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# Receiving the *Headian* Legacy: International Lawyers, South-to-North Resource Transfers, and the Challenge of International Development

OBIORA CHINEDU OKAFOR

A new factor has recently reemerged: financial transfers from South to North. Reemerged, for it was also a common occurrence in earlier colonial periods.

— Ivan Leigh Head<sup>1</sup>

## INTRODUCTION

Written over fifteen years ago by Ivan Leigh Head, a highly distinguished Canadian international lawyer, foreign policy expert, and international development thinker, the words contained in the above quotation point firmly at this great man's analytic incisiveness and hint at the sheer depth of his fairness of mind. For although the net transfer of resources from the much poorer geopolitical "South" to a far richer "North" remains to this day one of the most important obstacles to international development, rarely have the dominant accounts of international development given this phenomenon the pride of place that it surely deserves. Ivan

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Obiora Chinedu Okafor, Ph.D, LL.M (University of British Columbia), LL.M, LL.B (Hons.) (University of Nigeria, Enugu Campus), is an Associate Professor at Osgoode Hall Law School at York University in Toronto. This note is dedicated to the evergreen and loving memory of Ivan Leigh Head, my mentor, teacher, and international law colleague, whose death in late 2004 left a gaping hole in the fabric of humanist international legal thought. While it is sad that Ivan did pass away at all, it is heartbreaking that he did pass away just now, when the world needs, even more than ever before, his steady wisdom, his mild diplomatic tone, his deep appreciation of the South-North dangers that face us all, and his far-sighted developmental ecumenism. I should like to thank Tochi Uchendu for the many conversations and arguments that helped shape the thoughts contained in this note and Chinedu Idike for his research assistance.

<sup>1</sup> See I.L. Head, "South North Dangers" (1989) 68 *Foreign Affairs* 71 at 78.

Head was therefore well ahead of his time in foregrounding, highlighting, and criticizing this very disturbing, yet continuing, feature of South-North relations.

It is the insights that I have synthesized in whole or in part from Ivan Head's teaching and writing that frame and inform the brief intervention into international development and international legal thought that I want to offer in this note. These insights relate to, and concern, both the continuing need to foreground and reverse this worrisome trend in South-North relations and the important role that international lawyers can play in the execution of this challenging project.

### THE PHANTOM OF THE FOREIGN AID OPERA<sup>2</sup>

As favourable to the foreign aid-centred approach to international development as its overall conclusions were, the report on African development that was recently issued by the so-called Blair Commission<sup>3</sup> could not help but declare that

the system for allocating aid to African countries remains haphazard, uncoordinated and unfocused. Some donors continue to commit errors that, at best, reduce the effectiveness of aid. At worst, they undermine the long-term development of those they are supposed to be helping. Rich countries pursue their own fixations and fads, often ignoring the needs prioritized by African [and other developing country] governments ... They tie aid so that it can only be used to buy the donor's own products or services — effectively reducing the value of aid by as much as 30 per cent. Tied aid should be scrapped.<sup>4</sup>

The Blair Commission's assessment was thus that, although foreign aid can be well conceived and smartly delivered, foreign aid programs have all-too-often missed the mark. In the commission's view, "it is time ... to bring bad aid up to the standards of good aid."<sup>5</sup> This is a conclusion that Ivan Head would have himself reached were he still alive today. It is also a call to action with which he would have

<sup>2</sup> I owe this expression to the title of the famous artistic production "The Phantom of the Opera."

<sup>3</sup> See *Our Common Interest: Report of the Commission for Africa* (London: Commission for Africa, 2005), available at <[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/11\\_03\\_05africa.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/11_03_05africa.pdf) (last visited on 16 April 2005) [Blair Commission Report].

<sup>4</sup> *Ibid.* at 54.

<sup>5</sup> *Ibid.*

agreed. Indeed, over fifteen years before the Blair Commission was empanelled, Head had pointedly declared that

[d]evelopment assistance [or foreign aid] programs that are designed primarily for the benefit of the Northern donors — to reduce agricultural surpluses, to create employment in sluggish sectors of the economy, or to spur the export of military hardware — must be recognized for their inherent cynicism and their eventual ineffectiveness.<sup>6</sup>

This similarity between Ivan Head's conclusions and the nature of the contemporary situation, as recognized and articulated in the Blair Commission's report, is most remarkable.

