

# Florida A & M University Law Review

---

Volume 6

Number 1 *Social Justice, Development & Equality:  
Comparative Perspectives on Modern Praxis*

---

Article 1

Fall 2010

## Decolonization, Development, and Denial

Natsu Taylor Saito

Follow this and additional works at: <http://commons.law.famu.edu/famulawreview>

---

### Recommended Citation

Natsu T. Saito, *Decolonization, Development, and Denial*, 6 Fla. A&M U. L. Rev. (2010).  
Available at: <http://commons.law.famu.edu/famulawreview/vol6/iss1/1>

This Article is brought to you for free and open access by Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Florida A & M University Law Review by an authorized administrator of Scholarly Commons @ FAMU Law. For more information, please contact [linda.barrette@famu.edu](mailto:linda.barrette@famu.edu).

# DECOLONIZATION, DEVELOPMENT, AND DENIAL

*Natsu Taylor Saito\**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1	R
II.	THE TRANSITION FROM DECOLONIZATION TO DEVELOPMENT .....	6	R
	A. <i>Inherently Contradictory: Decolonizing Under Colonial         Rules</i> .....	8	R
	B. <i>The Influence of International Financial Institutions</i> .	12	R
	C. <i>“Good Governance” and “Failed States”</i> .....	17	R
III.	DEVELOPMENT AS A COLONIAL CONSTRUCT.....	21	R
	A. <i>“Guardianship” as a Justification for Colonial         Appropriation</i> .....	22	R
	B. <i>Self-Determination and the League of Nation’s         Mandate System</i> .....	25	R
	C. <i>The Persistence of the Development Model</i> .....	31	R
IV.	REIMAGINING DECOLONIZATION .....	33	R
	A. <i>Revisiting Self-Determination</i> .....	33	R
	B. <i>Questioning Fundamental Premises</i> .....	38	R
	C. <i>Envisioning Options</i> .....	42	R
V.	CONCLUSION .....	46	R

## I. INTRODUCTION

*[I ask you] to make today . . . a date whose meaning you will proudly teach your children. . . . We are proud of having struggled amid tears, fire, and blood [for it was] an indispensable struggle if we were to put an end to the humiliating slavery that had been forced upon us. . . . We are going to begin another struggle together, my*

---

\* © 2010. Professor of Law, Georgia State University College of Law. I am indebted to the many legal scholars who have critiqued the decolonization process, including Antony Anghie, Ibrahim Gassama, James Thuo Gathii, Ruth Gordon, Tayyab Mahmud, and Henry J. Richardson III, and grateful to the Georgia State University College of Law for its research support. The arguments presented in this essay are addressed in more detail in NATSU TAYLOR SAITO, *MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW* (2010).

*brothers, my sisters, a sublime struggle that will bring our country peace, prosperity, and grandeur.*

*Prime Minister Patrice Lumumba,  
Congo Independence Day, June 30, 1960<sup>1</sup>*

The national liberation movements of the late 1950s and 1960s brought tremendous hope and renewed aspirations to colonized peoples around the world, as illustrated by Patrice Lumumba's speech upon the recognition of the independence of the Congo.<sup>2</sup> The UN played a significant role in the decolonization process,<sup>3</sup> but neither that body nor the colonial powers liberated "dependent" territories; independence was hard won by colonized peoples, and reluctantly acknowledged by their colonizers.<sup>4</sup> As Argentine journalist Adolfo Gilly observed in his 1965 introduction to political philosopher Frantz Fanon's *Studies in a Dying Colonialism*: "The whole of humanity has erupted violently, tumultuously onto the state of history, taking its own destiny in its hands. . . . Liberation does not come as a gift from anybody."<sup>5</sup> The "tears, fire, and blood" were a price worth paying to bequeath genuine self-determination to coming generations.

In 1957, under Kwame Nkrumah's leadership, Ghana became the first African colony to win its independence.<sup>6</sup> A few years later, referencing Africa's vast mineral, agricultural and hydrological resources, Nkrumah emphasized: "Never before have a people had within their grasp so great an opportunity for developing a continent endowed with so much wealth."<sup>7</sup> Besides political independence, Nkrumah said, "[a]ll we ask of the former colonial powers is their good will and co-

---

1. Patrice Lumumba, "Speech at Proclamation of Independence," June 30, 1960, in INDEPENDENCE DOCUMENTS OF THE WORLD 793-797 (Albert P. Blaustein, Jay A. Sigler & Benjamin R. Beede eds. 1977) The precise wording of Lumumba's speech is reported in various ways, perhaps because it was a somewhat impromptu response to insulting comments made by Belgian King Albert Baudouin at the ceremony. See DAVID RENTON, DAVID SEDDON & LEO ZEILIG, THE CONGO: PLUNDER AND RESISTANCE 80-81 (2007) (alteration in original).

2. On Lumumba's assassination soon thereafter, see Ibrahim J. Gassama, *Africa and the Politics of Destruction: A Critical Re-Examination of Neocolonialism and its Consequences*, 10 ORE. REV. INT'L L. 327, 328-332 (2008).

3. See ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 196 (2005).

4. See Alain Pellet, *Book Review of the Charter of the United Nations: A Commentary*, ed. Bruno Simma, 25 MICH. J. INT'L L. 135, 140-141 (2003).

5. Adolfo Gilly, *Introduction in* FRANTZ FANON, *STUDIES IN A DYING COLONIALISM* 1-2 (1965).

6. See JAMES H. MERIWETHER, PROUDLY WE CAN BE AFRICANS: BLACK AMERICANS AND AFRICA, 1935-1961 150 (2002).

7. Kwame Nkrumah, *I Speak of Freedom*, 1961, available at <http://www.fordham.edu/halsall/mod/1961nkrumah.html>. See generally Gassama, *supra* note 2 (discussing the impact of Nkrumah's subsequent analysis of neocolonialism).

operation to remedy past mistakes and injustices.”<sup>8</sup> The political changes of the decades following World War II were accompanied, in fact, by dramatic transformations of international law and legal institutions, many of them purporting to facilitate a decolonized world, but the question remains whether past mistakes and injustices have been addressed in any meaningful way.

At the beginning of the twentieth century only a handful of non-European states were recognized as sufficiently “civilized” to participate in a proposed world government, a number that had grown to about fifty by the time the United Nations (UN) was established.<sup>9</sup> According to the Decolonization Unit of the United Nations, almost one-third of the world’s population was “non-self-governing” in 1945,<sup>10</sup> but by 2002 eighty former colonial territories had been recognized as independent and the UN had almost two hundred members.<sup>11</sup> Three chapters of the UN Charter and one of its principal organs were devoted to ensuring the eventual independence of “non-self-governing territories” and the wellbeing of their “inhabitants,”<sup>12</sup> and in 1960 alone the independence of eighteen African states was acknowledged by the United Nations.<sup>13</sup>

More than a half-century later, it is difficult to remember the optimism energizing the global movement for decolonization. Former European colonies in Africa and Asia account for virtually all of the states currently identified by the UN Development Programme (UNDP) as “least developed.”<sup>14</sup> According to a 2007/2008 UNDP re-

8. Nkrumah, *supra* note 7 (alteration in original).

9. See generally STEPHEN C. SCHLESINGER, *ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS* (2003).

10. U.N. Decolonization Unit Department of Political Affairs, The United Nations and Decolonization, available at <http://www.un.org/depts/dpi/decolonization/main.htm>.

11. In 1945 the UN founders anticipated some additional members, but they did not envision a wholesale transformation of colonies or “dependencies” into “civilized states,” as illustrated by the instructions given the architects of the UN Headquarters building to create a General Assembly hall capable of housing delegations from seventy countries, a number far short of current UN membership. See PHYLLIS BENNIS, *CALLING THE SHOTS: HOW WASHINGTON DOMINATES TODAY’S UN* 14-16 (1996). A listing of current UN members is available at <http://www.un.org/members/list.shtml>.

12. See UN Charter, arts. 73-91 (addressing non-self-governing territories) and arts. 7-8 (describing principal organs), available at <http://www.un.org/en/documents/charter/index.shtml>; see also <http://www.un.org/en/mainbodies/trusteeship/> (describing purposes of the UN Trusteeship Council).

13. See U.N. Decolonization Unit Department of Political Affairs, The United Nations and Decolonization, Trust and Non-self-governing Territories, 1945-1999, available at <http://www.un.org/depts/dpi/decolonization/trust2.htm>.

14. See United Nations, Development Policy and Analysis Division, List of Least Developed Countries, available at [http://www.un.org/esa/policy/devplan/profile/ldc\\_list.pdf](http://www.un.org/esa/policy/devplan/profile/ldc_list.pdf).

port, in twenty-two of these states almost two-thirds of the population lack improved sanitation and are undernourished.<sup>15</sup> The UNDP's 2010 Report notes that 1.44 billion people live on less than U.S. \$1.25 per day (the World Bank's standard for extreme poverty), most of them in South Asia and Sub-Saharan Africa.<sup>16</sup> UNDP studies also indicate that fifty-four countries were poorer in 2003 than they had been a decade earlier and that overall human development, as measured by a combination of income, life expectancy, and literacy, fell in twenty-one countries during the 1990s.<sup>17</sup> The poorest countries are also those most directly affected by climate change and associated "natural" disasters,<sup>18</sup> and by the devastation associated with armed conflict.<sup>19</sup>

Beyond recognizing the independence of formerly colonized territories, the primary "solution" proposed by the international community for these problems has been economic development. As of 2010, the United Nations has sponsored four Development Decades, two Industrial Development and Transport and Communications Decades specifically targeting Africa, two International Decades for the Eradication of Colonialism, and two Decades for the Eradication of Poverty.<sup>20</sup> It is now at the midpoint of a concerted effort to reach its "Millennium Development Goals" on the eradication of poverty.<sup>21</sup> There are many theories about why so little of the emancipating potential of the movement for decolonization has materialized and a multiplicity of critiques of the development programs sponsored by UN agencies and international financial institutions.<sup>22</sup> Yet even as devel-

---

15. United Nations Development Programme, "Fighting Climate Change: Human Solidarity in a Divided World," Human Development Report 2007/2008, at 264 (Table 10), available at [http://hdr.undp.org/en/media/HDR\\_10071008\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_10071008_EN_Complete.pdf).

16. See United Nations, Human Development Reports, 2010, available at <http://hdr.undp.org/en/reports/global/hdr2010/summary/poverty/>; see also World Bank Group, Millennium Development Goals, available at <http://ddp-ext.worldbank.org/ext/GMIS/gdmis.do?siteId=2&goalId=5&menuId=LNAV01GOAL1> (defining extreme poverty as \$1.25 per day in 2005 prices).

17. Larry Elliott, *The Lost Decade*, GUARDIAN, July 9, 2003.

18. Between 2000 and 2004 approximately 262 million people were impacted by "climate disasters," with "over 98 percent of them in the developing world." See UNDP, "Fighting Climate Change," *supra* note 15, at 8.

19. See *The World at War: Current Conflicts*, available at <http://www.globalsecurity.org/military/world/war/index.html> (noting that Africa is affected by war "to a greater extent than any other continent").

20. See United Nations Observances, International Decades, available at <http://www.un.org/observances/decades.shtml>.

21. See <http://www.un.org/millenniumgoals/>.

22. See generally Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L L.J. 1 (2004); THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER (Wolfgang Sachs ed., 2007); CRITICAL DEVELOPMENT THEORY: CONTRIBUTIONS TO A NEW PARADIGM (Ronaldo Munck & Denis O'Hearn eds., 1999).

opment programs fail to meet—or even result in discernable progress toward—their goals, the predictable response of international organizations is to initiate another round of the same types of programs.<sup>23</sup>

As discussed below, rather than “remedy[ing] past mistakes and injustices” as Nkrumah requested,<sup>24</sup> the programs initiated by the most powerful states and their leaders have ignored the history of colonialism, thereby precluding substantive analyses of structural inequities.<sup>25</sup> They have reduced the legacy of colonialism to “poverty” and then proceeded to implement “development” programs that purport to alleviate poverty without risking any fundamental change in global economic power. This cycle bears all the hallmarks of the stereotypical image of alchemy.<sup>26</sup> Rather than questioning the means or the ends of “development,” variants of failed strategies are simply repeated, reinforcing the appearance that these are the only viable alternatives.<sup>27</sup> This essay proposes that the problems associated with “underdevelopment” cannot be resolved at a global level as long as collective denial of the extent to which colonial relationships persist is the norm, and until affirmative steps are taken to decolonize international law and legal institutions. More significantly, perhaps, the repeated use of strategies known to be ineffective may be the result not of ignorance of the outcome, but precisely because such strategies provide the appearance of concern about inequities while simultaneously ensuring that the status quo will be maintained.

Part I looks at the role played by the development paradigm in the decolonization era of the past fifty years, summarizing the types of programs that have been implemented and highlighting the internal contradictions generated by a system in which self-determination is formally mandated yet effectively undermined by economic and political constraints placed upon newly independent states. Part II briefly presents some ways in which this construct of development was used by colonial administrations to facilitate efficient management and to

---

23. *See infra* notes 82-85, 90-97 and accompanying text.

24. *See supra* note 7 (alteration in original).

25. *See infra* notes 122-124 and accompanying text.

26. By stereotypical, I refer to common understandings of a process, repeated without success, whose aim was “the transmutation of the so-called base metals into gold by means of an ill-defined something called the Philosopher’s Stone.” STANLEY REDGROVE, *ALCHEMY: ANCIENT AND MODERN* 2 (2007 [1922]). For a more nuanced understanding of alchemy, *see generally* MARIE-LOUISE VON FRANZ, *ALCHEMY: AN INTRODUCTION TO THE SYMBOLISM AND THE PSYCHOLOGY* (1980).

