
January 2021

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Recommended Citation

Rumu Sarkar, *A Critical Essay on a Treatise on International Development Law: A Coming of Age*, 14 DePaul J. for Soc. Just. (2021)
Available at: <https://via.library.depaul.edu/jsj/vol14/iss1/6>

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**CRITICAL ESSAY
INTERNATIONAL DEVELOPMENT LAW:
A COMING OF AGE**

RUMU SARKAR*

During a completely random search on the web, I unexpectedly came across David H. Lempert's, "A Treatise on International Development Law," (the "Work").¹ The first item that caught my eye was the Abstract of the Work declaring that, "[t]his article presents an overview of the first legal treatise on international development law. . ." As this was an article published in a law school journal, it ran contrary to the accepted legal definitions of what constitutes a "treatise." Namely, that, "legal treatises are single or multi-volume works dedicated to the examination of an area of law. . . Treatises tend to provide an in-depth discussion of a particular area of law and will provide the researcher with references to a few cases and statutes." In contrast, "[a]rticles in academic journals tend to revolve around very theoretical and cutting-edge legal issues. Articles in practitioner-oriented journals tend to be more practical."²

It further struck me that claiming to be the "first" exposition in any field, but perhaps particularly in law, appears to be overreaching. It is rare that any legal topic has never been considered by anyone before. Indeed, in my own academic writing, I leave it to other commentators and peer reviewers to proclaim whether a stated idea or conclusion of mine is actually the "first" of its kind.³ In fact,

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¹ David Lempert, *A Treatise on International Development Law*, 11 *DePaul J. for Soc. Just.*, Art. 6 (2018).

² "Secondary Sources: 'Treaties,' and 'Legal Periodicals,'" Yale Law School, Lillian Goldman Law Library, available at <https://library.law.yale.edu/secondary-sources>. See also "Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, & Treatises, Intro to Treatises," that states that, "Treatises . . . are book-length expositions on the law as it pertains to a particular subject. . . . A legal treatise maybe a short, single volume or a large, multi volume set." Harvard law School Law Library, Secondary Sources, available at <https://guides.library.harvard.edu/c.php?g=309942&p=2070277> (last updated July 24, 2020).

³ Indeed, in my own experience in being peer reviewed (by law professors, not law students) for a legal text that I wrote, it was an (anonymous) peer reviewer that speculated that my writing was one of very few (if not the only one) to attempt a definition/articulation of the field of

Lempert also seems to be almost entirely self-referential since he quotes his own works in 60 out of the 96 footnotes in his article!

I further noted that in order to distinguish his Work from my own pre-existing volumes on the same subject-matter, Lempert states rather emphatically that:

Although one textbook appeared in 2009 with a title suggesting that it was a treatise on international development law, the actual focus and list of topics in the book helps explain what has really been happening in the field that has replaced and diverted attention from international development law. Rumu Sarkar's *International Development Law: Rule of Law, Human Rights, and Global Finance* is really a treatise on foreign investment law.* [fn. *18] As "development" itself has been redefined in the past several years to promote globalization and neocolonialism rather than the principles of development that are established under international law, so too has development law come to be reinvented as international investment and finance law under a new name. Indeed, Sarkar's book is really about international investment law, with "history and theory" in Part I serving as a springboard for focusing on the law of global financial systems. (Footnotes deleted.)⁴

He footnotes his text above by inserting footnote 18 that further declares:

See RUMU SARKAR, *INTERNATIONAL DEVELOPMENT LAW: RULE OF LAW, HUMAN RIGHTS, AND GLOBAL FINANCE*, xi (Oxford U. Press 2009). According to Sarkar's capsule autobiography, Rumu Sarkar taught a course in Development Law and International Finance at Georgetown University Law Center. In addition, Sarkar published this book with a title that defines *development law* as "a new field of legal studies" that is essentially an arm of foreign investment. Her book is based on an earlier study founded on economic measures. Since 2016, Sarkar is the General Counsel of Millennium Partners: a global investment firm that she describes as an "international development consulting firm".⁵

"international development law." The text being peer reviewed was Rumu Sarkar, *INTERNATIONAL DEVELOPMENT LAW: Rule of Law, Human Rights & Global Finance* (2d ed., Springer) (2020).

⁴ Lempert, *supra* note 1, at 6.

⁵ *Id.* at n. 18.

I must confess that upon reading this, my first response was to laugh. I described this passage to a law school friend and trusted advisor as a joke, but he strongly urged me to respond to this Work in kind by publishing my own views on it. He was right.⁶ Although the cause of my merriment may not be immediately obvious to anyone else, the Work is replete with factual errors and material misrepresentations with respect not only to my academic publications but also with regard to my professional status as a practicing lawyer.

