

# International Law of Development: Comparative Perspectives

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Agreements concluded between the predecessor State and the newly independent State . . . shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

The question is whether such agreements, which infringe the principle of sovereignty, are open to denunciation by one of the parties, or whether they are void *de plano* and *ab initio*. An examination of this problem in the light of the *jus cogens* prompts the reply that nullity is intrinsic and *ab initio*.

11. See Mohammed Bedjaoui: "Problèmes nouveaux de succession d'Etats", *Recueil des Cours de l'Académie de droit international*, 1970, II, Vol. 130, pp. 550-551 ("Réappréciation de l'éthique de l'indemnisation"; and the theory of the obligation to compensate the colonial territory as explained by Professor Rudolf Bistricky in 1966); and Mohammed Bedjaoui: "Non alignement et droit international", *Recueil des Cours*, *ibid.*, 1976, III, *passim* and especially pp. 430-444.

The problem was raised by the first conference of the Non-aligned Countries in September 1961 in Belgrade. This conference, at the level of Heads of State, devised a formula for a *right to reparation* and a *right to compensation*, (to counter-balance the right to compensation in the event of nationalization).

• The sixth of the 20 principles contained in *Declaration 3201 (S-VI) on the new international economic order affirms*

the right to all States, territories and peoples under foreign occupation, alien and colonial domination or *apartheid*, to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples" (para. 4(f)).

• The ninth of the 15 principles set out in the *Charter of Economic Rights and Duties of States (Resolution 3281 (XXIX))* places emphasis on "Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development".

12. Art. 1, para. 3, of the draft *Declaration of the Right to Development*, E/CN.4/1984/13, Annex II, 14 November 1983.

13. Cf. Oscar Schachter: *Sharing the World's Resources*, Columbia University Press, New York, 1977, *passim*.

14. Mauss: "Essai sur le don, forme archaïque de l'échange", *L'Année sociologique*, Paris, 1925.

## A NEW INTERNATIONAL LEGAL ORDER: WHAT LEGAL TOOLS FOR WHAT CHANGES?\*

Alain Pellet

Since its "invention" in 1974, the concept of a New International Economic Order (N.I.E.O.) has given rise to a great many studies. There remain great doubts, however, as to its precise meaning and scope, both of which are still in need of clarification.

A striking feature of these studies is that, despite its name, the so-called New International *Economic Order* is presented mainly as a normative concept. This applies equally to the concept of "Economic Order":

As a factual denotation for real economic conditions, it refers to the *norms, institutions* and other determinant factors of concrete existing economic process . . . As a *normative* term it denotes a desired or existing state of the economy in which the many diverse economic processes form a rational and efficiently integrated whole: the *rules, institutions* and steering mechanisms for the economic functioning and progress.<sup>1</sup>

As Professor Ian Brownlie puts it:<sup>2</sup> the N.I.E.O. represents in the *normative* sphere what in the institutional sphere is represented by UNCTAD and UNIDO.

Thus the validity of Professor Michel Eisemann's assertion that<sup>3</sup> "A great part of what is included in the 'New Order' is 'non legal'. It does not aim at setting up rules of law" would seem to be highly questionable. On the contrary, the present writer suggests that the NIEO has, first of all, a legal connotation and mainly aspires to the development of new legal rules in the economic and social sphere and that it is or, at least, claims to be, a New International Legal Order.

This indeed is the key issue: does the New International Order also have a legal dimension or does it only claim to have such a dimension?

In answering this question two irreconcilable schools of thought have emerged.

For most Western writers, the NIEO is nothing more than an easy "way of speaking", a "language of convenience", devoid of any legal reality. It means nothing more than the Third World's longing to establish new rules of the game – rules which, legally, do not exist other than in their imagination.<sup>4</sup> Their analyzes are then almost exclusively devoted to minimizing the potential contribution of international law in responding to the Third World's concerns. This is achieved principally by denying any legal value to the resolutions adopted by the General Assembly of the United Nations and by excluding "non-binding agreements" from the sphere of international law.<sup>5</sup>

On the other hand, many lawyers from the Third World attribute a new role to international law and claim that the rules desired and/or demanded by their countries already form part of positive international law and, as such, warrant respect by all countries, including, the industrialized States.<sup>6</sup> They, then, endeavour to establish that the principle of democracy implies that the General Assembly has a real "legislative" power.

In their extreme versions, both of these presentations are highly debatable.

