FROM NIEO TO NOW AND THE UNFINISHABLE STORY OF ECONOMIC JUSTICE

MARGOT E SALOMON*

Abstract Why have attempts to bring development aspirations to bear on international law over a period of 50 years come to far less than any reasonable person would hope? The early claims for a New International Economic Order and permanent sovereignty by developing countries over their natural resources, efforts to delineate a body of international development law, followed by the affirmation of a human right to development, were all attempts to have economic justice reflected in international law. Figures on world poverty and inequality suggest that international law accommodated no such restructuring. This article explores why it is international law has failed the poor of the world, and what interests it has served in their stead.

Key words: economic justice, international law and development, permanent sovereignty over natural resources.

I. INTRODUCTION

Stirred by their development aspirations, developing countries sought to shape international law in the latter half of the twentieth century so that it might provide for economic justice. Their claims of the 1960s and 1970s for a New International Economic Order (NIEO), their efforts to delineate a body of 'international development law', followed by the affirmation in 1986 of a human right to development, were concomitant attempts to see structural reform of the world economy embedded in international law. On the whole international law did no such thing: industrialized countries as net beneficiaries of the global economic system would not allow it. This article explores why it is international law has failed the poor of the world, and what interests it has served in their stead.[1]

* Centre for the Study of Human Rights and Law Department, London School of Economics and Political Science, m.e.salomon@lse.ac.uk. This article is an elaboration of a paper presented at the conference 'Being In-human: The Critical Theory and Law of Human Rights', Birkbeck/LSE, November 2011. I'd like to thank Danny Bradlow, Ali Kadri and Gus Van Harten for their very helpful comments on a draft of this text. As ever, responsibility for the views presented herein rests solely with the author.

[1] This paper uses the terms 'developed States or countries', 'industrialized States or countries', and the 'North', largely interchangeably. Similarly, the terms 'developing States or countries' and the 'South' are used interchangeably. References to the 'West' and the 'Third World' are relied on when necessary to capture the sentiment or language of the period.

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In 1976 the developed market-economy countries, with 20 per cent of the world population, enjoyed 66 per cent of total world income. By contrast, developing countries—excluding China—with about 50 per cent of the world population, received 12.5 per cent of the total world income;[2] with China included, 70 per cent of the world's people accounted for only 30 per cent of world income.[3] By the twenty-first century, 20 per cent of the world population is receiving approximately 85 per cent of income, with 6 per cent going to 60 per cent of the population.[4] In absolute terms, 40 per cent of the world population is today living on incomes so low as to preclude fully participating in wealth creation.[5] One in 4 people (1.4 billion) in the developing world live in extreme poverty attempting to survive below the international poverty line of USD1.25 a day.[6] If world poverty has decreased since the early 1990s, it is largely due to poverty reduction figures in a very small number of populous countries.[7] As for global inequality, it is widening rapidly between countries; inequality between countries weighted by population has shrunk since 1980 only when we factor in the fast growth in China and India; and inequality among households is probably increasing.[8] Moreover, while the global gap between the richest and the poorest people has been expanding, there is little evidence of actual improvement in the absolute position of the poorest since the 1980s (when the latest wave of globalization began).[9] In any case, as is frequently highlighted, any debates over trends cannot mask the persistence and magnitude of both poverty and inequality on a global scale.

To be sure, there are a range of domestic factors from inadequate economic policies, to corruption, to geography that may help to account for the current

[2] K Hossain, 'Introduction' in K Hossain (ed), *Legal Aspects of the New International Economic Order* (Frances Pinter Publishers 1980) 3.

[3] GA res 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, 1 May 1974, preambular para 1.

[4] R Wade and M Wolf [debate], 'Are Global Poverty and Inequality Getting Worse?' in D Held and A McGrew (eds), *The Global Transformations Reader* (2nd edn, Polity Press 2003) 441. In terms of global wealth distribution, 10 per cent of adults account for 85 per cent of the world total of global assets, with half the world's populations—concentrated in developing countries—owning barely 1 per cent of global wealth. J Davies et al, *The World Distribution of Household Wealth*, World Institute for Development Economics (UN University 2006).

[5] United Nations Development Programme (UNDP), *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (UNDP 2005) 38. Of the 4.8 bn people living in developing countries 2.7 bn, or 43 per cent of the world population, live on less than two US dollars a day. 'Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property: Annex' (61st World Health Assembly, 2008) para 2.

[6] World Bank at <http://www.worldbank.org> (Poverty Net). The World Bank (not uncontroversially), uses reference lines set at USD 1.25 and USD 2.00 a day 2005 purchasing power parity terms.

[7] See SG Reddy and C Minoiu, 'Has World Poverty Really Fallen?' (2007) 53 Review of Income and Wealth 484; *A Fair Globalization: Report of the World Commission on the Social Dimension of Globalization* (ILO 2004) 44.

[8] See B Milanovic, 'Global Income Inequality' in D Ehrenpreis (ed), *The Challenge of Inequality* (UNDP International Poverty Centre 2007) 6. The position that there has been a decline in worldwide inequality among households looks to the fast growth of China and to a lesser extent of India to provide the chief explanation. Wade and Wolf (n 4) 440–1.

[9] T Lines, *Making Poverty: A History* (Zed Books 2008) 25.

state of inequity, but it does not follow from the existence of local variations that these must be the only causally relevant factors, and that external factors are irrelevant.[10] Recognizing the existence of a State's domestic duties to address poverty and development failures does not preclude a full investigation into the ways in which international actors can be deeply implicated in the deprivation suffered by almost half the global population.

In the 1960s developing countries saw the General Assembly and the shaping of international law as important vehicles through which to press their claims for economic justice. The figures above indicate that international law could not have conceivably played a satisfactory role in addressing the development demands of these low-income countries, even if we would be careless to ignore their contribution to international law, not least in elevating the 'law of nations' to include a 'law of peoples'.[11] In 1974, developing countries asserted in the Declaration on the Establishment of a New International Economic Order that '[i]t has proved impossible to achieve an even and balanced development of the international community under the existing international order'.[12] To this assertion we might add that it remains an impossibility. This study reflects on a central reason why.

II. LIMITS TO THE SOVEREIGN EQUALITY OF STATES

The two well-established principles of the sovereign equality of States and of non-intervention[13] that have provided a basis for the claims by developing countries to a New International Economic Order can be said to comprise three elements: the right of States to choose freely their economic system; permanent sovereignty by States over their natural wealth and resources; and the equal participation of developing countries in international economic relations.[14] In the 1960s and 1970s as much as today, developing countries saw the principle of sovereignty as representing an important protection for economically and politically vulnerable States against interference by more powerful foreign

[10] T Pogge, 'The First United Nations Millennium Development Goal: A Cause for Celebration?' (2004) 5 Journal of Human Development 391.

[11] On this latter point, U Baxi, 'What May the "Third World" Expect from International Law?' in R Falk, B Rajagopal and J Stephens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish 2008) 16.

[12] Declaration on the Establishment of a New International Economic Order (n 3), preambular para 1.

[13] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI, art 2; GA res 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

[14] The right of every State freely to choose its economic system as an aspect of the (economic) sovereign equality of States was introduced in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. See further, Report of the Secretary-General, *Progressive Development of the Principles and Norms of International Law Relating to a New International Economic Order*, UN Doc A/39/504/Add.1, 23 October 1984, para 3.

