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CLOSING PLENARY: INTERNATIONAL LAW AS AN INSTRUMENT FOR DEVELOPMENT

The Closing Plenary was convened at 11:00 a.m., Saturday, March 30, 2019, with opening remarks by Sean D. Murphy of the American Society of International Law. The convener, Ernst Hirsch Ballin of the T.M.C. Asser Institute for International and European Law gave opening remarks. Janne Nijman of the Asser Institute, moderator, then introduced the plenary and the panelists: Martijn Snoep of the Netherlands Authority for Consumers & Markets; Ulrik Vestergaard Knudsen of the OECD; and Balakrishnan Rajagopal of MIT. Saskia Bruines, Deputy Mayor of The Hague, gave remarks at the conclusion of the panel.

Opening Remarks by Sean D. Murphy*

I welcome you all to this closing panel for the 113th Annual Meeting of the American Society of International Law.

This is the eighth year that the Society has partnered with our friends in The Hague to bring leading figures from The Hague and around the world to ASIL's Annual Meeting. As such, on behalf of the Society, I deeply thank our Dutch colleagues for their support and sponsorship of this session. I particularly thank the Municipality of The Hague, which has been central to this and I am delighted that we have The Hague Deputy Mayor, Saskia Bruines, here with us today.

Secondly, I would like to thank the Netherlands Embassy here in Washington D.C., which has been instrumental in helping to organize the event. And third, I would like to thank the T.M.C. Asser Institute, which was established in 1965 in The Hague and serves as an inter-university institute for international law. Today, it is a renowned center of expertise in the fields of public international law, private international law and European law.

I turn the podium over to Dr. Ernst Hirsch Ballin, the convener of today's panel.

Opening Remarks by Ernst Hirsch Ballin**

Mr. President,
Madam Deputy Mayor,
Fellow members of the Society, dear all,

Just like in previous years, it was again a great pleasure and privilege for us at the Asser Institute in The Hague to organize in close contact with ASIL, especially our friend Mark Agrast, and the City of The Hague a roundtable for the closing plenary. With the selection of the topic and the speakers, we try to do justice to the general theme of the annual meeting and the research

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and teaching focus of the Asser Institute. In these years of growing international tensions and attempts to reverse the embrace of multilateralism in international relations, we continue to focus on trust through international law.

One of the reasons why we feel deeply connected with this Society is that our name giver Tobias Asser and your co-founder and first president Elihu Root were partners and protagonists in the same movement of fostering peace through international law. Both of them contributed to the Dutch-American cooperation with respect to the Hague-based institutions established in and around the Peace Palace. And for both of them, this mission in the international arena was a consequence of their understanding of what would serve their own country best. You know, of course, that Elihu Root, was also involved in domestic politics, as a minister, as the secretary of state, and in later years as a senator. Less well known is Asser's participation in the Dutch liberal reform movement of the late nineteenth century. Root and Asser shared the understanding that just relations inside their country and in international relations were linked to each other. This is as important today as it was in their times. They both received the Nobel Peace Prize (1911 and 1912) for their contributions to the development of the international institutional order.

Their vision on international relations as an instrument for peaceful development of their countries was—in the words of Martti Koskenniemi's Grotius Lecture—no doubt enchanting. But their vision and their mission also had implicit limitations. The rights and interests of peoples in other parts of the world did not surface in their worldview. Inevitably, these great minds were also children of their time.

Are we able, and do we really want to do better? "International Law as an Instrument for Development"—the topic of this closing plenary—connects international law with the living conditions within nations and the sustainable development goals for their citizens. Here, the connections between international and internal justice will be scrutinized.

It is with much pleasure that I now give the floor to my close colleague at the board of the Asser Institute and at the University of Amsterdam, Professor Janne Nijman, who will introduce the participants of the round table and moderate the discussion.

Remarks and Questions by Janne E. Nijman*

Thank you, Ernst. Good morning ladies and gentlemen. It is an honor and privilege to moderate this closing plenary, in which we discuss a very topical and important subject—international law and development. We do so at a time of grave concerns about how poverty, inequality, and social injustice seem to accompany economic globalization. To be sure, international law as an instrument for economic development has contributed to the lifting of millions of people out of poverty; yet international trade law, investment law or even human rights law come with increasing inequality too. As a recent book argues, international economic law is also implicated in the construction of human "misery." So, it is high time to discuss international law as an instrument for development here at ASIL.

