EMERGING INTERNATIONAL DEVELOPMENT LAW AND TRADITIONAL INTERNATIONAL LAW—CONGRUENCE OR CLEAVAGE?

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One of the most significant developments in contemporary international economic relations has been the proliferation of a complex network of arrangements and undertakings for the benefit of the lesser developed countries. These arrangements range from declarations and final acts adopted at international conferences to more solemn obligations binding on various combinations of states and other international legal persons.

1 A. MUTHARIKA, INTERNATIONAL LAW OF DEVELOPMENT ix (1978)

I. INTRODUCTION

One of the primary purposes of the United Nations (UN) is to achieve "international cooperation in solving international problems of an economic, social, cultural or humanitarian character." Thus, in the past four decades, the international community, led by the developing nations, has sought to remedy existing problems of underdevelopment.

The emergence of politically independent developing countries in the post-war era has had a discernible impact on the present state of international law. The attainment of political independence by these countries brought into focus the economic disparities in the international system and the accompanying issue of "economic self-determination." A clamor has arisen for a more equitable international economic system to adequately reflect the needs and aspirations of the developing countries.

I would like to thank Professor Paul Kahn for his excellent supervision of earlier drafts of this article.
1 U.N. CHARTER art. 1, para. 3.
2 See M. BULAJIC, PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW (1986). "The struggle for the establishment of the New International Economic Order represents a continuation of the process of decolonization in the economic sphere, the negation of domination and of neo-colonialism in international economic relations." Id. at 15.
Gradually, a new discipline in contemporary international law referred to as "international development law" emerged. This article focuses on the legal status of emerging issues in international development law as a means of understanding the conceptual framework within which it is written. The concept is distinguished from other related terms such as "the right to development" and "The New International Economic Order". A brief historical exegesis of the international law of development is given, along with a discussion of its normative content, focusing primarily on treaties and other written instruments, state practice, judicial and juristic opinion, as well as the practice of intergovernmental and non-governmental organizations.

The article takes the position that although international development law is a new and emerging area of international law, its sources can be derived from the traditional formulation stipulated in article 38, paragraph 1 of the statute of the International Court of Justice (ICJ). The article stresses that international development law is necessitated by the increasing interdependence of states in international relations. Further, the emerging issues in international development law are in the interest of the entire international community, including developed as well as developing countries. As a result, international development law has a salutary effect on world order and basic human dignity and should therefore be actively promoted by the community of states. In conclusion this article recommends methods for enhancing the significance and importance of international development law.

A. Clarification of Terms

"International development law" refers to the law regulating the relations among sovereign but economically unequal states. It is "the international law of the modern era of the development of mankind." The "law of development" must be distinguished from the "right to development." Whereas the former generally refers,
inter alia, to the myriad international instruments constituting the corpus of the subject of development, the latter could be said to be a branch, albeit a significant aspect of the law of development. The concept of a right to development, for which there is no precise legal foundation, has evolved rapidly with a minimum of international scrutiny. The law of development, however, refers to a body of principles and rules formed within the international legal system with the aim of promoting development.

The international law of development is the emerging legal structure of the proposed New International Economic Order (NIEO). This law of development is the principal means through which attempts are being made to achieve a NIEO. It is an instrument for the economic and legal transformation of international relations whose basic aim is to promote equity and to compensate the developing countries for their disadvantaged position vis-a-vis developed countries.

II. EVOLUTION OF THE LAW OF DEVELOPMENT AS A NEW DIMENSION OF INTERNATIONAL LAW

The concept of the law of development as a new discipline in contemporary international law can be traced to the writings of the
late Professor Friedmann. Friedmann described the law of international economic development as a body of law which must concern itself not only with the minimum principles adequate for the legal protection for foreign investment, but also with the principles protecting national control of natural resources, as well as with matters pertaining to the policies, methods and structures of international financing of economic development.

In 1965 Professor Michel Virally referred to the law of development as a new area of international law. Thereafter, the Secretary-General of the United Nations prepared a survey of international law in response to a request by the International Law Commission of the UN. The survey stressed that international law was expanding:

from a body of law imposing negative restraints on independent sovereign states, to a body of law which, in recognition of conditions of increasing interdependence imposes on states various positive obligations of a procedural and substantive kind. The law,

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10 The term "economic development" was used interchangeably with "development" and "growth" in the period preceding the early 60's. See ECOSOC Commission on Human Rights: Report of the Secretary General, U.N. Doc. E/CN.4/SR 1334 at 7 (1979) [hereinafter Secretary General's Report]. Recent emphasis has, however, been on a far broader concept of development, particularly as it relates to the social aspects of development. The Brandt Commission for example, states that "development is more than the passage from rich to poor, from a traditional rural economy to a sophisticated urban one. It carries with it not only the idea of economic betterment, but also of greater human dignity, security, justice and equity." NORTHEAST-SOUTH: A PROGRAM FOR SURVIVAL 49 (1980).

The U.N. Commission on Human Rights has defined development as:

A comprehensive economic, social, cultural and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.


In this article, for purposes of brevity and clarity in analysis, only the economic aspects of development will be discussed.

