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KEYNOTE: WHAT DOES INTERNATIONAL LAW HAVE TO DO WITH INTERNATIONAL DEVELOPMENT?

DAVID P. STEWART*

I. INTRODUCTION

The broad topic of international development, understood with particular reference to the Millennium Development Goals,¹ addresses one of the critical aspects of our global future. Simply put, development is not just a good idea, a policy option, or a preferred outcome; it is a necessary process, fundamental to the future of human society.

I believe that without development, growth, progress, whatever you may wish to call it, the human race will stagnate and expire. That is the gloomy news. The good news is that it is in our nature to work towards a better future, to invent, to overcome, to improve, and to develop. At least, that's what several millennia of human existence suggest to me.

Yet, development is not inevitable. It may be necessary, but it is not inexorable. We have within us the seeds of our own obliteration. A world that doesn't develop, a world in which large portions of the human race live in poverty, in poor health and in political subjugation, where large segments of the population

* Visiting Professor of Law, Georgetown University Law Center. Member, Inter-American Juridical Committee; President-elect, American Branch of the International Law Association; ALI project on Restatement (Fourth) Foreign Relations Law of the United States (co-reporter on immunities); member, Board of Editors of the American Journal of International Law and Executive Council, ABA Section of International Law. It is a pleasure to return to the Sturm College of Law in Denver for this Sutton Colloquium on "The International Legal Perspectives on the Future of Development," and to share some thoughts on the relationship between international development and international law. Professor Ved Nanda has been one of my personal heroes for many years, a truly accomplished international lawyer and a man of unparalleled grace, wisdom and insight. It's been my privilege to work with him in a number of circumstances, including the American Branch of the International Law Association and the American Society of International Law. I am certain you realize how truly fortunate you are at the Sturm College of Law to be able to study with him, and under his tutelage.

1. The official site for the MDG implementation "indicators" is *Millennium Development Goal Indicators*, U.N., <http://mdgs.un.org/unsd/mdg/host.aspx?Content=indicators/officiallist.htm> (Apr. 6, 2014). The eight Millennium Development Goals, adopted by the U.N. General Assembly in 2000, are to (1) eradicate extreme poverty and hunger, (2) achieve universal primary education, (3) promote gender equality and empower women, (4) reduce child mortality, (5) improve maternal health, (6) combat HIV/AIDS, malaria and other diseases, (7) ensure environmental sustainability, and (8) develop a global partnership for development. Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000). See U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT (2013), available at <http://www.un.org/millenniumgoals/pdf/report-2013/mdg-report-2013-english.pdf>, for the most recent Millennium Development Goals Report (2013), which assesses progress toward the 2015 target date.

are excluded, where resources and wealth and the benefits of progress are not shared but are reserved for the fortunate few . . . well, that is very likely to be a world of jealousy and hostility, chaos and conflict, war and destruction. We do not need to be the proverbial rocket scientists to know that down that road lies a real prospect of annihilation.

If you are with me so far, then we can probably agree that international development is, as my daughter would say, “like, really important.”

But what does it have to do with international law? Or with us as lawyers or future lawyers? To turn the question around, what does international law have to do with development? Can international law contribute to development, and if so, how? How can we, as international lawyers, contribute most usefully to international development?

In answering these questions, my aim this morning is to speak primarily to the students and recent graduates in the audience, because I want to suggest some important possibilities to you.² I will be happy to take questions and comments at the end.

II. PROPOSITION ON HOW INTERNATIONAL LAW CAN CONTRIBUTE TO INTERNATIONAL DEVELOPMENT

Here is my proposition.

First: Not only can international law contribute to international development, it is an essential aspect of international development, one of the key ingredients that promotes and facilitates development. Not the only one, of course. Law alone cannot make development occur. I am not a believer in a legal “right to development,” or in the notion that development and progress can simply be legislated or legally mandated. But at the same time, international development is not likely to take place, and certainly not likely to occur as quickly or effectively, in a lawless environment. I hope you will agree that development will not thrive—cannot thrive—in the face of civil unrest or chaos or armed conflict, or in situations of widespread human rights abuses, or where corruption is rampant, or where the affected population seethes with unresolved grievances or is excluded from the political process.

Second: What is needed is not just economic growth and increased prosperity. Those things are necessary, of course, but they must also be accompanied by a stable system of governance, rules for the fair operation of society, mechanisms for resolving disputes equitably, prohibitions against crime and corruption, protections for human rights, effective remedies for wrongs—all the things that we generally say constitute the Rule of Law. That’s why Rule of Law promotion is almost

2. For some suggestions about possibilities and resources in this regard, those interested may wish to consult the references at *International Development*, GEO. L., <http://www.law.georgetown.edu/careers/career-planning/practice-areas/international-development.cfm> (last visited July 20, 2014).

always included as part of the “development package.” And *public sector reform* as part of good governance efforts in developing countries has traditionally been at the center of the Rule of Law agenda. Traditionally, the principal focus has been on the promotion and incorporation of public international law principles and standards at the international, regional, and national levels, particularly those coming from the human rights framework. This is where international law is generally thought to have its greatest impact, and where international lawyers can have a truly significant impact.

Third: What is often overlooked, however, is the importance of developing legal rules at the next level, in the context of *private transactions*. In other words, Rule of Law and public sector ordering is not sufficient, by itself. For truly effective growth and development to occur, it is critical to have effective rules, mechanisms and procedures at the transactional level, where businesses and customers and consumers and individuals connect. This is where the principles of *private international law* come into play.

The point is that these principles also have a direct and increasingly positive role in promoting good governance and the Rule of Law. And they too work to foster economic growth, by providing clarity of rules and certainty of expectations in private transactions, by establishing effective dispute settlement mechanisms in cross-border contexts, and by promoting fair and efficient commerce. This too is the lawyer’s territory. It is where we as lawyers have a broad—and often overlooked—range of opportunities to be productively engaged in the development process. It is where you, as lawyers-in-training, can usefully focus your attention.

III. ROLE OF LAW IN DEVELOPMENT

So let me expand on these general points. In thinking about the role of law in development, I have found it useful to imagine that there are three overlapping circles of endeavor: the economic and financial sector, Rule of Law efforts, and the contributions of private international law. Each is important in its own right, but all three working together are necessary.

A. *Economic Development*

Let us first take the economic field. This of course is at the heart of the process, and it involves mostly the work of the economic, financial, and development experts and their various projects directly related to sustainable development—such as building roads and bridges and airports, power grids and water mains and communications systems, schools and hospitals and factories—all the parts of the economic infrastructure and all the facilities that are absolutely necessary to the process of economic development and that in many ways actually define development.

This is mostly the domain of non-lawyer specialists, the economists and financial and engineering folks, the agriculture specialists, the hydrologists—all the technical experts who work at places like the U.N. and UNDP and the World Bank, the regional development banks, other international organizations such as the OECD, government agencies such as USAID, entities like the Peace Corps,

and non-governmental organizations such as Oxfam, the Ford Foundation, all the contractors—all the “direct action” institutions that provide funding and technical expertise and assistance.³

To be sure, many lawyers are involved in this sector, and many provide valuable counsel and service to the direct actors, but they are mostly in legal support roles addressing the needs of the specialists—lawyers advising and assisting clients. It’s good work, necessary work, very satisfying, and I have a number of colleagues who thrive in that environment. But it is a traditional role for lawyers serving their clients.

B. Rule of Law

By comparison, lawyers play a much larger and active role in the Rule of Law effort, which involves various international undertakings aimed at promoting and developing social and economic and governmental change through “law reform.”

The Rule of Law is a term that lacks an agreed definition and can encompass a wide range of projects aimed at creating the kind of modern, effective structure of public governance that supports and fosters economic growth. Its content differs from country to country, depending on the particular circumstances. But Rule of Law initiatives typically consist of capacity building initiatives aimed, for example, at creating effective government structures (with a functional, popularly elected legislature, an orderly and independent judiciary, an effective police presence and criminal justice system, and so forth) as well as promoting a broad culture of respect for human rights and fundamental freedoms in which the institutions of government comply with the law and can be held accountable for violations.⁴

More often than not, folks in the Rule of Law field will say they are working more broadly to create all the other things that constitute a workable and vibrant “civil society,” including a culture of law, fostering acceptance of non-governmental organizations, developing the legal profession, effective law schools, active bar associations, etc.⁵

This is mainstream lawyers’ territory, and when people talk about the role (or rule) of law in development, for the most part this is what they have in mind.

3. One helpful source of possibilities in this regard is Duke Law’s Career and Professional Development Center. See *Tips for Students Interested Post Graduate Careers in International Public Interest Law*, DUKE L., http://law.duke.edu/sites/default/files/international/International_Public_Interest_Tipsheet.pdf (last visited July 20, 2014).

4. Consider, for example, the different approaches taken by the United Nations. See U.N. & THE RULE OF L.: WEBSITE & DOCUMENT REPOSITORY, <http://www.un.org/en/ruleoflaw> (last visited July 20, 2014); see also *What is the Rule of Law?*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/what-rule-law> (last visited July 20, 2014).

5. One of the most active organizations in the field, which takes a broad view of “rule of law” projects, is the International Development and Law Organization (“IDLO”). See *About IDLO*, IDLO, <http://www.idlo.int/about-idlo> (last visited July 20, 2014).

Without question it is vital, because without the Rule of Law, economic progress is hardly likely to be lasting. We can probably all think of resource-rich countries that have experienced stunted growth and development precisely because they lack the Rule of Law.

Done correctly, the Rule of Law effort requires specialists in many legal areas, from constitutional law to legislative and administrative law, public procurement, economic regulations (securities markets, trade and commerce, and banking), and lots of other areas like the environment, health, education, and especially human rights. There is a particular need for experts in all the various aspects of criminal law, for the obvious reason that few threats to developing societies are more dangerous than bribery and corruption, the predations of organized crime, those who trafficking in drugs, people, arms—that is why this is really is an important area for international criminal lawyers.

The Rule of Law challenges are especially critical in situations of conflict or post-conflict reconstruction, where the criminal justice system may be dysfunctional and needs to be reconstituted and reformed. Here there is often a need for criminal law specialists who can work on issues of transitional justice, including such mechanisms as truth and reconciliation commissions. One of the most interesting and satisfying courses I teach is in fact international criminal law, precisely because of its relevance in the development context.

If you look at the increasing number of academic programs which are addressed to “law and development” or which offer specialized degrees in “development law,” these are the areas of specific knowledge that you will find they emphasize. Their goal is to prepare folks to work in the Rule of Law vineyard.⁶

If this is what calls to you—if this is where you think you might make a useful contribution—then I want to draw your attention to a recently published book, which should be of great interest and assistance to those of you who are called to the Rule of Law endeavor. It is edited by Leila Mooney, a lawyer who has worked in this field for many years. It’s entitled “Promoting the Rule of Law: A Practitioner’s Guide to Key Issues and Developments,” published a few months ago by the ABA.⁷ It details the kinds of direct involvement lawyers can have in this area. It is a wonderful introduction to the importance of this work and the range of possibilities open to you. It should be assigned reading in every course related to the process of development.

6. See, e.g., *Sustainable International Development Law LL.M. Program*, U. WASH. SCH. OF L. (Mar. 11, 2014), <http://www.law.washington.edu/sid/>; *LLM International Law and Development*, U. NOTTINGHAM SCH. OF L., <https://www.nottingham.ac.uk/law/prospective/ma-degrees/course-list/llm-international-law-dev.aspx> (last visited July 20, 2014); *LLM in International Development Law and Human Rights*, WARWICK SCH. OF L. (Nov. 19, 2013), http://www2.warwick.ac.uk/fac/soc/law/pg/pgprogram/human_rights_law/.

7. PROMOTING THE RULE OF LAW: A PRACTITIONER’S GUIDE TO KEY ISSUES AND DEVELOPMENTS (Leila Mooney ed., 2013).

C. Transactional Level

But in my view, the by-now traditional kind of Rule of Law effort is, alone, not sufficient. Why, you ask? Simply, we can all think of countries with great economic and natural resources as well as stable systems of governance at the public level, which do not grow because they lack a vibrant *private sector*.

As I indicated, Rule of Law programs focus mostly on the *public* level, on issues of governmental structure and functioning, on the need to create institutions for the administration of justice—courts, legislature, dispute settlement mechanisms—and the importance of establishing a culture of law in civil society. I want you to look past that, to the third level I mentioned earlier, the level of *private* transactions. This is critical because a society genuinely based on the Rule of Law also provides its constituents with fair and reliable norms by which they can organize their affairs and conduct their business, as well as the institutional means for resolving their disputes effectively and efficiently.

Properly conceived, the Rule of Law is more than just rules and laws, and promoting the Rule of Law certainly involves more than supporting or facilitating the creation of functional institutions to administer them. The Rule of Law rests fundamentally on attitudes and expectations, on a sense of confidence and commitment on the part of the individuals concerned, on broad acceptance and participation, and on a belief that reciprocal behavior will lead to orderly and equitable outcomes. These characteristics must be manifested in dealings between private parties as much as in their interaction with the courts, the criminal justice system, and other institutions of the state. It is often overlooked that at this other level that law and lawyers can also make significant contribution to the process of development, in the context of interactions between private members of the community with each other.

This is an area where the institutions and processes of “private international law” come into play. For many of you, the notion of Private International Law may be unfamiliar, or at least a bit fuzzy. So let me offer a brief overview and then give you some concrete examples to demonstrate what I mean and why it is important.

IV. PRIVATE INTERNATIONAL LAW AND DEVELOPMENT

Private international law is often defined as the law governing questions arising in transnational (cross-border) situations involving private parties, in particular such issues as jurisdiction, conflicts of law, and enforcement of judgments.⁸ It is thus distinguishable from public international law, which deals

8. The narrowest view, equating private international law with conflicts of law, is typically found in the civil law tradition but sometimes in British textbooks. See, e.g., MALCOM M. SHAW, *INTERNATIONAL LAW* 647 (6th ed., Cambridge 2008). Many U.S. textbooks favor a broader approach. See, e.g., MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARIES* 836 (4th ed. 2011).

primarily with relations between sovereign states and international organizations rather than private parties.

Today, private international law covers a vast and growing range of subjects, far beyond the traditional trilogy of jurisdiction, conflicts of law, and enforcement of judgments, from transnational commercial agreements to child support and family maintenance, from consumer protection, bankruptcy and secured transactions to the transportation of goods by sea and the regulation of intermediated securities.⁹ That's the sense—the broader sense, the contemporary sense—in which I am using the term.

In point of fact, the global community is deeply and actively involved in formulating truly *international* rules and procedures applicable to private individuals, transactions, and relationships. With greater frequency, these rules and principles are formulated in international bodies in the form of treaties and other international instruments (including non-binding “soft law”), and they are increasingly interpreted and applied by international tribunals as well as domestic courts and tribunals.

At the international level, the principles and instruments of private international law are mostly negotiated, agreed, and adopted in five different, but inter-related organizations. Of these five, three are international in scope and two are primarily regional. All have a global footprint.

The Hague Conference on Private International Law is the oldest of the five, having been founded in 1893. Largely European in its origins, the Conference now counts seventy-four member states from around the globe as well as the European Union, and more than 130 states are parties to at least one of the Conference's thirty-six modern conventions.¹⁰

The International Institute for the Unification of Private Law (known as “UNIDROIT”) was originally created in 1926 as an auxiliary organ of the League of Nations; today it is an independent intergovernmental organization headquartered in Rome entity, with sixty-three member states representing a wide range of different legal, economic and political systems as well as different cultural background.¹¹ It focuses largely on modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States.

The United Nations Commission on International Trade Law (“UNCITRAL”), established in 1966, serves as the core legal body of the U.N.

9. See, e.g., DON FORD, AMERICAN SOCIETY OF INTERNATIONAL LAW [ASIL]: ELECTRONIC RESOURCE GUIDE OF PRIVATE INTERNATIONAL LAW 3 (2013); *Areas of Private International Law*, HCCH, http://www.hcch.net/index_en.php?act=text.display&tid=10 (last visited July 20, 2014); *Private International Law*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/c3452.htm> (last visited July 20, 2014).

10. See *Home*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW [HCCH], http://www.hcch.net/index_en.php (last visited July 20, 2014), for information about the Conference.

11. See *UNIDROIT*, INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT], <http://www.unidroit.org> (last visited July 20, 2014), for information about UNIDROIT, including the conventions and other instruments it has adopted.

system in the field of international trade law.¹² Its membership consists of sixty member states elected by the U.N. General Assembly for six-year terms. Despite its formal title, many of its substantive efforts involve important public international law issues.

At the regional level, here in the Western Hemisphere, the Organization of American States ("OAS") has long undertaken work on issues of private international law. The negotiation of new principles and instruments among the member states has normally been conducted through specialized conferences on private international law, the first of which was held in 1975.¹³ Over the years that process produced some twenty-six separate instruments, including twenty conventions, three protocols, one model law and two "uniform documents."¹⁴ Today, much of the private international law activity takes place in the Inter-American Juridical Committee.¹⁵

For its part, the European Union has become an increasingly important venue for the articulation of private international law as part of its ongoing integrative efforts to harmonize the internal law of the Union's member states.¹⁶ It exercises considerable authority under the various constitutive treaty provisions on which the EU is based, and decisions of the European Court of Justice play an increasingly important role in the development of private international law doctrines.¹⁷

In the State Department, where I spent much of my career, a number of lawyers specialize in this field, in the Office of Private International Law, and working with these organizations, precisely because of the importance of their efforts for economic development and trade and business.¹⁸

The general, unifying goal of these organizations, in their private international law efforts, is to remove legal obstacles to cross-border business transactions through greater harmonization and unification of the relevant legal norms and principles. The objective is to provide the parties to such transactions a much

12. See generally *UNCITRAL*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW [UNCITRAL], <http://www.uncitral.org> (last visited July 20, 2014).

13. See *Private International Law*, ORG. OF AM. STATES [OAS], http://www.oas.org/dil/privateintlaw_interamericanconferences.htm (last visited July 20, 2014).

14. *Id.*

15. See *Inter-American Juridical Committee*, OAS, <http://www.oas.org/en/sla/iajc/default.asp> (last visited July 20, 2014), for information on the Committee.

16. Increasingly, the rules and regulations adopted by the European Union also exert an important influence on the formation and content of private international law throughout the world. See, e.g., Ronald A. Brand, *The European Union's New Role in International Private Litigation*, 2 LOY. U. CHI. INT'L L. REV. 227 (2005); see also Ralf Michael, *EU Law as Private International Law? Re-Conceptualising the Country-of-Origin Principle as Vested Rights Theory*, 2 J. PRIV. INT'L L. 195 (2006).

17. IVANA KUNDA & CARLOS MANUEL GONÇALVES DE MELO MARINHO, PRACTICAL HANDBOOK ON EUROPEAN PRIVATE INTERNATIONAL LAW 3-4 (2010), available at http://ec.europa.eu/justice/civil/files/practical_handbook_eu_international_law_en.pdf.

18. See, e.g., FORD, *supra* note 9; HCCH, *supra* note 9; U.S. DEP'T OF STATE, *supra* note 9.

greater degree of legal clarity, certainty, and predictability in their civil and commercial dealings.

At its core, the process of economic development results from private activity.¹⁹ Official development assistance and other government-to-government programs are vital, but development is driven on the ground by expanding markets, increasing mobility, quick and reliable financial transactions, and virtually unlimited, instantaneous information exchange through the mass media and the Internet. The rules and mechanisms of private international law contribute to economic growth and prosperity in developing countries, especially those lacking the legal and transactional infrastructure necessary to participate fully and efficiently in the modern global economy.

In an increasingly inter-connected world, the harmonization functions of private international law assume an ever-greater practical importance in promoting trade, commerce, and economic development. States with little or no experience in private international law matters, and those that lack the necessary legal infrastructure to participate actively and effectively in the globalized economy, tend to be severely disadvantaged in international trade, investment, and capital markets. One of the purposes of the private international law project is to assist them in gaining the knowledge and experience needed to overcome this deficiency.

By clarifying and harmonizing the rules and principles that apply to transnational civil and commercial dealings, and by enhancing party autonomy in ordinary commercial contracts, private international law facilitates the successful conclusion of commercial transactions and the avoidance (as well as prompt and efficient resolution) of disputes arising thereunder. By reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, it contributes directly to economic development and (because economic development is critical to establishment of the Rule of Law) it thereby contributes as well to the emergence of a robust and functional Rule of Law.

V. EXAMPLES OF THE ROLE OF PRIVATE INTERNATIONAL LAW IN DEVELOPMENT

So now, let me give you some concrete examples of the kind of work done by these private international law institutions, which are directly relevant to the process of development. The examples are intended to illustrate (i) how private international law projects actually contribute to establishing and strengthening the rule of law at the intra- and inter-state levels and (ii) what kind of opportunities are available for lawyers in practice to contribute to the international development project (broadly conceived).

19. See Heidi Metcalf Little, *The Role of Private Assistance in International Development*, 42 N.Y.U. J. INT'L L. & POL. 1091 (2010), for a discussion on the importance of private development assistance generally.

A. Goods and Services

Consider first the importance of clarity and certainty in cross-border contractual arrangements for the purchase and sale of goods and services. Differences in the domestic laws of various trading partners complicate the conclusion of such contracts. Harmonization of substantive commercial law principles can assist contracting parties in reaching an agreement on the terms of their deals as well as in the resolution of disputes arising out of those transactions. In so doing, private international law contributes not only to economic growth and stability, but also to respect for the Rule of Law.

Here, one needs only to acknowledge UNIDROIT's contributions, in particular the adoption in 2010 of the third edition of its Principles of International Commercial Contracts (sometimes described as a "global law of international commercial contracts"). While not themselves binding (in the same way as a treaty or domestic law), the Principles have been accepted by parties to trans-border commercial dealings, used as a model for domestic legislation, and frequently applied by tribunals in international commercial arbitration.²⁰

In 1980, UNCITRAL adopted the Convention on the International Sale of Goods and Services ("CISG"), now ratified by eighty-one U.N. member states (including the United States).²¹ As a self-executing treaty in the United States, the CISG is binding law with respect to contracts that fall within its scope, displacing state law to the extent of any inconsistency. The United States is a party to this convention,²² and some of you may actually have come across the CISG in your commercial law courses.

UNCITRAL has also played an important role in helping to adapt the rules of international commercial transactions to new forms of communication. Such transactions are increasingly carried out through electronic data interchange and other means of communication, commonly referred to as "electronic commerce." These involve the use of alternatives to paper-based methods of communication and storage of information. On the whole, domestic legislatures have been slow to

20. UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994), available at <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994>. The 2010 revision has been published by UNIDROIT in a stand-alone volume. See UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010), available at <http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf>

21. Venezuela and Ghana have signed but not yet ratified the CISG. Status: U.N. Convention on Contracts for the International Sale of Goods (Vienna, 1980), UNCITRAL http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited July 20, 2014). See UNCITRAL, U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), U.N. Sales No. E.10.V.14 (2010), for the text of the Convention. That site also has the current list of States Parties and a link to UNCITRAL's Digest of Case Law under the Convention.

22. Status: United Nations Convention on Contracts for the International Sale of Goods, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited July 20, 2014).

adapt to these technological innovations, and inconsistencies between national legislation have hindered transacting parties.

So in 1996, UNCITRAL adopted a model law intended to facilitate the use of electronic commerce on a basis acceptable to states with different legal, social, and economic systems.²³ In 2001, it adopted a second model law, aimed at legitimizing the use of electronic messaging and identification by making “electronic signatures” the functional equivalent of handwritten signatures.²⁴ And in 2005, it adopted the U.N. Convention on the Use of Electronic Communications in International Contracts.²⁵ The central premise of the Convention (like the earlier Model Law) is “functional equivalency,” so that information in electronic (data message) form will not be denied legal effect, validity or enforceability solely on the grounds of its electronic nature.²⁶

With regard to issues of dispute settlement in international commercial dealings, I imagine most of the students in the audience have had occasion to study the 1958 U.N. Convention on the Recognition and Enforcement of Arbitral Agreements (the “New York Convention”), along with the 1976 UNICTRAL Arbitration Rules (amended in 2010) and its 1985 Model Law (amended in 2006).²⁷ These three are among UNCITRAL’s best-known achievements, and all have played essential roles in establishing a framework for settling transnational commercial disputes between private parties through consensual arbitration rather than domestic court litigation.

In the context of commercial transactions, disputes and controversies are inevitable. When both parties are from the same jurisdiction, their disagreement may be submitted to their domestic courts. When the transaction crosses national borders, reaching agreement on a particular national forum for dispute resolution is less likely. International arbitration offers a viable alternative. But to be attractive to commercial parties, the system of international arbitration must be effective and efficient. Taken together, this triad of instruments offers parties to international transactions an alternative framework to domestic litigation for the resolution of disputes that arise from their civil and commercial dealings. These are critical to

23. UNCITRAL, UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE, U.N. Sales No. E.99.V.4 (1996).

24. UNCITRAL, UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES, U.N. SALES NO. E.02.V.8 (2001).

25. CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS, NOV. 23, 2005, U.N. DOC. A/60/515, E.07.V.2.

26. To date, eighteen countries have signed this treaty, including Russia and China, although only 5—Russia, Honduras, the Dominican Republic, Singapore and Congo—have ratified. *Status: Convention on the Use of Electronic Communications in International Contracts*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html (last visited July 20, 2014). See *Electronic Commerce*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html (last visited July 20, 2014), for the texts of all three instruments.

27. See *UNCITRAL Texts & Status: International Commercial Arbitration & Conciliation*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html (last visited July 20, 2014), for all three instruments.

the effective settlement of disputes in transnational commerce, in particular between developed and less developed countries.

B. Secured Transactions

Another illustrative area concerns secured interests. Access to adequate and affordable credit is unquestionably an essential element in economic development; in the case of private trade and commercial transactions, access to secured credit is frequently a *sine qua non*. Clarifying and standardizing the rules for such transactions is an essential Rule of Law task. Among the first international instruments to address these issues was UNCITRAL's 2001 U.N. Convention on the Assignment of Receivables in International Trade.²⁸ The purpose of the Convention is to promote the development of international trade by providing a comprehensive approach to the rules governing the transfer by agreement of all or part of or an undivided interest in the assignor's contractual right to payment of a monetary sum ("the receivable") from a third person ("the debtor").²⁹

Another key private international law instrument in this effort has been UNIDROIT's 2001 Convention on International Interests in Mobile Equipment (often referred to as the "Cape Town Convention").³⁰ As the title indicates, its focus is on secured interests in easily identifiable, high-value mobile equipment, which can readily move across national boundaries.³¹ Among other things, the Convention provides for the creation of a recognized international security interest sufficient to protect the interests of the creditors.³² It establishes the means for the electronic registration of those interests, in order to provide notice to third parties, and thus to enable creditors to preserve their priority against subsequently registered interests, any unregistered interests, and potentially, the debtor's insolvency administrator.³³

A protocol to the Cape Town Convention (adopted at the same time as the Convention itself) addresses the particular issues related to security interests in aircraft equipment.³⁴ A second protocol was concluded in 2007 covering the financing of railroad rolling stock (such as engines, freight cars, and passenger

28. U.N. COMM'N ON INT'L TRADE LAW, U.N. CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, U.N. Sales No. E.04.V.14 (2004).

29. *Id.*

30. See *Convention on International Interest in Mobile Equipment*, UNIDROIT (Nov. 16, 2001), available at <http://www.unidroit.org/instruments/security-interests/cape-town-convention>, for information about the 2001 Cape Town Convention on International Interests in Mobile Equipment.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Convention on International Interest in Mobile Equipment on Matters Specific to Aircraft Equipment*, Nov. 16, 2001, 4 U.S.T. 1830, 2307 U.N.T.S. 285, available at <http://www.unidroit.org/english/conventions/mobile-equipment/aircraftprotocol.pdf>.

cars), and work is currently proceeding on a possible third protocol addressed to space-based assets.³⁵

For its part, the OAS has also been active in the field of secured interests. In 2002 it adopted a Model Inter-American Law on Secured Interests, aimed at regulating security interests and securing the performance of any obligations in movable property.³⁶ States adopting the Model Law undertake to create a “unitary and uniform registration system applicable to all existing movable property security devices in the local legal framework.”³⁷ Proposed Model Registry Regulations, approved in October 2009, provide solutions to questions concerning registration and uniformity, and are intended for use in both civil law and common law systems in a cohesive implementation of the Model Law.³⁸

C. *Transport by Sea*

A third illustration concerns the transportation of goods by sea. The international legal framework governing this area extends back over eighty years, lacks uniformity, and has failed to adapt to modern transport practices such as containerization, door-to-door transport contracts, and the use of electronic transport documents. This outmoded legal system imposes significant costs (direct and indirect) on international commerce.

In 2008, UNCITRAL completed work on a new treaty to replace the antiquated rules contained in such earlier agreements as the Hague, Hague-Visby, and Hamburg Rules. The new U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was opened for signature in Rotterdam in the fall of 2009 (and thus was quickly denominated the “Rotterdam Rules”).³⁹

This multilateral convention is intended to provide both shippers and carriers with a modernized, balanced and universal regime to support the operation of maritime contracts of carriage including those involving other modes of transport (such as road or rail). In scope, it covers the entire contract of carriage, including: liability and obligations of the carrier, obligations of the shipper to the carrier, transport documents and electronic transport records, delivery of the goods, rights of the controlling party and transfer of rights, limits of liability, and provisions

35. Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, Feb. 23, 2007, 46 I.L.M. 662, available at <http://www.unidroit.org/instruments/security-interests/rail-protocol>; *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets*, UNIDROIT, (Mar. 9, 2012), available at <http://www.unidroit.org/instruments/security-interests/space-protocol>.

36. *Model Inter-American Law on Secured Transactions* (2002), available at http://www.oas.org/dil/cidip-vi-securedtransactions_eng.htm.

37. *Id.* art. 1.

38. See OAS, *Model Registry Regulations Under the Model Inter-American Law on Secured Transactions*, CIDIP-VII/doc.3/09 rev.3 (Oct. 9, 2009), for the text of the model registry regulations.

39. *New U.N. Convention Rotterdam Rules Open for Signatures*, ROTTERDAM RULES, <http://www.rotterdamrules2009.com/cms/index.php> (last visited July 20, 2014).

regarding the time for suit to be filed, jurisdiction, and dispute resolution mechanisms.⁴⁰

This new treaty, if widely adhered to, could bring significant benefits for trade with developing countries, many of which are currently party to the 1976 Hamburg Rules. To date, only three States—Spain, Togo, and the Congo—have ratified the Convention, although twenty-two others (including the United States) have signed it.⁴¹

D. Simplified Stock Corporations

One of the most intriguing recent developments concerns the promotion of a new form of corporate entity, known as the “Simplified Stock Corporation,” to facilitate economic growth at the level of small and micro-businesses. Essentially a hybrid of what we in the United States might call a limited liability partnership and a “close” corporation, this innovation is aimed at reducing the time, costs, and formalities of incorporation of formal companies while providing many of the benefits (structural and contractual flexibility, protection for investors and the ability to attract capital, and sufficient governmental supervision to ensure protection for customers).

Within the OAS, the Inter-American Juridical Committee has studied the concept, taking into account Colombia’s very successful experiences in this area, and in 2011 the Committee adopted a proposed Model Law on the topic for consideration of the Member States.⁴² The topic has more recently been taken up by UNCITRAL’s Working Group I on micro, small, and medium-sized enterprises.⁴³

E. Electronic Warehouse Receipts

Still another area in which legal creativity and innovation are making real contributions to economic growth and development involves establishment of electronic systems of warehouse receipts. In many areas of the world, and especially in many agricultural sectors, staple commodities (flowers, fruits, grains, vegetables) are produced by farmers working small plots or parcels of land. In general, these farmers either sell their surplus commodities locally or bring them to

40. *See id.*

41. *See* United Nations, Multilateral Treaties Deposited with the Secretary-General, *U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (July 20, 2014), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-8&chapter=11&lang=en (last updated Sept. 20, 2014).

42. Inter-American Juridical Committee, *Project for a Model Act on Simplified Stock Corporation*, CJI/RES. 188 (LXXX-O/12) and CJI/doc.380/11 corr. 1 (2012), compiled in OAS, *Annual Report of the Inter-American Juridical Committee to the 43rd Regular Session of the OAS General Assembly*, at 65-84, OAS Doc. CJI/doc.425/12 (August 10, 2012).

43. *See* UNCITRAL Working Grp. I Secretariat, *Micro, Small and Medium-Sized Enterprises: Features of Simplified Business Incorporation Regimes*, U.N. Doc. A/CN.9/WG.I/WP.82 (December 10, 2013).

a storage or collection point (warehouse) for transfer up the supply chain to a very distant market, in some cases in a different country. In most cases, the transactions are recorded on some form of paper-based “warehouse receipt” which give the producer little if any security. Frequently the farmer must wait a long time to receive his share of the proceeds.

Establishing a standardized and electronically based system of warehouse receipts can speed up the transactions considerably. If the receipt is secured and negotiable, both the farmer and his purchaser(s) can take more confidence in the transactions, and the producers can more easily obtaining financing to invest in the next crop yield.

In the United States, the 1916 Warehouse Act created a licensing system for warehouses to provide for financial security, recordkeeping, protection, and other operational items. The statute was recently revised to accommodate warehouse receipts in electronic form.⁴⁴ Both UNCITRAL and UNIDROIT have given some consideration to the issue, and in 2013 the Inter-American Juridical Committee undertook a project to prepare a model law on the subject for the consideration of the member states of the OAS.⁴⁵

F. Public Procurement

In most states, government procurement constitutes a significant portion of public expenditure. Fair, objective, and efficient procurement rules and procedures foster integrity, confidence, and transparency. They are the hallmarks of a Rule of Law system. They also promote economy, efficiency, and competition and thus lead to increased economic development. The lack of such rules and procedures invites fraud, waste, and corruption.

UNCITRAL’s revised Model Law on Public Procurement, adopted in 2011 to replace the 1994 UNCITRAL Model Law on Procurement of Goods, Construction, and Services, contains procedures and principles aimed in large part at avoiding abuses in the procurement process.⁴⁶ The text promotes objectivity, fairness, participation, competition, and integrity. Transparency is also a key principle, allowing visible compliance with the procedures and principles to be confirmed. A year later, UNCITRAL adopted a Guide to Enactment of the UNCITRAL Model Law on Public Procurement to assist states in implementing the Model Law.⁴⁷

44. Warehouse Act, ch. 313, pt. C, § 2 (1916), amended by Pub.L. 106-472, Title II, § 201, 114 Stat. 2061 (2000) (current version at 7 U.S.C. 241-256 (2012)).

45. Inter-American Juridical Committee, CJI/doc.427/13 and CJI/doc.437/13, *compiled in OAS, Annual Report of the Inter-American Juridical Committee to the 44th Regular Session of the OAS General Assembly*, at 104-12, OAS Doc. CP/doc.4956/14 (Jan. 24, 2014).

46. See *Procurement and Infrastructure Development*, UNCITRAL (2014), http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.htm (last visited July 20, 2014), regarding a description of UNCITRAL’s work on procurement of goods and services.

47. *Id.*; see also UNCITRAL Secretariat, *Guidance on Procurement Regulations to be Promulgated in Accordance with Article 4 of the UNCITRAL Model Law on Public Procurement*, U.N. Doc. A/CN.9/770 (Apr. 22, 2013).

Viable public-private partnerships require a legislative framework that guarantees transparency, fairness, and long-term sustainability, removes undesirable restrictions on private sector participation, and provides effective procedures for the award of privately financed infrastructure projects as well as the resolution of the inevitable disputes which arise thereunder. Recognizing these principles, UNCITRAL adopted, in 2002, a Legislative Guide on Privately Financed Infrastructure Projects, intended to assist in the establishment of such a legal framework. The Guide was supplemented in 2003 by Model Legislative Provisions drafted to assist domestic legislative bodies in the establishment of the necessary legal framework.⁴⁸

G. Access to Information

A key component in any system characterized by the Rule of Law is citizen access to government information. In a democracy, such access is considered an indispensable right, because it is essential to the citizen's ability to make informed decisions. It works to ensure government accountability and responsiveness to public needs. It also serves to protect individual rights. Lack of access undermines trust, fosters inefficiency, and invites corruption.

In recent years, the OAS has made a number of important contributions to Rule of Law promotion within the hemisphere. Perhaps the most critical has been acceptance of democracy as the fundamental principle of governance, in the form of the 2001 Inter-American Democratic Charter.⁴⁹ Among other things, the Charter recognizes (in Article 4) that "transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy."⁵⁰ To promote implementation of this principle, the OAS General Assembly in 2009 directed the preparation of a draft Model Law on Access to Information, together with an implementation guide, for the consideration of member states.⁵¹ The final versions of both documents were approved by the OAS General Assembly in June 2011, and OAS member states were urged to consider embracing and implementing the Model Inter-American Law on Access to Public Information.⁵²

The Model Law and Implementation Guide were drafted to apply in both common law and civil law systems, and address not only the collection, retention, and use of governmental information, but also information drawn from the private

48. See *Procurement and Infrastructure Development*, *supra* note 46, for the texts of the Legislative Guide and the Model Legislative Provisions.

49. Organization of American States, Inter-American Democratic Charter, Sept 11, 2001, OAS Doc. OEA/SerP/AG/Res.1 (2001).

50. *Id.* art. 4.

51. OAS, *Access to Public Information: Strengthening Democracy*, OAS Doc. AG/RES. 2514 (XXXIX-O/09) (Jun. 4, 2009).

52. See *Access to Information*, OAS DEP'T OF INT'L LAW, http://www.oas.org/DIL/access_to_information_model_law.htm (last visited July 20, 2014), for information on the Model Law on Access to Information and accompanying legislative guide.

sector and individuals. In consequence, they recognize that the rights to privacy and to access information must co-exist and be applied harmoniously. Many countries in the region had *habeas data* provisions even before they had considered adoption of access to information laws. Clearly, this is an area in which private international law rules work together with principles of human rights and progressive tenets of political ordering to foster greater respect for the Rule of Law.

H. Consumer Protection

Another current example of the contributions of private international law to the Rule of Law comes from the rapidly evolving area of international consumer protection. A number of international bodies have undertaken significant initiatives in this field, many of which focus on the importance of governmental regulation and enforcement, but the international system still lacks any centralized standard-setting or enforcement effort.

By contrast, within the OAS, recent efforts have addressed means of facilitating the effective resolution of disputes in cross-border consumer transactions. Since 2003, when CIDIP-VII was convened, attention has focused on possible ways to provide parties to cross-border consumer transactions with effective, economical, and expeditious alternatives to traditional forms of litigation in their domestic courts, while at the same time facilitating cross-border trade and lowering transaction costs.⁵³

Several possible approaches have been under consideration. One, put forward by Brazil, Argentina, and Paraguay, proposed a new multilateral Convention on Consumer Protection and Choice of Law.⁵⁴ Alternatively, Canada offered a draft Model Law on Jurisdiction and Choice of Law for consumer contracts.⁵⁵ For its part, the United States promoted a Model Law on Consumer Dispute Settlement and Redress which would, among other things, establish an expeditious, low-cost, and “user friendly” procedure for resolving “small claims” in cross-border consumer contracts as an alternative to litigation in domestic courts.⁵⁶

To date, no agreement has been reached. Largely as a result, the issue has been taken up in other bodies. For the past several years, UNCITRAL’s Working

53. See DAVID P. STEWART, PROMOTING THE RULE OF LAW AND ECONOMIC DEVELOPMENT THROUGH PRIVATE INTERNATIONAL LAW 14 (2011), available at http://www.oas.org/dil/esp/XXXVIII_Curso_Derecho_Internacional_David_Stewart_promoting_the_rule_of_law_and_economic.pdf, for general information on this effort.

54. OAS, *Proposals by the Member States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) Topic I: Consumer Protection (Brazil)*, OAS Doc. CP/CAJP-2652/08 add. 4 (Nov. 10, 2008).

55. OAS, *Proposals by the Member States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) Topic I: Consumer Protection (Canada)*, OAS Doc. CP/CAJP-2652/08 (Aug. 21, 2008).

56. OAS, *Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers submitted by the United States of America for CIDIP-VII*, OAS Doc. CP/CAJP-2652/08 add. 1 rev.1 (May 3, 2010).

Group III has been focused on developments in electronic commerce and communication, and in particular the elaboration of procedural rules for the on-line resolution of disputes (“ODR”) in cross-border electronic commerce transactions, including through conciliation and arbitration.⁵⁷ These rules would presumably apply in both business-to-business (“B2B”) and business-to-consumer (“B2C”) transactions.

Within the International Law Association (“ILA”), a committee of experts on international consumer protection has surveyed national legislation and practice in this area adopted a very thoughtful final report concerning the international dimensions of consumer protection in cross-border situations, as well as a “Statement on the Development of International Principles on Consumer Protection.”⁵⁸

I. Choice of Forum in Commercial Contracts

Returning to the fundamental question of dispute resolution, the international community to date has been unable to reach general agreement about (i) the permissible bases of domestic court jurisdiction over civil and commercial cases involving foreign parties or transactions, (ii) a unified approach to choice of law issues in cross-border transactions, or (iii) the specific grounds on which foreign judicial judgments will be recognized or enforced in domestic courts. For a number of years, negotiations on a multilateral “jurisdiction and judgments” treaty covering these areas were conducted at the Hague Conference, but they ultimately failed. Thus, at the global level, there is still no “civil litigation” analogue to the New York Convention or its OAS counter-part, the Inter-American Convention on International Commercial Arbitration.⁵⁹

But from the failed negotiations in The Hague, there arose a new and ultimately successful proposal for a convention addressed specifically to contractual “choice of court” clauses in international civil and commercial contracts. The Hague Conference adopted this new Convention on Choice of Court Agreements in June 2005, and it is now open for signature and ratification.⁶⁰

57. Comm’n on Int’l Trade Law, Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Guidelines, UN Doc. A/CN.9/WG.III/WP.128 (Jan. 22, 2014) (Note by the Secretariat).

58. See *International Protection of Consumers*, INT’L LAW ASS’N [ILA], <http://www.ila-hq.org/en/committees/index.cfm/cid/1030> (last visited July 20, 2014) for the ILA’s “Conference Report” and “Conference Resolution” from the ILA Biennial in Sophia in 2012.

59. See generally *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; *Inter-American Convention on International Commercial Arbitration*, Jan. 30, 1975, 1438 U.N.T.S. 249.

60. *Convention on Choice of Court Agreements*, concluded June 30, 2005, 44 I.L.M. 1294. To date, only Mexico has ratified this Convention, although the United States and the E.U. have signed. *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, HCCH (Nov. 19, 2010), http://www.hcch.net/index_en.php?act=conventions.status&cid=98.

The Choice of Court Agreements Convention addresses a gap in the current fabric of international commercial dispute settlement by providing that states parties must recognize and give effect to “exclusive choice of court agreements” (in U.S. parlance, these are sometimes called “forum selection clauses”). Such clauses are often employed when contracting parties do not wish to utilize non-judicial mechanisms such as arbitration. Obviously, they will agree to litigate in a specific court or judicial system only if they have assurance that the chosen jurisdiction will in fact hear the case and that the resulting judgment will be recognized and enforced in other countries.

Thus, the new Convention sets forth three basic rules to be applied in all states parties with respect to choice of court agreements falling within its scope: (i) the court chosen by the contracting parties has (and must exercise) jurisdiction to decide a covered dispute, (ii) courts *not* chosen by the parties do *not* have jurisdiction and must suspend or dismiss proceedings if brought, and (iii) a judgment from a chosen court rendered in accordance with such an agreement must be recognized and enforced in the courts of other states party to the Convention.⁶¹ By its terms, the Convention applies only to *exclusive* choice of court clauses, but states parties have the option (by taking a declaration) of permitting their courts to recognize and enforce judgments of courts of other States party designated in *non-exclusive* choice of court agreements.

The potential benefits of the Convention for private parties of qualifying transnational contracts are significant. Resting on the principle of party autonomy, the system provided by the Convention will ensure that the dispute settlement arrangements agreed to by those private contracting parties will be honored in the case of domestic court litigation in much the same way as private agreements to arbitrate are respected and given effect, thereby promoting certainty and predictability in international trade. Moreover, it will enhance the enforceability of the resulting judgments in the courts of other states parties, helping to redress the “lack of reciprocity” problem, which arises when foreign judgments are given more favorable consideration in some national courts than the judgments of those courts receive in foreign courts.

There continues to be debate about the modalities by which this Convention might be implemented in U.S. law, should the Senate give its advice and consent to ratification. Much of the debate centers around the extent to which the method of implementation would “federalize” matters related to the enforcement of foreign judicial judgments (there has never been a general federal statute in this area) and impose requirements on state courts to accept certain cases involving foreign parties.⁶²

61. Convention on Choice of Court Agreements, *supra* note 60, arts. 5, 6, 8.

62. See generally Guy S. Lipe and Timothy J. Tyler, *The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases*, 33 HOUS. J. INT'L L. 1 (2010); see also *Hague Convention on Choice of Courts*, NAT'L CENTER FOR STATE CTS., <https://www.ncsc.org/Services-and-Experts/Government-Relations/International/Hague-Convention-on-Choice-of-Courts.aspx> (last visited July 20, 2014).

J. International Family Law

The Rule of Law is arguably most important at those junctures where the interests and activities of the state intersect with the most basic needs and interests of the individual. Few such intersections are more sensitive than the ones involving families. In a world characterized by rapidly increasing transnational contacts and cross-border mobility, international family law has clearly emerged as a field of specialization in its own right. Here again, one finds private international law working to bridge gaps, reduce conflicts, and provide orderly and efficient mechanisms of dispute resolution.

Two multilateral treaties adopted by the Hague Conference, both widely ratified, constitute the cornerstones of the still-emerging international regime of child protection: the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption.⁶³ The former (with ninety-one contracting states) works to prevent (or undo) the removal of a child by one parent from the country of its habitual residence in violation of the other parent's custodial rights, and the latter (with ninety-three contracting states) serves to regularize the process of transnational adoptions, protecting the legitimate interests of all concerned.⁶⁴ The United States is a party to both, and both are applied and widely respected in practice on the international level.

In an increasingly globalized world, families frequently span continents. So do family disputes and dissolutions. How are trans-border maintenance and support arrangements to be handled in such cases? Some countries address this issue primarily through bilateral agreements providing for reciprocal recognition and enforcement of support orders in defined circumstances. The United States, for example, is party to more than twenty such agreements with other countries.⁶⁵ Within the OAS, the 1989 Inter-American Convention on Support Obligations has thirteen states parties.⁶⁶ But until recently, a global approach has been lacking.

In 2007, the Hague Conference adopted a new multilateral instrument, the Convention on the International Recovery of Child Support and Other Forms of

63. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 98, available at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24; Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 168, available at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=69.

64. Convention on the Civil Aspects of International Child Abduction, *supra* note 63, art. 3; Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption, *supra* note 63, art. 1.

65. See *Legal Considerations*, BUREAU OF CONSULAR AFF., http://travel.state.gov/law/family_issues/support_issues/support_issues_582.html (last visited July 20, 2014), for information about U.S. arrangements for child support and maintenance, including bilateral treaties.

66. *Signatories and Ratifications: Inter-American Convention on Support Obligations*, OAS, <http://www.oas.org/juridico/english/treaties/b-54.html> (last visited July 20, 2014).

Family Maintenance.⁶⁷ As in other family law agreements, the basic principle set forth in this agreement is one of reciprocity: a decision on child maintenance and support made in one state party must be recognized and enforced in other states party if the first state's jurisdiction was based on one of the accepted grounds enumerated in the Convention. In the United States, courts generally do recognize and enforce foreign child support obligations as a matter of comity, even though U.S. orders may not be given comparable treatment in the originating country.⁶⁸ The Convention would regularize this imbalance among all states that adhere to it and will in general work in favor of the children in question. The United States has signed the Convention and is actively pursuing ratification.⁶⁹

The foregoing is far from a complete description of the growing list of international family law agreements and projects. Others include protection of the elderly, recognition of same sex unions, and protection of international migrants, to name a few. But it should certainly serve to illustrate the many ways in which the rapidly expanding field of international family law works actively to promote Rule of Law objectives and fosters development in this critical area.

VI. TECHNICAL ASSISTANCE

Let me just a few words about the often-ignored area of *Technical Assistance*.

Standing alone, even the best private international law conventions, model laws, statements of principle, and other texts have little effect; they are just texts. Their potential can only be realized through acceptance and effective implementation at the domestic level. The first step must of course be formal approval and acceptance by the state concerned, either through ratification of the particular treaty, adoption of the model law, or implementation of other kinds of texts through regulation or judicial application.

In most instances, an equally important step is to promote uniformity of application across national boundaries. A convention aimed at harmonization, for example, will not achieve its objective if its provisions are given disparate interpretation in the courts of member states. For that reason, it has become common to see guides to implementation (either in the form of suggested statutory texts, legislative principles, or "handbooks") adopted at the same time as the convention itself.

Increasingly, the various international organizations concerned with private international law have tried to assist states in achieving effective and consistent

67. International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, 47 I.L.M. 257, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=131. See Convention on the Law Applicable to Maintenance Obligations, Protocol, Oct. 2, 1973, 1056 U.N.T.S. 199, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=133, for the companion Protocol on the Law Applicable to Maintenance Obligations.

68. See Michael J. Peters, *International Child Support: The United States Striving Towards a Better Solution*, 15 NEW ENG. J. OF INT'L & COMP. L. 91, 107-108 (2009).

69. *Status Table: Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, HCCH (Aug. 8, 2013), http://www.hcch.net/index_en.php?act=conventions.status&cid=131.

implementation of the treaties and other instruments in domestic law and practice. These efforts take a variety of forms. Within the Hague Conference, for example, the Permanent Bureau (its secretariat) provides technical assistance to promote and support the delivery of assistance and training to government and legal officials around the world regarding implementation of the Conference's various conventions, in particular those involving the international protection of children and families, international legal co-operation and litigation and international commercial and financial law.⁷⁰ They provide specialized training programs and customized technical assistance with the stated aim of creating "mutual understanding of legal cultures, building legal and administrative capacity and reinforcing the rule of law and good governance."⁷¹ The Permanent Bureau devotes a substantial portion of its efforts to encouraging uniform interpretation of, and consistent practices under, these and other instruments (a technical assistance function it calls "providing post-Convention services").⁷² One focal point for such efforts has been the Conference's International Centre for Judicial Studies and Technical Assistance.⁷³

Both UNIDROIT and UNCITRAL maintain electronic databases providing ready access to case law and other materials relevant to the interpretation and application of their conventions and other instruments. UNIDROIT's "UNILAW" database aims to make available up-to-date information on its uniform law instruments,⁷⁴ and UNCITRAL's "Clout" system includes court decisions and arbitral awards interpreting and applying the Commission's conventions and model laws.⁷⁵

Within the OAS, a Network of Hemispheric Legal Cooperation in the Area of Family and Child Law provides a means for the relevant authorities in the various national governments to coordinate with each other regarding application of the four regional family law conventions (i.e., those concerning support obligations, the return of children, trafficking in minors, and adoption).⁷⁶ This system also

70. *Overview*, HCCH, http://www.hcch.net/index_en.php?act=text.display&tid=26 (last visited July 20, 2014).

71. CITY OF THE HAGUE, *GUIDE TO INTERNATIONAL ORGANIZATIONS IN THE HAGUE* 44 (2013), available at <http://www.denhaag.nl/web/file?uuid=ebb86e87-e581-4921-9aa7-58bec16d899b&owner=a564205f-9b90-4ab4-b47b-ba5fe3736bf1>.

72. HCCH, *Brief Summary of the 5 April 2013 Meeting of the Technical Assistance Working Group*, HCCH Info. Doc. 9 (Apr. 2013), available at <http://www.hcch.net/upload/wop/genaff2013inf09.pdf>.

73. *GUIDE TO INTERNATIONAL ORGANIZATIONS IN THE HAGUE*, *supra* note 71 at 44.

74. See *The UNILAW Database on Uniform Law*, UNIFORM L. FOUND., <http://web.archive.org/web/20131207204707/http://unidroit.info/program.cfm?menu=subject&file=convention&lang=en> (last visited July 20, 2014), for access to the database.

75. See *Case Law on UNCITRAL Texts (CLOUT)*, UNCITRAL, http://www.uncitral.org/uncitral/en/case_law.html (last visited July 20, 2014).

76. See *Family and Child Law (the "Network")*, OAS (July 20, 2014), http://www.oas.org/dil/family_law.htm.

provides information to private individuals regarding the conventions and their application.

The general field of technical assistance is an area where you, as lawyers, can make a truly important contribution. More importantly, there are many opportunities. Let me give you one example with which I am personally involved. The International Law Institute in Washington, with a presence in Kampala, Abuja, Cairo, Santiago, and Istanbul, was originally connected to Georgetown Law Center but has been independent for some 30 years. It is dedicated to contributing to economic development and effective governance through the provision of technical assistance including “on the ground” as well as “off-site” training.⁷⁷

Key to its approach is recognition of the necessity of addressing both the public and private sectors in any discrete development undertaking. Economic growth and social stability is achieved through the right combination of enlightened policies, capable administration, and an active private sector. Without question, among the essential agreements are good government, stable legal and judicial systems, and functioning capital markets. The ILI’s training courses range further to cover such matters as government procurement, privatization, arbitration, bank restructuring, borrowing, and debt management. The Institute draws on professors and academics, partners and other practitioners from top law firms, government sector specialists, folks from donor organizations, intergovernmental organizations such as the WTO and the World Bank, and non-governmental organizations such as the International Judicial Academy. It is an excellent illustration of the ways in which we as lawyers can become directly and productively involved in international development efforts.

It also offers fascinating internships for those interested in this field.⁷⁸

VII. CONCLUSION

So, to conclude: There are many ways for us as lawyers—as international lawyers and even as students of international law—to contribute to economic growth and development, and to realizing the policy goals represented by the Millennium Development Goals.

My effort this morning has been to stress two points:

- First, that law, and in particular international law, has an integral role (in my view an indispensable role) to play in the process of development, and
- Second, law makes a critical contribution at the transactional level, in the form of contemporary private international law.

In my view, there really can be no question that the principles, instruments, and mechanisms of private international law, as reflected in the diverse endeavors described above, contribute directly to the trans-border flow of trade, capital,

77. See *About the International Law Institute*, INT’L L. INST. [ILI], <http://www.ili.org/about.html> (last visited July 20, 2014), for general information on the International Law Institute.

