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## Global Justice and the New International Economic Order: Competing Visions of Rights, Development and Justice

Antony Anghie<sup>1</sup>

### Introduction

The intensifying and inescapable phenomenon of global inequality has generated a wide-ranging debate about human rights and how it addresses the issue of inequality, both internationally and nationally. Inequality, of course, is one aspect of the broader theme of international justice. In this chapter, I explore the vision of global justice that was animated and elaborated by an initiative taken by Third World countries to create a New International Economic Order (NIEO). I then discuss how this vision compared and contrasted with the vision of global justice that was promulgated by international human rights law.

The NIEO campaign was at its height in the 1970s, at precisely the time that international human rights law was being perceived, at least in the West, as an initiative that would achieve global justice. After its ‘defeat’ in the 1970s, very little scholarly attention was paid to the NIEO. It is largely a consequence of the work of ‘Third World Approaches to International Law’ (TWAIL) scholars on the significance of the NIEO and in particular, its diagnosis of the causes of injustice and the role of international law both in causing and remedying this injustice that the NIEO remained, however marginally, a part of scholarly discussion and debate. In recent times, there has been quite justifiably, a renewal of interest in the NIEO—a result perhaps of the emergence of global history and a number of other developments which pointed to the provinciality and limitations of much traditional scholarship.<sup>2</sup> The NIEO campaigned to

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<sup>1</sup> Professor of Law, S.J. Quinney School of Law, University of Utah, and National University of Singapore. This article is dedicated to my mother who spent many happy years at the University of Peradeniya in the 1950s.

<sup>2</sup> See particularly ‘Special Issue: Toward a History of the New International Economic Order’, 6 (1) *Humanity* (2015); for an important work that deals with many of the themes that animated the NIEO, see J. v. Bernstorff and P. Dann (eds), *The Battle for International Law: South North Perspectives on the Decolonization Era* (2019). The NIEO also features in many recent histories and accounts of particular topics such as human rights and the emergence of neo-liberalism. See e.g. J. Whyte, *Morals of the Market: Human Rights and the Rise of Neoliberalism* (2019). For earlier writings on various aspects of the NIEO that I have drawn upon, see Antony Anghie, ‘Whose Utopia?’

transform international economic systems that had been designed to further colonial exploitation and that persisted in new forms even after colonies had achieved independence. Having ended colonialism in its classic form and having won their sovereignty, the new States were confronted with the reality of what Kwame Nkrumah termed ‘neo-colonialism’—in effect, colonial economic relations being continued and indeed entrenched in a supposedly postcolonial world.

For the international lawyers who were an essential part of the campaign for the NIEO, neo-colonialism could only be ended by the transformation of the international, finance, and trade regimes—all of which were seen as embodiments of an unjust and neo-colonial system of international relations. Human rights, as I have argued elsewhere, played only a minor role if any in this campaign.<sup>3</sup> This is not to say, however, that rights were ignored by the developing world. Rather, the developing world articulated a particular vision of rights that were in keeping with its broader political goals of furthering decolonization, consolidating sovereignty, and creating a more just international order—one that eliminated racism and that brought about the economic development that these countries believed were essential for their progress.

In this paper, I outline the origins and concerns of the NIEO, its relationship to development, and the efforts of the Third World to create legal regimes in the fields of trade, investment, and finance to construct the NIEO. I examine these issues further through a brief exploration of competing ideas of development. I then examine the efforts of the rich world to negate the NIEO. First, the rich world further emphasized its vision of global justice, of the problem of large-scale and enduring poverty and its solutions which were reflected in orthodox and classical visions of development. Second, it responded to the legal dimension of the challenge by formulating new versions of doctrines such as sources and sovereignty. I contrast the NIEO’s emphasis on ‘development’ as the vehicle to bring about the goals that the Third World sought with the efflorescence of ‘human rights’ that took place in the 1970s at roughly the same time. The Third World, at least initially, was an enthusiastic supporter of the new human rights campaign. However, the Third World vision of rights was intimately connected to issues of self-determination and collective rights, as well as with development rather than the liberal individual structure of rights. My broad effort is to outline

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Development, Human Rights and the Third World’, 22(1) *Qui Parle* 63-80 (2013); Antony Anghie, ‘Legal Aspects of the New International Economic Order’, 6(1) *Humanity*, 145; Antony Anghie, ‘Inequality, Human Rights and the New International Economic Order’, 10 (3) *Humanity*, Winter 2019, 429. For an incisive account, see Fr Noel Dias, ‘The NIEO Revisited’, 8 *Sri Lanka Journal of International Law* 27 (1996).

<sup>3</sup> See A. Anghie, ‘Inequality, Human Rights and the New International Economic Order’, *Humanity* (2019) 145, at 429 ff. I draw on this article in writing this chapter.

how the liberal vision of rights, while it may have furthered various forms of well-being, was limited by its very structure in its capacity to bring about the global redistribution of wealth called for by advocates of the NIEO. Rather, this vision of rights, which came to supplant its alternatives in time, attempted to engage with and ameliorate some of the worst outcomes of classic development policy.

This, in turn, became the ‘progressive’ vision of rights. In this way, it was only a very limited range of ideas—classic liberal rights and progressive rights, with their constrained engagement with global social and economic biases, that came to dominate international human rights thinking and debate. Visions of justice based on the NIEO collapsed by the 1980s due to a number of complex causes, leaving in place a profoundly unequal and unjust international system. The final part of this chapter suggests how the basic structures and processes that emerged during the time of the NIEO continue to shape current international law and relations. I inquire into this issue by exploring current debates about human rights, the neoliberal economy, and the earlier debates and battles that were fought and won and lost in the 1970s.

## **Development and the NIEO Vision of Global Justice**

Julius Nyerere, one of the principal third world leaders of the time, eloquently stated that the complaint of the poor countries was that not only were they poor “both in absolute and relative terms and in comparison with the rich nations”, but “[i]t is also that within the existing structures of economic interaction we must remain poor, and get relatively poor, whatever we do.”<sup>4</sup> It was this predicament that called for a New International Order, one that would enable the poor nations to ‘develop themselves according to their own interests, and to benefit from the efforts they made’. The achievement of political self-determination now revealed a new and formidable task that still awaited the recently decolonized State: achieving economic self-determination.

Development, as Nyerere makes clear, is the answer. For the Third World and its champions such as Nyerere and the prominent Algerian statesman-jurist Mohammad Bedjaoui, the causes of poverty were clear. Countries were rich because they had impoverished other countries.<sup>5</sup> The system of exploitation which ensured this condition and further inequalities was inaugurated by

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<sup>4</sup> Nyerere is quoted in C. Murphy, *The Emergence of the NIEO Ideology* (1984), p. 1. Murphy’s book is a good overview of the NIEO. For an insightful recent overview of this period and the different dimensions of decolonization, see v. Bernstorff and Dann (note 2 above), ‘Introduction’.

<sup>5</sup> As he puts it, ‘For centuries past, the prosperous countries have steadily grown richer at the expense of the underdeveloped countries which have become progressively poorer’. M. Bedjaoui, *Towards a New International Economic Order* (1979) 23.

imperialism and continued into the present. “... exploiting and exploited countries [became] integrated in this inequitable system, and [found] themselves indissolubly linked.”<sup>6</sup> Bedjaoui’s vision drew on various sources, World Bank reports, but more analytically, on the economic theories of scholars such as Samir Amin.<sup>7</sup>

Bedjaoui brilliantly outlined all the ramifications of this system by detailing how its workings and effects could be seen in a number of crucial areas. For instance, the economic disempowerment of the Third World meant that they had no control over the prices of their raw materials; that they were entirely dependent on external forces for their food—this at a time when US authorities who controlled much of the world’s food supply were declaring that food was ‘ammunition’;<sup>8</sup> that the terms of trade for raw materials were deteriorating; that the indebtedness of poor countries was rising as a consequence of the fact that new States were born with a debt that they could hardly pay;<sup>9</sup> and that the rich world consumed a disproportionate amount of the world’s resources. Bedjaoui combined detailed statistical evidence with caustic and eloquent commentary.