11 See Friedmann, supra note 9, at 1165.


in other words, is coming to be seen as concerned not only with the protection of the independence of states, but also with the duty to cooperate in the promotion of national and human welfare.\textsuperscript{14}

It also described the law relating to economic development as:

an emerging body of law as part of, and a complement to, the objective stated in the Preamble to the United Nations Charter of promoting "social progress and better standards of life in larger freedom" and the purposes of the Organization mentioned in paragraph 3 of article 1 of the Charter, namely "to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character."\textsuperscript{15}

Professor Schachter gave prominence to the concept of international development law in his article \textit{The Evolving International Law of Development}.\textsuperscript{16} He identified two broad categories of the \textit{corpus} of international development law: first, the complicated network of international undertakings and arrangements concerned with aid, trade, investment, and the like for the benefit of the less developed countries\textsuperscript{17}; and second, "the resolutions, declarations, charters of rights and duties, standards and final acts which seem to proliferate in international organizations and conferences."\textsuperscript{18} In effect, the evolving international law of development is to be derived, \textit{inter alia}, from the practice of states, treaties and judicial opinion.

\textsuperscript{14} Id. at 35.
\textsuperscript{15} Id. at 34-35.
\textsuperscript{17} Id. As Schachter explains, these undertakings involve a great variety of relationships, including those that are bilateral, regional, or global. \textit{Id}.
\textsuperscript{18} Id. at 3. According to Prof. Schachter, the central feature of the contemporary international law of development is:

the idea of need as a basis for entitlement . . . . The present rationale for international assistance and preferential treatment on the basis of need is more in keeping with the premises of the welfare state - that is, to provide for the minimal human needs of the most disadvantaged segments of society . . . thus there is increased acceptance of the idea that specially disadvantaged countries such as landlocked states or former colonial territories or states dependent on a single commodity have special needs that entitle them to preferential treatment.

\textit{Id}. at 10.
International development law is a compendious term for several new but interrelated principles in international law. Its precise scope, content and substance are still emerging. A review, however, of the texts of bilateral and multilateral agreements, UN declarations and resolutions, as well as an examination of the practice of major development actors reveals that specific norms have crystallized. The most important of these include:

1. The duty of states to cooperate for global welfare.
2. The principle of preferential treatment for developing countries.
3. The principle of entitlement of developing countries to need-based development assistance.

A. The Duty of States to Cooperate for Global Welfare

The duty of cooperation is derived largely from the UN Charter, article 1, paragraph 3 which states that one of the main purposes of the UN is “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character.” This objective is specified more precisely in article 55 of the Charter, and all members have pledged, under article 56, “to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in article 55.”

Scores of General Assembly resolutions and declarations pertaining to the economic and social progress of the developing countries, to the establishment of the NIEO, and to the strategies for the UN Development Decades reiterate the duty of states to cooperate for global welfare. Prominent among these is the 1970 Declaration on

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19 Art. 55 provides that the U.N. shall promote:
   a. higher standards of living, full employment, and conditions of economic and social progress and development;
   b. solutions of international economic, social, health and related problems; and international cultural and educational cooperation; and,
   c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. CHARTER art. 55.

20 Arts. 55 and 56 have been described as “the most significant provisions of the United Nations Charter.” See I. ELIAS, THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS 182 (1983).
Principles of International Law Concerning Friendly Relations and Cooperation among States\textsuperscript{21} (hereinafter Declaration on Friendly Relations). Others include the Declaration and Program on the Establishment of a NIEO,\textsuperscript{22} which states that international cooperation for development is the shared goal and common duty of all countries; the Charter of Economic Rights and Duties of States;\textsuperscript{23} and the 1980 resolution on an International Development Strategy for the Third UN Development Decade.\textsuperscript{24}

The UN Charter and these numerous General Assembly resolutions and declarations are often the basis for an assertion of the existence of a duty to cooperate for global welfare at the international level. The debate of the 37th session of the UN Commission on Human Rights, for example, stressed that "action to promote development [was] a legal obligation of the international community, and in particular of the industrialized countries."\textsuperscript{25} Several textwriters have elaborated on this duty as an established principle of international law.\textsuperscript{26} The moral and philosophical underpinnings of this duty of cooperation for global welfare are discussed below.


\textsuperscript{23} G.A. Res. 1281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1975), reprinted in 14 I.L.M. 251 (1975). Some say the Charter creates relatively few firm obligations, since so much of the Charter is diluted by the use of "should," considerable significance accrues by default to those passages that create firmer obligations and rights, and that even though the language adopted mandates action, the nature of that action is left almost completely to the discretion of individual States. The obligation, it is said, is firm, but not very tangible it is therefore unlikely that this Charter provision would motivate States to alter their behavior. See Gamble & Frankowska, International Law's Response to the New International Economic Order: An Overview, 9 B.C. INT'L & COMP. L. R. 257, 274 (1986); cf. note 51, infra.


\textsuperscript{25} See Secretary-General's Report, supra note 10, at 45.

\textsuperscript{26} See e.g. Verwey, supra note 4, at 20 (arguing that the most obvious secondary principle of the NIEO is that of the duty of all states to cooperate for the welfare of all, in particular the duty of the developed states to assist the developing states in the course of development); Lachs, The Development and General Trends of International Law in Our Time, 169 (IV) RECUEIL DES COURS 13, 96-100 (1980).
B. The Principle of Preferential Treatment for Developing Countries

The principle of preferential treatment for developing countries\(^2\) is based on the idea that unequals should be treated unequally in order to obtain an equitable application of the principle of equality.\(^2\) It thus introduces legal inequality or "positive discrimination"\(^2\) in international economic relations to the benefit of developing countries, and:

aims at correcting the inequitable effects of the traditional twin liberal principles of freedom and legal equity—which, in a society in which the economically weak have to compete with the economically powerful on an equal footing, tend to favor the latter. As one of the most conspicuous legal offsprings of the fundamental of "solidarity," it constitutes a cornerstone of what the Charter of Economic Rights and Duties of States refers to as "collective economic security for development."\(^3\)

The norms of equal and non-discriminatory treatment in the relations of states (based on the international economic system founded after the Second World War) came under increasing attack in the early

\(^{27}\) Discussions concerning the principle's implementation give rise to the problem of defining a developing country. The most convenient and least problematic criterion would be a resort to UN documentation and statistics for identification of the class of developing countries.