78. *Internships*, ILI, <http://www.ili.org/opportunities/internships.html> (last visited July 20, 2014).

people and ideas, the effective settlement of disputes, the well-being of families and children, and therefore to the Rule of Law. By focusing primarily on the relationship between international and domestic law, private international law adds an essential element to efforts to promote the legitimacy of the law internationally as well as domestically.

This provides an often-overlooked range of possibilities for us as lawyers to be involved in the development process. We can help to ensure that private international law continues to play a critical role in this field, by working to guarantee that the law adapts and responds effectively and creatively to the changing needs and structure of the international community. The successful achievement of the Millennium Development Goals depends on it.

THE FUTURE OF HUMAN DEVELOPMENT: THE RIGHT TO SURVIVE AS A FUNDAMENTAL ELEMENT OF THE RIGHT TO DEVELOPMENT

UPENDRA ACHARYA*

I. INTRODUCTION

Underdevelopment is a series of complex interacting phenomena that result in inequalities of wealth, poverty, and access to food, health, security, and education. Development, then, is the central answer to many of the world's problems. Development is the only tool that allows people all over the world to internalize a sense of equality and justice. Yet, it is important to determine the scope of the right to development. The right to development may be understood within multiple layers as: 1) an individual's right to survive by having access to minimum needs such as food, clean water, healthcare, and shelter – the bare minimum requirements to support human survival; 2) that there be no compromise of civil or political rights; 3) developing nations' rights and obligations to build capacity to facilitate survival rights; and, lastly, 4) international financial institutions' and donor countries' duty to prioritize their programs to these objectives and to be responsible for any kind of violation of the right to survival, the first and fundamental right to the right to development, due to their lack of good faith efforts to implement projects which uplift the human condition.

Human development has been considered at its core the expansion of peoples' choices, leading to a valuable and quality life.¹ Increasing peoples' choices and

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1. Two of the most celebrated pioneers of human development are Mahbub Ul Haq and Amartya Sen. Ul Haq is famously quoted as saying,

the basic purpose of development is to enlarge people's choices. In principle, these choices can be infinite and can change over time. People often value achievements that do not show up at all, or not immediately, in income or growth figures: greater access to knowledge, better nutrition and health services, more secure livelihoods, security against crime and physical violence, satisfying leisure hours, political and cultural freedoms and sense of participation in community activities. The objective of development is to create an enabling environment for people to enjoy long, healthy and creative lives.

About Human Development, U.N. DEV. PROGRAMME: HUMAN DEV. REPS., <http://hdr.undp.org/en/humandev> (last visited July 6, 2014) [hereinafter History of HDR].

opportunities allows them to build on human capabilities; people are capable of having more opportunities to achieve more in their lives.² These are “the substantive freedoms [a person] enjoys to lead the kind of life [they have] reason to value.”³ Human development may be related to, but is not equal to, economic development and the increase of income. Economic goals are interrelated with other human capabilities, foremost of which are healthy lives, education, access to a decent standard of living, and participation in community and society.⁴ Increasing the choices in peoples’ lives will inevitably lead to fundamental increases in the quality of living for both individuals and societies.⁵

Yet, even given such fundamental notions of individual choice, policymakers and policy implementers have failed to make the connection between these most fundamental truths and the fact that the right to development truly means a right to survival. Consider: whose right is the right to development and when does this right arise? Some theorists have believed human development is a matter of national security used to boost countries’ economies and undo the damage of world wars. But modern thought champions the individual as the subject of development. This approach has done much to advance the concept of development. Still, development has become a subject matter of economic and political debate and compromise. But the right to development has not reached the point where it can be realized through legal debate, determination, and legal methods of technical use. However, through different soft political and economic commitments, as well as programs related to development, the concept of the right to development has been legitimized by giving the right the color of law without the effect of law. By this tactic of legitimization by developed countries and international financial institutions (“IFIs”), the right to survival has disappeared and become discretionary in the context of programs of IFIs and developed countries – programs based on national interests. Such an absence of a claim-based approach has diminished a basic and fundamental right, the right to survival, within the right to development. Therefore, the right to survival must be recognized as embracing two elements: 1) every individual has a right to live

While Sen elaborated, “Human development, as an approach, is concerned with what I take to be the basic development idea: namely, advancing the richness of human life, rather than the richness of the economy in which human beings live, which is only a part of it.” *Id.* The preamble to the Declaration on the Right to Development states that development is the, “comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.” Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128, at 1 (Dec. 4, 1986). *See also* discussion *infra*, p. 6.

2. *See generally* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011).

3. HUMAN DEV. AND CAPABILITY ASS’N, BRIEFING NOTE, CAPABILITIES AND FUNCTIONINGS: DEFINITION AND JUSTIFICATION (2005), available at <http://terpconnect.umd.edu/~dcrocker/Courses/Docs/Alkire%20-%20Capability%20Functioning%20Briefing%20Note.pdf>.

4. *See generally* U.N. DEV. PROGRAMME, HUMAN DEV. REP. 2009 (2009) [hereinafter HDR 2009]; Paul Streeten, *Human Development: Means and Ends*, 84 AM. ECON. REV 232 (1994).

5. *See generally* HDR 2009, *supra* note 4; Streeten, *supra* note 4.

without infringement of the bare minimum of civil, political, social, and economic rights; and, 2) developing countries have a right to ensure their citizens' right to survival is not disturbed and an obligation to work towards fulfilling the right to survival by making policies and programs toward achieving that goal; these countries have a *duty*.⁶

Then what is a particular country to do if it does not have such a capacity to fulfill its rights and duties appertaining to the right of survival? Without the fulfillment of the development goals that would create this capacity, it is the country's overall development as well as the individuals' inherent rights that are affected. When it becomes difficult for a country to fulfill its duty to protect the right to development due to lack of financial stability and infrastructure and due to corruption, who will have the duty? Will it be international organizations that claim to work toward capacity building of underdeveloped societies with different polices, programs, and technical assistance, as well as other countries with the capacity to fulfill this duty? International law, through non-binding declaration, has created a moral obligation to take up this torch. Underdeveloped countries have difficulty maintaining consistent development due to incapacity and intentional political instability. The strategy of developed countries to use power politics to maintain the status quo shows us that the present system of development is not working. What place can a moral obligation have when there is a legal *right* to survival and a *duty* to protect those rights, which developing countries struggle to achieve? Current systems and international law provide for a moral sense of duty through soft law, yet miss very important elements: the acceptance of an inherent right of every individual to the means of basic survival, a historical context of the relationship of developed countries with underdeveloped countries, and a notion of legal responsibility for development in the system of laws and remedies. Without these elements, human development fails on a basic level because it becomes a notion of international charity and not a truth of human rights.

Economists, politicians, sociologists, historians, and many people of discipline have tried to address the problems of underdevelopment in humanity, but we have not achieved a satisfactory answer. In this context, international law also has attempted to address the problem and to shape the future of development. This paper will begin by giving an overview of the current state of human development. Next, given the modern state of development, this paper will explore the future of human development in light of its failure to recognize the right to survival in a system of legal rights and remedies. Following is an

6. For further explanation, see Armando Barrientos & David Hulme, *Global Norms and National Politics: The Case of Social Protection*, in *MILLENNIUM DEVELOPMENT GOALS AND HUMAN RIGHTS* 426, 429 (Malcolm Langford et al. eds., 2013) ("A rights-based approach [to development] entails the identification of 'duty-bearers' who are obligated to ensure that the rights of individuals are honoured. If rights are denied then these duty-bearers can be sanctioned for failure. The MDGs indicate that the international community and national government are to form a partnership to ensure the MDGs are met. But they do not specifically identify who the duty-bearers are, nor do they specify sanctions for failure to meet MDGs.").

explanation of the parties responsible for the protection right to survive, and the right to remedies against violations of the right to survive. Lastly, a proposal for judicial options to remedy violations to the right to survival will be presented in an effort to resolve the need for a mechanism.

II. THE MODERN CONTEXT OF DEVELOPMENT IN INTERNATIONAL LAW

A. *U.N. Charter and International Human Rights Law*

From the very beginning, in 1945, the U.N. Charter impliedly addressed the issues of development through self-determination,⁷ peace,⁸ and security concepts.⁹ The U.N. Charter's principles and purpose highlighted that all peoples should "promote social progress and better standards of life in larger freedom" and "employ international machinery for the promotion of the economic and social advancement of all peoples."¹⁰ Article 55 expounded these principles to include high standards of living, full employment, social progress and development, and solutions to economic, social, and health problems.¹¹ Yet, concrete objectives related to human development expanding on the Charter did not emerge until 1990 at the World Conference Summit.¹² The purposes and principles of the United Nations were not developed as concrete goals for human development, but rather as overarching values of the system at large.

Following suit, the Universal Declaration of Human Rights ("UDHR") recognized the inherent human dignity achieved through equal rights to human freedom, justice, and peace.¹³ The UDHR suggested that all human rights should be protected by the rule of law in order to promote social progress and better standards of life for larger freedom.¹⁴ It called for national effort and international cooperation to fulfill the realization of larger freedoms through human

7. U.N. Charter art. I, para. 2 (The purpose of the U.N. Charter is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace").

8. *Id.*; see also U.N. Chief Welcomes General Assembly's Adoption of Resolution on Human Security (Sept. 12, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42858&Cr=human+security&Cr1=#.UxkPEeddX3A> (statement of Secretary-General Ban Ki-moon) ("Guided by the principles of the United Nations Charter, human security brings together the three pillars of the Organization and seeks to promote greater coherence in our response to various challenges facing people worldwide.").

9. U.N. Charter art. 26 (noting that the Security Council was founded in order to protect the security of human and economic resources).

10. *Id.* pmbl.

11. *Id.* art. 55.

12. See U.N. Dep't of Econ. and Soc. Affairs, *The United Nations Development Agenda: Development for All*, U.N. Doc. ST/ESA/316, at 1 (2007), available at http://www.un.org/esa/devagenda/UNDA_BW5_Final.pdf.

13. Universal Declaration of Human Rights, G.A. Res. 217A (III) A, pmbl., U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

14. *Id.*

development.¹⁵ Immediately after the U.N. Charter and the UDHR, development fell into an ideological trap, continuing into the Cold War era. The inalienable right to human development split into first and second generations of rights—resulting in negative and positive duties within an international legal framework.¹⁶ Through the UDHR's predecessor documents, together constituting the International Bill of Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), this division of inalienable human rights could have been a catalyst to give effect to the right to survival, but its potential was unfortunately pushed back by political oversight, as little advancement in either international or domestic jurisprudence occurred.¹⁷

B. Soft Laws for Hard Problems: Diminishing Point of Claim Based Right to Survive

Later, the New International Economic Order was created in order to advance trade and development by improving terms of trade, increasing development assistance, reducing tariffs, and imposing other economic measures.¹⁸ Next came the Declaration on Social Progress and Development¹⁹ and then in 1966 the United Nations Development Programme ("UNDP"), founded in order to assist economic

15. For example, the right to work, equal pay, standard of living, adequate food, clothing, housing, medical care, education, and security, without discrimination. *Id.* arts. 22-26.

16. For a discussion on the development of positive and negative rights, particularly in the development of human rights in the United States, see Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.*, 3 N.Y. CITY L. REV. 59 (1998). See also, e.g., Hideaki Shinoda, *Conflict and Human Security: A Search for New Approaches of Peace-Building*, in 19 IPSHU ENG. RES. REP. SERIES 5, 12 (2004) (noting that Johann Galtung developed "positive peace as the absence of structural violence in opposition to the concept of negative peace as the absence of war."). Even before this, Franklin Roosevelt established the four freedoms, declaring every individual has the most basic and essential right to four freedoms: "The . . . freedom of speech and expression . . . The . . . freedom of every person to worship God in his own way. . . . The . . . freedom from want . . . [and] freedom from fear." Franklin Roosevelt, Transcript of President Franklin Roosevelt Annual Message (1941), available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=70&page=transcript>. The focus of human development encompassed competing goals of avoiding war, achieving economic success, and ensuring individuals' freedoms. In contrast, in terms of positive rights the development of the individual through access to food, medication, water, education, jobs, etc. came later.

17. See Phillip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 350-51 (1987); see also Kitty Arambulo, *Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?*, 2 U.C. DAVIS J. INT'L L. & POL'Y 111, 116 (1996) In regards to the ICESCR, "some United Nations studies have found evidence that although economic, social and cultural conditions can be confirmed by statistical data, they fail to identify the substantive legal character necessary to turn such conditions into rights." *Id.* at 111. Arambulo comes to the conclusion that the ICCPR has been subject to some jurisprudential interpretation, leading to greater understanding and implementation of the norms, giving it marginally more success than the ICESCR. See *id.* at 116.

18. See Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Sess., Supp. No. 1, U.N. Doc. A/9556, at 3 (1974).

19. Declaration on Social Progress and Development, G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630, at 49 (1969).

and political development globally.²⁰ UNDP was initially a response to the economic, social, and political state of underdeveloped countries post-WWII.²¹ During this era, economists primarily used gross domestic product and other economic indicators to measure the quality of life in individual countries.²² This was the institution of trickle-down economics, purporting that there would be a trickle-down effect of capital, improving basic survival conditions for the poorest of the world's citizens, and thus improving human development.²³ This was a major setback to recognizing a claim-based rights approach to human survival and betterment of the human condition. According to these theorists, the creation of the economically capable person through economic activities was the solution to human survival.²⁴ The prevailing thought was that in order for development to flourish in underdeveloped countries, those countries must follow the economic and socio-political models of already developed countries.²⁵ Human development became a statistical analysis of per-capita income, GNP, and industrial growth—a notion that economic and capital activities would lead to the betterment of people.

By the late 1970s skepticism about an economic model of human development was mounting. Countries that experienced rapid economic growth did not experience proportional growth within their social structures; the poor remained poor while the rich got richer.²⁶ In response, the U.N. affirmed the need to “recognize the importance of promoting a balanced and sustainable development

20. Consolidation of the Special Fund and the Expanded Programme of Technical Assistance in a United Nations Development Programme, G.A. Res. 2029 (XX), U.N. GAOR, 20th Sess., Supp. Nos. 1, 4, 6, U.N. Doc A/RES/2029(XX), at 20 (1965).

21. The UNDP was created out of the combined programs of the Expanded Programme of Technical Assistance (“EPTA”) and the United Nations Special Fund. Both programs focused on the development of underdeveloped countries in the area of resources, particularly focused on manpower, industry, and communications. Notice that development during this era was measured in terms of economic ability and wealth. See STEPHEN BROWNE, *THE UNITED NATIONS DEVELOPMENT PROGRAMME AND SYSTEM 7* (2011).

22. *Id.* at 8; see also Richard A. Easterlin, *The Globalization of Human Development*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 32, 33 (2000).

23. See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 78-80 (2002), for a description how the Washington consensus failed to improve the development situation globally, while policy makers pushed the trickle down agenda.

24. See GEORGE REISMAN, *CAPITALISM: A TREATISE ON ECONOMICS* 310 (1996) (“There is only the fact that capital accumulation and economic progress depend on saving and innovation and that these in turn depend on the freedom to make high profits and accumulate great wealth. The only alternative to improvement for all, through economic progress, achieved in this way, is the futile attempt of some men to gain at the expense of others by means of looting and plundering. This, the loot-and-plunder theory, is the alternative advocated by the critics of the misnamed trickle-down theory.”).

25. *Id.*; see also Stephen Browne, *Whatever Happened to ‘Development’?*, OPEN DEMOCRACY (Apr. 17, 2007), http://www.opendemocracy.net/globalization-institutions_government/development_browne_4535.jsp (“Development was conceived as a do-as-we-did process in which developing countries should follow the patterns of the developed countries. Capital was the principal ingredient to fuel growth.”).

26. One example of this is Brazil in the 1970s, where income inequalities expanded under trickle down policies. Browne, *supra* note 25.

for all people.”²⁷ Finally, after all these labor pains, in 1986 the General Assembly adopted the Declaration on the Right to Development (“RTD”), a non-binding instrument offering a consensus on development-soft law for extremely hard problems.²⁸ The RTD passed almost unanimously; the United States was the only country to vote against it.²⁹ Yet, it became clear that among the myriads of U.N. agencies and reports on development, a consensus about the practical consequences of the RTD could not be reached. Even with shifting views of human development from an economic model to a sustainable development model, little progress took place as underdeveloped countries became skeptical of assistance and advocated for liberalization.³⁰ Additionally, during the 1980s the Reagan and Thatcher administrations advanced a conservative agenda, unaffected by calls for advancement in human development advocating for transfers of aid and resources.³¹

The RTD was subsequently reaffirmed in Article 10 of the Vienna Declaration and Programme of Action, another non-binding soft instrument, in connection with which the United States changed its stance, supporting the new principles on human development.³² However, this change did not occur until 1993, seven years after the RTD. This support for the declaratory approach to the right to development was the end of an ideological and political conflict during the post-Soviet era.³³ Mahbub Ul Haq and Amartya Sen created the Human Development index (“HDI”) in 1990 through the United Nations Development

27. G.A. Res. 48/141, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/RES/48/141, at ¶ 3(c) (Dec. 20, 1993).

28. Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/RES/41/128 (Dec. 4, 1986).

29. See CTR. FOR DEV. & HUMAN RIGHTS, *THE RIGHT TO DEVELOPMENT: A PRIMER* 29 (2004).

30. See JOZEF M. RITZEN, *A CHANCE FOR THE WORLD BANK* 26 (2005) for a description of the failure of development as evidence by the gap between the rich and the poor, the mounting debt crisis, and the fact that the ten lowest countries on the Human Development Index through the 1990s and 1980s remained consistently underdeveloped.

31. Among these reports include the famous Brandt Commission’s *Independent Commission on International Development* and the *Common Security: A Blueprint for Survival* (1982), as well as the Brundtland Commission’s report *Our Common Future*. Browne, *supra* note 25.

32. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 10, U.N. Doc. A/CONF.157/23 (July 12, 1993) (“The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. As stated in the Declaration on the Right to Development, the human person is the central subject of development. While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights. States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development. Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.”).

33. Browne, *supra* note 25.

Programme.³⁴ The HDI was intended to give objective measures of success in development within countries; the index focused on statistical data of life expectancy, education, and income.³⁵ The Human Development Report (“HDR”) reports annually on the HDI and milestones achieved throughout the year.³⁶ The intent of the reports was to refocus development on the real matters of importance—the well-being of people—rather than the underlying causes and indicators of quality of life, such as economics and politics.³⁷ After the production of more than 600 reports, the information included has advanced to include gender-related indices, an inequality adjustment, and different measurements of poverty. In 2010 the HDR reported that many of the poorest countries in the 1970s had improved dramatically in the areas of health, education, and living standards.³⁸ Nevertheless, the same HDR points out the massive variance in development across nations. Countries such as the Democratic Republic of the Congo and Zimbabwe fell from their original point in the 1970s and others, such as Nepal, lagging far behind comparable countries despite experiencing some growth.³⁹

In this way, the 20th century introduced this idea of a right to development and turned it into a program with a kitchen sink full of different measures of development without addressing the concept of a basic and inherent right to survive in the context of human development. The right to development remained an economic object without legal mechanisms to enforce it. Social and political priorities were focused on national security interests, economic interests, and ideological warfare, while the competing goals of individual development created an internal struggle between the trickle-down approach and an approach to human development as a program focused on the core development of human rights.

III. THE MILLENNIUM DEVELOPMENT GOALS: GOOD INTENTION WITH INCOMPLETE CONCEPT

The dawn of the 21st century brought a new development in the form of the Millennium Development Goals (“MDG”), a set of eight specific objectives for the betterment of the human condition including eradicating poverty, and improving health, equality, and education, with eighteen specific targets related to forty-eight quantifiable indicators.⁴⁰ This became a national and international strategy for

34. History of HDR, *supra* note 1.

35. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2013, at 23 (2013).

36. *Id.*

37. In the premiere HDR, Mahbub Ul Haq wrote, “[p]eople are the real wealth of a nation. . . . This may appear to be a simple truth. But it is often forgotten in the immediate concern with the accumulation of commodities and financial wealth.” U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1990, at 9 (1990).

38. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2010, at 28 (2010).

39. *Id.* at 26-31.

40. There are eight goals to be achieved by 2015. These goals are 1) Eradicate extreme poverty and hunger; 2) Achieve universal primary education; 3) Promote gender equality and empower women; 4) Reduce child mortality; 5) Improve maternal health; 6) Combat HIV/AIDS, malaria, and other diseases; 7) Ensure environmental sustainability; and 8) Develop a global partnership for development.

development. Hunger, unsafe drinking water, HIV/AIDS, malaria, and other impairments would be cut in half by 2015.⁴¹

In 2002 the Monterey Conference on Financing for Development was held to consider the shortfalls in the resources required to achieve the MDGs, causing economists to identify the costs and benefits strategies.⁴² The Report of the High Level Panel on Financing for Development found that an extra \$50 billion per year would be required to achieve the goals on time.⁴³ The World Bank assessed the cost of achieving the MDGs overall, estimating that the total cost would fall between \$40 – 70 billion per year (an estimate vastly different from the High Level Panel's).⁴⁴ The World Bank focuses on macroeconomic policy objectives, inflation, budget deficits, etc., to reduce poverty by an elaborate market approach of general equilibrium and a demand-supply framework.⁴⁵ The programs handling the MDGs were confronted with genuine criticism in their attempt to implement the development consensus reflected in the MDGs,⁴⁶ which provided for a programmatic rather than a claims-based rights approach. The Millennium Project, headed by Professor Jeffrey Sachs, came up with a practical plan to invest in development and an MDG needs assessment with a list of technical interventions, but did not address policy and institutional reform.⁴⁷

Many countries could not even afford their development goals due to diversions in financial priorities because of International Monetary Fund (“IMF”) and World Bank conditions that focused on developing the private sector and legal reform.⁴⁸ Furthermore, MDG cost estimates did not consider the factorial nature of

See *Millennium Development Goals and Beyond 2015: Background*, U.N. DEV. PROGRAMME, <http://www.un.org/millenniumgoals/bkgd.shtml> (last visited July 6, 2014).

41. *Id.* (the target date for attaining the MDGs is 2015).

42. See International Conference on Financing for Development, Monterey, Mex., Mar. 18-22, 2002, *Monterrey Consensus on Financing for Development*, at 5-6, U.N. Doc. A/CONF.198/11 (2003), available at <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf>.

43. U.N. Secretary-General, *Executive Summary of the Report of the High-level Panel on Financing for Development*, at 20, U.N. Doc. A/55/1000 (June 21, 2001).

44. Shantayanan Devarajan, et. al., *Goals for Development: History, Prospects and Costs 1* (World Bank Policy Research, Working Paper No. WPS 2819, 2002), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2819>.

45. *Id.* at 15; see also James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 181 (2009) (the Asian Development Bank has taken successful measures to account for local conditions in their policies, yet, in Africa, World Bank measures have largely focused on a system favoring economic interests over human rights).

46. Gathii, *supra* note 45, at 181.

47. JEFFREY D. SACHS, U.N. MILLENNIUM PROJECT, *INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS*, ch. 7 (2005) [hereinafter MILLENNIUM PROJECT], available at <http://www.unmillenniumproject.org/documents/MainReportComplete-lowres.pdf>.

48. See *id.* at 29-52; see also Jeffrey D. Sachs, *Achieving the Millennium Development Goals: Health in the Developing World*, Speech at the Second Global Consultation of the Commission on Macroeconomics and Health (Oct. 29, 2003), available at http://www.who.int/macrohealth/infocentre/speeches/en/sachs_speech.pdf?ua=1.speeches/en/sachs_speech.pdf (speaking on the inability of underdeveloped countries to afford health care initiatives); cf. David McNair, *Who's Going to Pay for the MDGs*, *GUARDIAN* (Jan. 23, 2012),

interlinked goals; for example, reduction in child mortality will increase the school-aged population, causing an increase in the cost of universal primary education.⁴⁹ Nor did the estimates account for meaningful comparisons of absolute poverty across time and space. Global comparison is based on a dollar-a-day poverty line and does not take into account that China, India, Bangladesh, and Nepal account for a great deal of the total global poverty.⁵⁰ The Food and Agriculture Organization (“FAO”) uses a food balance approach to measure the nutritional MDG target; this approach combines information on the net food resources in a country with distributional assumptions of nutritional intake.⁵¹ This, perhaps, is an effective means of measuring potential food consumption within a country, but still falls short because it fails to account for disproportionate distribution of food sources.⁵² Lastly, the cost predictions fail to account for

<http://www.theguardian.com/global-development/poverty-matters/2012/jan/23/whos-going-to-pay-for-mdgs> (noting that aid alone is not enough, but transparency and accountability are essential if tax revenues are to be used to plug the financing gap).

49. There is undisputed evidence that education is interrelated to poverty, which is interrelated to infant mortality. See Sanjay Reddy & Antoine Heuty, *Global Development Goals: The Folly of Technocratic Pretensions*, 26 DEV. POL'Y REV. 5, 17 (2008) (“[A]chieving certain goals may increase the cost of achieving others.”). The assertion then is that if poverty and lack of education are linked to higher infant mortality, then it is possible that lower infant mortality may be linked to higher education rates and greater needs for resources as a byproduct of more children being born and needing those resources to continue a quality life. In the same way, if life spans are longer then more resources are necessary to maintain those people and give them a quality of life. This is purely conjecture, but one might also wonder if the quality of life increases will the cost of more invasive health care decrease? Or, as the adults become healthier because of greater resources and access to health care, will the cost of some social services, such as orphanages decrease? These are important questions, which on a macro level seem to have been left out of the equation. See, e.g., JULIA GRIGGS & ROBERT WALKER, *THE COSTS OF CHILD POVERTY FOR INDIVIDUALS AND SOCIETY: A LITERATURE REVIEW* 4 (2008), available at <http://www.jrf.org.uk/system/files/2301-child-poverty-costs.pdf> (“Infant mortality is higher amongst children born into poverty.”); cf. James F. Fries et al., *Reducing Health Care Costs by Reducing the Need and Demand for Medical Services*, 329 NEW ENG. J. MED. 321 (1993) (discussing the possibility of lowering health care costs through preventative care).

50. The dollar a day poverty level was first introduced in 1990 and has periodically been revised to account for inflation against the U.S. dollar. According to one World Bank analyst the use of an average, fixed global poverty line may not be the most representative, as poverty must take into account varying consumption levels. See Martin Ravallion, et al., *Dollar a Day Revisited 2*, 23-24 (World Bank Policy Research, Working Paper No. WPS 4620, 2008), available at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2008/09/02/000158349_20080902095754/RRendered/PDF/wps4620.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2008/09/02/000158349_20080902095754/Rendered/PDF/wps4620.pdf).

51. *Food Balance Sheets: A Handbook*, U.N. FOOD & AGRIC. ORG., <http://www.fao.org/docrep/003/x9892e/x9892e01.htm> (last visited July 6, 2014).

52. *Food Security Statistics*, U.N. FOOD & AGRIC. ORG., <http://www.fao.org/economic/ess/ess-fs/en/> (last visited July 6, 2014) (The food balance is determined by comparing the “domestic supply of food commodities” to the “domestic food utilization” and the “food supply available for human consumption.”); see also *FAO Basic Definitions of Hunger*, U.N. FOOD & AGRIC. ORG., <http://ecsw.org/files/global/world-hunger/news/fao-basic-definitions-of-hunger.pdf> (last visited July 6, 2014) (The security statistics are used to determine the probable rate of undernourishment, which is a person who consumes roughly less than 1800 kcal/day, depending on age, size, health, and other conditions.).

natural events such as tsunamis, disease and illness, or other accidents.⁵³ For example, between 1960 and 1987 Botswana experienced a rise in life expectancy from forty-seven to sixty-one, but in 2000, as a direct result of the HIV/AIDS pandemic, life expectancy fell drastically from sixty-one to thirty-nine.⁵⁴ Such unpredictable events are likely to continue in one form or another.

Another strong criticism of the MDGs is the superficiality of the goals. The MDGs seek to make local change through external forces (financing and resources), which seems counterintuitive when these external forces lack both sustainability and cultural understanding.⁵⁵ Furthermore, the MDGs fail to create strong objectives within those local communities, particularly with regard to human rights.⁵⁶ The goals do not take into account the wants and views of those they seek to assist, nor does the local community take ownership of the particular initiatives.⁵⁷

In September 2010, 140 countries' leaders, along with leaders of NGOs, met at the Millennium Development Goals Summit.⁵⁸ One thing everyone could agree on was the importance of human rights in the effort to achieve the MDGs.⁵⁹ Yet

53. See U.N. System Task Team on the Post-2015 U.N. Development Agenda, Discussion Note, Review of the Contributions of the MDG Agenda to Foster Development: Lessons for the post-2015 U.N. Development Agenda, at 8, (Mar. 2012), <http://sustainabledevelopment.un.org/content/documents/843taskteam.pdf> (“[T]he MDG framework failed to account for the vulnerability of countries to natural disasters and the possibility of sudden reversals of years of development gains.”).

54. Reddy & Heuty, *supra* note 49, at 21; see also RITZEN, *supra* note 30, at 26 (“A new setback for development came in the 1980s and 1990s in the form of HIV/AIDS Late in 2002, UNAIDS reported that in Southern Africa national adult HIV prevalence rates had risen higher than was thought possible, exceeding 30 per cent in four countries Fields in Southern Africa are lying fallow because there is no one to work Whoever is not sick is tending to the sick and dying or taking care of the orphans. Food can no longer be produced. We encounter for perhaps the first time in world history a food shortage . . . due to illness.”).

55. See AN INTRODUCTION TO THE HUMAN DEVELOPMENT AND CAPABILITY APPROACH: FREEDOM AND AGENCY 66-68 (Severine Deneulin et al. eds., Earthscan 2009). See also NAILA KABEER, INSTITUTE OF DEVELOPMENT STUDIES, CAN THE MDGs PROVIDE A PATHWAY TO SOCIAL JUSTICE? THE CHALLENGE OF INTERSECTING INEQUALITIES 6 (2010), available at <http://www.ids.ac.uk/files/dmfile/MDGreportwebsiteu2WC.pdf>; THE E-CONSULTATION ON HUNGER, FOOD AND NUTRITION SECURITY: COLLECTION OF THE CONTRIBUTION RECEIVED FROM THE 19TH NOVEMBER 2012 TO 10TH JANUARY 2013, at 390 (2013) [hereinafter CYINDEP] (describing the Cyprus Island-Wide NGO Development Platform).

56. CYINDEP, *supra* note 55.

57. According to one author, these concerns are not only legitimate, but pressing considering the nearing 2015. Among the list of serious concerns is,

tensions between MDG progress and authoritarian governance; procedural and legitimacy concerns; problems relating to poor specification; inappropriate scale of ambition based upon unreliable and arbitrary assumptions about feasibility; misinterpretation and misapplication of the MDGs at the national level; the failure to address growing inequalities; tensions with international human rights legal standards; and colonisation

Mac Darrow, *The Millennium Development Goals: Milestones or Millstones? Human Rights Priorities for the Post-2015 Development Agenda*, 15 YALE HUM. RTS. & DEV. L.J. 55, 60 (2012).

58. G.A. Res. 65/1, U.N. Doc. A/RES/65/1 (Sept. 22, 2010).

59. *Id.* ¶¶ 53, 55.

global summits are convened at the expense of taxpayers everywhere. In such summits promises are easily set, but seldom met. If previous summit's promises had been met, global trade would have been healthy by the year 2000; 24,000 children would not be dying each day from preventable causes.⁶⁰ The Millennium Development Goals Summit promises suffered from two factors. First, basic human survival elements that are recognized in the MDGs were reduced to programs instead of relying upon a claim-based rights approach. This transformed into bureaucratic and political welfare assistance, based on a dirigisme model,⁶¹ to those who should have the enforceable right to survival. Even worse, those people could not participate and represent their concerns in the MDGs' process in determining their fate. Second, it is clear from the discussion above that the programs and administrative modus operandi of the MDGs were not well thought out. The recognition of the enforceable inherent right to survive with well thought out programs is necessary for the future of human development.

IV. SUSTAINABLE DEVELOPMENT AND INEQUALITY CYCLE?

Yet another popular 21st century trend of human development is sustainable development. Sustainable development is the notion that development should facilitate a "sustained yield;" each country should balance consumption with reproduction of resources in order to sustain and balance resources over time.⁶² Sustainable development became a staple of human development starting with its début in the famous Brundtland Commission report *Our Common Future* in 1987.⁶³ While historically sustainable development has been couched in the context of environmental law, the 2013 report of the U.N. Conference on Sustainable Development described voluntary commitments to creating sustainable

60. Ernest C. Madu, *The Convention on the Rights of the Child—People and Partners*, UNICEF, http://www.unicef.org/rightsite/364_617.htm (last visited July 7, 2014).

61. See Charles Sabel & Sanjay Reddy, *Learning to Learn: Undoing the Gordian Knot of Development Today*, 50 CHALLENGE 73, 74 (2007) (the dirigisme model is "the assumption, common to nearly all development theory, that there is an expert agent—the state for the dogmatist and orthodox left, the International Monetary Fund (IMF) or other guardians of market orthodoxy for the right—that already sees the future of development and can therefore issue instructions for arriving there." These theories, which comprise the dirigisme model, are in constant conflict and revision. They "suppress diversity" and stagnate the actual potential for development to effectively help the people who most need its effects, the poor).

62. See Ulrich Grober, *Deep Roots: A Concept of "Sustainable Development" (Nachhaltigkeit) 7*, (Social Science Research Center Berlin for Social Research, Working Paper No. P. 2007-002, 2007). ("'Sustainability' is a semantic modification, extension and transfer of the term 'sustained yield.' This had been the doctrine and, indeed, the 'holy grail' of foresters all over the world for more or less two centuries. The essence of 'sustained yield forestry' was described for example by William A. Duerr, a leading American expert on forestry: 'To fulfill our obligations to our descendants and to stabilize our communities, each generation should sustain its resources at a high level and hand them along undiminished. The sustained yield of timber is an aspect of man's most fundamental need: to sustain life itself.' A fine anticipation of the Brundtland-formula.").

63. See U.N. General Assembly, Report of the World Commission on Environment and Development, U.N. Doc A/RES/42/187 (Dec. 11, 1987) (according to the report, sustainable development is, "development, which implies meeting the needs of the present without compromising the ability of future generations to meet their own needs").

development in education, economics, energy, water/sanitation, food security, climate change, transportation, oceans/seas, gender equality, and more.⁶⁴ Despite the fact that sustainable development has been the prevailing lens through which human development is viewed, it is not without extreme criticism.

Sustainable development presents three challenges as a theory for development: 1) sustainable development was put forward in an environmental context, with no direct connection to human rights; 2) sustainable development is but a program of action; and 3) sustainable development can provide a pretext for capitalism to support inequality.

Politically, sustainable development was created in the context of protecting the environment and creating development that would sustain the environment. This was a compromise between the North's environmental priorities and the South's development priorities.⁶⁵ Economically, sustainable development is a result of the fear that if the production and consumption patterns of the North continued and were adopted by the rest of the world, natural resource-based economies could not endure, and their demise would create a domino effect reaching every aspect of human lives all over the world.⁶⁶

Twenty years after the first U.N. Conference on Environment and Development in 1992, which formally incorporated the idea of sustainable development as a balancing approach between the environment and development,⁶⁷ world leaders met for the Rio+20 conference in 2012 to continue exploring this theme of environmental protection, discussing "a green economy in the context of sustainable development poverty eradication" and the institutional framework for sustainable development.⁶⁸ The Rio Declaration and the preceding Rio+20 highlight that while sustainable development still has concerns for the wellbeing of humanity, it is fixed on a nexus of environmental protection and does not recognize the importance of human rights, particularly in the context of the right to survival.⁶⁹

Therefore, another issue with sustainable development is the lack of a sense of entitlement or recognitions of rights; without such a notion of any rights or duties, the delivery of any aid is a charity rather than a manifestation of rights.⁷⁰ Accordingly, cooperation between the developed world and the developing world

64. See generally U.N. Conference on Sustainable Development, SUSTAINABLE DEVELOPMENT IN ACTION (2013). See also G.A. Res. 66/288, ¶¶ 1-5, U.N. Doc. A/RES/66/288 (July 27, 2012) (the Rio +20 Conference prefaced this notion highlighting seven priority areas of sustainable development: decent jobs, energy, sustainable cities, food security, sustainable agriculture, water, oceans and disaster readiness).

65. Upendra D. Acharya, *Is Development a Lost Paradise? Trade, Development and Environment: A Triadic Dream of International Law*, 45 ALBA. L. REV. 401, 403-07 (2007).

66. *Id.* at 404.

67. *Id.* at 410.

68. G.A. Res. 66/288, *supra* note 64, ¶ 12.

69. Acharya, *supra* note 65, at 410-11.

70. Frank J. Garcia, *A "Fair" Trade Law of Nations or a "Fair" Global Law of Economic Relations?*, 45 ALBA. L. REV. 303, 305 (2007).

is mandatory, a cooperation in which there is a legally binding obligation to collaborate in the transferring of capital, technology, or other goods and services, and such transfers should be seen as a right, not welfare or charity.⁷¹ Current theories of sustainable development do not view development assistance as a legal obligation corresponding with the legal right to survival, and thus fail to achieve success in development goals.⁷²

Lastly, a particularly strong criticism is that while development is the answer to the problems of global poverty, particularly hunger, *sustainable* development provides a convenient pretext to both protectionism and capitalism.⁷³ The notion of sustainable development, as imposed by already developed Western civilizations, does not take into account the incredibly unbalanced struggle to balance economic, environmental, cultural, and social justice needs.⁷⁴ This creates an inequality cycle where, in order for one country to maintain its standard of living, another country must inherently stay underdeveloped generating never-ending inequality and legitimization of such inequality through the existing concept and practice of sustainable development. There must be an equal distribution of wealth, technology, and capabilities in order for all countries to achieve development, but this undermines the control and interests of developed countries.

V. THE FUTURE OF HUMAN DEVELOPMENT: LESSONS LEARNED

Without change in the development model, the future of human development will continue on a path of perpetuating poverty and making only superficial changes to development. A major cause of this is the dirigisme model of development policy and programs. There is an assumption that there are expert agents who understand development problems, see the future, know the solution, and can fix the system.⁷⁵ The “expert agents” are those of U.N. agencies—nothing

71. Philip Alston, *Revitalizing United Nations Work on Human Rights and Development*, 18 MELB. U.L. REV. 216, 218-19 (1992).

72. Acharya, *supra* note 65, at 420.

73. See Roger Keil, *Sustaining Modernity, Modernizing Nature: The Environmental Crisis and the Survival of Capitalism*, in *THE SUSTAINABLE DEVELOPMENT PARADOX: URBAN POLITICAL ECONOMY IN THE UNITED STATES* 41, 49 (Rob Krueger & David Gibbs eds., 2007) (citation omitted) (“Inadequate responses to ecological exhaustion abound. Corporate elites and most governments promote a form of sustainability that is more about sustaining capitalism, growth, and profits than sustaining living environments.”). See also OLANIKE F. DEJI, *GENDER AND RURAL DEVELOPMENT: INTRODUCTION* 363, 369 (2011) (citation omitted) (quoting Joan Veon) (“Sustainable development has continued to evolve as that of protecting the world’s resources while its true agenda to control the world’s resources. It should be noted that [it] sets up the global infrastructure needed to manage, count, and control all of the world’s assets.”). This sentiment is echoed by Mary Jo Anderson, who stated “the real purpose of sustainable development is to contain and limit economic development in developing countries and in so doing control population growth.” See Austin Aneke, *Principle of Sustainable Development; One of the Greatest Impediments to Africa Development*, HUFFINGTON POST BLOG (June 20, 2012, 7:00 AM), http://www.huffingtonpost.co.uk/austin-aneke/principle-of-sustainable-_b_1610720.html?view=print&comm_ref=false.

74. See, e.g., Aneke, *supra* note 73.

75. Sable & Reddy, *supra* note 61, at 73.

more than bureaucratic czars created with taxpayer's money.⁷⁶ That is, the World Bank and IMF, the guardians of marketplace orthodoxy committed to the Washington consensus; donor countries, which push their own agendas in determining problems and priorities; and the national elites of each country, using development goals and strategies as tools to forward their own political and economic goals.⁷⁷ These parties control the fate of development goals, but ignore the fact that victims should be their primary concern and should be the decision-makers in own their lives. In this context, the victims' claim-based right to survival is just a daydream; the right to survival is reduced to programs based on available resources, followed at state discretion, resulting in an immunity of politicians from whatever violations they commit against the right to survive. Even if a national government wants to prioritize problems of development, placing the most pressing needs first—food, clean water, etc.—they must adhere to the austerity plans of the IMF and World Bank, development plans benefiting the private sector and placing constraints on other pro-development policies.⁷⁸

Furthermore, development has taken on the character of technical and bureaucratic programs based on political delivery of charity, instead of a claim-based rights movement of survival of human life. There has been a failure to factor in any legal obligations concerning basic human survival rights yet, at the same time, human development rights can be abstracted from positive rights enshrined in the UDHR that have only been put into practice through voluntary U.N. programs.⁷⁹ What's more, development goals fail to address the root causes of poverty, particularly the historical context of colonization and imperialism in parts of the underdeveloped population.⁸⁰ According to the modern imperialism theory of development, developed countries that once relied on underdeveloped countries to sustain them during the colonial periods continue to do so because of a technological-industrial relationship where “[i]ndustrial countries invest in the production and export of raw materials in developing countries, influence with their potential of power the terms of trade in their favour, and thus perpetuate the international division of labour.”⁸¹

Lastly, few or no accountability mechanisms have been created to address the failure of institutional financial programs in their attempts to achieve development

76. *Id.* at 73-74.

77. *Id.*

78. See Gustav Ranis, *Giving Up on Foreign Aid?*, 31 CATO J. 75, 76 (2011) (“Aid effectiveness has been subject to mounting doubts for several reasons. One, and critical, is the by now general acknowledgement—even by the World Bank and IMF—of the failure of the Structural Adjustment Lending of the 1980s and 90s, tied to conditionality enshrining the Washington Consensus, but usually deteriorating into annual ritual dances, with donors initially insisting on reforms but ultimately yielding to the need to disburse.”).

79. See *supra* p. 6.

80. See Robert Hunter Wade, *Globalization, Growth, Poverty, Inequality, Resentment, and Imperialism*, in GLOBAL POLITICAL ECONOMY 373-409 (John Ravenhill ed. 2008); Frithjof Kuhn, *Causes of Underdevelopment and Concepts for Development*, 8 J. INST. DEV. STUDIES 11 (1987).

81. Kuhn, *supra* note 80, at 20, § 2.2.2.

goals.⁸² This is not to deny that some accountability mechanisms do exist within IFIs and international organizations.⁸³ For example, the World Bank inspection panel reviews complaints of human rights violations occurring as a direct result of World Bank projects.⁸⁴ However, such panels issue only recommendations and, while some complaints result in effective change, others result in none at all.⁸⁵

These pitfalls do not bode well for the future of development since they set it up to become merely a programmatic approach with extreme problems, and fail to recognize the right to survival in the legal system of rights and remedies. A solution to these problems could be a radically new structure for human development. This new structure requires the recognition and enforcement of the right to survive. The right to survival is a customary international *jus cogens* norm, developed out of the recognition of the consensus of non-binding instruments proclaiming the right to development;⁸⁶ the numerous human rights instruments giving weight to component rights to the right to survival, primarily food, water, shelter, and security,⁸⁷ and incorporations of such rights into almost all constitutions and national and international jurisprudence.

VI. RESPONSIBLE PARTIES TO THE RIGHT TO SURVIVE

The new reconstructive approach needs to consider the existing failed elements of human development and analyze the roles of different parties the enfranchised/disfranchised context. In this new structure, the global community

82. See Siobhán McInerney-Lankford, *International Development Actors and Human Rights*, in MILLENNIUM DEVELOPMENT GOALS AND HUMAN RIGHTS 160, 162-64 (Malcolm Langford, et al. eds., 2013).

83. See Matthew Parish, *An Essay on the Accountability of International Organizations*, 7 INT'L ORGS. L. REV. 277, 283 (2010). These are most often seen in the context of employment disputes, but even these tribunals seem to have major short fallings. See also Report of the Redesign Panel on the U.N. System of Administration of Justice, U.N. Doc. A/61/205 (July 28, 2006), available at <http://www.un.org/ga/president/62/issues/resolutions/a-61-205.pdf> describing the Internal Justice System as "outmoded, dysfunctional inefficient and that it lacked independence . . . [It] fails to meet many basic due process standards established in international human rights instruments."

84. See *The Inspection Panel*, WORLD BANK, <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx> (last visited July 7, 2014).

85. Consider the case of the Chixoy Dam in Guatemala, where the Inspection Panel could only provide reparations after the project, which they funded, resulted in hundreds killed and more displaced. There was a question of if and how adequate reparations could be made. The victims took the case to the Inter-American Court on Human Rights; however, the government refused to make a settlement official. See Malcolm Langford, *A Sort of Homecoming: The Right to Housing*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 166, 181 (Mark Gibney & Sigrun Skogly, eds. 2010); *U.S. Congress Takes Strides Toward Reparations for Chixoy Dam Survivors*, BIC BANK INFO. (Jan. 22, 2014), <http://www.bicusa.org/us-congress-takes-strides-toward-reparations-for-chixoy-dam-survivors/>.

86. See *supra* pp. 7-11.

87. Personal security is a basic tenant of the UDHR, *supra* note 13, art. 3. The General Assembly has recognized water as a human right in GA 64/292. The Human Right to Water and Sanitation, G.A. Res. 64/292, U.N. Doc A/RES/64/292 (Aug. 3, 2010). Additionally, food as a human right has been derived from Art. 25 of the U.D.H.R. as integral to the right to an adequate standard of living. See Note by the Secretary General, *Right to Food*, U.N. Doc A/68/288 (Aug. 7, 2013) (Summary by the SG of Special Rapporteur on the Right to Food, Oliver De Shutter).

must make a distinction between the enfranchised and the disenfranchised. The disenfranchised are those who lack the basic necessities for survival: food, clean water, access to basic medical care, housing, etc. This new structure must take into account the causal relationship between the enfranchised and the disenfranchised.

A. *Right to Survive and International Financial Institutions*

Firstly, the parental nature of international organizations, imposing a particular economic ideology without giving consideration to alternatives, is one-sided and fails to account for domestic input and local development goals. The imposition of institutional arrangements, such as those by IFIs, over the World's poor results in stagnation in development.⁸⁸ One well-known example is the impact global lenders such as the IMF, the Inter-American Development Bank, and the World Bank have had on Jamaica, forever changing the climate of the economy, collapsing markets such as the dairy and banana industry.⁸⁹ In another example, the IFI effect was more subtle: in Kenya pressing human rights needs were largely absent from the judicial reform agenda and include the lack of interpretation of court proceedings into native languages, inadequate opportunity for trial preparation, improperly long periods of pre-trial detention, and abhorrent prison conditions.⁹⁰ These judicial reforms were intended to favor international investors.⁹¹

Underlying fundamental principles and policies, by which IFIs are structured and function, do not directly reconcile with the essential needs of the poor and, therefore, are contrary to the right of survival. For example, in the interest of remaining politically impartial, the World Bank requires that “[o]nly economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.”⁹² Article I highlights a purpose driven by economic pursuit: to assist in reconstruction “by facilitating the investment of capital,” to “promote private foreign investment,” and to “promote the long-range balanced growth of international trade.”⁹³ Similar provisions were introduced at the IMF and the International Development Association (“IDA”).⁹⁴ This is not to say that the banks *never* consider human rights in decision making, but rather that the nexus of decision making is

88. Ranis, *supra* note 78, at 76-77.

89. See Stephanie Black, *LIFE AND DEBT* (Tuff Gong Pictures 1990) speculating that the financial aid made condition on financial reforms and structural adjustments, such as trade liberalization and privatization failed to improve the economic situation of Jamaica and left the country \$4.6 billion in debt.

90. Gathii, *supra* note 45, at 187-94 (quoting Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 *WORLD BANK RES. OBSERVER* 117 (1999)).

91. *Id.*

92. International Bank for Reconstruction and Development Articles of Agreement art. IV § 10, Dec. 27, 1945, 2 U.N.T.S. 134 (*as amended effective* June 27, 2012).

93. *Id.* art. I.

94. Peter T. Muchlinski, *International Finance and Investment and Human Rights*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 263, 267 (Scott Sheeran & Sir Nigel Rodley eds., 2013).

intrinsically tied to economics, a truth that is entirely related to the view of the banks that development is a matter of economic success, not survival rights.⁹⁵

In a similar context, the IMF systematically uses conditionality in its lending process to impose goals based on quantitative, objective measurements of economic success in order both to resolve balance-of-payment problems and safeguard the funds' resources.⁹⁶ The purpose of conditional lending is to improve the economic and political situation in developing countries, yet the policy of conditional lending puts forth a particular economic agenda while failing to account for either input from the countries themselves or the macro effect on society, culture, and the economy.⁹⁷ However, in a more encouraging effort, the Board of Governors of the Inter-American Development Bank mandated the IDB to explicitly pursue two objectives, "reducing poverty and inequality and achieving sustainable growth. Alongside these objectives are two strategic goals: addressing the special needs of the less developed and smaller countries and fostering development through the private sector."⁹⁸

B. *Right to Survive and Developed Countries*

Developed countries have resisted the recognition of a claim-based right to survive and the right to development, but instead have recognized a soft approach to development, turning these rights into "fake" or "pseudo-rights." The programmatic approach of the MDGs and international instruments is non-binding, and does not create a legal context for these rights. The concept of the right to survive is limited to a program-only concept of sustainable development by politically compromised, economically supportive developed countries' economic interests.

Developed countries play a part in undermining development in this way by controlling IFIs, making them puppets to serve ideologically loaded economic financial systems.⁹⁹ Monetary imperialism from the global powers and the lack of

95. *Id.* at 267-69.

96. INT'L MONETARY FUND, GUIDELINES ON CONDITIONALITY 1 (2002), available at <https://www.imf.org/external/np/pdr/cond/2002/eng/guid/092302.pdf>. Notice that the guidelines do attempt to account for subjective, non-quantitative goals in the measure of structural benchmarks. However, the majority of success measures are objective and quantitative. Additionally, there has been a recent move to make more concessions to flexible lending procedures. See *IMF Conditionality Factsheet*, INT'L MONETARY FUND (Oct. 1, 2013), <https://www.imf.org/external/np/exr/facts/pdf/conditio.pdf>. However, there is still little mention of human rights or human survival as a factor in lending conditions.

97. The IMF did not consult local legislatures in their decision making process for lending, and removed the state's decision-making power over financial policy. Additionally, "[s]tructural reforms also result in several negative socioeconomic outcomes that generate social unrest and political opposition. Increasing unemployment and poverty rates, greater income inequality, and reduced social services result in the diminished living standards commonly observed after economic reform programs." See Chelsea Brown, *Democracy's Friend or Foe? The Effect of Recent IMF Conditional Lending in Latin America*, 30 INT'L POL. SCI. REV. 431, 434 (2009).

98. *Mandates*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/about-us/mandates,6280.html> (last visited July 13, 2014).

99. Sabel & Reddy, *supra* note 61, at 76-77.

political infrastructure created a struggle between meeting financial demands and maintaining basic necessities for life in Asia, Latin America, and the Middle East.¹⁰⁰ For example, in the recent global financial crisis, developing countries blamed developed countries for pushing “the free-market or neoliberal model, which emphasizes a small state, deregulation, private ownership, and low taxes,” agendas strongly advocated by the United States and IMF in the 1990s.¹⁰¹ Financial institutions continue to work from outdated economic models based on the perspective of developed countries; financial institutions such as “the World Bank and the United Kingdom’s Department for International Development have supported programs that strengthen public sectors, promote good governance, and combat corruption for the last 15 years with little to show for it.”¹⁰²

Moreover, developed countries ignore the facts of their colonial past and continue dominating underdeveloped countries, destroying the independent policy-making capacity with which they would have been able to address their own problems. Rapid decolonization of the vast majority of the world left many countries exposed to “the failure of colonial powers to lay firm foundations for democratic political development.”¹⁰³ For example, global expectations for Africa to develop during this period were high yet,

within the space of a decade, democratic independence governments were eliminated through coups and civil wars, replaced by military dictatorships or authoritarian one-party states governed by political strongmen and dominated by large tribal groups. Underdevelopment, the condition of stagnant or falling incomes relative to the rest of the world, combined with declining life expectancy rates, high infant and maternal mortality, extensive and increasing illiteracy.¹⁰⁴

The developed countries that left underdeveloped countries in a sad state after decolonization tend to be the same countries that justify humanitarian intervention through the Right to Protect doctrine (“R2P”). While R2P is established international law providing that a national government of a sovereign state has a responsibility to protect its own citizens from human rights abuses,¹⁰⁵ R2P places a strain on traditional notions of sovereignty in that it creates a new justification for foreign intervention.¹⁰⁶ For example, the means used in the NATO air strikes against Yugoslavia constituted warfare with the aim of taking down the Milosevic regime and destroying military resources rather than directly providing

100. Nancy Birdsall & Francis Fukuyama, *The Post-Washington Consensus: Development after the Crisis*, 90 FOREIGN AFF. 45, 46 (2011); PAUL BATTERSBY & JOSEPH M. SIRACUSA, GLOBALIZATION AND HUMAN SECURITY 19-22 (2009).

101. Birdsall & Fukuyama, *supra* note 100, at 46-47.

102. *Id.* at 51.

103. BATTERSBY & SIRACUSA, *supra* note 100, at 19.

104. *Id.*

105. Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT’L L. 298, 299-301 (2012).

106. John F. Murphy, *Responsibility to Protect (R2P) Comes of Age? A Sceptic’s View*, 18 ILSA J. INT’L & COMP. L. 413, 425 (2012).

humanitarian aid and security assistance.¹⁰⁷ Similar criticisms have been lodged against the U.S. when humanitarian intervention and human security were asserted to justify intervention in Iraq.¹⁰⁸ Another example is Security Council Resolution 1973, meant to protect civilians in Libya.¹⁰⁹ Several critics argued that the resolution was used as an abuse of power to oust Muammar Gaddafi from power in Libya.¹¹⁰ These abuses of discretion in the name of human security and human development use underdeveloped countries as pawns in politics and war without any regard for the loss of life that might result or the unnecessary delays to development committing violation of the right to survive.