Our speakers together offer a wonderfully rich account of personal and institutional experience and legal expertise. Today, we will examine the past, present, and future of international law as an instrument for development. This diachronical perspective will structure our discussion.

Let us start with some retrospection to set the stage. In international legal history, it is becoming commonplace that international law itself emerged in the fifteenth–sixteenth–seventeenth centuries, largely from the ambition to support foreign trade and investment. Thus, they arguably brought colonization and economic exploitation rather than global, fairly distributed development. When we jump to the 1960s, we find great popularity of the "law and development" movement—

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especially here in the United States. The idea was that law itself was crucial for the promotion of economic development and that the law and judicial systems of most developing countries were in need of reform. It looked at law as *an instrument for* social and economic change rather than *an expression thereof*. In the 1970s and 1980s this approach was scrutinized and discredited for its attempt to simply transplant Western legal systems to countries in the Global South. This is often referred to as "the rule of law" industry. More recently, scholars like Tamanaha have argued that reforms need to be given time and that one should not jump to conclusions. Indeed, law and development are intricately connected in numerous ways. I would say that today, the proposition that rule of law safeguards are central to chances of development is an important one. As is the more concrete proposition that law and legal institutions are essential to fight corruption and gender inequality, and to assure the enforcement of contracts.

The centrality of law and the judicial system to a country's development has also captured the imagination of international institutions such as the World Bank and the United Nations. It is otherwise an important item on the agenda of the Organisation for Economic Co-operation and Development (OECD): Middle East and North Africa (MENA) countries have requested OECD assistance in reinforcing respect for the rule of law in support of their economic and social development, in raising citizens' confidence in the integrity of the judiciary system and other public institutions, and in ensuring access to justice.

That said, obviously international law as an instrument for development is about much more. It is very much about the economic order that is created by international law and institutions. We have to think only of the 1974 UN General Assembly resolution on the "New International Economic Order," an attempt by Third World Countries to replace the Bretton Woods system with one that would be more supportive of their development. Our topic of today, *international* law as an instrument of development is about how international law and governance with all its subfields—ranging from trade law and competition law to global health governance or global urban governance—influences the process of development. I look forward to our discussion on how antitrust law and competition law can be conducive to development, and what the role is of market regulation in the promotion of development.

Firstly, let me start by inviting the panelists to reflect on a somewhat general question from your specific background and expertise. Looking back at international law and institutions as instruments for development, what can we learn from past use of international law for development? What should we bring to our current attempts to distribute development more justly, and what to the future? What in your view has worked, and what has not?

Secondly, I would like to touch specifically upon the two conceptions of development that include the use of international law. On one hand, international law is used to support economic development of states or societies as a whole—the macro level. On the other hand, international law is understood to contribute to the pursuit of human development—the micro level of individual human lives. How do these two approaches to development relate? Are they easily aligned, or do they often clash? How has international law produced and reproduced economic and individual human development? Living in a global society, what is the role of citizens and consumers in the pursuit of a fairer distribution of development?

Finally, I would like to invite the panelists to discuss the 2015 UN Sustainable Development Goals (SDGs) as a tool for accomplishing both economic and human development. A number of recent books address how neoliberal globalization has been supported by international law. I have already referred to the book *The Misery of International Law*,[1] but also *Globalists*, the latest

[1] John Linarelli, Margot E. Salomon, Muthucumaraswamy Sornarajah, The Misery of International Law: Confrontations with Injustice in the Global Economy (2018).

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book by Quinn Slobodian comes to mind. These books raise the question of how a neoliberal approach to the global economy—arguably entrenched in international law and institutions—may have brought about economic development at the national and global level but has failed secure *human* development. Arguably, the emphasis on sustainable development in more recent years is an attempt to counterbalance the dominant economic approach. Obviously, the SDGs are an agenda that seeks to use (amongst others) international law as a tool for accomplishing *both* economic and human development in a sustainable manner between now and 2030.

