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Infrastructural Developmentalism and its Many Types of Global Law

– A Comparison between the UN Sustainable Development Goals and China’s Belt & Road Initiative

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Infrastructural Developmentalism and its Many Types of Global Law

– A Comparison between the UN Sustainable Development Goals and China’s Belt & Road Initiative

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Abstract:

Today, we are witnessing the making, operation, and evolution of two gigantic development programs at the global level: the United Nations Sustainable Development Goals (SDGs), adopted by the General Assembly in 2015, and China’s Belt and Road Initiative (BRI), launched by President Xi Jinping in 2013. Perceived and real ideological differences notwithstanding, BRI and SDGs place infrastructures at the very heart of global development, strongly favoring pragmatism and immediate responsiveness. This paper analyzes the relations of this new developmental paradigm with law. By resorting to the Infrastructures as Regulation project (InfraReg), it focuses on the regulatability and regulatory effects of physical, informational, and digital infrastructures underlying both initiatives. The fluid re-arrangement of public and private, formal and informal legal frameworks regulating BRI indicate the emergence of a transnational legal infrastructure tied to and facilitated by material pragmatism, which stands in tension with China’s rhetorical embracement of international law as we know it. The implementation infrastructure of SDGs, on its part, reveals a resilience-driven governance style that is hard to reconcile with the futurity attached to the idea of (international) law. Although these findings would suggest a retreat from international law (and with it a decline of the international rule of law), the paper makes the case that actually many types of international and global law are emerging and resurfacing from infrastructural developmentalism which coexist in mutually determining and evolving ways. The hard question remains, nonetheless, whether such a relational condition can uphold the aspiration of order at the global level.

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1. Introduction

The relationship between law and development is revealing in regard to the different ideas of the rule of law that are promoted at the international and transnational levels at a given point in time. These ideas entail conceptions of international law, ranging from historical-normative projects of a systemic nature, like the post-War international legal order and the post-Cold War liberal-democratic new world order, to more pragmatic and fragmentary conceptions of international law, most prominently the one that focuses on the protection of trade and investment. Today, we are witnessing the making, operation, and evolution of two gigantic development programs at the global level: the United Nations 2030 Agenda and its Sustainable Development Goals (SDGs), adopted by the General Assembly in 2015, on the one hand, and China's Belt and Road Initiative (BRI), launched by President Xi Jinping in 2013, on the other. The principal aim of this paper is to unravel the most important ideas about law at the global level underlying and promoted by these contemporary development programs.

BRI and SDGs are less dissimilar than what one may think of at the outset, but less convergent than what many wish for, and then again less conflicting than what others profess. It is thus worth trying to overcome the comparative trap (section 2) and engage in a comparison that is not obsessed with finding similarities or differences, but that instead observes relations which may be meaningful in terms of ideas of law that are within and come out through contemporary development interventions. One such set of relations is that which BRI and SDGs entertain with infrastructures. While in the first case this is more obvious due to the construction of physical and digital infrastructures along the old Silk Roads, the SDGs' instrumentalization engineering is putting in motion a multi-scalar informational infrastructure of indicators, big data, communication, and human networks. Multiple partnerships between SDGs and BRI already show that each's relation to infrastructure are not unrelated with one another; an intricate relationship that finds expression in buzzwords of contemporary sustainable development like the 'smart city' or 'resilient infrastructure', where both programs meet in their goals and instantiations. In order to get a better grasp of this *law and infrastructural developmentalism*, I will use the Infrastructures as Regulation (*InfraReg*) theoretical lens (section 3), which pays attention to unexpected forms of regulation also by overcoming (modern) epistemic divides like nature and culture, technology and law, subjects and objects.

Most intriguingly, and perceived and real ideological differences notwithstanding, BRI and SDGs share an essential understanding of development, which is drastically different from previous developmental thinking. Albeit for different reasons, this new conception of development gives up on – or at least puts on a second plane – the goal of the long-term construction of an international community based on shared values. In lieu of this normative aspiration, SDGs and BRI strongly favor pragmatism and immediate responsiveness. Therefore, in the last section (section 4) I will turn to the relationship of this new developmental paradigm with law. Although the aforementioned clearly

suggests a retreat from international law, and hence a decline of the international rule of law, I will make the case that actually many types of global and international law are emerging and resurfacing from infrastructural developmentalism. An inquiry into the relations between these types of international and global law shall reveal that these coexist, not in parallel but in cross-cutting, mutually determining and evolving ways. In this co-constitutive condition, it is hard, if not futile, to insist on an ideal type of international law from which to assess rise or decline; it may even indicate that such prototype has never existed. Still, it does beg the question of whether a relational condition of different types of international and global law can hold. I have no false pretensions of solving this puzzle, but I wonder if, by giving up on ideal types, we may (still) be able to uphold the aspiration of order at the global level, and with it the normative condition which makes the future collectively meaningful.

2. Comparing comparisons

The SDGs and BRI are today's most important global development programs. Beyond that, they do not seem to have much in common at first sight. While the former is a multilateral undertaking par excellence, anchored in the United Nations (UN) and the result of long negotiations at the UN General Assembly, including very broad, arguably even unprecedented, consultative processes with civil society, the latter was unilaterally declared during a meeting of China's Communist Party, is primarily pursued bilaterally by China with other states, and has turned into the hallmark of its superpower ambitions. The SDGs are framed in a language of values, while BRI is constantly described in Chinese official discourse as rather pragmatic 'win-win cooperation'. In terms of their image around the world, the SDGs portray a picture of shiny happy people and the colorful cubes of sustainable development we try to live by. BRI, on its part, evokes an image of strong promotion and straightforward (almost cynical) defense of Chinese power and money, with all roads leading to Beijing. While there is some truth to these impressions, they depict only the surface, partly based on myths and prejudices, and significantly contributing to endure them over time.

The burgeoning literature comparing these programs reveals a more complex situation. There are, for instance, a series of geopolitical writings on two major fronts: the Chinese and the US fronts. Some Chinese scholars adopt a propagandistic style, promoting BRI as the best companion available to SDGs, particularly considering the willingness and almost unrivaled capacity of Chinese public and private investment, and a leadership vacuum in global governance, which China is called upon to fill in partnership with the UN and for the sake of global development. Along this line of argumentation, BRI is portrayed as a crucial enabler of global public goods or as a global public good itself, and Chinese international lawyers play a prominent role in this campaign.¹

¹ See Cao Jiahan, 'China's Belt and Road Initiative 2.0: Delivering Global Public Goods for Sustainable Development' (2019) 5 *China Quarterly of International Strategic Studies* 233; Shi Jingxia, 'The Belt and Road Initiative and International Law: An International Public Good Perspective' in Yun Zhao, *International Governance and the Rule of Law in China under the Belt and Road Initiative* (CUP 2018) 9; Kong Qingjiang and

