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Changing the World: The Ethical Impulse and International Law

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Dismantling Your House with Dignity: Ethics, Justice and the International

There is currently, in rich countries and poor, a groundswell of activism, activity, protest and popular engagement directed at creating a better world. Everywhere we look, people are singing, dancing, shopping (or not shopping), blogging, protesting, writing, performing, sponsoring and volunteering in the name of global justice. It is obvious that people care. This ethical impulse is coming from both the Third and First worlds, or if you prefer, from the both the Global South and the Global North. It is democratic, and not confined to young idealists and old hippies. As a human being, this makes me optimistic. I am grateful for people's energy and engagement. But as an international lawyer and scholar, the political shape of this ethical impulse and the institutional form to which it ultimately translates gives me pause. The precise reasons for my unease recently became clearer to me at an exhibition at the Brunei Gallery at the School of Oriental and African Studies in London in 2011, which brought together a photographic essay by Robert Wallis with works by the Tribal Women's Artist Collective from North Central India. [1]

The exhibition, called 'A Disappearing World', centred on the battle currently being waged between the non-Hindu tribal people in what is now Jharkhand, and the resource companies who have been granted mining rights by the Indian state. These rights have been granted over areas where this group of people have been living since well before the existence of the Indian state, since before colonisation, even before the idea of India. Much of the exhibition was devoted to chronicling the dispossession of the tribal people by the mining companies and the struggle to secure land titles and compensation that activists, both Indian and foreign, were waging on behalf of those peoples. As I walked around the exhibition, I thought about the number of clashes like this one occurring all over the world. In Brazil, China, Canada, the US, Myanmar, Colombia, South Africa, Indonesia, West Papua – even here in Australia – extractive industries and indigenous people are meeting every day in ways that will determine the fate of the indigenous peoples as well as the world's valleys, hills, forests and waterways.

The text accompanying one picture in particular has stayed with me these many months. It was a quote from the mining company worker charged with delivering the compensation cheques to those being forcibly relocated and with the oversight of the destruction of their houses. To paraphrase, the employee described the way in which often, the people to whom he delivered the compensation cheques would squat outside their huts, holding the cheques and weeping. In an attempt to accord the people some dignity, the employee would allow them to dismantle their houses themselves, rather than simply calling in the bulldozers as most of his colleagues did. He had since been demoted he said, for slowing down the line.

The dilemma of the mining company employee helped me clarify my unease about the forms of contemporary global activism. With its complex mix of empathy and complicity, his ethical position offered a useful analogy for the shape of mainstream ethical engagements and the ways in which they are institutionalised in the global political-economy. The best the 'international community' can currently do in the face of globalisation it seems is to help people dismantle their houses with dignity. This is not irrelevant – some dignity is better than none – but the response is explicitly ameliorative rather than resistant.

International law shapes this capacity to respond in particular ways. Those ways both background and foreground the struggle described above. The backgrounding happens through a slow process beginning roughly with the land appropriations of the New World in the seventeenth century. Continuing from there to the generalisation of the nation-state form in the twentieth century, international law in both its public and private variants has become the principal regulatory and institutional frame for structuring the way we share the earth. More recently, over the last sixty or so years, international law has also become the most prominent secular language through which competing aspirations about a better world are articulated and put into practice at a global level. In the present day, internationalised ethical engagements and the calls for global justice that accompany them almost invariably use the idioms of 'development' or 'human rights'. But addressing global inequality at the same time as environmental degradation becomes contradictory within the frame of development and human rights.

When the ethical impulse takes institutional form in these idioms, it also contributes to fostering a kind of global political illiteracy. This illiteracy makes it increasingly difficult to recognise and

to read the behaviours of most of the world as legitimate forms of political resistance or existence. Approaches to global justice founded in development and human rights also misrecognise or misrepresent their own relationship to authority. This misrecognition encourages the production of a depoliticised account of current global conditions, channelling the impulse for empathy and compassion expressed by large numbers of people worldwide into an unintentional complicity with coercive processes of transformation.