Their proponents are engaging in "wishful thinking" more than they are describing positive international law and they are completely forgetting that law is not an ideal philosophy or a kind of mental game (*jeu de l'esprit*) but rather a guide for concrete social behaviour. International law "does not appear in an abstract way but in a social environment, in a given society".<sup>7</sup> The World Court does not say otherwise when it states:

A rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part.<sup>8</sup>

And there is not the slightest doubt that this framework, this social environment, has evolved considerably since the end of World War II. The participation of around one hundred new States which emerged from the process of decolonization and the growing awareness of, and concern for, development inequalities

have deeply affected traditional international law. Thus law is no longer as it was in 1945 or before, and it is reasonable to assume that changes have occurred in the law making process itself as well as in the rules. "All is in flux. Even the sources of international law are changing".<sup>9</sup>

On the other hand, it is nevertheless doubtful that the "new" States have been able to impose such drastic changes as they often claim to have. In making such claims, they, in turn, neglect a huge part of the present social reality: the continuing predominance of the West in the world economy.

It therefore appears that neither the Western *laudatores temporis acti* nor the idealistic "progressive" lawyers describe, in an objective manner, applicable rules of international law. Both camps manipulate international law and twist legal reality in order to rationalize avowed or hidden policy goals. In fact, it is suggested that, although in positivist terms there exists no revolutionary new international legal order, international law is no longer what it was, even in the recent past. These changes have led many international lawyers to complain that international law is in a state of crisis.

One can wonder whether an element of "crisis" is simply inherent in international law or if today's international law really is in a state of crisis.

In a way, it is certainly true, as Quincy Wright wrote as early as 1955, that:

the *discipline* of international law is in a state of crisis. As understood by traditionalists, it appears to be obsolete and as understood by modernists, it appears to be premature.<sup>10</sup>

But, in fact, it is not international law itself which is in a state of crisis – never before have so many treaties been adopted, never have such precise international legal rules been agreed upon (and States have no less respect for them than in previous times) and never has international law been more frequently invoked than it is nowadays. If there is a crisis, it affects international lawyers, not the law itself.

"Law can be in a state of crisis, only if it is integrated in a static conception and if it contemplates the legal world and its components as everlasting data, immune from any change and any

revolution",<sup>11</sup> or, at the opposite end of the spectrum, if it is accepted that "revolution" can be achieved by merely amending the law.

It is clear, however, that economic development cannot be achieved through law alone; but it is also evident that new rules of law can accompany and consolidate economic changes and, in this respect only, international law may operate as a tool for change. Nevertheless the special circumstances of the North-South confrontation has led the international community to develop soft legal tools leading to weakened changes.

#### AN OBLITERATION OF THE TRADITIONAL SOURCES OF INTERNATIONAL LAW?

It has now become a commonplace to recall that the Third World "has never and does not object to all of the rules of international law".<sup>12</sup> In a way, if one considers international law as a whole, developing countries have even to a large extent adopted the opposite view and may have relied too much on the potentially progressive role of international law. As long ago as the Bandung Conference, respect for international law was proclaimed as one of the ten principles of peaceful coexistence.

In general, however, Third World's attitude towards international law has been fluctuating and hesitating.

Initially, the Third World championed an inflexible voluntarist doctrine according to which the exercise of the free will of individual States was the only way in which they could be bound by international law. This approach was designed to circumvent the theory that new States could be bound by "old" international law of European origin, in the formation of which, they had not been able to participate.

This was soon seen to be short-sighted for at least three reasons:

(1) developing countries quickly became aware that not all of the "old" rules were to be repudiated and that many of them were quite useful since both "new" and "old" States share at least one common goal: all of them are primarily concerned with upholding State sovereignty;

(2) adherence to a strict voluntarist theory did not enable them to make use of their main source of power: numerical strength; and

(3) once over the enthusiasm of the immediate post-independence period, they came to realize that the notion of the free will of individual States was, in many cases a deception since the principle of the sovereign equality of States is far from guaranteeing real equality in bargaining power in the context of international negotiations. Even if, in theory, they have equal rights, the United States and Fiji are everything but equal in fact and the result of a *tête-à-tête* negotiation between these two countries cannot but be detrimental to the latter.<sup>13</sup>

Therefore, these factors led the Third World to express some misgivings about the classical, "noble", sources of international law as enumerated in Article 38 of the Statute of the International Court of Justice, including custom and treaties.

These misgivings are particularly evident with respect to customary law.

