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Conference Report: The Battle for International Law in the Decolonization Era

By *Anna Krueger*[*]

Abstract: *This report examines the workshop "The Battle for International Law in the Decolonization Era", which took place on 5-7 November 2015 in Berlin, under the joint direction of Jochen von Bernstorff from Eberhard Karls University Tübingen and Philipp Dann from Humboldt University Berlin, and was sponsored by the Forum Transregionale Studien. Participants from all over the world, including Sundhya Pahuja, Muthucumarswamy Sornarajah, Matthew Craven and Martti Koskenniemi, debated about how politicians and scholars from the First, Second and Third World struggled for international law as a battlefield for concurring claims of postcolonial justice, solidarity and power politics between 1955 and 1975. My research focuses on one section of this battlefield, namely the debate about whether the established international law after World War II was binding for the newly independent states.*

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A. Introduction

Many of today's most urgent problems – poverty, war, terrorism and refugee flows – may be traced to a debate about international justice which was conducted in the Cold War period when many of the former European colonies in Africa and Asia gained their independence and, for the first time in history, raised their voices collectively with the former Latin American colonies as the "Third World". After decades of subjugation, these "newly independent states" were not willing to accept all the rules of the established international legal system since, from their perspective, many of these norms not only had been developed and established in the era of colonialism and without their participation, but structurally worked against their interests. Therefore, international lawyers in the Third World tried to change international law in accordance with the vital needs and crucial demands of the populations of their homelands, including, in contemporary language, "national development", "international solidarity" and "wealth for all". The most famous venture in this regard was the attempt to create a "New International Economic Order" (NIEO). The reactions of East and

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West to these demands led to what one might call "The Battle for International Law in the Decolonization Era", which is the title of a workshop which took place on 5-7 November 2015 in Berlin under the joint direction of Jochen von Bernstorff from Eberhard Karls University Tübingen and Philipp Dann from Humboldt University Berlin.[1] The workshop was sponsored by the *Forum Transregionale Studien*. The aim of the workshop was to do the groundwork for a publication on the topic, which will focus on debates of international law between 1955 and 1975, without losing sight of the significant historical dimensions of the matter. The purpose of the project is, as von Bernstorff explained, to give decolonization the place in history of international law it deserves, to question and rewrite standard stories about this era and – as a genealogical exercise – to explore and better understand how and why international law became what it is today.

B. Were the former colonies bound by traditional international law?

My research interest falls right within this battle for international law in the decolonization era.[2] I explore the debate about whether established international law after World War II was binding for former colonies, the newly independent states. Third World international lawyers were confronted with the Western view that if the newly independent states wanted to play the game of international law, they had to accept its rules. International lawyers like Ram Prakash Anand from India, Taslim Olawale Elias from Nigeria and Mohammed Bedjaoui from Algeria found this ultimately unfair and a violation of Third World sovereignty – a claim that found support from the USSR which was itself sceptical about what seemed to be a law of European lineage.[3] According to them, the new states should have the power to "pick and choose" which rules of the established international systems corresponded to their needs and only those rules were accordingly accepted by them, while other rules were not. But the Third World did by no means turn its back on international law, which it found a useful instrument to protect its newly won independence and to address its demands to the industrial states from which they wanted to gain economic support. Instead, international lawyers from the Third World believed in what I call their "global-solidary project": They

1 Participants: Jochen von Bernstorff (Tübingen), Philipp Dann (Berlin), Prabhakar Singh (Singapore), Isabel Feichtner (Frankfurt), Rotem Giladi (Jerusalem/Helsinki), Alexandra Kemmerer (Heidelberg), Bill Bowring (London), Matthew Craven (London), Luis Eslava (Kent), Surabhi Ranganathan (Cambridge), Ingo Venzke (Amsterdam), Muthucumarswamy Sornarajah (Singapore), Carl Landauer (San Francisco), Sundhya Pahuja (London), Guy Sinclair (London), Umut Özsu (Winnipeg) and Martti Koskenniemi (Helsinki).

2 My PhD thesis has the title: „Die Bindung der Dritten Welt an das postkoloniale Völkerrecht: Die Völkerrechtskommission, das Recht der Verträge und das Recht der Staatennachfolge in der Dekolonialisierung", supervised by Jochen von Bernstorff, submitted as dissertation at the Eberhard Karls Universität Tübingen on 24 February 2016.