If left unanswered by me, my silence may be viewed as a ratification of these conclusory and false statements, and I most definitely do *not* concur with them! (Indeed, I am aware of the maxim, *qui tacet consentire videtur*, or "silence implies/means consent," and I want to ensure that my failure to respond to these false characterizations heretofore is *not* interpreted as my consent to or agreement with what Lempert has published about me and my work.)⁷

Thus, it is with the kind permission of the Editorial Board and Staff of this distinguished law journal that I have been given leave to express my views here, and for which I am deeply grateful. So, I apologize for the tardiness of my response to Lempert's article, but frankly, I did not actually see it until August 2020.

A. FACTUAL ERRORS AND MATERIAL MISREPRESENTATIONS

At the outset, Lempert states that my own work, *INTERNATIONAL DEVELOPMENT LAW: Rule of Law, Human Rights & Global Finance* (1st ed., Oxford University Press, 2009), hereinafter referred to as "IDL 1st ed."⁸ "is really a treatise on foreign investment law."⁹ I find this description to be truly remarkable. Law libraries are full of treatises and other secondary materials that discuss the subject of international investment law. Put succinctly, "[i]nternational investment law is best described as a field of public international law which deals with the laws governing the commercial activities of multinational enterprises that are undertaken in foreign states. This occurs when a business or firm decides to open a branch of operations overseas, such as a factory or a mine, and in so doing it may come into

⁶ Zachary Z. Kinney is a Major, US Air Force, Retired; Colonel, DC Defense Force, Retired, and the former Chairman of the Criminal Law, Homeland Security and Paralegal Studies Department, Everest College, Arlington, Virginia Campus.

⁷ See The Law Dictionary, *Qui Tacet Consentire Videtur*, available at: <https://dictionary.thelaw.com/qui-tacet-consentire-videtur/>.

⁸ The original Oxford text has been updated and published as Rumu Sarkar, *INTERNATIONAL DEVELOPMENT LAW: Rule of Law, Human Rights & Global Finance* (2d ed., Springer) (2020), hereinafter referred to as "IDL 2d ed.")

⁹ Lempert, *supra* note 1, at 6.

conflict with that host state's laws.”¹⁰ I cannot imagine a topic farther removed from the subject-matter of *international development law* as set forth in IDL 1st ed.!

Further, by stating that, “development law [has] come to be reinvented as international investment and finance law under a new name,”¹¹ Lempert misconstrues (whether deliberately or not) the actual definition, function, and position of IDL within the subject-matter of international law overall.

In fact, if we consider the subject of “international financial law,” it has been precisely defined by the Peace Palace Library as:

International Financial Law is a framework of rules, standards and practices that govern international financial markets and transactions. The objective of this framework is to create international financial stability. This stability has to be created in an environment of national jurisdictions, each pursuing their own national interest and governance standards, and is constantly threatened by the consequences of increasing globalization, technological development and financial innovation.¹²

Once again, this is far removed from the subject-matter of international development law as I have defined it in both editions of IDL.

Indeed, I struggled with naming this new field of legal study as “international development law.” I made this clear in discussing the “so-called “international law of development” that underscored UN initiatives such as the New International Economic Order (NIEO).”¹³ I further stated that, “[i]t is with some misgiving that I have titled the text, *International Development Law*, for fear that it would be confused with this legal movement associated with the NIEO agenda. I can only

¹⁰ David Collins, *AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW* (Cambridge University Press, 2017) at 1. It is hardly possible to give a full listing of legal treatises on the same subject since there are so many, including, for example, Peter Muchlinski, Frederico Ortino, Christoph Schreuer, *Oxford Handbook of International Investment Law*, (Oxford Uni. Press, 2008); Rudolf Dolzer, Christoph Schreuer, “Principles of International Investment Law,” (Oxford Uni. Press, 2012); Karl Sauvant, “Yearbook on International Investment Law & Policy,” (Oxford Uni. Press, 2009); Zachary Douglas, *ed., et al.*, “The Foundations of International Investment Law: Bringing Theory into Practice,” (Oxford Uni. Press, 2014).

¹¹ Lempert, *supra* note 1, at 6.

¹² Peace Palace Library, *International Financial Law: Introduction*, available at: <https://peacepalacelibrary.nl/research-guides/economic-and-financial-law/international-financial-law/>, (last updated June 18, 2019).