Most importantly, he elaborated on the concept of ‘underdevelopment’—that is, the absence of development in the Third World was not because of endogenous causes, but a condition that was created through the exploitation that developing States had been subjected to. These were the different areas of concern. Bedjaoui further pointed out that ‘[o]ne-third of mankind, representing the most deprived developing countries, receives only 3 percent of the total world income’.<sup>10</sup> This inequality could be seen in a growing food crisis and the dispossession of peasant farmers.<sup>11</sup> Inequality—and entrenched and intensifying inequality—was the subject that Bedjaoui explored in some depth, pointing not only to its manifestation in many areas of economic activity but to the larger consequences that followed.

Emerging out of colonialism, achieving development became the single greatest concern of the ‘new States’. For the Third World, ‘Development’ was the central concept and initiative for the expression of its normative, political, and institutional vision of international justice.<sup>12</sup> The preoccupation with

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<sup>6</sup> Ibid. 24.

<sup>7</sup> For valuable background on Bedjaoui and influences on his thinking, see U. Ozsu, ‘“In the Interests of Mankind as a Whole”: Mohammed Badjaoui’s New International Economic Order’, (2015) *Humanity* 6.

<sup>8</sup> This in the sense that the US used food to support its allies, and to develop its commercial interests. See Bedjaoui (note 5 above) at 32-33.

<sup>9</sup> See Bedjaoui (note 5 above).

<sup>10</sup> Ibid. 26.

<sup>11</sup> Ibid. 29.

<sup>12</sup> For a perceptive study of the ‘development State’ see L. Eslava, ‘The Developmental State’, in v. Bernstorff and Dann (note 2 above) 77.

development is evident from at least 1955 when twenty-nine States from Asia and Africa met in Bandung to articulate the position of the newly independent States and their vision of international law and relations.<sup>13</sup> Economic development featured heavily on the agenda as it was seen as essential to decolonization. Indeed, 'Economic Cooperation' was the first item mentioned in the Final Communiqué of the Conference.<sup>14</sup> Even at this stage, developing countries recognized the need for foreign investment. They called for the creation of special funds within the UN system and the favourable involvement of the World Bank, and further, urged the swift formation of the International Finance Corporation (IFC) to promote foreign investment. Joint ventures were encouraged. The Bandung States also focused on Trade, emphasizing the need for stability in the pricing of commodities that the developing States were so dependent upon.<sup>15</sup> Diversification of exports was another major theme.

The economic development programme espoused by the Bandung States was understandably sketchy. Even so, a few important themes emerged. First, the Bandung States did not propose any particularly radical transformation in the international economic system, far less did they espouse detaching themselves from it. Rather, they sought to make some adjustments to the system, and indeed, saw international institutions such as the UN and the World Bank as their allies whose cooperation they sought. The Communiqué affirmed that foreign investment was essential for development. Curiously, Bandung made no reference to the topic of sovereignty over natural resources that had preoccupied Latin-American States for many decades, and that had been the focus of those countries in their efforts to rid themselves of the economic vestiges of colonialism. Although the Latin American States were technically sovereign and independent, they struggled to benefit from the natural resources in their territory because of foreign control over those resources. These countries had asserted the principle of 'permanent sovereignty over natural resources' (PSNR) to legitimize their nationalization of mining and other industries that were owned by foreign interests. A General Assembly declaration in 1952 affirmed the rights of States and peoples to permanent sovereignty over natural resources, thus commencing a campaign that was to become a central part of the 'Third World' aspiration to achieve development.<sup>16</sup> In many respects, the situation facing Latin American

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<sup>13</sup> See L. Eslava, M. Fakhri, and V. Nesiah (eds), *Bandung, Global Histories and International Law* (2017).

<sup>14</sup> Indonesia Ministry of Foreign Affairs, *Final Communiqué of the Asian-African Conference of Bandung* (1955), available at [https://www.cvce.eu/en/obj/final\\_communique\\_of\\_the\\_asian\\_african\\_conference\\_of\\_bandung\\_24\\_april\\_1955-en-676237bd-72f7-471f-949a-88b6ae513585.html](https://www.cvce.eu/en/obj/final_communique_of_the_asian_african_conference_of_bandung_24_april_1955-en-676237bd-72f7-471f-949a-88b6ae513585.html) (last visited 19 June 2021); see also, J. Faundez, 'Between Bandung and Doha: International Economic Law and Developing Countries', in Eslava, Fakhri, and Nesiah (note 13 above), p. 498-515.

<sup>15</sup> Bandung Final Communiqué (note 14 above).

<sup>16</sup> See General Assembly Resolution 626 (VII) 1952, 21 December 1952.

countries was an embodiment of the profound problem that was soon recognized as general to the Third World—the problem of possessing political sovereignty while lacking the economic sovereignty so indispensable for development.

The Bandung initiative led to the creation of the Non-Aligned Movement which was inaugurated shortly afterwards in Yugoslavia in 1956. The notable statesmen present on the occasion included Tito, Nehru, and Nasser. Nehru and Nasser had also been major figures at Bandung, and the continuity between those events is also evident in the principles outlined in the Declaration, which included respect for territorial integrity and sovereignty, mutual non-aggression, equality and mutual benefit, and peaceful coexistence. These had all been articulated in the Bandung Communiqué as the five principles or *panchaseel*. Importantly, however, the Non-Aligned Movement became a self-conscious and focused political initiative that now had an organizational form. The 1976 Conference, which took place at the height of the NIEO, was held in Colombo, Sri Lanka<sup>17</sup>.

### Competing Visions of Development

The Third World vision of development initially and tentatively outlined in Bandung, but much more comprehensively and powerfully asserted in the NIEO, challenged the formidable theory of development that was promoted and established by Western scholars and economists. The project of achieving development had intimate connections with the colonial administration. Development theory in the 1960s, however, was deeply shaped by W. W. Rostow's argument outlined in 'The Stages of Economic Growth'.<sup>18</sup> Heavily influenced by the work of Max Weber and indeed replicating the basic structures of stadial theory that had become so prominent in a wide variety of disciplines that sought to place the non-European world and its peoples within the broader trajectory of history, Rostow's theory asserted that all societies passed through 'Five Stages of Growth' that led from a 'Traditional Society' to the endpoint of 'High Mass Consumption' via the crucial third stage of 'Take Off'. Backward and traditional States could only progress through the introduction of modernity and science broadly through Westernization. Social and economic systems had to be transformed from the retardations of feudalism and its accompanying political and economic inefficiencies. Modernization generally required the introduction of the market and all the accompanying social and political changes to accomplish it. The progress of a society was measured then, by its level of per capita income.

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<sup>17</sup> See 'Non-Alignment and Third World Solidarity', *Marga Quarterly Journal*, Special Issue, Vol.3 No. 3 (1976).

<sup>18</sup> W. W. Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (1990, 3<sup>rd</sup> edn.). For a shorter version of the general argument, see W.W. Rostow, 'The Stages of Economic Growth', *The Economic History Review*, Second Series volume XII, No. 1 (1959), 11.