3 During the workshop Bill Bowring (London) talked about the massive contradictions in Soviet theory in the Cold War, but also on how Wodrow Wilson never wanted self-determination to apply to colonies while this was exactly what Vladimir Lenin wanted.

put their hope in the UN system and in what might be named the "emancipatory power" of international law[4] which should lead to a world order oriented towards justice, solidarity, development and wealth for all as common goals of the international community. First generation scholars in the Third World wanted to change the rules from within the established system, which has been the object of criticism in the aftermath from prominent scholars from the Third World today.[5] Indeed, the vocabulary Third World scholars from the first generation used often turned out to work against them. Take, as an example, one of the main goals of the global-solidary project: the development of the Third World. The term development had a purely positive impetus to the postcolonial Third World lawyers,[6] but, as a highly underdetermined term, it was also likely to be interpreted in a (neo-)colonial fashion. This was made the subject of discussion at the workshop by Philipp Dann in the context of the World Bank where development functioned as continuation of the civilizing mission, and by Luis Eslava who talked about the drama of how development was understood in the context of the Latin American developmental state.

I trace the endeavours of the first generation of Third World scholars in the International Law Commission (ILC) and the resulting conventions in which the question of the binding quality of international law became pertinent, namely the Vienna Convention on the Law of Treaties (VCLT) from 1969, the Vienna Convention on Succession of States in respect of Treaties (VCSST) from 1978 and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (VCSSPAD) from 1983. During the ILC´s work on these treaties, international lawyers from the Third World appeared as advocates for their home countries´ interests and fought against so-called "unequal treaties" concerning boundaries, other territorial regimes, concessions or acquired rights; by arguing with general principles of international law such as sovereign equality of states, self-determination of peoples and permanent sovereignty over natural resources (PSNR). During the work on the VCLT, the arenas for battles concerning the question of the binding quality of international law were the norms concerning coercion of a state by the threat or use of force (Article 52 VCLT), jus cogens (Articles 53 and 64 VCLT) and the principle rebus sic stantibus (Article 62 VCLT), whereas the topic of state succession became a battleground in its entirety (while my work is primarily focussed on Articles 11, 12 and 13 VCSST concerning boundary regimes and other territorial regimes as well as the question of why no rule about acquired rights was included in the VCSSPAD).

4 In contrast, today´s international lawyers in the Third World have at best a "critical faith in international law", as Sundhya Pahuja explained at the workshop.

5 *Luis Eslava/Sundhya Pahuja*, Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law, Verfassung und Recht in Übersee 45 (2012), p. 195, 208.

6 See *Mohammed Bedjaoui*, Towards a New International Economic Order, New York/London 1979, p. 66 et seq.; *Jochen von Bernstorff*, Das Recht auf Entwicklung, in: *Philipp Dann/Stefan Kadelbach/Markus Kaltenborn* (ed.), Entwicklung und Recht: Eine systematische Einführung, Baden-Baden 2014, p. 71, 74.

The Third World finally lost the battle for international law not only on the question of the binding quality of international law. One pertinent question is why: From an *ad hoc* perspective, its principal hope in international law may seem naïve and one may attest first generation scholars from the Third World a lack of critical reflection.[7] From a deconstructive point of view, however, the battle for international law in the decolonization era did not seem that predetermined: Concerning the meaning of development, concurring visions existed, but only the Western vision was able to realize itself. If we look at one example I have researched on, the norm concerning coercion of a state (Article 52 VCLT), scholars from North and South used the same argumentative method: drawing argumentative boundaries.[8] In this particular instance, scholars from the Third World wanted to establish absolute protection of the free will of states in the law of treaties, including a shield against all kinds of economic and political pressure,[9] while Western scholars solely tended towards a norm in the law of treaties corresponding to the prohibition of the use of physical force in international relations.[10] So the West drew the first boundary and pushed the debate away from the law of treaties right into the general principles of international law.[11] International lawyers from the Third World tried to push it back into the law of treaties.[12] In the end, the West won by pushing the Third World view into soft law.[13] So the structure of (postcolonial) international discourse seems quite flexible: Working with underdetermined terms and a number of argumentative methods, a concurring result (in accordance with either the view

7 Sundhya Pahuja said at the workshop that first generation scholars from the Third World wanted to "use international law to make them heard, but did not imagine how bad it would turn out".

