following the path of the West toward the goal of modernization.

C. THE META-NARRATIVE OF MODERNIZATION

The road to development is littered with discarded models and philosophies, but at the heart of all development theories is the belief that the Third World should follow in the footsteps of the West.⁵⁵ Development began as a quest for “modernity,”⁵⁶ and

⁵³ Shrestha, *supra* note 50, at 266. Professor Shrestha notes how a road that had fallen into disrepair would have been mended through the collective efforts of the village in the pre-development world. This sense of collective action disappeared with the advent of development, as everyone waited for the developers to fix it.

⁵⁴ Ted Lewellen, *Deconstructing Development: Toward an Anthropological Definition of a Value-Laden Concept*, Address at the Annual Meeting of the American Anthropological Association at Washington, DC (Nov. 1997) (noting that “many currently ‘underdeveloped’ regions of the world were developing quite well before their cultures were crushed or shifted in entirely new directions by Western expansion since the 16th Century”).

⁵⁵ See, e.g., Ziauddin Sardar, *Development and the Locations of Eurocentrism*, in *CRITICAL DEVELOPMENT THEORY*, *supra* note 4, at 53; see also Richard Cameron Blake, *The World Bank’s Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development*, 3 *YALE HUM. RTS. & DEV. L.J.* 159, 166 (2000) (stating “as developing countries created ‘economic, political, and social institutions similar to those in the West,’ economic development would inevitably result”); Aoki, *supra* note 3, at 927–28.

while development's history is complex, the modernization project has consistently been at its core.⁵⁷ Modernization has been defined as "the process by which a society comes to be characterized by a belief in the rational and scientific control of man's physical and social environment and the application of technology to that end."⁵⁸ All societies purportedly pass through distinct phases as they modernize.⁵⁹ The Rostow blueprint, for example, mandated five stages, the first being traditional society, which possessed limited science, technology and output per person; the second, where modern science leads to increased production in agriculture and industry; and the third "take-off" stage where obstacles to growth are transcended, new technology becomes predominant and growth becomes self-generating. More refined and complex processes mark the last two phases, as original industries are eclipsed and societies finally reach the level of high mass consumption. All societies are believed to traverse this particular path – that is, the progression is fixed and uni-linear.⁶⁰ Early theorists could not agree on how modernization would actually occur,⁶¹ although they did agree that it was essential to approximate the characteristics of the nations that comprised the

⁵⁶ OZAY MEHMET, WESTERNIZING THE THIRD WORLD: THE EUROCENTRICITY OF ECONOMIC DEVELOPMENT THEORIES 60 (2d ed. 1995) (noting traditional societies were viewed as exercising little control over their environment, as "lacking the traits of modern persons, and as devoid of political consciousness or active involvement in shaping their future.")

⁵⁷ Kothari & Minogue, *supra* note 7, at 7. Professors Kothari and Minogue contend that successive development theories have simply been reformulations of modernization theory, which they posit as the mega theory of development. *Id.* at 7–8.

⁵⁸ Sardar, *supra* note 55, at 52.

⁵⁹ JAMES MITTELMAN & MUSTAPHA KAMAL PASHA, OUT FROM UNDERDEVELOPMENT REVISITED: CHANGING GLOBAL STRUCTURES AND THE REMAKING OF THE THIRD WORLD 38 (1997).

⁶⁰ *Id.* (paraphrasing W.W. ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO (1960)).

⁶¹ In the early years, all parties seemed to focus on increasing foreign aid from industrialized countries. See GABE S. VARGES, THE NEW INTERNATIONAL ECONOMIC ORDER LEGAL DEBATE 3–4, 29 (1983). Adeoye Akinsanya & Arthur Davies, *Third World Quest for a New International Economic Order: an Overview*, 33 INT'L L.Q. 208, 209 (1984) (Noting that "for the developing nations, the realization of their economic backwardness and lack of progress in combating it led them, at first, to press for more foreign aid from the industrial countries.")

industrialized Western world.⁶² It was therefore assumed that tradition was an impediment to modernization, and Third World countries were encouraged to abandon their traditional lifestyles, beliefs and value systems in favor of “modern” Western norms and values.⁶³

The modernization discourse has had an enormous impact, and has persisted for several reasons including its compatibility with dominant neoclassical economic theories, as well as its simplicity and purported universality. Perhaps another part of its appeal is its apparent optimism, for it represents a belief in “progress.”⁶⁴ During the United Nations proclaimed “Development

The United Nations proclaimed the 1960s the “Development Decade” and announced, “less developed countries were to be assisted in achieving five percent annual growth in aggregate national income through expanded international trade and an annual flow of international assistance and capital.”).

⁶² MITTELMAN & PASHA, *supra* note 59, at 39; Sardar, *supra* note 55, at 52 (Noting one early indicator of modernization was urbanization, despite the fact that the overwhelming majority of the populations of the newly independent countries were based in rural areas. Other indicators included literacy and voting. Based on these indicators, the only road to modernization was industrialization.).

⁶³ Sardar, *supra* note 55, at 52. Professor Mittelman and Pasha illustrate the impact modernization theories can have by recounting the experiences of farmers in a district in Tanzania. In this district, land is in short supply and most farmers interplant bananas (the staple food) and coffee, because they do not have enough acreage to plant them separately. The government’s agricultural extension officers, however, advised them to plant coffee separately because bananas draw nitrogen and water from the soil and shade the coffee crop. This advice is based on experiments performed in laboratories and benefits only a minority of wealthier landowners who have enough land to segregate the crops and cultivate land under conditions similar to those in the lab. Larger landowners are also likely to mingle with government experts, which facilitate the kind of communication that leads to the adoption of such changes. Peasants resist the proposed innovations because they are useless or harmful to them. Government officers then regard the peasants as traditional, meaning irresponsible, stupid and lazy. The Modernization hypothesis is then invoked to justify supporting the agents of change and to legitimize coercing those now termed traditional peasants. MITTELMAN & PASHA, *supra* note 59, at 39.

⁶⁴ For a critique of progress, see José María Sbert, *Progress, in THE DEVELOPMENT DICTIONARY*, *supra* note 1, at 192; Vincent Tucker, *The Myth of Development: A Critique of a Eurocentric Discourse, in CRITICAL DEVELOPMENT THEORY*, *supra* note 4, at 4–5 (Noting that progress as a concept became pre-eminent during the French and English revolutions, as both nations set out to change the world and the manner in which it was perceived. This worldview eventually came to be perceived as self-evident and universally valid. The rights of man (albeit not all men or any women) were championed, science appeared to be capable of capturing nature and it was a period of exploration and experimentation. The new mission was modernity for the entire world and progress came to be fashioned in

Decade” of the 1960s, however, modernization produced only minimal improvements in the material conditions of life in the Third World. Eventually, initial modernization strategies were declared failures.⁶⁵ Notwithstanding this inauspicious beginning, however, modernization theory remains the meta-narrative that informs all other development narratives. Modernization continues to enjoy the unflagging support of major international financial institutions and other key national and international organizations that devise development strategies and allocate development resources.⁶⁶ It is also a key component of “law and development” theory which, through multiple incarnations, has been the consistent companion of modernization.⁶⁷

D. LAW AND DEVELOPMENT

Western legal scholars entered the development discourse through an offshoot of modernization theory known as law and development.⁶⁸ While modernization theorists equated Westernization and development, law and development theorists focused on the Westernization of Third World legal systems as a key prerequisite to, and catalyst for, development. Both theories shared the underlying premise that the Westernization of Third World countries was essential for – indeed, was the essence of – development.⁶⁹ Law and development theorists supposed that adopting Western legal systems would facilitate development by

evolutionary terms. It is forgotten or omitted, however, that a belief in “progress” also justified colonialism and imperialism, and has “legitimized” genocide, slavery, and a host of other atrocities.)

⁶⁵ See VARGES, *supra* note 61, at 29.

⁶⁶ DEVELOPMENT AS THEORY AND PRACTICE, *supra* note 10, at 271; Kothari & Minogue, *supra* note 7, at 8. See *infra* notes 112-228 and accompanying text for an extended discussion of these institutions and their role in the development project.

⁶⁷ Undoubtedly, the relationship of law to development has been an ever-present but contested theme. See discussion *infra* Part V for Third World efforts to use law as a tool for achieving and consolidating international political and economic.

⁶⁸ Modernization theory arose following WWII and was supported primarily by American scholars. Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470, 471 (1995) (reviewing 2 LAW AND DEVELOPMENT (Anthony Carty ed., 1992); LAW AND CRISIS IN THE THIRD WORLD (Sammy Adelman & Abdul Paliwala eds., 1993)).

⁶⁹ *Id.* at 471 (stating that “[t]he law and development movement adopted the basic tenets of modernization theory, adhering to the notion that evolutionary progress

providing the necessary elements for a functioning market system.⁷⁰ Westernizing the legal infrastructure of Third World countries was expected to create neutral, more accessible and more responsive government institutions.⁷¹ Benefits would include increased equality, freedom and participation, and these would in turn foster improved material standards of living.⁷² These benefits would then “trickle down” to the poorest of the poor.⁷³

Despite its strong and promising start, the law and development movement that began in the early 1960s lasted little more than a decade.⁷⁴ Perhaps the most significant factor in its demise

would ultimately result in legal ideals and institutions similar to those in the West”).

⁷⁰ David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1071. Its earliest proponents placed “extreme reliance on law as an agent of modernization and progress predicated on a study of the ideal types of law and administration that could facilitate progress.” Lakshman Marasinghe, *Law and Development: A Jurisprudence for the Developing World*, 8 DEV. EXPRESS 1, 2 (1998/1999).

⁷¹ Professor Tamanaha has summarized the law and development paradigm as follows:

1) society is made up of individuals who consent to the state for their own welfare; 2) the state exercises control over individuals through law, and it is constrained by law; 3) laws are designed to achieve social purposes and do not offer a special advantage to any individual or groups within the society; 4) laws are applied equally to all citizens; 5) courts are the primary legal institution with the responsibility for defining and applying the law; 6) adjudication is based upon a comprehensive body of authoritative rules and doctrines, and judicial decisions are not subject to outside influence; and 7) legal actors follow the restraining rules and most of the population has internalized the law, and where there are violations of the rules enforcement action will guarantee conformity

Tamanaha, *supra* note 68, at 473 (paraphrasing Trubek, *supra* note 70, at 1071).

⁷² Trubek, *supra* note 70, at 1073. Development was assumed to involve an increase in man’s rational capacity to control the world, and thus in his ability to improve his material well being. But “development” offered more than increased rationality and material satisfaction; it also promised greater equality, enhanced freedom, and fuller participation in the community. As an ideal, therefore, “development” held the promise of a life that would be richer in all ways for all Third World people.

⁷³ Blake, *supra* note 55, at 167.

⁷⁴ Several factors contributed to the movement’s abrupt demise, including a sharp drop in funding by both the public and private sectors in the United States. The U.S. Agency for International Development and the Ford Foundation, for example, were major funding sources for academic and fieldwork in law and development; their financial support declined sharply in the early mid-1970s. Some

was the rupture of the coalition that had given the movement the appearance of unanimity. Western academics and practitioners who were the initial proponents of law and development had enjoyed an initially positive reception from Third World leaders and elites – many of whom were Western educated.⁷⁵ By the early 1970s, however, many political leaders and intellectuals in the Third World had turned to dependency theory and other radical analyses of their circumstances, and were demanding a New International Economic Order.⁷⁶ In this context, law and development was widely denounced as “reflect[ing] the ideological hegemony of Western capitalism and the dominant economic forces of contemporary imperialism. . . . [and] as inadequate to explain development or underdevelopment. . . .”⁷⁷ Moreover, although the American experience was thought to exemplify the success of law and development, many observers expressed “doubt that the model accurately describe[d] legal life even in the United States.”⁷⁸

Long after widespread reports of the movement’s demise, however, the core premises of law and development continue to inform most Western thinking (both popular and official) about

observers believe this policy change reflected popular disillusionment and a general loss of faith in government and the viability of overseas interventions – resulting significantly from the Viet Nam war and Watergate. See Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding and Serving Palm-Wine*, 29 CASE W. RES. J. INT’L L. 167, 169 (1997).

⁷⁵ *Id.*

⁷⁶ Francis G. Snyder, *Law and Development in the Light of Dependency Theory*, 14 LAW & SOC’Y REV. 723, 727–28 (1980) (Discussing the two ways scholars reacted to the lack of success of these philosophies. Some argued that their failure “was the inevitable consequence of the transition to capitalist development. . . . The other elaborated a radical critique, suggesting that capitalist development in the periphery would not reproduce the historical capitalist path. . . . The first approach is still followed by the majority of development practitioners.”).

⁷⁷ *Id.* at 731; see also Aoki, *supra* note 3, at 928.

⁷⁸ Trubek, *supra* note 70, at 1081. Critics of the movement also observed that “the development equation contain[ed] a heavy social element, for which law is not the complete answer.” Marasinghe, *supra* note 70, at 2. Of course, modernization has continually reappeared in different guises. See *supra* notes 67–69 and accompanying text.

development.⁷⁹ Indeed, with economic globalization as its battering ram, the law and development movement recast and reasserted itself in the 1990s as “marketization” and “democratization.”⁸⁰ The current reincarnation of the law and development movement is known as the “good governance” agenda, which has been critiqued as “an uneasy combination of two main objectives: on the one hand, a project limiting the power of the state in the economy while simultaneously expanding the role of the market, and on the other, establishing liberal democracy as a counterpart to structural adjustment or neoliberal economic reform.”⁸¹ Capital exporting countries and the international financial institutions they control are actively

⁷⁹ For example, the intersection of law and economic development in the Third World continues to generate significant attention – as evidenced by a 1992 book with precisely that title. The book was edited by P. Ebow Bondzi-Simpson who, in the opening chapter, asserts that:

Law may be used to promote development as an institutional enterprise, providing a framework for procedures to be adopted, mechanisms for the settlement of disputes and/or agencies to monitor or review programs taken in pursuit of development. As a normative device, law may provide a catalog of substantive rights, obligations and entitlements. In either respect, law may be used to promote desired action or to curb or regulate undesired actions or consequences.

P. Ebow Bondzi-Simpson, *Confronting the Dilemmas of Development Through Law*, in *THE LAW AND ECONOMIC DEVELOPMENT IN THE THIRD WORLD* 6 (P. Ebow Bondzi-Simpson ed., 1992).

⁸⁰ Amy L. Chua, *Markets, Democracy and Ethnicity: Toward a New Paradigm for Law and Development*, 108 *YALE L.J.* 1, 14–15 (1998) (noting that the overwhelming majority of development literature still “urge[s] the rapid and full-blown liberalization and marketization of developing world economies”); *id.* at 17–18 (listing the many organizations that follow an agenda which promotes marketization and democratization). Professor Maxwell Chibundu notes:

Now that the globe seems to be marching to one drum beat, that of the free enterprise capitalist system, it follows that the legal institutions and practices that have fostered and sustained the triumph of the capitalist mode of production, accumulation, distribution, and consumption are best suited for other societies, appropriately modified at the margins to account for the peculiar foibles of those societies.

Chibundu, *supra* note 74, at 222.

⁸¹ James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 *VILL. L. REV.* 971, 1000 (2000).

promoting the good governance agenda.⁸² Like the modernization paradigm that is at its core, law and development continues to thrive, albeit in a new form.

Thus, as the first half of the Twentieth Century came to a close, a new entity was emerging in the international community, the underdeveloped world. Once it was discovered and then defined as poor and pre-modern, the foundation was in place for its development. As the second half of the 20th century progressed, “development” became the stated objective of virtually every country in what became the Third World. New nations differed on the question of how best to achieve development, but they unanimously agreed that development was their goal.⁸³ International institutions, in turn, propounded a variety of mechanisms to assist newly sovereign entities as they moved in the expected linear fashion towards the promised goal of being developed. Part II turns to the development institutions and the practices they propounded.

II. CONSTRUCTING DEVELOPMENT IN PRACTICE

A. THE INSTITUTIONAL EDIFICE

The International Monetary Fund (the IMF) and the International Bank for Reconstruction and Development (the World Bank) have come to exercise a profound influence on the economies of most Third World countries.⁸⁴ Indeed, International Financial Institutions (IFIs) virtually control the policy-making

⁸² In a 1989 report the World Bank identified bad government (including poor policies, incompetence and corruption) as the primary obstacle to economic development in sub-Saharan Africa. See WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH: A LONG-TERM PERSPECTIVE STUDY (1989).

⁸³ Chibundu, *supra* note 74, at 190–91.

⁸⁴ Mary C. Tsai, *Globalization and Conditionality: Two Sides of the Sovereignty Coin*, 31 LAW & POL’Y INT’L BUS. 1317 (2000); Anthony Galano III, *International Monetary Fund Response to the Brazilian Debt Crisis: Whether the Effects of Conditionality Have Undermined Brazil’s National Sovereignty?*, 6 PACE INT’L L. REV. 323 (1994); JACQUES J. POLAK & CATHERINE GWIN, THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND: A CHANGING RELATIONSHIP (1994). International Financial Institutions or IFIs increasingly embrace an ever-widening array of governmental functions, such as judicial and public service reorganization, government auditing functions, and labor and environmental concerns. 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, 266 (2000) [hereinafter Anghie, *Time Present and Time Past*] (noting

processes of some debtor countries.⁸⁵ When they were established at the end of World War II,⁸⁶ however, the World Bank was to assist in rebuilding post War Europe and the IMF was to monitor and regulate the international monetary system. Their evolution into institutions whose primary focus is the Third World is a crucial aspect of the evolving paradigm of development.⁸⁷

1. The World Bank

When the World Bank was founded at the end of World War II, its assigned priority was rebuilding Europe.⁸⁸ In 1947, however, just three years after the Bank's creation, the United States

World Bank interference in any activity that involves development); *see also* James Thuo Gathii, *Good Governance as a Counter-Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 *BUFF. HUM. RTS. L. REV.* 107 (1999) [hereinafter Gathii, *Good Governance*].

⁸⁵ One means is through "conditionality" – the IFI practice of making loans conditional on policy and/or structural changes by the borrowing state. Conditionality allows the World Bank and the IMF to restrict credit if a country's fails to comply with the terms of its lending agreement. Tsai, *supra* note 84; POLAK & GWIN, *supra* note 84. *See infra* notes 169-203 (detailing Structural Adjustment programs during the 1980s) and accompanying text.

⁸⁶ The World Bank and the IMF are also known as the Bretton Woods institutions, because they were formed at Bretton Woods, New Hampshire in July 1944. The two organizations have similar governance structures, operating according to a weighted voting system that is based on contributions made by members. The broad legal framework for the two institutions is also similar, with emphasis on an ostensibly non-political character. *See* Anghie, *supra* note 84, at 269; Gathii, *Good Governance*, *supra* note 84, at 225.

⁸⁷ *Cf.* Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 *HARV. INT'L L.J.* 529, 530 (2000) [hereinafter Rajagopal, *From Resistance to Renewal*]. Professor Rajagopal rejects the prevailing "functionalist" conception of international institutions. He notes that the functionalist "theory explains the emergence of international institutions as a result of a pragmatic necessity to serve concrete functions. The central proposition of this theory is that institutions are born and expand due to top-down policy decisions that correlate with the functional needs of international society." Not coincidentally, this top-down conception is consistent with the perceived "hegemonic nature of international law as an elitist discipline."

⁸⁸ Section I of Article I of IBRD's Articles of Agreement states that the Bank is:

To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purpose, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of

embarked on the Marshall Plan and took over most of the financing for the reconstruction of Europe. With its role in Europe eclipsed,⁸⁹ the Bank was left to pursue its secondary charge: “the development of productive facilities and resources in less developed countries.”⁹⁰ But even this function, as originally contemplated, bears little resemblance to the Bank’s contemporary role in the Third World. The World Bank was intended to act as an intermediary between prospective borrowers and prospective investors, meaning it was to play the traditional role of a private, commercial bank – except that its depositors and borrowers would be member states.⁹¹ Under the terms of its Articles of Agreement, the Bank was to make loans based exclusively on “considerations of economy and efficiency;”⁹² it was expressly prohibited from entertaining “political or other non-economic influences or considerations.”⁹³

The Bank’s evolution into an Institution that touches on almost all aspects of the economic, social and political lives of its borrowers has much to do with how development itself has evolved over the last fifty years and with other factors such as the post World War II struggle between capitalism and communism, a struggle within which the World Bank was a critical weapon.⁹⁴

the development of productive facilities and resources in less developed countries.

International Bank for Reconstruction and Development Articles of Agreement, art. I, §1, 60 Stat. 1440, 16 U.S.T. 1942, *as amended* (1945), available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20049557~menuPK:63000601~pagePK:34542~piPK:36600~theSitePK:29708,00.html> (last visited on Feb. 22, 2004).

⁸⁹ John D. Ciorciari, *A Prospective Enlargement of the Roles of the Bretton Woods Financial Institutions in International Peace Operations*, 22 FORDHAM INT’L L.J. 292, 298–99 (1998).

⁹⁰ International Bank for Reconstruction and Development Articles of Agreement, *supra* note 88, at art. I, § 1.

⁹¹ See Ciorciari, *supra* note 89, at 298–99; Dominique Carreau, *Why Not Merge the International Monetary Fund (IMF) with the International Bank for Reconstruction and Development (World Bank)?*, 62 FORDHAM L. REV. 1989, 1991 (1994).

⁹² International Bank for Reconstruction and Development Articles of Agreement, *supra* note 88, at art. III, § 5(b).

⁹³ *Id.*

⁹⁴ Rajagopal, *From Resistance to Renewal*, *supra* note 87, at 438 (“Indeed, it was commonplace in development thinking in the late 1950s and early 1960s that poor countries would succumb to Communism if they were not rescued from poverty.” Initially the Bank employed direct “project lending” to support anti-communist

With the establishment of the Inter-American Development Bank in 1961, the shift began towards linking the extension of credit to the implementation of reforms.⁹⁵ This opened the door to broader interventions in the political and social affairs of borrowing nations.⁹⁶ The Bank eventually began insisting on internal changes as a condition of receiving assistance. As the Bank's role in devising and carrying out both the practical and theoretical elements of development has persistently expanded and

regimes in Asia, Africa and Latin America. For example, Nicaragua, whose ruling Somoza family was cooperating closely with the U.S. military, received 10 World Bank loans between 1951 and 1960. Guatemala, however, with three times Nicaragua's population, received no World Bank support until the overthrow of its supposedly communist regime in 1955. Loans were used to build dams, highways and other infra-structure projects that would facilitate economic growth. As these projects failed to achieve their intended results, however, it became apparent that securing the allegiance of Third World regimes – particularly oppressive ones – would not necessarily pacify the populations who were subject to those regimes, and thus there might be a need for direct programs to alleviate poverty. In other words, preventing communist subversion in the Third World was going to require programs to alleviate poverty within Third World countries, and this was not being accomplished by the World Bank's project-based lending in support of infrastructure; the required shift in policy began at the regional level.)

⁹⁵ In 1959, U.S. President Eisenhower explained the establishment of the Inter-American Development Bank as follows:

Traditional unilateral aid was sustaining a prevailing social order, which was unjust to the masses of the people, but we could do nothing directly about this without violating the policy of non-intervention in the internal affairs of other nations. The creation of the new bank changed this, for now the Americas had a multinational instrument, secure against control by any one country, for bettering the life of people throughout the Americas; if this instrument insisted upon social reform as a condition of extending development credit, it could scarcely be charged with "intervention."

DWIGHT D. EISENHOWER, *WAGING PEACE, 1956-61: THE WHITE HOUSE YEARS* 516 (1965), *quoted in* 1 DEVESH KAPUR, *supra* note 30, at 155. Thus was established the regional mechanism for development assistance conditioned on specific internal reforms by the country receiving the assistance.

⁹⁶ The establishment of the IDA was the most significant institutional factor in the World Bank's shift away from project-lending based on traditional financial criteria and toward investing in "human capital" and poverty reduction programs in the Third World. It was the model for multilateral institutions that would have the credibility to insist on internal changes without charging individual nations with violating the international principle of non-intervention in the internal affairs of states. The same mechanism and rationale were implemented without the regional limitation when the International Development Association (IDA) was established as a part of the World Bank in 1961. Rajagopal, *From Resistance to Renewal*, *supra* note 87, at 552.

grown, its position in the affairs of its Third World members expanded in tandem, and steadily and consistently grew ever broader and deeper.⁹⁷

2. *The Evolving IMF Role in the Third World*

The International Monetary Fund was initially founded to stabilize the international monetary system and promote international trade,⁹⁸ by supervising international currency exchange rates and making short-term loans to member states when necessary to meet balance of payments difficulties.⁹⁹ Many factors contributed to the subsequent transformation of the IMF's role into a lender to Third World countries, but perhaps the most important was the 1971 U.S. decision to "float" the dollar.¹⁰⁰ This determination caused such significant changes in the international monetary system that the IMF was eventually reduced to monitoring exchange rates rather than setting them.¹⁰¹ Still, most IMF activity was directed toward industrialized nations until the oil crisis in the early 1970s. Newly established Euro-Markets were flooded with so-called "petro dollars,"¹⁰² and these markets

⁹⁷ See *infra* notes 112-228 and accompanying text for discussion of the "cycles of conventional wisdom."

