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Articles

The Right to Food: Holding Global Actors Accountable Under International Law

SMITA NARULA*

Economic globalization represents both an unmet opportunity and a significant challenge for the fulfillment of social and economic rights, including the right to food. While corporate sector accountability and the responsibility of international financial institutions (IFIs) to ensure social and economic rights are now at the forefront of the globalization discourse, greater attention must be paid to how these actors can be held accountable under international law. The existing human rights legal framework is ill-equipped to deal with violations committed by non-state actors, such as transnational corporations (TNCs), and multi-state actors, such as IFIs. Using the right to food as an entry point, this Article argues that international law is in need of rethinking under globalization. Part I examines the impact of IFIs and TNCs on the right to food and argues that effective implementation of the right to food is undermined by international human rights law's state-centric focus and jurisdictional constraints. Part II asserts that under the obligation of international cooperation, States Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) must respect and protect the right to food extraterritorially.

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This includes an obligation to regulate the activities of TNCs and IFIs over which they exercise influence or control. Part III addresses the need to locate the right to food outside of the international treaty law framework to ensure the accountability of non-ICESCR ratifying states. It analyzes the right to food as customary international law and concludes that the minimum core component of the right to food—the right to be free from hunger—may have already achieved customary status.

INTRODUCTION

The foundational paradigm of international human rights law is the accountability of sovereign states for ensuring the rights of individuals living within their jurisdiction. This paradigm is increasingly challenged by the fragmentation and transformation of state sovereignty in response to economic globalization. The global power exerted by a handful of states, transnational corporations (TNCs), and international financial institutions (IFIs) represents a significant shift in the international order. The power imbalances

created by this shift make it increasingly difficult for weaker states to assert full control over policies that are central to their ability to fulfill their social and economic rights obligations. This Article examines this dilemma in the context of promoting the right to food.

Under the International Covenant on Economic, Social and Cultural Rights (ICESCR) the "right to food" is defined as the right to be free from hunger and to have sustainable access to food in a quantity and quality sufficient to satisfy one's dietary and cultural needs. States that have ratified this Covenant are obligated to take steps to progressively achieve the full realization of the right to food for those within their territory or under their jurisdiction. Implicit in this state-centric approach is the rationale that human rights are the byproduct of relationships between governments and the individuals they govern, rather than relationships between global actors and individuals worldwide whose rights are affected by their actions. In the age of economic globalization, a variety of state and non-state actors may be contributing to the state of world hunger, but not all actors are given equal consideration under international law.

The existing human rights legal framework is ill-equipped to deal with these actors and the effects of their policies abroad: It does not adequately address the obligations of TNCs and IFIs; States Parties' obligations are limited to individuals in their territory or under their jurisdiction; and states that do not ratify the ICESCR may escape right to food obligations altogether. This Article seeks to close some of these accountability gaps. It proposes that three major doctrinal issues must be resolved if we are serious about using international law to promote the right to food. These are: 1) Defining the extraterritorial application of the ICESCR; 2) Holding transnational corporations and international financial institutions accountable via their relationship to powerful states; and 3) Locating the right to food outside the treaty framework in customary international law.

This Article begins with a comparison of economic and rights-based approaches to food security. Part I articulates the normative content of the right to food and examines threats to the right to food from states, IFIs, and TNCs. It also argues that effective implementation of the right to food is undermined by the state-centric focus and jurisdictional constraints of international human rights law. Part II asserts that under the obligation of international cooperation, States Parties to the ICESCR must respect and protect the right to food extraterritorially. This includes an obligation to regulate the activities of TNCs and IFIs over which they exercise influence or control.

States often have obligations under multiple legal regimes, including conditions of contracts with IFIs and TNCs, which may come into conflict with their human rights obligations. The development of norms outside the covenant model to reconcile the incompatibility of multiple legal regimes and to hold non-ICESCR ratifying states accountable for violations of the right to food is a necessary precursor to the realization of the right to food under globalization. Part III analyzes the right to food as customary international law and concludes that the minimum core component of the right to food—the right to be free from hunger—may have already achieved customary status.

In many respects the right to food is a useful entry point for looking at the ways in which international law is in need of rethinking under globalization. The problem is not with globalization per se; globalization actually represents an enormous opportunity to involve multiple actors in solving pervasive human rights problems. The end of world hunger and extreme poverty reduction is potentially within our grasp. Addressing the accountability of powerful states, TNCs and IFIs can lend support to this weighty effort. If the state-centric and territorial constraints of international law remain unaddressed, however, the potential of the international human rights framework itself may be undermined.

A. *Why Focus on Global Actors?*

In 2000, the U.N. Millennium Summit declared that halving the proportion of people who suffer from hunger between 1990 and 2015 is a key Millennium Development Goal.[1] Also in 2000, the U.N. Commission on Human Rights appointed a Special Rapporteur on the Right to Food in order to "respond fully to the necessity for an integrated and coordinated approach in the promotion and protection of the right to food."[2] In 2004, the U.N. Food and Agricultural Organization unveiled the Voluntary Guidelines on the Right to

1. The World Bank, About Us: Millennium Development Goals, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20104132~menuPK:250991~pagePK:43912~piPK:44037~theSitePK:29708,00.html (last visited Apr. 25, 2006).

2. *See* U.N. Comm'n on Human Rights [CHR], *The Right to Food*, U.N. Doc. E/CN.4/RES/2000/10 (Apr. 17, 2000), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/9dabffd5aa972cc2802568ce00570a46?Opendocument. The Rapporteur's mandate was extended in 2003 for another three years. *See* U.N. CHR, *The Right to Food*, U.N. Doc. E/CN.4/RES/2003/25 (Apr. 22, 2003), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/5dee8b5bc96f78e5c1256d1d003570ef?Opendocument.

Adequate Food.[3]

Right to food campaigns have also firmly taken root in countries all over the globe, including Brazil,[4] India,[5] South Africa,[6] and New Zealand.[7] Many of these campaigns have availed of protections offered by domestic constitutions. To date, at least twenty countries explicitly refer to the right to food or a related norm in their constitutions.[8] Domestic right to food campaigns have met with some success.[9] These campaigns thrive in large part because of the democratic spaces in which they operate.[10] Campaigns in India and South Africa, for example, have made ample use of a free media, have mobilized civil society in support of their demands, and have called for judicial intervention to check against government inaction.[11] The success of these campaigns, albeit measured,

3. U.N. Food & Agriculture Organization [FAO], *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, ¶ 16 (Nov. 2004), *available at* http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm (last visited Apr. 20, 2006).

4. *See* ActionAid Brasil, http://www.actionaid.org.br/eng/home.htm (last visited Apr. 20, 2006). ActionAid Brasil runs three campaigns to safeguard poor people's right to food and education—the National Campaign for the Right to Education, the GMO Free Brazil Campaign, and the Trade Campaign. *Id. See also* Food First: Institute for Food and Development Policy, Brazil: Rural Women Workers Struggle for their Rights, http://www.foodfirst.org (last visited Jan. 30, 2006).

5. The "Right to Food Campaign" in India is an informal network of organizations and individuals committed to the realization of the right to food. *See generally* Right to Food Campaign, Foundation Statement, http://www.righttofoodindia.org (last visited Mar. 26, 2006) [hereinafter Right to Food Foundation Statement].

6. The Right to Food Campaign in South Africa, initiated by the Community Law Centre, University of Western Cape, mobilizes support, disseminates information, coordinates activities, and organizes joint events focused on the right to food. *See generally* Right to Food Campaign: South Africa, http://www.communitylawcentre.org.za/ser/right_to_food_pamphlet.html (last visited Mar. 26, 2006).

7. New Zealand's Natural Food Commission, organized as a public service by the Natural Law Party, focuses on the issue of genetically engineered food and more specifically on the right of consumers to be informed about whether the food they purchase has been genetically engineered. *See* Green Party of Aotearoa New Zealand, Green Action, Food Revolution, Safe Food? Join the Food Revolution, http://www.greens.org.nz/food-revolution/default.asp (describing the campaign by the Green Party on the right to information about safe food) (last visited Apr. 20, 2006).

8. *See* U.N. FAO Legal Office, *The Right to Food in National Constitutions*, *in* THE RIGHT TO FOOD IN THEORY AND PRACTICE, *available at* http://www.fao.org/Legal/rtf/bkl.htm (last visited Apr. 25, 2006). A related norm is a norm that has an impact on or is interconnected with the right to food, such as the right to life.

9. *See infra* note 11.

10. For example, Amartya Sen is frequently cited for the assertion that democracy—and the existence of a free press therein—can prevent or avert famines. Amartya Sen, *Democracy as a Universal Value*, 10 J. DEMOCRACY 3, 8 (1999).

11. The "Mid-Day Meal Scheme" in India is an example. As a result of public interest litigation on the right to food, the Supreme Court of India directed State Governments and

necessarily raises the question of whether social and economic rights are best protected by using a civil and political rights framework that holds domestic government accountable for their failure to ensure the right to food. If so, then why focus on the social and economic rights obligations of global actors? And does such a focus merely externalize a problem whose roots are in fact domestic?

The focus on domestic factors—such as governmental oppression or ruling elite corruption—is not misplaced. In Zimbabwe, for example, recent violations of the right to food were a result of policies pursued by the national government independent of—and even opposed to—policies advocated by international institutions.[12] Still, the notion that hunger and poverty can today be *fully* explained in terms of national and local factors is a fallacy. Trade liberalization, the inability to effectively regulate the power of TNCs, and burdensome external debt servicing obligations[13] may restrict the state's ability to fashion appropriate tools to promote the realization of the right to food.[14] Here one could argue that developing country leaders have too often failed to protect the interests of their populations when negotiating the terms of foreign direct investment inflows, or of international trade and loan agreements. While this may be true, it does not take adequate account of the dramatically unequal bargaining power that frequently prevails in such dealings, nor does it factor in the extent of foreign

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Union Territories to implement a scheme providing every child in every government and government-assisted primary school with a prepared mid-day meal. *See* Right to Food Campaign, Mid-Day Meals, Supreme Court Orders, http://www.righttofoodindia.org/mdm/mdm_scorders.html (last visited Apr. 20, 2006).

12. For more on violations of the right to food in Zimbabwe, see *infra* Part I.A.1. *See also* JEFFREY SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME 194 (2005) (arguing that Zimbabwe is a case where "the traditional explanation of miserable rule is a sufficient explanation for a country's ills").

13. Though beyond the scope of this Article, the need for debt relief, increased aid, and balanced trade liberalization—and an examination of their potential impact on food security in developing countries—must ultimately also enter the right to food conversation. *See* SACHS, *supra* note 12, at 80; *see generally* JANET DINE, COMPANIES, INTERNATIONAL TRADE AND HUMAN RIGHTS (2005).

14. Vandana Shiva, *The Real Reasons for Hunger*, THE OBSERVER, June 3, 2002, *available at* http://observer.guardian.co.uk/international/story/0,6903,742149,00.html (criticizing Amartya Sen's famine studies as ignoring trade liberalization and globalization as significant factors for hunger today, including in India's "starvation deaths"). According to the U.N. Special Rapporteur on the Right to Food, the combination of international trade liberalization under the World Trade Organization (WTO) regime and the liberalization of agriculture under structural adjustment programs has proved to be a fatal mix for global food security and has led to increased hunger, and even starvation, for populations in the developing world. *See* U.N. CHR, *Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food*, ¶ 73, U.N. Doc. A/56/210 (July 23, 2001) (*prepared by* Jean Ziegler) [hereinafter Ziegler Report I].

complicity in domestic corruption.[15]

This Article focuses on the accountability of global actors in order to supplement, and to some extent counterbalance, the existing legal scholarship's focus on the enforceability of the right to food in the domestic setting.[16] Unless and until the accountability of global actors is more clearly defined under international law, the potential impact of both domestic and U.N.-related initiatives will continue to be undermined. The focus on global actors is not, however, an attempt to externalize the problem or to minimize the importance of ensuring domestic accountability. Holding local actors accountable is of fundamental importance—not least because it is a means of enabling societies to achieve a more equitable distribution of resources between the country's wealthy elite and its majority poor.

B. Economic v. Rights-Based Approaches to Food Security

Almost sixty percent of annual deaths worldwide—roughly 36 million—are a direct or indirect result of hunger and nutritional deficiencies.[17] More than 840 million people worldwide are malnourished.[18] Over ninety-five percent live in the developing world.[19] 153 million of them are children under the age of five.[20] Hunger is both a cause and consequence of poverty. Hungry workers

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15. *See* THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS 238 (2002). Pogge argues that:

> [L]ocal elites can afford to be oppressive and corrupt because, with foreign loans and military aid, they can stay in power even without popular support. And they are so often oppressive and corrupt, because it is, in light of the prevailing extreme international inequalities, far more lucrative for them to cater to the interests of the foreign governments and firms rather than to those of their impoverished compatriots.

Id.

16. For arguments supporting an individualized complaint system and urging against formal international adjudication of rights to food, see Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462 (2004); Ramin Pejan, *The Right to Water: The Road to Justiciability*, 36 GEO. WASH. INT'L L. REV. 1181 (2004); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992–1993).

17. This figure includes deaths that result from "nutritional deficiencies, infections, epidemics or diseases which attack the body when its resistance and immunity have been weakened by undernourishment or hunger." UNDP, *Human Development Report* (2000), *available at* http://hdr.undp.org/reports/global/2000/en.

18. Care USA, Campaigns: Hunger, Hunger Facts: Statistics on Hunger, http://www.careusa.org/campaigns/world-hunger/facts.asp (last visited Apr. 26, 2006).

19. *Id.*

20. *Id.*

produce less and therefore earn less. In turn, their poverty exacerbates their hunger.[21] Malnourishment is also the largest single contributor to disease. Undernourished mothers give birth to underweight children who are more susceptible to diseases that lead to their premature deaths.[22] Children who are sick and hungry also do poorly in school.[23] As a result they are more likely to end up as unskilled laborers, who do not earn enough to feed themselves or their families. The cycle of poverty, disease, and hunger continues.

The best antidote to hunger and poverty is sustained and equitable economic growth. Consequently, the right to food is deeply connected to the economic health of a country. Economic growth in East, South, and Southeast Asia was largely responsible for the 158 million reduction in the number of undernourished people from 1979–1981 to 1990–1992.[24] For many developing countries, improved agricultural productivity can also be an engine of non-agricultural growth.[25] A noted difference between Asia's economic successes and Africa's economic stagnation is Asia's high and rising food production per capita during recent decades.[26] Nutritional gains were also a critical factor in economic growth in Europe over the past two centuries.[27]

Though economic growth and increased food production are mutually reinforcing, they are not in and of themselves sufficient to ensure food security if economic growth bypasses poor and vulnerable populations. Moreover, hunger today cannot be blamed on a general shortage of food. Overall food production is not falling behind population growth.[28] People are hungry because they are poor and as a result lack the "substantive freedom" to be able to

21. U.N. FAO, *New Estimates Shed Light on Crushing Economic Costs of Hunger* (2004), http://www.fao.org/newsroom/en/focus/2004/51786/article_51795en.html (last visited Apr. 25, 2006).

22. U.N. FAO, *The Human Costs of Hunger* (2004), http://www.fao.org/newsroom/en/focus/2004/51786/article_51793en.html (last visited Apr. 26, 2006).

23. Care USA, *supra* note 18.

24. Luther Tweeten, *The Economics of Global Food Security* 2 (Anderson Chair Publication 1998), *available at* http://aede.osu.edu/programs/Anderson/papers_old/EconomicsGlobalFoodSecurity.pdf.

25. *See generally* Wendy S. Ayres & Alex F. McCalla, *Rural Development, Agriculture, and Food Security*, 33 FIN. & DEV. 8 (1996).

26. Africa, on the other hand, has experienced low and falling food production per capita. *See* SACHS, *supra* note 12, at 70.

27. Varun Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, 32 WORLD DEV. 465, 469 (2004).

28. *See generally* AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1981); Amartya Sen, *Ingredients of Famine Analysis: Availability and Entitlements*, 96 Q.J. ECON. 433 (1981); Amartya Sen, *World Economy*, NIEMAN REPORTS 32 (Fall 1995).

establish ownership over an adequate amount of food, either by growing the food themselves, or by buying it in the market. Amartya Sen convincingly argues that efforts to combat hunger must focus on the "entitlement" that each person enjoys over food, rather than the total food supply in the economy.[29] Because of low incomes, landlessness, or other factors, the poor lack these entitlements and, as a result, experience greater food insecurity. Economic growth can therefore only guarantee food security for all if it is coupled with an emphasis on poverty reduction.[30]

Human rights proponents and economists around the world have begun to address issues of poverty and hunger in both economic and human rights terms. For far too long, however, economic and rights discourses have operated on separate planes, with proponents on each side assuming that they have little to learn from one another. The rights-based approach emphasizes government obligations—rooted in domestic constitutions and international human rights treaties—to ensure immediately that people are free from hunger and ultimately that they have sustainable access to adequate and nutritious food. A rights-based approach includes four essential elements: evaluating the claims of rights holders and the corresponding obligations of duty bearers; developing strategies to build the capacity of rights holders' to claim their rights and of duty bearers to fulfill their obligations; monitoring and evaluating outcomes and processes using human rights principles and standards; and finally, incorporating the recommendations of international human rights bodies to inform each step of the process.[31]

The mainstream development economics approach toward promoting economic growth and food security has traditionally been premised on neo-classical economic philosophy, which stresses the importance of removing government distortions to the market.[32] Indeed, evidence from developing countries suggests that

29. AMARTYA SEN, DEVELOPMENT AS FREEDOM 161–62 (1999).

30. Poul Nielson, European Union Commissioner for Development and Humanitarian Aid, Keynote Address, Promoting Broad-Based Economic Growth and Food Security: A View from the European Union ch. 13 (Sept. 4–6, 2001), http://www.ifpri.org/pubs/books/2020conpro/ch13.pdf.

31. *See* United Nations, The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the U.N. Agencies (May 2003), *available at* http://www.crin.org/docs/resources/publications/hrbap/HR_common_understanding.doc.

32. *See* NICHOLAS VAN DE WALLE, AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS, 1979–1999 8 (2001) (describing the International Monetary Fund's stabilization prescriptions, including cuts to fiscal deficits and devaluing overvalued currencies, and the World Bank's promotion of price liberalization, deregulation and divestiture of state-owned enterprises).

inefficiencies from government policies can negatively impact food security.[33] Such an approach emphasizes limitations on government spending, the privatization of state-owned enterprises, the removal of barriers to trade, and government interference in financial and capital markets.

At first blush, the differences between a free market approach and a rights-based approach may seem insurmountable. Most fundamentally, a free market approach emphasizes non-interference by the state, while international human rights law is founded on the notion that states must intervene to respect, protect, and fulfill the right to food. Closer examination, however, reveals that the two approaches can reinforce each other. Increasingly, economic thought also acknowledges the importance of government intervention to address market failures.[34] The human rights mentality has also changed over time. Most significantly, there is now greater recognition that the role of human rights advocacy must be to complement market mechanisms, not circumvent them. Moreover, a rights-based approach calls on governments to pursue reforms, both individually and through international cooperation, which improve methods of production, conservation, and distribution of food.[35] In other words, human rights law requires appropriate economic reforms. In this sense, economic and social rights are both ends of and instruments for economic development. To the extent that they are instruments, "the policy consequences of a rights approach overlap considerably with a modern economic approach" to

33. John Beghin, Jean-Christophe Bureau & Sung Joon Park, *Food Security and Agricultural Protection in South Korea*, 85 AM. J. AGR. ECON. 618, 630 (2003) (demonstrating empirically that producer transfers and input subsidies had a negative impact on consumer welfare in South Korea); Eltighani M. Elamin, Dirdivi H.M. & Nassir A. El Naam, *Pricing Policies and Agricultural Export Performance in Sudan: The Lessons from the 1970s through 1990s* 11 (Aug. 8, 2000) (finding that the pricing policies of the government commodity boards in Sudan decreased the incentives to adopt new technology or increase output); *see also* Carol Lancaster, *Aid Debates and Food Needs*, *in* COPING WITH AFRICA'S FOOD CRISIS 42–43 (Naomi Chazan & Timothy Shaw eds., 1998); Jon Kraus, *The Political Economy of Food in Ghana*, *in* COPING WITH AFRICA'S FOOD CRISIS 81 (Naomi Chazan & Timothy Shaw eds., 1998).

34. *See, e.g.*, SACHS, *supra* note 12, at 348. (Even traditional economic thought emphasized the government's role. Much of Book V of Adam Smith's *Wealth of Nations* explains "why the state has responsibilities regarding defense, justice, infrastructure, and education, areas in which collective action is required to complement, or substitute, private-market forces.") Amartya Sen has also argued that the role of the government must be integrated with both economic and social institutions, including markets, trade, political parties, and civil society. *See* SEN, *supra* note 29, at 162.

35. International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

development.[36]

As World Bank economist Varun Gauri persuasively argues with regard to the provision of health care and education, human rights and economics-oriented approaches converge in several other ways.[37] An economics-oriented approach would begin with an assessment of whether market mechanisms can provide desirable services in sufficient quantities. If the market would provide these services at suboptimal levels, government intervention becomes necessary. In order to ensure the effectiveness of government provision of such services, economists would then stress strengthening mechanisms of government accountability to the intended recipients.[38] This concept can be linked to a central feature of human rights-based approaches, which emphasizes government accountability for ensuring fulfillment of rights. In fact, both approaches emphasize principles of empowerment, transparency, and accountability.[39]

Still, differences remain. An economic approach tends to emphasize averages and not individuals. Economic success is measured by the total average growth, such as a rise in gross domestic product or per capita income. A rights-based approach is premised on the notion that each and every individual can lay claim to basic rights and basic services. A focus on averages may not reveal that "economic growth is rarely uniformly distributed across a country."[40] Even when average economic growth is high, parts of a country or particular populations may be bypassed. Growth may enrich households linked to good market opportunities while bypassing the poor who are disconnected from market forces because they lack the requisite human capital (good nutrition and health, or an adequate education). In Asian countries that have experienced significant economic growth, extreme poverty—defined as the inability to meet basic needs for survival—continues to afflict certain parts of the population.[41] An economic approach may also fail to highlight the role of discrimination against particular ethnic, religious, racial, or caste groups as a reason for their economic exclusion. The market, though not normatively opposed to such standards, has no means of ensuring that discrimination does not take place. A rights-based approach attempts to provide checks against

36. Gauri, *supra* note 27, at 469.
37. *See id.* at 470–72.
38. *Id.* at 470.
39. *Id.*
40. SACHS, *supra* note 12, at 72.
41. *Id.*

such behavior by obligating governments to ensure the fulfillment of socio-economic rights without discrimination.

An economic approach also tolerates negative short-term consequences in return for long-term progress.[42] In the long run, market forces will hopefully spur economic growth, increase food production, and raise income levels to the point that people can afford to buy their own food. But in the interim the poorest of the poor may not be able to afford food or agricultural inputs offered at market rates and may suffer disproportionately from restrictions in government spending on food and welfare programs. A rights-based approach does not tolerate such trade-offs; it calls on governments to subsidize agricultural inputs or provide food when people cannot afford to feed themselves.[43] The use of subsidies is also a point of divergence. An economic approach would argue that subsidies distort the market; by changing relative prices, they encourage individuals to make economically inefficient decisions.[44] However, in some instances, redefining a market good as an entitlement based on human rights principles can also have positive consequences.[45]

Even if, on aggregate, removing market distortions in the agricultural market and enhancing economic growth may enhance food production, there is still the likelihood that the poor and other vulnerable groups may be harmed in the process. It is consistent with both a human rights approach and an economic-oriented approach to food security to require an assessment and plan to address any possible market failures prior to any major intervention that might have an implication for food security.[46] Consequently, various agencies and commentators have stressed the need for provision of

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42. *See* Gauri, *supra* note 27, at 466, 473.

43. ECOSOC, U.N. Comm. On Econ., Soc., & Cultural Rights, *General Comment No. 12, The Right to Adequate Food*, at 106, ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter *General Comment 12*].

44. *See* Gauri, *supra* note 27, at 473. Indeed empirical studies confirm that in some countries, agricultural input subsidies had a negative impact on consumer welfare, while government pricing policies for commodities decreased incentives to adopt new technologies or to increase output. *See generally* Beghin et al., *supra* note 33; Elamin et al., *supra* note 33.

45. *See* Gauri, *supra* note 27, at 473. For example, the demand for a right to anti-retroviral treatment from Brazil, India, and civil society organizations resulted in lower prices worldwide, while the recognition of the right to education in Uganda led to a surge in enrollments far beyond what was predicted by creating a new norm of universal school attendance. *Id.*

46. U.N. FAO, *World Food and Agriculture: A 20-year Perspective*, *in* WORLD AGRICULTURE: TOWARDS 2010 (Nikos Alexandatos ed., 1995), *available at* http://www.fao.org/documents/show_cdr.asp?url_file=/ docrep/V4200E/V4200E00.htm.

appropriate social safety nets to protect such groups.[47]

As detailed below, while free market policies have in many cases been both necessary and beneficial, some approaches to market liberalization have clearly exacerbated food insecurity in many countries following IFI-mandated structural adjustment programs.[48] Similarly, whatever their otherwise beneficial impacts, there are many cases in which irresponsible and unregulated activities undertaken by some TNCs have also contributed to hunger and decreased agricultural production in their host communities. Meanwhile, the rights-based approach has relied too much on government intervention, which itself can be riddled with corruption and inefficiencies. Even effective governments are not provided with sufficient guidance on how to prioritize the fulfillment of their socio-economic rights obligations, or how to ensure the most efficient use of limited resources. The lack of formulas or goal posts does however give governments and international actors significant leeway in the formulation of economic responses to human rights problems.

The purpose of this Article is not to set out the best economic policy options for growth and poverty reduction. Rather, it is to argue that those making such decisions need to be cognizant of their own legal human rights obligations, as well as those of governments in poor countries who ultimately hold primary responsibility for ensuring the fulfillment of their population's social and economic rights. Hunger-related deaths are neither natural nor inevitable—they can be significantly reduced by targeted policies. This Article addresses the role that international human rights law can play in forming this policy framework.

I. THE RIGHT TO FOOD UNDER INTERNATIONAL HUMAN RIGHTS LAW: THREATS AND ACCOUNTABILITY GAPS

A. *The Right to Food under International Human Rights Law*

The genesis of the modern international human rights system is often traced to the post-World War II prosecution of Nazi war

47. U.N. FAO, *Agriculture and Rural Poverty*, *in* WORLD AGRICULTURE: TOWARDS 2010, *supra* note 46, ch. 9, § 7; Luc Christiaensen et al., *Growth, Distribution, and Poverty in Africa* 33–34 (World Bank, Poverty Research Working Paper, Mar. 2002) (emphasizing that rainfall variability and fluctuation in global commodity prices make social protection measures in the agricultural sector important).

48. *See infra* Part I.B.1.a.

criminals in the Nuremberg trials and the international community's collective desire to "prevent the recurrence of such crimes against humanity through development of new standards for the protection of human rights."[49] These standards were subsequently codified in four stages: the articulation of human rights concerns in the U.N. Charter;[50] the identification of specific rights in the Universal Declaration of Human Rights (UDHR);[51] the elaboration of each of the rights in the International Covenant on Civil and Political Rights (ICCPR)[52] and the ICESCR;[53] and the adoption of additional conventions and declarations concerning various human rights issues, including gender and racial discrimination, children's rights, torture, and genocide.[54]

The right to food has been part of the international human rights regime since its inception. The right first found expression in Article 25 of the UDHR, which states that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food . . . ."[55] The right was

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49. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 10 (1982).

50. U.N. Charter art. 1 (purpose of the United Nations is to achieve international cooperation to solve economic, social, cultural and humanitarian problems while promoting human rights for all without distinction); *id.* art. 13 (role of General Assembly is to study and make recommendations to promote international cooperation and the realization of human rights); *id.* art. 55 (U.N. shall promote respect for human rights).

51. The UDHR is considered to be an "authoritative interpretation of the Charter of the United Nations" and "the common standard to which the legislation of all the Member States of the United Nations should aspire." Sohn, *supra* note 49, at 15 (citing Professor Cassin, one of the principal authors of the Declaration).

52. The ICCPR principally embodies two sets of rights: those pertaining to the physical integrity of the person (such as the right not to be tortured, executed, or enslaved) and those pertaining to legal proceedings, legal status, and the right to hold and profess one's beliefs (such as the right to counsel, freedom of speech, and freedom of religion). International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

53. The ICESCR generally protects the rights to self-determination, work and good work conditions, social security, family, an adequate standard of living (including housing and food), health, education, and cultural life. *See, e.g.*, ICESCR, *supra* note 35, arts. 1, 7, 10–11,

54. *See, e.g.*, Convention on the Rights of the Child [CRC], G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. 49 at 167, U.N. Doc. A/44/49 (Nov. 20, 1989); Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], U.N. GAOR, 34th Sess., G.A. Res. 34/180, Supp. No. 46 at 193, U.N. Doc. A/34/46 (Dec. 18, 1979); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

55. Universal Declaration of Human Rights [UDHR] art. 25(1), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). The right to food can also be found in Principle 4 of the United Nations Declaration on the Rights of the

subsequently codified in Article 11 of the ICESCR, which encompasses two separate, but related norms: the right to adequate food and the right to be free from hunger.[56] Article 11 reads:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
>
> The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
>
> (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
>
> (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.[57]

The right to adequate food (Article 11(1)) is a "relative" standard. In contrast, the right to be free from hunger (Article 11(2)) is "absolute"[58] and is the only right to be qualified as "fundamental" in both the ICCPR and the ICESCR.[59] States Parties to the ICESCR

Child,. G.A. Res. 1386 (XIV), ¶ 4, U.N. Doc. A/4354 (Nov. 20, 1959) ("The child shall have the right to adequate nutrition. . . .").

56. *See* Philip Alston, *International Law and the Human Right to Food*, *in* THE RIGHT TO FOOD 32 (Alston & Tomasevski eds., 1984).