27. For a parallel critique of strategies employed by political activists, *see generally* Ward Churchill, *Dismantling the Politics of Comfort*, in SATYA (April 2004); available at <http://www.satyamag.com/apr04/churchill.html>.

justify the imposition of colonial rule. Noting the parallels between the colonial and post-colonial eras, it is argued that practices perpetuating colonialism are unlikely to serve the ends of decolonization. The intractability of the development paradigm is considered in Part III, which begins with an overview of the ideological premises of this framework, noting that they are integrally related to the fundamental presumptions of Western civilization and identity. It suggests that these foundational beliefs will have to be challenged if we are to break out of the cycles which replicate the dynamics between colonizer and colonized, or “developed” and “developing” peoples.

## II. THE TRANSITION FROM DECOLONIZATION TO DEVELOPMENT

*The peoples of the earth . . . look to the United States as never before for good will, strength, and wise leadership. . . [W]e must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. . . Slowly but surely we are weaving a world fabric of international security and growing prosperity.*

*President Harry S. Truman,  
Inaugural Address, January 20, 1949<sup>28</sup>*

Speaking against the backdrop of an intensifying Cold War, President Harry Truman used his 1949 inaugural address to pledge that the United States would continue its “unfaltering support” for the United Nations, maintain programs for “world economic recovery,” use collective security agreements to “strengthen freedom-loving nations against the dangers of aggression,” and make “our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas.”<sup>29</sup> In doing so, Truman inaugurated the “era of development,”<sup>30</sup> centering it on the construct of poverty by emphasizing that “more than half the people of the world are living in conditions approaching misery.”<sup>31</sup> Rather than acknowledging the role that colonialism may have played in engendering such conditions, Truman claimed that “[f]or the first time in history, humanity possesses the knowledge and skill to relieve the suffering of these people,” thereby

---

28. President Harry S. Truman, Inaugural Address, (January 20, 1949); *available at* <http://www.yale.edu/lawweb/avalon/presiden/inaug/truman.htm> (alteration in original).

29. *Id.*

30. See Gustavo Esteva, *Development*, in *THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER* 6 (Wolfgang Sachs ed., 2007).

31. Truman, *supra* note 28. On the postwar “discovery” of poverty, see ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 21-24 (1995); on the subsequent “invention of development,” see *id.*, at 24-31.

casting the problem as one that was natural and inevitable to “underdeveloped” areas but capable of being remedied by Western science and technology.<sup>32</sup>

This depiction of both the problem and the solution summarize the philosophy of modernization and development that has dominated international relations since World War II.<sup>33</sup> In 1948, the World Bank began quantifying development in strictly monetary terms, equating per capita income with “underdevelopment” and thus discounting alternative understandings of social wellbeing.<sup>34</sup> This approach was institutionalized in 1960 when, at President John F. Kennedy’s request, the UN General Assembly announced its first Development Decade.<sup>35</sup> The program’s goal was for each “underdeveloped” country to achieve at least five percent annual growth in national income, with the assistance of capital contributions and aid equivalent to about one percent of the national income of each “developed” country.<sup>36</sup> The first decade’s goals were not met, but rather than questioning the project itself the UN simply gave its three subsequent “development decades” somewhat less ambitious goals.<sup>37</sup>

Since the 1960s, a “right to development” has been recognized as an emerging norm of international human rights law.<sup>38</sup> The UN

32. Truman, *supra* note 28 (“Greater production is the key to prosperity and peace. And the key to greater production is a wider and more vigorous application of modern scientific and technical knowledge.”).

33. See Gordon & Sylvester, *supra* note 22, at 9, 16 (noting that “development” has been construed as modernization plus national economic growth, and that “modernization” is rooted in the belief that humans can and should control their environment through reason and science).

34. *Id.* at 11, 14-15; see also Esteva, *supra* note 30, at 7. This measure has been broadened somewhat by the UNDP’s “human development index” which, in addition to income, now incorporates life expectancy, literacy and access to education, as well as “standard of living” as measured by GDP per capita. See UNDP, *Frequently Asked Questions*, available at <http://hdr.undp.org/en/statistics/faq/question,68,en.html>; see also Sabina Alkire & Maria Emma Santos, *Acute Multidimensional Poverty: A New Index for Developing Countries*, UNDP Human Development Research Paper 2010/11, available at [http://hdr.undp.org/en/reports/global/hdr2010/papers/HDRP\\_2010\\_11.pdf](http://hdr.undp.org/en/reports/global/hdr2010/papers/HDRP_2010_11.pdf) (using an index of ten related factors, and finding poverty highest in South Asia and Sub-Saharan Africa).

35. See G.A. Res. 1710 (XVI), UN Doc A/5100 (December 19, 1961); Gordon and Sylvester, *supra* note 22, at 30 n.118.

36. G.A. Res. 1710, *supra* note 35.

37. See International Development Strategy for the Fourth UN Development Decade, G.A. Res. 199, U.N. Doc. A/RES/45/199 (December 21, 1990); see also Esteva, *supra* note 30, at 13-17. Even when the United Nations Educational, Scientific and Cultural Organization (UNESCO) decided that “endogenous development” was more likely to succeed than externally-imposed development, its approach still presumed that economic growth was the goal. See Esteva, *supra* note 30, at 15-16.

38. See generally Noel G. Villaroman, *The Right to Development: Exploring the Legal Basis of a Supernorm*, 22 FLA. J. INT’L L. 299 (2010).



Human Rights Council and its predecessor, the Human Rights Commission, have utilized various Working Groups of Experts on the Right to Development since 1981,<sup>39</sup> and a Declaration on the Right to Development was adopted by the UN General Assembly in 1986.<sup>40</sup> According to the Office of the High Commissioner for Human Rights, it is a right of all individuals and all peoples “to participate in, contribute to, and enjoy economic, social, cultural and political development.”<sup>41</sup> While that description is broad enough to encompass virtually any vision, the most powerful international institutions and leaders have continued to perceive “development” in terms of economic growth, fueled by scientific and technological progress and measured by the reduction of poverty, hunger and disease.<sup>42</sup> Echoing themes from President Truman’s 1949 inaugural address, President Barack Obama took office in 2009 promising to “lay a new foundation for growth” in America by “wield[ing] technology’s wonders” and pledging to work with “the people of poor nations” to “nourish starved bodies and feed hungry minds.”<sup>43</sup> The perception of some of the leaders of newly independent states that recognition of a right to development could serve to “denounce the old colonial compact” has not materialized.<sup>44</sup>

A. *Inherently Contradictory: Decolonizing Under Colonial Rules*

The paradigm that emerged in the postwar decades presumed development as a universal goal, measuring the “progress” of former colonies in strictly Western economic terms and relying upon global economic expansion to address the problems of the dispossessed.<sup>45</sup> The extent to which newly recognized states had been stripped of their wealth was disregarded, as was the extent to which the Western powers had relied upon the exploitation of the resources of these territories

---

39. See UN Office of the High Commissioner for Human Rights (OHCHR), *The Right to Development at a Glance*, available at [http://www.ohchr.org/Documents/Issues/RtD/RTD\\_at\\_a\\_glance.pdf](http://www.ohchr.org/Documents/Issues/RtD/RTD_at_a_glance.pdf).

40. G.A. Res. 41/128 (1986).

41. UN OHCHR, *The Right To Development*, *supra* note 39.

42. See UN Millennium Development Goals, available at <http://www.un.org/millenniumgoals/> (describing the “eight anti-poverty goals” of the 2005-2015 decade); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2860 (2006) (“[d]evelopment is often conflated with sheer economic growth”).

43. President Barack Obama, Inaugural Address (January 21, 2009); available at <http://www.whitehouse.gov/blog/inaugural-address/>.

44. See Villaroman, *supra* note 38, at 299 (quoting a 1967 statement by the foreign minister of Senegal).

45. See *supra* notes 34-42 and accompanying text.

for their own development.<sup>46</sup> It was as if the historical slate had been wiped clean at the moment the former colonies became independent; they were now simply “backward” or “less developed” states, and the countries that had become rich and powerful at their expense would create institutions to “aid” in their development.<sup>47</sup>

This framing was subject to one important caveat. The historical record had not been erased with respect to the leases and concession agreements entered into prior to independence; the former colonial powers now insisted that these remained binding on the new states.<sup>48</sup> The 1941 Atlantic Charter, proclaimed by President Franklin Roosevelt and British Prime Minister Winston Churchill, described a world order in which all states would have equal access “to the trade, and to the raw materials of the world,”<sup>49</sup> thereby “characteriz[ing] the resources of the mandate territories as somehow belonging to humanity as a whole.”<sup>50</sup> Former colonies would be recognized as legitimate states only if they agreed to comply with international law;<sup>51</sup> a system that had authorized the appropriation of their resources and now insisted that they comply with agreements entered into by or at the behest of their former colonial rulers.<sup>52</sup>

Although these territories had not been recognized as sovereign enough to prevent colonial occupation and expropriation, they were now deemed to have had just enough sovereignty to have alienated their natural resources.<sup>53</sup> Nationalization of these resources was permissible only upon payment of “just” compensation which, in turn, was determined by standards established at a time when colonized territo-

46. See generally WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1981); SAMIR AMIN, *IMPERIALISM AND UNEQUAL DEVELOPMENT* (1977); SAMIR AMIN, *UNEQUAL DEVELOPMENT: AN ESSAY ON THE SOCIAL FORMATIONS OF PERIPHERAL CAPITALISM* (1976).

47. See ANGHIE, *supra* note 3, at 242.

48. *Id.* at 211-212.

49. Atlantic Charter (1941), *text available at* <http://usinfo.org/docs/democracy/53.htm>.

50. ANGHIE, *supra* note 3, at 212 (alteration in original).

51. See Michael J. Kelly, *Pulling at the Threads of Westphalia: ‘Involuntary Sovereignty Waiver’ – Revolutionary International Legal Theory or Return to Rule by the Great Powers?* 10 *UCLA J. INT’L L. & FOR. AFF.* 361, 391 (2005) (Statehood was “bequeathed on the colonies of the European powers as the preferred incorporation of political self-realization for colonial peoples. They were, in effect, made in the image of their creators.”).

52. See ANGHIE, *supra* note 3, at 218-220.

53. See *id.* at 220 (“the essential manifestation of self-determination, the assertion of sovereignty, becomes primarily a surrender to obligations. [Legal] personality . . . is invented in order to be bound.”) Similarly, American Indians have been deemed sovereign enough to have lawfully alienated their lands through treaties, but not sovereign enough to insist that the United States adhere to those treaties. See WARD CHURCHILL, *PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLES AND ANGLOAMERICAN LAW 5-14* (2003).

ries had no voice in the development of the law.<sup>54</sup> As Algerian President Houari Boumedienne observed, “In the eyes of the vast majority of humanity it is an (economic) order that is as unjust and as outdated as the colonial order to which it owes its origin and substance.”<sup>55</sup>

Leaders of the newly independent states recognized that they had to control their own resources in order to survive and prosper, so they used their power in the UN General Assembly to contest what they perceived as predatory legal rules. Thus, the 1960 Resolution 1514 on Decolonization affirmed that “peoples may . . . freely dispose of their natural wealth and resources”<sup>56</sup> and a 1962 resolution declared that the “right of peoples and nations to permanent sovereignty over their natural wealth must be exercised in the interest of their national development and the well-being of the people . . . concerned.”<sup>57</sup> The provision for nationalization in the 1962 resolution was ambiguous, however, providing that “appropriate compensation” was to be paid “in accordance with the rules in force in the State taking such measures . . . and in accordance with international law,”<sup>58</sup> the latter phrase having been insisted upon by the United States and Britain.<sup>59</sup>

By the early 1970s, a number of states associated with the Non-Aligned Movement were attempting to rectify this contradiction by launching a New International Economic Order (NIEO).<sup>60</sup> Using their voting power within the General Assembly, the non-aligned

---

54. See ANGHIE, *supra* note 3, at 213-216.

55. Quoted in Robert F. Meagher, Introduction to Symposium: *The United Nations: Challenges of Law and Development*, 36 HARV. INT'L L.J. 273, 276 (1995).

56. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), UN Doc A/4684 (December 14, 1960). The impact of this Resolution was limited by its protection of “the national unity and the territorial integrity” of extant states. *Id.* Furthermore, at the insistence of the United States and the Soviet Union, another resolution was passed the following day which protected settler colonial states by requiring that territories would only be recognized as non-self-governing if they were “geographically separate” from their colonizers. See Principles which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, G.A. Res. 1541 UN Doc A/4684 (December 15, 1960); see also Ediberto Román, *Empire Forgotten: The United States' Colonization of Puerto Rico*, 42 VILLANOVA L. REV. 1119, 1138 (1997); Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479, 509-511 (1994); Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 293-295 (1992).