In the US, BRI gets most attention from foreign policy analysts, particularly within prestigious think-tanks, like the Brookings Institution, the Council on Foreign Relations, or the National Committee on American Foreign Policy (NCAFP). There, BRI is mostly seen as pure power politics by China, and possible similarities with SDGs are, in any case, belittled as distraction maneuvers from real hegemonic ambitions. The recurrent theme is to find ways for the US and their allies to contain China's infrastructural advancements across the world. Accordingly, far beyond any narrative about global cooperation for development, BRI is described as the foe within an emerging and fierce geo-infrastructural race.² The point that BRI has turned 'infrastructure development [into] one of the greatest battlefields of our time', has been raised by the World Economic Forum (WEF),³ a view which finds echoes among international law and IR scholars beyond the US, under the notion of a new 'geoeconomic order.'⁴

Another major stream of the literature on BRI and SDGs comes from the professionals of sustainable development who overwhelmingly highlight the synergies between these programs, or at least their potentialities for convergence,⁵ a trend not least spurred by the UN itself, which increasingly sees China's initiative as an indispensable partner for making the SDGs work on the ground.⁶ International legal studies dealing with these initiatives usually focus on specific challenges for international law, such as for international environmental law, whereby the comparison comes in as a test of BRI's

Ming Du, 'Is the 'Belt and Road' Initiative the Chinese Vision of Global Governance?' in Giuseppe Martinico and Xueyan Wu (eds), *A Legal Analysis of the Belt and Road Initiative – Towards a New Silk Road?* (Palgrave 2020) 5; a distanced and substantial analysis of BRI's geopolitics can be found in the work of Selina Ho, see, for example, Selina Ho, 'Infrastructure and Chinese power' (2020) 96 *International Affairs* 1461.

² See, for instance, Amar Bhattacharya et al, *China's Belt and Road: The New Geopolitics of Global Infrastructure Development* (Brookings Institution Report 2019); Jacob Lew et al, *China's Belt and Road: Implications for the United States* (Council on Foreign Relations Task Force Report, March 2021); the Council on Foreign Relations entertains not only a task force on BRI, but also an interactive Belt and Road Tracker, which tracks how BRI changes states' bilateral relations with China over time, at <https://www.cfr.org/article/belt-and-road-tracker> (last visited 24 September 2021); see also Theresa Fallon, 'The New Silk Road: Xi Jinping's Grand Strategy for Euroasia' (2015) 37 *American Foreign Policy Interest* 140.

³ See World Economic Forum (WEF), *Geo-economics: Seven Challenges to Globalization* (2015); World Economic Forum (WEF), *Global Risk Report* (2019); Samir Saran, 'The Collision of 3 Geographies is Creating a New World Order' (World Economic Forum 2018), at <https://www.weforum.org/agenda/2018/11/eurasia-indo-pacific-arctic-new-world-order> (last visited 24 September 2021).

⁴ See Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 *Journal of International Economic Law* 655, at 660 (mentioning that in the new 'Geoeconomic Order' states seek to 'weaponise interdependence (...) as China is doing through its Belt and Road Initiative').

⁵ See, for instance, Donal J. Lewis, Xiaohua Yang, Diana Moise and Stephen John Roddy, 'Dynamic Synergies between China's Belt and Road Initiative and the UN's Sustainable Development Goals' (2021) 4 *Journal of International Business Policy* 58; for a critical appraisal of these purported synergies, see Johanna Aleria Lorenzo, 'A Multilateral Track for Sustainable Development Along the Belt and Road: Aligning Country Ownership with International Rule of Law' (2021) 47 *KFG Working Paper Series*, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" (hereafter Lorenzo, 'A Multilateral Track for Sustainable Development').

⁶ See UN Press Release, 'United Nations Poised to Support Alignment of China's Belt and Road Initiative with Sustainable Development Goals, Secretary-General Says at Opening Ceremony' (SG/SM/19556, 26 April 2019); see also United Nations Industrial Development Organization (UNIDO), 'Industry for Development – When Industry meets the City: The Belt and Road Initiative' (September 2017) Making It: UNIDO's Quarterly Magazine, at https://www.unido.org/sites/default/files/2017-09/makingit_24_full_web_0.pdf (last visited 24 September 2021).

compatibility with SDGs' standards, which are presumed to align with international legal obligations.⁷ The first comprehensive legal analysis of both programs is offered by Johanna Aleria Lorenzo, who scrutinizes BRI in light of an emerging field of 'international sustainable development law', which provides the criteria for making global economic development projects and their infrastructural ambitions compatible with environmental and social requirements, including human rights.⁸ As Lorenzo mentions, a central normative piece of this emerging legal field 'is the UNGA Resolution laying down the 2030 Agenda and the SDGs.'⁹

As can be seen, the project of comparison itself is not disinterested. Instead, an overarching idea or set of ideas tend to motivate the analysis from the beginning. A natural candidate for comparing BRI and SDGs against its backdrop is sustainable development, or a specific aspect of this very broad idea, like climate change law. Almost inevitably, thus, the UN program becomes both a unit and the yardstick of comparison. What is sought is to find ways of making BRI compatible with SDGs; making BRI 'greener', for example. Sustainable development and the rule of law sometimes conflate in the frame of reference of this comparative trap.

But, what could possibly be wrong with the aim that international development should meet requirements of environmental protection, transparency, accountability, and human rights? Why not just openly declare the rule of law as the *tertium comparationis*? There is nothing wrong or illegitimate with such an undertaking *per se*. However, it bears the risk inherent to functionalism in comparative law, which is that the framework of comparison gives a methodological advantage to the comparatist by predisposing what to search for.¹⁰ Using this standard comparative method in our case would mean that unexpected similarities, differences, and relations more broadly between BRI and SDGs would often stay under the radar. Considering that SDGs and BRI are dynamically evolving practices, unexpected differences, similarities, and relations are to be expected. This paper aims at widening the scope of the radar as much as possible, not by engaging into a series of in-depth case studies, but rather conceptually, that is by using an analytical lens which is less loaded with preconceptions of right and wrong; less methodological and more phenomenological, if you wish. This should apply to development as such, as well as to law and development, that is to the ideas conveyed and promoted about law through development.

⁷ See, for instance, Sanja Bogojević and Mimi Zou, 'Making Infrastructure 'Visible' in Environmental Law: The Belt and Road Initiative and Climate Change Friction' (2021) 10 *Transnational Environmental Law* 35.

⁸ See Lorenzo, 'A Multilateral Track for Sustainable Development' (n 5); *ibid*, 55-60, on the notion of 'international sustainable development law'.

⁹ *Ibid*, 55.

¹⁰ See Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar 2016) 52-59 (mentioning that the functionalist 'reifies "function" as a principle of reality and totalizes it as the container of reality, and does not take it for what it is: an analytical device introduced by comparative functionalism to order and construct the real world from, and within, a peculiar perspective and subject it then to cognitive control'), at 54.

3. Intimating BRI's and SDG's global law by *thinking infrastructurally*

Since SDGs and BRI are global development programs, it is international, and global law indeed, which is presumed here. Crucially, however, the understanding of law used in this analysis should not be predetermined. In order to identify the law which is inherent to or emerging from these development initiatives, it is necessary to work with an open textured concept of law which is porous enough to allow for the unexpected. It is important to clarify that I am not referring here to the open texture of legal language as in a rule, e.g. in the sense described and used by H.L.A. Hart,¹¹ but to the open texture of the concept of law, in the sense of law being itself a porous notion.¹² Global law signals two basic things: first, that lawmaking is not constrained to the traditional international legal subjects, most clearly states and international organizations (IOs), and second, but related to the former, that the different layers, from the local to the transnational, are more often than not intertwined. Beyond that, there is little concrete meaning to it and we are left, borrowing from Neil Walker, with lots of 'intimations' of what it could be possibly about.¹³ What may be seen as an analytical shortfall is, however, an asset, because it allows for 'the possibility of the unexpected'¹⁴. Indeed, for present purposes, intimations work better than premises, and attention should thus be paid to very different forms of ruling. Hence, the theoretical lens mentioned above should be able to reveal the regulatory effects – broadly understood as directing behavior – unfolding in the framework of BRI and SDGs.