⁹⁸ The principal task originally assigned to the IMF was "to promote international monetary cooperation" and "to give confidence to members by making the Fund's resources temporarily available to them under adequate safeguards." Articles of Agreement of the International Monetary Fund, art. I(i), I(v), 60 Stat. 1401, 29 U.S.T. 2203, *as amended* (1945), available at <http://www.imf.org/external/pubs/ft/aa/aa.pdf> (last visited Nov. 16, 2003) [hereinafter IMF Articles of Agreement]; see also Enrique R. Carrasco, *Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1996); Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47 (1996); Stephen Anthony, *IMF Structural Adjustment Programs: An Economic Evaluation*, 3 GEO. PUBLIC POL'Y REV. 133 (1998).

⁹⁹ Carreau, *supra* note 91 (Noting that in essence, the IMF's member states agreed to relinquish some of their sovereignty over their national monetary systems in exchange for short-term assistance when needed, and for the stability the IMF would bring to the international monetary system. The IMF's normative powers thus depended on the cooperation of its member states.)

¹⁰⁰ *Id.* (also noting that this decision may have been in violation of the par value system established in the IMF Articles of Agreement).

¹⁰¹ *Id.*

¹⁰² Bradlow, *supra* note 98, at 47.

usurped most of the IMF's role as a lender to credit-worthy industrialized states who could now avoid IMF conditions.¹⁰³ As credit-worthy borrowers sought loans elsewhere, the IMF found itself lending almost exclusively to Third World countries.¹⁰⁴ Indeed, since the second amendment of its Articles of Agreement in 1978, the IMF has become primarily a lender to the Third World.¹⁰⁵ This new role was cemented by the debt crises of the 1980s, as the IMF assumed increasing control over the economies of states that had no alternative sources of outside financing. The Third World debt crisis in the 1980s also led the IMF and World Bank to effectively consolidate their policies toward the Third World.¹⁰⁶

¹⁰³ Carreau, *supra* note 91 (noting that IMF lending has always been conditional; borrowers are required to adopt stabilization plans and to correct the types of imbalances that were thought to have figured significantly in precipitating World War II).

¹⁰⁴ Professor Carreau observes:

Gradually and involuntarily, the IMF has lost its influence over its most developed member states, which remain bound by very limited monetary obligations since the collapse of the par value system in 1971 and which have abstained from turning to the IMF for assistance. . . because of the conditions imposed.

Carreau, *supra* note 91, at 1997.

¹⁰⁵ Rajagopal, *From Resistance to Renewal*, *supra* note 87, at 570.

¹⁰⁶ For example, the IMF now recognizes economic growth as an objective – even though economic growth was not one of its original purposes and is still not mentioned in the IMF's Articles of Agreement. JACQUES J. POLAK, 184 *THE CHANGING NATURE OF IMF CONDITIONALITY, ESSAYS IN INTERNATIONAL FINANCE*, at 1, 17 (1991). It defines desirable economic growth as “high quality growth rather than flash in the pan growth fueled by inflation and excessive borrowing, or growth at the expense of the poor, of the environment, or growth run by the state.” IMF Managing Director Michael Camdessus, *quoted in id.*, at 19. This model of economic growth is quite compatible with the World Bank's theory of economic development. Rajagopal, *From Resistance to Renewal*, *supra* note 87, at 573. Professor Carreau notes:

The IMF's role seems limited to controlling the economies of member states requesting financial assistance, namely developing countries and former command economy countries that have no alternative sources of outside financing. . . Its assistance, originally limited to financing short-term difficulties, has been completely modified to address long-term, structural imbalances. And this is precisely the World Bank's mission.

Carreau, *supra* note 91, at 1997–98.

IFI performance as “the apparatus of management and control of social reality in the Third World”¹⁰⁷ has provoked an intense barrage of criticism,¹⁰⁸ ranging from liberal critics who generally accept the goals and objectives of IFIs but perceive problems in implementation,¹⁰⁹ to those embracing a more radical perspective, who view IFIs as tools of the industrialized north in their continuing exploitation of the South.¹¹⁰ Others reject both critiques.¹¹¹ What is certain, however, is the decisive and ever-

¹⁰⁷ Rajagopal, *From Resistance to Renewal*, *supra* note 87, at 541.

¹⁰⁸ Genoveva Hernandez Uriz, *To Lend or Not To Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197 (2001).

¹⁰⁹ Liberal critics generally accept the candor and validity of IFI goals of alleviating poverty and improving standards of living in the Third World. See *Operational Directive 4.15: Poverty Reduction (1992)*, THE WORLD BANK OPERATIONAL MANUAL 2 (1992) (stating that “sustainable poverty reduction is the Bank’s overarching objective”); Policy Development and Review Department, *The Poverty Reduction and Growth Facility (PRGF) – Operational Issues*, International Monetary Fund, at <http://www.imf.org/external/np/pdr/prsp/poverty2.htm> (last visited Feb. 21, 2004) (proclaiming “poverty reduction efforts among low-income members a key and more explicit element of a renewed growth-oriented economic strategy” of the IMF). In their view, the problem is ineffective strategies and/or improper implementation by IFIs themselves and/or by Third World governments. Some liberal critics also allege that IFIs are “out of touch” because they are Western-dominated and unrepresentative. See, e.g., Oscar Shachter, *The Evolving Law of International Development*, 15 COLUM. J. TRANSNAT’L L. 1 (1976).

¹¹⁰ Critics embracing a more radical perspective contend that IFIs are in place primarily to maintain the international economic status quo, and to enable the countries of the industrialized North to continue exploiting the countries of the South. See, e.g., *Saving Failed States*, *supra* note 12; David Greenberg, *Law and Development in Light of Dependency Theory*, 3 RES. IN L. & SOC. 129, 152 (1980); James Thuo Gathii, *Africa’s Economic and Political Predicaments*, 45 VILL. L. REV. 971, 1002 [hereinafter Gathii, *Africa Predicaments*]; Gathii, *Good Governance*, *supra* note 84, at 224 (relating the hierarchical nature of the international order and demonstrating that decisions to undertake national economic management have been taken out of the hands of developing countries through structural adjustment programs that are required for the continuance of foreign aid). Critics also point out that eighty percent of U.S. aid to Africa, for example, is spent on American commodities, expertise, and subcontractors; only twenty percent of the money ever leaves the U.S. It is also noteworthy that in 1989, the Bank employed 80,000 consultants on Africa with only one percent of them being African, meaning the other ninety-nine percent come from outside the continent. Ernesto Hernandez-Cata, Remark, *Panel Three: The Role of Multi-Lateral Institutions in African Development*, 30 LAW & POL’Y INT’L BUS. 708, 711 (1999).

¹¹¹ For example, Professor Balakrishnan Rajagopal contends that both the liberal and radical critiques are useful but flawed. He believes that the liberal critique (1) fails to acknowledge that IFI interventions in the Third World often worsen

expanding position of these institutions in the “cycles of convention wisdom” that make up the ensuing narrative of development.

B. CYCLES OF CONVENTIONAL WISDOM¹¹²

The concept of development is “riddled with paradoxes, and few theories are more bedeviled by contested hypotheses.”¹¹³ Development has taken many shapes and forms since the 1950s, when economic growth was its sole objective. In the 1960s, poverty alleviation and distributional equity were added as objectives. “Basic Needs” emerged in the 1970s, and the cultural dimension took its place beside economic development and more

circumstances by exacerbating class divisions that are already too broad, and (2) is inadequate to explain not only the general failure of IFI poverty reduction programs, but also the widespread popular resistance to those programs in the Third World. He believes the radical critique, on the other hand, oversimplifies complex and differing relationships, leads to “policy paralysis,” and fails to explain the continuing participation of legions of intelligent and genuinely well-intentioned individuals in “development work.” Professor Rajagopal suggests an alternative analysis that differs from the liberal and radical critiques. He maintains that just as the Third World is defined by the concept of development, IFIs are defined by their mission, and the development project has become that mission. He continues:

IFIs have had a complex relationship with Third World resistance. . . it is the process by which [IFIs] have dealt with that resistance, and not so much the resistance itself, that have revealed the centrality of the resistance to the formation of the [IFIs'] changing institutional agendas. . . This . . . is hardly acknowledged by the [IFIs], who see their evolution as being governed purely by the laws of economics, finance, or their Articles of Agreement. It matters less that poverty alleviation programs never alleviate poverty or that conditionalities never achieve their stated goals. Rather, these specific interventions . . . redound to the authority and expansion of international institutions.

Rajagopal, *From Resistance to Renewal*, *supra* note 87, at 576.

¹¹² The phrase “cycles of conventional wisdom” is borrowed from an article by economist Paul Krugman that discusses the myriad models of development promulgated by development specialists and how these models were developed. He concludes that development specialists are a closed insular group that does not rely upon proven methods or past experience, and appear unable to accomplish modernization. Paul Krugman, *Cycles of Conventional Wisdom in Economic Development*, 72 INT’L AFFAIRS 717, 717 (1996).

¹¹³ Kothari & Minogue, *supra* note 7, at 1. Definitions of “development” abound. Professor Simon asserts that these definitions are “contextual and contingent upon the ideological, epistemological or methodological orientation of their purveyors, and there has never been a consensus or unanimity about the meaning or content of development.” Simon, *supra* note 10, at 17.

emphasis was placed on self-reliance.¹¹⁴ The 1980s brought gender issues and environmentalism as prominent themes.¹¹⁵ By the 1990s, globalization had become the focal point.¹¹⁶ While the following account attempts to break these and many other permutations into discrete time frames, there is considerable overlap. Theories and practices sometimes evolved slowly; sometimes seemed to disappear, only to reappear in a different form; and sometimes gave way to polar opposite strategies. This brief account can only sketch how development has evolved and been transformed and adjusted over the last fifty years, as developers tried and failed to “better humankind through the alleviation of poverty and the realization of human potential.”¹¹⁷

1. *The “Golden Age” of Development: 1950-1970*¹¹⁸

The 20-year period from 1950 to 1970 has been labeled the “golden age” of development.¹¹⁹ The development project was in its infancy, but the clear “expert” consensus was that insufficient income was the key problem facing Third World countries, and

¹¹⁴ Autonomous decision-making and implementation by both nations and peoples were emphasized. Sardar, *supra* note 55. See also Rosemary McGee, *Participating in Development*, in *DEVELOPMENT THEORY AND PRACTICE CRITICAL PERSPECTIVES*, *supra* note 7, at 92.

¹¹⁵ Finite resources and the fragility of the global environment were additional factors to be considered and taken into account. Sardar, *supra* note 55, at 53. This followed on the heels of the Stockholm Conference on the Environment in 1972 and was popularized by such publications as *WORLD COMMISSION ON EMPLOYMENT, OUR COMMON FUTURE* (1987).

¹¹⁶ “Liberalization” and “open markets” have become the driving force of development. Sardar, *supra* note 55.

¹¹⁷ Cowen & Shenton, *supra* note 17, at 27.

¹¹⁸ The so-called “golden age of development” overlapped with the beginning of what would be a series of United Nations Development Decades. Pursuant to a request by President John F. Kennedy, the General Assembly of the United Nations unanimously approved Resolution 1710, which declared the first Development Decade in 1961. The goal was to attain, “in each under-developed country a substantial increase in the rate of growth, with each country setting its own target, taking as the objective a minimum annual rate of growth of aggregate national income of 5 percent at the end of the Decade.” G.A. Res. 1710, U.N. GAOR, 16th Sess., 1084th plen. mtg., at 17, U.N. Doc. A/5100 (1961); *DUSAN DJONOVICH, 1 RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY, UNITED NATIONS RESOLUTIONS* (1972). In some respects, these resolutions reflect the failures of development, the hopes of Third World nations, and convey the progression of development in theory and practice.

¹¹⁹ MEHMET, *supra* note 56, at 63.

economic growth was the solution.¹²⁰ The prevailing orthodoxy postulated that national economic management would maximize growth and employment; accordingly, the state was to orchestrate development through the use of macroeconomic policy tools.¹²¹ Early development theory relied heavily on “state-led developmentalism.”¹²² National governments were to adopt policies that stimulated growth.¹²³ The standard approach to economic development involved highly abstract plans, economic model building and parastatal agencies.¹²⁴ Capital investment to build infrastructure, industrialize and to generally modernize societies was thought to be the most important ingredient in economic growth.¹²⁵ Therefore, the World Bank extended project-based loans to build dams, highways and other infrastructure projects.¹²⁶ Technology was also a critical component and given

¹²⁰ ESCOBAR, *supra* note 19, at 24 (stating development theory was strongly influenced by the neo-Keynesian consensus that dominated economic thinking and practice in the post-War period); Paul Cammack, *Neoliberalism, the World Bank and the New Politics of Development*, in *DEVELOPMENT THEORY AND PRACTICE*, *supra* note 7, at 157, 161 (noting that it was assumed that states could and should intervene directly in production and distribution, making development an active, state-led process).

¹²¹ Cammack, *supra* note 120, at 157, 161; MEHMET, *supra* note 56, at 60.

¹²² MEHMET, *supra* note 56, at 96. This is quite ironic given the contemporary near-religious devotion to the free market.

¹²³ Cammack, *supra* note 120, at 157, 161; MEHMET, *supra* note 56, at 60.

¹²⁴ MEHMET, *supra* note 56, at 96. Planners did not consider how countries would administer these ambitious plans; indeed institution building was ignored and Western planners utilized a “how to do” approach. *Id.*

¹²⁵ Because underdeveloped countries were believed to be “trapped in a vicious circle of poverty and thus lacking capital, it would therefore have to come from abroad.” ESCOBAR, *supra* note 19, at 40.

¹²⁶ “Project lending” was aimed primarily at developing infrastructure; it was intended to facilitate business by cultivating the factors necessary for economic growth. Bank officials believed it was crucial to construct electric power plants and roads because industry could not be developed without electricity and the means to transport finished products. Thus in the absence of this kind of infrastructure, most economic activities would be difficult if not impossible. For example, good roads were necessary because no investor would want to invest in a country if its products could not be transported. Sandra Blanco, *Symposium: Part One: Pursuing the Good Life: The Meaning of Development as It Relates to the World Bank and the IMF*, 9 *TRANSNAT’L. & CONTEMP. PROBS.* 109, 110 (1999). Consequently, the Bank mainly financed dams, highways, and other large-scale infrastructure projects. Tsai, *supra* note 84.

the lack of capital to purchase it, technical assistance became essential.¹²⁷ As technology was introduced, Third World social and cultural factors were ignored because Western developers believed technology was culturally neutral and invariably beneficial.¹²⁸ Historical, institutional and economic realities were generally disregarded in the early days of the development project.¹²⁹

Very few of the early plans for economic growth led to measurable successes, and it became apparent that the gains that were achieved would not automatically benefit the most needy citizens within target countries.¹³⁰ The “trickle down” theory, which postulated that economic growth would necessarily shrink the gap between the rich and the poor, proved to be untrue.¹³¹ As optimism regarding economic growth began to wane,¹³² Third World leaders began demanding permanent sovereignty over natural resources¹³³ and a school of thought known as “dependency theory” emerged offering a radical critique of mainstream economics.¹³⁴ Meanwhile, the Cold War between capitalism and communism had become the dominant factor in global politics

¹²⁷ ESCOBAR, *supra* note 19, at 36 (noting that technology not only “amplified material progress, [but] would confer . . . a sense of direction and significance”; it was the key to modernization and indeed the transfer of technology became an important component of the development project).

¹²⁸ *Id.*

¹²⁹ MEHMET, *supra* note 56, at 96. Institutional efficiency, indigenous history and culture and critical issues such as land reform were not part of the planning process; plans were generally derived in a vacuum. *Id.*

¹³⁰ Blanco, *supra* note 126, at 111.

¹³¹ *Id.*

¹³² Esteva, *supra* note 1, at 13.

¹³³ See discussion *infra* Part III. A.

¹³⁴ The multiplying failures of the development project and other events supported the dependency critique. For example, when internal forces extended state control over the economy through nationalizations, and sought to give workers and farmers more of a share in national wealth, private investors would flee and foreign loans would be denied. This financial strangulation sometimes led to military coups and military incursions into the political process. The repetition of this course of events fueled radical intellectuals who emphasized the impact of imperialism, which used political, military and economic dominance to control production in foreign nations. They also emphasized the impact of external forces from the economies of the “center” on the economies of the “periphery”, and focused on domination and subordination in general, and specifically on the effects of imperialism and colonialism. MITTELMAN & PASHA, *supra* note 59, at 44–45.

and the primary consideration in U.S. policy toward the Third World.¹³⁵

The perception grew that more coordination by international institutions would be needed to execute what was becoming the ever more complex undertaking of development.¹³⁶ Thus, as the 1960s progressed (perhaps foreshadowing the contemporary idea of “comprehensive development”), developmentalism became more wide-ranging.¹³⁷ Third World governments began to establish social programs that would more directly address poverty, by improving housing, education, health, energy and transportation.¹³⁸ The World Bank began to support projects in these areas, as well projects focusing on population control, nutrition and urban development.¹³⁹ This represented a significant change in Bank policy, as the Bank moved beyond lending funds for profit-oriented projects towards funding social projects involving non-economic policy choices.¹⁴⁰ Development had begun its expansion beyond economic growth.

2. *The Second Phase: Integrating Social and Economic Elements*

By the early 1970's, the World Bank focused its resources and policies exclusively on the Third World.¹⁴¹ What has been called the “second era of development”¹⁴² was characterized by

¹³⁵ See discussion *infra* Part II.A.

¹³⁶ ESCOBAR, *supra* note 19, at 40.

¹³⁷ Senarclens, *supra* note 30.

¹³⁸ Blanco, *supra* note 126, at 111.

¹³⁹ Carreau, *supra* note 91, at 1999.

¹⁴⁰ This was also arguably a violation of its Articles of Agreement. The World Bank Articles of Agreement provide that the World Bank's lending policy is to be dictated by purely financial considerations, meaning its funds can be lent only on projects that are reasonably expected to generate sufficient funds to repay the loan. Although it was believed these projects would contribute to the overall development of member States, these projects could not be viewed as profit-oriented. Indeed, many of these projects did not generate any income whatsoever. Thus, the Bank increased its financial exposure, and borrowing members had to utilize already limited foreign exchange resources to repay the Bank. Not surprisingly, the Bank began to face defaults. Carreau, *supra* note 91, at 1999.

¹⁴¹ Jennifer N. Weidner, *World Bank Study*, 7 BUFF. HUM. RTS. L. REV. 193 (2001).

¹⁴² In 1970, the UN General Assembly declared the beginning of a Second Development Decade (1971-1981) that called for a more equitable distribution of income

escalating efforts to integrate social considerations into the pursuit of economic goals.¹⁴³ It was conceded that the development strategies then in place would not eliminate hunger and poverty, and “Basic Needs” became the new maxim within the development community.¹⁴⁴ Rather than focusing on the infrastructure and mega-projects that had previously dominated development strategies and funding, the “Basic Needs” approach proposed that poverty be dealt with by focusing directly on food, clothing, shelter, education and employment.¹⁴⁵ Moreover, people whose basic needs were met might be less susceptible to “Communist subversion,”¹⁴⁶ which was an important consideration during the Cold War. “Basic Needs” was quite popular because it was universalistic, yet easily tailored to be country-specific;¹⁴⁷ it remained in favor until policies centered on the poor were abandoned in favor of structural adjustment lending.¹⁴⁸

Policy studies that examined processes, values and social consequences were prominent during this phase.¹⁴⁹ Moreover, the presumptions that policy-making was exclusively a

and wealth, growth in primary education, prevention and treatment of disease, and improved nutrition and housing. It also called for adjustments in trade policies and for economically advantaged countries to support the development endeavors of developing countries. EDMUND OZMANCZYK, *ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS* 528 (Anthony Mango ed., 2003). See also G.A. Res. 2626, U.N. GAOR, 25th Sess., 1912th plen. mtg., at 39, U.N. Doc. A/8124 and /Add.1 (1970).

¹⁴³ Esteva, *supra* note 1, at 13–14. As early as 1962 ECOSOC had recommended that the economic and social aspects of development be integrated. *Proposals for Action of the First UN Development Decade (1960-70)*, declared that “development is growth plus change. . . . Change is social and cultural as well as economic, and qualitative as well as quantitative. . . . The key concept must be improved quality of peoples’ lives. Nonetheless, development continued to be perceived as a “definable path of economic growth passing through various stages, and “integration” simply linked the social aspect to the economic aspect. Solon L. Baraclough, *In Quest of Sustainable Development* (unpublished paper, UNRISD).

¹⁴⁴ Development was in reality more likely to worsen levels of absolute poverty for a large segment of the population.

¹⁴⁵ MITTELMAN & PASHA, *supra* note 59, at 92.

¹⁴⁶ See discussion *supra* notes 94-95 and accompanying text.

¹⁴⁷ Esteva, *supra* note 1, at 15. It also dovetailed with the World Bank strategy of targeting groups such as the rural poor and small farmers.

¹⁴⁸ See *supra* notes 169-203 and accompanying text. This coincided with the end of Robert McNamara’s tenure as President of the World Bank.

¹⁴⁹ MITTELMAN & PASHA, *supra* note 59, at 42.

state activity and that Third World governments acted on behalf of their respective populations, also began to be challenged.¹⁵⁰ As developers explored ways to deliver aid that would meet basic needs, Western non-governmental organizations (NGOs) emerged to assist.¹⁵¹ “Grassroots development” and “empowerment” became the mottos of the day, as “bottom up” theories such as micro-development,¹⁵² endogenous development,¹⁵³ sustainable development¹⁵⁴

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 92.

¹⁵² For example, “Micro-development” theorists advocated targeting the individual rather than infrastructure and governments, on the premise that development would occur when people were empowered to confront and address their poverty. Once empowered, people would “organize themselves and overcome the obstacles to their social, cultural and economic well-being” with foreign organizations relegated to a supportive role. Empirically, micro-development theory assumes that poverty results from lack [of] access to resources that are essential to the satisfaction of basic human needs,” and that this lack of access is a ‘product of lack of power in social relations.’” See Blake, *supra* note 55, at 166. Micro-development theorists also emphasize a more equitable distribution of international economic power, which can occur only at the macro level. Russell Lawrence Barsh, *The Right to Development as a Human Right: Results of the Global Consultation*, 13 HUM. RTS. Q. 322, 327 (1991).

¹⁵³ Endogenous development proposed that the distinctiveness of individual cultures and societies should be at the center of determining the goals to be pursued. This approach was generally accepted for a period of time, even though it was at odds with core assumptions of the development project, which are universalistic. Esteva, *supra* note 1, at 15.

¹⁵⁴ Sustainable development was defined as economic growth that takes account of environmental concerns. See David P. Forsythe, *The United Nations, Human Rights, and Development*, 19 HUM. RTS. Q. 334, 334 (1997). Like micro-development, it had a social dimension, emphasizing that development is more than economic growth. See also Blake, *supra* note 55, at 168; Forsythe, *supra* note 154, at 335. Both micro-development and sustainable development concentrate on education and literacy, health services, poverty alleviation, environmental protection, community cooperation and participation, and social and cultural cohesiveness; success is not measured solely in terms of economic growth. Results can be intangible, such as improved skills in communication, leadership or management; a stronger sense of self; the establishment of civil liberties; or the increased ability to leverage services from the state. Results can also be tangible, such as increases in the production of agricultural or manufactured goods; a rise in family incomes; a building used for organizational activities; or a road or water system. *Id.* at 166–68. The Stockholm conference on the environment was in 1972, and the notion of sustainable development was further defined and cemented with the publication of the Brandt Report, entitled *Our Common Future*, *supra* note 115.

and other themes began to emerge to replace “top down” theories.¹⁵⁵

Indeed, as the 1970s progressed, “major problems, such as the environment, over-population, food scarcity, the role of women, habitat destruction and unemployment were brought to the fore, and each new conundrum had an independent career that demanded both public and institutional consideration.”¹⁵⁶ What these numerous theories have in common, however, is that they originated in the West, and more specifically the international institutions that by this time defined, designed and controlled developmentalism. They often followed new domestic policy prescriptions and emphases in the industrialized countries. For example, “Basic Needs” followed on the heels of the War on Poverty in the United States, which may have suggested the model.¹⁵⁷ Emphasis on the role of women in development cannot be separated from the feminist movement in the United States. Environmental concerns surfaced as the environment became an issue in the United States and Europe.¹⁵⁸ This pedigree highlights the extent to which policies are designed and imposed separate and apart from the communities they purport to serve.¹⁵⁹

On the other hand, the complex responses, both real and anticipated, of Third World peoples to development interventions cannot be discounted. The idea of meeting “Basic Needs” for example, was largely a response to Cold War concerns that poor populations may be susceptible to communist subversion.¹⁶⁰

¹⁵⁵ MITTELMAN & PASHA, *supra* note 59, at 93. The problem was that neither theorists nor NGOs bothered with the endogenous cultures from which successful grassroots institutions might emerge. *Id.* See also McGee, *supra* note 114, at 92; Majid Rahnema, *Participation*, in THE DEVELOPMENT DICTIONARY, *supra* note 1, at 116 [hereinafter Rahnema, *Participation*].