C. *Right to Survive and Partnership Between Corporations and National Governments*

Corporate activity in underdeveloped areas of the world additionally lead to continued underdevelopment. Perhaps one of the most current examples is that of the garment belt in Bangladesh, where disregard for the basic safety of factory workers has cost thousands of lives in factory fires and collapses.¹¹¹ Despite the overwhelming evidence establishing a lack of safety conditions for more than a decade, corporate brand owners continue to permit unsafe labor conditions and plead ignorance to factory conditions.¹¹² Another example of this is the Coca-Cola Plachimada in India, which contributed to significant water use in the drought-stricken area in the mid-2000s, contributing to the deprivation of farmers and

107. Gerd Oberleitner, *Human Security: A Challenge to International Law?*, 11 GLOBAL GOVERNANCE 185, 194 (2005).

108. Zachary D.A. Hingst, *Libya and the Responsibility to Protect: Building Block or Roadblock?*, 22 TRANSNAT'L L. & CONTEMP. PROBS. 227, 250-51 (2013).

109. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17 2011).

110. PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 751-52 (2013).

111. See *Dhaka Rana Plaza Collapse: Pressure Tells on Retailers and Government*, BBC NEWS (May 14, 2013), <http://www.bbc.com/news/world-asia-22525431> (an estimated 1,100 died in the factory collapse at Rana Plaza); *Bangladesh: Tragedy Shows Urgency of Worker Protections*, HUM. RTS. WATCH (Apr. 25, 2013), <http://www.hrw.org/news/2013/04/25/bangladesh-tragedy-shows-urgency-worker-protections> (four examples noted by Human Rights Watch are: in April 2005, 73 garment factory workers died in a factory collapse in Savar, again in February 2006, 18 workers were killed in a garment factory collapse in Dhaka, and in June 2010, 25 workers were killed in a different collapse in Dhaka, in November 2012, 100 workers died in a factory fire in Dhaka). See also Stephen Frost, *Garment Factory Collapses in Bangladesh*, CSR ASIA WEEKLY (Apr. 19, 2005), <http://csr-asia.com/csr-asia-weekly-news-detail.php?id=3946> (the article described the 2005 factory conditions as deplorable, citing poor workers conditions, withheld wages, and the discouragement of unions as part of the problem for unsafe and unhealthy factory conditions); Ataur R. Belai & Robin W. Roberts, *Stakeholders' Perceptions of Corporate Social Reporting in Bangladesh*, 97 J. BUS. ETHICS 311, 317 (2010) (one interviewee reported that, "[t]ruly speaking, the garment factory owners are very shrewd people. They buy labour at a very cheap rate. They don't care about the health and safety measures. As a result, we lost hundreds of human lives in recent days due to factory fires. The victims who survived are not even getting proper compensation. The offenders go away without being brought to justice. Isn't it a human crime?").

112. See *supra* note 111.

villagers of drinkable water.¹¹³ The High Court of Kerala stilled the injunction prohibiting the Coca-Cola plant from continuing to draw water from the area, reasoning that the plant was only a minor cause of the drought; yet critics point out that it is negligent to continue to allow the plant to draw 500,000 liters of water a day from the villagers' common water in the middle of a life-threatening drought.¹¹⁴

What's more, corporations become explicitly responsible for their human rights violations when they derive power from state actors, in both "power with" and "power over" models.¹¹⁵ Accordingly, "[s]tates share 'power with' corporations to solve states' economic, political, diplomatic, and security problems. In this process, corporations may enjoy sovereign immunity and profit from their expertise by opening up the market for state functions."¹¹⁶ Anne-Marie Slaughter describes the "power with" dynamic as "[t]he power of co-creation, the power of mass collaboration, the power of diverse minds coming together and the ability then to solve problems in ways we have never been able to do before."¹¹⁷ A prominent example of this is the *Doe v. Unocal* case, where the Myanmar military built roads and helipads, provided security, and relocated Myanmar citizens through armed violence at the very least acting in concert with Unocal's efforts to build a natural gas pipeline running through the same area.¹¹⁸

VII. THE RIGHT TO REMEDY FOR VIOLATIONS OF THE RIGHT TO SURVIVE

While the relationship between victims and violators of the right to development and survival is a causal relationship, it has not been recognized as a legal relationship and is not accounted for in the international system of rights and remedies. Yet, it is an accepted principle of international law that when individuals' rights are violated, they must have recourse and remedies.¹¹⁹ The

113. See *Hindustan Coca-Cola Beverages v. Perumatty Grama Panchayat*, (2005) 2 K.L.T. 554 (India), available at <http://indiankanoon.org/doc/580673/>.

114. *Id.* See also *Case Against Coca-Cola Kerala State: India*, THE RIGHTS TO WATER & SANITATION, <http://www.righttowater.info/rights-in-practice/legal-approaches/legal-approach-case-studies/case-against-coca-cola-kerala-state-india/> (last visited July 13, 2014).

115. Upendra D. Acharya, *Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?*, 36 B.C. INT'L & COMP. L. REV. 937, 959-60 (2013).

116. *Id.* at 960.

117. Anne-Marie Slaughter, Commentary, *The Grotius Lecture: Asil 2010 International Law in A Time of Change: Should International Law Lead or Follow?*, 26 AM. U. INT'L L. REV. 1315, 1375 (2011).

118. *Doe I v. Unocal Corp.*, 395 F.3d 932, 938-39 (9th Cir. 2002) *on reh'g en banc sub nom.* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).

119. But a few examples of the numerous expressions of this in international instruments are the U.N. Convention on Privileges and Immunities, the UDHR, and the ICCPR. Convention on the Privileges and Immunities of the U.N. art. 8 § 29, Feb. 9, 1946, 1 U.N.T.S. 15, 30 ("In all civil cases against the organization, the U.N. must provide "appropriate modes of settlement"); UDHR, *supra* note 13, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."). See also International Covenant on Civil and Political Rights art. 2, ¶ 3(a), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

General Assembly itself has explained that every individual has the right to “[e]qual and effective access to justice; . . . adequate, effective and prompt reparation for harm suffered; and . . . access to relevant information concerning violations and reparation mechanisms” when a state commits human rights violations.¹²⁰ Additionally, the European Court of Human Rights has even held that sovereign immunities and immunities for international organizations only apply insofar as “the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.”¹²¹ Thus, the courts have recognized that individuals’ inherent rights permeate all other obligations; international organizations as well as nation-states must conform to human rights standards.¹²² These examples definitely demonstrate that the right to remedies for violations of the right to survival is a well-established principle of international law and has matured to the status of customary international law.

A. *International Organizations*

The global community is growing more and more receptive to the trend that both corporations and international organizations are responsible for the impact they have over the countries they interact with, both positively and negatively.¹²³ International organizations particularly must be made strictly accountable for any violations of the right to survive, whether due to negligence in policies and operations of programs or operations of programs and policies without reasonable

120. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 11, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

121. See *Beer & Regan v. Germany*, App. No. 28934/95, 33 Eur. H.R. Rep. 3, 54 (1999); *Waite & Kennedy v. Germany*, App. No. 26083/94, 30 Eur. H.R. Rep. 261, 261 (1999).

122. See *W. European Union v. Siedler* [Cass.] [Court of Cassation], Dec. 21, 2009, AR S040129F (Belg.), reviewed and reprinted in Cedric Ryngaert, *Oxford Reports on Int'l L. in Domestic Courts* (Andre Nollkaemper & Erika de Wet eds., 2010), available at <http://opil.ouplaw.com/view/10.1093/law-ildc/1625be09.case.1/law-ildc-1625be09#law-ildc-1625be09-headNote-1>. Article 6 (1) of the ECHR guarantees a complainant the right to a fair trial, regardless of immunities.

123. *E.g.*, G.A. Res. 66/100, ¶ 4, U.N. Doc. A/RES/66/100 (Feb. 27, 2012) (stating that, “the subject of responsibility of international organizations is of major importance in the relations of States and international organizations”). Compare U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework: Rep. of the Secretary-General*, at 15, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (the Ruggie Principle, though non-binding, are a perfect example of the multitude of non-binding principles which impute a duty on corporations to practice due diligence in their international relations), and YANN QUEINNEC, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: AN EVOLVING LEGAL STATUS* 25 (2007), available at http://oecdwatch.org/publications-en/Publication_3064 (arguing that Corporate Social Responsibility (“CSR”) guidelines have become customary among states and enterprises, and therefore, the OECD Guidelines and Ruggie Principles, which are based on CSR, are customary international law), with Christian Schliemann, *Procedural Rules for the Implementation of the OECD Guidelines for Multinational Enterprise—A Public International Law Perspective*, 13 GERMAN L.J. 51, 57 (2012) (positing that while the guidelines themselves have not reached the level of customary law, “it should be kept in mind that the Guidelines are referring, in large part, to already-existing international standards, of which some present binding law.”).

discretion. This is important because many developed countries' programs relating to development and survival are heavily directed or implemented by international organizations. For example, a case filed in U.S. District Court in the Southern District of New York against the U.N. by the Institute for Justice and Democracy in Haiti alleges gross negligence on the part of the U.N. for allowing U.N. peacekeepers to enter Haiti without taking proper precautions to prevent cholera from contaminating the water supply through waste generated from the peacekeepers' campsite.¹²⁴ The contamination resulted in a mass epidemic killing thousands and infecting even more.¹²⁵ The complainants argue that there is an obligation to provide individuals who are victims of violations of international law with an effective remedy, which is required both under international law and the Charter and the Convention on the Privileges and Immunities of the United Nations.¹²⁶

Similarly, the General Assembly officially took notice of the Draft Responsibilities for International Organizations in 2011, commanding “[the regulations] to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action.”¹²⁷ Articles 3 and 4 of the Draft Resolution state:

Every internationally wrongful act of an international organization entails the international responsibility of that organization. . . . There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

- (a) Is attributable to that organization under international law; and
- (b) Constitutes a breach of an international obligation of that organization.¹²⁸

The Draft Responsibilities includes extensive provisions defining “wrongful acts” and remedies for wrongful acts, but fails to establish an enforcement mechanism for the breaches.¹²⁹ However, such accountability has not gone unnoticed in a legal context. Vera Gowlland-Bebbas’ testimony during the Russell Tribunal on Palestine analyzed the accountability of the U.N. for its part in both Rwanda and Srebrenica, and drew the conclusion that as an international

124. Rick Gladstone, *Rights Advocates Suing U.N. Over the Spread of Cholera in Haiti*, N.Y. TIMES, Oct. 8, 2013, at A4.

125. *Id.*

126. Petition for Relief from Institute for Justice & Democracy in Haiti to U.N. Stabilization Mission in Haiti 25-27 (Nov. 3, 2011), available at <http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf> (relief denied); Complaint at 40, *Georges v. United Nations*, No. 13CV07146 (S.D.N.Y. Oct. 9, 2013), available at <http://www.ijdh.org/wp-content/uploads/2013/10/Cholera-Complaint.pdf>.

127. G.A. Res. 66/100, *supra* note 123, ¶ 3.

128. *Id.* arts. 3-4.

129. *Id.* (notice that the draft resolutions are set to be officially accepted in the 2014 session of the GA).

organization, the U.N. had a responsibility to protect in those situations.¹³⁰ Here, she made the assertion that under international law the U.N. is responsible for actions taken by the Security Council and General Assembly, particularly with regard to Palestine.¹³¹ She notes that international law is largely rendered irrelevant because no suitable court exists to enforce international law against the U.N., yet this does not negate the fact that international organizations should be accountable when they break the law.¹³²

B. Corporations

Corporations enjoy a unique immunity from all kinds of violations of human rights, including the right to survive, because most restrictions on human rights violations under international law apply only to state actors or a natural person.¹³³ Litigation against corporations for human rights violations has been largely unsuccessful,¹³⁴ even though a number of non-binding principles continue to establish a trend of accountability for corporations' impact. The National Contact Points through the Organization for Economic Cooperation and Development ("OECD") routinely engage in mediation to hold international corporations accountable for their failures to prevent human rights violations.¹³⁵ Furthermore, corporations are compelled to perform due diligence audits to ensure they do not adversely affect human rights in the countries with which they do business because of domestic legislation requiring due diligence, including legislation in the United States, France, Finland, and Germany.¹³⁶ Additionally, corporations seem to have

130. See Vera Gowlland-Debbas, *Testimony to the Russell Tribunal on Palestine*, YOUTUBE (Oct.27, 2012), https://www.youtube.com/watch?v=tPVcHUeMc_Y&feature=player_embedded#at=25.

131. *Id.*

132. *Id.*

133. Dana Weiss & Ronen Shamir, *Corporate Accountability to Human Rights: The Case of the Gaza Strip*, 24 HARV. HUM. RTS. J. 155, 156, 175 (2011) (discussing the historical nexus between human rights and corporations, and calling for more accountability measures for corporations committing human rights violations).

134. Litigants have been largely discouraged by the leverage gained by corporations in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). However, this should not necessarily deter from past success in litigation for corporate liability in human rights violations, such as *Doe I v. Unocal Corp.*, 395 F.3d 932, 960 (9th Cir. 2002) *on reh'g en banc sub nom.* John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005). There are those scholars who believe all is not lost in the world of corporate liability. *E.g.*, Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 42 (2011).

135. See, *e.g.*, Cmty. Legal Educ. Ctr. v. Am. Sugar Ref. Inc. (Cambodia v. U.S.), Case No. 276, (U.S. Nat'l Contact Point 2013), available at http://oecdwatch.org/cases/Case_276 (the NCP engaged in mediation involving the illegal eviction of Cambodian residence by the American Sugar Refining Co.); Clean Clothes Campaign v. Adidas (Austria v. Ger.), Case No. 27, (Ger. Nat'l Contact Point 2004), available at http://oecdwatch.org/cases/Case_27 (The NCP negotiated positive steps improving labor condition for workers in Adidas' factories).

136. See California Transparency in Supply Chains Act of 2010, CAL. CIV. CODE § 1714.43 (2012) (compelling any company doing business in the state of CA, with international business over a stated monetary value to perform and publish due diligence audits); Dodd-Frank Wall Street Reform and Consumer Protection Act, Publ. L. No. 111-203, § 1502(b)-(d), 124 Stat. 2213-16 (2010) (codified at 15 U.S.C. § 78m) (compelling companies utilizing conflict minerals to perform due diligence audits);

made an intentional point of keeping such cases out of litigation; for example, when Nordstrom was sued by Saipan workers for damages related to RICO Act violations, which asserted, among other things, using manufacturers in Saipan that engaged in forced labor, the company settled outside of court.¹³⁷

In a recent report by the Special Representative of the Secretary General, Mr. John Ruggie, pronounced the Guiding Principles on Business and Human Rights.¹³⁸ The report came up with the “Protect, Respect, and Remedy” framework.¹³⁹ The report clearly imposes states with the duty to protect against human rights abuses within their jurisdictions, including those abused committed by corporations.¹⁴⁰ In order to fulfill their human rights duties and obligations, states should enact and enforce laws to require corporations to uphold human rights obligations regardless of whether a corporation is privately-owned or state-owned.¹⁴¹ The report pronounces that it is corporations’ responsibility to respect human rights by addressing adverse human rights impacts and asks corporations to acknowledge the International Bill of Human Rights and the Declaration on Fundamental Principles and Rights at Work.¹⁴² It also suggests that corporations come up with their own volunteer policies of human rights and operate their functions based on the principles of human rights assessments and due diligence.¹⁴³ The third element of the report is the access to remedy through judicial, administrative, and legislative means.¹⁴⁴ It suggests that state based and non-state based remedy be utilized for remedy.¹⁴⁵

Although this report is a progressive step toward the issue of the corporate abuse of human rights and the right to survive, it fails to address how states can be held liable for the violation of the duty to protect. This has been an ongoing

Schliemann, *supra* note 123, at 57 (“[The Netherlands requires] a declaration from companies that they are aware of the [OECD Guidelines for Multinational Enterprise] and endeavor to comply with them to the best of their ability. In France, Finland, Germany, and Denmark, multinational enterprises applying for and receiving state subsidies have to sign a clause that they are well aware (*avoir pris connaissance*) of the Guidelines. In many other countries, the Guidelines are at least mentioned within the process of granting subsidies to enterprises.”).

137. *Nordstrom Settles Lawsuit Over Sweatshops*, KOMONEWS.COM (Aug. 9, 1999, 8:05 AM), 2006, <http://www.komonews.com/news/archive/3976951.html>. See also Lisa Girion, *Nike Settles Lawsuit Over Labor Claims*, L.A. TIMES, Sep. 13, 2003, <http://articles.latimes.com/2003/sep/13/business/fi-nike13>. But see Puck Lo, *Forever 21 Fails to Comply with Sweatshop Investigation*, CORPWATCH BLOG (Nov. 30 2012), <http://www.corpwatch.org/article.php?id=15799>.

138. Special Rep. of the Security Council on the Issue of Human Rights and Transaction Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, annexed in the final report to the Human Rights Council, U.N. Doc. A/HRC/17/31 (March 21, 2011).

139. *Id.* ¶¶ 1-2.

140. *Id.* ¶¶ 5-10.

141. *Id.* ¶¶ 11-12.

142. *Id.* ¶¶ 12.

143. *Id.* ¶¶ 17-21.

144. *Id.* ¶ 25.

145. *Id.* ¶¶ 26-31.

obstacle in realizing human rights or the right to survive. The report does not guarantee that corporations are subjects of international law, but instead keeps them within the traditional notion of territorial jurisdiction of states. The report recognizes that corporate abuses of human rights are a new phenomenon, but is reluctant to treat them as such. On the remedy matter, the report does not provide a special forum for special cases of corporate abuses of violations that may cause another setback to the right to survive.

C. *Sovereigns*

Since the conclusion of World War II, when the Nuremberg and Tokyo trials commenced, the international community has attempted to create mechanisms for holding governments accountable for humanitarian and human rights violations.¹⁴⁶ Regional courts have been established, including the European Court of Human Rights,¹⁴⁷ the Inter-American Court on Human Rights,¹⁴⁸ and the African Court of Human and People's Rights,¹⁴⁹ each of which allow victims to bring complaints against member states that violate human rights. One problem with these courts is their inability to enforce rulings without some sort of executor branch; the courts rely on individual states to implement norms of international law, including the judgments of the courts, yet these quasi-courts experience relatively low compliance.¹⁵⁰ For example, in the case of torture, almost every international court has expressed concerns that there is no mechanism to ensure reparations awarded to victims will actually be honored.¹⁵¹ In the international arena, the International Criminal Court ("ICC") arose out of a gradual call for a permanent international

146. See NUREMBERG HUMAN RIGHTS CTR., THE ROAD TO THE INTERNATIONAL CRIMINAL COURT: NUREMBERG TO THE HAGUE 8, 16 (2007) available at http://www.iccnw.org/documents/FromNurembergttoHague_07july_eng.pdf.

147. Convention for the Protection of Human Rights and Fundamental Freedoms art. 19, Nov. 4, 1950, 213 U.N.T.S. 221 (and its Protocols).

148. Statute of the Inter-American Court of Human Rights art. 1, Oct. 1979, O.A.S.T.S. No. 448.

149. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 1, June 9, 1998, O.A.U. Doc OAU/LRG/AFCHPR/PROT(III) (entered into force Jan. 25, 2004).

150. EMILY HAFNER-BURTON, MAKING HUMAN RIGHTS A REALITY 112-13 (2013).

151. REDRESS TRUST, ENFORCEMENT OF AWARDS FOR VICTIMS OF TORTURE AND OTHER INTERNATIONAL CRIMES 17 (2006), available at http://www.redress.org/downloads/publications/master_enforcement%2030%20May%202006.pdf ("All international bodies have expressed concern over ensuring that their views, decisions, and judgments are made effective so that full reparation is afforded to the victims of human rights violations. But even in cases where such views, decisions and judgments are legally binding . . . there is a tension between their binding force and the finality of domestic decisions. In particular, there is no established collateral procedure for cases in which international courts and tribunals find a violation by a domestic decision (particularly when it has been reviewed by the highest judicial body of the State). In practice, a respondent State's political and judicial divisions are mobilised to varying degrees depending on the nature of the judgments, views or decisions: Do they require purely executive remedial action or legislative and/or judicial action? It appears that compliance depends on the extent to which each governmental division rallies to respond to a specific judgment and on the pressure that each international enforcement procedure is able to exercise over the State.").

court following the tribunals on Rwanda and the former Yugoslavia.¹⁵² The ICC has jurisdiction over any person, regardless of immunities, who commits crimes under the Rome Statute.¹⁵³ Despite the victory of gaining a permanent international court, countries that have not signed or ratified the Rome Statute are not accountable to the Court. And the ICC is already criticized for focusing almost exclusively on Africa; further, since the Court's opening in 2002, only twenty-one cases have been brought before it.¹⁵⁴ While these human rights courts appear to be in their infancy, and it remains to be seen whether they prove to be effective solutions, one thing is clear: they are an indication that sovereigns are responsible for the effects they have on human rights.

VIII. NEED FOR ENFORCEMENT MECHANISM: ACCOUNTABILITY AND REMEDIES FOR THE RIGHT TO SURVIVAL

Once the global community accepts these basic assumptions, they can begin working toward creating a system of accountability for the maintenance of the most basic human rights that allow for the right to survival. This approach would force governments, organizations, and corporations that interact with underdeveloped countries to perform a survival-impact assessment of policies and programs. Programs and policies that are intended to aid in development must consider first the sustainability of basic survival rights, and policies and programs that are development-neutral must not hinder survival rights.

In a system of rights and remedies, there must be an accountability measure to ensure survival-impact surveys are performed and followed. An independent, international body that represents both developed and developing nations, NGOs, and human rights commissions should first carry out such accountability. Two options to rights and remedies should exist:

A. *A Permanent Survival Court*

A permanent "survival court" could be developed, allowing victims of survival rights violations to bring suit against those with causal relationships to the violation. This court should be created by the Security Council to consider such cases and issue binding rulings. If these rulings are not followed, the General Assembly could recommend action against the violators, or the Security Council

152. *About the Court*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited July 13, 2014).

153. Rome Statute of the International Criminal Court, art. 1, U.N. Doc. A/CONF.183/9 (1998), available at <http://legal.un.org/icc/statute/rome/rome.htm> (entered into force 1 July 2002); HAFNER-BURTON, *supra* note 142, at 9 ("Since 2002, the International Criminal Court (ICC), a permanent tribunal, has been empowered to prosecute genocide, war crimes, and crimes against humanity committed not only by representatives of the treaty's participants but also by other governments, like Sudan, that never agreed to participate.").

154. *Situations and Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited July 13, 2014).

could take enforcement action against them. It should be clear that Council members should not be allowed to veto decisions of the court, as survival rights are inherent in nature. Unlike the Security Council, this court should carry universal jurisdiction, since the right to survival is a human right and a *jus cogens* norm. Additionally, the court should be able to apply retroactive justice as the Nuremberg and the Tokyo courts did.¹⁵⁵

B. Already Existing Domestic and International Courts

Victims should also be able to take advantage of existing domestic and international courts, should these be the most appropriate venues. In the case of international organizations, victims should first bring the complaint to the organization itself. If the complaint were not remedied, the victim would have the option to appeal to the highest court of their country. If the case is not remedied in the highest court, the case could be appealed to the International Court of Justice. In the case of corporation's violations, the victim could bring the case either in the home country of the corporation, or in the host country, at the victim's discretion. Either forum should be appropriate under international law, because the right to survival is an inherent right and *jus cogens* norm. In the case of sovereigns (government officials of donor countries and receiving countries etc.) victims should be allowed to bring suit in their respective countries, and appeal to that country's highest court. If no favorable outcome is found, the victim could appeal to the ICJ.

IX. CONCLUSION

The modern context of development in international law has made significant advancement to recognize the importance of social progress, peace and economic freedoms in a larger context of human development. Yet, the current state of human development has taken a largely programmatic approach, turning human development into a charity as opposed to a legal recognition of a fundamental right, established in a system of rights and remedies. Without the recognition of a legal right, IFIs, IOs, state's policies and programs will stagnate over time, bringing little success to human development platforms. If human development is to achieve the success hoped for, there must be fundamental changes in developing a system recognizing remedies for violations of the right to survive.

155. William O. Douglas said of the Nuremberg Trials, "I thought at the time and still think that the Nuremberg trials were unprincipled," he wrote. "Law was created ex post facto to suit the passion and clamor of the time." However, the Tribunal denied that the London Charter created ex post facto as that law had been articulated in some manner already in the Covenant of the League of Nations and the Hague Convention. Further, these principles on trial were *jus cogens* norms of human rights. See Mark Weber, *Nuremberg Trials and the Holocaust*, INST. FOR HIST. REV., http://www.ihr.org/jhr/v12/v12p167_Webera.html (last visited July 13, 2014).

HUMAN RIGHTS TAKE A BACK SEAT: THE SUPREME COURT HANDS OUT A PASS TO MULTINATIONALS AND OTHER WOULD BE VIOLATORS OF THE LAW OF NATIONS

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I. INTRODUCTION

The significance of the recent *Kiobel v. Royal Dutch Petro. Co.*¹ decision cannot be understated. Imagine a United States that is a safe haven for civil suits for multinational corporations (“MNCs”) that are complicit in committing heinous human rights violations abroad, such as genocide, and torture. That sounds repugnant to many proud, patriotic, and law-abiding Americans, but that’s exactly what *Kiobel* may possibly allow. The case dealt with Nigerian residents that filed a class action under the Alien Tort Statute (“ATS”).² The plaintiffs claimed that Dutch, British, and Nigerian MNCs, while engaged in oil exploration and production, “aided and abetted the Nigerian government in committing human rights abuses in violation of the law of nations.”³ The defendants had been engaged in oil exploration and production in the Ogoni region of Nigeria since 1958. In response to these activities, residents of the Ogoni region eventually organized to protest the environmental effects of oil exploration there.⁴ The Defendants “responded by enlisting the aid of the Nigerian government to suppress the Ogoni resistance.”⁵ Subsequently, “[t]hroughout 1993 and 1994, Nigerian military forces . . . shot and killed Ogoni residents and attacked Ogoni villages”⁶ During these attacks, there were allegations of beatings, rapes, unlawful arrests, and destruction and looting of property by the military forces with the assistance of the defendants.⁷ The victims subsequently brought claims in the United States against the defendants for aiding and abetting the Nigerian government in violation of the law of nations, also known as customary international law (“CIL”), and the

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1. 133 S. Ct. 1659 (2013).

2. 28 U.S.C. § 1350 (2012) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

3. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010).

4. *Id.* at 123.

5. *Id.*

6. *Id.*

7. *Id.*

case was eventually heard by the Supreme Court. While *certiorari* was originally granted to determine whether corporations could be sued under the ATS, the Court after oral arguments ordered supplemental briefings and argument on a new question: To what extent could U.S. courts recognize a cause of action under the ATS for conduct that occurred within the territory of a foreign sovereign?⁸ The Court then unanimously concluded that the Nigerian nationals' case seeking relief for violations of the law of nations occurring outside the United States was barred because the presumption against the extraterritorial application of domestic law applied to the claims under the ATS, and that nothing in the ATS rebutted that presumption.⁹ "It [left] for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'"¹⁰ This conclusion was largely supported by the canon of statutory interpretation known as the presumption against extraterritorial application, which provides that when a statute gives no clear indication of an extraterritorial application, it has none, and reflects the presumption that U.S. law "governs domestically but does not rule the world."¹¹ "This presumption 'serves to protect against unintended clashes between U.S. laws and those of other nations which could result in international discord.'"¹²

The controversial opinion, which has many human rights activists up in arms, undoubtedly deals a significant blow to international law and its undertaking to protect fundamental human rights since the United States is a proclaimed leader in this area. After all, it's one of the reasons that the U.S. is currently concerned with using armed force in Syria—thousands of innocent civilians have died reportedly due to violations of international law by the Assad regime.¹³ Accordingly, despite the unanimous decision, *Kiobel* appears to send a precarious message and likely takes off the table a significant deterrent to would be corporate violators of human rights or other serious laws of nations. At first blush, the decision seems harmless since victims of human rights violations could technically pursue legal action in their home states instead of the U.S. pursuant to their domestic law. This defense of *Kiobel* flies in the face of reality, however, because human rights violations that generate ATS¹⁴ litigation primarily occur in countries with meager legal systems and corrupt governments. As a result, the victims typically cannot get sufficient relief from their countries of citizenship where the crimes are typically committed. In addition, many of the foreign nations that play host to MNCs are financially beholden to the MNC, which makes it impossible to pursue justice.

8. *Kiobel*, 133 S. Ct. at 1671.

9. *Id.* at 1669.

10. *Id.* at 1673.

11. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 444, 454 (2007).

12. *Kiobel*, 133 S. Ct. at 1664 (quoting *EEOC v. Arabain Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

13. *John Kerry's statement on Syria—full transcript*, GUARDIAN (Aug. 26, 2013), <http://www.theguardian.com/world/2013/aug/26/john-kerry-syria-statement-full-transcript> ("And there is a reason why no matter what you believe about Syria, all peoples and all nations who believe in the cause of our common humanity must stand up to assure that there is accountability for the use of chemical weapons so that it never happens again.").

14. 28 U.S.C. § 1350 (2012).

An egregious example of such a close relationship between a MNC and a government that led to extraordinary malfeasance is represented in the case of *Sarei v. Rio Tinto, PLC*.¹⁵ Rio Tinto is a British-Australian multinational metals and mining corporation with one of its many operations in Papua New Guinea. The case arose from atrocities in PNG where thousands of people were killed following Rio Tinto's actions. The facts of the case are surely well known to the human rights attorney so only a brief background will be offered. In short, Papua New Guinea is dependent on mining production for two-thirds of its export earnings.¹⁶ During the 1960s, Rio Tinto sought to build a mine in Bougainville, an island province of Papua New Guinea.¹⁷ To secure the deal for rights to natural resources, "Rio Tinto offered the [Papua New Guinea] government 19.1 percent of the mine's profits to obtain its assistance in [the] venture."¹⁸ The ensuing operations resulted in devastating environmental degradation and poisoning which ruined the health and subsistence of the islanders.¹⁹ In addition, the company subjected black islanders to "slave-like" conditions, and it also paid lower wages to the black islanders it employed compared to the white workers it recruited from off the island.²⁰ As a result, "[i]n November 1988, Bougainvilleans engaged in acts of sabotage that forced the mine to close, [and] Rio Tinto sought the assistance of the Papua New Guinea government to quell the uprising and reopen the mine."²¹ "Rio Tinto warned the impoverished Papua New Guinea government that it would no longer invest in Papua New Guinea 'if the government did not quell the uprising so that the company could recommence operations.'"²² Accordingly, the Papua New Guinea army mounted an attack killing many civilians, and around 15,000 Bougainvilleans died during the conflict.²³ Rio Tinto allegedly provided the army troops with logistical support, and repeated grave violations of human rights law and numerous crimes against humanity were committed, including aerial bombings and burnings of entire villages.²⁴ Thousands of civilians were killed by systematic acts of cruelty, rape and degrading treatment, often at the behest of Rio Tinto,²⁵ who was clearly in a superior position to the poverty-stricken and poorly governed nation. Unfortunately, the victims could not find justice in the corrupt Papua New Guinea legal system.²⁶ The case was supposed to return to the district court for

15. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007).

16. *The World Factbook*, U.S. CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/pp.html> (last visited July 30, 2014).

17. *Sarei*, 487 F.3d at 1198.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Borchien Lai, *The Alien Tort Claims Act: Temporary Stopgap Measure or Permanent Remedy?*, 26. NW. J. INT'L L. & BUS. 139, 149 (2005) (quoting *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002)).

23. *Id.*

24. *Sarei*, 487 F.3d at 1198.

25. *Id.*

26. *See generally Sarei*, 650 F. Supp. 2d 1004.

further proceedings; however, following the Supreme Court's ruling in *Kiobel*, the case was dismissed citing the Supreme Court's reasoning against the extraterritorial application of the ATS.²⁷

The atrocities committed in Papua New Guinea make this example one of the less complicated to analyze because of the extremity of the behavior, but just one of many across the world. Many developing nations rely upon the economic stimulus provided by MNCs and governments find themselves vulnerable to direct influence from MNCs. Thus, the likelihood of future perpetration of human rights abuses where MNCs are complicit with governments is high. If there were adequate and legitimate domestic legal remedies available in countries like Papua New Guinea during the time of the violations, then *Kiobel* ruling may not be such a major concern for the victims or defenders of human rights because the victims could lean on their own legal systems. But when the victims of such crimes cannot find a proper remedy in their home states, typically due to the close relationship between the MNC and the host government, the United States legal system was seen as a mechanism for redressing human rights violations, until the *Kiobel* decision. *Kiobel* therefore undermines the standing of the United States legal system as a protector of human rights and appears to slam the door shut on victims of human rights abuses committed abroad by corporations or individuals.²⁸ Similarly, rather than advancing the respect for the rule of law, *Kiobel* further emboldens MNCs to encourage human rights abuses. Even though there was some disagreement in the circuit courts over MNC liability under the ATS, the Supreme Court's ruling in *Kiobel* flies against a long history of U.S. federal courts having held that private corporations and individuals indeed owe duties under the law of nations, and therefore can be subject to lawsuits under the ATS for violations of the law of nations that occur in foreign lands.²⁹ Consequently, the Court seems to tacitly condone irresponsible corporate behavior with its decision because the reality of current mechanisms to police MNCs in the international arena are ineffective and allow corporations to essentially monitor themselves. This note will first identify the curious approach the Court took considering its presumption against extraterritorial application of the ATS, which essentially avoided the

27. *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (9th Cir. 2013) (affirming the District Court's judgment to dismiss with prejudice).

28. *Arg. Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) ("The Alien Tort Statute by its terms *does not distinguish among classes of defendants . . .*") (emphasis added).

29. *See Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005); *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1258 (N.D. Ala. 2003); *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (Talisman I), 244 F. Supp. 2d 289, 314 (S.D.N.Y. 2003); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000); *see also Khulumani v. Barclay Nat'l Bank, Ltd.* 504 F.3d 254, 258, 260 (2d Cir. 2007); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-04 (2d Cir. 2000); *Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1008 (S.D. Ind. 2007); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 20 (D.D.C. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).

original issue of MNC liability under international law, and then explore a consequence of the decision as it relates to responsible corporate behavior.

II. KIOBEL INEXPLICABLY DEFIES EXECUTIVE GUIDANCE AND PRECEDENT ALLOWING REDRESS IN U.S. COURTS FOR HUMAN RIGHTS ABUSES COMMITTED ABROAD

A plain reading of the ATS clearly evinces that it was enacted with foreign matters in mind; it specifically refers to “aliens,” “treaties,” and the “law of nations.”³⁰ Specifically, the ATS provides jurisdiction over (1) tort actions, (2) brought by aliens only, (3) for violations of the law of nations (also called customary international law).³¹ Its purpose was to address violations of the law of nations.³² The statute has been part of the U.S. Code for more than two hundred years.³³ Despite its meager legislative history, there have been executive governmental actions that provide guidance for courts to resolve ATS matters. For example, in 1795, Attorney General Bradford of the U.S., shortly after the enactment of the ATS, opined that a British corporation could pursue a civil action under the ATS for injury caused to it in violation of international law by American citizens.³⁴ The American perpetrators, in concert with a French fleet, had attacked a settlement managed by the British corporation in Sierra Leone in violation of international law.³⁵ Then in 1907, the U.S. Attorney General rendered an opinion stating that an American corporation could be held liable under the ATS to Mexican nationals if the defendant’s “diversion of the water [of the Rio Grande] was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty.”³⁶ These Attorney General opinions are in conflict with *Kiobel*’s holding. *Kiobel* curiously dismissed Bradford’s opinion from 1795 as one that “defies a definitive reading and we need not adopt one here...the opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality.”³⁷ *Kiobel*’s quick dismissal of these opinions, especially Bradford’s, seems a bit bizarre since the Supreme Court relied on Attorney General Bradford’s 1795 opinion in *Sosa*.³⁸ Since the days of these Attorney General opinions, the political branches have remained quiet regarding the ATS.

Furthermore, *Kiobel* defies *Filartiga v. Pena-Irala*, a celebrated and landmark Second Circuit case that advanced human rights.³⁹ In the 1970s, a lawsuit was filed in U.S. District Court “on behalf of Dr. Joel Filártiga and Dolly Filártiga

30. 28 U.S.C. § 1350 (2012).

31. *Id.*

32. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

33. *Id.* at 712.

34. *Breach of Neutrality*, 1 Op. Att’y Gen. 57 (1795).

35. *Id.* at 58.

36. *Mexican Boundary-Diversion of the Rio Grande*, 26 Op. Att’y Gen. 250, 253 (1908).

37. *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1668 (2013).

38. *Id.* at 1667-68.

39. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

charging former Paraguayan official Americo Peña-Irala with the wrongful death of Joelito Filártiga.”⁴⁰ “Dolly Fitártiga and her younger brother, Joelito, lived in Asuncion, Paraguay with their mother and father, Dr. Joel Filártiga.”⁴¹ The doctor was a “well-known physician, painter, and opponent of Latin America’s ‘most durable dictator,’ General Alfredo Stroessner.”⁴² “In 1976, 17-year-old Joelito was abducted and later tortured to death by Americo Norberto Peña-Irala, the inspector general in the Department of Investigation for the Police of Asuncion.”⁴³ The District Court “ultimately granted [Peña-Irala’s] motion to dismiss the complaint and allowed his return to Paraguay.”⁴⁴ The court opined that “although the proscription of torture had become ‘a norm of customary international law,’ the court was bound to follow appellate precedents, which narrowly limited the function of international law only to relations between states.”⁴⁵ But on appeal the Second Circuit reversed by “recognizing that foreign nationals who are victims of international human rights violations may sue their malfeasors in federal court for civil redress.”⁴⁶ The court continued by providing that such redress is available even for acts which occurred abroad so long as the court has subject matter jurisdiction and personal jurisdiction over the defendant. In addition, the court stated that freedom from torture is guaranteed under customary international law and therefore it had subject matter jurisdiction.⁴⁷ “Upon remand by the circuit in June 1980, the District Court granted plaintiffs’ motion for a default judgment against [Peña-Irala] for failure to answer the complaint and referred the case to a magistrate for determination of the damages due the Filártiga family.”⁴⁸ “The magistrate [then] awarded the Filártigas over \$10 million in damages,”⁴⁹ although this was never collected. The *Filártiga* decision set a precedent for claims involving an increasing number of internationally recognized rights, including freedom from torture, slavery, genocide, and cruel and inhuman treatment even if violations were committed outside of U.S. territory. As a result, *Filartiga* has “continuously been hailed by international human rights experts in [the U.S.] and abroad.”⁵⁰

The *Kiobel* decision is a puzzling about-face. Under the precedent set by *Kiobel*, if the current Supreme Court were faced with the facts in *Filartiga*, the Court would apparently have required the *Filartiga* plaintiffs to demonstrate that torturers, such as Peña-Irala, committed their acts in the United States or in a location where it asserts unfettered jurisdiction. Of course no such demonstration

40. *Filartiga v. Pena-Irala*, CENTER FOR CONST. RTS., <http://ccrjustice.org/ourcases/past-cases/fil%C3%A1rtiga-v.-pe%C3%B1a-irala> (last visited July 30, 2014).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*; *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

47. *Filartiga*, 630 F.2d at 884.

48. CENTER FOR CONST. RTS., *supra* note 40.

49. *Id.*

50. *Id.*

could have been made and the case would have been dismissed. The *Filartiga* case was received with little controversy and viewed as methodologically sound. So sound, in fact, that it is generally accepted that the Torture Victim Protection Act (“TVPA”) was intended to be a codification by congress of the decision in *Filartiga*.⁵¹ With the apparent retreat in *Kiobel*, people like Pena-Irala could do what he did in Paraguay and then move to the United States without fear of answering to the victims of such heinous atrocities. Absent filing a suit in the home country, which can be a difficult task, or successful extradition or rendition efforts, which tend to be riddled with political issues (as evidenced by the recent U.S. and Russia controversy over Mr. Edward Snowden⁵²), Pena-Irala could be sitting safe and sound in the United States without having to pay for his actions. The ATS acted as a deterrent to would-be violators of the law of nations, especially corporations complicit in this sort of behavior, but now that deterrent has effectively disappeared. Therefore, corporations have even less of a reason for socially responsible behavior, a prudential issue that *Kiobel* chose not to consider.

III. ABSENT REDRESS UNDER THE ATS IN THE UNITED STATES FOR HUMAN RIGHTS VIOLATIONS COMMITTED ABROAD, CURRENT ENFORCEMENT MECHANISMS FOR MNCs ARE INADEQUATE

The primary enforcement mechanisms to ensure responsible corporate behavior seem to include the ATS, municipal laws, voluntary corporate codes of conduct, and pressure from non-governmental organizations (“NGOs”). Unfortunately, *Kiobel* diminished the scope and reach of the ATS thereby reducing MNC accountability. By *Kiobel* not addressing the issue of corporate social responsibility (“CSR”), *Kiobel* actually encourages irresponsible MNC conduct. To exacerbate the problem, there are limited means through which corporations can be monitored and regulated because “[c]urrently most international laws are directed at the actions of states, not corporations.”⁵³ The ATS, however, could have been an influential tool to promote CSR, especially in developing countries where local legal regimes are weak or non-existent, and where MNCs only half-heartedly follow their codes of conduct. The ATS could also have been a motivating and “unique mechanism through which corporations could be held accountable to international standards, and subjected to international law under the auspices of the U.S. court system.”⁵⁴ But *Kiobel* razed that possibility. Without the ATS, and in many cases municipal laws available to keep MNCs in check,

51. Eric Gruzen, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?*,

14 TRANSNAT’L LAW. 207, 232 (2001); See also BINDA PREET SAHNI, TRANSNATIONAL CORPORATE LIABILITY: ACCOUNTABILITY FOR HUMAN INJURY 318-19 (2006).

52. Mr. Snowden is the former National Security Agency (NSA) contractor that leaked sensitive information and then fled the U.S. to seek asylum from Russia. *Edward Snowden News*, ABC NEWS (Mar. 23, 2014, 5:02 PM), <http://abcnews.go.com/topics/news/us/edward-snowden.htm>.

53. Shanaira Udawadia, *Corporate Responsibility for International Human Rights Violations*, 13 S. CAL. INTERDIS. L.J. 359, 390 (2004).

54. *Id.* at 386.

MNCs are left to regulate themselves through corporate codes, with scrutiny only from various NGOs.

A. Corporate Codes of Conduct are Unenforceable and an Ineffective Means to Police MNC Behavior

“In response to mounting pressures for increased corporate accountability (from consumer groups and other NGOs, and from potential public regulation, litigation or prosecution) [during the 1990s,] voluntary private self-regulation was seen as a possible new way of filling the regulatory void opened up by globalization.”⁵⁵ Self-regulation, as demonstrated by the international banking industry, is more fable than fact. Nevertheless, “the 1990s saw a proliferation of corporate codes of conduct and an increased emphasis on corporate responsibility.”⁵⁶ Such codes are typically created in one of several ways: (1) by companies for their own guidance, (2) by industries for other corporations to follow, or (3) by governments as a model for MNCs to consider (public codes).⁵⁷ Some commentators optimistically say that “[t]he development of codes of conduct relevant to human rights and other social issues, as well as standards for greater corporate reporting and disclosure, [aid] in the promotion of CSR”⁵⁸ because they seek to constrain socially undesirable behavior of transnational non-state actors.⁵⁹ But the problem is that the codes, regardless of how they are created, are voluntary in nature and MNCs are invited to pledge themselves to the code rather than forced to do so.⁶⁰ Thus, the codes are not legally enforceable,⁶¹ and only a few codes include meaningful monitoring mechanisms or disclosure requirements designed to enhance compliance. Can you imagine if all one had to do was to “pledge” not to break the speed limit, and expect that “pledge” to be followed without any consequential external pressure? The efficacy of such a pledge to self-regulate would certainly be ambitious indeed.

Furthermore, since many corporations create their own codes and follow them to differing degrees, corporate codes lack usefulness and uniformity. In fact, “there is a growing sense that voluntary codes alone are ineffective and that their proliferation is leading to contradictory and incoherent efforts.”⁶² For instance, “IKEA has agents monitor overseas labor conditions ensuring that children are not

55. HELEN KELLER, CORPORATE CODES OF CONDUCT AND THEIR IMPLEMENTATION: THE QUESTION OF LEGITIMACY 3 (2006), available at http://www.yale.edu/macmillan/Helen_Keller_Paper.pdf.

56. *Id.*

57. SAHNI, *supra* note 51, at 35.

58. Dr. Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L L. REV. 1265, 1288 (2004).

59. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 103 (2006).

60. *Id.*

61. KELLER, *supra* note 55, at 4, 23 (discussing very loose compliance mechanisms in the codes—a survey of 132 codes found that 41% of the codes did not specifically mention monitoring, and as for cases of non-compliance, often no clear sanctions are defined).

62. Bunn, *supra* note 58, at 1291.

forced to engage in [unlawful employment activities].”⁶³ That certainly is an effort that seems to be productive, at least genuine, in preventing human rights violations. Conversely, “Nike has been continually criticized for its lax regulation of the working conditions in its Indonesian, Chinese, and Vietnamese plants.”⁶⁴ “Although both companies have corporate codes, they are not equally [monitored] as a means of protecting human rights.”⁶⁵ The inconsistency in complying or simply disregarding a corporate code reflects factors such as MNC’s commitments to its own financial growth, and other political factors, which could prevent MNCs from following self-imposed regulations. Therefore, legal accountability may be needed to provide corporations with the incentive to follow their codes, particularly in less developed nations where human rights abuses are more likely to occur. The legal accountability incentive to follow codes to prevent human rights abuses could certainly come from the fear of a lawsuit, and large U.S. judgments under the ATS; a consequence of ATS litigation that even the Second Circuit *Kiobel* court alluded to in its opinion.⁶⁶ As one may imagine, however, even the threat of legal accountability does not necessarily deter power-wielding MNCs from engaging in lucrative projects that violate human rights. This is clearly evidenced from the uncertain record of ATS litigation involving MNCs, especially if the benefit of profit outweighs the legal ramifications of human rights violations.

Similarly the U.N. working group on MNCs acknowledges that the use of an entirely voluntary system for codes of conduct is not enough, and it anticipates that the international community will move toward the codification of binding norms backed by a range of implementation measures.⁶⁷ This U.N. finding, along with the fact that there appears to be a reluctance of many firms to include independent monitoring to verify code compliance, invites suspicion that the codes may be used more for public relations purposes rather than a genuine attempt at improving corporate performance.⁶⁸ Consequently, since there is no legitimate codification of binding norms that MNCs are required to follow, it appears NGOs have taken the lead to push for enforcement of human rights. Although a noble effort, it’s debatable how effective those efforts have been.

B. NGO Efforts to Pressure MNC Behavior Generally Fall Short

NGOs are essentially private legally constituted organizations created by natural persons with no participation or representation of any government. They

63. Udwadia, *supra* note 53, at 391.

64. *Id.*

65. *Id.*

66. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 116-17 (2d Cir. 2010) (juries hearing ATS claims are capable of awarding multibillion-dollar verdicts and such litigation has led many defendants to settle ATS claims prior to trial). In one ATS case, for example, a jury considering damages after a default judgment returned a \$4.5 billion verdict against Radovan Karadzic, former president of the self-proclaimed Bosnian-Serb republic of Srpska. *Id.*

67. *Kiobel*, 621 F.3d 111, 116-17.

68. KELLER, *supra* note 55, at 55-56.

pursue issues of interest to its members by lobbying and/or direct action.⁶⁹ And within this system of corporate code “enforcement,” corporate standards are even sometimes developed with the cooperation of elements of the NGO community and MNCs. The NGOs then monitor compliance with these self-imposed standards and, in an effort to compel compliance, report violations to the media. The media then theoretically publicizes “breaches of standards to the corporation’s consumer, investors, and the financial community, [and] places great pressure on the corporation to act to correct the deficiencies.”⁷⁰ “In this way and within this focused area of relationships, [NGOs basically act as substitutes] for the state in virtually all respects.”⁷¹ As a result of NGO efforts nationally and internationally, the global presence of NGOs indeed imposes a growing level of accountability on corporations.

But NGO oversight, although ambitious, is clearly disputed with respect to its efficacy. For instance, “many of the codes drawn up by NGOs . . . have been adopted by a relatively small number of firms.”⁷² In addition to drawing up codes, “[a]n important area of activity for NGOs involved in questions of corporate accountability is the review of various policy initiatives [drawn up by corporations] and other actions aimed at improving corporate standards.”⁷³ These policy initiatives are evaluated for their content as well as their practical impact, which naturally raises questions for legal research and empirical study. “Depending on their findings, NGOs can develop appropriate responses ranging from private consultations to field visits to public testimony and media coverage.”⁷⁴ As a result of NGO efforts, some scholars believe that “compliance with corporate codes is becoming an economic necessity as corporations fear the consequences of being targeted, shamed, and deemed a violator of human rights.”⁷⁵ This is so because “consumers today are often influenced by the characterization of corporations and choose not to purchase products that have been made in a socially irresponsible manner. [Therefore], reports from NGOs on the inappropriate activities of a corporation have a significant effect on profits.”⁷⁶ For instance, pressure from NGOs forced Heineken, Motorola, ARCO, and several other corporations to abandon their investments in Myanmar after Unocal’s alleged endorsement of human rights violations there.⁷⁷

Yet despite the apparent vigilant monitoring of corporate behavior by NGOs, a source completely independent of the MNC, some critics have charged that CSR

69. For comprehensive discussion on NGOs, see Peter Willetts, *What is a Non-Governmental Organization?*, CITY U. LONDON, <http://www.staff.city.ac.uk/p.willetts/CS-NTWKS/NGO-ART.HTM> (last visited July 30, 2014).

70. Larry Cata Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart As Global Legislator*, 39 CONN. L. REV. 1739, 1762 (2007).

71. *Id.*

72. KELLER, *supra* note 55, at 55.

73. Bunn, *supra* note 58, at 1275.

74. Bunn, *supra* note 58, at 1275.

75. Udwardia, *supra* note 53, at 393.

76. *Id.*

77. *Id.* at 393-94.

efforts are merely elaborate public relations exercises designed to give the impression that MNCs are concerned about social issues.⁷⁸ In this respect, it's important to remember that NGOs as private entities have no power to actually do anything to the MNC. It's because of the "goodwill" of the MNC and business prudence that a MNC would work with a NGO in the first place. If NGO efforts were really so effective, then crimes that have led up to ATS suits would not be so common. This becomes blatantly evident by examining the recent influx of ATS litigation across a majority of the federal circuits.⁷⁹ Having said that, the thought of potential legal liability would certainly be more of a deterrent for MNCs than NGO oversight, which can do no more than apply "toothless" pressure or report alleged violations to the media for unfavorable coverage. NGO efforts may or may not persuade the MNC to change its ways.

To illustrate, in March 2006, the National Labor Committee (NLC)⁸⁰ "published a report that detailed a number of violations of Jordanian labor law and international human rights norms by a number of apparel factories in the Kingdom of Jordan."⁸¹ The report was aimed at Wal-Mart, Gloria Vanderbilt, Target, Kohl's, Thalia Sodi for Kmart, Victoria's Secret, L.L.Bean and others, and it asserted that tens of thousands of foreign guest workers were stripped of their passports and trapped in involuntary servitude sewing clothing, which prompted the New York Times to publish a story⁸² about the report detailing the findings.⁸³ As a result,

several members of the U.S. House of Representatives sent a letter to the U.S. Secretary of State and the U.S. Trade Representative to urge "that the Administration urgently initiate an investigation of labor conditions in Jordan, and that the U.S. Government offer its assistance to ensure the safety of the workers who courageously provided information to the NLC, and to protect such workers from retaliation by their employers."⁸⁴

The NLC, in its determined role as monitor, decided to follow up on its report, and six months after the report, the NLC noted that there was some improvement in some factories; however, many violations such as human trafficking, illegal working conditions, and forcible deportations continued to

78. Bunn, *supra* note 58, at 1291.

79. See, e.g., sources cited *supra* note 29.

80. Larry Cat Backer, *Wal-Mart: The New Superpower*, 39 CONN. L. REV. 1739, 1762-1763 (2007) ("The [NLC] is a human rights NGO based in New York. The [NLC] 'investigates and exposes human and labor rights abuses committed by U.S. companies producing goods in the developing world . . . ' Outside the United States, the [NLC] monitors the compliance of multinational corporations and the economic entities with which they do business on compliance with a host of legal and other human rights standards." (citations omitted)).

81. *Id.* at 1763.

82. Steven Greenhouse & Michael Barbaro, *An Ugly Side of Free Trade: Sweatshops in Jordan*, N.Y. TIMES, May 3, 2006, <http://www.nytimes.com/2006/05/03/business/worldbusiness/03clothing.html?pagewanted=all>.

83. Backer, *supra* note 80, at 1765.

84. *Id.*

occur.⁸⁵ This example suggests that MNCs, although possibly influenced by outside pressure, do not really find socially responsible behavior as important as the duty it has to its shareholders to maximize profits whenever it can.

C. The Ambitious Work of NGOs and Voluntary MNC Compliance With Corporate Codes Appears to Fall Short Due to Reality of Profits

We increasingly hear that CSR has become an important business prerogative. Newspapers, magazines, books, and other media outlets espouse the benefits of corporations behaving responsibly, and caution managers about the business risks of a poor CSR performance.⁸⁶ “Executives are [reportedly] informed that by demonstrating concern for the environment, human rights, community development, and the welfare of their employees, both in the U.S. and abroad, they will make their firms more profitable, . . . and that that their firms will gain a competitive advantage by appealing to the growing numbers of socially and environmentally oriented consumers, investors and employees.”⁸⁷ Moreover, some scholars advocate that there is a positive correlation between CSR and the bottom line numbers of transnational corporations, and that numerous studies have shown an empirical edge for companies that are responsible in their business dealings.⁸⁸ In that vein, such positive behavior within the world community only stands to improve their brands because such responsibility is typically rewarded by customer loyalty, and it reflects a good will with prospective customers.⁸⁹ Along the same lines, MNCs rely heavily on investment to satisfy costs. But human rights violations committed by MNCs are typically “front page” information, which generally scares off serious investors.⁹⁰ The dearth of investors in those circumstances may be true to some extent, but “main-stream investors still rarely consider a firm’s CSR record in deciding which shares to buy, sell or hold,”⁹¹ which only raises doubts about the genuineness of CSR, and reinforces the need for a legitimate enforcement mechanism like the embattled ATS.