57. Permanent Sovereignty over Natural Resources, G.A. Res. 1803, UN Doc. A/5217 (December 14, 1962).

58. *Id.*

59. See ANGHIE, *supra* note 3, at 217 n.55.

60. See Ruth Gordon, *The Dawn of a New, New International Economic Order?* 72 LAW & CONTEMP. PROBS. 131, 142-145 (2009); BENNIS, *supra* note 11, at 14-16.

states obtained recognition of the NIEO, a related program of action, and a Charter of Economic Rights and Duties of States.<sup>61</sup> Among other things, the Charter removed reference to international standards of compensation for the nationalization of foreign property, providing instead that in the absence of other agreement, national law would be applied.<sup>62</sup> The United States and five other states voted against the Charter, which otherwise received overwhelming support in the General Assembly, particularly from smaller and newly recognized countries.<sup>63</sup>

The world's most economically powerful countries refused to concede that this attempt to restructure economic relations between the "developed" and "developing" areas—often termed North and South—had any binding effect.<sup>64</sup> The United States and its allies relied upon older principles of international law to argue that developing countries could not be treated more preferentially than developed ones; that the NIEO Charter's concept of collective economic security was without legal basis; and that settled law required full and prompt compensation for foreign property that was nationalized. Further, they maintained that nonbinding resolutions of the General Assembly could not change customary law without their consent.<sup>65</sup>

However, where extant international law tended to benefit the formerly colonized, Northern states did not hesitate to develop new rules intended to undermine attempts by recently recognized states to exercise sovereignty over their natural resources. Traditionally, contracts with private entities had been governed by the laws of the country in which those companies were doing business.<sup>66</sup> In the mid-1970s, as disputes arose over oil contracts with Arab states, international arbitral tribunals began announcing a "new" international law of contracts privileging Western notions of private property. This law essentially gave the private corporations engaged in transnational business quasi-sovereign status by declaring that the agreements they had entered into were not simply contracts subject to the host country's do-

---

61. G.A. Res. 3201, UN Doc A/RES/3201 (May 1, 1974); G.A. Res. 3202, UN Doc A/9559 (May 1, 1974); G.A. Res. 3281, UN Doc. A/RES/3281 (December 12, 1974).

62. See Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437, 437-439 (1981).

63. *Id.* at 439.

64. See James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. H.R. L. REV. 107, 118-119 (1999).

65. *Id.*

66. See ANGHIE, *supra* note 3, at 226-227.

mestic law but, instead, international agreements subject to an amalgamation of private contract law and international treaty law.<sup>67</sup>

By the late 1970s, the global economic growth that had been promised to the “developing” world since the end of World War II had not materialized and the most powerful states had successfully blocked any fundamental legal or structural changes that might have narrowed the gap between rich and poor countries. With the debt crisis of the 1980s, “many Third World governments were now pleading for sufficient funds to stay afloat rather than demanding economic and political concessions.”<sup>68</sup> Addressing the legacy of colonialism became the problem of the formerly colonized, and at this point effective control over development was transferred from UN organs to the financial institutions conceived in 1944 at the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire, and revitalized in the mid-1970s.<sup>69</sup>

### *B. The Influence of International Financial Institutions*

The most significant of the Bretton Woods institutions are the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), also known as the World Bank. The IMF was established to encourage global economic growth and trade by stabilizing currency exchange rates and providing short-term financing.<sup>70</sup> The World Bank’s initial mandate was to facilitate economic rebuilding in Europe after World War II by providing capital,<sup>71</sup> but shortly after the war the United States implemented its Marshall Plan for European reconstruction, leaving the IBRD to focus

---

67. *Id.* at 229-234; *see also* 241-242.

68. Gordon & Sylvester, *supra* note 22, at 59; *see also id.* at 37-38 (discussing the impact of the oil crisis); Gordon, *supra* note 60, at 145-147.

69. *See* John W. Head, *Law and Policy in International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks*, 17 KAN. J. L. & PUB. POL’Y 194, 195-201; *see generally* Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 NYU J. INT’L L. & POLITICS 243 (2000).

70. *See* Gordon & Sylvester, *supra* note 22, at 26; Graham Bird, *A Suitable Case for Treatment? Understanding the Ongoing Debate about the IMF*, 22 THIRD WORLD QUARTERLY 823, 825 (2001). *See generally*, Articles of Agreement of the International Monetary Fund (July 22, 1944; *entered into force* December 27, 1945), available at <http://www.imf.org/external/pubs/ft/aa/index.htm>.

71. *See* Richard E. Feinberg, *The Changing Relationship between the World Bank and the International Monetary Fund*, 42 INT’L ORG. 545, 546-548 (1988); *see also* Mark E. Wadryk, *Is It Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country?* 17 WIS. INT’L L. J. 553, 555-556 (1999).

on the “less developed” countries.<sup>72</sup> Because the poorest countries failed to qualify for the IBRD’s long-term loans, which carried near-market interest rates, the International Development Association (IDA) and various regional development banks were created in 1960 to provide “soft loans” at lower rates.<sup>73</sup>

The transfer of development functions from UN organs to the IMF and the World Bank signaled a significant shift in political as well as economic power. The United Nations has a stated commitment to the equality of states, and the General Assembly, with its “one nation, one vote” policy, is formally structured as a democratic institution.<sup>74</sup> Although most states are also members of the IMF and the World Bank, these entities lack democratic constraints as voting power is determined by each member state’s contribution or capital subscription which, in turn, depends on the country’s relative economic strength.<sup>75</sup> Further, unlike most treaty-based international institutions, these organizations preserve the right to interpret their Articles of Agreement without appeal to any outside court, tribunal, or arbitral process.<sup>76</sup> Regional development banks are also dominated by their non-borrowing member countries, raising questions about their ability to reflect regional priorities.<sup>77</sup>

---

72. See Head, *supra* note 69, at 196-197; Rolf H. Weber & Douglas W. Arner, *Toward a New Design for International Financial Regulation*, 29 U. PA. J. INT’L L. 391, 394 (2007).

73. See Head, *supra* note 69, at 196-197. A third proposed Bretton Woods institution, the International Trade Organization, did not materialize but the General Agreement on Tariffs and Trade (GATT) was initiated at Bretton Woods and eventually resulted in the creation of the World Trade Organization. See Weber & Arner, *supra* note 72, at 395; see also World Trade Organization, “The GATT Years: From Havana to Marrakesh,” available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/fact4_e.htm).

74. See UN Charter, *supra* note 13, arts. 2(2), 18(1).

75. See Wadzyk, *supra* note 71, at 561 (also noting that attempts by the UN General Assembly to challenge this voting structure were unsuccessful). When the IMF and IBRD were established, the U.S. controlled about one-third of the voting power in each and, although this share has dropped to about 17 percent, the United States effectively maintains veto power over any policy changes. See Ngaire Woods, *The United States and the International Financial Institutions: Power and Influence Within the World Bank and the IMF*, in US HEGEMONY AND INTERNATIONAL ORGANIZATIONS 92 (Rosemary Foot, S. Neil MacFarlane, & Michael Mastaduno eds., 2003). For current statistics on voting strength, see the IMF and the World Bank Group websites, available at <http://www.imf.org>; <http://web.worldbank.org>.

76. Changes can be made to the Articles of Agreement of either organization only by agreement of three-fifths of the members, who must collectively control 85 percent of the voting power. See <http://www.imf.org/external/pubs/ft/aa/index.htm>; <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>. See also Joseph Gold, *The Interpretation by the International Monetary Fund of Its Articles of Agreement*, 3 INT’L & COMP. L. Q. 256, 256-257 (1954).

77. See Enrique R. Carrasco, Wesley Carrington, & HeeJin Lee, *Governance and Accountability: The Regional Development Banks*, 27 B.U. INT’L L.J. 1, 59-60 (2009).

The initial justification for the rigid governance structures of the world's primary financial institutions was that they were to be involved only in economic, not political, activity. Thus, for example, the charter of the IBRD, which is almost identical to that of the IDA, provides that loans are to be granted with "due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations," and that the Bank is not to "interfere in the political affairs of any member" nor "be influenced in their decisions by the political character" of the member(s).<sup>78</sup> However, lending decisions have often been politicized. During the 1960s, for example, the World Bank invoked the restrictions on political involvement to ignore UN resolutions prohibiting loans to South Africa and Portugal because of their policies of apartheid and continued colonialism.<sup>79</sup> Nonetheless, during this same period, loans were used strategically to support regimes perceived to be anticommunist. Thus, Nicaragua received ten loans during the 1950s when its government worked closely with the U.S. military, while Guatemala, which had a much larger population, received no loans until its leftist leaders were replaced.<sup>80</sup>

IMF and World Bank policies and practices began to overlap as they focused increasingly on "less developed" countries unable to obtain loans from more conventional sources, and both institutions began to impose conditions on borrower states which required economic restructuring.<sup>81</sup> In the mid-1970s the IMF began making medium-term loans to poorer countries, and by the 1980s it was lending almost exclusively to these states.<sup>82</sup> By then the Bank, which had previously concentrated on project-specific, long-term loans, was also offering medium-term loans conditioned on "structural adjustments" it claimed would address the underlying causes of the recipient state's economic problems.<sup>83</sup> These conditions often entailed devastating cutbacks in government spending and, therefore, in health, education, employment

---

78. See Wadzyk, *supra* note 71, at 559-560 (quoting IBRD Articles of Agreement, arts. III and IV).

79. *Id.* at 563.

80. See Gordon & Sylvester, *supra* note 22, at 24 n.94; see also Daniel D. Bradlow, *Rapidly Changing Functions and Slowly Evolving Structures: The Troubling Case of the IMF*, 94 AM. SOC. INT'L L. PROC. 152, 157 (2000) (noting discrepancies in IMF consideration of human rights issues in Venezuela, Mexico and Indonesia in the late 1980s and 1990s).

81. See Gordon & Sylvester, *supra* note 22, at 24-25; see also Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT'L L. & POL. 331, 338-339 (2006); Feinberg, *supra* note 71, at 549.

82. See Gordon & Sylvester, *supra* note 22, at 26-27.

83. See Feinberg, *supra* note 71, at 549.

and welfare programs.<sup>84</sup> Discussing the problems associated with such conditionalities, Namita Wahi observes, “The most important right implicated in the measures taken by the World Bank and the IMF is the right to self-determination which involves the right of all peoples to freely determine their political status and freely pursue their economic, social, and cultural development.”<sup>85</sup>

This is the decolonization dilemma in a nutshell. As articulated in Common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, “[a]ll peoples have the right to self-determination,” by virtue of which “they freely determine their political status and freely pursue their economic, social, and cultural development.”<sup>86</sup> Self-determination is the heart and soul of decolonization; without it, decolonization is meaningless. The “right to development” has been framed in terms almost identical to those describing the right to self-determination, i.e., the right “to participate in, contribute to, and enjoy economic, social, cultural and political development.”<sup>87</sup> Nonetheless, the means of development offered by the international system require compliance with measures that undermine self-determination. Thus, the route which purports to lead to meaningful decolonization comes right back to a relationship in which self-determination (and, therefore real decolonization) must be subordinated to survival, the primary difference to direct colonialism being that the conditionalities are accepted “voluntarily” in exchange for desperately needed loans.<sup>88</sup> As Frantz Fanon put it, “What was wrested by bombardments is reconverted into results of free negotiations.”<sup>89</sup>

The loan programs of the international financial institutions have been no more successful than the “development decades” of the United Nations in eliminating malnutrition and unemployment or otherwise closing the gap between “developed” and “developing”

---

84. See Walden Bello, *Global Economic Counterrevolution: Northern Economic Warfare Devastates the South*, in *50 Years Is Enough: The Case Against the World Bank and the International Monetary Fund* 14, 18 (Kevin Danaher ed., 1994); see generally, Margaret Chon, *Intellectual Property and the Development Divide*, 27 *CARDOZO L. REV.* 2821 (2006).

85. See Wahi, *supra* note 81, at 350.

86. International Covenant on Civil and Political Rights (ICCPR), December 16, 1966, *entered into force* March 23, 1976, 999 U.N.T.S. 171 (1966): 171, art. 1; International Covenant on Economic, Social and Cultural Rights (ICESCR), December 16, 1966, *entered into force* January 3, 1976, 993 U.N.T.S. 3 (1966): 3, art. 1 (alteration in original).

87. UN OHCHR, *The Right To Development*, *supra* note 39.

88. See Gordon, *supra* note 60, at 145-151.

89. FRANTZ FANON, *First Truths on the Colonial Problem*, in *TOWARD THE AFRICAN REVOLUTION* 120-126, 122 (Haakon Chevalier trans., 1969 [1964]).



countries.<sup>90</sup> But the power of these institutions continues to grow. In fact, the failure of IMF and World Bank policies to achieve their stated goals has been used to extend their influence more intrusively into all sectors of society. It is apparently not considered problematic that “poverty alleviation programs never alleviate poverty or that conditionalities never achieve their stated goals” because the interventions “redound to the authority and expansion of international financial institutions.”<sup>91</sup>

The working definition of “economic considerations” has been expanded by these lenders to include political and social factors, and now incorporates assessments of environmental policies, human rights, and “governance.”<sup>92</sup> According to former IMF counsel John Head, “today it is common to find these institutions requiring their borrowing member countries to accept and adhere to prescribed policies on environmental protection, indigenous peoples, involuntary resettlement, governance, corruption, public participation, the role of women in development, and poverty reduction.”<sup>93</sup> As a result of this “mission creep,” he concludes that the multilateral development banks “should be regarded as having been transformed from financial institutions into regulatory agencies.”<sup>94</sup>

These regulatory functions are particularly significant because, by the end of the twentieth century, two-thirds of all states, representing about half the world’s population, were indebted to international financial institutions.<sup>95</sup> Constrained to operating within the political and economic structures established by the major powers, the hopes and energies of the national liberation movements of the 1960s were soon replaced by the realization that “independence” would not be accompanied by significant social restructuring or improvements in economic welfare. Beginning in 1972, international financial institutions dropped some of their more ambitious goals and shifted their

---

90. See *supra* notes 14-19, 83-84, 88 and accompanying text. On the failure of investments based upon bilateral treaty regimes to significantly affect conditions in “developing” countries, see generally Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L.J. 427 (2010).

91. Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT’L L.J. 529, 576 (2000).