How do you look at this Agenda and the expectations that come with it? Do the SDGs and/or contemporary human rights instruments offer an effective language to contest the neoliberal international economic order and the role international law plays to sustain it? Have the SDGs the potential to make international law an instrument more attuned to *human* development? How do you translate these SDGs, that is: implement these goals into policies of your organization and interpret them to engage both businesses and consumers? And, more generally, how can international law perform better as an instrument for development?

Remarks by Martijn Snoep*

Thank you very much and thank you for inviting me here. Firstly, I would like to mention that, despite having practiced international competition law for twenty-eight years, the area of international public law is largely outside my area of scope. However, I thought it would be interesting to share with you some of the ideas behind international competition law and how competition law is part of the thought process of many governments and institutions in aiding development around the world.

The international proliferation of competition law really began after World War II. Following the war in the Pacific, the U.S. government insisted that Japan and Korea implement a rigid set of rules reflecting the U.S. style of competition law in order to rebuild both countries after the war. In Europe, a similar movement occurred, although in some European countries there were already early remnants of competition law, and so there was not a need to create a completely new system from the ground. This meant that, with the help of the U.S. government, competition law was implemented upon existing structures in Germany and a few other countries.

In Europe, a big change took place when the European Community for Coal and Steel was established by the Treaty of Paris. This was the agreement that paved the way for the current European Union. Coal and steel were placed under a multinational framework in which competition law was one of the core principles to achieve market integration. The idea behind this was that, if companies could no longer enter into cartels for coal and steel, then this would foster European integration and thus limit the likelihood of the outbreak of another war in Europe.

The idea behind competition law, particularly the form in which it was implemented in Europe, was that competition not only promotes consumer welfare (i.e., lower prices, higher quality, more innovation), but also promotes political objectives like market integration and economic democracy in the form of free choice for consumers and business opportunities. This promotion of economic democracy and the resulting dispersion of economic power was, and is, still an important part of competition law thinking in Europe and other countries.

The European Coal and Steel Community and its founding Treaty formed the basis of many of the economic treaties that followed, which were also imbued with the same principles about competition law. This pattern continued after the various accession agreements between Central and

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Eastern European countries were concluded after the end of the Cold War. The European Union insisted on a strong and rigid competition law system within these countries prior to their accession to the EU. Nowadays, in its trade agreements with third countries, the European Commission also insists on the implementation of a rigid and thorough competition law system.

Competition law is not only a part of the international law development stimulated by the European Union, as countries like the United States, Canada, Australia, and many other countries play an important role in the proliferation of competition law. There are numerous international organizations who also play a role in this proliferation—the OECD, for example, has a strong program helping countries to further develop their competition regime, and the United Nations Conference on Trade and Development is also an important player in this area.

One of the most interesting and well-functioning bodies in this field is the International Competition Network (ICN), which was founded over a decade ago in 2001, and now has over ninety participant countries. The ICN brings together different competition authorities, state representatives, and non-governmental advisors to share their experiences and best practices, and to learn from each other. There is an annual global conference and working groups on different topics meet regularly. There is a strong outreach element by developed countries in order to include countries with emerging competition law regimes and help them to set up a well-functioning system of laws and enforcement. This is the good news.

In terms of the "bad news" and the issues with the system, the premise of competition law is that consumers should be sufficiently empowered to exercise their economic rights. Consumers can "vote with their feet," in the sense that, if they are dissatisfied with a particular product or service, they are free to go to another supplier. If there are enough suppliers, then this creates competition, and competition in turn creates favorable outcomes for consumer welfare, market integration, and economic democracy.

However, there are three main issues with this premise. Firstly, consumers can only make a rational choice if they have sufficient information. In many markets worldwide, there is a significant information asymmetry, and rules must be enacted to correct this asymmetry and ensure that consumers, at the very least, have all the information necessary to make an informed decision.

