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Law and Development into the 1990s: The Need to Use International Law to Impose Accountability to People on International Development Actors

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Part I — Accountability and Development

LAW AND DEVELOPMENT INTO THE '90s: USING INTERNATIONAL LAW TO IMPOSE ACCOUNTABILITY TO PEOPLE ON INTERNATIONAL DEVELOPMENT ACTORS

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From the 1980s onwards there have been growing concerns about the "accountability" of the major agencies in the international development industry, notably the World Bank.

The growth of ecological awareness has led to increasing concern over the environmental impacts of many kinds of "development" activities promoted by the Bank or other IDAs (international development agencies) — and to the social impacts of environments degraded in the name of "development."

The growth of international human rights law has led to a greater appreciation of the fact that many kinds of "development" activities inflict foreseeable harms upon people (e.g. displacement, landlessness, discriminations against women, destruction of the

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communities and cultures of indigenous peoples, physical harms to workers employed in hazardous industries) — harms which constitute violations of rights now recognized and protected by international law.

The explosive growth of various kinds of NGOs (Non-Governmental Organizations) — such as workers' organizations, womens' groups, legal resources centers, human rights activists — has led to demands for more popular participation in the design, management, monitoring and regulation of "development" projects and programs and, in more general terms, democratization of "development processes."

These concerns seem to be converging to produce a clearer perception, in many circles, of the need to use — and develop — international law to make IDAs more accountable to universal principles which protect human rights and environments. This paper attempts simply to present a brief overview of the subject and, hopefully, to demonstrate its great importance to those working as practitioners, NGO activists or scholars in the fields of "law and development" and "human rights." Other papers in this symposium portray the various kinds of harms which development activities so often inflict on discrete categories of people.

These wrongs fall into three interrelated categories. The first may be labelled "exclusion" wrongs. Despite all the fashionable rhetoric about encouraging "participation," those people whose basic interests are most directly affected by development projects are still, too often excluded from participation in the management of project activities. Denial of participation begins with the widespread practice of treating project plans and proposals as official "secrets," and continues with the negligent and inexcusable failure to disclose full information about the activities proposed to those potentially affected. These "exclusion" wrongs are compounded when affected people are denied (or discouraged from exercising) opportunities to organize themselves to protect their interests, or denied access to forums and processes in which their concerns can be expressed and considered, and when they lack legal resources to aid these efforts.

Denial of effective participation leads directly to infliction of other harms such as: a failure by those responsible for the project to generate all the knowledge needed to enable intelligent planning or managing which takes account of local conditions and concerns, or a failure to calculate fully and fairly the potential risks and "social costs" of the activity proposed.

A second category of development wrongs can be labeled "substantive harms." As already noted, development projects can produce displacement, landlessness, and other forms of impoverishment. These projects often generate serious health or safety risks, food insecurity, further economic marginalization of women, damage to the societies and cultures of indigenous people and many other harms. A vast literature on development projects, though not law-oriented, portrays these outcomes as "social costs," or project flaws, but they are also "legal wrongs."

A third category of development wrongs focuses attention on "failures to provide redress" for the victims of the harms noted above. A glaring example is the project planners' failure to provide procedures assuring that victims of displacement receive compensation for land and property lost and personal losses. Sometimes the beginnings of this wrongdoing lie in outright neglect. Sometimes the intention to provide compensation is evident, but no effective processes are established to implement that intention. Since those facing displacement are usually uniformed, unorganized, and unrepresented (in both political and legal terms) they are regularly victimized by officials who control whatever processes are established for redress.

But there are other failures as well. Opportunities for redress should include procedures established early on as a part of the planning process, enabling those put at risk by a proposed project to protest the legality of the undertaking, or to demand alternative, less damaging means of implementing the goals sought. Again, these grievances are essentially legal in nature and principles of fundamental fairness, if applied to development activities, would demand that the claims of those put at risk be fully and fairly heard. The difficulty is that those who engage in development

planning and managing regularly operate under an ignorance of human rights law or under the false belief that they are not accountable to it.