Inequality and the Earth's Limits

Many will be familiar with the facts which suggest that the earth is groaning under the weight of the demands we are making of it. This is true both in relation to the earth as a source of what we need to sustain us, and also (perhaps primarily) as a sink for what we dispose of. Not only in terms of carbon emissions, but also in terms of chemical pollutants and biodiversity loss, we are approaching the boundaries of what the earth can absorb. The exhaustion of the earth is happening at a time when inequality has also been increasing rapidly. The world's richest 450 individual people now possess more wealth than the poorest 415 million people combined. In 1960, the ratio of per capita income of Europe to Africa was 30:1; by 2005 it had swollen to 40:1.[2] Increases in inequality have not only played out between nations, but within them. Small elites in many poor countries have become immensely wealthy. In many instances, miraculous economic growth engenders, if not relies upon, processes which actively pauperise large sectors of the population.[3] Inequality is growing in many rich countries too; events such as Hurricane Katrina remind us that the 'Third World' is also in the First. Economic historian Gregory Clark suggests that in the present moment, both the richest *and* the poorest people who have *ever* lived, live on this earth today.[4] Zygmunt Bauman talks about this in terms of the 'collateral damage' of global growth.[5] As the news (and Australia's resource 'boom') reminds us every day, these challenges are playing out against the backdrop of the changing dynamics of North–South relations and the growing economic power of several highly populous states in the South. As it is currently conceived, international law is incapable of providing an effective regulatory and institutional frame through which to view and deal with these issues.

Development as a Proxy for Wellbeing

Since the creation of the institutions of contemporary international law at the end of World War II, international law has become the most prominent secular language through which competing aspirations about a better world are articulated and put into practice at a global level. This internationalised language of justice has drawn its values, both explicitly and implicitly, from the institutionalised concept of development.[6] Also since that time, exploding with the end of the Cold War, internationalised ethics has found expression in the forms and idioms of human rights. This is true institutionally and increasingly also in terms of social movements and activists. As Samuel Moyne puts it, since the death of state-sponsored socialism, human rights have become the 'last utopia'.[7]

One manifestation of the centrality of the modern concept of development is that since the wave of decolonisation in the 1950s and 1960s, development has become a proxy for the question of material need or human flourishing.[8] This dominance remains true to the present day, such that when we talk about the problem of the persistence of global poverty, the solution is still development. For example, the efforts of the world to eradicate hunger, to empower women, to increase primary education, to reduce child and infant mortality, and to improve maternal health are declared to be the millennium *development* goals.[9] Trade negotiation rounds that purport to focus on poor countries are labelled '*development* rounds', and the way we address the problem of environmental degradation is through sustainable *development*.[10] Even international military interventions have been recast as development problems; money spent on security and post-war reconstruction in Iraq and Afghanistan, for example, is now officially accounted for as 'development' spending.[11]

This equivalence has been remarkably resilient, even in the face of its poor record. Because despite more than sixty years of 'development', the proliferation of a huge international bureaucracy, and thousands of NGOs dedicated to bringing about the end of poverty, the gains have been modest at best. Using the institutions' own terms of monetary income-based measures of poverty, recent World Bank statistics suggest that half the world's people live on less than \$2.50 per day, and many survive on far less than that.[12] The Bank's own statistics regarding improvements on various indicators show only marginal gains. If the clear decline in income poverty in China is excluded, then the percentage of people living below the poverty line in the rest of the world has barely declined over the past three decades.[13] This failure is especially

marked given that the size of the world economy has increased twenty-fold over the twentieth century. Over this time, not only has the world become much richer, but a colossal international bureaucracy has proliferated, specifically charged with the task of alleviating poverty. William Easterley estimates that over $2.3 trillion has been spent on foreign aid alone over the last five decades.[14] And of course, over the same period, inequality has also increased and it has become unavoidably apparent that we are demanding too much of the planet, and too quickly. In addition to this failure, those states that have raised the standard of living of their general populations have almost invariably done so by specifically ignoring international developmental orthodoxies.[15]

The History of Development

One potential response to the observation that 'development' has become the axiomatic frame for international approaches to poverty reduction is to argue that development is just a word or place-marker for something else. According to this argument, what we intend when we use the word 'development', is simply to indicate a general encapsulation of people improving their standard of living: what is important is the idea of getting better or progress that it implies. But as Carl Schmitt reminded us almost a hundred years ago, concepts must be understood in terms of their concrete political existence.[16] Development is not simply a neutral place marker, and as an idea, it does not simply mean a general improvement of any kind in people's quality of life. As a story about the world, what development does it to organise space into time – specifically, the developed world is the future of the developing world. And the present of the developing world is the past of the developed world. In this story, we are all united in a universal history in which we are moving toward a specific end state.