States, initially and largely those in the North.[15] At a practical level, the use of the principle as a defence has been questionable, just as the commitment to sovereign equality has always been historically inadequate to ensure an international legal order that would *actively* contribute to the development of the weakest sections of the international community.[16] Legal equality and functional equality are not coextensive, and as such, sovereign equality was interpreted by developing countries as allowing also for 'affirmative action': a means by which substance would be given to the principle of sovereign equality.[17]

The traditional negative requirement to respect each State's fundamental sovereign prerogative by refraining from intervening in its internal or external affairs likewise has offered only a derisory legal methodology in a world of sovereign States with dramatically differing power, wealth, and influence. The principle of sovereign equality, that in theory offers a normative defence against unwelcomed commercial influence, has failed to embed any positive requirements to advance a comprehensive system of equitable benefit-sharing internationally. That the liberalization of trade, investment and finance—apart from any harms caused—has not yet accommodated in any significant way the 'non-market governance' of poverty-reduction, presents a stark example of the weak redistributive capacity of the international legal system.[18] In the early decades of the United Nations (UN) as now, this vacuum has initiated no global redistributive mechanism to address the existence of wide-scale deprivation.[19]

Standing in opposition to the traditional interpretation of these two core principles, has been that of international cooperation. As a purpose of the UN's economic and social mandate,[20] as one of its basic principles,[21] and subsequently as a human rights obligation corresponding to socio-economic and development rights,[22] this ideal has sought to provide the foundation upon

[15] See DD Bradlow, 'Development Decision-Making and the Content of International Development Law' (2004) 27 BCIntl&CompLRev 205.

[16] See J Castañeda, 'Introduction to the Law of International Economic Relations' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (UNESCO/Martinus Nijhoff 1991) 593.

[17] Hossain (n 2) 5–6; Bradlow (n 15) 206.

[18] On trade see JP Trachtman, 'Legal Aspects of the Poverty Agenda at the WTO: Trade Law and "Global Apartheid"' (2003) 6 JIEL 4; S Prowse (DfID), 'Trade and Poverty Panel', *Does International Law Mean Business: A Partnership for Progress?*, International Law Association, British Branch Annual Conference, London, May 2008; *Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization* (Twenty-first session 1999), UN Doc E/C.12/1999/9, para 6.

[19] Robert Wade rightly makes this point in the context of contemporary international arrangements generally, in RH Wade, 'Globalization, Growth, Poverty, Inequality, Resentment, and Imperialism' in J Ravenhill (ed), *Global Political Economy* (2nd edn, Oxford University Press 2008) 403; and Trachtman (n 18) 4.

[20] UN Charter (n 13) arts 1(3), 55, 56.

[21] ibid art 2(5) in this provision the duty is to cooperate with the Organization itself in the maintenance of peace and security.

[22] Universal Declaration of Human Rights, GA res 217A (III), 10 December 1948, UN Doc A/810 art 28; International Covenant on Economic, Social and Cultural Rights (1966), entered into

which positive action in securing these benefits globally would be advanced. Unsurprisingly, international cooperation has offered an important basis upon which the demands for a just international economic order, then and now, have been based. The Covenant of the League of Nations took the initial step of laying down that its Members should make provisions to secure and maintain 'equitable treatment for commerce'.[23] The UN Charter goes much further, providing as one of the purposes of the organization the goal of achieving 'international co-operation' in solving international problems of an economic, social character, and in promoting and encouraging respect for human rights for all;[24] and that the UN shall promote conditions of economic and social progress and development, and human rights.[25] The Charter frames the lack of economic and social opportunity as detrimental to international relations, and recognizes its reversal as dependent upon the cooperation of the international community of States. The UN provided an institutional set-up to support these objectives, in particular through its establishment of the Economic and Social Council (ECOSOC), a principal organ mandated to initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters, and to make recommendations to the General Assembly and UN Specialized Agencies.[26] The Charter also anticipated a central role for the relevant UN specialized agencies in this area[27] which were to be brought into the UN family through relationship agreements with ECOSOC.[28] Obligations of 'international assistance and cooperation' were subsequently included in human rights instruments addressing economic, social and cultural rights and development.[29]

While the modern international legal system imposed passive obligations of abstention on States, as well as the modalities for their cooperation in the form of positive obligations, as neoliberalism arrived it became increasingly unlikely that there would be any further advance of this agenda for redistributive action. Neoliberalism has been the dominant economic model since the 1980s; its most recent ascent to the ruling economic orthodoxy taking place with the 1989–90 collapse of communism in the Soviet Union and Central Europe and the 'triumph of capitalism'. Under this ideology, the efficiency derived of self-regulating markets generates optimum wealth (that will, in theory, trickle down and be helpful to the living standards of the poor over

force 3 January 1976, GA res A/RES/2200A (XXI), 993 UNTS 3, art 2(1); Declaration on the Right to Development, GA res 41/128, annex, UN GAOR, Forty-first session, Supp. No 53, at 186, UN Doc A/41/53 (1986); Convention on the Rights of the Child (1989), entered into force 2 September 1990, GA res A/RES/44/25, annex 44, UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989) art 4.

[23] Covenant of the League of Nations, 225 Consolidated Treaty Series (CTS) 195, art 23(e).
[24] UN Charter (n 13), art 1(3).
[25] ibid art 55.
[26] ibid art 62.
[27] ibid art 57.
[28] ibid art 53.
[29] For a comprehensive study, see ME Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press 2007).

time),[30] and any growth in material inequality should on this account best be understood as incentivizing, thus driving productivity and spurring the economy—a far cry from any kind of manifesto for collective justice.

III. THE NEW INTERNATIONAL ECONOMIC ORDER

As has been alluded to, any straightforward recounting of the post-World War II institutional projects masks far less encouraging truths exposed by the efforts of developing States, in particular newly decolonized States, to confront the structural biases and their ensuing development problems through the creation of a new international economic order. The Latin American States were the early agitators in the 1950s prior to the major wave of post-war decolonization.[31] In the 1960s and 1970s developing countries mobilized under the auspices of the 'Group of 77' and advocated reform of the laws governing international economic relations that reflected their post-colonial demands for control over economic activity within their own borders; for participation in the governance of the globalizing economy; for fair access to technology, international trade, finance and investment; and for international cooperation from industrialized States—with the status of a legal obligation—towards their development aspirations.[32] In the early 1970s many formerly dependent African and Asian States attained political independence which bolstered their voices in the General Assembly where developing countries already held the majority of seats. The framework of a new international economic order condemned, and sought to refashion, a system that was premised on acutely asymmetrical relationships, which found reflection in international law. The 'Third World' was rebelling against what it recognized as the sanctioning by law of a relationship between 'exploiters and the exploited'.[33] As is well known, the political self-determination of decolonization highlighted the absence of the 'economic self-determination' of developing countries nationally and internationally. Their political independence and responsibility for their

[30] Even if no one believes in 'trickle down' anymore, questions remain as to whether in practice it is a 'neoliberal idea that refuses to die'. N Kaul, *How Many Zeros are there in a Trillion? On Economic Neoliberalism and Economic Justice*, OpenDemocracy, 23 March 2011 <http://www.opendemocracy.net>; and JE Stiglitz, 'Is there a Post-Washington Consensus?' in N Serra and JE Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 47.

[31] See G Abi-Saab, 'Permanent Sovereignty over Natural Resources' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (UNESCO/Martinus Nijhoff 1991) 600. On the formative post-World War II years generally, see N Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 36ff.

[32] For a comprehensive overview of the NIEO demands see ME Ellis, 'The New International Economic Order: The Debate over the Legal Effects of General Assembly Resolutions Revisited' (1985) 15 CalWIntlLJ 658.