¹⁵⁶ “The complex relation between one particular problem and the other problems would be established and then unified with the problem currently at the center of the process.” Esteva, *Development*, in THE DEVELOPMENT DICTIONARY at 14.

¹⁵⁷ Wolfgang Sachs, *Environment*, in THE POST-DEVELOPMENT READER, *supra* note 17, at 26 (noting that the ebb and flow of international development theories generally follow political sensibilities in the West). For a discussion of the emergence of “basic needs” as a development strategy, see Arturo Escobar, *Planning*, in THE POST-DEVELOPMENT READER, *supra* note 17, at 137–39 [hereinafter Escobar, *Planning*]; see also Illich, *supra* note 42, at 88–101.

¹⁵⁸ Sachs, *supra* note 157, at 26.

¹⁵⁹ McGee, *supra* note 114, at 92; Rahnema, *supra* note 155, at 116.

¹⁶⁰ See Rajagopal, *From Resistance to Renewal*, *supra* note 87.

Micro-development and participation are partly in response to policy failures, but may also have been responses to changing perceptions of the objects of development.¹⁶¹ Certainly, the relationship between developers and the objects of development were and remain complex. Nonetheless, it is quite apparent that the majority of power has resided in the developers, as the lost decade for development amply demonstrates.

3. *The Third World Debt Crisis and the “Lost Decade” for Development (1980-1990)*

The 1980s are often termed development’s “lost decade”¹⁶² as a combination of factors led to the debacle of structural adjustment.¹⁶³ Chief among these factors was what has come to be known as the Third World debt crisis, which even today remains a critical issue.¹⁶⁴ Most analysts trace the roots of the Third World debt crisis to the oil crises of the early and mid 1970s,

¹⁶¹ For an analysis of participation, see Rahnama, *supra* note 155, at 116. The emergence of these paradigms may also reflect the influence of NGOS. McGee, *supra* note 114, at 92.

¹⁶² On December 5, 1980, the UN General Assembly approved Resolution 35/36 that established the need for a Third Development Decade for the 1980s. It called for accelerating development, promoting economic and social development, reducing disparities between Northern and Southern tier countries, and early eradication of poverty and dependency. The definitive objective was the “constant improvement of the well being of the entire population through full participation in the process of development and the fair distribution of benefits to women.” G.A. Res. 36, U.N. GAOR, 35th Sess., 83d plen. mtg., at 106, U.N. Doc. A/RES/35/36 (1980). Part of the strategy included establishing a new international economic order, which would include industrialization and a more stable, equitable and effective international monetary system. OZMANCZYK, *supra* note 142, at 528.

¹⁶³ See *infra* notes 165–69 and accompanying text.

¹⁶⁴ The crushing burden of this debt continues to cement the dependent status of the poorest countries in the international financial system. The combined total external debt of the Third World now exceeds two trillion dollars. See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1999, at 196 (1999). The legion and, thus far, unsuccessful proposals for resolving the crisis have included the “Baker plan”; the “Brady plan”; “debt-for-equity,” “debt-for-nature,” and “debt-for-development” plans; “securitization”; and the “Miyazawa,” “Mitterand,” and “Robinson” proposals. Sylvester, *supra* note 6, at 265–76. The program currently in effect is the Heavily Indebted Poor Countries (“HIPC”) Debt Initiative. HIPC was launched by the World Bank and the IMF in 1996, and then revised in 1999. Assistance provided by HIPC is in addition to such relief as a debtor country may be able to arrange directly with creditors. The World Bank’s web site outlines the initiative as follows:

when spiking oil prices simultaneously impoverished oil-importing Third World countries and flooded international financial markets with oil profits in need of investment.¹⁶⁵ The Organization of Petroleum Exporting Countries (“OPEC”) became “a major creditor of the United States and Western Multinational banks¹⁶⁶ that in turn loaned the money to poor, often politically unstable Third World countries.”¹⁶⁷ Left with massive loans that carried skyrocketing interest rates, and at the same time unable

Eligible countries will qualify for debt relief in two stages. In the first stage the debtor country will need to demonstrate the capacity to use prudently the assistance granted by establishing a satisfactory track record, normally of three years. . . . In the second stage . . . the country will implement a full-fledged poverty reduction strategy, which has been prepared with broad participation of civil society, and an agreed set of measures aimed at enhancing economic growth.

The World Bank Group, *Ethiopia Receives Debt Relief Under HIPC Initiative: Total Support Worth US\$1.9 Billion*, at <http://www.worldbank.org/hipc/about/background.html> (last visited July 13, 2003). The program now involves 42 countries: 34 in Africa, four in Latin America, three in Asia and one in the Middle East. The World Bank Group, *HIPC, HIPC Map*, at <http://www.worldbank.org/hipc/about/map/map.html> (last visited July 13, 2003). The results of the HIPC Initiative remain to be seen. Its implementation to date, however, has been no less top-down and inflexible than previous IFI programs, according to participating country government officials with whom one of the present authors has spoken. Professor Thomas observes that, “[t]he debt burden is directly related to world hunger and poverty because debtor governments must divert precious and scarce resources to paying down external debt instead of meeting the pressing needs of their populations.” Chantal Thomas, *International Debt Forgiveness and Global Poverty Reduction*, 27 *FORDHAM URB. L.J.* 1711, 1712 (2000). Many Third World governments spend more than twice as much servicing external debt as they do on health and education. See Oxfam International Advocacy Office & UNICEF, *Debt Relief and Poverty Reduction: Meeting the Challenge*, § 2.1 (1999), available at http://www.oxfam.org/eng/pdfs/pp9908_debt_relief_and_poverty_reduction.pdf (last visited Feb. 22, 2004). “In Zambia – where infant mortality rates are increasing, over half a million children are out of school, and illiteracy is rising – debt servicing claims more of the national budget than health and education combined.” *Id.*, at § 3.2 (emphasis omitted).

¹⁶⁵ Jerome I. Levinson, *A Perspective on the Debt Crisis*, 4 *AM. U. J. INT’L L. & POL’Y* 489 (1989).

¹⁶⁶ Oil prices, which had increased five-fold between 1971 and 1974, doubled again in 1980. *Id.* at 491, 495–96.

¹⁶⁷ By 1974, OPEC annual revenues exceeded \$100 billion. Sylvester, *supra* note 6, at 264. The precariousness of the situation was compounded by political instability in Middle East, the 1979 fall of the Shah of Iran, and double digit inflation in the United States. *Id.*

to raise sufficient revenues through exports to pay these debts, Third World nations acquired growing deficits.¹⁶⁸

Structural adjustment became the method by which debtor countries were to correct ballooning deficits.¹⁶⁹ These programs transformed the IMF from an institution that had been primarily concerned with stabilizing global exchange rates, into one deeply involved in the social and political policies of the poorest countries of the Third World.¹⁷⁰ IMF lending has always been conditional, but the short-term lending provisions originally utilized by the IMF were thought inadequate to address the development problems faced by Third World nations. So longer-term financing arrangements were implemented and the IMF broadened its traditional scope of inquiry to include evaluations of domestic issues such as labor, health care, and agriculture.¹⁷¹

¹⁶⁸ *Id.* at 265 (Noting that these developments affected Third World debtors in two critical ways. First, a significant portion of the loans carried floating interest rates, and these rates skyrocketed. Second, because of tight money and weakened demand, Third World debtors had trouble selling their exports to raise revenue. In 1982, Mexico made its historic declaration of inability to meet even the interest payments on its external debts, and the “Third World debt crisis” was well on its way to becoming a household phrase.)

¹⁶⁹ Rajesh Swaminathan, *Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights*, 37 COLUM. J. TRANSNAT'L L. 161 (1998); Anthony, *supra* note 98. Adjustment lending consisted of six core objectives. These were: “[1] raising saving rates, [2] securing financial stability, [3] liberalizing and opening economies to foreign trade, [4] reducing state intervention and making markets more efficient, [5] reorienting government spending and improving revenue collection, and [6] mobilizing external sources.” IMF Development and Review Department, *Experience Under the IMF's Enhanced Structural Adjustment Facility*, FIN. & DEV., Sept. 1997, at 32, available at <http://www.imf.org/external/pubs/ft/fandd/1997/09/pdf/imf.pdf> (last visited Nov. 16, 2003).

¹⁷⁰ Swaminathan, *supra* note 169; Bradlow, *supra* note 98; Anthony, *supra* note 98. Organization of Economic Cooperation and Development (“OECD”) members and countries such as Brazil, Mexico, South Korea, Taiwan and Thailand could bypass the IMF and its constraints. Carreau, *supra* note 91, at 1996.

¹⁷¹ Swaminathan, *supra* note 169, at 178–79; Bradlow, *supra* note 98. The IMF's Articles of Agreement explicitly prohibits any consideration of a nation's political affairs in making loan determinations. Bradlow, *supra* note 98, Carreau, *supra* note 91, at 1997. Indeed, the IMF was to only be concerned with attaining specifically prescribed macroeconomic goals, rather than with how a Member State actually reached those goals. Although conditions were always attached to IMF lending, they were limited to macro-economic variables such as debt, money supply, and inflation. *Id.* But with its involvement in the Third World, these constraints began to dissolve, as the Fund's primary role shifted to handling the economies of developing countries and, more recently, countries in transition.

By the mid-1980s, the World Bank had also begun to grant loans for adjustment purposes.¹⁷² Loans were now being made to meet balance-of-payments difficulties rather than for specific projects,¹⁷³ and these loans were conditional on the debtor nation's promise to take certain steps to reform "inappropriate public policies".¹⁷⁴ These loans were the Bank's first foray into the domestic policies of its debtors, and were the predecessor of structural adjustment programs ("SAPs").¹⁷⁵ Although the Bank had been steadily embracing a broader vision of its role in the development process,¹⁷⁶ it had yet to involve itself directly in the social or political affairs of its borrowers.¹⁷⁷ As the international debt crisis widened and deepened,¹⁷⁸ however, the World Bank

Moreover, stabilization programs sponsored and approved by the Fund are 'a seal of international approval of a State's economic policies that acts as a de facto guarantee for prospective private lenders. *Id.*

¹⁷² *Id.* at 1999. Loans were made for adjustment in given sectors (sector adjustment), or for national economies as a whole (structural adjustment).

¹⁷³ Tsai, *supra* note 84, at 1331–32; Swaminathan, *supra* note 169, at 169–70; Weidner, *supra* note 141, at 200.

¹⁷⁴ The Bank, of course, determined which policies were "appropriate" – and it did so against the backdrop of the "cold war" between the West and the Soviet bloc. Weidner, *supra* note 141.

¹⁷⁵ Initially, the Bank developed two types of policy-based loans for the Third World. The first of these was termed a "structural adjustment loan," or SAL. SALs generally run eight to ten years and require the borrowing country to conform to certain Bank guidelines regarding economic policies. The stated objectives of SALs are: "(1) correcting balance of payments imbalances, (2) eliminating distortions and promoting microeconomic efficiency, (3) reducing high inflation rates, (4) protecting or resuming output growth, and (5) minimizing the cost of adjustment to the poorest" segments of the population. The second type of policy-based lending is "sector adjustment loans," or SECALs. SECALs are similar to SALs in that both are conditioned on implementing policy-based initiatives. SECALs, however, are generally more narrowly defined, and specific sectors of the economy are targeted for fiscal reform. Usually the focus is on exports, agriculture, industry, energy, and public enterprises. SALs and SECALS are both referred to as structural adjustment programs (SAPs) because they promote economic liberalization by forcing nations to address inequity in their fiscal policies. Carrasco, *supra* note 98, at 29; Tsai, *supra* note 84, at 1320–21; 3 THE WORLD BANK: LENDING ON A GLOBAL SCALE, RETHINKING BRETTON WOODS 11 (Jo Marie Griesgraber & Bernhard G. Gunter eds., 1996).

¹⁷⁶ Carreau, *supra* note 91, at 1999.

¹⁷⁷ Bradlow, *supra* note 98, at 38–39; Uriz, *supra* note 108, at 203–04.

¹⁷⁸ See *supra*, notes 164–65 and accompanying text for discussion of the magnitude and significance of Third World debt.

began to use structural adjustment programs in an ever more intrusive way.¹⁷⁹

The Bank concluded that the primary impediment to economic growth was Third World government policies.¹⁸⁰ Rather than relying entirely on macroeconomic indicators,¹⁸¹ The World Bank began to condition its loans on Bank judgments regarding an increasingly wide range of domestic policies.¹⁸² The World Bank was prohibited from becoming involved in the politics of borrowing nations by its Articles of Agreement,¹⁸³ so its growing role in the domestic policies of its borrowers was rationalized by broadly interpreting the concept of "economic development."¹⁸⁴ Under this rubric, the World Bank's scope increased to encompass legal and judicial reform, family planning, education, developing the private sector and health care, among various other initiatives.¹⁸⁵ Moreover, if structural adjustment conditions were not met, future assistance could be denied¹⁸⁶ and adherence to these conditions was critical in securing access to private capital.¹⁸⁷ Consequently, the pressure on countries facing economic crisis to conform to SAP conditions was extraordinarily high.¹⁸⁸

¹⁷⁹ Carrasco, *supra* note 98, at 38–39; Bradlow, *supra* note 98, at 57.

¹⁸⁰ The bank turned to alleviating Third World poverty by promoting economic growth.

¹⁸¹ IMF Articles of Agreement, *supra* note 98, art. 4(1); Bradlow, *supra* note 98, at 57.

¹⁸² Bradlow, *supra* note 98, at 57 (noting that in the 1980s, the Bank became heavily involved in funding development projects in such spheres as health, education, agriculture and housing).

¹⁸³ Bradlow, *supra* note 98, at 47, 54.

¹⁸⁴ Weidner, *supra* note 141, at 198–99; Bradlow, *supra* note 98, at 60.

¹⁸⁵ See Bradlow, *supra* note 98, at 57; Uriz, *supra* note 108, at 205; Weidner, *supra* note 141, at 198–99.

¹⁸⁶ Carrasco, *supra* note 98, at 38–39; Tsai, *supra* note 84, at 1322.

¹⁸⁷ The "seal of approval" earned by complying with World Bank and IMF credit packages was critical to attaining private loans from the commercial banks of developed countries. See Tsai, *supra* note 84, at 1322; Galano, *supra* note 84, at 339; Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443, 445 (1997).

¹⁸⁸ Tsai, *supra* note 84, at 1322.

Some critics contend that SAPs amount to economic coercion,¹⁸⁹ and have caused legendary devastation.¹⁹⁰ Structural adjustment led to a severe deterioration in living conditions,¹⁹¹ as cutbacks in government spending led to drastic declines in medical services, public education and other services.¹⁹² This often led to violent protests as basic necessities became unaffordable,¹⁹³ and popular protests sometimes triggered government repression. Structural adjustment thus came to be associated with deteriorations in freedom and, at times, human rights abuses.¹⁹⁴

Some observers maintain that Structural Adjustment Programs were never intended to achieve their stated purposes, but were only implemented to further Western interests, such as the repayment of Third World debt to Western banks.¹⁹⁵ Structural adjustment, in part, entailed turning Third World countries into “favorable investment climates” for multinational corporations.¹⁹⁶ But this goal often conflicted with meeting the basic

¹⁸⁹ 3 THE WORLD BANK, *supra* note 175, at 134; George B.N. Ayittey, *Aid for Black Elephants: How Foreign Assistance Has Failed Africa*, in PERPETUATING POVERTY: THE WORLD BANK, THE IMF, AND THE DEVELOPING WORLD 115–16, 140–42 (Doug Bandow & Ian Vásquez eds., 1994).

¹⁹⁰ Swaminathan, *supra* note 169, at 177–89.

¹⁹¹ See Anghie, *Time Present and Time Past*, *supra* note 84, at 252–53 (commenting on adverse effects of IFI structural adjustment programs in the Third World.). Somalia and Rwanda are two examples of states that were subjects of extensive structural adjustment programs that may have contributed to their collapse. See *id.* at 263.

¹⁹² With reductions in the size of governments, unemployment rose in countries where the state was the largest employer, and privatizing state activities often contributed to more hardships for the working poor. Swaminathan, *supra* note 169, at 180–82; Ayittey, *supra* note 189, at 140–41; Orford, *supra* note 187, at 470–71.

¹⁹³ Swaminathan, *supra* note 169, at 180–82; Ayittey, *supra* note 189, at 140–41.

¹⁹⁴ Orford, *supra* note 187, at 456; Swaminathan, *supra* note 169, at 181; Rajagopal, *From Resistance to Renewal*, *supra* note 87, at 575; 3 THE WORLD BANK, *supra* note 175, at 14–15, 46–48; PERPETUATING POVERTY, *supra* note 189, at 59–60.

¹⁹⁵ For example, James Gathii opines that structural adjustment in Sub-Saharan Africa primarily focused on producing a conducive framework within which the repayment of the debts owed by African states to international banks and lending agencies is facilitated, and the unhindered influx of new international capital into these countries is secured. Gathii, *Good Governance*, *supra* note 84, at 207.

¹⁹⁶ Structural adjustment programs typically involved currency devaluations, producer price increases, trade liberalization, privatization, and a range of specific institutional changes prescribed under the heading of “good governance.” Anghie, *Time Present and Time Past*, *supra* note 84, at 252–53. See also, Antony

needs of the general public,¹⁹⁷ as did trade liberalization.¹⁹⁸ But even when viewed more favorably, SAPs and the conditions that they imposed curtailed the governing capacity of member states by vastly limiting the range of available economic, political and social policy options.¹⁹⁹ Once a state accepted financial assistance from World Bank or IMF entities, a great deal of state decision-making authority was effectively delegated to these institutions,²⁰⁰ and the debtor nation, in effect, became an instrument of the IFI, as lending officials exerted control over a wide range of domestic sectors, including those entrusted with providing education, health care and social services, and with protecting the rights of the nation's workforce.²⁰¹ By shaping and determining the policy choices available to governments, conditionalities foreclose political prerogatives that are generally thought to constitute the core of state sovereignty.²⁰²

Structural adjustment was in most respects a failure, for as the 1980s drew to a close, developing countries were poorer, more debt-ridden, and even less able to provide services such as education and health care. Governments were also facing angry

Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887, 908 (2000) (discussing good governance and the IFI goal of furthering neo-liberal economic policies through structural adjustment entailing privatization, trade liberalization and currency devaluation).

¹⁹⁷ Swaminathan, *supra* note 169, at 181 (noting that regulations that protected labor, for example, were usually early casualties of such policies); Orford, *supra* note 187, at 453–55. Higher interest rates may attract foreign investors, but they can also inflict unbearable economic pressures on small businesses, including farmers who may be forced to sell their land because they can no longer obtain operating capital. 3 THE WORLD BANK, *supra* note 175, at 10, 47.

¹⁹⁸ Trade liberalization often had devastating effects on Third World countries. Eliminating tariffs, for example, can promote access to domestic markets, but it can also make it much more difficult for local producers to compete against foreign suppliers; as local businesses fail, additional jobs are lost. Encouraging export production also leads to the increased harvesting of cash crops, which can cause domestic food shortages and accelerate soil erosion. SAPs thus tended to make countries more dependent on imported goods and manufactured items, and more predisposed to overexploit their natural resources. 3 THE WORLD BANK, *supra* note 175, at 47.

¹⁹⁹ Tsai, *supra* note 84, at 1321; Orford, *supra* note 187, at 470.

²⁰⁰ Of course the specific terms of the agreements governing this assistance varied as did the actual conditions imposed.

²⁰¹ *Id.* at 470–71.

²⁰² Tsai, *supra* note 84, at 1319; Galano, *supra* note 84, at 323; Orford, *supra* note 187, at 470.

populations who were no longer able to obtain the most elementary goods and services. Sovereign policy choices and prerogatives were increasingly limited and shaped by international predilections emanating from international financial institutions and by the escalating rhetoric of globalization. The dramatic failure of SAPs in addressing the economic disasters experienced by much of Sub-Saharan Africa and other countries during the 1980s prompted yet another retooling of the IFI approach to the Third World.²⁰³ It is in this environment that the “Washington Consensus” began to take shape.

4. *The Washington “Consensus” and the “New” Conditionality*²⁰⁴

The 1990s brought the collapse of the Soviet Union and the end of the Cold War, making the United States the world’s sole superpower. With the demise of the Soviet Union and China’s move towards a market economy, alternative economic models disappeared and the political and economic views of the United States began to completely dominate both theory and practice. Modernization was now defined as integration into the global economy, and development as economic liberalization, privatization and embracing the “free market”.²⁰⁵

The World Bank articulated the new orthodoxy in a series of reports that began in 1991 and culminated with its 1999 Report, “Entering Into the 21st Century”, which consolidated a decade-long process of devising and defining what the World Bank

²⁰³ Watts, *supra* note 24, at 58.

²⁰⁴ As had been the case since 1961, the UN General Assembly declared yet another development decade, to begin on January 1, 1990. Resolution 45/199 again declared the objective of accelerated development, calling for a surge in the pace of economic growth in developing countries; a development process that is responsive to social needs, seeks to reduce extreme poverty, promotes the development and utilization of human resources and skills and is environmentally sustainable; an improvement in international monetary, financial and trade mechanisms in support of development; a strong and stable world economy with sound national and international macroeconomic management; the strengthening of international cooperation for development; and special efforts to assist the least developed countries. G.A. Res. 199, U.N. GAOR, 45th Sess., 71st plen. mtg., U.N. Doc. A/RES/45/199 (1990).

²⁰⁵ MITTELMAN & PASHA, *supra* note 59, at 42. It is sometimes termed the three Ds: denationalization, deregulation, and devaluation. *Id.*

termed a Comprehensive Development Framework.²⁰⁶ With this report, development indeed became all encompassing.²⁰⁷ According to the Bank, the underlying premise of the CDF is that growth must include consideration of structural,²⁰⁸ human,²⁰⁹ physical,²¹⁰ and sector-specific²¹¹ aspects of development. All of these strategies were to be achieved through market-friendly policies and market incentives.²¹² The necessary actors would be governments, local organizations,²¹³ and non-governmental organizations (“NGOs”).²¹⁴ The CDF also co-opted development

²⁰⁶ For a discussion of these reports, which were promulgated throughout the 1990s, see Cammack, *supra* note 120, at 157, 164.

²⁰⁷ The World Bank Group, CDF Proposal, *A Proposal for a Comprehensive Development Framework (A Discussion Draft)* (Jan. 21, 1999) (memorandum from James D. Wolfensohn, President, to the Board, Management, and Staff of the World Bank Group), available at <http://siteresources.worldbank.org/CDF/Resources/cdf.pdf> (last visited Feb. 22, 2004) [hereinafter “CDF Proposal”]; Blake, *supra* note 55, at 160. According to this report, the World Bank would henceforth be guided by four guiding principles: (1) development goals and strategies should be determined by individual member states, and not by the World Bank; (2) development should be holistic in nature, so that growth focuses not just on economic variables, but also on social and political implications; (3) the development process should involve all actors affected by World Bank lending practices; and (4) development policies should have a long-term focus. CDF Proposal, *supra* this note, at 22–24. The Bank believes the CDF is an improvement over its previous adherence to macroeconomic indicators as the sole gauge of a nation’s economic health, while acknowledging that the CDF has not met with universal approval. See, e.g., Uriz, *supra* note 108, at 205; Blake, *supra* note 55, at 177.

²⁰⁸ Structural aspects included good and clean governance, a well-organized financial system, and an adequate social safety net to accommodate the short-term negative impact of some World Bank programs. CDF Proposal, *supra* note 207, at 10–12; see Blake, *supra* note 55, at 162.

²⁰⁹ Human aspects encompassed education, health, and population issues. CDF Proposal, *supra* note 207, at 13–14; see Blake, *supra* note 55, at 162.

²¹⁰ Physical characteristics for growth included quantifiable achievements in building infrastructure, including adequate water and sewer systems, access to energy, access and transportation inlays. CDF Proposal, *supra* note 207, at 15–18; see Blake, *supra* note 55, at 163.

²¹¹ Sector-specific aspects of development referred to strategies to promote the advancement of rural, urban, and private sectors. CDF Proposal, *supra* note 207, at 18–20; Cammack, *supra* note 120, at 157, 164.

²¹² Cammack, *supra* note 120, at 157, 164.

²¹³ Weidner, *supra* note 141, at 223–24; Blake, *supra* note 55, at 163.