Within both programs, development is conceived as enabled to a great extent through infrastructures. In BRI's case this is quite straightforward, since it unites the 'Silk Road Economic Belt' and the '21st Century Maritime Silk Road' in 'one belt, one road' (hence also called 'OBOR'), which is to create the necessary interconnectivity for economic development to flourish along these corridors.¹⁵ For such purposes, China signs bilateral memoranda of understanding (MoU) with partner nations, which complemented with private and public contracts, facilitate China's funding and construction of roads, railways, ports, airports, and electric powerplants in the territories of partner countries. According to some sources, these non-binding bilateral agreements amount to 140 by now,¹⁶ meaning that BRI outpaces by far the original corridors envisaged by China's government,

¹¹ See H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1st edition 1961, third edition 2012) 128 et seq.

¹² See Frederick Schauer, 'On the Open Texture of Law' (2013) 87 *Grazer Philosophische Studien* 197 (hereafter Schauer, 'Open Texture').

¹³ See Neil Walker, *Intimations of Global Law* (CUP 2014) (hereafter Walker, *Intimations*).

¹⁴ Schauer, 'Open Texture' (n 12) 198.

¹⁵ See National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China (with State Council authorization), 'Action Plan on the Belt and Road Initiative' (30 March 2015), at http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm (last visited 24 September 2021).

¹⁶ The Green Belt and Road Initiative Center of Beijing's Central University of Finance and Economics regularly updates a list on BRI participating countries, which as of January 2021 were said to amount to 140; this roughly coincides with the numbers mentioned by the Chicago-based Council on Foreign Relations, see Christoph Nedopil, 'Countries of the Belt and Road Initiative' (IIGF Green BRI Center 2021), at <https://greenfdc.org/countries-of-the-belt-and-road-initiative-bri/> (last visited 24 September 2021); Jacob J. Lew et al, *China's Belt and Road: Implications for the United States* (Council on Foreign Relations 2021). It is

reminiscent of the ancient silk roads,¹⁷ comprising nowadays also large parts of Africa and an increasing number of Latin American and Caribbean states. And this only refers to the so-called ‘hardware of the BRI’,¹⁸ since the Digital and now also Health Silk Roads are geographically unbound.

In the case of SDGs, the construction, improvement, and maintenance of infrastructure is not only a goal in itself (SDG 9 on ‘resilient infrastructure, inclusive and sustainable industrialization and innovation’), it is also part and parcel of several other goals, such as ‘the availability and sustainable management of water and sanitation’ (SDG 6), and the ‘access to affordable, reliable, sustainable and modern energy’ (SDG 7).¹⁹ Moreover, infrastructure is mainstreamed across many goals and a vast amount of their interlinked targets, as the cross-references on ‘sustainable energy’ and ‘sustainable transport’ show, which reach out to relevant topics on climate change action (SDG 13), gender equality and the empowerment of women and girls (SDG 5), as well as on the promotion of peace and justice (SDG 16). In pursuing to make cities and human settlements ‘inclusive, safe, resilient and sustainable’, SDG 11 is a case in point for the omnipresence of infrastructures, running from typical urban services of clean water and sanitation, energy, transportation, and housing, for example, to all digital infrastructures required to make cities smart and, hence, ‘inclusive, safe, resilient and sustainable’.²⁰ What is most important for present purposes is that the instrumentalization of SDGs rests on an informational infrastructure of indicators, big data, and human networks, to which I shall return in some more detail below.

It is of course the case that social and economic progress has been tied to the availability (existence, maintenance, affordability) of infrastructures. Therefore, international cooperation for development, or developmental interventions for that matter, have also a long tradition of being driven by infrastructural improvement. One may even speak of transnational infrastructure initiatives, in the sense of the promotion, facilitation, and instrumentality of a series of related infrastructures across borders. These initiatives may be sub-regional, regional, and transregional in scope, and may be motivated by various reasons, from pressing migration crises to economic integration plans. The most far reaching transnational infrastructural initiative has been the Marshall Plan, a world-ordering project that has remained unmatched, although some conceive BRI as turning into the

actually problematic to assess the exact number of BRI participating countries, as some countries have signed MoUs with China, but no BRI-related projects have been carried out so far, whereas a few countries have not signed such MoUs, but BRI-related projects have been or are currently carried out.

¹⁷ For a historically informed analysis, see Peter Frankopan, *The New Silk Roads: The Present and Future of the World* (Bloomsbury Publishing 2015).

¹⁸ See OECD, ‘China’s Belt and Road Initiative in the Global Trade, Investment and Finance Landscape’ in OECD, *Business and Finance Outlook* (OECD 2018) 3.

¹⁹ See Sustainable Development Goals, UN Doc. A/RES/70/1 (2015) (hereafter SDGs).

²⁰ On the overlaps of different urban concepts in terms of political ideas, spatial configurations, and social implications, see Tali Hatuk et al, ‘The Political Premises of Contemporary Urban Concepts: The Global City, the Sustainable City, the Resilient City, the Creative City, and the Smart City’ (2018) 19 *Planning Theory & Practice* 160; for an assessment of SDG 11 from an international law perspective, see the various contributions in Helmut Philipp Aust and Anél du Plessis (eds), *The Globalisation of Urban Governance – Legal Perspectives on Sustainable Development Goal 11* (Routledge 2019).

‘Chinese Marshall Plan’.²¹ Be that as it may, what matters here is that today there are two major transnational initiatives operating simultaneously which have placed infrastructures at the very heart of global development policy and work, thus allowing us to speak of contemporary ‘infrastructural developmentalism’.²² Accordingly, this paper focuses on the relations between transnational infrastructural developmentalism and law.²³ The assumption is quite simple, namely that the changes or shifts of emphasis in developmental ideas and practices will also reveal meaningful changes in the law. In other words, if it is true that developmentalism is nowadays defined by infrastructures in novel ways, then the latter should be presumed to stay in a close and perhaps even co-constitutive relation with the law. This would suggest, *prima facie*, a turn to materiality in global law, whereby infrastructures ‘come to matter to law by being engaged in the production of legal meaning through interpretive and representational practices.’²⁴

The analytical framework that seems most appropriate for such purposes is provided by the *Infrastructures as Regulation* project (InfraReg), which focuses on the regulatory effects and ordering capacities of physical, informational, and digital infrastructures.²⁵ Regulatory effects are understood broadly, as encompassing different forms of shaping behavior, ‘such as requiring, preventing, channeling, enabling, and nudging particular human-social behavior. Some infrastructure projects are intended to regulate with a view to specific results, or at least have purposes which can readily be (re-)characterized as regulatory. In other cases, regulation and regulatory effects are a wholly unconsidered by-product.’²⁶ As we can see, this wide notion of regulation fits well with the open-texture of law approach described above, and we may be able to intimate patterns of global law as it is reconfigured by diverse and sometimes emerging forms of global regulation. Applying this lens promises to get a better grasp on the jurisgenerative capacities of the infrastructures that are promoted by BRI and SDGs, as well as on the normative ideas underlying the general infrastructural

²¹ This comparison was very common (almost a commonplace) in the media, especially in the first years of BRI’s existence. It must be said that Chinese scholars also contributed to the dissemination of this analogy; for an overview of early Chinese rhetoric on this, see Jin Ling, ‘The “New Silk Road” Initiative: China’s Marshall Plan?’ (2015) 50 *China International Studies* 70.