The shift from an agricultural to an industrial base, for instance, was essential for this project. Modernization theory became the basis of World Bank policies, as well as the entire US development aid apparatus. It also formed the core assumptions of related studies in areas such as sociology and political science—that focused on issues such as the military and its role in bringing about such a transformation or anthropological research into whether members of a particular society indeed behaved like the ‘rational actors’ presumed by this theory.<sup>19</sup>

The modernization theory suggested that the market and the evolution of the market man were inevitable. Laissez-faire was thus the best policy and State interference was regarded as a distortion of this process. However, the State could play a positive role if rather than hindering the market, it promoted it: ‘the government could ‘attempt to convince its citizens of the need for “modernization” while at the same time substituting its entrepreneurial ability and knowledge to fill the vacuum’.<sup>20</sup> The modernization theory also suggested then, that this transformation was in many respects linear and inevitable and that Western Societies and market-driven and liberal democratic societies were the ultimate models of what all other societies would in time become. Fukuyama’s argument made many decades later, followed this same structure.

Modernization theory was at the height of its influence and popularity in the 1960s. In many societies where this model was adopted, however, it became inescapably apparent that modernization theory led to a particular form of economic growth—one that was marked by increasing and impressive growth rates, but also by the intensification of inequality and with it, inevitable social tensions and political instability. The ‘trickle down’ theory of economics that this model presumed did not materialize.<sup>21</sup> Further, this type of growth correlated with increasing and large-scale unemployment.<sup>22</sup> Even more worryingly, this type of growth seemed to make large sections of the population—the poorest, even worse off than before.<sup>23</sup> Inevitably, this led to social tensions and instability—the suppression of which required authoritarian governments. Dictatorships inevitably sought US support for their policies by claiming that dissent was driven by communism and that violent government action to eradicate the threat was therefore justified. Modernization seemed then, to lend itself to both authoritarianism and inequality.

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<sup>19</sup> See for a useful overview of development theory, C. K. Wilber and K. P. Jameson, ‘Paradigm of Economic Development and Beyond’ in C. K. Wilber, *The Political Economy of Development and Underdevelopment* (1987, 4<sup>th</sup> edn.), p. 3-28.

<sup>20</sup> Wilber and Jameson, *ibid*, p. 9.

<sup>21</sup> *Ibid.* 11. The theory has attracted a huge literature.

<sup>22</sup> *Ibid.* 10-11.

<sup>23</sup> *Ibid.* 11.

Recognizing this trend, development institutions and scholars formulated modified versions of modernization theory, the ‘Basic Needs Approach’ and the ‘Redistribution with Growth Approach’,<sup>24</sup> or ‘Growth with Equity’. The Basic Needs Approach recognized the many problems associated with modernization theory, including inequality, growing unemployment, and stagnation in wages. In many countries, the income of the poor had suffered not only in relative but in absolute terms.<sup>25</sup> The Basic Needs Approach addressed the problems of inequality and poverty that now seemed common consequences of modernization theory through policies directed at ensuring that, even as growth was being pursued, the poorest were provided with essential social goods, health, food, and accommodation. Rather than focusing exclusively on economic growth as a measure of a society’s progress and well-being, Basic Needs also focused on issues such as life expectancy and literacy rates to outline a broader vision of development and to formulate an appropriate set of metrics.<sup>26</sup> Basic Needs also attempted to address another problem that accompanied modernization: the growing division between urban and rural populations—the latter suffering as a result of the focus on urban growth and industrialization. Agriculture, seen as primitive, was neglected by modernization policy, as a result of which, large-scale migration to the cities took place, causing a variety of social problems. More broadly, Basic Needs suggested that the ‘trickle down’ approach was problematic because those who acquired power as a result of their wealth often changed the rules, the legislation, and political structure to further their interests. *Laissez-faire* did not take place in a political vacuum, and social turmoil and even attempts at revolution could be spurred by the social effects of modernization theory.

Most importantly, some version of the Basic Needs and Redistribution with Growth Approach was adopted and refined by the World Bank under the Presidency of Robert McNamara. The Bank, with its considerable influence as the arbiter—the ultimate authority in development policy since it was by now the most significant development organization, provided support for this approach through its lending policy. Equally importantly, its technocratic expertise was harnessed to assess, measure, and implement, as appropriate, the Basic Needs Approach.

Whatever their other differences, both modernization and Basic Needs Approaches assumed the absence of development to be due to purely

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<sup>24</sup> The classic text on Redistribution with Growth is H. Chenery et.al, *Redistribution with Growth* (1974). Chenery was not only a Professor of Economics at Harvard University, but also served as Vice-President of development policy at the World Bank under Robert McNamara.

<sup>25</sup> Wilber and Jameson (note 19 above), p. 11.

<sup>26</sup> For a useful overview, see J. S. Hoadley, ‘The Rise and Fall of the Basic Needs Approach’, 16 (3) *Cooperation and Conflict* (1981). For a recent assessment of the Basic Needs Approach, see S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018), chapter 5.



endogenous factors. People in the developing world were poor because they lacked the mindset, the entrepreneurial skills, the proper incentives, and the economic and political structures needed for development. They were in all these respects backward and what was required was the embrace of development policies to remedy this situation, and accelerate an inevitable process. This vision of poverty and its causes was profoundly challenged by what might be broadly termed as the ‘dependency theory’. Formulated in various versions by scholars such as Walter Rodney<sup>27</sup> and Andre Gunder Frank,<sup>28</sup> dependency theorists broadly argued that the lack of development, far from being somehow endemic to the Third World, was a condition created by the West through its policies of imperialism and then, neo-imperialism. Dependency theorists argued that poverty was created by the West, and the resulting condition was termed ‘under-development’. Broadly, the West, the centre, had become wealthy through its extraction of resources and value from the non-Western world—the peripheries. Certainly, a form of modernization had been established in the process as cities crucial to the trading and extraction enterprises were constructed in the colonies. For dependency theorists, however, these centres of industry and modernity were not so much harbingers of growth and the foundations of the ‘Take Off’ Phase of Rostow’s theory, but rather, crucial components of a complex hydraulics that drained the wealth of the periphery—through these cities to larger cities and finally the metropolitan centre. The appearance of modernization was illusory, as this version of it was not self-sustaining and indeed, prevented real development, instead entrenching ongoing dependency. Virtually all developing countries emerged with debt while the liabilities incurred by colonial powers were then transferred to independent States according to the international law of State succession. For dependency theorists, this debt was another means of control and furthering the ongoing impoverishment of the Third World. Dependency theory also pointed out that local elites often played the role of compradors—ensuring that Western interests would continue to be served.

Dependency theory drew on Marxism in its vision of imperial political economy as extracting resources from the periphery. Marx however, while eloquent in his denunciation of capitalism exploitation in an imperial context, also adhered, like modernization theory, to a stadial version of development. That is, capitalist expansion, although exploitative, would accelerate the progress of non-Western countries towards capitalist relations. For dependency theorists, however, the version of capitalism exported to the non-Western countries was a defective and distorted version rather than the one Marx viewed as the prelude to communism.<sup>29</sup> The policy implications of dependency theory were starkly

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<sup>27</sup> W. Rodney, *How Europe Underdeveloped Africa* (1972).

<sup>28</sup> A. G. Frank, ‘The Development of Underdevelopment’, (1966) *Monthly Review* 18(4), at 17-31.

<sup>29</sup> B. Warren, *Imperialism: Pioneer of Capitalism* (1980). The book, published posthumously, generated a heated debate between supporters of Warren’s argument and dependency theorists.

different from modernization theory. Rather than engaging with the West to accelerate and intensify industrialization, what was needed was a detachment from a biased global economic system and instead, autonomous economic development including policies such as import-substitution.