[33] M Bedjaoui, *Towards a New International Economic Order* (UNESCO/Holmes and Meier 1979) 24.

own economic affairs exposed just how dependent they were on other States and how vulnerable they were within the existing economic system.[34]

The NIEO process resulted in the adoption of several resolutions, most notably the UN Declaration on Permanent Sovereignty over Natural Resources,[35] the Declaration on the Establishment of a New International Economic Order, along with a Programme of Action, and the Charter of Economic Rights and Duties of States.[36] Focus was also placed on the need to adopt and implement an international code of conduct for transnational corporations and on the regulation of transfer of technology. As Faundez remarks, '[t]hese two codes underwent interminable discussion within the UN [the former with in ECOSOC, the latter under the UN Conference on Trade and Development (UNCTAD)] but were never formally approved.'[37] None of the aforementioned resolutions or declarations was formally binding, and while the representatives of developed States with market economies allowed the Declaration on the Establishment of a NIEO to be adopted by consensus they did so with reservations.[38] As for the Charter of Economic Rights and Duties of States, concerns over the standard of treatment for their investors abroad, especially the provisions related to expropriation and compensation, resulted in developed States voting against it. Whenever the Charter's provisions were cited in subsequent declarations developed States always insisted that they were not legally binding.[39] The strong opposition of these industrialized States

[34] See L Henkin, *International Law: Politics and Values* (Martinus Nijhoff Publishers 1995) 156; see also Castañeda (n 16) 591.

[35] GA res 1803 (XVII) of 14 December 1962, Permanent Sovereignty over Natural Resources.

[36] GA res 3281 (XXIX) of 12 December 1974, the Charter on the Economic Rights and Duties of States, 120 votes in favour; 6 against; 10 abstentions. Those States that voted against the resolution were Belgium, Denmark, German Federal Republic, Luxembourg, the United Kingdom, and the United States.

[37] J Faundez, 'International Economic Law and Development before and after Neo-Liberalism' in J Faundez and C Tan (eds), *International Law, Economic Globalization and Development* (Edward Elgar 2010) 16. On the shortcomings of the voluntary principles and standards for responsible business conduct of the OECD Guidelines for Multinational Enterprise see P Muchlinski, 'Holistic Approaches to Development and International Investment Law: The Role of International Investment Agreements' in J Faundez and C Tan (eds), ibid 193 and J Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc E/CN.4/2006/97, 22 February 2006, para 41.

[38] United States, West Germany, France, Japan and the United Kingdom. M Bulajic, *Principles of International Development Law* (2nd edn, Martinus Nijhoff Publishers 1993) 271.

[39] The shift in the position of Western states points to changes introduced by developing countries into the two 1974 NIEO resolutions, most notably the exclusion of any reference to *international* law, which as Subedi notes, is a break with the more balanced provisions of Resolution 1803 of 1962 on Permanent Sovereignty over Natural Resources (PSNR). In particular, the NIEO Charter does not require that any regulation, nationalization or expropriation be in accordance with international law, with article 2 of the Charter representing the most controversial provision in this regard. See SP Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 26; see further DE Veilleville and BS Vasani, 'Sovereignty over Natural Resources versus Rights under Investment Contracts: Which One Prevails?' (2008) 5 TDM 4–5.

meant the large convergence of States on the substance of new standards necessary for the formation of customary international law was lacking:[40] any general support within the UN was to remain at the level of broad principle.[41]

As a matter of normative status, there was one success which is often said to have emerged from the efforts by developing States to shape the evolving rules of international economic law: the general acceptance by the international community of the principle of permanent sovereignty over natural resources (PSNR). The General Assembly had decided as early as 1952 to include a right of all peoples and nations to self-determination in a human rights treaty and mandated the Commission on Human Rights to prepare a draft on the subject.[42] It was in the context of the Commission's subsequent debate on the right of self-determination that the economic and social aspects, in addition to the political aspects, were invoked. Abi-Saab explains that when the concept of PSNR was launched in 1952 'theories were circulating to the effect that concession agreements created rights *in rem* even over unextracted resources in the ground; and that the danger of depriving a people on a permanent basis of the control and most of the benefits of a major resource, particularly in the Third World commodity producing countries, by invoking such agreements, was the paramount concern behind Chile's amendment, which introduced the concept into article 1 of the Human Rights Covenant on self-determination.'[43] In 1955 the General Assembly adopted a draft article as part of the self-determination provisions in the two Human Rights Covenants, the second paragraph of which subsequently appeared as common Article 1(2), and states: 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'[44] The groundwork for the adoption in 1962 by the General Assembly of Resolution 1803 declaring a right to permanent sovereignty over natural resources stemmed from the draft Human Rights Covenants supplied

[40] See A Cassese, *International Law* (2nd edn, Oxford University Press 2005) 507.

[41] See M Bennouna, 'International Law and Development' in M Bedjaoui (ed), (n 16) 621; and Cassese (n 40) 509.

[42] GA res A/Res/545 (VI) of 5 February 1952, Inclusion in the International Covenant or Covenants on Human Rights of an Article Relating to the Right of Peoples to Self-Determination, paras 1–2.

[43] Abi-Saab (n 31) 603; and, HS Zakariya, 'Sovereignty over Natural Resources and the Search for A New International Economic Order' in K Hossain (ed), *Legal Aspects of the New International Economic Order* (Frances Pinter Publishers Ltd 1980) 209. The first resolution on the subject was that of the General Assembly, GA res 626 (VII) of 21 December 1952, The Right to Exploit Freely Natural Wealth and Resources. See, Report of the Secretary-General, *Progressive Development of the Principles and Norms of International Law relating to a New International Economic Order* (n 14) para 54.

[44] Years later, a formulation preferred by developing countries was inserted as article 47 of the ICCPR and article 25 of the ICESCR (n 22) ('Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.').

by the Commission on Human Rights to the Third Committee of the General Assembly.[45]

The principle of self-determination in the UN Charter and fleshed out thereafter underpinned formal sovereignty, and the post-1945 international order saw the principle of non-intervention in the domestic affairs of other States rendered applicable not just to European States but to all States. The non-intervention principle was asserted by developing States and used to underscore their demands to shape policies within their own territories. The principle of PSNR was motivated by the concern among developing States that the orthodox international law on foreign investment undermined the effective exercise of their sovereignty in the economic realm by favouring the interests of capital-exporting States and their corporations, and enabling those foreign actors to constrain policy options of host governments.[46] PSNR was thus an attack on the established tenets of international law that developing non-self-governing peoples had no role in formulating, except as coerced counterpart. The attempts of new States to regain control over their natural resources generated complex debates regarding several doctrines of international law including those of State succession and acquired rights whereby the newly independent countries were legally bound to honour the concessionary rights to their natural resources which colonial powers and trading companies had acquired prior to independence often through 'duress and deception, and [where] the concessions had often never been the subject of meaningful consent on the part of the Third World peoples'.[47] PSNR also sought to challenge existing customary international law in the area of a compensation standard for the expropriation of property that was determined by and for developed States and their private sector beneficiaries. As Pahuja summarizes: 'In essence, the West was arguing for the Hull formula of "prompt, adequate and effective", or market-based compensation, determinable internationally. For its part, the Third World was arguing that the relevant compensation should be "appropriate", economically contextual, historically sensitive and determinable nationally.'[48]

[45] For a concise summary of the drafting history, see further I Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 539–41. On the motivations and shifts in the UN between the language of peoples (those under foreign occupation, colonial domination or apartheid) to that of developing countries or States (post-decolonization) as subjects of sovereignty over natural resources, see Schrijver (n 31) 166.

[46] See DP Fidler, 'Revolt Against or From Within the West: TWAIL, the Developing World, and the Future Direction of International Law' (2003) 2(1) Chinese Journal of International Law 41.