\(^{28}\) The distinction between equity and equality, although sometimes difficult to discern, is important in this context. "Equality" suggests possession of the same rights, privileges, duties, etc. Here, however, there is economic inequality between developing and developed countries. The argument, therefore, is that an application of equitable (i.e. just; existing in equity; available or sustainable in equity, or upon the rules and principles of equity - BLACK'S LAW DICTIONARY 482 (5th ed. 1984)) principles will secure greater economic equality.

Compare remarks by Mr. Tammes in a discussion by the International Law Commission (ILC) on the most favored-nation clause. See 1 Y.B. INT'L LAW COMM'N 208 (1986) (stating that differential treatment of developing states was "reminiscent of the Aristotelian definition of equality as requiring that the unequal should be treated unequally.")


\(^{30}\) Id. (footnotes omitted).
60's. One of the strongest attacks came from the first Secretary-General of the United Nations Conference on Trade and Development (UNCTAD), Raul Prebisch, when he asserted that "no matter how valid the principle of the most favored nation may be in trade relations among equals, it is not an acceptable and adequate concept for trade among countries with highly unequal economic power." UNCTAD subsequently called for "the early establishment of a mutually acceptable system of generalized non-reciprocal and non-discriminatory preferences which would be beneficial to developing countries." The claim to preferential treatment has since been extended to fields other than trade. Article 19 of the Charter of Economic Rights and Duties of States, for example, explicitly states:

With a view to accelerating the economic growth of developing countries and bridging the economic gap between developed and developing countries, developed countries should grant generalized preferential non-reciprocal and non-discriminatory treatment to developing countries in those fields of international economic cooperation where it may be feasible.

Similar provisions can be found in the Lima Declaration and Plan of Action on Industrial Development and Cooperation, General Assembly Resolution 3362 (5-VII) on Development and International Economic Cooperation, the Development Strategy for the Third

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32 U.N. Final Act and Report of UNCTAD II, Annex I (E/CONF. 46/141). The Generalized Preferences (GP) system has been described as "the most important practical application up to date of the principle of differential treatment." Yusuf, Differential Treatment As a Dimension of the Right to Development, in HAGUE WORKSHOP, THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL 233, 234 (1979) [hereinafter HAGUE WORKSHOP 1979].
33 G.A. Res. 1281 supra note 23, at art. 19 (1975). It should be noted that preferential treatment is not limited to tariff preferences but is also sought in all fields of international economic cooperation where it is feasible. It is also recognized in the areas of transfer of technology (Art. 13), and cooperation in the economic, social, cultural, scientific and technological fields (Art. 9).
34 U.N. Doc. A/10112 (1975) reprinted in 14 I.L.M. 826 (1975) [hereinafter Lima Declaration]. The plan of action suggests a series of special measures for building up the necessary economic and social infrastructure in the least developed, land-locked and island developing countries; the redeployment of certain productive capacities to the developing countries; and an expansion of the Generalized System of Preferences.
United Nations Development Decade, and in the 1982 UN Convention on the Law of the Sea. The status and legal significance of the principle enshrined in these documents is more extensively discussed below.

C. The Principle of Entitlement of Development to Need-Based Development Assistance

The principle of entitlement is aimed at bridging the disparities in international economic relations. This "new conception of international entitlement to aid and preferences based on need," as suggested earlier, is a central feature of the international law of development. It is expressed "in many of the agreements relating to trade preferences, investment, and resources; in the bilateral and multilateral programs of aid; and in the broad normative resolutions adopted by the United Nations bodies on commodities, relocation of industry, the oceans, international liquidity, and numerous related matters."

Thus, the International Development Association, for example, was created in 1960 for the purpose of accelerating the economic

For the text of the resolution, see 14 I.L.M. 1524 (1974). The resolution calls for inter alia: preferential access for the developing countries to the domestic markets of the developed countries; favorable and concessional terms on all loans and credit extended to the developing countries; and development and transfer of technologies appropriate to furthering the growth of developing countries. See id.

Reprinted in S. MUTHARIKA, INTERNATIONAL LAW OF DEVELOPMENT 17.

U.N. Doc. A/CONF.62/122, reprinted in 26 I.L.M. 1261 (1982). The provisions on preferential treatment of developing countries are found in different sections of the Convention. Particularly instructive are Article 148 ("The effective participation of developing states in activities in the Area shall be promoted . . . having due regard to their special interests and needs, and in particular to the special need of the landlocked and geographically disadvantaged . . ."); Article 144 (programs for transfer of technology to developing states with regard to activities in the Area and for providing opportunities to personnel from the developing states for training in marine science and technology and for their full participation in activities in the Area); Article 150 (Policies relating to activities in the Area shall be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over all development of all countries, especially developing states). Id.


Id.
development of less developed countries. International financial institutions like the World Bank were also set up with the specific purpose of encouraging "the development of productive facilities and resources in less developed countries." In light of these documents, some argue the entitlement to international development assistance:

has become integrated in the thinking and practice of States on both sides of the process, because they all deem it right and they deem it obligatory; it has effectively passed into the reality of international custom and forms part and parcel of customary international practice which constitutes one of the sources of international law.