This similarity is also disturbing in its indication that, on the whole, not all that much has changed in international development praxis in the years that intervened between Head's visionary call to action in 1989 and the issuance of the Blair Commission report in 2005. While the Canadian International Development Agency (CIDA) is now widely recognized for its strenuous efforts to rethink its praxis in light of the kind of powerful insights that Head's writings have consistently offered,<sup>7</sup> and most other international development agencies have subscribed to the forward-looking Paris Principles on Aid Effectiveness,<sup>8</sup> to a highly significant extent, net transfers of resources from South to North still mar the development landscape; tied aid still frustrates the struggle to reduce poverty in the South while enriching many in the North; and too many rich countries still tend to pursue their own fixations and fads at the expense of the needs prioritized by developing countries.<sup>9</sup> It is no wonder then that almost nowhere in the geo-political South has foreign aid been isolated as the key factor in generating widespread and *sustainable* social development — certainly not in China, India, Singapore, Botswana, or Malaysia. While aid played some role in these relative development success stories, it did not play the central role.

<sup>6</sup> See Head, "South-North Dangers," *supra* note 1 at 85.

<sup>7</sup> See Canadian International Development Agency, Policy Statement, *Canada Making a Difference in the World: A Policy Statement on Strengthening and Effectiveness* (September 2005), available at <<http://www.acdi-cida.gc.ca/aideffectiveness>> (last visited on 21 March 2005).

<sup>8</sup> See Paris Principles on Aid Effectiveness (Declaration of the Paris High-Level Forum, 2 March 2005), available at <<http://www1.worldbank.org/harmonization/paris/finalparisdeclaration.pdf>> (last visited on 21 March 2005).

<sup>9</sup> See Blair Commission Report, *supra* note 3 at 32.

Among the obstacles that have impeded the success of most foreign aid-centred international development efforts, the net transfer of wealth by other means from South to North ranks among the most important. The importance of this issue is underscored by the fact that international development efforts do not have a fighting chance of succeeding as long as there is a net loss of wealth from the much poorer South to the far richer North. It is on the nature of this worrisome trend, and on the means of reversing it, that the rest of this note will concentrate.

#### NET SOUTH-TO-NORTH RESOURCE TRANSFERS: A BRIEF ANATOMY OF THE PHENOMENON

While a range of factors contribute to the net flow of wealth from the South to the North (for example, debt servicing, diversion of public funds from developing countries to secure personal bank accounts in the North, and certain unfair trading and investment practices), only the “debt servicing” and “diversion of public funds” issues will be discussed in this section. The question of the relationship of fairer trade to strengthened development praxis will be dealt with in the following section. One of the most consequential avenues through which more and more of the South’s resources are transferred to the North is through the payment by developing countries of the interest charged by Northern countries and Northern-controlled banks on the many loans that have been taken from these Northern sources by almost all governments in the South. Of some interest is the fact that many of these loans were in fact offered to these Southern countries as a form of “foreign aid.” As is now widely recognized, the debt-servicing obligations of many developing countries has become so grand as to result in the diversion of huge resources from basic social developmental activities in these countries in favour of such debt repayments. Writing over a decade and a half ago, Ivan Head warned that this kind of debt servicing by the South had led most developing countries from “illiquidity” to “insolvency.”<sup>10</sup> The Blair Commission has only recently issued a similar warning. It has noted that over the years developing countries in Africa (as elsewhere) have had serious difficulties paying down the interest on their debts, let alone the capital.<sup>11</sup> What is more, in most countries in the South, these debt obligations have

<sup>10</sup> See Head, “South-North Dangers,” *supra* note 1 at 79.

<sup>11</sup> See Blair Commission Report, *supra* note 3 at 24.

become so relatively onerous that they cannot possibly be repaid.<sup>12</sup> This is so notwithstanding that the original sums borrowed have, in most cases, been paid back already and that the outstanding amounts are in reality the interest that is owed on the debt. As Ivan Head did point out, as of 1989, interest payments by the South accounted for over 50 per cent of its debt servicing payments to the North.<sup>13</sup> The Blair Commission's much more recent conclusions in this connection are very similar.<sup>14</sup> In both cases, Ivan Head's wise words serve to remind us, yet again, of our collective failure (in the time that has elapsed since his 1989 call to action) to act boldly, selflessly, and humanely to ameliorate this very serious threat to human security around the globe.