[47] A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 213 and 212–16.

[48] S Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 149. On arguments by colonized States that compensation should take into account the manner in which concessions were obtained as well as the profits made by the colonial power or trading company from the exploitation of the resources, see Anghie (n 47) 212–13.

Insofar as the principle of PSNR represented a victory for the developing world, it advanced the notion that sovereign States had the right to expropriate or nationalize the assets of foreign companies under certain conditions, including 'public utility', with the owner being paid 'appropriate' compensation. The reference in Resolution 1803 provides that 'the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures [nationalization, expropriation or requisitioning] in the exercise of its sovereignty and in accordance with international law.' Thus the resolution did not deny the relevance of international law as a factor in determining appropriate compensation, yet nor did it limit the legal basis for the determination of compensation to international law.[49] It seemed to balance the competing priorities of developing States for control over their natural wealth and resources with the interests of developed States whose concern was with ensuring protection for their corporate nationals investing abroad. PSNR presented a statement of the law that was acceptable to the interests of both sides. The story does not, however, end there.

A critical observer will argue that the principle of PSNR represents a questionable victory for developing States in that, first, the *assumptions* that underpin the Declaration reflect their capitulation to the economic ideology of the advanced capitalist world and its unabated commitment to strengthening the rights of foreign capital.[50] More specifically, the claim of developing States to their natural resources understood these raw materials as something to be 'exploited': as the object of private property.[51] Second, whatever normative gains can be said to have emerged in the area of PSNR, the rules in Bilateral Investment Treaties (BITs) today closely approximate or even exceed such old customary rules favoured by industrialized States. For example, the international minimum standard of treatment for aliens (over the national standard of treatment) has been developed to provide protection to foreign investors at the core of which is the principle of fair and equitable treatment. The standard of fair and equitable treatment has been interpreted by investment tribunals to go well beyond the customary minimum standard of treatment.[52] The endorsement by developing States of national treatment points to 'the role the law associated with the international standard has played in maintaining a

[49] See Subedi (n 39) 21–3; and, M Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 445ff.

[50] Chimni explains that: 'The 1962 Declaration does not . . . incorporate a balance between the interests of capital-exporting and capital-importing countries. [Any] positive assessment is based, *first*, on the understanding that the rights claimed by the Third World countries on the basis of PSNR render foreign capital vulnerable to a less than fair treatment. *Second*, that the value of foreign capital is now universally recognized . . . .'. BS Chimni, 'The Principle of Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation' (1998) 38 IJIL 213–14.

[51] Abi-Saab (n 31) 602; see also, Pahuja (n 48) 125.

[52] See generally, Fidler (n 46) 54; M Sornarajah, *The Clash of Globalisations and the International Law on Foreign Investment*, The Simon Reisman Lecture in International Trade Policy, Centre for Trade Policy and Law, Ottawa 2002, 3.

privileged status for aliens, supporting alien control of large areas of the national economy, and providing a pretext for foreign armed intervention'.[53] Another example is the Hull formula requiring 'prompt, adequate and effective' (full) compensation for the expropriation of foreign investments (over 'just' or 'appropriate' compensation).[54] As has been noted elsewhere, most Third World States did not deny the principle of compensation *per se* but instead argued that '"appropriate compensation" was indeed payable but that internationally determined, market-based standards were not "appropriate"'.[55] Third, while in the 1970s and 1980s disputes on direct expropriation mainly related to the nationalization of foreign property, today the central concern is that concepts such as indirect expropriation may be applied to *bona fide* regulatory measures taken by the host government and aimed at protecting the environment, health and other welfare interests of society, giving rise to claims for compensation.[56] Perhaps unsurprisingly then, this legal principle of PSNR to emerge from the polarized NIEO debates cannot be said to have entrenched any redistributive agenda: claims as to its normative success offer merely a sentimental historical narrative about the efforts of poor countries in the shaping of international rules that on deeper reflection show them to be instruments of the powerful.

Concerns over the *application* of the principle of PSNR were highlighted in the years following the adoption of the NIEO declarations, along with wider criticisms over the power differentials embedded in the international investment regime more generally. These concerns endure to date. They included the dependence of many developing countries on financial and technological assistance in order to exploit those natural resources from an international private sector driven by profit-generation and not the economic or social development of the host State and its people. The deeply unsatisfying choices of a poor developing country, then as now, were often to accept a deal offered by the companies, or to leave their resources untapped.[57]

Disquiet over a range of other problems existed, including that of stabilization clauses by which the host State, for instance, agrees not to alter the terms of an investment contract it has undertaken with the foreign investor except with the consent of both parties.[58] Similar concerns are raised today in that stabilization clauses 'stipulate that the law prevailing at the time the

[53] Brownlie (n 45) 525.

[54] 'The claim to full or adequate compensation is supported by the majority of capital-exporting states, for the obvious reason that it affords the best protection for the capital which leaves these states as foreign investment.' The concept of 'full compensation' includes consideration of future profits the investment would have made. Sornarajah (n 49) 412 and 414.

[55] Pahuja (n 48) 151.

[56] See, *'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law,* OECD Working Papers on International Investment, No 2004/4, 2.

[57] Zakariya (n 42) 216–18.

[58] E Jiminez de Arechaga, 'Application of the Rules of State Responsibility to the Nationalization of Foreign-Owned Property' in K. Hossain (ed), (n 2) 229–30.

decision was taken by foreign investors to invest in the host country would be applicable to them, and such laws would not be altered to the detriment of the investor'.[59] While under a BIT between the investor country and the investor-receiving country (as distinct from an investment contract between the host government and the foreign investor),[60] a host State is not per se prevented from taking new legal or administrative measures in order to govern the country and (ideally) to comply with its treaty obligations under other international legal regimes (for example, human rights or in the area of environmental protection), under customary international foreign investment law the host State would be expected to compensate the investor for economic losses if it amounts to 'indirect expropriation'.[61] The direction of the case law is yet unfolding on the matter of whether *bona fide* regulatory measures which nonetheless significantly impact the commercial interests of foreign investors should be compensable.[62] Investment contracts can go even further than BITs 'and require compensation for *any* interference by the host State that increases the cost of the project'.[63] While foreign investment may bring certain beneficial impacts to the developing country societies, then as now, the subordination of the fundamental right of a State to regulate so as to advance public welfare—as well as its fundamental human rights *obligation* to do so—over the interests of foreign investors remains a sustained point of contention.[64] Other issues along the North-South political cleavage regarding the international law on foreign investment have persisted for decades in one form or another, such as concerns over procedural fairness and a lack of adjudicative independence when it comes to the settlement of investment disputes.[65]

[59] Subedi (n 39) 104.

[60] In the absence of a global treaty on international investment, in addition to BITs, other public international law instruments that deal with foreign investment are: regional treaties such as the North American Free Trade Agreement; and (bilateral) Free Trade Agreements (FTAs), as well as, the WTO's Agreement on Trade-Related Investment Measures (TRIMS), and its General Agreement on Trade in Services (GATS).

[61] Subedi (n 39) 104.

[62] I thank Anthea Roberts for her reflections on this point. Compare, for example, *Saluka Investments BV (The Netherlands) v The Czech Republic, UNCITRAL*, Partial Award, 6 March 2006, para 255 and *Tecnicas Medioambientales Tecmed S.A. v Mexico*, ICSID Case No ARB(AF)/00/2, 29 May 2003, paras 116 and 121. Mann highlights that provisions on the right to regulate in the public interest, such as measures to meet health, safety or environmental concerns, can be rendered 'legally useless' by the introduction of qualifying language that requires that those measures 'are consistent' with the International Investment Agreement. H Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities* (International Institute for Sustainable Development 2008) 19.