As a result of the consistent and widespread response to the special problems of developing countries, some suggest customary international law already recognizes developing countries as a special category of subjects. The merits of these claims, as well as of the principle of entitlement of developing countries to need-based development assistance, are discussed below.

IV. Evaluation of the Evidence

Having outlined the normative content of international development law, this section analyzes the probative value of the previously mentioned sources. It establishes that the sources of international development law are in pari materia with the traditional sources of international law, as stipulated in article 38 of the I.C.J. statute. International development law is also derived from extra-legal, albeit equally valid, sources of contemporary international law.

A. International Conventions and Instruments

As mentioned previously, the normative content of international development law is derived in large measure from the UN Charter.

43 HAGUE WORKSHOP 1979, supra note 32, at 97.
44 See e.g., Verwey, The Recognition of the Developing Countries As Special Subjects of International law Beyond the Sphere of United Nations Resolutions, id., at 372; cf. Mestdagh, The Right to Development, 28 NETH. INT’L REV. 30, 36-37 (1981) (arguing against recognition of developing countries as a special category of subjects in international law, since that would entail “creating not only two kinds of subjects of the law, but also two kinds of law.”)
Some argue, however, these provisions of the Charter do not create any legal obligations on the part of member states, and since they are formulated in general non-specific wording, they are "meaningless and redundant." This argument has a very superficial theoretical appeal, however, article 56 of the Charter clearly obligates a state to do something towards the achievement of the purposes set forth in article 55. This implies a right to do nothing does not exist. A teleological interpretation of the Charter requires that its provisions be regarded as legally binding on member states, particularly in light of Charter provisions that "express clearly the obligations of all members. . . . (While the provisions are general, nevertheless they have the force of positive international law and create basic duties.)"

Political and juridical organs of the UN have also interpreted the provisions of articles 55 and 56 as constituting legal obligations. The preferable view, therefore, is that these Charter provisions establish firm commitments in the form of a binding treaty obligation.

This conclusion fails to solve the problem of obligation because the UN Charter does not specify in detail what kind of action the member states are expected to take. Article 13(1) of the Charter, however, calls upon the General Assembly to "initiate studies and make recommendations for the purpose of: a) . . . encouraging the progressive development of international law and its codification." Thus, several pertinent UN resolutions and declarations have clarified the substantive principles of international development law. The International Covenant on Economic, Social and Cultural Rights, for example, clearly requires:

Each State Party to the present Covenant [to undertake] steps, indirectly and through international assistance and cooperation

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45 H. Kelsen, The Law of the United Nations 99 (1951) ("Art. 56 is one of the most obscure provisions of the Charter," [and] does not impose any obligation upon the members. . . . Legally, article 56 is meaningless and redundant.")

46 Verwey, supra note 4, at 21. To be sure, the claims of the developing countries are simply for the operation of law as in certain constitutional systems by way of affirmative action and reverse discrimination to secure equal opportunity.


49 Some textwriters have insisted that the U.N. Charter should be regarded as a Constitution or Charter, rather than a treaty. For our purposes here, however, by whatever designation the Charter is referred to, this does not detract from the legal force of its provisions.
especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means including in particular the adoption of legislative measures.\(^50\)

At least 70 states are party to this Covenant, and their treaty obligation therefore imposes a legal duty\(^51\) on them. This is consistent with the fundamental precept of international law that agreements are binding on the parties and must be performed by them in good faith (\textit{pacta sunt servanda}). The principle has been so universally applied that it suffices merely to state it.\(^52\)


Admittedly the Covenant is somewhat nebulous concerning the exact nature of the obligations it seeks to create. For example, it raises the question of what a country's maximum available resources are. Does it mean the United States, for instance, in signing the Covenant, was cognizant of the possibility of subjecting its defense budget or allocation of its domestic resources to third party review? The question, thus framed, must be answered in the negative. The Covenant also leaves unanswered what are all appropriate means.

\(^51\) The legal duty may exist notwithstanding the lack of specificity of the kind of obligation involved. Broad generalization and imprecise formulation, as in this Covenant are often considered too indefinite to support the intention of creating legal obligations. This, however, is not a hard and fast rule. The legal implications of the UN Charter, for example, together with other constitutional instruments, though formulated in broad general terms, have not been seriously disputed and are generally considered binding. \textit{See} Chowdhury, \textit{Legal Status of the Charter of Economic Rights and Duties of States, in Legal Aspects of the New International Economic Order 79, 81} (Hossain, ed. 1980).

Under Article 18 of the Vienna Convention on the Law of Treaties, a State is obliged to refrain from acts which would defeat the object and purpose of a treaty it has signed, even if the treaty is not yet in force. In deciding the exact nature of the legal obligations devolving on states, courts should therefore consider the object and purpose of the Covenant which, \textit{ex hypostesi}, is the promotion of international development. The domestic law analogue to this interpretation of legal obligation is what the French refer to as "\textit{obligations de resultat}," rather than mere "\textit{obligations de moyen}"—i.e., obligations which guarantee the attainment of certain results, so that the mere fact of the non-materialization of the result constitutes a violation of the obligation, rather than an obligation of mere performance which leaves discretion to the subject on whom the duty is imposed. The ICSID award of Klockner v. Cameroon, 1 J. INT'L ARB. 145 (1984), elaborated on this concept of "obligation of result." The difficulty with this argument, however, is that the degree to which the desired result will be attained rests significantly more with the developing countries themselves, depending on how they utilize the development assistance granted them. Moreover, most of the developing countries simply do not have the means of guaranteeing the results for their citizens.