Custom is, no doubt, the part of international law in which the differences in power among the various actors in international relations are most apparent: they are not concealed by any institutional veil. Practice – which is an essential requisite for the formation of any customary rule – is the "actual test", not only of "governmental wills",<sup>14</sup> but also of naked power relations. In an unequal international society, custom cannot fail to be the result of an (implicit) unequal bargain and the reflection of the "dominant ideology".<sup>15</sup>

Moreover, time is a necessary ingredient of the customary process, even if the World Court has admitted that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law".<sup>16</sup>

However, this must be somewhat qualified from two points of view:

(1) First, custom can, and has, become an indirect way of consolidating vague rules embodied in resolutions of the General Assembly or other international organs. Thus in the recent *Aminoil* Award, the Arbitration Tribunal accepted the positive legal existence of new rules concerning nationalizations when it

stated that the "succession of events taking place on the world plane in the petroleum industry" has "led to the frequently progressive elimination of foreign investments from producing countries. The final result of the nationalizations concerned is today secured as a matter of law, and is no longer contested. This consolidation has resulted from consent given by the interested companies, and, sometimes by the States to which they belong".<sup>17</sup>

(2) On the other hand, the customary process can be connected with conventional law-making. Although one can doubt strongly that the results meet Third World requirements,<sup>18</sup> this was what happened in response to pressure from developing countries during the Third United Nations Conference on the Law of the Sea. The discussions on the Montego Bay Convention have provided a powerful incentive for the creation of new customary rules such as the consecration of the Exclusive Economic Zone, or the twelve miles rule.

Although the present study is not the appropriate place to discuss in any detail the new law of the sea, it is certainly a very impressive example of the mixture of mistrust and fascination that developing countries exhibit towards the traditional law-making processes: these countries urged the conclusion of a very comprehensive treaty but, at the same time, succeeded in making it superfluous in part, by relying on resolutions adopted by the General Assembly and by pushing forward new customary rules.

This is clear evidence of the ambiguous attitude of the Third World towards treaties.

As a matter of fact, treaty law is entirely ruled by *pacta sunt servanda*. This truism involves quite a complex set of attraction/repulsion reactions from developing countries. As far as they can extract significant concessions from the North, they will seek to embody them in a binding treaty. But, more often than not, a treaty can be a fool's bargain since by definition, negotiating parties are unequal (see above p. 121); in that situation one can assume that the compromise resulting from the negotiations will favour the strongest side ie, the views expressed by developed countries. Moreover, since both sides will have negotiated from a position of supposed equality, the agreed position could, at least in theory, be set in concrete "for ever" . . . unless a new treaty is

concluded; but no one can be certain that developed countries will agree to this new step.

In a certain sense, in international law-making, the sovereign equality of States is reflected not by the one-nation-one-vote principle, but rather by the right of each State to refuse to be bound in the absence of its consent.<sup>19</sup>

Coming from the former Special Representative of the President of the United States at the Third Conference on the Law of the Sea, this constitutes a serious warning. . . .

In order to partially escape these risks, contemporary conventional practice has invented various techniques, whose common feature is to mitigate conventional rigidity:<sup>20</sup>

- parties limit their commitment in time; in this respect it is interesting to recall that the Lomé Conventions and the commodities agreements must be renewed every five years;
- contracting States provide for safety clauses or waivers (see, for example, Articles XIX, XXIV or XXV of the GATT); or
- they contrive to limit the scope of their commitments by hazardous drafting and by relying on "soft" clauses or hortatory provisions. Part IV of the GATT or Article IV, Section 1, of the Second Amendment to the Articles of Agreement of the IMF of March 24, 1976, are striking examples of this technique.

These endeavours to weaken conventional commitments do not affect only the substantive provisions of treaties but extend also to the conventional mould itself.

#### WEAKENED TOOLS FOR SLIGHT CHANGES

It is not sufficient to recognize that "it is no longer possible to say that there are no sources of international law other than those listed in Article 38 of the Statute of the International Court of Justice".<sup>21</sup> The fact is that the venerable and traditional doctrine of the sources of the international law itself has proved to be too abrupt and to be unable to satisfy the requirements of contemporary international society.

The "either-or posture",<sup>22</sup> which is implicit in this doctrine, may be appropriate in an international society in which a few European (or European-like) States have almost identical approaches and needs and are able to impose their will all over the world. However, it is singularly inadequate in the context of a deeply divided world composed of more than 160 States, with varied or even opposed needs and interests. It no longer seems reasonable to equate "the creation of international law" with "the sources of international law" contained in Article 38 of the Statute of the International Court of Justice. Such an approach distorts inquiry by conceiving of law-creation exclusively from the perspective of the rules applicable in this once centralized, judicial institution.<sup>23</sup> The distortion is all the greater given that the judicial process is quite an exceptional event in the international sphere.<sup>24</sup>

In the present state of international relations, it appears that the North is no more able to impose its views on the Third World than the South is able to extract genuine commitments from the industrialized countries to the rules they propose.<sup>25</sup>