Secondly, although in recent decades, governments have indeed made efforts to enact consumer protection laws that ensure that consumers are provided with all the information necessary to make a decision (i.e., general conditions in consumer contracts), often such transparency is not enough. Scholars have noted that there is a significant amount of consumer inertia, meaning that consumers often stay with one supplier of a certain product, despite the fact that that supplier is at best mediocre and better alternatives are available for the rational consumer. One of the reasons for this is that consumers do not always act rationally, as is the premise in competition law policy. Now, the biggest challenge for competition law and other authorities globally is how to help consumers to make a rational choice without being patronizing and disturbing the market. This is a very delicate issue to navigate, as is further amplified by modern technologies, which allow suppliers to utilize consumer inertia in order to extract more value out of consumers than would be possible in a truly competitive market.

In response to the question, to provide some background on my professional journey, I worked in private practice for twenty-eight years, representing almost exclusively multinational firms. Over the years, I felt increasingly uncomfortable. These large companies are very powerful and have a lot of money. The reason why I "changed sides" and started working for the government is because I saw this inequality in the battle of legal arms. The other side that motivated me to join the independent government agency that I represent was that this agency enforces consumer protection and competition laws. I strongly believe that both need to go hand in hand, because of the issue that consumers need to be informed and protected in order for markets to remain competitive.

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Consumer protection laws that protect consumers against their own impulses also need be implemented and enforced. For example, big tech products that are advertised as "free"—in fact, you pay with your privacy. In order for competition law and economic democracy to really generate the results that it promises, consumers need to be protected against themselves, for example, by strict privacy laws.

Finally, I do believe that there is sufficient evidence that economic development is a very important enabler for human development, and that economic laws (international or domestic) are necessary to stimulate such economic development. There are many international organizations worldwide, like the OECD, the UN Conference on Trade and Development (UNCTAD) and ICN, who really make a difference in helping countries to reach and promote economic development domestically. Sometimes it is also helpful to look at the small steps taken by organizations, as focusing on the bigger picture often makes change appear slow and inconsistent. In looking at the small steps, we can better see the progress that has been made.

In this context it is worth noting that the sustainable development goals have further helped to shape the thinking among companies, governments and law-enforcing agencies how human and economic development must go hand in hand. To give a few examples from over the last few years, the European Commission has strictly enforced its rules against European truck manufacturers that entered into quasi-agreements not to introduce more environmentally friendly engines for a period of time. This innovation-limiting cartel was heavily punished by the Commission. And there are other examples. Looking at these steps and the international cooperation at many levels, including the creation of "soft" international law, make me hopeful when looking toward the future of the sustainable development goals, despite all the challenges that we will continue to face.

Remarks by Balakrishnan Rajagopal*

Thank you, Janne. The discussions so far have already raised the question of what exactly we mean when we discuss "development"—was it a particular historical experience affecting certain countries, and characterized by the use of particular technologies and modes of intervention? Or is development merely another word to describe capitalism, or the phenomenon of globalization?

Firstly, at least in the academic fields that I am associated with, whether it is international law, human rights, or development studies more broadly, development has a particular meaning, which is quite distinct from globalization, and certainly from capitalism. Modern international law of the twentieth century, with its focus on functionalism, pragmatism, global institutions, and human rights was historically founded as a result of what scholars have termed the "development encounter." The development encounter is the intersection between an international law largely created as a product of Western ideas and practices, and the aspirations and political strategies emerging from the rest of the world as it became decolonized. In that sense, international law is more than simply an instrument of development, but rather resulted from the encounter with development. I have argued this in several ways in my works, most particularly in my book *International Law from Below.*

The second thing I should note is that this modern international law can be seen most acutely in the politics of decolonization, specifically since the 1960s. The historical precursors to development were both intellectual (for example as in the work of scholars such as Wilfred Jenks in the inter-war years, calling for what he called a "social character" of international law), and institutional (as in the formation of the International Labour Organization, and particularly in the experience of the Permanent Mandates Commission, which has often been credited as the precursor to

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modern international institutions, such as the World Bank). One of the historical precursors to development was also political, as seen in the demand by Japan at Versailles for the racial equality of nations.

My larger point is that decolonization produced an impetus by transforming much of old international law in the 1960s, an ethos which was captured partly in the work of scholars such as Wolfgang Friedmann, and other leading figures, to argue for what they termed a "law of cooperation," as the title of his book *The Changing Structures of International Law*, implied.