Another important reason for the net transfer of resources from South to North is the corrupt diversion of billions of dollars from the accounts of poor developing countries to personal bank accounts in the much richer North. While all too many (though certainly not all) politicians in the South have partaken of the vice of corrupt enrichment and looting of the national treasury in their respective countries, far too many Northern banks have profited from receiving, securing, and otherwise dealing in these illicit funds. For instance, it is estimated that the amount of such sums originating from Africa that are now held in Northern banks could suffice to repay over one-half of the total debt owed to the North by African countries.<sup>15</sup> By recommending that countries in the North should rapidly "track down money looted by corrupt African leaders, now sitting in foreign bank accounts, and send that money back to the states from whom it was stolen," the Blair Commission recognized the seriousness of this problem as an obstacle to social development in the South.<sup>16</sup> Yet, virtually all the relevant countries of the North have thus far been reluctant to take the kind of decisive action that is required to stem the tide of this type of illicit flow of resources from South to North. Although some limited action is now being taken in some of these countries, the overall picture is one of reluctance to repatriate these stolen funds. Were he still alive today, Ivan Head would have wisely warned the relevant

<sup>12</sup> *Ibid.* at 41.

<sup>13</sup> See Head, "South-North Dangers," *supra* note 1 at 79.

<sup>14</sup> See Blair Commission Report, *supra* note 3 at 24.

<sup>15</sup> See *ibid.* at 32.

<sup>16</sup> *Ibid.*

countries and their banks that “measured against the relentless momentum of current phenomena, indifference is not benign.”<sup>17</sup>

#### BEYOND THE NET TRANSFER OF WEALTH FROM SOUTH TO NORTH

Among the key recommendations made by the Blair Commission are that for rapid social development to occur in most African countries (and by implication in many other developing countries), these countries will require a significant increase in the volume of their trade with each other and with the rest of the world as well as the enactment of fairer trading rules.<sup>18</sup> The implicit recognition in these two recommendations is that as long as the rules are fairer, a significant increase in the level of South-to-South and South-to-North trade will play a key role in stemming the tide of South-to-North resource transfers and in encouraging the achievement of higher levels of social development in the South. This conclusion is of course a commendable one. For example, although protectionism exists on both sides of the South-North divide, with regard to the specific issue of agriculture (on which a vast number of developing countries depend for much of their incomes and on which the fates of most Northern economies do not really rest), the heavy hand of Northern protectionism is one of the key factors that has marked and marred the possibility of greater and fairer South-North trade. Such unfair trade regimes also hinder the generation of the kind of enhanced earnings in the South that can sustain rapid social development in these countries.<sup>19</sup>

However, as commendable as its recommendations regarding the role of trade in development are, the Blair Commission report is unsatisfactory in at least one key structural respect. It fails to recognize *fully* the fact that “fairer trade” is much more likely than “better aid” to become the single most important driver of sustained social development in African and other Southern countries. The report’s hopes for rapid social development within African countries rests much too heavily on the potential for the adoption by the North of an emergent “good aid” praxis. Yet, as has been argued already, over the last half-century or so, nowhere in the developing world has foreign aid functioned as the key factor producing sustained social development. The report’s bias towards foreign aid is thus somewhat surprising. Given the Blair Commission’s own

<sup>17</sup> See Head, “South-North Dangers,” *supra* note 1 at 86.

<sup>18</sup> See Blair Commission Report, *supra* note 3 at 48–53.

<sup>19</sup> *Ibid.* at 50.

acknowledgment that all of the handful of countries in the South that have all but leapt into the developed world have done so largely because they have “used trade to break into new markets and change the face of their economies,”<sup>20</sup> this relative bias towards foreign aid (rather than fairer trade) as the central engine of social development in the South would, I dare say, be unconvincing to a mind as acute as Ivan Head’s. Even the report’s argument that, on the whole, Africa does not yet produce enough goods at the right quality and price to increase its share of global trade<sup>21</sup> does not really meet the challenge posed by an analysis of the available evidence of what has *in fact* worked in the developing world. It does not belie the underlying argument being made in this note that fairer trade is more likely than even the best foreign aid schemes to be sustainable as the central plank of a social development edifice. As the commission itself understands,<sup>22</sup> most of the appropriate goods/services for export to the North can, with the right effort, be manufactured in the South (perhaps with better-oriented foreign aid). Yet the key point is that if sustainable social development is to occur in most of the South, developing countries must make and sell goods in both Southern and Northern markets, and high-end services must be provided to the North by corporations and individuals in these countries.