57. ICESCR, *supra* note 35, art. 11.

58. THE RIGHT TO FOOD: GUIDE THROUGH APPLICABLE INTERNATIONAL LAW xviii (Katarina Tomasevski ed., 1987).

59. ICESCR, *supra* note 35, art. 11(2). The ICCPR implies a right to food as part of the fundamental right to life found in Article 6. *See* U.N. FAO, *Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, Implications of the Voluntary Guidelines for Parties and Non-Parties to the International*

are required to take steps to progressively achieve the right to adequate food.[60] Progressive realization implies moving "as expeditiously as possible" towards this goal.[61] As a minimum core obligation, States Parties must act immediately "to mitigate and alleviate hunger . . . even in times of natural or other disasters."[62] Articulating the normative content of a relative standard such as the *right to adequate food* presents a greater challenge. The Committee on Economic, Social and Cultural Rights (ESCR Committee or Committee)[63] has concluded that the "core content" of the right to adequate food implies ensuring:

> The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; [and] [t]he accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.[64]

In his study on the right to adequate food as a human right, Asbjoern Eide developed a three-level typology of states' duties, which is now a widely used framework for analyzing states' human rights obligations generally.[65] These are: the duty to respect, the

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Covenant on Economic, Social and Cultural Rights, *available at* http://www.fao.org/docrep/meeting/007/j1632e.htm (last visited Apr. 25, 2006); *see also* U.N. CHR, *General Comment 6*, 16th Sess. (1982), at 6, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994) ("The protection of [the right to life] requires that States adopt positive measures . . . . [T]he Committee considers that it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.").

60. ICESCR, *supra* note 35, art. 2(1). For further discussion of Article 2(1), see *infra* Part II.A.2. *see also* U.N. Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment 3: The Nature of States Parties' Obligations*, 5th Sess. (1990), at 48–49, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

61. *General Comment 12*, *supra* note 43, ¶ 14.

62. *Id.* ¶ 6.

63. The ESCR Committee, established by virtue of the ECOSOC Res. 1985/17, is empowered to carry out the monitoring functions assigned to the ECOSOC in order to ensure states' compliance with the ICESCR. *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. ECOSOC Res. 1985/17 (May 28, 1985). In fulfilling its obligations, the ESCR Committee began adopting General Comments "with a view to assisting the States Parties in fulfilling their reporting obligations." U.N. ECOSOC, *Report on the Twentieth and Twenty-First Sessions*, ¶ 49, U.N. Doc. E/C.12/1999/11 (Jan. 1, 2000). While the status of the General Comments under international law is unclear, and potentially contestable, they still constitute carefully considered and systematic analyses emanating from a body uniquely placed to offer an interpretation of the norms contained in the ICESCR.

64. *General Comment 12*, *supra* note 43, ¶ 8.

65. U.N. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of

duty to protect, and the duty to facilitate or fulfill human rights.[66] The duty to *respect* the right to food is essentially a duty of non-interference with existing access to adequate food. It requires States Parties to refrain from measures that prevent such access. The duty to *protect* the right to food requires State Parties "to ensure that enterprises or individuals do not deprive individuals of their access to adequate food."[67] The duty to *fulfill* the right to food is a positive obligation that the ESCR Committee has interpreted to include the duty to facilitate and to provide. The duty to *facilitate* means that "the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security."[68] "Whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly."[69]

1. Violations of the Right to Food in Zimbabwe

Violations of the right to food in Zimbabwe provide an illustrative example of a government's failure to fulfill its obligation to respect, protect, fulfill, and facilitate the right to food within its territory. In 2000 and 2001, following years of inequitable land distribution inherited from Zimbabwe's colonial past, the Zimbabwean government backed groups of war veterans, youth "militias," and other landless citizens in their forcible invasion of farms. In addition, the government designated thousands of farms for "compulsory acquisition" without compensating the farmers for the cost of the appropriated land.[70] The implementation of the land

Minorities, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987) (*submitted by* Asbjørn Eide).

66. *Id.* ¶¶ 112–14.

67. *General Comment 12*, *supra* note 43, ¶ 15. The Special Rapporteur adds that General Comment 15 on the right to water requires the adoption of "necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems." ECOSOC, U.N. CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15 (2002): The Right to Water*, ¶ 23, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *General Comment 15*].

68. *General Comment 12*, *supra* note 43, ¶ 15.

69. *Id.*

70. AMNESTY INT'L, ZIMBABWE: POWER AND HUNGER—VIOLATIONS OF THE RIGHT TO FOOD 10–14, 18–29 (2004) [hereinafter AI-ZIMBABWE], *available at* http://web.amnesty.org/library/pdf/AFR460262004ENGLISH/$File/AFR4602604.pdf.

reform program had a disastrous impact on access to food in the country. In 2001, Zimbabwe's maize production fell by twenty-eight percent, largely as a result of reduced plantings on large-scale commercial farms seized as part of the land reform process.[71] When combined with a drought in 2002, the already-reduced food production declined further.[72] Between 2001 and 2003, the U.N. Food and Agriculture Organization (FAO) and U.N. World Food Programme assessments indicated that about half of Zimbabwe's population was "food insecure."[73]

Zimbabwe's government responded to the food shortage by restricting international food aid to the country and denying food to its political opponents. The government's Grain Marketing Board, which was given a monopoly on the purchase and distribution of grain, pursued discriminatory policies by denying opposition party supporters access to food.[74] Suspicious that international humanitarian efforts masked support for opposition parties, some local authorities obstructed food aid programs and harassed aid workers.[75] In May 2004, despite independent predictions of another grain production shortfall and estimates that up to 5.5 million Zimbabweans would require food assistance, the national government refused help from the international community, announcing that the country did not need food aid.[76]

As a party to the ICESCR,[77] among other relevant

71. U.N. FAO, GLOBAL INFORMATION AND EARLY WARNING SYSTEM ON FOOD AND AGRICULTURE [GIEWS], FOOD SUPPLY SITUATION AND CROP PROSPECTS IN SUB-SAHARAN AFRICA NO. 3 65 (Dec. 2002) [hereinafter FAO/GIEWS], *available at* ftp://ftp.fao.org/docrep/fao/005/y8255e/y8255e00.pdf.

72. *Id.* at 63. At the same time, many Zimbabweans' income declined: Seventy percent of farm workers lost their jobs as a direct result of the land reform program. *Id.* at 65.

73. AI- ZIMBABWE, *supra* note 70, at 34–35. According to the FAO, food security exists when "all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life." *Id.* at i.

74. *Id.* at 38–39.

75. *Id.*

76. *Zimbabwe Halts Emergency Food Aid*, BBC NEWS, May 11, 2004, http://news.bbc.co.uk/1/hi/world/africa/3704211.stm.

77. *See generally* ICESCR, *supra* note 35; *see also* OFFICE OF THE U.N. HIGH COMM. FOR HUM. RTS., STATUS OF RATIFICATION OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (June 3, 2005), *available at* http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf. While Zimbabwe acceded to the ICESCR on August 13, 1999, *id.*, the treaty must be incorporated by an Act of Parliament to become part of Zimbabwean law. *See* AI-ZIMBABWE, *supra* note 70, at 18. Nevertheless, the act of accession does indicate the state's intention to be bound by the terms of the treaty. *See* Int'l Network for Social, Cultural, and Economic Rights, *Section 5: Background Information on the ICESCR*,

international treaties,[78] the Zimbabwean government's actions were in clear violation of international law. The government violated its duty to respect, protect, and fulfill the right to food in significant ways. When it took measures to prevent access to food it violated its duty to respect the right to food. When it allowed other actors to deprive individuals of their access to adequate food it failed in its duty to protect the right to food. And when it refused to *provide* food for those who were unable to feed themselves, or to *facilitate* access to food by proactively engaging in activities aimed at strengthening people's utilization of resources and means to ensure their livelihood, it violated the duty to fulfill the right to food. Even where resource constraints existed, the government of Zimbabwe was obligated to meet its core obligation to ensure that everyone in its jurisdiction had the minimum essential food to ensure freedom from hunger. In addition, the government was under an obligation to guarantee, with immediate effect, that the right to food was exercised without discrimination of any kind, including discrimination on the basis of political or other opinion.[79] The ESCR Committee has also emphasized that "food should never be used as an instrument of political and economic pressure."[80] The government was clearly in violation of this norm.[81]

Zimbabwe is but one example where local actors facilitated widespread food insecurity. Incidents of national governments violating the right to food abound, such as the Taliban's policy

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http://www.escr-net.org/EngGeneral/ op_rp_5.asp (last visited Jan. 15, 2006).

78. Zimbabwe is also party to the ICCPR, the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, the Convention on the Rights of the Child, and the Convention on the Elimination of all forms of Discrimination Against Women. *See infra* Part III.C.1; *see also supra* notes 52, 54.

79. *See* ICESCR, *supra* note 35, art. 2(2).

80. *General Comment 12*, *supra* note 43, ¶ 37.

81. In addition, in May 2005 the Government of Zimbabwe suddenly launched "Operation Restore Order," a country-wide initiative to "clean-up" its cities. Anna Kajumulo Tibaijuka, U.N. Special Envoy on Human Settlements Issues in Zimbabwe, *Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina* 7 (July 18, 2005), *available at* http://www.unhabitat.org/documents/ZimbabweReport.pdf. The Operation developed into a nationwide demolition and eviction campaign that led to the destruction of homes and/or sources of livelihood of more than 700,000 people. The displacement caused by the operation disrupted normal means of accessing food, destroyed people's sources of income, and largely dismantled the informal sector of the economy. The government once again violated international human rights law by, inter alia, disrupting access to food, arbitrarily depriving people of their homes and sources of livelihood, and, more generally, launching an operation that worsened the already-deteriorating food security situation in the country. At the time of this writing, the government had failed to meaningfully cooperate with the international community to redress the humanitarian crises created by the Operation. *Id.* at 7–9, 38.

prohibiting widowed mothers from working to feed their families in Afghanistan;[82] the North Korean government's attempt to hide the country's worst cases of hunger through restricting freedom of movement within the country (including placing restrictions on international aid agencies), and punishing citizens found foraging for food outside their villages without a travel permit;[83] and countless cases of government corruption or economic mismanagement linked to increased levels of poverty.[84]

B. The Impact of IFIs and TNCs on the Right to Food

While Zimbabwe is a paradigmatic example of a local government violating its own citizens' right to food through independently-made policy choices, even in Zimbabwe international actors have had significant and detrimental impacts on food security.[85] In many other cases, reduction in food security may stem from the actions of IFIs and TNCs, and cannot be explained so easily as the sole result of local government policies and actions.

1. The Impact of IFI Policies and Programs on the Right to Food

The economic prescriptions of the International Monetary Fund (IMF) have been subject to much scrutiny in the past decade, spurred in part by the failure of structural adjustment programs in the 1980s and 1990s,[86] growing protests by grassroots anti-globalization movements,[87] and the Asian financial crisis of the 1990s.[88] Powerful members of the IMF have been charged with dictating the economic

82. Julian West, *U.N. is Poised to Quit Afghanistan in Food Aid Row*, SUNDAY TELEGRAPH (UK), June 3, 2001, § News, Int'l (reporting that Taliban officials also assaulted international aid workers and obstructed aid programs at a time when the country was almost entirely dependent on international food aid).

83. AMNESTY INT'L, STARVED OF RIGHTS: HUMAN RIGHTS AND THE FOOD CRISIS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA (NORTH KOREA) 15–19 (Jan. 2004), *available at* http://web.amnesty.org/library/pdf/ASA240032004ENGLISH/ $File/ASA2400304.pdf.

84. *See generally* Southern African Regional Poverty Network, Poverty Brief: Hunger and Food Security (2003), http://www.sarpn.org.za/documents/d0000285/index.php; ERIC CHETWYND, FRANCES CHETWYND & BERTRAM SPECTOR, CORRUPTION AND POVERTY: A REVIEW OF RECENT LITERATURE (2003), *available at* http://pdf.dec.org/pdf_docs/PNACW645.pdf

85. *See infra* Part I.B.1.a.

86. *See* SACHS, *supra* note 12, at 82.

87. *See, e.g.*, 50 Years is Enough: U.S. Network for Global Economic Justice, http://www.50years.org.

88. *See generally* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2003).

policies of weaker states through structural adjustment programs and the forced liberalization of developing country markets. Critics have argued that the conditions imposed in return for IMF financial assistance undermine national sovereignty.[89] Most importantly for this discussion, the IMF has also come under sharp attack for the impact that its policies have on the social and economic rights of populations in borrowing countries, including the right to food.[90]

a. The Structural Adjustment Era

The IFI-mandated structural adjustment era of the 1980s–1990s was ostensibly designed to correct four perceived causes of a nation's economic problems: excessive government intervention in markets, excessive government spending, excessive state-ownership, and poor governance.[91] The package of economic reforms mandated by structural adjustment programs therefore focused on promoting the efficiency of the free market through liberalization, budget cuts, privatization, and good governance.[92] The structural adjustment agenda was not without merit. Closed markets and excessive state control were at the heart of many economic crises facing poor countries.[93] By many accounts, however, structural adjustment failed to deliver, particularly with regard to improving food security in borrowing countries.[94]

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89. *Id.* at 9.

90. *See* Philip Alston, Symposium, *Immediate Constraints on Achieving the Right to Food: The International Monetary Fund and the Right to Food*, 30 HOW. L.J. 473 (1987); Sigrun I. Skogly, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (2001).

91. SACHS, *supra* note 12, at 81.

92. *Id.*

93. *Id.* at 81–82.

94. *See generally* AMITAVA MUKHERJEE, STRUCTURAL ADJUSTMENT PROGRAMME AND FOOD SECURITY: HUNGER AND POVERTY IN INDIA (1994); P. ROBBINS & R.S.B. FERRIS, THE IMPACT OF GLOBALIZATION ON THE AGRICULTURAL SECTORS OF EAST AND CENTRAL AFRICAN COUNTRIES (2003); The Whirled Bank Group, *Structural Adjustment Program*, http://www.whirledbank.org/development/sap.html (last visited Apr. 20, 2006); Oxfam Policy Department, *A Case for Reform: Fifty Years of the IMF and the World Bank* (1995) *available at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/09/25/000178830_98101911304260/Rendered/PDF/multi_page.pdf; Friends of the Earth & The Development Group for Alternative Policies, *On the Wrong Track: A Summary Assessment of IMF Interventions in Selected Countries* (Jan. 1998), http://www.developmentgap.org/wrong.html; Public Citizen, *Survey of IMF Impact on African Countries*, http://www.citizen.org/trade/africa/house_fight/articles.cfm?ID=7688 (last visited Apr. 20, 2006); Ross Hammond, Evangelical Lutheran Church of Tanzania, *The Impact of IMF Structural Adjustment Policies on Tanzanian Agriculture*, http://www.developmentgap.org/wrong.html#Tansanzia (last visited Feb. 6, 2006).

Countries under structural adjustment were often required to remove price controls and state subsidies. Budget balancing was achieved through cuts in government spending on social programs, including social services to feed poor and hungry populations.[95] Additionally, structural adjustment programs mandated the removal of food subsidies, often resulting in substantial price hikes, with a disproportionate impact on the poorest and most vulnerable in the population.[96] Many countries under structural adjustment were also required to remove subsidies from agricultural inputs, such as fertilizer and pesticides, resulting in an increase in input prices and decrease in their use for subsistence crop production.[97]

Structural adjustment programs also encouraged countries to focus on the production and export of "cash crops," such as cocoa and coffee, to earn foreign exchange while foregoing the production of basic food crops. The prices of such cash crops continued to fluctuate erratically on the global market, depressing prices and reducing returns on the country's investment.[98] Currency devaluation, when combined with the removal of price controls, resulted in further extreme price hikes, increasing poverty to such an extent that riots erupted in a number of countries.[99] Moreover, currency devaluations and the removal of price controls further increased cash crop production relative to basic food crops.[100]

According to a World Bank study, countries in Africa adhering to the IMF structural adjustment policies experienced slower growth in agricultural production than countries that did not adhere to them.[101] An IMF structural adjustment program in Senegal that began in 1986 led to a drop in the production of basic food crops, such as vegetables, corn, and millet, and undermined food security.[102] By 1995, forty percent of the population was classified

95. Ziegler Report, *supra* note 14, at 21 (noting that upwards of twenty percent of national budgets are sometimes dedicated to debt servicing programs).

96. MUKHERJEE, *supra* note 94, at 119–20, 124–25.

97. Christina H. Gladwin & Anne M. Thomson, *Food or Cash Crops: Which is the Key to Food Security?*, *available at* http://www.fred.ifas.ufl.edu/CRSP/food.htm (last visited Feb. 5, 2006); ROBBINS & FERRIS, *supra* note 94, at 16–17; MUKHERJEE, *supra* note 94, at 82.

98. The Whirled Bank Group, *supra* note 94.

99. In India, for example, the landless class and small farmers had to reduce food consumption by up to fifty percent as a result of higher prices after the implementation of structural adjustment. MUKHERJEE, *supra* note 94, at 203–05; *see also* SACHS, *supra* note 12, at 74 ("In the past, IMF-led austerity has frequently led to riots, coups, and the collapse of public services."); The Whirled Bank Group, *supra* note 94.

100. SACHS, *supra* note 12, at 156.

101. Oxfam Policy Department, *supra* note 94, at 15 (citing WORLD BANK, ADJUSTMENT IN AFRICA: REFORM, RESULTS AND THE ROAD AHEAD (1994)).

102. Friends of the Earth, *supra* note 94 (summarizing Yassine Fall, Partners for African

as hungry—up seven percent from 1990.[103] In Tanzania, where a structural adjustment program also began in 1986, the Tanzanian government likewise implemented currency devaluations, cuts in agricultural subsidies, and trade liberalization. By 1996, Tanzania faced a severe food shortage due in part to the removal of subsidies for fertilizers.[104] The World Bank concluded that infant mortality, nutrition, and primary school enrollment were "stagnant or worse, compared to the level of the 1970s or early 1980s," prior to IMF structural adjustment.[105] The increased costs of agricultural inputs and a growing emphasis on cash crop production under structural adjustment policies in Zimbabwe reduced the capacity of communities to produce food for local consumption and had a devastating impact on food security. By the end of the 1990s, thirty percent of children under the age of five were considered chronically malnourished.[106]

In the aggregate, the traditional refrain that short-term pain would lead to long-term economic gains did not hold true under structural adjustment. By some estimates, at the start of the twenty-first century, Africa as a whole was poorer than it was during the 1960s.[107] Correspondingly, the food security situation in Africa worsened considerably over the past three decades due to a combination of policy choices and population growth.[108] Without substantial food policy reforms and enhanced international and

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Development and Economic Justice, *Gender and Social Dimensions of IMF Policies in Senegal*, *in* THE ALL-TOO-VISIBLE HAND: A FIVE COUNTRY LOOK AT THE LONG AND DESTRUCTIVE REACH OF THE IMF (The Development Group for Alternative Policies ed., 1999)), *available at* http://www.developmentgap.org/imftitle_and_overview.html.

103. *Id.*; Public Citizen, *supra* note 94.

104. Friends of the Earth, *supra* note 94.

105. Hammond, *supra* note 94.

106. STRUCTURAL ADJUSTMENT PARTICIPATORY REVIEW INT'L NETWORK, A MULTI-COUNTRY PARTICIPATORY ASSESSMENT OF STRUCTURAL ADJUSTMENT 118 (Apr. 2002). IMF structural adjustment policies also hurt poor farmers in Zambia by restricting their access to credit for production and marketing. *See* OXFAM POLICY DEPARTMENT, A CASE FOR REFORM: FIFTY YEARS OF THE IMF AND THE WORLD BANK 11 (1995). In Ghana, public spending on health, education, and agriculture fell under IMF structural adjustment programs. Public Citizen, *Survey of IMF Impact on African Countries*, *available at* http://www.citizen.org/trade/africa/house_fight/articles.cfm?ID=7688 (last visited Apr. 20, 2006).

107. *See* SACHS, *supra* note 12, at 189.

108. Mark W. Rosegrant et al., *Looking Ahead: Long-Term Prospects for Africa's Agricultural Development and Food Security* xi (Int'l Food Policy Research Institute, 2020 Discussion Paper 41, Aug. 2005) ("Although the proportion of malnourished individuals in Sub-Saharan Africa has remained in the range of 33–35 percent since around 1970, the absolute number of malnourished people in Africa has increased substantially with population growth, from around 88 million in 1970 to an estimate of over 200 million in 1999–2001.")

national investment in the agricultural sector, the absolute numbers of malnourished children in sub-Saharan Africa will continue to rise, according to 2005 projections.[109] The negative effects of structural adjustment are not limited to Africa. According to a multi-country study conducted by civil society organizations in partnership with the World Bank, the net effects of structural adjustment in Bangladesh, Ecuador, Hungary, Mexico, and the Philippines were greater impoverishment and marginalization of local communities.[110]

b. A New Era?: Reforms to IFI Lending Programs

Following nearly two decades of economic upheavals in borrowing countries, international financial institutions are now searching for more effective approaches to tackling poverty.[111] Most notably, in 1996 donor countries committed themselves to addressing the debt crisis faced by Heavily Indebted Poor Countries (HIPC) through an initiative to reduce debt and make funds available for poverty reduction.[112] In 1999, the World Bank and IMF initiated the Poverty Reduction Strategy Papers (PRSPs) process, which, according to the IMF, "result[ed] in a comprehensive country-based strategy for poverty reduction."[113] The PRSPs underpin the HIPC initiative and attempt to make aid more effective in reducing poverty. Significant efforts have also been made to reform IFI conditionality in recent years, particularly by the World Bank.[114]

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109. *Id.* at 12.

110. STRUCTURAL ADJUSTMENT PARTICIPATORY REVIEW INT'L NETWORK, *supra* note 106, at 173–87. This conclusion is consistent with an econometric analysis of participation in IMF agreements, which found that, after controlling for selection bias of countries entering into such agreements, IMF policies are regressively redistributive and hurt growth. JAMES RAYMOND VREELAND, THE IMF AND ECONOMIC DEVELOPMENT 153–54 (2003).

111. *See* SACHS, *supra* note 12, at 74.

112. *See* The World Bank, *The Enhanced HIPC Initiative*, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20260411~menuPK:64166739~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html (last visited Apr. 25, 2006); The World Bank Group, *The HIPC History*, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20263277~menuPK:528655~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html (last visited Apr. 25, 2006).

113. Int'l Monetary Fund [IMF], *A Factsheet: Poverty Reduction Strategy Papers* (Sept. 2005), *available at* http://www.imf.org/external/np/exr/facts/prsp.htm.

114. For example, the World Bank in 2004 revised its conditionality guidelines with an aim to "help poor people by making the Bank a more effective development partner in supporting countries' strategies for growth and poverty reduction and for reaching the Millennium Development Goals." WORLD BANK, FROM ADJUSTMENT LENDING TO DEVELOPMENT POLICY LENDING: UPDATE OF WORLD BANK POLICY 1 (Aug. 2004).

These efforts have not, however, succeeded in solving many of the problems created by structural adjustment. While conditionality has been reduced in several areas, the increasing number of "non-binding conditions" has generally been perceived as requirements by loan recipients.[115] A United Nations Development Programme (UNDP) review of PRSPs concluded that the macroeconomic prescriptions contained in the documents were largely similar to earlier stabilization policies.[116] In sum, countries are still required to emphasize macroeconomic considerations, fiscal reform, and privatization,[117] without adequately addressing the impact of these policies on poverty reduction.[118]

The 2005 famine in Niger is a case study in the negative impact of policies implemented with an emphasis on macroeconomic considerations and without a focus on preserving a population's right to food. The aid group Médecins Sans Frontières (MSF) contends that economic policies encouraged by IFIs contributed to the famine that struck Niger in 2005.[119] The drought and locusts that reduced Niger's harvest in 2004 do not fully explain the subsequent epidemic of hunger; despite the diminished yield, the country still produced sufficient food to feed its own population.[120] According to MSF, the effects of natural events could have been mitigated when the first signs of a food crisis appeared in early 2005.[121] The Nigerien government, however, was urged by international financial

115. Hetty Kovach, *European Network on Debt and Development, Loosening the Leash? World Bank Conditionality Review: Eurodad Policy Briefing* 4-5 (Aug. 2005).

116. UNDP, *Review of the Poverty Reduction Strategy Paper* 5 (2001)

117. The privatization of state-owned enterprises is not in and of itself a bad thing. The privatization of certain social services can lead to greater efficiencies. But as discussed below, privatization does not always bring the benefits it promises. *See infra* notes 146–48 and accompanying text.

118. Fantu Cheru, *The Highly Indebted Countries (HIPC) Initiative: A Human Rights Assessment of the Poverty Reduction Strategy Papers (PRSP)*, ESOCOR, U.N. CHR, 57th Sess., at 11–14, U.N. Doc. E/CN.4/2001/56 (Jan. 2001); *see also* IRÙNGÚ HOUGHTON, ACTIONAIDUSA, UP AGAINST THE WIND: ACTIONAID'S PRS EXPERIENCE 4 (Apr. 2002), *available at* www.actionaidusa.org/pdf/Upagainstwinds.pdf (concluding that, while reforms to public enterprises and the social service sector are assessed in relation to their poverty reduction potential, "core monetary, fiscal, structural reform provisions are not being subjected to a clear analysis of their impact on poverty and poor people").

119. *August Will Be the Worst Month in Niger*, MÉDECINS SANS FRONTIÈRES NEWS, Aug. 8, 2005, *available at* http://www.msf.org/msfinternational/invoke.cfm?objectid=949B295A-E018-0C72-099A049D222E25A1&component=toolkit.article&method=full_html (last visited Feb. 9, 2006).

120. Interview by Margaret Warner with Christopher Barrett, Co-Director, African Food Security and Natural Resources Management (Aug. 4, 2005), *available at* http://www.pbs.org/newshour/bb/africa/july-dec05/niger_8-04.html.

121. *August Will be the Worst Month in Niger*, *supra* note 119.

institutions, key donor countries, and U.N. agencies to refrain from acting in a manner that would destabilize the local food market or drain resources from ongoing development projects. As a result, instead of organizing free food distributions to vulnerable populations, officials attempted a series of "market-based" approaches, including offering cereals at reduced prices to families that could ill-afford even the subsidized rate.[122] As the situation deteriorated, authorities attempted to loan grain to people. Ultimately, "[e]ven as thousands perished by late June [2005], some donors praised the Nigerien government for respecting the market and not distributing free food."[123]

The drought and locusts also struck Niger's western neighbor Mali, along with a number of other countries throughout western and central Africa. Mali, however, was able to escape "famine" by reportedly breaking with the strictly "market-based" approaches to dealing with its shortfalls. Upon ascertaining that the previous year's harvest was below average, Mali's government immediately distributed 10,000 tons of free millet to those who were hardest hit; as of August 12, 2005, the government had handed out an additional 11,000 tons.[124] According to the World Food Programme (WFP), these timely interventions averted a larger-scale crisis like the one facing Niger.[125]

In response to allegations that its policies played a role in creating famine conditions in Niger, Thomas Dawson, the Director of External Relations at the IMF claimed that Niger's structural adjustment program accommodated famine-related spending.[126] The IMF further argued that structural adjustment measures, like a short-lived Value-Added Tax (VAT) to milk, sugar, and wheat in January 2005, were necessary to increase domestic revenue for poverty-reduction programs.[127] These explanations, however, did not stem criticism from aid groups who felt that "[t]here ha[d] to be a better

122. *Id.*

123. *Id.*; *see also* Alex Duval Smith, *IMF and EU Are Blamed for Starvation in Niger*, INDEPENDENT (UK), Aug. 1, 2005, at 23; Craig Timberg, *The Rise of a Market Mentality Means Many Go Hungry in Niger*, WASHINGTON POST, Aug. 11, 2005, at A17.

124. Jeevan Vasagar, *Don't Blame the Locusts*, GUARDIAN (U.K.), Aug. 12, 2005, *available at* http://www.guardian.co.uk/famine/story/0,12128,1547852,00.html; U.N. Office for the Coordination of Humanitarian Affairs, *Mali: No Famine, But a Perennial Problem of Poverty*, Integrated Regional Information Network News [IRIN NEWS], Aug. 15, 2005, *available at* http://www.irinnews.org/report.asp?ReportID=48586&SelectRegion=West_Africa.

125. Vasagar, *supra* note 124.

126. Thomas C. Dawson, *IMF Is Combating Niger Famine*, INDEPENDENT (UK), Aug. 5, 2005, at 36.

127. *Id.*

safety net for the poorest of the poor during a crisis even while long term development continue[d]."[128]

The Nigerien government's refusal to distribute free food to its population is arguably in violation of its human rights obligations under the ICESCR[129] which, according to the ESCR Committee, require states to directly provide food "[w]henever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal."[130] Like many poor countries, Niger essentially faced a conflict between its obligations to comply with binding U.N. treaty commitments and its obligations to live up to IFI agreements. In such a situation, a government like Niger may be left with no choice but simply to "ignore the human rights treaty obligations, as the pressure from largely donor-imposed [IFI] conditionality is stronger. Countries may be punished for violating IFI and WTO conditions, but not those of the UN."[131]

As the case of Niger illustrates, a main concern of IFI lending practices and conditionality is that they deflect accountability of states to their citizens (and their human rights obligations) and instead engender government accountability only to IFI commitments. If these commitments are negotiated and monitored without a concern for international human rights obligations, then human rights commitments—which have relatively weak enforcement provisions when compared to IFI commitments—lose out. The extent to which macroeconomic policy reforms may run counter to a borrowing country's human rights obligations under the ICESCR or other international human rights treaties, however, is virtually absent from IFI policy considerations. The IMF/World Bank also does not consider the human rights obligations of member states to refrain from enforcing conditions that undermine human rights obligations of borrowing countries. Incorporating a human rights framework into IFI policies may help borrowing countries avoid these conflicts between competing international obligations and may mitigate the resulting impact on poor and vulnerable populations. Part II.B of this Article argues that it is possible to hold IFIs accountable for violations of the right to food through IFI member states, many of which have ratified the ICESCR.