Confronted by this impasse many Western lawyers have reacted by "excommunicating" soft law from the sphere of law, even if they pay lip-service to the political role of "non-legal" instruments. For these authors, "it is not always easy to draw the frontiers between the pre-legal and the legal. . . . It is nonetheless true that the threshold does exist: on one side of the line, there is born a legal obligation that can be relied on before a court or arbitrator, the flouting of which constitutes an internationally unlawful act giving rise to international responsibility; on the other side, there is nothing of the kind";<sup>26</sup> "a legal commitment is or is not, it cannot be 'more or less' legal";<sup>27</sup> there does not exist, and cannot exist, any "relativity" in international norms, they are either binding or non-legal.<sup>28</sup>

The present writer cannot but challenge these assertions, which are not corroborated by the realities of contemporary international life. The fact is that between the legal and the non-legal there is no definite threshold. As is the case with light and darkness there is indeed half-light or . . . semi-darkness. Lawyers are always free to decide the precise place where law (or light) begins and where it ends but, in doing so, they deny themselves any possibility to apprehend the whole reality, to describe international law in its totality.

Acceptance of such a static view based on the traditional doctrine of sources would lead to the rather discouraging view that the evolution of international society is definitely "blocked", at least in the absence of an unlikely world revolution.

On the contrary, while a dynamic perspective, based on the study of the law-making process, and one which rejects the idea that law is made of "yes or no", "plus or minus", "binding or non-binding", and accepts international law "in her infinite variety"<sup>29</sup> is certainly more disturbing for a majority of lawyers, it nevertheless reflects much more accurately the existing international social reality.

It is a fact that "normativity is a matter of degree, expressive of expectations by national governments toward what is permissible or impermissible",<sup>30</sup> and that "it is excessively simplistic to divide written norms into those that are binding and those that are not".<sup>31</sup> The lawyer's duty is not to be the guardian of an unalterable legal order, nor is it only to interpret consensus among States, "but also to make understandings between States as flexible an instrument as possible in order to encourage agreement".

True, *opinio juris* is the very criterion of international law.<sup>32</sup> But States' *opinio* can be, and indeed, is shaded in the sense that they may intend on the one hand to soften or mitigate their commitments or on the other hand to be bound completely; but the norm they have accepted can be imperative (*cogens*), "simply" binding, inciting, or recommendatory, or permissive, etc. Another technique by which States might minimize their commitments is by entering into "soft" arrangements.

Indeed, "the catalog of instruments by which States express their will and establish mutual relations is being continuously enriched by additions bearing the most varied labels".<sup>33</sup>

It is obvious that "non-binding agreements" are not a new phenomenon and that they are not confined only to that part of the law dealing with international economic or development law.<sup>34</sup> Nevertheless there seems to be a definite predilection for such techniques in these fields.<sup>35</sup> Thus recent years have seen the adoption of a multiplicity of "Declarations" or "Final Acts", "Joint Communiqués", "Memoranda of understanding", "Codes of conduct", "Guidelines", "Concerted Conclusions", "*De facto*" and "Gentlemen's Agreements", "Arrangements" (eg, the IMF

“Stand-by Arrangements”), etc. This is not surprising since these agreements have some of the advantages of treaties, without having their disadvantages (see above, p. 122): they can be carefully elaborated through formal negotiations; they are written instruments, evidencing clearly (if so desired) what the negotiators had in mind; but they are not required to be ratified in accordance with complicated national constitutional processes before entering into force and they can be easily completed, modified or abandoned – although nobody really knows under exactly what conditions.

Resolutions adopted by international organizations, especially by the General Assembly of the United Nations, have in large part the same character. Moreover, resolutions have a special attraction for the Third World: constituting a majority in world-wide organizations, they can exercise control over the law-making process through resolutions.<sup>36</sup> (It might be true that resolutions are not concerted “agreements” but unilateral acts attributable only to the organ which adopted them, and not to the Member States. However, “camp-to-camp” negotiations, or “reservations” made by Member States when the text is adopted largely weaken this peculiarity).

Be that as it may, these various instruments would be of a very limited interest in developing countries’ eyes if they were nothing but mere scraps of paper, which they are certainly not.

In spite of the opposing views expressed by a few learned writers<sup>37</sup> the resolutions adopted by the General Assembly are surely not of a binding nature.<sup>38</sup> The main argument to the contrary – ie, the “democratic principle” – is not very convincing: “there are obvious difficulties in transposing to international society a principle of democratic rule that is based on individual votes and acceptance of national solidarity. Decisions based on the principle of one-state-one-vote cannot be thought of as democratic when States vary so enormously in size and composition of their populations and in their internal responsiveness to their people”.<sup>39</sup> Generally speaking, it is very doubtful that States can be compared to individuals in any respect – sovereignty has no common feature with human dignity; the two concepts are completely different by their very nature.<sup>40</sup>

It appears that even a positive vote in favour of a resolution does not bind the voting State since when it cast its vote, it was voting

for a non-binding text, a recommendation; and it is quite possible that it would have adopted another attitude had the text been binding.<sup>41</sup>

However, this statement does not mean that resolutions and non-binding agreements are non-legal instruments.