²¹⁴ NGOs had long been critical of – and largely ignored by – the international financial institutions. The Bank now invites selected NGOs to take part in development projects. By 1999, 52% of Bank projects involved some type of NGO

strategies previously termed “alternative”²¹⁵ – such as environmental management, human resource development, building self-reliance,²¹⁶ and concentrating on civil society,²¹⁷ social institutions, and human rights.²¹⁸

The groundwork for the CDF was laid in the 1989 Report, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, which introduced “good governance” as a programmatic priority.²¹⁹ Defined as an initiative to build pluralistic institutions that would perform functions in much the same manner as Western governments,²²⁰ good governance also emphasized privatization and “marketization”, as opposed to government regulation of the

participation. Weidner, *supra* note 141, at 220. A rather striking and wide-ranging example of NGO participation in World Bank programs began in 1995 when the Bank entered into a joint initiative with the Structural Adjustment Participatory Review Initiative Network (SAPRIN). Today, SAPRIN works in 17 countries where it consults with World Bank officials on the effects of specific lending arrangements. The objective of SAPRIN is to legitimize local knowledge in the analysis of economic-reform programs and to make space for, and institutionalize, grassroots involvement in macroeconomic decision-making. See Structural Adjustment Participatory Review International Network, at <http://www.saprin.org> (last visited Nov. 16, 2003).

²¹⁵ Kothari & Minogue, *supra* note 7, at 9.

²¹⁶ Watts, *supra* note 24, at 58. The rationale behind building self-reliance was “the desire to release those energies that permit ordinary people to take charge of their lives.” *Id.*

²¹⁷ Civil society is also central in the alternatives to development paradigm, which has focused on “new social movements.” *Id.* at 58. Both the new development economics of the 1990s and the anti-development paradigm assert alternative strategies; both speak of an expanded role for civil society and both question the form, function and character of the developmental state. *Id.* at 59.

²¹⁸ *Id.* at 58.

²¹⁹ Uriz, *supra* note 108, at 204. The good governance initiative was defined as “a systematic effort to build pluralistic institutional structures, a determination to respect the rule of law, and a vigorous protection of freedom of the press and human rights.” *Id.*

²²⁰ *Id.* at 204–05 (noting that good governance has been criticized as entailing a variety of interventions that are inconsistent with the Bank’s mandate and, as a doubtful solution to the multifaceted crises of the Third World). Professor Gathii contends that “good governance” policies are based on the questionable assumption that reducing governmental intervention in the economy will automatically increase economic growth and personal freedom. The Organization of African Unity and the Economic Commission on Africa identified external economic dependence as a major factor in Africa’s poor economic performance in the Lagos Report of 1980, and recommended that external dependence on Western countries be reduced and replaced with a self-sustaining development strategy based

economy.²²¹ The 1990 World Development Report proposed that the poor be integrated into the labor force.²²² Thus, at the center of the CDF agenda is incorporating the poor into what is now the global capitalist system, by putting them to work in the service of international capital.²²³ Throughout the 1990s, the Bank promulgated a series of reports prescribing market friendly interventions such as creating a competitive environment where private enterprises can flourish, integrating into the global economy, and investing in people so that the populace might participate in the market.²²⁴ In addition, governments were urged to define and protect property rights; provide effective legal, judicial, and regulatory systems; make available an efficient civil service and protect the environment.²²⁵ Previous orthodoxies have been reversed, as the need for import substitution and a strong state have been replaced by export-led growth and a state that exists

on the maximum internal use of the continent's resources. Gathii, *Good Governance*, *supra* note 84, at 109. Professor Gathii also maintains that the good governance agenda focuses too much attention on internal policy failures within Third World countries and not enough on the historical and international economic factors that Southern governments believe are the primary causes of their current difficulties. See Gathii, *Africa Predicaments*, *supra* note 110, at 1008 (noting that African governments take the opposite view of IFIs and other proponents of the good governance agenda; and contrasting the Lagos Report with the Berg Report's emphasis on improper economic policies pursued by African governments as the main cause of the crisis).

²²¹ See Gathii, *Good Governance*, *supra* note 84, at 108.

²²² Cammack, *supra* note 120, at 164. This policy promoted a pattern of growth that would utilize the most abundant asset possessed by the poor – their labor. The prevailing logic is that governments should pursue policies that provide businesses (capital) across the globe with an adequate number of healthy and educated workers, and to impose disciplines that ensure these workers remain available. Basic social services, such as primary education, health care and family planning, which make it possible for the poor to work, are to be made available and this would more easily allow capital to exploit the global labor market. Benefits are to be targeted to potential workers, which then makes it difficult to survive outside of the labor market, and creates safety nets that propel workers back into the market if they temporarily drop out.

²²³ *Id.* As Professor Cammack puts it, the CDF entails putting the poor to work, in the name of poverty alleviation. Of course, it also means low wage workers for global capital.

²²⁴ For example, governments should provide health care, education, nutrition and family planning services, which are spheres that often are not well-served by the private market. *Id.* at 166.

²²⁵ *Id.*

primarily to support private markets.²²⁶ Thus, the Comprehensive Development Framework concretizes the new neo-liberal orthodoxy of markets and democracy.

It is evident that the World Bank has sought to respond to some of its critics and move beyond the macroeconomic failures of structural adjustment. The problem is that the Bank and other international financial institutions²²⁷ are only capable of modifying their policies within the same discursive space. The Comprehensive Development Framework demonstrates just how all-

²²⁶ State managed stabilization policies to prevent recession or depression have given way to internationally managed policies of restructuring, often deliberately inducing domestic recession; re-distributive taxation to bring about greater equality of incomes has been abandoned in favor fiscal reform that rewards entrepreneurship and accentuates inequality; measures to regulate prices have been dropped; public control over labor and money markets has been systematically stripped away; the indefinite extension of the sphere of wants to be satisfied by public enterprise has been thrown into reverse and social security legislation has been restructured to promote rather than work against market forces." *Id.* at 164.

²²⁷ The IMF approach to the Third World has continued to evolve, but it has been "less comprehensive" in its interventions in the name of development. Although it is outside the scope of its mandate, the IMF expressly supports Third World economic growth. The IMF also now includes poverty alleviation among its major goals, although its Articles of Agreement do not contemplate this objective. Carrasco, *supra* note 98, at 39–41; Rajagopal, *From Resistance to Renewal*, *supra* note 87, at 569–74. The IMF created the Poverty Reduction and Growth Facility (PRGF) in 1999. As described by the IMF, this new endeavor "aims at making poverty reduction efforts among low-income members a key and more explicit element of a renewed growth-oriented strategy." Creation of the PRGF was significant because it was the first time the IMF had officially declared that "growth-policies should be implemented in a framework in which the pressing need to reduce poverty is also a central objective." International Monetary Fund, Policy Development and Review Department, *The Poverty Reduction and Growth Facility (PRGF) – Operational Issues* (Dec. 13, 1999), at <http://www.imf.org/external/np/pdr/prsp/poverty2.htm> (last visited June 7, 2002) [hereinafter *PRGF*]. Instead of pursuing strictly macroeconomic objectives, "high quality" economic development has become the IMF's new emphasis, and "high quality" development includes considering the social and political consequences of IMF lending. Carrasco, *supra* note 98, at 569–74. "Good governance" in borrowing countries is also currently a stated goal of the IMF, and thus the IMF's stated objectives are now more similar to those of the World Bank. *Id.*; *PRGF*, *supra* note 227. Unlike the World Bank the IMF has not formalized relations with NGOs. Bradlow, *supra* note 98, at 77. The IMF continues to utilize adjustment lending. *PGRF*, *supra* note 227. Yet even the IMF and World Bank acknowledge it is problematic. See generally International Monetary Fund, *Annual Report of the Executive Board for the Financial Year Ended April 30, 1997*, available at <http://www.imf.org/external/pubs/ft/ar/97/97imf.htm> (last visited Feb. 22, 2004); WORLD BANK, GLOBAL DEVELOPMENT FINANCE (1998).

inclusive and wide-ranging interventions in the Third World have become. Unfortunately, these economic programs have in reality exacerbated inequality and poverty within the populations of many Third World countries.²²⁸

III. LEGAL CONSTRUCTIONS OF DEVELOPMENT

As the cycles of conventional wisdom promulgated by international institutions waxed and waned, the nations of the Third World began to take rather bold steps in the international legal arena to obtain and solidify a legal right to development. While firmly rooted in the belief that development was the ultimate objective, the movements that emerged in the 1960s and 1970s were quite strident attempts to take control of this process and to transform the economic and political relationship between the North and the South.²²⁹ As the lost development decade of the 1980s unfolded and these movements collapsed, Third World states attempted to incorporate development into the burgeoning rights discourse, and thus to explicitly claim comprehensive development as a legal right. More recently this quest has ripened into the more radical demand for reparations.²³⁰ These efforts in many ways mirror the larger evolution of the development discourse; with the movement to establish a law of international development, countries of the Third World seized the legal initiative to establish development as a legally mandated imperative.

²²⁸ See Anghie, *Time Present and Time Past*, *supra* note 84, at 252–53 (noting that IFI loans are part of an adjustment lending process and are supposed to ameliorate some of the consequences of the fundamental changes the Bank requires countries to undertake); Chua, *supra* note 80.

²²⁹ The emergence of a “Third World,” that stood separate and apart from the first and second world also emerged during this era, as did the nationalizations of oil companies, events that empowered and emboldened nations in the Middle East. Given the raging Cold War, the time may also have been ripe to make demands for social justice. The 1960s was also a time of political protest in the United States and across Europe, and thus “demands” for justice were part of a larger trend, so to speak.

²³⁰ At this point, the demand for reparations has only been articulated in limited forums and within few documents. See *infra* notes 299–310 and accompanying text for a discussion of reparations. It cannot be equated with the sustained movements for Permanent Sovereignty over Natural Resources, the New International Economic Order, or the Right to Development.

The movement to establish a law of international development²³¹ became the focal point and the vehicle for a profound and historic political confrontation between the West and the Third World. Although couched in legal terms, this confrontation was and remains fundamentally ideological.²³² International law was an instrument that promoted the interests of the North at the expense of the South. The South now sought to turn the

²³¹ Development law or the “law of development” was recognized as branch of international law in the 1960s. Héctor Gros Espiell, *The Right of Development as a Human Right*, 16 TEX. INT’L. L.J. 189, 190 (1981). After 1960 the United Nations began to give attention to the concept of development, and gradually shaped a new juridical discipline, “the international law of development,” which attempted to characterize, and make enforceable a system of rights and obligations. *Id.* Not to be confused with the “law and development” discussed, *see supra* Part I.D, the international law of development comprises principles promoting the economic and social development of the Third World, while seeking to strengthen and assert their position in international relations. Nina M. Eejima, *Sustainable Development and the Search for a Better Environment, a Better World: A Work in Progress*, 18 UCLA J. ENV’T. L. & POL’Y 99, 109 (1999/2000). Indeed, the law of development rejects a key premise of law and development, holding instead that “[t]he problem was not simply that economic and social institutions in the peripheral countries were not modern. . .but rather that these societies were characterized by. . . structures where the economic and social institutions were geared to meet the demands of developed societies rather than the needs of the developing societies.” Chibundu, *supra* note 74, at 191.

²³² Although it gained widespread attention in the 1960s and 1970s, the roots of the law of development go considerably deeper. Early antecedents include the Drago Doctrine, by which Latin American states sought to prohibit armed foreign (i.e., U.S.) intervention predicated on civil disputes. *See* Convention on Rights and Duties of States, Dec. 26, 1933, art. 9, 49 Stat. 3097, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934). In 1902, Argentina’s Minister of Foreign Affairs informed the United States that forcible U.S. intervention in Argentina to secure payment of debts allegedly owed to private U.S. citizens and companies was unjustified and dangerous. *Argentine Republic: “Monroe Doctrine” and Diplomatic Claims of European Powers*, in UNITED STATES DEPARTMENT OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, ISSUE 1903, *Argentine Republic: “Monroe Doctrine” and Diplomatic Claims of European Powers* 1–5 (1903) (note from Luis M. Drago to the U.S. Department of State). Professor Richard Falk has observed that the concept of a state protecting its nationals abroad has also been used “as a means to impose the external will of richer and more powerful nations [on others].” Richard Falk, *Historical Tendencies, Modernizing and Revolutionary Nations, and the International Legal Order*. 8 HOW. L. J. 128, 133 (1962).

tables by using international law to re-order the international political and economic sphere and to achieve the goal of development.²³³ Coinciding with the rise of dependency theory, which posed a more radical critique of the economic relationships among the countries of the world,²³⁴ and more specifically “the persistent and indeed widening inequalities between the societies of the South and the industrialized countries of the West,”²³⁵ the law of development sought no less than a fundamental change in the relationship between the West and the Third World. With the United Nations Conference on Trade and Development (“UNCTAD”) as their institutional forum,²³⁶ Third World leaders

²³³ The European origin of an international law that purports to be “universal” was and remains a persistent underlying theme. See, e.g., T.O. Elias, *Modern Sources of International Law*, in *TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP* 49 (Wolfgang Friedmann et al. eds., 1972); R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 *INT’L & COMP. L.Q.* 55, 56 (1966); Jorge Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 *INT’L ORG.* 38, 39 (1961); B. ROLING, *INTERNATIONAL LAW IN AN EXPANDED WORLD* 10 (1960); JAMES L. BRIERLY, *THE LAW OF NATIONS* 44 (Oxford University Press 1997). But the problem was not merely with the origin of the law; the problem was with the law’s application. Judge Philip C. Jessup, in describing the need for revising traditional international law, acknowledged the Third World view that “the rules of law were developed by the exploiting imperialistic powers to promote their interests at the expense of the countries which in earlier centuries were either colonies or politically and militarily weak and provided important sources of raw materials and perhaps labor to the exploiting powers.” Philip C. Jessup, *Non-Universal International Law*, 12 *COLUM. J. TRANSNAT’L L.* 415, 419 (1973).

²³⁴ See Snyder, *supra* note 76, at 737 (quoting COLIN LEYS, *UNDERDEVELOPMENT IN KENYA: THE POLITICAL ECONOMY OF NEO-COLONIALISM, 1964-1971* (1975)) (stating that underdevelopment theory is . . . partly a correction and partly an expansion of Marx’s interpretation of history, an expansion of his method and central ideas to a problem which, on a world scale, was still in embryo at his death: the failure of the countries of Asia, Africa, and Latin America to follow a path of autonomous, capitalist development, leading to their “regeneration” after they had been brought within the world capitalist economy). Dependency theory has been criticized as accepting the fundamental premises of the development paradigm. *Id.*

²³⁵ See Chibundu, *supra* note 74, at 189.

²³⁶ Akinsanya & Davies, *supra* note 61, at 209–11 (noting that since it was established in 1964 UNCTAD has been “one of the forums used by the developing countries to press home their demand for a New International Economic Order” and that it has become an “important intervener on behalf of less developed countries in their relations with advanced industrial States” (quoting Robert S. Walters, *UNCTAD: Intervener Between Poor and Rich States*, 7 *J.W.T. L.* 528 (1973))). UNCTAD’s recommendations are not legally binding, however. See

declared that “more than foreign aid, what was needed for the Third World to break out of the vicious circle of poverty was a change in the terms governing its relationship with the industrial world”.²³⁷ Although largely rejected in the West,²³⁸ the international law of development has been championed in the Third World since the 1960s.²³⁹ It has been an avowedly activist movement from its inception,²⁴⁰ and in due course, advocated a broad

also VARGES, *supra* note 61, at 3 (discussing how unification enabled developing countries to be a force that could not be ignored).

²³⁷ See VARGES, *supra* note 61, at 3. Dependency theorists acknowledged that developed countries may at some time have been “undeveloped,” but argued that they never played the role of the “underdeveloped” country within the world capitalist system. See Snyder, *supra* note 76, at 748. The original centers of capitalism established their wealth and their power through incorporating and exploiting other parts of the world. The primary accumulation of capital in the metropolises or center was fed through a drain of wealth from the satellite or peripheral countries, typically involving their colonization, a “surplus drain” which continues to the present day even if its forms may have changed, and direct colonial rule is no longer a necessary condition of this process.

Id. at 726 (quoting Harry Bernstein, *Sociology of Underdevelopment vs. Sociology of Development?*, in DAVID LEHMAN ED., *DEVELOPMENT THEORY: FOUR CRITICAL STUDIES* (David Lehmann ed., 1979)); see also Makau Mutua, *Critical Race Theory and International Law: Convergence and Divergence*, 45 *VILL. L. REV.* 841, 850 (2000). Using critical race theory to evaluate international law, Mutua states, “What the world has witnessed in the last five centuries is the universalization of an international law that is particular to Europe and seeks not universal justice, but an international legal order that erects, preserves and embraces European and American domination of the globe.” *Id.*

²³⁸ Third World leaders warned that the unequal distribution of power threatens peace, and that permitting the existence of such a system could potentially give rise to a “major worldwide revolution.” See VARGES, *supra* note 61, at 6. Given the wholesale rejection of all aspects of the law of development, however, the West apparently did not take this threat seriously, or perhaps believed it had other mechanisms at its disposal to deal with outbreaks of violence.

²³⁹ See generally Schachter, *supra* note 109. Through the international law of development, dependency theorists and their allies attempted to establish an enforceable system of rights and obligations based on international law.

²⁴⁰ According to Professor Espiell,

The affirmation that there is and there must be an international law of development, implies an acceptance that law must be an instrument for the transformation of society, a tool for effective action in the struggle of all peoples and all men against poverty, dependence and ignorance. The international law of development must not be understood as a mere compilation of norms relating to a single subject – development. On the contrary, it constitutes a juridical system bound to enable development and hasten it. It is, therefore, essentially a teleological law, whose characteristics are determined by the mission assigned to it.

range of development-related programs.²⁴¹ The opening gambit, the movement and demand for permanent sovereignty over natural resources was less wide-ranging than what was to follow, but was surely no less far-reaching.

A. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

The movement for permanent sovereignty over natural resources ("PSNR") embodied and symbolized the conflict of economic interests between capital exporting and capital importing nations.²⁴² Control over the natural resources located in what we now call the Third World was a principal impetus for European colonial conquest. As colonialism ended, it was immediately clear to the leaders of newly independent nations that control of those same resources would be the key to future economic viability.²⁴³ Natural resources were the "natural" starting point, and a boundary that developing countries could point to as evidence of the absence of genuine equality in the community of nations.²⁴⁴ Accordingly, newly independent states quickly sought to renegotiate or void the extraordinarily inequitable arrangements that had been imposed upon them during the colonial period, and to

HÉCTOR GROS ESPIELL, *DERECHO INTERNACIONAL DEL DESARROLLO* (1975), translated and quoted in Espiell, *supra* note 231, at 190.

²⁴¹ Tamanaha, *supra* note 68, at 471 (noting such demands as such as "preferential treatment, entitlement to developmental assistance, debt relief, low interest loans or outright grants, and the low-cost transfer of technology").

²⁴² Franz Xavier Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage*, 26 ENV'T'L. L. 1187, 1190 (1996) (citing MILAN BULAJIC, *PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER* 269 (2d ed. 1993)).

²⁴³ See WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* 28, 162, 168 (1972). The natural resources at issue include a vast array of minerals as well as oil and gas.

²⁴⁴ Third World leaders believed that "the right to freely dispose of natural resources and wealth was the seminal source of a series of corollary state rights, including the right to freely determine and control the prospecting, exploration, development, exploitation, use and marketing of its natural resources and to subject such activities to national laws within the limits of its exclusive economic jurisdiction under prevailing international law." See Eejima, *supra* 231, at 110.

establish that the ultimate authority over natural resources is vested in the nation-state where those resources are located.²⁴⁵

Although the movement for PSNR is typically associated with the debate surrounding the December 14, 1962 passage of U.N. General Assembly Resolution 1803,²⁴⁶ in fact, it was underway a full decade earlier.²⁴⁷ Still, the 1962 Resolution and surrounding debate are said by many commentators to reflect the most contentious question of the new international economic order.²⁴⁸ A threshold legal question was whether the inalienability of natural resources constituted a peremptory norm of international law under the doctrine of *jus cogens*, or whether individual cases should be resolved by balancing strict enforcement of contractual obligations under the doctrine of *pacta sunt servanda* against relief based on changed circumstances under the doctrine of *rebus sic stantibus*.²⁴⁹ The concrete manifestation of this seemingly theoretical issue was the enforceability or voidability of long-term concessions providing for the extraction of natural resources on terms extremely favorable to Western based transnational corporations.²⁵⁰ Although these agreements should have been highly suspect based on the circumstances under which they typically were negotiated, Third World governments were having

²⁴⁵ Perrez, *supra* note 242, at 1190.

²⁴⁶ G.A. Res. 1803, U.N. GAOR, 17th Sess., 1194th plen. mtg., U.N. Doc. A/5217 (1962), reprinted in 2 I.L.M. 223 (1963). Resolution 1803 was adopted by a vote of eighty-seven to two, with twelve states abstaining. See KAMAL HOSSAIN, SUBRATA ROY CHOWDHURY EDS., PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW: PRINCIPLE AND PRACTICE 91 (1984); Perrez, *supra* note 242, at 1191-92.

²⁴⁷ In 1952, Chile asserted the concept of permanent sovereignty over natural resources at the U.N. Commission on Human Rights. U.N. Doc. E/CN.4/L.24 (1952). Also in 1952, The General Assembly passed Resolutions 523 (VI) and 626 (VII), the latter entitled: "Right to Exploit Freely Natural Wealth and Resources." G.A. Res. 523, U.N. GAOR, 6th Sess., 360th plen. mtg., Supp. No. 20, U.N. Doc. A/2119 (1952); G.A. Res. 626, U.N. GAOR, 7th Sess., 411th plen. mtg., U.N. Doc. A/PV.411 (1952). See HOSSAIN, *supra* note 246, at 2.

²⁴⁸ See JERZY MAKARCZYK, PRINCIPLES OF A NEW INTERNATIONAL ECONOMIC ORDER: A STUDY OF INTERNATIONAL LAW IN THE MAKING 184, 198, 199 (1988).

²⁴⁹ See HOSSAIN, *supra* note 246.

²⁵⁰ See MAKARCZYK, *supra* note 248.

little success with individual challenges – a series of which were made in arbitrations after World War II.²⁵¹

Therefore, Third World countries sought, through the PSNR declaration, to establish the right to expropriate foreign enterprises if they deemed it necessary to do so.²⁵² It was clear that resolutions according the right to nationalize were widely supported and would be easily passed by the UN General Assembly, so Western interests turned their energy and attention to the issue of compensation for expropriations. Western states and interests contended that the relevant law was “well settled” – state expropriation of foreign-owned property required payment of “prompt, adequate, and effective” compensation under the “Hull formula”.²⁵³ Rejecting the unspoken premise that foreign ownership was presumptively legitimate, and realizing that such a standard would preclude nationalizations in many poor nations, Third World leaders contended that the national tribunals of the host country, in accordance with national law, should determine compensation.²⁵⁴ The standard, ultimately incorporated into U.N. General Assembly Resolution 1803, requires “appropriate compensation.”²⁵⁵ This would appear to reflect a compromise,

²⁵¹ See, e.g., *Saudi Arabia v. Arabian American Oil Co.*, 27 I.L.R. 117 (Arb. Trib. 1958); *Sapphire Int'l Petroleum Ltd. v. Nat'l Iranian Oil Co.*, 35 I.L.R. 136 (Cavin Arb. 1963); *Petroleum Dev. Ltd. v. Sheikh of the Abu Dhabi*, 18 I.L.R. 144 (Arb. Trib. 1951) – all enforcing the validity of long-term pro-Western concessions over the objections of Third World hosts. Consequently, nationalizing these concessions bound host states to pay prompt, adequate and effective compensation to the alien owners.

²⁵² See Perrez, *supra* note 242, at 1191–92.

²⁵³ See Patrick Norton, *A Law for the Future or a Law for the Past? Modern Tribunals and the Law of International Expropriation*, 85 AM. J. INT'L L. 474, 475–76 (1991); Stephen M. Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 A.B.A. J. 463, 465 (1963) [hereinafter Schwebel, *Permanent Sovereignty*]. The “Hull formula” refers to a pronouncement by U.S. Secretary of State Cordell Hull in connection with a 1938 dispute over Mexico's nationalization of foreign-owned oil fields. See G. HACKWORTH, 3 DIGEST OF INTERNATIONAL LAW 655–65 (1942).

²⁵⁴ See G. Roy, *Is the Law of the Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961); M. BEDJAOU, TOWARD A NEW INTERNATIONAL ECONOMIC ORDER (1979); F.V. GARCIA-AMADOR, THE CHANGING LAW OF INTERNATIONAL CLAIMS 895–932 (1984).

²⁵⁵ G.A. Res. 1803, *supra* note 246, at 15. At the time of its adoption, the United States delegation argued that the phrase “appropriate compensation” made “in accordance with international law” meant “prompt, adequate and effective” compensation as required under international law. Andrew T. Guzman, *Why LDC'S*

but it has proved to be a victory for capital exporting nations who have had the political and economic power to insist on the traditional (Western) Hull formula.²⁵⁶ This constraint made nationalization too costly for many non-oil exporting states.

Nonetheless, the principle of permanent sovereignty over national resources has been reiterated in subsequent resolutions and declarations, and clearly reflects at least a Third World consensus not just on what the law should be – but on what the law is.²⁵⁷ Although PSNR ultimately proved to be a hollow victory, the PSNR movement and General Assembly Resolution 1803 were important in establishing momentum for an international law of development. This movement next appeared in the form of demands for a New International Economic Order.