²² Borrowing the expression from Bilge Firat, ‘“The Most Eastern of the West, the Most Western of the East”: Energy-Transport Infrastructures and Regional Politics of the Periphery in Turkey’ (2016) 3 *Economic Anthropology* 81.

²³ Following a rather traditional approach to ‘law and development’, understood as the study of the intersections of ideas and practices on development, law, and of the institutions of development cooperation, see David M. Trubek and Alvaro Santos, ‘Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice’ in David M. Trubek and Álvaro Santos (eds), *The New Law and Economic Development – A Critical Appraisal* (CUP 2010) 1, at 3-4; on the different versions of law and development scholarship, see Liliana Lizarazo-Rodríguez, ‘Approaches to Law and Development’ in Koen de Feyter et al (eds), *Encyclopedia of Law and Development* (Edward Elgar 2021) 11.

²⁴ Hyo Yoon Kang and Sara Kendall, ‘Legal Materiality’ in Simon Stern, Maksymilian Del Mar and Bernadette Meyler (eds), *The Oxford Handbook of Law and Humanities* (OUP 2019) 21 (hereafter Yoon Kang and Kendall, ‘Legal Materiality’).

²⁵ See InfraReg project description, at <https://www.iilj.org/infraereg/infraereg-project/> (last visited 24 September 2021) (hereafter ‘InfraReg’).

²⁶ *Ibid.*

thinking which permeates these initiatives. But before turning to that analysis, a few more words on InfraReg are in order.

The InfraReg project builds on a series of disciplines that study the social impacts of infrastructures. Social and cultural anthropology, for example, has a long tradition of analyzing how infrastructures tend to create societal inclusion and/or exclusion, as well as how intended and unintended consequences of infrastructures often unfold and change over longer periods of time. For example, some persistent racial inequalities can be traced to segregationist urban planning that goes back centuries to colonial pasts,²⁷ while in other cases, a road that is meant to bring economic growth, enables social movements or is otherwise repurposed long after it was built.²⁸ Science and Technology Studies (S&T), on their part, contribute to understanding the technical in technology as co-constitutive of organizational forms, social relations, and knowledge production. This is actually crucial for understanding the move to ‘digital humanitarianism’ which is currently reconfiguring international disaster law and international development law.²⁹ Perhaps most fundamentally, InfraReg is premised on the notion articulated by Susan Leigh Star that ‘infrastructure is both relational and ecological’, meaning that it is the relations between different things and the embeddedness of these relations in their environment (built and natural) what makes an infrastructure in the first place an infrastructure, but also what makes it socially meaningful – and worth studying from a social science perspective;³⁰ in other words, *infrastructures are always already social*. It is in this sense that InfraReg is also and crucially about a mentality that is willing to observe how things are structured while they structure other things and social relations;³¹ in the words of Benedict Kingsbury:

‘thinking infrastructurally typically entails understanding infrastructure not simply as a thing, but as a set of relations, processes and imaginations. One well-established approach brings together the technical (the designed and engineered physical and software elements), the

²⁷ See, for instance, Daniel Nemser, *Infrastructures of Race: Concentration and Biopolitics in Colonial Mexico* (University of Texas Press 2017).

²⁸ See, for instance, Jeremy M. Campbell, ‘Between the Material and the Figural Road: The Incompleteness of Colonial Geographies in Amazonia’ in Dimitris Dalakoglou and Penny Harvey (eds), *Roads and Anthropology – Ethnography, Infrastructures, (Im)mobility* (Routledge 2015) 481.

²⁹ For an overview, in particular of the changing professional practices, see Patrick Meier, *Digital Humanitarians: How Big Data Is Changing the Face of Humanitarian Response* (Routledge 2015); for an important critical appraisal, see Mark Duffield, *Post-Humanitarianism: Governing Precarity in the Digital World* (Wiley 2018); a broader, long-term project on the subject-matter is run by Fleur Johns at the University of New South Wales, see *Digital Humanitarianism: Law & Policy Challenges*, at <https://www.datapolicy.law.unsw.edu.au/> (last visited 24 September 2021).

³⁰ See Susan Leigh Star, ‘The Ethnography of Infrastructure’ (1999) 43 *American Behavioral Scientist* 377.

³¹ In object-oriented ontology this is a central theme, articulated as ‘recompositioning’ or ‘becoming with’, and plays a major role in cultural-anthropological studies on infrastructure, see, for instance, the contributions in Gregg Hetherington (ed), *Infrastructure, Environment, and Life in the Anthropocene* (Duke University Press 2019) (hereafter Hetherington, *Infrastructure, Environment, and Life*). There is arguably a lineage between this political characteristic of the Anthropocene and Spinoza’s thesis on the *natura naturans* and *natura naturata*; on Spinoza’s importance for contemporary political thought, see Hasana Sharp, *Spinoza and the Politics of Renaturalization* (Chicago University Press 2011).

social (the human and non-human actants in their intricate relations), and the organizational (the forms of entity, regulatory arrangements, financing, inspection, governance, etc.).³²

Therefore, the regulatory effects and the regulation of infrastructures, or their regulatability, should not be separated strictly. BRI is a case in point.

a) BRI's Legal Infrastructuring

The *mélange* of public and private, national and international, even formal and informal law that somehow regulates the initiative and its many physical and digital instantiations is a complex re-arrangement of legal frameworks, which some read as a flexible 'legal infrastructure [of] soft law agreements, contracts, and dispute settlement mechanisms'. Thus, the legal instantiation of BRI rearranges existing legal institutions into a 'transnational legal ordering imbued with Chinese characteristics'. The physical and digital projects, as well as the transnational law that supports them, are then said to be creating 'in combination (...) a Sino-centric transnational economic order.'³³ Whereas I am not concerned with geoeconomics here, the interpretation that BRI is promoting a transnational-type of law that rearranges existing legal frameworks in meanable ways certainly deserves further attention. One may call these maneuvers 'transnational legal ordering',³⁴ a further move to 'informal international lawmaking',³⁵ or as another illustration of the interplays between formality and informality that characterize global law's condition as a 'resilience normativity'.³⁶ In any case, it is hard not to see in BRI's legal stratifications those concurrent trends of 'fragmentation, deformalization, and empire', which, according to Martti Koskenniemi, undermine the idea that the 'world can – or should be governed through a single international law'.³⁷

The re-arrangement of existing legal frameworks with the aim of repurposing or shaping more or less established international legal regimes, which are very difficult to reform through formal means, *inter alia* because of cumbersome multilateral negotiations,³⁸ is a lesson-learned from powerful players, most of all the US. Through the combination of 'international and national legal authorities' with informal elements, several US-led 'initiatives' have spurred significant shifts to the international legal regimes of non-proliferation of weapons of mass destruction (WMD) and the law of the sea, for

³² Benedict Kingsbury, 'Infrastructure and InfraReg: On Rousing the International Law 'Wizard of Is'' (2019) 8 Cambridge International Law Journal 171, at 179 (hereafter Kingsbury, 'Infrastructure and InfraReg').