Development has a very particular history, which is a legacy of both imperialism and the Cold War, and which is intimately intertwined with the history of contemporary international law. It is, quite precisely, not just a word; it is a specific way of knowing the world that is both discourse and institutional machinery. Historically, the emergence of the concept of development is closely related to decolonisation. The end of the second world war, the success of independence struggles and the fatigue of Empire meant that former colonies were increasingly decolonising. The fact that the jurisdiction of European public international law was universalised and spread over the globe during the imperial period meant that the European

nation-state form was granted a monopoly over legal personality.[17] Accordingly, colonies could decolonise only through self-determination as nation-states, and only within former colonial boundaries, as expressed in the doctrine of *uti possedetis*.

And yet even as nation-statehood channelled the results of decolonisation through creating a monopoly over legal personality, successful struggles for independence still confronted the identity of the international 'community' with ways of living, being and socially organising quite different to European ways.[18] During and after the period of decolonisation, what we might call the changing complexion of the international community potentially exposed international law's universal territorial reach as precisely an outcome of imperial geography. Were it to be regarded as a competition between equals, the meeting between different systems of law, society and economy could potentially also reveal that international law's claim authoritatively to speak the law was founded in a hierarchy secured historically by racial difference.[19] It was the modern discourse of development that provided a way to maintain the putative objectivity and universal reach of international law in the face of these differences. This maintenance was effected by securing those values being put forth as universal in a new hierarchy. This hierarchy was anchored by the freshly minted concept of Gross National Product.

The concept of Gross National Product ('GNP' or 'GDP') was invented in the 1940s and 50s, around the same time as the concept of development.[20] Conceptually, GDP provided an ostensibly empirical or 'objective' ratification of the United States' position as the (first) world's most powerful nation. It also replaced race as the measure of superiority between peoples in ways that the Holocaust had made unpalatable, even to the remaining imperial powers. Even with the realisation of the promise of formal sovereign equality, nation-states could still be ordered in a hierarchy: GDP instead of race became the organising value.

What made this particular ladder so attractive was that it seemed to throw out the idea of racial difference – which was both humiliating and unchangeable – and replace it structurally with a *promise*; that states at the bottom were included within the bosom of the international community and set on a path toward joining the ranks of the chosen few 'developed' states at the top. This 'new' hierarchy was what Jennifer Beard has called a hierarchy of desire[21] – and it was structured around both a promise and a technical challenge. And so development immediately provided a means of ordering the world in which everyone was included on formally equal

terms, but in which a hierarchy – and essentially the old hierarchy – was maintained. The seeds were planted too for inequality to become a technocratic rather than political question. Development therefore became central to what Gilbert Rist has called the 'anti-colonial imperialism' of the Cold War era. [22] It quickly became – and arguably still is – the primary idiom in which demands for greater material equality were issued, both inside and outside the nation-state.

Development and Human Rights

The human rights movement – as a legal and institutional phenomenon at least, if not also a political phenomenon – has also come to accept development as a proxy for both the means to alleviate poverty and address inequality, and its end. The human rights movement can be seen to have contributed to the dominance of the development paradigm in two particular ways. First, over the last two decades, human rights discourse has been used to explain why global poverty should matter to the rich world. This justification has been both in terms of legality and morality.[23] In both idioms, the justification relies explicitly on development as the solution to global poverty. Some scholars and activists have pushed this even further by trying to institutionalise this combination by arguing for a right *to* development, and while that initiative has gained little traction, it is a telling example of the way that the concepts of human rights and development have captured the imaginative domain of institutional and state-based approaches to global poverty in both the North and South.[24]

Second, over the same period, human rights have been used to try to refine the meaning of development to combine social and political 'goods' with the more orthodox notion of economic growth. We can think of this as an explicitly ameliorative relationship between human rights and development. In this ameliorative vein, activists and scholars have also turned to rights to soften or humanise the development *process*. This includes attempts to broaden the definition of development beyond economic growth to include other intangible human goods,[25] to accord procedural rights against the state as it carries out the development project, to sensitise development to its effects on women, to provide the case for compensation for the forced displacements carried out in the name of development, and to provide the normative impetus for 'inclusive' or 'pro-poor' growth.[26]