Whether or not CSR is in fact a profitable activity for corporations is hotly contested.⁹² For instance, it has been said that the corporate world is a self-serving, opportunistic world. That it’s geared for self-preservation and profit maximization with no regard for human dignity and even less for personal responsibility.⁹³ After all, despite the recent recession in the U.S. where the majority of hard working

85. *Id.*

86. David Vogel, *CSR Doesn't Pay*, FORBES MAG., Nov. 16, 2009, http://www.forbes.com/2008/10/16/csr-doesnt-pay-lead-corprespons08-cx_dv_1016vogel.html.

87. *Id.*

88. Joe W. (Chip) Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL'Y 334, 365 (2009).

89. *Id.* at 344-345.

90. Chip Pitts, Address at the George Washington University School of Law (Oct. 14, 2010).

91. Vogel, *supra* note 86.

92. Cherie Metcalf, *Corporate Social Responsibility as Global Public Law*, 28 PACE ENVTL. L. REV. 145, 155 (2010).

93. Lois A. Levin & Robert C. Hinkley, *Is Corporate Social Responsibility an Oxymoron?*, COMMONDREAMS.ORG (July 26, 2004), <http://www.commondreams.org/views04/0726-11.htm>.

Americans (the ones that are fortunate to be working) are struggling to pay their mortgages, the corporations are making record profits.⁹⁴ The news of astronomical profits in the midst of economic difficulties naturally strikes a chord with many observers. As a result, some have the view that corporations are powerful institutions, yet they do not serve humanity well when their pursuit of profits leads to strategies that degrade the environment, violate human rights and the dignity of employees, endanger public health and safety and otherwise undermine the welfare of communities. Some scholars have even audaciously said that “Corporate Social Responsibility” is an oxymoron because if the corporations were socially responsible entities we would not be facing a toxic world and exploited populations for profit.⁹⁵ The belief that corporate responsibility “pays” is an enticing belief indeed.⁹⁶ “Who would not want to live in a world in which corporate virtue is rewarded and corporate irresponsibility punished?”⁹⁷ “Unfortunately, the evidence for these rewards and punishments is rather weak.”⁹⁸ “There is [indeed] a ‘market for virtue’”⁹⁹ as proponents of CSR advocate, but it is a very limited one and it is not growing.

“One can certainly find examples of firms with superior CSR performance that have done well [for their shareholders,] as well as firms with poor CSR reputations that have performed poorly.”¹⁰⁰ But one can find “at least as many examples of firms with good CSR records that have not done well and firms with poor CSR reputations that rewarded their shareholders”¹⁰¹ handsomely. This is because “for most [MNCs], most of the time, CSR is largely irrelevant to their financial performance.”¹⁰² “The MNC with possibly the world’s poorest environmental reputation is ExxonMobil largely due to its reputed indifference to the problem of global climate change and its continued focus on fossil fuels.”¹⁰³ Not to pick on ExxonMobil, but it is one of the world’s most profitable corporations.¹⁰⁴ Conversely, “one can also find examples of successful firms for

94. Catherine Rampell, *Corporate Profits Were the Highest on Record Last Quarter*, N.Y. TIMES, Nov. 24, 2010, at B2, available at http://www.nytimes.com/2010/11/24/business/economy/24econ.html?_r=1 (discussing a Department of Commerce report showing earned profits at an annual rate of \$1.659 trillion in the third quarter, the highest figure recorded since the government began keeping track over 60 years ago, at least in nominal or non-inflation-adjusted terms).

95. Levin & Hinkley, *supra* note 93.

96. Vogel, *supra* note 86.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Ben Rooney, *Exxon Mobil Profit Nearly Doubles*, CNNMONEY.COM, July 29, 2010, <http://money.cnn.com/2010/07/29/news/companies/Exxon/index.htm> (the world’s largest public energy company reported net income of \$7.56 billion, or \$1.60 a share, in the second quarter, up 91% from \$3.95 billion, or 81 cents a share, in the same period in 2009).

whom CSR has been a core element of their business strategy.”¹⁰⁵ Patagonia and Seventh Generation come readily to mind, but it is important not to generalize from these examples.¹⁰⁶ “To assume that the business environment has fundamentally changed and that we are entering a new world in which voluntary CSR efforts have become critical to the success of *all* or even *most* firms is misinformed”¹⁰⁷ and arguably naive.

What this discussion simply brings to the forefront is that even if the corporate codes are voluntarily followed by MNCs or by pressure from NGOs, MNCs really have only a negligible incentive to do so without the possibility of public enforcement for violation of human rights. This is especially in light of an opportunity to make vast profits and to please their shareholders for continued investment. After all, “a business corporation is organized and carried on primarily for the profit of the stockholders, and the powers of the directors are to be employed for that end.”¹⁰⁸ “The discretion of Directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself.”¹⁰⁹ As a result, “[c]orporations . . . try to deliver the greatest value to their shareholders, and this leads them to engage in a cost-benefit analysis.”¹¹⁰ “If the financial rewards of bad conduct are greater than what MNCs may have to pay, there is no real incentive to stop.”¹¹¹ “The findings from studies of codes of conduct [that aim to improve corporate behavior] suggest that this is in fact the dominant attitude.”¹¹² A recent Organization of Economic and Cooperation and Development (“OECD”) report authored by a business sector advisory group puts the point clearly, and it states categorically that “most industrialized societies recognize that generating long-term economic profit is the corporation’s primary objective. In the long run, the generation of economic profit to enhance shareholder value through the pursuit of sustained competitive advantage is necessary to attract the capital required for prudent growth and perpetuation.” The authors of the group did also acknowledge that ethics and ethics codes have a clear place in corporate governance whose goal is profit maximization.¹¹³

Despite the inadequate system of voluntary codes and the righteous efforts of NGOs, MNCs continue to operate as they wish, seemingly undeterred. Some might find that insulting, but *Kiobel* seemed to simply overlook the issue. *Kiobel* did not sufficiently consider this prudential matter that undoubtedly plays a factor into corporate behavior, especially in third world countries. Still, regardless of

105. Vogel, *supra* note 86.

106. *Id.*

107. *Id.*

108. Ian B. Lee, *Corporate Law, Profit Maximization, and the “Responsible” Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 34-35 (2005).

109. *Id.*

110. Gwynne Skinner, *Nuremberg’s Legacy Continues: The Nuremberg Trials’ Influence on Human Rights Litigation in U.S. Courts under the Alien Tort Statute*, 71 ALB. L. REV. 321, 365 (2008).

111. *Id.*

112. KELLER, *supra* note 55, at 41.

113. *Id.*

one's opinion about the lack of policing mechanisms for MNCs, and even if *Kiobel* is considered sound reasoning by its supporters, one cannot deny the inequity behind the majority's logic because the victims of such human rights violations do not even get a legitimate day in court to tell their story. They are simply left with the emotional and physical scars left behind by MNC conduct and essentially no remedy.

IV. CONCLUSION

Inexplicably, the Supreme Court stunted the promotion of and accountability for enforcing human rights. The ATS' positive impact on human rights blossomed in the 1980s with the decision in the *Filartiga* case. Individuals committing egregious human rights violations in faraway places could no longer escape the rule of law. The Supreme Court, in restricting the reach of the ATS, has reversed course on the enforcement of human rights by incorrectly barring the application of the ATS to human rights violations committed by non-US residents or MNCs with sufficient jurisdictional ties to the U.S. The Court has eviscerated one of the few tools for MNC human rights accountability. What tools remain to enforce MNC accountability are as ineffective as the courts sitting in countries that foster complicity between MNCs and corrupt governments to inflict human rights abuses for sake of mutual economic pursuits. Furthermore, monitoring of corporate behavior by NGOs and self-imposed codes of corporate responsibility are almost laughable in comparison to potential judicial remedies. Considering the original intent of the ATS, which is to bring civil justice for the victims of the serious violators of the laws of nations, the risk of having a bold national reputation by enforcing human rights violations that occur anywhere in the world is outweighed by noble efforts to help the underprivileged and abused.

Recognizing that this article presents a rather grim accounting of the potential impact of the *Kiobel* decision, it is important to point out a few brief optimistic observations. First, the holding is narrow. The Court determined all the conduct took place outside the U.S. and the defendants lacked jurisdictional ties through mere corporate presence.¹¹⁴ The Court did not say that human rights law does not apply to corporations and therefore the ATS still could have teeth. Arguably, one can read the opinion to assume that MNCs can be sued or why did the Court discuss whether "mere corporate presence" was enough to assert the Alien Torts Statute?¹¹⁵ Second, the Court did nothing to undermine the ability of the United States to hold its own citizens and residents accountable. The *Kiobel* decision involves conduct committed wholly outside the United States involving foreign plaintiffs and defendants. If, for example, the conduct described in *Kiobel* occurred within the jurisdiction of United States or by United States citizens or residents, then the Court would likely have ruled differently. Lastly, and to a lesser extent, under the right circumstances foreign courts are still viable battlegrounds. Therefore, the Supreme Court may not have completely gutted the

114. *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1669 (2013).

115. *Id.*

ATS, but the Court certainly did not do any favors for would be victims of MNC conduct that breaches human rights law outside the United States.

INVESTING IN SUSTAINABILITY: ETHICS GUIDELINES AND THE NORWEGIAN SOVEREIGN WEALTH FUND

DR. ANITA M. HALVORSSEN* AND CODY D. ELDRIDGE**

I. INTRODUCTION

Companies that bring sustainability to the core of their business strategy, often referred to as “socially responsible,” are increasingly outperforming their competitors over the long term.¹ The investment world is also gaining cognizance of this and has begun focusing on environmental, social, and corporate governance (“ESG”) issues, referred to as responsible investment. Responsible investors are moving companies toward sustainable development by aligning investors’ financial decisions with the companies’ impacts on the environment and societies.²

This integration process can also be referred to as internalizing the negative externalities of production, in the broadest sense, both at home and abroad, thereby eliminating those externalities altogether, or at a minimum incorporating environmental and social costs into the cost of production. Unfortunately, investors often overlook the link between environmental and financial returns, especially if the focus is on short-term returns rather than long-term sustainability. As a category of investors growing in prominence, sovereign wealth funds stand at the intersection of sustainable investment and the desire to maximize financial returns. Due to the sheer size of sovereign wealth funds as investors, it will be to no small extent their responsibility to push companies to work toward mitigating

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1. *What is Responsible Investment?*, PRINCIPLES FOR RESPONSIBLE INV., <http://www.unpri.org/what-is-ri> (last visited July 20, 2014) [hereinafter U.N. PRI] (Principles for Responsible Investment (“PRI”) is a U.N. supported initiative). See also Robert G. Eccles, Ioannis Ioanno & George Serafiem, *The Impact of Corporate Sustainability on Organizational Processes and Performance* 4 (Harvard Bus. School, Working Paper No. 12-035, 2013), available at http://www.hbs.edu/faculty/Publication%20Files/12-035_a3c1f5d8-452d-4b48-9a49-812424424cc2.pdf (last visited July 20, 2014).

2. In this article, sustainable development, sustainability, and ethics and are used interchangeably. Sustainable development, as defined by the Brundtland Commission (the U.N. World Commission on Environment and Development (WCED)), calls for economic “development that meets the needs of the present without compromising the needs of future generations.” WORLD COMM’N ON ENV’T AND DEV., OUR COMMON FUTURE, ch. 2 ¶ 1 (1987), available at <http://www.un-documents.net/our-common-future.pdf> [hereinafter OUR COMMON FUTURE]. Sustainable development is also described as an integrative principle, integrating economic with environmental and social concerns. See Nico Schrijver & Friedl Weiss, *Introduction to INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT* xii-xiii (Nico Schrijver & Friedl Weiss eds., 2004).

these externalities, and in particular climate change, because their investment decisions can have such a large influence on companies.³

This article will demonstrate that one particular investor, the Norwegian Sovereign Wealth Fund, Government Pension Fund–Global (“GPFG”), has not ignored the importance of integrating ESG issues into its investment decision-making. The GPFG is the largest sovereign wealth fund (“SWF”) in the world and thus arguably one of the most influential investment funds.⁴ Since the introduction of the Ethics Guidelines in 2004, the GPFG has prioritized sustainability within its investment decision-making, and has in many ways been successful in that endeavor.⁵ Given its successes in achieving high rates of return while facilitating sustainable/ethical business practices among its investment recipients, the GPFG should be regarded as a model for best practice for other institutional investors. The work of the main entity mandated to implement the Ethics Guidelines, the Council on Ethics, has been described as evolving into a “coherent jurisprudence of ethics for corporate investment” using public power to influence private governance among companies.⁶ Its recommendations have been followed closely by other pension funds which have, in turn, also excluded the same companies from their investment portfolio.⁷

The GPFG engages in responsible investing through two mechanisms: (1) exercising the ownership rights granted to it through the securities it controls in corporations (active ownership) to place firms on a path to sustainability, and (2) observation and exclusion of companies from its investment portfolio when those firms engage in unethical/unsustainable practices. The empirical analysis set out in this paper focuses on the latter mechanism, highlighting the ways in which it is routinely successful in motivating states to adopt sustainable business practices.

3. See Mitch Towner, *Norway's Summit on Responsible Investing*, 12 J. INV. MGMT. 33, 33-34 (2014) (referring to Christoph Loch's opening speech at the conference). Assets under management of SWF amounts to over \$6 trillion. *Sovereign Wealth Fund Rankings*, SWF INST., <http://www.swfinstitute.org/fund-rankings> (last visited July 20, 2014).

4. See *Sovereign Wealth Fund Rankings*, *supra* note 3.

5. See *Guidelines for the Observation and Exclusion of Companies from the Government Pension Fund Global's Investment Universe*, REGJERINGEN.NO, § 2, http://www.regjeringen.no/en/sub/styret-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277 (last visited July 20, 2014) [hereinafter *Guidelines for Observation and Exclusion*]; *Management Mandate*, NORGES BANK INV. MGMT, <http://www.nbim.no/en/the-fund/governance-model/management-mandate/#Chapter2> (last visited July 20, 2014) [hereinafter *NBIM Management Mandate*]. The Ministry of Finance adopted the new guidelines on March 1, 2010 pursuant to Government Pension Fund Act. See MINISTRY OF FIN., *MANAGEMENT MANDATE FOR THE GOVERNMENT PENSION FUND GLOBAL 4, 25-26 (2010)*, available at http://www.regjeringen.no/Upload/FIN/Statens%20pensjonsfond/mandat_spu_eng.pdf.

6. Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Legislative Power: The Norwegian Sovereign Wealth Fund in Global Markets*, 29 AM. U. INT'L L. REV. 1, 50 (2013).

7. See VICTOR LUND SHAMMAS, *ETIKK I OLJEFONDET: – BARE BUTIKK OG UTENRIKSPOLITIKK? [ETHICS IN THE OIL FUND: JUST BUSINESS AND FOREIGN POLICY?]* 8 (2012), available at http://www.academia.edu/3678322/Etik_k_i_Oljefondet_Rapport_Changemaker (quoting Dag O. Hessen, member of the board of the Council on Ethics).

To date, there has been little empirical analysis examining the effectiveness of the GPFG in enforcing its Ethics Guidelines.⁸ We present evidence showing that the Council on Ethics, under certain circumstances, is more successful at influencing corporate behavior. Specifically, we show that the Council on Ethics is more effective as the relative size of the investment in a given corporation increases. This serves as a model for other institutional investors who may wish to implement Ethics Guidelines targeting the behavior of corporations in their investment portfolios.

Although the GPFG has succeeded in facilitating sustainable behavior while contributing to the development of best practices for responsible investors, we also suggest several reform proposals for improving the overall effectiveness of the GPFG in implementing its Ethics Guidelines. The Norwegian Ministry of Finance established the Strategy Council for the GPFG in the spring of 2013 in order to review the work of the GPFG on responsible investment.⁹ Elements of its report, “Responsible Investment and the Norwegian Government Pension Fund Global,” published last November, will be examined and other suggestions for change will also be introduced.¹⁰ The reform proposals include: expanding the grounds for exclusion to include, among others, companies that produce energy from fossil fuels, or at the very least energy production from coal and oil sands; granting the Council on Ethics more autonomy; increasing the level of transparency in the active ownership of the investment arm of the GPFG, including when entering into dialogue with companies; and lastly, amending the mandate for the investment arm, requiring it to fully consider the Organisation for Economic Co-operation and Development (“OECD”) Guidelines for Multinational Enterprises when managing the companies currently within its investment portfolio, prioritizing companies for assessment when they present a significant risk of actual or potential adverse environmental or social impacts.¹¹

Part II introduces the GPFG, its legal framework, and the Council on Ethics and its efforts at influencing the corporations in which it invests. Part III addresses the interrelated questions about company compliance with the Ethics Guidelines

8. See ELROY DIMSON ET AL., RESPONSIBLE INVESTMENT AND THE NORWEGIAN GOVERNMENT PENSION FUND GLOBAL 9-10 (2013), available at http://www.regjeringen.no/pages/38525979/sc_mainrreport.pdf; see also *The Council on Ethics for the GPFG*, MINISTRY OF FIN., (June 24, 2013), <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/the-council-on-ethics-for-the-government.html?id=447010> [hereinafter *The Council on Ethics for the GPFG*]; *infra* note 52 and accompanying text.

9. DIMSON ET AL., *supra* note 8, at 3.

10. *Id.* at 3-4.

11. See e.g., NORWEGIAN NAT’L CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINAT’L ENTERS., FINAL STATEMENT: COMPLAINT FROM LOK SHAKTI ABHIYAN, KOREAN TRANSNATIONAL CORPORATIONS WATCH, FAIR GREEN AND GLOBAL ALLIANCE AND FORUM FOR ENVIRONMENT AND DEVELOPMENT VS. POSCO (SOUTH KOREA), ABP/APG (NETHERLANDS) AND NBIM (NORWAY) 45-48 (2013), available at http://www.regjeringen.no/pages/36798927/nbim_final2.pdf [hereinafter FINAL STATEMENT: POSCO CASE].

and what drives firm compliance with such guidelines. Part IV sets out the sustainable pathway using the GPFG as a model for other institutional investors. Part V introduces some reform proposals focusing on how to strengthen the GPFG's responsible investment strategy. Part VI concludes with the observation that the GPFG remains a solid model for other institutional investors, even more so if it incorporates some of the reform proposals.

II. NORWAY'S SWF - GPFG¹²

A. Origins

Norway began exploiting its oil and gas reserves in 1971.¹³ In 1990, the Norwegian government established a sovereign wealth fund, first called the Petroleum Fund, and later renamed the Government Pension Fund-Global.¹⁴ The goal of the GPFG is to use revenues from Norway's oil reserves without affecting general income flow to the government, thereby buffering the impact of volatile oil revenues on government spending.¹⁵ The fund also serves as an instrument for long-term financial savings, ensuring that Norway's oil wealth benefits not just the current generation, but also future generations, thereby fulfilling an important ethical obligation¹⁶ in line with the principle of intergenerational equity.¹⁷ The GPFG is also mandated to function as a responsible investor in fulfilling this ethical obligation, exercising good corporate governance and promoting sustainable development in economic, social, and environmental terms.¹⁸

12. See Anita Halvorsen, *Addressing Climate Change Through the Norwegian Sovereign Wealth Fund (SWF): Using Responsible Investments to Encourage Corporations to Take ESG Issues into Account in Their Decision-Making*, 8 INT'L & COMP. CORP. L.J. 1, 4-15 (2011) for background on sustainable development and SWFs.

13. TORE ERIKSEN, NORWAY MINISTRY OF FIN., THE NORWEGIAN PETROLEUM SECTOR AND THE GOVERNMENT PENSION FUND—GLOBAL 3 (2006), available at http://www.regjeringen.no/upload/FIN/Statens%20pensjonsfond/The_Norwegian_Petroleum_Sector_te.pdf.

14. The Government Petroleum Fund, 22 June 1990, Act No. 36 §§ 1-2; The Government Pension Fund Act, 21 Dec. 2005, Act No. 123 § 2 (establishing the Government Pension Fund as an umbrella entity comprised of the Government Pension Fund-Global, formerly the Petroleum Fund and the Government Pension Fund-Norway, formerly the National Insurance Scheme. This article focuses only on the Government Pension Fund-Global (GPFG)).

15. *The Report from the Graver Committee*, MINISTRY OF FIN., § 1 (Nov. 7, 2003), http://www.regjeringen.no/en/dep/fin/tema/statens_pensjonsfond/ansvarligeinvesteringer/graverutvalget/Report-on-ethical-guidelines.html?id=420232 [hereinafter *Graver Committee Report*]; see also ERIKSEN, *supra* note 13, at 7-8.

16. *Graver Committee Report*, *supra* note 15, § 2.2.

17. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 17-18 (1989) (defining intergenerational equity is defined as justice between generations).

18. NORWEGIAN MINISTRY OF FIN., ON THE MANAGEMENT OF THE GOVERNMENT PENSION FUND IN 2008: REPORT NO. 20 (2008-2009) TO THE STORTING 11 (2009), available at http://www.regjeringen.no/pages/2185603/PDFS/STM200820090020000EN_PDFS.pdf [hereinafter GPF REPORT NO. 20].

In terms of benefiting future generations, it is important to focus on sustainable development and place it in the context of SWFs. Balancing maximum financial returns with sustainable development is difficult for any profit-making entity, but SWFs, having a longer investment timeframe, are in a better position to promote sustainable development. In an effort to address this challenge, the Norwegian Parliament adopted Ethics Guidelines for the GPF in 2004, specifically prohibiting investments that would put the fund at an unacceptable risk of contributing to serious or systematic human rights violations, severe environmental damage, and gross corruption,¹⁹ essentially spelling out the requirements of sustainable development. After an evaluation process in 2008, these guidelines were amended in 2010.²⁰

B. Legal and Institutional Framework

While the GPF was established in 1990,²¹ it did not receive any funds until there was a budget surplus in 1996.²² The government's net cash flow from petroleum operations is transferred in its entirety to the GPF through the state budget, whereas the fiscal guidelines stipulate that only the expected real return on the fund—four percent of the fund should be returned to the budget for general spending purposes—hence the real value of the fund itself will be protected.²³

The Norwegian State is the official owner of the GPF, and the Ministry of Finance manages it on behalf of the Norwegian people. However, in order to have political backing, major changes to the GPF's investment strategy are presented to Parliament before being implemented.²⁴ The Ministry of Finance determines the overall investment strategy for the GPF, and follows up on its operational management.²⁵ The operational management of the GPF has been delegated to the Norwegian Central Bank, *Norges Bank*.²⁶ This role, however, is not a Central Bank function, and is therefore strictly separated from the Central Bank's other activities and referred to as the Norges Bank Investment Management ("NBIM").²⁷ The GPF is not established as a separate legal entity, but as a deposit account at the *Norges Bank*. *Norges Bank* has a management agreement with the Ministry of

19. See *Guidelines for Observation and Exclusion*, *supra* note 5, § 2 (3); *NBIM Management Mandate*, *supra* note 5 (replacing 2004 ethical guidelines); *infra* note 55 and accompanying text.

20. See *Guidelines for Observation and Exclusion*, *supra* note 5.

21. The Government Petroleum Fund, 22 June 1990, Act No. 36.

22. Øystein Olsen & Yngvar Tveit, *Statens Petroleumsfond—Et Redskap For Langsiktig Forvaltning Av Oljeformuen*, in *HVA GJØR OLJEPENGENE MED OSS? [WHAT DOES THE OIL INCOME DO TO US?]* 99, 105 (Arne Jon Isachsen ed., 2002).

23. ERIKSEN, *supra* note 13, at 6.

24. See, e.g., Larry Catá Backer, *Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment*, 41 *GEO. J. INT'L L.* 425, 453 (2010); GPF REPORT NO. 20, *supra* note 18, at 11.

25. Backer, *supra* note 24, at 454.

26. *Id.* at 455.

27. GPF REPORT NO. 20, *supra* note 18, at 37.

Finance specifically delegating the operational authority over the GPFG to the bank and this agreement is publicly disclosed.²⁸

The GPFG's assets are invested strictly in foreign financial instruments (thirty-five to forty percent in bonds, sixty percent in equities, and five percent in real estate), in over seventy developed and emerging markets.²⁹ Unlike traditional pension funds, the GPFG is not earmarked for specific liabilities, but is an instrument for general savings on the part of the State.³⁰ Because it has a very long investment horizon and is not subject to short-term liquidity requirements, the GPFG has a higher risk-bearing capacity than many comparable funds.³¹ As of 2013, the market value of the GPFG is NOK 5,038 billion (approx. U.S. \$840 billion).³² Currently, the GPFG is invested in over eight thousand companies and owns approximately 1.3 percent of global listed shares.³³

The goal for the investment strategy of the fund is to achieve maximum financial return with moderate risk to help ensure that future generations will be able to draw the maximum possible benefit from the oil wealth.³⁴ In order to achieve a maximum financial return, and as a long-term investor, the government sees its role as being a responsible investor, promoting good corporate governance and safeguarding environmental and social concerns.³⁵ This applies particularly to the broadly diversified, economy-wide investor—often referred to as “universal investor,” such as the Norwegian GPFG.³⁶

There is broad political support for the ethical framework for the responsible management of the GPFG.³⁷ Being a responsible investor is defined as ensuring

28. *Id.*; see also Management Mandate for the Government Pension Fund Global, 21. Dec. 2005 No. 123, §§ 2, 7, available at http://www.regjeringen.no/pages/1719656/gpfg_madate_042013.pdf.

29. *Investments*, NORGES BANK INV. MGMT., <http://www.nbim.no/en/Investments> (last visited July 20, 2013).

30. GPF REPORT NO. 20, *supra* note 18, at 12.

31. *Id.*

32. *Market Value*, NORGES BANK INV. MGMT., <http://www.nbim.no/en/the-fund/market-value/> (last updated Mar. 28, 2014); NORGES BANK INVESTMENT MANAGEMENT (NBIM), GOVERNMENT PENSION FUND GLOBAL: QUARTERLY REPORT: SECOND QUARTER 2013, at 10 tbl.1-10 (2013), available at <http://www.nbim.no/en/press-and-publications/Reports/2013/quarterly-report-2q-2013> (listing market value of GPFG as 4,397 billion NOK as of June 13, 2013).

33. NORGES BANK INV. MGMT., GOVERNMENT PENSION FUND GLOBAL: ANNUAL REPORT 2013 27 (2014), available at http://www.nbim.no/globalassets/reports/2013/annual-report/annual-report_2013_web.pdf.

34. GPF REPORT NO. 20, *supra* note 18, at 11-12.

35. *Id.* at 11.

36. Interview with Anne Kvam, former Head of Corporate Governance, Norges Bank Investment Management, (July 23, 2008); see NORWEGIAN MINISTRY OF FIN., ON THE MANAGEMENT OF THE GOVERNMENT PENSION FUND IN 2009: REPORT NO. 10 (2009-2010) TO THE STORTING 133-36 (2010), available at http://www.regjeringen.no/pages/2500165/PDFS/STM200920100010000EN_PDFS.pdf [hereinafter GPF REPORT NO. 10]. “A universal owner (UO) is defined as an owner with investments spread across a large number of companies in many industries and countries.” *Id.* at 133; see also JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC 3 (2000).

37. GPF REPORT NO. 20, *supra* note 18, at 12.

that the GPFG is managed in a way that “promotes better functioning, legitimate and efficient markets and sustainable development in the broadest sense.”³⁸ Promoting sustainable development in economic, environmental, and social terms is regarded as a precondition for good financial returns over time.³⁹ This goal is in keeping with the U.N. Principles for Responsible Investment (“U.N. PRI”) that the Ministry of Finance, as formal owner of the GPFG, has signed.⁴⁰ These principles emphasize that ESG issues can affect the performance of investment portfolios.⁴¹

C. Ethics Guidelines

In 2004, based on the work of the Graver Committee,⁴² the Norwegian Parliament debated and then accepted unanimously the Ethics Guidelines for the GPFG—to better fulfill its ethics obligations for future generations.⁴³ The Graver Committee focused on two main ethical obligations: (1) the obligation to ensure financial returns so that future generations will benefit from the oil wealth contingent on sustainable development, and (2) the obligation to respect fundamental rights of those who are affected by the companies in which the Fund invests.⁴⁴ These obligations became the premise for the Ethics Guidelines.⁴⁵

After an in-depth review process in 2008-2009, the Ethical Guidelines of 2004 were replaced on March 1, 2010, adding several new measures to fulfill the ethical obligations.⁴⁶ These were mostly procedural with few changes to the substantive provisions of the guidelines. After consultations, two new sets of guidelines were adopted by the Ministry of Finance. The first set of guidelines, the *Guidelines for Norges Bank's work on responsible management and active ownership* was integrated into the new regulations on the management of the GPFG.⁴⁷ The second set of guidelines was the *Guidelines for observation and exclusion from the GPFGs investment universe*, the main focus of this paper.⁴⁸ These two sets of guidelines constitute the new Ethics Guidelines.⁴⁹

38. *Id.*

39. *Id.* at 13.

40. *Id.*; see also *Signatories to the Principles for Responsible Investment*, PRINCIPLES FOR RESPONSIBLE INV., <http://www.unpri.org/signatories/signatories> (last visited July 20, 2014).

41. See U.N. PRI, *supra* note 1.

42. *Graver Committee Report*, *supra* note 15, § 6 Annex 1 (describing the committee as a government appointed committee with a mandate to propose a set of ethics guidelines).

43. NORWEGIAN MINISTRY OF FIN., GOVERNMENT PENSION FUND GLOBAL: RESPONSIBLE INVESTMENT 8-9 (2010), available at http://www.regjeringen.no/upload/FIN/brosjyre/2010/spu/english_2010/SPU_hefte_eng_ebook.pdf.

44. *Graver Committee Report*, *supra* note 15, § 6.

45. *Id.*

46. *The Council on Ethics for the GPFG*, *supra* note 8; see also GPF REPORT NO. 10, *supra* note 36, at 93.

47. *Id.*

48. See *id.*

49. *Id.* at 92-93 (The Storting (the Norwegian Parliament) gave its approval to the Government's plan. See § 3.2 of Recommendation no. 277 (2008-2009) to the Storting).

The mechanisms used by the GPF to fulfill these ethical obligations are active ownership and observation or exclusion of companies.⁵⁰ In order to safeguard the GPF's financial interests, *Norges Bank*, through NBIM, is mandated to exercise active ownership rights for the fund's investments.⁵¹ The Council on Ethics makes recommendations on the observation and exclusion of companies to the Ministry of Finance, which then makes the final decision.⁵² This process could give the appearance of such decisions being subject to political considerations, yet the Ministry emphasizes that it is acting in its capacity as an investor with the goal of maximizing the long-term real return and that other political objectives must be pursued by other means, for instance through foreign affairs or environmental policies. The Ministry of Finance has stated "we risk losing our credibility as a financial investor if we use the Fund [GPF] as an instrument in our foreign policy."⁵³

The exercise of the ownership rights by NBIM is based on the U.N.'s Global Compact, the OECD Guidelines for Corporate Governance, and the OECD Guidelines for Multinational Enterprises.⁵⁴ NBIM's exercise of its ownership rights in the GPF are considered active in the sense that the NBIM is an active shareholder observing standards of corporate governance in the form of shareholder rights and informal means to influence the corporations' adherence to the Ethical Guidelines.⁵⁵ As part of its ownership activities, the NBIM uses several approaches to influence corporations in its investment portfolio, including shareholder proposals and voting at annual general meetings, dialogue with companies, legal action, meeting with regulatory authorities, and collaboration with other investors.⁵⁶ In recent years, the NBIM has also published documents outlining their social and environmental expectations of companies in which the GPF invests in order to strengthen its active ownership effort, the first being on children's rights, entitled the NBIM's Investor Expectations on Children's

50. *Graver Committee Report*, *supra* note 15, § 5.1.

51. *NBIM Management Mandate*, *supra* note 5, §§ 2.2-2.3.

52. *The Council on Ethics for the GPF*, *supra* note 8.

53. Hilde Singaas, Former State Sec'y, Ministry of Fin., Opening Speech at the Responsible Investment Conference at the Norwegian Business School (BI) (June 20, 2013), available at http://www.regjeringen.no/nb/dep/fin/aktuelt/taler_artikler/taler_og_artikler_av_ovrig_politisk_leder/taler-og-artikler-av-hilde-singaas/2013/opening-speech-at-the-responsible-invest.html?id=731193.

54. *Graver Committee Report*, *supra* note 15, § 5.1; see ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), available at <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> [hereinafter OECD GUIDELINES ON MULTINATIONALS].

55. *Graver Committee Report*, *supra* note 15, §§ 3.1, 5.1; see also GPF REPORT NO. 10, *supra* note 36, at 125.

56. GPF REPORT NO. 10, *supra* note 36, at 125.

Rights.⁵⁷ The NBIM's Investor Expectations on Climate Change Management and Water Management were soon to follow.⁵⁸

The Council on Ethics, in charge of recommending observation and exclusion, was established by royal decree in 2004.⁵⁹ It has five members and a secretariat of seven people.⁶⁰ The Council on Ethics works with a number of consultants.⁶¹ Furthermore, it uses software programs to monitor newswires and other sources for reports or information related to or involving companies in the GPFG's portfolio in order to flag the worst offenders of the Ethics Guidelines.⁶²

If a company is involved in the production of weapons that through normal use violates fundamental humanitarian principles, it is identified through a negative screening process and excluded from the investment universe (product-based exclusion).⁶³ Furthermore, companies producing tobacco have been added to the criteria for exclusion.⁶⁴ Companies will be excluded from the investment universe (conduct-based) if there is an unacceptable risk of the GPFG contributing to or being responsible for:

- a) Serious or systematic human rights violations such as murder, torture, deprivation of liberty, forced labor, the worst forms of child labor, and other child exploitation;
- b) Serious violations of the rights of individuals in situations of war or conflict;
- c) Severe environmental damage;
- d) Gross corruption;
- e) Other particularly serious violations of fundamental ethical norms.⁶⁵

57. See *Children's Rights*, NORGES BANK INV. MGMT., <http://www.nbim.no/en/responsibility/responsible-investments/childrens-rights> (last updated Feb. 27, 2014) (providing link to brochure on NBIM's Investor Expectations on Children's Rights).

58. See *Climate Change*, NORGES BANK INV. MGMT., <http://www.nbim.no/en/responsibility/responsible-investments/climate-change> (last updated Feb. 27, 2014) (providing link to brochure NBIM's Investor Expectations on Climate Change Management); *Water Management*, NORGES BANK INV. MGMT., <http://www.nbim.no/en/responsibility/responsible-investments/water-management> (last updated Feb. 27, 2014) (providing link to brochure NBIM's Investor Expectations on Water Management).

59. *The Council on Ethics for the GPFG*, *supra* note 8; see also *Guidelines for Observation and Exclusion*, *supra* note 5, §§ 2-5.

60. GPF REPORT NO. 20, *supra* note 18, at 89.

61. REGJERINGEN.NO, no. 9 http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/frequently-asked-questions.html?id=605599#OLE_LINK16 (last updated Nov. 30, 2012).

62. *Id.* no. 16.

63. *Guidelines for Observation and Exclusion*, *supra* note 5, § 2(1)(a).

64. *Id.* § 2(1)(b). This was one outcome of the evaluation process in 2008-2009. *Id.* The criterion is limited to production of tobacco products, and does not include associated products, such as, filters and flavor additives, or the sale of tobacco products. *Id.*

65. *Guidelines for Observation and Exclusion*, *supra* note 5, § 2(3).

The premises for the Ethics Guidelines clearly state that the GPFG's investment should generate a sound return, contingent on sustainable development, and not represent an unacceptable risk of complicity in grossly unethical acts, including the areas of human rights and the environment. Only states can violate their human rights obligations directly under international law (outside the realm of international criminal law), yet companies can contribute to human rights violations committed by states and the GPFG, in turn, may contribute to the companies' complicity through its ownership.⁶⁶ No evidence of contribution needs to be provided for the GPFG to take action; the presence of an unacceptable *risk* is sufficient to trigger a response.⁶⁷ This also applies to acts or omissions in regard to the environment. Only the most serious violations of the ethical standards should provide a basis for exclusion. The fact that a risk is deemed unacceptable is linked to the seriousness of the ongoing act, whether a company is accused of several counts of unethical conduct, and the degree of probability of the act taking place in the future.⁶⁸ Past acts alone are not enough for exclusion from the GPFG, yet past patterns of conduct can be relevant when they indicate future conduct.⁶⁹ The Council on Ethics also makes sure that there is factual evidence to support the accusations leveled at the company.⁷⁰

To date, the Ministry of Finance, based upon recommendations from the Council on Ethics, has screened out investments in eighteen companies on the basis of their production of certain kinds of weapons, such as central parts of nuclear weapons, and involvement in the production of cluster munitions and landmines.⁷¹ In addition, one company has been excluded for selling military material to Burma.⁷² Twenty-one companies have been excluded for tobacco production.⁷³ In order to avoid the unacceptable risk of the GPFG contributing to serious or systematic human rights violations or severe environmental damage, eighteen companies have been excluded from GPFG.⁷⁴ Two companies were excluded on grounds of other particularly gross violations of fundamental ethical

66. COUNCIL ON ETHICS FOR THE GOV'T PENSION FUND—GLOBAL, COUNCIL ON ETHICS FOR THE GOVERNMENT PENSION FUND—GLOBAL: ANNUAL REPORT 2005, at 45 (2006), available at <http://www.regjeringen.no/pages/1957930/Årsmelding%202005%20eng.pdf> [hereinafter ANNUAL REPORT 2005].

67. *Id.*

68. GPF REPORT NO. 10, *supra* note 36, at 77; see also *Guidelines for Observation and Exclusion*, *supra* note 5, § 2(4).

69. ANNUAL REPORT 2005, *supra* note 66, at 47-48.

70. GPF REPORT NO. 10, *supra* note 36, at 77.

71. *Companies Excluded from the Investment Universe*, MINISTRY OF FIN., <http://www.regjeringen.no/en/dep/fin/Selected-topics/the-government-pension-fund/responsible-investments/companies-excluded-from-the-investment-u.html?id=447122> (last updated Apr. 9, 2014).

72. *Id.* (referring to Dongfeng Motor Group Co Ltd. (28 Feb. 2009)).

73. *Id.*

74. *Id.*

norms⁷⁵ and three for serious violations of the rights of individuals in situations of war or conflict.⁷⁶

No companies have yet been withdrawn from the investment universe of the GPFG due to their lack of action to *mitigate climate change*, under the “severe environmental damage” criterion under the *Guidelines for Observation and Exclusion*. Currently, this criterion does not cover climate change. The NBIM, on the other hand, has entered into dialogue with companies lobbying against regulations requiring action to mitigate climate change and has used its voting rights as a shareholder on climate change resolutions introduced by shareholders at the general meetings of targeted companies. The NBIM has also communicated its expectations to companies in regard to addressing climate change, as mentioned above.

In addition, in 2012, NBIM expanded its climate change focus area to include deforestation of tropical rainforests as a means of emitting carbon, in addition to its existing focus on emissions of greenhouse gases through the burning of fossil fuels as stipulated in its expectation documents.⁷⁷ Based on that decision, it divested stocks from twenty-three palm oil companies from GPFG’s investment portfolio determining that they were producing palm oil in an unsustainable manner, contributing to tropical rainforest deforestation.⁷⁸

III. GPFG’S – EMPIRICAL EVIDENCE OF EFFECTIVENESS

The observation and exclusion mechanisms employed by the GPFG to monitor compliance with the Ethics Guidelines leave open the possibility that firms found to be in breach of these guidelines can alter their unethical behaviors and shift their internal practices toward sustainability. Given that unsustainable practices can lead to divestment and exclusion from the GPFG, corporations face some incentives to adhere to its Ethics Guidelines; this is especially the case where corporations may wish to avoid the costs, both material and reputational, of being

75. *Id.* (Potash Corporation of Saskatchewan (6 Dec. 2011) and Elbit Systems Ltd. (31 Aug. 2009)). For Potash Corporation, see COUNCIL ON ETHICS FOR THE GOV’T PENSION FUND - GLOBAL, COUNCIL ON ETHICS FOR THE GOVERNMENT PENSION FUND—GLOBAL: ANNUAL REPORT 2011, at 53 (2011), available at http://www.regjeringen.no/pages/1957930/Annual_Report_2011.pdf [hereinafter ANNUAL REPORT 2011]. For Elbit Systems, see COUNCIL ON ETHICS FOR THE GOV’T PENSION FUND—GLOBAL, COUNCIL ON ETHICS FOR THE GOVERNMENT PENSION FUND - GLOBAL: ANNUAL REPORT 2009, at 26 (Sept. 3, 2009), available at http://www.regjeringen.no/pages/1957930/Etikkradet_E2009.pdf [hereinafter ANNUAL REPORT 2009].

76. *Companies Excluded from the Investment Universe*, *supra* note 71 (Shikun & Binui Ltd. (31 May 2012), Africa Israel Investments (30 Jan. 2014), and Danya Cebus (30 Jan. 2014)).

77. NORGES BANK INV. MGMT., GOVERNMENT PENSION FUND GLOBAL: ANNUAL REPORT 2012, at 35 (2012), available at <http://www.nbim.no/globalassets/reports/2012/annual-report/annual-report-2012.pdf>; see also *id.* at 19 (deeming some economies’ “long-term business model . . . unsustainable.”).

78. *Id.* at 35; see also COUNCIL ON ETHICS FOR THE GOV’T PENSION FUND—GLOBAL, COUNCIL ON ETHICS FOR THE GOVERNMENT PENSION FUND—GLOBAL: ANNUAL REPORT 2012 18, at 66 (2012), available at http://www.regjeringen.no/pages/1957930/aarsmelding_2012_engelsk.pdf [hereinafter ANNUAL REPORT 2012].

divested and publicly identified as having unethical and unsustainable practices. Thus, in addition to monitoring compliance with the GPFG's Ethics Guidelines, through observation and exclusion, the Council on Ethics has the additional effect of redirecting unsustainable corporate behavior and frequently placing corporations on more sustainable pathways.

This section provides an empirical analysis of this process; it assesses the effectiveness of the GPFG in altering corporate behavior once violations of Ethics Guidelines have been detected. It begins with two case studies of corporations, Germany-based Siemens AG and U.S.-based FMC Corporation, both of which have been publicly identified for engaging in unsustainable practices by the Council on Ethics, and have subsequently addressed these unsustainable behaviors. Then the section provides a large-N empirical analysis of all firms that have similarly been identified by the Council on Ethics since 2005.

A. The cases of Siemens and FMC Corporation

In 2007, the GPFG publicly identified the Germany-based multinational conglomerate Siemens AG as the subject of a Council on Ethics investigation for gross corruption. In its investigation, the Council on Ethics highlighted instances where the corporation had actively engaged in corrupt behaviors spanning more than a decade, including bribing public officials in over twenty-five countries to win various tenders and to obtain government contracts.⁷⁹ At the time of the investigation, the GPFG held investments worth approximately U.S. \$500 million in Siemens stocks and bonds.⁸⁰

Siemens undertook immediate efforts to respond to the concerns raised by the GPFG, providing to the Council on Ethics information about its guidelines relating to corruption and arguing that compliance with such guidelines had become "a top priority."⁸¹ In its letter to the Council on Ethics, Siemens further emphasized that it was "committed to clearing up all misconduct no matter who was responsible, and will endorse the necessary consequences."⁸² Indeed, Siemens' high level of responsiveness to the Council on Ethics drew acknowledgement in the Council's annual report.

In 2009, the Norwegian Ministry of Finance placed Siemens on an "observation list" for a period of four years, during which the Council on Ethics and NBIM were both tasked with monitoring and reporting on Siemens' efforts to redress its corrupt practices. During that period, the Council on Ethics continued

79. COUNCIL ON ETHICS FOR THE GOV'T PENSION FUND—GLOBAL, COUNCIL ON ETHICS FOR THE GOVERNMENT PENSION FUND—GLOBAL: ANNUAL REPORT 2008, at 47 (2008), available at http://www.regjeringen.no/pages/1957930/etikkradet_engelsk08.pdf.

80. *Id.* at 45.

81. *Id.* at 55.

82. *Id.* (emphasis omitted).

to observe Siemens and engaged in direct dialogue with the company to monitor its efforts at implementing more sustainable business practices.⁸³

In 2012, Siemens was removed from observation following a report by the Council on Ethics that emphasized a shift within the corporation toward addressing and eliminating corrupt practices. The Council on Ethics noted that “it [was] unlikely that there was a higher risk of corruption in Siemens than in other comparable companies” and thus recommended that its observation period come to an end.⁸⁴

This process reveals that efforts undertaken by the GPFG helped facilitate a change in Siemens’ corporate behavior in a more sustainable direction. While Siemens’ corruption was widely publicized and became the subject of a number of lawsuits, market-based pressure from investors such as the GPFG no doubt influenced Siemens’ decision to implement more sustainable practices over time. This is corroborated by Siemens’ high level of responsiveness to inquiries from the Council on Ethics.

An additional case further illustrates the ways in which the Council on Ethics can be successful in motivating companies to engage in more sustainable behaviors. In 2010, the Council on Ethics recommended to the Ministry of Finance that it exclude the U.S.-based FMC Corporation for “particularly serious violations of ethical norms” tied to its practice of purchasing phosphate minerals mined from the non-self-governing territory of Western Sahara.⁸⁵ The Ministry of Finance concurred with the Council’s recommendation and divested securities worth some U.S. \$50 million the following year.⁸⁶

During the course of the investigation into alleged unethical practices, FMC Corporation revealed to the Council on Ethics that it was party to long-term contracts with Moroccan companies to purchase phosphates from Western Sahara, and that it intended to continue this practice into the future.⁸⁷ Indeed, FMC Corporation notified the Council on Ethics that its operations were in many ways dependent on access to such phosphates.⁸⁸ In its Annual Report, the Council notes that, “FMC Corp[oration] makes it clear that FMC Foret [its Spanish subsidiary] will continue to buy phosphate from Bou Craa [northern Western Sahara], and that the company’s plant in Huelva, Spain, to a great extent is dependent on access to

83. ANNUAL REPORT 2009, *supra* note 75, at 5.

84. ANNUAL REPORT 2012, *supra* note 78, at 6-7.

85. ANNUAL REPORT 2011, *supra* note 75, at 6-7. FMC Foret’s phosphate trade with the state-owned Moroccan mining company was contrary to the interests of the local population and not for their benefit. *Id.* This breach of the Ethics Guidelines fell under the category “other particularly serious violations of fundamental ethical norms.” *Guidelines for Observation and Exclusion*, *supra* note 5, § 2(3)(e).

86. ANNUAL REPORT 2011, *supra* note 75, at 6; *Norway Blacklists US/Canadian Fertilizer Firms over Sahara Imports*, WESTERN SAHARA RESOURCE WATCH (June 12, 2011), <http://www.wsrw.org/a105x2177>.

87. ANNUAL REPORT 2011, *supra* note 75, at 57-58.

88. *Id.* at 58.

phosphate of the quality found at Bou Craa.”⁸⁹ The Council on Ethics regarded this information as an assurance that FMC Corporation intended to continue engaging in what it considered to be grossly unethical behavior; this information formed the basis of the Council’s decision to recommend exclusion.⁹⁰

Following FMC Corporation’s exclusion from the GPF, the Council on Ethics continued to contact the corporation to determine whether it continued to purchase phosphates mined from Western Sahara.⁹¹ This practice is established in Paragraph 5 of the GPF’s Ethics Guidelines, which directs the Council on Ethics to “routinely assess whether the basis for exclusion still exists and may, in light of new information, recommend that the Ministry of Finance reverse an exclusion ruling.”⁹² In August 2012, FMC Corporation notified the Council on Ethics that it had ceased purchasing phosphates from Western Sahara. Notably, the company also stated that it had no “plans or agreements that include future purchases of phosphates from Western Sahara.”⁹³ This marked a significant shift in behavior for FMC Corporation, which had purchased phosphates extracted from Western Sahara for some forty years.⁹⁴ In light of this information, the Council on Ethics recommended to the Ministry of Finance that FMC Corporation’s exclusion be reversed.⁹⁵ The Ministry of Finance accepted the recommendation, and FMC Corporation subsequently reappeared in NBIM’s investment portfolio.⁹⁶

The above cases illustrate the ways in which the Council on Ethics’ screening and exclusion mechanisms can have the effect of redirecting unethical behaviors. Both Siemens AG and FMC Corporation were highly responsive to the Council on Ethics and eventually redressed their unethical practices in ways that placed each firm on a more sustainable pathway. These shifts in corporate behavior are attributable to investor-side concerns over long-term sustainability. The remainder of this section turns to a larger quantitative test of these mechanisms to evaluate their ability to motivate firms to change unethical behavior.

B. Influencing corporate behavior

We propose that the ability of the GPF to influence corporate behavior toward more sustainable practices is tied to the degree of market leverage it possesses over a given corporation. We argue that the magnitude of this leverage, in turn, is a reflection of the relative size of the investment the GPF maintains in a given corporation. Larger relative investments lead to more leverage because they magnify the consequences of observation and potential exclusion when the Council on Ethics identifies companies for unethical practices. We thus conduct

89. *Id.*

90. *Id.* at 58, 62.

91. ANNUAL REPORT 2012, *supra* note 78, at 50.

92. *Guidelines for Observation and Exclusion*, *supra* note 5, § 5(5).

93. ANNUAL REPORT 2012, *supra* note 78, at 50-51.

94. ANNUAL REPORT 2011, *supra* note 75, at 57.

95. ANNUAL REPORT 2012, *supra* note 78, at 51.

96. *Id.* at 6-7.

an empirical test that models the likelihood of a corporation altering its unethical behavior as a function of the relative size of investment the GPFM maintains in that firm. We hypothesize that larger relative investments are more likely to influence corporate behavior in a direction toward more sustainable practices than smaller relative investments.

1. Sample

The high level of transparency within the GPFM permits us to test our hypothesis on all corporations that have been publicly identified as subjects of investigation by the Council on Ethics, as well as all corporations that have been negatively screened for unethical practices. These are firms such as Siemens AG and FMC Corporation that have been investigated for engaging in unethical behavior by the Council on Ethics. In the process of being investigated, these companies have the option to alter their practices to bring them into alignment with Ethics Guidelines before they are excluded from the fund. There are seventy-nine such corporations that appear in our sample.⁹⁷

2. Variables

Our Dependent Variable (“DV”) is a dichotomous measure that captures whether a corporation changes its unethical practice following an investigation by the Council on Ethics. If the corporation alters its behavior, it is coded as a one. If a corporation is investigated for unethical practices and is subsequently divested and never alters its behavior, it is coded as a zero.

Our primary independent variable (“IV”) is designed to capture the degree of market leverage the GPFM maintains over a target firm. It measures the percentage of outstanding shares of a firm that are owned by the GPFM. We calculate this variable by dividing the value of the GPFM’s investment in the firm in Norwegian Kroner (“NOK”) by the value of the corporation’s total outstanding shares in NOK. All figures are calculated based on values taken from the year the corporation was publicly revealed as the subject of investigation. The minimum percent ownership in the sample is zero, while the maximum percent ownership is 2.07 percent of total outstanding shares. In cases where the percent ownership of a corporation is zero, the GPFM has typically engaged in negative screening, and has never owned shares in that corporation. These data are publicly available from NBIM’s annual reports.⁹⁸

We also include a number of control variables (“CV”) in our analysis. Our first CV is the size of a corporation by market capitalization the year it was

97. Information on each of these corporations was compiled from the Council on Ethics’ annual reports for years 2005 to 2013. See *Annual Reports*, REGJERINGEN.NO, http://www.regjeringen.no/en/sub/styret-rad-utvalg/ethics_council/annual-reports.html?id=458699 (last visited July 20, 2014).

98. *Reports*, NORGES BANK INV. MGMT, <http://www.nbim.no/en/transparency/reports/> (last updated Feb. 27, 2014).

identified as the subject of investigation by the GPFG. Market capitalization is presented for all corporations in NOK, even if that corporation's shares and bonds are traded in a currency other than NOK. We include this control under the assumption that the size of a corporation may influence its likelihood of altering an unsustainable behavior. For example, large firms may be less wary of the costs of divestment and thus less sensitive to any market leverage exerted by the GPFG. Conversely, large firms may be more sensitive to the reputation costs of being identified as the subject of investigation for unethical behaviors; in such cases, these firms may be more likely to alter an unethical behavior.

Our second CV measures the level of democracy of the country within which the firm is chartered, or the state within which the violation of the Ethics Guidelines occurred where that country is different. For example, Wal-Mart USA, which appears in the sample for violations of human rights, is coded based on the level of democracy in the United States, while Wal-Mart de Mexico is coded based on the level of democracy in Mexico. To measure the level of democracy, we use the 21-point "Polity Score" scale, where states with the lowest level of democracy are coded as -10 and states with the highest level are coded as 10.⁹⁹ We include this control under the assumption that corporations in more democratic countries may be more receptive to efforts at incorporating sustainable practices than corporations from less democratic countries.

Our third CV is a dichotomous measure indicating whether a firm has been negatively screened or investigated for the production of munitions. This category of companies represents a uniquely difficult set of cases for the Council on Ethics. For most of these companies, weapons production is a core business function. It is therefore less likely that these firms will cease the production of munitions to align their behavior with the GPFG's Ethics Guidelines. This is especially the case when compared with other types of unethical behaviors, like corruption or environmental degradation, which companies may be more willing to address insofar as they do not constitute a central function of the business.

A similar logic motivates the inclusion of our final CV, which indicates whether a corporation produces tobacco. While tobacco-producing firms have the opportunity to alter their unethical behaviors, none to date have.¹⁰⁰ This is unsurprising, as implementing sustainable practices for these corporations would imply abandoning tobacco production altogether. There are eighteen tobacco-producing firms that have been excluded from the GPFG. The dummy measuring tobacco production predicts a perfect rate of corporations failing to alter their unsustainable behaviors; it thus has the statistical effect of dropping these observations from the sample. Notably, this accounts for the drop in the number of observations used to estimate our model.

99. Monty G. Marshall & Ted Robert Gurr, *Polity IV Project: Political Regime Characteristics and Transitions, 1800-2012*, CENTER FOR SYSTEMIC PEACE, <http://www.systemicpeace.org/polity/polity4.htm> (last updated June 10, 2013).

100. See *Annual Reports*, *supra* note 97.

3. Case Selection

Testing our hypothesis on this sample raises the potential for selection bias. If the Council on Ethics systematically investigates corporations that are more likely *a priori* to alter their unethical practices, then only these corporations will select into our sample, while corporations that are less likely to alter unethical practices will be excluded. This selection problem threatens to undermine the generalizability of our results. The obvious econometric solution, a two-stage Heckman selection model,¹⁰¹ is infeasible due to the exclusion restriction requiring us to identify some instrument that predicts whether a corporation will select into an investigation for unsustainable practices.