It is true that these instruments have very important effects outside the legal sphere or, to be more precise, that they can, in many respects, have an influence on the legal family:

(1) they can be a “source of inspiration, self-confidence and moral support”<sup>42</sup> for States acting in the directions they point to. Thus in the course of political debates at the international level, States invoke resolutions and non-binding agreements as often – and maybe more often – as they invoke treaties;

(2) these instruments create “expectations” on the part of other States and are quite effective means of pressure in international relations;<sup>43</sup>

(3) they are vehicles for changes, and, at the very least, they embody the convictions of the majority of States which participated in the discussions and indicate “the general direction in which international law is developing”.<sup>44</sup> In this respect, one must point out that, while the International Court of Justice was called upon, in rendering its decisions in the *Case concerning the Continental Shelf (Tunisia/Libya)*, to take account of “the new accepted trends in the Third Conference on the Law of the Sea”, the Court, albeit cautiously, indicated that, even without this express invitation, it would have had to rely on these new trends;<sup>45</sup>

(4) they can have a “catalytic effect”,<sup>46</sup> whether by crystallizing “an emerging rule of customary law *in statu nascendi*”,<sup>47</sup> or by being “way-stations on the road to the conclusion of a treaty”,<sup>48</sup> for example, the 1970 General Assembly Declaration of Principles Governing the Sea-bed and the Ocean Floor and the Sub-soil thereof, beyond the Limits of National Jurisdiction has given rise to a new (imprecise but positive) customary principle and to the 1982 Montego Bay Convention.

Indeed, if nothing more could be added, it would be reasonable to state that these “dubious” instruments are non-legal in character, even if they exert, from the outside, a non-negligible influence on

law-making. However, a much more persuasive "legal" case can be made if one is prepared to go beyond a strict and narrow juridical analysis.

Resolutions adopted by international organs and non-binding agreements cannot be invoked before Courts, and non-performance cannot be a ground for invoking State responsibility, or legal sanctions, or reprisals (though lawful counter-measures can be forseen).<sup>49</sup>

But these negative aspects present only a partial description of the legal scope of these instruments, the adoption of which has at least three direct legal effects:

(1) Not only do they constitute "evidence of the formation of rules of customary (or general) international law"<sup>50</sup> (which may happen, although not necessarily), but the norms they embody are also, *per se*, (and not in relation to other sources), "new standards of relevance for the negotiations between the concerned States".<sup>51</sup> In a large part, "international standards" can be defined as "weakened" customary rules,<sup>52</sup> which "parties" must "consider" in good faith, either because they are members of the international organisation which has adopted them or because they have agreed to them.

(2) "[O]nce a matter has become the subject of such a norm, the matter can be no longer asserted to be one within the reserved domain or domestic jurisdiction of the State".<sup>53</sup> This is one explanation for example of why colonialist States were so strongly opposed to the adoption of General Assembly resolutions in the field of colonialism.

(3) Even more important is the fact that, in many cases, these instruments have a "delegitimizing" role.<sup>54</sup> Quite often, developing countries challenge old general international norms – *lex delenda*<sup>55</sup> – and indicate in a resolution (or a joint declaration) the rules they favour. In doing so, these countries clearly express at the same time their hostility towards the old norms, and their conviction that they are, or should be, no longer bound by them. Those instruments express then negative *opinioniones juris*.

It may be exaggerated to argue that resolutions and non-binding instruments have an abrogatory effect: pre-existing law is not

thereby abolished; it still binds those States which have constantly abided by it. But the ancient norm can no longer rule the behaviour of States which have challenged it, except if the norm is embodied in a treaty.<sup>56</sup>

The famous rule about compensation in case of nationalization of foreign property stated in Article 2 of the Charter of Economic Rights and Duties of States is a typical example:

A vast majority of States categorically rejected the proposal to refer to "adequate, prompt and effective compensation", thus demonstrating that the alleged customary rule lacked the necessary generality and uniformity. Consequently, one of the facts evidenced by the process of elaboration of this instrument is that the classical doctrine does not represent the general consensus of States and, consequently, cannot be considered as a rule of customary law.<sup>57</sup>

From this example, it follows that the old rule is no longer applicable to States which cast their vote in favour of the Charter thereby expressing their opposition to the "old" norm. Since some States objected to the proposed norm (or abstained), and since there is no consistent practice favouring either position, one is compelled to concede that no binding rule can be applied to the relations between the two groups of States.<sup>58</sup>

Certainly, this is not a very satisfactory result from a legal perspective; and it is doubtful that it is very satisfying either from the point of view of the Third World. This *vacuum juris* might mean a change for the worse since the absence of any legal rule invites the application of law of the jungle, which is inevitably detrimental to the weaker side . . .