The report is also significantly deficient in terms of its treatment of what I will refer to as the “remittance question.” Although it acknowledges that remittances from the diasporic citizens of developing countries to their relatives in the developing world (totalling over US \$100 billion in 2003) are a highly attractive source of social development finance in the South, and it does identify the barriers to increased remittances,<sup>23</sup> the report does not do a good job of analyzing and fathoming the true potential of this remarkable phenomenon. It does not also devote as much energy as it could to developing creative proposals for overcoming the obstacles in the path of the increased flow of such funds to key parts of the South. Furthermore, the report pays insufficient attention to the important economic implications of the inherent nature of the typical remittance of funds from a Northern country to a given African country as a culturally normative expression of a deep sense of

<sup>20</sup> *Ibid.* at 48.

<sup>21</sup> *Ibid.* at 50.

<sup>22</sup> *Ibid.* at 53.

<sup>23</sup> *Ibid.* at 205.



obligation (not simply charity). Typical foreign aid schemes allocate a significant percentage of aid funds to administrative costs (usually benefiting the citizens of the donor country); too often miss the mark in terms of accurately identifying and solving the priority development problems of the particular communities or persons in issue; and are hardly reliable or sustainable. By contrast, driven, sustained, and framed as they are by a deep sense of obligation (of the very kind that Ivan Head's writings and the Blair Commission report sought to imbue the world with), remittances to the South tend to be much more reliable. They are also far more accurate at reaching the intended beneficiaries and in solving the prioritized problem. What is more, remittances do not involve nearly as much administrative expense as the typical foreign aid project. In light of the great potential and important advantages of remittances, it is disappointing that the Blair Commission report did not spend more of its time brainstorming about ways of developing much larger flows of remittances to Africa and the rest of the developing world. This result may be because it instinctively leans towards foreign aid as the key driver of social development in Africa especially and in the third world in general. The argument that I am making is not, of course, that foreign aid ought to be abandoned in favour of a reliance on remittances. Good foreign aid schemes are much better than remittances at addressing the broad institutional needs of developing countries. By contrast, remittances tend to work best with individual and small group recipients. The argument that is being made is simply that since remittances tend to be significantly more efficient than foreign aid at ameliorating poverty in the South, much more attention ought to be paid to the task of designing systems and policies that are likely to encourage and increase such flows. The conditions within Northern polities that can encourage and lead to increases in remittances to the South (such as fairer migration rules, the facilitation of better jobs for qualified immigrant professionals, and the issuance of remittance tax credits for those diasporic individuals or families who sustain their parents or send young relatives to school in the South) ought to be enhanced or fostered.

Without the implementation of these kinds of measures, alongside the implementation of the other appropriate measures, the net transfers of resources from South to North that signal the relative failure, overall, of decades of Southern social development efforts and Northern-driven international development programming will most likely continue to pose a huge obstacle to sustained

social development in the South. In my own estimation, unhappy as he was with the net transfer of wealth from the much poorer South to the far richer North, Ivan Head would have endorsed this argument.

#### ROLE OF THE INTERNATIONAL LAWYER

As Ivan Head's work has taught many of us, the discipline of international law and the virtual college of international lawyers that constitute it, have been traditionally insensitive to the cause of development. In his now classic contribution to the 1987 edition of this *Yearbook*, Head reminds us all that

[t]o assume ... that international law as now constituted is a prerequisite to development — or is even sympathetic to development — is at least subject to challenge. That international law can, indeed should, contribute to development, is not in question, but it must be remembered that some of the applications of legal principles, designed as they often were in the industrialized countries, are not always in the interest of developing countries.<sup>24</sup>

On any fair assessment of international legal history, Head's analysis was correct. Traditional international legal insensitivity to development has not only been reflected in our relative inattention as a discipline to this subject,<sup>25</sup> but it has also been revealed in the ways in which the content and silences of international law have too often worked to impede social development in the South. Some key areas where international law has functioned in this way are in its traditional reluctance (even refusal) to regulate effectively even the most rapacious multinational corporations;<sup>26</sup> the harmful effects that the strict application of international intellectual property rules have had on the access of poor people in the South to essential drugs for treating HIV/AIDS;<sup>27</sup> and the unfairness of some international trade (World Trade Organization-based) rules (such

<sup>24</sup> See I.L. Head, "The Contribution of International Law to Development" (1987) 25 *Canadian Yearbook of International Law* 29 at 30.

<sup>25</sup> *Ibid.* at 36–38.

<sup>26</sup> See S.C. Agbakwa, "A Line in the Sand: International Disorder and the Impugnity of Non-State Corporate Actors in the Developing World," in A. Anghie, et al., eds., *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003) at 1.