8 This method of argument was mentioned by several participants of the workshop, including Martti Koskenniemi, Sundhya Pahuja (in the context of what she calls "actualization of authority") and Matthew Craven.

9 ILC, UN Doc A/CN.4/SR.705, ILC-Yearbook (1963, I), p. 209, 212, para. 33, 42, 45.

10 *Humphrey Waldock*, Second Report on the Law of Treaties, UN Doc A/CN.4/156 and Add.1-3, Yearbook of the International Law Commission (1963, II), p. 36, 52, para. 5.

11 *Humphrey Waldock*, UN Doc A/CN.4/183 and Add.1-4, ILC-Yearbook (1966, II), p. 1, 19, para. 3 et seq. The competence to define the prohibition of use of force was transferred to the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States. The open formulation of the norm in the law of treaties concerning coercion should only refer to Article 2 No. 4 UN-Charter.

12 See the so-called "Nineteen-State-Amendment" at the First Session of the United Nations Conference on the Law of Treaties, UN Conference on the Law of Treaties, UN Doc A/CONF.39/SR.48, Meeting Records (1968), p. 268, 269, para. 21 et seq.

13 UN Conference on the Law of Treaties, UN Doc A/CONF.39/SR.57, Meeting Records (1968), p. 328, 328 f., para. 1; *Kirsten Schmalenbach*, Article 52, in: *Oliver Dörr/Kirsten Schmalenbach* (ed.), Vienna Convention on the Law of Treaties: A Commentary, Berlin/Heidelberg 2012, p. 885, para. 30; *Lucius Caflisch*, Unequal Treaties, German Yearbook of International Law 35 (1992), p. 52, 75; *Cornelius Murphy*, Economic Duress and Unequal Treaties, Virginia Journal of International Law 11 (1970), p. 61, 61.

of the North or the South) seems justifiable.[14] In this way, every legal decision becomes a political statement, or, as Martti Koskenniemi puts it, "(t)he question is never whether or not to go by law but by which law and whose law."[15]

The workshop "The Battle for International Law in the Decolonization Era" gave plenty of interesting insights enlightening postcolonial debates like the one about whether traditional international law was binding to the former colonies. In the following, I therefore choose to sketch the workshop´s discussion on some important Third World protagonists as well as on aspects of international investment protection law and link it with my research question.

C. Ram Prakash Anand

At the workshop Prabhakar Singh pictured Ram Prakash Anand as a significant international lawyer in India, who was – like most Third World scholars of that time – highly influenced by Western scholars, in Anand´s case especially those from Yale.[16] In Singh´s description, Anand was more of a teacher for India than a scholar searching for international reputation and he never worked as a practitioner. However, during my research, I came across Anand´s work on the history of international law which was of crucial importance for other scholars as well as practitioners all over the Third World. Building on the Austrian-Hungarian scholar Charles Henry Alexandrowicz, who worked in Madras in the 1950s and 1960s, Anand researched on the role which international law played in the precolonial as well as the colonial history of the world.[17] Anand came to the conclusion that "not only do many of the new states of Asia and Africa have a rich heritage of law and legal procedures, and they have been quite familiar with inter-state law which was being applied in their international relations, but international rules were actually in force and being applied in their relations with the European Powers during the sixteenth, seventeenth and eighteenth centuries, or what is termed the classical period of international law."[18] But in the 19th century, according to Anand, Europe used international law to deprive non-Christian entities in Africa and Asia from their former legal personality and subjugate them as "un-

14 Cf. *Martti Koskenniemi*, From Apology to Utopia: The Structure of International Legal Argument, Cambridge 2005, p. 70, 503 et seq.; *Martti Koskenniemi*, The Fate of Public International Law: Between Technique and Politics, Modern Law Review 70 (2007), p. 1, 4, 6, 8.

15 *Koskenniemi,* 2005, note 14, p. xiv.