## The NIEO

It is against this rich history of anti-colonial campaigns and alternative visions of how to achieve development that the developing countries formulated specific initiatives in the realm of international law and relations. These were to culminate in the Declaration on a New International Economic Order in 1974. This initiative commenced earlier, with the creation of the United Nations Conference on Trade and Development (UNCTAD)—a significant achievement of the new States as they sought to create international bodies and institutions that furthered their interests.<sup>30</sup> Developing States by this stage realized that bodies such as the World Bank operated largely in the interests of the West. They further viewed the trade negotiations based on the General Agreement on Tariffs and Trade (GATT) with some concern, as they believed that their trade interests were not properly reflected in the emerging regime. UNCTAD was founded through the General Assembly in which the developing countries had the largest number of members and which by now was an important forum to express Third World views and promote Third World initiatives. UNCTAD was led initially by the prominent Argentinian economist Raul Prebisch, whose path-breaking work was crucial for the emergence of dependency theory. Prebisch, who was also the Director of the Economic Commission for Latin America, was a key figure in UNCTAD. UNCTAD was intent on creating a system that would ensure commodity price stability—a recurring concern for developing countries—and that would also allow for preferential trade arrangements for goods from developing countries.

The broad features of the Declaration on the Establishment of an NIEO may be summarily presented. At the heart of the project was the claim that '[i]t has proved impossible to achieve an even and balanced development of the international community under the existing international economic order'.<sup>31</sup> Inequality was a major and very explicit concern, and the Declaration pointed to the widening gap between rich and poor countries. Further, it stated that alien and colonial domination continued to shape international relations which prevented the emancipation of peoples in the developing countries. The broad

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<sup>30</sup> For an overview of UNCTAD, see C. Fortin, 'United Nations Conference on Trade and Development (UNCTAD)', *Max Planck Encyclopedia of International Law* (2018).

<sup>31</sup> Declaration on the Establishment of a New International Economic Order, GA Res. 3201 (S-VI), 1 May 1974 (hereinafter 'NIEO Declaration').

animating political concepts were interdependence, appeals to peace and justice, and a repeated invocation of the needs of an 'international community'.

Normatively, we might see here the articulation of what might be termed a 'Third World Cosmopolitanism'. Ideas about 'humanity' and the 'global community' were developed and deployed by early jurists such as Vitoria and Grotius. This concept, or versions of it, were as central to theorizing about the international order, natural law, reason, rights, and property as the concept of the social contract. The idea of 'international community' articulated by the Declaration, by contrast, called for redistribution, remedying inequality, and the reform of the international system. It was by necessity radically different because it was seeking to reverse and transform the earlier idea of 'international community', of cosmopolitanism that justified imperialism, and precisely the inequalities that the NIEO was seeking to confront.

How then could cosmopolitanism be contested and rethought in these circumstances? Cosmopolitanism, of course, is the foundation of international human rights law, and so we might see in the debates that followed contrasting ideas of global community and rights. In its essence, what we see is a debate between property rights that could be acquired globally and protected through international law with no restriction on the movement of Europeans because of the sacrosanct right to trade. Once that property had been acquired, it had to be protected. The different visions of cosmopolitanism essentially provided sharply contrasting views of property and political economy. But by this time property was so centrally entrenched in the system that any attack on it was regarded as scandalous. The juridical foundations of the NIEO consisted of the principles of sovereign equality, cooperation, and full and equal participation in decision-making in global matters. Economically, there was a particular focus on stabilizing commodity prices, and the reform of the monetary system to enable development. Technology transfer and the regulation of multinational corporations were further themes taken up in the Declaration.<sup>32</sup>

The NIEO, as is the case with other major Declarations such as the Universal Declaration on Human Rights (hereinafter the 'UDHR'), was in many respects aspirational, as suggested by its encompassing references to the international community, inequality, and international justice. However, it reflected and pointed to a number of important initiatives that were already taking place and that were being fought out in disparate locations in the UN system. One of the most intense battles of the NIEO, however, was fought over the crucial issue of 'permanent sovereignty over natural resources', its history and economics. In short, the 'new States' resolved upon becoming independent to regain control

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<sup>32</sup> See NIEO Declaration, *ibid*, clause 3(g).

over their natural resources - the same resources that colonial powers had been intent on exploiting from the very commencement of the imperial enterprise.

Many of these resources were extracted by way of concessions granted by the colonial powers to private enterprises and corporations from their own or allied countries. An intense battle over the question of 'acquired rights'—that is, the claim that the newly independent States were bound by the concession agreements that had been entered into by their predecessor colonial masters, was a central issue in international law at the time.<sup>33</sup> The developing States argued that they could not be bound by such concession agreements which were entered into by their former colonizers and that often included terms which were extremely favourable to corporations based in their own countries. It is no surprise that some of the major mining and resource companies that are among the largest in the industry today began as colonial enterprises. Development was the principal concern of the new States, and for this reason, control over their mineral resources became imperative, and nationalizations followed.

These nationalizations were fiercely opposed by the rich countries. The rich world argued that while nationalization was permitted under international law, compensation for the nationalization had to be paid according to international standards. This argument was strongly opposed by developing countries who countered that they were sovereign over the resources in their own country and that further, they had the right to determine the level of compensation payable—if at all—in accordance with national law, as this too was an attribute of sovereignty. The rich countries argued that foreign property was protected, not by national, but by international minimum standards. At the turn of the century, in one of the first addresses made to the American Society of International Law, its President Elihu Root had argued that international justice and the standard of civilization demanded that a certain elementary standard of international justice be maintained—and this focused on the protection of aliens and their property. The rich world argued that this 'minimum standard' was customary international law and hence binding on all States, including the new States, which upon becoming independent and full members of the family of nations, were correspondingly bound by the obligations that were part of that system. Thus, in this context, the acquisition of sovereignty was inseparable from obligation.

Corporations such as the Dutch East and West Indian Companies, the East India Company, and the British South African Company had been principal actors in imperial expansion in Asia and Africa. In the 1970s, multinational corporations,

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<sup>33</sup> For recent accounts of this debate, see: M. Craven, 'Colonial Fragments: Decolonization, Concessions and Acquired Rights', in *v. Bernstorff and Dann* (note 2 above), 101; A. Brunner, 'Acquired Rights and State Succession' in *v. Bernstorff and Dann* (note 2 above), 124.

which bore many resemblances to colonial trading companies, devised new ways to protect their interests. A complex and intimate relationship had existed between colonial powers and their corporations. The overthrow of Salvador Allende in 1973, and earlier, of the Iranian Prime Minister, Mossadegh, once he had nationalized English and American oil interests, demonstrated the ongoing power exercised by these corporations which could summon up the support of their countries to displace developing country governments that opposed them.<sup>34</sup> It is hardly surprising then, that the NIEO called for the '[r]egulation and supervision of the activities of transnational corporations'.<sup>35</sup>

In effect, if we consider the many affirmations of sovereignty that the NIEO Declaration contains—sovereignty as entailing the right to natural resources and to adopt the 'economic and social system that it deems appropriate', it appears almost as though what is being presented is a series of self-evident propositions. What is notable, however, is that colonization and the economic consequences that followed from it were the targets of these specific expressions of sovereignty—natural resources, control over corporations, and fair prices for the ending of colonialism. The whole history of colonialism shaped the making of the Declaration both in its larger structure and its specific demands. It also contained a provision relating to reparations - Clause 4(f), requiring 'restitution and full compensation' to colonized peoples whose resources had been depleted and exploited. This was a counter in many ways to the claims being made by corporations to compensation, payable according to international standards, upon being nationalized.

Western powers were alarmed by the NIEO initiative and immediately set about undermining and defeating it in every forum available.<sup>36</sup> In the field of development studies, P. T. Bauer, later to become adviser to Prime Minister Thatcher, wrote an influential critique of the NIEO whose title made his argument explicit and unequivocal: 'Equality, the Third World and Economic Delusion'.<sup>37</sup> For Bauer, '[t]he successful pursuit of the unholy grail of economic equality would exchange the promised reduction of removal of differences in income and wealth for much greater actual inequality of power between rulers

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<sup>34</sup> S. Pahuja and A. Saunders, 'Rival Worlds and the Place of the Corporation in International Law', in v. Bernstorff and Dann (note 2 above), 101. This chapter provides a detailed account of Chile's efforts to promote the initiative.