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128. *August Will Be the Worst Month in Niger*, *supra* note 119 (quoting Dr. Milton Tectonidis, a nutritional specialist for MSF in Niger).

129. Niger acceded to the ICESCR on June 7, 1986. OFFICE OF THE U.N. HIGH COMM. FOR HUM. RTS., *supra* note 77, at 8.

130. *General Comment 12*, *supra* note 43, ¶ 15.

131. Canadian Council for International Co-operation, *Reality of Aid 2004* (2004), *available at* http://www.ccic.ca/e/docs/002_aid_roa_2004.pdf.

2. The Impact of TNCs on the Right to Food

In addition to international financial institutions, transnational corporations are increasingly playing a role in determining the level of food security for populations around the world. As national economic policies, which are often dictated by international financial institutions, encourage the replacement of diverse crops intended for local consumption with commercial crops intended for export,[132] investment in the agricultural sector by transnational corporations has, in many instances, had a negative impact on food production. It is estimated that every year an extra million hectares are being transferred from food crop to export crop production—a process driven in large part by TNCs.[133] In Central America, for example, transnational corporations have been heavily involved in the production of non-traditional exports—mainly fruits, vegetables, and flowers—for sale in the North American market.[134] As a result of this emphasis, land used for cultivation of basic food crops in Chile decreased by nearly thirty percent from 1989 to 1993, as non-traditional exports replaced beans, wheat, and other staple foods.[135]

The replacement of varied local food crops with commercial cash crops can also damage local ecosystems, leading to decreased food production over the long-term. While seed and fertilizer developments during the Green Revolution of the 1960s initially increased food production, TNCs subsequently purchased many of the family seed companies, and the technology proved unsustainable. Rice yields have steadily declined since the 1960s, from ten tons to seven tons per hectare, according to studies by the International Rice Research Institute.[136] Additionally, due to marketing of seeds by TNCs, thousands of traditional plant varieties have been lost. This dramatic reduction in biodiversity threatens agriculture and food security, as it decreases the available range of genetic material for developing crops with increased yields and enhanced pest and disease resistance.[137]

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132. *See supra* Part I.B.1.

133. JOHN MADELEY, BIG BUSINESS, POOR PEOPLES: THE IMPACT OF TRANSNATIONAL CORPORATIONS ON THE WORLD'S POOR 39 (1999).

134. For example, TNCs control about twenty-five percent of the total production of non-traditional export crops and handle the distribution and transport of a significant portion of these crops. MADELEY, *supra* note 133, at 65.

135. *Id.* (noting that foreign corporations own three of the top four companies involved in the trade of non-traditional exports).

136. *Id.*

137. *Id.*

Accompanying the growth of the non-traditional export market, food producers have increasingly relied on pesticides in order to satisfy North American consumers' demand for blemish-free fruit and vegetables.[138] A major side-effect of pesticide over-use is new pests and viruses that have significantly harmed food crop production, including bean production in Brazil and Chile.[139] Additionally, tobacco producers are cutting down large numbers of trees in semi-arid environments in order to service the growing international market. The resulting deforestation and soil erosion has negatively impacted food production in countries like Kenya, which are already at risk of food shortages.[140] TNCs have also contributed to over-fishing. Large trawlers, owned by TNCs from northern countries, are responsible for the unsustainable depletion of the world's fish supplies. They have also damaged near-shore fishing areas in some developing countries, decreasing the availability of this low-cost source of protein for many people living in coastal communities.[141]

Outside of the agricultural sector, there are numerous documented instances in which the activities of TNCs, particularly those engaged in resource extraction, have interfered with food production in their areas of operation. In southeastern Nigeria, repeated oil spills on fields and pipelines operated by Royal/Dutch Shell and other TNCs destroyed the water supplies and farmlands of the Ogoni people. After a spill affecting the village of Yaata in April 2001, for example, maize, cassava, and yam crops were stained with crude oil. Much of the village's livestock had either died or was dying from eating polluted vegetation and drinking contaminated water, while "dead fish rose to the surface of creeks and ponds."[142] Residents of the Oriente Region of Ecuador, meanwhile, have testified to a seventy percent decline in agricultural productivity, as well as increased rates of cancer and other serious diseases, as a result of massive amounts of oil wastewater dumped into local

138. *Id.* at 67.

139. *Id.*

140. *Id.* at 54–55. Approximately seventy percent of tobacco is produced by five major corporations. They are Philip Morris, BAT Industries, RJF Nabisco, Rothmans, and Japan Tobacco. *Id.* at 48. Four-fifths of tobacco is produced in developing countries. *Id.* at 49.

141. *Id.* at 80–81, 83.

142. IRIN NEWS, *Nigeria: IRIN Focus on Ogoni Oil Spill*, www.irinnews.org/report.asp?ReportID=8131&SelectREgion=West_Africa&SelectCountry=Nigeria (last visited Feb. 21, 2006); *see also* David Kinley & Junko Tadaki, *From Talk to Walk: The Emergency of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 934 (2004) (citing Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L. J. 1963, 1964–65 (1996)).

waterways by ChevronTexaco over a period of two decades.[143] PT Inco's mining and smelting facilities in Soroako, Indonesia occupy what was formerly the community's prime agricultural land. Its mining activities have depleted the fish and shellfish stocks in the local lake and decreased the agricultural productivity of the remaining lands, due to heavy water, air pollution, and erosion.[144] In Plachimada, India, a Coca-Cola bottling plant was forced to shut down after local activists complained that the company had usurped local water supplies, destroyed paddy fields, and distributed toxic cadmium-laden sludge from the plant as free "fertilizer" to local farmers.[145]

When accompanied by monopolization by TNCs, the privatization of the water sector can also be detrimental to food security because of its effects on local producers.[146] Privatization often occurs before adequate regulatory or competition frameworks are put into place. Moreover, TNCs may be able to persuade governments, sometimes through corruption, to give them a monopoly over the privatized sector. When water sources are privatized in a manner that deprives farmers of water for use in irrigation, or that makes the provision of water unaffordable, then the right to food is affected.[147] As noted by the Special Rapporteur on the Right to Food, "[s]afe drinking water is essential to adequate nutrition" and highly important for irrigation purposes, "given that this is essential for food production and for ensuring food

143. Amazon Watch, *Pressure Mounts on ChevronTexaco to Confront its Responsibility for the "Rainforest Chernobyl"* (Apr. 26, 2004), *available at* http://www.amazonwatch.org/newsroom/view_news.php?id=781; Miguel San Sebastián & Juan Antonio Córdoba, *"Yana Curi" Report: The Impact of Oil Development on the Health of the People of the Ecuadorian Amazon* (1999), *available at* http://www.amazonwatch.org/amazon/EC/toxico/downloads/yanacuri_eng.pdf; Amnesty Int'l, Business and Human Rights, *Ecuador—Oil Rights or Human Rights?*, http://www.amnestyusa.org/business/ecuador.html (last visited Apr. 20, 2006).

144. Chris Ballard, *Human Rights and the Mining Sector in Indonesia: A Baseline Study* 20–22 (Mining, Minerals, and Sustainable Development No. 182, Oct. 2001), http://www.natural-resources.org/minerals/CD/docs/mmsd/othercountries/indonesia_hr_baseline.pdf.

145. D. Rajeev, *Sludge Dirt on Coca-Cola*, ASIA TIMES ONLINE, Aug. 22, 2005, http://www.atimes.com/atimes/South_Asia/GH23Df02.html.

146. *See generally* VANDANA SHIVA, WATER WARS: PRIVATIZATION, POLLUTION AND PROFIT (2002).

147. STIGLITZ, *supra* note 88, at 54–58; *see also* U.N. CHR, *Second Submission of Jean Ziegler, Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights to the Intergovernmental Working Group for the Voluntary Guidelines on the Right to Adequate Food, available at* http://www.righttofood.org/SECOND%20SUBMISSION%20SR%20RIGHT%20TO%20FOOD.htm (last visited Apr. 20, 2006) ("Water is a key element of the right to food.").

availability, particularly in countries where the poor depend primarily on their own production."[148]

Finally, TNCs can also have detrimental effects on the right to food in their role as employers. There are many documented instances in which TNCs, or their suppliers in developing countries, have failed to pay their workers enough to purchase sufficient food for their families. The National Labor Committee has published reports documenting insufficient wage payment, as well as many other labor abuses, in TNC supplier factories in Honduras,[149] China,[150] and Bangladesh,[151] among other countries. While TNCs often argue that their supplier factories pay average or above-average wages for the countries in which they operate—and workers often express the sentiment that it is better to be underpaid than unemployed—the workers' families' right to food is nevertheless being affected when they cannot afford to provide their children with adequate nutrition.

With increasing consolidation in the agri-food industry, transnational corporations have also been able to exert control over prices of both agricultural inputs and outputs: five corporations control the global trade in grain, while ten corporations control thirty-two percent of the global commercial seed market, including one hundred percent of the genetically modified seed.[152] High prices for

148. ECOSOC, U.N. CHR, *Report Submitted by the Special Rapporteur on the Right to Food in Accordance with Commission on Human Rights Resolution 2002/25*, 59th Sess., ¶ 35, U.N. Doc. E/CN.4/2003/54 (Jan. 10, 2003) (*prepared by* Jean Zielger) [hereinafter Ziegler Report II]; *see also General Comment 15*, *supra* note 67, ¶ 7; *Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses*, U.N. Doc. A/51/869 (Apr. 11, 1997).

149. *See, e.g.*, Nat'l Labor Comm., *Han-Soll Factory: Sweating for the NBA and NFL* (July 2005), *available at* http://www.nlcnet.org/news/han_sol_report_web.pdf.

150. *See, e.g.*, Nat'l Labor Committee & Students and Scholars Against Corporate Misbehavior, *Disney's Children's Books Made with the Blood Sweat and Tears of Young Workers in China* (Aug. 18, 2005), *available at* http://www.nlcnet.org/news/china/pdfs/hung_hing.pdf.

151. *See, e.g.*, National Labor Comm., *Ending the Race to the Bottom* (undated), *available at* http://www.nlcnet.org/campaigns/shahmakhdum/1001/bangla%20rpt%20final.pdf; National Labor Comm., Disney Sweatshop in Bangladesh (2004), *available at* http://www.nlcnet.org/campaigns/niagra/niagra-bangladesh.pdf.

152. *Talking with Vandana Shiva*, PEACEWORK, July–Aug. 2000, *available at* http://www.afsc.org/pwork/0700/072k12.htm (reviewing VANDANA SHIVA, STOLEN HARVEST: THE HIJACKING OF THE GLOBAL FOOD SUPPLY (2000)). In addition to its effect on farmers in developing countries, the increasingly consolidated control over international food production and supply affects the choices of consumers in developed countries, making it increasingly difficult and expensive in many areas to find fresh, locally-grown produce, or food grown from non-genetically modified seeds, without the use of commercial pesticides and fertilizers. *Id.*

chemical pesticides, fertilizers, and seeds distributed by large TNCs such as Monsanto have raised the cost of agricultural production while the prices paid to farmers for their produce have in many cases stagnated or declined; as a result, farmers in developing countries often lose money on the sale of their crops and can barely afford to feed their own families.[153]

Would it stretch traditional conceptions of corporate duty too far to hold corporations responsible for the types of rights violations described above? The U.N. Global Compact, launched in 2000,[154] urges corporations to support and respect the protection of international human rights within their "sphere[s] of influence."[155] Steven Ratner employs a concept similar to the "sphere of influence" when he claims that corporate duties are a function of, among other factors, the corporation's "nexus" to the population whose rights have been affected.[156]

In many of the cases described above, the affected populations clearly fall within the TNC's sphere of influence. The nexus between the TNC and the population is easy to see, for example, where the TNC is the employer of the affected persons or where the TNC's physical operations destroy the food supplies of its neighbors. In other cases, the link is less direct, but a case for regulation of TNC activity may still be made. Where a corporation is the sole or primary supplier of agricultural inputs and/or purchaser of agricultural products from a region, for example, the farmers in that region could arguably fall within the corporation's sphere of influence. Returning to Amartya Sen's argument that hunger results in large part from an individual's lack of "entitlement" over the means to either purchase food (through earning a sufficient income) or produce food (through favorable agricultural conditions and access to agricultural inputs), the cases above demonstrate the role of TNCs in contributing to violations of the right to food by obstructing access

153. ActionAid Int'l, *Power Hungry: Six Reasons to Regulate Global Food Corporations* 11–17 (2005), http://www.eldis.org/static/DOC17252.htm; Peter O'Driscoll, *Part of the Problem: Trade, Transnational Corporations, and Hunger*, CENTER FOCUS (Mar. 2005), http://www.globalpolicy.org/socecon/tncs/2005/03problem.pdf; *see also* VANDANA SHIVA, STOLEN HARVEST: THE HIJACKING OF THE GLOBAL FOOD SUPPLY (2000).

154. Amnesty Int'l, *U.N. Global Compact: The Nine Principles*, *available at* http://web.amnesty.org/pages/ec-globalcompact9principles-eng (last visited Apr. 25, 2006); *see also infra* notes 307–08.

155. While the Compact is non-binding, corporations that choose to join the Compact commit to upholding nine basic principles for safeguarding human rights, labor standards, and the environment. *Id.*

156. Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 506–11 (2001).

to these vital entitlements.[157] Part II.C of this Article argues that TNCs can be held indirectly accountable for these violations via their relationship to their home state.

C. *The State-centric and Jurisdictional Constraints of International Human Rights Law*

Implementation of human rights obligations has traditionally focused on the actions of States Parties within their own territory, but as the discussion above has shown, the right to food is threatened not only by states, but by IFIs and TNCs whose actions decrease the ability of individuals to meet their food needs. In addition, many states may have an effect on the right to food outside their own territory through their membership in IFIs or their support for TNCs. An effective approach to implementing the right to food will require mechanisms to hold IFIs and TNCs accountable for violations, and to hold states accountable to individuals located outside their jurisdiction.

While the content of the right to food is increasingly well-defined, the jurisdictional constraints and the state-centric nature of the international human rights legal framework undermine its effective implementation. States Parties' obligations to individuals are largely limited to those who are located within their territory or under their jurisdiction.[158] The responsibility of states to those outside their jurisdiction is therefore unclear. Moreover, human rights law is state-centric: States bear exclusive legal responsibility for ensuring human rights. Non-state actors, such as TNCs, are not subjects under international human rights law. Effective implementation of the right to food therefore requires a clearer articulation of the extraterritorial obligations of States Parties to the ICESCR, and a means to hold TNCs and IFIs accountable for human rights violations via their relationship to the state. Such accountability must also be rooted in a doctrinal framework that can be reconciled with the more conservative articulations of state responsibility under international law jurisprudence.

The reports of the U.N. Special Rapporteur on the Right to Food have attempted to address these constraints by expanding the extraterritorial application of the ICESCR and by addressing the

157. *See generally* Amartya Sen, *Ingredients of Famine Analysis: Availability and Entitlements*, 96 Q.J. ECON. 433 (1981).

158. For a discussion of the meaning of jurisdiction under international human rights law, *see infra* Part II.A.

accountability of TNCs and IFIs via their relationship to the state.[159] While asserting that the primary obligation to realize the right to food rests with national governments,[160] the Special Rapporteur notes that governments also have "extranational obligations" to respect, protect, and facilitate the right to food.[161] He argues that the duty to respect extends to actions that have a negative impact on the right to food for people in other countries.[162] Accordingly, a country must refrain from imposing food-related sanctions or embargoes and must ensure that its trade policies and relations do not violate the right to food of people in other countries.[163] Under the duty to protect, a state must protect individuals against the harmful activities of TNCs investing and operating in that state (what we will call *host* state obligations). The Special Rapporteur adds that states also have a duty to prevent violations by their companies and corporations operating abroad (what we will call *home* state obligations).[164] The obligation to facilitate has also been interpreted to require states to build a social and international order in which the right to food can be fully realized.[165] In part this requires that states "take account of their 'extranational obligations' in their deliberations in multilateral organizations, including the IMF, World Bank and the World Trade Organization (WTO)."[166]

In essence, the Special Rapporteur is expanding the extraterritorial application of states' obligations under the ICESCR. Under the view that states' duties must arise wherever their actions

159. Ziegler Report II, *supra* note 148, ¶¶ 26-27; U.N. CHR, *Submission of Jean Ziegler, Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights to the March 2003 Meeting of the IGWG for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, ¶ 18 (2003), *available at* http://www.fao.org/righttofood/common/ecg/23811_en_un.rapp.i.pdf (last visited Apr. 25, 2006) [hereinafter *Submission of Jean Ziegler*]; Press Release, U.N. GA, 57th Sess., Third Committee (Social, Humanitarian, Cultural), 43d, 44th mtgs., U.N. Doc. GA/SHC/3721, *Anyone Dying From Hunger was Dying From Murder, Special Rapporteur Tells Third Committee, as Discussion on Human Rights Continues*, U.N. Doc. 6A/SHC/3721 (Nov. 11, 2002) [hereinafter *Anyone Dying*]; U.N. CHR, *Right to Food: U. N. Special Rapporteur's Report to UNCHR*: New *Developments Offer Hope for the Right to Food*, 59th Sess. (2003) [hereinafter *Right to Food*].

160. Ziegler Report II, *supra* note 148, ¶ 29; *Submission of Jean Ziegler*, *supra* note 159, ¶ 18; *Anyone Dying*, *supra* note 159.

161. Zeigler Report II, *supra* note 148, ¶ 29.

162. *Id.*

163. *Id.*

164. *Right to Food*, *supra* note 159.

165. Ziegler Report II, *supra* note 148, ¶ 29.

166. *Id.*

have a human rights effect,[167] such an approach is plausible. Under a justice and morality framework, it is even laudable.[168] Ultimately, and problematically, such normative guidance is at odds with international law in three respects.

First, as noted above, the state only bears responsibility for respecting, protecting, and fulfilling the rights of those within its territory or under its jurisdiction. Jurisdiction has been narrowly interpreted by international law jurisprudence to apply only to situations where a state exercises "effective control."[169] How then can a state be obligated to ensure that its policy-setting in international financial institutions does not violate the right to food of people in territories over which it does not exercise effective control?

Second, non-state actors are not legal subjects under international human rights law. They must therefore be regulated via the state. Yet the indirect regulation of TNCs via states is fraught with problems. Economic arrangements between a TNC and its host state may restrict the host state's ability to regulate TNC activity in practical and legal terms. Moreover, under international law, the home state is generally not liable for the conduct of non-state actors unless the non-state actors are de facto agents of the state, or the non-state actors were acting "on the instructions of, or under the direction or control of, that State in carrying out the [wrongful] conduct."[170] Invoking home state accountability also implicates the extraterritorial reach of the ICESCR beyond a state's jurisdiction.

Third, states have obligations under multiple legal regimes, including contracts with IFIs and TNCs, that may come into conflict with their human rights obligations. The development of norms outside the covenant model to cover other areas of international law and to reconcile the incompatibility of multiple legal regimes is a precursor to building an international order where the right to food can be realized. Moreover, powerful actors such as the United States have yet to ratify the Covenant. Their responsibility may best be addressed under customary international law. The remainder of this Article attempts to resolve the incompatibilities described above by holding TNCs and IFIs accountable via their relationship to the state

167. *See, e.g.*, Fons Coomans, *Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, *in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 183, 187 (Fons Coomans & Menno T. Kamminga eds., 2004).

168. *See generally* POGGE, *supra* note 15.

169. *See infra* Part II.A.1.

170. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session*, U.N. GAOR, 56th Sess, Supp. No. 10 at 43, UN Doc A/56/10 (2001); *see also infra* notes 341 and accompanying text.

and by locating the right to food in customary international law.

II. INTERNATIONAL FINANCIAL INSTITUTIONS AND TRANSNATIONAL CORPORATIONS: ACCOUNTABILITY VIA THE STATE

Globalization is characterized by the expansion of transnational corporations, by an increased role for international financial institutions, and by a proliferation of multilateral agreements and arrangements. As described in Part I, IFIs, such as the IMF, have actively promoted macroeconomic reforms in the global south that have facilitated the expansion of TNCs and the promotion of free trade. The IMF has also conditioned loans to developing countries on reductions in social spending and re-tooling production to service international markets, sometimes at great costs to social welfare and domestic markets.[171] These processes make it increasingly difficult for weaker states to assert full control over many of the aspects of policy-making that are central to their ability to fulfill their right to food obligations.

International human rights law does not impose direct obligations on IFIs and TNCs.[172] These actors can, however, be held indirectly accountable via their relationship to powerful states.[173] Though IFIs and TNCs are the twin engines of economic globalization, powerful states remain the central drivers. IFIs (such as the World Bank and the IMF) are essentially multi-state actors; they are comprised of member states. Member state decisions often dictate economic policies in weaker countries.[174] Powerful states also provide their TNCs with significant financial and political backing that may allow TNCs to control resources and markets in countries in which they operate or where their products are sold. These controls may heighten the potential for, and broaden the scope of, violations of the right to food.[175]

This Part asserts that States Parties to the ICESCR are obligated to ensure that the right to food is respected and protected in IFI agreements. It further proposes that home states must exercise

171. Beth Lyon, *Discourse in Development: A Post-Colonial "Agenda" for the United Nations Committee on Economic, Social and Cultural Rights*, 10 AM. U.J. GENDER SOC. POL'Y & L. 535, 556 (2002).

172. *See supra* Part I.C.

173. *See infra* Part II.B–C.

174. *See infra* Part II.B.1

175. *See supra* Part I.B.2.

due diligence in regulating the activities of TNCs where it can be shown that the home state exercises decisive influence over the ability of TNCs to operate in an unregulated manner abroad. The due diligence and decisive influence standards have been shaped and defined by international law jurisprudence. While case law has not applied these standards to the relationship between home states and TNCs, this Part proposes that they may be useful in defining the obligations of home states vis-à-vis their TNCs. We begin with an analysis of the jurisdictional scope of the ICESCR.

A. *Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*

Unlike other human rights treaties, the ICESCR contains no provision specifying its jurisdictional scope of action. As discussed in Part I, effective implementation of the right to food requires that the ICESCR be applied extraterritorially. There are two distinct approaches to expanding the scope of ICESCR beyond a state's territory. The first approach argues that the ICESCR can be applied extraterritorially where a state exercises jurisdiction through "effective control."[176] The second approach argues that, under the obligation of international cooperation, State Parties to the ICESCR must respect and protect social and economic rights extraterritorially regardless of whether jurisdiction is exercised abroad.[177] As explored below, each approach is problematic in its own right. The doctrine of effective control is too restrictive. Situations in which states have been found to exercise effective control are primarily limited to occupation and the exercise of control over armed forces.[178] The obligation of international cooperation suffers from the opposite problem—it is too expansive and ill-defined. Moreover, it does not provide the kind of guidance that a rule of law must provide to enable states to understand and fulfill their obligations.

1. Extraterritorial Application Where Jurisdiction is Exercised Through "Effective Control"

Though the ICESCR contains no jurisdictional clause, the ESCR Committee has taken a jurisdictional rather than territorial approach to defining ICESCR obligations. The Committee has noted

176. *See infra* Part II.A.1.
177. *See infra* Part II.A.2.
178. *See infra* Part II.A.1.

that "Every State is obliged to ensure for everyone *under its jurisdiction* access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger."[179] The *Maastricht Guidelines*[180] provide that state responsibility for violations of the ICESCR are in principle imputable to the state within whose jurisdiction they occur.[181] Such a view also conforms to judicial interpretations of human rights treaties that do contain a jurisdiction clause. The ICCPR,[182] the American

179. *General Comment 12*, *supra* note 43, ¶ 14 (emphasis added). The ESCR Committee has consistently used the jurisdiction standard in its comments on rights contained in the ICESCR. *See* U.N. CESCR, *General Comment 4: The Right to Adequate Housing*, 6th Sess., ¶ 13, U.N. Doc. E/1992/23 (Dec. 13, 1991); U.N. CESCR, *General Comment 13: Implementation of the ICESCR, The Right to Education (Article 13 of the ICESCR)*, 21st Sess., ¶¶ 6(a), (b), U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999); U.N. CESCR, *Substantive Issues Arising in the Implementation of the ICESCR, General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR)*, 22d Sess., ¶¶ 12(b), 51, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); *General Comment 15*, *supra* note 67, ¶¶ 12(c), 31, 44(b), 53; U.N. CESCR, *Implementation of the ICESCR, General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, 17th Sess., ¶ 10, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997); U.N. CESCR, *Substantive Issues Arising in the Implementation of the ICESCR, General Comment 9: The Domestic Application of the Covenant*, 19th Sess., ¶ 9, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998).

180. U.N. ESOCOR, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 24th Sess., at 16, U.N. Doc E/C.12/2000/13 (Oct. 2, 2000) [hereinafter *Maastricht Guidelines*]. The *Maastricht Guidelines* are an elaboration of the nature and scope of economic, social, and cultural rights violations, responses, and remedies agreed upon by members of the International Commission of Jurists. Though not legally binding, the Guidelines are an influential source of guidance on the implementation of the ICESCR.

181. *Id.* ¶ 16.

182. Article 2(1) of the ICCPR provides that each State party must respect and ensure "all individuals within its territory and subject to its jurisdiction" the rights recognized in the ICCPR. ICCPR, *supra* note 52, art. 2(1). However, the interpretation of the phrase "within its territory and subject to its jurisdiction" has been subject to debate. If territory and jurisdiction are read in conjunction then only people who are within the territory *and* subject to a state's jurisdiction would be protected. The *travaux préparatoires* to the ICCPR, however, provide for a broader interpretation. *See* U.N. GAOR, *Annotations on the Text of the Draft International Covenants on Human Rights*, 10th Sess., pt. 2, U.N. Doc. A/2929 (July 1, 1955) (asserting that "a State should not be relieved of its obligations . . . to persons who remained within its jurisdiction merely because they were not within its territory") [hereinafter *Annotations*]. As a result, legal scholars have adopted the interpretation that the ICCPR requires States Parties to grant protection to individuals within its territory *or* under its jurisdiction, such that a State party must protect individuals within its jurisdiction, regardless of whether they are within its territory. *See* Theodor Meron, *Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995); *see also* U.N. CHR, *General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Saldias de Lopez v. Uruguay, Communication No. 52/1979 (July 29, 1981), at 88, U.N. Doc. CCPR/C/OP/1 (1984) ("It would be unconscionable to so interpret [this provision] as to permit a State party to perpetrate

Convention on Human Rights,[183] and the European Convention on Human Rights and Fundamental Freedoms all refer to a state's jurisdiction, rather than its territory, in defining the scope of treaty obligation application.[184]

It has been recognized that under certain factual circumstances a state can be found to have jurisdiction outside its territory where it exercises "effective control."[185] Occupation and the exercise of control over military or paramilitary forces are often cited as the clearest examples of a state exercising effective control abroad. The extraterritorial application of human rights treaties in such a context has been confirmed by the European Court of Human Rights[186] and the Human Rights Committee in several important cases.[187]

In the 1996 case of *Loizidou v. Turkey*, the European Court of Human Rights held that "the concept of 'jurisdiction' under [this provision] is not restricted to the national territory of the Contracting States. . . . [T]he responsibility of a Contracting Party could also arise when . . . it exercises *effective control* of an area outside its national territory."[188] The Court's decision in *Loizidou* became the basis for

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violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."); *supra* note 181.

183. Article 1 of the American Convention on Human Rights calls on States Parties to "ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" recognized in the Convention. American Convention on Human Rights, Nov. 22, 1969, 144 U.N.T.S 123.

184. The European Convention's Article 1 provides that the "High Contracting Parties shall secure to everyone within their jurisdiction" the Convention's rights and freedoms. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

185. *See General Comment No. 31*, *supra* note 182, ¶ 10 ("[A] State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. . . ."); *Comments of the Human Rights Committee: Republic of Bosnia-Herzegovina*, ¶ 4, U.N. Doc. CCPR/C/79/Add.14 (Dec. 28, 1992) (confirming that Republic of Bosnia-Herzegovina is legally responsible for acts in territory over which it had factual and effective control).

186. *See* Drozd & Janousek v. France & Spain, App. No. 12747/87, 14 Eur. H.R. Rep. 745, ¶ 91 (1992).

187. The Human Rights Committee was established to monitor the implementation of the ICCPR and the Protocols to the ICCPR. *See* U.N. Office of the High Commissioner for Human Rights, Introduction to the Human Rights Comm., *available at* http://www.unhchr.ch/html/menu2/6/a/introhrc.htm (last visited Apr. 25, 2006). In reviewing Iraq's periodic report in July 1991, the Committee noted the "failure of the report to address events in Kuwait after 2 August 1990, given Iraq's clear responsibility under international law for the observance of human rights during its occupation of that country," U.N. HRC, *Report of the Human Rights Committee*, U.N. GAOR, 46th Sess., § 652, U.N. Doc. A/46/40 (Oct. 10, 1991).

188. Loizidou v. Turkey, App. No. 15318/8923, Eur. H.R. Rep. 513, ¶ 52 (1996)

holding Turkey responsible for violations that took place on the territory of the Turkish Republic of Northern Cyprus (TRNC) in *Cyprus v. Turkey*.[189] In that case, the Court held that TRNC was within Turkey's jurisdiction under the "effective overall control" test enunciated by the Court in *Loizidou*. The Court stressed that Turkey's responsibility extended to the acts of the local administration,[190] which survived by virtue of Turkey's military and other support.[191] In *Bankovic v. Belgium and Others*, the European Court of Human Rights, while affirming that jurisdiction is essentially limited by the sovereign territorial rights of states, concluded that the exercise of extraterritorial jurisdiction can exist when, through *effective control* of a territory, a state "exercises all or some of the public powers normally to be exercised by" the government of that territory.[192]

Moreover, the Inter-American Commission on Human Rights has also accepted state control as the decisive test for the extraterritorial application of the American Convention on Human Rights. In 1999, in the case of *Coard et al. v. United States*, the

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(emphasis added). The case involved a landowner in the Republic of Cyprus who claimed that she was denied her property rights by Turkish forces in the area. The Court supported her claim, stating that Turkey was responsible due to its exercise of "effective overall control over that part of the island." *Id.* ¶ 56.

189. Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 327.

190. Loizidou v. Turkey, App. No. 15318/8923, Eur. H.R. Rep. 513, ¶ 56 (1996)

191. *Id.* ¶¶ 16–17.

192. Bankovic v. Belgium and Others, 2001-XII Eur. Ct. H.R. 335. The case was brought against seventeen NATO member states by the relatives of those killed during the NATO bombing of Radio-Television Serbia (RTS) headquarters during the Kosovo conflict. The applicants argued that the bombing of RTS violated Article 2 (right to life), Article 10 (freedom of expression), and Article 13 (right to an effective remedy) of the European Convention on Human Rights. The Court concluded that because NATO states did not exercise "effective control" over the bombed territory, these states did not have jurisdiction over the applicants and their deceased relatives. *Id.* ¶¶ 71–72, 80. Though the *Bankovic* decision addressed human rights obligations under a regional instrument (the European Convention on Human Rights), such that its findings may be limited to the Council of European Member States, the case is included here to illustrate the broader trend in other human rights treaties to extend jurisdiction beyond a state's territory. A similar conclusion was reached by the European Court of Human Rights in the case of *Issa and Others v. Turkey*. Issa and Others v. Turkey App. No. 31821/96, 2004 Eur. Ct. H.R. 629. In *Issa*, the Court noted that in exceptional circumstances the acts of contracting states performed outside their territory or which produced effects there might amount to exercise by them of their jurisdiction within the meaning of Article 1 of the European Convention. Thus, a state's responsibility might be engaged where, as a consequence of military action—whether lawful or unlawful—that state in practice exercised effective control of an area situated outside its national territory. *Id.* ¶ 69. The Court further noted that "accountability in such situations stemmed from the fact that art. 1 of the Convention could not be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory." *Id.* ¶ 71.

Commission found that the United States was responsible for human rights violations against people in its custody on Grenada's soil.[193] Three years later, the Inter-American Commission on Human Rights called on the United States to take precautionary measures towards detainees in Guantánamo Bay. In making the request the Commission noted that the rights "prescribed under the American Declaration of the Rights and Duties of Man, [constitute] a source of legal obligation for all [Organization of American States] member states in respect of persons subject to their authority and control."[194]

The cases discussed above deal almost exclusively with violations of civil and political rights. Given that social and economic rights are *interdependent* with civil and political rights,[195] a strong policy argument can be made that a state's ICESCR obligations, like its civil and political rights obligations, should extend beyond its territory to situations where it exercises "effective control." The right to food, for example, is interdependent with civil and political rights such as the right to life, the right to self-determination, and the right to information. Without food the right to life would be rendered meaningless.[196] Similarly, the right to self-determination, as defined by Articles 1 of the ICCPR and ICESCR,[197] is violated when a state permits "the exploitation of the country's food-producing capacity in the exclusive interests of a small part of the population or of foreign (public or private) corporate interests while a large number of the State's inhabitants are starving

193. Coard et al. v. U.S., Case 10.951, Inter-Am. C.H.R., Report No. 109/99, ¶ 37 (1999).

194. Inter-Am. C.H.R., *Detainees in Guantánamo Bay, Cuba (Request for Precautionary Measures* (Mar. 13, 2002), *available at* http://www.law.wits.ac.za/humanrts/iachr/guantanamomeasures2002.html.

195. *See generally* Craig Scott, *The Interdependence and Permeability of Human Right Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L.J. 769 (1989); *see also* CHR Res. 2001/30, *Question of the Realization in all Countries of the Economic, Social and Cultural rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems which the Developing Countries Face in their Efforts to Achieve these Human Rights*, ¶ 4(d), U.N. Doc. E/CN.4/RES2001/30 (Apr. 20, 2001) (reaffirming "the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms," and positing that "promoting and protecting one category of rights should therefore never exempt or excuse States from the promotion and protection of other rights").

196. *See, e.g.*, Kishen Pattnayak & Another v. State of Orissa, A.I.R. 1989 S.C. 677; People's Union for Civil Liberties v. Union of India & Ors. (S.C. 2001), Writ Petition (Civil) No. 196/2001, *reprinted in* RIGHT TO FOOD 48 (Colin Gonsalves ed., 2004); *see also supra* note 59. *But see* Alston, *supra* note 56, at 24 (summarizing arguments against a broad conceptualization of the right to life).

197. ICCPR, *supra* note 52, art. 1; ICESCR, *supra* note 35, art. 1.

or malnourished."[198] Additionally, the failure to disclose information about food nutrition, production, and safety are all direct violations of the right to information as articulated in Article 19 of the ICCPR.[199] This symbiotic relationship between civil and political rights, and social and economic rights argues against differential treatment of the two sets of norms.

A 2004 advisory opinion by the International Court of Justice (ICJ) points to a similar conclusion. While not legally binding, the advisory opinion, issued in this case by the highest judicial organ in international law, can provide authoritative interpretation on questions of law.[200] In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ addressed whether the ICESCR, which Israel has ratified, applied extraterritorially in the West Bank and the Gaza Strip.[201] Israel argued against extraterritorial application claiming that the effective control argument was inapplicable to Israel because humanitarian law, rather than human rights law, governed the West Bank and Gaza Strip.[202] The ICJ rejected Israel's argument, holding that "the protection offered by human rights conventions does not cease in the case of armed conflict" and that "the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power."[203] The Court further held that "[i]n the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights" and "is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities."[204] The Court specifically

198. Alston, *supra* note 56, at 23.

199. The Special Rapporteur on the Right to Food has noted that "[f]ood sovereignty demands the protection of consumer interests, including regulation for food safety that embodies the precautionary principle and the accurate labeling of food and animal feed products for information about content and origins." *The Right to Food, supra* note 159, ¶ 32; U.N. CHR, *The Right to Adequate Food and to be Free From Hunger: Updated Study on the Right to Food*, 51st Sess., U.N. Doc. E/CN.4/Sub.2/1999/12 (June 28, 1999); Convention on the Rights of the Child, *supra* note 54, art. 24(e) (States Parties must take appropriate measures "[t]o ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition.").

200. Statute of the International Court of Justice art. 65(1), June 26, 1945, 59 Stat. 1055, T.S. No. 933 [hereinafter ICJ Statute].

201. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶ 1 (July 9).

202. *Id.* ¶ 102.

203. *Id.* ¶¶ 106, 112.

204. *Id.* ¶ 112. The position of the Court is consistent with the position taken by the U.N. Human Rights Committee with respect to the applicability of the ICCPR in the

noted the impact of the wall construction on the right to food but stopped short of imposing a positive obligation on Israel to ensure social and economic rights.[205] Instead, the Court restricted its ruling to the so-called negative obligations—the obligations to respect and protect.

Even assuming that the effective control doctrine applies to States Parties' obligations under the ICESCR, ultimately, its utility is extremely limited. Though international human rights jurisprudence tells us that a state can exercise "effective control" in situations of occupation or armed conflict, the majority of extraterritorial violations of the right to food under globalization are committed outside these limited scenarios. For the effective control doctrine to be useful in this regard, it would have to include those situations in which states exercise *effective economic control* over economic policies or markets outside their territories. Using an economic control standard to define the jurisdictional scope of the ICESCR does have some appeal. By their very nature, social and economic rights are more easily violated under globalization's deterioration of economic sovereignty. The same cannot be said of civil and political rights under globalization. Even states that yield some degree of economic control still retain a high level of sovereignty in the civil and political arena.[206] One could therefore argue that the jurisdictional scope of the ICESCR should be adapted to reflect erosions and expansions of economic jurisdiction.

Proposing such a provocative departure from current interpretations of jurisdiction under international law raises numerous pressing questions. Chief among them is the question of when states' actions can give rise to the claim that they are exercising economic control. While these questions are beyond the scope of this Article, future research, policy initiatives, and ultimately jurisprudence on

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occupied territories. *See* Human Rights Comm., *Concluding Observations of the Human Rights Committee: Israel*, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003).

205. *Legal Consequences of the Construction of a Wall*, 2004 I.C.J. 131, ¶ 112.

206. Zambia, for example, adhered to strict structural adjustment programs even as the government continued to maintain a stronghold in the area of civil and political rights. Priscilla Jere-Mwiindilila, *The Effects of Structural Adjustment on Women in Zambia*, *in* FAITH, ECONOMICS AND AFRICA 44 (1994), *available at* http://www.warc.ch/pc/rw942/02.html; *cf.* U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices 2004: Zambia* (2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41633.htm. A summary of IMF structural adjustment programs shows that states that adopted the programs gave up a certain degree of economic sovereignty. Yet the majority of the listed states routinely resist any foreign interference into their civil and political governance (e.g., Russia, Sudan). *See* Double Standards, *IMF Structural Adjustment Programs: The Globalization of Poverty, Summary* (Dec. 5, 2005), http://www.doublestandards.org/sap1.html.

effective implementation of social and economic rights may benefit from consideration of a state's economic jurisdiction.

2. Extraterritorial Application Under the Obligation of International Cooperation

The obligation of international cooperation with respect to the implementation of the right to food is embodied in Article 2(1) and Article 11 of the ICESCR. Article 2(1) of the ICESCR provides:

> Each State Party to the present Covenant undertakes to take steps, individually *and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[207]

Article 11(1), articulating the right to adequate food, further provides that "States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[208] Article 11(2) calls on States Parties to take measures, "individually and through international co-operation," to ensure the fundamental right to be free from hunger.[209]

In its General Comment 12 on the right to adequate food, the ESCR Committee provides guidance on the interpretation of the obligation of international cooperation. The Committee notes that states "should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food."[210] The Comment provides that "States Parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required."[211] In international agreements, where relevant, States Parties should ensure that the right to adequate food is given due attention. States Parties should also "refrain at all times from food embargoes or similar measures which endanger conditions

207. ICESCR, *supra* note 35, art. 2(1) (emphasis added).
208. *Id.* art. 11(1).
209. *Id.* art. 11(2).
210. *General Comment 12*, *supra* note 43, ¶ 36.
211. *Id.*

for food production and access to food in other countries."[212] And finally, food should never be used as an instrument of political and economic pressure. The Committee looks to the "spirit" of Article 56 of the Charter of the United Nations,[213] specific provisions contained in Articles 11,[214] 21, and 23 of the ICESCR,[215] and the Rome Declaration of the World Food Summit[216] in reaching its conclusions.[217]

The Committee has also spelled out the content of such international obligations with regard to the right to health[218] and the right to water.[219] In all three Comments, the Committee highlights the obligations to respect and protect, or the negative obligations of international cooperation, over the obligation to fulfill. In the right to food context, the Committee does provide, however, that States Parties should "facilitate access to food" and "provide the necessary aid" in other countries when required.[220] At least one commentator has pointed to the ESCR Committee's General Comment on the nature of States Parties' obligations (General Comment 3) as evidence of a "duty to fulfill" placed on third-party states.[221] The

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212. *Id.* ¶ 37.

213. U.N. Charter art. 56, 55(a).

214. For a discussion of Article 11 of the ICESCR, see notes 49–69 and accompanying text.

215. ICESCR, *supra* note 35, art. 23 (stating that international action to achieve the rights included in the ICESCR includes conventions, recommendations, technical assistance, and regional meetings).

216. The Rome Declaration on World Food Security and the World Food Summit Plan of Action were adopted at the end of the 1996 World Food Summit, which brought together nearly 10,000 participants from 185 countries and the European Community. *See* U.N. FAO, *Rome Declaration on World Food Security* (Nov. 13–17, 1996), *available at* http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/003/w3613e/w3613e00.htm. The Rome Declaration sets forth commitments that present the basis for achieving sustainable food security. Commitment Seven stresses that governments are required to involve "all elements of civil society," and the involvement of the international community and the U.N. is recommended. *Id.* ¶¶ 56–57.

217. *General Comment 12*, *supra* note 43, ¶¶ 36–37; *see also General Comment 3*, *supra* note 60, ¶¶ 13–14 (stating that international obligations should be seen in connection with Articles 1(3), 55, and 56 of the U.N. Charter).

218. *General Comment 14*, *supra* note 179, ¶ 39 ("States Parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means . . . .").

219. *General Comment 15*, *supra* note 67, ¶ 31 ("States Parties have to respect the enjoyment of the right in other countries. International cooperation requires States Parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries.").

220. *General Comment 12*, *supra* note 43, ¶ 36.

221. Coomans, *supra* note 167, at 196.

Committee notes that "international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard."[222] The commentator suggests that this statement by the ESCR Committee forms the foundation for the imposition of the "duty to fulfill" on third-party states.[223]

The obligation of international cooperation, as interpreted under the General Comments, gets us on the road to broadening the extraterritorial application of the ICESCR. Still, we encounter the problem that the obligation is ill-defined. Taken to its extreme, the obligation could be interpreted as a general call for the transfer of resources and wealth from rich states to poor states.[224] The articulation of the obligation in a manner that includes a duty to fulfill social and economic rights in other countries may also be met with a great deal of political resistance by states that do not wish to cast their aid-giving in legal obligation terms.[225] A more fruitful approach is to emphasize the obligations to respect and protect economic and social rights extraterritorially and to focus on the vehicles through which extraterritorial violations occur—namely IFIs and TNCs. Ensuring that States Parties' obligations extend to their relationship with these actors may be the most effective means of establishing extraterritorial application of the ICESCR in theory and in practice.

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222. *General Comment 3*, *supra* note 60, ¶ 14; Coomans, *supra* note 167, at 196.

223. Coomans, *supra* note 167, at 196.

224. *See, e.g.*, United Nations Development Programme, Human Development Report 2003, ch. 8 (Sakiko Fukunda-Parr ed., 2003), *available at* http://hdr.undp.org/reports/global/2003/pdf/hdr03_frontmatter.pdf.

225. There are numerous examples of such statements by U.S. representatives on economic, social, and cultural rights generally, and on the right to food in particular. See, e.g., Remarks by Marc Leland, Public Delegate to the 60th U.N. Comm'n on Hum. Rts. (Mar. 29, 2004), *available at* http://www.humanrights-usa.net/2004/statements/0329Leland.htm ("The progressive realization of economic, social and cultural rights will not be achieved through shifting blame from a country's government to the international community . . . ."); Explanation of Vote on the Resolution on the Right to Food by Jeffrey de Laurentis (Apr. 16, 2004), *available at* http://www.humanrights-usa.net/2004/statements/0421Food.htm ("The attainment of [the right to adequate food as a component of the right to an adequate standard of living] is a goal or aspiration to be realized progressively—it does not give rise to international obligations or domestic legal entitlements, nor does it diminish the responsibilities of national governments toward their citizens.").

B. *Holding International Financial Institutions Accountable Via the State*

Both the World Bank and the IMF are essentially *multi-state* actors. They are comprised of member states, many of which have ratified the ICESCR. Legal scholarship on these IFIs often mischaracterizes them as non-state actors,[226] implying that they are not subjects of international human rights law. In reality, their status as multi-state actors can provide a basis for subjecting them to the requirements of international human rights law through the many member states that have ratified human rights treaties. Because the obligations imposed on these institutions are indirect (they are imposed via their member states), it is important to consider how such obligations can better inform member states' participation in, and influence over, IFI decision-making.

The *Maastricht Guidelines* provide that States Parties' duty to protect extends to their "participation in international organizations, where they act collectively."[227] They provide that states should "use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members."[228] International organizations, including international financial institutions, are further called upon to "correct their policies so that they do not result in deprivation of economic, social and cultural rights"[229] and should take these rights into account when policies and programs are "implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights."[230]

The Guidelines raise key questions that must be answered in order to assign states extraterritorial obligations to respect the right to food: Do member states exert sufficient influence within IFIs such that they can use their influence to ensure that violations do not result from IFI programs and policies? And how can the right to food be taken into account in the design of policies and programs? Both questions are addressed below. For the purpose of our analysis we will focus on the IMF and to a lesser extent the World Bank.

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226. *See generally* Eric Allen Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIPIAC L. REV. 23 (2004); Thomas M. McDonnell et al., *Human Rights and Non-State Actors*, 11 PACE INT'L L. REV. 205 (1999).

227. *Maastricht Guidelines*, *supra* note 180, ¶ 19.

228. *Id.*

229. *Id.*

230. *Id.*

1. The Relative Influence of IFI Member States

Both the World Bank and the IMF are composed of and driven by signatory states. The World Bank is made up of 184 member countries, which are jointly responsible for how the institution is financed and how its money is spent.[231] The IMF is also made up of the same 184 member countries, which are jointly responsible for the IMF's functions.[232] Still, some member countries have much more influence than others.

The voting power of IMF member states is based on their subscriptions (quotas).[233] The United States holds about seventeen percent of the total voting power.[234] Collectively, rich countries currently control over sixty percent of the votes.[235] As a result, the United States can veto decisions requiring a super-majority (eighty-five percent of the vote).[236] Similarly, a coalition of industrial countries can veto decisions that require a seventy percent majority or even a simple majority (fifty-one percent of the vote).[237] Conversely, the forty-six sub-Saharan African countries, many of which are also borrowing countries, have only 4.4% of the total voting power.[238] The IMF asserts that apportionment of voting power must reflect member states' financial shares to ensure that creditor nations continue to contribute to the fund, and maintains that most decisions are in fact made by consensus so that all states have an opportunity to be heard.[239] Critics point out that such informal voting still allows large vote holders to exert considerable influence over discussions and that informal proceedings reduce the transparency of IMF operations.[240]

The disproportionate influence of rich states within IFIs is also borne out by empirical research analyzing the pattern of lending

231. Both the World Bank and the IMF came out of the Bretton Woods Agreement of 1944. To become part of the World Bank, countries must first be admitted to the IMF. *See* Ricardo Faini & Enzo Grilli, *Who Runs the IFIs?* 7 (Centre for Economic and Policy Research, Discussion Paper No. 4666, 2004), *available at* http://www.cepr.org/pubs/new-dps/showdp.asp?dpno=4666.

232. *Id.*

233. Quotas are shares in the Fund capital. IFI Watchnet, *Reality Bites: A Rebuttal of the IMF's "Common Criticism: Some Responses"* § 5.1 (Sept. 2003), *available at* http://ifiwatchnet.org/doc/realitybites.pdf.

234. *Id.*

235. *Id.* § 5.2.

236. Decisions on matters of capital expansion require a super-majority. *Id.* § 5.1.

237. *Id.*

238. *Id.* §§ 5.1–5.2.

239. *Id.* § 5.1.

240. *See id.* §§ 5.1–5.3; Faini & Grilli, *supra* note 232, at 4.

of both the World Bank and the IMF as a function of the interests of their large shareholders. In a discussion paper titled "Who Runs the IFIs?," the Centre for Economic Policy Research concludes that the lending pattern of both institutions "is influenced by the commercial and the financial interests of the U.S. and, to a lesser extent, of the E.U."[241] Many lending decisions are political in nature, responding to the national interests of one or several large shareholders "who can mass enough support from the others to carry them through or to block them."[242] An informal power sharing agreement between Europe and the United States also determines the nationality of the heads of the two institutions. The Managing Director of the IMF is always a European, while the President of the World Bank is always an American.[243] Maintaining a certain national in these influential positions "is in itself an indicator of influence."[244] In particular, the research highlights the influence, through the top management of both institutions, of the United States (the largest shareholder), the United Kingdom, France and, more recently, Germany. The Executive Directors of each of these countries are particularly influential inside the two Boards. In addition, the U.S. Treasury has "been able to exert a relatively stronger day to day monitoring and 'control' over both organizations because of its locational advantage."[245]

The substantial influence of powerful states within the IMF suggests that they are capable of influencing the organization to act in accordance with international law, as suggested by the *Maastricht Guidelines*. Their influence also undermines the IMF's assertion that it negotiates rather than dictates the terms of a loan agreement. Countries seeking IMF assistance are often in desperate need of funds. Their desperation weakens their negotiating position. As a result, the balance of power lies with the IMF.[246] As a self-proclaimed lender of last resort,[247] the IMF too recognizes and capitalizes on its ability to impose specific economic reforms. Like any banker, the IMF should in principle be allowed to impose conditions on borrowers that make it more likely that the loan will be

241. Faini & Grilli, *supra* note 232, at abstract. The researchers add that Japan's role is "smaller and more regional, being largely confined to decisions concerning Asia." *Id.* at 21.

242. *Id.* at 5.

243. *Id.* at 6; STIGLITZ, *supra* note 88, at 19.

244. Faini & Grilli, *supra* note 232. at 6.

245. *Id.* at 10.

246. STIGLITZ, *supra* note 88, at 42.

247. *See* IMF, *Common Criticisms of the IMF: Some Responses, available at* http://www.imf.org/external/np/exr/ccrit/eng/crans.htm (Feb. 16, 2006) [hereinafter *Common Criticisms*].

repaid. But critics point out that the conditionality imposed by the IMF, and in some cases the World Bank, may reduce the likelihood of repayment.[248] Moreover, in many instances, the problem is not that rulers of borrowing governments have no control vis-à-vis the IMF, but rather that they have no accountability to their own citizens, allowing them to implement only those reforms that favor members of the ruling elite.[249] As discussed further below, conditionality can be imposed in a manner that safeguards human rights, such as the right to food, and with the active participation of those most affected by the reforms.

2. The Human Rights Obligations of IFI Member States

Commentators have argued that institutions such as the World Bank and the IMF have international personalities, and as such, have rights and duties under international law that are separate from and in addition to the duties of their member states.[250] Even assuming this to be true, the World Bank and the IMF would not be bound by the provisions of the ICESCR (the central document affirming the right to food) or other treaties since those documents focus solely on the responsibility of the state. However, these institutions would arguably be bound by the terms of customary international law.[251] For an analysis of whether the right to food has achieved the status of customary international law, see Part III.

A more direct approach may be to address the human rights obligations of IFI member states. As described above, IFIs are the

248. STIGLITZ, *supra* note 88, at 44–46.

249. VAN DE WALLE, *supra* note 32, at 48; *see generally* Adam Przeworski & James Raymond Vreeland, *The Effect of IMF Programs on Economic Growth*, 62 J. DEV. ECON. 403 (2000) (arguing that governments facing economic crises enter into agreements with the IMF either to gain access to needed foreign reserve or to rely on the agreement as a means to gain necessary political leverage to impose unpopular austerity measures).

250. *See, e.g.*, Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527, 560 (2002); Skogly, *supra* note 90, at 134 (asserting that the World Bank has an international personality); Daniel Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47, 51 (1996) (stating that the World Bank is a subject of international law because it is an international organization and, therefore, cannot violate customary international law); Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, *in* THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 323, 325 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999) (stating that the Bank may have legal obligations of consultation deriving from the Bank's constitutive documents and legal relations with its member states).

251. *See The Right to Food*, *supra* note 159, ¶¶ 37–38.

sum of their parts, and the parts consist of member states, some with more influence than others. Member states do not leave their human rights obligations at the door when entering these corridors of power.[252] All European Union countries have ratified the ICESCR and are obligated to comply with its provisions.[253] Japan, which plays an influential role in lending to Asian countries, has also ratified the ICESCR.[254] Notably, the United States has not. It has, however, signed the ICESCR.[255] On a technical reading, it must therefore still refrain from taking action that would go against the object and purpose of the treaty.[256] When the World Bank or the IMF disregard or violate human rights, it reflects the failure of these member states to abide by their international human rights obligations. The World Bank's Senior Counsel agrees insofar as he states that the Bank must account for its members' treaty obligations:

> Because governments are the owners of the institutions like the World Bank, and are bound to comply with the treaties they have ratified, multilateral financial institutions must be careful to ensure that if these treaties are implicated in their projects, the treaties are appropriately taken into account in project design and finance.[257]

The notion that states can be held responsible for implementing international agreements that violate their international human rights obligations is not new to international law. As early as

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252. *See General Comment 8*, *supra* note 179, ¶¶ 11–14 (describing the human rights obligations of a party or parties responsible for the imposition of sanctions, be they a state, a group of states, the international community or an international or regional organization).

253. For example, the United Kingdom ratified the ICESCR on August 20, 1976; Germany ratified the ICESCR on January 3, 1976; France ratified the ICESCR on February 4, 1982. OFFICE OF THE U.N. HIGH COMM. FOR HUM. RTS, *supra* note 77, at 5, 11.

254. Japan ratified the ICESCR on September 21, 1979. *Id.* at 6.

255. The United States signed the ICESCR on October 5, 1977. *Id.* at 11.

256. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. For such a doctrine to be controlling in the context of U.S. participation in IFIs, it would have to be shown that international cooperation is central to the object and purpose of the ICESCR. As noted above, the critical role of international cooperation has repeatedly been affirmed by the ESCR Committee in its interpretation of States Parties' obligations under the ICESCR. Moreover, under economic globalization, effective implementation of the ICESCR is greatly undermined without some degree of international cooperation. Still, concrete conclusions in this regard are likely premature. As a result, the problem of the non-ratifying state must be confronted on multiple fronts. As explored in Part III, the obligations of non-ratifying states can also be addressed by locating the right to food in customary international law. For a discussion of U.S. state practice and opinio juris on the right to food, see *infra* Part III.D.

257. Charles E. Di Leva, *International Environmental Law and Development*, 10 GEO. INT'L ENVTL. L. REV. 501, 501–02 (1998).

1958, the European Commission on Human Rights observed that if a State party to the European Convention on Human Rights (ECHR) concludes an international agreement that disables it from performing its functions under the ECHR, it will be answerable for any resultant breach of its Convention obligations.[258] In *X & X v. F.R.G.*, the Commission held that "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty."[259] In other words, earlier human rights treaty obligations must prevail over inconsistent agreements entered into at a later stage.

A similar line of reasoning was taken by the European Commission in the 1990 case of *M & Co. v. F.R.G.* which also addressed a state's obligation under the ECHR. The Commission stated:

> Under Article 1 of the Convention the Member States are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations.[260]

Citing with approval *X & X v. F.R.G.*, the Commission added that while states may transfer power to an international organization, "a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers."[261] Accordingly, the Commission concluded that "the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection."[262]

In 1999, the European Court of Human Rights reaffirmed this doctrine and held in *Matthews v. the U.K.*, that "[t]he Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured.' Member States' responsibility therefore continues even

258. X & X v. F.R.G., 1958 Y.B. Eur. Conv. on H.R. 256, 300 (Eur. Comm'n on H.R.).
259. *Id.*
260. M & Co. v. F.R.G., 1990 Y.B. Eur. Conv. on H.R. 51 (Eur. Comm'n on H.R.).
261. *Id.*
262. *Id.* In other words, fundamental rights must continue to be protected within such an organization.

after such a transfer."[263] Whether such a doctrine implicates the collective responsibility of all member states (in this case EU Member States) to ensure that ECHR rights are secured is as yet unresolved. A review of a number of cases before the European Court of Justice and the European Court of Human Rights on these issues has led at least one commentator to conclude that case law in this area is unsettled: "An unambiguous doctrine of 'Member State responsibility' is yet to be developed. But the trend in the Court's case-law is clear: at the very least a State is responsible where its own authorities, in implementing EU law, violate the ECHR."[264]

Such a reading mirrors the normative guidance on States Parties' obligations under the ICESCR. Where a State Party enters an agreement with an international financial institution that undermines its ability to respect, protect, and fulfill the right to food, it will be held responsible for breaches of its obligations.[265] The thornier question is raised by the as yet unsettled question of Member States responsibility which would provide that IMF member states must ensure that ICESCR rights continue to be secured when they act as a collective to shape the economic policies of weaker states. If we define the obligation of international cooperation to mean that States Parties must respect and protect the right to food extraterritorially, then such obligation could be applied to a state's participation in IFIs.

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263. Matthews v. U.K., 1999-I Eur. Ct. H.R. 251, ¶ 32.

264. Rick Lawson, *The Contribution of the Agency to the Implementation in the EU of International and European Human Rights Instruments*, *in* MONITORING FUNDAMENTAL RIGHTS IN THE EU: THE CONTRIBUTION OF THE FUNDAMENTAL RIGHTS AGENCY 243 (Philip Alston & Olivier De Schutter eds., 2005).

265. Such an interpretation is consistent with the *Maastricht Guidelines*, which provide that violations under the ICESCR can occur when a state fails to "take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations." *Maastricht Guidelines*, *supra* note 180, § 15(j). It is also consistent with the argument that ensuring the fulfillment of the right to be free from hunger constitutes an *erga omnes* obligation that is incumbent upon all States Parties to the ICCPR and the ICESCR. The Human Rights Committee has emphasized that, "[E]very State Party has a legal interest in the performance by every other State Party of its obligations." U.N. CHR, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 2, CCPR/C/74/CRP.4/Rev.6 (Mar. 29, 2004). While the jurisdiction of the HRC relates to the ICCPR and the specific interpretation refers to the implementation of Article 2 of the Convention (non-discrimination), the argument here of an *erga omnes* obligation to help other states to realize their human rights commitments is based on a reading of the U.N. Charter and is, therefore, arguably broader. Consequently, States Parties' obligations extend not only to individuals within their jurisdictions but also, at a minimum, to ensuring that their actions, either unilaterally or multilaterally, do not negatively impact the realization of human rights for individuals in other jurisdictions.

3. Respecting and Protecting the Right to Food under IFI Agreements

In 1998 the ESCR Committee called upon the IMF and the World Bank "to pay enhanced attention in their activities to respect for economic, social and cultural rights."[266] In addition, the Committee has specifically noted that "international financial institutions, notably the IMF and the World Bank, should pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the debt crisis."[267] As described below, IFIs can move closer to the goal of respecting and protecting the right to food by recognizing the importance of safety nets, by focusing not only on processes, but on outcomes, and by giving developing countries greater freedom to comply with their international human rights obligations.