II.

The task of concerned lawyers (working within IDAs and governments, as well as outside) is to begin to make those who "do development" accountable to law. Human rights law provides the first and most important source for these legal standards, because it lays down both substantive and procedural standards. Unless this legal obligation to respect and protect human rights can be secured, it is unlikely that accountability to other sources of law, such as environmental standards, can be enforced.

This obligation attaches to both government and IDA. The focus here is on the accountability of IDAs to human rights law. The obligation of IDAs is very clear, since they set the policy framework and agenda, and provide the means for many "development" activities which impact so significantly on so many people. The UN system has as one of its basic purposes, the creation of an international law of human rights which should be respected by international organizations as well as member states. Agencies which operate through, and as a part of that international system must respect and promote this goal. If they do, then governments will be pressed to follow. If they do not, many governments will continue to ignore their obligations.

The human rights obligations of IDAs have been made explicit by the UN General Assembly's 1986 Declaration on the Human Right to Development (HRD Declaration). Another paper in this volume analyzes in some detail the meaning and implications of this badly drafted, often misunderstood, international instrument. As explained there, and in a recent Report of the Secretary General of the UN, the HRD Declaration lays down these interrelated principles:

(1) The underlying purpose of development is to help people, notably the victims of maldevelopment and underdevelopment, to

secure conditions in life which befit the dignity now ascribed to the human person by universal rights law.

(2) These intended "beneficiaries" of "development" must therefore be active participants in development processes (from participation in policymaking to participation in specific activities which affect their interests).

(3) International human rights should be seen as both ends and means of defining, pursuing and regulating development policies.

(4) Thus, human rights law must also be seen to provide some substantive standards to be imposed on development activities.

(5) Human rights must also be seen as a source of procedural law with respect to the procedures which must be followed by IDAs, governments (and those private agencies with whom they deal) to design, manage and regulate development transactions. In particular, rights of participation for those affected by these activities and remedies for those harmed by them must be secured; for without these guarantees there are no means to protect substantive rights.

(6) IDAs, governments and other development actors must respect and incorporate these principles into their internal law governing the conduct of development activities, and they must hold individual actors accountable to rules designed to achieve that end.

(7) People everywhere have the right to use the international system (such as appropriate forums) to demand recognition and enforcement of these principles.

The basic message of the HRD Declaration is hardly novel. The UN system (notably the General Assembly and various "World Congresses" held under the auspices of specialized agencies) has long been used to declare international development policies, and increasingly human rights standards have been a part of those instruments. As far back as 1979 the FAO-sponsored World Congress on Agrarian Reform and Agricultural Development called upon governments and development actors to recognize participation in development processes as a basic human right essential to secure a redistribution of power over, and

accountability for, decisions taken in the name of "development." As recently as 1991 the UNDP, in its celebrated *Human Development Report* emphasized that improvement of the conditions of life for people was indeed the basic purpose of development, and the realization of human rights through development was declared central to that goal.

The HRD Declaration in effect calls for IDA accountability to international human rights law, and our task is to identify some of the most important rights to be recognized, protected and, indeed, promoted through international development activities. The following is an illustrative categorizing to serve that function.

(1) *Rights of participation* are guaranteed by the Universal Declaration, the International Covenants, numerous ILO conventions and other international instruments. On many occasions, resolutions of the UN General Assembly and of World Congresses sponsored by UN agencies have declared these rights to be essential to the processes of development. Indeed they are, for, unless people can exercise rights of participation, they are powerless to assert and secure other rights.

Rights of participation can vary in purpose and scope; they must be adapted to the occasion. The more a particular group's basic interests are affected by a proposed development activity, the more that group must be capacitated and empowered to identify, assert, and demand protection of their interests — i.e. their rights — in relation to that activity. This goal, mandated by law, can only be realized by according a broad array of particular rights, such as rights of project-affected people to enjoy:

a. Timely notification of the project proposal and access to information about it.

b. Access to support groups and "legal resources."

c. Freedom to form their own self-managed associations and engage in collective studies.

d. Freedom to communicate their concerns, if necessary to the world at large.

e. Access to the media, particularly the media monopolized by governments.

f. Access to relevant officials and agencies and fair hearing to present their case.

g. Access to institutions (courts or other designated agencies) that can redress legal harms and impose accountability when harm is done.