<sup>35</sup> See J. Blair, 'Corporations at the United Nations: Echoes of the New International Economic Order', (2015) *Humanity* 6(1); Pahuja and Saunders, *ibid*.

<sup>36</sup> See D. Sargent, 'North/South: the United States Responds to the New International Economic Order' (2015) *Humanity*, at 201-217.

<sup>37</sup> P. T. Bauer, *Equality, the Third World, and Economic Delusion* (1981).

and subjects'.<sup>38</sup> Bauer broadly transposed the basic tenets of neoliberalism<sup>39</sup> to the issue of development and first world-third world relations. Bauer was especially vehement in his condemnation of the coercion that he saw as being an essential mechanism of redistribution: 'wealth as such does not imply coercive power'. He acknowledged and then equally quickly dismissed the possibility that wealth could result in the accumulation of political power: '[w]ealth can sometimes secure a degree of political influence, although the likelihood and significance of this possibility are apt to be much exaggerated'.<sup>40</sup> He specifically mentioned the NIEO, claiming that it would require a 'world government with totalitarian powers'.<sup>41</sup> Wealth was attributable to people's capacities and motivations.

Bauer's critique of the coercion that he saw as inherent in the campaign for redistribution did not extend, however, to an examination of how coercion of the most extreme sort was inherent in imperialism, and in the slave trade that had so enriched Britain and other European States in the conquest of the Americas and Africa. Having considerable experience in West Africa and Indonesia, Bauer adopted the basic tenets of modernization theory; the West had developed because of cultural and economic progress, and such progress had not been experienced in Third World countries (notably Africa) and 'this long period of antecedent development is ignored in the advocacy of global redistribution'.<sup>42</sup> It is not only the Third World, however, but the welfare-state in the West that was criticized by Bauer. However, for the purposes of this chapter, my focus will be on the relationship between the NIEO and human rights.

## Development, the Third World and Human Rights

The role of the Third World, and more specifically jurists from the Third World, in the drafting of the major international human rights instruments, and in particular, the UDHR, is the subject of much debate. From the outset, however, advocates from colonized States embraced human rights law. They regarded it as a means of resisting colonial oppression. It is no surprise that European States, while intent on formulating international human rights instruments, were reluctant to extend their application to the colonies. Colonized peoples, in enthusiastically endorsing human rights, were following in a well-established tradition of appealing to universal rights promised by the French and American

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<sup>38</sup> Ibid, p. 8.

<sup>39</sup> It is unsurprising that Bauer features in the illuminating exploration of neo-liberalism and its origins in Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018).

<sup>40</sup> Bauer (note 37 above), p. 8.

<sup>41</sup> Ibid, p. 19.

<sup>42</sup> Ibid, p. 23.



traditions to protect themselves, their interests and perhaps even more fundamentally, to assert their humanity. This tradition is evident from at least the time of the Haitian revolution and the campaign to abolish slavery. For the Third World, human rights provided a crucial means to achieve self-determination and decolonization.<sup>43</sup>

One of the first major statements of a self-consciously anti-colonial group of Third World States was produced at the Bandung Conference—the Communiqué, which asserted that '[t]he Asian African Conference declared its full support for the fundamental principles of Human Rights as set forth in the Charter of the United Nations and took note of the Universal Declaration on Human Rights as a common standard of achievement for all peoples and all nations'. The Conference further invoked human rights in condemning all forms of racism and praised 'the victims of racism' who had taken a courageous stand against discrimination. South Africa was a particular target. Presciently, the Conference States pledged to eliminate racism in their own countries 'and pledged to use their full moral influence to guard against the danger of falling victims to the same evil in their struggle to eradicate it'. Notably, this endorsement of rights was placed under a heading titled: 'Human rights and self-determination'. A complex set of relationships and aspirations were expressed through the broad promise of human rights: this encompassed sovereignty, decolonization, and anti-racism—which were intimately connected to claims of equality and indeed, personhood itself.

This particular vision of human rights as self-determination was not to be found in the UDHR, but it was included as the very first article in both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—which proclaimed that '[a]ll peoples have the right of self-determination'. Article 1(2), which is less remarked on, again focused on the rights of 'peoples'. The idea of 'peoples' rights is contrary to a more classic liberal notion that only individuals possess rights, and the difference between the two frameworks has been intensively and continuously debated. The broad and common critique of 'peoples' rights is that the meaning of 'people' is and will always remain contested; and further, that an emphasis on 'peoples' rights could result in individual rights being subordinated to the 'people'. The relationship between individual and social rights remains controversial, and crises such as 9/11 and now the pandemic have manifested new versions of the ongoing task of redefining that relationship in particular political and social circumstances. In the context of decolonization, however, the resort to 'peoples' rights' was understandable even if earlier histories suggested

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<sup>43</sup> See A. Dirk Moses, M. Duranti and R. Burke, *Decolonization, Self-Determination and the Rise of Global Human Rights Politics* (2020).

the complications that could arise. ‘Universal’ human rights remained an abstraction.<sup>44</sup> Paradoxically perhaps, in order to have rights, one had to have a sovereign State, the ultimate guarantor of such rights. GA Resolution 637 (VII) of 1952 affirmed that ‘the rights of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights’.<sup>45</sup> Here we find the Arendtian idea of the ‘nation’ – even if the State is not presented as the guarantor of rights at this stage. In this respect, the term ‘people’ was an intermediary category between the individual and the sovereign. The idea of ‘the people’—the ‘volk’, resonated with the idea of ‘the nation’ (indeed, subsequent juristic efforts to define the people inevitably invoke the nation, whether explicitly or otherwise). And if the nation was to be the guarantor of rights in a world of sovereign States, then it was essential for that nation to *become* a sovereign State to play this fundamental role.

Moreover, it was only by identifying the people as rights holders that the concept of rights could be allied with the project of decolonization.<sup>46</sup> The complications stemming from peoples’ rights and self-determination have been extensively if inconclusively discussed. Less attention, however, has been given to the question of people’s rights in the context of economic self-determination—the subject of Article 1(2). The article seeks to assert the economic rights of peoples.<sup>47</sup> It affirms the economic dimension of self-determination by asserting the right of peoples to ‘freely dispose of their natural wealth and resources without prejudice to any obligations arising out of economic cooperation’.<sup>48</sup> The language of affirming a right in the form of a right to ‘dispose of [one’s] natural wealth’ is disconcerting. However, the connection between sovereignty and control over natural resources is also seen in the declaration on permanent sovereignty over natural resources. The 1952 Resolution Number 626 (VII) states: ‘[r]emembering the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations’.<sup>49</sup> A number of complications arise from this assertion. It is of course an inherent right of a State to use its natural resources in a manner it thinks fit. Here, however, the right is presented as a right of ‘peoples and nations’—a terminology that survived, and is to be found in Resolution 1803. The articulation of the rights of ‘peoples’ in this way gave rights to colonized

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<sup>44</sup> See GA Res. 523 (VI), 12 January 1952; GA. Res 637 C (VII), 16 December 1952 (rights of peoples and nations to self-determination); GA Res. 626 (VII), 21 December 1952 (right to exploit freely natural wealth and resources).

<sup>45</sup> GA Res. 637 C (VII), *ibid*.

<sup>46</sup> For a powerful and informed critique of self-determination, see Jorg Fisch, *The Right of Self-Determination of Peoples* (2015).

<sup>47</sup> See GA Fifth Session 421(V), A/RES421(V)A, 42 calling on the Human Rights Commission to include rights suggested by the USSR and Yugoslavia.