[63] Subedi (n 39) 104.

[64] See *The Public Statement on the International Investment Regime*, 31 August 2010. The Statement was prepared and is supported by academics with expertise relating to investment law, arbitration and regulation and is available in English, French, Spanish and Russian at <http://www.osgoode.yorku.ca/public_statement>. ('We have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.').

[65] See Abi-Saab (n 31) 613–14; G Van Harten, *A Case for an International Investment Court*, Society of International Economic Law Working Paper No 22/08 (2008); see further, G Van Harten, Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law' in SW Schill

Historically the aim of BITs, it is said, has been to strengthen the protection afforded foreign investors, especially in developing and transitional markets, *in return* for increased inward foreign investment flows. With the rise of globalization in the 1990s, developing countries courted foreign investors offering incentives and legislative protection.[66] It is difficult to accept, however, that mutual benefits were meaningfully foreseen. A former attorney at the US State Department speaking on the topic of investment treaty law remarked recently that: 'The US BITS and US BITS policy [in the 1980s] were essentially a tool of ideology, of imposing US economic policy on other States. During that early phase of US BITs policy there were no defensive concerns or risks from the perspective of the policymakers in Washington'.[67] The Chief Director of the South African Trade and Industry Department emphasizes that when he took over as his country's BIT negotiator in 2001 he was 'quite horrified to read the content of a BIT. The BIT places all the obligations on the host States, and gives all the rights to the investors.'[68] In any case, the sum of empirical evidence cannot be said to demonstrate incontrovertibly that BITs have contributed even to the targeted objective of economic development in the host States.[69] Moreover, a commitment to social development as part of the foreign investment objectives remains all but absent from BITs,[70] as does a proper calibration of the balance between the rights and obligations of all stakeholders in the investment process, which would include host countries, investors and their home countries, as well as local communities.[71] The obstacle to change is not a lack of solutions, including to the legal investment regime, but is due instead to a lack of political will.[72] In short, the international law that we have is the international law that the powerful want. Macmillan highlights that 'The effect of decolonisation on the world economy has, of

(ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 627.

[66] Sornarajah (n 52) 4–5. Sornarajah elaborates: 'The sudden rush for foreign investment-based assets was necessary, as aid had dried up, as had the availability of loans from banks after the petro-dollar crisis. Globalisation was the catch-cry of the times and liberalisation of markets was seen as the way to prosperity. . . . The picture changed dramatically as the new millennium was beginning. A succession of economic crisis called into question the virtues of liberalisation and capital markets.' ibid.

[67] *Rethinking Investment Treaty Law: A Policy Perspective,* London School of Economics, Transnational Law Project, Public Lecture, 23 May 2011.

[68] Randall Williams, Chief Director at the South-African Trade and Industry Department, ibid.

[69] Muchlinski (n 37) 186. And on the perceived benefits flowing from FDI, F Macmillan, 'The World Trade Organization and the Turbulent Legacy of International Economic Law-Making in the Long Twentieth Century' in J Faundez and C Tan (eds), (n 37) 170.

[70] Muchlinski (n 37) 181–2.

[71] ibid 190.

[72] For a thoughtful overview of how International Investment Agreements could be recalibrated, see ibid 180; for a proposed new model for IIAs with rights and obligations for investors, home States, and host States see H Mann et al, *IISD Model International Agreement on Investment For Sustainable Development*, art 1: 'The objective of this Agreement is to promote foreign investment that supports sustainable development, in particular in developing and least-developed countries'.

course, been profound. In particular, decolonisation has called for the development of new techniques for accessing the resources of the so-called developing world on terms that ensure that the dominant position of the former colonial power in the world economy is maintained.'[73] International law, as Chimni notes, offers the juridical sanctioning of mere rights but not duties of transnational capital, unequal exchange, and dominance when it comes to influencing economic policies in developing countries and over access to technology, as well as a range of other inequities characterized by the perverse subsidization from South to North.[74]

Commenting in 1991, Abi-Saab concluded that the real impact and significance of the principle of PSNR was less at the level of concrete technical rules than as regards the 'structure, parameters and basic assumptions' of the international legal system itself. In particular, 'Rather than … creating a hidden assumption that any act of the State affecting these interests constitutes a legal injury, hence a violation of international law, the principle proceeds from the affirmation of the permanent sovereignty of the State and its freedom of action as a general rule, any limitation or obligations attaching to the exercise of this freedom being the exception that has to be demonstrated'.[75] This orientation in international law is manifested in the idea of third generation human rights, notably a people's rights to self-determination which includes sovereignty over their natural resources, along with economic self-determination, also framed as the human right to development, a point to which we will return.[76] But whether in terms of general international law or international human rights law, legal movements that have sought to bolster the economic and social upward mobilization of developing countries and their people have remained subordinated to the interests of capital-exporting States and their transnational corporations, and to the structures, including judicial, that prioritize the protection of the property and economic interests of foreign investors over the right to regulate of States and, ultimately, the right to political and economic self-determination of their people.[77]

There were other key elements of the original NIEO agenda including the establishment of special and differential treatment under international trade

[73] Macmillan (n 69) 158.

[74] Chimni (n 50) 211. Chimni asserts that 'the general character of contemporary international law … is neo-colonial'. ibid.

[75] Abi-Saab (n 31) 614–15.

[76] See The Declaration on the Right to Development (n 22), art 1(2).

[77] See, the *Public Statement on the International Investment Regime* (n 64) para 5. Common article 1(2) of the Human Rights Covenants would seem to qualify the right of peoples over their natural wealth and resources when stating that it is 'without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law'. Although, this qualification sits uncomfortably alongside common articles 47 (ICCPR) and 25 (ICESCR) which provide that: 'Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.' The Committees have not offered much clarification, and in so far as they have interpreted the article, have done so (not insignificantly), as regards peoples' right to sovereignty over their natural resources as applied to indigenous peoples within a given State.

law,[78] and demands for access to the exploitation of resources of the deep-sea bed largely for the benefit of developing countries.[79] But if the 'changes made in the General Agreement on Trade and Tariffs (GATT) law and practice constitute a substantive shift in international law towards basing the application of important international legal rules on a State's level of economic development rather than on the traditional approach of all sovereign States bearing equal and identical obligations under international law',[80] its formal success cannot mask serious doubts as to whether the international trading system has delivered net benefits to developing countries in the form of faster growth and poverty reduction. As Trachtman concludes: 'Perhaps the most important area for coherence – for aligning global trade policy with other policy – is poverty. Trade, and the WTO, is an engine for global growth. Although growth is expected to ameliorate poverty, the WTO has not yet directly confronted questions regarding the global redistribution of its benefits.'[81]

Developing States, at least initially, did impact on the contours of international law when it came to the law of the sea, most notably regarding access to non-living resources on or beneath the ocean floor in an area beyond national jurisdiction. Fiddler highlights that the common heritage of mankind (CHM) concept—by introducing ideas about the management of global economic resources into the UN Convention on the Law of the Sea (UNCLOS)—instilled in international law a scheme of distributive economic justice.[82] But this was not to last. CHM replaced the 'freedom of the high seas' principle which allowed any State to exploit those resources (for example, the mineral-rich deposits) for their benefit, which *de facto* meant those States with the technological capabilities.[83] CHM as such undermined the advantage traditionally afforded developed States and remained a matter of intense controversy even after the adoption of UNCLOS in 1982, with developed States refusing to ratify the treaty. UNCLOS itself did not enter into force for over a decade in part as a result of the CHM element, and in 1994 the provision was amended to reflect the interests of developed countries as to how those

[78] Charter on the Economic Rights and Duties of States, Ch II (n 36), art 18.