¹³ Rumu Sarkar, *INTERNATIONAL DEVELOPMENT LAW: Rule of Law, Human Rights and Global Finance* (Oxford Uni. Press, 2009) hereinafter referred to as “IDL 1st ed.”

hope that we are sufficiently past that stage of theory as to not create any confusion on this point.”¹⁴

However, I was not able to provide a neatly worded definition of international development law in good faith in IDL 1st ed. since I was very cognizant of the fact that, as I saw it, the subject was an admixture of law, philosophy, history and economics. Thus, the multi-disciplinary aspects of the subject would naturally lead to disagreements on how to establish the legitimate parameters of the subject. Moreover, the underlying question of what constitutes “development” itself may not be agreed upon at the outset! So, I undertook a three-part analysis, first, in defining a nexus with development. To wit,

Distinguishing international development law questions from private international law questions may not be easy since implications of both may be present in any given fact scenario. *The distinction between an international legal issue and an international development law question may be drawn by asking the following question: Does a domestic law question of a developing country have a foreseeable impact on the development of that country?* For example, if a host country wishes to build a seaport in order to boost its overall economic development, this does not necessarily raise a specific development law question. If, however, a host country is building a seaport using project finance that involves joint ventures with foreign operators and requires that a new foreign investment regime be put in place, then development law questions do arise. (Emphasis in original.)

Similarly, the legal issue of whether women should have the right to the legal custody of their children following a separation from the marital domicile may pose a family law issue under domestic law, or an international human rights question, or, if legal reform of existing family law is contemplated in order to change the legal status of women, a development law question.¹⁵

The excerpt above sets forth my thinking on how to define an “international development law” question. Both the definition and the subject-matter itself is simply not related to (or a substitute for) international investment law or

¹⁴ *Id.* at 55, n. 68.

¹⁵ IDL 1st ed., *supra* note 13, at 79; *see also*, IDL 2d ed., *supra* note 8, at xi-xii where the same analysis was carried forth.

international financial law as those fields are currently, and historically have, been treated by established legal scholars.

Second, by recognizing that international development law is a subset of international law, I established a legitimate place for it within the “taxonomy” of law. Third, I further argued that *international development law* itself establishes an overarching rubric under which many other law subjects may be classified, such as investment law, banking law, women’s rights, environmental law, trade law, etc. *if* these subjects actually address the development process.¹⁶ Thus, Lempert has it backwards: international development law (IDL) is not “foreign investment law” but rather “foreign investment law” is a subset of IDL insofar as it may specifically deal with development law questions!

Lempert also argues that I was actually writing on “international investment law, with ‘history and theory’ in Part I serving as a springboard for focusing on the law of global financial systems.”¹⁷ This is a completely misplaced and untrue characterization of my work that actually reveals his superficial and slipshod reading of IDL 1st edition.

The first part of both works, IDL 1st and 2d editions, sets the foundation for the entire subject, and upon which the second part is built. This follows the accepted and widely used approach of teaching legal subjects by first establishing the context of the law by examining its historical roots, legislative history and case law history, if applicable. To simply discuss the principles and legal framework of IDL, especially as “an emerging legal discipline” as I put it, without any context of any kind erodes its credibility as a legitimate subject of law. (In fact, this is exactly what Lempert attempts to do in his Work, and the lack of context, I would argue, undercuts his attempt.)

Accordingly, both editions of IDL are divided into two major parts: the first part dealing with the history, the theoretical and substantive principles, and whether there is a human right to development. The second part sets forth the international financial architecture with specific discussions on sovereign debt, privatization, emerging capital markets, and corruption. (NB. The new chapter on “Corruption and Its Consequences,” is only found in IDL 2d ed.) The first part is not a “springboard” for the second, but a “foundation” for it: the two parts are distinct but interlinked.

Moreover, writing about the international financial architecture that supports development was a conscious choice for me. In other words, I made the issues surrounding the financing of development as the starting point for IDL. The specific projects and development-related undertakings in, for example, infrastructure,

¹⁶ See e.g., IDL 2d ed., *supra* note 8, at xii; See also IDL 1st ed., *supra* note 13, at 77.

¹⁷ Lempert, *supra* note 1, at 6.

health, climate change, habitat protection, women's empowerment etc., all need to be financed before they may be successfully achieved. Further, in laying out this road map for IDL, I classified these and other subjects as falling under the rubric of IDL generally insofar as they may relate to development efforts.