During this historical moment, developing countries perceived international law as a *barrier* to development, not as a *tool* of development, and therefore, they argued for transformation. The work of the first generation of Third World Approaches to International Law (TWAIL) scholars, such as Mohammed Bedjaoui and R.P. Anand, were intended to push toward that goal. However, the push for developing countries to transform international law following their decolonization did not fully materialize, as we can see from the formal non-acceptance of demands such as the New International Economic Order by Western states. Nevertheless, they had material successes—vividly illustrated by the rise of Brazil, Russia, India, China, and South Africa (BRICS). In a 2013 report, the UN Development Programme (UNDP) termed this "the rise of the rest," echoing the title of a book written by my colleague, the late Alice Amsden.[2]

The success of these developing countries, whether BRICS or others, came partly by explicitly violating Western international law, including in areas such as competition law, investment law, intellectual property, as well as by strategically deploying international law techniques, to bolster and entrench their economic and social advancement, particularly in the use of international trade law and the World Trade Organization (WTO), where developing countries are active participants. Thus, although international law was seen as a barrier to development by decolonized states in the 1960s, they selectively used it to achieve their goals.

The third point I would like to make is that the class character of international law is revealed by the overinvestment in lawmaking in areas that are relevant for global capitalism and the ruling classes, and the underinvestment in lawmaking in areas that are relevant for the "subordinate" classes. We see this in the creation of institutions with real teeth (such as the International Centre for Settlement of Investment Disputes (ICSID) since the 1960s, and picking up speed since the 1970s, and the meltdown of the global financial and banking sectors and the formation of the Basel Committee on Banking Supervision. The neoliberal turn in world politics since the 1980s and 1990s (often repackaged as "globalization") cemented this overinvestment in legal regimes which helped to form a particular kind of international law—one that was created by, and worked only for the interests of a global class of elites.

In the 1990s, we see the creation of the WTO, a "legal Frankenstein," and the North American Free Trade Agreement (particularly Chapter 11). Compared to this, the international law regimes that protect human rights, the oceans and other commons, and the environment are mostly toothless. The lopsidedness in the character of international law today, as seen historically, has deeply affected, and is affected by the structure of the states which form the international system. In other words, states also exhibit a class character internally, divided between a globalitarian class, and subordinate classes within their own states, whether in wealthier countries, like the United States, but also in countries like Brazil or India. The intersection of the multiple crises in which we find ourselves today—primarily an ecological and planetary crisis; a moral and civilizational crisis; and a political and institutional crisis—can be rooted in the class character of the state and the international legal order which states have created historically.

[2] Alice H. Amsden, The Rise of "The Rest": Challenges to the West from Late-Industrializing Economies (2004).

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For me, these are some basic reflections, based on which we can move onto the question of how we can build international law to be more responsive for development.

In responding to the second question, it would be useful to start with a short genealogy. Human development emerged as a critique of the limits of economic development. Since the 1970s, a new paradigm of development thinking emerged, based on existing work in welfare economics, that attempted to explain why state-led development strategies had largely been disappointing, and what else could take its place. This was seen to be the case especially with Import Substituting Industrialization strategies pursued in Latin America, but also with statist models of development in Asia including in India.

The verdict was clear: the state did not deliver as promised, and its assumption about the benefits of economic growth (i.e., that wealth would trickle down, and the dual economy would gradually disappear) proved to be hard to defend. Human development was supposed to shift the focus not only to more micro-economic foundations, but also to human capability as a focus (particularly reflected in the work of Amartya Sen and others). The focus was thus on *poverty* instead of *growth*, with specific focus on sectors such as housing and education.

As I mentioned, human development was supposed to be a critique of the limits of economic development, but it also rested on a critique of the state's role in the economy. What human development actually revealed as a paradigm was that there was no escaping the state in the economy. At its core, the issue was the role of the state in the economy, and the move to human development did not cleanly break from economic development models, which also demanded state involvement in the economy.