\(^52\) On the "strategic nature" of this cardinal principle in the law of treaties,
The Declaration on Friendly Relations serves as a further example. This authoritative declaration was unanimously adopted with the full participation and consent of all the member states. In effect, the consensus on its adoption conforms to the discernible "trend from consent to consensus as the basis of international legal obligations."

The legal status of international development law is contingent on the significance attached to UN resolutions and declarations. see T. ELIAS, NEW HORIZONS IN INTERNATIONAL LAW 44 (1979). The Covenant on Economic, Social and Cultural Rights adds that the international cooperation is based on free consent. See Annex to G.A. Res. 2200 supra note 50, at art. 11, para. 1. As later discussed, however, this free consent has been abundantly manifested in the practice of states.

See supra, note 21. See also the Universal Declaration on Human Rights, which "has passed into the mainstream of contemporary international law guiding national as well as international constitutions and action." See T. ELIAS, supra note 20, at 214. The Declaration is now regarded as a part of the "law of the United Nations." I. BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS 21 (1981).


Perhaps the obligation to grant assistance arises out of the system of the UN itself. The UN could assert a claim on behalf of the developing countries, against developed countries, for international development assistance. The developed countries could meet this obligation bilaterally as well as unilaterally.

The question as to what substantive content of the declaration brought about this consensus is answered by a perusal of the declaration. It specifically mentions, among others, the principle that states shall fulfill in good faith the obligations assumed by them in accordance with the Charter and that all States have a duty to cooperate. Thus, if the United States refused to pay its share of UN assessment which would otherwise have been used to channel aid to the third world, it could plausibly be argued that the United States had not acted in good faith nor adhered to the duty to cooperate for international welfare. Admittedly, a difficult question remains concerning the exact standards or criteria used in assessing whether countries adhere to this obligation. It is suggested that a purposive and contextual interpretation on a case-by-case basis would illuminate the decision-making process.


The United States Supreme Court also relied on the notion of consensus in assessing the reality of an international legal obligation. In Banco Nationale de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Court held that international law rules imposing a duty upon an expropriating government to pay an alien "prompt, adequate and effective" compensation were no longer supported by a consensus of sovereign states, and therefore the validity of those rules were so ambiguous as to make them inapplicable to the case.

This conclusion is a result of the bulk of the corpus of international law incorporated and codified primarily in Assembly resolutions and declarations.
Several respected textwriters take the view that these resolutions and declarations do not have any legally binding force.\(^5\)\(^8\) Admittedly, such resolutions are not a formal source of law within the formulation of article 38(1) of the Statute of the I.C.J. Under the UN Charter, the Assembly does not have the legal competence to legislate or to adopt legally binding decisions except those regarding certain organizational matters such as regulations for the Secretariat and other procedural rules. There is indeed a vast amount of literature on this age-old question.\(^5\)\(^9\) A review of such literature is, however, beyond the scope of this article. Despite their formally non-binding character "even within the conservative framework of article 38 of the statute, legal effect may be given to the collective pronouncements of the General Assembly."\(^6\)\(^0\) Indeed in a sense, these resolutions reflect state practice.\(^6\)\(^1\) State practice, as is generally known, is identical with custom, which undoubtedly plays an important role within the framework of the UN.\(^6\)\(^2\) For this discussion, it is instructive to note the former President of the I.C.J. has recognized three of the declarations giving substantive content to international development law as examples of law-making resolutions and declarations of the General Assembly.\(^6\)\(^3\)

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\(^6\)\(^0\) Schachter, supra note 16, at 5. General Assembly resolutions have had a formative influence on the development of international law, and are now regarded as expressions of common interest and the "general will" of the international community. O. Schachter, supra note 59, at 111.

\(^6\)\(^1\) R. Higgins, supra note 59, at 2-5. "International custom is to be deduced from the practice of states, which includes their international dealings as manifested by their diplomatic actions and public pronouncements .... [T]he body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence." Id.

\(^6\)\(^2\) For a long-standing debate on a legitimate interpretation of state practice or custom, see Akehurst, Custom as a Source of International Law, 47 Brit. Y.B. Int’l L. 1 (1974-75), and D’Amato, The Concept of Human Rights in International Law, 82 Colum. L. Rev. 1110 (1982).

\(^6\)\(^3\) These three declarations are:
The numerous resolutions and authoritative declarations of the UN and other international conventions adopted by the world community clarify and elaborate principles of international law. These developments have given rise to rules of law which are in a stage of approximation to customary international law.

B. International Custom

Customary practice is a dependable guide for ascertaining the continuing scope and meaning of commitments reduced to writing in treaties and international agreements, and "[since] it is based upon collaborative behavior, it is most likely to be representative of the common interests of the community." The creation of international development law came about in large part through the process of claims and counter-claims made by states. As a matter of daily practice, international law is largely concerned with claims, "but the claims themselves, although they may articulate a legal norm, cannot constitute the material component of custom." It thus remains to be seen whether the claims are manifested in the actual practice of states.

The practice of providing development assistance to developing countries through a program known as Official Development Assistance points to the recognition of the substantive inequality

1. Resolution on the Charter of Economic Rights and Duties of States;
2. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States;

See I. Elias, supra note 20, at 213-14.