Additionally, Lempert in his footnote about me goes on to argue that, "Sarkar published this book [IDL 1st ed.] with a title that defines *development law* as "a new field of legal studies" that is essentially an arm of foreign investment. Her book is based on an earlier study founded on economic measures."¹⁸ At the outset, I defined IDL as "an emerging legal discipline,"¹⁹ and never characterized it as "an arm of foreign investment." Sadly, I have no idea what he means by "an earlier study founded on economic measures."

In the same footnote, Lempert baldly asserts that, "[s]ince 2016, Sarkar is the General Counsel of Millennium Partners: a global investment firm that she describes as an "international development consulting firm."²⁰ I find this statement to be completely incomprehensible. First, I have been the General Counsel of Millennium Partners since 2013, not 2016, and it *is* an international development consulting firm!²¹ To suggest otherwise is to imply that I don't even know what the firm, whom I represent, does in course of its own business.

Moreover, I am at a loss in terms of what motivates Lempert's invective against me since I have had no direct or indirect personal contact with him, or through anyone else. My only guess is that his mischaracterization of Millennium Partners, and my role in it, serves his underlying purpose of casting both my academic and professional careers as exclusively dedicated to "international finance" in complete disregard for what my professional and academic careers actually have been. Perhaps Lempert's motive in publishing deliberately misleading characterizations about my work is to establish himself as the true founder of IDL. If this is the case, it is a sad commentary on his own lack of professionalism and integrity.

During the course of my academic career as a law professor, I must have read hundreds of law review articles, and I have published well over a dozen of my own. But I do not recall reading a critique of someone's work that was laced with such factual inaccuracies that encompass not only the academic work itself but also the professional career of the legal author! Lempert's outrageous statements concerning me and my published works are mean-spirited as well as being academically unfounded and dishonest. Thus, I feel that it is incumbent on me to explain my own

¹⁸ *Id.* at n. 18.

¹⁹ IDL 1st ed., *supra* note 13, at Preface at unnumbered first page.

²⁰ Lempert, *supra* note 1, at 6 n.18.

²¹ See the website of Millennium Partners, available at: <http://www.millenniumpartners.org/news/> (last visited Dec. 23, 2020). The site clearly states that I joined the firm as General Counsel in November 2013, and the projects described therein are all Rule of Law reform projects.

pathway to creating IDL (although I had no prior intention of doing so) in light of the fact that Lempert has called it into question.

B. THE GENESIS AND THE TRAJECTORY OF INTERNATIONAL DEVELOPMENT LAW

As a final matter, Lempert takes issue, apparently, with my position as a former adjunct law professor at the Georgetown University Law Center, stating that, “[a]ccording to Sarkar’s capsule autobiography, Rumu Sarkar taught a course in Development Law and International Finance at Georgetown University Law Center.”²² This is only partially true and thus, is also factually misleading by its omissions.

When I began teaching at Georgetown Law, the LL.M. course was called, “Law and Development.” Along with other Georgetown law professors who taught the same seminar at different times, we all relied on miscellaneous law reviews, newspaper articles and the like. After teaching the subject for the first two years, I began to become totally dissatisfied with this approach. Even though I laid out certain organizing principles of “Law and Development,” it evaporated the moment the course was finished.

Perhaps out of sheer naiveté, I undertook the task of writing a textbook on the subject. After all, most law classes revolve around a text or case book of some kind. While certain courses I took while a law student did have a binder of opinions and other academic materials that were specifically collated by the law professor, this was the exception rather than the rule.

Thus, writing a text on IDL was informed both by my teaching at Georgetown Law as well as my work in the field since at the time, I was an attorney with the Office of the General Counsel, U.S. Agency for International Development (USAID). My professional experience stemmed from working on USAID's development portfolio, and traveling to its many offices in, for example, Albania, Burundi, El Salvador, Kenya, Pakistan, the Philippines, Yemen, Zambia. (Believe me, this is hardly a complete list of my travels!)

These experiences were a complete immersion on how development projects are conceived and implemented as well as an introduction to the many, complex legal issues surrounding these undertakings. It was quite an experience, and it enabled me to move seamlessly between theory and practice. The fact that my field work fully informed my academic writing gave me tremendous satisfaction, and I sincerely hope that my Georgetown law students benefited from this perspective as well.

²² Lempert, *supra* note 1, at 6 n.18.

In retrospect, I must say that Georgetown Law was very supportive of me since I kept changing the title of the LL.M. course as my thinking, research and publishing progressed. In fact, I was never particularly fond of the “Law and Development” title, and stated that:

This chapter outlines the contours of [international] development law as a new legal discipline. A transition to this new discipline, however, requires a movement away from the terminology of “law and development.” As the scholarly literature on the subject definitively concludes, the law and development movement, its intellectual adherents, and its viability as a legal doctrine have long been defunct. (Footnote eliminated.)