This dubious result can be explained quite easily.<sup>59</sup>

"Bargaining is still the most common and characteristic mode of resolving conflicting positions among nations".<sup>60</sup> Now, it appears that in the present state of international relations the North is no longer in a position to dictate the content of the law to the Third World while the latter is not (yet?) able to impose its views upon the developed countries. States in a numerical majority are still a sociological minority, so that the very concept of majority does not mean much in the international sphere (see above, p. 12). Then, *volens nolens*, both sides are led to compromise by resorting to soft law, either by writing "hard instruments softly" (especial

treaties – see above p. 123), or by having recourse to non-binding instruments. “The main usefulness of soft law rests in the possibility thus to overcome a deadlock in relations between States pursuing conflicting ideological and/or economic aims.”

The NIEO is, in fact, one of the main fields in which international soft law is used. Having failed to obtain the acquiescence of developed countries to the rules they demand, developing countries have at least succeeded in convincing the former to make a step in this direction; and, quite often, if circumstances are favourable, these “soft”, stuttering norms, will become “hard”, binding rules.<sup>61</sup> The Third World will then be able to invoke these new rules to justify additional steps towards the achievement of a NIEO for which they are calling,<sup>62</sup> “it is part of the ‘nature’ of legal development to generate problems that lead to solutions which create new problems and so on. Just as there are no fixed ends, there are no final solutions”.<sup>63</sup>

In these circumstances, it seems hazardous to assert conclusively the existence of a New International *Legal* Order since it may be argued that such an order could only exist if the NIEO itself was a concrete reality. This is not so: the NIEO is a global package embracing the entirety of the Third World’s demands; some of these have been satisfied, but many have not.

This does not mean that modern international society is static. It is evolving slowly for the better and law can be held to contribute to this change if it is seen in its totality, including soft norms, which, for the moment, are the principal vehicles of change, however limited may be the evolution. Anyhow, new wine can perfectly well be poured into old bottles, provided that there is among the international community a real political will in favour of change.

## FOOTNOTES

\* This paper draws upon, and, in some respects, extends my contribution to the *Mélanges Charles Chaumont* (Pédone, Paris, 1984), entitled “Le bon droit et L’ivraie – plaidoyer pour l’ivraie” (pp. 465–493). I am indebted to Philip Alston, Lecturer, Harvard Law School, who kindly reviewed this paper.

1. Ernst-Ulrich Petersmann, “International Economic Theory and International Economic Law; on the Tasks of a Legal Theory of International Economic Order”, in R. St. J. Macdonald and D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, Nijhoff, The Hague, 1983, p. 227. Italics added.

2. Ian Brownlie, “Legal Status of Natural Resources in International Law (Some Aspects)”, *R.C.A.D.I.* 1979 – I, p. 255. Italics added.

3. Pierre-Michel Eisemann, “Le nouvel ordre économique international en tant que concept politico-juridique”, *Ann. T.M.*, 1976, p. 103. My translation. See also Dominique Carreau, Patrick Juillard and Thiébaud Flory, *Droit international économique*, L.G.D.J., Paris, 1980, p. 89.

4. See, for example, Ignaz Seidl-Hohenveldern, “Règles juridiques et le conflit Nord-Sud”, *Ozör* 1982, pp. 199–244.

5. See, for examples, Prosper Weil, “Towards Relative Normativity in International Law?” *A.J.I.L.*, 1983, pp. 413–442 or Michel Virally, “La distinction entre textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus”, *Ann. I.D.I.*, 1983, Vol. 60–I, pp. 166–355. See also, above p. 125.

6. See for example Ahmed Mahiou, “Bilan de la notion de droit international du développement. Une finalité entre le développement et la dépendance”, in Maurice Flory éd., *La formation des normes en droit international du développement*, C.N.R.S., Paris, O.P.U., Algiers, 1984, pp. 17–27; and for a very “harsh” presentation, Subrata Roy Chowdhury, “Legal Status of the Charter of Economic Rights and Duties of States”, in Kamal Hossain ed., *Legal Aspects of the N.I.E.O.*, Frances Pinter Ltd., London, 1980, pp. 70–94.

7. Christian Dominicé, “Observations sur la définition du droit des gens”, *Mélanges Bindschedler*, Stämpfli, Bern, 1980, p. 77.