B. THE NEW INTERNATIONAL ECONOMIC ORDER

In the early 1970s, the United Nations was again the forum for an exceedingly contentious series of debates between Third World leaders and representatives of the Western, capital exporting countries. Although the debates were again cast in legal terms, the conflict remained fundamentally ideological, having to do with the international distribution of power. The principles of the movement for a new international economic order (“NIEO”) were embodied in a set of instruments passed by the United Nations General Assembly. These instruments include the Declaration on the Establishment of the New International Economic Order,²⁵⁸ the Programme of Action on the Establishment of a

Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 VA. J. INT'L L. 639, 649 (1998) (citing Schwebel, *Permanent Sovereignty*, *supra* note 253).

²⁵⁶ Subsequent state practice of paying what amounts to prompt, adequate and effective compensation, albeit often under pain of international economic ostracism or worse military intervention, has reinforced the Hull formula. Industrialized states can now point to extensive state practice to support their position, as well as a series of bilateral investment treaties that require payment of prompt, adequate and effective compensation. Guzman, *supra* note 255, at 648. That Third World nations have taken these actions under pain of economic banishment appears to be besides the point.

²⁵⁷ Nicolass Jan Schriver, *Sovereignty over Natural Resources: Balancing Rights and Duties in an Interdependent World* 3, 4 (2002).

²⁵⁸ G.A. Res. 3201, U.N. GAOR, 6th Special Sess., at 3, U.N. Doc. A/RES/3201(s_VI) (1974).

New International Economic Order²⁵⁹ and the Charter of Economic Rights and Duties of States.²⁶⁰ The principles embodied in these documents represent an expansion of the movement for permanent sovereignty over natural resources, and continuation of the legal effort by Southern countries to find voice and to exercise more power over their political and economic destinies.²⁶¹ Relying on the discourse of sovereignty and believing in both the power of international law and the importance of development, the NIEO movement asserted that full and permanent sovereignty was not limited to natural resources, but applied to all economic activities.²⁶²

Adopted by the U.N. General Assembly in 1976,²⁶³ the Charter of Economic Rights and Duties of States (“the Charter”) was the documentary centerpiece of this phase of the movement.²⁶⁴

²⁵⁹ G.A. Res. 3202, U.N. GAOR, 6th Special Sess., at 5, U.N. Doc. A/9559 (1974).

²⁶⁰ Report of the Second Committee, U.N. Doc. A/9946, 28 (Dec. 9, 1974) and U.N. Doc. A/RES/3281 (XXIX) (Jan 15, 1975); G.A. Res. 3281, U.N. GAOR, 29th Sess., 2315th plen. mtg., at 50, U.N. Doc. A/RES/3281 (1974).

²⁶¹ VARGES, *supra* note 61, at 5, 37.

²⁶² *Id.*

²⁶³ CERDS was adopted by a General Assembly vote of 120 to six, with 10 abstentions. Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States voted against the Charter. Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain abstained. See RALPH STUART SMITH, *THE UNITED STATES AND THE THIRD WORLD: A DISCUSSION PAPER* (1976).

²⁶⁴ In April 1972 President Echeverria of Mexico proposed that the United Nations Conference on Trade and Development (UNCTAD) draft a charter delineating the economic rights of nations. In May 1972 UNCTAD voted to establish a working group to draft such a charter; UNCTAD Res. 45 (III), U.N. Doc. TD/180. The United States abstained from the vote, but agreed to participate in the Working Group. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* § 26.2, at 1166 (3d ed. 1995). The need for such a charter was explained by Mexico’s Secretary of Foreign Relations:

[T]he underdeveloped countries. . . have decided not to continue to play a passive role, but to be active participants in the changing of those structures that hinder their well-being. . . [T]he interdependence of all the components of the global economic system demands a modification of the international structures that condition their behavior. . . The greatest menace to peace that we face nowadays is the increasing tension and the very noticeable separation between the industrialized countries and those which are underdeveloped.

The NIEO agenda, as articulated in the Charter, included subjecting private foreign capital to the domestic laws of Third World host countries, full and effective participation in world governance, special trade preferences, stabilizing export prices for commodities exported by Southern countries, debt forgiveness or rescheduling, and technology transfer.²⁶⁵ The Charter also explicitly recognized the sovereign right to nationalize foreign property and to determine what compensation should be paid,²⁶⁶ and confirmed the right of host nation governments to supervise transnational corporations operating within their jurisdictions.²⁶⁷ The Charter further mandated that industrialized countries cooperate to improve living standards and the general welfare in developing countries.²⁶⁸

Emilio O. Rabasa, Address Before the 68th Annual Meeting of the American Society of International Law, in 68 AM. SOC'Y INT'L PROC. 302, 303-05 (1974).

²⁶⁵ See JACKSON, *supra* note 264, at 1166-67.

²⁶⁶ Marjorie Cohn, *The World Trade Organization: Elevating Property Interests Above Human Rights*, 29 GA. J. INT'L & COMP. L 427, 438 (2001). Capital exporting states voted against this provision and have never accepted it. Article 2(2)(c) of the Charter provides that each state has the right to:

Nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means.

Tali Levy, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective Standard"*, 31 STAN. J. INT'L L. 423, 436 (1995).

²⁶⁷ Under the Charter, the right to supervise foreign business operations included the right to establish performance requirements that would ensure that foreign investment served the economic and social priorities of national development in the host nation. See G.A. Res. 3281, *supra* note 260, at 52. Cohn, *supra* note 266, at 438.

²⁶⁸ Cohn, *supra* note 266, at 53-54. Every state is also charged with a duty to cooperate in promoting the steady and increasing expansion and liberalization of world trade. In a reference intended to accommodate socialist nations, CERDS stipulated the right to engage in international trade and economic cooperation irrespective of political and economic differences. *Id.* at 53-54, 438.

Northern opposition to the NIEO generally and to the Charter in particular was immediate, uniform and adamant.²⁶⁹ Technically, Northern countries objected to the Charter's alleged rejection of "established principles of international law" – principles they contended were "neutral" and "universal."²⁷⁰ Third World leaders and scholars, however, contended (and still do) that international law was contrived in part to enable and justify colonialism, and has been an instrument "for enhancing and aggravating human suffering, not for alleviating it."²⁷¹ Yet even as the NIEO movement sought to change legal principles, it also relied on law,²⁷² seeking only to change its content and to use it as a force for change. Given the overwhelming majorities that approved these declarations, Southern countries took the position that resolutions comprising the New International Economic Order were legally binding on all nation states, but the West disagreed and has never accepted them.²⁷³ Although Northern

²⁶⁹ See Akinsanya & Davies, *supra* note 61, at 211.

²⁷⁰ See *supra* note 233 and accompanying text for discussion in European origins of international law. See also, e.g., Elias, *supra* note 233; Anand, *supra* note 233; Castaneda, *supra* note 233, at 39; ROLING, *supra* note 233, at 5; BRIERLY, *supra* note 233, at 44.

²⁷¹ Makua wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1140 (1995); see also Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT'L L.J. 1 (1999).

²⁷² Mexico's Secretary of Foreign Relations appealed for support for the NIEO this way:

Let us subject the fundamental economic elements for the future of world development to the rule of law. . . . Let us codify norms and create an authentic body of rules that will allow the international community to settle disputes and control abuses. Law represents a force in itself that can become a basic source of innovation for society.

Emilio O. Rabasa, *The Charter of Economic Rights and Duties of States*, 68 AM. SOC'Y INT'L PROC. 302, 303–05 (1974) (address at joint luncheon with the Section on International Law of the American Bar Association). Secretary Rabasa also analogized specifically to various U.S. legislative measures such as the Social Security Act of 1935, the National Labor Relations Act of 1935, the Fair Labor Standards Act of 1938, the Employment Act of 1946, and the Economic Opportunity act of 1964 as establishing a principle of redistributing wealth for the protection and betterment of the disadvantaged within U.S. society. "Why not then transfer the philosophy that has been the basis for this new process to the international field?" he asked. *Id.*

²⁷³ See Charles N. Brower & John B. Tepe, Jr., *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW 295,

countries detailed their objections to specific provisions of the Charter,²⁷⁴ it was unmistakable that the disagreement was not merely technical. Rather, the NIEO movement brought into focus a fundamental political conflict between the West and the Third World.²⁷⁵ The debt crisis in the early 1980s was perhaps the final blow to the NIEO as many Third World governments were now pleading for sufficient funds to stay afloat rather than demanding economic and political concessions.²⁷⁶ Although the NIEO failed to produce the desired redistribution of international economic power, the Third World has been persistent, and many of the principles found in the New International Economic Order were soon reformulated and reintroduced as the Right to Development.²⁷⁷

300 (1975). There is continuing debate on whether these resolutions reflected *opino juris*, that is evidence of what the overwhelming majority of states believed the law to be, and whether simply voting for a resolution is the kind of state practice necessary to form customary international law. Most western scholars have strenuously argued against according the status of law to UN resolutions, especially after large Third World majorities began to find voice in the General Assembly. Third World nations have taken the opposing view, arguing that at the least such resolutions reflect some version of state practice or *opino juris*. See generally ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963).

²⁷⁴ Brower & Tepe, *supra* note 273, at 295, 300–01.

²⁷⁵ See Stephen M. Schwebel, Counselor on International Law, U.S. Department of State, Remarks at the 68th Annual Meeting of the American Society of International Law, in 68 AM. SOC'Y INT'L L. PROC. 209, 210–12 (1974). U.S. State Department attorney Stephen Schwebel summed up the Northern view:

If the Charter turns out to be simply a statement of the alleged rights of the developing countries and the alleged duties of the developed, it will be a kind of bill of particulars, if not an indictment, which will have no more impact on international economic affairs, not to speak of international law, than a number of self-serving calls which developing countries have issued in the past in UNCTAD and elsewhere.

Brower & Tepe, *supra* note 273.

²⁷⁶ See *supra* Part II. B. 3 for a discussion of the Third World debt crisis.

²⁷⁷ Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT'L L. REV. 1425, 1431 (2000) (“The NIEO challenged the status quo, and the far-reaching implications of its implementation, were met with substantial resistance by industrialized countries. Notwithstanding these controversies, it is clear that many NIEO provisions have helped shape the right to development.”)

C. THE RIGHT TO DEVELOPMENT

In 1986, the United Nations adopted the Declaration on the Right to Development (“UNDRD”),²⁷⁸ whose objective was to convert development from being merely a goal or aspiration into an entitlement, both for countries and for their individual citizens.²⁷⁹ The movement for a right to development continued Third World demands for a more equitable distribution of international power, but it did so in a less threatening and strident manner than NIEO demands, perhaps reflecting the weakened position of Third World countries in the wake of the debt crisis.²⁸⁰ The UNDRD also sought to expand the definition of development to include technology, human rights, participation, equal opportunity, accountability, and differential treatment for developing countries.²⁸¹

²⁷⁸ G.A. Res. 128, U.N. GAOR, 41st Sess., Annex at 186, U.N. Doc. A/RES/41/128 (1983).

²⁷⁹ The right to development purports to operate both collectively at the international level, and individually at the domestic level. This evolution – from collective to both collective and individual, and from international to both international and domestic – was key to the transition from the law of development to the right to development. Espiell, *supra* note 231, at 192. “After initiation of the process designed to establish a law of development and the right to develop, conceived of as a collective right, the idea of the right to development as a human right that is a right belonging to individuals began to take shape.” *Id.* The results of this transition can be seen in the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESR”), G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 99, U.N. Doc. A/6316 (1966), both of which incorporate many of the principles of the human right to development.

²⁸⁰ It also sought to empower individuals and sub-national groups within individual countries. *See* G.A. Res. 128, *supra* note 278, at arts. 1.1, 2.1, 2.3 (stating that individuals are the primary beneficiaries of the right, and that both individuals and the state must work for “the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from”).

²⁸¹ *See* Mickelson, *supra* note 3, at 12 (quoting Keba M’Baye, First President of the Supreme Court of Senegal, who emphasized this point in his 1972 speech introducing the right to development: “Economic growth must be accompanied by socio-cultural progress; that means, in the simplest possible terms, that we must give it a human dimension . . . growth is a necessary but not a sufficient condition for the achievement of development”); Barsh, *supra* note 152, at 328 (stating that participants of the Global Consultations concerned with the implementation of the right to development were “especially critical of international development

Development as a human right evolved in part from earlier assertions regarding the law of development.²⁸² It was first articulated by Senegalese Justice Keba M'Baye,²⁸³ who proclaimed that "development is the right of all men."²⁸⁴ Justice M'Baye reasoned that a human right to development was needed to rectify the injustices of an international economic system in which the North benefits at the expense of the South.²⁸⁵ M'Baye also maintained that basic principles of humanity support a right to development,²⁸⁶ and he observed an "inherent correlation between the

strategies which have been 'oriented merely towards economic growth and financial considerations'"); Forysthe, *supra* note 154, at 334.

²⁸² The law of development asserted the need for a right of development *similar* to a human right, but this right was thought to be a collective one – whereas human rights are typically thought of as individual. Espiell, *supra* note 231, at 190.

²⁸³ See Bunn, *supra* note 277, at 1433; Mickelson, *supra* note 3, at 10; Espiell, *supra* note 231, at 192 (all identifying Justice Keba M'Baye as author of the Right to Development). This pronouncement was made in his inaugural lecture at the Third Session of Instruction of the International Institute for Human Rights. *Id.*

²⁸⁴ Espiell, *supra* note 231, at 192 (quoting Keba M'Baye, *Le Droit au développement comme un droit de l'Homme*, in 5 REVUE DES DROITS DE L'HOMME 503, 505 (1972)). Following M'Baye's lead, Professor Juan Antonio Carrillo Salcedo of Spain also identified the Right to Development as a human right. Carrillo Salcedo, *El Derecho al desarrollo como un derecho humano*, in 25 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 119–25 (1972) ("The right of development as a right of states and peoples must unavoidably be founded on the recognition of the right of every man to a free and worthy life in his community. Every human being has the right to live, which implies the right to aspire to an increasingly better existence.")).

²⁸⁵ Even the "development assistance" contributed by the North, he observed, served principally to enable underdeveloped countries to become markets for Northern goods and services. See M'Baye, *supra* note 284, at 15 (noting that development assistance is "in many cases little more than a disguised export subsidy," designed to improve the underdeveloped countries' ability to act as a market for the finished or semi-finished products of the developed world); Mickelson, *supra* note 3, at 381–83 (Addressing M'Baye's observation that, "the deep division between the South and North posed an increasing threat to international stability, and hence raising the standard of living in poor countries could be "a form of life insurance" for rich countries. M'Baye also stated that since industrialized countries designed and benefited from the current international economic system, they were responsible for its injurious consequences.) "Given their power in the system and their utilization of that power to their own advantage, the rich countries of the North should assume responsibilities for their actions." *Id.* at 13 (quoting M'Baye, *supra* note 284, at 505, 521–22).

²⁸⁶ Mickelson, *supra* note 3, at 13 (quoting M'Baye, *supra* note 284, at 524).

enjoyment of human rights and economic development,” believing that human rights could not be enjoyed without economic development.²⁸⁷

However, those who expected the UNDRD to mark a turning point in international economic relations have been sorely disappointed.²⁸⁸ While development as a human right has been advocated by developing countries²⁸⁹ it has been just as vigorously opposed by those nations that would be obliged to render the substantial material assistance necessary to effectuate the right, and by the international financial institutions whose support and commitment would be needed to implement it.²⁹⁰ To acknowledge a *right* to development would mean conceding that there is an obligation to provide foreign assistance and to take part in the development project. The West has vehemently and

²⁸⁷ *Id.* at 14 (quoting M'Baye, *supra* note 284, at 529). See also Espiell, *supra* note 231, at 192 (quoting M'Baye, *supra* note 284, at 515) (acknowledging M'Baye's belief that “[e]ach man has the right to live and the right to live better”).

²⁸⁸ It should be noted that in his 1972 speech, M'Baye expressed reservations concerning efforts to legalize a human right to development. He maintained that these efforts were unnecessary because the human right to development already existed. He also feared proponents of the right might lose sight of the desired end and find “victory” in a mere legal declaration. See Mickelson, *supra* note 3, at 14. Accordingly, M'Baye opposed those who called for completing the Universal Declaration of Human Rights by proclaiming a Right to Development, because he regarded this as unnecessary, and perhaps even counterproductive: “[I]t is hardly useful to encumber ourselves with a new proclamation, as if it were a matter of creating a new right. The right to development is already inscribed in international law.” *Id.* (quoting M'Baye, *supra* note 284, at 526).

²⁸⁹ Bunn, *supra* note 277, at 1436.

[I]n terms of international human rights law, the existence of the right to development is a *fait accompli*. Whatever reservations different groups may have as to its legitimacy, viability or usefulness, such doubts are now better left behind and replaced by efforts to ensure that the formal process of elaborating the content of the right is a productive and constructive exercise.

Id. (quoting Philip Alston, *Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy*, in DEVELOPMENT, HUMAN RIGHTS AND THE RULE OF LAW 31, 106 (International Commission of Jurists eds. 1981)). Proponents of the right to development maintain that it has a rich legal foundation that includes the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the UNESCO Declaration on Race and Racial Prejudice and other international conventions. *Id.*

²⁹⁰ See, e.g., Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT'L L.J. 473, 478 (1985). Scholars

consistently rejected legal obligations of this variety. The UNDRD has not been an exception and, of course, there is no effective sanction for non-recognition of the UNDRD.²⁹¹

The UNDRD also clearly defines development as comprehensive. While earlier international law of development efforts were framed as demands to modify the international distribution of economic and political power, the right to development attempts to utilize the human rights framework. Perhaps this reflects the weaker position of Third World countries by the 1980s, or it may signify an altered post Cold War political landscape that has changed the nature of what can be claimed and the mode in which those claims can be made. While Third World scholars and nations have continued to assert the right to development, some have also harkened back to more radical demands²⁹² and have sought to hold industrialized countries to account by demanding reparations.²⁹³

D. REPARATIONS

If one accepts the proposition that the Third World has been severely and systematically exploited through arrangements that include slavery and colonialism,²⁹⁴ then the idea of compensation

contesting its existence assert that these conventions merely make explicit references to "development" which does not mean they support a *right* to development.

²⁹¹ Advocates reason that the lack of universal recognition or sanctions for non-adherence does not render the UNDRD meaningless, given the initial rejection of many new international human rights. Espiell, *supra* note 231, at 198 ("Consequently it is evident that the inadequacies that still plague the juridical characteristics of the right of development in general, and particularly as an individual right, do not allow the possibility of denying its legal existence, though it is still embryonic and imperfect.")

²⁹² One of the provisions of the Charter of Economic Rights and Duties of States foreshadowed contemporary demands for reparations. Article 16 calls for restitution based on the injuries caused by "colonialism, apartheid, racial discrimination, neocolonialism and all forms of foreign aggression, occupation and domination." G.A. Res. 3281, *supra* note 260.

²⁹³ M'Baye observed that since industrialized countries designed and benefited from the current international economic system, they were responsible for its injurious consequences. See Mickelson, *supra* note 3, at 383 ("Given their power in the system and their utilization of that power to their own advantage, the rich countries of the North should assume responsibilities of their actions." (quoting M'Baye, *supra* note 284)).

²⁹⁴ See, e.g., RODNEY, *supra* note 243.

for that harm should hardly be remarkable.²⁹⁵ But calls for reparations to the victims of slavery and colonialism have been extremely controversial.²⁹⁶ Drawing on the vigorously debated movement in the U.S. for reparations to the descendants of African slaves,²⁹⁷ the international struggle for reparations has been

²⁹⁵ Conceptually, reparations may be the simplest approach to international economic justice. Black's Law Dictionary defines reparation as both "[t]he act of making amends for a wrong" and "[c]ompensation for an injury or wrong, esp. for wartime damages or breach of an international obligation." BLACK'S LAW DICTIONARY 1301 (7th ed. 1999). Perhaps it is the natural successor to the NIEO and the right to development, insofar as the simplicity of the demand for reparations represents an evolutionary focusing and sharpening of the Third World position.

²⁹⁶ This may be because the simplicity and directness of the idea leaves virtually no room for obfuscation or for "spinning" compensation as charitable assistance. Although reparations focus on repairing the injury suffered by victims, assigning responsibility for payment seems to require the assignment of blame, and this inevitably triggers belligerent resistance to reparations proposals. It explains, for example, the European Union's refusal, as recently as 2001, to apologize for Western Europe's substantial role in the Atlantic slave trade. At the 2001 World Conference Against Racism, the lead E.U. negotiator, Belgian Foreign Minister Louis Michel, equivocated thusly, "[s]lavery today is, of course, a crime against humanity, slavery yesterday, in the past was of course. . . a very grave thing, a very horrible thing. . . It is very difficult to consider that you can compare slavery today to slavery in the past." *Europeans at U.N. Meeting Agree to Apology for Slavery – But Not to Reparations*, ST. LOUIS POST-DISPATCH (MISSOURI), Sept. 8, 2001, at 20.

²⁹⁷ The movement for reparations is really a collection of movements. See, e.g., RANDAL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); RICHARD F. AMERICA, *PAYING THE SOCIAL DEBT: WHAT WHITE AMERICA OWES BLACK AMERICA* (1993) (in support of reparations); DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2003); David Horowitz, *Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks – and Racist Too*, 31 BLACK SCHOLAR 48 (2002) (opposing reparations). The reparations movement within the United States has had the benefit of substantial scholarly analysis. For an excellent summary of legal issues and citations to a wealth of writings on the topic, see Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003). Much of the analysis focuses on substantive and procedural legal issues that are specific to the U.S. legal system and on the anticipated legal battles over reparations within the domestic U.S. context. See, e.g., Rhonda V. Magee, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993); Adrienne D. Davis, *The Case for United States Reparations to African-Americans*, 7 HUM. RTS. BR. 3 (2000); BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (2d ed. 2003); Graham Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. REV. 1063 (1968). However, scholars in the U.S. – particularly within the legal academy – have also done a great deal of theoretical work that is likely to be useful in support of Third World demands for international reparations.

contested in the United Nations and its associated institutions. The latest skirmish was the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (the “Conference” or “WCAR”).²⁹⁸ Preparations for the

Some of this work is litigation oriented, but based on principles that might also conceivably resonate with the general public. Unjust enrichment is one such legal principle – and a politically interesting option because it does not require blame or fault; only (basically) that a benefit has been received and retained, and that injustice will result if the benefit is not disgorged. *See generally* E. ALLAN FARNSWORTH, *CONTRACTS* (3d ed. 1999); DOUG RENDLEMAN, *REMEDIES CASES AND MATERIALS* (6th ed. 1999). Difficulties with the technical application of the doctrine of unjust enrichment include calculating the benefit conferred and offsetting any gain received by the plaintiffs, and tracing the benefit to *its present holders*. Brophy, *supra* note 297, at 522. In light of the anticipated difficulty of achieving reparations through litigation, some supporters of reparations for African Americans are advocating a more overtly political approach that relies on the legislative process. *Id.* at 523.

²⁹⁸ Held in September in Durban, South Africa, the 2001 WCAR was actually the third in a series (and is thus sometimes referred to as the “Third World Conference Against Racism”). The first World Conference Against Racism was convened in Geneva, Switzerland in August 1978, and attended by representatives of 125 countries, as well as observers from U.N. agencies, intergovernmental organizations, and non-governmental organizations. REPORT OF THE WORLD CONFERENCE TO COMBAT RACISM AND RACIAL DISCRIMINATION, U.N. DOC. A/CONF. 92/40, U.N. Sales No. E79.XIV.2 (1978) [hereinafter RACISM REPORT]. Because of a 1975 General Assembly Resolution equating Zionism with racism and racial discrimination, the United States and Israel boycotted the 1978 Conference. G.A. Res. 3379, U.N. GAOR, 30th Sess., Supp. No. 34, at 83, U.N. Doc. A/10034 (1975); RACISM REPORT, *supra* note 298. *See also* U.S. Participation in the United Nations, REPORT BY THE PRESIDENT TO CONGRESS FOR THE YEAR 1977, at 172 (1977). The first Conference focused mainly on South Africa, with a majority of participating nations favoring strong international measures to oppose and dismantle the apartheid regime. There was some disagreement regarding the nature of the measures that should be taken against South Africa, and some (mainly Western European) disagreement with the conference majority’s condemnation of Israel’s treatment of the Palestinians. RACISM REPORT, *supra* note 298, at 15, 113, 129–30. A second World Conference to Combat Racism and Racial Discrimination was held in August 1983. Geneva was again the venue, South Africa and the Middle East were again the principal topics, and the United States again chose not to attend because of the majority’s position on the latter. *See id.* As with the first conference, Western commentators proclaimed the second conference a failure. *See, e.g.,* Christopher N. Camponovo, *Disaster in Durban: The United Nations World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, 34 GEO. WASH. INT’L L. REV. 659, 667 (2003)). Despite majority agreement on its principal themes and conclusions, in 1997, the General Assembly resolved to convene a third World Conference Against Racism, to be held in Durban, in the newly democratized South Africa. G.A. Res. 52/111, *supra* note 298.