While we cannot model any selection bias, we can determine whether there is anything systematically different about firms that select into Council on Ethics investigations from those that do not. To determine whether there is anything substantively different about companies that select into our sample from companies that do not, we take two random draws of seventy-nine corporations from the GPF's investment universe. This is equivalent to the number of corporations in our sample. For each randomly drawn firm, we calculate the percent of total outstanding shares controlled by the GPF. We then perform difference-in-mean tests (two-tailed) to determine whether there is a statistically significant difference across means for firms that select into our sample and the firms that do not. If there is no sample selection bias, there should be no statistically significant difference in means between the corporations in our sample and the corporations randomly drawn in terms of the percent of shares owned by the GPF.

The results of the difference-in-means tests reveal no significant differences (at ninety percent confidence) between the mean percentages of outstanding shares controlled by the GPF for corporations that select into our sample.¹⁰² There is thus nothing systematically different about firms that select into our sample versus those that do not in terms of the relative slice of shares controlled. This suggests that the Council on Ethics does not choose corporations that it believes will be *a priori* more amenable to implementing more sustainable practices, while failing to investigate firms that will be less willing to address its concerns.

We test our hypothesis using logistic regression; our model is laid out in equation form below.¹⁰³

101. James J. Heckman, *Sample Selection Bias as a Specification Error*, 47 *ECONOMETRICA* 153 (1979). The Heckman selection model is a common method for correcting parameter estimates that are biased due to sample selection effects. *See id.*

102. For the first random draw, $t(79)=1.2406$, $p=0.1096$; for the second random draw, $t(79)=1.2407$, $p=0.1096$.

103. The beta coefficients represent the parameters estimated by maximizing the likelihood function associated with the equation we present. These coefficients, in turn, allow us to use data simulations to calculate the probability of a company changing its unethical behavior following negative screening or exclusion.

$$\begin{aligned}
 \text{Logit (Firm compliance)} = & \beta_0 + \beta_1 * \text{Percent Firm Control} \\
 & + \beta_2 * \text{Firm Size} \\
 & + \beta_3 * \text{Democracy} \\
 & + \beta_4 * \text{Weapons} \\
 & + \beta_5 * \text{Tobacco}
 \end{aligned}$$

4. Results

The results (presented in Table 1) provide support for our hypothesis that the likelihood of a corporation changing an unethical behavior increases as the relative size of the GPFG's investment in that corporation increases. This suggests that corporations tend to be more receptive to investors' efforts at implementing sustainable practices as the relative size of the investment increases. Notably, it only requires small relative increases in investment size for companies to change their practices. In other words, small relative increases in investment share yield disproportionate increases in the probability of a corporation changing its behavior. This also suggests that, under certain circumstances, corporations can be highly sensitive to the expectations of investors with regard to sustainable practices, even when those investors own only small relative slices of a corporation's tradable securities.

For example, based on simulations (presented in Table 2), the model predicts a forty-one percent likelihood of a firm abandoning an unethical practice following negative screening or an investigation when the GPFG controls zero shares. This low likelihood is perhaps unsurprising given that the GPFG maintains almost no market leverage over such firms. However, when the GPFG controls a quarter of one percent of outstanding shares in a firm, the probability of that firm changing an unethical behavior rises to 0.52. Stated differently, there is about a fifty percent chance that a firm will change its behavior when investigated or negatively screened when the GPFG controls 0.25 of the total outstanding shares of that firm. The likelihood of observing a change increases substantially to 0.71 when the GPFG controls as much as 0.75 percent of outstanding shares in a corporation. When this increases to one percent, the likelihood of a firm changing some unethical behavior further increases to 0.78. The pattern is consistent throughout simulations as the percent of shares controlled rises; indeed, the model predicts a ninety percent chance that a corporation will discontinue an unethical behavior when the GPFG controls 1.75 percent of outstanding shares. This again suggests that only small relative increases in the amount of securities controlled by investors has the ability to magnify substantially market leverage in terms of convincing corporations to adopt more sustainable practices.

The size of a corporation by market capitalization has a weakly significant relationship ($p \leq 0.10$) to the likelihood of that corporation altering its behavior following investigation or negative screening from the Council on Ethics. While the relationship is not significant at conventional thresholds, it is notable that the relationship is positive, suggesting that larger companies may be *more* likely to change their behavior than smaller companies. This could indicate that larger

companies may be more sensitive to investor interests related to sustainable practices.

As expected, the coefficient on the dummy variable indicating whether a company engages in weapons production is significant and signed negatively; this demonstrates that companies engaged in weapons production are indeed less likely to alter their unethical practices than are companies that are investigated or screened for violations in other areas. Indeed, the model predicts only a thirty-two percent likelihood of such a company changing its behavior following negative screening or an investigation when the GPFG controls one percent of total outstanding shares. When the relative slice of control doubles to two percent, the model predicts only a sixty-four percent likelihood of a firm changing its behavior. Substantively, this suggests that it is more difficult to wield market leverage over weapons manufacturers in an effort to implement more sustainable practices.

Last, the level of democracy of the country in which a given firm is located bears no significant relationship to the likelihood of that company changing some unethical behavior. In other words, companies in highly democratic countries are no more (or less) likely to change their behavior than are companies in undemocratic countries. This null result is perhaps heartening for investors who may wish to target companies in undemocratic countries, as they appear to be just as receptive to implementing sustainable practices as companies chartered in countries that are highly democratic. Substantively, this result suggests that the location of a company bears little relationship to its receptiveness to investor pressures over implementing more sustainable practices. Market leverage appears to have the same effect on firms, whether they're chartered in democratic countries or otherwise.

Table 1: Explaining Changes in Corporate Behavior

Percent Shares Owned	1.741*
	(0.857)
Firm Size	2.510 ^{WS}
	(1.420)
Democracy	0.553
	(9.143)
Weapons	-2.279*
	(0.867)
Constant	-0.524

(0.874)

Pseudo R2	0.243
Percent Predicted Correctly	67.92
N	53

* $p \leq 0.05$, WS $p \leq 0.10$; robust standard errors reported in parentheses, two-tailed tests.

Table 2: Predicted Probability of a Firm Changing its Behavior at Levels of Percent Firm Ownership

Percent Ownership	Likelihood Change	Confidence Interval
0	0.41	0.20-0.65
0.25	0.52	0.33-0.70
0.50	0.62	0.44-0.77
0.75	0.71	0.51-0.87
1.00	0.78	0.54-0.93
1.25	0.84	0.57-0.97
1.50	0.87	0.58-0.99
1.75	0.90	0.59-0.99
2.00	0.92	0.60-0.99

* Estimated using CLARIFY¹⁰⁴; firm size and democracy are held at their mean values, while weapons production is held at its mode.

IV. THE SUSTAINABLE PATHWAY-GPFG AS A MODEL FOR OTHER INSTITUTIONAL INVESTORS

The GPFG has been referred to as the “gold standard of sovereign wealth funds” by the President of the European Commission.¹⁰⁵ The GPFG is also listed among the most transparent of the SWFs, with a rating of ten, the highest score on the Lindaburg-Maduell Transparency Index.¹⁰⁶ This rating is based on several factors, including: whether the fund discloses its “history including reasons for its creation, origins of wealth, and government ownership structure”; whether the fund provides “up-to-date independently audited annual reports,” and its ownership stakes in companies, and provides guidelines with regard to “ethical standards, investment policies, and enforcement of guidelines.”¹⁰⁷

Measured against the U.N. PRI, and considering its most recent revisions, the GPFG is a workable model for other institutional investors. Now that it has brought environment and climate change to the forefront, it is more likely to take ESG issues into account in a broader fashion. The exclusion mechanism is a long, time-consuming process which some may claim is not necessary if investors take ESG issues into account in a more holistic manner in their investment decision-making. However, as with all voluntary approaches, they will only be as effective as the reliability of the self-reporting mechanisms. Having an exclusion mechanism available can indeed be very effective, as we have shown, and should remain as a ‘stick’. The best approach is to address ESG issues at all levels, having both investors and companies integrating ESG issues into their decision-making process. States should be encouraged (or assisted) to adopt practical legislation addressing ESG issues.

Currently, there are few globally accepted best practice standards for SWFs regarding taking ESG issues into account.¹⁰⁸ The Norwegian Ministry of Finance considers the U.N. PRI an important initiative because it “combines the need for a

104. MICHAEL TOMZ, JASON WITTENBERG & GARY KING, CLARIFY: SOFTWARE FOR INTERPRETING AND PRESENTING STATISTICAL RESULTS (Version 2.0 2003), <http://scholar.harvard.edu/gking/clarify>.

105. José Manuel Barroso, President, Eur. Comm’n, Sovereign Wealth Funds: No European Legislation but Rather a Common Approach (Feb. 25, 2008), available at http://ec.europa.eu/archives/commission_2004-2009/president/pdf/statement_20080225_02_en.pdf.

106. Carl Linaburg & Michael Maduell, *Linaburg-Maduell Transparency Index*, SWF INST., <http://www.swfinstitute.org/statistics-research/linaburg-maduell-transparency-index/> (last visited July 20, 2014).

107. *Id.*

108. *Id.*

common platform and understanding of the issues and the need for a certain amount of flexibility in execution on the part of the individual investor.”¹⁰⁹

The work of the GPFG may itself form the basis of a new global best practice standard. Actions taken by the GPFG may have a wider multiplier effect, prompting responsible investment not just by other SWFs, but also private sector institutional investors.¹¹⁰ There seems to be a growing preference toward engaging with companies rather than excluding them. However, there is a dilemma in “the paradox of the opportunity to positively influence a company by being an active shareholder, while inherently supporting their irresponsible practices by being an investor.”¹¹¹ The NBIM Investor Expectations on Climate Change Management is a promising tool, since it is followed up with an annual compliance report, assessing whether the companies the GPFG is invested in are meeting the NBIM’s expectations. Thereby, the Norwegian GPFG could be viewed as a leader in the industry and with some tweaking be a model of best practice.

Regarding the GPFG, the Ethics Guidelines can be an effective tool to influence corporate behavior, especially the observation and exclusion mechanisms. In addition, the NBIM’s environment-related active equity mandates should help promote sustainable companies ahead of others in the investment universe. Furthermore, the NBIM’s Investor Expectations on Children’s Rights, Water Management, and Climate Change Management and their respective annual assessment reports will lead to more dialogue between the NBIM and reluctant companies that are part of the investment portfolio of the GPFG, encouraging them to get on a more sustainable path.

V. REFORM PROPOSALS

The Strategy Council for the Government Pension Fund Global, established in the spring of 2013, with a mandate to strengthen the work of the GPFG on responsible investment,¹¹² delivered its report, the Responsible Investment and the Norwegian Government Pension Fund Global, to the Ministry of Finance on November 11, 2013.¹¹³

The report of the Strategy Council recommends that an outline for a responsible investment framework should be set out for the GPFG. It would include its motivation, mandate, principles, strategies, and evaluation.¹¹⁴ Furthermore, it recommends consistency among the GPFG’s objectives, priorities,

109. GPF REPORT NO. 10, *supra* note 36, at 131.

110. Bent Sofus Tranøy, *Flexible Adjustment in the Age of Financialisation: The Case of Norway*, 14 *GEOPOLITICS* 360, 360-61 (2009).

111. Sarah Takaki, *Stakeholder Perspectives on Norwegian Investment Responsibility*, 12 *J. INV. MGMT.* 20, 25-26 (2014) (referencing the acknowledgement made by Mr. Hermstad at the Responsible Investment Conference in Oslo on 20 June 2013).

112. See *The Council on Ethics for the GPFG*, *supra* note 8 that requires the Council of Ethics to ensure the GPFG’s investments comply with the ethical guidelines.

113. DIMSON ET AL., *supra* note 8, at 4, 31.

114. *Id.* at 17.

and activities in the responsible investment framework. In addition, it emphasizes more transparency and accountability. Based on these recommendations, the Strategy Council sees a need to integrate all the responsible investment activities of the fund into NBIM, giving the Board of *Norges Bank* the final say on divestment decisions, rather than the Ministry of Finance as it is today.¹¹⁵

The objective of the GPFG's responsible investment strategy, originally set out by the Graver Committee, has broad political support.¹¹⁶ More transparency and accountability has already been called for by several NGOs.¹¹⁷ The main issue being debated about the report is its recommendation calling for the integration of the resources and competence of the Council on Ethics into NBIM. The authors strongly disagree with this recommendation, as will be explained below in the context of the effectiveness of the implementation of the Ethics Guidelines.

The exclusion mechanism the Council on Ethics uses when it makes its recommendations to the Ministry of Finance at the outset of the investment process, eliminating producers of unethical *products* from the investment portfolio, has been very effective.¹¹⁸ Indeed, some manufacturers have been eager to inform the GPFG if they have stopped producing some products to again be able to be included in the GPFG's portfolio.¹¹⁹

In addition, the mechanism to place companies under observation or exclude them from the investment portfolio if there is an unacceptable *risk* that the company contributes to unethical *behavior*, seems, as the authors' empirical analysis has demonstrated, to work well as a tool to encourage companies to move toward sustainable development.¹²⁰ Yet, several suggestions have been made for improvements, among them, giving the Council on Ethics more autonomy.¹²¹ This, however, is contrary to the Strategy Council's recommendation to integrate the Council on Ethics into NBIM. Keeping the Council on Ethics separate from NBIM is very important because it allows the Council to focus purely on ethical

115. *Id.* at 30.

116. *See supra* text accompanying note 37.

117. *See* ANITA HASLIE & JOAKIM HAMMERLIN, ENDRINGER I DEN ETISKE FORVALTNINGEN AV STATENS PENSJONSFOND UTLAND, [CHANGES IN THE ETHICS MANAGEMENT OF THE GOVERNMENT PENSION FUND GLOBAL] 11, (2013), available at <http://www.fivas.org/sider/tekst.asp?side=723> [hereinafter HASLIE REPORT].

118. Originally called the negative screening process. *See* DIMSON ET AL., *supra* note 8, at 5.

119. ETIKKRÅDET, RECOMMENDATION TO REVOKE THE EXCLUSION OF THE COMPANIES BAE SYSTEMS PLC. AND FINMECCANICA S.P.A. FROM THE INVESTMENT UNIVERSE OF THE GOVERNMENT PENSION FUND GLOBAL I (2012) (unofficial translation), available at http://www.regjeringen.no/upload/FIN/etikkradet/2013/bae_finmec_eng.pdf (BAE Systems plc wrote to the Ethics Council 10 days before they received the routine enquiry from the Council asking if MBDA—a company which BAE Systems plc through a joint venture, had a controlling interest in—was still involved in the production of nuclear weapons. BAE Systems plc stated that MBDA's production of ASMP-A had now been completed, thus the basis for the exclusion of MBDA's owners no longer applied.).

120. For example Siemens and FMC Corporation made changes. *See* discussion *supra* Part III.a.

121. SHAMMAS, *supra* note 7, at 4.

issues without being distracted by the financial implications of its recommendations.¹²² As long as sustainable development is not given priority over financial issues, the controlling function of the Council on Ethics should be upheld in an independent entity accountable only to the Ministry of Finance, since it represents the owners, the people of Norway. The Council is, in fact, evolving into a quasi-judicial entity in making its recommendations to the Ministry.¹²³ As Backer explains, the work of the Council on Ethics has “the beginnings of a coherent jurisprudence of ethics for corporate investment, utilizing public power to influence private governance among enterprises.”¹²⁴ This value should not be underestimated as it has, as stated above, been followed closely by other pension funds that have, in turn, also excluded the same companies from their investment portfolio.

More autonomy for the Council on Ethics would make sense in some circumstances. Giving the Council on Ethics greater say in exclusion cases, rather than just making recommendations to the Ministry of Finance, would keep the decision further away from politics whose influence has been criticized by some commentators.¹²⁵ Then the Council on Ethics would have to acquire authority over NBIM regarding ethics issues. This is not compatible with the GPFPG's current structure, which means NBIM's mandate from the Ministry of Finance would need to be amended. The Council on Ethics could have a final say in the straightforward exclusion cases and in problematic cases, a recommendation to the Ministry of Finance could be either accepted or turned down within a deadline of six months by the Ministry, without second-guessing the Council on Ethics' thorough analysis.¹²⁶ In recent cases, the Ministry has used more than a year to decide whether to accept some of the Council on Ethics' recommendations, often leading to the information used in the Council's investigation being outdated as was also stated in the Strategy Council's report.¹²⁷

The Strategy Council has stated that with the current structure there are “risks of litigation from companies and other shareholders.”¹²⁸ However, this has not happened to date for the simple reason that “whether or not to invest in a company is a matter of free choice”, as the Graver Committee expressed it in its report in

122. See Magnus Borgen, *Fraråder å la oljefondets Etikkråd bli en del av Norges Bank* [Advise Against Letting the Oil Fund Council on Ethic Become a Part of Norges Bank], BELLONA (Nov. 12, 2013), <http://bellona.no/nyheter/klima/2013-11-frarader-la-oljefondets-etikkrad-bli-en-del-av-norges-bank> (last visited July 20, 2014).

123. Backer, *supra* note 6, at 24.

124. *Id.* at 50.

125. See SHAMMAS, *supra* note 7, at 9.

126. Kristoffer Rønneberg, *For trege med etikk-beslutninger* [Too Slow with the Ethics Decisions], AFTENPOSTEN (Mar. 16, 2012), <http://www.aftenposten.no/oljefondet/For-trege-med-etikk-beslutninger-6785594.html#.UhmK3RbvzJ> (citing Ola Mestad the head of the Council on Ethics); see HASLIE REPORT, *supra* note 117, at 16-17.

127. DIMSON ET AL., *supra* note 8, at 23.

128. *Id.*

2003.¹²⁹ There is no public hearing or appeals process regarding an exclusion decision because it is not a legal process. It is an investor making a decision to sell because it is not happy with its investment. That happens all the time in the market place for whatever reason—it is a matter of “free choice.”¹³⁰ Yet, the Council on Ethics does give the companies a chance to respond to the allegation of potential unethical behavior.¹³¹ In addition, all exclusions are reviewed annually to determine if any of the excluded companies can return to the GPF’s portfolio and there is a move towards engaging more with companies rather than excluding them. However, this system only works if there is a ‘stick’ in the background to keep everyone focused on the consequences for not cooperating. If the Ethics Guidelines were to become *legal* requirements, then the Council on Ethics, which is not a legal tribunal, would have to adopt a standard litigation process, including due process rules, to avoid undermining the legitimacy of the Fund in global markets.¹³²

The exercising of ownership rights is growing in popularity among investors. Employing environmental-related investment mandates is also growing in use. Yet, sixty percent of companies still do not consider ESG issues important.¹³³ The standard dilemma is weighing the financial returns against the ethical expectations, which the Strategy Council has deftly expounded upon in its report.¹³⁴ Yet, the Norwegian people through their Parliament agreed to focus on ethics when they established the Ethics Guidelines. That was a political decision. The investment managers do not have the authority to make decisions on ethics, they have the expertise when it comes to analyzing the risks involved, but they cannot decide which risks are the right ones to take.¹³⁵ NBIM’s department dealing with active ownership policy has the mandate to weigh the Ethics Guidelines up against the financial interests, while the Council on Ethics focuses only on the ethics. Obviously, this department, being quite small and definitely not the main focus of the NBIM is going to have a challenge in fulfilling its mandate. Support and guidance from the Council on Ethics could strengthen their position.

Many observers have suggested expanding the focus areas for NBIM in its active ownership and divestment policies to coincide more with the OECD Guidelines for Multinational Enterprises.¹³⁶ Some argue that investor expectations

129. *Graver Committee Report*, *supra* note 15, § 2.2.

130. *Id.*

131. ANNUAL REPORT 2011, *supra* note 75, at 9.

132. SIMON CHESTERMAN, ALBRIGHT GROUP LLC, ASSESSMENT OF IMPLEMENTATION OF ARTICLES 3 AND 4 OF THE ETHICAL GUIDELINES FOR THE GOVERNMENT PENSION FUND-GLOBAL 27-28 (2008), *available at* http://www.regjeringen.no/upload/FIN/Vedlegg/aff/Albright_Group_Ethical_Guidelines.pdf.

133. Towner, *supra* note 3, at 40.

134. DIMSON ET AL., *supra* note 8, at 5.

135. Martin Skancke, *Ny strategi bør legges på is* [New Strategy Should be Left on Ice], DAGENS NÆRINGSLIV, Nov. 13, 2013, at 3.

136. See OECD GUIDELINES ON MULTINATIONALS, *supra* note 54, at 13-16.

should include human rights in general, not just children's rights.¹³⁷ Other environment and social issues should also be given their own investor expectations. The current investor expectations, which include children's rights, climate change, and water management, are quite disparate issues, seemingly random. One could base the investor expectations on, for instance, gradually introducing the major areas addressed in the OECD Guidelines for Multinational Enterprises, prioritizing companies for assessment when they present a significant risk of actual or potential adverse environmental or social impacts.¹³⁸ Increased transparency by stipulating which criteria are used to choose which issues are to be included in the investor expectations, as the Strategy Council has suggested, and making them available to the public would likely add to the legitimacy of NBIM and allow the owners of the GPF, the Norwegian people, to better hold it to account.¹³⁹

Suggestions have also been made for NBIM to publish information regarding its dialogues with companies following up on its active ownership.¹⁴⁰ The list of top scorers on compliance reporting with regard to investor expectations on children's rights, climate change and water management is all very well, but does not encourage accountability by measuring how effective these mechanisms are.¹⁴¹ Compare this to the Council on Ethics that publishes all its recommendations on exclusions made to the Ministry of Finance, which our empirical analysis has shown to be effective.¹⁴²

Rather than integrating the resources and competence of the Council on Ethics into the *Norges Bank*, the Council on Ethics should become more autonomous and NBIM itself should beef up its active ownership and be accountable to the Council on Ethics for its work in that area. As long as the Council on Ethics and NBIM cooperate, then there is less chance of overlap. What is needed is more funding in the ethics area. The cost of the work of the Council on Ethics and NBIM on active ownership is a very small fraction of what is used by the investment managers (internal and external managers). These managers should also become more sensitive to ESG issues in their investment practices. Currently, positive screening (environmental investments) amounts to a very small fraction of the value of the GPF portfolio;¹⁴³ it needs to be substantially increased

137. Interview with Hans Petter Graver, University of Oslo, Norway (Aug. 20, 2013).

138. See POSCO CASE, *supra* note 11, at 47.

139. DIMSON ET AL., *supra* note 8, at 27.

140. See HASLIE REPORT, *supra* note 117, at 22; SHAMMAS, *supra* note 7, at 11 for an explanation of how the Swedish national pension fund, AP, enters into dialogue with the companies it invests in.

141. HASLIE REPORT, *supra* note 117, at 19.

142. See Gunnell E. Sandanger & Arild Hermstad, *Slik blir oljefondet best i klassen [That's How the Oil Fund Becomes Best-in-Class]*, ENERGI OG KLIMA (Nov. 14, 2013), <http://energiogklima.no/kommentar-analyse/slik-blir-oljefondet-best-i-klassen>.

143. It was projected that only NOK 20 billion (less than 1% of the value of GPF's portfolio) would be invested between 2010 and 2015. GPF REPORT NO. 20, *supra* note 18, at 27; see also BENJAMIN J. RICHARDSON, SOVEREIGN WEALTH FUNDS AND THE QUEST FOR SUSTAINABILITY: INSIGHTS FROM NORWAY AND NEW ZEALAND, NORDIC J. OF COM. L., no. 2, 2011, at 1, 24-25.

and over time will show much bigger returns as the market receives the signals that the green economy is our only choice for the future. If Norway is serious about promoting sustainable development, then it has to bear that short-term cost. However, as a universal investor, this short-term cost is not as great as the long-term cost of renegeing on responsible investment since that is more likely to have a material effect on portfolio risk and performance.¹⁴⁴

Finally, a much debated theme is divesting from fossil fuel investments entirely (or at least coal and oil sands). The GPF, the entity that was supposed to leverage against shifts in oil prices to safeguard the stability of the mainland economy, is now giving up that function, since according to the HSBC report, oil stocks will go down in value due to action taken to address climate change.¹⁴⁵ Furthermore, if the long-term perspective on sustainable development is taken, it is clear that the goal of staying below the two degree Celsius increase in temperature will not be reached if most of the fossil fuels are not left in the ground. This, of course, reflects the oxymoronic situation that the income of the GPF is based on the exploitation of oil and gas. Just as other SWFs accumulate income from other natural resources, Norway should aim to gradually shift from oil and gas to renewable energy. A first step would be amend the Ethics Guidelines to add exploitation of coal and oil sands to the list of products excluded from the GPF portfolio as has been suggested from several quarters.¹⁴⁶

VI. CONCLUSION

The Albright Group and Simon Chesterman, who were hired by the Norwegian Ministry of Finance to evaluate the Ethics Guidelines of the GPF in 2008, stated that “[t]he work done by NBIM and the Council [on Ethics] has established Norway as a leader on ethical issues in the global economy, in particular through NBIM’s work on child labour and the Council’s practice of publishing thorough opinions.”¹⁴⁷ Our analysis corroborates the opinion of the Albright Group; we show that the Council on Ethics is highly effective in certain cases at motivating changes in corporate behavior in ways that put the companies in the GPF’s investment portfolio on a path to sustainability. Though we agree with the Strategy Council’s report of 2013 that coherence and transparency in the context of the GPF are important, we strongly disagree with its recommendation of integrating the Council on Ethics’ function into NBIM.

144. See definition of universal investor *supra* note 36.

145. Will Nichols, *HSBC: BP, Shell, Statoil at Risk From ‘Unburnable’ Reserves*, GREENBIZ.COM (Jan. 29, 2003), <http://www.greenbiz.com/news/2013/01/30/bp-shell-statoil-risk-unburnable-reserves>.

146. CATHRINE HAMBRO & NORWEGIAN CLIMATE FOUND., ER OLJEFONDETS TJÆRESANDINVESTERINGER ULOVLIGE? [ARE THE OIL FUND’S TAR SAND INVESTMENTS ILLEGAL?] 12-13 (2013), available at <http://klimastiftelsen.no/wp-content/uploads/2013/08/Oljefondet-tjaeresand-rapport-NK2-2013.pdf>.

147. CHESTERMAN, *supra* note 132, at 3.

Strengthening responsible investment by giving more autonomy to the Council on Ethics, and beefing up the transparency of NBIM and expanding its focus areas to correspond more closely with the OECD Guidelines for Multinational Enterprises, will place the Norwegian SWF in a position to be an even better model of a responsible investor. This, in turn, should encourage corporations to take ESG issues into account in their activities.

KEYNOTE: THE RIGHTS OF THE UNDERCLASS IN 2015

PETER WEISS*

It gives me great pleasure to be here in the company of two old and dear friends: Ved Nanda, distinguished laborer in the vineyards of international law and my fellow traveler on the road to a nuclear weapons free world, and George Shepherd, who worked with me in the early days of the American Committee on Africa when he returned to teach at the university here after helping to set up rural cooperatives in Uganda. They invited me to give a talk to a non-legal audience at the School of International Studies in 1990. I called it “The Rights of the Underclass”, which accounts for the peculiar title of my paper today. After twenty-three years, it is still relevant.

I don’t suppose there is any doubt that good development needs good law, but, just to reinforce the point, let me quote from what Helen Clark, the current administrator of the United Nations Development Program (“UNDP”), said in a speech she gave a year ago in Kampala at the Assembly of States Parties to the International Criminal Court: “The rule of law underpins the UN’s mission to advance peace, development and human rights and, as such, is central to the mandate of UNDP.”¹

Now if you will permit me, I will begin with a personal note concerning some connections between my background and the theme of this conference. My first full time job was as a translator/investigator on the staff of the Decartelization Branch of the United States Office of Military Government in Berlin in 1946-47. The head of this agency was James Stewart Martin, a brilliant young man – he was thirty-two at the time – whom I had met when he was a professor and I was a student at St. John’s College in Annapolis. Nobody talks about cartels any more, but our job at the time was to break up the German cartels that had financed Hitler’s rise to power. After Jim resigned from his assignment when it had become increasingly difficult to carry out, he wrote a book titled *All Honorable Men*, which dealt with the collaboration between Wall Street and German industry and

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1. Helen Clark, UNDP Administrator, Speech at the 11th Session of the Assembly of States Parties to the International Criminal Court: Human Development and International Justice (Nov. 19, 2012), *available at* <http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/11/19/helen-clark-human-development-and-international-justice/> (referencing her speech at Kampala).

banks during the pre-war period of the Third Reich.² As an example of the phoenix like quality of certain literary works, I can tell you that I recently heard from a professor at a leading university who specializes in the republication of important out-of-print books and who is interested in republishing *All Honorable Men*.

Fast forward, but not too fast. Five years after Berlin, upon graduating from Yale Law School, I received an offer too good to refuse. The President and Dean of St. John's, Stringfellow Barr and Scott Buchanan, had retired from the college after an exhausting and ultimately successful battle with the Naval Academy across the street, which had come up with the quaint notion that most of the space occupied by the college could be better used by the Academy. They created the Foundation for World Government with a one million dollar grant, which was a lot of money in those days, from Anita McCormick Blaine, the International Harvester heiress. It soon became clear to them that, given the huge economic disparity between what were then called developed and underdeveloped countries, talk of world government was baying at the moon. They therefore focused their efforts on ideas and institutions aimed at bridging the gap between rich and poor countries. Barr had written a pamphlet called "Let's Join the Human Race," from which I can remember only one statistic, namely that the annual budget of the United Nations for technical assistance to underdeveloped countries was twenty million dollars, the same as that of New York City's sanitation department.³

One of the creations of the Foundation for World Government was IDPA, for International Development Placement Association, the mission of which was to send young Americans with technical and professional skills to underdeveloped countries to work for local wages. I was asked to run IDPA and I did so for two years, during which we placed a fair number of doctors, engineers, city planners, community development workers and others as employees of local institutions in Asia, Africa, and Latin America. Eventually we had to fold our tents because the two ultraconservative ladies running the Charitable Organizations Section of the Internal Revenue Service decided that, while IDPA was in a real sense, a precursor of the Peace Corps, it was just an employment agency and therefore not entitled to operate on tax exempt foundation funds.

Having established my competence to deal with the subject of today's conference on the basis of two short jobs I had about sixty years ago, let's get serious . . . I have a few short suggestions for Development 2015 at the end of this paper, but in essence I will leave that task to the experts you heard this morning and will hear this afternoon. For now, I will simply state the obvious: the challenge in and after 2015 will be to bring up the rear in accomplishing the eight millennium development goals ("MGDs") on which some progress, but not nearly enough, has been made.

That said, let me turn to what I would like to see as MDG number nine: reining in the power of multinational corporations to do harm to the underclass,

2. JAMES STEWART MARTIN, *ALL HONORABLE MEN* (1950).

3. STRINGFELLOW BARR, *LET'S JOIN THE HUMAN RACE* (1950).

which makes up most of the world's population, or, for that matter, the middle class, where there is one. Let me be clear about this: I do not hate corporations. I worked for quite a few of them, including some pretty big ones, during the part of my legal career devoted to intellectual property. In the course of doing so I met some very nice people. I even felt sorry for some of them, who might have liked doing some pro bono human rights work, but felt strapped into a *modus operandi* which put profit for shareholders above every ethical consideration.

2012 saw the publication of a remarkable legal tome consisting of forty-seven essays by legal scholars recruited by Antonio Cassese, the eminent Italian international law professor who died shortly before the publication of this, his last work.⁴ He contributed the introduction and the conclusion, as well as a number of interior pieces assigned to other authors who failed to meet their deadlines, an occurrence not unusual in circles of academic literature.

What makes the book remarkable is that despite its title, *Realizing Utopia*, and its obvious dedication to ideas about how in the next ten to twenty years the law might be used to bring about a more just and efficient world, one comes away from its pages without much optimism about achieving that objective. Indeed, Cassese himself quotes Aldous Huxley, anno 1925, as saying that utopians "are much too preoccupied with what ought to be to pay any serious attention to what is."⁵

Cassese argues that states are, and will remain for the foreseeable future, the main players in the game of international law. It is not easy to disagree with that proposition when one considers, for instance, how the nuclear weapons states are flouting the unanimous mandate of the International Court of Justice to negotiate in good faith for a nuclear weapons free world, or how states fail to take any serious steps to deal collaboratively with climate change, or how the millennium goal of eliminating poverty is treated by states as a matter of entitlement rather than rights.

But then there is another recent book, this one by Ruti Teitel of New York Law School, felicitously titled *Humanity's Law*, which largely succeeds in demonstrating that over the last half century international law has moved from a state-centric to a person-centric system.⁶ Cassese might even agree with that, since he admits that one of the bright spots in the current development of international law is transnational litigation. i.e. individuals bringing suits in one country based on events which occurred in another. This is happening not only in human rights but also in financial matters. Recently, for instance, JP Morgan settled with the U.S. government for thirteen billion dollars just before it was about to be sued in connection with transactions which occurred in London.⁷

4. REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW (Antonio Cassese ed 2012).

5. *Id.* at xvii (quoting Aldous Huxley).

6. RUTI TEITEL, HUMANITY'S LAW 35-36, 55-56 (2011).

7. Aruna Viswanatha et. al, *JP Morgan Says 'Mea Culpa' in \$13 Billion Settlement With U.S.*, REUTERS (Nov. 19, 2013), <http://www.reuters.com/article/2013/11/19/us-jpmorgan-settlement-idUSBRE9A100A20131119>.

What does all this have to do with development after 2015? Only this: That multinational corporations, which are in many respects more powerful actors on the world scene than even states, are basically unregulated in their activities in the developing world. They are poachers on the terrain of the underclass. Some of their offenses are direct, such as pollution of land and water by Texaco in Ecuador⁸ or pharmaceutical testing violating accepted standards by Pfizer in Nigeria.⁹ Frequently the alleged tort or crime consists of aiding and abetting or actively participating with repressive governments in murdering union officials (Mercedes Benz in Argentina)¹⁰ or making slave labor available by repressive governments to corporations (Unocal in Burma).¹¹

A great deal of anti-corporate transnational litigation has taken place in recent years, with indifferent results. I would like to tell you about one case which illustrates what the victims of corporate behavior in the developing world are up against in their search for justice.

A decision rendered by the Court of Appeals for the Second Circuit in New York in 1980 brought back to life a long neglected law dating back to the first Judiciary Act of the United States adopted by the Congress in 1789.¹² Known as the Alien Tort Claims Act, or Alien Tort Statute (“ATS”), it gave an alien the right to sue in a U.S. court for a tort in violation of the law of nations, as international law was called at that time. It did not say whether the tort had to be committed in the United States, nor whether the defendant had to be a US citizen or could be another alien. The 1980 case, *Filartiga v. Peña-Irala*,¹³ in which I happened to be lead counsel, was brought by the sister of a Paraguayan teenager against a Paraguayan police official then living in the United States, who had tortured her brother to death in Paraguay.¹⁴ It was a shot across the bow aimed at their father, who was a leading opponent of General Stroessner, the long running dictator of Paraguay.¹⁵ The Second Circuit, taking the broad language of ATS literally, held

8. See Juan Forero, *Rain Forest Residents, Texaco Face Off in Ecuador*, NPR (Apr. 30, 2009), <http://www.npr.org/templates/story/story.php?storyId=103233560>.

9. *Pfizer: Nigeria Drug Trial Victims Get Compensation*, BBC NEWS AFRICA (Aug. 11, 2011) <http://www.bbc.co.uk/news/world-africa-14493277>.

10. Lawrence Hurley, *U.S. Top Court Rules for Daimler in Argentina Human Rights Case*, REUTERS (Jan. 14, 2014), <http://www.reuters.com/article/2014/01/14/us-usa-court-rights-idUSBREA0D0YF20140114>.

11. *Doe I v. Unocal Corp.*, 395 F.3d 932, 936-37 (9th Cir. 2002).

12. 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

13. *Filartiga v. Peña-Irala*, 630 F.2d 876, 876 (2d Cir. 1980).

14. *Id.* at 878.

15. *E.g.*, Mark Philip Bradley, *Introduction to HUMAN RIGHTS AND REVOLUTIONS*, at vii, vii (Jeffrey N. Wasserstrom et al, eds., 2007); *Filartiga v. Peña-Irala*, CENTER FOR CONST. RTS., <http://ccrjustice.org/ourcases/past-cases/fil%C3%A1rtiga-v.-pe%C3%B1a-irala> (last visited June 7, 2014) [hereinafter *Filartiga Summary*].

for the plaintiffs—the father, living in Paraguay, was also a plaintiff—awarding them 10.5 million dollars, which has never been collected.¹⁶

The *Filartiga* precedent opened the door to a steady stream of transnational litigation, against both individuals and corporations.¹⁷ It was followed for thirty years in several other circuits. But then, in 2010, came a totally unexpected decision from the Second Circuit, dismissing a corporate ATS case on the highly questionable ground that there is no such thing as corporate liability under international law. The case was *Kiobel v. Royal Dutch Petroleum*.¹⁸ It arose from the company's activities in prospecting for and extracting oil in the Ogoni region of Nigeria, which had triggered a strong protest movement from the local people.¹⁹ The complaint alleged that the company had requested and received the assistance of the Nigerian army and police in quashing the protest movement, which they had accomplished through rape, beating, killings and other gross human rights violations, all of which were aided and abetted by the company.²⁰

On appeal to the Supreme Court, the first hearing went reasonably well, with the U.S. government chiming in in support of the plaintiffs, arguing that if the ATS was good enough for individuals it should be equally good for corporations.²¹ But then, a few days after the hearing, came the second thunderbolt from Olympus, an order from Chief Justice Roberts for rehearing and rebriefing on a questions which neither side had raised in the litigation below, i.e. “Whether and under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”²² As a result, the court was inundated by a new slew of briefs and amicus briefs from governments, chambers of commerce and other business organizations arguing for dismissal, as well as human rights

16. *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984); *Filártiga Summary*, *supra* note 15.

17. For example, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) where, while rejecting the claim at hand, the Supreme Court affirmed an individual's right to bring a claim under the ATS; *Wiwa v. Shell Petroleum Dev. Co. of Nigeria Ltd.*, 355 Fed. Appx. 81 (2d Cir. 2009). This case ended with Shell agreeing to pay the Wiwa family \$15.5 million. *Wiwa et al v. Royal Dutch Petroleum et al*, CENTER FOR CONST. RTS., <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum> (last visited July 30, 2014).

18. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013) (affirmed on different grounds).

Together, those authorities demonstrate that imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*. Because corporate liability is not recognized as a “specific, universal, and obligatory” norm, it is not a rule of customary international law that we may apply under the ATS.

Id. at 145 (citation omitted).

19. *Id.* at 123.

20. *Id.*

21. Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (No. 10-1491).

22. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (memorandum restoring case to calendar for reargument).

organizations and some legal organizations, taking the opposite view. In the event, business won and, disappointingly, by a unanimous decision.²³

The five conservative justices declined to answer the question of corporate liability, which had brought the case to them in the first place.²⁴ Instead, they opted for a presumption against extraterritoriality,²⁵ which sounds to quite a few lawyers like something the cat dragged in. Indeed, it was not endorsed by the four liberal justices, who, in a concurring opinion by Justice Breyer, based their agreement with the result on the lack of a United States national interest in the fact situation of the case.²⁶

What could that national interest have been?

First, the often proclaimed interest of the U.S. government in promoting human rights throughout the world, as evidenced, *inter alia*, by the State Department's annual country by country report on the state of human rights.²⁷

Second, the fact that Shell, a subsidiary of Royal Dutch, carried out extensive operations in the United States and that it was not in the national interest of the U.S. to allow a company belonging to a corporate family that engaged in gross human rights violations to operate in the United States, Justice Breyer's opinion took it for granted that the United States should not be a haven for foreign torturers, but failed to extend that principle to corporations.²⁸

Third, that U.S. companies, which presumably could be enjoined from committing gross human rights violations in foreign countries, should not be deprived of a handy mechanism for leveling the playing field with their foreign competitors.

And fourth, that the *Kiobel* case was wending its way through US courts at a time when the new principle of universal jurisdiction, which holds that certain practices are so heinous that they should be subject to criminal and civil

23. See *Kiobel v. Royal Dutch Petroleum*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum> (last visited July 30, 2014) (listing amicus briefs filed after Mar. 5, 2012 order for rehearing and the unanimous decision on April 17, 2013).

24. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) ("The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign.").

25. *Id.* at 1669 ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.").

26. *Id.* at 1670-71.

Unlike the Court, I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

Id. at 1671 (citation omitted).

27. See *Human Rights Reports*, U.S. DEP'T. OF STATE, <http://www.state.gov/j/drl/rls/hrrpt> (last visited July 30, 2014).

28. *Kiobel*, 133 S. Ct. at 1671 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

prosecution anywhere in the world, was gaining acceptance in a number of foreign countries.²⁹ Thus the *Kiobel* decision, undoing thirty years of transnational litigation under ATS, stands as another example of negative American exceptionalism.

It is, indeed, a giant step backward in American jurisprudence. But all is not lost. Lower courts, many of which regard international law with suspicion if not outright animosity, have lost no time in throwing out pending ATS cases, giving the *Kiobel* decision an absolutist interpretation which can be summarized as “if it happened abroad, fagettaboutit”.³⁰ That interpretation, however, is not justified by a close reading of the decision. Not only the four liberals, but also the Chief Justice and Justice Kennedy, who knows more international law than any of his Supreme colleagues, made clear that, presumption against extraterritoriality or not, the door was not completely closed to ATS cases.³¹ Even more significantly, two of the most conservative justices, Alito and Thomas, but interestingly not Scalia, took their three conservative brethren to task for not having gone far enough in making the presumption an absolute rule.³² Appeals being taken from some of the dismissed ATS cases may provide guidance on how to structure a case that may make it through the ATS’ slightly ajar door.³³

29. See, for example, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14) for a demonstration of Belgium’s universal jurisdiction statute; see also Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, (2001) for a discussion of universal jurisdiction cases from Spain and the United Kingdom. “The court found that the lack of express authorization for universal jurisdiction in the 1948 Genocide Convention did not mean such jurisdiction was barred, as it was consistent with the intent of the drafters.” *Id.* at 313 (citation omitted).

30. See, e.g., Roger Alford, *Lower Courts Narrowly Interpret Kiobel*, OPINIO JURIS, <http://opiniojuris.org/2013/09/23/lower-courts-narrowly-interpret-kiobel> (last visited July 30, 2014).

31. See *Kiobel*, 133 S. Ct. at 1669 (Chief Justice Robert’s majority opinion stating that “[o]n these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application”) (Justice Kennedy, in his concurrence, stating “[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute”).

32. *Id.* at 1169-70.

33. Two courts have already ruled that ATS claims should proceed on fact situations distinguishable from those in *Kiobel*, 133 S. Ct. at 1669. The first concerns a case pending at the U.S. District Court of Massachusetts, *Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304 (Mass. Dist. Ct. 2013), in which plaintiffs allege that defendant, an American pastor, aided and abetted persons in Uganda in persecuting members of the LGBTI community in that country. *Id.* at 310. Defendant’s motion for dismissal based on the *Kiobel* holding on extraterritoriality was denied on August 14, 2013, on the ground that he was an American citizen and that his aiding and abetting was carried out both in Uganda and in the United States from his office in Massachusetts. *Id.* at 335. The second case, *Al Shimari v. CACI Intern., Inc.*, 679 F.3d 205 (4th Cir. 2012), in which the Fourth Circuit, on May 12, 2012, also rejected a *Kiobel* defense. Plaintiffs, former detainees at Abu Ghraib, Iraq, alleged torture and other abuse by defendant corporation and one of its employees. *Id.* at 209. The court distinguished the fact situation from that in *Kiobel* on multiple grounds, including that defendant, a military contractor, was incorporated in Delaware and domiciled in Virginia, that the torturers were also U.S. citizens, and that the contract between CACI and the U.S. Department of Interior was executed in Iowa and administered in Colorado. *Id.* at 227.

A word now about universal jurisdiction. You can think of it as the legal regime to which Antonio Cassese and his contributors aspire, but which they despair of seeing realized in their lifetimes. A regime, if you will, in which legal positivism, in which the law is no more than what lawmakers in each country prescribe, is replaced by a global system based on certain intransgressible fundamental principles. And what is more and relatively new, a regime in which gross violations of fundamental universal norms do, or at least should, give rise to jurisdiction over such violations even if committed in another country. Universal jurisdiction is usually thought of in terms of human rights violations, but it need not be so restricted. *Lex mercatoria*, the merchant law, was used to facilitate trade throughout medieval Europe according to a set of agreed upon principles.³⁴ It survives today, albeit inadequately, under different names through a network of international commercial and financial agreements.³⁵

It is not difficult to imagine how a regime efficiently based on an updated *lex mercatoria* and the Universal Declaration of Human Rights,³⁶ and its many offspring, would make for a more orderly and more just global society, one that would promote development and prevent conflict rather than perpetually busy itself with conflict resolution.

I think I am supposed to make some concrete suggestions about bridging the gap between rich and poor countries after 2015. Here are a few:

1. Stop calling economic and social rights aspirational and start treating them as real. The failure to be free from hunger is just as harmful as the failure to be free from torture, if not more so.
2. Stop calling rights entitlements. A decent standard of living is a right that nobody can take away from you. An entitlement can be taken away by any number of political organs. Like, for instance, the Tea Party.
3. The Tobin tax, 0.01 percent on financial transactions, could, according to some calculations, wipe out the deficit. Does anybody seriously believe it would stop the financial markets from functioning?
4. Since corporations of a certain size are such powerful actors on the world scene, should they be internationally incorporated and internationally regulated?

34. Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 658 (1999).

35. See, e.g., INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACT, Art. 1.6 (2010). "These Principles set forth general rules for international commercial contracts. . . . They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like." *Id.* pmbl. StSU, THE PRINCIPLES OF EUROPEAN CONTRACT LAW 2002, PART I, II, AND III, art. 1:101 ("These Principles are intended to be applied as general rules of contract law in the European Communities. . . . These Principles may be applied when the parties . . . have agreed that their contract is to be governed by 'general principles of law,' the '*lex mercatoria*' or the like.")

36. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

5. I am not a great fan of the prison system as currently administered, but until somebody invents a more humane and restorative form of punishment, isn't it time that financial crooks other than inside traders and Ponzi schemers go to jail? After all, even thirteen billion is only money, particularly if it comes out of corporate funds rather than personal ones.
6. Now that those two ladies are no longer running the charity section of the Internal Revenue Service, let's bring back IDPA and send idealistic and competent technicians and professionals to work as employees of local agencies at local wages in developing countries.
7. Last, but no way least, let us devise a more efficient system for insuring corporate accountability. Corporations should be free to devote their full energy to providing the world's people with goods and services, without becoming bogged down in corruption and human rights violations.

I am jumping around quite a bit here, so let me end with this: I have a friend who likes to needle me by saying "law is the dead hand of the past laid upon the present." To which I usually reply "law is the burning vision of the future leading us onward." Of course we are both wrong. But I still prefer my version.

CAN THE CHINESE BIOGAS EXPERIENCE SHED LIGHT ON THE FUTURE OF SUSTAINABLE ENERGY DEVELOPMENT?

JASON B. AAMODT* AND DR. CHEN WENQIN**

“What we have to be is what we are.”

– Thomas Merton

I. INTRODUCTION

In China, a *low-tech* biogas revolution is providing modern energy services to nearly forty million rural households—120,000,000 people—that otherwise would be mired in energy poverty.¹ Indeed, by the end of 2010, biogas supplied 22.5% of China’s rural population with some part of their energy needs.²

While China is today well-known for *high-tech* industrial exports, perhaps one of the Nation’s most significant—and underappreciated—achievements is the wide-scale development of *low-tech* household biogas to solve rural energy needs. Many other developing countries promote the use of biogas to help resolve energy poverty. However, China’s success with biogas in energy poor rural areas is unique.

This raises two key questions: Why is China’s biogas program successful? Can the factors for China’s biogas success also be exported? The need for answers to these questions is increasingly important. There are approximately 2.6 billion people—mostly women and children—who cook with three-stone fires and other devices that cause them to inhale soot and dangerous fumes. More than two million of those same women and children die *each year* from exposure to soot and fumes. China’s biogas projects resolve exactly that problem for nearly one-quarter of all rural Chinese families. The mix of ingredients that makes China’s biogas program successful might hold a key to energy justice for the “Other Third.”³

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1. Wei Qu, Qin Tu & Bettina Bluemling, *Which Factors are Effective for Farmer’s Biogas Use? – Evidence from a Large Scale Survey in China*, 63 ENERGY POL’Y 26, 30 (2013) [hereinafter “*Biogas Survey*”] (indicating at Table 3 that rural homes in China average three residents).

2. Jorrit Gosens, et al., *Sustainability Effects of Household-scale Biogas in Rural China*, 54 ENERGY POL’Y 273, 274 (2013).

3. See, e.g., Lakshman Guruswamy, *Energy Poverty*, 36 ENV. & RES. 139 (2011); Lakshman Guruswamy, *Energy Justice and Sustainable Development*, 21 COLO. J. INT’L ENVTL. L. & POL’Y 231

A great deal has been written recently about China's energy policy⁴ and its biogas program.⁵ These various books and articles, for instance, explore the history of biogas, its regional distribution, and the social acceptance of biogas. At the same time, there have been significant attempts to distill the laws and policies that might be useful in addressing energy poverty. However, none of the prior literature attempts, as this article does, to identify the policies that led to China's success, nor do prior articles seek to identify the policies most amenable to successful repetition elsewhere.

This article seeks, therefore, to contribute to the energy poverty discussion by separating out the important factors that led to China's biogas success, while also attempting to outline Chinese policies that might be of most use in other parts of the world. The first and introductory part of this article identifies what biogas is, how it is created, what it can be used to do, and also discusses some of its environmental and social benefits and drawbacks. Part II sketches out the energy dynamic in China and compares the figures in China to the worldwide situation using the most recently available data. Part III sketches the question of energy poverty, providing a simple fact-based analysis of the energy poverty felt keenly by approximately one-third of humanity. Part IV analyzes Chinese law and policy

(2010). The term the "Other Third" is a reference to the fact that about one-third of the world's population lacks access to energy resources. *See id.* For a fuller description of the issue of energy justice generally, *see* Part III, *infra*.

4. *See, e.g.*, Fangy Li, Zhouying Song & Weidong Liu, *China's Energy Consumption Under the Global Economic Crisis: Decomposition and Sectoral Analysis*, 64 ENERGY POL'Y 193 (2014); Bao-Jie He, Li Yang, & Miao Ye, *Building energy efficiency in China rural areas: Situation, drawbacks, challenges, corresponding measures and policies*, 11 SUSTAINABLE CITIES & SOC'Y 7 (2014); CHINA'S SEARCH FOR ENERGY SECURITY: DOMESTIC SOURCES AND INTERNATIONAL IMPLICATIONS (Suisheng Zhao ed., 2013); PHILIP ANDREWS-SPEED, THE GOVERNANCE OF ENERGY IN CHINA: TRANSITION TO A LOW-CARBON ECONOMY (2012); CHINA'S ENERGY EFFICIENCY AND CARBON EMISSIONS OUTLOOK (Bruno Skaali & Tomas Knezevic eds., 2012); ENERGY CONSUMPTION IN CHINA: OUTLOOK AND DEMAND SCENARIOS (Brian A. Childers & Margret C. Downing eds., 2012); PHILIP ANDREWS-SPEED, ENERGY POLICY AND REGULATION IN THE PEOPLE'S REPUBLIC OF CHINA (2003).

5. *See, e.g.*, Wei Qu, Qin Tu & Bettina Bluemling, *Which Factors are Effective for Farmer's Biogas Use? – Evidence from a Large Scale Survey in China*, 63 ENERGY POL'Y 26, 30 (2013); Gosens, et al., *supra* note 2; Bettina Bluemling, Arthur P.J. Mol & Qin Tu, *The Social Organization of Agricultural Biogas Production and Use*, 63 ENERGY POL'Y 10 (2013); Ling Chen, Lixin Zhao, Changshan Ren & Fei Wang, *The Progress and Prospects of Rural Biogas Production in China*, 51 ENERGY POL'Y 58 (2012); David Fridley, Nina Zheng & Nathaniel Aden, *What Can China Do? China's Best Alternative Outcome for Energy Efficiency and CO₂ Emissions*, in CHINA'S ENERGY EFFICIENCY & CARBON EMISSIONS OUTLOOK 80 (Bruno Skaali & Tomas Knezevic eds., 2012); Wang Yichao, *Analysis on the Development History of and Research on China's Biogas*. 3 AGRIC. ARCHAEOLOGY 266(2012); Wang Fei, Cai Yaqing, Qiuhuanguang, *Current Status, Incentives and Constraints for Future Development of Biogas Industry in China*, 28 TRANSACTIONS OF THE CSAE 184 (2012); Li Jingming, Xue Mei, *Review and Prospect on Biogas Development in China*. 28 RENEWABLE ENERGY RESOURCES 1 (2010); Yu Chen, et al., *Household Biogas Use in Rural China: A Study of Opportunities and Constraints*, 14 RENEWABLE & SUSTAINABLE ENERGY REV. 545 (2010); Huang Liming, *Financing Rural Renewable Energy: A Comparison Between China and India*, 13 RENEWABLE & SUSTAINABLE ENERGY REV. 1096 (2009); Lin Gan & Juan Yu, *Bioenergy Transition in Rural China: Policy Options and Co-benefits*, 36 ENERGY POL'Y 531 (2008).

regarding biogas focusing on governmental action, subsidies, extension networks, marketing and advertising, market forces, educational factors, climatic factors, and foreign investment. Finally, Part V attempts to extract potentially useful policy prescriptions from the Chinese biogas experience. A brief conclusion brings this article to a close. In summary, and as set forth herein, our research indicates that China's biogas program is a model for action that might be useful as other nations seek to overcome energy poverty.