Cumulatively, these moves have resulted in the relatively mainstream adoption of a 'rights-based approach' to development.[27] Typically, the expansion of development and its convergence with human rights is understood as a good thing. There are many contemporary efforts that are directed at expanding the reach, enforcement and mutual coherence of these regimes. But these concepts as they are currently institutionalised make addressing growing global inequality within the earth's limits a contradiction for two reasons.

First, economic growth remains the not-so-secret beating heart of the development project, and development itself remains both process and horizon. Secondly**,** the structural homologies between human rights law, development and international law (and the way the three concepts interact) combine to locate the causes of poverty and suffering in present and local causes, precluding legal measures that address the international or historical causes.[28] I will deal briefly with each of these problems or features in turn.

Turning to the centrality of growth, it is true that redefinitions of development have been critical of the 'trickle down' approach to poverty alleviation. They have also tried to address the dislocations caused by development as well as the increases in inequality that have accompanied growth. But they still rely on growth as the engine of development and on development as the goal. Even Amartya Sen's idea of development as freedom, for example, ultimately relies on economic growth as the principal driver of increased prosperity.[29] Because of this sympathy, institutionalised human rights have necessarily been interpreted in ways that leave the expansion of the market fundamentally unchallenged, along with the associated ideology that a growth-based approach to development assumes.[30] Upendra Baxi has described this as the growth of 'trade-related market friendly human rights'.

This emphasis on growth is being maintained in the face of an overwhelming body of scientific evidence that suggests that we are already using the equivalent of 1.5 planets.[31] In other words, if everyone on earth lived with the ecological footprint of an average Australian, we would need approximately five planets to sustain the current population of the earth.[32] To put it differently, the earth could keep around 1.8 billion people living at the current consumption levels of an average person in a high-income country (or a rich person in a poor country), as opposed to the almost seven billion we currently have with vastly disparate consumption levels.

The implications of this fact have been recognised in the turn by states and international institutions to the promotion of 'sustainable development'. At its core, sustainable development means 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[33] In theory, this idea of sustainable development understands that three intersecting spheres – of society, environment and economy – must complement each other if development is to be sustainable. The goal then is then to find the 'sweet spot', or point of overlap, between these three distinct spheres.[34]But in practice, without a fundamental redefinition of each distinct sphere, the 'sweet spot' is a very limited space, if not a myth.

Because it is the lynchpin of the developmental paradigm, economic growth has been difficult to dislodge from the heart of the development project. Accordingly, sustainable development is overtly directed towards sustaining growth-based development rather than towards sustaining the social, natural and political environment in which it takes place.[35]

But even the more modest horizon of sustaining growth-based development may not be achievable. The main hopes of that horizon are pinned on three ideas. First, that technology will enable growing consumption through 'green growth';[36] second, that we will 'clean up' after development has taken place; and third, that growth should be 'inclusive' or 'pro-poor'.[37] Even on their own terms, a close study of each of those hopes shows us that sustainable development is at best capable of producing less *un*sustainable development.[38]

Whilst this in itself is not a bad thing, sustainable development as a discourse is also profoundly depoliticising. It provides a way to deal rhetorically with the contradiction between the development *prescription* of increased consumption-based growth and the impossibility of making good the development *promise* when we are already using more of the earth's resources than can be sustained.[39] Even a cursory study of institutional and political practice shows us that the discourse of sustainable development has diverted institutional energies from the urgent need to recognise the implications for a growth-based model: the fact that we are bypassing the earth's biophysical capacity. This is manifesting not just as climate change, but also as water scarcity, extreme biodiversity loss, accumulated chemical poisons in the atmosphere and the decline of the carrying capacity of the oceans.[40] The idea of a 'cleanup' or of the replacement of those losses by

technological means – or even the idea that we actually fully understand what is being lost – is a fantasy even according to the best available science.