Conference included four regional conferences and each Regional Conference adopted reports addressing the most important issues to their region.²⁹⁹ These Regional Conferences revealed that the most important issues to many Third World countries included the legacy of colonialism, slavery and the slave trade,³⁰⁰ matters that were not priorities for Western nations.³⁰¹ Indeed, the African regional Declaration focused

²⁹⁹ Regional conferences were held in Strasbourg, France; Santiago, Chile; Dakar, Senegal; and Teheran, Iran. In addition, five regional expert seminars were held in Geneva, Warsaw, Bangkok, Addis Ababa and Santiago during 1999 and 2000. United Nations, World Conference Against Racism, Basic Information, *The World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, at <http://www.un.org/WCAR/e-kit/background1.htm> (last visited May 22, 2002).

³⁰⁰ For example, the Asian Preparatory Conference in Teheran concluded that "States which pursued policies or practices based on racial or national superiority, such as colonialism or other forms of alien domination or foreign occupation, slavery, the slave trade and ethnic cleansing, should assume responsibility . . . and compensate the victims of such policies and practices." *Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Asian Preparatory Meeting* (Tehran, Feb. 19-21, 2001), U.N. GAOR, Preparatory Comm., 2d Sess., U.N. Doc. A/CONF.189/PC.2/9 (2001). At the Santiago Regional Conference, representatives of countries in North, Central and South America, and the Caribbean agreed to "take measures to alleviate inequities that still persist because of the shameful legacy of slavery." The delegates also condemned "the brutal crimes and injustices that were committed against indigenous peoples and Africans and their descendants who were subjected to slavery, the trans-Atlantic slave trade and other forms of servitude that today could constitute crimes against humanity." *Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Regional Conference of the Americas* (Santiago, Chile, Dec. 5-7, 2000), U.N. GAOR, Preparatory Comm., 2d Sess., Annex IV-V, at 19, U.N. Doc. A/CONF. 189/PC.2/7 (2001) [hereinafter *Santiago Report*].

³⁰¹ These matters that were not addressed in the documents adopted by the European regional conference in Strasbourg. See *Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Final Documents of the European Conference Against Racism* (Strasbourg, France, Oct. 11-13, 2000), U.N. GAOR, Preparatory Comm., 2d Sess., Annex IV-V, U.N. Doc. A/CONF. 189/PC.2/6 (2001). Only over the strenuous objections of the United States and Canada, did the Santiago conference acknowledge that slavery was an international crime, resulting in:

[S]ubstantial and lasting economic, political and cultural damage to these peoples and. . . justice now requires substantial national and international efforts to repair such damage. Such reparation should be in the form of policies, programmes and measures adopted by the States, which benefited materially from these practices, and designed to rectify the economic, cultural and political damage, which inflict the affected communities and peoples.

primarily on injuries stemming from slavery and colonialism,³⁰² and recommended international compensation for its victims.³⁰³

Although later events diverted attention from the WCAR debate over reparations,³⁰⁴ it was apparent that reparations were

Santiago Report, supra note 300, at 14, 70.

³⁰² The African regional Conference in Dakar, Senegal focused primarily on slavery and colonialism. The Declaration adopted by the Dakar conference stated:

[T]he slave trade, . . . colonialism and apartheid. . . have had profound crippling effects on the economic development of Africa and. . . justice now requires that substantial national and international efforts be made to repair the damage; . . . States which pursued racist policies or acts of racial discrimination such as slavery and colonialism should assume their moral, economic, political and legal responsibilities. . . and provide adequate reparation to those communities or individuals who, individually or collectively, are victims of such racist policies or acts, regardless of when or by whom they were committed.

Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Regional Conference of Africa (Dakar, Jan. 22-24, 2001), U.N. GAOR, Preparatory Comm., 2d Sess., U.N. Doc. A/CONF. 189/PC.2/8 (2001) [hereinafter *Dakar Report*]. The Dakar delegates recommended that a follow-up mechanism be established and entrusted with supervising implementation of the Declaration and Programme of Action to be adopted by the World Conference, and that such mechanism be required to report annually to the United Nations General Assembly. *Id.*

³⁰³ The Programme of Action adopted by the Dakar conference included the following language:

An International Compensation Scheme should be set up for victims of the slave trade, as well as victims of any other transnational racist policies and acts. . . A Development Reparation Fund should be set up to provide resources for the development process in countries affected by colonialism. . . [S]uch reparation should be in the form of enhanced policies, programmes and measures to be adopted by States which benefit materially from these practices in order to rectify, through affirmative action, the economic, cultural and political damage which has been inflicted on the affected communities and peoples in the full implementation of their right to development.

Id.

³⁰⁴ On the fourth day of the Durban conference, the United States and Israel withdrew their delegations in protest over the decided likelihood that the Conference would condemn Israel for its treatment of the Palestinians. Rachel L. Swans, *U.S. and Israelis Quit Racism Talks over Denunciation*, N.Y. TIMES, Sept. 4, 2001, at A1; Douglas Blackmon, U.S., *Israel Pull Delegates Out of U.N. Conference on Racism*, WALL ST. J., Sept. 4, 2001, at A12. A few days after the Conference ended, the World Trade Center in New York and the Pentagon in Washington, D.C. were attacked on September 11, 2001. N.R. Kleinfeld, *U.S. Attacked: Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. TIMES, Sept. 12, 2001, at A1. These events diverted Western media attention first from the issue of reparations and then from the Conference in its entirety.

a clear priority for many nations of the world.³⁰⁵ The Declaration ultimately adopted by the Conference concluded that colonialism led to racism, racial discrimination and related intolerance, and that “the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today.”³⁰⁶ Nonetheless, the Programme of Action did not endorse reparations for those countries that had been the victims of colonialism. Instead it acknowledged a “need to develop programmes for the

³⁰⁵ *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (Durban, Aug. 31-Sept. 8, 2001), U.N. ESCOR, at 5–27, U.N. Doc. A/CONF.189/12 (2002) [hereinafter *Durban Report*]. See also Celina Romany & Katherine Culliton, *The UN World Conference Against Racism: A Race-Ethnic and Gender Perspective*, 9 HUM. BRTB No.2, at 14, 15 (2002); Nicole Itano, *Former Colonies Calling for Reparations*, CHRISTIAN SCI. MONITOR, Sept. 5, 2001, at A-1, available at <http://www.csmonitor.com/2001/0905/p1s4-wogi.html>. Proponents of reparations – notably the African delegates who had met at the Dakar regional conference – also sought apologies for slavery and colonialism, noting “other groups that were subjected to other scourges and injustices have received repeated apologies from different countries, as well as ample reparations, on a bilateral basis, from both public and private sources and lately through certain international organizations.” *Dakar Report*, *supra* note 302, at ¶ 29. Certain Native Americans, Holocaust victims, Japanese Americans interned during World War II, and South Africans have obtained some form of reparations in recent years. Brophy, *supra* note 297, at 499. Australia, Austria, France, Germany, New Zealand, South Africa, and the United Kingdom – as well as religious denominations and multinational corporations – have in recent years offered apologies for past wrongs. William Bradford, *With a Very Great Blame on Our Hearts: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 5–6 (2002/2003). Professor Brophy adds that U.S. President Clinton “apologized for, was part of apologies for, or discussed apologizing for slavery, the genocide in Rwanda, executions of civilians during the Korean war, the United States’ support of Guatemala’s military while it committed genocide, medical experiments on African Americans at Tuskegee, radiation experiments, and the deprivation of native Hawaiians’ land.” Brophy, *supra* note 297, at 501. Professor Bradford has termed this an age of apology. Bradford, *supra* note 305, at 5–6; Brophy, *supra* note 297, at 501. Apologies would not be extended at this Conference, however. The U.S. delegation withdrew from the Conference and did not endorse the final Declaration. Tom Lantos, *The Durban Debacle: An Insider’s View of the UN World Conference Against Racism*, 26 FLETCHER F. WORLD AFF. 31, 48 (2002). European Union delegates avoided apologizing, declined to offer reparations, and refused to acknowledge that the trans-Atlantic slave trade was a crime against humanity *at the time it occurred*. Michael Slackman, *Divisive U.N. Race Talks End in Accord*, L.A. TIMES, Sept. 9, 2001, at A1.

³⁰⁶ *Durban Report*, *supra* note 305, at 14. The Declaration also proclaimed that “slavery and the slave trade are a crime against humanity.” *Id.*

social and economic development of these societies and the diaspora, within the framework of a new partnership based on the spirit of solidarity and mutual respect.”³⁰⁷

Many who supported reparations were very disappointed.³⁰⁸ Yet, the inability to garner sufficient support for reparations is not surprising, nor is endorsement and adoption of the alternative programs for economic and social development. To demand reparations is to demand compensation that can be utilized as the payee sees fit. Harking back to the more militant demands of the New International Order, reparations are a more radical demand to return plundered assets, jurisdiction and authority to their rightful possessors, the governments and peoples of the Third World. It would indeed be surprising that an international community that views certain peoples as underdeveloped and in need of developing into something else would adopt such a concept.³⁰⁹ Additional programs, designed and implemented by international institutions, however, do fit within the current paradigm that defines the Third World. Thus putting the case for reparations on the international public record is an act of historic significance – despite its rejection by those countries and interests currently in power.³¹⁰ Moreover, its overwhelming rejection by the West and the endorsement in its stead of development says much about development as discourse.

³⁰⁷ *Id.* at 158.

³⁰⁸ For example, Fode Dabor, an ambassador from Sierra Leone and a member of the African negotiating committee at the Durban Conference, said, “[t]his is very bad, very disappointing, but we all had to go along because no one wanted to take the blame for the conference collapsing. We lost on everything, the question of the apology, the question of the slave trade and the question of reparations.” Slackman, *supra* note 305. Moreover, Western press accounts of the conference were overwhelmingly negative – many amounting, in fact, to ridicule of the Conference and the positions asserted by its majority. See, e.g., Lantos, *supra* note 305, at 48; Anne Bayesfsky, *The U.N. World Conference Against Racism: A racist anti-racism conference*, *American Society of International Law, PROCEEDINGS OF THE ANNUAL MEETING* 65–74 (2002); Camponovo, *supra* note 298, at 667.

³⁰⁹ Given the role of the U.S. and other European powers in the slave trade and the lack of any real regret for their activities, perhaps this lack of support is not surprising.

³¹⁰ The Durban conference contributes importantly to strengthening the case that is already supported by the great majority of the membership of the United Nations. Samir Amin, *World Conference Against Racism: A People’s Victory*, 53 *MONTHLY REV.* 7, 20 (2001).

International law proved incapable of being a starting place for reordering the international economic system and sharing economic power with the Third World. International law is based in part on shared interests,³¹¹ but it is also based on power and that power resides with the industrialized world, and more particularly these days, with the United States. Law has been used in the service of development and as a mechanism to control the Third World, through such principles as prompt, adequate and effective compensation. When Third World nations sought to use law as a source of strength and power they were rebuffed and then simply ignored, as their proposals died a slow but inevitable death. International law proved incapable of assisting the non-West, for its purpose is to serve the West. In the era of globalization, international law will be an even stronger part of the edifice that locks the Third World into chasing a future that is made in the West through the discourse of Development

IV. DECONSTRUCTING DEVELOPMENT

*'Development is the process by which other peoples are "dominated, and their destinies are shaped, according to an essentially Western way of conceiving and perceiving the world; it is part of an imperial process whereby other peoples are appropriated and turned into objects". Development is a fundamental part of the process 'whereby the developed countries manage, control and even create the Third World economically, politically, sociologically and culturally',*³¹²

Development can be viewed as an idea, an objective or as an activity.³¹³ Previous parts of this article have discussed development within each of these contexts. This part turns to deconstructing the development paradigm by interrogating

³¹¹ See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE, LAW AND FOREIGN POLICY* (2d ed. 1979).

³¹² Tucker, *supra* note 64, at 1.

³¹³ As Professors Kothari and Minogue note, when development is explored as an idea, one is in the realm of theory. When objectives are established, one is delineating the process by which ideas are turned into practice. Examining actual

development as discourse³¹⁴ and as ideology.³¹⁵ Postmodernism's considerations of difference and discourse, and its challenge to the universalizing "truths" of enlightenment thinking, greatly assist in appraising development in both theory and practice.³¹⁶ Scholars have drawn on this perspective to question whether development is synonymous with westernization and modernization, and whether Western political, social and economic

practice entails analysis of these activities. Of course, even the idea of development is contested territory. Kothari & Minogue, *supra* note 7, at 12. The meaning of development in practice is also contested. See *supra* Part II B for discussion of the cycles of conventional development policy wisdom.

³¹⁴ This term is used in the broader Foucauldian sense of discourse:

The key feature is that the world is not simply "there" to be talked about, rather it is through discourse itself that the world is brought into being. It is also in such a discourse that speakers and hearers, writers and readers, come to an understanding about themselves, their relationship to each other and their place in the world (the construction of subjectivity). It is the "complex of signs and practices which organizes social existence and social reproduction". . . There are certain unspoken rules controlling which statements can be made and which cannot within the discourse, and these rules determine the nature of the discourse. . . These rules concern such things as classification, the ordering and distribution of that knowledge of the world that the discourse both enables and delimits.

BILL ASHCROFT ET AL., KEY CONCEPTS IN POST-COLONIAL STUDIES 71 (1998). For a definition that uses law as an example of discourse, see HERBERT KOHL, POWERFUL IDEAS FOR POWERFUL THINKING 59 (1993).

³¹⁵ Ideology has been defined as:

Ideas, attitudes, and values that represent the interests of a group or class of people. These ideas are expressed through the arts, and in all of the ways in which a group within a society displays its perception of the world. . . Ideas do not express realities so much as the values of the people who control society. They are false in that they claim truth and universality even though they are rooted in historically based economic relationships. Analyzing an ideology consists . . . of discovering how dominant systems of ideas relate to the actual needs, demands, and self-descriptions of the ruling class.

HERBERT KOHL, FROM ARCHETYPE TO ZEITGEIST POWERFUL IDEAS FOR POWERFUL THINKING 59 (1992).

³¹⁶ Postmodernism is a rejection of modernity and is characterized by the acceptance of ephemerality, fragmentation, discontinuity and attacks on the notion that there might be a metalanguage or metatheory through which all things can be connected or represented. There is "an intense distrust of all global or totalizing discourses, a rejection of metanarratives, of large-scale theoretical interpretations, of universal application. Postmodernism also rejects the Hegelian view of history and the idea of progress." MADAN SARUP ET. AL., IDENTITY, CULTURE AND THE POSTMODERN WORLD 95 (1996).

institutions and practices (whether liberal or socialist) are the keys to solving the problems of the Third World.³¹⁷

A. POSITIONING DEVELOPMENT IN THE WESTERN IMAGINATION

If development is a natural and universal process, and an inherent part of the human condition, we can only critique its successes or failures – not the concept itself. It often seems that development is indeed innate, for it is seldom contested in a fundamental fashion and the reaction to those who raise such queries is often incredulity or outright dismissal. Although it is shrouded by a discourse that portrays it as a universal and invariably desirable process, development is actually a set of “practices and beliefs that are woven into the fabric of Western culture and is specific to it.”³¹⁸ Development is neither an innate process, nor a trans-cultural concept that can claim universal validity.³¹⁹ Rather, many of the ideas embedded within the development paradigm, such as progress, planning, poverty and modernization are firmly rooted within Western economic, political and cultural thought.³²⁰

³¹⁷ The entire idea of development epitomizes modernity, which has been described as follows:

Modernity is usually perceived as positivistic, technocratic and rationalistic. It has been identified with the belief in linear progress, absolute truths, the rational planning of ideal social orders, and the standardization of knowledge and its production. The modernity project came into focus during the eighteenth century, and was an extraordinary intellectual effort on the part of Enlightenment thinkers to develop objective science, universal morality and autonomous art. Enlightenment thinkers embraced the idea of progress; they believed in justice and in the possibility of the human happiness.

SARUP, *supra* note 316, at 94; Jane L. Parpart, *Post-Modernism, Gender and Development*, in *POWER OF DEVELOPMENT* 253 (Jonathan Crush, ed. 1995).

³¹⁸ Tucker, *supra* note 64, at 2 (Postulating that it may be because the “myth of development” is part of the social imaginary of Western societies, that despite the transfer of goods, gadgets, capital, technology, hospitals and roads, the economic and socioeconomic accomplishments of the West have not necessarily been replicated in Third World countries. He also notes that the economic, social and political transformations of the Third World are inseparable from the production and reproduction of meanings, symbols and knowledge that is cultural reproduction.)

³¹⁹ *Id.*

³²⁰ For critical analysis of these and other widely accepted development concepts, see *THE DEVELOPMENT DICTIONARY*, *supra* note 1.

The widespread acceptance of development as instinctive or natural has much to do with the power of the West to construct the prism through which the world is perceived. At the heart of this overwhelmingly dominant western world view³²¹ is Euro-centrism – “the conscious or unconscious process by which Europe and Euro-American assumptions are constructed as, or assumed to be, the normal, the natural or the universal.”³²² This perspective has become the near-exclusive organizing principle and evaluative standard for humankind.³²³ The West not only influences and alters but, in some ways, essentially produces other cultures.³²⁴ Indeed, much of the non-West now uses the West, almost instinctively, as the standard for judging the worth of its societies.³²⁵ Euro-centrism also organizes the system of thought

³²¹ See Sardar, *supra* note 55, at 44 (“Western civilization is not located in a geographical space, for in these days of globalization it envelopes the globe with its desires, images, politics, and consumer and cultural products.”).

³²² ASHCROFT ET AL., *supra* note 314, at 91. By the eighteenth century, the concept of Europe was solidly constructed as a sign of superiority and as being in opposition to the rest of the world’s cultures. Eurocentrism is also present in the very existence of such fields as anthropology, in the assumptions and practices of Christianity through mission education and mission activity, and in the assumed superiority of Western mathematics, cartography, art and numerous other cultural and social practices which have been claimed, or assumed to be based on a universal, objective set of values. *Id.* at 91–92.

³²³ For instance, the West defines “civilization” by reference to technology, thereby measuring other civilizations by technological capabilities. The Eurocentric idea of nation-state has been deemed to be the only desirable and legitimate form of political organization, forcing non-Western societies to organize in this manner. Groups without a state are viewed as people without a home, such as the Kurds, gypsies and Jews before the state of Israel was established. Freedom is defined in a way that does not incorporate basic needs such as hunger and housing or the subordination of freedom for more eminent goals such as community and tradition. Instead the focus is the individual – which is the epitome of the Western view of freedom. All of these Eurocentric categories play an intrinsic role in development. Sardar, *supra* note 55, at 49.

³²⁴ ASHCROFT ET AL., *supra* note 314, at 91–92.

³²⁵ The non-West includes intellectuals, academics, writers, thinkers, novelists, politicians and decision-makers in Asia, Africa and Latin America who use the West as the yardstick for measuring the social and political progress within their own societies. Accordingly, the non-West promotes Eurocentrism, both wittingly and unwittingly, and colludes in its own victimization while simultaneously maintaining the global system of inequality. Sardar, *supra* note 55, at 44.

known as development.³²⁶ This is not to suggest that development is inherently flawed or invalid *because* it emanates from the West.³²⁷ Rather, it is to submit that because development is merely a particular system of thought, it is not impervious to fundamental challenge or critique. The power of Euro-centrism makes this critique difficult,³²⁸ however, and reduces even development's most serious critics to attacking it from within the boundaries of the paradigm.³²⁹

Locating development within the Western imagination may seem to suggest that the Third World is "a passive vessel for ideas that emanate from the West".³³⁰ But neither the West nor its

³²⁶ Whether employing such terms as First World and Third World, or describing developed nations as post-industrial societies or as nations in the throes of advanced capitalism and the non-West as merely industrializing, Eurocentrism cannot be expunged from the concept of development. "Development continues to mean what it has always meant: a standard by which the West measures the non-West." *Id.* at 49.

³²⁷ Notwithstanding the at times dubious motivations of its proponents, modernization or progress as defined by the West is not by definition objectionable – although its desirability can certainly be debated. Indeed, it has been the subject of much debate. For a variety of perspectives, see THE POST-DEVELOPMENT READER, *supra* note 11. Rather, it is to suggest that although the dominant Western view is only one perspective, it has been held to be the universal point of reference and the only perspective deemed worthy of shaping countless lives for the last fifty-five years; other views have been dismissed as invalid or irrelevant. Esteva, *supra* note 1, at 6.

³²⁸ For a discussion of natural law in both its traditional and modern permutations, see Brian Bix, *Natural Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 223 (Dennis Patterson ed., 1999).

³²⁹ For example, despite the challenges dependency theory presented to the prevailing economic order, it shared many of the underlying premises of the modernization discourse, never questioning the desirability of development and conceiving of it in terms of economic growth, industrialization and liberal democracy. Tucker, *supra* note 64, at 14. The postmodern critique itself can be criticized as being part of the Western imagination and Western discourse and its demolition of such grand narratives as religion, tradition and history may be inimical to the interests of the non-West for it is these things that make the non-West, the non-West. Sardar, *supra* note 55, at 45.

³³⁰ Professor Kiely warns that dismissing development as Eurocentrism is "too simplistic, for it homogenizes both the West and the Third World and reduces the latter to passive recipients of the ideas of the former. It then becomes difficult to imagine how the people of the Third World could behave in any way other than being simple puppets of the West." He contends that a satisfactory analysis of development would regard it not only as a European creation, but also as a reflection of the responses, reactions and resistance of the people who are its objects. He cautions that critics be careful to not reduce development to an idea

ideas are a homogenous totality, and certainly the millions of people who have been on the receiving end of development policies possess complex histories, societies, politics, cultures and individual lives. They have responded to development in countless ways, and development itself has changed and evolved, at times in reaction to these multiple responses. Nonetheless, for the most part the development project continues to be shaped by Western elites and experts, who define its objects, theories and practices.³³¹ Its theoretical underpinnings can be found in enlightenment philosophy,³³² and its veneer of universality and inevitability is part of the Eurocentrism that shapes most contemporary worldviews, and simultaneously devalues and marginalizes the knowledge of others.³³³ Development thus elevates and reinforces the power of the West, as it controls and in essence creates the Third World.³³⁴

Development is rooted in an evolutionary myth that reduces history to a series of formal stages.³³⁵ Although this myth is founded on the particular experiences of European societies, the

without a history and that is impervious to change, when in fact development discourse – its language, strategy and practice – has changed over time, both in response to previous strategies and to shifts in power relations in the world. Kiely, *supra* note 7, at 36.

³³¹ At the level of policy makers, who are comprised of national and international elites, the West has largely won the political, social and ideological battle. Most Third World elites attend university in the West, have professors and teachers from the West, and have in many respects accepted the Western view of the world. Tucker, *supra* note 64, at 13 (discussing the preponderance of universities, institutes, research grants and foundations in the West, all of which support and solidify certain world views). Those who reject a Eurocentric worldview are marginalized as radicals, fundamentalists, cultural nationalists, or as being irrational, crazy or otherwise to be dismissed. See Sardar, *supra* note 55, at 44–62. At the grassroots level, the acceptance or rejection of Eurocentricity may be more complex. Here resistance to development can be found in myriad acts that are often classified as ignorance or lack of common sense. These voices are reduced to what post-colonialist term “clamor.” Ruth Gordon, *Critical Race Theory and International Law*, 45 VILL. L. REV. 827, 835 (2000) [hereinafter Gordon, *Critical Race Theory*].

³³² SARUP ET. AL., *supra* note 316, at 94. (discussing the enlightenment foundations of modernity).

³³³ Sardar, *supra* note 55, at 44, 47–49.

³³⁴ Tucker, *supra* note 64, at 1.

³³⁵ Indeed these underlying assumptions are so taken for granted that they often escape critical scrutiny. *Id.* at 7.

development paradigm regards these stages as universal and applicable to all societies.³³⁶ It is the norm by which other social orders are judged,³³⁷ and all societies are presumed to transverse the same fixed and linear path.³³⁸ This linear view of the past, present and future is necessarily imbued with hierarchy for the concept of development suggests that:

There are nations that have embraced Western technology enough to be developed; there are other nations on a lower scale of civilization that are developing; and there are still other nations that, steeped in religion and tradition, reject all forms of liberalism and secularism and thus remain underdeveloped . . .³³⁹

Western industrialized nations are at the pinnacle of this edifice and the nations of the Third World are necessarily subordinate to those at the apex. But development holds out the prospect that, with the assistance of the “more advanced,” the underdeveloped could catch up and also become modern and developed.³⁴⁰ These assumptions were a natural extension of a colonial discourse that emphasized Third World cultural, political, social and racial inferiority³⁴¹ and justified itself,

³³⁶ See, e.g., Teodor Shanin, *The Idea of Progress*, in THE POST-DEVELOPMENT READER, *supra* note 11, at 65.

³³⁷ Tucker, *supra* note 64, at 7.

³³⁸ MITTELMAN & PASHA, *supra* note 59, at 38. See *supra* notes 55–69 and accompanying text on Modernization theory.