II. THE POTENTIAL OF BIOGAS

A biogas digester takes wastes from the fields and rural communities, like straw, rice or corn husks, vegetable waste, animal waste, and human waste, and it decomposes it in a controlled way that creates a substance very like natural gas, but it is called biogas.⁶ One or two cows, six to eight pigs, or four adult humans can supply adequate daily feedstock for a single-household biodigester.⁷ The device is called a "digester" because it is designed to create a favorable environment for "anaerobic" bacteria, which will "eat" the waste, giving off methane as byproduct of *their* digestive process.⁸ Anaerobic means "in the absence of oxygen." In fact, the bacteria, which do the digesting, are very similar to many of the bacteria existing inside the guts of mammals.⁹ The biogas digester is designed to facilitate the growth of these anaerobic bacteria, because without them no biogas is created.

A biogas digester is a relatively simple device. It has no moving parts, and it requires no input of energy—short of the waste feedstock—to operate.¹⁰ As a result, biogas digesters are relatively inexpensive, and their construction is well-known.¹¹ The following is a diagram showing a typical rural biogas digester:

6. Christopher Higman & Maarten van der Burgt, GASIFICATION 83-84 (2d ed. 2008) ; Elizabeth Price & Paul Chermisonoff, BIOGAS PRODUCTION AND UTILIZATION 55-86 (1981) [hereinafter *Biogas Production*].

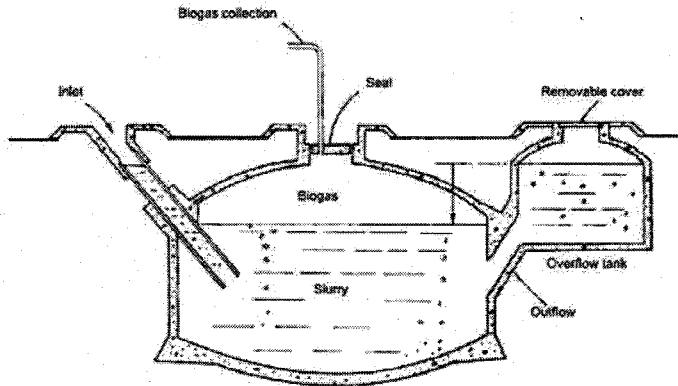
7. Valerie Brown, *BIOGAS: A Bright Idea for Africa*, 114 ENVIRON HEALTH PERSPECTIVES 300, 301 (2006) [hereinafter *Bright Idea*].

8. See *Biogas Production*, *supra* note 6, at 87-117.

9. *Id.*

10. *Id.*

11. *Id.*



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Because a biogas digester is designed to grow living organisms, its operation and maintenance can be dynamic and complicated. Temperature is important.¹³ Likewise, the mix of waste, bacteria, and water will substantially affect the efficiency and results obtained by the digester.¹⁴

Just like natural gas, biogas can be used to cook, heat homes, light rooms, power cars and other machines, and generate electricity.¹⁵ Leftovers from biogas can be a high quality fertilizer which may be valuable in a rural setting.¹⁶ Because biogas is produced from agricultural wastes that otherwise are discarded, harnessing biogas can not only reduce water and air pollution, but the energy source is also inherently “renewable.” Moreover, biogas digesters treat pathogens, reducing suffering from infectious diseases.¹⁷

Biogas can have significant environmental benefits. In Nepal, biogas plants serving 1.25 million people reduced black carbon and eliminated 630,000 tons of

12. Li Kangmin & Mae-Wan Ho, *Biogas China*, INST. SCI. IN SOCIETY (Feb. 10, 2006), www.i-sis.org.uk/BiogasChina.php; see also Regina Gregory, *China—Biogas*, ECOTIPPING POINTS PROJECT (Nov. 2010), <http://www.ecotippingpoints.org/our-stories/indepth/china-biogas.html>.

13. *Id.* at 87-88.

14. *Id.*

15. See *Biogas*, ASHDEN, <http://www.ashden.org/biogas> (last visited Aug. 5, 2014). Solar technologies also have a significant contribution to make as ASETs for lighting. See, e.g., Firdaus Kharas, *2012's Best Solar Lights In the Developing World*, SOLAR CAMPAIGN (Nov. 15, 2012), <http://www.solarcampaign.org/2012s-best-solar-lights-in-the-developing-world/>.

16. See, for example, BENJAMIN SOVACOO & IRA MARTINA DRUPADY, ENERGY ACCESS, POVERTY, AND DEVELOPMENT: THE GOVERNANCE OF SMALL-SCALE RENEWABLE ENERGY IN DEVELOPING ASIA 71 (2012), noting in relation to biogas development in Bangladesh that “[o]ne interesting offshoot from the biogas program has been the production of high quality organic fertilizer, made as a byproduct from . . . biogas plant[s].”

17. See *Bright Idea*, *supra* note 7 at 302 (“Properly designed and used, a biogas digester mitigates a wide spectrum of environmental undesirables: it improves sanitation; it reduces greenhouse gas emissions; it reduces demand for wood and charcoal for cooking, and therefore helps preserve forested areas and natural vegetation; and it provides a high-quality organic fertilizer.”).

carbon dioxide emissions.¹⁸ Moreover, 420,000 tons of fuel wood was not cut down, improving water quality in watersheds dependent upon a living forest.¹⁹ And, using biogas can eliminate methane would otherwise be created. Because methane is a greenhouse gas twenty times more powerful than carbon dioxide, burning the methane in biogas to make heat, light, or to cook actually reduces the climate change potential of development.²⁰

On the other hand, biogas has its drawbacks. It concentrates nutrients, which when not disposed of properly cause land-based water pollution.²¹ Concentrated pollutants can have more profound impacts on natural water systems.²² The biogas itself is explosive. And, since biogas can displace air, digesters need to be placed in well-ventilated areas to prevent asphyxiation.²³ When not properly managed, or when distribution systems are substandard, it can cause fires, damaging property, injuring, or killing.²⁴ It is, therefore, imperative that biogas development be accompanied with a management plan that adequately addresses these concerns so that the drawbacks do not overpower the benefits. As we will see, China's biogas system is successful in part because its government is attempting to comprehensively address these management issues.

III. SOURCES OF ENERGY

China is a vibrant country, especially when viewed through the lens of development and energy. China is the world's most populous country; it is geographically enormous, and it is diverse in every sense. In broad terms, China is the largest consumer of energy in the world.²⁵ China's energy use has grown at a

18. See *Biogas Sector Partnership, Nepal: Domestic Biogas*, ASHDEN, <http://www.ashden.org/winners/bsp> (last visited Aug. 5, 2014).

19. See *id.* ("One user's feedback was very simple 'I would never' she said, 'have contemplated marrying a man whose home didn't have a biogas plant.'")

20. Biogas is already a significant energy source in the United States. See *Landfill Methane Outreach Project*, EPA, <http://www.epa.gov/lmop> (last updated July 7, 2014).

21. J.B. Holm-Nielsen, T. Al Seadi & P. Oleskowicz-Popiel, *The future of anaerobic digestion and biogas utilization*, 100 *BIORESOURCE TECH.* 5478, 5478 (2009).

22. See, for example, Jessica Leet, et al., *Assessing Impacts of Land-Applied Manure from Concentrated Animal Feeding Operations on Fish Populations and Communities*, 46 *ENVTL. SCI. & TECH.* 13440 (2012) for a discussion on the impacts, for instance of concentrated animal feeding operation waste on minnows. While the article does not address biogasification, wastes from concentrated animal feeding operations are often used as feed stocks for biogas units. Therefore, the impact of these wastes on the environment, particularly after concentration by bio gasification, is a relevant drawback.

23. *Beginners Guide to Biogas*, U. ADELAIDE, <http://www.adelaide.edu.au/biogas/safety/> (last updated May 8, 2014).

24. See, e.g., GERMAN AGRICULTURAL OCCUPATIONAL HEALTH & SAFETY AGENCY, *SAFETY RULES FOR BIOGAS SYSTEMS* (2008), available at http://www.biogaspro.com/assets/3rd_party/safety-rules-for-biogas-systems-2008.pdf.

25. INTERNATIONAL ENERGY AGENCY [IEA], 2013 KEY WORLD ENERGY STATISTICS 46 (2013) [hereinafter IEA KEY STATS], available at <http://www.iea.org/publications/freepublications/publication/KeyWorld2013.pdf>. IEA's report uses 2011 data. China is reported in 2011 to have a Total Primary Energy Supply ("TPES") of 2,728 Million

stunning rate. For example, the International Energy Agency reports that in 1973 China accounted for 7% of the entire world's Total Primary Energy Supply ("TPES").²⁶ The IEA's most recent data shows that in 2011 China accounted for 20.9% of the world's TPES.²⁷ In that same time the world's TPES doubled, from about 6,000 Million Tons Oil Equivalent ("Mtoe") to 12,000 Mtoe.²⁸ Since the overall world energy supply itself doubled in the same time frame that China's fraction increased by three-times,²⁹ China's actual energy supply increased six-fold – all in just less than forty years.

China's growth is expected to continue.³⁰ Today, China's energy use per person is much lower, for instance, than the United States'.³¹ Specifically, in 2011, China's use of energy, expressed commonly in the literature as "Tons of Oil Equivalent" ("Toe") per person – the amount of energy used per person – was 2.03.³² In just the four years since China exceeded the United States as the largest emitter of Carbon Dioxide,³³ China's Toe per person increased by more than 0.5 Toe per person, from 1.48 Toe per person.³⁴ When GDP increases, it has been observed that the Toe per person rate increases as well.³⁵ Comparatively, in 2011, the United States' Toe per person was 7.02.³⁶ Accordingly, as GDP increases in China, rates of energy consumption would appear primed for growth, as well.³⁷

In China, the dominant source of energy is coal/peat—at 68% of the supply.³⁸ However, biofuels and waste are the third largest supply of energy (7.9%), behind oil (16.2%).³⁹ Indeed, biofuels and waste supply more energy in China than natural gas, nuclear, hydro, geothermal, solar, and wind—*combined*.⁴⁰ The following chart from the International Energy Agency ("IEA") illustrates China's energy supply in 2011:

Tons Oil Equivalent (Mtoe). *Id.* The United States, which previously led the world in energy consumption, is second, with a TPES in 2011 of 2,191 Mtoe. *Id.* For the most up to date statistics see *Statistics Search*, INT'L ENERGY AGENCY, <http://www.iea.org/statistics/statisticssearch/> (last visited Aug. 5, 2014) where the IEA's available data for any country can be accessed easily.

26. See IEA KEY STATS, *supra* note 25, at 8.

27. *Id.*

28. *Id.*

29. *Id.*

30. DAVID G. FRIDLEY, NINA ZHENG & NATHANIEL T. ADEN, WHAT CAN CHINA DO? CHINA'S BEST ALTERNATIVE OUTCOME FOR ENERGY EFFICIENCY AND CO₂ EMISSIONS 80 (2012).

31. IEA KEY STATS, *supra* note 25, at 57 (the United States' Toe/ per person was 7.02 in 2011—more than 3-times China's per person use of electricity).

32. *Id.* at 49.

33. *China overtakes U.S. in greenhouse gas emissions*, N.Y. TIMES, June 20, 2007, http://www.nytimes.com/2007/06/20/business/worldbusiness/20iht-emit.1.6227564.html?_r=0.

34. FRIDLEY, *supra* note 30, at 80.

35. *Id.*

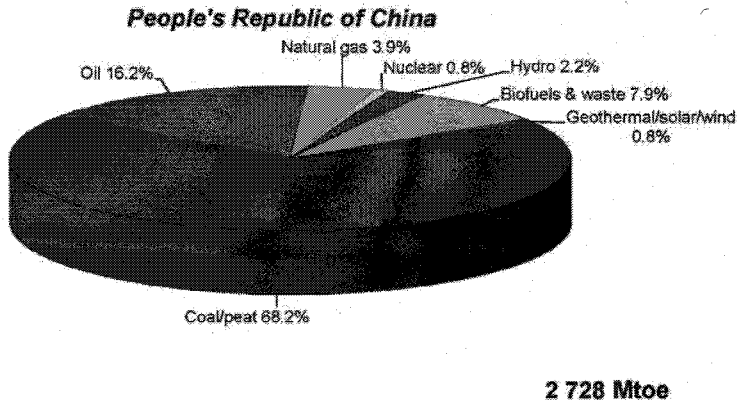
36. IEA KEY STATS, *supra* note 25, at 57.

37. FRIDLEY, *supra* note 30, at 80.

38. See *Share of total primary energy supply in 2011: People's Republic of China*, IEA ENERGY STAT., <http://www.iea.org/stats/WebGraphs/CHINA4.pdf> (last visited Feb. 2, 2014).

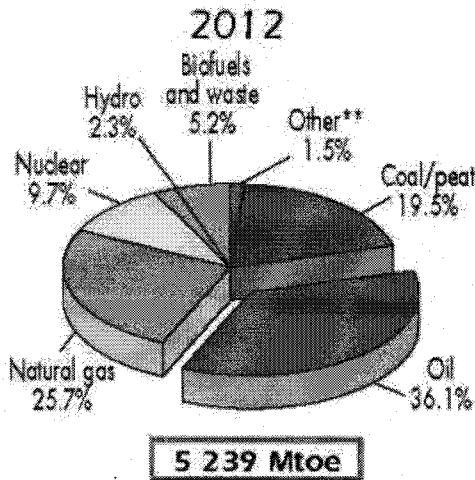
39. *Id.*

40. *Id.*



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China's energy mix is different from the worldwide experience. The IEA reports that in 2012, oil was the world's largest source of energy (36.1%), while biofuels and waste were fifth most abundant (5.2%), behind natural gas (25.7%), coal/peat (19.5%) and nuclear (9.7%).⁴² On a worldwide scale, biofuels (which include biogas and other fuels) continued to be an important source of energy, exceeding the input of hydro, geothermal, solar and wind, combined.⁴³ However, they do not have the same importance worldwide that biogas has in China. The following chart from the IEA illustrates the world's fuel supply in 2012:



41. *Id.*

42. See IEA KEY STATS, *supra* note 25, at 7.

43. *Id.*

IV. ENERGY POVERTY

The question of the sources of energy invariably leads to the inequitable fact that less than 17% of the world's population consumes 80% of the world's resources.⁴⁵ The inverse of that equation leaves about one-third of the world—the “Other Third”⁴⁶—without access to energy resources that are essentially taken for granted in the modern world. What this means is that approximately 2.6 billion people⁴⁷ have little or no access to beneficial energy services for cooking, heating, water sanitation, drinking water, illumination, transportation, or basic mechanical needs.⁴⁸ Approximately 1.3 billion people lack access to electricity.⁴⁹ This lack of access to energy services now bears the name “energy poverty,”⁵⁰ and the phenomena contributes to a feedback loop of ill health, economic hardship, and reduced educational opportunities, particularly for women and for children.⁵¹

In China, the IEA reports that there is near universal access to electricity.⁵² The IEA's definition of “energy access” as applied to electricity is “a first electrical supply connection, with a minimum level of consumption (250 kilowatt-hours [kWh] per year for a rural household . . .)”⁵³ This equates to enough electricity to light perhaps two 60-watt light bulbs for slightly less than six hours per day. Putting aside the question of the quality of electricity access in China (or elsewhere in the developing world), the IEA reports that a full one-third of China's population—446 million people—rely on biomass for cooking.⁵⁴

Therefore, China is home to nearly one-quarter of all the people worldwide that lack access to modern energy services. Most of these people are in rural parts

44. *Id.*

45. See *Social & Economic Injustice*, WORLD CENTRIC, <http://worldcentric.org/conscious-living/social-and-economic-injustice> (last visited Aug. 5, 2014).

46. See *The Other Third*, U. COLO. BOULDER, <http://www.colorado.edu/theotherthird/> (last visited Aug. 5, 2014).

47. The approximately 2.6 billion people are predominantly located in Africa, Asia, and South America. See IEA, *WORLD ENERGY OUTLOOK 2013*, at 89, tbl.2.3 (2013).

48. Lakshman Guruswamy, *Energy Justice and Sustainable Development*, 21 *COLO. J. INT'L ENVTL. L. & POL'Y* 231, 231 (2010).

49. See IEA, *supra* note 47, at 88, 89, tbl. 2.3.

50. Patrick Nussbaumer, Morgan Brazilian & Vijay Modi, *Measuring Energy Poverty: Focusing on What Matters*, 16 *RENEWABLE & SUSTAINABLE ENERGY REVS.* 231, 232 (2012).

51. Guruswamy, *supra* note 48, at 240, 244.

52. See IEA, *supra* note 47, at 89, tbl. 2.3.

53. See IEA, *supra* note 47, at 530.

54. See IEA, *supra* note 47, at 89, tbl. 2.3. Given that there is universal electricity access, and that still nearly 1/2 of China's population relies on biomass for cooking, and that about 15% of China's population relies on biogas for heating and cooking energy, it is clear that the minimal energy supplied by electricity is but one part of the equation.

of China.⁵⁵ Indeed, the only country in the world likely to have more people living in energy poverty is India.⁵⁶ It is in the face of these stark and unrelenting facts that we look at China's significant and meaningful efforts in developing the use of biogas.

V. CHINESE BIOGAS LAW AND POLICY

A. *The History of China's Rural Biogas Development*

China has a long history of biogas utilization. In the 1880s, scientists experimented with biogas in Chaomei area of Guangdong province.⁵⁷ By the end of the 19th century, small and simple biogas digesters were demonstrated.⁵⁸ In the 1920s, Luo Guorui from Taiwan invented what was called the "hydraulic pressure biogas pool" and in 1929, he established the first biogas promotion organization—the Guorui Gas Lamp Company.⁵⁹ In 1931, when he moved to Shanghai, Luo Guorui established a new biogas company.⁶⁰ The company grew, eventually extending biogas production into thirteen provinces.⁶¹ China's initial biogas development was one of entrepreneurship.

Since the establishment of new China, the government has highly valued the potential role of biogas.⁶² Chinese biogas developed quickly. However, the development was not steady. There were setbacks, which are discussed below. The development of Chinese biogas in new China can be roughly divided into four stages as set out herein.

B. *Initial Development (from the 1950s to the 1980s)*

In 1958, Chairman Mao Zedong, upon learning that biogas can be used to light lamps and for cooking, and that the byproducts can also be used as fertilizer, undertook efforts to promote and develop biogas.⁶³ A critical mass developed starting around the end of the 1960s to the beginning of the 1970s, when more than

55. Wei Qu, Qin Tu & Bettina Bluemling, *Which Factors are Effective for Farmer's Biogas Use?—Evidence from a Large Scale Survey in China*, 63 ENERGY POL'Y 26, 30 (2013).

56. See IEA, *supra* note 47, at 88, n.19 noting that in 2012 India's total population estimates were increased greatly, increasing the numbers of persons estimated to be living without access to modern energy services.

57. *Analysis on the Development History of and Research on China's Biogas*, *supra* note 5.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Mao Zedong, Deng Xiaoping, Jiang Zemin, and Hu Jintao respectively inspected the rural biogas work in 1958, 1980, 1991, and 2003. All of them gave instructions to develop Chinese rural biogas. In 2002 and 2006, former Premier Wen Jiabao emphasized the development of rural biogas.

63. MINISTRY OF AGRICULTURE OF THE PEOPLE'S REPUBLIC OF CHINA, QUANGUO NONGCUN ZHAOQI FUWU TIXI JIANSHE FANG'AN (SHIXING) (全国农村沼气服务体系建设方案 (试行)) [NATIONAL RURAL BIOGAS SERVICE SYSTEM CONSTRUCTION PROGRAM (TRIAL)] (2007) [hereinafter TRIAL CONSTRUCTION PROGRAM 2007], available at <http://www.fjagri.gov.cn/upload/File/20090626113917.doc>.

six million biogas digesters were built.⁶⁴ However, owing at least in part to unknown technology issues, the design and construction, maintenance and operation of these digesters was not standard.⁶⁵ There were failures with many of the digesters, resulting in only a small percentage of them being used for any substantial period of time.⁶⁶

In 1979, the State Council endorsed the Report of the Ministry of Agriculture on Several Issues in the Contemporary Construction of Biogas in Rural Areas.⁶⁷ The State Council created the National Biogas Construction Leading Group.⁶⁸ As a result, China's biogas underwent another period of rapid development, and the number of households with biogas digesters increased to seven million by the close of the decade.⁶⁹ However, the number abruptly dropped to four million in the beginning of the 1980s owing to the re-adoption of indigenous methods that were found preferable to the management of a biodigester.⁷⁰

C. Adjustment and Technological Improvement (from the mid-1980s to 2000)

In 1988, the Chinese Biogas Association was founded.⁷¹ The Chinese government called upon biogas technicians to cooperate and make breakthroughs in the key biogas technologies.⁷² At the same time, the government created a uniform biogas digester construction policy centered on "suitable local conditions, adhering to quality, paying attention to both construction and management, comprehensive utilization, emphasizing practical results as well as active and steady development."⁷³

From 1984 to 1991, a great deal of effort was dedicated to repairing the previously built, but defectively made or poorly maintained digesters. During that

64. ZHONGGUO ZHAOQI CHANYE FAZHAN LICHENG HUIGU (中国沼气产业发展历程回顾) [FUJIAN PROVINCIAL AGRICULTURAL DEPARTMENT], FUJIAN SHENG NONGYE TING (福建省农业厅) [REVIEW ON THE DEVELOPMENT PROCESS OF CHINA'S BIOGAS INDUSTRY] (2011), available at <http://www.fjagri.gov.cn/html/hypd/stny/ncny/2011/03/01/65475.html>.

65. *Id.*

66. *Id.*

67. Wang Fei, Cai Yaqing, & Qiuhuang (王飞, 蔡亚庆, 仇焕广), *Zhongguo zhaoqi fazhan de xianzhuang, qudong ji zhiyue yinsu fenxi* (中国沼气发展的现状驱动及制约因素分析) [*Incentives and constraints for future development of biogas industry in China*], 28 J. AGRIC. ENGINEERING 184 (2012), available at http://www.tcsae.org/nygcxben/ch/reader/view_abstract.aspx?flag=1&file_no=20120133&journal_id=nygcxb.

68. DENG GUANGLIAN, (邓光联), ZHONGGUO ZHAOQI JIANSHE XIANZHUANG YU FAZHAN DUICE (中国沼气建设现状与发展对策) PRESENT SITUATION OF AND DEVELOPMENT SUGGESTIONS FOR CHINA'S BIOGAS CONSTRUCTION 26 (2007), available at http://wenku.baidu.com/link?url=yvWB5cgQIn7r7qNWZ_wfk-UTjhJy0CFmFK0iAq6tUOAOQxL-aCdGSl8CijUiDuiBeiZhpq5u8eSLqCPPZ4DYtkskcZD2aOoGKGKS8xEEzu.

69. FUJIAN PROVINCIAL AGRICULTURAL DEPARTMENT, *supra* note 64.

70. *Id.*

71. DENG GUANGLIAN, *supra* note 68.

72. FUJIAN PROVINCIAL AGRICULTURAL DEPARTMENT, *supra* note 64.

73. DENG GUANGLIAN, *supra* note 68.

time, about 100,000 household biogas digesters were built every year.⁷⁴ From 1992 to 1998, the benefit of biogas construction became more and more obvious as the result of improvements in the technology that resulted from the policies adopted in the prior decade.⁷⁵ As a result, in the mid-to-late 1990s, the rate of biogas digester construction increased drastically to about 500,000 each year.⁷⁶

In 1997, the Law of the People's Republic of China on Energy Conservation was enacted,⁷⁷ encouraging and supporting the vigorous development of biogas in rural areas. By the end of 2000, there were 9.8 million rural biogas household digesters in China.⁷⁸

D. Rapid Development (from 2001 to 2006)

In 1999, the Ministry of Agriculture began to strongly promote biogas, not just in the southern provinces, but in the northern ones as well.⁷⁹ The Ministry of Agriculture carried out campaigns called variously the "Energy Environmental Protection Project" and "Ecological Homestead Rich Peasants Project," among others.⁸⁰ These positively phrased names appear aimed to promote interest in biogas.⁸¹

Rural biogas development was also strengthened at this time by a number of important central committee policies:

- The Opinions of the CPC Central Committee and State Council on Several Policies to Promote the Increase of Farmers' Income of 2004,⁸²
- The Opinions of the CPC Central Committee and State Council on Several Policies to Further Strengthen Rural Work and Improve Agricultural Comprehensive Production Capacity of 2005,⁸³

74. TU YUNZHANG (屠云璋), ZHONGGUO ZHAOQI FAZHAN XIANZHUANG I (中国沼气发展现状) [PRESENT SITUATION OF CHINA'S BIOGAS DEVELOPMENT] (2012), available at <http://wenku.baidu.com/link?url=hiqsdCATnNaQOKoXUmL-bub0Qzyhu7zrRErw5MXTQJhsBtmofEa5MQHKH42IFbW5UM5KIPiE5GVMfN2pliQlvbjm7ItDvtCQgMhTboUuNbG>.

75. FUJIAN PROVINCIAL AGRICULTURAL DEPARTMENT, *supra* note 64.

76. TU YUNZHANG, *supra* note 74 at 2.

77. See Zhonghua Renmin Gongheguo Jieyao Nengyuan Fa (中华人民共和国节约能源法) [Law of the People's Republic of China on Energy Conservation] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) 2006 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 258 Art. 59.

78. TRIAL CONSTRUCTION PROGRAM 2007, *supra* note 63.

79. FUJIAN PROVINCIAL AGRICULTURAL DEPARTMENT, *supra* note 64.

80. *Review and prospect on biogas development in China*, *supra* note 5.

81. *Id.*

82. THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, ZHONGGONG ZHONGYANG GUOWUYUAN GUANYU CUJIN NONGMIN ZENGJIA SHOURU RUOGAN ZHENGCE DE YIJIAN (中共中央国务院关于促进农民增加收入若干政策的意见) [OPINIONS OF THE CPC CENTRAL COMMITTEE AND STATE COUNCIL ON SEVERAL POLICIES TO PROMOTE THE INCREASE OF FARMERS' INCOME OF 2004] (2003), available at http://www.gov.cn/test/2005-07/04/content_11870.htm.

83. THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, ZHONGGONG ZHONGYANG GUOWUYUAN GUANYU JINYIBU JIAQIANG NONGCUN GONGZUO TIGAO NONGYE ZONGHE

- Circular of the State Council on the Recent Key Work of Constructing Conservation Oriented Society of 2005,⁸⁴ as well as the
- Opinions of the CPC Central Committee and State Council on Promoting the Construction of New Socialist Countryside of 2006.⁸⁵

The Fifth Plenary Sessions of 16th Central Committee of the Communist Party of 2005 required the vigorous expansion of rural biogas and the active development of clean energy suitable in rural conditions.⁸⁶ In the 11th Five-Year Plan Outlines for National Economic and Social Development (2006-2010), rural biogas is listed as one of the key projects of new countryside construction.⁸⁷ In the 12th Five-Year Plan for Renewable Energy Development, biogas is listed as one of the eight key projects in renewable energy development.⁸⁸

At the same time, the government also created mechanisms to fund the development of rural biogas. The Opinions of the CPC Central Committee and the State Council on the Development of Agricultural and Rural Work of 2003,⁸⁹ the Management Measures for Rural Biogas Construction Treasury Bonds Programme (Trial)⁹⁰ as well as the 2006 Implementation Opinions on the Fiscal and Tax Policy

SHENGCHAN NENGLI RUOGAN ZHENGCE DE YIJIAN (中共中央国务院关于进一步加强农村工作提高农业综合生产能力若干政策的意见) [OPINIONS OF THE CPC CENTRAL COMMITTEE AND STATE COUNCIL ON SEVERAL POLICIES TO FURTHER STRENGTHEN RURAL WORK AND IMPROVE AGRICULTURAL COMPREHENSIVE PRODUCTION CAPACITY OF 2005] (2004), available at http://www.gov.cn/test/2006-02/22/content_207406.htm.

84. THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, GUOWUYUAN GUANYU ZUO HAO JIANSHEJIEYUEXING SHEHUI JINQI ZHONGDIAN GONGZUO DE TONGZHI (国务院关于做好建设节约型社会近期重点工作的通知) [CIRCULAR OF THE STATE COUNCIL ON THE RECENT KEY WORK OF CONSTRUCTING CONSERVATION ORIENTED SOCIETY] (2005), available at http://www.gov.cn/zw/gk/2005-09/08/content_30265.htm.

85. THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, ZHONGGONG ZHONGYANG GUOWUYUAN GUANYU TUIJIN SHEHUI ZHUYI XIN NONGCUN JIANSHE DE RUOGAN YIJIAN (中共中央 国务院关于推进 社会主义新农村建设的若干意见) [OPINIONS OF THE CPC CENTRAL COMMITTEE AND STATE COUNCIL ON PROMOTING THE CONSTRUCTION OF NEW SOCIALIST COUNTRYSIDE OF 2006] (2005), available at http://www.gov.cn/gongbao/content/2006/content_254151.htm.

86. *Id.*

87. THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, ZHONGHUA RENMIN GONGHEGUO GUOMIN JINGJI HE SHEHUI FAZHAN DI SHIYI GE WU NIAN GUIHUA GANGYAO (中华人民共和国国民经济和社会发展规划第十一个五年规划纲要) [11TH FIVE-YEAR PLAN FOR RENEWABLE ENERGY DEVELOPMENT] (2006), available at http://www.gov.cn/gongbao/content/2006/content_268766.htm.

88. The Central People's Government of the People's Republic of China, Ke Zaisheng Nengyuan Fazhan Shi'erwu Guihua Quanwen (可再生能源发展十二五规划全文) [12th Five-Year Plan for Renewable Energy Development] (2013), available at http://www.ce.cn/cysc/ny/zcjd/201302/01/t20130201_21331890.shtml.

89. XINJIANG AGRICULTURE, ZHONGGONG ZHONGYANG GUOWUYUAN GUANYU ZUO HAO NONGYE HE NONGCUN GONGZUO DE YIJIAN (中共中央国务院关于做好农业和农村工作的意见) [THE OPINIONS OF THE CPC CENTRAL COMMITTEE AND THE STATE COUNCIL ON THE DEVELOPMENT OF AGRICULTURAL AND RURAL WORK OF 2003] (2003), available at <http://www.xjxmw.gov.cn/zx/snzc/xjwjhb/2003n/09/902259.shtml>.

90. GUOWUYUAN BANGONG TING GUANYU JIAQIANG JICHU SHESHI GONGCHENG ZHILIANG GUANLI DE TONGZHI (国务院办公厅关于加强基础设施工程质量管理的通知) [STATE COUNCIL

to Support the Development of Bio Energy and Bio Chemical Industry⁹¹ clearly strengthened the government's efforts by creating ways to fund biogas for rural farmers, who do not usually have the funds necessary to install biogas facilities.⁹²

Provisions concerning the promotion of rural biogas construction were incorporated into relevant laws. For instance, Article 52 of the Regulations on Conversion of Farmland to Forests provides that local governments at various levels shall, in the light of the actual situation, strengthen the rural biogas construction, as well as small-scale hydropower, solar energy and wind energy to meet the demands for energy by those who convert their farmland to forests.⁹³

Likewise, Article 57 of Agriculture Law of the People's Republic of China contains a number of relevant provisions in relation to the development of agriculture and the rural economy:

- Attention shall be paid to the rational use and protection of the natural resources, such as the land, water, forests, grasslands and wild animals and plants,
- Development shall include the use of renewable and clean sources of energy such as hydro-energy, biogas, solar energy and wind energy,
- Development shall address the ecological aspects of agriculture, and
- Development shall protect and improve the ecological environment.⁹⁴

Article 39 of the Animal Husbandry Law of the People's Republic of China states that Livestock and poultry breeding farms and small-scale breeding villages shall "4) . . . have such facilities as biogas digesters or other harmless treatment

CIRCULAR ON STRENGTHENING INFRASTRUCTURE PROJECT QUALITY MANAGEMENT], NONGCUN ZHAOQI JIANSHE GUOZHAI XIANGMU GUANLI BANFA (SHIXING) (农村沼气建设国债项目管理办法(试行)) [MANAGEMENT MEASURES FOR RURAL BIOGAS CONSTRUCTION TREASURY BONDS PROGRAM (TRIAL)] (2003), available at <http://www.moa.gov.cn/zwl/m/zxfb/201007/P020100702547096593568.doc>.

91. MINISTRY OF FIN. OF CHINA, CAIZHENG BU GUOJIA FAZHAN GAIGE WEI NONGYE BU GUOJIA SHUIWU ZONGJU GUOJIA LINYE JU GUANYU FAZHAN SHENGWU NENGYUAN HE SHENGWU HUAGONG CAISHUI FUCHI ZHENGCE DE SHISHI YIJIAN (财政部国家发展改革委农业部国家税务总局国家林业局关于发展生物能源和生物化工财税扶持政策的实施意见) [2006 IMPLEMENTATION OPINIONS ON THE FISCAL AND TAX POLICY TO SUPPORT THE DEVELOPMENT OF BIO ENERGY AND BIO CHEMICAL INDUSTRY] (2006), available at http://www.mof.gov.cn/zhengwuxinxi/caizhengwengao/caizhengbuwengao2007/caizhengbuwengao20071/200805/t20080519_26018.html.

92. *China Biogas Project Turns Waste into Energy*, IFAD, <http://www.ruralpovertyportal.org/country/voice/tags/china/biogas> (last visited Aug. 5, 2014).

93. Tuigeng huan lin Tiaoli (退耕还林条例) [Regulations on Conversion of Farmland to Forests] (promulgated by the State Council, Dec. 6, 2002, effective Jan. 20, 2003) art. 52 (China), available at http://www.gov.cn/gongbao/content/2003/content_62531.htm.

94. Zhongguo de Zhonghua Renmin Gongheguo Nongye fa (中国的中华人民共和国农业法 [Agriculture Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2002, effective March 1, 2003) art. 57 (China), available at http://www.gov.cn/ziliao/flfg/2005-09/12/content_30998.htm.

facilities to comprehensively utilize livestock manure, waste water and other solid wastes."⁹⁵

The Renewable Energy Law of 2005 encourages biomass power generation and states in Article 18 that the state shall encourage the development and utilization of renewable energy sources in rural areas.⁹⁶ Under the 2005 Renewable Energy Law, energy authorities of local people's governments above the county level shall make renewable energy plans in rural areas on the basis of local economic and social development, ecological protection and health needs, and the promotion of biogas shall be included in these plans.⁹⁷ Meanwhile, under this law the local people's governments above the county level are required to provide financial support for project of renewable energy utilization in rural areas.⁹⁸

In 2006, the National Development and Reform Commission enacted the Provisions Concerning the Management of Electricity Generated from Renewable Energy⁹⁹ and the Trial Measures for the Management of Prices and Allocation of Costs for Electricity Generated from Renewable Energy.¹⁰⁰ The two regulations specifically provide that the State Council department in charge of prices shall establish a benchmark price for different areas if the feed-in tariff for biomass generating electricity is set by the government.¹⁰¹ These tariffs provide for the opportunity to encourage biogas to electricity projects.

Government funding for biogas development increased at the turn of the millennium. From 2001 to 2006 the central government invested 6.12 billion RMB in the construction and development of biogas, which resulted in thirteen million households building biogas plants for their domestic energy needs.¹⁰² At

95. Zhonghua Renmin Gongheguo Xumu fa (中华人民共和国畜牧法) [Animal Husbandry Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2005, effective July 1, 2006) art. 39 (China), available at http://www.gov.cn/ziliao/flfg/2005-12/29/content_141833.htm.

96. Zhonghua Renmin Gongheguo ke Zaisheng Nengyuan fa (Xiuzheng an) (中华人民共和国可再生能源法(修正案)) [Renewable Energy Law (Amendment)], (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2005, amended Dec. 26, 2009) art. 18 (China), available at http://www.npc.gov.cn/huiyi/cwh/1112/2009-12/26/content_1533216.htm.

97. *Id.*

98. *Id.*

99. *Kezaisheng Nengyuan Fadian Youguan Guanli Guiding* (可再生能源发电有关管理规定) [Notice on Provisions Concerning the Management of Electricity Generated from Renewable Energy], GUOJIA FAZHAN GAIGE WEI (国家发展改革委) [NAT'L DEV. & REFORM COMM'N], http://www.ndrc.gov.cn/zcfb/zcfbtz/200602/t20060206_58735.html (last visited Sept. 6, 2014).

100. *Ke Zai Sheng Neng Yuan Fa Dian Jia Ge He Fei Yong Fen Tan Guan Li Shi Xing Ban Fa* (可再生能源发电价格和费用分摊管理试行办法) [The Trial Measures for the Management of Prices and Allocation of Costs for Electricity Generated from Renewable Energy] (promulgated by the Nat'l Dev. and Reform Comm'n, Jan. 4, 2006) (China), available at http://www.gov.cn/ztlz/2006-01/20/content_165910.htm.

101. See *Provisions Concerning the Management of Electricity Generated from Renewable Energy*, *supra* note 99; Trial Measures for the Management of Prices and Allocation of Costs for Electricity Generated from Renewable Energy, *supra* note 100.

102. FUJIAN PROVINCIAL AGRICULTURAL DEPARTMENT, *supra* note 64.

the end of 2002, there were eleven million¹⁰³ rural households owning biogas digesters and just four years later in 2006, the number doubled to twenty-two million.¹⁰⁴

E. Management and Strengthening (from 2007 until the Present)

With the development of China's rural biogas, new problems arose. The biggest one was the lack of effective management of the biogas digester, causing low gas production.¹⁰⁵ To deal with this problem, in 2007 and more recently, the government issued a series of policies, regulations and laws to promote the management of biogas digesters. In the Medium to Long-Term Renewable Energy Development Plan of 2007, issued by the National Development and Reform Commission, biogas is listed as a key energy source for China.¹⁰⁶ In 2007, the Ministry of Agriculture published the National Rural Biogas Projects Construction Plan (2006-2010), which sets biogas construction goals.¹⁰⁷ In the same year, the Ministry of Agriculture and the National Development and Reform Commission jointly issued National Rural Biogas Service System Development Scheme¹⁰⁸ and Opinions on Further Strengthening Biogas Construction and Management¹⁰⁹ in which the two ministries put forward the specific requirement of consolidating preliminary work, defining management responsibility, increasing the speed of the construction progress, carrying out funding, management, and strengthening quality control.¹¹⁰

The central government emphasized the importance of biogas development in the 12th Five Year Plan for National Economic and Social Development (2011-2015).¹¹¹ The government enacted Circular Economy Promotion Law in 2008, in

103. Zhang Fuwei (张福伟), *Guojia Fuchi Xiangmu Taiyangneng Zhaoqi* (国家扶持项目太阳能沼气) [*Projects Supported by the Government—Solar Energy and Biogas*], CCTV.COM (Sept. 14, 2007, 2:22 PM), <http://finance.cctv.com/20070914/107536.shtml>.

104. See TRIAL CONSTRUCTION PROGRAM 2007 *supra* note 63.

105. See DAVID WARGERT, *BIOGAS IN DEVELOPING RURAL AREAS 10-11* (2009), available at <http://www.davidwargert.net/docs/Biogas.pdf> for an explanation of the problems from bad maintenance of biogas digester.

106. NAT'L DEV. & REFORM COMM'N OF CHINA, *MEDIUM AND LONG-TERM DEVELOPMENT PLAN FOR RENEWABLE ENERGY IN CHINA (ABBREVIATED VERSION, ENGLISH DRAFT) 6* (2007) available at http://www.martinot.info/China_RE_Plan_to_2020_Sep-2007.pdf.

107. TRIAL CONSTRUCTION PROGRAM 2007, *supra* note 63.

108. *Id.*

109. NONGYE BU (农业部) [MINISTRY OF AGRIC.], *NONGYE BU GUOJIA FAZHAN HE GAIGE WEIYUANHUI GUANYU JINYIBU JIAQIANG NONGCUN ZHAOQI JIANSHE GUANLI DE YIJIAN* (农业部国家发展和改革委员会关于进一步加强农村沼气建设管理的意见) [OPINIONS ON FURTHER STRENGTHENING BIOGAS CONSTRUCTION AND MANAGEMENT] (2007), available at http://www.moa.gov.cn/zwl/m/zcfg/qtbmgz/200709/t20070930_898899.htm.

110. *Id.*; OPINIONS ON FURTHER STRENGTHENING BIOGAS CONSTRUCTION AND MANAGEMENT, *supra* note 109.

111. THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, *Zhonghua Renmin Gongheguo Guomin Jingji he Shehui Fazhan di Shi'er ge wu Nian Guihua Gangyao* (中华人民共和国国民经济和社会发展第十二个五年规划纲要) [12th Five Year Plan for National

which the State encouraged and supported agricultural producers and relevant enterprises seeking to employ biogas technologies that make comprehensive use of straw, poultry and livestock manure, or other agricultural wastes.¹¹² It is pointed out in the 2012 Opinions on Further Strengthening Biogas Construction in Rural Areas that biogas management and service as well as overall biogas project quality should be strengthened.¹¹³

The use of biogas for rural energy needs has grown steeply in the past two decades. There are many elements contributing to this growth, among which, policies, laws and regulations play a key role.

During the history of China's biogas development, the government issued policies, regulations and laws covering various aspects of rural biogas construction and development. Whenever a new situation arose, the government issued guidelines to direct future action. For instance, the government issued a series of policies, regulations and laws to promote new digester construction, especially during the period from 1999 to 2006.¹¹⁴ However, when there were problems with design, and the management of the digesters required improvement, the government issued policies, regulations and laws meant to make the operation of the digesters more efficient.¹¹⁵ In recent years, with the urbanization of China, some areas are in short supply of the waste feedstocks normally used in biogas digesters.¹¹⁶ More recently, as the management of biogas digesters improved, a demand for a digester service system is increasing. The government issued the

Economic and Social Development (2011-2015)] (2011), available at http://www.gov.cn/2011lh/content_1825838.htm.

112. See Zhonghua Renmin Gongheguo Xunhuan Jingji Cujin fa (中华人民共和国循环经济促进法) [Circular Economy Promotion Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2008, effective Jan. 1, 2009) art. 34 (China), http://www.gov.cn/flfg/2008-08/29/content_1084355.htm.

113. OPINIONS ON FURTHER STRENGTHENING BIOGAS CONSTRUCTION AND MANAGEMENT, *supra* note 109.

114. The following policies and laws were issued during this period: *Opinions of the CPC Central Committee and State Council on Several Policies to Promote the Increase of Farmers' Income of 2004*, *Opinions of the CPC Central Committee and State Council on Several Policies to Further Strengthen Rural Work and Improve Agricultural Comprehensive Production Capacity of 2005*, *Circular of the State Council on the Recent Key Work of Constructing Conservation Oriented Society of 2005*, *Opinions of the CPC Central Committee and State Council on Promoting the Construction of New Socialist Countryside of 2006*, *Opinions of the CPC Central Committee and the State Council on the Development of Agricultural and Rural Work of 2003*, *the Management Measures for Rural Biogas Construction Treasury Bonds Programme (Trial)*, *the 2006 Implementation Opinions on the Fiscal and Tax Policy to Support the Development of Bio Energy and Bio Chemical Industry*, *Agriculture Law of the PRC*, *Husbandry Law of the PRC* and *Renewable Energy Law of the PRC*.

115. See *id.*

116. *Bioenergy Transition in Rural China: Policy Options and Co-benefits*, *supra* note 5, at 533 ("This resource constraint becomes particularly severe with the operation of biomass power plants and consequent demand rise for biomass resources.").

2012 Opinions on Further Strengthening Biogas Construction in Rural Areas and suggested concrete measures to deal with these issues.¹¹⁷

F. Funding for Biogas Development

Since 2003, more and more funding has been provided by the Chinese government for biogas development. It is stated in the Opinions of the CPC Central Committee and the State Council on the Development of Agricultural and Rural Work of 2003 that biogas construction in rural areas significantly increased rural income, and improved rural living conditions.¹¹⁸ As a result of those findings, the Central Committee stated that, “[t]he development of biogas in areas of converting cropland to forest shall be given priority.”¹¹⁹ In the same year, the Management Measures for Rural Biogas Construction Treasury Bonds Program (Trial) was enacted.¹²⁰ Under the Trial, the central government subsidized rural biogas construction with treasury bonds.¹²¹ This greatly motivated the construction of rural household biogas digesters because money was available for their construction.

Likewise, the 2005 Renewable Energy Law requires the local people’s governments above the county level provide financial support for projects of renewable energy utilization in rural areas.¹²² It is also clearly pointed out in the 2006 Implementation Opinions on the Fiscal and Tax Policy to Support the Development of Bio Energy and Bio Chemical Industry that the state will implement relevant fiscal and tax policy such as a flexible loss subsidy, raw material base grants, demonstration grants and tax preferences to facilitate the development of bio energy, among other things.¹²³

Accordingly, the central government has been increasing its investment in biogas development. In 2001 the Rural Infrastructure Project awarded 0.1 billion RMB in subsidies for rural biogas development, and in 2002, it awarded another 0.2 billion RMB.¹²⁴

117. *Guojia Fagaiwei yu Nongye bu Fabu Guanyu Jinyibu Jiaqiang Nongcun Zhaoqi Jianshe de Yijian* (国家发改委与农业部发布关于进一步加强农村沼气建设的意见) [*National Development and Reform Commission and the Ministry of Agriculture issued the “Circular on Further Strengthening Rural Biogas Opinion”*], MA’ANSHAN SHI NONGYE WEIYUANHUI BANGONGSHI (马鞍山市农业委员会办公室) [MA’ANSHAN CITY OFFICE OF THE COMMITTEE ON AGRICULTURE] (May 23, 2012, 2:49 PM), http://www.masnw.gov.cn/news_view.asp?newsid=7094.

118. THE OPINIONS OF THE CPC CENTRAL COMMITTEE AND THE STATE COUNCIL ON THE DEVELOPMENT OF AGRICULTURAL AND RURAL WORK OF 2003, *supra* note 89.

119. *Id.*

120. MANAGEMENT MEASURES FOR RURAL BIOGAS CONSTRUCTION TREASURY BONDS PROGRAM (TRIAL), *supra* note 90.

121. *Id.*

122. Renewable Energy Law (Amendment), *supra* note 96.

123. 2006 IMPLEMENTATION OPINIONS ON THE FISCAL AND TAX POLICY TO SUPPORT THE DEVELOPMENT OF BIO ENERGY AND BIO CHEMICAL INDUSTRY, *supra* note 91.

124. DENG GUANGLIAN, *supra* note 68.

Since 2003, the government has been increasing the funding level every year.¹²⁵ In 2007, the central government invested 2.5 billion RMB in biogas development.¹²⁶ In 2008 the amount reached three billion RMB.¹²⁷ At the end of 2008, the central government added three billion RMB.¹²⁸ In 2009 and 2010, the central government invested five billion RMB each year specifically supporting the construction and development of rural biogas industry.¹²⁹ By the end of 2011, this financing by the government, coupled with the favorable laws and policies mentioned above resulted in 39.96 million households using biogas as an energy source.¹³⁰ It is predicted that the number of the rural biogas digesters supplying households with their energy needs will reach between fifty million by 2015.¹³¹

In the new Opinions on Further Strengthening Biogas Construction in Rural Areas of 2012 the local governments are also required to increase investment in biogas projects.¹³²

G. Standardization in the Biogas Industry

From 1950 to 2011, China issued thirty-three standard specification documents for rural biogas systems, forming basic standards systems for rural biogas.¹³³ With the government's attention switching more to the management of rural biogas, it has recently issued various documents to promote the construction of service systems for biogas.¹³⁴

Various laws, policies, and regulations have been aimed in China at technological standardization in biogas industry. For example, in 2010 the National Development and Reform Commission and the Ministry of Agriculture initiated the Rural Biogas Science and Technology Support Project and special funds were arranged to increase the gas production ratio, broaden the biogas

125. The funding from 2003 to 2005 was one billion RMB each year; from 2006 to 2007 the funding was 2.5 billion RMB each year. Funding in the beginning of 2008 was three billion RMB and at the end of 2008 three billion RMB funding was added. Funding for 2009 and 2010 was five billion RMB each year. See *Review and Prospect on Biogas Development in China*, *supra* note 5.

126. *Review and Prospect on Biogas Development in China*, *supra* note 5.

127. *Id.*

128. *Id.*

129. *Id.*

130. Zhang Taolin (张桃林), *Nongcun Zhaoqi Jianshe Liqiu Wuda Zhuanbian* (农村沼气建设力求五大转变) [*Five Changes are Needed in Rural Biogas Construction*], ADMIN. OF GRAIN OF CHINA (Dec. 27, 2012, 8:37AM), <http://www.grain.gov.cn/Grain/ShowNews.aspx?newsid=39567>.

131. 12th Five-Year Plan for Renewable Energy Development, *supra* note 88.

132. *National Development and Reform Commission and the Ministry of Agriculture issued the "Circular on Further Strengthening Rural Biogas Opinion," supra* note 117.

133. See, for example, National Energy Infrastructure and Management Standardization Technical Committee and Second Editorial Office of Standards Press of China. *Biogas and Related Standards* (Standards Press of China, Aug. 2008); see *Policies and Regulations*, CHINA BIOGAS SOC'Y, http://www.biogas.cn/CN/B_Policy.aspx (last visited Aug. 9, 2014) for most of the standards.

134. See, e.g., *National Development and Reform Commission and the Ministry of Agriculture issued the "Circular on Further Strengthening Rural Biogas Opinion," supra* note 117.

application scope and improve biogas utilization benefits.¹³⁵ The 12th Five Year Plan for National Energy Technology of 2012 sets out goals and key tasks for the development of new energy including biogas.¹³⁶

Moreover, relevant policies, laws and regulations also motivate the standardization of biogas systems. From 1950 to 2011, China issued thirty-three standard specification documents for rural biogas systems, forming basic standards system for rural biogas.¹³⁷ With the government's attention switching more to the management of rural biogas, it has recently begun to realize the importance of a service system. Therefore, the government has recently issued various documents to promote the construction of service system for biogas.¹³⁸

H. Problems Existing in and Policy Suggestions for the Development of China's Rural Biogas Program

With the development of China's urbanization process, some new problems appear to be arising in the rural biogas program. The first major obstacle to continued success of the biogas digesters in China appears to be a lack of services aimed at ensuring their smooth operation and continued efficiency. It appears that needed service systems may not be totally in position in China.¹³⁹ In the same vein, the funding system has been focused on building digesters, but it appears that the financial needs associated with the operation and maintenance of these forty million biogas digesters may not yet be completely thought out.

Moreover, the changing landscape of China is likely to result in less small farm animal husbandry.¹⁴⁰ This will likely cause a shortage in feedstocks for biogas digesters in rural settings. However, with the increase of centralized livestock farms, it is likely that medium to large size biogas plants will be

135. Yan Xin (颜昕), Guojia Fagaiwei he Nongye bu Qidong Nongcun Zhaoqi Keji Zhicheng Xiangmu Jianshe (国家发改委和农业部启动农村沼气科技支撑项目建设) [*National Development and Reform Commission and the Ministry of Agriculture to Start the Construction of Rural Biogas Technology Support Project*], ZHONGGUO QIXIANG BAOSHE (中国气象报社) [CHINA METEOROLOGICAL NEWSPAPER] (Oct. 25, 2010, 3:33:00 PM), http://2011.cma.gov.cn/qhbh/newsbobao/201010/t20101025_80272.html.

136. GUOJIA NENGYUAN JU (国家能源局) [NATIONAL ENERGY BOARD] GUOJIA NENGYUAN KEJI SHI'ERWU GUIHUA 2011-2015 (国家能源科技十二五规划2011-2015) [NATIONAL ENERGY TECHNOLOGY 12TH FIVE YEAR PLAN 2011-2015] (2011), available at <http://www.gov.cn/gzdt/att/att/site1/20120210/001e3741a474109f0bc001.pdf>.

137. See, e.g., National Energy Infrastructure and Management Standardization Technical Committee and Second Editorial Office of Standards Press of China, *Biogas and Related Standards* (Standards Press of China, Aug. 2008); see *Policies and Regulations*, CHINA BIOGAS SOC'Y, http://www.biogas.cn/CN/B_Policy.aspx (last visited Aug. 9, 2014) for most of the standards.

138. See, e.g., *National Development and Reform Commission and the Ministry of Agriculture issued the "Circular on Further Strengthening Rural Biogas Opinion," supra note 117.*

139. Some authors indicate that the lagging construction of a social service system limited the utilization of biogas. See *Review and Prospect on Biogas Development in China, supra note 5.*

140. *Beijing is delicately super-sizing the country's farms*, CHINA ECON. REV. (July 13, 2013), <http://www.chinaeconomicreview.com/beijing-land-reform-Brazil-rural-farms-Wuliming-industrial-farming>.

developed, which can either supply biogas, or electricity to meet rural energy needs.¹⁴¹

VI. FACTORS CONTRIBUTING TO THE SUCCESS OF CHINA'S BIOGAS PROGRAM

The success of China's biogas program appears from our research to relate to five main factors: 1) education and promotion, 2) technical improvement and standardization, 3) supporting laws and policies, 4) funding, and 5) China's energy needs. The first four factors, when China implemented them together, resulted in a successful program that was intended to address the fifth factor. Moreover, each of these factors appears interrelated and a necessary condition for the other. For instance, technical improvement would not have occurred without initial promotion, and the laws and policies supporting biogas would not have been passed unless the technical bona fides of the program were established. Funding itself was, and continues to be, dependent upon the other four factors—there would be no reason to fund the program unless the community was aware of the benefits (promotion), if the systems did not work (improvement), if the government was not creating a conducive environment (supporting law and policy), nor would funding exist if the energy need was not real.

Before addressing these factors, however, we wish to address a likely misconception: that China's authoritarian central government is in fact the reason for its success with biogas.¹⁴² While it is true the strong central government contributed to the various laws and policies, the government's role alone does not appear to be to be an independent factor leading to the success of biogas. During the times of China's strongest central government, biogas systems struggled with failure.¹⁴³ It was not until the government called for research and development that addressed both construction and digester management that the systems began to be successful.¹⁴⁴ In this way the government played a role, but that role was one of encouraging solutions to problems, not mandating a result.

The most significant gains in the installation of biogas units occurred in the last decade or so, and appeared to be related to funding that was made available for biogas installation.¹⁴⁵ This funding took the form of tax rebates, subsidies to offset part of the cost, bonds, loans, and in some cases grants.¹⁴⁶ While it is true the government supplied the funding, that fact alone does not lend itself to authoritarian criticism. Governments everywhere often provide financial incentives. An interesting dynamic in this case, however, is that the financial

141. *The progress and prospects of rural biogas production in China*, *supra* note 5, at 62 ("Supported by the central government, the development of China's biogas plants will aim for economies of scale, industrialization, and commercialization.").