A close examination of the right to food in the ICESCR suggests that market-based economic reform and respect for the right to food need not be in conflict. As noted earlier, Article 11(2) of the ICESCR calls on States Parties to undertake measures, individually and through international cooperation, to improve methods of production, conservation and distribution of food by, inter alia, developing or reforming agrarian systems to achieve the most efficient development and utilization of natural resources.[268] The General Comment of the ESCR Committee adds that States Parties must ensure the *availability* and *accessibility* of adequate food.[269] Availability refers to "the possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand."[270] A careful reading of these Covenant obligations suggests that governments must institute agricultural and market reforms that lead to greater access to adequate food. Economic reforms that lend themselves to such outcomes are therefore consistent with a rights-based approach to food security, as discussed in the introduction to this Article.

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266. U.N. CESCR, *Statement on Globalization and Economic, Social and Cultural Rights*, 18th Sess. (May 11, 1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/adc44375895aa10d8025668f003cc06e?Opendocument.

267. *General Comment 12*, *supra* note 43, ¶ 41.

268. ICESCR, *supra* note 35, art. 11(2).

269. *General Comment 12*, *supra* note 43, ¶ 8.

270. *Id.* ¶ 12.

Nonetheless, the question of whether IMF prescriptions exacerbate or abate food insecurity remains. As discussed above, much has been written about the effect of IMF policies on economic growth,[271] poverty, and food security. Part of the critique has centered on accusations that IMF-supported programs (and IMF bailouts) are designed to favor foreign investors rather than local populations.[272] The IMF has responded to critics by noting that its policies are designed to restore investor confidence and attract foreign capital that is essential for economic growth and employment.[273] Supporters of a free market approach to alleviating food insecurity also emphasize the need to reduce inefficiencies that result from government involvement in the food market, such as regulation of food prices, over-valued exchange rates, and government-run marketing boards.[274]

Even if the free market approach is correct, respect for the right to food requires institutionalizing safety nets to ensure that the vulnerable are protected during a transition to liberalized agricultural markets, and setting up monitoring systems to measure the impact of such policies on the population's right to food. IFIs themselves have begun to recognize the importance of social safety nets when programs call for cuts in government spending. Similarly, ensuring that safety nets are in place before privatization of government sectors takes place is critical to mitigating the negative effects of privatization described above. Notable economists have also concluded that social safety nets are essential to cushion the transition during economic reforms.[275] As one author notes:

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271. *See generally* STIGLITZ, *supra* note 88; Mark Weisbrot et al., *Growth May Be Good for the Poor—But are IMF and World Bank Policies Good for Growth?: A Closer Look at the World Bank's Most Recent Defense of Its Policies* (Centre for Econ. & Pol'y Res., 2000), *available at* http://www.cepr.net/response_to_dollar_kraay.htm.

272. IFI Watchnet, *supra* note 233, § 2.2.

273. *See Common Criticisms*, *supra* note 247 (noting that countries "come to the IMF when, through some combination of bad luck and bad policies, they have already run into deep financial difficulties").

274. *See* Carol Lancaster, *Aid Debates and Food Needs*, *in* COPING WITH AFRICA'S FOOD CRISIS 42–43 (Naomi Chazan & Timothy Shaw eds., 1998); Jon Kraus, *The Political Economy of Food in Ghana*, *in* COPING WITH AFRICA'S FOOD CRISIS 81 (Naomi Chazan & Timothy Shaw eds., 1998).

275. *See, e.g.*, SACHS, *supra* note 12, at 115 (arguing that "social safety nets, such as pensions, health care, and other benefits for the elderly and the poor, are needed to cushion the transition to a market economy"); *see also* Amartya Sen, *A Plan for Asia's Growth: Build on Much that is Good in the "Eastern Strategy,"* ASIA WEEK.COM, Vol. 25, No. 40 (Oct. 8, 1999), *available at* http://www.pathfinder.com/asiaweek/magazine/99/1008/viewpoint.html (arguing that arrangements for social safety nets are a form of "protective security" and an important instrumental freedom).

> [The b]uilding of an economic "pie" is a necessary but not sufficient condition for food security. Transfers must occur between "haves" and "have nots" to provide food security but without a pie there is nothing to transfer. . . . The public safety net is for those unable to depend on themselves, the market, family, or other private sources for sustenance. Landless peasants, smallholders, and urban poor are especially vulnerable. Options include targeted humanitarian food assistance and food for work.[276]

Providing food directly to hunger-stricken populations will not solve their long-term problems, but it will save lives in the interim as economic development takes hold. A case study from Argentina provides an example of the importance of maintaining safety nets. In 1998, the Argentine government obtained a World Bank structural adjustment loan of roughly $2.5 billion in order to avoid currency devaluation.[277] The government was required to drastically reduce fiscal expenditure as a requirement of the loan. A social clause in the agreement, however, mandated that the government maintain a safety net of social programs worth about $680 million.[278] The Garden or Pro-Huerta Program was among these social programs. With an annual budget of roughly $11 million it assisted nearly three million people in achieving self-sufficient food production through seed distribution and technical assistance.[279] During the 1999 national elections, the government reallocated funds from the Garden Program to fund projects in areas where it needed votes. As a result, the budget of the Program was cut from $11 million to $4 million.[280]

Program recipients began organizing themselves in protest and eventually approached the Centro de Estudios Legales y Sociales (CELS or Center for Legal and Social Studies) for assistance. CELS, a non-governmental organization (NGO), brought the situation to the attention of the World Bank's Inspection Panel.[281] While the NGO

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276. Tweeten, *supra* note 24, at 8.

277. Victor Abramovich, *World Bank Inspection Panel: Challenging Structural Adjustment Programmes*, *in* LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ACHIEVEMENTS, CHALLENGES AND STRATEGIES 172 (Centre on Housing Rights and Evictions, 2003), *available at* http://www.cohre.org/library/Litigating%20ESCR%20Report.pdf.

278. *Id.*

279. *Id.*

280. *Id.*

281. The Inspection Panel was established by the Executive Directors of the World Bank in 1993. Its primary purpose is to address the concerns of those affected by Bank

invoked the right to food, its central argument was that the Bank management's lack of supervision failed to ensure compliance with the loan's social clause.[282] This complaint and the accompanying mobilization surrounding the case placed significant pressure on Bank management, which in turn pressured the government to restore full funding to the Program.[283]

Focusing on safety nets, as a preliminary step, may be productive for a variety of reasons. In response to critiques of the impact of IFI policies on the poor, both the IMF and the World Bank now increasingly make provisions for social safety nets to cushion the impact of financial crises through continued spending on certain social services.[284] Moreover, the detrimental impact of eliminating certain public programs on the right to food is much clearer and far less controversial than the complex causation issues surrounding other IMF economic prescriptions.

Social safety nets alone, however, will not solve the broader problem of the impact of IFI policies on the right to food. First, social safety nets are not immune from being cut. Second, the privatization of state-owned enterprises often kicks in before safety nets are properly functioning. And third, even where they function properly, they do not adequately compensate for the failure of various IMF policies to generate employment and increase income.[285]

Broader consideration must therefore be given to the impact of liberalization and other IFI policies on the right to food.

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projects and to ensure that the Bank adheres to its operational policies and procedures in the design, preparation, and implementation of its projects. The Panel consists of three members who are appointed by the Board for five-year periods. For more information, see The Inspection Panel, http://www.inspectionpanel.org.

282. The Bank's initial response to a complaint from CELS was that it could not dictate how much money should be put into a specific program. CELS responded that the Garden Program was part of the original package of programs that the Bank itself concluded would be disproportionately affected by the structural adjustment plan. CELS further argued that the budget cut affected the viability of the program and that its elimination violated the country's poverty reduction strategy. Abramovich, *supra* note 277, at 172.

283. *Id.*

284. *See Common Criticisms*, *supra* note 247.

285. IFI Watchnet, *supra* note 233, § 1.3. A 2003 report by the international human rights NGO Foodfirst Information and Action Network (FIAN International) claims that structural adjustment programs pursued by the World Bank and the IMF in Argentina had a "devastating effect" on employment levels in the country which in turn had a corresponding negative impact on people's right to food. FIAN, RIGHT TO FOOD IN ARGENTINA: REPORT OF THE INTERNATIONAL FACT FINDING MISSION TO ARGENTINA 21 (Apr. 2003), *available at* http://www.eed.de/dyn/download?entry=page.en.pub.en.11; *see also* U.N. OHCHR, HUMAN RIGHTS AND POVERTY REDUCTION: A CONCEPTUAL FRAMEWORK, U.N. Doc. HR/PUB/04/1 (2004), available at http://www.ohchr.org/english/issues/poverty/docs/povertyE.pdf.

Fundamentally, this may require a shift from the IMF's standardized and process-oriented approach, to a tailored outcomes-oriented approach. Critics have charged that the IMF does not undertake a differential diagnosis specific to country conditions and instead offers standardized advice relating to budget cuts, trade liberalization, and privatization of state-owned enterprises without due regard to the specific context. The IMF has, for example, overlooked problems related to climate, disease, cultural conditions, and agronomy.[286] A country's performance is also often judged by whether or not it carries out IFI advice and not by whether or not it has achieved particular development objectives, such as poverty reduction. As a result, "the debate rarely centers on whether or not a policy is correct, but whether the policy was carried out."[287] There remains a need for providing developing country governments, as well as parliamentarians and civil society stakeholders, with a greater degree of ownership and control over the policy recommendations arrived at through the PRSP processes.[288] Furthermore, there should be greater emphasis on the use of outcome indicators related to poverty reduction, with consideration given to conditionality based on progress towards achieving outcomes.[289]

The ESCR Committee notes that ensuring accessibility to adequate food implies that:

> personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. . . . Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.[290]

The Committee's reading of Covenant obligations speaks to keeping the cost of food at a level that does not infringe on other rights (such that households do not have to forgo other basic needs in order to have sufficient food) and instituting special programs to address the needs of particularly impoverished sections of the population. Controlling for sudden price hikes resulting from the removal of food

286. SACHS, *supra* note 12, at 76, 79, 83.

287. *Id.* at 80.

288. Hetty Kovach, *Loosening the Leash?* 4–5 (Enrodad Policy Briefing, 2005) *available at* http://www.eurodad.org/uploadstore/cms/docs/Microsoft_Word_Eurodad_Policy_Briefing_on_World_Bank_Conditionality_Review.pdf.

289. *See id.* at 9.

290. *General Comment 12*, *supra* note 43, ¶ 13.

subsidies and price controls would therefore have to be addressed, either through a revision of these strategies or through special programs geared toward affected populations.

As detailed above, economic reforms can be instituted in a manner that protects vulnerable populations in the short term, and helps ensure that they are not bypassed by economic progress in the long run. Emphasizing IFI member states' obligations to respect and protect the right to food extraterritorially also gives borrowing countries greater autonomy to fashion their economic policies in line with their social and economic rights obligations.

C. *Holding Transnational Corporations Accountable Via the State*

The liberalization of trade and the privatization and deregulation of economies have substantially reduced the state's influence over the daily economic lives of its citizens. The so-called "decline of the nation State" is accompanied by the rise of another powerful actor—the TNC.[291] As described in Part I, TNCs can have an immense impact on the production, trade, processing, marketing, and retailing of food. They can, for example, determine the types of food produced, the technologies associated with that production, and the prices at which such resources are made available to local sectors. In essence, TNCs shift the focus away from meeting the needs and requirements of the local population and toward profit-maximization.[292] Environmental disasters and water pollution caused by TNCs can also threaten the right to food.[293]

Imposing social and economic rights obligations on TNCs presents a significant and unmet challenge. As explored in Part I, human rights law organizes itself around the relationship between a state and the individuals under the state's jurisdiction. As such it does not provide a viable mechanism for holding TNCs directly accountable. International legal accountability for TNCs remains virtually nonexistent.[294] While legal regulation of domestic

291. Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, *in* THE EU AND HUMAN RIGHTS 553 (Philip Alston ed., 1999).

292. *See* Ziegler Report II, *supra* note 148, ¶ 37 (discussing tendency of TNCs to invest in cash crops rather than crops important to the food security of the poor); U.N. CHR, *The Right to Food: Note by the Secretary-General*, U.N. GAOR, 58th Sess., ¶ 31, U.N. Doc. A/58/330 (Aug. 28, 2003) (*prepared by* Jean Ziegler) [hereinafter Ziegler Report III].

293. *See supra* Part I.B.2.

294. For a comprehensive framework proposal for imposing international obligations on

corporate activity affecting human rights is becoming commonplace,[295] by and large these laws do not apply to the extraterritorial operations of TNCs.[296] Private sector initiatives aimed at creating mechanisms of corporate accountability remain limited in scope and are self-regulating.[297] To the extent that international human rights law holds a state responsible for the actions of TNCs, such responsibility normally attaches to the host state.[298] Economic arrangements between the host state and the TNC may, however, restrict the ability of the host state to regulate the TNC in practical and legal terms.[299] Meanwhile, the responsibility of home states—that provide extensive political and financial support to TNCs that violate the right to food abroad—remains largely unaddressed. This section proposes home state accountability where the home state exercises *decisive influence* over the ability of TNCs to operate in an unregulated manner abroad.

1. Current Mechanisms to Hold TNCs Directly Accountable

a. "Soft Law"

The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, adopted by the Sub-Commission on the Promotion and

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TNCs, *see generally* Kinley & Tadaki, *supra* note 142. TNC duties vis-à-vis the right to food remain largely unaddressed by Kinley and Tadaki in their article.

295. *See generally* David Kinley, *Human Rights as Legally Binding or Merely Relevant?*, *in* COMMERCIAL LAW AND HUMAN RIGHTS 25 (Stephen Bottomley & David Kinley eds., 2002) (stating that legal regulation of corporate activity affecting human rights can be found in areas such as criminal law, and in anti-discrimination, health, work safety, environmental protection, and labor rights laws).

296. Kinley & Tadaki, *supra* note 142, at 937–39.

297. On a regional level, both the European Union (EU) and the Organization of American States (OAS) have taken steps toward regulating the conduct of TNCs, although they too are inadequate in ensuring the right to food. The EU has developed a Code of Conduct, which is directed at states and focuses exclusively on arms exports. *See* Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L L. J. 89, 126–29 (2001); *see also* Federation of American Scientists, *Arms Transfers Codes of Conduct*, http://www.fas.org/asmp/campaigns/codecon.html (last visited Apr. 25, 2006). The OAS created the Inter-American Convention Against Corruption, which criminalizes acts of bribery. Inter-American Convention Against Corruption, 3d plen. Sess. (Mar. 29, 1996), *available at* http://www.oas.org/juridico/English/Treaties/b-58.html. However, the Convention is narrow in scope and is not self-executing, and even ratifying countries have not taken any steps towards its implementation. *See* Baker, *supra* note 297, at 128–29.

298. *See infra* Part II.C.2.

299. *Id.*

Protection of Human Rights (Norms)[300] are, to date, the clearest articulation of TNCs' affirmative obligation (within their spheres of activity and influence) to promote, respect, and protect "human rights recognized in international as well as national law."[301] TNCs are called upon to respect economic, social and cultural rights, including "the rights to development, adequate food and drinking water,"[302] and to "refrain from actions which obstruct or impede the realization of those rights."[303] The Norms, however, are nonbinding and have yet to be adopted by the Commission on Human Rights.[304]

The Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the U.N. General Assembly in March 1999, states that private actors have an "important role and responsibility . . . in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized."[305] It too is nonbinding.[306]

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300. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Subcomm'n on the Promotion and Protection of Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (Aug 26, 2003).

301. *Id.* ¶ 1.

302. *Id.* ¶ 12.

303. *Id.*

304. The resolution on the Norms has yet to be adopted by the U.N. Commission on Human Rights. Major business lobby groups (such as the International Chamber of Commerce, the International Organization of Employers, and the U.S. International Business Council) have specifically opposed the Norms, arguing that they conflict with the voluntary nature of existing approaches to corporate social responsibility. *See, e.g.*, CSR Europe, *Background Note: United Nations Norms on the Responsibility of Transnational Companies*, http://www.csreurope.org/UNnormsbriefingsheet_pdf_media_public.aspx (last visited Apr. 25, 2006); *see also* U.N. CHR, *The Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights: Report of the U.N. High Commissioner for Human Rights* (Mar. 2005), http://www.ohchr.org/english/issues/globalization/business/reportbusiness.htm.

305. U.N. CHR, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* art. 18, ¶ 2, 53d Sess., 85th plen. Mtg., Supp. No. 49, U.N. Doc. A/RES/53/144 (Mar. 8, 1999).

306. Additionally, in 1996 the U.N. General Assembly adopted a Code of Conduct for Public Officials, also a nonbinding document. *See* Baker, *supra* note 297, at 126–27; *see also* Erin L. Borg, Note, *Sharing the Blame for September Eleventh: The Case for a New Law to Regulate the Activities of American Corporations Abroad*, 20 ARIZ. J. INT'L & COMP. LAW 607, 628–29 (2003). Subsequently, the U.N. Commission on Transnational Corporations drafted a Code of Conduct for Transnational Corporations in 1998; the Code

Other "soft law" attempts at TNC regulation are also non-binding and ultimately inadequate. The U.N. Global Compact, implemented in 1999, includes principles that call on corporations to respect workers' rights and human rights, counter corruption, and practice environmental responsibility.[307] Corporations that sign on to the Global Compact are allowed to brand their products with the U.N. logo, signifying their compliance with the Global Compact Principles. Compliance in this case requires simply that the TNC post on a U.N. website the steps that it is taking to comply with the Principles,[308] making it possible for a company to formally comply with the Principles without taking any actual steps to protect human rights.

The Organization for Economic Co-operation and Development's (OECD) 1976 Guidelines for Multinational Enterprises (revised in 2000) call on enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."[309] The Guidelines focus on labor laws, environmental protections, combating bribery, protecting consumer interests, issues related to competition and taxation, and the development of science and technology. The ILO's 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy urges governments of member states, corporations operating in their territories, and employers' and workers' organizations to respect the UDHR, its corresponding international covenants, and core labor-related rights.[310] While the Guidelines and the Declaration address TNCs directly, they too are nonbinding and lacking in sufficient monitoring mechanisms. As a result, host states are free to adopt

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was never adopted.

307. United Nations, *U.N. Global Compact*, princs. 3–6 (labor rights), princs. 1, 2 (human rights), princs. 7–9 (environment), princ. 10 (corruption) (Jul. 26, 2000), http://www.unglobalcompact.org.

308. *See* United Nations, *U.N. Global Compact: Policy on the Use of Global Compact Name and Logos*, http://www.unglobalcompact.org/AboutTheGC/gc_logo_policy.html; *see also* Meaghan Shaughnessy, *Human Rights and the Environment: The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y, 159 (2000); William H. Meyer & Boyka Stefanova, Symposium, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501 (2001).

309. OECD, The OECD Guidelines for Multinational Enterprises 29 (June 2000), *available at* http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html.

310. ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 204th Sess., 83 I.L.O. Official Bull. (2000), *available at* http://www.ilo.org/public/english/standards/norm/sources/mne.htm.

(and TNCs can take advantage of) lax environmental and labor standards.[311]

b. Codes of Conduct

Voluntary codes of corporate conduct introduced by numerous corporations also appear to do little to secure TNC respect for fundamental human rights. A sampling of codes reveals a general lack of consistency.[312] Common to many codes, however, is a focus on employment practices and the protection of labor rights.[313] NGOs have also attempted to influence TNC behavior through certification programs.[314] These too are largely restricted in scope to labor and environmental practices.[315]

While codes of conduct and certification programs remain relevant to the fulfillment of the right to food (adequate wages translate into better access to food while protecting the environment guards water supplies and agricultural land), these programs are self-regulating; compliance cannot be ensured. Public pressure to enact voluntary codes of conduct tends to affect only the most prominent corporations, allowing smaller and less well-known companies to continue their rights violations with impunity.[316] Moreover, a TNC can technically be in compliance with labor and environmental standards and still have a detrimental impact on the right to food.

311. Kinley, *supra* note 295, at 949–50.

312. *See* Baker, *supra* note 297, at 138–40.

313. *See, e.g.*, Reebok.com, Reebok Human Rights Programs: Our Business Practices, http://www.reebok.com/Static/global/initiatives/rights/business (last visited Apr. 25, 2006); Nikebiz.com, Worker & Factories: Code of Conduct, http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=code#code (last visited Apr. 25, 2006); Gap Inc., Social Responsibility, http://www.gapinc.com/public/SocialResponsibility/socialres.shtml (last visited Apr. 25, 2006). Levi's Code of Conduct differs slightly in that its global sourcing and operating guideline claims to assess the "human rights environment" as well as the "political, economic and social environment" in making its decisions on whether or not to conduct business in a particular country. Levi Strauss & Co., Social Responsibility/Global Sourcing & Operating Guideline, http://www.levistrauss.com/responsibility/conduct/guidelines.htm (last visited Apr. 25, 2006).

314. One such initiative, launched by Reverend Leon Sullivan, was instrumental in the fight against apartheid in South Africa. *See* Mallenbaker.net, The Global Sullivan Principles of Corporate Social Responsibility, http://www.mallenbaker.net/csr/CSRfiles/ Sullivan.html (last visited Apr. 25, 2006).

315. *See, e.g.*, Social Accountability International, http://www.sa-intl.org (last visited Apr. 25, 2006); Rugmark, *How Certification Works*, *available at* http://www.rugmark.org/cert.htm (last visited Apr. 25, 2006); *see also*, Baker, *supra* note 297, at 131–32.

316. Kenneth Roth, *Rules on Corporate Ethics Could Help, Not Hinder, Multinationals*, FINANCIAL TIMES (U.K.), June 21, 2005, at 19.

Illustrating what Olivier De Schutter terms a "micro" approach to corporate responsibility,[317] codes of conduct confine themselves to the impact of a particular investment, project, or industry on labor and environmental conditions. No attempt is made to examine the overall contribution of the TNC to general development.[318] They thus fall short of ensuring that TNC investment in developing countries benefit the citizenry on a macroeconomic level and do not consider the number of ways in which TNC operations affect the right to food.

Still, codes of conduct, certification programs, and soft law guidelines are arguably a step in the right direction and potentially helpful complements to other mechanisms of accountability. Some commentators have argued that the codes have "an important normative impact on the development of domestic and international laws."[319] David Kinley and Junko Tadaki, for example, survey the potential legal and normative impact of corporate codes. Legally, codes may influence contractual agreements between corporations and their employees. Regulatory agencies may adopt standards expressed in industry codes to fashion binding reporting requirements.[320] Normatively, the behavior of non-state actors in promoting, adopting, and implementing voluntary standards can in turn influence state behavior and perhaps even invite legislative support.[321] It is therefore all the more important that codes of conduct include appropriate reference to the right to food and not be limited in scope to environmental and labor standards. In a similar vein, attempts at creating soft law instruments demonstrate the willingness of multilateral institutions to rein in the impact of TNCs on human rights, and, according to one commentator, may over time ripen into customary international law.[322]

317. *See* Olivier De Schutter, *Transnational Corporations as Instruments of Human Development*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 403, 406 (Philip Alston & Mary Robinson eds., 2005) (arguing that tools to ensure accountability must address the structural and macroeconomic questions raised by foreign direct investment).

318. *See id.*

319. Kinley & Tadaki, *supra* note 142, at 936.

320. *Id.* at 956–57.

321. *Id.* at 958–59.

322. *See id.* at 952 (citing Hans Baade's argument that the follow up procedures of the OECD Guidelines constitute the requisite state practice). For a discussion of state practice and opinio juris with respect to the right to food, see *infra* Part III.C.

2. Indirect Accountability—The Role of the State

Given the current inadequacy of mechanisms to hold TNCs directly accountable, the focus on indirect accountability—that is, the accountability of the state for TNCs actions—must be sharpened. International human rights law obligates states to regulate the behavior of non-state actors, whether individuals or corporations. The duty to *protect* the right to food requires State Parties "to ensure that enterprises or individuals do not deprive individuals of their access to adequate food."[323] Accordingly, a state must protect individuals against the harmful activities of TNCs investing and operating in the state ("host state obligations").

To the extent that international human rights jurisprudence has considered state accountability for the actions of TNCs, it has limited its consideration to host state accountability. In the Ogoniland case, the African Commission on Human and Peoples' Rights found that the Nigerian government had failed to regulate the harmful activities of oil companies against the Ogoni People.[324] Commenting specifically on the right to food, the Commission held that there was a violation because Nigeria had, inter alia, "allowed private oil companies[325] to destroy food sources."[326] While the Ogoniland case held a state liable for failing to regulate corporate activity, its findings are limited to the host state (in this case Nigeria).[327]

There are many sound reasons to expect the host state to regulate TNC activity. The host state has primary responsibility for the protection of human rights in its territory or under its jurisdiction, the host state negotiates the terms under which TNCs can operate in the country, and the host state's administrative and judicial machinery can provide a regulatory framework. Economic arrangements between a TNC and the state may, however, restrict the

323. *See supra* Part I.A; *General Comment 12*, *supra* note 43; *see also General Comment 15*, *supra* note 67, ¶ 23.

324. Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rts. (SERACESR) v. Nigeria, Communication No. 155/96, (prepared by African Commission on Human and Peoples' Rights) (2001), *available at* http://www1.umn.edu/humanrts/africa/comcases/155-96.html.

325. The corporation in the case was a joint venture between the Nigerian National Petroleum Corporation (a majority partner with a fifty-five percent stake) and Shell Petroleum Development Corporation. Shell operated the consortium.

326. SERACESR v. Nigeria, Communication No. 155/96, (prepared by African Commission on Human and Peoples' Rights), ¶ 66.

327. The Commission reaffirmed that: "The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation." *Id.* ¶ 65.

host state's ability to perform its duties.[328]

One example is the "stability" clause that is common to agreements between foreign investors and the host state, which provides that the state will not impose further regulations on the investor that could diminish the profitability of the investment.[329] In addition, the wealth of the TNCs may serve as a bargaining chip capable of shaping the state's economic and political stance vis-à-vis the TNC.[330] According to the U.N. Conference on Trade and Development, approximately one third of the world's top 100 economies are corporations.[331] According to other estimates, the top twenty-five TNCs may be richer than approximately 170 nations.[332] As Mark Baker points out, many small underdeveloped nations with low GDPs are unable to cope with the power of TNCs.[333] The attraction of capital investment from a TNC to a poor nation may be so great that "it could be argued that political leaders in poor nations would be abusing their discretion if they did not allow their nation to be infiltrated by [a TNC]."[334] Exacerbating the problem is the fact that, in many instances, developing country governments and their ruling elites actually benefit from TNCs' unregulated behavior to the detriment of the countries' poorer populations.[335] Privileges accorded to TNCs are also often the result of government corruption and acceptance of bribes by government officials.[336] Moreover, TNCs are not motivated by the same interests as the state. Their

328. *See, e.g.*, AMNESTY INT'L, CONTRACTING OUT OF HUMAN RIGHTS: THE CHAD-CAMEROON PIPELINE PROJECT 7 (2005), *available at* http://web.amnesty.org/library/Index/engpol340122005 (stating that state-investor "project agreements could encourage the governments of Chad and Cameroon to ignore their human rights obligations").

329. *See* De Schutter, *supra* note 317, at 414–16.

330. Baker, *supra* note 297, at 95–96; *see also* Su-Ping Lu, Note, *Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 605–06 (2000).

331. U.N. Conference on Trade and Development, *Are Transnationals Bigger than Countries?*, U.N. Doc. TAD/INF/PR/47 (Dec. 8, 2002), *available at* http://www.unctad.org/Templates/Webflyer.asp?docID=2426&intItemID=1528&lang=1.

332. Baker, *supra* note 297, at 94.

333. *Id.*

334. *Id.* at 95–96.

335. According to one study, "foreign investment dependence benefits the elite segments of the income-earning population over the poorer eighty percent." Linda Beer & Terry Boswell, *The Resilience of Dependency Effects in Explaining Income Inequality in the Global Economy: A Cross-National Analysis, 1975–1995*, 8 J. OF WORLD SYSTEMS RESEARCH 30, 52 (2002), *available at* http://jwsr.ucr.edu/archive/vol8/number1/pdf/jwsr-v8n1-beerboswell.pdf.

336. STIGLITZ, *supra* note 88, at 71–72; *see also* Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), *available at* http://www.hrw.org/reports/1999/enron.

fiduciary duty to their shareholders arguably puts profit-seeking ahead of the interests of the local communities in which they operate.

To be clear, the issue is not whether TNCs should be allowed to invest in developing countries. Indeed, in many instances TNCs may provide much-needed capital and may help spur economic growth in a manner that promotes regular access to food.[337] The concern, therefore, is not with foreign direct investment per se, but with investments that give TNCs unfettered control over natural and economic resources without the requisite level of review and accountability. With appropriate regulation, TNCs have enormous potential to contribute to hunger and poverty solutions. They employ the world's best technologies, have the leading research units, and possess organizational and logistical operations that are superior to most public sector institutions. Article 11(2) of the ICESCR itself provides that countries should make full use of scientific and technical knowledge to improve methods of food production, conservation, and distribution.[338] The potential for real partnership between developing country governments and TNCs in this regard, however, remains largely untapped.

As indicated earlier, this Article does not dismiss the ability or obligation of host states to honor their commitments under the ICESCR. Moreover, international law on this point is quite clear. What remains unclear is the responsibility of the home state. While home states negotiate an advantageous framework and provide other essential services critical to the operation of TNCs abroad, they are not held responsible for the consequences.[339]

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337. Kamminga, *supra* note 291, at 554 ("In many cases foreign direct investment by MNCs has a positive effect on respect for social and economic rights in the host State, through the creations of jobs and by generally raising the standards of living.").