In my view, international law has had very little to do with human development. The core of mainstream international law has focused on building an architecture, which will protect economic development of a particular kind. This is particularly true since the neoliberal turn in the 1980s. The main area of international law that has intersected with human development is, of course, human rights, especially in the area of economic and social rights, in the area of housing, for example. It has also intersected with human development through demands by developing countries for norms such as the right to development.

However, these areas of international law remain marginal to the core of international law, as demonstrated by the way they are taught in U.S. law schools, or the way they are seen as relevant for practice by private practitioners, or the way they are used as a framework for interstate bargaining and negotiation.

In fact, international law has acted more as a barrier to the achievement of human development, rather than as an enabler of it. And this goes back to the class character of international law, which systematically favors those who are well off. If we take health, for example, as a core human development goal, we can see the number of barriers that international law erects in achieving basic health equity across the globe, through intellectual property regimes, which protect pharmaceuticals and their pricing mechanism, investment regimes which prevent states from intervening in markets, using threats of litigation and compulsory arbitration and so on.

However, international law alone is not the *only* reason for the move toward human development —the class character of the states that comprise the international system actually undermines international law's ability to act. Perhaps this should lead to a call for reconceptualizing international law to move beyond that traditional framework of states.

To conclude, international law functions as a major barrier to the achievement of human development, even as it protects and promotes a particular version of economic development.

What has international law to do with the success of the most successful countries, such as the Scandinavian countries, as you mentioned Ulrik? If it can be argued that the particular experiences and successes of Nordic countries resulted from the specific institutional designs, mechanisms, and

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spaces created by international law, then the question becomes "if they could do it, then why not other countries?" The answer to this question is perhaps linked to the class character of societies—perhaps the way in which Nordic societies are structured is quite different from a country like Brazil, for example, with its history of slavery and racial exploitation, and a particular form of capitalism, which has been exploitative for many years and sanctioned and protected by a legal order dominated by the West, which was not the case for Scandinavian countries.

The reference to a soft international law by Ulrik earlier might be explored for the way in which a counter-hegemonic regime of international law might be used to temper some of the excesses of a formal regime of international law, which does not really work for anyone other than those who are well-off. For example, in spaces such as the Food and Agriculture Organization of the UN, and using soft law instruments such as the 2012 Voluntary Guidelines on the Responsible Governance of Tenure of Land, which provide a very practical and usable soft law standard at the international level for international organizations, states and NGOs try to improve the situation of the most marginalized on the ground. There are hopes within international law—the future of the whole system is not condemned.

Going forward, if we are going to make international law matter for development, we can go about it in two different ways. One is that we should reform the existing structures of international law, which is a very legitimate goal to pursue, including bringing back elements that have been lost in time since the 1960s and 1970s, such as the law of cooperation. The second is that we should think about moving away from a fixation on traditional sources of international law for more innovative approaches. For example, the work that we are conducting with the Asser Institute on cities in international law as new sites where new action can be generated.

We should also stop overexpecting international law to deliver on everything. It is not a magic bullet, and it cannot be expected to solve all of the world's problems. Some issues are better solved with other tools, and this does not mean that international law is becoming marginal. For example, one of the most important developments to happen in Kenya in recent years was the creation of an Internet platform based on crowd-sourced data called "Ushahidi." This platform helped Kenyan youth to mobilize and respond to election monitoring, civic engagement, and humanitarian response. This moment coincided with the moment of new constitution making in Kenya, and the opening of new democratic reforms. International law had little, if anything, to do with this.

The biggest problem is that international law has a lot of leftover barriers to development, many of them of fairly recent origin, from the 1980s and 1990s, and we must work to actively remove these barriers.

Remarks by Ulrik Vestergaard Knudsen*

Thank you very much, Janne. The answers to the two questions that you asked in your email are essentially the same: "what has worked?" and "what are the sensitivities from the last few decades that should be brought into the present and the future?" Globalization is the answer to these two questions.

Seen from our perspective at the OECD, there is objectively no doubt that globalization has yielded the greatest increase in global prosperity in human history. It has helped to spread democracy, and indirectly helped to spread human rights. It has also fostered a diffusion of choice for consumers worldwide, for science, medicine, culture, sports, art, and so on. This was especially true for the West, in the first half of the period following World War II, and has since been the case for China, Vietnam, South Korea, and many others. It is important to remember that globalization

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has lifted almost a billion people out of poverty in the last two or three decades, which is undoubtedly a great achievement.