Thus, the human rights concept of "participation" is much more "tough" and explicit than the "soft" notion often propounded by development "experts" who discuss participation as if it was some sort of discretionary policy to be determined by those who control projects. Perhaps the most important component of the right to participation are the rights of association and collective action. Since, individually, poor people are usually uninformed, powerless and historically ignored, their participation can only be developed and exercised through the formation of self-created, self-managed organizations. Rights of project-affected people to form such groups — and enjoy outside help on this endeavor — have been clearly recognized and emphasized in many international instruments but seldom promoted.

(2) *Rights to Basic Needs.* The International Covenant on Social, Economic and Cultural Rights, has declared the existence of the "universal rights" of "all people" to "food," "health," "education," and other necessities of life.

Of course, any government worthy of legitimacy must recognize its overriding moral obligations to promote — or at least protect — the means of realizing these basic needs. But that hardly ends the matter. The Covenants declare that rights to food, health, and education are "human" rights of people which transcend and limit the powers of government and which impose accountability on those who abuse these limits. This proposition is crucial when viewed in the context of development projects, because a great many of these activities run roughshod over peoples' basic interests in health, food, land, and education including access to knowledge which "enables" one to "participate effectively" in development processes. Example abound of projects which create new kinds of health risks, threats to food security, probabilities of land-grabbing and similar dangers.

Basic needs rights, like the other universal rights in the UN Declaration and Covenants, are obvious corollaries to one's right to live a life that befits the dignity we now ascribe to the human person. Each of the basic needs rights (like rights of "participation" and "equality") are aggregations of component rights which entitle people threatened or victimized by hunger, disease, and other harms to physical well-being, to identify, protest, and redress man-made conditions and practices which plainly contribute to those evils.

The challenge is to develop, in very different "development contexts," the measures necessary to enable particular threatened communities to protect and enjoy conditions which enable realization of their basic needs. That means development actors must identify those particular project activities or results which may contribute to impermissible deprivations of basic needs. This task clearly requires the participation of those affected because they probably know best how they will be affected. Participation rights and basic needs rights are indeed "indivisible" and "interdependent." This self-evident proposition negates the assertion that there is a dichotomy between "economic" and "political" rights. Rather, the two "categories" are interdependent.

(3) *Rights to Equality — Notably for Women.* These rights empower people to prevent and redress discriminatory development practices which affect allocation of essential resources, services and opportunities. These rights are guaranteed by the Universal Declaration, the Covenants, and (particularly important for present purposes) by the 1979 UN Convention on the Elimination of All Forms Discrimination Against Women (CEDAW).

Article 14 of CEDAW should certainly loom large in the design and management of agricultural and rural development projects. It focuses closely on precisely those rights which are particularly important to rural women in relation to their roles and opportunities in development processes and projects. Thus, it requires that "the law" of a project guarantee to project-affected women equality in respect to access to: land; credit; income generated by sale of agricultural products aided by the project;

cooperatives and related structures. Article 14 can be used to impose specific duties of project planners and managers, and it can be used to guarantee women equal rights to participation in all decision making about the design and administration of the project. This use of Article 14 is simply illustrative of how CEDAW should be brought to bear on development activities.

(4) *Rights of Workers* are protected in general by the Covenants, and in particular by various ILO Conventions directed towards Third World workers. Conventions 14 an 87 protect the right of industrial workers to form unions. Other Conventions protect their right to fairness and to physical safety. Convention 141 guarantees the right of organization for all "rural workers" — a term which includes peasants, women in rural households tenants and sharecroppers, as well as landless laborers. Other conventions deal specifically with women and children as employees, with migrant laborers and with conditions of safety and health in agricultural industries. These ILO Conventions have been ratified by many governments. In any event, they express rights which are simply extensions of the International Covenants, and which can be seen as "legal resources" for victim groups and their supporters.