142. For an accessible and comprehensive discussion of political governance in China, please see Ming Xia, *China Rises Companion: Political Governance*, N.Y. TIMES, <http://www.nytimes.com/ref/college/coll-china-politics.html> (last visited Aug. 9, 2014).

143. FUJIAN PROVINCIAL AGRICULTURAL DEPARTMENT, *supra* note 64.

144. *Id.*

145. See *supra* note 127 and accompanying text.

146. See *supra* notes 119-128 and accompanying text.

incentives were successful among some of China's poorest—its agricultural peasants who otherwise lacked clean cooking technologies.

Progressing past the question of the role of China's government directly, the first factor that our research uncovered as an important element to the success of China's biogas program was education and promotion. Two particular education efforts stand out from our research: The Ministry of Agriculture's creation in 1979 of the National Biogas Construction Leading Group,¹⁴⁷ and Ministry of Agriculture's 1999 biogas promotion campaigns called variously the "Energy Environmental Protection Project" and "Ecological Homestead Rich Peasants Project."¹⁴⁸ The Leading Group provided a structure for dealing with the needs of the biogas development campaign. The Leading Group addressed questions of technical improvement, and also addressed questions relating to preferred use.¹⁴⁹ Together these education and promotion efforts appear to have contributed to the wave of biogas growth that occurred in the 1980s and 1990s, while setting the stage for interest in the various financial policies that were later enacted.¹⁵⁰

The role of technical improvement as a factor impacting the success of biogas development in China cannot be overstated. Initial development efforts centered on technical innovation, and in fact those early innovations appear to have captured the imagination of China's leaders, ultimately leading to the interest in biogas development.¹⁵¹ Then, when development occurred, the large-scale efforts were a failure because of technical reasons.¹⁵² When the digesters failed to operate properly, and literally millions of them were abandoned.¹⁵³ China's technical response, creating thirty-three standard specification documents for rural biogas systems, corrected the early problems and led to the opportunity to make biogas a success.

Another important technical innovation that led to the success of biogas in China was the development of digesters that work in cold climates. Anaerobic bacteria do not "eat" when they are cold or frozen. If the bacteria do not "eat," they cannot make biogas. Chinese scientists tackled that issue, making it possible to expand biogas into China's colder climates.¹⁵⁴ This innovation, which might not seem like much, is quite important. Much of China's agricultural production occurs in more northerly climates.¹⁵⁵ It is in these areas that the biogas is perhaps of greatest utility, providing fuel for heating, lighting and cooking to rural

147. *See supra* note 70 and accompanying text.

148. *See supra* notes 83-84 and accompanying text.

149. *See supra* notes 83-84 and accompanying text.

150. *See supra* notes 119-128 and accompanying text.

151. *See supra* notes 74-81 and accompanying text.

152. *See Biogas and Related Standards, supra*, note 137; *Policies and Regulations, supra* note 137.

153. *See supra*, notes 67-69 and accompanying text.

154. *The Progress and Prospects of Rural Biogas Production in China, supra* note 5, at 59.

155. Bao-Jie He, Li Yang, & Miao Ye, *Building Energy Efficiency in China Rural Areas: Situation, Drawbacks, Challenges, Corresponding Measures and Policies*, 11 SUSTAINABLE CITIES & SOC'Y 7, 8-9 (2014).

households. Without the significant work undertaken to extend biogas into colder climates, the program would likely not be nearly the success that it is today.

The role of China's policies and laws that support biogas development cannot be overstated. As addressed in Section IV, above, China implemented a full suite of laws and policies surrounding biogas. These laws did not always have the sophistication with which they are now imbued. Instead, the early laws, metaphorically, put the cart before the horse, promoting the technology for wide scale use without having already worked out technical and social issues. Problems were encountered: the technology failed, or users found the operation to be less appealing than their traditional alternatives.

China's problems in developing biogas appear to have been viewed as integral parts of the solution. Rather than scrapping the program, the applicable laws and policies were modified to address the growing needs.¹⁵⁶ It appears that China was successful in this regard because it used administrative agencies that had specialized knowledge and a broad mission coupled with the opportunity to flexibly address the issues. Accordingly, China's use of its agencies, like the Ministry of Agriculture, appear to be a vital ingredient in promoting the dynamic legal and policy responses necessary to successfully deploy biogas as an energy technology on a wide, consumer-based scale.

China's *process* of funding of the biogas program seems to be the factor that is most significantly contributing to the accelerated adoption of biogas in China. While funding efforts appear to have always been significant, when the range of funding started exceeding three billion per year, and when the methods of funding were widened to include bonds, grants, loans, subsidies and tax rebates, the rate of biogas expansion appears to have accelerated drastically.

This is quite an important feature of China's experience. The people who are the audience—the customer base—are very poor peasant farmers. What might be mistaken in the analysis of the world's poor is an assertion that they have no money to afford modern energy services. That is not the case—the world's poor have money. However, and in a common sense manner, it is reasonable to assume the poor value the money they have. Accordingly, a Chinese peasant, who was well educated on the issues of biogas, still often did *not* have enough incentive to purchase a digester.¹⁵⁷ One conclusion is that the money in hand, or the money spent on something else is more valuable than the benefits to be obtained from biogas. China's financial incentives appear to have tipped that scale,¹⁵⁸ and the success of funding in promoting biogas development clearly demonstrates that financial incentives that make economic sense to the end user need to be adopted if energy poverty is to be eliminated.

156. See *supra*, notes 74-106 and accompanying text.

157. See Gosens et. al., *supra* note 2, at 285 for a discussion on the role of subsidies in household fuel use in China.

158. *Bioenergy transition in rural China: Policy options and co-benefits*, *supra* note 5, at 533 ("China has made the most success in rural household biogas development, mostly through government subsidies on technology dissemination.")

What China's experience also shows is that economic incentives are not a unitary solution even where they are the strongest catalyst for change. As China's initial attempts to fund faulty digesters in the 1970s showed, all of the other supporting aspects of program are necessary. Without education, technological proof, and legal support, financial support merely causes failure and a waste of the financial resources dedicated to the project.

Finally, one must look to China's energy needs, the sources of energy and other necessary resources that the nation has ready access to in order to understand the success of biogas. Indeed, this critical element of the discussion might in other countries support the development of a different energy technology. In China, the energy need that biogas is meeting is for the rural poor. The rural poor are largely farmers, and as a result they have ready access to organic wastes that become the feedstocks for biodigestion and the production of biogas. A biodigester also needs water and a place to utilize the residue, both items usually available in an agrarian landscape. Biogas therefore fits neatly within a Chinese farmer's energy needs and resources. Conversely, biogas is not likely a useful technology for those living nomadic lifestyles or who live in extreme climates like deserts, high mountains, or the arctic where biological wastes or water resources are often not readily available.¹⁵⁹

Another element of China's energy needs and sources that impact the use of biogas is the relative paucity of natural gas in China. China's energy mix is dominated by coal.¹⁶⁰ Where natural gas supplies 25.7% of the world energy supply, in China, it supplies just 3.9%.¹⁶¹ As many authors point out, China's dependence upon coal requires the nation to find cleaner burning technologies.¹⁶² Biogas is uniquely well suited to fill this gap by creating what is for all intents and purposes natural gas from agricultural and other biological waste.

Other countries may or may not have such energy and environmental pressures impacting energy development. Nigeria provides an interesting contrast. In Nigeria, there are substantial agricultural wastes, similar agricultural frameworks, and similar rural needs for household energy services.¹⁶³ However, Nigeria contains immense quantities of natural gas that is flared without being used.¹⁶⁴ That difference might make it more sensible for energy development in

159. BENJAMIN SOVACOO & IRA MARTINA DRUPADY, *ENERGY ACCESS, POVERTY, AND DEVELOPMENT: THE GOVERNANCE OF SMALL-SCALE RENEWABLE ENERGY IN DEVELOPING ASIA* (2012) (noting, for instance, the difficulty of providing energy services to nomadic Chinese).

160. *See supra* notes 41-45 and accompanying text.

161. *See supra* notes 43-44 and accompanying text.

162. *See, e.g.*, David Fridley, Nina Zheng and Nathaniel Aden, *What Can China Do? China's Best Alternative Outcome for Energy Efficiency and CO₂ Emissions*, in *CHINA'S ENERGY EFFICIENCY AND CARBON EMISSIONS OUTLOOK 80* (B. Skaali & T. Knezevic, eds., 2012).

163. *See, e.g.*, Okeh Okeh, Chukwudi Onwosi & Frederick Odibo, *Biogas Production from Rice Husks Generated from Various Rice Mills in Ebonyi State, Nigeria*, 62 *RENEWABLE ENERGY* 204 (2014).

164. Stephen C. Nwanya, *Climate Change and Energy Implications of Gas Flaring for Nigeria*, 6 *INT'L J. LOW CARBON TECH.* 193, 193 (2011).

Nigeria to focus on harnessing the wasted natural gas, rather than converting biological wastes to gas. Even if that process to be the case in Nigeria, the framework of development outlined by China's biogas experience could still provide an important policy model that could help in the sustainable development of energy resources and the improvement of living conditions no matter the energy and resource mix confronted.

VII. CONCLUSION

China's biogas experience—truly a grand experiment that touches the lives of approximately 120 million people—yields a model that should be considered in the energy and sustainable development framework for lesser developed countries. The very nature of China's approach—to experiment, to educate, to modify policies to needs, to refine the technology, and to provide adequate funding—appears to define a useful process that might yield beneficial results when applied to the need to make energy resources available for the Other Third.

DEVELOPMENT AND WOMEN'S RIGHTS AS HUMAN RIGHTS: A POLITICAL AND SOCIAL ECONOMY APPROACH WITHIN A DEEP DEMOCRATIC FRAMEWORK

HAIDER A. KHAN*

I. INTRODUCTION

In Vienna in 1993, the World Conference on Human Rights recognized that women's rights are human rights.¹ However, even today, the foundations of this claim are not always made clear and it is seen as merely political. This, however, is a simplistic position far from the truth. Sen has pointed out that the capabilities

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1. See World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 18, U.N. Doc. A/CONF.157/23 (July 12, 1993); see also MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 106–112 (2004) (referencing a fairly comprehensive history of human rights including women's rights and modern pioneers such as Mary Astell (1666–1731), Mary Wollstonecraft (1759–1797), and Olympe de Gouge (1748–1793), who are important precursors of the belated recognition in Vienna).

approach provides at least a partial foundation for human rights.² This paper claims that extensions of the capabilities approach can further progress a theoretical foundation of women's rights.

Here I attempt to examine specifically this line of thought in providing some theoretical advances for development and women's rights as human rights, that are highly policy-relevant, by relying on an explicitly dynamic social version of the capabilities approach called "the social capabilities" approach. This version of the social capabilities approach extends important aspects of Sen's characterization of development as freedom.³ This approach also has the virtue of being grounded in the ontology of difference that respects cultural differences and nuances within a moral realist framework.⁴ An alternative set of economic and social policies with an enabling legal-political environment for advancing women's rights and development follow logically from the approach developed here.⁵ In this paper by political economy, I mean the classical state and civil society—including their 20th century extensions—and their interactions.⁶ By social economy, I mean the underlying social basis of the political economy including the family structure and

2. Amartya Sen, *Human Rights and Capabilities*, 6 J. OF HUMAN DEV. 151, 151-52 (2005) [hereinafter Sen, *Human Rights*]; Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 332-38 (2004) [hereinafter Sen, *Elements*].

3. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 17-18 (1999) [hereinafter SEN, DEVELOPMENT] for a discussion on how the concept of personal "capabilities" interacts with development and individual freedoms.

4. See LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? (2013); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2013); GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY (2002); Richard N. Boyd, *How to Be a Moral Realist*, in ESSAYS ON MORAL REALISM 181 (Geoffrey Sayre-McCord ed., 1988); FÉLIX GUATTARI & SUELY ROLNIK, MICROPOLÍTICA: CARTOGRAFIAS DO DESEJO (1986), translated in KAREL CLAPSHOW & BRIAN HOLMES, MOLECULAR REVOLUTION IN BRAZIL (2008); GILLES DELEUZE & FÉLIX GUATTARI, MILLE PLATEAUX (1980), translated in BRIAN MASSUMI, A THOUSAND PLATEAUX (1987); JACQUES DERRIDA, POSITIONS (1972), translated in ALAN BASS, POSITIONS (1981); GILLES DELEUZE, DIFFÉRENCE ET REPÉTITION (1968), translated in PAUL PATTON, DIFFERENCE AND REPETITION (1994); Cille Kennedy et al., *Mental Health, Disabilities, and Women: A Policy Oriented Data Review*, 8 J. DISABILITY POL'Y STUD. 1, 1-2 (1997); U.N. Centre for Reg'l Dev., *Transitional Economies and Regional Economic Development Strategies: Lessons from Five Low-Income Developing Countries*, 19 U.N. CENTRE FOR REG'L DEV. RESEARCH REPORT (Haider A. Khan & Asfaw Kumssa eds., Sept. 1996) [hereinafter UNCRD].

5. The book by Lila Abu-Lughod in particular, based on her extensive fieldwork among the Bedouins, illustrates powerfully why a dynamic view of difference accepted with humility is so important for both the social scientist and the policymaker. See Abu-Lughod, *supra* note 4. This is also important with respect to creating applicable democratic theory for Islamic societies. See *id.* Refer to Nader Hashemi's book on the important issues regarding Islam, secularism, and democracy. NADER HASHEMI, ISLAM, SECULARISM, AND LIBERAL DEMOCRACY: TOWARD A DEMOCRATIC THEORY FOR MUSLIM SOCIETIES (2009). An ontology of difference would suggest an endogenous generative power regarding democracy in Islamic societies that can be creative in its own way that is different from what happened elsewhere historically.

6. See HAIDER A. KHAN, TECHNOLOGY, DEVELOPMENT AND DEMOCRACY: LIMITS OF NATIONAL INNOVATION SYSTEMS IN THE AGE OF POSTMODERNISM, at ch. 7 (1998) [hereinafter KHAN, TECHNOLOGY (1998)] for a discussion on "the classical idea of a polis for a modern polity."

various overlapping communities in which the family and the individuals are embedded.⁷

I begin with the standard approach to human rights and discuss the Universal Human Rights Model (“UHRM”) before developing the nuanced social capabilities approach followed throughout the rest of this paper. I present “deep democracy” as a structure in addition to formal democratic apparatus such that the practice of such democratic life can be reproduced with the basic values intact.⁸ Change is not precluded. However, all such changes should deepen democracy, not weaken it.⁹ “Deep democracy” in this sense is intimately connected with economic and social justice.¹⁰ As will be seen later in this paper, the social capabilities approach, women’s rights, and “deep democracy” are related in an intimate way.

II. THE STANDARD CONCEPT OF HUMAN RIGHTS

Human rights, as they are usually and loosely conceived, are the rights that one has because one is human. Before accepting this simple definition, a series of questions must be asked. For example, what does it mean to have a right? How are being human and having rights related? Are there alternatives to the simple and usually minimalist definitions of human rights as the rights that one has because one is human? How do women’s rights relate to human rights?

As Donnelly explains:

7. Here, we need to be mindful of Gayatri Spivak’s insightful remarks on “women’s rights as human rights” as a slogan only in Kolkata and the ontology of difference combined with actual involved fieldwork and participation in actual women’s movements from below. Gayatri Chakravorty Spivak, *Sunil Gangopadhyay Memorial Session—Kolkata Literary Meet 2013*, YOUTUBE (Feb. 13, 2013), <http://www.youtube.com/watch?v=b196CksnjEl>. Spivak’s remarks on human rights discourse in civil society as a sign of failure of both state and revolution point towards the need for deeper reflection, especially on the politics of the human rights discourse. See *id.* Clearly, one major evasion of mainstream human rights discourse is the suppression of class differences. The differential ontology, based among other things on a radical political and social economy approach of differentiation, brings to light what is buried deep in the political unconscious—to use the term by Jameson—by bourgeois humanism and presents the struggle for human rights of women as a differential struggle on the road to emancipation that cannot ignore the class differential among both men and women. *Id.*; see also FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* (1981).

8. See generally KHAN, *TECHNOLOGY* (1998), *supra* note 6; Haider A. Khan, *Deepening Democracy During Crisis: Building on an Ontology of Difference*, COSMOPOLIS (2012) [hereinafter Khan, *Deepening Democracy*]; Haider A. Khan, *A Theory of Deep Democracy and Economic Justice in the Age of Postmodernism*, 1 CONTEMP. READINGS IN L. & SOC. JUST. 47-48 (2009) [hereinafter Khan, *Deep Democracy* (2009)], available at <http://www.cecol.com/asp/getdocument.aspx?logid=5&id=3897d9e2-ca3a-4924-96d1-42f5d68a8ce8>; Haider A. Khan, *A Theory of Deep Democracy and Economic Justice in the Age of Postmodernism*, CIRJE F-SERIES, NO. CIRJE-F-468, (2007) [hereinafter Khan, *Deep Democracy* (2007)], available at <http://econpapers.repec.org/paper/kyfseres/2007cf468.htm>.

9. KHAN, *TECHNOLOGY* (1998), *supra* note 6; Khan, *Deep Democracy* (2007), *supra* note 8, at 14 (providing a list of conditions or changes that must be made for democracy to be deepened).

10. See generally KHAN, *TECHNOLOGY* (1998), *supra* note 6; Khan, *Deep Democracy* (2009), *supra* note 8; Khan, *Deep Democracy* (2007), *supra* note 8.

“Right” in English, like equivalent words in several other languages, has two central moral and political senses: rectitude and entitlement. In the sense of rectitude, we speak of “the right thing to do,” of *something* being right (or wrong). In the narrower sense of entitlement we typically speak of *someone* having a right.¹¹

Rights claims imply both a right-holder and a duty-bearer. There is a strong presumption that the duty-bearer must attend to the right-holder’s entitlement.¹²

A Hohfeldian conception of rights defines a field of rule-governed interactions centered on, and under the control of, the right-holder.¹³ Thus, Donnelly tells us:

“A has a right to x (with respect to B)” specifies a right-holder (A), an object of the right (x), and a duty-bearer (B). It also outlines the relationships in which they stand. A is entitled to x (with respect to B), B stands under correlative obligations to A (with respect to x), and, should it be necessary, A may make special claims upon B to discharge those obligations.

Rights are not reducible to the correlative duties of those against whom they are held. If Anne has a right to x with respect to Bob, it is more than simply desirable, good, or even right that Anne enjoy x. She is entitled to it. Should Bob fail to discharge his obligations, besides acting improperly (i.e., violating standards of rectitude) and harming Anne, he violates her rights, making him subject to special remedial claims and sanctions.

Neither is having a right reducible to enjoying a benefit. Anne is not a passive beneficiary of Bob’s obligation. She is actively in charge of the relationship, as suggested by the language of “exercising” rights. She may assert her right to x. If he fails to discharge his obligation, Anne may press further claims against Bob, choose not to pursue the matter, or even excuse him, largely at her own discretion. Rights empower, not just benefit, those who hold them.¹⁴

The social capabilities approach to women’s rights that I develop here emphasizes the positive freedom to achieve crucial aspects of socially grounded individuality of the right bearer and, in this sense, provides a social foundation for women’s rights. However, first I must discuss the UHRM, which can also be justified from the social capabilities point of view.

11. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 7 (3d ed. 2013); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 188 (1977) explaining, “the word ‘right’ has different force in different contexts.”

12. DONNELLY, *supra* note 11, at 7-8.

13. *See id.* at 7-12; see also *Rights, The Form of Rights: The Hohfeldian Analytical System*, STAN. ENCYCLOPEDIA OF PHIL. (July 2, 2011), <http://plato.stanford.edu/entries/rights/#2.1>.

14. DONNELLY, *supra* note 11, at 8.

III. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS MODEL

In recognition of the central role of the “Universal Declaration of Human Rights”¹⁵ in establishing the contemporary consensus on internationally recognized human rights, one can justify calling it the Universal Human Rights Model. However, it is not thereby implied that the model is complete. In fact, extensions to women’s rights are an example of a good use of the universalizing tendencies in the UHRM. As is well known, the United Nations General Assembly adopted the Universal Declaration of Human Rights on December 10, 1948, by a vote of 48-0 (with eight abstentions).¹⁶ Since then virtually all states have endorsed it regularly and repeatedly.¹⁷ This phenomenon accounts for the wide acceptance of the idea that for the purposes of international action, “human rights” means roughly, what is in the Universal Declaration of Human Rights.¹⁸

The purpose of presenting the list below from UHRM is to examine the implications for women’s rights in the UHRM. This paper examines these implications not just for the sake of understanding the connection between UHRM and women’s status, though this is one of the goals of this paper, but for the goal of learning something about the specific policies of the state apparatus in light of its human rights obligations and commitments. As mentioned earlier, this paper bases its approach to human rights on the social capabilities theory, which follows immediately after this section. Therefore, interpret the UHRM presented below in that light.

This list from the UHRM includes all rights that receive explicit mention in both the Universal Declaration and its Covenants or receives a full article in one of these three instruments: the Universal Declaration (U), the International Covenant on Civil and Political Rights (C), or the International Covenant on Economic, Social and Cultural Rights (E). References are to the article by number in the respective instrument.¹⁹

- Nondiscrimination (U2, E2, C2)
- Life (U3, C6)
- Liberty and security of person (U3, C9)
- Protection against slavery (U4, C8)
- Legal personality (U6, C16)
- Equal protection of the law (U7, C14, C26)

15. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

16. Irving Sarnoff, *U.N. Declaration*, L.A. TIMES (May 14, 2001), <http://articles.latimes.com/2001/may/14/local/me-63234>; see generally UDHR, *supra* note 15; ISHAY, *supra* note 1, at 16-18 (discussing the origins of the Universal Declaration of Human Rights).

17. See generally ISHAY, *supra* note 1, at tpls.A.3 & A.4 for a demonstration of the continuance of various countries convening to create human rights-related documents.

18. See *id.* at 18.

19. UDHR, *supra* note 15; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

- Legal remedy (U8, C2)
- Protection against arbitrary arrest, detention, or exile (U9, C9)
- Access to independent and impartial tribunal (U10, C14)
- Presumption of innocence (U11, C14)
- Protection against ex post facto laws (U11, C15)
- Privacy (U12, C17)
- Freedom of movement (U13, C12)
- Nationality (U15, C24)
- Marry and found a family (U16, C23)
- Protection and assistance of families (U16, E10, C23)
- Marriage only with free consent of spouses (U16, E10, C23)
- Equal rights of men and women in marriage (U16, C23)
- Freedom of thought, conscience, and religion (U18, C18)
- Freedom of opinion and expression (U19, C19)
- Freedom of assembly (U20, C21)
- Freedom of association (U20, C22)
- Participation in government (U21, C25)
- Social security (U22, E9)
- Work (U23, E6)
- Just and favorable conditions of work (U23, E7)
- Trade Unions (U23, E8, C22)
- Rest and leisure (U24, E7)
- Adequate standard of living (U25, E11)
- Education (U26, E13)
- Participation in cultural life (U27, E15)
- Self-determination (E1, C1)
- Protection of and assistance to children (E10, C24)
- Freedom from hunger (E11)
- Health (E12, U25)
- Asylum (U14)
- Property (U17)
- Compulsory primary education (E14)
- Humane treatment when deprived of liberty (C10)
- Protection against imprisonment for a debt (C11)
- Expulsion of aliens only by law (C13)
- Prohibition of war propaganda and incitement to discrimination (C20)
- Minority culture (C27)

IV. THE SOCIAL CAPABILITIES APPROACH TO WOMEN'S RIGHTS

Various theorists drawing upon the insights of Adam Smith have proposed a theoretically rigorous and elaborate evaluation of well-being.²⁰ Sen is the originator of this “capability approach” in recent times.²¹ The theoretical criticisms of the utilitarian approach by Sen, Nussbaum and others that this approach reduces all qualities into quanta of utilities are serious ones.²² Nussbaum gives a graphic example of this by quoting the exchange between Mr. Gradgrind, economist and grief-stricken father, and his pupil Bitzer.²³ Bitzer outdoes his mentor by adhering to a strict code of utilitarian rationality that cannot comprehend a father's grief.²⁴ Khan has pursued a similar line of criticism in a number of recent papers and in the book *Technology, Development and Democracy*.²⁵ This approach makes the capabilities explicitly social and asks what concatenation of economic (real and financial) and other (e.g., political, social etc.) institutions will allow capabilities to be both increase steadily on the average and tend to equalize them among diverse individuals?²⁶ In effect, as the following discussion makes clear, we are asking how can we increase and equalize real, positive freedom for individuals in specific social contexts?

In discussing the well-being implications of human rights for women in particular, I wish to take on a version of the social capabilities approach. It is not my intent to present how human rights policies for women affect detailed empirical indicators of well-being. I simply wish to pose clearly the conceptual problem of evaluating the problems of denying women their rights and the possible consequences of human rights based reforms. The institutional reforms and changes proposed later in this paper, and by feminist scholars who suggest

20. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* IV (Edwin Cannan ed., Methuen & Co. 1904) (1776); ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* Part I (Dover Publications, Inc. 2006) (1759).

21. Sen, *Elements*, *supra* note 2, at 332-38. See also AMARTYA SEN, *INEQUALITY REEXAMINED*, at xi (2012); SEN, *DEVELOPMENT* *supra* note 3, at 18; Sen, *Human Rights*, *supra* note 2, at 152.

22. See MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 11-15 (2000) [hereinafter NUSSBAUM, *WOMEN*].

23. MARTHA NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 1, 13, 22, 23 (1995).

24. *Id.* at 23 (describing Bitzer as a “good student” because of his “remarkably flat and abstract description” of a horse that was devoid of emotion).

25. See KHAN, *TECHNOLOGY* (1998), *supra* note 6; UNCRD, *supra* note 8; Haider A. Khan & Hitoshi Sogabe, *Macroeconomic Effects of IMF Adjustment Policies*, in *ECONOMIC JUSTICE IN AFRICA: ADJUSTMENT AND SUSTAINABLE DEVELOPMENT*, at ch. 11 (George W. Shepherd & Karamo N.M. Sonko eds., 1994); Khan, *Deep Democracy* (2007), *supra* note 8, at 1; Haider A. Khan & Mariko Frame, *China's Energy Security: National Security, Ecological Balance and Regional Co-operation*, CIRJE-F-482 (2007), available at <http://www.cirje.e.u-tokyo.ac.jp/research/dp/2007/2007cf482.pdf>; Haider Khan, *Technology, Modernity, and Development: Creating Social Capabilities in a POLIS*, in *MODERNITY AND TECHNOLOGY* 327 (Thomas J. Misa, Philip Brey, & Andrew Feenberg eds., 2003).

26. See generally KARL MARX, *CAPITAL: VOLUME I*, at chs. 1-10 (1867) for a discussion on commodities, exchange, money, the circulation of commodities, the general formula for capital, the buying and selling of labor-power, the labor process, the producing surplus value process, constant and variable capital, the surplus-value rate, and the working day.

alternative non-patriarchal structures, must be proven to be capability-enhancing for women, or at least not to be capability-reducing for them. First, we still need to ask what social capabilities means both abstractly and concretely.

In a number of influential and insightful contributions, Martha Nussbaum has developed an Aristotelian interpretation of capabilities.²⁷ The connections between capabilities and a distinctly Aristotelian conception of human flourishing are indeed striking. Later in this section, we will discuss a list of general capabilities drawing upon both Sen and Nussbaum. The Aristotelian connections will become quite clear through this exercise in comparison and contrast.

In my article *Technology, Development and Democracy*, I point out some Hegelian connections as well.²⁸ In particular, the Hegelian conception of freedom as an interactive arrangement in society where concrete institutions of family, civil society, and state all play definite roles seems a specifically modern way of viewing the possibilities and limits of human flourishing in a liberal society based on private property.²⁹ Hegel's *Philosophy of Right* is a landmark contribution, in this sense, to the elucidation of the problem of freedom in modern societies.³⁰

The equally interesting thesis of Gilbert that Marx was an Aristotlean in his critique of alienation illustrates that such a conception of the theory of alienation supports the emphasis on the capabilities as a non-alienated set of qualities that are potentially attainable, but may actually be largely unachievable—particularly for women—under the existing institutional arrangements.³¹ Gilbert points out that in some parts of Marx's *Capital* “compared productive activity in general with labor under capitalism in a precisely Aristotelian way.”³² Marx's characterization of Milton's labors on the *Paradise Lost* as self-motivated, non-alienated labor and his contrast of such labor with that of a hack writer who writes only for the money he receives from the capitalist publisher underlines the good of genuine life-affirming labor.³³ Ironically, in real life under capitalism and in bourgeois political economy Milton's labor is “unproductive”³⁴ while the hack is a “productive” wage-laborer.³⁵

In *Capital*, Marx shows how the accumulated dead labor in the form of capital dominates workers.³⁶ Workers are mere means of further accumulation.³⁷ Under the sign of capital, death dominates over life and denies the workers the necessary opportunity to realize their potential to be free, creative beings.³⁸ In particular,

27. NUSSBAUM, WOMEN *supra* note 22, at 11.

28. KHAN, TECHNOLOGY (1998), *supra* note 6, at 7-8.

29. G.W.F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS (1821), translated in S.W. DYDE, PHILOSOPHY OF RIGHT xlviii-xlix (Dover Publications, Inc. 2005) (1896).

30. *Id.*

31. ALAN GILBERT, DEMOCRATIC INDIVIDUALITY 41, 239-40 (1990).

32. *Id.* at 265.

33. *Id.* at 250, 265.

34. That is, under the strict assumption that no wage payments were made.

35. GILBERT, *supra* note 31, at 265.

36. MARX, *supra* note 26, at 281.

37. *Id.* at 247-48, 289-91.

38. *Id.* at 246-48.

Marx argues that going beyond abstract labor means recognizing the use value/exchange value distinction as emerging in a historically specific, alienated and alienating, mode of production.³⁹ Going beyond such a distinction ultimately means going beyond the value form itself in the political economic sphere, or rather more broadly, a transvaluation of values⁴⁰ in a society of the future that can result from a transformation of capitalist social relations historically.⁴¹ As Gilbert points out, Marx's seemingly non-moral starting point of analyzing commodities ultimately leads to a moral critique of capital as a social relation.⁴² Interestingly, a qualitative labor theory of value ("QLTV") that is currently being developed by a Hegelian group of thinkers would seem to imply such a moral critique as well.⁴³

Taking the QLTV as the central explanatory framework and connecting it with eudemonism can help illuminate Foucault's important insights about the societies of discipline and control that form a part of his critique of modernity. From this point of view, such developments are consistent with the reproduction of the value form under the domination of capital. Foucault shows how the discipline of the army served as the model for discipline in the factory.⁴⁴ In fact, for Foucault, this disciplinary mode of functioning will permeate virtually every institution with a more subtle and manipulative until a system of control can be developed.⁴⁵

Foucault's concept of bio-power⁴⁶ is a particularly powerful way of characterizing how the production and reproduction of life itself can become an object of control under capitalism. In *Discipline and Punish*, Foucault analyzes in detail how the human body can be objectified.⁴⁷ The fundamental goal of the disciplinary power was to create a "docile body".⁴⁸ At the same time, this docile body also needed to be a productive body.⁴⁹ Looked at from the perspective of QLTV, this implies nothing less than the total alienation of flesh and spirit.⁵⁰ Once again, the problem from the human point of view—in spite of the ironically

39. See MARX, *supra* note 26, chs. 1-10.

40. The Nietzschean language is intentional. A radical interpretation of both Marx and Nietzsche can find important similarities in exploring the nature of freedom.

41. See MARX, *supra* note 26, chs. 1-10.

42. GILBERT, *supra* note 31, at 268-69.

43. See, e.g., PETER C. DOOLEY, *THE LABOUR THEORY OF VALUE* 16 (2005).

44. See generally MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 142 (2d ed. 1977).

45. *Id.*

46. See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1978); Michel Foucault, *The Politics of Health in the Eighteenth Century*, in *POWER/KNOWLEDGE* (Colin Gordon ed., 1980); Michel Foucault, *Naissance de la biopolitique* in *DITS ET ECRITS* (1994). Foucault's debt to Nietzsche as far as the exploration of biopower among other things, through a genealogical study is concerned, has been acknowledged by Foucault himself.

47. MICHEL FOUCAULT, *SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON* (1975) *translated in* ALAN SHERIDAN, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (2d ed. 1995).

48. *Id.*

49. *Id.*

50. See *id.* ch.1.

avowed “anti-humanism” of early Foucault⁵¹—then becomes how to overcome this alienation?

We now turn to this problem: If, as I have argued so far, the abolition of alienation requires the abolition of capital as a relation of domination, can QLTV throw any light on how to abolish capital as a social relation? Could capabilities then be reconstrued in a more radically critical way by following this Aristotelian-Hegelian-Marxian connection? In the rest of this paper, I show that this can be done and explore the further implications of this move for development theory and policy. In what follows, I first give a characterization of capabilities following Sen, Nussbaum and others. Then I discuss the fully social and political nature of these capabilities. One can construe capabilities as general powers of human body and mind under specified social, economic, and political structures that can be acquired, maintained, nurtured, and developed.⁵² Capabilities can be diminished and even completely lost under circumstances such as malnutrition or severe confinement.⁵³ I have emphasized elsewhere the irreducibly social (not merely biological) character of these human capabilities. Sen himself emphasizes “a certain sort of possibility or opportunity for functioning” without always carefully specifying the institutional setting.

In order to assess the critical reach of such a fully social capabilities perspective we need to go further and try to describe more concretely what some of the basic capabilities may be. David Crocker has given an admirable summary of both Nussbaum’s and Sen’s approach to capabilities in a recent essay.⁵⁴ Mainly relying on Nussbaum but also on other sources (shown below), he has compiled a list that is worth reproducing here:

Basic Human “Social”⁵⁵ Capabilities

(N and S stand for “Nussbaum” and “Sen,” respectively; the quoted items come from Nussbaum unless otherwise noted)

1. Virtues in Relation to Mortality
 - 1.1. N and S: “Being able to live to the end of a complete human life, so far as is possible
 - 1.2. N: Being able to be courageous
2. Bodily Virtues

51. KHAN, TECHNOLOGY (1998), *supra* note 6, at 88-89.

52. *Id.* at 95.

53. *Id.*; see David A. Crocker, *Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, Part 2*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 153, 157-60 (Martha C. Nussbaum & Johnathan Glover eds., 1995) [hereinafter Crocker, *Functioning and Capability*]; David A. Crocker, *Toward Development Ethics*, 19 WORLD DEV. 457, 465-66 (1991) [hereinafter Crocker, *Development Ethics*].

54. See Crocker, *Functioning and Capability*, *supra* note 53, at 157-64.

55. Our usage of social is akin to Gilbert’s use of “social” in social theory. Important political features are also included in the category of “social.” GILBERT, *supra* note 31, at 16-18. However, as above, I will use “social and political” also to underline the salience of both political ideas and practices.

- 2.1. N and S: "Being able to have good health"
- 2.2. N and S: "Being able to be adequately nourished"
- 2.3. N and S: "Being able to have adequate shelter"
- 2.4. N: "Being able to have opportunities for sexual satisfaction"
- 2.5. N and S: "Being able to move about from place to place"
3. Virtue of Pleasure
 - 3.1. N and S: Being able to avoid unnecessary and non-useful pain and to have pleasurable experiences
4. Cognitive Virtues
 - 4.1. N: "Being able to use the five senses"
 - 4.2. N: "Being able to imagine"
 - 4.3. N: "Being able to think and reason"
 - 4.4. N and S: Being "acceptably well-informed"
5. Virtues of Affiliation I (Compassion)
 - 5.1. N: "Being able to have attachments to things and persons outside ourselves"
 - 5.2. N: "Being able to love, grieve, to feel longing and gratitude"
6. Virtue of Practical Reason (Agency)
 - 6.1. N: "Being able to form a conception of the good"
S: "Capability to choose," "ability to form goals, commitments, values"
 - 6.2. N and S: "Being able to engage in critical reflection about the planning of one's own life"
7. Affiliation II (Friendship and Justice)
 - 7.1. N: "Being able to live for and to others, to recognize and show concern for other human beings, to engage in various forms of familial and social interaction"
 - 7.1.1. N: Being capable of friendship
S: Being able to visit and entertain friends
 - 7.1.2. S: Being able to participate in the community
 - 7.1.3. N: Being able to participate politically and being capable of justice
8. Ecological Virtue
 - 8.1. N: "Being able to live with concern for and in relation to animals, plants and the world of nature"
9. Leisure Virtues
 - 9.1. N: "Being able to laugh, to play, to enjoy recreational activities"
10. Virtues of Separateness

- 10.1. N: "Being able to live one's own life and nobody else's"
- 10.2. N: "Being able to live in one's very own surroundings and context"
- 11. Virtue of Self-respect
 - 11.1. S: "Capability to have self-respect"
 - 11.2. S: "Capability of appearing in public without shame"
- 12. Virtue of Human Flourishing
 - 12.1. N: "Capability to live a rich and fully human life, up to the limit permitted by natural possibilities"
 - 12.2. S: "Ability to achieve valuable functionings"⁵⁶

As Crocker correctly points out, we can facilitate this ordering by requiring that "it might be better for practical rationality and affiliation to 'infuse' but not 'organize' the other virtues."⁵⁷ Crocker contrasts Nussbaum's approach with Sen's.⁵⁸

Sen's and Nussbaum's lists differ at a few points. For Sen, the bodily capabilities and functionings are intrinsically good and not, as they are in some dualistic theories of the good life, merely instrumental means to other (higher) goods. In interpreting Aristotle, Nussbaum distinguishes between bodily functionings that are chosen and intentional, for instance, "chosen self-nutritive and reproductive activities that form part of a reason-guided life" and those that are non-intentional, such as digestion and other "functioning of the bodily system in sleep."⁵⁹

Furthermore, Nussbaum has included items such as "being able to have attachments to things and persons outside ourselves" and "being able to live with concern for and in relation to animals, plants and the world of nature,"⁶⁰ for which Sen has no counterparts. These items are welcome features. Item 8, "ecological virtue," is an especially important addition to Nussbaum's outlook.⁶¹ Crocker points out that:

In a period when many are exploring ways of effecting a convergence between environmental ethics and development ethics, it is important that an essentially anthropocentric ethic "make room" for respect for other species and for ecological systems. Worth considering is whether Nussbaum's "ecological virtue" is strong enough. Perhaps it should be formulated to read: "Being able to live with concern for and in relation to animals, plants, and nature as intrinsically valuable." Item 9 injects

56. WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES (Martha C. Nussbaum & Johnathan Glover eds., 1995); Crocker, *Functioning and Capability*, *supra* note 53, at 174-76 (footnotes and citations omitted).

57. Crocker, *Functioning and Capability*, *supra* note 53, at 176.

58. *Id.* at 176-77.

59. *Id.*

60. *Id.* at 155, 175.

61. *Id.* at 175.

some appealing playfulness in a list otherwise marked by the “spirit of seriousness.” What explains the presence of these items on Nussbaum’s list, their absence on Sen’s list, and, more generally, the more concrete texture often displayed in Nussbaum’s descriptions? One hypothesis is that the differences are due to Nussbaum’s greater attention . . . to the limits, vulnerabilities, and needs of human existence. Further, it may be that Nussbaum’s richer conception of human beings derives from making use “of the story-telling imagination far more than the scientific intellect.” On the other hand, Sen helpfully includes the good of self-respect, a virtue that enables him to find common ground with Rawls and to establish links with the Kantian ethical tradition, in which moral agents have the obligation to respect all persons, including themselves, as ends-in-themselves.⁶²

Both Sen and Nussbaum agree, however, that these capabilities are distinct and of central importance.⁶³ One cannot easily trade off one dimension of capability against another. At most, one can do so in a very limited way. One cannot reduce capabilities to a common measure such as utility. As Crocker points out, “capability ethic” has implications for freedom, rights, and justice going far beyond simple distribution of income considerations.⁶⁴ If one accepts the capability approach as a serious foundation for human development, then it follows that going beyond distributive justice is necessary for a complete evaluation of the impact of economic policies.

In evaluating any policy regime—for instance international financial regimes and national economic policies under globalization—from this perspective not only do I wish to pose the question of efficiency, but also the whole set of questions regarding human freedom, in particular, the positive human freedom to be or to do certain things. Thus, creation of markets and efficient production by itself would mean very little if it led to a lopsided distribution of benefits. Worse yet, if markets and other institutions led to phenomena such as reduced life expectancy, increased unemployment, reduced consumption levels for many, and deprivation for certain groups such as women and minorities then they will not even be weakly equitable global economic structure. On the contrary, under such circumstances, the global markets and other financial institutions will be strongly inequitable from the capability perspective.

It is because of this perspective that the existing positive analysis of the problems of political economy such as those of global financial markets and institutions from the perspective of Social Capabilities Approach to Women’s Rights need to be put in a completely transparent “social capabilities” framework. Such a framework is openly normative and makes a strong ethical case for helping the disadvantaged increase their capabilities towards achieving equality of capabilities. Thus, for instance, poorer nations and poor people in the global

62. *Id.* at 177.

63. *Id.*

64. *Id.* at 153.

economy deserve a special ethical attention within any proposed global financial architecture.⁶⁵ As I showed in my keynote paper delivered at conference on Financial Crisis, in Bali, Indonesia, in the context of adopting innovation structures leading to increased productivities, ultimately the aim of any increase in productivity needs to be the increase of freedom.⁶⁶ Such freedom, as Sen points out has both an instrumental value and an ultimate value.⁶⁷ Instrumentally, freedom as social capabilities can lead to a further increase in productivity.⁶⁸ Thus, even a hard-nosed, efficiency driven analysis must address this aspect as an empirical issue. Therefore, an Aristotelian interpretation of Sen-Nussbaum conceptualization of capabilities can go a long way towards a social democratic regime of development as freedom, and this is much to be applauded.

However, pushing the concept of social capabilities in the Hegel-Marx direction of overcoming alienation by achieving freedom as a concrete universal right requires a very radical form of global social democracy. An added strength of such an approach will be to go some distance towards bridging the gap between the process aspect of human and women's rights and the capabilities approach. I now turn to a demonstration of this thesis.

V. FROM UTILITARIAN WELFARE ECONOMICS TO A SOCIAL CAPABILITIES BASED ETHICS FOR WOMEN'S RIGHTS

The utilitarian tradition in economics, as Sen correctly reminds us, is based on three distinct components.⁶⁹ One of these components is consequentialism:⁷⁰ all choices of actions, rules, institutions etc. must be judged by the consequences of the particular choice made. In this sense, consequentialism is merely results oriented. However, it does rule out purely or exclusively rights-based or deontological decision rules. A second constituting element of utilitarianism is what Sen has termed "welfarism."⁷¹ According to Sen welfarism "restricts the judgments of state of affairs to the utilities in the respective states. . . ."⁷² Combining welfarism with consequentialism, one can derive the proposition that "every choice must be judged by the respective utilities it generates."⁷³

Finally, the third element of utilitarianism, namely, sum-ranking of utilities, imposes an aggregation scheme whereby utilities of different people can simply be summed together without bothering about their distribution over the entire

65. Haider A. Khan, *Global Financial Governance: Towards a New Global Financial Architecture for Averting Deep Financial Crisis* 32, Keynote paper delivered at conference on Financial Crisis, in Bali, Indonesia (Sept. 24-26, 2013), available at http://mpr.ub.uni-muenchen.de/49275/1/MPRA_paper_49275.pdf [hereinafter Khan, *Global Financial Governance*].

66. KHAN, *TECHNOLOGY* (1998), *supra* note 6, at 97.

67. SEN, *DEVELOPMENT*, *supra* note 3, at 157-58.

68. *Id.* at 5.

69. *Id.* at 58.

70. *Id.*

71. *Id.* at 59.

72. *Id.*

73. *Id.*

population.⁷⁴ This neatly sidesteps who gets what; but it is clearly the greatest good under the three conditions when utility is the only good to consider. Notice that Robbins attacked the classical utilitarian idea of interpersonal comparability and, by implication, the sum-ranking of utilities in the 1930s.⁷⁵ However, the alternative, radically subjective view of personal utility also sidesteps the issue of distribution. No two Pareto optimal states are, strictly speaking, comparable. In general, equilibrium theory, the second theorem of welfare economics, merely states that under a suitable redistribution of initial endowments, one can achieve every Pareto optimal state as a competitive equilibrium. However, there is no bias towards—or, for that matter, against—an egalitarian distribution.

Sen's radical critique of utilitarianism and his replacement of utility with capabilities have changed the paradigmatic terms of discourse.⁷⁶ It is no longer necessary to debate the various meanings of utility and how best to distribute the utilities. Positive, concrete freedoms, such as the Sen-Nussbaum list of capabilities above demonstrates, have replaced the talk about utilities.⁷⁷

A new set of questions arise with this radical shift of the terrain of discourse. What are the social, political, and economic conditions under which capabilities are best promoted for all the people in an equalizing direction? Both the levels and distribution of capabilities are important. Perhaps responding in an indirect way to earlier criticisms, Sen has outlined the "perspective of freedom" more definitely.⁷⁸ Freedom is important both for *evaluative* and for *effectiveness* reasons.⁷⁹ Evaluation of societies by the actual amount of substantive freedoms enjoyed by people is radically different from using utility, procedural liberty, real income etc.⁸⁰ *Effectiveness reason* rests on Sen's claim that freedom enhances the "agency" of the individual leading to greater individual initiative and social effective social participation.⁸¹ Thus, freedom can be viewed as both the primary end and the principal means for development. Sen also gives a five-fold classification of instrumental freedoms as consisting of political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security.⁸²

In the rest of this section, I argue that a perspective of global "deep democracy" consistent with Sen's characterization of freedom⁸³ leads us to a consistent critique of the existing political and socioeconomic arrangements

74. *Id.*

75. LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE, at vii, 136-139 (3d ed. 1932).

76. See generally SEN, DEVELOPMENT, *supra* note 3.

77. *Id.*

78. Compare SEN, DEVELOPMENT, *supra* note 3, at 62-63, with Crocker, *Functioning and Capability*, *supra* note 53, at 174-76.

79. SEN, DEVELOPMENT, *supra* note 3, at 18.

80. *Id.* at 19.

81. *Id.* at 18.

82. *Id.* at xii.

83. *Id.* at 3-4 (alleging that freedoms are not limited to narrow views of development, but also include social and economic arrangements and political and civil rights).

globally and furthermore it can be a pointed critique of the unjust treatment of women in developing world in particular at present. Following the enlightenment project as formulated by Kant,⁸⁴ and the critique of Kantian understanding by Hegel,⁸⁵ and finally, the “this-sided” worldly critique of Hegel by Feuerbach⁸⁶ and the dialectical critique of Feuerbach’s one-sided materialism by Marx⁸⁷ takes us to a questioning of the existing institutions when these fail to promote and equalize social capabilities. My piece *Deepening Democracy During Crisis: Building on an Ontology of Difference* captures many of these concerns.⁸⁸

Building on the contributions of classical thinkers from Rousseau to modern theories of participatory and strong democracy advanced by scholars such as Barber,⁸⁹ “deep democracy” advances the thesis of equalization of capabilities as a central concern of global economic justice. Most important from this perspective is the work by scholars such as Alan Gilbert on radical democracy that is internationalist and welcomes mass activism.⁹⁰

Extending the important earlier work of Gilbert, in a number of my essays and books I establish the claim of equalizing social capabilities along with global justice as central elements of a sufficiently rich conception of democracy that respects the rights of citizens underlying the core concept of democracy.⁹¹ Conceiving rights following Sen as “goal rights” is one way to defend the centrality of capabilities. Another way is to view these rights—most importantly, the right to self-determination—as self-sustaining is if and only if movement towards a global sustainability of equalization of capabilities occurs. Extending Gilbert’s cluster conditions for democracy,⁹² I establish that three clusters are of particular significance: political, economic, and cultural.⁹³

The political cluster begins with formal democratic principles of universal suffrage and elections, but does not stop there. Although this “formal democracy” must be defended vigorously, it is seen as one aspect of a deeper form of democracy that various polities are moving towards. In order to gain insight into this deeper form, we need to ask what conditions can sustain freedom—

84. IMMANUEL KANT, AN ANSWER TO THE QUESTION: “WHAT IS ENLIGHTENMENT?” 1-3 (1784), available at https://web.cn.edu/kwheeler/documents/What_is_Enlightenment.pdf.

85. GEORG HEGEL, HEGEL’S PHILOSOPHY OF RIGHT 213-14 (T. M. Knox trans., 1969).

86. FREDERICK ENGELS, LUDWIG FEUERBACH UND DER AUSGANG DER KLASSISCHEN DEUTSCHEN PHILOSOPHIE (1886), translated in LUDWIG FEUERBACH AND THE END OF CLASSICAL GERMAN PHILOSOPHY (Progress Publishers 1946), available at <http://www.marxists.org/archive/marx/works/1886/ludwig-feuerbach/>.

87. KARL MARX, CRITIQUE OF HEGEL’S PHILOSOPHY OF RIGHT, in EARLY WRITINGS (T. B. Bottomore trans., 1964).

88. KHAN, TECHNOLOGY (1998), *supra* note 6, at 123; Khan, *Deep Democracy* (2009), *supra* note 8; Khan, *Deep Democracy* (2007), *supra* note 8, at 1-2; Khan, *Deepening Democracy*, *supra* note 8.

89. BENJAMIN R. BARBER, STRONG DEMOCRACY 117 (1984).

90. GILBERT, *supra* note 31.

91. KHAN, TECHNOLOGY (1998), *supra* note 8, at 95-99.

92. GILBERT, *supra* note 31; see also George Kateb, *Democratic Individuality and Claims of Politics*, 12 POLITICAL THEORY 331 (1984).

93. KHAN, TECHNOLOGY (1998), *supra* note 8, at 92.

particularly for women in developing countries—which underlies the core idea of democracy. The answer is that as soon as freedom is conceived positively, and not just as mere absence of coercions, capabilities come to the fore.

However, probing deeply into the project of enhancing and equalizing the capabilities of citizens even in rough, practical sense, economic and cultural conditions come to be seen as crucial. For example, education, including critical ethical and political education, is recognized as of utmost importance. In so far as democratic movements for a just society—women's rights movements being an important part of these movements—have been schools for political education. Schools of political education starting with at least the political movements from 17th century onwards including major movements in the 20th century and the new social movements of this century are not just disruptive moments, but are complex struggles where much political learning about freedom takes place. Thus, “deep democracy” will necessarily involve a continuous engagement with the past, present, and future of the democratic movements in a pluralistic context. Periodic individual and mass, nonviolent civil disobedience movements will be a necessary part of a “deep democratic” agenda.

Economically, the provision of leisure time for both personal private interest and the exercise of citizenship responsibilities will be necessary. Workplace democracy is also a salient condition, since production is socially necessary and will occupy a certain amount of time for all able bodied and mentally competent adults. The capabilities literature has not always been clear on this point.⁹⁴ However, it is logical to think that a person's capabilities will suffer deprivation if working conditions do not allow discussion, participation, and “ownership” of work conditions. The literature on flat organizations in knowledge economy generally makes a case that organizations should treat the newer, “intellectual” labor in this way.⁹⁵ Alternatively, the social capabilities approach leads to the conclusion that organizations large and small should treat all workers this way so that organizations can overcome workplace alienation without necessarily using labor saving capital-intensive technologies.

Overcoming alienation also requires a vibrant non-patriarchal culture where artistic and other forms of individual and collective expressive activities are as open as possible. Capabilities in this dimension are vital for the protection of democratic values and practices, since these also involve internalization of mutual respect, integrity, tolerance, and creativity. One can see that using the advances in cognitive, social psychology and some schools of psychoanalysis capabilities can be further advanced through a therapeutic approach to social problems. A “postmodern” insight is also the need to recognize the limits to certain types of

94. See, e.g., KHAN, TECHNOLOGY (1998), *supra* note 6, at 95-99; Khan, *Deep Democracy* (2009), *supra* note 8; Khan, *Deep Democracy* (2007), *supra* note 8, at 4-5; Crocker, *Functioning and Capability*, *supra* note 53; Khan, *Global Financial Governance*, *supra* note 73.

95. See, e.g., KHAN, TECHNOLOGY (1998), *supra* note 6 at 95-99; Khan, *Deep Democracy* (2009), *supra* note 8; Khan, *Deep Democracy* (2007), *supra* note 8; Crocker, *Functioning and Capability*, *supra* note 53; Khan, *Global Financial Governance*, *supra* note 73.

economic growth. As Daly and others have pointed out, the scale of production counts in a globalized, interdependent planet in a significant way.⁹⁶ Ecological issues will often require a just, global democratic procedure for deliberation and policymaking. In short, all of the cluster conditions—political, economic, and cultural—require a theory of global justice as an underpinning and justification.

I have proposed such a theory in the context of a postmodern world by building on elements of Rawls and Sen, using the ontology of difference to take it beyond a simple Eurocentric framework.⁹⁷ In brief, the structural forces in the global economy push towards integrating markets and regions. However, many markets are embedded in national economies; there are also non-market aspects of social and cultural lives of people that are threatened.⁹⁸ As a result, we find the contradictory phenomena of McWorld and Jihad.⁹⁹ The creation of a genuine global society, which many see as the ultimate outcome of globalization, then necessitates meeting the requirements of global justice. I mention at least five areas, where the norms of global justice must evolve (among others):¹⁰⁰

1. *International trade and monetary regimes*: The current asymmetric system of payments that penalizes the deficit countries by forcing only them to bear the costs of adjustment needs to evolve into a global burden sharing institution. The World Trade Organization similarly needs to acknowledge the historical imbalances in the world trading system. For example, specialization according to static comparative advantage may lock the developing countries in a relatively backward situation in the emerging global division of labor.¹⁰¹
2. *International capital flows*: From the perspective of many people in the developed economies, capital flight to least developed countries (“LDCs”) (with or without free trade agreements) may constitute a barrier to well-being, at least in the short-run.¹⁰² At the same time foreign direct investment in LDCs may create only low-wage, marginal jobs.¹⁰³ A just approach to foreign direct investment must consider the effects on both the north and south in terms of self-determination. A controlled capital flow accompanied by improvements of wages and working conditions in the south may be the most desirable solution.¹⁰⁴
3. *International ecological considerations*: Global interdependence has been increasingly recognized in this area. However, it is not clear what justice

96. See HERMAN E. DALY, *ECOLOGICAL ECONOMICS AND SUSTAINABLE DEVELOPMENT, SELECTED ESSAYS OF HERMAN DALY* (2007).

97. KHAN, *TECHNOLOGY* (1998), *supra* note 6, at 124-25.

98. *Id.*

99. BENJAMIN BARBER, *JIHAD VS. MCWORLD: TERRORISM'S CHALLENGE TO DEMOCRACY* (1995).

100. KHAN, *TECHNOLOGY* (1998), *supra* note 6, at 128-29.

101. *Id.* at 131-32.