The second reason why development and rights prevent us from simultaneously thinking about inequality and limits is that international human rights law and institutional discourses of development focus on economic growth as the solution to the problem of poverty and locate the causes of poverty and suffering in the present and the local.[41] Attempts to vary this diagnosis from within the developmental frame – by arguing that the structures of the global political economy contribute to immiseration,[42] or that trade policy and international conditionalities prevent development,[43] for example – just don't 'stick' in institutional terms. The story about the causes of poverty embedded within development discourse is homologous with the structure of international law. The effect is to preclude international legal measures that address the global or historical causes of poverty and inequality. The causal story combines with the way in which the development story relies on an idea of knowledge generated in the North and applied in the South. The effect of this combination and its institutionalisation in international law is to vest responsibility downwards into the nation-state, and to vest authority upwards into the international community.

So, when international practices such as unfair trading regimes, damaging conditionalities, or strategic military interventions contribute to the emmiseration of people in the global South, international law has no teeth to bite the international; it can only bite the local with a bite that is harder and wider in its application.[44] Accordingly, when the World Bank calls for attention to be paid to human rights, it does not subject its own practices to human rights scrutiny, but expands the conditions on borrower states to include human rights. As I have argued elsewhere, that same structure allows the Global North to engage in self-interested economic behaviour and to present that behaviour as altruistic. International Monetary Fund conditionalities around free trade are a prime example of this.[45]

Where to From Here?

Why not then simply abandon international law as a site of struggle? Perhaps we should accept the analysis of China Miéville, that 'a world structured around international law is a world of imperial violence'.[46] Why stick with international law at all? To answer that question, we need to

think about the different reasons why people stay *with* international law, if not necessarily *within* it. There are five postures into which people's attitudes generally fall. The first posture hinges on the belief that international law is a social artefact or practice which is on the side of the good. The second is a variant of this that says international law is an empty vessel into which content of any kind can be poured, including progressive content. These two stances may not be blind to critiques of international law, but they see bad outcomes wrought by law as distortions of power in an otherwise neutral system of rules. These two stances cover most of the mainstream approaches to international law and justice. More critical engagements with international law, that nevertheless still stick with it, fall into the third and fourth categories. The third category includes those who are alive to international law's history and critical of its operation, but yet maintain a faith in its promise. Third World Approaches to International Law or 'TWAIL', is a good example of this. Then there is the fourth category of those who we might call 'principled opportunists' who use international law tactically in particular political battles or for particular struggles.[47] This attitude entails a rejection of the 'distortion thesis' implicit in mainstream international law: if every inequality, or every abuse and infraction is understood as a demonstration of the fact that the order has not yet reached its full potential, it is hard to see the basis on which one could reasonably hope that this same order will eventually be equal to its own aspirations. Successfully adopting a stance of principled opportunism would require a historical and critical engagement with international law that considers how international law is implicated in the production and maintenance of exploitation and disadvantage. This is important so that, as Knox puts it, tactics are not mistaken for strategy, or that the price of the battle is not the war.

The fifth reason that one might not abandon international law as a site of struggle is because of a recognition that not everyone has the luxury of disengagement with international law. For some – possibly even most – of the world, if they don't do international law, international law will 'do' them. Understanding what I mean by this means paying attention to claims being made for the authority to speak the law, and to understand how and why the authority to decide what *is* law is produced and exercised. In international legal terms, generating this kind of story means extending what we might traditionally think of as the places or sites where international law operates, to what some scholars are calling the 'new jurisdictions' of international law.[48] Jurisdiction, from *juris-dictio* ('to speak the law'), is a tradition of thinking that pays attention to

authority, specifically to the claim to speak the law. Within these sites or 'new jurisdictions' of international law there is contestation between two possible understandings of the good: the bringing-into-being or 'materialisation' of international law and its projects (such as development) competes with alternative world views or conceptions of well-being. This is a meeting between laws, but the contestation is generally not seen as such. Thinking about jurisdiction encourages us to look at that situation as a meeting between laws, rather than reading the situation as something else. The story with which we began is a good example of this meeting, and of the implications of how we read it for an ethical engagement.