338. ICESCR, *supra* note 35, art. 11(2).

339. For example, in 1998, the U.S. administration and members of Congress pursued fast-track authorization for trade agreements that would remove labor rights standards from bilateral treaty negotiations. HUMAN RIGHTS WATCH, WORLD REPORT 1998: UNITED STATES—HUMAN RIGHTS DEVELOPMENT, *available at* http://www.hrw.org/worldreport/Back.htm. However, compare this to the Caribbean Basin Initiative (CBI), 19 U.S.C. § 2702(c)(8) (2004), which is one of the programs granting favorable terms of trade for developing nations, requiring that one of the discretionary criteria which the President must take into account in designating a country as eligible for CBI is the degree to which workers in such a country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collectively; and the Generalized System of Preferences (GSP), 19 U.S.C. § 2462 (2004), which requires the recipients to respect "internationally recognized worker rights" in order to receive the benefits, defining internationally recognized worker rights as: "(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health," Trade Act of 1974, § 502(a)(4)

3. Home State Accountability

Globalization increasingly blurs the line between state and non-state actors. In particular, the relationship between home states and TNCs has become significantly more interdependent. Home states actively provide financial and political support to TNCs, without which the TNCs would be unable to operate abroad. Accordingly, the Special Rapporteur on the Right to Food notes that states have a duty to prevent violations by their companies and corporations operating abroad.[340] If the obligation of international cooperation includes the duty to protect individuals from the extraterritorial activities of TNCs, then such accountability must be rooted in a doctrinal framework that supports imputing a TNC's actions in the host state to the home state on jurisdictional grounds.

Under international law, states are generally not liable for the conduct of non-state actors, unless the non-state actors are de facto agents of the state, or the non-state actors were acting "on the instructions of, or under the direction or control of, that state in carrying out the [wrongful] conduct."[341] At the same time, human rights jurisprudence suggests a more expansive standard: States must exercise *due diligence* in protecting individuals from abuses committed by unknown or non-state actors, regardless of their relationship to those actors.[342] A merging of these standards, hinted at in the *Maastricht Guidelines*, may provide a means of bridging this gap.

The *Maastricht Guidelines* provide that the obligation to protect includes:

> [T]he State's responsibility to ensure that private entities or individuals, including transnational corporations *over which they exercise jurisdiction*, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise *due diligence* in controlling the behavior of such non-state actors.[343]

How then do we determine whether a home state exercises jurisdiction over a TNC operating abroad? And what might the due

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(codified as amended at 19 U.S.C. § 2467(a)(4) (2004)).

340. Ziegler Report III, *supra* note 292, ¶ 31.

341. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 170, art. 8.

342. *See infra* Part II.C.3.c.

343. *Maastricht Guidelines*, *supra* note 180, at Guideline 18 (emphasis added).

diligence standard require of a state where jurisdiction is established? There is to date no international law jurisprudence on the issue of home state accountability for TNC actions. Jurisprudence focusing on state jurisdiction over non-state actors in other contexts may offer some guidance and suggest a paradigm that may be applied to the relationship between home states and TNCs.

a. The Effective or Overall Control Standard

State liability for non-state actors has been largely restricted to acts of de facto state agents. However, the category of "agents" is gradually broadening. Apart from strict agency relationship, international law holds states accountable for actions of non-state parties over which the state exercises jurisdiction.[344] A series of cases have attempted to answer the question of when a state can be said to exercise jurisdiction over non-state actors. The answer ultimately rests on the degree of control that a state exerts over the activities of the non-state actors in question.

In the seminal case of *Nicaragua v. United States*, the ICJ held that that the acts of contras could not be attributed to the United States on the reasoning that:

> [U.S.] participation . . . in the financing, organizing, training, supplying and equipping of the contras, the selection of . . . targets, and the planning . . . of the operation, is still insufficient in itself . . . for the purpose of attributing to the United States the acts committed by the contras . . . .[345]

The Court said that in order to hold the United States responsible, it would have to be proved that the United States had "effective control" of the contras.[346]

The "effective control" test in *Nicaragua* should not be confused with the language of "effective control" cited by the European Court of Human Rights and the Human Rights Committee in defining state jurisdiction for the purposes of the conventions they

344. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 115 (June 27).

345. *Id.* ¶¶ 92–96.

346. *Id.* Gibney, Tomasevski, and Vedsted-Hansen criticize the ICJ's decision in *Nicaragua* as having set the bar too high and treating "control" as an either-or proposition, failing to take into account the continuum that exists in practice. Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 286 (1999).

monitor.[347] The *Nicaragua* test deals with responsibilities that flow from a state's control over non-state agents while the latter deals with responsibilities that flow from a state having control over a specific piece of territory. The two do not always coincide. For example, a state could be held responsible for having effective control over mercenaries operating abroad even where the state lacks effective control over the territory in which the mercenaries operate.

More recently, in *Prosecutor v. Tadic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) rejected the "effective control" test in favor of the "overall control" test.[348] In addressing the issue of what measure of state control international law requires for organized military groups, the Tribunal looked to the U.N. Security Council Resolutions and debates surrounding, inter alia, South African raids into Zambia to destroy bases of the SWAPO in 1976, Israeli raids in Lebanon in June 1982, the South African raid in Lesotho in December 1982, and the decision in the *Nicaragua* case.[349] The Tribunal concluded:

> [I]t would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State. . . . [I]t must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[350]

The *Tadic* case must be distinguished from *Nicaragua* on multiple grounds. Unlike *Nicaragua*, the non-state actor in *Tadic* was an organized armed force. The issue before the Tribunal in *Tadic* was whether the conflict in question could be characterized as an international armed conflict such that the application of certain international humanitarian norms was justified.[351] Moreover, *Nicaragua* dealt with the issue of state responsibility while *Tadic* dealt with individual responsibility. It could therefore be argued that

347. *See supra* Part II.A.1.
348. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 120 (July 15, 1999).
349. *Id.* ¶ 130.
350. *Id.* ¶¶ 130–31.
351. *Id.* ¶ 103.

the *Tadic* decision is confined to its facts.[352] Regardless, under either standard, states can easily sidestep any responsibility for the acts of TNCs by claiming that they do not exercise such a high degree of control.[353] Although TNCs receive substantial support and backing from their home states, to suggest that they are under the state's effective or overall control would be to ignore the substantial autonomy TNCs enjoy in the conduct of day to day affairs, both at home and abroad.

b. The Decisive Influence Standard

A 2004 European Court of Human Rights case suggests that the standard is loosening.[354] In *Ilascu and others v. Moldova and Russia* the Court found that Russia was responsible for harm caused to the applicants by the authorities in the breakaway region of the Moldavian Republic of Transdniestria (MRT).[355] It reasoned that MRT forces were under the "effective control, *or at the very least decisive influence*" of Russia, adding that the forces survived "by virtue of the military, economic, financial and political support given to [them] by the Russian Federation."[356] The Court also attributed responsibility to Russia for not taking foreseeable actions that would have prevented the abuses in question.[357] Using the *Ilascu* "decisive influence" standard, one could argue that a home state should be held responsible for the actions of a TNC abroad where it can be shown that the TNC survives by virtue of the home state's economic, financial and political support.[358] One could further argue that the

352. In adopting the *Draft Articles*, the International Law Commission did not interpret *Tadic* as meriting a departure from the standard articulated in *Nicaragua*. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 170, at 104.

353. Gibney et al., *supra* note 346, at 287 (arguing that the "effective control" test in *Nicaragua* is prone to evasion by states that deny control over the TNC in question).

354. *See* Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83, 84–85 (2003). Jinks argued that the U.S. actions in Afghanistan post-September 11, 2001 subtly loosened the effective control standard because the U.S. invasion of Afghanistan was justified on the grounds that the Taliban "supported and harbored" al Qaeda. *Id.* The Security Council's support of the invasion signaled a relaxing of international law standards on state responsibility. *Id.*

355. Ilascu v. Russia & Moldova, App. No. 48787/99, 2004 Eur. Ct. H.R. 318. Although the case deals specifically with the issue of jurisdiction, it is nonetheless informative on the question of state responsibility.

356. *Id.* ¶ 392 (emphasis added).

357. *Id.* ¶ 393.

358. The *Draft Articles* note that in theory, the conduct of all human beings, corporations or collectivities linked to the state by nationality, habitual residence or incorporation might be attributed to the state, whether or not they have any connection to the

home state should take foreseeable actions to prevent the abuses in question.

Home state support for TNCs comes in a variety of forms: states negotiate bilateral and multilateral investment treaties that define the framework legal rights of TNCs;[359] government export credit agencies offer overseas investment insurance to cover political risks, and in some cases commercial risks borne by TNCs;[360] and regional and national development finance institutions offer private sector financing.[361] Politically, home states have also played a role in the negotiation, rewriting, or enforcement of contracts that are heavily titled in TNCs' favor.[362] Home states have, for example, pushed developing countries to live up to "vastly unfair" contracts, even when those contracts were signed by corrupt host state officials who are no longer in power.[363] The negotiating power of the TNC was, in these cases, fortified by the muscle power of the home state.[364]

To be clear, the argument here is not that home states control every decision or move that TNCs make. As noted above, TNCs

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government. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 170, at 80. However, the *Draft Articles* caution that "in international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the state as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of public authority." *Id.* Accordingly, the *Draft Articles* note that the general rule is that "only conduct attributed to the state at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the state." *Id.*

359. Bilateral and multilateral investment agreements can play a significant role in framing the legal rights of foreign investors and can impede the ability of the host state to regulate TNC activity with respect to human rights. *See* De Schutter, *supra* note 317, 435–37 (arguing that bilateral investment treaties are the "main tool" in "organizing the legal framework of foreign direct investment in the way most favourable to the interests of the foreign investors"). For a detailed discussion on the absence of social responsibility clauses in multilateral investments, see Bonnie Penfold, *Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities* (Int'l Lab. Off., Working Paper No. 95, 2005), *available at* http://www-ilo-mirror.cornell.edu/public/english/employment/multi/download/wp95.pdf.

360. Penfold, *supra* note 359, at 10–14.

361. *Id.* at vii, 23–24 (discussing the significant role of development finance institutions in funding foreign direct investment).

362. STIGLITZ, *supra* note 88, at 71 ("In Argentina, the French government reportedly weighed in pushing for a rewriting of the terms of concessions for a water utility (Aguas Argentinas), after the French parent company (Suez Lyonnaise) that had signed the agreements found them less profitable than it had thought.").

363. *Id.*

364. *Id.* (describing cases in which the U.S. government, following the overthrow of Mohammed Suharto in 1998 and Nawaz Sharif in 1999, put pressure on the new Indonesian and Pakistani governments to live up to agreements signed by their corrupt predecessors).

enjoy great autonomy in their day-to-day operations. The argument, rather, is that home states can play a considerable role in financing and fashioning an advantageous and deregulated framework for TNCs' operations abroad. Without insurance, their risks may not be covered; without capital, they may not be able to finance their ventures abroad; without trade agreements, they may not be able to do business abroad; and without the home states' political muscle, they may not enjoy such a high degree of deregulation or profit from contracts that are tilted heavily in their favor. It is therefore not unreasonable to conclude that in many cases (though not all) home state support is vital to TNCs' survival in host states. If so, then home states must exercise due diligence in regulating the activities of TNCs abroad.

c. The Due Diligence Standard

The principle that states must exercise due diligence in protecting individuals from abuses committed by unknown or non-state actors is reiterated throughout human rights jurisprudence.[365] In *Velásquez Rodriguez v. Honduras*, a case concerning the disappearance of Manfredo Velásquez, the Inter-American Court of Human Rights stated that:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [Inter-American Convention on Human Rights].[366]

365. See, for example, the *Tellini* case of 1923, which involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. *Tellini* case, *reprinted in* League of Nations, *Official Journal*, 5th Year, No. 4 (Apr. 1924); *see also Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 170, at 81.

366. Velásquez Rodriguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988). The Court's articulation of a state's duty to protect (interpreted in this case as a duty to effectively investigate disappearances) concerned violations that took place within the national territory of the state (where it presumptively exercises effective control). Arguably, a similar standard of due diligence would apply where it can be shown that a state's international human rights obligations extend beyond its physical territory, as discussed above.

In the case of *Herrera Rubio v. Colombia*, the Human Rights Committee found a violation based on Colombia's lack of investigatory vigor even though it was not clear that the culprit of the alleged abuse was a state agent.[367] The case was an individual complaint submitted by Mr. Herrera Rubio to the Human Rights Committee pursuant to Article 5, paragraph 4, of the Optional Protocol to the ICCPR. The applicant claimed that he was tortured and that his parents were tortured and killed by individuals in military uniforms, identified as members of the "counterguerrilla[s]."[368] The Committee held that irrespective of whether the paramilitaries were state agents, Colombia is under an obligation, in accordance with the provisions of Article 2 of the ICCPR, to take "effective measures to remedy the violations that Mr. Herrera Rubio has suffered and further to investigate said violations, take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future."[369]

In *Mahmut Kaya v. Turkey*, a case involving the kidnapping, torture, and murder of two alleged supporters of the Kurdistan Worker's Party, the European Court of Human Rights held that while it could not be established whether a state agent was involved in the killing, the Turkish government had an obligation to take reasonable measures available to them to prevent a real and immediate risk to the lives of the deceased.[370] Failure to take such measures constituted a violation of Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[371]

What do these cases tell us about what is required of a state under the due diligence standard? In *Velásquez*, the Inter-American Court of Human Rights held Honduras responsible for its lack of due

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367. Herrera Rubio v. Colombia, Comm. No. 161/1983 (Nov. 2, 1987), U.N. Doc. CCPR/C/OP/2, at 192 (1990), *available at* http://www1.umn.edu/humanrts/undocs/newscans/161-1983.html.

368. *Id.* ¶ 1.5.

369. *Id.* ¶ 12.

370. Mahmut Kaya v. Turkey, 2000-III, Eur. Ct. H.R. 129, ¶ 87.

371. Article 2 provides:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
> (a) in defence of any person from unlawful violence;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, as amended by Protocol No. 11, Nov. 4, 1950, 213 U.N.T.S. 221.

diligence in preventing the violation or responding to it as required.[372] In *Herrera*, the Human Rights Committee ruled that Colombia must take effective measures to remedy the violations suffered by the complainant, must investigate the violations, and must take steps to ensure that similar violations do not occur in the future.[373] And finally, in *Mahmut Kaya*, the European Court of Human Rights held that the Turkish government had an obligation to take reasonable measures available to them to prevent a real and immediate risk to the lives of the deceased.[374] Read together, the cases impose on the state, at the very least, an obligation to prevent violations by non-state actors.

Such a reading is consistent with the *Maastricht Guidelines* which, as noted above, provide that states are responsible for violations of economic, social, and cultural rights that result from their failure to exercise due diligence in controlling the behavior of non-state actors, including corporations.[375] The Special Rapporteur on the Right to Food adds that the obligation to protect implies that states "have a duty to regulate their companies and corporations that operate in other countries to prevent violations."[376] Under the obligation of international cooperation discussed above, the regulation of corporations fulfills a State Party's obligation to protect.

d. Domestic Regulation of TNC Activity Abroad

One means of satisfying the due diligence obligation is for home states to regulate corporate activity through the enactment of domestic legislation with extraterritorial reach. Though states have historically resisted opening their courts for adjudication of violations committed outside their territory,[377] such an interpretation of a state's

372. *See supra* notes 365–66 and accompanying text.

373. *See supra* notes 367–69 and accompanying text.

374. *See supra* notes 370–71 and accompanying text.

375. *See supra* note 343.

376. Ziegler Report II, *supra* note 148, ¶ 29; *see also* U.N. Subcomm'n on the Promotion & Prot. of Hum. Rts., *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, 57th Sess., Provisional Agenda Item 6, U.N. Doc. E/CN.4/Sub.2/2005 (June 16, 2005) (outlining states' obligations to regulate the manufacture, possession, and transfer of small arms, in order to prevent their use in the commission of human rights abuses by private actors, including abuses that may occur abroad).

377. *See, e.g.*, Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 123–24 (1996) (discussing judicial presumption against extraterritoriality of U.S. labor

obligations under the ICESCR resonates with other international treaties. The United Nations Convention Against Transnational Organized Crime and the Convention Against Torture are both examples of agreements mandating state actions with extraterritorial reach.[378] In addition, in the context of child trafficking, the Convention on the Rights of the Child (CRC)'s Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography provides that a state must exercise extraterritorial jurisdiction in order to criminalize the acts of its nationals or residents when they abuse children in another country.[379] Similarly, a resolution on the sexual exploitation of children, adopted by the Council of Europe encouraged member states "to include in their criminal legislation the principle of extraterritorial prosecution and conviction for offences."[380]

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is of particular interest in that it encourages extraterritorial application of domestic laws to regulate business conduct.[381] Specifically, Article 4(2) of the Convention provides:

> Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction. . . . 4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.[382]

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laws).

378. Convention Against Transnational Organized Crime arts. 5, 6, 15, 18, 30(1), G.A. Res. 25, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (2001); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5, G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93rd plen. mtg., Supp. No. 51, U.N. Doc. A/Res/39/46 (Dec. 10, 1984) (requiring the establishment of jurisdiction over certain offenses, even if committed outside the state's territory) [hereinafter CAT].

379. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography art. 4, G.A. Res. 54/263, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263 (May 16, 2000).

380. Resolution on the Sexual Exploitation of Children, EUR. PARL. DOC. (RES 1099) ¶ 12 (Sept. 25, 1996), *available at* http://assembly.coe.int/Documents/AdoptedText/ta96/eres1099.htm#1.

381. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, OECD Doc. DAFFE/IME/BR(97)20, 37 I.L.M. 1 (1998), *available at* http://www.oecd.org/document/20/0,2340,en_2649_34859_2017813_1_1_1_1,00.html.

382. *Id.*

Commentary to Article 4 notes that "[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required."[383] While the Convention itself is of limited use as a vehicle for curbing TNC violations of the right to food,[384] its approach to extraterritoriality may serve as a model for domestic legislation regulating TNC activity abroad. The proposed legislation could, for example, provide guidelines on respecting and protecting the right to food; include requirements to institute and adhere to codes of conduct; include environmental and labor protections; and sanction violations of these standards with both civil and criminal penalties. To ensure effectiveness, the legislation could also allow for private actions that are not plagued by the same difficulties currently faced under statutes like the U.S. Alien Torts Claim Act.[385] One suggested model for such a regulatory framework, at least in the United States, is a modified version of the Foreign Corrupt Practices Act of 1977 (FCPA), which prohibits foreign bribery and creates record-keeping and accounting requirements for corporations.[386] The FCPA contains civil and criminal penalties for violators but does not contain a right of private action.[387]

The OECD's Guidelines for Multinational Enterprises, which so far remain voluntary, could also serve as a model for a regulatory framework since they call on enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."[388] The Guidelines' broad focus on labor laws, environmental protections, combating bribery, protecting consumer interests, issues related to competition and taxation, and the development of science and technology could also cover the variety of ways in which TNCs affect the right to food. At least one commentator has suggested the OECD should use its anti-bribery convention as a model and a adopt

383. *Id.*

384. The Convention does not apply to forms of corruption other than bribery, bribery which is purely domestic, or bribery in which the direct, indirect, or intended recipient of the benefit is not a public official. It also does not include cases where the bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining of some undue advantage in such business. *Id.* art. I(1)

385. *See* Borg, *supra* note 306, at 609–10. Violations of social and economic rights, which are most prone to abuse by TNCs, fall outside the ambit of the statute all together. For a discussion of the procedural and substantive limitations of using the Alien Tort Claims Act to hold corporations accountable, see Kinley, *supra* note 295, at 940–43.

386. *See* Borg, *supra* note 306, at 639–42.

387. *Id.*

388. OECD, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 29 (2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.

a treaty:

> [R]equiring member states to enact laws similar to its guidelines that would be enforceable under national criminal or civil codes, carrying penalties such as fines or in extreme cases, imprisonment. Like anti-bribery laws, this national legislation would bind any company operating in that nation's jurisdiction. In addition, the United Nations, which has already drafted non-binding norms on corporate conduct, might provide a forum to negotiate a universally applicable treaty.[389]

Though the presumption against extraterritorial application of domestic legislation in countries such as the United States presents a formidable obstacle,[390] it is not insurmountable. The application of the presumption has been inconsistent at best. Courts often find exception to the territoriality principle where activities taking place outside the United States are seen as having some kind of "effect" inside the United States.[391] The presumption is readily abandoned, for example, in cases dealing with securities and anti-trust cases, but firmly kept in claims of labor laws violations.[392] Mark Gibney and David Emerick argue that the case law focuses (perhaps unsurprisingly) on what will benefit the United States, such that monopolistic practices that negatively affect the American economy can be reached by U.S. domestic law.[393] The same is true for criminal behavior that occurs outside U.S. borders, but which may have negative consequences within them.[394] On the other hand, applying domestic safety standards to nuclear reactors sold to Third World countries is perceived as not being in the national interest of the United States, especially when such regulations might hamper the ability of U.S. corporations to compete for business in the global

389. Roth, *supra* note 316, at 19.

390. *See, e,g.*, Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested."); EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)). In 2003, Belgium repealed its "universal jurisdiction" law, which allowed victims to file complaints in Belgium for atrocities committed abroad. *See* Human Rights Watch, *Belgium: Universal Jurisdiction Law Repealed* (Aug. 1, 2003), *available at* http://www.hrw.org/press/2003/08/belgium080103.htm.

391. *See* Gibney & Emerick, *supra* note 377, at 128.

392. *Id.* at 132.

393. *Id.* at 128.

394. *Id.* at 128–29.

market.[395] In such cases, courts are more reluctant to find an exception to the principle of territoriality.[396]

Creating a regulatory framework for monitoring (and sanctioning) TNCs' activities abroad similarly has costs for TNCs, consumers, shareholders, and the home state. Overcoming a presumption against extraterritorial application therefore necessitates a strong articulation of the benefits of such regulation for countries such as the United States. In short, one may need to show that the long-term benefits of regulating TNCs' activities abroad outweigh the burdens that such regulation imposes.[397] One could argue, for example, that regulating the impact of TNC activity abroad may in the long run contribute to the economic, social, and political stability of the countries in which TNCs operate, which in turn creates a more hospitable investment climate.[398] Such regulation is also consistent with a "macro-approach" to corporate social responsibility described above.[399] Domestic governance of TNCs' activities abroad could also improve the home state's image abroad. TNCs' actions may be viewed as representative of their home states' views and practices.[400] Accordingly, abusive practices of TNCs may damage a home state's reputation abroad, and, in some circumstances, may result in real costs to the home state.[401]

Subjecting TNCs to their home state's jurisdiction raises a number of complex legal questions. Would home state jurisdiction infringe on the national sovereignty of the host state? Under what circumstances could parent companies be held liable for the actions of their subsidiaries abroad? Can plaintiffs overcome the defense that home state courts are forum non conveniens for claims against TNCs operating abroad? These questions will require sufficient airing and review for the proposed domestic legislation to be effective. Traditionally, the use of the forum non conveniens defense has allowed TNCs to avoid liability in the home state while simultaneously shielding themselves from the actions of subsidiaries

395. *Id.* at 139–40.

396. *Id.*

397. *See, e.g.*, Borg, *supra* note 306, at 633–39 (arguing that effective sanctions for U.S. corporate misconduct would benefit the United States).

398. *See* De Schutter, *supra* note 317, at 424; *see also* SACHS, *supra* note 12, at 330–34 (arguing that hard evidence has established strong links between extreme poverty abroad and the threats to national security).

399. *See* De Schutter, *supra* note 317, at 406.

400. *See* Borg, *supra* note 306, at 635, 643 ("When American MNCs perpetrate abuses abroad, their actions cast a dark shadow on the United States and its policies.").

401. *Id.*

operating abroad.[402] However, as noted above, home state jurisdiction has been successfully achieved in other contexts.[403]

Creating a regulatory framework may also have costs for the host state. Prescriptions for reining in TNC behavior in host countries regularly come up against the caution that such regulations should not act as a disincentive for the very foreign direct investment that is needed to support economic growth.[404] Though foreign direct investment may help alleviate poverty, it does so more effectively if grounded in positive corporate conduct. Providing a uniformly-enforced regulatory framework may actually encourage foreign investment in developing countries by leveling the business playing field for ethical corporations.[405] Some western companies have begun to recognize the merits of operating under enforceable standards that apply to all their competitors, rather than voluntary standards that only really affect companies with prominent public profiles.[406] Involving the home state in both normative and practical terms in such regulations could provide an effective means of protecting the right to food where accountability gaps exist.

III. NON-RATIFYING STATES: ACCOUNTABILITY VIA CUSTOMARY INTERNATIONAL LAW

Even if the issues surrounding extraterritoriality, TNCs, and IFIs were appropriately resolved, one still has to contend with the fact that the ICESCR, and other treaties establishing the right to food or a related norm, are not universally ratified. Even when ratified, states' human rights obligations often come into conflict with obligations under other legal regimes.[407] To some extent, the problems of non-ratification and the incompatibility of multiple legal regimes can be addressed by locating the right to food in customary international law. Norms that have achieved the status of customary international law will bind non-states-parties[408] and may encourage

402. Kinley, *supra* note 295, at 943–44.

403. *See supra* notes 392–98 and accompanying text.

404. SACHS, *supra* note 12, at 356 (stating that a number of studies confirm that countries with higher levels of foreign direct investment positively correlate with high economic growth and higher GNP per capita).

405. Roth, *supra* note 316, at 19.

406. *Id.*

407. Such regimes include bilateral trade agreements or structural adjustment programs. *See supra* Part I.B.

408. A persistent objection to the establishment of a norm while it is becoming law may exempt the objector from such a norm (the so-called "persistent objector rule"). Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 538 (1993). *See generally*

states to implement international agreements in line with customary human rights norms.[409]

The objective of this section is to analyze the status of the right to food as a norm of customary international law. In the absence of universal ratification of the ICESCR and in the face of a proliferation of international agreements that greatly undermine a state's ability to respect, protect, and fulfill the right to food, this exercise takes on a timely and utilitarian character. In addition, meaningful developments in promoting the right to food in practice and in law merit a consideration of what impact, if any, these developments have on the status of the right to food in customary international law. To be clear, this is not an easy endeavor, nor does it lend itself to easy conclusions. The formation and modification of customary international law is an uncertain process because it lacks procedural clarity and authoritative guidance.[410] Moreover, custom is a fluid source of law, the content of which is not fixed.[411]

While some have argued that updating or revising custom dilutes the power of such norms,[412] equally compelling are arguments that point to the biases inherent in the current delineation of customary norms that render them meaningless for much of the

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Ted Stein, *The Approach of A Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985) (discussing the persistent objector rule and arguing that while it has historically been invoked only rarely it is likely to play a larger role in coming decades due to changes in international law). Some norms are exempt from the persistent objector rule. For example, jus cogens norms bind all states regardless of objections made. Charney, *supra*, at 538–39. Some principles of customary law have achieved the force of peremptory or jus cogens norms, which cannot be violated or altered except by a norm of comparable character. Vienna Convention, *supra* note 256, art. 53; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1987) (defining jus cogens norms as peremptory and specifying torture as one such norm) [hereinafter RESTATEMENT]; Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 741–42 n.6 ("A 'peremptory norm,' also known as *jus cogens*, is defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.'" (citing CHRISTOS L. ROZAKIS, THE CONCEPT OF *JUS COGENS* IN THE LAW OF TREATIES (1976); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 203 (2d ed. 1984); JERZY SZTUCKI, *JUS COGENS* AND THE VIENNA CONVENTION ON THE LAW OF TREATIES (1974))).

409. Achieving customary international law status may also allow access to remedies not contemplated by human rights treaties. One example is the ability to bring suit before the ICJ. ICJ Statute, *supra* note 200, art. 38.

410. It is also a slow process of growth in which courses of conduct once considered optional "become first habitual or usual, and then obligatory." Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 784 (2001) (quoting H.L.A. HART, THE CONCEPT OF LAW 183 (1961)).

411. Roberts, *supra* note 410, at 784.

412. For an overview, see *id.*; *see also* Charney, *supra* note 408.

world's population.[413] This section argues that the analysis of state practice and opinio juris (the two indicators of customary international law) must appropriately reflect changes in the global order that have an impact on the formation of custom. Although states are the relevant actors in the formation of custom, globalization necessitates an approach that acknowledges that states no longer act alone and that the formation of custom and international law is often the result of collective state action in international forums. Our analysis begins with how the hierarchy of human rights has, to date, influenced the formation of customary human rights law.

A. *The Human Rights Hierarchy*

Though economic, social, and cultural rights formed a core part of the post-World War II body of human rights doctrine, they were soon delinked from civil and political rights. The drafters of the UDHR had intended it to be the precursor of a single Human Rights Covenant that would make the principles of the Declaration binding on ratifying states.[414] As the Cold War intensified, and the Soviet Union promoted the inclusion of economic, social, and cultural rights in a single covenant, the United States insisted on extricating these rights and including them in a separate document.[415] In the end, a 1952 General Assembly resolution mandated the creation of two covenants instead of one.[416] Despite the obvious interdependence and indivisibility of the two sets of rights,[417] economic, social, and cultural rights were essentially subordinated to their civil and

413. Commenting on the *Restatement*'s emphasis on civil and political rights, Bruno Simma and Philip Alston poignantly ask:

> [W]hether any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not capital punishment for crimes committed by juveniles or death by starvation and which finds no place for a right of access to primary health care, is not flawed in terms both of the theory of human rights and the United Nations doctrine.

Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 95 (1988–1989).

414. Supporters of this approach maintained that:

> human rights could not be clearly divided into different categories, nor could they be so classified as to represent a hierarchy of values. . . . Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic and social and cultural rights could not be long ensured . . . .

Annotations, *supra* note 182, at 7.

415. Lyon, *supra* note 171, at 539–41.

416. *Id.* For arguments in favor of two separate covenants, see generally *Annotations*, *supra* note 182.