³³⁹ Sardar, *supra* note 55, at 49.

³⁴⁰ Tucker, *supra* note 64, at 7. Under the rubric of modernization, Westernization gained the status of a universal goal and destiny. Progress became not only inevitable, but also obligatory and orthodox development hinged on the absolute certainty of universal modernity. To the “West development” and “modernization” characterized efforts by those in the Third World whom they implicitly assumed to be destined to achieve their levels of consumption. *Id.* See also Jose Maria Sbert, *Progress*, in THE DEVELOPMENT DICTIONARY, *supra* note 1, at 192.

³⁴¹ Colonialism was legitimized and grounded in part on a racial discourse that defined white Europeans as a superior race with a superior culture, and other races as inferior and in need of being civilized by whites. See Gordon, *Saving Failed States*, *supra* note 12, at 908–09; Gordon, *Racing U.S. Foreign Policy*, *supra* note 13, at 14–15. This raises questions regarding the role of race and culture in constructing development as discourse, as the largely colored colonized world became the colonized and then the underdeveloped “Other.” While race is only one of many factors, it is an additional means to separate developers from the Other. It may make it easier to view such peoples as incapable and, implicitly, as inferior. See, e.g., Leonard Frank, *The Development Game*, in THE POST-DEVELOPMENT READER, *supra* note 11, at 262 (A Canadian described the make-up of his development project assessment “team,” which included an American, a

in part, by a paternalistic mission to uplift and civilize the natives.³⁴² While development is a postcolonial (if not a neo-colonial) discourse,³⁴³ it has strong colonial roots.³⁴⁴ Indeed, the transition from colonialism to the development process may have been merely a shift in emphasis rather than the end of one project and the beginning of another.³⁴⁵ The rhetoric of colonialism

Korean, a Japanese, a Dane, and a Bangladeshi, thrown in only for color. He also admits his surprise and discomfort when the Other looked too white). Certainly there are also issues of class, and Third World elites also generally promote the development project. It has also been demonstrated that development theory and practice is gendered. See, e.g., Kothari, *supra* note 22, at 39. Yet the Third World is largely the colored world and thus it is at least worth questioning the degree to which race figures into the international hierarchy that development epitomizes. Power within development discourse resides in the West, and more specifically in international institutions that are dominated by western, and primarily white, nations. This is not to say that these Institutions do not employ people from many nations, including people of color from all parts of the world. Nonetheless, the policies that emanate from these institutions are formed in Western capitals and institutions. Markets now dominate, because the U.S. has decided that markets dominate. To work in these Institutions one must believe in the models they propound. Alternative views are simply absorbed, watered-down co-opted, or dismissed.

³⁴² Gordon, *Saving Failed States*, *supra* note 12 (discussing trusteeship and colonialism as part of the civilizing mission and the white man's burden of uplifting the natives); Parpart, *supra* note 317, at 261.

³⁴³ In its simplest formulation, "post-colonial" or "postcolonial" refers, chronologically, to the post independence period. However, since the late 1970s, the term has had a more complex meaning and is utilized to discuss the various cultural effects of colonization. See ASHCROFT ET AL., *supra* note 314, at 186. Postcolonial theory has been described as an "umbrella term for diverse critical approaches that deconstruct Western thought, and refers not to a simple periodisation but rather to a methodological revisionism that enables a wholesale critique of Western structures of knowledge and power." Kothari, *supra* note 22, at 39. For a discussion of the shifting and sometimes vague distinctions between postcolonial and post-colonial, see ASHCROFT ET AL., *supra* note 314, at 186–92.

³⁴⁴ Kothari, *supra* note 22, at 36–37 (noting that there may not be a clear distinction between the before of colonialism and the after of independence, that can be viewed as two sharply contrasting periods separated by the moment of decolonization).

³⁴⁵ Indeed, as early as 1937, one colonial governor said, "the exploitation theory. . . is dead, and the development theory has taken its place." Bernard Bordillon, *The African Producer in Nigeria, West Africa*, Jan 30, 1937, at 75, cited in 1 DEVESH KAPUR ET AL., *supra* note 30, at 96 n. 35. It took a while after the governor's insight for the rhetoric to change, but change it did. See Kothari, *supra* note 22, at 37 (discussing the extent to which the end of colonialism may or may not have signaled an end to empire, although it did effectively suggest the end of a specific form of imperialism even as imperial interest and global reach continued to be present).

re-emerged in the language of international development agencies through a discourse that emphasized the vulnerability and helplessness of Third World peoples.³⁴⁶ The World Bank sent “missions” to underdeveloped countries to formulate wide-ranging development programs that would, in effect, bring salvation.³⁴⁷ There was now a moral imperative to intervene,³⁴⁸ even as the power relationship that formerly existed between the colonizer and the colonized continued.³⁴⁹ By the middle of the 20th century, those whom Europeans had previously designated as “uncivilized” and “backward” now had a new appellation: underdeveloped.³⁵⁰

B. CONSTRUCTING THE UNDERDEVELOPED

A critical aspect of the dominance of the West resides in its power to produce and propagate knowledge and to thereby create categories such as the underdeveloped.³⁵¹ The West has been able to define and indeed to create the “Other” – objects to be

³⁴⁶ Parpart, *supra* note 317, at 261. This language then provides the rationale for the neo-classic market-oriented reforms being forced on Third World governments with the promise that they will reconstruct their economies. *Id.*

³⁴⁷ Escobar, *Planning*, *supra* note 157, at 135.

³⁴⁸ While colonial discourse constructed an obligation to undertake the white man’s burden and civilize the natives, such considerations were clearly secondary to the economic and political aspects of colonialism. With development, the West now had an obligation, and indeed was morally obligated to intervene in the Third World and modernize the underdeveloped.

³⁴⁹ Kothari, *supra* note 22, at 39. Professor Kothari continues that “the boundaries and distinctions that formerly marked the power relations between colonizers and the colonized continue to be played out, and are reinscribed on the relationship between development and administrators and recipients of aid.” *Id.*

³⁵⁰ Sbert, *supra* note 340, at 192.

³⁵¹ Tucker, *supra* note 64, at 13 (noting that the media is based in Western nations and is accompanied by the overwhelming dominance of European and North American Universities, foundations, institutes and research resources. Western scholars can obtain grants to study in the Third World, while it is more difficult for Third World scholars to study in the West, and when they do; they are socialized into the dominant paradigms of Western thinking. The unequal relationship that persists between the West and the Third World is an integral part of this process).

studied, described and developed,³⁵² and that “Other” is invariably lacking, deficient, inferior,³⁵³ and in need of Western assistance.³⁵⁴ This power to define and represent others is assumed “in the portrayal of ways in which people live their lives, in articulating their experiences – and on this basis, in shaping the processes of change.”³⁵⁵ Peoples with complex and varied histories, cultures and communities became homogenized masses mired in intolerable poverty and in need of Western assistance.³⁵⁶ The objects of development proliferated and included, inter alia, poverty, insufficient technology and capital, rapid population growth, inadequate public services, and archaic agricultural practices; new problems were continually incorporated, categorized and further defined.³⁵⁷ Indeed, the “vast surface over which the discourse effortlessly moved eventually covered practically the

³⁵² *Id.*

³⁵³ That the Other is lacking, deficient and inferior follows from a colonial discourse that viewed certain races and peoples as inferior and in need the benefits of civilization dispensed by their colonizer. See generally Gordon, *Saving Failed States*, *supra* note 12; BASIL DAVILSON, *THE BLACK MAN'S BURDEN AFRICA AND THE CURSE OF THE NATION-STATE* (1993).

³⁵⁴ On “helping,” see Marianne Gronemeyer, *Helping*, in *THE DEVELOPMENT DICTIONARY*, *supra* note 1, at 53.

³⁵⁵ ESCOBAR, *supra* note 19, at 40–41.

³⁵⁶ *Id.* at 41 (noting that “abnormalities were identified, such as the illiterate, the underdeveloped, the malnourished, small farmers, or landless peasants, which development would later treat and reform”).

³⁵⁷ Additional subjects included cities, rural areas, housing, schools, factories, hospitals, towns, regions and habitat. These ever-proliferating categories came from a range of sources, including governments, universities, research centers and the expanding international institutional edifice. Other categories and objects, such as cultural attitudes and values and the existence of racial, religious, geographic, or ethnic factors that were believed to be associated with backwardness, were later introduced, but with more caution or surreptitiously. *Id.* at 41–42. Professor Escobar notes that the never-ending specification of problems required detailed observation at all levels of a particular society, and accordingly complete profiles of countries were developed and elaborated. *Id.* at 42. The techniques for gathering this data have been refined and expanded. Indeed a cursory examination of the World Bank's Website confirms this, for complete country profiles of most countries can be found covering a wealth of information. See *infra* notes 378–79 and accompanying text for discussion in the reliability of this data and its place in World Bank analysis.

entire cultural, economic and political geography of the Third World.”³⁵⁸

Development problems were invariably framed in a manner that required Western intervention and the input of “experts”,³⁵⁹ and it was the discourse of development that determined who qualified as “expert.”³⁶⁰ Economists, demographers, educators, anthropologists, sociologists, psychologists and specialists in agriculture, public health and nutrition were enlisted to carry out the modernization project.³⁶¹ Development professionals were generally dispassionate academics and practitioners, who were usually far removed from the experiences and lives in which they intervened.³⁶² Locating knowledge in specialists, however, privileges some voices and silences others.³⁶³ It also means solutions

³⁵⁸ “Client categories” were created and proliferated as populations were consistently and continually found to be lacking and in need of treatment and reform. ESCOBAR, *supra* note 19, at 41.

³⁵⁹ Tucker, *supra* note 64, at 7. Development planners and practitioners often dismiss as inconsequential the voices of the individuals whose impoverishment they seek to address. Kothari, *supra* note 22, at 39.

³⁶⁰ There is a close connection between control over knowledge and assertions of power. For example, Western scientific knowledge is represented as universally valid and thus applicable to all, but not everyone qualified as an expert.

³⁶¹ ESCOBAR, *supra* note 19, at 41; Tucker, *supra* note 64, at 7. Adaptation became a key concept, for peoples and groups had to adapt. *Id.*

³⁶² See Anders Narman & David Simon, *Introduction, in DEVELOPMENT AS THEORY AND PRACTICE CURRENT PROSPECTIVES ON DEVELOPMENT AND DEVELOPMENT CO-OPERATION 8* (David Simon et al. eds., 1999). For a revealing account from inside the development community, see Frank, *supra* note 341, at 262. This account of how a multinational team of experts approved a project to develop a rural area on the North-West frontier of Afghanistan demonstrates that when the “facts” do not fit reality, reality is ignored; that local knowledge is purposely ignored when it would mean that expert knowledge is unnecessary; that areas can be “hot” for all sorts of reasons, having very little to do with the needs of local people; and that the objects of development are presumed to be people of color (Mr. Frank notes his surprise that these people were not the colored people he usually encountered on such missions). See also ESCOBAR, *supra* note 19, at 41. Moreover, the expert focus on promoting change at any cost raises issues of cultural imperialism.

³⁶³ ESCOBAR, *supra* note 19, at 45. Escobar queries: why cash crops (to generate foreign exchange, and thus to obtain capital and technology) and centralized planning, instead of participatory and decentralized approaches; why agricultural development based on large mechanized farms, instead of alternative agricultural systems based on smaller farms, ecological considerations, integrated cropping and pest management; why rapid economic growth, but not internal markets to satisfy the needs of the masses of people; why capital intensive, but not labor

emanate from foreign sources,³⁶⁴ while local knowledge and ways of knowing and being are ignored, discarded or co-opted.³⁶⁵ Overpowered by the hegemonic discourse of the West, Third World societies often were effectively prevented from articulating their own identities and worldviews. Many seem to have internalized the perspectives of the modernizers and developers, a process facilitated by comprador Third World intellectuals.³⁶⁶

The post war development discourse established a discursive practice that in turn established the rules of the game.³⁶⁷ This discourse permits “the systematic creation of objects, concepts and strategies,”³⁶⁸ as it determines who can speak, from what points of view, and with what authority. It establishes the criteria that define expertise and that expertise was deemed to reside in Western systems of thought, values and ways of life. Dominant

intensive solutions. Some of these choices are now being considered, given the profound disasters facing many developing countries and their developers. But this reconsideration still takes place within the developmental framework. *Id.* at 43.

³⁶⁴ The historical and cultural location of the “expert” may make it impossible to shake off this status, by simply adopting participatory techniques, for it is a question of political power. Kothari, *supra* note 22, at 39. For a detailed critique of participation, see Rahnema, *supra* note 11, at 116.

³⁶⁵ ESCOBAR, *supra* note 19, at 41 (noting that communities responded to the development agenda in myriad ways that sometimes incorporated resistance, and there were manifold failures as developers tried and failed to bring about modernization); Kothari, *supra* note 22, at 39 (noting development planners and practitioners often dismissed as inconsequential, the voices of the individuals whose impoverishment and marginality they were seeking to address); Tucker, *supra* note 64, at 7–8 (Observing that development was not conceived of as a cultural process. Rather culture was a “residual variable that would disappear with the advent of modernization. Thus it is unsurprising that development has wrecked havoc on Third World cultures, ironically in their name and in their interest. These multiple and varied encounters “were subsumed under the category of tradition, an essentially pejorative term that denoted divergence from the generally accepted norms of reason and progress.”).

³⁶⁶ Tucker, *supra* note 64, at 13.

³⁶⁷ ESCOBAR, *supra* note 19, at 41.

³⁶⁸ Esteva, *supra* note 1, at 13. *See generally* THE DEVELOPMENT DICTIONARY, *supra* note 1 (deconstructing such familiar “devspeak” terms as, inter alia, planning, participation, poverty, progress, population, needs, helping, and development).

strands of development theory and practice (including most “alternative” theories) are constructed in the West and implemented in the Third World.³⁶⁹ Western policy-makers decide which projects will be funded and where aid money will be spent or withdrawn.³⁷⁰ Third World governments are granted ostensible authority over their citizens, but rich countries and international lending institutions very often decide what will actually be done in Third World countries.³⁷¹ Thus, the hierarchical relationship that once existed between the colonizer and the colonized continues.³⁷²

An example of how the problem and then the solution are constructed within the development paradigm can be discerned in an oft-told depiction of Egypt. Popular representations of Egypt invariably describe it as an overpopulated country, whose population is crowded within a narrow strip of land in the Nile Valley, and is growing at a rate that outpaces its ability to grow sufficient food.³⁷³ The obvious response to the “natural limits of

³⁶⁹ Kothari, *supra* note 22, at 38; ESCOBAR, *supra* note 19, at 41 (remarking that it is “Western dominated institutions that determine the practices and procedures for all problems, theories, or objects that surface and are then named, analyzed and eventually transformed into a policy or a plan”).

³⁷⁰ ESCOBAR, *supra* note 19, at 41.

³⁷¹ Within the broad parameters of the policies set by the West, Third World countries may have some agency over the specifics and emphasis of projects. See Frank, *supra* note 341, at 262.

³⁷² Kothari, *supra* note 22, at 39.

³⁷³ The following discussion of Egypt can be found in Timothy Mitchell, *The Object of Development America's Egypt*, in *POWER OF DEVELOPMENT* 129–57 (Jonathan Crush ed., 1995). Professor Mitchell contends that the following description of Egypt can be found in almost any study of Egypt produced by an American or an international development agency:

The geographical and demographic characteristics of Egypt delineate its basic problem. Although the country contains about 386,000 square miles, . . . only a narrow strip in the Nile Valley and its Delta is usable. This area of 15,000 square miles – less than 4 percent of the land – is but an elongated oasis in the midst of desert. Without the Nile, which flows through Egypt for about a thousand miles without being joined by a single tributary, the country would be part of the Sahara. Crammed into the habitable area is 98 per cent of the population . . . the population has been growing rapidly and is estimated to have doubled since 1947.

The popularity of this image of space and numbers is summed up in a World Bank report: “These two themes – the relatively fixed amount of usable land and the rapid growth of the population – will be seen as leitmotifs in the discussion of Egypt’s Economic problems.” The additional image of a traditional rural world

geography and demography” is technological and managerial assistance, entailing the massive input of Western expertise and capital resources.³⁷⁴ Yet substantial questions can be raised regarding the claim that Egypt has too many people,³⁷⁵ that it lacks the ability to grow sufficient food³⁷⁶ or that it possesses too little

implies a system of agriculture that is static and therefore incapable of changing itself; thus any impetus for change must come from the outside. Yet political and economic changes in rural Egypt have taken place since the Middle Ages. Ignoring these transformations creates the impression that the poverty of the Nile Valley is a traditional poverty of a peasantry that only recently joined the twentieth century and only external forces can provide the impetus to transform Egyptian agriculture. New capital investment, new irrigation methods, improved seed varieties and cut flowers, all of which will bring foreign capital required to finance such technologies, becomes the principal means to achieve this transformation.

³⁷⁴ The World Bank posits that “the development problem is essentially a question of the quantity, quality and proportion of resources to be devoted to development on the one hand and to economic management on the other.” Thus the productive limits imposed by nature will be overcome by the forces of technology, while existing natural resources will be made more productive by more efficient management, which turns out to mean dismantling the bureaucracy of the Egyptian state and permitting market forces to work their magic. Mitchell, *supra* note 373, at 139.

³⁷⁵ Professor Mitchell questions why population densities in Egypt are compared to those in Bangladesh and Indonesia, rather than say Belgium or South Korea where population densities “are respectively three and four times higher than Indonesia.” *Id.* In other words, high population density is not necessarily an indication of overpopulation. While Egypt’s population level per hectare of arable land is similar to that of Bangladesh, and about double that of Indonesia, this comparison is misleading for Egyptian output per hectare is more than three times that of both countries. A more realistic comparison might be with the Philippines and Thailand, countries that are similar in total population and per capita gross national product, combined with far greater areas of cultivated land. But even with less land, Egypt’s agricultural population produces more crops per person than either of these countries. Professor Mitchell also asserts that there is no *prima facie* evidence for the assumption that Egypt’s population of 50 million is too large for its cultivable area. On a global level, given the demand on resources that the average Egyptian makes on world resources, versus the average citizen of industrialized countries, it is arguable whether Egyptian population growth threatens the world’s limited resources. But the corollary to the population argument is the rate at which the population is growing and that this rapid growth is surpassing the country’s ability to feed itself. *Id.* at 131–32.

³⁷⁶ Mitchell notes that according to World Bank tables, between 1965 and 1980, Egypt’s population grew at an annual rate of 2.1 percent a year, but agricultural production grew at an even faster rate of 2.7 percent a year. Thus it is not true that the population has been growing faster than the country’s ability to feed itself. He maintains that the reason Egypt has had to import increasing amounts of food can be found by examining the kinds of food being consumed and who gets to consume it. Egypt actually has a high rate of calorie consumption, with average

land.³⁷⁷ If the problem is redefined as changing consumption patterns and access to land, then the solutions also change and may encompass political and social constructs that are beyond the reach of Western development experts.

This misrepresentation of Egypt does not merely give rise to ineffective policies, however. Its simplistic and unchallenged premises³⁷⁸ demonstrate how Western-based development institutions continue to present the countries and peoples of the Third World (such as Egypt and its peoples) as objects of development,

protein consumption exceeding that found in most middle and high-income countries. The problem is that the shift has come in higher levels of food consumption among the better off, and most especially a higher consumption of meat, which means that food production has in part shifted to food for animals that are then slaughtered and sold as meat. It is the switch to meat consumption, rather than an increase in population that has required the dramatic increase in food imports. *Id.* at 132–36.

³⁷⁷ The image of a narrow strip of fertile land crammed with millions of inhabitants enables the analysis of Egyptian economic development to quickly eclipse the issue of access to land, because with so many people occupying so little space the problem appears to be explained. Images are painted of millions of tiny parcels and not enough land to go around. (The average size of a holding is two feddans, 94% of all owners have less than five feddans each, and only 0.2 percent have at least 50 feddans each.) But given the extremely fertile soils, year-round sunshine and permanently available irrigation water, very high yields can be obtained from two or even three crops a year and thus holdings of less than five feddans are not as small as they may seem and are well above the minimum farm size required for a family farm to feed itself (estimated at 0.8 feddans). These figures also fail to mention that the remaining six percent of landowners, with holdings from five feddans up to the legal limit of 50 feddans per individual or 100 feddans per family with dependent children, controlled 33 percent of the country's agricultural area and this concentration is increasing. It may also be that these official figures, which rely on village land registers, under-represent the concentration of landholding. *Id.* at 136–39.

³⁷⁸ For a discussion of how World Bank data and studies are created and utilized, see Gavin Williams, *Modernizing Malthus: the World Bank, Population Control and the African Environment*, in *POWER OF DEVELOPMENT*, *supra* note 17 (analyzing a World Bank report on sub-Saharan Africa and noting how data and impressive looking tables are often included, but bare little relation to the report, that much of the research that is commissioned is of poor quality and when it is good, it is not used or is shaped to fit pre-determined outcomes). See also Frank, *supra* note 341, at 262.

as something external to the expertise that is development, despite the tremendous involvement³⁷⁹ of these institutions in the affairs of Third World nations and communities.³⁸⁰

V. CONCLUSION: ENVISIONING A POST DEVELOPMENT WORLD

*All developing countries are caught in a time warp of sorts, where they can never really catch up with the West, . . . for the West has become the past, present and future of the non-West.*³⁸¹

³⁷⁹ The development project never sees itself as part of the problem and therefore developers rarely acknowledge responsibility for development's many failures. The World Bank acknowledges failures, but seldom acknowledges its involvement in such failures. Typically the blame is placed on its partner governments, and sometimes on the people themselves. An example can be found in the World Bank's analysis of sub-Saharan Africa, which in itself is questionable given the great variety of cultures, conditions, environmental settings and other factors that can be found in Africa. The Bank does not ask whether whole approaches, such as importing chemical and mechanical technologies, might be inappropriate. Instead it recommends more of the same. The environmental consequences of World Bank strategies are rarely considered. Instead, African women are identified as a cause of environmental damage. The Bank overlooks the consequences of mechanized farming and chemical fertilizers, and of dams and irrigation projects. The Report on Sub-Saharan Africa also draws no distinction between pastoralists and cultivators, or between capitalist farms and peasant smallholdings. Moreover, World Bank projects consistently privilege large-scale farmers who are politically influential, easier to reach and responsive to advice from project officials. Williams, *supra* note 378, at 158, 165. Much credit is claimed for perceived successes, however, such as the so-called Asian miracles of South Korea, Taiwan, Singapore, and Hong Kong. This too is a constructed space for it is doubtful that these "successes" had anything to do with the prescriptions advanced by development agencies. See O'Hearn, *supra* note 4, at 113-34.

³⁸⁰ Professor Mitchell notes:

The discourse of international development constitutes itself in this way as an expertise and intelligence that stands completely apart from the country and the people it describes. Much of this intelligence is generated inside organizations such as the World Bank and USAID, which play a powerful economic and political role within countries like Egypt. International development has a special need to overlook this internal involvement in the places and problems it analyzes.

Mitchell, *supra* note 373, at 130.

³⁸¹ Sardar, *supra* note 55, at 46. For example, the newly industrialized countries or larger Third World countries such as China, India and Brazil are now engaged in manufacturing and industries that are no longer found in the post-industrialized West. As the West abandons a particular activity, it is relegated to the Third World. Sardar writes:

Can development be transformed? What shape would a transformed development paradigm take? If development turns out to be incapable of fundamental change, what would the world look like without it? This part begins the process of thinking about these questions and contemplating a world without development. If development depends on shared beliefs rather than destiny, it is possible to *at least ask* whether Third World societies must necessarily reproduce themselves according to Western notions of development, or remain forever at the margins of the international community.³⁸² Must one develop or perish?³⁸³ We do not propose a substitute grand vision; our aim is to challenge the narrative of development, not to replace it with another.

Development theory and practice are in a quandary. There is a gap between academics and practitioners.³⁸⁴ Development

The present of the non-West is the past of the West, and the future of developing countries is the present of the West. When the non-West reaches the point of development, it has already become the past of the West, meaning the non-West has no real future since its future is already known in Europe and America. Parts of the non-West are the distant, pre-industrial revolution past of the North. The West was not just history; it is remade in the present and reconstructed in the future. . . . At each stage, it is internalized more and more and becomes an integral part of the global consciousness. As such, the future has been colonized by the West. . . . *The future is defined in the image of the West. . . taking us towards a single, determined future. . . .* An illusion of accelerated movement is produced to create an illusion of inevitability and to shroud the Eurocentric dimension of the exercise. Conventionally, the colonization of the future was known as Westernization. Now it goes under the rubric of globalization. The process that is transforming the world into the proverbial global village, rapidly shrinking distances, compressing space and time, is also shaping the world in the image of a single culture and civilization. In this Eurocentric vision of the future, technology is projected as an autonomous and desirable force. Its desirable products generate more desire; its second-order side effects require more technology to solve them. Thus there is a perpetual feedback loop and this self-perpetuating momentum has locked us in a linear, one dimensional trajectory that has foreclosed the future of the non-West.