16 Cf. *Upendra Baxi*, In Memoriam: Ram Prakash Anand (1933-2011), Trade, Law and Development 3 (2011), p. 2, 3.

17 See for example *Charles Henry Alexandrowicz*, An Introduction to the History of the Law of Nations in the East Indies, Oxford 1967. Cf. *Bhupinder S. Chimni*, The World of TWAIL: Introduction to the Special Issue, Trade, Law and Development 3 (2011), p. 14, 15 f.

18 *Ram Prakash Anand*, New States and International Law, Delhi/Bombay/Bangalore/Kanpur/London 1972, p. 13.

civilized" and "barbaric".[19] During colonization, "civilization (…) provided the legal title to the position of dominating Power".[20] Anand outlined that during the colonization period European states forced entities in Africa and Asia *inter alia* to sign unequal treaties accepted as valid by international law.[21] International law at that time had become a "ruler´s law" for their relations with the extra-European "barbarous" world.[22] Anand´s description of the function of international law in history as well as of the historical genesis of some international law rules in the colonial context became central to the critique of traditional international law developed by Third World scholars. As Anand himself concluded:

> *„The present body of international law is, therefore, naturally affected by the power interests of the last and the early part of the present century and is to a great extent a legacy of the age of colonialism and imperialism. This law was meant to serve the interests of a limited number of powerful states and was supposed to be applicable between themselves in their relations with each other. The vast majority of peoples had neither any voice nor any right and were meant to be exploited and, if necessary, colonized to serve the interests of their masters."*[23]

Nevertheless, as Singh pronounced at the workshop, Anand had a strong belief in international law. In particular, decolonization was considered by Anand and other scholars from the Third World at that point in time as a world-shattering moment that would lead to tremendous changes in international law and society.[24] They put their hope especially in the United Nations as a platform to address change.[25] After decades in which they had no influence on the development of international law, newly independent states wished to take an active role in institutions like the ILC.[26]

19 *Ram Prakash Anand*, Attitude of the Asian-African States Toward Certain Problems of International Law, 15 International & Comparative Law Quarterly (1966), S. 55, 58.

20 *Anand*, note 18, p. 21 f.

21 *Anand*, note 18, p. 23.

22 *Anand*, note 18, p. 25.

23 *Anand*, note 18, p. 114.

24 *Georges M. Abi-Saab*, The Newly Independent States and the Rules of International Law: An Outline, Howard Law Journal 8 (1962), p. 95, 119; *Anand*, note 18, p. 46.

25 *Anand*, note 18, p. 25; *Abi-Saab*, note 24, p. 95, 98. Guy Sinclair explained at the workshop that "as much as the United Nations provided an institutional context for decolonization, decolonization effected a profound transformation in the legal structures and powers of the UN.".

26 Cf. *Prakash S. Sinha*, Perspective of the Newly Independent States on the Binding Quality of International Law, International and Comparative Law Quarterly 14 (1965), p. 121, 124.

D. Taslim Olawale Elias

Carl Landauer examined two books of Taslim Olawale Elias[27] at the workshop and accordingly described how Elias "fits in a legal tradition that sees law as social ordering with a legal regime that evolves with society." Indeed, many international lawyers after World War II, including Anand as well as Elias, devoted themselves to what has been called a "sociological jurisprudence"[28] which considered law to be "a process of authoritative decision-making in a society", while "the contents of every legal system are determined by social and power process of the community in which it functions. In other words, sociological factors of a society determine the content of law."[29] From this point of view, the established international order reflected the social order of colonialism and had to be changed in accordance with the sociological changes accompanying decolonization. As a practitioner, Elias tried to change international law to better serve Third World demands, *inter alia* as a member of the ILC. Thereby Landauer pronounced Elias´ pragmatism as an "insider´s insider" who took a prominent role in many international conferences. For example, the Second Session of the United Nations Conference on the Law of Treaties almost failed because of disagreement concerning a dispute resolution mechanism for the later VCLT, it was the "package deal" proposed by 13 African and Asian States led by Elias which finally secured the success of the conference.[30] Yet Landauer also pointed out Elias´ blind spots: He addressed Elias´ move "of establishing the importance of international relations and law in Africa´s precolonial past." Certainly, Elias saw unequal treaties – which he condemned as colonial practice – none the less more as a proof for the former colonies´ precolonial sovereignty than as something to fight against in the field of the law of treaties.[31] It was a fight others had to engage in because to Elias, rehabilitation of the African identity after colonialism sometimes seemed more urgent than changing international law for a better future.[32] This certainly makes Elias a moderate Third World scholar of his time and distinguishes him from more radical advocates of the new states. This is why, as Landauer explained, "James Gathii identified Elias as fitting within the "weak" tradition of Third World international scholarship, trying to get Africa on an equal footing with international law rather than mov-

27 *Taslim Olawale Elias*, British Colonial Law: A Comparative Study of the Interaction between British and Local Laws in British Dependencies, California 1962, and *Taslim Olawale Elias*, Africa and the Development of International Law, Leiden/New York 1972.