92. See Wadrzyk, *supra* note 71, at 554, 562-569; Head, *supra* note 69, at 198-199.

93. John W. Head, *For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 U. KAN. L. REV. 241, 252.

94. *Id.*

95. See ANGHIE, *supra* note 3, at 247.

focus to meeting “basic needs.”<sup>96</sup> Even this proved beyond the capacity of the structures of development, but it did provide yet another rationale for intervention in the domestic affairs of the states receiving Western “aid.”<sup>97</sup>

These interventions were intensified by the reintroduction of monetarist policies favoring deregulation and the “structural adjustment” programs introduced in the 1980s, with their requirements that debtor countries eliminate subsidies for local agriculture and industries, and sacrifice social welfare programs in favor of debt service, “free markets,” and production for export.<sup>98</sup> The delinking of the dollar from the gold standard allowed the economies of the industrialized North to expand far beyond their productive capacity, but only “debtor” states were subjected to the rigors of the adjustment programs,<sup>99</sup> a double standard that did not pass unnoticed in the wake of the American fiscal collapse of 2008.<sup>100</sup>

### C. “Good Governance” and “Failed States”

By the 1990s the World Bank, the IMF, and their regional variants were framing their development policies in terms of “democratization” and “good governance,” based on the theory that deficiencies in these areas—rather than, say, neocolonialism<sup>101</sup> or economic exploitation—were the cause of underdevelopment. The failure of the previous decades’ development initiatives to reduce poverty or improve living conditions did not lead to questioning of the project, or to structural adjustment of the international economic system itself, but rather to intensified efforts to “modernize” the global South.<sup>102</sup> As a result, although these newer states are formally recognized as self-governing, they can often survive only by surrendering any real sover-

---

96. See GILBERT RIST, *THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH* 162 (Patrick Camiller trans., 1997) (noting that the term “basic needs” was introduced by World Bank president Robert McNamara).

97. *Id.* at 164.

98. See Bello, *supra* note 84, at 14-19; for additional case studies, see generally 50 YEARS IS ENOUGH, *supra* note 84.

99. See RIST, *supra* note 96, at 172-173.

100. See Neil MacFarquhar, *Upheaval on Wall St. Stirs Anger in the U.N.*, NY TIMES, September 24, 2008; see generally Gordon, *supra* note 60.

101. See Gassama, *supra* note 2, at 329 (explaining neocolonialism as “the name used to express the idea that colonial powers appear to engage in the process of relinquishing control of their colonies even as they were actually evolving new strategies to maintain colonial influence in the face of popular demand for liberation.”)

102. See ANGHIE, *supra* note 3, at 249 (also noting that the “good governance” standard is not applied to advanced industrial states); see generally Gathii, *supra* note 64.

eighty they might have to the institutions that control their economies and, often, their political leadership.<sup>103</sup> The alternative, in many cases, is to be deemed a “failed state,” susceptible to political and military, as well as financial, intervention.<sup>104</sup>

The constraints placed upon decolonization have been political and social as well as economic. In many instances, the hopes of fundamental social transformation attending national independence rested on the human rights framework articulated in the early postwar period. In particular, it seemed that the principle of self-determination and the economic, cultural and social rights articulated in various UN declarations and treaties,<sup>105</sup> as well as the UN’s consistent condemnation of all forms of racial discrimination,<sup>106</sup> would ensure the social space necessary for implementing the liberatory vision of the decolonization movements. However, the rights considered essential to “development” are those civil and political rights sometimes characterized as “negative” rights, that is, proscriptions on governmental intervention rather than prescriptions for social change.<sup>107</sup> These are also framed as rights that can only be exercised by individuals, not by social movements, communities, or peoples. Both the Universal Declaration of Human Rights<sup>108</sup> and the International Covenant on Civil and Political Rights<sup>109</sup> — where these rights are most prominently articulated—are considered universally applicable but in fact, as legal scholar Makau Mutua notes, they are “derived from bodies of domestic jurisprudence developed over several centuries in the West” and represent “attempts to universalize civil and political rights accepted or

---

103. See ANGHIE, *supra* note 3, at 265 (noting that Third World states’ sovereignty is effectively negated by international influence over their economies); see generally Gathii, *supra* note 64.

104. See generally Andrew Coleman and Jackson Maogoto, *Democracy’s Global Quest: A Noble Crusade Wrapped in Dirty Reality?* 28 SUFFOLK TRANS. L. REV. 175 (2005); Ruth E. Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903 (1997); see also Simon Chesterman, *Virtual Trusteeship*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 219-233 (David M. Malone ed., 2004) (discussing UN Security Council interventions in “failed states”).

105. See *supra* note 86, *infra* notes 112-114 and accompanying text.

106. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810 at 71 (1948), arts. 1, 2, 7; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force January 4, 1969; ICCPR, *supra* note 86, art 2(2); ICESCR, *supra* note 86, art. 2.

107. See Natsu Taylor Saito, *Beyond Civil Rights: Considering ‘Third Generation’ International Human Rights Law in the United States*, 28 U. MIAMI L. REV. 387, 392-394 (1997).

108. See *supra* note 106.

109. See *supra* note 86.

aspired to in Western democracies.”<sup>110</sup> This has led many in the global South and, in particular, many Indigenous peoples to view the contemporary human rights regime as a “Trojan horse,” to borrow the phrasing of Gustavo Esteva and Madhu Suri Prakash, designed to impose Western cultural and political values upon their societies, thereby denying them the opportunity for meaningful exercise of their right to self-determination.<sup>111</sup>

The right of all peoples to self-determination undergirds the provisions of the UN Charter on non-self-governing territories,<sup>112</sup> and has been affirmed by the 1960 Declaration on Decolonization,<sup>113</sup> common Article 1 of the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights,<sup>114</sup> and by subsequent decisions of the International Court of Justice.<sup>115</sup> Nonetheless it has been narrowly interpreted and effectively limited to conform to Western understandings of international law and human rights. Although the number of new states recognized and admitted to UN membership in the 1960s and 1970s was dramatic, this did not result in a reformulation of the basic tenets of international law. Only those states deemed sufficiently “civilized” were acknowledged to be sovereign, and the legacy of colonialism was reflected further in the fact that, for the most part, the new states were defined by territorial boundaries that had been arbitrarily imposed upon them by European powers.<sup>116</sup> Thus, “the right to self-determination was exercised not by the victims of colonization but by their victimizers, the elites who control the international state system.”<sup>117</sup>

Thus, for a variety of reasons, some of which are described above, the economic and sociopolitical promises of the early years of

110. Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589, 605-606 (1996).

111. GUSTAVO ESTEVA & MADHU SURI PRAKASH, GRASSROOTS POSTMODERNISM: REMAKING THE SOIL OF CULTURES 117 (1998).

112. UN Charter, *supra* note 13, arts. 73-91.

113. *See supra* note 56.

114. *See supra* note 56; *see also* B.C. NIRMAL, THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL LAW 40-46 (1999).

115. *See, e.g., Western Sahara (Advisory Opinion)*, 1975 I.C.J. 12 (finding that the people of the Western Sahara had a right to decolonization under Resolution 1514, notwithstanding the claims of Morocco and Mauritania); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, 1971 I.C.J. 16 (finding Namibia’s right to self-determination violated by South African occupation).

116. *See* Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT’L L. 1113, 1134 (1995); *see generally* Tayyab Mahmud, *Geography and International Law: Towards a Postcolonial Mapping*, 5 SANTA CLARA J. INT’L L. 525 (2007).

117. Mutua, *supra* note 116, at 1116.

decolonization have been constrained by structures in which states are accorded international recognition only if they conform to extant rules of international law, and internal societal relations are constrained by both the narrow range of rights recognized as universal as well as the constraints placed upon access to global capital and markets.<sup>118</sup> In Africa, Nkrumah's vision of "developing a continent endowed with so much wealth"<sup>119</sup> has not materialized and other parts of the "developing" world have not fared much better.

In 1965, Nkrumah lamented that "Africa is a paradox which illustrates and highlights neocolonialism. Her earth is rich, yet the products that come from above and below her soil continue to enrich, not Africans predominantly, but groups and individuals who operate to Africa's impoverishment."<sup>120</sup> More than forty-five years later, it is difficult to come up with a better description of the plight of a continent that reflects the inadequacies of the dominant neoliberal economic model.<sup>121</sup> As legal scholar Antony Anghie has observed, the jurists of the postwar era were "framing the project as though the colonial encounter was about to occur, as opposed to having already taken place."<sup>122</sup> One result has been, to quote Arundhati Roy, that the "entrenched system of appropriation has created a situation in which poor countries which have been plundered by colonizing regimes for centuries are steeped in debt to the very same countries that plundered them."<sup>123</sup> Another is that the exploitation resulting from colonialism is not a subject of redress, but of "aid" or "generosity" on the part of the richest states.<sup>124</sup>

To the extent that the most powerful states have assumed responsibility for addressing this legacy, it has been almost exclusively framed in terms of elevating "less developed" peoples to the standards of the "more developed" states. Will more development, perhaps accompanied by better structures of governance, alleviate the problems faced by formerly colonized peoples? As noted above, neither the five decades of development programs sponsored by the international community nor the regulatory regimes implemented by international financial institutions have been particularly successful. This provides

---

118. See *supra* notes 51-52, 56-65 and accompanying text.

119. Nkrumah, *supra* note 7.

120. Gassama, *supra* note 2, at 336, quoting KWAME NKUMAH, *NEOCOLONIALISM: THE LAST STAGE OF IMPERIALISM* 1 (1965).

121. See *supra* note 9, 51-53 and accompanying text.

122. ANGHIE, *supra* note 3, at 65-66.

123. Quoted in Gassama, *supra* note 2, at 229 n.8.

124. See, e.g., Raj Bhala, *The Limits of American Generosity*, 29 *FORDHAM INT'L L.J.* 299 (2006) (advocating the benefits of "generosity" with respect to trade with Africa).

empirical evidence that “development” may not be a viable path to true decolonization and raises the question of whether development, as formulated by these organizations, has subverted the process of decolonization rather than furthering self-determination. The history of the construct of development as a tool of colonial administration helps us understand why this may be a reasonable working hypothesis.

### III. DEVELOPMENT AS A COLONIAL CONSTRUCT

*As most of us are aware, development rarely seems to “work”—or at least with the consequences intended or the outcomes predicted. Why then, if it is so unworkable, does it not only persist but seem continuously to be expanding its reach and scope? Could it be that development does in fact work very well?*

*Jonathan Crush, “Imagining Development,” 1995<sup>125</sup>*

The paradigm of decolonization established by the United Nations and strongly supported by the United States has been dedicated to transforming colonized territories into states that would assimilate into the international order already consolidated by the colonial powers, an order privileging territorial integrity over the rights of non-self-governing peoples.<sup>126</sup> Thus, part of the price of recognition as a new state was the acceptance of extant legal rules and institutions, as well as the “civilizing mission” of international law.<sup>127</sup> Nothing in that framing acknowledged that colonialism might have been wrong, that the colonizing powers may have been unjustly enriched, or that the colonized were deserving of legal redress. As a result, the “decolonization” process implicitly legitimized the arguments made by colonizing powers since the fifteenth century that colonialism was for the “good” of the colonized.<sup>128</sup>

The formal equality of states meant no colonizing state owed anything to its former colonies, for all states were now “equal”; some

---

125. Jonathan Crush, *Imagining Development*, in *POWER OF DEVELOPMENT* 1, 4 (Jonathan Crush ed., 1995).

126. Joel Ngugi, *The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa*, 20 *WISC. INT’L L.J.* 297, 304-305 (2002) (noting that “the concept of ‘internal sovereignty’ would be employed by the new states to ‘incorporate and assimilate’ those whom the classical colonizers had ‘forgotten’ to ‘modernize’”).

127. For an overview of this process, see generally James Tully, *Modern Constitutional Democracy and Imperialism*, 46 *OSGOODE HALL L.J.* 461 (2008) (describing the roles that “civilization,” “modernization” and “democratization” have played in maintaining Western imperialism after formal decolonization).

128. This history is presented in more detail in NATSU TAYLOR SAITO, *MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW*, 37-75 (2010).

just happened to be richer than others. The problems that might have been attributed to colonization were now defined as human rights issues and, to the extent these implicated material wellbeing, economic development programs became the primary remedy. This has remained true, despite the glaring failure of such programs to bring about the “growing prosperity” forecast by Truman<sup>129</sup> and the many thoughtful and thorough critiques they have generated.<sup>130</sup> This section explores the possibility that development programs are incapable of furthering decolonization because they are deeply rooted in colonial structures. To illustrate that thesis, it considers the how some aspects of the postwar development model were utilized by the colonial powers in the administration of their territories and the implications of that history.

A. “Guardianship” as a Justification for Colonial Appropriation

International legal scholar and political scientist Quincy Wright observed in 1930 that well before World War I “nationalism or its antecedent, government by consent of the governed,” shifted the rationale for the possession and administration of colonies “to conform to the theory of protectorates.”<sup>131</sup> This approach reflects legal justifications proffered for colonialism since Franciscus de Victoria, who argued in the early sixteenth century that although Indigenous peoples were capable of rationality and thus had certain rights, they were “unfit to found or administer a lawful State up to the standard required by human and civil claims.”<sup>132</sup> As a result, it was argued that it was in their interest for the Spanish to “undertake the administration of their country . . . so long as this was clearly for [the Indians’] benefit.”<sup>133</sup> According to law professor Robert A. Williams, Jr., Victoria was the first to articulate a “European discourse of conquest” based upon secular values:

The material wealth of Western culture . . . could be attained by the Indians if they simply agreed to accept the West’s civilizing religion and the political and legal hegemony of their self-appointed European guardians. To refuse these benefits indicated delusion and a

---

129. *See supra* note 28.

130. *See supra* note 22.

131. QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 14 (1968 [1930]).

132. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 104 (1990) (quoting F. Victoria, *De Indis et de Ivre Belli Reflectiones* 160-161 (E. Nys ed., J. Bate trans., 1917)).