8. I.C.J. Advisory Opinion of December 20, 1980, *Interpretation of the*

- Agreement of 25 March 1951 between the W.H.O. and Egypt, N° 10, *Rep.* p. 76.
9. Wang Tieya, "The Third World and International Law", in R. St. J. Macdonald and D. M. Johnston eds., *op. cit.*, n. (1), p. 963.
10. Quincy Wright, *The Study of International Relations*, Appleton, New York, 1955, p. 233; italics added. See also J.L. Kunz, "La crise et les transformations du droit des gens", *R.C.A.D.I.* 1955-II, n° 88, pp. 1-104.
11. Mohamed S. Benyahia, Opening Speech, Algiers Colloquium 11-15 Octobre 1976, *Droit international et développement*, O.P.U., Algier p. 10. (My translation.)
12. Wang Tieya, *op. cit.*, n. (9), p. 962.
13. On the other hand, President T. Olowale Elias is perfectly right when denouncing the incoherences of the "Western" voluntarism: "The advocates of consent as the only basis of obligation for sovereign States are also the first to insist that the three-quarters of the world that took no part in (the formation of international law) must be regarded as bound by it, consent or no consent" ("Modern Sources of International Law", *Essays in Honor of Philip Jessup - Transnational Law in a Changing Society*, Columbia U.P., New York, 1972, p. 49).
14. Guy de Lacharrière, *La politique juridique extérieure*, Economica, Paris, 1983, p. 57 (My translation.)
15. Brigitte Stern, "La coutume au coeur du droit international - Quelques réflexions", *Mélanges Reuter*, Pedone, Paris, 1982, p. 499. (My translation.)
16. I.C.J., 20 Feb. 1969, *North-Sea Continent Shelf Cases*, n° 74, *Rep.* p. 43.
17. Arbitration Tribunal, Award of March 24, 1982, *Aminoil v. Kuwait*, n° 141, *I.L.M.* 1982, p. 1032.
18. See the very severe opinion of Arvid Pardo, "Views of Major Actors at the Law of the Sea Conference and Prospects for Agreement", in Cyril E. Black ed., *A New World Order?*, Princeton U.P., 1975, pp. 55-59.
19. John R. Stevenson, "Law-making for the Seas", *ibid.*, p. 52.
20. For more details see Alain Pellet, *Droit international du développement*, "Que sais-je?", n° 1731, P.U.F., Paris, 1978, p. 73 ff and *Le cadre juridique de la vie économique internationale*, cours I.E.P., F.N.S.P., Paris, 1982, p. 75 ff.
21. Wang Tieya, *op. cit.*, n. (9), p. 963.

22. R.R. Baxter, "International Law in Her 'Infinite Variety'", *I.C.L.Q.*, 1980, p. 565.
23. Richard A. Falk, "On the Quasi-Legal Competence of the General Assembly", *A.J.I.L.* 1966, p. 783 (reproduced in *The Status of International Law in International Society*, Princeton U.P., 1970 p. 174). In the same sense, see also Patricia Buirette-Maurau, *La participation du Tiers Monde à l'élaboration du droit international*, L.G.D.J., Paris, 1983, p. 40.
24. Nevertheless, Prof. Michel Virally considers that "the true question is to know if the provisions included in an international text are likely to be invoked before an international Court and if the judge can use them in the view of giving its decision on the case" (*op. cit.*, n. (5), pp. 245-246). (My translation.)
25. In North-South negotiations, communist countries are negligible partners.
26. Prosper Weil, *op. cit.*, n. (5), pp. 417-418.
27. Prosper Weil, in *Ann. I.D.I.*, vol. 60-I, 1983, p. 369. (My translation.)
28. See Prosper Weil, *op. cit.*, n. (5), *passim* and Michel Virally, *op. cit.*, n. (5), p. 244 ff.
29. R.R. Baxter, *op. cit.*, n. (22).
30. Richard Falk, *op. cit.*, n. (23), p. 787 (or p. 178).
31. R.R. Baxter, *op. cit.*, n. (22), p. 565.
32. See a very interesting presentation of *opinio juris* by Bin Cheng, "Custom - The Future of General State Practice in a Divided World", in R. St. J. Macdonald and D.M. Johnston eds. *op. cit.*, n. (1), p. 530 ff.
33. Manfred Lachs, "Some Reflections on Substance and Form in International Law", in *Essays in Honor of Philip Jessup*, *op. cit.*, n. (13), p. 104.
34. See R.R. Baxter, *op. cit.*, n. (22), pp. 549-566, *passim*; Pierre-Michel Eisemann, "Le Gentlemen's Agreement comme source du droit international", *J.D.I.*, 1979, pp. 326-348; Elihu Lauterpacht, "Gentlemen's Agreements", in Flume ed., *Feitschrift für F. Mann - Internationales Recht und Wirtschaftsordnung*, pp. 381-398; Friedrich Munch, "Non-Binding Agreements", *Zaörv* 1969, pp. 1-11; Oscar Schachter, "The Twilight Existence or Non-binding International Agreements", *A.J.I.L.* 1977, pp. 296-304.