It would be a critical intellectual and pragmatic error to remain wedded to this terminology or the intellectual underpinnings of the law and development approach to legal systems development. Moreover, there is an implicit stigma attached to legal disciplines that are described in a conjunctive fashion such as “law and development” or “law and literature” or “law and the rights of women.” International development law has moved past the conjunctive stage and has come of age.²³

In looking through my class lecture outlines for the Georgetown Law’s LL.M. seminar in preparing this article, I note that it went from “Law and Development” to “Development Law and Finance,” to “Development Law,” to “International Development Law.” So, while Lempert’s description of my teaching a course in Development Law and International Finance at Georgetown University Law Center is correct, it is incomplete. Moreover, the title itself should have been a clue to him of something much larger: My publication of DEVELOPMENT LAW AND INTERNATIONAL FINANCE.²⁴

So, while Lempert may believe that IDL 1st edition was my first exposition on the subject, it was actually my third! I changed the title when I changed my publisher, and it was also a reflection of my maturing ideas on the subject. Indeed, the importance of the very first edition of the work cannot be underestimated, at least in my own mind.

²³ IDL 1st ed., *supra* note 13, at 75.

²⁴ Rumu Sarkar, DEVELOPMENT LAW AND INTERNATIONAL FINANCE (Kluwer Law Int’l, 1st ed., 1999, 2d ed., 2002). These texts were the author’s first two expositions on the subject before publishing IDL 1st ed. with Oxford University Press (2009).

I actually went to the home office of my now late law professor, Sir Elihu Lauterpacht, CBE QC LLD, in his Cambridge, UK home to request him to write the foreword to this work. (I had taken his public international law course as part of my LL.M. studies at Cambridge University, and he gave me a “first” for my final examination in his course.) He readily agreed to provide the foreword, and then got out of his chair and pulled down a volume from his extensive law library and began rifling through the pages. “Rumu,” he said quietly, “under the rules of Cambridge University, you may submit this work as a Ph.D. thesis.”

I was stunned at this possibility, but I did submit the work before I left Cambridge, but didn’t hear anything for about six months. Thinking it was a missed opportunity, I dismissed it until I received an email inviting me to do my viva (oral dissertation) at Trinity College.²⁵ After a harrowing two hours of an examination by two law professors, I was later informed weeks later that I had passed, and a few months later, received my Ph.D. in Philosophy!

Some time later, I happened to attend a seminar on theories in law that was hosted by Georgetown Law, and made the acquaintance of Professor (and later Vice-Dean) Yansheng Zhu who was completing his Fulbright Scholarship at Georgetown Law. He was already familiar with my work on international development law to my surprise. He invited me to speak at his law school, the Xiamen School of Law in Xiamen, China. To my further surprise, he specifically asked to me to lecture on “whether there was a human right to development.” The only caveat, he said, was for me to obtain a Fulbright Scholarship in order to support my trip.

I was somewhat taken aback by his request, but did, in fact, obtain a Fulbright Scholarship. However, while I did lecture at Xiamen and was very generously hosted by Professor Yansheng and Professor Huiping Chen, I was not able to use my Fulbright grant in time.

Instead, I was invited to speak at the John Paul II School of Law in Lublin, Poland, thanks to the gracious invitation of Father (Professor) Włodzimierz Bronski. I taught a two-week advanced seminar on “Global Finance & International Financial Crimes.” My 80+ graduate law students spoke English as a second or perhaps third language but, regrettably, I could not speak a word of Polish. Despite this, I was amazed at the reception I received, especially a standing ovation and two bouquets of flowers from my students at the conclusion of the course!

This Fulbright experience, in turn, later led to a fortuitous meeting with another Fulbrighter who introduced me to Air Force Colonel Brad Boetig who directs the

²⁵ N.B. Sir Eli was a Fellow of Trinity College and an Honorary Professor of International Law. I matriculated from Newnham College, Cambridge University, and received a Masters of Law (LL.M.), and a Ph.D. in Philosophy.

Global Health Distance Learning Program at the Uniformed Services University, F. Edward Hébert School of Medicine in Bethesda, MD. After two years of teaching there, I am now an Assistant Professor teaching principally in the Global Health and Development course. I certainly never expected to be teaching intentional development law to medical students and global health specialists! It is, and continues to be, a wonderful teaching and learning experience for me.