<sup>48</sup> See e.g. Art. 1(2) of the ICCPR.

<sup>49</sup> GA Res. 626 (VII) (note 44 above).

societies even before they became States. There is a complex relationship here. Thus, in the case of Namibia for instance, the United Nations (hereinafter the 'UN') asserted that the people of Namibia had rights to their resources that the government of South Africa, the administering power, had to respect.

This version of human rights was closely connected, from the outset, with the goals of achieving development. Thus, the preamble of Resolution 626 asserts 'the need for encouraging the underdeveloped countries in the proper use and exploitation of their natural wealth and resources' and proceeds to emphasize that development is crucial to international peace. Thus, while the Third World supported human rights, this was a vision of human rights that furthered the larger Third World projects of decolonization, anti-racism, and development.<sup>50</sup>

## Defeating the NIEO

The NIEO's effort to formulate and implement a novel vision of global justice was defeated through a variety of concerted strategies by Western countries and intellectuals. The project provoked outright hostility from American neoconservatives such as Irving Kristol and Daniel Patrick Moynihan—the former describing the NIEO as 'mau-mauing' the North. Henry Kissinger developed a comprehensive campaign to divide the Southern States. European statesmen such as Willy Brandt sought to be conciliatory, producing an important volume called 'North-South: A Program for Survival'.<sup>51</sup> A complete understanding of how the NIEO campaign faltered must take into account the different arenas and strategies in which this particular campaign was waged against the NIEO. Broadly, the United States and other Western countries launched a diplomatic offensive against the NIEO. The oil crisis of the 1970s, the debt crisis of the 1980s in Latin America, and the election of Margaret Thatcher and Ronald Reagan all contributed to the demise of the NIEO. In the more confined area of international law, particular struggles took place in relation to international trade, permanent sovereignty over natural resources, efforts to hold multinational corporations accountable, and concession agreements.

For the purpose of this chapter, however, my focus is on the significance of human rights for this particular debate. Since the drafting of the UDHR, a number of human rights treaties that created binding obligations had come into existence. The landmark Genocide Convention was followed by the Convention

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<sup>50</sup> See A. Anghie, 'International Human Rights Law and A Developing World Perspective' in S. Sheeran and N. Rodley (eds), *Routledge Handbook of International Human Rights Law* (2013), at p. 109-127.

<sup>51</sup> See N. Gilman, 'The New International Economic Order: A Reintroduction', 6 (1) *Humanity* (2015).

on the Elimination of Racial Discrimination, the ICCPR, and the ICESCR. Developing countries were, on the whole, enthusiastic in becoming members of these treaties. This was despite the East-West division on the significance of economic and social rights—a division that became further exacerbated in the 1980s as the Cold War took on new dimensions. The developing countries, for understandable reasons, given the imperial practice of deploying race to justify their subordination as ‘inferior’ peoples, played a major role in this initiative prohibiting racial discrimination.

The entire human rights project, however, now took on a different significance as a result of the NIEO. This might be understood in different ways. Imperialism had furthered itself through a version of what I would broadly term ‘transnational rights’—that is, entities, invariably European, would claim to assert rights as against distant countries and peoples. Vitoria, for instance, argued that Europeans had the right to trade and travel. The intellectual basis of this seemed to rest on the cosmopolitan view that ‘the world belonged to all’, and that even the invention of private property did not undermine the basic rights of all human beings stemming from this condition. This was a very powerful justification for commercial and trade expansion. Once the sovereign States were established as the dominant form of political organization, however, this system of rights—a system by which one entity could claim rights against distant peoples and societies, was relegated into insignificance. With the emergence of the sovereign State, parties outside that State, whether they were sovereign or individuals, could only make claims against that State if the State had bound itself to allow such claims.

This was the fundamental dilemma confronting the NIEO. On the one hand, it sought to consolidate Third World sovereignty—a sovereignty that still seemed fragile and adolescent; on the other, it demanded that rich countries in some sense, exercise their sovereignty in a way that would benefit the Third World countries. It was this damning characterization of the NIEO as making endless demands on the West that was integral to the campaign against the NIEO. Indeed, that is still the view of the NIEO held by many scholars.<sup>52</sup> What is overlooked or dismissed here is the compelling Third World argument that the rich countries had acquired much of their wealth from developing countries and their resources. The assertion of Third World sovereignty in the NIEO was an assertion against the enduring social and economic consequences of a legal regime that had been transformed even if it continued to shape international relations.

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<sup>52</sup> See S. M. Schwebel, ‘Review of the Battle for International Law’ (2020) 21 *Journal of World Investment and Trade Law*, 631-647.

Human rights now could be deployed precisely to defeat these transnational claims. Samuel Moyn has made the famous argument that human rights emerged in the 1970s as the 'last utopia'. I have argued that for developing countries at least, at precisely the period that Moyn studies (i.e., the 1970s), it was the NIEO that represented utopia—a utopia that was sought in a global campaign that encompassed UNCTAD, the General Assembly of the UN, and the Non-Aligned Movement among other forums. I have also argued that human rights, with its sudden popular prominence, its inclusion in Carter's foreign policy considerations, and its inspiration for NGOs, could be thought of as a 'counter utopia'. Very simply, developing countries believed that justice required large-scale redistribution and a reform of the structures that had led to inequality being embedded in the international system in the first place. It was the international system and the international legal doctrines that supported it that needed reform. Human rights discourse—and this was furthered by US foreign policy initiatives, suggested that social justice could be best achieved by the protection of human rights. This idea was to be found in the Charter of the United Nations (hereinafter the 'UN Charter') itself, where the preamble suggested that the promotion and protection of human rights were important for the 'creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations'.<sup>53</sup> Thus, justice could be delivered to the people of the Third World through the advancement of human rights. Furthermore, at this stage, human rights caught the popular imagination through the work of NGOs such as Amnesty International, as well as through broader theorizing on 'global justice' that focused on international human rights law.

The rise of authoritarianism in many developing countries, where corruption and nationalism had replaced the promise of a new beginning, made the need for human rights real and vivid. Inevitably, human rights were implicated and deployed in the Cold War as well as a means by which Soviet and communist repression could be criticized, on one hand, and also an important way of criticizing the brutalities committed by regimes supported by the US in various ways. Perhaps more broadly - and this is a theme that has long persisted in scholarship on global justice - manifest atrocities of the sort that are identified in Article 7 of the Rome Statute of the International Criminal Court (hereinafter the 'ICC Statute') may be more amenable to analysis than technical and inaccessible examinations of commodity prices and standards of compensation. Since at least the time of the Holocaust, this is the imaginary that has played an important role in influential thinking about social justice.

My intuition that human rights were used, at least by some parties as a way of thwarting the NIEO, has been supported by Jessica Whyte in her important

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<sup>53</sup> See Article 55 of the UN Charter.

examination of the rise of neoliberalism. Whyte's illuminating work demonstrates how neoliberal intellectuals and some human rights organizations, infused international human rights law with a powerful moral ethos based on a neoliberal vision of the market.<sup>54</sup> The suggestion here is that international human rights law, which at least in the 1948 Declaration sought to promote economic and social rights and did not provide primacy to the market, was given a different resonance by this intellectual project of neoliberalism.