35. See F. Roessler, "Law, *De Facto* Agreements and Declarations of Principle in International Economic Relations", *G.YB.I.L.* 1978, pp. 27-59.
36. See Mohamed Bedjaoui, *For a New International Economic Order*, UNESCO, Paris, 1979, p. 142.
37. See eg, T. Olawale Elias, *op. cit.*, n. (13), p. 49 ff. and, although more hesitatingly, Mohamed Bedjaoui, *op. cit.*, n. (36), p. 181 ff.
38. This is, of course, self-evident as for "non-binding agreements".
39. Oscar Schachter, *op. cit.*, n. (29), pp. 794-795.
40. I do *not* suggest that statehood is not a pre-requisite for human dignity, in the modern world - but this is quite another story! . . .
41. In this sense, see Stephen M. Schwebel, "The Effect of Resolutions of the United Nations General Assembly on Customary International Law", *Procs. Am. Sty. I.L.*, 1979, p. 301, or Oscar Schachter, *op. cit.*, n. (29), p. 791.
42. Hasan S. Zakariya, "Sovereignty over Natural Resources and the Search for a New International Order", in Kamal Hossain ed., *op. cit.*, n. (6), p. 210.
43. Oscar Schachter, *op. cit.*, n. (34), p. 297; M. Bothe, "Legal and Non-legal Norms - a Meaningful Distinction in International Relations", *N.YB.I.L.*, 1980, p. 66 or R.R. Baxter, *op. cit.*, n. (22), p. 557.
44. Wang Tieya, *op. cit.*, n. (9), p. 964.
45. I.C.J., 24 Feb. 1982, n° 24, *Rep.* p. 38. Paradoxically enough, the World Court was bolder in some other cases; see eg; the Advisory opinions given in the *Namibia Case* (*Rep.* 1971, p. 31) and in the *Western Sahara Case* (*Rep.* 1975, p. 30), or the Judgment delivered in the *Fisheries Jurisdiction Case* (*Rep.* 1974, p. 23 and 192).
46. Ian Brownlie, *op. cit.*, n. (2), p. 261. See also I. Delupis, *International Law and the Independent States*, Crane, New York, 1974, p. 14.
47. Eduardo Jimenez de Arechaga, "International Law in the Past Third of a Century", *R.C.A.D.I.* 1978-I, p. 31.
48. R.R. Baxter, *op. cit.*, n. (22), p. 564.
49. See the converging analysis by Oscar Schachter (p. 300) and Pierre-Michel Eisemann (p. 346), *op. cit.*, n. (34).
50. Ian Brownlie, *op. cit.*, n. (2), p. 260; see also Oscar Schachter, *op. cit.*, n. (29), p. 793.

51. R.R. Baxter, *op. cit.*, n. (22), p. 565; see also Oscar Schachter, *op. cit.*, n. (34), p. 304.
52. For a legal definition of international "standards", see Georg Schwarzenberger, "The Province and Standards of International Economic Law", *I.C.L.Q.*, 1948, pp. 402-420, and "The Principles and Standards of International Economic Law", *R.C.A.D.* 1966-I, n° 117, pp. 5-98, or Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit international public*, L.G.D.J., Paris, 1987, n° 654.
53. R.R. Baxter, *op. cit.*, n. (22), p. 565; see also Oscar Schachter *op. cit.*, n. (34), p. 304.
54. Oscar Schachter, *op. cit.*, n. (29), p. 794.
55. Michel Virally, "A propos de la *lex ferenda*", *Mélanges Reuter*, *op. cit.*, n. (15), p. 531.
56. I elaborate more on this point, in "Le bon droit et l'ivraie - Plaidoyer pour l'ivraie (Remarques sur quelques problèmes de méthode en droit international du développement)", in *Mélanges Chaumont*, Pedone, Paris, 1984, pp. 465-493.
57. Eduardo Jimenez de Arechaga, *op. cit.*, n. (47), p. 301.
58. "Opposing" States certainly remain bound in their *inter se* relations by the traditional rule.
59. Ignaz Seidl-Hohenveldern, "International Economic 'Soft Law'", *R.C.A.D.I.* 1979-II, n° 163, p. 193.
60. Oscar Schachter, "The Evolving Law of International Development", *Col. Jl. of Trnsl. L.*, 1976, p. 13.
61. See, for examples, the non-reciprocity principle in North-South economic relations or the trade preferences.
62. Oscar Schachter, *op. cit.*, n. (29), p. 750.