[79] ibid Ch. III (Common Responsibilities towards the International Community) art 29.

[80] Fidler (n 46) 44.

[81] JP Trachtman, 'The Missing Link: Coherence and Poverty and the WTO' (2005) 8 JIEL 619; and, Trachtman (n 18) 10–11 ('It appears that the concept of 'Special and Differential Treatment' (S&D), at least as applied so far, has limited utility. S&D is a complex phenomenon – some aspects of S&D are undoubtedly beneficial. However, this concept seems to mask the fact that the international trade system has done little specifically intended to alleviate poverty: it is not special and differential enough.'); F Ismail, *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* (CUTS/FES 2007) iii ('[T]he concept of S&DT, while recognizing the need to take into account the special needs of developing countries, is by itself ineffective and serves as a palliative for unfair and imbalanced trade rules.')

[82] Fidler (n 46) 46; see also JT Gathii, 'Third World Approaches to International Economic Governance' in R Falk, B Rajagopal and J Stephens (eds), (n 11) 260–1.

[83] Fidler (n 46) 44–6.

resources should be exploited.[84] In the end, '[o]n both the substantive rules on exploitation of deep sea-bed resources and the economic benefits deep sea-bed mining would generate for developing countries through international wealth redistribution, the Third World Lost'.[85]

IV. THE REAL REASONS THE NIEO FAILED

The NIEOs overall lack of success has been attributed in part to developing countries not having presented a unified platform and an agreed set of concrete objectives.[86] Further, the impact of the debt crisis of the 1980s which devastated developing countries and shifted the attention of the international community from the international economic order to development in individual countries, overshadowed the demands for NIEO.[87] But the central failure to establishing a NIEO was due to the fact that industrialized States did not want any such thing. It is not surprising to hear suggested that they were unwilling to enter into genuine global negotiations;[88] and then, as now, were unwilling to see rules created that did not serve their economic interests well. In so far as the post-war settlement reflected economic and social development among the purposes of the UN, and as part of the institutional framework establishing the World Bank, the International Monetary Fund, and the GATT,[89] this was not to be implemented so effectively as to displace the power and advantage held by influential States.

Opposition to the spirit if not the letter of calls for a new international economic order continue today with vociferous attempts by industrialized States to keep matters of economics and finance outside of the UN where they are in the minority and instead firmly situated in the organizations where they hold the bulk of power, be it formally such as in the Bretton Woods Institutions under their system of weighted voting,[90] informally as per the G20,[91] or on the

[84] ibid 54–5; Chimni (n 50) 215.

[85] Fidler (n 46) 55.

[86] Bennouna (n 41) 621. Developing countries were also accused of 'excessive politicization' of problems within international organizations and of being irresponsible in the examination of world problems. See Bedjaoui (n 33) 144.

[87] Bradlow (n 15) 198.

[88] Bennouna (n 41) 621.

[89] See Faundez (n 37) 13.

[90] The NIEO demands included a strong and effective voice for developing countries in the decision-making of international economic institutions; see the Charter on the Economic Rights and Duties of States, Ch. II, art 10. Recent reform of World Bank and IMF voting has seen emerging economies make the greatest gains, less so for the low-income countries that are their borrowers or are reliant on their policy prescriptions or approval. See New Rules for Global Finance at <http://www.new-rules.org> and DD Bradlow, 'The Reform of the Governance of the IFIs: A Critical Assessment' in H Cissé, DD Bradlow and B Kingsbury (eds), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance*, Vol 3 (World Bank 2012) 41.

[91] 'Norway Takes Aim at the G20: One of the Greatest Setbacks Since World War II', *Der Spiegel* Interview with the Norwegian Foreign Minister, 6 June 2010; and, RH Wade and J Vestergaard, 'G20 + 5 Reinforces the Problem of Arbitrary Mechanisms', *The Financial Times (International)* 18 April 2011.

basis of influence as played out in the World Trade Organization (WTO).[92] Sweden, speaking on behalf of the European Union (EU), said as much at the UN Social Forum in August 2009, a meeting convened to discuss the impact of the economic and financial crisis on poverty alleviation and the exercise of human rights globally.[93] Another example comes by way of a Commission mandated by the President of the UN General Assembly and headed by the former World Bank economist Joseph Stiglitz. The Commission submitted a report to the General Assembly on the crisis in late 2009 calling for an independent body within the UN to analyse the global economy including its social and environmental aspects. The report recommended, *inter alia*, the establishment of a principal organ of the UN—a Global Economic Coordination Council (on par with Security Council and General Assembly)—to provide high-level leadership at the interface of economic, social, and environmental issues.[94] Little is likely to come about as a result of these recommendations; as is their practice, the lead industrialized States are making sure that no meaningful action is taken that would give the UN a role as co-ordinator on issues that involve the Bretton Woods Institutions and WTO. This strategy is predictable: it ensures that the dominant position of industrialized States is maintained (with some space for 'emerging economies'), and that poorer countries continue to be suitably marginalized from influencing international economic affairs. This is convenient because, as Koskenniemi lucidly points out: 'once one knows which institution will deal with an issue, one already knows how it will be disposed of'.[95]

V. AN INTERNATIONAL DEVELOPMENT LAW?

The moniker 'international development law' is, as such, an overstatement. What its proponents sought to achieve by its deployment remains deeply important, but it is best understood as an attempt at reading particular values—including more recently those derived from other areas of international law such as socio-economic rights—into existing legal frameworks.[96] What has been referred to by some commentators in the recent past as the 'new

[92] See, among others, Macmillan (n 69) 158; R Howse, *Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization*, UN Doc E/CN.4/Sub.2/2004/17 (2004) paras 37–9.

[93] See generally *Report of the 2009 Social Forum* (31 August – 2 September 2009), UN Doc A/HRC/13/51.

[94] *Commission of Experts of the President of the General Assembly on Reforms of the International Monetary and Financial Systems*, 19 March 2009, UN Doc A/63/XXX.

[95] M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 MLR 23.

[96] Comparable views can be found in: P Peters, 'Recent Developments in International Development Law' in SR Chowdury et al (eds), *The Right to Development in International Law* (Martinus Nijhoff Publishers 1992) 113; R Sarkar, *International Development Law: Rule of Law, Human Rights, and Global Finance* (Oxford University Press 2009) 77; and, Bennouna (n 41) 621.

international law of development',[97] is really an effort to render international law alive to the plight of the poor and to highlight attempts by developing States to see redressed its biases and lacuna. As we have seen, the UN Charter provides the first legal source of the modern era requiring collective effort on behalf of the UN Members to promote both economic and social development and human rights. But this does not of itself indicate the existence of an international development law, it merely provides a directive to have fleshed one out.[98]

What 'international development law' offered was an affirmation of the principles of equity, sovereign equality, interdependence, and the idea of the common interests and international cooperation among all States, so that they would influence the rules that governed international economic relations.[99] By fashioning legal arguments drawn from existing international doctrine,[100] NIEO sought to expose the development implications of various sets of international economic rules, and, more broadly, to provide a marker against which they could be evaluated for being just, procedurally and substantively. The aim of international development law—to imbue existing international economic law with an emphasis on equity and participation—was in many ways shaped and bolstered by the ascent of standard-setting in international human rights law in the decades following the establishment of the UN, in particular in the area of peoples' rights. The legal strategy of developing States to achieve a greater degree of substantive equality within the international community relied on the norm-setting process within the General Assembly, which necessarily took the form of soft-law declarations given the opposition of industrialized States to the establishment of binding norms on the subject. Developing countries are today still agitating for a treaty that captures their development aspirations, now under the auspices of the UN Working Group on the Right to Development.[101] It remains an elusive demand.