<sup>27</sup> See J.T. Gathii, "The Legal Status of the Doha Declaration on TRIPS and Public Health under the Vienna Convention on the Law of Treaties" (2002) 15 *Harvard Journal of Law and Technology* 292 at 293–95.

as those related to agricultural subsidies) *vis-à-vis* most countries in the South.<sup>28</sup>

However, it must be said in favour of our discipline that it has improved significantly in its level of sensitivity to the cause of international development. Most serious scholars in the area now see development and international law as being linked. Under sustained pressure from a determined transnational coalition, the relevant intellectual property rules have changed somewhat in order to allow increased access in the South to cheaper AIDS drugs. And pressure has been applied to deploy legal reform towards the reduction (even abolishing) of the agricultural subsidies that have kept much produce from the South from reaching key markets in the North.

The underlying lessons are, thus, that international law can change and that it has in fact sometimes been changed in order to make it more sensitive to the cause of development. As such, it is not difficult to imagine an international legal regime that is much less tolerant of the global form of usury that has *helped* keep most Southern economies creaking and groaning under the weight of their debt obligations. It is also not that hard to think of ways in which existing or new international law norms can be deployed more smartly in order to increase the costs and dangers of looting public treasuries in the South or of accepting to launder such sums in the North. The fact that international trade rules can be modified to create the enabling environment for fairer agricultural trade is also well within the average person's imaginative capacity. All three measures can help greatly in stemming the tide of the net transfer of resources from South to North. And all of these measures are within our collective capacities to help foster (whether as citizens, international lawyers, foreign policy advisors, or even international decision-makers).

As such, as Ivan Head often reminded us, international lawyers do have an important role to play in the creation of the right normative environment for social development to flower. As Ivan Head saw it, ours ought to be a humanist vocation, not merely a rigorous discipline. While the vagaries of international politics will continue to frame and limit our reality and our capabilities, the power of ideas — indeed, the kinds of fresh, humanist, fair-minded international legal ideas that Ivan Head often dreamed up and argued in favour of — should not be lightly dismissed. And the more we think and act as if our collective purpose is not merely to capture and

<sup>28</sup> See Blair Commission Report, *supra* note 3 at 51.

express the desires of international politicians but also to function, *à la* M. Koskenniemi, as the “gentle civilisers” of international politics,<sup>29</sup> the more fully we will have received Ivan Head’s towering and worthy intellectual legacy.

#### RECEIVING THE *HEADIAN* LEGACY

One important theme that runs through this note is that Ivan Head was highly knowledgeable about international development, remarkably visionary in his conclusions regarding it, and deeply committed to its success. To many of those who worked with and knew him closely, it can only be gratifying that his knowledge of, and vision for, international development matches so closely the thinking of those who, nearly two decades after his first key writings on the area appeared, now seek to transform international development praxis. The tone of the Blair Commission report and the tenor of the new institutional discourses of the Canadian (and some other) international development agencies shows much promise and are remarkable in their conscious or unconscious reception and affirmation of the rich *Headian* legacy.

Yet, as has been argued in this note, far more needs to be done (mostly beyond the foreign aid praxis) if international development efforts are to achieve more success. For one, if most world leaders shared even half of Ivan’s commitment to international development, the challenges facing international development praxis today would be far less daunting. After all, was this commitment deficit among world leaders not one of the important reasons for empanelling the Blair Commission?<sup>30</sup> The urgency of imbuing this kind of commitment in the relevant leaders cannot be overestimated. Second, a lot more thought and effort ought to be devoted to ways of ameliorating or even eliminating the debt crisis; ensuring fairer trade for the South; returning looted funds to their original sources in the South; enhancing remittances to the South; and fostering greater social development over all. It is then and only then that we can conclude that Ivan Leigh Head’s towering and inspiring intellectual legacy has been as fully and truly received within international development praxis as it surely deserves.

<sup>29</sup> See M. Koskenniemi, “The Place of Law in Collective Security” (1996) 17 *Michigan Journal of International Law* 455.

<sup>30</sup> See Blair Commission Report, *supra* note 3 at 56.

Yet none of these recommended actions will likely be taken unless the basic current of Ivan Head's internationalist humanism and developmental ecumenism — that is, his much justified and evidence-based belief in “the mutual vulnerability of South and North” — is not itself more fully received and internalized across the South-North divide.<sup>31</sup> As Ivan Head himself did warn us: “[T]ime is not on the side of the North any more than it favors the South.”<sup>32</sup>

<sup>31</sup> See I.L. Head, *On a Hinge of History: The Mutual Vulnerability of South and North* (Toronto: University of Toronto Press, 1991).

<sup>32</sup> See Head, “South-North Dangers,” *supra* note 1 at 86.