(5) *Rights to Security in Land* are crucial to small holders and rural workers who depend on possession and use for their livelihood, and civic and cultural status. Projects which make people landless and impoverished plainly violate Basic Needs Rights discussed above. It is a fundamental principle of the International Covenant on Economic, Social and Cultural Rights that people can never be "denied the means of their subsistence." A new, controversial ILO Convention, No. 169 adopted by the World Congress of 1989, speaks directly to the rights of ethnic and cultural minorities, such as indigenous "tribal" people, to retain their ancestral lands. Such lands are usually held under some form of communal tenure. It would limit the situations in which expropriation of these lands is permissible, and imposes other procedural and substantive requirements which must be satisfied before any involuntary displacement can take place.

(6) *Human Rights and Environmental Wrongs.* While there is not yet an adequate body of "hard," international law on the

subject, it seems clear that IDAs (and other international actors) have an obligation to protect environments. Many international instruments have urged such action, notably the May 1990 "Declaration on International Economic Cooperation" and draft resolutions prepared by the UN for the Rio Environmental Congress in June, 1992. The report of the Brundtland Commission in the '80s popularized, indeed sanctified, the concept of "sustainable" development. The World Bank, acting under intense popular pressure, has created its own internal environmental law: it requires detailed impact studies and provides standards for acceptability of projects. Other IDAs have adopted similar policies.

The continuing struggle to impose environmental accountability must be integrated with international human rights law. Experience teaches that the protection of environments (and the enforcement of environmental legislation) requires vigorous exercise of rights of participation by concerned groups.

The complementarity between protection of human rights and protection of environments can be expressed in terms of several propositions. (1) Wrongs done to environments almost always cause wrongs to people: violations of their basic rights (e.g. threats to food systems, health, access to essential resources). (2) The exercise of human rights (notably participation) is essential to prevent or redress wrongs (as many experiences teach). (3) The more human rights are respected, the more likely there will be strong efforts to demand protection of environments. (4) The more rights are denied, the greater the risk that authoritarian governments in pursuit of immediate gain will ignore the consequences of destroying ecologies on which people depend.

The movement to impose international environmental standards has sometimes been depicted (with some justification) as a hypocritical effort by "the North" to impose restrictions on "the South," while the same time doing nothing to prevent the pillaging of resources and the pollution of the atmosphere by the affluent countries. But this observation, however valid, hardly responds to the need to protect people in the Third World (and often their cultures) from environmental harms — not only living

people, but generations to come. The argument pressed here is that those people, and all others concerned, must have the power to hold IDAs accountable to environmental standards derived from universal human rights and from principles governing development which recognize the primacy of people in development processes.

(7) *The Rights of Young People.* The recently adopted UN Convention on the Rights of the Child is another source for the international law of accountability. It underscores the importance of "sustainable" development in terms of intergenerational justice, and the importance of recognizing the rights of children, including the duty to incorporate those who speak for children as active participators in development processes. The Convention is important also because it imposes a distinct obligation on UNICEF to monitor compliance, working with Third World NGOs, and to assume a more proactive role in exposing development activities which threaten the basic interests of children.

(8) *Rights to Redress Wrongs — Threatened and Actual.* Violations of basic rights are legal wrongs — "torts" or "delicts" in the jargon of the law. Those wronged by a tort are entitled to civil or criminal remedies which force the wrongdoer to provide redress for the damage done and deter future wrongdoing. It is essential to recognize that when IDAs commit rights violations they are as much "tortfeasors" as a "private" actor who engaged in the same conduct would be. It is no answer to say that IDAs enjoy "immunity" from such a tort action. The "immunity" may protect the IDA from the coercion of a court, but it certainly does *not* mean the actor is above and beyond the law. IDAs are legally — as well as morally — bound to insure that project victims are compensated, or that the damage done will be rectified in other ways, such as by provision of resources and services. International human rights law guarantees a "remedy" for each violation of each right. This obligation is imposed on both governmental and intergovernmental bodies — for the latter must insist on compliance by the former. The right to a remedy also includes the right of those seriously threatened by an activity which is arguably illegal to demand cessation of the activity. When the threatened damage is clear, such claims must be fully and fairly heard, and

fairness demands that the burden of justification must be assumed by the putative wrongdoer.