³³ Gregory Shaffer and Henry Gao, 'A New Chinese Economic Order?' (2020) 23 Journal of International Economic Law 607, at 607, 616, and 633 (hereafter Shaffer and Gao, 'A New Chinese Economic Order?').

³⁴ *Ibid*; see further Terence C. Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015).

³⁵ See Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012) 13.

³⁶ Alejandro Rodiles, *Coalitions of the Willing and International Law – The Interplay between Formality and Informality* (CUP 2018) 254 (hereafter Rodiles, 'Coalitions of the Willing').

³⁷ Martti Koskenniemi, 'Global Governance and Public International Law' (2004) 37 *Kritische Justiz* 241; on BRI's deformalization, fragmentation, and hegemonic tones, see also Lorenzo, 'A Multilateral Track for Sustainable Development' (n 5).

³⁸ In IR literature this has been treated under the rubric of 'regime shifting', see Julia C. Morse and Robert O. Keohane, 'Contested Multilateralism' (2014) 9 *The Review of International Organizations* 385.

example.³⁹ Such shifting strategies require a network of IOs and transnational coalitions, public and private actors, which together reassemble normative practices, institutions, and their fields. While this resonates with socio-legal approaches, most of all those inspired in actor-network-theory (ANT),⁴⁰ the emphasis on networks and assemblages brings forward an imagination of non-hierarchical and contingent symbiosis.⁴¹ Instead, understanding coalition-building as the deployment of an infrastructure of bureaucracies, experts, and several forms of normative practices, helps to better comprehend the alignments that are forged, by design and not randomly, and which are 'also consonant with the development of law and institutions'.⁴²

In the case of BRI, this legal *infrastructuring* is tied to and further facilitated by a pervasive material pragmatism, most visible in the notion that development is to be achieved through physical and digital interconnectedness. As mentioned, development has always also been about infrastructure availability, but in BRI, *infrastructure is development*, as the Chinese discourse of non-conditionality to legal reform makes clear.⁴³ It is not as if ideals or imaginations were abandoned, these are rather substituted. In untidying development from the kind of transnational rule of law interventions *à la* World Bank,⁴⁴ a new representational practice emerges according to which infrastructures are attributed the power of connecting the world in a common aim of progress,⁴⁵ which is one of the meanings ascribed to China's slogan of 'the community of common destiny', the 'ultimate goal of BRI', according to President Xi.⁴⁶ As to the specific idea of law here, the intersection of law and development seems to be limited to the legal frameworks as conveniently rearranged through and for infrastructures, and BRI would accordingly stand for a highly instrumental version of law at the global level. However, this is not exclusive to BRI. Indeed, one of the recurrent intimations of global

³⁹ See Rodiles, *Coalitions of the Willing* (n 3636) Chapters 4 & 5.

⁴⁰ See Bruno Latour, *Reassembling the Social – An Introduction to Actor-Network Theory* (OUP 2005).

⁴¹ See Gavin Sullivan, 'Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List' (2014) 5 *Transnational Legal Theory* 81, at 90-91.

⁴² Kingsbury, 'Infrastructure and InfraReg' (n 32) 179. This is not to suggest that these alignments cannot shift over time; in other words, raising awareness on the ordering motivations which drive infrastructures does not imply to reduce them to 'master-mind' narratives and 'totalizing plans'; cf. Tania Murray Li, 'Practices of Assemblage and Community Forest Management' (2007) 36 *Economy and Society* 263, at 265.

⁴³ See China International Development Cooperation Agency (CIDCA), *China's Foreign Aid* (2011) (updated 2018), at http://en.cidca.gov.cn/2018-08/09/c_261159.htm (last visited 24 September 2021). 'Imposing no political conditions' is one of China's Eight Principles for Economic Aid and Technical Assistance to Other Countries, declared by former Premier Zhou Enlai during a visit to Ghana, on 15 January 1964. The Eight Principles are still valid today and are consonant with the Five Principles of Peaceful Coexistence, China's guiding principles in international relations (mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence), see Ministry of Foreign Affairs of the People's Republic of China, 'China's Initiation of the Five Principles of Peaceful Co-Existence', at https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18053.shtml (last visited 24 September 2021); on the Five Principles, see also Maria Adele Carrai, *Sovereignty in China: A Genealogy of a Concept since 1840* (CUP 2019), at 158-167.

⁴⁴ For a practice-informed and theoretically deep-grounded analysis, see Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (CUP 2011).

⁴⁵ On how things become meaningful to law through representational practices, see Yoon Kang and Kendall, 'Legal Materiality' (n 2424) 21.

⁴⁶ Quoted in Denghua Zhang, 'The Concept of 'Community of Common Destiny' in China's Diplomacy: Meaning, Motives and Implications' (2017) 5 *Asia & Pacific Policy Studies* 196.

law is that of a growing arsenal of ruling devices or ‘regulatory trends.’⁴⁷ These trends are selectively and flexibly employed for any given purpose under a ‘whatever works normative pragmatism,’⁴⁸ which becomes clearer when we talk about ‘the global law *and governance* of ...’. Quite interestingly, this whatever works normative pragmatism is nowhere else as present as in the SDGs.

b) SDG’s Resilience-Driven Infrastructure of Implementation

As mentioned above, beyond the omnipresence of physical infrastructures as a goal and within several targets of sustainable development, SDGs’ instrumentality as such hinges upon a multi-scalar informational infrastructure of indicators, big data, communication, and human networks. SDG 17, which deals with the implementation of the whole 2030 Agenda, relies on ‘partnerships for sustainable development’.⁴⁹ This has several implications. ‘Partnerships for development’ are also about financing development through private companies and public-private partnerships (PPP), often shrinking the role of the traditional funders of development aid (IOs and donor states) to brokers of private investment. Some criticize, accordingly, that in ‘the new SDG financing ecosystem, private actors are no longer passive bystanders in the development process nor engaged merely as clients or contractors for bilateral or multilateral development organisations but they have become co-investors and co-producers in development projects and programmes.’⁵⁰

On the other hand, there is the data. We are talking of several institutions and digital networks, which collect, organize and publish immeasurable amounts of data that is considered or turned relevant for achieving sustainable development. UN agencies, like the UN Statistic Division (UNSD) and its SDGs Data Labs online platform, the UN Global Pulse, an initiative of the UN Secretary General that consists itself of a network of UN Pulse Labs in several cities around the world and the UN Headquarters, the private sector and NGOs which partner with the UN, all are part of this ‘infrastructure of development data’.⁵¹ Here is also where strong linkages between SDGs and BRI are to be found. Take for instance *CasEarth* of China’s Academy of Science, a priority research program under the Digital Silk Road, which is meant to create a sharing platform for big data and cloud services, establishing a ‘state-of-the-art-Big Earth Data Infrastructure’ in partnership with the UN for achieving all SDGs related to the natural environment.⁵²

⁴⁷ Walker, *Intimations* (n 13) 166 et seq.