'International development law' and the NIEO instruments that best represent its objectives entrenched economic and social development as a principle of international law and it was on the basis of that principle that claims and demands were, and continue to be, made. But there is no separate international legal development regime the standards of which can be said to have been breached as a result of egregious global disparities in income and opportunity that pass for the status quo. 'International development law' is not 'the law regulating the relations among sovereign but economically unequal States';[102]

[97] JCN Paul, 'The United Nations and the Creation of an International Development Law' (1995) 38 HarvIntlLJ 319.
[98] UN Charter (n 13), art 13(1).
[99] Declaration on the Establishment of a New International Economic Order (n 3), preambular para 3; Charter on the Economic Rights and Duties of States (n 36), preambular para 4.
[100] See Bradlow (n 15) 196.
[101] *Report of the High-Level Task Force on the Iimplementation of the Right to Development on its Sixth Session* (14–22 January 2010), UN Doc A/HRC/15/WG.2/task force/2, para 77.
[102] Bulajic (n 38) 43.

it is more amorphous and less effective than this: its vitiated impact can be found instead here and there, for example in the preferential and non-reciprocal treatment of developing countries in international trade law, in the language of technology transfer (relevant also to current climate change negotiations),[103] in the content of the human right to development, and in development assistance. The places where international law and development converge are as such many, although individually and together are so far not sufficient to realize the underlying objectives of development law, that is of 'making the international economic order more equitable and to help developing countries to gain greater control over their destinies.'[104] With their voice and numbers developing countries chose a strategy that sought to harness the tools of an international law that had historically served them so poorly and—with inadequate effect—to reclaim their potential as a means for the egalitarian regulation of international life.

There are, however, at least two important overarching contributions to be made by the ideas advanced as international development law that do not depend on it constituting a body of law in the way just described. First, international development law exemplifies precisely why different legal regimes cannot exist in complete isolation, and second, the preoccupations that inform it bring to light the core implication of a rights-based approach to development.

On the first point, the fact that international development law does not in fact form a discrete set of rules may point up its most valuable contribution: the importance of better cross-fertilizing the international legal regimes, of trade, investment, finance, human rights, environment, and perhaps others to the ends of justice. This may represent something far more significant than the claim to a new branch of international law by drawing on *existing* areas of international law to show how they impact on and are relevant for human welfare, in particular, of the most disadvantaged globally. In a period where the fragmentation of international law has become a live issue, ensuring the universal goal of addressing poverty, inequality, and ensuring human well-being globally in an environmentally sustainable manner, points up the importance of having development objectives inform many areas of international law. As such, the term 'development in international law' might better describe the concerns that motivate international development law, and where it is situated intellectually and legally. But this begs the question as to what is meant by development.

The second, perhaps inadvertent, contribution of 'international development law' is to highlight the link between human rights and development. While it is true that there is still traction for the idea that development is coterminous with economic development and even more narrowly with economic growth, a

[103] See, for example, *Beyond Technology Transfer: Protecting Human Rights in a Climate-Constrained World* (International Council on Human Rights Policy 2011) Summary and Recommendations.

[104] Bradlow (n 15) 196–7.

holistic, human-centred view of development may yet take hold.[105] On this 'modern' account, economic aspects of development cannot be disassociated from social, political, environmental and cultural aspects.[106] In a way that is contrary to economic orthodoxy this approach sees people not only as the primary beneficiaries of development but also as agents of change.[107] The focus is on process shaped by human rights principles and standards, and not only outcomes, with a key assumption therefore being that capital accumulation does not represent development, but instead 'development [. . .] becomes the articulation of the social forces that shape capital accumulation'.[108]

VI. THE TENTATIVE CONTRIBUTION OF THE HUMAN RIGHT TO DEVELOPMENT

Under the terms of the Declaration on the Right to Development (DRD), it is each person, and not the State per se, that is the central subject of development, and as such the person should be the active participant and beneficiary of the right to development.[109] While the focus shifted to the person, this human right in international law represents a set of claims borne of the NIEO. That the DRD offers a posthumous reiteration of NIEO aspirations is unambiguous, even if the US government under the Reagan Administration sought to make it clear to the other members of the UN Commission on Human Rights in 1981 that the declaration that they were about to draft should not be used as a means of resuscitating NIEO.[110] Adopted in 1986 the General Assembly included in the preamble its awareness 'that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order'.[111] The principles that underpinned the NIEO were articulated in Article 3(3) of the Declaration whereby: 'States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.'

The preamble and the first article of the DRD reaffirm the centrality of the principle of PSNR in stating that: 'The human right to development also implies the full realization of the right of peoples to self-determination, which

[105] This former view as outlined by Fukuda-Parr holds that: 'economic growth is not only a necessary but a sufficient condition for improving human welfare.' S Fukuda-Parr, *Global Partnerships for Development.* Paper delivered at: 25 Years of the Right to Development: Achievements and Challenges, Friedrich Ebert Stiftung/OHCHR, Berlin 24–25 February 2011; and see P Patnaik, 'A Left Approach to Development' XLV *Economic and Political Weekly*, 24 July 2010; Salomon (n 29) 128–32.

[106] Bradlow (n 15) 207; and see R Danino *Legal Opinion on Human Rights and the Work of the World Bank*, Senior Vice President and General Counsel, World Bank, 27 January 2006, para 7.

[107] Fukuda-Parr (n 105).

[108] A Kadri, 'An Outline for the Right to Economic Development in the Arab World' (2011) 56 Real-World Economics Review 2.

[109] DRD (n 22) art 2(1).

[110] SP Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 HarvHumRtsJ 143.

[111] DRD (n 22) preambular para 15.

includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.'[112] Uncharacteristically for a human rights declaration (adapted as it was from the Charter of Economic Rights and Duties of States), the DRD provides not only for a 'duty' on the part of the State to formulate national development policies that improve the well-being of its people, that are participatory and oriented towards ensuring a fair distribution of the benefits of any such policies, but it also provides for a 'right' of States.[113] Motivated by the NIEO preoccupations of developing countries with the workings of the international economic system, the formulation implies that the State can assert the right of its people to development against other States and actors. Similarly, while the DRD confirms that the right to development is 'an inalienable human right', it simultaneously asserts that 'equality of opportunity for development is a prerogative both of nations and of individuals who make up nations'.[114]

Effective international cooperation as 'an essential factor for the full achievement of [a State's] development goals' is key to the NIEO's Charter of Economic Rights and Duties of States[115] just as advancing a duty of international cooperation in ensuring worldwide arrangements conducive to human-centred development provides the object and purpose of the DRD. Article 3(3) refers to the duty of all States to cooperate with each other in ensuring development and eliminating obstacles to development. Article 4(1) refers to the duty of all States to take steps individually and collectively to formulate international development policies in order to facilitate the full realization of the right to development. In Article 4(2) the DRD provides that 'effective international cooperation is essential' as a 'complement to the efforts of developing countries' and 'in providing these countries with appropriate means and facilities to foster their comprehensive development'. Like the NIEO instruments that had come before it, the Declaration was a further response—this time harnessing the language and moral authority of human rights—against an international environment largely conducive to the further accumulation of wealth by the wealthy through the expansive tendencies of global capital. In response, the right to development demanded international cooperation under law for the creation of a structural environment favourable to the realization of basic human rights, for everyone.[116]

[112] ibid art 1(2); see also DRD, preambular para 7; Declaration on Permanent Sovereignty over Natural Resources (n 35) art 1.