28 See *Roscoe Pound*, Jurisprudence, edition I, New Jersey 1959, reprint 2008, p. 291 et seq.; cf. *Koskenniemi,* 2005, note 14, p. 612.

29 *Anand*, note 18, p. 25.

30 UN Conference on the Law of Treaties, UN Doc A/CONF.39/SR.34, Meeting Records (1969), p. 185, 188, para. 27; *Taslim Olawale Elias*, The Modern Law of Treaties, Leiden/New York 1974, p. 7, 192 f.; *Shabtai Rosenne,* The Law of Treaties: A Guide to the Legislative History of the Vienna Convention, Leyden 1970, p. 85. See article 66 VCLT and Annex.

31 Elias 1972, note 27, p. 19.

32 Cf. *James Thuo Gathii*, A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias, Leiden Journal of International Law 21 (2008), p. 317, 318 f.

ing to a critique of international law itself." Accordingly, as Landauer explains, Elias "talks of his "critique" of international institutions but does not sound like Bedjaoui in "Towards a New International Economic Order".

E. Mohammed Bedjaoui

Mohammed Bedjaoui, however, certainly fitted into the "strong" tradition of Third World international scholarship in Gathii´s sense. Like Umut Özsu declared at the workshop, "as one of the most significant international lawyers to emerge from the Third World, Mohammed Bedjaoui is a towering figure, as prolific as a scholar and active as a diplomat as he has been influential as a judge." Bedjaoui´s critique of international law was influenced by socialist theory and he therefore showed himself much more critical concerning the role and the political and economic structure of international law than Anand or Elias did.

„Imperialism, colonialism and neo-colonialism", "dependence, exploitation, the looting of the resources of the Third World, and the introduction of zones of influence", "the cruel, inhuman law of maximum profit" and "the Faustian power of multinational firms" were the categories in which Bedjaoui thought of international law and they constituted the vocabulary with which Bedjaoui attacked the established international order.[33] At least as much as with Anand and Elias, the genesis of international law was crucial to Bedjaoui:

> *„Here we come to the real nature of the so-called `international´ law, to its substance and even to the reality of its existence. As it has been formed historically on the basis of regional acts of force, it could not be an international law established by common accord, but an international law given to the whole world by one or two dominant groups. This is how it was able to serve as a legal basis for the various political and economic aspects of imperialism.*
> *The classic international law thus consisted of a set of rules with a geographical basis (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law)."*[34]

Bedjaoui´s critique reached the political and economic deep structure of the international legal order and in consequence, Bedjaoui became a fighter against its narrow-minded structures. Umut Özsu considered at the workshop that "Bedjaoui´s development from legal militant and colonial subject to legal counsel and post-colonial policymaker reflected a series of broader developments in regard to the commitment to political and economic self-determination that underwrote the push for decolonization." Bedjaoui made it from a supporter of the *Front de Libération Nationale* at the end of the Algerian war to a successful (interna-

33 *Bedjaoui*, note 6, p. 20.

34 *Bedjaoui*, note 6, p. 50.

tional) lawyer and politician.[35] Although enormously critical of legal orders, Bedjaoui adhered to the legal form. To Bedjaoui, law was "neither pre-established nor untouchable."[36] He was aware of the dialectic relationship between law and society, but, perhaps even more than Anand and Elias, he believed that after decolonization, the time for change had come and that international law played a crucial rule in this change.[37] Bedjaoui wrote:

> *„At such a time, one is conscious of the amazing yet fruitful contradiction contained in law, the contradiction between its true nature and its real function. On the one hand, it reflects a social reality which is changing and which it is obliged to try to keep up with, though there is bound to be some discrepancy and lag. In this, it appears as something evolutionary, on the other hand, by being the expression of social relations, it fixes or stabilizes the social milieu of which it is the product. It thus reinforces and protects established practices, rejecting any change which might threaten them, and in this aspect its function is conservative. Movement and inertia, change and conservatism are the two factors permanently activating what it is and what it is becoming."*[38]

Bedjaoui was willing to fight for change and when he was appointed by the ILC as Special Rapporteur for the Succession of States in Respect of Matters other than Treaties, his first act was to attack the traditional norms of international investment protection law.