III.

Once it is understood that IDAs have a *legal obligation* to respect and protect basic human rights in and through the development processes they initiate, we come to the real agenda: formulating steps necessary to put IDAs under a more specific rule of law. These are steps which IDAs themselves must take — but under informed, intelligent pressure from concerned organizations, both governmental and non-governmental.

A starting point is to focus on IDA-fostered development activities, notably projects which directly and distinctively impact on the basic interests of specific segments of a community. That approach is our concern here, and the effort below is to sketch, quite summarily, the essential elements of the kind of human right-based procedures which each IDA must develop to govern its project activities. In light of prior discussion, four bodies of principles should be incorporated in these IDA codes of human rights law.

(1) *Participation*. These principles would require all relevant IDA workers to understand the full range of the rights of participation previously noted. It also would require them, as part of the process of initiating, planning and negotiating the project, to secure appropriate assurances that these rights will be given effect, and to specify steps to be taken to secure that result.

Rights of participation must be put in place at the very time a proposed project is given serious consideration. That step is necessary to secure the informed, meaningful involvement of all types of project affected people in both the planning and the review of plans before the project is "finalized." As the development literature teaches, this kind of participation, early-on, is essential. But rights of participation should also be part of every ongoing phase of the project, from further planning to conclusion of the formal project agreements (e.g. the loan agreement), to managing and monitoring the project, to final reviews and

evaluation. Participation at each phase has a distinct function — a lesson taught well by so much development literature.

Obviously no single, model set of directives can provide detailed guidance for implementation of these basic requirements for all kinds of projects. Some projects, by their very nature, obviously require full scale community participation in their conception and management, e.g., social forestry schemes. Some may require particularized forms; for example, projects to train (or retrain) extension workers (an important reform in Africa) may require special efforts to sensitize agents to the needs and rights of rural women. In other projects "participation," if effective, may soon generate groups who are hostile to or suspicious of the proposed undertaking, e.g. where the project entails displacement of people or other clear risks to distinct groups. The particular set of steps taken to protect rights of participation of differently affected groups will vary with the nature of the project and the social context, or political status of project-affected peoples.

Realization of participation rights may also require the active involvement of national and international NGOs concerned with particular aspects of development policy, and with particular human-rights-in-development issues. For example, national organizations concerned with "women-in-development" issues may be indispensable to mounting efforts to help local women to understand, discuss and voice their concerns with projects which may affect their interests in particular ways. Thus IDA "internal law" must recognize the crucial role which outside, as well as local, community-level NGOs, can play in organizing effective participation.

These examples should make it clear that development of IDA policies and internal law designed to respect and promote participation is a complex task. But it certainly is possible to formulate rules and procedures to mobilize participation in respect to any project, and that task must be addressed because it goes to the essence of realizing human rights in and through development.

(2) *Transparency.* Respect for rights of participation obviously imposes affirmative duties to inform. IDA's must make sure that when projects are initiated all aspects of the undertaking are

disclosed to the public and particularly to affected communities. Where a proposed project creates foreseeable risks (e.g. of displacement) on some, then special efforts are required to advise those affected of the nature of these risks and their rights in the matter. The principle of transparency must include rights of access to studies and other project documents such as environmental and social impact assessments, and rights of access to authoritative decision-makers and decisionmaking processes. In the past the World Bank has often negotiated project loan agreements as if these were some species of secret treaty-making diplomacy. Loan agreements may be "treaties" for some purposes (World Bank agreements are treated as such by the parties); but they can also be seen as laws which lay down the terms of a project. The secrecy practiced by the Bank is contradictory to the Bank's repeated preaching on the need to bring principles of good "governance" into the business of development. If there are particular matters which deserve a privilege of confidentiality, in order to protect a compelling *public* interest, those can be identified in the code of transparency which should guide IDAs.