[113] DRD (n 22), art 2(3), preambular para 2; Charter on the Economic Rights and Duties of States, Ch II (n 36) art 7.

[114] DRD (n 22) preambular para 16.

[115] Charter on the Economic Rights and Duties of States (n 36) preambular para 10; see also among other provisions, preambular paras 1 and 2 and Ch 1 on 'Fundamentals of International Economic Relations'.

[116] ME Salomon, 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development' in SP Marks (ed), *Implementing the Right to Development: The Role of International Law* (Harvard School of Public Health/Friedrich Ebert Stiftung 2008) 17.

As a so-called third generation right, the right to development has the developing State as both a right-holder and duty-bearer,[117] with the individual as the ultimate beneficiary whose human rights can only be secured, in the words of Bedjaoui, by 'liberat[ing] the State from certain international arrangements that siphon off its wealth abroad'.[118] The Charter on the Economic Rights and Duties of States may have built on the insight that the obstacles to bringing welfare to the people of the developing world are not only internal but often external, but it was the DRD that placed people, not States, at the heart of the endeavour to dismantle the mechanisms of economic subjugation, making a just international economic order a human rights matter.

Ian Brownlie concluded in the years following the DRD's adoption that 'the right constitutes a general affirmation of a need for a programme of international economic justice.'[119] There are strong arguments that it makes a distinctive normative contribution to international law: the Declaration gave legal expression to the notion that the ability of States to develop and to fulfil their human rights obligations are constrained by the structural arrangements and actions of the international community.[120] As the drafting of the DRD highlights, it was meant to give substance to the human right to a just international order as recognized in the Universal Declaration of Human Rights in 1948.[121] The juridical re-imagining of the role and parameters of a contemporary international law of human rights that the right to development asserts in the interest of global justice are not to be dismissed lightly. However, like the NIEO claims which had come before, it seems that it will only ever be part of an unfinishable story.

VII. CONCLUDING REMARKS

What has emerged as the constant feature from NIEO to now is a substandard evolution in law. Political self-interest within a neoliberal order has yielded juridical intransigence where it counts most; progressive legal principles aimed at a system of international economic justice have all but atrophied. Our economic order, shaped for decades by the neoliberal variant of market capitalism, serves the interests of capital and corporations. The focus on profit rates are mediated by a structure of political power and legal authority that in significant ways have strayed far from seeking justice and in fact might foresee particular roles for the poor of the world: their hunger, dispossession and

[117] For a detailed consideration, see Salomon (n 29) 114–21; see also A Orford, 'Globalization and the Right to Development' in P Alston (ed), *Peoples' Rights* (Oxford University Press 2001) 137.

[118] M Bedjaoui, 'The Right to Development' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff 1991) 1180.

[119] I Brownlie, 'The Human Right to Development' (Commonwealth Secretariat 1989) 8.

[120] Salomon (n 29) 50–6.

[121] *Report of the Working Group of Governmental Experts on the Right to Development* (Fourth Session, 9 December 1982), UN Doc E/CN4/1983/11 annex IV, Pt I, Section II, art 1.

disempowerment paving the way for the transnational imperial plunder of their natural resources and other assets;[122] while their desolate status may invite a profit-generating enterprise in the design and practice of public–private partnerships for poverty reduction and sustainable pro-poor development.[123] We are now undeniably aware of the ways in which violence and natural disasters pave the way for foreign commercial intervention and gain,[124] and how it may be possible that an interventionist penal State set up to respond to social restiveness is a necessary corollary of wealth accumulation by a small minority—a defining characteristic of the neoliberal order.[125] It is difficult to conclude that the nature and scale of poverty and underdevelopment globally are anything but a policy choice of those people and States at the top,[126] and that the international law we have is the international law that serves those choices well.[127]

The NIEO and subsequent legal initiatives that sought to bring economic and social development to bear on international law were dismissed as either aspirational[128] or misguided.[129] The idea of a hierarchy of international norms that challenges the fragmented state of international law and would have fairness, justice and human development prioritized over investment, as well as trade and finance, reflects our moral intuitions, the assertions of human rights bodies,[130]

[122] A Kadri, *Another Famine in the Horn of Africa: Putting Hunger in Context*, Triple Crisis, 10 August 2011. <http://triplecrisis.com> on 'landgrabs', see among others, O de Schutter, *Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, Report of the Special Rapporteur on the right to food, UN Doc A/HRC/13/33/Add.2, 28 December 2009; and ME Salomon, 'The Ethics of Foreign Investment: Agricultural Land in Africa', *The Majalla*, 5 August 2010 (English and Arabic) <http://www.majalla.com/en/ideas/article94948.ece>.

[123] A Saith, 'From Universal Values to Millennium Development Goals: Lost in Translation' (2006) 37 Development and Change 1171 and 1196.

[124] N Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Allen Lane 2007); Sornarajah (n 52) 6.

[125] L Wacquant, *Bringing the State Back In*, British Journal of Sociology Public Lecture, London School of Economics, 6 October 2009; L Wacquant, *The Punitive Regulation of Poverty in the Neoliberal Age* OpenDemocracy, 1 August 2011.

[126] See generally A Gewirth, 'Duties to Fulfil the Human Rights of the Poor' in T Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press/UNESCO 2007) 228; T Pogge, 'Introduction' in T Pogge (ed), ibid 6; S Marks, 'Human Rights and the Bottom Billion' (2009) 14 EHRLR 48.

[127] See further ME Salomon, 'Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism' (2008) 51 GYIL 39.

[128] See M Sornarajah, 'A Justice-Based Regime for Foreign Investment Protection and the Counsel of the Osgoode Hall Statement', Special Section on *International Law, Human Rights, and the Global Economy: Innovations and Expectations for the 21st Century* (2012), Guest Editor ME Salomon, 4 Global Policy Journal 3.

[129] J Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 CalWIntlLJ 473.

[130] *Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization* (n 18), para 2; *Sawhoyamaxa Indigenous Community v Paraguay*, Judgment of 29 March 2006, Inter-Am Ct HR (ser C), Report No 146, para 140 (The Inter-American Court of Human Rights holds that the enforcement of bilateral investment treaties should always be compatible with the American Convention on Human Rights).

and the hopes of academic experts,[131] but the facts hardly support its existence. A number of features emerge as central to the narrative of international law that instead foreground its failures: asymmetry in political power and the law that is borne of it; its weak redistributive capacity; and its structural biases that allow for the need that we know today. It is a credible contention that we live in world 'devoid of sentiments of solidarity with the deprived and the oppressed';[132] not least in its modern history, international law has hardly demonstrated otherwise.

What will by now have become clear is why attempts to bring development aspirations to bear on international law over a period of 50 years have come to far less than any reasonable person would hope: the answer is simply because the *beneficiaries* of the global economy have ensured that it is so. Change will only come when the rules cease to serve only the interests of the powerful. Indeed, it may well be the case that it will soon be developed States that revive the NIEO's prescriptions as they may increasingly have to rely on its precepts as they become recipients of inward investments that limit their exercise of sovereignty under the very rules they fashioned.[133] In the final analysis then, we must conclude that the enduring absence of economic justice represents an acute omission for the majority of the world's inhabitants but that this truth offers only an incomplete appraisal of a shared story. To some, the current system has not been a failure at all.

[131] *The Public Statement on the International Investment Regime* (n 64).

[132] BS Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 MelbJIntl L 499.

[133] Sornarajah (n 128).