F. International investment protection law

Isabel Feichtner explained at the workshop how for a long time, "colonies and dependent territories have been the suppliers of raw materials". One means for this were unequal treaties establishing concessions. After decolonization, many newly independent states rebelled against such concessions. As described by Muthucumarswamy Sornarajah, the Third World argued that economic self-determination applied to their resources and since it belonged to peoples and not to states, the recapture of PSNR had to be possible in the public interest. Even the West accepted the newly independent states´ right to expropriate rights acquired by concessions, but claimed a demand for compensation under international law in return, which many Third World countries could not afford. The old battle line, Sornarajah elaborated, which was drawn between the US and its Hull-Doctrine on the one side and

35 *Umut Özsu*, „In the interests of mankind as a whole": Mohammed Bedjaoui´s New International Economic Order, Humanity: An International Journal of Human Rights, Humanitarianism, and Development 6 (2015), p. 129, 130 et seq.; *Emile Yakpo/Tahar Boumedra* (ed.), Liber Amicorum Judge Mohammed Bedjaoui, The Haag/London/Boston 1999), p. 2 et seq.; Who´s Who in the United Nations and Related Agencies, New York 1975, p. 48.

36 *Bedjaoui*, note 6, p. 101.

37 Cf. Bedjaoui, note 6, p. 244.

38 *Bedjaoui*, note 6, p. 112.

Latin America and the Calvo-Doctrine on the other, became "universalized" through decolonization.

At the workshop, Matthew Craven, who has published an enlightening study on the VCSST,[39] showed himself interested in the debates on acquired rights as part of international investment protection law. Craven was especially wondering why concessions did not actually appear in the VCSSPAD. Actually, the question of acquired rights was another example for how boundaries were drawn in international law discourse: They were originally considered to belong to the right of state responsibility. As competent Special Rapporteur, Francisco V. García-Amador propagated an international minimum standard of compensation for expropriation of acquired rights regardless of the nationality of the affected individual.[40] Since such investment protection standards were highly disputed, García-Amador´s predecessor as Special Rapporteur, Roberto Ago turned to a different approach to state responsibility, focusing on a secondary law matrix.[41] In this way, acquired rights fell outside the topic and Bedjaoui tried to pull them into state succession, but did not succeed. Craven´s preliminary presumptions for this were that either "the critical moment was over" or "Bedjaoui´s real target was not the content of the acquired rights doctrine but to put the topic on the national level". According to my research, for Bedjaoui at least, the critical moment was anything but over, and also Craven´s second guess is only half the truth. Already in his first Report as Special Rapporteur, acquired rights were of central importance because, in Bedjaoui´s view, the question whether new states were bound by concessions given by their predecessor state was of decisive importance to the economic development of the Third World.[42] Bedjaoui´s goal was to establish a norm of international law according to which states had the right to expropriate acquired rights without paying compensation, at least in the context of decolonization.[43] He attached great value on the specific economic circumstances in which a concession was granted as well as on the expropriating state´s need to establish its own commercial policy while downgrading the question of the individual´s human rights.[44] However, the ILC was divided by disagreement on the question of compensation and Bedjaoui in the first place agreed to preliminary focus on „Succession of States in Economic and Financial Matters" instead.[45] But then Bedjaoui

39 *Matthew Craven,* The Decolonization of International Law: State Succession and the Law of Treaties, Oxford 2007.

40 Cf. *Francisco V. García-Amador*, The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation, Lawyer of The Americas 12 (1980), p. 1, 1 et seq.

41 *Roberto A*go, UN Doc A/CN.4/217, Corr.1 and Add.1ILC-Yearbook (1969, II), p. 125-156, 127, para. 5 f.