However, globalization is also a sensitivity. Over the last few decades, we have witnessed a growing concern that the benefits of globalization are not evenly spread, especially in Western countries, which have seen a resurgence in nationalism, populism, and protectionist sentiments. This is perhaps a reflection upon the fact that globalization has not helped the middle class grow in Western countries.

If we look at the biggest country in the Western world, the United States, and the five or six biggest countries in Europe, we can see that these countries are all marred by the biggest societal divisions that they have faced since the end of World War II. In the United States, it is the question of whether you are a supporter of Donald Trump or against him. In the UK, the British government has been unable to discuss any other political subject than the British exit from the European Union, an issue that has marred British politics for over three years. In Germany, there have been many existential discussions over identity, migration, and the greening of the economy. In Italy, we see the divisions even within the populist factions. These divisions also exist within Spain and France, and many other European countries.

It is important to note that globalization may only be one of the many reasons why these countries are facing these issues. However, it is a crisis that all of us, especially those within the multilateral institutions, should reflect upon. It is also noteworthy that this "backlash" against globalization is not characteristic of the developing world. In Asia and Africa, there have been no such uprisings against globalization and free trade. It is interesting that the backlash has instead originated from Western states, which were the ones that created these structures, and benefited from them for the last seventy years. It is perhaps the greatest irony of our time, that the countries that have benefited the most from international law-based cooperation and the international rules-based system are the ones most eager to dismantle it. The OECD is a very staunch believer in the international rules-based order. I cannot see an alternative method to tackle global issues such as migration, urbanization, tourism, and other issues that we face, without international cooperation.

However, we do need to ensure that we successfully distribute the benefits of globalization. This is the biggest question that we need to address in order to save, and perhaps reform, the international rules-based system that has served us so well in the past, and that I hope will continue to serve us well in the future.

In response to the statements made by Balakrishnan on the lopsidedness of the international system, while I would agree that we do have some distributional problems, I would disagree that the system is *inherently* lopsided. If you look at the UN, WTO, etc., there is certainly a case to say that a lot is being done for developing countries to be able to catch up. In the last few decades, it is not the Western states that have provided the growth to the world, but the "rise of the rest" as you have rightly pointed out.

What we have been doing at the OECD is that we have provided soft law, and we have done so in nearly every area of public life, be it environment, development aid, intellectual property rights, and more. We have also provided soft law to address the question of what should guide private businesses and multinational enterprises. This is the way that we try to contribute.

The OECD is not the first and foremost organization that one would consider when talking about human rights, but it is certainly in its Charter that member countries not only have to live up to global rules on market economy, but also rules on democracy and human rights. As we look to the future, some of the areas that we do the most promising work at the OECD are to do with protecting the rights of future generations—one area is artificial intelligence, which we will hear much more about in the coming years, and the other is perhaps the most economically and politically charged work at the OECD, which is the work on digital tax. If we lose the tax base from the

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big tech companies, it will become obsolete to talk about protecting human rights and the vulnerable populations in the future.

I do not agree with the statement by Balakrishnan that international law acts as a barrier to development. If you look at some of the most successful countries in the world when it comes to combining the economic development regime with the human development regime (which would probably include the Scandinavian and Nordic countries, and perhaps also the Netherlands), these countries always come out on top when looking at the various OECD indexes for human development (be it inclusion, gender equality, participation in the workforce, etc.). My very strong sense is that these countries come out on top because they have embraced *both* the economic development regime *as well as* the human development regime. These are countries that have fully internalized the idea of open markets (product markets, labor markets, service markets, etc.). On the other hand, however, they also have a very high degree of redistribution, and a very strong state. Therefore, the issue is much more complex—you need to combine the human development regime and the economic development regime in order to create "winners" and social inclusion.

One thing to mention when discussing the tensions between human development and economic development, and perhaps the source of disagreement between Balakrishnan and I is the different terms in which we view international law. I would think about the more abstract cooperation regimes that have traded with transparency and product markets worldwide; the distribution of the human rights regime, and also security alliances that have allowed these countries to grow and focus their attention on developing a welfare state in relative safety from war. I am perhaps thinking about international law in the softest of terms, compared to you Balakrishnan, who are perhaps thinking about a more legally strict interpretation of international law.