133. *Id.*

lack of reason, justifying an even sterner, more disciplined exercise of the Europeans' guardianship. . . .<sup>134</sup>

These presumptions, often reiterated in development discourse today, were incorporated into the U.S. Supreme Court's legal theories justifying the appropriation of American Indian lands and resources on the theory, articulated by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, that the Indians' "relation to the United States resembles that of a ward to his guardian."<sup>135</sup> The evolution of this body of U.S. law is significant because of the tremendous influence the United States has had on the development of international law,<sup>136</sup> and because the U.S. continues to use these theories to defend its right as a settler colonial state to the territories, contiguous and non-contiguous, over which it claims jurisdiction.<sup>137</sup>

In the early years of the United States, lawmakers were quite clear, despite their many actions to the contrary, that American Indian nations were sovereign entities and that treaties made with them fell squarely within the rubric of international law. As summarized by Anghie, "the existence of a treaty . . . presupposed a legal universe to which both parties adhered."<sup>138</sup> However, by asserting that Indigenous peoples were "domestic, dependent nations"<sup>139</sup> whose welfare was entrusted to the U.S. government, the Marshall Court's trilogy of opinions concerning American Indians broke dramatically with the treaty-based paradigm and laid the foundation for the U.S. claim to absolute, plenary power over these nations.<sup>140</sup> This framing was subsequently

134. *Id.* at 106.

135. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). See also ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 47-70 (2005).

136. See, e.g., Saito, *supra* note 128, at 182-190 (discussing U.S. influence on postwar international legal institutions); see generally BENNIS, *supra* note 11 (detailing U.S. influence on the UN).

137. On the United States' justifications for its claims to the lands encompassed within the "lower forty-eight" states, see WILLIAMS, *supra* note 132, at 227-280; see generally Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219. On the acquisition and incorporation of Hawai'i, see generally WARD CHURCHILL, *Stolen Kingdom: The Right of Hawai'i to Decolonization*, in PERVERSIONS OF JUSTICE, *supra* note 53, at 303-403; HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I (1993); on Alaska, see WALTER NUGENT, HABITS OF EMPIRE: A HISTORY OF AMERICAN EXPANSION 237-251 (2008). On the status of Puerto Rico as an external colony, see generally Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILLANOVA L. REV. 1119 (1997).

138. ANGHIE, *supra* note 3, at 70.

139. *Cherokee Nation*, 30 U.S. at 17.

140. See generally *Johnson and Graham's Lessee v. McIntosh*, 21 U.S. 543 (1823) (invoking the doctrine of discovery to hold that American Indians did not hold land title



incorporated into the theories of international legal scholars such as James Lorimer, who noted in 1883 that the “right of undeveloped races, like the right of undeveloped individuals, is a right not to recognition as what they are not, but to guardianship—that is, to guidance—in becoming that of which they are capable.”<sup>141</sup> In this construction, international law provided “protection” to Indigenous and colonized peoples, but did not recognize them as state actors.

This perspective dominated the 1884–85 Berlin Conference at which European colonial powers attempted reach agreement concerning the regulation of their “possessions” in Africa. Africans, of course, were entirely excluded from the process.<sup>142</sup> Mutua observes that although numerous African nations had highly advanced civilizations and had long since been organized in forms that met European criteria for state recognition, “without much knowledge about the continent, early European jurists and publicists had decided that much of Africa was a no-man’s land that could be brought under legal occupation.”<sup>143</sup> Taking colonial domination as a given, the “civilized” powers focused on articulating a more “humanitarian” approach, consistent with Justice Marshall’s formulation, in which treaties with Indigenous peoples were interpreted not as mutually beneficial and binding legal instruments but rather as justifications for occupation accompanied by commitments to “protect” the “natives” from undue exploitation.<sup>144</sup>

Thus, while the General Act promulgated by the Berlin Conference participants, including the United States, focused primarily on the uniform regulation of trade and navigation, it also reflected this emphasis on “trusteeship.”<sup>145</sup> The parties committed themselves “to watch over the preservation of the native tribes, and to care for the improvements of the conditions of their moral and material well-being,

---

capable of being alienated); *Cherokee Nation*, 30 U.S. 1 (holding that the Cherokee Nation was not a “foreign state” for purposes of federal court jurisdiction); *Worcester v. Georgia*, 31 U.S. 515 (1832) (finding that federal jurisdiction on Cherokee land preempted state laws). See also SAITO, *supra* note 128, at 90-95 (2010) (analyzing these cases); NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 19-22, 28-31 (2006) (discussing the application of the plenary power doctrine to American Indian nations).

141. JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 157 (2005 [1883]).

142. See Mutua, *supra* note 116, at 1127-1129.

143. *Id.* at 1130; see generally *Western Sahara (Advisory Opinion)*, 1975 I.C.J. 12 (acknowledging that treaties with African nations precluded colonial claims that their lands could be considered *terra nullius*), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=69&case=61&code=sa&p3=4>.

144. See *supra* notes 131-135 and accompanying text.

145. See General Act of the Berlin Conference on West Africa, February 6, 1885, reproduced at 3 SUPPL. AM. J. INT’L L. 7 (1909).

and to help in suppressing slavery,” and to develop institutions “which aim at instructing the natives and bringing home to them the blessings of civilization.”<sup>146</sup> These goals were also reflected in a subsequent resolution of the Institute of International Law that emphasized “the duty of colonizing powers to avoid useless severities, to respect native [rights to] . . . property, to education and [to] improve their moral and material conditions, to respect liberty of conscience, to prepare for the abolition of slavery, and to prohibit slave and liquor trade.”<sup>147</sup>

Wright notes that “humanitarianism was strengthened by a new appreciation of economic expediency” as the industrialized states increasingly desired natural resources and markets outside their colonies.<sup>148</sup> Thus, German Chancellor Otto von Bismarck said of the Berlin Conference, “all the Governments invited share the wish to bring the natives of Africa within the pale of civilization by opening up the interior of the continent to commerce.”<sup>149</sup> This conflation of the moral and material wellbeing of colonized peoples, and the regulation of the internal life of their societies that accompanied it, took on increasing significance under the mandate system of the League of Nations.<sup>150</sup> It also created the template for both the trusteeship system of the United Nations<sup>151</sup> and the regulatory processes of the international financial institutions established in the wake of World War II.<sup>152</sup>

### *B. Self-Determination and the League of Nations’ Mandate System*

Even as colonial power was being expanded and consolidated in Africa and southeast Asia, an emerging right to self-determination was being acknowledged by the leaders of the world’s more powerful states. Asking Congress to declare war in 1917, U.S. President Woodrow Wilson observed: “Self-governed nations do not . . . set the course of

---

146. *See id.*

147. *See* WRIGHT, *supra* note 131, at 17 n.36a (“Resolution, 1888”) (alteration in original).

148. *Id.* at 9-10; *see also* ANGHIE, *supra* note 3, at 69.

149. *Quoted in* Makau Wa Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILLANOVA L. REV. 841, 847 (2000); *see also* Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 64 (1999) (noting that trade became “the mechanism for advancement and progress”).

150. *See* ANGHIE, *supra* note 3, at 136 (noting that under the Mandate System, “international law and institutions were required to create the economic, political and social conditions under which a sovereign state could come into being”).

151. *See* UN Charter, *supra* note 13, arts. 75-91.

152. *See supra* notes 70-84, 90-94 and accompanying text.

intrigue to bring about some critical posture of affairs which will give them an opportunity to strike and make conquest. Such designs can be successfully worked out only under cover and where no one has the right to ask questions.”<sup>153</sup> In other words, democratic governance was the key to a peaceful world, a theme which would be reiterated throughout the twentieth century. This proposition was expanded upon in Wilson’s 1918 “Fourteen Points” speech to Congress in which he proclaimed: “What we demand . . . is that the world . . . be made safe for every peace-loving nation which, like our own, wishes to live its own life, determine its own institutions, be assured of justice and fair dealing by the other peoples of the world as against force and selfish aggression.”<sup>154</sup> Among other things, the president called for an “absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined,” and the establishment of a “general association of nations” to ensure “political independence and territorial integrity to great and small states alike.”<sup>155</sup>

By the end of the war the Allies were much indebted to the United States and, convinced that the League of Nations was the only hope for implementing his vision of global order, Wilson used all the powers at his disposal to ensure its establishment.<sup>156</sup> Wilson’s plan incorporated three key points:

National self-determination, the international equivalent of democracy in domestic politics, would embody the principle of consent of the governed. Free trade would soften national rivalries and broaden prosperity. The League was to give security to the whole system through mutual guarantees of territorial integrity and common actions against an aggressor.<sup>157</sup>

Although Wilson’s draft of the League Covenant proposed that future territorial adjustments would be made “pursuant to the principle of

---

153. President Woodrow Wilson, address to Joint Session of Congress: Request for Declaration of War (April 2, 1917); Woodrow Wilson Presidential Library, *available at* <http://wwl2.dataformat.com/Document.aspx?doc=29623>.

154. President Woodrow Wilson, address to Joint Session of Congress: Address on the Fourteen Points for Peace (Jan. 8, 1918); Woodrow Wilson Presidential Library, *available at* <http://wwl2.dataformat.com/Document.aspx?doc=30716>.

155. *Id.*

156. See PAGE SMITH, *AMERICA ENTERS THE WORLD: A PEOPLE’S HISTORY OF THE PROGRESSIVE ERA AND WORLD WAR I*, 720-738 (1985).

157. RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT* 354 (1989 [1948]).

self-determination,” this language was dropped and the final version did not explicitly mention self-determination at all.<sup>158</sup> Ultimately, most of the territorial divisions incorporated into the Treaty of Versailles were based on secret agreements between the Allies and rarely involved plebiscites or referenda to consider the desires of the peoples involved.<sup>159</sup>

Rather than simply redistributing the colonies of Germany and the Ottoman Empire in the wake of their defeat in World War I, the League developed a Mandate System that would serve as a prototype for decolonization during the twentieth century. Jan Smuts, the Afrikaaner general and future prime minister of South Africa, initially proposed this system for the European peoples of the former empires of Russia, Turkey, and Austria-Hungary, whom he characterized as “incapable of or deficient in power of self-government.”<sup>160</sup> Wilson endorsed the framework proposed by Smuts, but ensured that it was applied only to the Middle Eastern territories of the Ottoman Turkish Empire and the colonies held by Germany.<sup>161</sup> Rather than being designated as mandates, the European territories were incorporated into existing states through a complex redrawing of borders and a system of treaties intended to protect national minorities.<sup>162</sup>

Article 22 of the League’s Covenant began with a formulation reminiscent of Justice John Marshall’s characterization of the United States as the “guardian” of American Indians:<sup>163</sup>

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation.<sup>164</sup>

---

158. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 32 (1996 [rev’d ed.]).

159. See Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT’L L. 1, 5-8 (1993); see also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 52 (1992).

160. Quoted in ANGHIE, *supra* note 3, at 119.

161. See WRIGHT, *supra* note 131, at 24-43.

162. See Nathaniel Berman, *‘But the Alternative is Despair’: European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1821-1859 (1993); see generally Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy and the Limits of the Interwar Framework*, 33 HARV. INT’L L.J. 353 (1992).

163. See *Cherokee Nation*, 30 U.S. at 17.

164. League of Nations Covenant, art. 22. Available at <http://fletcher.tufts.edu/multi/www/league-covenant.html#annex>.

This Article then asserted that “the best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations.”<sup>165</sup>

Three classifications of mandate territories were established, based on their perceived degree of “civilization.” The first were the non-European territories of the Turkish Empire, recognized as having “reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”<sup>166</sup> The second were former German colonies in Central Africa, “at such a stage that the Mandatory must be responsible for the administration of the territory,” subject to certain guarantees protecting their peoples and securing “equal opportunities for the trade and commerce of other Members of the League.”<sup>167</sup> The third group, which included South-West Africa and islands in the South Pacific, were deemed “best administered under the laws of the Mandatory as integral portions of its territory,” again subject to certain safeguards for their populations.<sup>168</sup>

The power to govern the mandates was divided among the Allies, who continued to administer their own colonies as they saw fit.<sup>169</sup> In many ways, therefore, this system functioned simply as a redistribution of colonial possessions, except that under Article 22 the mandatory powers were responsible to the League.<sup>170</sup> Disputes concerning administration of mandate territories were to be handled by the League through its Permanent Mandates Commission, and the peoples of the mandated territories had no direct input into the process, other than an ineffectual right to petition the Commission.<sup>171</sup>

The template for “development” created during the tenure of the League’s Mandate System would have lasting effects on the decolonization movement and on the contemporary world order in which purportedly equal and sovereign states must function within structures that increasingly use measures of “progress” and “develop-

---

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* On these distinctions, see also ANGHIE, *supra* note 3, at 120-122; SMITH, *supra* note 156, at 705-706.

169. See WRIGHT, *supra* note 131, at 43-48 (detailing the assignments).

170. See League of Nations Covenant, *supra* note 164, art. 1 (limiting membership to initial and invited signatories and “any fully self-governing State, Dominion or Colony” whose admission was agreed to by two-thirds of League members and who provided additional specified assurances).