(3) *Standards to protect substantive rights.* The central purpose an IDA code of human rights law is to protect the substantive rights of project-affected people. A necessary step for this task is the making of a social impact assessment, analogous to an environmental assessment, which analyzes carefully the potential impacts of project activities (including changes in physical environments) on the basic interests of people. For example, if a proposed irrigation scheme creates risks of water-borne vector diseases, the project must make clear what measures will be taken to alleviate the risk and protect communities from new health hazards. The impact of agricultural projects on women must be carefully studied. Different projects create different risks of human rights violations, but the ultimate law of each project derived from the IDA's human rights code and finalized in loan and other agreements must assure protection of those rights. It is thus incumbent on all IDAs, but particularly the World Bank because of the diverse scope of its project activities, to prepare particular codes of standards governing particular areas of human

rights concern. Indeed the World Banks "code" of resettlement "guidelines" for the protection of displacement victims is an example of what must be done in respect to other kinds of risk-prone projects.

(4) *Redress*. A fourth set of principles must provide for full and fair hearings for the grievances and claims of project-affected people. There must be processes for hearing and resolving (through mediations or some other form of resolution) grievances directed towards: (a) claims that the project — or some part of it — should be aborted (or redesigned) because of the scope and severity of the potential harms (social costs) it will inflict; (b) claims that the project is being managed in ways that violate human rights; (c) claims for compensation and other redress for harms actually inflicted.

Implementation of these principles will call for careful attention to *process*, i.e.: creating appropriate, independent mediators and arbiters of these kinds of disputes; allocating burdens of proof fairly so that claimants are not subjected to discriminatory limitations; assurance that other elements of due process are protected.

At first blush it may seem that what is proposed above is novel and unworkable — as well as "politically sensitive." However, there already exist adequate models and precedents for these steps. The World Bank's environmental assessment procedures — in effect a "code" — already provides for many of the very kinds of standards and processes suggested here. Indeed, if one reflects on it, environmental assessments necessarily include social impact assessments (as the Bank's own *Environmental Assessment Sourcebook* makes clear). The Bank has also declared its intention to assure participation and protection of women in its project planning and management — a step which clearly will call for a code if it is to be effected. These are only examples. It is no answer to suggest that the protection of human rights imposes "politically sensitive" burdens on IDA officials. Of course it does. That is inherent in the nature of all efforts to protect human rights. It is clear that rights can only be protected by putting IDAs under a rule of law geared towards that purpose.

IV.

The international order will, inevitably, be restructured — one way or another — in the coming decade. Already, we are witnessing the development of new roles and powers of intervention asserted by the UN Security Council. We have been witnessing the assertion of essentially coercive powers by the World Bank and the IMF to compel the restructuring of the political economies of many states. The draft resolutions prepared for the 1992 Rio world conference on the environment seem to call upon states to enact stringent new legal protections — and these principles may be used by international organizations to press some governments to act in other, unprecedented ways which will affect their economies. These are only examples of a gradual buildup of power within some international organizations.

One problem with the enhancement of the powers of these international organizations is the autonomous character of these institutions. International organizations such as the Security Council and the IMF often operate in secrecy, indeed with seeming arrogance, as if they were Platonic Guardians. There is surely a growing need to impose accountability on them to respect principles which increasingly reflect the common consensus of humankind.

Just as struggles go forward at this time, in many parts of the world, to "democratize" governments which have long operated with autonomy in authoritarian ways, so efforts must be initiated to democratize international institutions — and the vast bureaucracies we pay to staff them. Human rights law now provides a body of principles which can be used as a resource for all people. Hopefully, that resource can be used to press IDAs to adopt policies leading to greater "democratization" and greater accountability to local peoples in the exercise of their immense powers.