A Meeting between Laws

When we gaze from the city, what we see when mining companies and indigenous peoples meet is 'development'. The view from the city persuades us that the modernist project of making the world is already complete. The exploitation of the 'natural resources' of the earth is a matter of when and how, not whether. Many see the dislocations that process entails and use human rights approaches to ameliorate people's suffering. But it is less commonly recognised that the encounter is also the meeting of two conflicting systems of law.[49] As Arundhati Roy points out in *Broken Republic*, to the Donghri people, the Hills of Orissa are full of law (and full of gods).[50] To the mining companies, and to the Indian state, on the other hand, the hills are full of bauxite. Looking at the hills and seeing the bauxite, as well as the possibility of its extraction, means taking another kind of law for granted, leaving only the bauxite visible to the naked eye. The relocation of the people who live becomes a question of procedure. Although these two systems of laws exist at the same time and in the same place, the continuing existence of one kind of law *as law* is repressed. The ostensibly ineluctable passage of history is what allows us to repress one law *as* law. Globally, a meeting between laws and the repression of one of them is a daily occurrence. The ongoing repression of other systems of law by the law of the nation-state is one dimension of the modern legacy of imperialism; it is part of the legacy we tend to call 'development'.[51]

The indigenous people's resistance to mining in India is one example of this. Similar battles are being waged everywhere in many contexts. In the developmental mindset, these forms of existence are read through the lens of universal history as remnants. Accordingly, these practices of resistance are read as traditional, backwards, ignorant or insane. From the far left (but still

developmental) perspective, they are read as false consciousness. From all points in the political spectrum, temporality works as a technology of governance.

In the best version of this story, human rights humanises this process with procedural rights and compensation for the loss. But the process itself is nevertheless understood as the inevitable course of history. In contrast to this, jurisdictional thinking understands this as a conflict of laws, and as an exercise of the authority to both speak the law and determine what law is. Thinking about the contestation as a conflict of presently existing, legitimate and justified laws makes a different ethical demand and asks us to take responsibility for that exercise of authority and our relationship to it. Such thinking does not offer us the absolution that the discourse of progress, or the tide of history, offers when we accept the developmentalist frame. The point is not that the pursuit of compensation for those who are displaced is a bad thing, but that it approximates justice – however imperfectly – only from a particular worldview. A worldview implies a way of understanding the world and knowing it, as well as engaging with it and determining that to which we aspire. Those aspirations are then carried out by people who have the capacity to make that world view authoritative.[52] This recognition demands taking ethical responsibility for that decision, and for that exercise of authority. The question of economic growth as the best way to ensure human happiness, and the relentlessness extraction of resources that goes with it, are then understood as political choices, not the inevitable events in an historical flow. Once we understand that worldview in terms of politics and conduct, we can see more clearly the violence that an assertion of one form of authority against another engenders, rather than seeing transcendent values unfolding as progress and history.

Conclusion

In the Australian context, most talks of the kind upon which this essay is based – including my own – begin with an acknowledgement of the 'traditional owners' of the land on which we meet. This acknowledgement is a gesture of good faith which tries to avow – and perhaps even to take responsibility for – the dispossession which has backgrounded every meeting which has taken place since then. Implicit in this acknowledgement of 'traditional ownership' though, is another kind of meeting, one which is repressed. This more secret meeting is one between indigenous and non-indigenous *laws*.[53] These two systems of law exist at the same time and in the same place, but the continuing existence of indigenous laws *as* law is repressed. The qualification of

the dispossessed as 'traditional', or 'customary' owners is the marker of this repression, a gesture which is ratified by history. The simultaneity of the avowal of the dispossession, and its disavowal by history, is exemplary of the form that ethical engagement often takes in a post-colonial context. In this, an orientation toward the ethical is genuinely sought, but the relationship of the speaker to the authority to speak the law – and to determine *which* law is law – is not understood to be problematic because the 'tide of history' absolves us of responsibility for that relation. That difficult 'ethics of the postcolony', as we might call it, is the ethics that animates 'poverty alleviation' as a project of international law. The alliance of developmentalism, human rights and international law ultimately pits equality and environment against each other. That trinity also produces a frame of reference that casts some forms of existence, resistance and law as quaint remnants of the past. This casting enables the coercive transformation of most people in the world in the interests of a few. It does so whilst offering the comfort of history as a justification for the violence that transformation engenders. Taking seriously the tradition of international law as a language of concern and responsibility means understanding it too as a language and practice of authorisation.

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