171. See Anghie, *supra* note 3, at 122-123.

ment” to assess their competency and degree of “civilization.” Antony Anghie, building upon Quincy Wright’s detailed exposition of the internal workings of the Mandate System, explains that at the system was grounded in an ideological commitment to creating “a progressive, enlightened colonialism, as opposed to the bad, exploitative colonialism of the nineteenth century.”<sup>172</sup> This was used by the Allies to justify the disparity between establishing mandates for the German and non-European Ottoman Turkish colonies while maintaining their own African and Asian empires which, as Anghie put it, “naturally fell into the category of ‘good colonialism.’”<sup>173</sup> Thus, for example, in a classic text published during this period, British colonial administrator Frederick Lugard, a member of the League’s Permanent Mandates Commission, emphasized the “dual mandate” of the British to bring the benefits of civilization to African peoples while opening their territories to international commerce.<sup>174</sup>

What might otherwise have been perceived as tension between the humanitarian goals of the Mandate System and its commitment to economic development was reconciled by the presumption that economic “advancement” was a prerequisite of civilization. As British Colonial Secretary Joseph Chamberlain had announced in 1896, “in our colonial policy, as fast as we acquire new territory and develop it, [we] develop it as trustees of civilization for the commerce of the world.”<sup>175</sup> Thus the League’s Covenant emphasized that “the well-being and development” of those not adequately prepared to cope with “the strenuous conditions” of modernity constituted “a sacred trust of civilization,”<sup>176</sup> and explicitly provided that League members were to “endeavour to secure and maintain fair and human conditions of labour” and to “undertake to secure just treatment of the native inhabitants of territories under their control.”<sup>177</sup>

The wellbeing of the peoples at issue was largely measured by their economic productivity; this, in turn, required the maintenance of certain levels of health, hygiene, and education. While the Permanent Mandates Commission discussed labor conditions extensively, often measuring them by mortality and morbidity statistics, at least some of

---

172. *Id.* at 157.

173. *Id.*

174. *Id.* at 252; *see generally* FREDERICK D. LUGARD, *The Dual Mandate in British Tropical Africa* (1922).

175. JOSEPH CHAMBERLAIN, *British Trade and the Expansion of Empire*, in *FOREIGN AND COLONIAL SPEECHES* 144 (2009 [1897]) (speech to the Birmingham Chamber of Commerce, November 13, 1896) (alteration in original).

176. *See* League of Nations Covenant, *supra* note 164, art. 22.

177. *Id.* at art. 23.

its members believed that certain “races” were simply unsuited to economic survival in the modern world.<sup>178</sup> Subsistence economies that did not produce a marketable surplus were by definition “backward,” and reluctance to engage in wage labor or indifference to the accumulation of wealth were deemed cultural impediments to progress for, according to the Commission, “the law of labor is a law of nature, which no one should be allowed to evade.”<sup>179</sup> Traditional forms of governance were eviscerated and Indigenous leaders rendered impotent under the theory that, “scarcely aware of the fact that their little sovereignty has been transferred to a higher group, they will assist in the work of the mandatory government and will be content with the empty title and the modest stipend.”<sup>180</sup>

Employing what was termed the “science of colonial administration,”<sup>181</sup> every aspect of native society was studied and the Permanent Mandates Commission utilized complex questionnaires to collect volumes of data on issues such as governmental structure and functioning, taxation, land use, labor conditions, health care, and educational facilities.<sup>182</sup> This information was then used to regulate all aspects of Indigenous societies. “Progress” was measured by the development of infrastructure — roads, railroads, and telegraph systems—which, in turn, allowed the mandatory powers to penetrate the interior of the territory and, once there, to transform each society’s economic, political, educational, health, legal, and policing systems.<sup>183</sup>

Underlying this international effort was the premise that eventually the mandate territories would be sufficiently “developed” to be recognized as independent sovereigns, but the entire process of transforming former colonies into self-governing states was so deeply infused with the ideological presumptions of Western civilization that the notion of self-determination was stripped of any real meaning.<sup>184</sup> Despite the League of Nations having expanded its community of “civi-

---

178. See WRIGHT, *supra* note 131, at 252 (quoting one Commission member’s observation that those races “unable to work” would disappear, while those capable of work should be required to do so to fulfill the mission of the Mandate System).

179. Quoted in ANGHIE, *supra* note 3, at 165.

180. *Id.* at 170 (quoting Minutes of the Third Session of the Permanent Mandates Commission).

181. See WRIGHT, *supra* note 131, at 229; see also ANGHIE, *supra* note 3, at 184-190.

182. See WRIGHT, *supra* note 131, at 187-188.

183. See Anghie, *supra* note 3, at 186 (noting the similarities to Michel Foucault’s explanation of how social control may be attained “by defining the normal, the standard and the truth against which deviations are identified and then remedied”).

184. See generally Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT’L L. & POL. 513 (2002).

lized” states to include not only European countries and the United States but also a number of Latin American states and Japan,<sup>185</sup> the prevalent belief was that fundamentally divergent understandings, worldviews, and value systems were simply impediments to progress.<sup>186</sup> In the positivist international legal framework that emerged in the nineteenth century, “sovereignty, in the case of non-European societies, does not arise ‘naturally’; rather, it has to be bestowed,”<sup>187</sup> and the Mandate System made it clear that it would be bestowed only when the colonial powers deemed that the purportedly objective and scientific criteria they had established had been met.<sup>188</sup> In other words, peoples would be recognized as having the capacity to be self-determining only after abandoning any understandings of their own histories, cultures, or worldviews that conflicted with Western values, thereby effectively conceding to the “inevitability” that genuine self-determination was no longer an option.<sup>189</sup>

### C. *The Persistence of the Development Model*

The history of “development”—or, in its earlier iterations, “civilization” and “progress”—in the colonial process is significant to contemporary understandings of the role played by the development paradigm in decolonization because it illustrates that many of the mechanisms used to maintain colonial control are being replicated by international organizations which, today, purport to rectify the damage done to formerly colonized territories. Aimé Césaire, in his classic *Discourse on Colonialism*, quotes Walter Hines Page, U.S. ambassador to Great Britain, asking Woodrow Wilson in 1914: “‘What are we going to do with this . . . Empire, presently, when economic forces unmistakably put the leadership of the race in our hands?’ . . . ‘*Aid to the disinherited countries,*’ says Truman.” In other words, Césaire continues, “American high finance considers that the time has come to raid every colony in the world.”<sup>190</sup> As with their explicitly colonial predecessors, the agencies of development have failed to provide avenues for true self-determination and denied colonized and formerly colonized peoples control over their natural resources.<sup>191</sup> Having undermined al-

---

185. See WRIGHT, *supra* note 131, at 16.

186. *Id.* at 558-568.

187. ANGHIE, *supra* note 3, at 107.

188. See *id.* at 108.

189. See WRIGHT, *supra* note 131, at 559, 584.

190. AIMÉ CÉSAIRE, *DISCOURSE ON COLONIALISM* 76 (Joan Pinkham trans., 2000 [1950]) (emphasis in original).

191. See *supra* notes 53-67 and accompanying text.



ternative means of economic self-sufficiency, access to the capital necessary to function in the contemporary global economy has been made contingent on the creation of political and social structures emulating Western models.<sup>192</sup>

Viewed in this light, it should come as no surprise that a half-century of “development” programs have resulted in the replication of the relations of economic and political power prevalent in the colonial era. What is surprising is that the development paradigm persists as the commonly proffered solution to contemporary problems of global impoverishment and insecurity. The proposals made by the UN Development Programme,<sup>193</sup> or the IMF,<sup>194</sup> or world leaders such as President Obama,<sup>195</sup> if taken at face value, appear to be advocating the repetition of an approach which, decade after development decade, and critiques of development programs abound.<sup>196</sup> In addition, the similarities between contemporary development programs and the methods used to maintain the economic and political relations between colonizing powers and their territories are well documented. If these methods were considered an efficient means of ensuring that non-self governing territories remained both profitable and politically subservient, why would they now serve a decolonizing or independence-building function?

Perhaps contemporary development programs are simply well-intended exercises in futility, much like the stereotypical experiments in alchemy. However, those who determine the policies of the world’s most powerful institutions are neither ignorant nor incompetent. It is at least equally plausible, therefore, that programs which consistently fail to meet their articulated goals continue to be mandated *because* they maintain the status quo very effectively. The states that “developed” at least in part thanks to colonial exploitation, and that continue to benefit from neocolonial relations, exercise disproportionate control over international institutions because of their economic as well as political power.<sup>197</sup> It is not surprising that the policies they advocate and implement would replicate existing economic and political (im)balances rather than fostering true decolonization. The following section, therefore, explores the possibility of approaching decoloniza-

---

192. See *supra* notes 54, 67-68 and accompanying text.

193. See *supra* notes 14-15, 20-21 and accompanying text.

194. See *supra* notes 70, 81-82, 93-94 and accompanying text.

195. See *supra* notes 43 and accompanying text.

196. See, e.g., *supra* notes 14-19, 22 and accompanying text.

197. See Sally Engle Merry, *From Law and Colonialism to Law and Globalization*, 28 LAW & SOC. INQ. 569, 570 (2003).

tion from a perspective unconstrained by the concurrent model of development.

#### IV. REIMAGINING DECOLONIZATION

*[T]he first moment of resistance to imperialism brought forth all the various nationalist and independence movements that culminated in the large-scale dismantling of the great classical empires, and the birth of many new states throughout the world. The second moment (liberation), however, still continues with us, and its complexities and turbulence in many instances still defy resolution.*

*Edward Said, 1990*<sup>198</sup>

In strictly economic terms, the development paradigm has failed to facilitate the improvements in material conditions of life foreseen in conjunction with the end of centuries of colonial rule. The liberatory potential of decolonization—the restructuring of formerly colonized societies in ways that would allow peoples to govern themselves and to provide for their communities in a manner both sustainable and culturally consonant—has not been realized.<sup>199</sup> If the ongoing immiseration of so many peoples, the spread of armed conflict, and environmental devastation are to be avoided, we must think outside the box of the contemporary world order. In turn, this requires reconsideration of some of the most basic premises upon which it has been built. This section returns to the notion of self-determination because it is central to the decolonization project. It then addresses the ideological premises of the doctrine of development, premises which coincide with those of colonization. Finally, it considers some possibilities for fundamental change embodied in worldviews that move beyond the current model in which statehood and development are equated with decolonization.

##### A. *Revisiting Self-Determination*

The decolonization process of the twentieth century was closely supervised by the colonial powers themselves, and implemented entirely within the framework of international relations they had developed. In other words, both the analysis of the injustices of colonialism and the means by which they were to be redressed were

---

198. Edward W. Said, *Yeats and Decolonization*, 69-95 in TERRY EAGLETON, FREDERIC JAMESON & EDWARD W. SAID, *NATIONALISM, COLONIALISM, AND LITERATURE* 83 (1990) (alteration in original).

199. See *supra* notes 14-19, 53-55 and accompanying text.

determined by those who perpetrated the wrongs.<sup>200</sup> By maintaining control over the mechanisms for the collective imposition of sanctions and the use of force, precluding substantive transformation of international law without their consent, and consolidating significant power within economic institutions, the dominant powers ensured not only that the legacy of colonialism would remain unredressed but also that colonial relations would be reproduced in various new forms.<sup>201</sup>

The most obvious of these forms was, perhaps, the perpetuation of territorial boundaries arbitrarily imposed upon the colonies. Makau Mutua observes that the “‘Scramble for Africa,’ . . . driven by the need for raw materials and markets for European capitalism, is responsible for the imposition of the modern state on Africa,”<sup>202</sup> and that because “the European powers treated Africa as terra nullius or no-man’s land,”<sup>203</sup> the boundaries they drew on their maps had no relationship to the cultural, political, or economic realities of the peoples whom they were quite well aware inhabited the lands at issue. The result, of course, was a system in which preexisting nations and communities were both divided between separate colonies and forcibly merged with other peoples.<sup>204</sup> Conditioning the right of decolonization on the adoption of colonially imposed state structures and boundaries was therefore not the granting, or recognition, of a right to self-determination but a process of “legitimiz[ing] the denial of sovereignty to pre-colonial, independent African states and communities.”<sup>205</sup>

As noted by intellectual historian Edward Said, imperialism:

is an act of geographical violence through which virtually every space in the world is explored, charted, and finally brought under control. For the native, the history of his or her colonial servitude is inaugurated by the loss to an outsider of the local place, whose concrete geographical identity must thereafter be searched for and somehow restored. From what? Not just from foreigners, but also from a whole other agenda whose purposes and processes are controlled elsewhere.<sup>206</sup>

Because history, culture, language and geography were ignored in the delineation of these territories, legal scholar Tayyab Mahmud explains

---

200. See *supra* notes 45-69 and accompanying text.

201. See generally, James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007).

202. Makau Wa Mutua, *Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State*, 21 BROOKLYN J. INT’L L. 505, 518 (1995).

203. See *id.* at 519.

204. *Id.* at 518.

205. Mutua, *supra* note 202, at 523n84 (alteration in original).

206. Said, *supra* note 198, at 77.

that “[t]he resulting postcolonial ‘contrived state’ is often a mockery of the right of self-determination because territory rather than a distinct people become the primary frame of reference of the right.”<sup>207</sup> This process “ensured that internal colonialism became the rule rather than the exception.”<sup>208</sup>

Said characterized this process as a “dynamic of dependence”<sup>209</sup> resulting from the reality that “the cultural horizons of nationalism are fatally limited by the common history of colonizer and colonized assumed by the nationalist movement itself.”<sup>210</sup> For the peoples of newly independent states, the price paid for a “self-determination” limited to nominal political independence was the loss of self-definition: “From 1949 onwards, often without realizing it, more than two billion inhabitants of the planet found themselves changing their name, being ‘officially’ regarded as they appeared in the eyes of others, called upon to deepen their Westernization by repudiating their own values.”<sup>211</sup> Quite predictably, the resulting states “have more often than not failed to develop into cohesive political units having legitimacy, and have been plagued by separatist movements, civil wars, and secessions.”<sup>212</sup>

The extent to which this reality has undermined any hope of actual peace or security for the world’s peoples in the postwar years was illustrated by cultural geographer Bernard Neitschmann, who emphasized the importance of distinguishing states, as political constructs, from nations, which he defined in terms of peoples with common history, culture, language, and geographic ties.<sup>213</sup> Neitschmann reported that, as of 1993, there were ninety-seven wars between states and the nations over which they were attempting to exercise political control compared to one “state versus state” war and six “nation versus nation” wars.<sup>214</sup> He also estimated that between 1945 and 1993 over 80 percent of all deaths attributable to genocide resulted from state-directed genocides against the peoples of nations.<sup>215</sup> With governments unable to ensure basic security, many of

---

207. Tayyab Mahmud, *Geography and International Law: Towards a Postcolonial Mapping*, 5 SANTA CLARA J. INT’L L. 525, 545 (2007) (alteration in original).