417. *See supra* note 195.

political counterparts[418] and became the "casualties" of Cold War politics.[419]

At the time of the drafting of the ICCPR and the ICESCR—and in the four decades since their adoption—a number of arguments have been put forth to justify the primacy of civil and political rights. These include the notion that civil and political rights (or "first generation" rights) are "negative rights" that require only that a state refrain from certain types of behavior.[420] They can therefore be implemented with immediate effect and with limited strain on state resources. By contrast, economic and social rights (or "second generation" rights) require "positive" action by the state.[421] They can only be implemented gradually and at great cost to the state. Both sets of assumptions have been challenged elsewhere, typically by showing that a variety of civil and political rights require great state expenditure (such as the right to counsel) and that a number of social and economic rights can be implemented immediately through the adoption and enforcement of legislation that sets minimum wage standards or ensures the right to form trade unions.[422]

The hierarchy privileging civil and political rights over social and economic rights is also ingrained in the language of the ICCPR and the ICESCR, their enforcement mechanisms (or lack thereof), and in the setup of each Covenant's monitoring bodies. While States Parties are obligated to immediately implement the rights contained in the ICCPR, under the ICESCR they can work toward their "progressive implementation."[423] Unlike the ICCPR,[424] the ICESCR currently lacks an Optional Protocol that would enable the ESCR Committee to investigate claimed violations (although a Draft Optional Protocol to the ICESCR is being considered).[425] The ESCR

418. Attempts to include economic, social, and cultural rights in the UDHR also faced strong opposition. *See* Henry J. Steiner & Philip Alston, *Economic and Social Rights*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 244 (2d ed. 2000).

419. Lyon, *supra* note 171, at 536.

420. *See, e.g.*, Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT'L L. 689, 712 (1998).

421. *See id.* at 711; Lyon, *supra* note 171, at 549–50; *see also* Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT'L L.J. 763, 764–65 (2003).

422. *See* Gordon, *supra* note 422, at 711–12.

423. *See, e.g.*, ICESCR, *supra* note 35, arts. 2, 14; ICCPR, *supra* note 52, arts. 1–2. Certain obligations under the ICESCR take immediate effect, such as the duty to guarantee that ICESCR rights will be exercised without discrimination and the duty to ensure freedom from hunger. *Id.* arts. 2(2), 11(2); *see also supra* Part I.A.

424. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_opt.htm.

425. Status of the International Covenants on Human Rights, U.N. ESCOR, U.N.

Committee is also the only one of the six major human rights treaty bodies that was not created by the treaty it was set up to monitor, and is comparatively under-resourced.[426]

This hierarchy of rights causes some to dismiss obligations under the right to food, like other social and economic rights, as "soft law" that is "nonbinding" and whose primary function is to provide a set of guidelines that states may or may not choose to follow.[427] On the other side of the spectrum is the characterization of the right to food as part of customary international law, or even a peremptory norm of general international law.[428] Both of these positions are problematic. The right to food is hard law; it is binding on states upon ratification of the ICESCR. To characterize the right to food as soft law misrepresents and undermines the legal obligations of states to respect fundamental human rights norms. The problem lies not with the binding nature of the norm, but with weaknesses in implementation, enforcement, and a lack of universal ratification.[429] At the same time, characterizations of the right to food as a norm of customary international law are often unaccompanied by meaningful legal analysis and leave open gaping theoretical holes that dissenters can easily attack. As a result, the claims of human rights advocates

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Comm'n on Hum. Rts. at 1, U.N. Doc. E/CN.4/1997/105 (Dec. 18, 1996)

426. The Committee was created by U.N. Economic and Social Council Resolution 1985/17. Office of the High Commissioner for Human Rights, *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the ICESCR*. ECOSOC Res. 1985/17, U.N. ESCOR, 1st Sess., 22d mtg., U.N. Doc. E/RES/1985/17 (May 28, 1985), *available at* http://193.194.138.190/Huridocda/Huridoca.nsf/(Symbol)/E.RES.1985.17.En?Opendocument; *see also* Lyon, *supra* note 171, at 541–42. In contrast, the ICESCR merely orders states who are parties to the agreement to submit their reports to the U.N. Economic and Social Council. ICESCR, *supra* note 35, art. 16; *see also* UNHCHR, *Introduction to Treaty-Monitoring Bodies*, *available at* http://www.unhchr.ch/ html/menu2/6/intro.htm (last visited Apr. 25, 2006).

427. *See generally* Robert L. Bard, Symposium, *The Right to Food*, 70 IOWA L. REV. 1279 (1985) (arguing that under a positivistic concept of law—which identifies valid rules by the process employed to establish the rules, rather than their content—no legally cognizable right to food exists).

428. Anthony Paul Kearns, Note, *The Right to Food Exists Via Customary International Law*, 22 SUFFOLK TRANSNAT'L L. REV. 223, 255–56 (1998) (arguing that the right to food has achieved jus cogens status). Given the status of a jus cogens norm as the ultimate trump card that supersedes all other rules of international law (including the persistent objector rule), it is tempting to leap to the conclusion that the right to food is among these norms, but the status of the right to food as a jus cogens norm is not a given.

429. In Louis Sohn's words, "[I]t is not the law that is soft, but the governments." Sohn, *supra* note 49, at 13. Much of international law gives rise to the procedural challenge that governments, who are the international lawmakers, are not going to "declare punishable an act that they may some day wish to commit." *Id.*

can more easily be dismissed as impassioned rhetoric.[430]

The hierarchy of rights has affected the development of customary human rights law in a manner that heavily favors civil and political rights. Under § 702 on Customary International Law of Human Rights, *The Restatement (Third) of the Foreign Relations Law of the United States* (*Restatement*), a state violates international law if:

> as a matter of state policy, it practices, encourages, or condones
>
> (a) genocide,
>
> (b) slavery or slave trade,
>
> (c) the murder or causing the disappearance of individuals,
>
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
>
> (e) prolonged arbitrary detention,
>
> (f) systematic racial discrimination, or
>
> (g) a consistent pattern of gross violations of internationally recognized human rights.[431]

Commentary to this section notes that "only those human rights whose status as customary law is generally accepted (as of 1987) and whose scope and content are generally agreed" upon are included in the list.[432] The commentary clarifies that the "list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future."[433]

Customary international law in general, and the *Restatement*'s articulation of customary human rights norms in particular, has been criticized as reflecting the priorities of Western societies,[434] for its inherent gender bias,[435] and for assuming that American values are

430. *See, e.g.*, Andras Sajo, *Socioeconomic Rights and the International Economic Order*, 35 N.Y.U. J. INT'L L. & POL. 221, 224 (2002).

431. RESTATEMENT, *supra* note 408, § 702.

432. *Id.* cmt. a.

433. *Id.* Article 64 of the Vienna Convention of the Law of Treaties also makes room for the possibility that new jus cogens norms may emerge in the future. *See* Vienna Convention, *supra* note 256, art. 64; Steiner & Alston, *supra* note 418, at 225.

434. Commentators have, for example, noted that international human rights norms give primacy to individual rights over communal or group needs. Roberts, *supra* note 410, at 768–69.

435. *See* Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 65, 69–74 (1995) (arguing that rights are "defined according to what men fear

synonymous with those reflected in international law.[436] Despite these criticisms, the *Restatement* remains the clearest (and most cited) articulation of customary international law norms.

B. *The Formation of Customary Human Rights Law*

Evaluating the right to food as customary international law requires an analysis of the two elements that combine to make up customary international law: general state practice and opinio juris, the belief that the practice is obligatory.[437] These two conditions are set out in § 702 of the *Restatement*, and are widely accepted as indicators of customary international law.[438] State practice and opinio juris on the right to food have evolved significantly since the adoption of the UDHR in 1948 and the ICESCR in 1966.[439] The categories of state practice and opinio juris are by no means separate and distinct; they exhibit a great deal of overlap and often come into conflict.[440] The overlap is in essence an expression of the complementary nature of state practice and opinio juris. In many cases, states will not act unless they feel obligated to, and states will not obligate themselves unless it is consistent with how they wish to act.

Over the past several decades, the formation of custom has undergone substantial changes. States acting in isolation are no longer the sole contributors to the formation of custom. Decisions affecting state behavior are increasingly made in collectives through conferences, declarations, resolutions, and compacts.[441] Our

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will happen to them" and are reflective of a dominant male perspective in the public sphere that may not be shared by women or supported by women's experience in the private sphere).

436. *See* Simma & Alston, *supra* note 413, at 95.

437. *See* North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20) ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.").

438. *See* Steiner & Alston, *supra* note 418, at 70; *see also* ICJ Statute, *supra* note 200, art. 38(1)(b) (defining the sources of international law to include "international custom, as evidence of a general practice accepted as law").

439. *See infra* Part III.C.

440. Very few states, for example, assert the right to torture individuals. To the contrary, they often recognize the customary international law norm against torture, even when their agents are found to be violating the norm. *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS, Apr. 28, 2004, http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml (discussing investigation of abuse of Iraqi prisoners at Abu Ghraib and quoting Brig. Gen. Mark Kimmitt describing the abuse as "criminal behavior").

441. *See infra* Part III.C.3–4.

understanding of the elements of customary international law must adapt to these changes in the global order. In particular, we must look beyond the practice of individual states or explicit expressions of legal obligations.

Traditionally, state practice was gleaned from claims and counter-claims between two states, while opinio juris was gleaned from the expression of legal views by states, as embodied in official statements of nations (by heads of state, organs of government, or those contained in declarations and laws), or through statements concerning other nations' practice or opinions.[442] As Oscar Schachter points out, these constructions of state practice and opinio juris are inappropriate for the formation of custom in the area of human rights, where states do not usually make claims directly on other states and rarely protest one-on-one another state's violations that do not affect their nationals.[443] Rather, human rights issues are debated and sometimes resolved in international forums.[444] State practice and opinio juris is therefore more likely to be found in states' behavior in such forums. The *Restatement* itself recognizes collective state action as evidence of state practice. It notes that state practice includes "governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states . . . ."[445]

In the context of human rights law, opinio juris need not be verbal or explicit.[446] Insisting on a state's explicit expression that it is acting out of legal obligation is at best unrealistic. At worst, it acts as a disincentive to the formation of customary human rights norms. From the perspective of states, as long as they do not announce that their actions are in furtherance of a legal obligation, the human rights norm will never be part of customary international law and the state will never be bound to respect it. Such an approach also severely undermines both the credibility and enforceability of human rights law and creates an impediment to the development of customary human rights law. This is particularly undesirable in the context of social and economic rights, whose development into customary norms has already been impeded by the biases discussed earlier in the section.[447] Moreover, insisting on explicit expression of legal

442. RESTATEMENT, *supra* note 408, § 102.

443. Oscar Schachter, *International Law in Theory and Practice*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 226, 228 (Steiner & Alston eds., 2000).

444. *Id.* at 229.

445. RESTATEMENT, *supra* note 408, § 102 cmt. b.

446. Steiner & Alston, *supra* note 418, at 70.

447. *See supra* Part III.A.

obligation also discounts the overwhelming evidence, described below, of state practice in favor of ensuring the right to food.

Evidence of state practice and opinio juris should therefore be derived from U.N. resolutions,[448] declarations, plans of action; and statements by government officials to the legislature, to the press, at international conferences and at meetings of international organizations.[449] The ratification of human rights treaties also provides compelling evidence of both state practice and opinio juris.[450] Similarly, an examination of humanitarian law offers insight into the right to food as a norm that states pledge to uphold even in times of armed conflict.

Judicial decisions can also have a formative effect on custom by "crystallizing emerging rules and thus influencing state behavior."[451] Similarly, constitutional provisions provide the strongest articulation of a state's domestic legal obligations. They too offer evidence of opinio juris and, when implemented, of state practice.[452] In addition, non-state actors can affect both the determination and development of custom in a variety of ways.[453] Writings by influential publicists, for example, can help shape interpretations of international law.[454] The role of civil society and NGOs in defining what should be customary practice is also an important part of this equation. NGOs are now prominent players in international forums and significant contributors to the formation of customary human rights law.[455] NGOs can help articulate emerging customs and monitor state compliance with international law by

448. In the *Nicaragua* case, the ICJ suggested that U.N. General Assembly resolutions also fulfilled the role of opinio juris. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 184, 188–93 (June 27). In addition, a commission of the Institute of International Law, headed by Krzysztof Skubiszewski, concluded that "a resolution may constitute evidence of customary law or of one of its ingredients (opinio juris, custom-creating practice) . . . ." 61 ANN. INST. DE DR. INT., pt. I (Helsinki Sess.) (1985) at 29-358, *cited in* Oscar Schachter, *New Custom: Power, Opinio Juris, and Contrary Practice*, *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 531, 532 (Jerzy Makarczyk ed., 1996).

449. Steiner & Alston, *supra* note 418, at 39, 69, 70.

450. *See, e.g.*, RESTATEMENT, *supra* note 408, § 102, rep. n.5.

451. *See* Roberts, *supra* note 410, at 774–75.

452. Schachter, *supra* note 443, at 228–29; *see also* Steiner & Alston, *supra* note 418, at 39, 69, 70.

453. Roberts, *supra* note 410, at 774 (citing Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579, 595 (1999)); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 959–60 (1996).

454. Roberts, *supra* note 410, at 774.

455. *Id.* at 775.

investigating and exposing violations of human rights.[456] Amnesty International's aggressive campaign against torture, instrumental in elevating the status of the right to be free from torture to a jus cogens norm,[457] is a case in point. What it tells us about the role of NGOs in promoting the right to food as customary international law is discussed at the end of this section.

With these parameters in mind, we now turn to an analysis of whether the right to food may be said to have become part of customary international law. As described in Part I, the right to food actually encompasses two separate but related norms: the right to adequate food and the right to be free from hunger. While the right to adequate food is a "relative" standard, the right to be free from hunger is "absolute" and fundamental.[458] The right to adequate food—defined as sustainable access to food in a quantity and quality sufficient to satisfy one's dietary and cultural needs[459]—may not yet be part of customary law, but a strong case can be made that the right to be free from hunger has achieved this status.

C. *Analysis of the Right to Food as Customary International Law*

The question of whether the right to food can be characterized as customary international law has not been sufficiently analyzed. A shortcut taken by some is to claim that the right is part of customary international law by virtue of its inclusion in the UDHR, the substance of which can now be regarded as customary law in its entirety.[460] Donald Buckingham, for example, argues that the UDHR is an authoritative interpretation of U.N. Charter Articles 1(3), 55 and 56, indicative of state practice among U.N. member states, and repeatedly referred to as though it has binding legal effect.[461]

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456. *Id.*

457. *See infra* notes 558–59 and accompanying text.

458. Tomasevski, THE RIGHT TO FOOD, *supra* note 58, at xviii.

459. *General Comment 12*, *supra* note 43, ¶ 8.

460. Simma & Alston, *supra* note 413, at 84 (citing, inter alia, Humphrey, *The Universal Declaration of Human Rights: Its History Impact and Juridical Character*, *in* HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 37 (Ramcharan ed., 1979); Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT. L.J. 129, 133 (1977)).

461. Donald E. Buckingham, *A Recipe for Change: Towards and Integrated Approach to Food Under International Law*, 6 PACE INT'L L. REV. 285, 293 (1994); Office of the High Commissioner for Human Rights, *The Universal Declaration of Human Rights*, U.N. Doc. DPI/1937/A (Dec. 1997), *available at* http://www.unhchr.ch/udhr/miscinfo/carta.htm.

The *Restatement* takes the position that "[p]ractice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights, even if only in principle."[462] Under this approach, provisions of the UDHR that proclaim the fundamental right to food may be cited as evidence of state practice moving towards recognizing the right to food as a customary international norm.[463] But the conclusion that the right to food is a norm of customary international law solely by virtue of its inclusion in the UDHR is misguided.

While some UDHR norms have become customary international law,[464] the sequence of events leading to and following the adoption of the UDHR raises serious doubts as to whether *all* of its norms can claim such status. The historic deprioritization of social and economic rights, coupled with the human rights community's longstanding practice of monitoring and promoting primarily "first generation" rights, have affected the development of customary human rights law in a manner that heavily favors civil and political rights.[465] To argue that all rights contained in the UDHR have acquired customary international law status essentially ignores historical developments and contemporary articulations of customary human rights law.[466] It is therefore necessary to determine whether, apart from the UDHR, evidence exists pointing to widespread state practice and opinio juris supporting the treatment of the right to food as customary international law.

1. Human Rights Treaties

While human rights treaties are often cited as evidence of state practice, given that they effectively signal a state's acceptance of legal obligation, they may also be cited as evidence of opinio juris.[467] As stated in Part I, the right to food is most clearly

462. RESTATEMENT, *supra* note 408, § 701, rep. n.2.

463. *See* Universal Declaration of Human Rights art. 25, G.A. Res. 217 A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

464. The right to be free from slavery and the right to be free from torture are examples of UDHR norms that are widely considered to have achieved customary international law status. All states are bound by these norms, even those that have not ratified the ICCPR (prohibiting slavery or servitude) or CAT. *See* RESTATEMENT, *supra* note 408, § 702.

465. *See supra* Part III.A.

466. Kearns, *supra* note 428, at 255–56 (arguing that the right to food has achieved jus cogens status).

467. RESTATEMENT, *supra* note 408, § 102, rep. n.5.

pronounced in Article 11 of the ICESCR.[468] Like the ICCPR, the ICESCR has been widely ratified.[469] Additionally, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States Parties to ensure adequate nutrition for women during pregnancy and lactation.[470] It has been ratified by 179 states.[471] The CRC has 192 States Parties. Each State Party is called upon to take appropriate measures to combat disease and malnutrition through, inter alia, the provision of adequate nutritious foods and clean drinking water.[472] According to the *Restatement*, while general state practice need not be universal, it should include those states most directly affected.[473] In the case of the ICESCR, CEDAW and CRC, not only have the conventions been widely ratified, but their States Parties include countries that are most affected by world hunger, including India and the countries of sub-Saharan Africa.[474] In addition to human rights treaties, the right to food can be found under humanitarian law,[475] in U.N. resolutions,[476] and in countless international declarations.[477] According to one commentator, the international community's attempts to actualize the right to food can be found in "over one hundred instruments relevant to the right to food's definition and establishment as a human right."[478]

2. Humanitarian Law

The Geneva Conventions, considered the cornerstones of international humanitarian law and widely claimed as customary

468. ICESCR, *supra* note 35, art. 11.

469. The ICESCR has been ratified by 149 states and signed by an additional 7. The ICCPR has 152 States Parties. U.N. OFFICE OF THE HIGH COMM. FOR HUM. RTS., *supra* note 77.

470. CEDAW, *supra* note 54, art. 12(2).

471. U.N. OFFICE OF THE HIGH COMM. FOR HUM. RTS., *supra* note 77.

472. CRC, *supra* note 54, arts. 24(2)(c), 27.

473. Steiner & Alston, *supra* note 418, at 70. The Law of the Sea, for example, matters much more to states that are coastal than to those that are landlocked.

474. U.N. OFFICE OF THE HIGH COMM. FOR HUM. RTS., *supra* note 77; U.N. FAO, *23 Countries in Sub-Saharan Africa are Facing Food Emergencies*, July 23, 2003, *available at* http://www.fao.org/english/newsroom/news/2003/20863-en.html. All of these countries have ratified at least one of the mentioned conventions.

475. *See infra* Part III.C.2.

476. *See infra* Part III.C.3.

477. *See infra* Part III.C.4.

478. Kearns, *supra* note 428, at 232, 254 (citing Tomasevski, *supra* note 58, and arguing that the continuous reinforcement of the right through human rights instruments and other vehicles is part of the "ongoing and evolving process that represents customary international law").

international law,[479] ensure the availability of food in cases of armed conflict. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I) requires a state that has captured medical personnel from a neutral country, who were providing medical assistance to an enemy party, to provide such individuals with the same food as is granted to the corresponding personnel in the state's own armed forces, and to ensure that "[t]he food shall in any case be sufficient as regards quantity, quality and variety to keep the said personnel in a normal state of health."[480]

Similarly, the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) requires the detaining power to "supply prisoners of war who are being evacuated with sufficient food" and to ensure that "[t]he basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies."[481] A number of other provisions in the same Convention also relate to the right to food.[482] The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) contains several articles that address the right to food.[483] Article 55 is of particular importance as it imposes an affirmative duty on the occupying power to ensure food and medical supplies for the occupied population.[484] Two Protocols to the Geneva Conventions also address the right to food.[485] In particular,

479. Major Joseph P. "Dutch" Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 37 (2001); *see also* Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621, 624 n.11 (1995).

480. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field art. 32, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950).

481. Geneva Convention Relative to the Treatment of Prisoners of War arts. 20, 26, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

482. *See, e.g.*, *id.* arts. 28, 31, 46, 72.

483. Geneva Convention Relative to the Protection of Civilian Personnel in Time of War arts. 15, 23, 36, 40, 49, 50–51, 55, 59, 60–62, 76, 87, 89, 91, 100, 108, 127, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

484. *Id.* art. 55.

485. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 54, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979) [hereinafter Protocol I], *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS RESOLUTIONS AND OTHER DOCUMENTS 712711 (Dietrich Schindler & Jirí Toman eds., 4th rev. ed. 2004); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 5(1)(b),(c), 14, 18, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II].

they provide that the "[s]tarvation of civilians as a method of combat is prohibited."[486] The Protocols also impose a positive obligation, stating that relief actions must be undertaken if the civilian population is lacking food supplies, subject to the consent of the party or parties concerned.[487]

While a detailed examination of the Geneva Conventions and other norms of humanitarian law is beyond the scope of this Article, two points are worth noting. First, under humanitarian law, both the right to be free from hunger and the right to adequate food are firmly established as rights that must be respected in times of armed conflict. Second, states have exhibited virtually universal adherence to the Conventions.[488] While the applicability of the Conventions to detainees in the "war on terror" has recently been challenged by the United States,[489] no state has rejected the application of provisions ensuring access to food in times of armed conflict.

Because the Geneva Conventions are only applicable to situations of armed conflict, it could be argued that the norms encapsulated in these documents cannot be presumed to carry the same weight in non-conflict situations. On the other hand, a number of human rights (including the right to life) are routinely suspended for the duration of hostilities.[490] Those norms that are observed even in times of conflict can easily be seen as having the status of fundamental rights. Additionally, humanitarian law is increasingly seen as incorporating those norms that are already established under human rights law.[491]

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486. Protocol I, *supra* note 485, art. 54(1); Protocol II, *supra* note 485, art. 14.

487. Protocol I, *supra* note 485, art. 70(1); Protocol II, *supra* note 485, art. 18(2); *see also* Rome Statute of the International Criminal Court art. 7(1)–(2), July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) (addressing issues of access to food).

488. International Committee of the Red Cross, The Geneva Conventions: The Core of International Humanitarian Law (2004), http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions.

489. The United States has taken the position that the Geneva Conventions do not apply to al Qaeda members and only partially apply to members of the Taliban, with the result that neither Taliban nor al Qaeda detainees are considered by the United States to be prisoners of war. *See* Memorandum from President Bush, to the Vice President et al., regarding Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf.

490. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 256 (2000); *see also* U.N. Human Rts. Comm., *General Comment 29: States of Emergency*, ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (noting that states may derogate from the ICCPR in times of armed conflict).

491. *See* Meron, *supra* note 490, at 239; Yoram Dinstein, *The International Law of Inter-State Wars and Human Rights*, 7 ISR. Y.B. HUM. RTS. 139, 148 (1977); *see also* Theodor Meron, Note & Comment, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for A New Instrument*, 77 AM. J. INT'L L. 589 (1983).

3. U.N. Resolutions

Resolutions made by multi-state actors in international forums are an important indication of state practice, and depending on their content, may also provide evidence of opinio juris.[492] The U.N. General Assembly resolutions are of particular importance because they reflect the views and actions of a plurality of states. U.N. General Assembly resolutions repeatedly reference the right to food and/or the obligation to refrain from endangering food security. Resolution 57/226, *The Right to Food*, for example, states that "food should not be used as an instrument of political or economic pressure" and reaffirms "the importance of international cooperation and solidarity, as well as the necessity of refraining from unilateral measures that are not in accordance with international law and the Charter of the United Nations and that endanger food security."[493] The Resolution also reaffirms "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger so as to be able fully to develop and maintain their physical and mental capacities."[494]

Similar statements are made in General Assembly Resolution 58/186, *The Right to Food.* That Resolution goes even further, noting that:

> [E]ach State *must* adopt a strategy consistent with its resources and capacities to achieve its individual goals in implementing the recommendations contained in the Rome Declaration and the World Food Summit Plan of Action and, at the same time, cooperate regionally and internationally in order to organize collective solutions to global issues of food security in a world of increasingly interlinked institutions, societies and economies where coordinated efforts and shared responsibilities are essential.[495]

Sanctions-imposing resolutions also evince recognition of the right to be free from hunger as a fundamental human rights norm.[496]

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492. *See supra* note 448.

493. The Right to Food, U.N. GAOR, 57th Sess., Supp. No. 49, at 2, U.N. Doc. A/RES/57/226 (Feb. 26, 2003).

494. *Id.*

495. The Right to Food, U.N. GAOR, 58th Sess., Supp. No. 49, at 2, U.N. Doc. A/RES/58/186 (Mar. 18, 2004) (emphasis added). For more on the Rome Declaration and the World Food Summit Plan of Action, see *supra* note 216.

496. A 2004 working paper outlining basic criteria for the imposition of sanctions states, "Decisions on sanctions must not create situations in which fundamental human rights not

In its imposition of sanctions, the Security Council increasingly strives to balance the requisite degree of effectiveness with the need to minimize collateral injuries to the population, such as the deprivation of food or essential medicines.[497] Multilateral sanctions against Iraq, perhaps the most comprehensive in history, are a case in point.[498] During the first phase—from August 1990 to April 1997—all Iraqi exports and all Iraqi imports, with the exception of essential foodstuffs and medical supplies, were banned.[499] The exception for food was a narrow one and ultimately, a lack of information and the "red tape of the Sanctions Committee" severely restricted the flow of food to Iraq, resulting in severe hunger and malnutrition in the Iraqi population.[500] In an attempt to counter the devastation caused by years of sanctions, the United Nations established the Oil-for-Food program in 1996.[501] In April 1997, the program began, allowing Iraq

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subject to suspension even in an emergency situation would be violated, above all the right to life, the right to freedom from hunger and the right to effective health care and medical services for all." Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, *Declaration on the Basic Conditions and Standard Criteria for the Introduction and Implementation of Sanctions and other Coercive Measures: Revised Working Paper Submitted by the Russian Federation*, ¶ 14, U.N. Doc. A/AC.182/L.114/Rev.1/Annex I(14) (Mar. 17, 2004).

497. For example, each of the arms embargoes imposed against Rwanda, S.C. Res. 918, ¶ 12, U.N. Doc. S/RES/918 (May 17, 1994), S.C. Res 997, ¶ 3(c), U.N. Doc. S/RES/997 (June 9, 1995); Liberia, S.C. Res. 788, ¶ 12, U.N. Doc. S/RES/788 (Nov. 19, 1992); and Somalia, S.C. Res. 733, ¶ 9, U.N. Doc. S/RES/733 (Jan. 23, 1992), highlight the importance of increasing humanitarian assistance to the affected population. *See also* S.C. Res. 1333 pmbl., ¶ 17, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (recognizing vis-à-vis the Taliban regime that the "necessity for sanctions to contain adequate and effective exemptions to avoid adverse humanitarian consequences"); S.C. Res. 943, pmbl., ¶ 9, U.N. Doc. S/RES/943 (Sept. 23, 1994) (calling upon "the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) to maintain the effective closure of the border between Federal Republic of Yugoslavia (Serbia and Montenegro) and the Republic of Bosnia and Herzegovina with respect to all goods except foodstuffs, medical supplies and clothing for essential humanitarian needs").

498. *See* John Rempel, Liaison, Mennonite Central Committee United Nations Office, *A Brief History of United Nations Sanctions Against Iraq*, http://peace.mennolink.org/articles/iraqsancthist.html (last visited Apr. 25, 2006); *see also* Richard Garfield, *Changes in Health and Well-Being in Iraq during the 1990s: What Do We Know and How Do We Know It?*, *in* SANCTIONS ON IRAQ–BACKGROUND, CONSEQUENCES, STRATEGIES: PROCEEDINGS OF THE CONFERENCE HOSTED BY THE CAMPAIGN AGAINST SANCTIONS ON IRAQ 32, 38–42 (1999), *available at* http://www.casi.org.uk/conf99/proceedings.pdf.

499. Roger Normand & Christoph Wilcke, Symposium, *Human Rights, Sanctions and Terrorist Threats: The United Nations Sanctions Against Iraq*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 299, 309–10 (2001).

500. Cassandra LaRae-Perez, Note, *Economic Sanctions as a Use of Force: Re-Evaluating the Legality of Sanctions from an Effects-Based Perspective*, 20 B.U. INT'L L.J. 161, 166–67 (2002).

501. Global Policy Forum, Sanctions Against Iraq, http://www.globalpolicy.org/security/sanction/indexone.htm (last visited Apr. 25, 2006).

to pay for the importation of humanitarian goods through an escrow account containing Iraqi oil revenues and administered by the Security Council.[502] The program ended in 2003 and has since been dogged by revelations of corruption.[503] Still, the program helped establish that even the most comprehensive sanctions regimes must carve out exceptions for the importation of food.[504]

4. Declarations

Declarations provide additional evidence of state practice and, in some circumstances, opinio juris. Multi-state declarations are gaining importance as states increasingly act collectively by forming conferences, groups, and compacts. It is in these forums that states are likely to pronounce their positions on legal rights and obligations.[505]

The right to be free from hunger and, to some degree, the right to adequate food has been reaffirmed by states in a number of conferences and declarations, beginning as early as 1967, when eighteen states signed a Food Aid Convention (FAC), declaring their intention to supply a minimum amount of food aid to countries in need.[506] In 1997, members of the Food Aid Committee (Argentina, Australia, Canada, the European Community and its Member States, Japan, Norway, Switzerland, and the United States) negotiated a new FAC, which came into effect on July 1, 1999, with an initial duration period of three years.[507] The overarching objective of the FAC is "[t]o contribute to world food security and to improve the ability of the international community to respond to emergency food situations and other food needs of developing countries."[508] The FAC was extended by two years in June 2003.[509]

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502. Normand & Wilcke, *supra* note 499, at 309–10.