66 Development assistance is one of the primary means through which capital is sent to the developing countries. It represents approximately a third of all external capital receipts by developing countries. Organization for Economic Cooperation and Development, Development Cooperation; Efforts and Policies of the Members of the Development Assistance Committee, 1982 OECD Review, 51, 53 (1982).

Development assistance, which is intended to be a means for poorer countries to better their quality of life, has often failed to achieve its basic goals because of serious environmental and social disruption caused by intended and unintended effects of these activities. See Muldoon, The International Law of Ecodevelopment; Emerging Norms for Development Assistance Agencies, 22 Tex. Int’l L.J. 1, 2 (1987).
among states. The Generalized Preference System (GPS), under which developed countries grant preferential and non-reciprocal treatment for developing countries, is also generally followed. Since March 1972, UNCTAD, in collaboration with UNDP, has provided technical cooperation on the GPS adopted by UNCTAD in 1970. This preferential tariff system provides advantages to developing countries by enabling qualified products to enter markets of preference giving countries at reduced or totally eliminated most favored nation rates of duty. The GPS is designed to raise the levels of developing countries’ foreign exchange earnings, rates of industrialization, and levels of economic development.67

Another example is the Lome Conventions establishing a compensatory financing machinery called STABEX.68 STABEX provides the African, Caribbean and Pacific (ACP) States with the right to be compensated by the European Community for shortfalls in export earnings from specified primary products, under certain circumstances, and up to certain limits. The importance of these treaties is clear, since “they obligate a large number of states to concrete NIEO-relevant conduct; the obligations are both firm and tangible.”69

State Practice shows that the differential treatment of developing countries is recognized and accepted by the international community and is applied by the developed countries in their relations with developing countries. Some object, however, that this treatment does not establish international custom. The developed states may have several motives for granting development assistance but do not act out of a legal conviction. In addition, it is argued, the lack of opinio juris70 detracts from its essence as custom. The difficulty

67 UNCTAD BULLETIN No. 230, at 14 (March 1987).
70 Though some legal commentators have minimized the importance of opinio juris, the World Court has categorically insisted upon this requirement of a psychological element. See, e.g., The Lotus Case, 1927 P.C.I.J. (Ser. A) No. 9, at 28; North Sea Continental Shelf Cases, 1969 I.C.J. 3, at para. 77.
with the \textit{opinio juris} requirement is that the first States to adopt a new practice are regarded as acting on the basis that the practice is obligatory before it has become obligatory.\footnote{Kelsen, for example, accepts \textit{opinio juris} in theory, but observes that it can only be inferred from conduct. Thus, the conduct, and not the state of mind, is legally decisive. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 564 (1966).} Additionally, "subjectivities are only ascertainable to an onlooker through overt behavior and one necessarily relies on conduct to infer the perception of others."\footnote{\textit{Id.}; cf. Schachter, \textit{Towards a Theory of International Obligation}, 8 VA. J. INT'L L. 300, 313 (1968) ("But it would be misleading to conclude that this implied the elimination of a psychological test. It is one thing to use conduct as an indicator of \textit{opinio juris}; it is another - and quite a different process - to evaluate conduct independently of \textit{opinio juris}").} State practice on the matter is specific; it has been constant and consistent, so that what started as a mere habit has gradually but inevitably hardened into a general practice based on the conviction that it is required.\footnote{Even a constant, consistent, and uniform nature of State Practice does not necessarily establish custom. This is particularly true since States like the United States, although they give development assistance and the like, have consistently denied that they are under a legal obligation to do so. Specific practice, however, could lead one to infer a certain degree of \textit{opinio juris}. It could be argued that the developed countries involved grant development assistance because they deem it right to do so. This may not necessarily imply \textit{opinio juris}, but it does not detract from the psychological element involved. \textit{See also}, O. SCHACHTER, \textit{SHARING THE WORLD'S RESOURCES} 8 (1977). Schacter states: [W]hat is striking is not so much its espousal by the large majority of poor and handicapped countries but that the governments on the other side, to whom the demands for resources are addressed, have also by and large agreed that need is a legitimate and sufficient ground for preferential distribution. This agreement is evidenced not only by their concurrence in many international resolutions and by their own policy statements, but also, more convincingly, by a continuing series of actions to grant assistance and preferences to those countries in need. \textit{Id.}}

\textbf{C. Other Traditional and Non-Traditional Arguments for International Development Law}

Some argue a moral duty of reparation devolves upon the developed countries because underdevelopment is basically the sequel of colonial domination.\footnote{\textit{See Secretary General's Report, supra note 10.}} As a result, documents like the Declaration on the Establishment of a New International Economic Order posit "the right of all states, territories and peoples under foreign occupation, alien and colonial domination to restitution and full com-
compensation for ... exploitation and depletion."\textsuperscript{75} This proposed reasoning, however, is not in accordance with State Practice. To so argue would be to argue that developed countries which were not former colonial masters would not be under a duty to grant any development assistance.\textsuperscript{76} The developed countries do not grant assistance because they need to account for colonial exploitation. Additionally, in practice developed countries do not limit development assistance exclusively to former colonies. The constitutive documents, referred to previously, mention the duty of co-operation for the welfare of all nations not just for that of former colonies.