208. *Id.*

209. Said, *supra* note 198, at 75.

210. *Id.* at 74.

211. RIST, *supra* note 96, at 258.

212. Mahmud, *supra* note 207, at 545-546; see also Bernard Neitschmann, *The Fourth World: Nations Versus States, in Reordering the World: Geopolitical Perspectives on the Twenty-first Century* 237 (George J. Demko & William B. Wood eds., 1994).

213. NEITSCHMANN, *supra* note 212.

214. *Id.* at 237.

215. *Id.*

these countries have been caught in a downward spiral of disintegrating social networks, dysfunctional distribution systems for food and other basic necessities, the rise of predatory crime and private security forces, heightened levels of “ethnic” violence, and a resulting rise in displaced persons and refugees.<sup>216</sup>

It is under such circumstances that the powerful states of the North describe many of these recently recognized states as “failed,” using that label to justify the re-imposition of some form of colonial “supervision.”<sup>217</sup> As law professor Ruth Gordon explains, many Western analysts believe that this is the result of a rush to decolonization (a view that does not necessarily entail acknowledgment that these problems are rooted in the process of colonization itself) and propose some version of international trusteeship as a solution.<sup>218</sup> Since the early 1990s, proposals have been made for international interventions into states with “governance problems” which would extend and formalize the “good governance” requirements of international development agencies by adapting international law to accommodate new forms of guardianship over these states.<sup>219</sup> This would require a redefinition of sovereignty and a repudiation of the principles of self-determination, sovereign equality, and nonintervention fundamental to contemporary international law.<sup>220</sup> As international legal scholar Henry Richardson points out, incorporating the construct of “failed states” into international law in this manner, without addressing the relationship between failures of governance and economic injustice, would effectively “re-legalize” colonialism by reinforcing the authority of Northern states and leading toward “a ‘directorship’ international order.”<sup>221</sup>

---

216. Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 306-309 (1995); John H. Sylvester, *Essay: Sub-Saharan Africa: Economic Stagnation, Political Disintegration, and the Specter of Recolonization*, 27 LOY. L.A. L. REV. 1299, 1306 (1994).

217. For analyses advocating such renewed use of “trust” powers, see generally Saira Mohamed, *From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council*, 105 COL. L. REV. 809 (2005); Brian Deiwert, *A New Trusteeship for World Peace and Security: Can an Old League of Nations Idea be Applied to a Twenty-First Century Iraq?* 14 IND. INT'L & COMP. L. REV. 771 (2004). For critiques of this approach, see generally Gordon, *supra* note 104; Henry J. Richardson, III, *Failed States, Self-Determination, and Prevention Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP. L.J. 1 (1996).

218. See Gordon, *supra* note 216, at 308-311; Gordon, *supra* note 104, at 904-905.

219. Richardson, *supra* note 217, at 1.

220. See Gordon, *supra* note 216, at 311-323.

221. Richardson, *supra* note 217, at 5-7.

Substantive decolonization will not be accomplished solely in the realm of law. However, law has always been central to the colonial enterprise and, therefore, meaningful decolonization will require a fundamental restructuring of international law and its attendant institutions.<sup>222</sup> Law professor B. S. Chimni has observed that international lawyers and scholars in India struggled with this issue in their first “postcolonial” decades, “indict[ing] international law for legitimizing the subjugation and oppression of Asian peoples,” and developing coalitions to bring about the expansion and restructuring of the legal system.<sup>223</sup> While acknowledging the numerous contributions of these efforts, Chimni notes some basic weaknesses that undermined the movement as a whole.<sup>224</sup> One was that “the end of colonialism was equated with the end of international relations based on exploitation and violence,” with a resulting failure “to see that the structures that had spawned colonialism remained in place.”<sup>225</sup> A second weakness was the adoption of international law’s positivist methodology, which precluded analyses of the historical and political contexts within which these institutions function.<sup>226</sup> Finally, these intellectuals accepted and supported “the post colonial State as standing above conflicts and classes,” with the result that insufficient attention was paid to state violence, human rights issues, and “the impact of international legal structures on the lives of ordinary men and women.”<sup>227</sup>

This case study in the decolonization of law illustrates the importance of accepting as foundational the premises that all peoples—not simply the states purporting to represent them—are the rightful subjects of international law; that there is a deep and rich history in which societies of all different types have developed systems to govern their relations with others; that historical context and political effects cannot be detached from legal norms or institutions; and that blindly adopting either the methodological approach or the structures of the currently hegemonic model will predictably reproduce the relationships upon which it was founded and which it has gone to extreme

---

222. See generally Daren Z. Zook, *Decolonizing Law: Identity Politics, Human Rights, and The United Nations*, 19 HARV. HUM. RTS. J. 95 (2006); Sundhya Pahuja, *The Postcoloniality of International Law*, 46 HARV. INT’L L.J. 459 (2005).

223. See B.S. Chimni, *Teaching, Research and Promotion of International Law in India: Past, Present and Future*, 5 SINGAPORE J. INT’L & COMP. L. 368, 369-370 (2001) (alteration in original).

224. *Id.*

225. *Id.* at 370.

226. *Id.* at 370-371.

227. *Id.* at 372; see also Ugo MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* 202-211 (2008).

measures to maintain. If we take the all peoples premise of the right to self-determination seriously, we must likewise take it in proper historical context, understanding that it refers not simply to the aggregate of individual atomized “units” within the global world order but to peoples, each with their own multilayered identities, cultures, histories, and worldviews. With this conceptual shift, the claim to universality so central to the contemporary international legal system and its doctrine of development begins to crumble.

### B. Questioning Fundamental Premises

The international legal order we have inherited is premised upon a universalized and universalizing worldview in which we share a common goal of advancing human “civilization,”<sup>228</sup> a paradigm that undergirds the ideology of colonialism and of development. As put by law professor David Kennedy, “International law has seen itself as the voice of civilization, of the center, of the modern, of the future, and of universal humanism and progress against, or in dialog with, the voices of the non-Christian world, the primitive, underdeveloped, non-Western, outlaw world of those who do not yet see things from a high place.”<sup>229</sup>

In this euroderivative framing, the civilized are juxtaposed to the savage who are depicted as part of nature. “Opposed to cultivation, which is civilized, is savagery, which isn’t. And what is savage (*silvestris, silva*) is literally ‘of the woods.’ . . . Our languages thus encode the forms of fear and contempt felt by a settled agricultural community for other modes of material and social organization.”<sup>230</sup> In this worldview civilization and human-ness are measured by distance from nature and thus defined by what they are not. Legal philosopher Peter Fitzpatrick explains that when identity is thus created through negation, an “uncivilized” Other must always exist to confirm the existence of the civilized.<sup>231</sup>

Once it is presumed that people are defined by their distinction from nature, it follows that progress or development is rightfully mea-

228. For a more detailed explication, see SAITO, *supra* note 128, at 19-30.

229. David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 NYU J. INT’L L. & POLITICS 335, 359 (2000); see generally David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J. 1 (1986).

230. RICHARD WASWO, *THE FOUNDING LEGEND OF WESTERN CIVILIZATION: FROM VIRGIL TO VIETNAM* 6 (1997); see also FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 74 (2010 [1975]) (noting that until the late 1500s the term “savage” was used to refer to plant, animal and (uncivilized) human life).

231. PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 38 (1992).

sured by the extent to which humans have brought nature under their control. Rationality and language, both posited as distinctly human attributes, are credited with allowing human conquest of the earth through scientific and technological advances.<sup>232</sup> In this worldview, science gave humanity an accelerating ability to convert natural substances such as coal and oil, and even atomic particles, into “fuels” whose energy was harnessed to industry. Industrialization propelled the growth of markets, ever more “efficient” modes of transportation, and urbanization.<sup>233</sup> Kenyan legal scholar Bosire Maragia explains that thus, in the Western paradigm,

Science became the social context for producing the knowledge essential to the development of technology which in turn drove industrial production that came to be identified with social progress. The ideas of progress, civilization, and development required privileging science and technology as well as the systematic obliteration of all types of knowledge that were identified with primitive, uncivilized, and, today, underdeveloped societies.<sup>234</sup>

If one accepts a universally applicable definition of human progress as leading to higher forms of civilization measured, in large part, by material or scientific development, one then has “objective” and “rational” means by which to judge a society or culture’s relative degree of civilization.<sup>235</sup> By this measure, Western civilization represents the highest stage yet attained in human history. This conclusion is often reached by comparing the relative material wellbeing of people in “civilized” and “uncivilized”—or “developed” and “developing”—states. In addition, Darwinian notions of evolution are often invoked to portray the Western powers’ conquest of huge portions of the planet as evidence of their superiority. J. M. Roberts provides a typical example of this formulation in his *History of the World*:

By 1900 European civilization had shown itself to be the most successful which had ever existed. Men might not always agree on what was most important about it but no one could deny that it had produced wealth on an unprecedented scale and that it dominated the rest of the globe by power and influence as no previous civiliza-

---

232. See, e.g., J.M. ROBERTS, *HISTORY OF THE WORLD* 29 (1993) (“The irrationalities of this [twentieth] century show the narrow limits of Man’s capacity for conscious control of his destiny. To this extent, he is still determined, still unfree, still a part of nature.”)

233. See *id.* at 565-573; WASWO, *supra* note 230, at 186-187.

234. Bosire Maragia, *The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge All That Is Needed?* 18 *GEORGETOWN INT’L ENV. L. REV.* 197, 217-218 (2006).

235. See generally Teodor Shanin, *The Idea of Progress in THE POST-DEVELOPMENT READER* 65-71 (Majid Rahnema & Victoria Bawtree eds., 1997).



tion had ever done. Europeans (or their descendants) ran the world.<sup>236</sup>

Within this framing, those who resist incorporation into this history may simply be “backward” and in need of enlightenment. Those who refuse to assimilate despite having been given the opportunity, and who persist in opposing the spread of Western civilization, are unlikely to survive.<sup>237</sup>

Because Western identity relies so heavily on the negation of the Other and is so embedded in a universalizing history of the “rise” of humanity from a state of nature, an uncivilized—or at least insufficiently civilized—Other is a necessary component of this identity. Anghie uses the phrase “dynamic of difference” to refer to an “endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilized and the other as ‘particular’ and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society.”<sup>238</sup> This understanding of the “Other” is rooted in the work of Edward Said, who explained the Orient as “the place of Europe’s greatest and richest and oldest colonies, the source of its civilizations and languages, its cultural contestant, and one of its deepest and most recurring images of the Other,” a construct that “has helped to define Europe (or the West) as its contrasting image, idea, personality, and experience.”<sup>239</sup>

Just as particular individuals and cultures must posit an “uncivilized” Other in order to self-identify as “civilized,” the existence of a colonial center, or metropole, requires a periphery. By definition, the “center” can no longer be central if the entire periphery is absorbed and incorporated into it. One way to move beyond the center-periphery dichotomy which lies at the heart of colonialism is to acknowledge and empower a multiplicity of interrelated and perhaps overlapping realities and sources of power, none of which exert control over the others. This possibility is recognized, at least potentially, in the contemporary

---

236. Roberts, *supra* note 232, at 555. See also ERIC R. WOLF, *Europe and the People Without History* 5 (1982) (discussing the “genealogy” of the West).

237. See, e.g., Wright, *supra* note 131, at 252. (quoting the observation of a member of the League’s Permanent Mandate Commission that those races “unable to work” would disappear, while those capable of working should be required to do so in order to fulfill the mission of the mandate).

238. ANGHIE, *supra* note 3, at 4. Peter Fitzpatrick extends the concept to his analysis of the development of Western law, noting that it “is imbued with this negative transcendence in its own myth of origin where it is imperiously set against certain ‘others’ who concentrate the qualities it opposes.” Fitzpatrick, *supra* note 231, at 10.

239. EDWARD W. SAID, *ORIENTALISM* 1-2 (1979).

notion of self-determination, which, as legal scholar Hurst Hannum reminds us, is in “constant evolution.”<sup>240</sup>

Hannum chronicles this evolution from the Wilsonian position, which gave “lip service” to national aspirations but included no meaningful right to be free from external domination, to the decolonization phase in which the right of non-self-governing territories to independence was recognized, to a third and contemporary stage in which international law purports to guarantee more extensive human rights but “generally exclud[es] a right to independent statehood.”<sup>241</sup> He concludes that “the norm of self-determination in the post-colonial era is both a shield that protects a state (in most cases) from secession and a spear that pierces the governmental veil of sovereignty behind which undemocratic or discriminatory regimes attempt to hide.”<sup>242</sup>

As this summary illustrates, even in the process of decolonization, states have continued to be presumed the primary “actors” of international law, and national liberation equated with statehood. However, if the liberatory potential of self-determination is to be realized, the sanctity of extant state formations as well as the construct of statehood itself will need to be interrogated. European states themselves were the product of colonization and conquest, and they used their self-reflective descriptions of what it meant to be a “civilized state” to justify the imposition of colonial regimes upon other parts of the world.<sup>243</sup> The distinctions they drew between those deemed savage or barbarian and those recognized as civilized were critical underpinnings of the international legal order they constructed—one that conditioned rights on state recognition, rationalized conquest with the doctrine of “discovery,” and used the “higher purpose” of spreading civilization to justify what were otherwise unconscionable policies.<sup>244</sup>

---

240. Hannum, *supra* note 159, at 66.

241. *Id.* at 67 (alteration in original).