503. *Oil-for-Fraud: UN Oil-for-Food Scandal*, ECONOMIST.COM, Apr. 22, 2004, *available at* http://www.economist.com/agenda/displaystory.cfm?story_id=E1_NGTRNGD.

504. *See General Comment 8*, *supra* note 179, ¶ 12 (discussing the need to take economic, social, and cultural human rights "fully into account when designing an appropriate sanctions regime").

505. *See* RESTATEMENT, supra note 408, § 102, rep. n.5.

506. International Grains Arrangement 1967: Wheat Trade Convention and Food Aid Convention art. I, Oct. 15, 1967, TIAS 6537, 727 U.N.T.S. 2, *available at* http://www.austlii.edu.au/au/other/dfat/treaties/1968/14.html ("The purpose of this Convention is to carry out a food aid program . . . for the benefit of developing countries.").

507. Food Aid Convention, Apr. 13, 1999, KAV 6136, 2073 U.N.T.S. 135, *available at* http://www.fao.org/Legal/rtf/fac99-e.htm [hereinafter FAC].

508. *Id.* art. I.

509. U.N. FAO, *Food Outlook: Food Aid—Developments Related to the Food Aid Convention*, Apr. 2004, *available at* http://www.fao.org/documents/show_cdr.asp?url_file=/

In 1974, the Universal Declaration on the Eradication of Hunger and Malnutrition proclaimed the unequivocal right of every individual to be free from hunger.[510] In 1984, the U.N. General Assembly resolved that "the right to food is a universal human right which should be guaranteed to all people, and, in that context, [the General Assembly] believes in the general principle that food should not be used as an instrument of political pressure."[511] A year later, the World Food Security Compact reaffirmed the fundamental right to be free from hunger.[512]

In 1996, the World Food Summit held by the FAO once again reaffirmed "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger."[513] The World Food Summit was attended by 185 countries and the European Community, as well as 790 NGO delegates representing a total of 457 organizations.[514] The Rome Declaration on Food Security (which was a product of the Summit) emphasized "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger."[515] The Food Summit resulted in a detailed Plan of Action, which outlined steps towards achieving food security.[516]

While the declarations confirm states' recognition of the right to food as a fundamental human right, it could be argued that the declarations do not represent universal acceptance of the right to food as a legal right. On the other hand, these declarations formed part of the process that led to the promulgation of the Millennium Development Goals (MDGs), which have been universally

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docrep/006/J2084e/j2084e08.htm (last visited Apr. 25, 2006).

510. World Food Conference, Universal Declaration on the Eradication of Hunger and Malnutrition, ¶ 1, U.N. Doc. E/CONF.65/20 (Nov. 16, 1974), *available at* http://www.ohchr.org/english/law/malnutrition.htm (World Food Conference convened under G.A. Res. 3180 (XXVIII), U.N. Doc. A/9030 (Dec. 17, 1973); Declaration endorsed by G.A. Res. 3348 (XXIX), U.N. Doc. A/9631 (Dec. 17, 1974)).

511. *Food and Agricultural Problems*, G.A. Res. 166, ¶ 6, U.N. GAOR, 39th Sess., Supp. No. 5, U.N. Doc. A/RES/39/166 (Dec. 17, 1984).

512. U.N. FAO, *Adoption of the World Food Security Compact: Report of the Conference of FAO*, item V.E, 23d Sess. (Nov. 9–28, 1985), *available at* http://www.fao.org/docrep/x5562E/X5562e00.htm.

513. Rome Declaration on World Food Security, *supra* note 216.

514. U.N. FAO, *World Food Summit*, Nov. 13–17, 1996 (June 1999), http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/X2051e/X2051e00.htm (follow "Attendance" hyperlink).

515. *Rome Declaration on World Food Security*, *supra* note 216.

516. *Id.*

recognized.[517] The MDGs were adopted by all members of the United Nations.[518] The first MDG concerns the eradication of extreme poverty and hunger. Specifically, it calls for reducing the proportion of people living on less than $1 a day to half the 1990 level by 2015.[519] It also calls for halving the proportion of people who suffer from hunger between 1990 and 2015.[520]

The MDGs represent virtually universal acceptance of the right to be free from hunger, which is the core minimum component of the right to food. The *Restatement* itself provides that "virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights" can be evidence of customary international law.[521] Because of the universal participation of states in the preparation and adoption of the MDGs,[522] the MDGs should be viewed as evidence of customary international law. Commitments to the MDGs have also been reinforced or confirmed in other forums, including the WTO's Doha Ministerial Declaration,[523] the Monterrey Consensus,[524] and most recently, the FAO's Voluntary Guidelines for the Implementation of the Right to Adequate Food.[525]

In addition to MDGs and other declarations, the right to be free from hunger and, to some extent, the broader right to adequate food have been reaffirmed or read into regional charters, conventions, and declarations, including the American Declaration of

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517. *See supra* note 1.

518. *See Road Map Towards the Implementation of the United Nations Millennium Declaration*, U.N. GAOR, 56th Sess., Agenda Item 40, U.N. Doc. A/56/326 (Sept. 6, 2001) (refining some of MDGs).

519. *Id.*

520. World Bank Group, *Millennium Development Goals: Eradicate Extreme Poverty and Hunger*, http://ddp-ext.worldbank.org/ext/GMIS/gdmis.do?siteId=2&goalId=5&targetId=15&menuId=LNAV01GOAL1SUB1 (last visited Apr. 25, 2006).

521. RESTATEMENT, *supra* note 408, § 701.

522. Gordon Brown, U.K. Chancellor of the Exchequer, Speech at the Nat'l Gallery of Scotland (Jan. 6, 2005), *in* BBC NEWS, Jan. 6, 2005, *available at* http://news.bbc.co.uk/1/hi/uk_politics/4151525.stm.

523. WTO, Doha WTO Ministerial 2001, Ministerial Declaration adopted on 14 November 2001, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

524. The Monterrey Consensus came out of the March 2002 International Conference on Financing for Development in Monterrey, Mexico. *See* U.N. Dep't of Economic and Social Affairs, Follow-Up Process to the International Conference on Financing for Development, http://www.un.org/esa/ffd (last visited Apr. 25, 2006).

525. U.N. Press Release SAG/299, Committee on World Food Security Adopts Right to Food Guidelines, Sept. 24, 2004, *available at* http://www.un.org/News/Press/docs/2004/sag299.doc.htm; *see also* Press Release, U.N. FAO Newsroom, Committee on World Food Security Adopts Right to Food Guidelines, Sept. 24, 2004, http://www.fao.org/newsroom/en/news/2004/50821.

the Rights and Duties of Man (1948),[526] the Charter of the Organization of American States (1948),[527] the Inter-American Charter of Social Guarantees,[528] the Additional Protocol to the American Convention on Human Rights,[529] the Cairo Declaration on Human Rights,[530] and the African Charter on Human and Peoples' Rights (and its accompanying Protocol).[531]

5. Constitutional Rights and Domestic Jurisprudence

The right to food has also been incorporated or read into national constitutions. At least twenty countries now explicitly refer to the right to be free from hunger (and to some degree the right to adequate food) or a related norm in their national constitutions.[532] In some countries the judiciary has also played an active role in promoting the right to food. The Supreme Court of India, for

526. American Declaration of the Rights and Duties of Man art. XI, Apr. 30, 1948, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, *available at* http://www.oas.org/juridico/English/ga-Res98/Eres1591.htm ("Every person has the right to the preservation of his health through sanitary and social measures relating to food . . . to the extent permitted by public and community resources.").

527. Charter of the Organization of American States art. 34(j), Apr. 30, 1948, T.I.A.S. 2361, 119 U.N.T.S. 3, *amended by* Protocol of Buenos Aires, O.A.S.T.S. No. 1-A (1967), *further amended by* Protocol of Cartagena, O.A.S.T.S. No. 66 (1985), *further amended by* Protocol of Washington, OEA/Ser.A/2 Add. 3 (SEPF) (1992), *further amended by* Protocol of Managua, OEA/Ser.A/2 Add. (1993), *available at* http://www.oas.org/juridico/english/charter.html.

528. Inter-American Charter of Social Guarantees art. 5, Apr. 30, 1948, *in* Int'l Conferences of Am. States, 2d Supp., 1942–1954, Pan Am. Union, 1958, at 262.

529. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) art. 12(1), Nov. 17, 1988, O.A.S.T.S. No. 69. The Additional Protocol has been ratified by thirteen countries. Inter-American Commission on Human Rights, Signatures and Current Status of Ratifications, http://www.iachr.org/Basicos/basic6.htm (last visited Apr. 25, 2006).

530. Cairo Declaration on Human Rights in Islam art. 17(c), Aug. 5, 1990, Organization of the Islamic Conference A/CONF.157/PC/62/Add.18 (1993).

531. African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 15, July 11, 2003, 2d Ordinary Session of the Assembly of the Union, *available at* http://www.achpr.org/english/_info/women_en.html. The right to food exists implicitly in the African Charter on Human and Peoples' Rights, as determined in *SERACESR v. Nigeria*. Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rts. (SERACESR) v. Nigeria, Communication No. 155/96, (prepared by African Commission on Human and Peoples' Rights) (2001).

532. The countries are Bangladesh, Brazil, Colombia, Congo, Cuba, Ecuador, Ethiopia, Guatemala, Haiti, India, Islamic Republic of Iran, Malawi, Nicaragua, Nigeria, Pakistan, Paraguay, South Africa, Sri Lanka, Uganda, and Ukraine. *See* THE RIGHT TO FOOD IN THEORY AND PRACTICE, *supra* note 8, at 42–43. Ironically, developed countries, which do not suffer the same resource constraints as developing countries, do not appear in this list.

example, affirmed that where people are unable to feed themselves adequately, governments have an obligation to ensure that they are not exposed to malnourishment, starvation, and other related problems.[533] In South Africa, the implementation of the right to food has been strengthened by the establishment of the South African Human Rights Commission to ensure the progressive realization of economic, social and cultural rights.[534]

D. The Right to be Free from Hunger as Customary International Law

As demonstrated above, a plethora of treaties, resolutions, and declarations at the international level, and a growing number of constitutional and judicial interpretations at the domestic level, evince the evolution of the right to food into a customary norm. It could nevertheless be argued that recognition of the right to food as a legal right with corresponding legal obligations is nowhere near universal and that conclusions regarding its status as custom are premature. A particularly strong argument, however, can be made that the right to be free from hunger has already achieved the status of customary international law.

While the number of documents affirming the right to be free from hunger has already been outlined above, the nearly universal commitment to reducing hunger under the MDGs bears repeating. In the words of U.K. Chancellor Gordon Brown:

> The Millennium Development Goals were not a casual commitment. Every world leader signed up. Every international body signed up. Almost every single country signed up. The world in unison accepting the challenge and agreeing the changes necessary to fulfil it—rights and responsibilities accepted by rich and poor alike.[535]

Still, additional evidence is required to support the claim that the right to be free from hunger may already be customary international law. The ESCR Committee has held that "basic

533. People's Union for Civil Liberties v. Union of India & Ors. (S.C. 2001), Writ Petition (Civil) No. 196/2001, *reprinted in* RIGHT TO FOOD 48 (Colin Gonsalves ed., 2004).

534. The Commission is required, under the Constitution, to report annually to Parliament on the realization of economic and social rights. U.N. Econ. & Soc. Council, Comm. on Human Rights, *The Right to Food* 58th Sess., Agenda Item 10, ¶¶ 46, 48–49, 52, U.N. Doc. E/CN.4/2002/58 (Jan. 10, 2002) (*prepared by* Jean Ziegler).

535. Brown, *supra* note 522.

economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law . . . ."[536] As explained in Part I, the right to be free from hunger is a minimum core component of the broader right to food. While the right to adequate food is a "relative" standard, the right to be free from hunger is "absolute" and fundamental.[537] Indeed it is the only right to be qualified as "fundamental" in both the ICCPR and the ICESCR.[538]

A comparative reading of the language of the ICESCR also supports the distinct status of the right to be free from hunger. Article 11(1) requires states to recognize the right of everyone to adequate food and to "take *appropriate steps* to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on *free consent.*"[539] The language of Article 11(2), however, is markedly different:

> States Parties to the present Covenant, recognizing the *fundamental* right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, *which are needed* to improve methods of production, conservation and distribution of food by . . . [t]aking into account the problems of both food-importing and food-exporting countries, to *ensure* an equitable distribution of world food supplies in relation to need.[540]

In contrast to the right to adequate food, the right to be free from hunger is considered a fundamental right; states must take whatever steps are needed to ensure its realization and international cooperation is mandatory and not subject to consent. In other words, the obligation to ensure the right to be free from hunger takes immediate effect (unlike the right to adequate food) and is not subject to the standard of progressive realization that applies to other social and economic rights. The ESCR Committee's General Comment 12

536. U.N. CESCR, *CESCR Concluding Observations: Israel*, ¶ 31, 13th Sess., U.N. Doc. E/C.12/1/Add.90 (May 23, 2003); *see also* Schachter, *supra* note 443, at 231 ("Present tendencies also suggest that other human rights may be on their way to acceptance as general international law . . . in particular, the right to basic sustenance . . . ."); Buckingham, *supra* note 461, at 293.

537. Tomasevski, THE RIGHT TO FOOD, *supra* note 58, at xviii.

538. ICESCR, *supra* note 35, art. 11(2); *see also Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food*, *supra* note 59, ¶ 16; *General Comment 6*, *supra* note 59.

539. ICESCR, *supra* note 35, art. 11(1) (emphasis added).

540. *Id.* art. 11(2). (emphasis added)

recognized, pursuant to Article 11(2), "that more immediate and urgent steps may be needed" to realize the right to be free from hunger.[541] Moreover, while "[t]he right to adequate food will have to be realized progressively. . . . States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters."[542]

Even states that have not ratified the ICESCR or constitutionalized the right to food (or read the right into a fundamental right already contained in the constitution) often act consistently with a recognition that people should not go hungry. Examples abound of foreign food aid to countries in need,[543] and of domestic food aid through programs that subsidize or provide food to vulnerable populations.[544] Food drives initiated by NGOs and other non-state actors further evince recognition of the right to be free from hunger. The unprecedented outpouring of both governmental and private aid in response to the December 2004 Indian Ocean tsunami is the most recent and telling example. Within two weeks of the disaster, the U.N.'s World Food Programme confidently announced that none of the survivors of the tsunami would lose their lives to hunger, adding that food aid had reached "nearly everyone who has been harmed by the disaster."[545]

Even the United States, which has consistently opposed the recognition of social and economic rights in general—it has not ratified the ICESCR—and the right to food in particular, supports efforts to ensure freedom from hunger, at home and abroad. Domestically, the cornerstone of America's anti-hunger strategy is federal food assistance in the form of programs such as the Food Stamp Program, child nutrition programs, and the Special

541. *General Comment 12*, *supra* note 43, ¶1.

542. *Id.* ¶6.

543. *See generally* Charles E. Hanrahan & Carol Canada, *CRS Report for Congress: International Food Aid: U.S. and Other Donor Contributions* (2005), *available at* http://www.nationalaglawcenter.org/assets/crs/RS21279.pdf.

544. *See, e.g.*, U.S. Dep't of Agric., Food and Nutrition Service, Food Stamp Program, http://www.fns.usda.gov/fsp (last visited Apr. 25, 2006).

545. U.N. Upbeat on Tsunami Hunger Aid, BBC NEWS, Jan. 9, 2005, *available at* http://news.bbc.co.uk/1/hi/world/asia-pacific/4157947.stm. However, there are risks associated with food aid, including encouraging dependency and discouraging local production. Canadian Foodgrains Bank, Risks of Food Aid, http://www.foodgrainsbank.ca/programming/planning_reporting/tips/tips/tips402.pdf (last visited Mar. 20, 2006); *see also* FRANCES MOORE LAPPE ET AL., WORLD HUNGER: 12 MYTHS 136–37 (2d ed. 1998), *reprinted in* Globalissues.org, Myth: More U.S. Aid Will Help the Hungry, Food Aid Forestalls Development (Nov. 25, 2000), http://www.globalissues.org/TradeRelated/Poverty/FoodDumping/FoodFirst/Consequence4.asp.

Supplemental Nutrition Program for Women, Infants, and Children (WIC).[546] Internationally, the United States supplied fifty-nine percent of food aid from major donors between 1995 and 2003, and over forty-eight percent of food aid contributions to the World Food Programme between 1996 and April 2005.[547] While the United States initially announced post-tsunami aid in the amount of $35 million, it eventually increased its aid budget to $950 million, partly in response to criticism that it was being "stingy."[548]

While the United States could argue—and in the past has argued—that it is under "no international legal obligation to feed others,"[549] it is unlikely that the United States could have ignored calls to increase aid. While its compulsion to act may not be couched

546. *See* A BLUEPRINT TO END HUNGER 4 (National Anti-Hunger Organizations, 2004), *available at* http://www.alliancetoendhunger.org/pdfs/Blueprint%20to%20End%20Hunger.pdf. U.S. courts have acknowledged that the Eighth Amendment requires that inmates be allowed access to necessary medical care. *See* Estelle v. Gamble, 429 U.S. 97, 103–05 (1976). Additionally, the courts acknowledge inmates' right to a special diet if such an accommodation is medically necessary. Byrd v. Wilson, 701 F.2d 592 (6th Cir. 1983); Frazier v. Dep't of Corr., No. 97-2086, 1997 WL 603773 (10th Cir. Oct. 1, 1997). Courts have also held that the First Amendment guarantees inmates the right to "food sufficient to sustain them in good health that satisfies the dietary laws of their religion." Fox v. Erickson, No. 94-2997, 1995 WL 29540 (8th Cir. Jan. 27, 1995) (quoting McElyea v. Babbitt, 833 F.2d 196, 198 (9th Cir. 1987)). Indeed, as one court has observed, "Some have suggested that there is, in the American Constitutional system, a fundamental right to food for the destitute. It seems clear that without food, and its corollary, physical survival, all of the other rights embodied in the Constitution lose their meaning." West v. Bowen, 879 F.2d 1122, 1145 n.15 (3d Cir. 1989) (citing, inter alia, Universal Declaration of Human Rights, G.A. Res. 217(A) at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948)); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 778–79 (1988) ("The day may indeed come when a general doctrine under the fifth and fourteenth amendments recognizes for each individual a constitutional right to a decent level of affirmative governmental protection in meeting the basic human needs of physical survival."); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 19–48 (1987); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (arguing that the Supreme Court should protect the poor through a right to minimum welfare); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (discussing the support that Rawls provides for a theory of justiciable welfare rights); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (1979) (responding to criticisms of his theory of minimum welfare rights).

547. Hanrahan & Canada, *supra* note 543, at 1–2.

548. Bill Sammon, *U.N. Official Slams U.S. as "Stingy" Over Aid*, WASH. TIMES, Dec. 28, 2004, at A1, *available at* http://www.washtimes.com/national/20041228-122330-7268r.htm; *see also* Bob Deans, *Bush Nearly Triples Request for Tsunami Relief*, SEATTLE POST-INTELLIGENCER, Feb. 10, 2005, § Nation/World *available at* http://seattlepi.nwsource.com/national/211462_tsunamifunds10.html.

549. Press Release, U.S. Mission to the United Nations, Statement by Lucy Tamlyn, Senior Advisor, on Agenda Item 105: Human Rights Questions, in the Third Committee (Oct. 27, 2004), *available at* http://www.un.int/usa/04_211.htm.

in legal obligation terms, it nevertheless felt compelled to respond, reflecting some understanding of its broader responsibilities as a rich nation. A more careful examination of the U.S. objections to the right to food also shows that it too maintains a distinction between the right to adequate food and freedom from hunger. In its reservation to the 2002 World Food Summit Declaration, the U.S. objections centered on the existence of international obligations and on the justiciability of the right to adequate food in the domestic context.[550] The statement supported the progressive realization of the right to adequate food as a component of the right to an adequate standard of living,[551] adding that the "real work" at hand is the reduction of poverty and hunger.[552] It is noteworthy that the only other reservation to the Declaration was submitted by Norway, indicating its preference for stronger language and a binding Code of Conduct.[553] The United States was also the only country to vote against the U.N. resolution on the right to food.[554] Here too the United States supported the right to adequate food as a component of the right to an adequate standard of living and added that the "[U.S.] Government's commitment to providing food aid and ending hunger [is] unquestionable."[555]

In sum, despite opposition to the broader right to food as a legal obligation, even the United States demonstrates some recognition of the fundamental right to be free from hunger through its state practice. Still one could argue that the United States has been a "persistent objector" to the right to food.[556] Yet the analysis above shows that its objections have not been consistent and have distinguished between the right to adequate food and freedom from hunger. Moreover, the United States' position does not negate the possibility that the right to be free from hunger has become a customary international norm—it simply determines whether or not

550. *See* Remarks by Marc Leland, *supra* note 225.

551. *Id.*

552. JONATHAN SHEFF, THE RIGHT TO FOOD AND THE WORLD FOOD SUMMIT: FIVE YEARS LATER 15 (The Carr Center for Human Rights Policy, Summer Report 2002), *available at* http://www.ksg.harvard.edu/cchrp/pdf/The%20Right%20to%20Food%20Report02.pdf.

553. *Id.* at 15 n.i.

554. *The Right to Food*, G.A. Res. 56/155, U.N. GAOR, 56th Sess., Supp. No. 49, U.N. Doc. A/RES/56/155 (Feb. 15, 2002).

555. *Summary Record of the 56th Meeting, held at the Palais des Nations, Geneva, on Tuesday, 22 April 2003*, U.N. CHR, 59th Sess., U.N. Doc. E/CN.4/2003/SR.56 (May 19, 2003). The United States also voiced its objections to the justiciability of the right to food during the Third Committee of the General Assembly meeting in 2001. Peter Rosset, *U.S. Opposes Right to Food at World Summit*, FOODFIRST, June 30, 2002, http://www.foodfirst.org/archive/media/opeds/2002/usopposes.html.

556. *See supra* note 408.

the United States is bound by the norm.[557]

While strong evidence exists to support the status of the right to be free from hunger as customary international law, additional steps must be taken to elevate the broader right to adequate food to this status. The following section addresses the role of non-state actors, including NGOs, in crystallizing the right to food as a norm of customary international law.

E. The Role of Non-governmental Organizations

NGOs in both the developed and developing world—as veritable "enforcers" of human rights—have a significant role to play in shaping public perception and promoting the right to food as customary international law. Left to their own devices, states may have little incentive to implement or enforce human rights norms that often act as restraints on state behavior. The contribution of NGOs in the formation of customary human rights law cannot be underestimated. Amnesty International's role in elevating the status of the right to be free from torture into a jus cogens norm is a case in point. The NGO's early monitoring and campaigning against torture worldwide helped define practices prohibited under the norm.[558] Through consistent pressure and support for governmental initiatives, it also enabled the adoption of the Declaration on Protection of All Persons from Being Subjected to Torture and other Cruel, Inhumane or Degrading Punishment by the General Assembly in 1975, and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in 1984.[559]

Though state practice and opinio juris on the right to be free from torture often come into direct conflict,[560] NGOs have played a crucial role in bridging this gap by closely monitoring states' compliance with this norm.[561] The same could be done with respect

557. Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18) (observing that even if there were a customary rule prohibiting the enclosure of bays by baselines over ten miles long, Norway would not be bound by it because Norway had persistently objected to the rule); *see also* Asylum (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20).

558. Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 96–97 (2001); *see also* Joaquin Tacsan, Letter from the Chair, 2 INT'L LEGAL THEORY 1, 5–8 (III(2)) (1996), *available at* http://law.ubalt.edu/cicl/ilt/2_1_1996.pdf (discussing the role of human actors, including non-governmental organizations, in the development of international law).

559. Nagan & Atkins, *supra* note 558, at 87, 96–97.

560. *See supra* note 440.

561. *See, e.g.*, Amnesty Int'l, *Stop Torture and Ill-Treatment in the "War on Terror,"*

to social and economic rights. Those states that recognize the right to food should be held accountable for their failure to fulfill their obligations, both individually and through their relationship with TNCs and IFIs. Those states that do not accept legal obligation but act consistently with the recognition of the right to food should be called upon to acknowledge that their actions stem from a widely accepted norm of customary international law.

In response to the critique that "socioeconomic rights are simply not providing the guidance that a rule of law should provide,"[562] it is imperative to develop such guidance. The *Maastricht Guidelines* and General Comments of the ESCR Committee are steps in the right direction, but much more remains to be done. Here too NGOs can play a role. Greater certainty and specificity in the form of indicators and benchmarks, greater clarity in formulating state obligations, and more stringent monitoring mechanisms are required in order for the right to food to make its way boldly and comfortably into customary international law.

CONCLUSION

The millions of people who continue to suffer and die from hunger or hunger-related illnesses are a testament to the failure of the international community to use the "right to food" as an effective weapon in the fight against hunger. International human rights law and the bodies, activists, and scholars who promote human rights norms have not kept pace with the changing economic order. While the right to food is both hard law and a strong moral imperative, the inability to reconcile states' obligations with global processes has allowed the world's most powerful actors (transnational corporations, international financial institutions, and influential states) to opt out of legal obligation. This Article begins the process of closing these accountability gaps.

Given the fundamental nature of the right to food, and its relationship to the economic environment, even subtle changes in the global economic order can have profound and often devastating effects on one's ability to be free from hunger or have sustainable

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http://web.amnesty.org/pages/stoptorture-index-eng (last visited Apr. 25, 2006); Human Rts. Watch: United States, *Prison: Torture/Mistreatment, Recent Human Rights Work on the Torture and Abuse of U.S. Detainees*, http://www.hrw.org/doc/?t=usa_torture (last visited Apr. 25, 2006); World Organisation Against Torture, http://www.omct.org (last visited Apr. 25, 2006).

562. Sajo, *supra* note 430, at 224.

access to adequate food. In the introduction to this Article, I demonstrated how economic and rights-based approaches to food security can reinforce one another while compensating for each other's shortcomings. Part I examined the threats to the right to food from states, TNCs, and IFIs. It exposed the accountability gaps in international law that undermine effective implementation of the right to food by allowing TNCs and IFIs to slip through the cracks. It further argued that normative guidance on the obligation of states to uphold the right to food extraterritorially conflicts with the more conservative articulations of states' obligations under international law. In Part II.A, I proposed that the ICESCR can be extraterritorially applied using the obligation of international cooperation, particularly with regard to the duties to respect and protect social and economic rights.

International financial institutions such as the World Bank and the IMF are essentially *multi-state* actors. They are comprised of member states, many of which are States Parties to the ICESCR. In Part II.B, I argued that member states can be required to take into account their international human rights treaty obligations when participating in IFIs. Given significant weaknesses in mechanisms to hold TNCs directly accountable, or indirectly accountable via the host state, in Part II.C I argued that TNCs can be held indirectly accountable via the home state by adapting the due diligence and decisive influence standards to the relationship between home states and TNCs. I further proposed that home states regulate corporate activity through the enactment of domestic legislation or multi-lateral conventions with extraterritorial reach.

The development of norms outside the ICESCR to reconcile the incompatibility of multiple legal regimes and to hold non-ICESCR ratifying states accountable is a necessary precursor to the realization of the right to food under globalization. In Part III, I addressed the accountability of non-ratifying states by locating the right to food in customary international law. Globalization necessitates an approach that acknowledges that states no longer act alone and that the formation of custom and international law is often the result of collective state action in international forums. Through an analysis of the right to food under international and regional human rights instruments, humanitarian law, U.N. resolutions, declarations, as well as domestic constitutions and jurisprudence, I demonstrated that state practice and opinio juris on the right food has expanded dramatically since the adoption of the UDHR in 1948 and the ICESCR in 1966. I further concluded that the minimum core component of the right to food—the right to be free from hunger—may have already achieved customary status.

The changes called for in this Article necessarily require the willing participation of states' governments and the international community. Scholars, the judiciary, and the NGO sector also have a role to play in moving the discussion forward. Yet a review of legal scholarship on the subject finds surprisingly little on the extraterritorial application of economic and social rights in general and nothing of substance on the right to food in particular. The *Restatement*, which has not been updated since 1987, must also be brought in line with developments in state practice and opinio juris over the past two decades. In addition, more exploration of the legal obligation of international cooperation is needed both in terms of its theoretical foundations and its evolution in international law.

While this Article begins to fill the doctrinal gaps in a legal structure that is quickly losing its relevance in a globalized world, the development of norms must go hand in hand with evolutions in public perception.[563] Civil society in both developed and developing countries must embrace and demand the right to food as a legal entitlement. NGOs can help shape public perception of the right to food and, ultimately, help ensure its effective enforcement. NGOs can, for example, monitor the impact of IFI and TNC policies on the right to food, and other social and economic rights; they can assist in the development of appropriate indicators to measure the implementation of social and economic rights at home; and they can document and report on failures of governments to ensure non-interference with the enjoyment of social and economic rights abroad. Finally, NGOs can focus on the fact that many powerful countries that are drivers of economic globalization, including the United States, have not ratified the ICESCR.[564] Promoting the ratification of the ICESCR by these countries improves the chances that they will be held accountable for their actions on the global stage.

Despite the historic deprioritization of social and economic rights, the negative effects of globalization have recently brought them to the forefront of human rights and development discourse. As articulations, interpretations, and even commitments to promoting the right to food become more commonplace, the ability to enforce these commitments, or to reconcile them with global processes and global actors, remains relatively weak. In order to ensure the right to food

563. *See* Jean Dreze, *Democracy and the Right to Food*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARD MUTUAL REINFORCEMENT 45 (Philip Alston et al. eds., 2005).

564. Other countries that have not ratified the ICESCR include Indonesia, Malaysia, Myanmar, Pakistan, and Singapore, as well as a number of Middle Eastern countries. *See* U.N. OFFICE OF THE HIGH COMM. FOR HUM. RTS., *supra* note 77.

for all, it is necessary to re-examine the human rights framework in light of globalization. Though by no means exhaustive, the doctrinal changes proposed in this Article are a first and necessary step.