Id.

³⁸² Tucker, *supra* note 64, at 3.

³⁸³ *Id.*

³⁸⁴ For a discussion of the gap between theoreticians and practitioners, see Narman & Simon, *supra* note at 362, at 1–2 (Noting practitioners are preoccupied with action, which is often not placed in a larger context, while academics are concerned with understanding. Politician, planners and administrators would prefer to not question development because it would threaten international consensus,

thought and policy have been subjected to the postmodern critique³⁸⁵ discussed in this article, and have broadened into diverse and sometimes inconsistent theories and modes of analysis.³⁸⁶ These diverse perspectives are partly in response to a pervasive disillusionment with the failures of development,³⁸⁷ and partly in support of the rising voices of indigenous resistance to development.³⁸⁸ At its most radical, anti-developmentalism urges abandoning “Western universalism or Euro-Americanism and calls for identifying other visions, other ways of knowing and being, and for recognizing that development has been an illusion.”³⁸⁹ It suggests that by challenging the central concepts that set boundaries on our thinking, development can be exposed and “rejected as degenerate, ecologically maladaptive, and an empty dream.”³⁹⁰ Somewhat less radically, there is the hope that exposing the ideology underlying development might lead to transformative responses from development’s proponents and practitioners.³⁹¹

instead devoting time to international conferences where declarations are formulated that are to be translated into development policy.).

³⁸⁵ These critiques and post-modernism in general have also been subjected to critique. See Sardar, *supra* note 55, at 45–46.

³⁸⁶ Simon, *supra* note 10, at 17.

³⁸⁷ *Id.* Professor Simon also cites “the collapse of socialism” which was viewed as an alternative model of development, the growing economic diversity of countries in the Third World, increasing concern for environmental sustainability; increasing assertiveness of voices from below and the rise of the postmodern challenge to universalizing theories and conventional practices of development. *Id.*

³⁸⁸ See Arturo Escobar, *Imagining a Post Development Era*, in POWER OF DEVELOPMENT, *supra* note 17, at 211, 216–20 [hereinafter Escobar, *Imagining a Post Development Era*]; Watts, *supra* note 24, at 44, 57–60; D.L. Sheth, *Alternatives from an Indian Grassroots Perspective*, in THE POST-DEVELOPMENT READER, *supra* note 11, at 329.

³⁸⁹ Watts, *supra* note 24, at 44–46.

³⁹⁰ *Id.* at 45. Others state “development appears as a blunder of planetary proportions, an edifice which shows cracks and is starting to crumble. At its most understated, there is a sense of malaise, a crisis of developmentalism (practice) and an impasse in development thinking (theory).”

³⁹¹ Martin Minogue and Uma Kothari, *Conclusion: Orthodoxy and its Alternatives in Contemporary Development*, in DEVELOPMENT THEORY AND PRACTICE, *supra* note 7, at 179–80 [hereinafter Minogue & Kothari, *Conclusion*].

The institutions, experts and politicians involved in technical assistance, however, view the concept of development as incontestable, even while conceding some of its failures.³⁹² Some proponents fear that if development is criticized, already inadequate assistance could be terminated or diverted to other ends.³⁹³ Moreover, some development projects have been beneficial³⁹⁴ and imposed relatively little negative impact.³⁹⁵ The postmodern analysis has also been criticized as challenging the notion of collective action and interests, and as making “even the possibility of international intervention in pursuit of development illusory and reactionary.”³⁹⁶ Post developmentalism seems to encourage

³⁹² Practitioners do usually agree, however, that development should have a human face, and that target populations should be permitted to participate in planning programs and implementing them. Rahnema, *supra* note 11, at 381.

³⁹³ *Id.* (Noting that there is a real danger that the many plausible arguments against development will be used to take funds that would be used for development and direct them to other uses. Perhaps it is better to spend the funds on agricultural projects, food, shelter and health care, however questionable such spending may be from philosophical point of view, than on say security and weapons. But are they not connected. Can repressive states obtain funds more easily when security requests are coupled with requests for development assistance.). The recent spectacle at the UN, with the U.S. bribing or threatening states with development aid to persuade them to vote for a resolution to use force against Iraq, really crystallizes this point. See, e.g., Henry J. Richardson, III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L L.J. 27 (2003).

³⁹⁴ The so-called “Asian tigers” are often presented as proof that development can, and eventually will, work. The economies of South Korea, Thailand, Singapore, Hong Kong, and Taiwan are frequently offered as proof of the viability of the Washington consensus and the triumph of export led growth based on markets. Yet the rapid modernization of these nations had little to do with the international development paradigm. For a devastating critique of the viability, sustainability and perhaps the myth of the Asian Tigers, see O’Hearn, *supra* note 4, at 117.

³⁹⁵ Rahnema, *Towards Post-Development*, *supra* note 11, at 381. Professor Rahnema was the UN Representative in Mali and coordinator of other development projects. She also notes that the bulk of the world’s resources are being utilized for arms and repressive governments and she questions whether or not these funds might be better spent on development projects, even if they are flawed.

³⁹⁶ Kiely, *supra* note 7, at 36. Professor Kiely maintains that the idea that needs and poverty are solely social and cultural constructions, mistake the word for the world and can create conditions wherein a positive local politics of empowerment slides fitfully into an amoral politics of indifference. *Id.* In other words, it may cause the rich to simply disengage. See also Jan Nederveen Pieterse, *My Paradigm or Yours? Alternative Development, Post-Development, Reflexive Development*, 29 DEV. & CHANGE 343 (1998).

disengagement, and the abrogation of any Western accountability for the current state of affairs in Third World nations.³⁹⁷ It is believed to offer little to those who aspire to safe drinking water, a roof that does not leak and other material goods most citizens of industrialized countries take for granted.³⁹⁸ Post-development theorists are charged with attempting “to reinvent a pre-colonial Eden that never existed and is no less violent in scripting identity, than are identities constructed in the name of development.”³⁹⁹ Adding to the complexity is the daunting task of considering a post development world in the wake of fifty years of development that has left many individuals worse off,⁴⁰⁰ and countries mired in debt and enmeshed in a system that has in effect led to re-colonization.⁴⁰¹ What is more, in an era of globalization, is it even possible to escape the development paradigm?⁴⁰² These critiques raise serious questions to which—absent

³⁹⁷ Simon, *supra* note 10, at 17.

³⁹⁸ Both authors have visited Southern countries and witnessed the need for these “comforts,” and thus take these criticisms very seriously. See Sylvester, *supra* note 6.

³⁹⁹ It is maintained that the anti-development thesis does not take us “beyond the dualisms of modernity and tradition, and dominant and dominated” and is rather vague about alternatives as it romanticizes local cultures. Kiely, *supra* note 7, at 36–37. Professor Kiely notes that the idea that development always undermines authentic cultures “can itself be considered a form of cultural imperialism, based on a long tradition of romanticizing the ‘Other.’” *Id.*

⁴⁰⁰ See, e.g., Narman & Simon, *supra* note 362, at 8. Professors Narman and Simon point out that silence is often taken for lack of knowledge, while it could really arise out of courtesy, a desire to not disagree or offend or to disclose information considered too private. Indeed the targets of development have been quite ingenious in filtering the advice and instructions received from development professionals. They have not been as passive as might be thought and have been able to be selective in accordance with their own needs and perceptions through their cultural filters.

⁴⁰¹ Given the amount of control exercised by international financial institutions over the economies, politics and societal choices in the nations of the Third World, it does not seem to be too far from colonialism. Indeed the discourse of racial, social, political and cultural superiority that justified colonialism, underlies the development discourse. Gordon, *Saving Failed States*, *supra* note 12, at 926.

⁴⁰² It has been argued that nations do not necessarily participate in the globalization project “as nations inevitably on their way to modernity, but as pragmatic and strategic actors in a much more restricted game that is governed by free trade, specializing in what can be done without the aid of protection, privatization, and living within ones means.” O’Hearn, *supra* note 4, at 117.

a new meta-narrative—there is no comprehensive “answer.” Instead, there may be a range of inquiries that might help shift the entire approach to development and to the Third World.⁴⁰³ Our intent is to begin a paradigm shift that relocates the locus of control and authority.

With this possibility in mind, consider a question. Is it possible the Third World would have been better off without the official development assistance it has been accorded since the 1950s, keeping in mind the successes and failures of development and its impact on war, peace, government structures, sovereignty, debt and a host of other issues? Professors Simon and Narman pose a simpler form of this question⁴⁰⁴ and of course find it impossible to answer.⁴⁰⁵ Yet perhaps it is a question that nonetheless should be asked, as the liberal consensus constructs globalization in a manner that threatens to consign permanently the people of the Third World to do the work that people in the West no longer want to do.⁴⁰⁶ The Western assumption is that material wealth means personal contentment, and the middle classes and elites of the South seem to have adopted this view.⁴⁰⁷ But perhaps this is not entirely the case for everyone. The desirability of material wealth may vary for different peoples depending on their particular values and mores, just as such needs and desires vary within the Western world. Development is assumed to improve the lives of its targets, but who defines “improvement,” and who determines priorities and the desirability of interventions in pursuit of change. The answers to these multifaceted questions are even more complex after fifty years of

⁴⁰³ Escobar posits that there is little point in speculating in the abstract about the character of a post-development era, for if we accept that critical thought must be situated, then a discussion of these issues should be practice-oriented, engaging with the political claims and actions of oppositional movements. See Escobar, *Imagining a Post Development Era*, *supra* note 388, at 211, 216.

⁴⁰⁴ Simply put, “would the Third World have been better off without development assistance?” See, e.g., Narman & Simon, *supra* note 362, at 7.

⁴⁰⁵ *Id.*

⁴⁰⁶ Of course, it is international capital that has decided that Western workers no longer will do certain types of work. Chantel Thomas, *Globalization and the Production of Hierarchy*, 33 U.C. DAVIS L. REV. 1451 (2000) (discussing when corporations relocate to the Third World in search of cheap labor, less governmental regulation and the like).

⁴⁰⁷ See, e.g., Narman & Simon, *supra* note 362, at 1–2.

development, during which a plethora of policies have rained down upon a broad range of societies, cultures and peoples.

Consider a second question. Was everything in the previous “non-developed world” really so terrible? Surely the pre-colonial world was not an idyllic paradise. And is true that people did not have many of the goods that are now deemed necessities in the West.⁴⁰⁸ But perhaps people were productive enough to produce what they needed, a capacity that is sorely lacking today as many countries are barely able to feed their people.⁴⁰⁹ Certainly, the pre-development world was affected to varying degrees by colonialism, which had uneven and often destabilizing consequences for the colonized.⁴¹⁰ Nonetheless it is important to ask how people viewed themselves and their communities before the advent of development.⁴¹¹ Is it possible that a sense of inclusiveness, cohesiveness, belief in local capabilities, and a perception of self-worth could characterize communities—even when those communities were what many today would characterize as poor?⁴¹² This is not to champion or romanticize mythical “timeless traditions.”⁴¹³ Rather, it is to acknowledge that before development people were not helpless, incompetent, inferior creatures in need of salvation from the West, but instead were quite capable and diverse human beings organized into myriad, complex communities. A post development paradigm must consider how

⁴⁰⁸ See Illich, *supra* note 42, at 88 (discussing the evolution of needs in development discourse, as it evolved from food, clothing, materials for housing and mechanical power into a measurable standard such as Gross National Product and then into notions of absolute poverty and minimum levels of human decency).

⁴⁰⁹ Rahnema, *Towards Post-Development*, *supra* note 11, at 377, 379. The pre-development world was also the colonized world and colonialism was a destructive force that disrupted communities, changed cultures and had complex effects across very complex cultures. Thus developers did not confront pristine societies untouched by the West. See Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528 (1999).

⁴¹⁰ Gordon, *Saving Failed States*, *supra* note 12, at 930–35.

⁴¹¹ See *supra* notes 35–54 and accompanying text on poverty.

⁴¹² Illich, *supra* note 42, at 88, 96 (Noting in “*traditional* poverty, people could rely on finding a cultural hemlock,” but development is a process which “lifts people out of their traditional cultural commons,” dissolving such cultural bonds. Many are sinking deeper and deeper into an abyss of worsening poverty from which they will never be able to rise and meet their new needs.).

⁴¹³ For a discussion of the modern-traditional dichotomy, see ESCOBAR, *supra* note 19, at 75–80; Escobar, *Planning*, *supra* note 157, at 135–36.

local communities might begin to regain the agency to identify and name ones own dreams, viewpoints and ways of being.

This transformation must also interrogate how and why non-Western cultures and systems of thought are treated as somehow inferior, if not unacceptable.⁴¹⁴ This query is really directed more to Western communities and their views of the non-Western "Other." To return agency to the peoples of the Third World would mean abdicating the power to name and define the problem, as well as the scope and content of the dialogue, and the substance and scale of any solutions.⁴¹⁵ It is undeniable that many in the development industry are very intelligent people with good hearts and only the best of intentions. They truly care about the work they are doing and the people they are trying to assist. But it can be difficult to revise long held perspectives and perceptions, especially when those perspectives are an integral part of the cultural milieu in which one exists.⁴¹⁶ Images of the Third World as deficient and inferior are inherent in the words "underdeveloped," "undeveloped," and "developing." This, of course, empowers the developer. Moreover, even as one tries to escape the development prism, there is often a nagging suspicion that without the West the peoples of the Third World really are somewhat helpless and not quite up to the task regardless of how

⁴¹⁴ Cultures change, but development viewed tradition and Third World cultures as impediments to modernization and thus to be eradicated in favor of development. Indeed development can be visualized as a process by which people are lifted out of their cultural commons. In this transition, cultural bonds are dissolved, even though culture can continue to tinge development in superficial ways – one need only observe rural people recently transplanted to the megacities of the Third World. ESCOBAR, *supra* note 19, at 75–80; Escobar, *Planning*, *supra* note 157, at 135–36.

⁴¹⁵ McGee, *Participating in Development*, in *DEVELOPMENT THEORY* at 93, 95–96. (Noting early orthodoxy when the "development agency conceived, designed, funded, managed, implemented and evaluated the project from somewhere outside its boundaries"; and there were the project beneficiaries –undifferentiated, passive recipients of goods and services provided through project channels. People – whether in the agency or in the beneficiary population – were scarcely acknowledged to be there." Beginning the 1980s higher levels of "participation" came into vogue, but even these interventions were problematic.)

⁴¹⁶ See Doug J. Porter, *Scenes from Childhood the Homesickness of Development Discourses*, in *POWER OF DEVELOPMENT*, *supra* note 17, at 63 (noting that discourse analysis at minimum might make development workers aware of their practices).

it is defined.⁴¹⁷ When coupled with the racism that generally presumes the Other as not quite competent, it becomes even more difficult to move beyond these beliefs.⁴¹⁸ Yet the crucial question is control over destinies, the importing and imposition of values, and who is given the power to define?⁴¹⁹ Besides its economic and technological might, the West has the power to define.⁴²⁰ This power must be returned to the peoples of the Third World, who must determine the narratives that are to govern their lives.

This necessarily raises questions as to who exactly are “the people,” and how to go about determining what “they” want. It may be that “the people” are incapable of being concretely defined, and that any attempt to do so risks essentializing broad and diverse communities. No attempt is made here to do so. Moreover, no assumptions are made about the extent or the manner in which peoples may want to engage or disengage from the West or the development project, nor as to how people define their basic needs or how those needs should be met. Indeed, it is fully expected that many will completely embrace the West and what it has to offer; that others may be more selective, finding value in some facets and unsuitability in others; while still others will reject the West across-the-board. Rather than making such determinations, the work to be done in the West is to try to figure out ways to somehow create a space to let people determine these things for themselves.

⁴¹⁷ This analysis does not take account of situations involving war or similar conflicts. The responsibilities of the international community in any such situation necessarily differ from that in times of peace, regardless of where a particular nation stands on the modernization scale.

⁴¹⁸ Racial difference on the international stage cannot be equated with notions of race in the United States. But it is equally clear that a racial discourse partly inspired colonial discourse and is not irrelevant in foreign policy. It certainly colors perceptions of the developing world, which is inevitably seen as the colored world. Gordon, *Critical Race Theory*, *supra* note 331. It is also acknowledged that development practitioners come from all over the world and thus may be people of color. This does not mean race is irrelevant, but that it may be that its effect is more complex and difficult to sort out.

⁴¹⁹ Tucker, *supra* note 64, at 3.

⁴²⁰ Sardar, *supra* note 55, at 44. The West defines freedom, progress, law, tradition, community science, what is real and what it means to be human. Non-Western societies must accept these definitions or cease to exist. *Id.*

What separates this undertaking from alternative development approaches such as participation,⁴²¹ is a different attitude and perspective in the West. The struggle to make this change begins with Western interrogation of the assumption of power over others, and the usurpation of agency and voice. Those in the West who are concerned about poor peoples in the Third World must begin to question the power presumed to reside in self and in the West. At all points along the political spectrum, whatever the critique, the power to change or improve the lives of Third World peoples is assumed to reside in the West. This may not be true in the final analysis. But whether it is or not, giving up this power may bring about a humility that permits a true exchange and a dialogue that does not frame the questions, control the dialogue and assume the answers, for it entertains the possibility that those answers may lie elsewhere.

Consider a third and final question? What if development had succeeded? What if the governments, institutions and people charged with realizing the development project had succeeded in fulfilling its many promises, and there had actually been sufficient funds and resources to make development a reality and all so-called underdeveloped countries were now on economic par with the industrialized countries? It is doubtful the planet could support a world in which everyone consumed as many resources and generated as much waste as the industrialized world.⁴²² Perhaps this indicates that development as currently defined is not universally attainable,⁴²³ and replicating western consumption patterns may not be a desirable goal due to its global impact. This is not to say that the people of the Third World should not have access to the material goods widely enjoyed in the West. The people who will be affected must determine the desirability of those goods, and of adopting the lifestyle

⁴²¹ Participation attempts to incorporate the voice of development's target in the process of development. For a discussion of the evolution of "participation," see McGee, *supra* note 114, at 93. See also Rahnama, *Participation*, *supra* note 155, at 116; Minogue & Kothari, *Conclusion*, *supra* note 391, at 185–86.

⁴²² Rahnama, *Towards Post-Development*, *supra* note 11, at 377, 379. See also Richard Douthwaite, *Is it Possible to Build a Sustainable World*, in *CRITICAL DEVELOPMENT THEORY*, *supra* note 4, at 158–60 (detailing why the current global economic system is unsustainable).

⁴²³ See, e.g., Eduardo Galeano, *To Be Like Them*, in *THE POST-DEVELOPMENT READER*, *supra* note 11, at 214.

associated with a consumer culture.⁴²⁴ It is only to say that perhaps modernization as it is currently configured is ultimately unsustainable and the entire international community should begin to re-think development in all of its manifestations.⁴²⁵

There is evidence to suggest that this transformation may already be taking place on both the local and global levels. The rising voices confronting globalization raise one set of challenges.⁴²⁶ At the local level, the development paradigm is being contested and transformed by “social movements that are characterized by social actors, as opposed to structures; the promotion of democratic, egalitarian and participatory styles of politics; and a search, not for grand structural transformations but rather, for the construction of identities and greater autonomy through modifications in everyday practices and beliefs.”⁴²⁷ While certainly not a grand break with the past,⁴²⁸ these developments

⁴²⁴ Often when these questions are raised, the immediate response is that everyone wants what the West offers and the person raising the question is queried about whether he or she would give up their Western life-style. Third World scholars are similarly interrogated, and if they reside in the West, are presented as proof that all peoples desire life in the West. For those born and raised in Western countries, this is truly an unfair question, for few are willing to change their entire way of life, especially when that life has always been posited as superior and the alternative posited as inferior. The Western brain drain is certainly a reality, as Western educated elites seek jobs in the North. And while it is true that many elites have embraced development wholeheartedly, not all Third World elites have migrated to the West. Moreover, it may be difficult to straddle the morass left in the wake of development, which has left many with few viable economic options besides re-settling in the West. Leaving may be the only reasonable course, and thus many leave even as they make their life work helping those left behind. Finally it is not argued that the West is inferior and undesirable and no one would choose it. Indeed many have and many undoubtedly will. What is posed is how to give people the choice to direct the change, or lack thereof, that will govern their lives.

⁴²⁵ This would include, if not prioritize, the waste and environmental degradation wrought by the industrialized world.

⁴²⁶ While the demonstrations and other actions against globalizations are more or less ridiculed in the United States by the American media, this resistance has continued and is perhaps expanding.

⁴²⁷ Escobar, *Imagining a Post Development Era*, *supra* note 388, at 211, 217.

⁴²⁸ Escobar notes that these new social movements are often compared with the old, meaning “modernization or dependency; politics centered around traditional actors like parties, vanguards, and the working class who struggle for the control of the state, and towards a view of society as composed of more or less immutable structures class relations that only great changes (i.e. massive development

clearly signal a new direction.⁴²⁹ It may be these local and particular movements that point us towards a post-development world that is not tied to grand schemes and designs, but is rooted in the diverse and the specific. In the face of globalization, which is presented as inevitable, focusing on the local may seem parochial. But almost all global actors, including multinational corporations, whose reach and power seems to be almost infinite, in fact operate locally. Products and services must be made and sold within localities and it may be on the local level that such entities, and the notion of the global and universal, can be most effectively questioned and, if necessary, challenged.⁴³⁰

Does this mean that there is no role for those in the West who wish to assist and act in solidarity with those in the Third World who seem to be on the economic and political periphery? On the contrary, there may be a number of ways to engage, although the nature of that engagement may have to evolve. Documenting and sharing the local encounters noted above can be of immense assistance for such information can not only be encouraging and inspiring, but may help other communities in devising strategies and tactics.⁴³¹ Scholars, attorneys, economists and

schemes or revolutionary upheavals) can alter in a significant way.” *Id.* He suggests that there may be significant continuities between the two regimes, including ways in which “for instance, old styles of politics are pervasive among the new movements – are overlooked.” Equally important the past is endowed with features that are not completely accurate (for instance the claim that all styles of politics in the past were clientilistic and non-participatory). *Id.*

⁴²⁹ Most of these social movements have been in Latin America. *Id.*

⁴³⁰ This insight is found in Gustavo Esteva and Madhu Suri Prakash, *From Global Thinking to Local Thinking*, in (THE POST-DEVELOPMENT READER (Majid Rahnema and Victoria Bawtree eds., 1997) at 277. This quite brilliant essay begins with the bumper sticker that urges its reader to “think globally, act locally,” noting that it reflects the desire to act in solidarity with those on the periphery of globalization. But they propose that perhaps the best course is to think locally and act locally, given that even MNCs must sell and make their products locally. Indeed, to this extent, all global projects, including the development project, is local. It may be impossible to challenge such entities globally because most localities are unable to act effectively at the global level, which can be seen in some of the difficulties faced by the anti-globalization movements. But there may be more possibilities to mount such challenges on the local level.

⁴³¹ See Esteva, *From Global Thinking to Local Thinking*, in THE POST-DEVELOPMENT READER, *supra* note 11, at 286–88 (suggesting this role). By supporting local communities as they attempt to take on global capital and international institutions, there is a space for intervention by Western communities that want to assist.

others might also engage Western institutions on expunging the obscene debt that is draining many of the very poorest countries.⁴³² The debt did not exist in 1950 and has many roots, but surely it is tied to the modernization project. This article does not address wars and other instances of extreme dislocation that may require certain types of interventions be it from the West or other Third World nations. Although the legality of such interventions is the subject of endless debate,⁴³³ this may be another area in which concerned communities in the West can assert positive influence.

There is certainly work to be done in shaping assistance when assistance is desired, although it may be difficult to let go of deep-rooted assumptions and long-held power. Without doubt, critically questioning the very concept of development is the first step in fundamentally changing the manner in which one thinks about development and its objects, and is the place to begin probing accepted wisdom about "the Other." There is little to suggest that the people whose lives have been dramatically changed by development necessarily refuse to accept change. What may be desired is change that helps people enhance inborn and cultural capacities, and change that allows individuals to blossom and leaves them free to change the rules and content of change, according to their own ethics and aspirations.⁴³⁴ The objective it is to pose different questions, to hear the responses of others, and to not assume that the answers reside in the West. It is to slowly, but steadily and surely, accomplish a paradigm shift.

⁴³² See *supra* notes 6, 164–68 and accompanying text. For an excellent analysis of the debt problem in Africa, see Chris N. Okeke, *The Debt Burden: An African Perspective*, 35 INT'L LAW 1489 (2001); Susan George, *How the Poor Develop the Rich*, in THE POST-DEVELOPMENT READER, *supra* note 11, at 207 (detailing how the debt drains funds from the Third World and enriches the industrialized world).

⁴³³ See, e.g., Ruth Gordon, *Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti*, 31 TEX. INT'L L.J. 43 (1996).

⁴³⁴ Rahnema, *Towards Post-Development*, *supra* note 11, at 384. Industrialization might be rejected by some, welcomed by others or it might be restructured to meet local needs; other alternatives would be on the table. Health care and other basic social services might be embraced, or perhaps reshaped and then supported.