⁴⁸ See Alejandro Rodiles, ‘The Global Insecure Counterterrorism City’ in Helmut Philipp Aust and Janne E. Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar 2021) 214, at 226.

⁴⁹ SDGs (n 19).

⁵⁰ Celine Tan, ‘Audit as Accountability: Technical Authority and Expertise in the Governance of Private Financing for Development’ (2021) 20 *Social & Legal Studies* 1, at 4.

⁵¹ See Angelina Fischer and Sakiko Fukuda-Parr, ‘Introduction – Data, Knowledge, Politics and Localizing the SDGs’ (2019) 20 *Journal of Human Development and Capabilities* 375, at 376 (hereafter Fischer and Fukuda-Parr, ‘Data, Knowledge, Politics and Localizing the SDGs’).

⁵² See Chinese Academy of Science, *Big Earth Data in Support of the Sustainable Development Goals* (Beijing 2020).

The data is used for several purposes, but prominently so in connection with the indicators attached to the goals and targets⁵³ as a means of measuring compliance. Hence, Sally Engle Merry has described this as an ‘infrastructure of measurement’ which includes ‘physical, organizational, and knowledge dimensions’, that is ‘the resources available to count: the people, the expertise, and the technology to gather, analyze, and share data.’⁵⁴ This has major implications for the development field. For instance, there is the well-known ‘quiet power of indicators’,⁵⁵ which is enhanced through the data infrastructure. Measurement is itself a form of regulation, also because indicators of norm compliance become intrinsically tied to the meaning of the norms that they are there to measure in the first place. Concretely, this means that the goals of sustainable development, so carefully crafted during inclusive multilateral and multistakeholder negotiations, are broken down to ‘narrow and limited measures’, so that the structural change pursued by the 2030 Agenda is atomized into ‘specific accomplishments.’⁵⁶ For Angelina Fischer and Sakiko Fukuda-Parr, the ‘technical, managerial and measurable’ re-arrangement of development problems is ‘at tension with our understanding of development as capability expansion and human development, particularly one that promotes a human centered approach to human progress’.⁵⁷

The informational infrastructure of SDGs is not limited to measuring compliance and financing development, it also informs how development works. Take for instance the mining of vast amounts of data of peoples’ behavior collected from technical devices such as smart phones, a standard practice of the UN Pulse Labs. The patterns of behavior that are mapped by this means promise to signal emerging or occurring events that require developmental interventions, such as possible outbreaks of transmissible diseases, floods, or gender violence.⁵⁸ The data and the corresponding visualizing dashboards participate as actants in the production of knowledge that guides the design

⁵³ UN Doc A/RES/71/313 (10 July 2017), Annex Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development.

⁵⁴ Sally Engle Merry, ‘The Sustainable Development Goals Confront the Infrastructure of Measurement’ (2019) Global Policy 146 (hereafter Merry, ‘The Sustainable Development Goals’).

⁵⁵ See Sally Engle Merry, Kevin E. Davis and Benedict Kingsbury (eds), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (CUP 2015).

⁵⁶ Merry, ‘The Sustainable Development Goals’ (n 54) 146; in addition, there is of course the problem of how faithfully a given development goal can be measured in the first place, and whether it rather serves to disguise lack of compliance (the ‘proxy problem of indicators’, according to Merry), thus creating perverse incentives for bureaucracies to generate practices of pretension, which consume valuable resources.

⁵⁷ Fischer and Fukuda-Parr, ‘Data, Knowledge, Politics and Localizing the SDGs’ (n 51) 383. In other words, it betrays the capabilities approach to development inspired in the writings of Amartya Sen and Martha Nussbaum, which is often viewed as the underlying philosophy of the 2030 Agenda; see Amartya Sen, *Development as Freedom* (Anchor Books 2000); Martha C. Nussbaum, *Creating Capabilities – The Human Development Approach* (Harvard University Press 2011).

⁵⁸ Smartphones and apps are the most common form of collecting these data from people, but when information is required from ecosystems, different types of sentinels are used, from many things to living animals, all connected in an Internet of Things and of nature, see, for instance, Stephanie Wakefield and Bruce Braun, ‘Oystertexture: Infrastructure, Profanation, and the Sacred Figure of the Human’ in Hetherington, *Infrastructure, Environment, and Life* (n 3131) 193.

and deployment of those developmental interventions.⁵⁹ Together, these practices, technologies, and artefacts reorganize the professional field of development in what Fleur Johns describes as a move ‘from planning to prototypes’, that is basically an idea of the ‘here and now’, instead of making ‘big plans for the future’.⁶⁰

As said, the infrastructure for SDGs’ instrumentality includes human networks too, and this goes well-beyond smartphone and app users. Here is where the so-called ‘thick data’ comes in. As David Chandler observes from the activities of the Jakarta Pulse Lab and the interviews he conducted there, ‘passive data-mining of social media’ needs to be complemented with ‘fine-grained ethnographic research’.⁶¹ In order to achieve this, anthropologists and other social scientists are hired at the UN Pulse Labs to trace conduct on the ground that emerge as endogenous means to cope with situations of risks and underdevelopment. This is complementary to, it does not substitute, the mapping based on digital information. The key aspect for present purposes is to note that this form of hybrid informational infrastructure has evolved beyond mapping. The forms of social organization that are assembled here are not only those indicative of an upcoming danger that can be prevented or the response to which somehow anticipated and pre-designed. It crucially involves the sensing of whatever works on the ground to mitigate the impacts or adapt to floods, draughts, pollution, insufficient public services, or violence, for example.

The UN Development Programme (UNDP) has created, in addition to the Pulse Labs, the so-called SDG Accelerator Labs, whose main purpose is to identify emergent forms of social organization, assist those involved in them, grant financial support, and enhance these mundane practices through capacity-building activities. If successful, it is crucial to disseminate them as good practices of sustainable development to be mimicked elsewhere; that is to *accelerate* these spontaneous forms of social organization. This sort of meta-practice of development practices⁶² is sometimes referred to as ‘hacking’, which emphasizes the experimental aspect of turning risks into opportunities,

⁵⁹ Geographers have been paying attention for a while now to how digitized maps are transforming professional practices, see, e.g., Ryan Burns, ‘Rethinking Big Data in Digital Humanitarianism: Practices, Epistemologies, and Social Relations’ (2015) 80 *GeoJournal* 477.

⁶⁰ Fleur Johns, ‘From Planning to Prototypes: New Ways of Seeing Like a State’ (2019) 82 *Modern Law Review* 833. It should be clarified that ‘prototype’ is not used by Johns in the sense of a model or original type, but as in contemporary design theory and practice, i.e. as experimental processes of modelling; for a good overview, see Bradley Camburn et al, ‘Design Prototyping Methods: State of the Art in Strategies, Techniques, and Guidelines’ (2017) 3 *Design Science* 1; see also Michele Pasinelli and Alexander Brem, ‘Prototyping in Theory and Practice: A Study of the Similarities and Differences between Engineers and Designers’ (2017) 27 *Creativity and Innovation Management* 121.