Economic and social rights, an important feature of the UDHR, were further detailed and expanded in the ICESCR. The affirmation of the right to work, to social security, to an adequate standard of living—including food, clothing, and housing,<sup>55</sup> offered a promise of economic justice.<sup>56</sup> It is understandable then, that developing countries were enthusiastic advocates for the ICESCR, and indeed, the ethos of the ICESCR was also reflected in the many socialist projects launched in developing countries such as Tanzania. The role of economic and social rights in addressing inequality and furthering social justice was examined in detail in a number of different UN forums. As Julia Dehm in her far-reaching examination of this theme points out, Third World activism to promote the broad goals of the NIEO did not entirely relinquish human rights, even if human rights did not feature in any major way in the NIEO Declaration itself.<sup>57</sup> The Iranian jurist Manouchehr Ganji prepared an extensive report on 'The Widening Gap: a Study of the Realization of Economic, Social and Cultural Rights' for the Commission of Human Rights.<sup>58</sup> As Dehm points out, Ganji argued that the developing States could not meet their economic and social rights obligations without the support of the international community—especially at a time when Third World debt was increasing.<sup>59</sup> Third World States themselves, of course, made the same point when discussing the Report.<sup>60</sup>

International texts and treaties provided some recognition of the argument that States could not meet their obligations without international support (a version of this idea is also found in 'The Responsibility to Protect'). Article 28 of the UDHR states that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.

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<sup>54</sup> See Whyte (note 2 above).

<sup>55</sup> See Article 11 of the ICESCR.

<sup>56</sup> For a wide-ranging study of economic and social rights, see J. Woods and H Lewis, *Human Rights and the Global Marketplace: Economic, Social and Cultural Dimensions* (2005).

<sup>57</sup> J. Dehm, 'Righting Inequality: Human Rights Responses to Economic Inequality in the United Nations', (2020) 10(3) *Humanity*, at 443-459.

<sup>58</sup> M. Ganji, 'The Widening Gap: A Study of the Realization of Economic, Social and Cultural Rights', E/CN.4/1131 (January 1974). I am indebted to the detailed study of Ganji's report by Julia Dehm (*ibid*).

<sup>59</sup> See Dehm (note 57 above), 19.

<sup>60</sup> *Ibid*.



More particularly, Article 2(1) of the ICESCR suggests that States may have human rights obligations beyond their own borders, as '[e]ach party to the present Covenant undertakes to take steps individually and through international assistance and cooperation' in order to achieve the rights set out in the Covenant. Further, Article 11 of the ICESCR, which deals with a range of economic and social rights, asserts that '...States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent'. These texts then, comprehend the basic reality that the ability of a State to promote economic and social rights within its territory was dependent to some extent on the broader international system. Whereas the NIEO was based on precisely this premise, human rights would proceed beyond urging States to 'cooperate' to create an appropriate international system. It further stressed that such cooperation was to be based on 'free consent'. Consent to change was precisely what the rich world was unwilling to provide.

The question of 'extraterritorial' obligations has been further studied since then, by Human Rights Rapporteurs and the Human Rights Committees. The question here is whether a State bears human rights obligations beyond its territorial border and jurisdiction. In the case of economic and social rights, the question would be whether rich countries might have some sort of obligation to malnourished populations in a poor country on the basis of the 'right to food'. If anything, the clear links between international trade regimes, for instance, and the ability of a State to ensure its people enjoy a 'right to food', have become much more evident and subject to greater scrutiny.<sup>61</sup> When discussing such extraterritorial rights, however, these authorities 'talk mainly in hope rather than expectation'.<sup>62</sup> Within the jurisprudence of human rights, scholars have pointed to many difficulties in giving effect to extraterritorial rights. What are the obligations of a rich State to starving people in a poor State thousands of miles away? 'Who is the duty bearer when different States have the capacity to assist?'<sup>63</sup>

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<sup>61</sup> The important work of successive special rapporteurs, Olivier de Schutter, Hilal Elver and Michael Fakhri, have explored with depth and insight the relationship between international economic regimes such as the trade regime and the right to food. See, for instance, Human Rights Council, 'The Right to Food in the Context of International Trade Law and Policy', UN Doc. A/75/219, 22 July 2020.

<sup>62</sup> See B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (2014), p. 967.

<sup>63</sup> Saul, Kinley, and Mowbray, *ibid*, 968, citing Langford, Coomans and Gomez Isa. It is striking, but entirely understandable, that extensive research is now being done on the links between international economic regimes and their impact on human rights. This points to the fact that human rights are dependent on those regimes, whether they be trade or intellectual property or foreign investment.

The ‘Right to Development’, a right that had first been articulated in the 1960s, became the principal means by which the developing countries attempted to establish robust and meaningful obligations on States to ensure the human rights of people beyond their borders. Development, as I have argued, encapsulated the ambitions of the developing world, embodying aspirations for the protection of human rights as well as the achievement of higher standards of living. Bedjaoui’s claim then, that development was the ultimate right is in keeping with this vision.<sup>64</sup> The link is explicitly made of the transition between the NIEO and human rights, and more specifically, the ‘right to development’: the preamble of the Declaration on the Right of Development contains the language ‘[a]ware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order’.<sup>65</sup> Article 3 of the Declaration elaborates on the theme by expressing that ‘[s]tates have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development’.

The NIEO Declaration made no reference to human rights. By the 1980s, developing countries responded to the demise of the NIEO and the ascendance of human rights by attempting to reframe the claims of the NIEO for a more just world order in the language of human rights. The Declaration on the Right to Development, coming as it did in 1986, was in many ways an affirmation of the failure of the NIEO, not only in terms of its economic and political goals but also as presenting a vision of justice that contrasted sharply with the vision suggested by classic individual human rights. Perhaps these two projects aimed broadly for the same goals – a peaceful world in which people could live with some sort of security and well-being. The right to development encompassed the idea that development, in its many dimensions: economic, social, cultural, and political, was intrinsically linked to all human rights and fundamental freedoms.

But the two visions differed sharply on how this was to be achieved. For the NIEO, the international system was the problem and needed to be restructured; for human rights activists and scholars, and NGOs focusing on classic individual rights, the Third World State—authoritarian and dictatorial, was the problem that had to be remedied through human rights. Within Europe itself, the European Court of Human Rights was emerging as a successful example of what human rights law could achieve. In the developing country’s attempt to re-package

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<sup>64</sup> See M. Bedjaoui, *The Right to Development; International Law: Achievements and Prospects* (Brill, 1997), at 1177. For an insightful overview of the emergence of the Right to Development, see D. Whelan, ‘Under the Aegis of Man: The Right to Development and the Origins of the New International Economic Order’ (2015) 6(1) *Humanity*, at 93. This article traces the emergence of the ‘right to development’ by the Senegalese Foreign Minister, Doudou Thiem in 1966, through to its later inclusion in the work of the Human Rights Commission.

<sup>65</sup> Declaration on the Right to Development, GA Res. 41/128, 4 December 1986.

NIEO goals in the form of human rights, the right to development was in many ways an admission that human rights law had assumed primacy in discussions of global justice, and that it was by reviving the idea that development was essential for human rights that the broad ideas of the NIEO could be furthered within the lexicon of human rights. Having failed to bring about economic restructuring, international economic structures that had been the target of the NIEO remained not only intact but indeed had consolidated and expanded. The extent of these reversals became evident in the 1990s when the end of the Cold War and the collapse of the Berlin Wall led to NIEO strategies being reversed in every sector. The Third World proposals for investment, trade, and commodity agreements were defeated.

The World Trade Organization (hereinafter the 'WTO'), finally created in 1994, signalled the construction of a new world order based on neoliberal economics. The crucial topics of Intellectual Property and trade in services were included in the WTO regime despite the faltering resistance of the developing countries who understood that these regimes, authored by the rich countries and in many cases, the corporations in rich countries, would operate to their disadvantage. The Third World had seen the Charter of Economic Rights and Duties of States—which, for instance, included crucial provisions on permanent sovereignty over natural resources, as a blueprint for international economic order, complementing the UN Charter itself.<sup>66</sup> However, it was the WTO with all its far-reaching rules that governed the international economic realm and that could be seen as a rival to the UN. In many ways, it was a more sophisticated and advanced international institution—one that included a compulsory dispute settlement mechanism.