In addition, the acceptance by other law professors and academics of the full text of IDL 1st edition became clear to me when I was invited by Professor James Fry²⁶ to be a guest lecturer at the Fletcher School of Law and Diplomacy. To my surprise, he used the entire text of IDL 1st edition for his seminar on “Law and Development.”

To cite another example, I was very humbled in coming across a book review of IDL 1st edition posted on the University of Toronto Law Library that stated, “I would recommend this book for any academic or firm library, definitely, as *an academic treatise* as well as a helpful guide for practicing attorneys in international development law. This book is a valuable contribution to the literature on a developing area of international law. Sarkar's work is thoughtful and well researched; it largely achieves the goal of bringing cohesion to a largely scattered topic.”²⁷ (Emphasis supplied.) Therefore, for Lempert to suggest that IDL 1st edition is not a “treatise” or that it does not deal with international development issues generally but with international finance issues only, cannot be supported.

The last time I visited Cambridge was to attend Sir Eli's memorial service in 2017. It was a very sad occasion for all of us who knew, respected and admired him. His devotion to his students, and theirs for him, was legendary. His impact on

²⁶ Professor James Fry is an Associate Professor of Law and Director of the LLM Program at the University of Hong Kong. At the time of his invitation to me, he was a Visiting Professor at the Fletcher School of Law and Diplomacy, teaching a law seminar entitled, “Law and Development.”

²⁷ Book review of INTERNATIONAL DEVELOPMENT LAW (1st ed.) (Oxford Uni. Press, 2009), available at: <https://search.library.utoronto.ca/details?7065169&uuid=2fa2ebb2-a399-4d79-b030-e30e1701f295> (last visited Dec. 23, 2020). The review further states, in part:

In this path-breaking work, Professor Rumu Sarkar expertly combines law, philosophy, political theory, and economic analysis with real world experience to establish for the first time a comprehensive foundation of substantive law principles of international development law. This meticulously documented work is sure to be the touchstone for all future writing in a subject area that is quickly emerging as one of the most important in international law...Rumu Sarkar's new book comes as a most welcome decisive step forward. Making full use of her acute intelligence and multiple fields of expertise, and writing with the moral passion of one who cares personally for those whom development at its best is meant to benefit, Sarkar works just that synthesis which international development law, as a simultaneously academic and practical discipline fraught with ethical importance, has been so long awaiting. *Id.*

public international law questions as a barrister and as a distinguished law professor is also truly legendary.

It was in 2019 that I discovered something quite unexpected. Sir Eli had donated his massive collection of his personal law books to Gray's Inn, London, where he had done his clerkship to become a barrister. It is now known as the "Lauterpacht Collection." To my complete astonishment, Sir Eli had included two of my legal works!

He did not, however, donate my works that he had written a foreword to, namely all four editions of the IDL collection. The Librarian of Gray's Inn has graciously accepted my personal donation of those works simply because they have Sir Eli's foreword in all of them, including the last, IDL 2d edition, which was published after Eli had passed away. I preserved his foreword in memorium because his teaching and support for my own academic endeavors were so deeply meaningful to me. My journey in creating International Development Law as a new legal discipline has been a deeply moving journey for me, both academically and personally.

So, I would have welcomed a disciplined and respectful dialogue with Lempert regardless of whether he agreed or disagreed with my theories, approaches, research or writing. Instead, I was met with a side swipe that deliberately misstates facts and creates misleading impressions about my publications and professional career.

C. CONCLUDING THOUGHTS

It is not my intent here to critique Lempert's Work. I will leave it to his readers to judge its authenticity and value. However, I will say that even a superficial perusal of his Work reveals the shaky foundation upon which it is laid. He describes his "methodology for extracting the basic principles from the body of treaties is one regularly used by lawyers and judges when trying to find the precepts underlying laws and is referred to as *statutory analysis*."²⁸ However, statutory analysis is the interpretation applied to statutes, not treaties. Indeed, it is axiomatic that treaties are not statutes. Simply put:

At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and

²⁸ Lempert, *supra* note 1, at 8.

a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative "implementation."²⁹

Further, the "statutes" that Lempert cites are UN treaties by and large that are devoted to human rights issues, and that may or may not have been ratified under U.S. law, and thus, may or may not be applicable as U.S. law. Even if these treaties have been properly ratified (which Lempert does not specify), such legal instruments may be considered to have the legal force of "statutes" only from the vantage point of U.S. law. By failing to make this critical distinction at the outset, Lempert's writing seems both confused and confusing. Moreover, his discussion does not address the adoption (and enforcement) of such conventions and other treaties by other countries.