⁶¹ David Chandler, *Ontopolitics in the Anthropocene – An Introduction to Mapping, Sensing and Hacking* (Routledge 2018) 149 (hereafter Chandler, *Ontopolitics in the Anthropocene*).

⁶² Interestingly, social work scholarship has introduced the notion of ‘meta-practice’ in order to respond to the increasingly global and interconnected challenges the profession faces on the ground, particularly in the framework of sustainability; see Erlene Grise-Owens, J. Jay Miller and Larry W. Owens, ‘Responding to Global Shifts: Meta-Practice as a Relevant Social Work Paradigm’ (2014) 34 *Journal of Teaching in Social Work* 46. This paradigm shift in social work is a case in point for the multi-scalar dynamics (and problems) of contemporary sustainable development.

problems into solutions.⁶³ In a way, SDG Accelerator Labs assemble and reassemble those bricolage-kind of technics which arise from needs and provide solutions to these needs from within;⁶⁴ such as solid waste management practices in megapolitan areas of the Global South.⁶⁵ Actually, ‘data powered positive deviance’, one of the main projects of the SDG Accelerator Labs across locales, ‘was established in the belief that lessons on how to tackle complex sustainable development challenges are best learned from the people who face those challenges and find their own solutions to cope with the situations they live in’.⁶⁶

Mapping, sensing, and hacking are modes of governance that clearly obey to the logics of resilience.⁶⁷ While the meaning of this buzzword is vague, suffice it here to recall how it gained prominence in disaster relief and security domains, especially within UK government agencies already in the 1990s, and travelled from there to the world of the UN and international development.⁶⁸ In a nutshell, it stands for the adaptation to change and the coping with risks. It builds on practices on the ground, so that it is usually framed in a typical UN jargon of empowerment and local ownership. What UN documents, philanthropic foundations, think-tanks, and the academia enamored with a positive soundbite that somehow promises to help us navigate the uncertainties of the Anthropocene do not mention, is that it defers political and legal responsibility, substitutes government with highly experimental governance, and that it is actually based on a profound disenchantment with the idea of law and development as a search for normative solutions and long term improvement of living conditions. The disillusion is certainly justified for various reasons and from several political fronts,

⁶³ Chandler, *Ontopolitics in the Anthropocene* (n 61) at 143.

⁶⁴ As explained by Lévi-Strauss, ‘[t]he ‘bricoleur is adept at performing a large number of diverse tasks; but unlike the engineer, he does not subordinate each of them to the availability of raw materials and tools conceived and procured for the purposes of the project. His universe of instruments is closed and the rules of his game are always to make do with ‘whatever is at hand’ (...);’ see Claude Lévi-Strauss, *The Savage Mind* (University of Chicago Press 1966) at 17.

⁶⁵ See Helmut Aust and Alejandro Rodiles, ‘Cities and Local Governments: International Development from Below?’, 50 KFG Working Paper Series, Berlin Potsdam Research Group “The International Rule of Law – Rise or Decline?”, forthcoming in Luis Eslava, Ruth M. Buchanan, and Sundhya Pahuja (eds), *The Oxford Handbook of International Law and Development* (hereafter *Oxford Handbook of International Law and Development*, forthcoming) (hereafter Aust and Rodiles, ‘Cities and Local Governments’).

⁶⁶ UNDP Global Accelerator Labs, ‘What are we working right now?’, at <https://acceleratorlabs.undp.org/content/acceleratorlabs/en/home/our-work.html> (last visited 24 September 2021).

⁶⁷ Chandler, *Ontopolitics in the Anthropocene* (n 61) at 21 (mentioning that all three modes ‘seek to govern adaptively or responsively in ways which increasingly appear to become at home in the Anthropocene condition’).

⁶⁸ This shows the connections between international disaster law and international development law (probably also climate change law), and their co-evolutive practices. However, this evolution has not always been smooth; on the tensions between relief and development workers around concrete understandings and critiques of resilience, see Tom Scott-Smith, ‘Paradoxes of Resilience: A Review of the World Disasters Report 2016’ (2018) 49 *Development and Change* 662.

but it bears the major peril of conceiving and practicing global development as the promotion of capabilities of the underdeveloped to live with underdevelopment.⁶⁹

4. BRI, SDGs, and their many types of law at the global level

I have tried to identify similarities *and* differences between BRI and SDGs. This relates both to their underlying structure, including their institutions and institutional (re)arrangements (or *infrastructure*, indeed), as well as to the values promoted through them. These values are not only transmitted but also shaped, made and remade through the (infra)structures that serve to articulate them in the first place. In this case, BRI and SDGs promote contesting and compatible values through similar and dissimilar means. By ‘thinking infrastructurally’, different processes and relations could be observed that are unleashed through the regulation of and via the regulatory effects of the many infrastructures in play – physical, digital, hybrid, and which often work in juxtaposition. Persistent biases about their apparently so different nature could be set aside, without falling into the trap (or wishful thinking on besides of the professionals of sustainable development) that, in the end, it is all about actual and potential synergies.

BRI and SDGs are multilevel, involving IOs, states, and local governments alike⁷⁰; they are both multi-actor too, engaging the private sector and heavily relying on PPPs. However, the multi-stakeholderism of BRI does not go as far as the whole-of-society approach that is tied to the implementation infrastructure of SDGs. Whereas the latter shows a strong preference for prototypical governance and resilience, the former prioritizes the shaping of the law of development through the re-arrangement of legal frameworks. However, this is only a difference of degree, since both perform a *law and governance of sustainable development* which coincides in several ways. This is also because their infrastructures of implementation meet at several coordinates, in industrial improvements as well as in the attempts towards the interoperability of their data systems, for example.

As we know from law and development scholars, international development theory and practice reveals a lot about the ideas of law that are promoted at the international and transnational levels at a given point in time.⁷¹ That is the main reason that motivates this analysis, and it is no exaggeration to say that law and development scholarship is experiencing a new momentum, spurred by the paradigm shifts that are presumed to be promoted by BRI and SDGs, though in different ways.⁷²

⁶⁹ I have made this point elsewhere, see Alejandro Rodiles, ‘The Global South and the Law and Governance of Global Security: Towards a Scholarship on the Global Ecology of Insecurities’ in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (OUP 2021) 878, at 888.

⁷⁰ For the role of local governments in contemporary development, and in SDGs and BRI in particular, see Aust and Rodiles, ‘Cities and Local Governments’ (n 65).

⁷¹ See, for instance, Michael J. Trebilcock and Mariana Mota Prado, *An Advanced Introduction to Law and Development* (Edward Elgar 2014) at 46-47 and 62.

⁷² See, for instance, Lorenzo, ‘A Multilateral Track for Sustainable Development’ (n 5); and *Oxford Handbook of International Law and Development*, forthcoming (n 65).