The concept of "common interest," which was mentioned by one of the audience members is a very interesting concept, as it is not a concept which comes up very often anymore. It is large problem now that we do not have a big wave in support of multilateralism, and no country or region strong and/or willing enough to take up the mantle. While the European states are genuine supporters of multilateralism, they are currently so preoccupied with their own internal issues that that we cannot rely on EU to take up the mantle of multilateralism.

In answer to the question posed by Professor Schrijver, part of the reason for the lack of development in international law over the last few decades is the nationalist, populist, and protectionist backlash. Further, if we look to the WTO for example, we have not been able to create new rules since its finalization in 1994. Not only does not this mean that no market openings have been created in favor of developing countries, but there is also a crumbling of the dispute settlement system of the WTO. There is certainly a lack of development in international law.

A small note about the SDGs—perhaps they can be seen as a sort of silver lining to the situation. In my experience over the last few years since we agreed to the SDGs, they have become a brand of almost every government. Even in developing countries, the SDGs are something that companies are taking seriously and are affecting the way they do business in terms of climate and water protection—they are no longer being viewed as merely a branding exercise. The SDGs are certainly the boldest ambitions that mankind has set for itself.

How do we make international institutions directly accountable for citizens at the grassroots level? This is unlikely to happen in the near future, and is a very big ask, considering the circumstances we are in at the moment.

It is very clear from the rest of the panel and including myself that we do live in challenging times, so I do not want to be too optimistic. But let me just ask five basic questions to human existence when it comes to the golden age of international law since World War II.

Firstly, have we seen a rise in the amount of democracies around the world? *Yes*. Secondly, have we seen a rise in the spread of human rights in the last seven decades? *Yes*. Third, have we seen

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billions of boys and girls being lifted to new levels of education? *Yes*. Fourth, have we seen a decrease in the number of devastating wars around the world? *Yes*. Lastly, have we seen billions of people lifted out of poverty over these seven decades? *Yes*.

Therefore, let us not leave this conference totally pessimistic about what mankind can achieve if we cooperate and reform our international law and institutions. My final question— which may not elicit complete agreement from the panel— is as follows: has international law helped this development and allowed us to achieve these successes in 2019? *Yes it has.*

Closing Remarks by Sean Murphy

Thank you very much Janne for moderating this panel, and I also thank the panelists for an outstanding intellectual buffet. I invite Saskia Bruines to come to the podium to say a few closing remarks.

Closing Remarks by Saskia Bruines*

Thank you very much ladies and gentlemen, it is a pleasure to be here. Thank you, honorable guests of the panel for the very interesting discussion that was raised, and for the questions that were surfaced about globalization, inequality, access to information and the influence of new technologies on our societies. Finding answers to all these questions is not easy, as we have seen.

I would like to make some remarks about new technologies and international law as an instrument for well-being. Three months ago in The Hague, we organized a Hackathon for Good, a competition for young, talented IT professionals to solve practical issues regarding peace, justice, and security. Organizations like the Red Cross, the International Criminal Court, and NATO submitted an issue to tech start-ups, which then began working on the issue.

The winner of this competition produced something very valuable. They combined data from satellites and social media to create a tool that made it easier to identify areas which were prone to land grabbing. Land grabbing is the phenomenon in which large corporations or political powers simply "steal" land. This land is usually fertile land used by small local communities—land that is essential for their economic survival. In principle, these people are protected by international law; however, protection can only be effective if we also see where land is prone to land grabbing. Practical instruments using new technologies can play an important role in this.

As the international city of peace and justice, The Hague is keen to contribute in the development of international law as an instrument of development. We also want to facilitate this development for the next age—the digital age. As the example I gave has shown, we can support the law with very practical digital solutions. At the same time, it is also important to embed our use of data and artificial intelligence in the current legal system.

There is a lot to be done to further develop international law, and The Hague feels it can play an important role in this regard.

* Deputy Mayor of The Hague.

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