In addition, the "outline" of his "treatise" is just that: an outline, literally!³⁰ Clearly, this does not meet the requirements of being a "legal treatise," despite Lempert's bombastic, self-serving claims otherwise.

But what really caught my attention is his section on the "Legal Enforcement of International Development Interventions, International and Domestic." He seems to lay out a confused thesis that insofar as:

International law and mechanisms theoretically offer justification for enforcement of the elements of international development law that could hold high officials today of most major governments and international institutions, including the major development banks and multi-lateral organizations like the United Nations and its agencies, *subject to criminal prosecution for interventions in development* that in fact promote hidden agendas that undermine cultural viability (in criminal violation of the Genocide Convention) and that act to impoverish certain groups in ways that undermine their resources, stability, and livelihoods while knowingly benefitting [sic] other groups in ways that are "crimes against humanity." (Emphasis supplied.)³¹

Lempert further claims that, "[t]he Rome Statute establishes four international crimes, two of which are at the basis of international development law: the crime

²⁹ Carlos Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995); see generally John Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 326-327 (1992).

³⁰ Compare Lempert, *supra* note 1, at 9-28, with IDL 1st ed., *supra* note 13, at 75-148, and IDL 2d ed., *supra* note 8, at 71-119.

³¹ Lempert, *supra* note 1, at 28.

of genocide and crimes against humanity.”³² (Footnote eliminated.) Thus, concluding that “[a]ny violations of cultural sovereignty and sustainability would potentially be criminally enforceable under [the Genocide Convention].”³³

Frankly, I am nonplussed by this idea. First of all, the nature of development, if anything, is a question of civil, not criminal law. The leap of logic in holding officials of international development banks, and multilateral institutions such as the UN for genocide and crimes against humanity for any perceived failures in development does strain credulity.

In my own writings, I avoided the idea of criminality in the development process, until I was not able to avoid it any longer. During my last few years of teaching at Georgetown Law, I began to explore the idea of the failed state, and its consequences. Of course, the idea of the “failure of the state” as a pillar supporting any discussion of international development law was clearly laid out in IDL 1st ed.³⁴ However, I could no longer ignore the failure in development that was caused by failed states such as Afghanistan, Sudan, Somalia, Libya and Yemen.

A collapsed state that was unable (or unwilling) to police its borders often lead to the emergence of ungoverned or ungovernable territories. This, in turn, helps to create a welcoming environment for the illegal transit of goods and persons, and for corruption in general. In the final analysis, it may create a vicious circle of failed and failing states, and a platform for transnational organized crime, international terrorism, and corruption.

My friend, Colonel Zachary Kinney,³⁵ was instrumental in this regard. He invited me to teach with him at the International Law Enforcement Academy (ILEA) in Roswell, New Mexico, which is a program run by the U.S. Department of State’s Bureau of International Narcotics and Law Enforcement Affairs. He encouraged me to scrutinize the failure of the state through the lens of the criminal activities that follow (and are encouraged by) such a collapse. As a result, the tripartite analysis of transnational organized crime, international terrorism (particularly Islamic-based terrorism), and endemic corruption within and without the collapsed state (by host government officials, private banks, and even multilateral institutions) came into clear focus for me, and for the participants in the ILEA courses where I taught.

Indeed, this was exactly what my Fulbright seminar in Poland discussed. However, I had not included all of this academic work in the first edition of IDL.

³² *Id.*

³³ *Id.* at 29.

³⁴ IDL 1st ed., *supra* note 13, at 15-22.

³⁵ *See supra* note 6.

This was corrected when I published IDL 2d edition in 2020 which now includes a new, previously unpublished chapter on “Corruption and Its Consequences.”

So, while I can appreciate Lempert’s desire to explore criminal facets of the development process, I again find his analysis to be confused and confusing. I certainly had no wish to describe my own journey to the making of IDL (in all its iterations) here, but I felt that Lempert’s aspersions against me both as a legal scholar and practicing lawyer cannot be ignored. To the extent that I have cited my own works, it is in refutation to Lempert’s claims, and so I hope that you as the reader will indulge me. It is not my intent to be “self-referential” as well!

In conclusion, if Lempert decides to undertake another academic venture, I trust that he will do so with less hubris, and more humility.

ADDENDUM:

I have duly noted that there have been two cross-currents in reviews of IDL 1st edition, and in the peer review process leading to the publication of IDL 2d ed. To wit: first, that IDL should be viewed as “international financial law,” and the second, that IDL should contain (and discuss) all law subjects subsumed beneath its banner. The first has been exhaustively dealt with above, and this mistake in my view has been made as a result of the way in which IDL has, on occasion, been interpreted by its readers. But IDL is not what it may appear to be at first glance. (And I do mean “glance.”)