42 *Mohammed Bedjaoui*, UN Doc A/CN.4/204 and Corr.1, ILC-Yearbook (1968, II), p. 94, 116, para. 144 et seq.

43 *Bedjaoui*, note 42, p. 94, 115 f., para. 144.

44 *Bedjaoui*, note 42, p. 94, 116, para. 144.

45 ILC, UN Doc A/CN.4/SR.965, ILC-Yearbook (1968, I), p. 127, 130, para. 36, 38.

named his Second Report „*Economic and Financial Acquired Rights and State Succession*“ because he considered the question of acquired rights to be at the heart of all state succession problems and therefore wanted to consider it first.[46] At length he argued passionately against a duty to compensate in cases of expropriation after decolonization because of sociological, historical, economical, juristic-logical reasons. While ILC members from the Second and Third World applauded his report[47], Western members were massively affronted and criticized Bedjaoui vehemently and even personally.[48] This was the moment when Bedjaoui realized that he would not be able to establish an international right to expropriation without compensation. His following reports were much tamer. But the fight was not over, and Bedjaoui changed his strategy and tried through the back door to establish that all questions concerning concessions and acquired rights fell within the national jurisdiction of the expropriating state.[49] However, as the VCSSPAD should never come into force, Bedjaoui´s efforts blew out. In accordance with the Western conception, the question of acquired right became specified by the law of aliens and by human rights law.[50] Bedjaoui had used the same argumentative method – drawing boundaries – that Western scholars successfully used in other disputes concerning the question whether the traditional international law was binding for the former colonies. However, his endeavours and the Third World position *per se* was again marginalized by the industrialized nations´ refusal to sign the VCSSPAD.

G. Conclusion

Sornarajah explained that the NIEO was not dead, because there had been a reaction to it: Third World policy in the sector of investment protection became more moderate, new types of contracts which do not contradict PSNR were concluded, state companies guaranteed that ownership resides with the state; the same is guaranteed in the national constitutions. From the viewpoint of first generation scholars in the Third World and their global-solidary project, this still seems like a major failure because world order seems to remain unjust. This is why Sornarajah imagines that “it could well be that the ideas behind the NIEO would resurface” and that “the time may be ripe to rekindle the smouldering embers of the NIEO.”

46 *Mohammed Bedjaoui*, UN Doc A/CN.4/216/REV.1, ILC-Yearbook (1969, II), p. 69, 69, 71, para. 3.

47 ILC, UN Doc A/CN.4/SR.1000, ILC-Yearbook (1969, I), p. 53, 56, para. 25.

48 ILC, UN Doc A/CN.4/SR.1001, ILC-Yearbook (1969, I), p. 57, 59, para. 17 et seq.

49 *Mohammed Bedjaoui*, UN Doc A/CN.4/267, Yearbook of the International Law Commission (1973, II) p. 3, 10, 24; *Mohammed Bedjaoui*, UN Doc A/CN.4/282, Yearbook of the International Law Commission (1974, II, 1) p. 91, 98.

50 Cf. Fritz Visser, The Principle of Permanent Sovereignty over Natural Resources and the Nationalisation of Foreign Interests, Comparative and International Law Journal of South Africa 21 (1988), p. 76, 86 et seq.

Sundhya Pahuja, however, criticized the "sit-on-the-table-view" of first generation international lawyers in the Third World as naïve from today´s perspective, since "if you buy sovereignty, you buy the whole package. If you put something in a box, then the guy who made the boxes can shift them." From this view, international law does not seem to contain any emancipatory potential for the former colonies.

Indeed, even though Third World scholars in the decolonization period used similar argumentative methods as their Western counterparts and the very same mechanisms have been used by global North and South in a sometimes paradox manner, in the end it seemed to be the North who succeeded and the South who became marginalized. Yet, as von Bernstorff said at the workshop, "the UN were young and Third World scholars really believed they could change international law." Also, from a deconstructive perspective the discourse structure of international law would in theory have allowed any side to prevail, whether First, Second or Third World. In fact, once again in history, might had become right. While the structure of international law would have allowed for another outcome, political and economic power did not. But even the opinion of rulers may change: From this point of view, international law may still work as a platform to articulate Third World demands in the hope to convince Western leaders in the hope for a better world – just as Anand, Elias and Bedjaoui, each in their own way, tried to do.