242. *Id.* at 68; see also Robert D. Sloane, *Policies of State Succession: Harmonizing Self Determination and Global Order in the Twenty-First Century* 30 *FORDHAM L. REV.* 1288, 1306 (noting “the prevailing view, that the modern right to self-determination must, with few exceptions, be exercised within a framework that respects the territorial integrity of sovereign States”); see also *In re Secession of Quebec*, 3 *I.L.M.* 1340 (1998).

243. See Mahmud, *supra* note 207, at 534; Wolf, *supra* note 236, at 101-125; see generally, ROBERT BARTLETT, *THE MAKING OF EUROPE: CONQUEST, COLONIZATION AND CULTURAL CHANGE* 950 – 1350 (1994)

244. See Mahmud, *supra* note 207, at 541-543; see also SAITO, *supra* note 128, at 35-53.

*C. Envisioning Options*

Colonization and its contemporary variants continue to be contested. Although “decolonization” has come to be equated with formal independence, it is important to note the distinction made by Edward Said between two intertwined political moments, the “period of nationalist anti-imperialism” and the “era of liberationist anti-imperial resistance that often followed it.”<sup>245</sup> Noting that the struggles against domination continue in formerly colonized regions of the world, Said suggests “that liberation, and not nationalist independence, is the new alternative, liberation which by its very nature involves, in Fanon’s words, a transformation of social consciousness. . . .”<sup>246</sup> Independent statehood, the goal of nationalist anti-imperialism, has not resulted in fulfillment of the vision reflected in Patrice Lumumba’s speech upon the granting of independence to the Congo.<sup>247</sup> Realization of the liberatory potential of decolonization requires us to re-envision the premises upon which the current international order—and its doctrine of development—are based, and to restructure international institutions in accordance with this transformed social consciousness.

What might this involve? Gustav Esteva and Madhu Suri Prakash note that “our grassroots experiences continue to teach us that we do not live in a universe, but in a pluriverse; that the universality in the human condition claimed by human rights propagators exists only in their minority worldview.”<sup>248</sup> If we view our surroundings as a pluriverse rather than the universe, we can begin to deconstruct the institutions whose purpose is the “globalization” of all humanity, thereby opening up the space, both literal and conceptual, for a multiplicity of adaptive systems of social organization. In what has been termed the Fourth World of Indigenous nations there are numerous societies where people are presumed to be an integral part of a nonhierarchical natural world, with a nonlinear history.<sup>249</sup> In various forms, most of these cultures have an understanding of human purpose that relates to a responsibility to the earth, rather than a right or

---

245. Said, *supra* note 198, at 83.

246. *Id.*

247. *See supra* note 1 and accompanying text.

248. ESTEVA & PRAKASH, *supra* note 111, at 125; *see also id.* at 27 (“the subject is always historical and specific: he or she cannot be abstracted out of the relation, adopting some divine view from ‘nowhere’”).

249. *See generally* Ward Churchill, *I Am Indigenist: Notes on the Ideology of the Fourth World*, in *ACTS OF REBELLION: THE WARD CHURCHILL READER* 275-299 (2003); GEORGE MANUEL & MICHAEL POSLUNS, *THE FOURTH WORLD: AN INDIAN REALITY* (1974).

destiny to tame the savage wilderness.<sup>250</sup> From such perspectives, justice may be perceived as the antithesis of what we in the West associate with law. According to social philosopher Robert Vachon, among many traditional indigenous cultures “it is difficult to understand that rights or entitlements could be homocentrically defined by a human being. That they, furthermore, could be defined by a sovereign state . . . is almost ridiculous.”<sup>251</sup>

Acknowledging this diversity of perspectives means rejecting a universalizing, hierarchical notion of human identity and purpose, being willing to entertain the possibility that the human “good” may not be dependent on scientific or technological advances—or “development”—and being open to truly diverse understandings of peoples, histories, and worldviews. Global institutions could use the need for changes in international law illustrated by the problems of those states described as “failed” or “failing” as an opportunity to acknowledge that the problems of colonialism have not been adequately addressed by the contemporary international legal system and its programs for development. In turn, this acknowledgment could serve as the basis for structural changes that help decolonize law rather than reinforcing the disparities of wealth and power that it currently serves to protect.<sup>252</sup>

Richardson points out that instead of accepting “the implicit notion among some elites that self-determination is an illicit claim whose proponents are best suppressed in the name of international public order,”<sup>253</sup> we could find in the construct “a duty, specified to those countries of the world community having the sufficient resources, of establishing international transparent process in a declared ‘failed’ state designed to eliminate, in the short term, all pockets of abject poverty. . . . [And] to support irreversible, locally empowering development process to ensure such poverty would never return.”<sup>254</sup> Or, as Gordon has advocated, we could turn the usual presumption of the colonial Other “on its head and assume that people are quite capable of governing themselves.”<sup>255</sup> She observes that international law currently

---

250. See VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 78-97 (2d ed. 1992 [1973]).

251. ESTEVA & PRAKASH, *supra* note 111, at 110 (quoting Robert Vachon, *L'étude du Pluralisme Juridique: Une Approche Diatopique et Dialogale*, J. LEG. PLURALISM & UNOFFICIAL L. 163,65 (1990)).

252. See Richardson, *supra* note 217, at 7 (linking “failed states” to “the perennial dilemma of a state-centric international legal system” of protecting rights within states whose resources are inadequate to the task).

253. *Id.*

254. *Id.* at 8 (alteration in original).

255. Gordon, *supra* note 104, at 971.

“focuses on institutions and the privileges and powers of states; the silence of the peoples of these communities, in transforming international law, is deafening.”<sup>256</sup> Resisting such silencing, Xanana Gusmão, the first president of an independent East Timor, stated:

We are not interested in a legacy of cars and laws, nor are we interested in a legacy of development plans for Timorese . . . We are not interested in inheriting an economic rationale which leaves out the social and political complexity of East Timorese reality. Nor do we wish to inherit the heavy decision-making and project implementation mechanisms in which the role of the East Timorese is to give their consent as observers rather than the active players we should start to be.<sup>257</sup>

If international legal norms and institutions are to be reconstructed in a truly liberatory fashion there must be room for all voices and perspectives, and the creation of this space requires stepping back from the fundamental premise that the purpose of international law is to articulate and enforce one universal worldview.<sup>258</sup> In light of the history referenced in this essay, as well as the willingness of many contemporary legal scholars to acknowledge that the Westphalian system has outlived its political utility, it seems reasonable to consider solutions that would empower the peoples and nations upon which state structures have been imposed, rather than limiting our “post-statist” options to the framework of economic globalization created by the most powerful states.<sup>259</sup>

It seems evident that a diversity of perspectives cannot be meaningfully incorporated through the “one size fits all” development or democratization programs currently advocated by international institutions as the only available means of redress for the legacies of colonialism.<sup>260</sup> As Esteva notes in his critique of UNESCO’s support for “endogenous development,” “if the impulse is truly endogenous, that is, if the initiatives really come out of the diverse cultures and

---

256. *Id.*

257. Quoted in Joel C. Beauvais, *Benevolent Despotism: A Critique of U.S. State-Building in East Timor*, 33 NYU J. INT’L L. & POL. 1101, 1101-1102 (2001).

258. The potential of incorporating non-Western understandings into international law is reflected in the growing appreciation of Indigenous approaches to environmental problems. See, e.g., Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. L.J. REFORM. 277, 278-279 (1993).

259. For an analysis equating the current world order to a globalized imperial state, see generally B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT’L L. 1 (2004).

260. For other possible models, see, e.g., M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203, 247-250 (2006) (discussing basic principles of law applicable to reparations for gross violations of human rights law).

their different systems of values, nothing would lead us to believe that from these would necessarily arise development—no matter how it is defined—or even an impulse leading in that direction.”<sup>261</sup> Arturo Escobar similarly emphasizes that development economics is but one “construction of the world,” not “the objective universal science its practitioners assumed it was.”<sup>262</sup> He notes, however, that in addition to “mak[ing] explicit the existence of a plurality of models,” it is necessary to understand “the mechanisms by which local cultural knowledge and economic resources are appropriated by larger forces . . . and, conversely, the ways in which local innovations and gains can be preserved as part of local economic and cultural power.”<sup>263</sup>

Deconstructing development theory, Swiss development theorist Gilbert Rist points out that it would be hypocritical to criticize the Western bias inherent to a universalizing belief in development “if one were then to claim that one’s own conclusions were universal. . . . But this in no way justifies the injustices of the present day, when some continue to ‘develop’ while others have to make do with a ‘happy poverty’ — on the false grounds that this corresponds to their particular culture.”<sup>264</sup> In an analysis that can be usefully adapted to the problems discussed in this essay, Rist makes three suggestions intended to help “prepare the ground for post-development—which should not be confused with ‘anti-development,’” cautioning that “[t]o want to do something different from what has been done so far does not mean doing the opposite.”<sup>265</sup> First, he advocates taking an approach to growth that recognizes the importance of all peoples’ material conditions of life but “consciously addresses international inequalities as well as environmental devastation” rather than being restricted to free trade principles.<sup>266</sup> Rist then proposes reinforcing alternatives developed by “social movements in the South which have stopped expecting everything to come from the good will of those in power, and no longer believe either in aid or in international co-operation,”<sup>267</sup> i.e., removing the constraints that prevent subordinated communities from becoming self-reliant or reviving their own value systems. Finally, he emphasizes the need to challenge ideas considered self-evident in ordinary

---

261. Esteva, *supra* note 30, at 15-16; *see also supra* note 37.

262. ESCOBAR, *supra* note 31, at 94.

263. *Id.* at 98 (alteration in original).

264. RIST, *supra* note 96, at 241.

265. *Id.* at 247 (alteration in original).

266. *Id.* at 248 (summarizing this approach as “manag[ing] without illusions a system that is known to be perverse”); *see also id.* at 242.

267. *Id.* at 243; *see also id.* at 248 (describing this as “a wager on the positive aspects of exclusion”).

discourse and to construct non-hegemonic explanatory models that incorporate a wide range of historic and cultural realities.<sup>268</sup> Each of these suggestions provides a useful starting point for constructing of a model of decolonization that moves beyond the narrow parameters of development theory.

## V. CONCLUSION

*I hear the storm. They talk to me about progress, about "achievements," diseases cured, improved standards of living. I am talking about societies drained of their essence, cultures trampled underfoot, institutions undermined, lands confiscated, religions smashed, magnificent artistic creations destroyed, extraordinary possibilities wiped out.*

*Aimé Césaire, Discourse on Colonialism, 1955*<sup>269</sup>

This essay began by invoking the hopes of the early years of decolonization, and noting the contrast between those visions of liberation and the disappointments of contemporary realities. Part I briefly summarized the history of decolonization in international law, and the proffering of "development" as the international community's solution to the problems faced by the people of newly independent states. In light of the persistent failures of that model, Part II suggested that the premises of the development model are virtually identical to those undergirding colonialism, and observed that they were utilized, apparently quite effectively, to maintain colonial administrations. Considering this history, it seems not only reasonable but very predictable that the relationship of domination and subordination inherent to colonial structures would be replicated with respect to "developed" and "developing" states. Distinguishing statehood from aspirations to liberation, Part III considered some alternative approaches through which, collectively, we may be able to extricate ourselves from the spiral of inequality and sociopolitical unrest in which we find ourselves today.

One remaining thought should be addressed. If we are to take seriously the notion that we inhabit a pluriverse—rather than *the* universe—of peoples, communities, and worldviews, we will also be forced to recognize that the legacies of colonialism cannot be framed only in terms of the "problems" of the formerly colonized and what needs to be changed with respect to their communities. In *The Colonizer and the Colonized*, Tunisian sociologist Albert Memmi systematically explains

---

268. *Id.* at 247.

269. CÉSZAIRE, *supra* note 190, at 42-43.

how anyone who finds him or herself party to a colonial relationship is inevitably defined by it.<sup>270</sup> There can be no neutral parties, no “good” colonizers.<sup>271</sup> Elimination of the colonial relationship, then, requires transformation on both sides. The colonized cannot be liberated if the colonizers, or those benefit from colonialism, remain unchanged. The metropole cannot exist, as such, without the periphery.

Similarly, as long as there are “developed” states, there will be the “developing,” “less developed,” or permanently “underdeveloped” states. If we are serious about eliminating these distinctions, the fundamental transformations of social consciousness referenced by Fanon and Said will have to occur not only among the formerly—and perhaps still—colonized, but among those who have benefitted from, and continue to benefit from, the legacy of colonialism. This, in turn, means being willing to accept fundamental changes to the status quo. While this may be a discomfiting prospect, it seems likely that, as Rist observes, the “greatest danger we face is a refusal to face reality, be it out of conformity or fear.”<sup>272</sup> The current state of global affairs, with its widespread immiseration, armed conflicts, and environmental disasters, is clearly not sustainable. Having seen that neither collective denial nor the repetition of failed “development” programs will change this reality, it appears that creative alternatives are in order.

---

270. ALBERT MEMMI, *The Colonizer and the Colonized* ix (Howard Greenfeld trans., 1965) (noting that the colonial relationship “chained the colonizer and the colonized into an implacable dependence, molded their respective characters and dictated their conduct”).

271. See Jean-Paul Sartre, *Introduction*, in *id.* at xxv.

272. RIST, *supra* note 96, at 258.



\*\*\*