Other commentators suggest charity may be one of the reasons why the developed countries are under an obligation to grant developing countries development assistance. Charity, however, denotes an element of volition or generosity rather than a compulsion to act. The pejorative connotations attached to the word charity are obvious. Furthermore, developing countries themselves might be reluctant to accept assistance on that basis.\textsuperscript{77}

Principles of equity and justice are more solid bases for international development law.\textsuperscript{78} Recent trends in world social process\textsuperscript{79} suggest that principles of equity and justice are increasingly invoked in international law. The linkage of justice and the development process came about when the UN General Assembly stressed that global economic development should be established "on the basis

\textsuperscript{75} See Declaration, supra note 22, at para. 4(f).

\textsuperscript{76} It could, however, be plausibly argued that countries like the United States even if not colonial masters, benefitted immensely from the system of colonization through the resources of their allies and other dependent territories. According to this argument, the developed countries owe a duty to the developing countries. This duty is a result of the system of colonization and its impact.

\textsuperscript{77} See HAGUE WORKSHOP 1979, supra note 32, at 98.

\textsuperscript{78} Admittedly, these are not traditional sources of law in the I.C.J. statute, which is generally accepted as constituting a list of the sources of international law. See M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 4 (1984). The argument could however be made that "equity" and "justice" are "general principles of law" recognized by civilized nations. In addition, paragraph 2 of article 38 permits the I.C.J. to decide a case \textit{ex aequo et bono} if the parties agree thereto. And in any case, there are other sources which are not easily discoverable in the text of article 38. See Schachter, supra note 72, 300-322 (1968).

\textsuperscript{79} "World social process" is a compendious term used to indicate that the expanding circles of interaction among men extend to the remotest inhabitants of the globe (i.e. world), and that the active participants of the interaction (i.e. process) are living beings (i.e. social). See M. McDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 10 (1987).
of justice, equality and mutual benefit.” The notion of justice elevates the satisfaction of the developing countries’ needs to that of an entitlement, thus transforming the relationship between donor and recipient into one of “mutual rights and responsibilities.”

The need for equity in international law is not derived exclusively from moral idealism. In order to remain effective, international law must change to conform to the sociological structure of the international community. The interdependence of developed and developing countries makes the economic well being of each nation a matter of concern for all. The emergence of international development law should therefore be regarded as a trend in the mutual interests of the North as well as the South. The increasing reliance of the North on the South for trade and resources, and the concern surrounding an already precarious international economic order, exacerbated by the worsening problems of the developing countries, reflects these interests.

The law not only reflects the prevailing state of affairs, it also serves as an instrument for achieving what is required. Regardless of the criteria used to ascertain international law the result must reflect the contemporary expectations of the majority of the community. As long as it seeks to set legal standards, international law must reflect a consensus of the values and opinions of an inclusive community. This naturally leads to considerations of law and equity in the relations between states.

The Anglo-Norwegian Fisheries case elaborated on the importance of justice and equity. In this case, the I.C.J. regarded the

80 Preparation for an International Development Strategy for the Third United Nations Development Decade, G.A. Res. 33/193, U.N. GAOR Supp. (No. 45) at 121, U.N. Doc. A/33/45 (1979). The terms “justice” and “equality” are not necessarily coterminous. Equality is defined as “the condition of possessing substantially the same rights, privileges and immunities, and being liable to substantially the same duties.” BLACK’S LAW DICTIONARY, 481 (5th ed. 1984). This is certainly a far cry from the kind of equity or justice being sought by international development law. The concept of “mutual benefit” is also difficult to understand in this context, in light of claims for almost exclusive benefits to the developing countries. It can however be understood in the sense that the attainment of a new international economic order would be to the mutual benefit of all parties involved.

81 O. SCHACHTER, supra note 73, at 9 (1977).

82 See Lachs, supra note 26, at 95 (“The enlightened long-term self-interest of the developed countries lies in the reduction of this material gap between ‘North’ and ‘South’.”)

83 M. BULAJIC, supra note 2, at 43.

economic interests and geographic position of Norway as "very distinctive," thus necessitating special treatment, stating "such a coast, viewed as a whole calls for the application of a different method. Nor can one characterize as exceptions to the rule the very many derogations which would be necessitated by such a rugged coast. The rule would disappear under the exceptions." The court concluded the method of straight baselines established in the Norwegian system, although contrary to the accepted standard at the time, "was imposed by the peculiar geography of the Norwegian coast." The case suggests that international law can, and indeed must be used to rectify inherent inequalities between states. Since some of the peculiar problems of the developing countries are the result of nature's work, some argue that it is not for international law to change geography or "completely refashion nature." The converse, however, is equally true; it certainly is not the function of international law to re-emphasize or exacerbate the inequality already existing. International development law seeks to mitigate or rectify existing inequalities, and this is a compelling reason why it should be given juridical status.

Historically, international judicial opinion employed criteria such as a sense of rightness, necessity, reason, natural law, humanitarian values and the will of the international community. Thus, the

85 Id. at 128-29.
86 Id. at 139.
87 For a critique of this position see Waldock, The Anglo-Norwegian Fisheries Cases, 28 Brit. Y.B. Int'l L. 114 (1951).
89 See also Lachs, supra note 26, at 94-95 (arguing that law can be an important tool in assisting poorer people raise their standard of living, in preventing the rich from becoming richer at the expense of the poor, and in serving as an instrument of progress and for the betterment of international relations).
90 See e.g. Concerning Continental Shelf (Libya v. Malta), 1985 I.C.J. 4 (July 27, 1984) ("the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law ... even though it looks with particularity to the peculiar circumstances of an instant case, it looks beyond it to principles of more general application"); South West Africa Cases, 1966 I.C.J. 250-324 (Tanaka, J. Dissenting) (finding the rule against apartheid constituted a general principle of law, not necessarily within the formulation of article 38(1) of the I.C.J. statute, but for the simple reason that it was a jus naturale, "valid through all kinds of human societies", and derived from the concept of "man as a person."); Anglo Norwegian Fisheries Case, 1969 I.C.J. 49 (although all states are equal before the law and are entitled to equal treatment, "equity does not necessarily imply equality."); Reservations to the Conventions on the Prevention and Punishment of the Crime of Genocide, Advisory opinion, 1951 I.C.J. 15 (application of "humanitarian" values.)
moral and philosophical underpinnings of international development law are not at variance with the case law. For example, in Concerning the Continental Shelf (Tunisia v. Libya), the court stressed that in the application of equitable principles, the fairness of the result was more important than the principle to be applied in reaching that result. The court stated:

The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to reach the result. It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable: it may acquire this quality by reference to the equitableness of the solution.

Applying this statement to the field of international development law suggests the principles discussed above derive their legal validity from the equitableness of the solution they seek to obtain. It further suggests developing countries are entitled to claim international development assistance as of right if that would result in a more equitable international system. The claims being made for a new international economic order have therefore received tacit judicial recognition.

Emerging international development law is increasingly receiving attention from jurists. Since the writings of publicists are a source

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91 Concerning the Continental Shelf (Tunisia v. Libya), 1982 I.C.J. 1 (Feb. 24).
92 Id. at para. 70 (emphasis added). Although this statement was used in relation to applicable principles and rules for the delimitation of the Continental Shelf area appertaining to Libya and Tunisia, it is a fair inference that the invocation of equitable principles would apply a fortiori to the area of international development law.
of international law, the more the authorities refer to the legal validity of international development law, the more authoritative the concept will be. The desirability of this conclusion is borne out by the significance of the subject.

V. SIGNIFICANCE AND USEFULNESS OF INTERNATIONAL DEVELOPMENT LAW

International development law is important for a number of reasons. The first is the extent to which it will enhance the aspirations of developing countries which form the bulk of the international community. The developing countries view international law suspiciously because the status quo engendered within its application is to their disadvantage.\textsuperscript{94} International development law responds to the major goal of eliminating existing inequalities in international economic relations and therefore serves to make international law more relevant to developing countries benefiting the international community at large.

The implications for international peace and security resulting from a recognition of international development law are obvious. International peace and security are related to, and cannot exist independently of, international development. Thus, in Resolution 3176 (XXVIII), the General Assembly clearly stated that international peace and security are necessary conditions for the social and economic progress of all countries.\textsuperscript{95} Economic inequality is a destabilizing factor in the orderly conduct of inter-state relations. There is no dispute that Third World countries have frequently violated


\textsuperscript{95} It is noteworthy that the maintenance of peace, the achievement of development and the promotion of respect for human rights are the central objectives of the UN, as stated in the charter. The relationship between peace and security, on the one hand, and development, on the other hand, is also manifest in the effect that disarmament has on development. In the Draft Declaration on the Right to Development, experts from France and the Netherlands stressed that "there exists a close relationship between disarmament and development; that progress in the field of disarmament would considerably promote progress in the field of development." \textit{Question of the Realization in all Countries of the Economic Social, and Cultural Rights Contained in the Universal Declaration of Human Rights, and Study of Special Problems which the Developing Countries Face in Their Efforts to Achieve these Rights}. U.N. Doc. E/CN.4/1985/11, Annex III, at 1.
existing rules of international law out of a desire to rectify what they regard as economic inequities in the international system. Studies also conclusively establish that problems of growing economic crises frequently lead to the toppling of moderate or democratically elected regimes by radical, and often dictatorial regimes. The continuation of this trend is certainly not conducive to the maintenance of a minimum world order. Thus, international development law which aims at improving the economic situation in the Third World could also serve to enhance the maintenance of world order.

The ultimate purpose of development is to lay the basis for realizing human dignity. Recent trends in world social process point out an increased emphasis on the concept of basic human dignity. This concern for the advancement of human rights is here to stay, out of necessity as well as idealism. Since international development law is aimed, inter alia, at upholding the concept of human dignity it is therefore a firm indication of its importance and usefulness as a normative order.

VI. APPRAISAL AND CONCLUSION

International development law is an emerging branch of international law. It represents the beginning of a conscious effort to face the inescapable fact of global interdependence.
This article has shown that the principles on which international development law is based are largely found in international treaties, UN resolutions and declarations, as well as in the practice of States. The relevant norms and principles are directly dependent on the character of the political and economic trends of development. This results from the dialectic relationship between the economic infrastructure of the international system and its legal superstructure.

International development law can make its mark only if its benefits are perceived as universal, and its costs do not exceed its benefits. It spite of the degree of sacrifice required of the developed countries, in the long run this sacrifice should inure to the benefit of the developed countries as well as the developing countries.

Effective adherence to principles of international development law will require sufficient political will and support nationally as well as internationally. The concept of State sovereignty, which seems to be prima facie in conflict with international development law, must be reviewed. States must accept restrictions on the exercise of their sovereign rights in external as well as internal economic policies. This requires the implementation of more effective regulatory mechanisms by international development agencies and other actors in the international arena.

In conclusion, it must be stressed that concern for international development is necessary for the continued functioning of the international system. Questions pertaining to international development law will therefore remain the most intensely debated in the next decade and will produce discernible effects on the evolution of substantive rules of international law as well as on the international decision-making process.

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100 The developing countries, for example, would have to be accountable for the international development assistance they received.