Not only did these visions of the market and political economy now come to dominate as neoliberalism became the all-encompassing vision, but certain actors developed a version of human rights that seemed to complement and further neoliberalism. Scholars from developing countries were acutely aware of this trend, and unsurprisingly so as the neoliberal version of human rights was formulated to further the neoliberal transformation of the Third World. Although international human rights law traces its antecedents to natural law developments, and the French and American revolutions, many of the major developments in international human rights law might be seen as efforts by major international actors to manage developing countries through the discourse of rights. As Upendra Baxi perceptively and presciently argued, the Universal Declaration was being supplanted by another version of human rights that was

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<sup>66</sup> Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX), 12 December 1974.

animated by ‘the promotion and protection of the collective rights of global capital’.<sup>67</sup>

Institutions such as the World Bank which were vigorous and powerful promoters of neoliberal globalization, characterized their activities, their economic reform, and structural adjustment policies as furthering human rights by promoting ‘good governance’. The focus on ‘good governance’ once again made the Third World State the subject of international reform. The complete defeat of the Third World initiative is dramatically suggested by the fact that the World Bank at this time, claimed that its policies were furthering the ‘right to development’. No more ironic or emphatic instance could be given of how the Third World project of development itself was now entirely taken over by neoliberalism.<sup>68</sup> The more traditional strand of human rights, one that was not—at least not [explicitly](#) market-oriented, now confronted the reality that international economic regimes, the newly established WTO with its intellectual property regime, and the formidable investment treaty system, had a significant impact on international human rights. A single award handed down by an investment tribunal, of more than five billion dollars,<sup>69</sup> would wipe out a good portion of the social welfare and education budgets of a Third World country.

Although scholars have suggested various ways in which human rights might be integrated with international trade and investment law to better protect human rights, little progress has been made in integrating human rights into the decision-making systems, and the tribunals and courts that hand down awards that have a binding force. There is a turn now in bilateral investment treaties to create more ‘policy space’, and to provide the State with more discretion to take measures to protect its population. Bilateral investment treaties have been much more effective in protecting against the so-called abuses of the State than international human rights law. It is surely ironic that the rights of foreigners have more effective protection than the human rights of the people within the territory.

## Towards a Conclusion

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<sup>67</sup> U. Baxi, ‘The Voices of Suffering and the Future of Human Rights’, (1998) 8 *Transnational Law and Contemporary Problems* 125, at 163-164.

<sup>68</sup> See A. Anghie, ‘Time Present and Time Past: Globalization, International Financial Institutions, and the Third World’, (2000) 32 *N.Y.U. Journal of International Law and Politics*, at 243.

<sup>69</sup> See e.g. ICSID, *Tethyan Copper Pty. Ltd v Islamic Republic of Pakistan – Award*, 12 July 2019, ICSID Case No. ARB/12/1; this is only one example of the massive amounts awarded to corporations under the investment arbitration system, one that is being increasingly challenged not only by [developing](#) countries, but also by the West itself which now runs the risk of being at the receiving end of the system, with China as a major capital exporter.

It is now surely evident that the effective protection of human rights, in particular economic and social rights, is crucially dependent on international economic law and indeed, the much more complex regimes that manage issues such as international debt in ways that advance the interests of creditors. And secondly, that human rights instruments are largely unable to manage the operation of these regimes despite their often adverse impacts on human rights. This is the broader point that emerges from a survey of the many innovative and thoughtful efforts to use international human rights law as a way of ensuring that international trade and investment regimes do not adversely affect human dignity. Elements of the NIEO effort to regulate the actions of multinational corporations have re-emerged in the many initiatives to hold multinational corporations responsible under international law for human rights violations.<sup>70</sup> Whereas the NIEO sought to regulate multinationals to ensure that their practices did not undermine the policies of the Third World State to achieve development, the Business and Human Rights Initiative seeks to ensure that multinationals monitor their practices in order to make certain that they do not violate human rights. In this sense, human rights might be seen as establishing at least in principle, the basic norms of economic justice.<sup>71</sup>

A question remains, however, as to how effective such initiatives will be in the absence of binding legal obligations on multinationals. The 'Right to Development' continues to be refined and a Draft Convention of the Right to Development has now been issued by the working group.<sup>72</sup> Article 5 of the Draft Convention makes explicit the position that the right to development 'implies the full realization of the right of all peoples to self-determination'. Article 13 returns to the theme of a duty to cooperate, in order to ensure that the 'international conditions' favourable to the right to development are in place. The problem remains of defining the contents of this duty and indeed, persuading the rich States to agree to this provision even if it is phrased in terms of a 'duty to cooperate' rather than anything more concrete.<sup>73</sup>

Despite the many intervening years, it is still arguable that the NIEO, in its emphasis on changing international economic structures, rather than on human

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<sup>70</sup> See the various activities of the United Nations Human Rights – Office of the High Commissioner, *Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, available at: <https://www.ohchr.org/en/issues/business/pages/wghrandtransnationalcorporationsandotherbusiness.aspx> (accessed 25 Nov 2024).

<sup>71</sup> The tireless work of Philip Alston has been crucial in making this connection: see e.g., UN Human Rights Council–Report of the Special Rapporteur on Extreme Poverty and Human Rights–'The Parlous State of Poverty Eradication', UN. Doc., A/HRC/44/40, 2 July 2020.

<sup>72</sup> UN Human Rights Council, 'Draft Convention on the Right to Development, with Commentaries', UN. Doc., A/HRC/WG.2/21/2/Add.1, 20 January 2020.

<sup>73</sup> Ibid.

rights to advance the cause of development—and thereby global economic justice, has proven to be correct in its analysis of what was required to bring about global economic justice. As Margot Salmon argues forcefully, the quest for global economic justice, most powerfully asserted by the NIEO, remains incomplete and unfinished.<sup>74</sup> I have argued that the NIEO and human rights presented contending and competing visions of global justice. The defeat of the NIEO in the 1980s and the expansion and proliferation of human rights since then as the ‘last utopia’—a proliferation that significantly corresponded with the unrelenting advance of neoliberal globalization, suggests that human rights, even if not complicit with neoliberalism and all the social dislocation and inequality it has generated, has been ineffectual in preventing the global injustice it has facilitated. In 1999, I argued that human rights have failed to address the challenges of globalization, and I have no reason to change that view despite all that has happened since then.<sup>75</sup> Indeed, it can be argued that neoliberalism has devised even more effective legal technologies, especially in the realm of private law, to expand even further - as Linarelli, Salmon, and Sornarajah have brilliantly demonstrated in their landmark work, *The Misery of International Law*.<sup>76</sup>

To argue that the NIEO insights remain valid does not mean a complete acceptance of its vision of justice. The NIEO vision of development emphasized rapid industrialization; the impact of this model of development on the environment was hardly considered, even though the Stockholm Conference had taken place a few years earlier. The ecological crisis we face is surely one of the gravest confronting the globe, threatening its very survival. The NIEO vision of development cannot remain unamended. It is also clear from the ongoing traumas that postcolonial States have suffered as a result of tyranny, mass violence, dictatorships, and re-emergent nationalisms, that basic human rights such as the right to free speech, to a fair trial, and to be free of torture are as important as ever. Human rights then do play a crucial role in furthering international justice. My argument has been that it is less effective in achieving economic justice. The promotion of human rights and international economic restructuring then is needed to achieve the elusive goal of global justice.

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<sup>74</sup> See M. E. Salmon, ‘From NIEO to Now and the Unfinishable Story of Economic Justice’ (2013) 62(1) *ICLQ*, at 31-54.

<sup>75</sup> Anghie (note 68 above), 249.

<sup>76</sup> See J. Linarelli, M. E. Salmon, and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018).