So, what idea or type of law can we distil from this analysis? Well, first of all, many. There is not such a thing as the new paradigm for the law in and of development today – in any case, the law promoted by development is shaped by the law of development, so that ideas of law and development are hardly a matter of in- and outside, of pure institutional law here and pure legal intervention there. What we have seen is rather the emergence, resurfacing, and coexistence of many types of international and global law: bilateral international law, on the one hand, and networked global law on the other, for instance.⁷³ However, we have also seen that these are not mutually exclusive, as there is much networking in BRI too. As to the formal/informal divide, both initiatives combine formal and informal law in a way that is better described as a jurisgenerative interplay. The informal serial bilateralism of BRI is accompanied by a formal private international law framework of contract law and conflict of laws rules, so that informal public law may reveal itself here as a strategy to promote a more private oriented transnational legal ordering.⁷⁴ SDGs legal nature as soft law does not make it an informal initiative, but the whatever works rationality inherent to their implementation infrastructure has provoked classifications on their regulatory character that even make the elusive concept of global governance look old-fashioned. ‘Metagovernance’ is becoming the new moniker for describing regulatory activities where the norm addressees are called upon to act as norm entrepreneurs under the resilience mantra, a ‘whole-of-society approach’ that lifts binary understandings of subjects and objects.⁷⁵ Along the way, these changes in the law and governance of sustainable development affect an array of institutional practices inside the UN, contributing to the world organization’s further transformation into a flexible platform. Finally, the presumption that BRI straightforwardly advances a sovereigntist, consent-based international law, in opposition to the cosmopolitan global law of SDGs, has been also put into question here. BRI’s resort to multilevel and multiactor implementation potentially jeopardizes its state-centered project, and more attention should be paid to the unintended consequences over time of BRI’s physical, digital, and legal infrastructures.⁷⁶ The purported cosmopolitan global law of SDGs should be questioned precisely because of its embracement of resilience discourse and practice: the very same whole-of-society approach which promises to empower people all over the world can also be seen as the atomization of development into micro-interventions at the local scale, thus abandoning the aim of addressing structural causes of underdevelopment at the global one.⁷⁷

⁷³ These lines owe much to conversations with Andrew Hurrell.

⁷⁴ See Shaffer and Gao, ‘A New Chinese Economic Order?’ (n 33).

⁷⁵ See, e.g., Louis Meuleman, *Metagovernance for Sustainability – A Framework for Implementing the Sustainable Development Goals* (Routledge 2018); Jacob Torfing, B. Guy Peters and Eva Sørensen (eds), *Interactive Governance: Advancing the Paradigm* (OUP 2021).

⁷⁶ See, e.g., the study on the unintended consequences of BRI airports in China by Weiqiang Lin Qi Ai, ‘Aerial Silk Roads’: Airport Infrastructure in China’s Belt and Road Initiative’ (2020) 51 *Development and Change* 1123 (arguing that ‘closely tracking the unfolding of a range of infrastructure planning practices within specific projects can demystify modern-day development programmes like the BRI, by revealing how their grand ‘visions’ are often reinterpreted, altered and frustrated at local levels, even before they have a chance to influence the world’).

⁷⁷ See Merry, ‘The Sustainable Development Goals’ (n 54).

5. Conclusion

The many types of international and global law identified here would pose a threat to the international rule of law if the latter would mirror an ideal type of international law, or if such thing would exist. However, ‘kind and characteristic elements of international law’⁷⁸ are so heavily contested that ideal types run the risk of becoming proxies for apparently insurmountable divisions between the North and South, or the West and the rest. Kind and characteristics always obey spatiotemporal choices, informed by one’s background, motivations, and preferences. This reflects the open-texture of law in the sense of being a non-static, rather dynamic concept that changes over time. By adding the spatial dimension (where do we situate the kind and characteristics of law) as well as the motivational one (our affects and *Weltanschauung*), the open texture of law comes close to Mariana Valverde’s notion of ‘chronotope of law’, which sets out to ‘capture in thought the open-endedness and unpredictability of the multi-voice dialogue that is law.’⁷⁹

In the present case, we can hope for a multi-voice dialogue among new and resurfacing types of international and global law to arise. After all, the architecture of international law has always resembled more an archeological site of older and newer layers than a stand-alone building constructed from the scratch. This image suggests less coherence and robustness than what most constitutionalized accounts of international law may tolerate, but it does not give up on the idea of an order of things. While these lines sound very foucauldian,⁸⁰ I am rather thinking of a necessary relationship between normativity and order in the sense of orientation for future collective action. As explained by Lorraine Daston in her *Against Nature*, any ‘shall’ only makes sense if there is a future form of ‘will’ to which we can connect it. Without this orientation, norms are not norms but mere ad hoc rules, which turn living in nature into a nightmare and living together into chaos.⁸¹ Similarly, but writing from a different context, Hannah Arendt defends the power of promise as a collective political and juridical act, which by making imperfect plans for the future, masters unpredictability and going-solo ambitions, allowing for the construction of a world of plurality and freedom;⁸² an aspiration which resonates well with the idea of order in global international society.⁸³ I think that it is a powerful sign that philosophical anthropology meets political philosophy in trying to understand the purpose of normative orders. In any case, what I take from these thoughts is that our concern should not be so much about whether a type of law corresponds to another, nor about whether there could or should be only one type of international law (which is normatively pretty much the same). Instead, we should ask whether the many types of law can entertain a future-oriented dialogue with each

⁷⁸ Heike Krieger and Georg Nolte, ‘The International Rule of Law – Rise or Decline? – Approaching Current Foundational Challenges’ in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The International Rule of Law – Rise or Decline?* (OUP 2019) 3, at 6.

⁷⁹ Mariana Valverde, *Chronotopes of Law – Jurisdiction, Scale and Governance* (Routledge 2015) 177.

⁸⁰ See Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Routledge 2005).

⁸¹ See Lorraine Daston, *Against Nature* (MIT Press 2019) 46-64.

⁸² See Hannah Arendt, *The Human Condition* (2nd edition, The University of Chicago Press 2013) 237-246.

⁸³ See Andrew Hurrell, *On Global Order – Power, Values, and the Constitution of International Society* (OUP 2007).

other, from which an imagination for 'some organised futurity and collective planning'⁸⁴ can be obtained. A preliminary assessment drawn from the present analysis denotes a highly problematic relationship between infrastructural developmentalism and normativity, which intimates a decline of the rule of law at the global level. Indeed, BRI runs counter the collective act of promising by resorting to the (representation of) unmediated and unnegotiated power of infrastructural developmentalism, while SDGs' implementation infrastructure with its embracement of resilience seems to renounce to the act of promising altogether. However, BRI and SDGs are projects over time. Hence, practices and relations of and between them are only beginning to unfold. Thinking infrastructurally about them also invites us to pay attention to the open-ended processes they unleash, and to understand that multiple and unpredictable futures cannot be foreclosed.⁸⁵

⁸⁴ Kingsbury, 'Infrastructure and InfraReg' (n 32) 186.

⁸⁵ There is a way of thinking of infrastructures as 'chronotopes', that is as spatio-temporal projects that unleash diachronically, and where social, political and technical futures emerge from multi-voice dialogues, similarly to Mariana Valverde's 'chronotopes of law', see Hannah Appel, Nikhil Anand, and Akhil Gupta, 'Introduction: Temporality, Politics, and the Promise of Infrastructure' in Nikhil Anand, Akhil Gupta and Hannah Appel (eds), *The Promise of Infrastructure* (Duke University Press 2018) 1, at 17. I thank Benedict Kingsbury for drawing my attention to this.

The Author



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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

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