The second requires a discussion of all aspects of IDL in one setting. Not only would result in an encyclopedic “theory of everything,” it far surpasses my ability to comment on every possible dimension of IDL!

In fact, IDL 1st ed., recognized this possibility and specifically stated that, “[the text] is not intended to be used as a primer for international business transactions. Nor is this text intended to be a restatement of black letter law on subjects such as bankruptcy law, secured transactions, or intellectual property law, as such subjects might affect relations between the developed and the developing world. More importantly, trade issues, while critical to the international development process, have not been addressed since those debates are so abundantly addressed elsewhere.”³⁶

In recognition of these two issues in viewing IDL (both editions), I have published a section in the second edition that expands and clarifies the parameters of IDL. I reproduce it here with the kind permission of the Editors of this distinguished law journal.

³⁶ IDL 1st ed., *supra* note 13, at xiv.

“WHAT THE TEXT IS AND WHAT IT IS NOT”³⁷

In light of the fact that the queries posed by the subject of international development law are broad and ambitious, it would be remiss on my part not to advise the reader of the limitations of this text. This text examines the relationship of certain legal, historical, and philosophic ideas to one another within the context of the international development process. It is not intended to be used as a primer for international business transactions. Nor is this text intended to be a restatement of black letter law on subjects such as bankruptcy law, secured transactions, environmental law, or intellectual property law for example, as such subjects might affect legal relations between the developed and the developing world. This text is being proffered in hopes that it may provide an overview of the legal, philosophical, and financial underpinnings of international development going forward.

Therefore, in setting the general parameters of the discussion below, let me make some important clarifications at the start. First, “international development law” (IDL) itself fits under the general banner of “international law.” However, it should not automatically be classified under the subject of “international finance law” or under “international economic law.” I realize that this will be a temptation because of the way that the text is written; however, that is not my intent. Moreover, please bear in mind that “international development” actually means “sustainable international development.”

Second, I specifically chose to discuss the methods and implications of “financing” international development for the focus of the text. Not only do I feel that I may have something substantive to offer in this discussion, but financing development is in my view also the logical starting point for embarking on any concerted effort to encourage or facilitate “international development.”

By this, I simply mean that whether the development project or focus is on maternal health, child survival and nutrition, species and habitat protection, fair trade or any number of issues, the financing of development (both on a micro- and macroeconomic scale) is the means by which development goals may be achieved. I regret any confusion I may have created on this point based on my previous writings. I trust that this clarification here will be useful in going forward. (I also recognize that other approaches may be taken to the subject matter of international development law, but I sincerely hope that this starting point is a useful one, both as an academic and as a practical matter.)

Third, while the text does address many topics related to international development, it is not intended to be the “theory of everything.” In other words,

³⁷ IDL 2d. ed., *supra* note 8, at xii-xiii.

IDL is not, and was never intended to be, a handbook on literally every subject related to international development. Not only will this surpass any expertise I may have to offer, but the text itself would become unwieldy and unusable.

Accordingly, there are many important subjects that are not dealt with in any significant way, such as trade, immigration, environment, climate change, international arbitration, intellectual property rights, women's rights, and international human rights. While these and many other subjects do fall under the rubric of IDL, they are not dealt with in detail in light of the fact that other texts, casebooks, and treatises dealing with these subjects, as written by subject matter experts, are widely found elsewhere. It is my hope that a focus here on financing international development is the logical starting point to which other academics and practitioners may add their own analysis on specific subject matters that are part of the IDL universe.

More importantly, trade issues, while critical to the international development process, have not been addressed since those debates are so abundantly addressed elsewhere. Not only would it be redundant, but it would also be less ably discussed within this context. It is the hope of the author that professors who may wish to use the text will supplement it with trade discussions and other materials, as they may see fit.

In addition, while the importance of dispute settlement mechanisms, especially those focused on international investment arbitration and related dispute resolution approaches, cannot be overestimated, a discussion of these approaches will also, regrettably, be omitted in order to lend more clarity and succinctness to this text. International arbitration and host government regulation of foreign investment are vast and detailed subjects of law and legal practice that deserve a more thorough treatment than may be offered in this more limited context that is clearly focused on the impact of global finance on the international development process in general.

Finally, it is my hope that this work adds to the growing and fascinating legal discourse on international development generally which, in my view, is one of the most dynamic areas of international law at present.