102. *Id.* at 131.

103. Adrian Wood, *How Trade Hurt Unskilled Workers*, 9 J. ECON. PERSPECTIVES 57, 61 (1995).

104. KHAN, *TECHNOLOGY* (1998), *supra* note 6.

demands in terms of the relationship between the north and south. All other things being equal, the enforcement of strict environmental standards would seem to be just. However, some argue that such standards may destroy the livelihood of some people in the south. A global tax and transfer scheme would seem to be the precondition for applying a global set of environmental standards. The transfer of ecologically sound technology systems from rich to the poor countries is a precondition for justice in this sphere.¹⁰⁵

4. *Asset redistribution and human development*: Much of the foregoing discussion pinpoints the need for giving people the economic wherewithal in order for them to develop their social capabilities. Most studies have discovered that non-redistribution of assets to the poor hampers poverty alleviation strategies.¹⁰⁶ Redistributing assets and developing their human capital so that the poor can have access to markets becomes a major necessity in our normative framework. In most parts of the world, this will require structural reforms rather than marginal policy interventions.
5. *Gender justice*: The impact of globalization on women will have to be assessed carefully. The well-documented facts regarding gender inequalities, that so far have affected women's capabilities negatively, demand unequivocally that policymakers pay careful attention to enhancing (or at least not decreasing) women's capabilities.¹⁰⁷ Will globalization help women to overcome social limitations such as lack of nutrition and limits on participation in social, economic, and political life? Unfortunately, the answer is unclear. As far as many developing country women do not possess skills for the global market place, globalization is already hurting them.

These five examples are illustrative and by no means do they exhaust all the pertinent issues in moving towards a just economy globally. (For example, we could add or highlight the growing rural/urban disparities with globalization and its implications for justice). Nevertheless, they do illustrate both the problems and prospects for justice in the age of globalization. One of the major political problems we have not discussed so far is the weakening of national sovereignty that the call for global economic justice entails. Agreeing to a global mode of production and distribution constrained by the principles of justice does mean surrendering considerable authority to international agreements, conventions, and ultimately, perhaps to new international organizations. It should be observed, however, that even without the constraining role of justice, the globalization process weakens national sovereignty, even for advanced industrialized countries

105. *Id.*

106. See, e.g., IRMA ADELMAN & SHERMAN ROBINSON, INCOME DISTRIBUTION POLICY IN DEVELOPING COUNTRIES: A CASE STUDY OF KOREA (1978); Jeffrey James & Haider A. Khan, *The Employment Effects of an Income Redistribution in Developing Countries*, 21 WORLD DEV. 817 (1993).

107. See *Human Development Reports (2000-2012)*, U.N. DEV. PROGRAM. <http://hdr.undp.org/en/global-reports> (last visited July 20, 2014).

(e.g., NAFTA). Thus, the call for a just economy must confront this (as well as other issues, such as weakening of traditional cultural modes of living) head on in the light of reasonable principles. The fundamental message is that among these principles, freedom as rational autonomy of the individual must be the principal one. This is one rational approach (perhaps the only one) if we are to avoid both the Scylla of Jihad and the Charybdis of McWorld.

The McWorld aspect of globalization is a result of a fractured but real economic, financial and technological integration.¹⁰⁸ Following the collapse of the Bretton Woods Agreement in the early 1970s, the financial market (including interest rates and exchange rates) was deregulated, thereby enhancing the flow of capital between nations.¹⁰⁹ Until then the Bretton Woods agreement of 1945 governed the world financial system, which provided for fixed exchange rate that expressed currency values in terms of dollars and gold.¹¹⁰ The Nixon administration laid the foundation for a global market when it abolished the Bretton Woods system in 1971 and replaced it with a floating exchange rate.¹¹¹ This was reinforced by the resurgence of a neoliberal free-market ideology of liberalization, privatization, and deregulation that became the “only game in town” following the ascendance of political conservatives—Reagan in the U.S. and Thatcher in Great Britain.¹¹² The collapse of the former socialist countries and the emergence of the neoliberal thinking as a dominant and unchallenged school of thought further reinforced the global market foundation. All these factors created an environment conducive for the free movement of goods, including capital goods, and services as well as finance, thereby seemingly creating an integrated global economy. In various articles, I have discussed the main causes of this contradictory, but nonetheless integrating, moment in the world economy.¹¹³ However, an alternative set of policies that can address the problems of slow growth and external payments while promoting the equalization and enhancement of social capabilities is also possible, as the discussion in Section 5 below will show.

Before discussing these, however, I discuss the links between “social” capabilities and process aspects of women’s rights. Sen points out correctly that while his version of capabilities approach is superior to others—e.g., the Rawlsian primary goods framework—in terms of opportunities and positive freedom aspects, it is weak concerning the procedural aspects of freedom and justice.¹¹⁴ Indeed,

108. KHAN, TECHNOLOGY (1998), *supra* note 6.

109. Khan, Global Financial Governance, *supra* note 73, at 57.

110. *Id.*

111. *Id.*

112. *Id.*

113. Haider A. Khan, *Using Macroeconomic Computable General Equilibrium Models to Assess the Poverty Reduction Impact of Structural Adjustment Policies*, (ADB, Tokyo: Japan, Discussion Paper No. 12, 2004) [hereinafter Khan, *Equilibrium Models*], available at <http://www.adbi.org/files/2004.07.dp12.macroeconomic.equilibrium.models.poverty.pdf>.

114. See Sen, *Human Rights and Capabilities*, *supra* note 2; Sen, *Elements*, *supra* note 2.

Rawls's "first principle" of justice centers on the priority of liberty.¹¹⁵ The first part of his "second principle" involves procedural fairness. In particular, it demands "positions and offices [be] open to all."¹¹⁶

If we take Rawls seriously, we must properly emphasize the process aspect of liberty in any foundational theory of human rights that claims to have some degree of comprehensiveness. Here the attraction of the "social" and political interpretation of capabilities is that to some extent the social rules that respect this emphasis on process can be included. A full articulation of this position is beyond the scope of this paper. The intuition behind this claim, however, is that a Hegelian approach that explicitly recognizes the importance of social and political institutions in defining freedom and social individuality in incorporating the process aspect within the ethical community (*sittlichkeit*).¹¹⁷

VI. THE ROLE OF A NETWORK OF INSTITUTIONS IN CREATING SOCIAL CAPABILITIES FOR WOMEN: FREEDOM AS THE DYNAMICS OF SOCIAL CAPABILITIES EMBEDDED IN INSTITUTIONS

From our normative analysis so far it would appear that a nuanced, broad consequentialism of the sort Sen advocates—"a goal rights system with consequence based reasoning"—is superior to a narrow deontological view of rights and freedom such as Nozick's.¹¹⁸ However, the modern Hegel-Marx connections push us further in the direction of a critical assessment of institutions and the need for radical institutional change if necessary. The necessity for such changes is obvious in predatory regimes such as the Pol Pot regime in Cambodia, or Saudi Arabia under corrupt princes. A wide range of institutional changes is necessary even in formally democratic regimes such as India, or Bangladesh.¹¹⁹

The central point about deepening democracy is that it is an evolving, dynamic network of institutions, and not just an agenda for piecemeal reforms. Although individual reforms are welcome and should be supported vigorously, a movement for "deep democracy" must advocate deeper, systemic changes along with the specific reforms that people are fighting for at any given moment. Therefore, the role of the new social movements for gender justice is, from this perspective, positive and encouraging; but in order to be fully effective, these movements must have a deep democratic agenda and fight for it openly.

The network of social, political, and economic institutions necessary for promoting such wellbeing freedoms and agency freedoms as are necessary for the full self-determination of women can be both historically and culturally specific, thus respecting the ontology of difference. However, in keeping with a moral

115. JOHN RAWLS, *A THEORY OF JUSTICE* 53 (1971).

116. *Id.*

117. *Id.*

118. Sen, *Rights and Capabilities*, *supra* note 2, at 152-153; ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 5-6 (1974).

119. See Haider A. Khan, *Democracy in Bangladesh: From Crisis to Sustainability*, 9 J. BANGL. STUDS. 13, 21 (2007) [hereinafter Khan, *Democracy in Bangladesh*].

realist theory of moral progress, they must involve the actual provisioning of adequate amounts of resources and safeguards for women's rights all around development. Along with the constitutionally liberal guarantees of physical safety and freedom from arbitrary coercion, there must be positive guarantees of being able to pursue a political life of citizenship that gives social and political opportunities to all. In the age of globalization, this implies, ultimately, that nothing short of a global charter of rights for all humans with implementing institutions at international, national, and local levels are called for.

This may seem hopelessly utopian to many. Therefore, let me observe that the strategic positioning of fighting for a global citizenship does not negate the many small, local struggles for extending well-being and agency freedoms, but rather the strategy is predicated upon active participation in whatever capacity it is possible, across the national boundaries in these myriads of ongoing struggles. The more farsighted people in the anti-globalization movements around the globe are already moving in this direction. The positive policy changes from above for promotion of the capabilities of the disadvantaged in particular—by the International Financial Institutions, developed country governments, and developing country governments—are always welcome developments. However, the partial and limited nature of these policy initiatives needs to be recognized. It is also doubtful that without mass democratic movements from below even limited reforms from the above will be forthcoming.

The economic struggles for better wages and working conditions in both domestic and transnational firms are of great significance in the age of globalization. The social capabilities of women will remain greatly stunted even under conditions of full employment if low wages and dangerous, unhealthy working conditions are the norm. A more radical step, which is consistent with the logic of development as freedom, is the overcoming of domination in the workplace. Such struggles for the overcoming of domination in the workplace can then be connected with the broader democratic movements around the world.

The important point that emerges from this perspective is that freedom is positive, concrete, and dynamic. It is positive in the sense of alerting us to the need for promoting social capabilities. It is concrete in two senses. One is the concreteness in the identification of specific functionings and capabilities that the "development as freedom" approach calls for explicitly. The second concrete aspect—here freedom is finally, a "concrete universal" in Hegel's terminology¹²⁰—is the absolute necessity to embody social freedom in concrete, interrelated, historically specific social, political, and economic institutions. It is dynamic in the sense that such institutions, and to some extent, the idea of freedom itself, may undergo further changes in the direction of promoting further capabilities as the future unfolds. In the next section, I attempt a concrete illustration of this idea by looking at the problems of women's capabilities.

120. HEGEL, *supra* note 29, at 152.

VII. WOMEN'S CAPABILITIES PROMOTION AS A SPECIAL POLICY IMPERATIVE:
PRESENT TASKS AND A MOVEMENT TOWARDS THE FUTURE

Within this project of promoting global "deep democracy" through the progressive equalization and enhancement of social capabilities defended above, certain items such as ecological justice, sharing of wealth across borders, and gender justice have proved to have both logical and normative salience. Here, I develop one theme—namely, the problem of developing women's capabilities as an important aspect of global justice—as an example to illustrate the practical relevance of the capabilities approach.

Here, too, the two important modern pioneers are Sen and Nussbaum. Sen's *Inequality Reexamined* has an important chapter on Gender and Capabilities.¹²¹ Sen has contributed to a rigorous examination of the connections between gender and capabilities both conceptually and through empirical work in collaboration with others. *Women, Culture and Development*—Nussbaum's edited volume with Jonathan Glover as the coeditor—is another landmark contribution to the field of gender and development.¹²² Nussbaum's *Women and Human Development: The Capabilities Approach* is also a most illuminating contribution, but here I will focus on her pioneering contribution, *Human Capabilities, Female Human Beings*, in *Women Culture, and Development* for the most part.¹²³

Incidentally, Nussbaum also takes issue with certain relativist postmodern criticisms of "essentialism" and defends an Aristotelian "essentialist" conception of capabilities in *Human Capabilities, Female Human Beings* as well.¹²⁴ My approach here dispenses with "essentialism" in favor of ontological difference but defends the human flourishing for women cogently by conceptualizing capabilities as fully social within a history of struggles for moral progress that accord with the theory of moral realism of Richard Boyd in particular.¹²⁵

The Nussbaum-Glover book begins with a concrete case study of a woman's right to employment in India and Bangladesh based on her fieldwork by Martha Chen.¹²⁶ Apart from the editors, the book presents a number of different perspectives on methodology and foundations of conceptualizing women's equality.¹²⁷ For example, Onora O'Neill presents a vigorous case against using

121. SEN, *INEQUALITY REEXAMINED*, *supra* note 21, at 117-128.

122. WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES (Martha C. Nussbaum & Jonathan Glover eds., 1995).

123. Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61 (Martha C. Nussbaum & Jonathan Glover eds., 1995) [hereinafter Nussbaum, *Female Human Beings*]; NUSSBAUM, WOMEN, *supra* note 22.

124. Nussbaum, *Female Human Beings*, *supra* note 123, at 62-64.

125. See Richard Boyd, *On the Current Status of Scientific Realism*, in THE PHILOSOPHY OF SCIENCE 195, 207-10 (Richard Boyd et al. eds., 1991).

126. Martha Chen, *A Matter of Survival: Women's Right to Employment in India and Bangladesh*, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 37 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

127. See WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES, *supra* note 123.

preference satisfaction as the normative criterion in economics.¹²⁸ She couples this with an equally vigorous defense of the capabilities approach.¹²⁹ She is, however, a Kantian and weaves skillfully the capabilities approach with a form of the Kantian principle that we not act on principles that we cannot act upon by all and argues that such a Kantian principle can serve as a valuable test for viable social policies. Her arguments result in showing that victimization, “by violence, by coercion, by intimidation . . .”¹³⁰ is simply unacceptable. Inter alia, this is also a powerful condemnation of the victimization of women.

I have already mentioned David Crocker’s meticulous essay on the concept of capabilities.¹³¹ Hilary Putnam also defends a pragmatic approach close to John Dewey’s position that there could be a rational basis for articulating and holding onto an ethical position.¹³² Although, as Linda Alcoff points out in her comments, some feminists have followed philosophers such as Nietzsche and Foucault in order to criticize the kind of “rationalistic” approach Putnam defends, the point that democratic processes are necessary in Putnam’s argument seems to be intact.¹³³ In my defense of a deeper form of democracy, I have emphasized the need for respecting differences, as well as the role of power and desire, without making the last two items either epiphenomena or overwhelmingly arbitrary. Indeed, the recognition of the Dionysian aspects of human nature leads to the need for a structure and procedures for democracy that will both protect individuals from tyranny and promote their social capabilities in an interactive, causally reciprocal, and efficacious manner.

Respecting differences among cultures does not preclude a consideration of cross-cultural standards of justice. This is an important conclusion drawn by Seyla Benhabib in the Nussbaum-Glover volume.¹³⁴ There are internal debates within each culture about justice, as Sen and others have also pointed out.¹³⁵ There may be sufficient common ground among seemingly different cultures in their critical and reflective discourses on ethics and justice. This points to the possibility of discussing women’s capabilities from a global and objective perspective. There are a number of other essays—conceptual and empirical—including the highly

128. Onora O’Neill, *Justice, Capabilities, and Vulnerabilities*, in *WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 140, 141-44 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

129. *Id.* at 143-45.

130. *Id.* at 147.

131. See Crocker, *supra* note 53.

132. See HILARY PUTNAM, *REALISM WITH A HUMAN FACE* 21-26 (James Conant ed., 1990).

133. See Linda Alcoff, *Democracy and Rationality: A Dialogue with Hilary Putnam*, in *WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 226, 231-32 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

134. Seyla Benhabib, *Cultural Complexity, Moral Interdependence, and the Global Dialogical Community*, in *WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 235, 249-52 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

135. See DONNELLY, *supra* note 12; ISHAY, *supra* note 1, at 47, 60, 126-27; KHAN, *TECHNOLOGY* (1998), *supra* note 8, at 123-33; Khan, *Deep Democracy* (2009), *supra* note 8, at 54-58; Khan, *Deep Democracy* (2007), *supra* note 8, at 2-5, 10; Khan, *Democracy in Bangladesh*, *supra* note 119, at 15-16.

relevant and important essays in Part IV, which give regional perspectives on women's equality from China, Mexico, India, and Africa. From matters of basic functionings, such as health and survival, to issues related to political voice—in short, the whole spectrum of functionings related to self-determination—there is by now compelling recorded evidence of discrimination against women almost everywhere in the world. In developing countries, along with general discrimination, there are also important regional variations. For example, even with great poverty, Sub-Saharan Africa shows less gender discrimination in basic health matters than the wealthy Indian state of the Punjab. This also allows us to illustrate the severity of such discrimination in some Asian countries in particular.

The female-male ratio in Sub-Saharan Africa is 102.2 to 100.¹³⁶ The same ratio for many Asian, Latin American, and North African countries is much lower—in fact, the female percentage is less than male percentage.¹³⁷ In order to dramatize the issue, Sen has expressed this gap as the absolute number of “missing women.”¹³⁸ Following this approach, in the 1990s, the number of missing women in Southeast Asia was 2.4 million; in Latin America it was 4.4 million; in North Africa, 2.4 million; in Iran, 1.4 million; in China 44 million; in India 36.7 million; in West Asia, 4.3 million.¹³⁹ According to Dreze and Sen, in India there are more girls dying than boys; i.e. mortality rates are higher for the girls.¹⁴⁰ Additionally, the mortality rates are higher for women than men in all age groups until the late thirty.¹⁴¹ As Chen, Nussbaum, and others have pointed out, income poverty alone cannot explain this tragic fact.¹⁴² Social and political arrangements, including what commonly goes under the names of customs and culture, are also implicated.¹⁴³ The limits of cultural relativism become apparent in such a defining case as women's mortality. Increasingly, the women and the poor themselves are speaking out and asking for solutions.¹⁴⁴

Does this imply that “enlightened” policy makers and foreign aid workers, including the NGOs, have the moral right to impose their policies on the women in poor communities? Far from it. What we really need are new institutions inclusive of women, led by them locally and working cooperatively with the other democratic institutions. In other words, promotion of “deep democracy” at the local level with active participation and leadership from local women is a necessary condition.

136. Martha C. Nussbaum, *Introduction, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 1, 3 (Martha C. Nussbaum & Jonathan Glover eds., 1995) [hereinafter Nussbaum, *Introduction*].

137. See SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 3, at 104-05 (1999).

138. *Id.* at 104.

139. Nussbaum, *Introduction, supra* note 136, at 3.

140. Amartya Sen, *Women's Survival as a Development Problem*, 43 *BULLETIN OF THE AMER. ACAD. ARTS & SCIS.*, 14, 16 (1989).

141. *Id.* at 16.

142. See Chen, *supra* note 126, at 52-53; Nussbaum, *Introduction, supra* note 136, at 3.

143. Nussbaum, *Introduction, supra* note 136, at 3-4.

144. DEEPA NARAYAN ET. AL., *CAN ANYONE HEAR US?* 273-83 (2000).

It is also an implication of this type of policy and institutional approach that a serious attempt must be made to collect and interpret the relevant information regarding the functionings and capabilities of women. Indicators such as life expectancy, females as a percentage of total population, and other demographic data are, needless to say, as relevant as ever. Social indicators for education and rights to participate in social life are also crucial. Additionally, political indicators of democratic rights and democratic participation are of great importance. Only when women have rights and are actually participating at all levels of political organization, and indeed leading many of them, is it possible to claim that positive political freedoms for women are an actuality.

VIII. CONCLUSIONS: THE FUTURE OF SOCIAL CAPABILITIES APPROACH AS AN EVALUATIVE FRAMEWORK FOR WOMEN'S RIGHTS

In the end, we must recognize both the ontological basis in differential social history of women for a social capabilities approach to women's human rights as freedom and its normative and practical policy implications. This is why I try to defend the concept of social capabilities in the book *Technology, Development and Democracy* in a non-foundational and presuppositionless way while drawing out the policy lessons.¹⁴⁵ Furthermore, as the pioneering work of Sen and Nussbaum, among others, have shown elegantly, there are many philosophical defenses of the basic capabilities approach. The ontology of difference can do this by focusing on women both as human beings and as a particular type of human beings with full claims to individuality in the John Duns Scotus' sense of *haecceity*.¹⁴⁶

The more important real world issue now is to make the many policy implications of this approach subject of debate and discussion. This is already happening to some extent. We have mentioned the human development index and its various refinements.¹⁴⁷ There are also periodic conferences at various universities around the world to discuss theoretical advances and applications of the capabilities approach. The World Institute for Development Economics Research ("WIDER") has an ongoing research agenda that corresponds quite closely to the social capabilities approach.¹⁴⁸ One hope that emerges out of all these activities is that policy makers in the International Financial Institutions and the various regional and national organizations will attempt seriously to implement a social capabilities-based approach. Two most important areas are poverty reduction and overcoming women's particular deprivations. Needless to say, these are related areas where policy approach must engage in active dialogues with women and formulate policies with their full democratic participation.

145. KHAN, TECHNOLOGY (1998), *supra* note 8, at 95-99.

146. JOHN DUNS SCOTUS, EARLY OXFORD LECTURE OF INDIVIDUATION 82, ¶ 170 (2005).

147. See WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2001 MENTAL HEALTH: NEW UNDERSTANDING, NEW HOPE (2001), available at http://www.who.int/whr/2001/en/whr01_en.pdf?ua=1.

148. See *Research Programme*, UNITED NATIONS UNIV.—WORLD INST. FOR DEV. ECON. RESEARCH, <http://www.wider.unu.edu/research/> (last visited Mar. 27, 2014).

These do not cover all of the applicable areas, but are paradigmatic in the sense that the clear and present relevance of the approach logically leads to an agenda for action ranging from income transfers, public and private employment creation to political freedom and activism.

One broad area of practical application, as even the International Financial Institutions move away from the so-called Washington Consensus is the design and implementation of alternative structural adjustment policies (“ASAPs”). Basically, the conventional structural adjustments policies (“SAPs”) focus on short to medium run results regarding inflation and balance-of- payments equilibrium.¹⁴⁹ In the case of many impoverished economies, privatization itself may have become a goal for structural reform. Likewise, market-making can also become a goal in itself.¹⁵⁰ Not enough recognition has been accorded to the economic side effects such as unemployment or (at least a temporary) lowering of output. Social dimensions of adjustment came to be recognized even later. The status of vulnerable groups such as women, children, and the poor do not often figure explicitly in these programs. From the arguments presented in this paper, it seems that in order to design a capability-enhancing ASAP the following elements must figure prominently:

1. A clear recognition of the status of the different socio-economic groups in developing countries in terms of their economic and overall level of well-being.
2. A list of priorities in terms of economic and social goals must be prepared. In the case of incompatibilities of some of these goals, the question of trade-offs must be raised and resolved explicitly rather than implicitly through the logic of the market.
3. In particular, issues of fair inter-regional allocation of resources or opportunities must be addressed explicitly.
4. Human development indicators based on the capability framework must become an integral part of ASAPs.
5. As our discussion in the previous section shows, the record of developing countries concerning gender disparities is not flattering. Therefore, gender-justice must become a central part of ASAPs—not a peripheral issue to be ignored or to be resolved later after enough growth has taken place.
6. As alluded to in the brief discussion of ecology, environment, and sustainable development, with ecological effects of adjustment included, must become the conceptual center of thinking about ASAPs in these economies.

149. In Khan & Sogabe, *supra* note 71, we have attempted a statistical evaluation of the impacts of the IMF programs for a large number of LDCs.

150. Market-making here refers to the idea that creation of markets for anything, i.e. commodifying everything, is the solution. This has led to the privatization of water and protests against it among other privatization and market-making moves.

7. It follows then that an ASAP must explicitly address ecological and distributional issues related to women in particular. This implies that there will be a need for careful inter-disciplinary studies on probable impacts of a policy package before its implementation. It also implies the need for follow-up studies in order to assess the after-effects of an ASAP. The crucial aspect here from the perspective of development as freedom is to ascertain which substantive freedoms are enhanced or diminished and then to assess their overall significance.

Looking further beyond the current economic problems with SAP, we might ask if the freedom-centered perspective of women's rights and development will survive. For not only is the world divided between the rich and the poor, there are also dark and destructive political and cultural forces ranging from arms race to global terrorism. Indeed, it will be naïve to pretend that recognition of what is good will automatically lead to that good. Here again, the argument cannot stop at simply establishing the validity of the women's rights as demands for enhancing the social capabilities as freedom approach, but it must furnish grounds for thinking that there is a fighting chance of getting there.

The emphasis here on both achieving constitutional guarantees of freedom and on the need for an ever vigilant politically aware and active mass democratic movement will, I hope, focus attention on the crucial political and cultural aspects of equalizing capabilities for women. Without a vigorous, self-aware, and self-critical democratic movement that genuinely respects social individuality and its all around development, the approach discussed here can only be just another academic discourse. The substantive approach to social capabilities underlined in this paper gives me hope that combining a critical theory with all around social practice and movement from below will make women's rights as human rights an achievable project in our lifetime.

WASTE NOT, WANT NOT: THE RIGHT TO FOOD, FOOD WASTE AND THE SUSTAINABLE DEVELOPMENT GOALS

ANASTASIA TELESETSKY*

I. INTRODUCTION

If we want farmers to grow a surplus, they need processing and safe storage facilities so they are not forced to watch their harvested crops be eaten by pests or spoil in un-insulated sheds. They need roads that are not only paved but able to withstand more frequent and extreme weather. And they need reliable access to electricity and clean water, as well as links to markets and information.¹

Food producers and companies that support these producers would have us believe that there is not enough food quantity to feed the growing human population and so they urge an expansion of agricultural production.² Yet, these same producers give little thought to systematically reducing food waste even though this is one of the understated tragedies for our times. The Food and Agriculture Organization (“FAO”) estimates that one-third of global food production for humans is lost or wasted.³ With 1.3 billion tons of food being either lost or wasted,⁴ this is a topic that has shocked the moral conscience of global thought leaders. Pope Francis gave a passionate oration on waste when he spoke in St. Peter’s Square on World Environment Day in June 2013, observing that:

The culture of waste has made us insensitive even to the waste and disposal of food, which is even more despicable when all over the world, unfortunately, many individuals and families are suffering from

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1. *World Environment Day 2013: Cutting Food Waste to Conserve Resources and Fight Hunger*, INT’L FUND FOR AGRIC. DEV. (June 29, 2013), <http://www.ifad.org/media/events/2013/wed.htm> (quoting Kanayo F. Nwanze, President of the International Fund for Agriculture and Development).

2. See, for example, *Increasing Food Production*, CROPLIFE AMERICA, <http://www.croplifeamerica.org/crop-protection/benefits/increase-food-production> (last visited June 29, 2014) urging an increase in food production to meet a growing population and suggesting an increase in pesticide application to reduce crop losses of 20–40%.

3. FOOD & AGRIC. ORG. OF THE U.N. [FAO], GLOBAL LOSSES AND FOOD WASTE: EXTENT, CAUSES AND PREVENTION, at v (Jenny Gustavsson et. al., 2011) [hereinafter Gustavsson et al.], available at www.fao.org/docrep/014/mb060e/mb060e00.pdf.

4. *Id.*

hunger and malnutrition . . . Throwing away food is like stealing from the table of the poor and hungry.⁵

As Pope Francis insists, we have globally become inured to various food waste practices across the community of nations that leave individuals and families hungry. Yet food waste is not simply a topic of moral concern, it is also, as this essay will argue, a topic of serious legal magnitude. Food waste has been historically the largest overlooked component of achieving the internationally recognized “right to food.” Creating a zero food waste sustainable development goal to measure progress towards achieving global food security is an appropriate and progressive step to achieving the “right to food.”

The problem of food loss and waste (“food waste”)⁶ is not simply an affliction of the wealthy nations. Even those countries most in need are losing food at unsustainable rates that are exacerbating existing shortfalls of food supplies. In Sub-Saharan Africa, it is projected that at current population growth rates and current production rates, the region will only be able to produce twenty-five percent of its own food.⁷ At the same time, recent FAO statistics indicate that due largely to production loss close to 150 kilograms of food is lost or wasted per year per person in Sub-Sahara Africa and South/Southeast Asia, two of the most vulnerable regions to food insecurity.⁸ United Nations Environment Programme (“UNEP”) reports that thirty million tons of fish are annually discarded, which accounts for about one-quarter of the annual marine landings.⁹

Food insecurity is a chronic problem, particularly in the developing world where droughts or floods may devastate food crops and there is no automatic government benefit plan to fill the shortfall for the dependent families. Between 2011 and 2013, about one in eight people in the world (842 million people) continued to suffer from chronic hunger particularly in areas such as Sub-Saharan Africa.¹⁰ While there are estimates that food production will need to increase

5. Joe Phelan, *Pope Declares that Wasting Food is Akin to Stealing from the Poor*, CHARTERED INST. WASTE MGMT. JOURNAL ONLINE (June 29, 2013), <http://www.ciwm-journal.co.uk/archives/1609>.

6. FAO defines food waste and food loss as two different concepts. FAO, FOOD WASTAGE FOOTPRINT: IMPACTS ON NATURAL RESOURCES 8-9 (2013), available at <http://www.fao.org/docrep/018/i3347e/i3347e.pdf>. Food loss refers to an inadvertent decrease in mass or quality of food intended for human consumption. See *id.* Food waste refers to the deliberate discarding of food that is appropriate for human consumption. *Id.* at 9. While FAO refers to the concepts of food loss and food waste together as “food wastage,” this paper will simply use the plain language term of “food waste.” *Id.*

7. GLOBAL HARVEST INITIATIVE, 2013 GLOBAL AGRICULTURAL PRODUCTIVITY REPORT: SUSTAINABLE PATHWAYS TO SUFFICIENT NUTRITIOUS AND AFFORDABLE FOOD 10 (2013), available at http://globalharvestinitiative.org/GAP/2013_GAP_Report_BOOK_ONLINE.pdf.

8. Gustavsson et al., *supra* note 3, at 5, fig.2.

9. U.N. ENVTL. PROGRAMME [UNEP], THE ENVIRONMENTAL FOOD CRISIS: THE ENVIRONMENT’S ROLE IN AVERTING FUTURE FOOD CRISIS: UNEP RAPID RESPONSE ASSESSMENT 29 (C. Nellemann et al. eds., 2009), available at http://www.grida.no/files/publications/FoodCrisis_lores.pdf.

10. FAO, THE STATE OF FOOD INSECURITY IN THE WORLD 2013: THE MULTIPLE DIMENSIONS OF FOOD SECURITY 8 (2013) [hereinafter THE STATE OF FOOD INSECURITY IN THE WORLD 2013], available at <http://www.fao.org/docrep/018/i3434e/i3434e.pdf>.

somewhere between fifty percent by 2030 and seventy percent by 2050 to meet the needs of an increasing population,¹¹ it becomes clear that states can and should invest in reducing and preventing food waste rather than simply investing in new production to meet the increased needs.

This article urges the development of a global economic development strategy based on the human “right to food” that takes into consideration the chronic and pervasive global food waste problems. Specifically, this article argues that the Sustainable Development Goals offer a significant vehicle for achieving the human “right to food” by focusing global attention on eliminating food waste. This article argues for increasing human prosperity not by pursuing new growth (literally, in this case), but rather by investing in the full protection of already existing agricultural resources. In international food policy, the adage “waste not, want not” should be the foundation upon which all other food decisions are made.

II. REDUCING FOOD WASTE AS PART OF THE PROGRESSIVE REALIZATION OF THE HUMAN RIGHT TO FOOD IN A “GREEN ECONOMY”

While most intergovernmental attention has focused on increasing food availability,¹² relatively little attention has been given to creating international, regional, and national legal frameworks for food waste reduction. In fact, only five percent of agricultural development money is allocated to storage and processing solutions with the remainder focused on new production.¹³ This lack of support is surprising because food storage does not require substantial financial investments on the part of either host governments or donor governments in order to make a measurable impact on improving livelihoods.¹⁴

According to the FAO, we produce enough food for each person to have approximately 2,700 calories each day and yet there is still chronic hunger.¹⁵ While part of the disconnect between the available calories and the hungry communities may be attributed to ongoing civil wars leading to internal displacement or to environmental catastrophes correlated with climate shifts, part of the story is also one of waste due in part to a lack of basic economic infrastructure to properly manage and store food along the entire food chain from production to consumption. Food is wasted at a number of different steps along the food chain, beginning with production losses due to either poor harvest

11. LUCIA WEGNER & GINE ZWART, OXFAM INT’L, WHO WILL FEED THE WORLD? THE PRODUCTION CHALLENGE 3 (2011), <http://www.oxfam.org/sites/www.oxfam.org/files/who-will-feed-the-world-tr-260411-en.pdf>; FAO, GLOBAL AGRICULTURE TOWARDS 2050, at 2 (2009), available at http://www.fao.org/fileadmin/templates/wsfs/docs/Issues_papers/HLEF2050_Global_Agriculture.pdf.

12. THE STATE OF FOOD INSECURITY IN THE WORLD 2013, *supra* note 10, at 10.

13. See UNEP, TOWARDS A GREEN ECONOMY: PATHWAYS TO SUSTAINABLE DEVELOPMENT AND POVERTY ERADICATION 54, Box 5 (2011), available at http://www.unep.org/greeneconomy/Portals/88/documents/ger/ger_final_dec_2011/Green%20Economy_Report_Final_Dec2011.pdf.

14. *Id.* (finding that an investment of between \$20-\$100 for either a small-capacity or large capacity metal grain silo would increase the price of grain per 100 kilograms from \$13 to \$38).

15. JEAN ZIEGLER ET AL., THE FIGHT FOR THE RIGHT TO FOOD: LESSONS LEARNED 3 (2012).

practices or bycatch discard practices. Waste problems are compounded by losses due to a lack of adequate storage, processing capacity, or available markets. The consumer is the last link in the waste chain with food discarded due to a lack of storage capacity or wasteful cultural practices. While there is less food wasted in the Global South at the consumer end than in the Global North, where the problem of food waste is particularly acute, there is still approximately 120-170 kilograms of food wasted per person per year in Sub-Saharan Africa and Southeast Asia with approximately six to eleven kilograms of that waste directly attributable to consumers.¹⁶

Given the high population densities in the Global South, the cumulative loss of food in the Global South is noteworthy. For example, researchers from China Agricultural University observed that edible food thrown out by restaurants in China between 2006 and 2008 accounted for almost ten percent of the country's annual crop production during that time period, or enough to feed 200 million people.¹⁷ FAO calculates that 300 million individuals could be fed with the lost and wasted food from Africa alone.¹⁸ Much of this loss can be attributed to "financial, managerial and technical limitations in harvesting techniques, storage and cooling facilities in difficult climatic conditions, infrastructure, packaging and marketing systems."¹⁹ Some food products are more problematic than others. Cassava, which is typically sold as a fresh root and tuber in the Global South, is highly perishable, and there have been insufficient efforts to address post harvest handling and storage.²⁰ Over half of the fruits and vegetables produced in Africa and non-industrialized Asia are wasted.²¹ Most of this waste occurs at the post-harvest and processing stage due to perishability in the humid climate of many states.²² Milk is also frequently wasted in the Global South due to a lack of easily available cold storage facilities.²³

Unlike some global challenges that require member states to make sacrifices, reducing food waste is a relatively tractable problem that depends largely on coupling targeted government food security interventions with pro-poor community agriculture investment programs. Reminding individual states of their ongoing obligations to fulfill the "right to food" for their citizens and to support other states in achieving their efforts to achieve the "right to food" may be one means of improving food security.

16. Gustavsson et al., *supra* note 3, at 5.

17. Zhou Wanqing, *From Famine to Food Waste: Time to Reflect*, CHINA DIALOGUE (Feb. 12, 2013), <https://www.chinadialogue.net/blog/5697-From-famine-to-food-waste-time-to-reflect/en>.

18. *Save Food: Global Initiative of Food Losses and Waste Reduction-Key Findings*, FAO, <http://www.fao.org/save-food/key-findings/en/> (last visited June 29, 2014).

19. Gustavsson et al., *supra* note 3, at v.

20. *Id.* at 6.

21. *Id.* at 7 fig.6.

22. *Id.* at 7-8.

23. *Id.* at 9, 12.

A. *Right to Food*

This lack of systematic attention to reduction of food waste reflects in part a lack of international commitment to progressively implementing the “right to food” enshrined in the Universal Declaration of Human Rights (the “Declaration of Human Rights”). Article 25 of the Declaration of Human Rights provides 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”²⁴ Article 11 of the International Covenant on Economic, Social, and Cultural Rights (the “Covenant”) provides for State recognition of “the right of everyone to an adequate standard of living . . . including adequate food . . . and to the continuous improvement of living conditions.”²⁵ States are expected to “take appropriate steps to ensure the realization of this right” which includes “recognizing . . . the essential importance of international co-operation based on free consent.”²⁶ The Covenant provides one narrow reference to reducing food waste. Parties to the Covenant are expected “individually and through international co-operation” to “improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge . . . by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.”²⁷ The choice of the words “conservation . . . of food” suggests an obligation to use existing knowledge to protect existing food resources from waste so as to ensure “efficient . . . utilization of natural resources.” While this language may have been intended to be narrowly tailored to the food waste that happens as food loss in the fields as part of agricultural systems, it can also be read to apply to a lack of storage, markets, commodity networks, and small-scale processing industries since the obligation includes “developing or reforming agrarian systems.” A connection between Article 11(2)(a) and the global efforts to reduce food waste has not been explicitly made, but is essential because it provides a needed legal catalyst for action beyond moral motivations.

General Comment 12, drafted by the U.N. Committee on Economic, Social and Cultural Rights, further refined the legal content of the “right to food” by indicating that the right included an obligation on the part of the State to respect, protect, and fulfill access to adequate food.²⁸ Each of these operative terms was further defined to provide guidance to states about basic content of the obligation. Regarding the obligation to “fulfill” the “right to food,” states are specifically expected to “pro-actively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood,

24. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 25, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

25. International Covenant on Economic Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 11(1), U.N. Doc. A/RES/21/2200 (Dec. 16, 1976).

26. *Id.*

27. *Id.* art. 11(2).

28. Committee on Economic, Social, and Cultural Rights [CESCR], General Comment No. 12: The Right to Adequate Food, ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

including food security.”²⁹ This language when viewed in the context of continuing food losses and food wastage implies a defined obligation for states to actively protect food sources from wastage to ensure that its populations will have optimal use of existing food resources.

1. World Food Summit and Plans of Action

The “right to food” was further refined in the 1996 Rome Declaration at the World Food Summit (the “Rome Declaration”) with commitments by 180 nations to reduce the number of people with inadequate food by 2015.³⁰ To implement the Rome Declaration, states were expected to nationally “adopt actions . . . to enhance food security” as well as to “improve sub-regional, regional, and international cooperation” in order “to mobilize, and optimize the use of, available resources to support national efforts”³¹

In the “World Food Summit Plan of Action” agreed to by the states to implement the Rome Declaration, there were four significant references to food waste. In the most important food waste reference in the Plan of Action, states agreed to “formulate and implement integrated rural development strategies . . . that promote rural employment, skill formation, infrastructure, institutions and services, in support of rural development and household food security”³² Specifically “governments, in partnership with all actors of civil society, and with the support of international institutions, will, as appropriate . . . reduce post-harvest losses and ensure safe storage, food processing and distribution facilities and transportation systems.”³³ In the second reference, states and civil society groups agreed to “[d]evelop and promote improved food processing, preservation and storage technologies to reduce post-harvest food losses, especially at the local level.”³⁴ In the third reference, states agreed “[t]o pursue . . . reduced wastes and losses, taking fully into account the need to sustain natural resources”³⁵ without any further explication of how they would achieve this commitment. In the final reference to waste and loss, states agreed to “combat environmental threats to food security” and specifically to reduce bycatch waste from fishing.³⁶

After the World Food Summit, the FAO Committee on World Food Security was assigned the charge of monitoring, evaluating, and consulting on the implementation of the Plan of Action (the “Action Plan”).³⁷ The specific

29. *Id.*

30. FAO, ROME DECLARATION ON WORLD FOOD SECURITY AND WORLD FOOD SUMMIT PLAN OF ACTION 1 (1996), available at <http://www.fao.org/ag/againfo/programmes/en/lead/toolbox/indust/romedec.pdf>.

31. *See id.* ¶¶ 58-59.

32. *Id.* ¶ 36.

33. *Id.*

34. *Id.* ¶ 21(d).

35. *Id.* ¶ 32.

36. *Id.* ¶ 33.

37. *World Food Summit and its Follow Up*, FAO (June 1999), <http://www.fao.org/docrep/x2051e/x2051e00.HTM>.

commitments under Objective 2.3 and Objective 3.5 of the Action Plan reflect an explicit understanding by 1996 that more needed to be done at every stage of the food cycle including the final stages where food is wasted and lost, particularly post-harvest. Yet it was over a decade before countries began to engage in designing community-based infrastructure to address the ongoing tragic loss of food to spoilage. At the international level, post-1996 until almost 2004, there appeared to be little large-scale systematic effort on reduction of food waste or losses. In fact, as recently as 2012, FAO indicated in its Action Plan to Improve Agricultural and Rural Statistics that more attention needs to be given simply to statistically calculating post-harvest losses.³⁸ In the Mid-Term Review of the World Food Summit, ten years after the original summit, there was not a single mention of the need to curb food losses or food wastes. Rather, the lessons learned by states as reflected in the report of the Committee on World Food Security continued to focus on agricultural growth with the emphasis on enhancing the “performance of the productive sectors.”³⁹ No mention was made of tackling food waste in spite of the earlier commitments within the Action Plan.

2. Voluntary Guidelines on the Progressive Realization of the Right to Food

Only one mention is made indirectly to food waste reduction in the Voluntary Guidelines on the Progressive Realization of the Right to Food (the “Guidelines”), even though the guidelines were supposedly designed “to provide practical guidance to States in their implementation of the progressive realization of the right to adequate food in the context of national food security, in order to achieve the goals of the World Food Summit Plan of Action.”⁴⁰ Paragraph 27 provides that states will promote adequate and safe food supplies through, *inter alia*, storage and distribution.⁴¹ Appearing under the subtitle of “economic development policies,” it is unclear whether states are undertaking voluntarily the commitment to build more storage facilities and public markets for insecure food producers. With only one reference that remains ambiguous in terms of what states obligations are more specifically, the disconnect between the Plan of Action’s specific provisions on reducing post-harvest losses and the Guidelines’ generalizations seems to reflect a lack of political interest in addressing food waste as a human rights concern.

38. FAO, THE WORLD BANK & THE UNITED NATIONS STATISTICAL COMMISSION, ACTION PLAN OF THE GLOBAL STRATEGY TO IMPROVE AGRICULTURAL AND RURAL STATISTICS: FOR FOOD SECURITY, SUSTAINABLE AGRICULTURE AND RURAL DEVELOPMENT 46 (2012), available at <http://www.fao.org/docrep/016/i3082e/i3082e.pdf>.

39. FAO Committee on World Food Security [CFS], *Mid-Term Review of Achieving the World Food Summit Target*, CFS: 2006/3 ¶ 74 (Aug. 2006), available at <ftp://ftp.fao.org/docrep/fao/meeting/011/j8303e.pdf>.

40. FAO, THE RIGHT TO FOOD: VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY 2 (Nov. 2004) [hereinafter THE RIGHT TO FOOD], available at <ftp://ftp.fao.org/docrep/fao/009/y7937e/y7937e00.pdf>.

41. *Id.* at 10.

Only recently has political attention to food waste begun to gain some traction as a priority topic for national governments making specific investments in food industries. In the past five to ten years, a number of countries issued national reports based on their implementation efforts under the 1996 Global Plan of Action.⁴² Most of these reports indicated that the states were still struggling with reducing post-harvest losses that were resulting in food wastage. In most cases, these losses were directly correlated with insufficient linkages between geographically dispersed producers and markets. For example, Bangladesh in its 2008-2015 National Food Policy Plan of Action explicitly noted that “[d]eficiencies in transportation/connections with markets, packaging, handling and storage facilities . . . continue to prevent farmers from getting full returns on their produce.”⁴³ In Pakistan, where twenty-five to thirty-five percent of food is lost to post-harvest losses, the government noted the need for “better harvesting, handling, storage, packing and packaging and transportation of the produce” with investments in “cold chain transportation and modern ware-house storage systems.”⁴⁴ Likewise in Malaysia, which is generally food secure when compared to Bangladesh and Pakistan, the Government emphasized the need for creating near production areas farm collection centers, packing house facilities, trading centers, and wholesale markets in order to reduce post-harvest losses.⁴⁵ A number of countries, such as Indonesia with high poverty rates and high food wastage, reported no efforts to examine food losses in their follow-up reports.⁴⁶ Generally, follow-up to the World Food Summit has been relatively poor or at least not very public.⁴⁷

While food waste and food loss is a known problem that has been identified by decision-makers over the course of the past two decades, it has received, at best, passing global notice until 2011 when the Swedish Institute for Food and Biotechnology at the request of the FAO published the report, “Global Food Losses and Food Waste.”⁴⁸ This report observed that food in the Global South was

42. FAO, THE RIGHT TO FOOD IN THEORY AND PRACTICE: IMPLEMENTATION OF THE WORLD FOOD SUMMIT PLAN OF ACTION 23 (1998).

43. FOOD PLANNING & MONITORING UNIT MINISTRY OF FOOD & DISASTER MGMT., GOV'T OF THE PEOPLE'S REPUBLIC OF BANGL., THE NATIONAL FOOD POLICY PLAN OF ACTION (2008-2015), at 43 (2008), available at [http://www.nfpcsp.org/agridrupal/sites/default/files/The_National_Food_Policy_Plan_of_Action_\(2008-15\).pdf](http://www.nfpcsp.org/agridrupal/sites/default/files/The_National_Food_Policy_Plan_of_Action_(2008-15).pdf).

44. MINISTRY OF FOOD, AGRIC. & LIVESTOCK, GOV'T OF PAK., COUNTRY REPORT FOR THE FOLLOW-UP OF THE IMPLEMENTATION OF WORLD FOOD SUMMIT—PLAN OF ACTION 18 (Aug. 2004), available at <ftp://ftp.fao.org/docrep/fao/Meeting/008/ae014e.pdf>.

45. MALAYSIA MINISTRY OF AGRIC. & AGRO-BASED INDUS. FOLLOW-UP OF THE IMPLEMENTATION OF THE WORLD FOOD SUMMIT PLAN OF ACTION 1 (May 2008), available at <ftp://ftp.fao.org/docrep/fao/Meeting/013/A1699e.pdf>.

46. See THE AGENCY FOR FOOD SEC., MINISTRY OF AGRIC., REPUBLIC OF INDONESIA, FOLLOW-UP OF THE IMPLEMENTATION OF THE WORLD FOOD SUMMIT PLAN OF ACTION 3 (Dec. 22, 2005), available at <ftp://ftp.fao.org/docrep/fao/meeting/010/ag310e.pdf>.

47. MICHAEL WINDFUHR & JANNIE JONSEN, FOOD SOVEREIGNTY: TOWARDS DEMOCRACY IN LOCALIZED FOOD SYSTEMS, at xi-xii (2005).

48. Gustavsson et al., *supra* note 3.

largely wasted either some point between production stage and the processing stage.⁴⁹ The authors recommended government investment in roads, energy and market accompanied by private investments in transportation, storage, cooling and markets.⁵⁰ Additional investments should be made to link farmers with either processors or consumers to reduce food losses.⁵¹ Current market facilities in the Global South are often unsanitary and lack appropriate storage equipment to maintain perishables.⁵²

3. 2013 Global Strategic Framework for Food Security and Nutrition

When the non-binding Global Strategic Framework for Food Security and Nutrition was drafted in October 2013 to improve coordination between the recently reformed Committee on Food Security and stakeholders, food waste was briefly identified as a cause of chronic hunger.⁵³ The Committee on Food Security noted that states must “reduce high levels of post-harvest losses and food waste through investment in improving rural infrastructure, including communications, transport, storage, energy”⁵⁴ In spite of this explicit recognition of the waste problem, reducing waste did not play a primary role in the overall framework. Only two mentions were made in the document. First, the drafters concluded that waste needed to be addressed as a strategy for avoiding excessive food price volatility by increasing food production and availability.⁵⁵ Second, waste is addressed as a small-scale food production problem with states, international organizations and regional organizations encouraged to implement policies “reducing post-harvest losses and increasing post-harvest value addition, and on fostering smallholder-inclusive local, national and regional food markets, including transportation storage and processing.”⁵⁶ Curiously, the management of the food chain to avoid waste was identified as a potential food security and nutrition issue in a final section of the report for issues “that may require further attention” with the caveat that it may not be an issue to be handled by the Committee on Food Security.⁵⁷

The lack of prominence given in the framework to reducing food waste is surprising. While other food security themes, such as increasing sustainable agricultural production and climate-proofing agriculture, received their own sections,⁵⁸ the mention of reducing waste was extremely brief. The idea in the concluding section that reducing food waste may not be a priority for the

49. *Id.* at 10.

50. *Id.* at 11.

51. *Id.* at 13.

52. *Id.*

53. FAO COMM. ON WORLD FOOD SECURITY, GLOBAL STRATEGIC FRAMEWORK FOR FOOD SECURITY AND NUTRITION 9 (2013), available at http://www.fao.org/fileadmin/templates/cfs/Docs1213/gsf/GSF_Version_2_EN.pdf.

54. *Id.* at 10.

55. *Id.* at 18-19.

56. *Id.* at 17.

57. *Id.* at 50.

58. *Id.* at 23, 34.

Committee can be construed as irresponsible and reflects a lack of strategy on the part of the international community for achieving short-term food security. With food waste being downplayed in the document that reflects the most current thinking on international food security, there needs to be other means of tackling what seems to be both an obvious and a tractable problem requiring only limited new resources and technologies. One potential important venue for advancing the human rights agenda underlying the legal imperative to reduce food waste is the emerging concept of the “green economy.” As will be suggested in the final section of Part I, linking a “right to food” that includes an obligation to address food waste with the concept of the “green economy” holds great promise for restoring potentially up to one-third of our food stocks.

B. Green Economy

Wasting food is a multi-resource problem. The waste associated with food extends beyond simply the food products to include irrigation water, fossil fuel, agricultural inputs, soil, and labor.⁵⁹ FAO estimates that the ecological footprint for 1.3 gigatonnes of wasted food is 3.3 gigatonnes of carbon dioxide, 250 cubic kilometers of wasted water, and 1.4 billion hectares of typically monocropped land that could have been put to other uses.⁶⁰ In January 2014, scientists observed that croplands are continuing to expand at expense of savannah, forests, and grassland, with little consideration for how to use existing agricultural land more effectively.⁶¹ The use of these resources to make food that is never consumed is likely to have other unintended external consequences. For example, in China, agriculture has a greater impact on water pollution than any other industrial sector.⁶² Where food is produced and then never consumed because of waste, states will find themselves confronting the social costs of food production such as overexposure to pesticides without reaping equivalent social benefits from consumption.

The perpetuation of the food waste problem runs counter to the basic principles of the “Green Economy,” an idea actively promoted by the UNEP as a mechanism for achieving sustainable development and ensuring that per capita welfare does not decline over time.⁶³ As understood by policymakers, the outcome of a “green economy” is a low-carbon, resource efficient, and socially inclusive economy supported by public and private investments in improving resource

59. FAO, FOOD WASTAGE FOOTPRINT: IMPACTS ON NATURAL RES., *supra* note 6, at 10.

60. *Id.* at 6.

61. UNEP INTERNATIONAL RESOURCE PANEL, ASSESSING GLOBAL LAND USE: BALANCING CONSUMPTION WITH SUSTAINABLE SUPPLY 13 (2014), *available at* http://www.unep.org/resourcepanel/Portals/24102/PDFs//Full_Report-Assessing_Global_Land_UseEnglish_%28PDF%29.pdf.

62. UNEP, TOWARDS A GREEN ECONOMY: PATHWAYS TO SUSTAINABLE DEVELOPMENT AND POVERTY ERADICATION 50 (2011), *available at* http://www.unep.org/greeneconomy/Portals/88/documents/ger/ger_final_dec_2011/Green%20Economy_Report_Final_Dec2011.pdf.

63. *Id.* at 17.

efficiency.⁶⁴ In relation to food waste, UNEP recognizes that increasing post-harvest storage and processing facilities are aspects of “the greening of agriculture.”⁶⁵ Food recovery may be improved “through simple targeted investments in post-harvest supply chains.”⁶⁶ In particular, UNEP promotes “village-level processing of farm products and by-products”⁶⁷ which would include taking food clippings and scraps from processing and processing them into organic fertilizers.⁶⁸ For foods that do not need to be immediately processed such as grains, UNEP suggests concerted efforts to provide appropriate storage facilities or packaging processes to prevent waste.

Unlike the food security agenda with the legally cognizable “right to food,” there is no legal framework negotiated for the implementation of a “green economy.” The concept of the “green economy” is instead a signifier to encourage the building of a normative bridge between the existing “business as usual” approach and a socially inclusive, environmentally protective economy. While this article suggests that UNEP’s vision of a “green economy” can be valuable in catalyzing food waste reduction, the “green economy” idea has many critics who consider it to be either not radical enough of a normative approach⁶⁹ or believe that it fails to take sufficient account of social aspects of growth and remains fixated on economic models.⁷⁰ One means of addressing both of these critiques is to connect the “green economy” explicitly to the achievement of the “right to food.”

UNEP suggests that states may be able to effectively mainstream green economy principles through the negotiation of a combination of environmental and social indicators that might be adopted by states as indicators of progress on achieving “green economy” sustainability.⁷¹ Among the proposed factors with relevance to food waste are water stress, land conservation, material productivity, water productivity, carbon dioxide productivity, fossil fuel subsidies, water subsidies, and access to resources.⁷² If these indicators were ever to become the basis for creating new legal obligations for states based on national “green

64. *Id.* at 16.

65. *Id.* at 42.

66. *Id.* at 47.

67. *Id.* at 53.

68. *Id.* at 54.

69. Donald K. Anton, *The 2012 United Nations Conference on Sustainable Development and the Future of International Environmental Protection*, 7 *CONSILIENCE: J. SUSTAINABILITY* 64, 69 (2012) (urging for global leaders to focus on environment and not merely “green economy”).

70. Barbara Unmüßig et al., *Critique of the Green Economy: Toward Social and Environmental Equity*, 22 *HEINRICH-BÖLL-STIFTUNG ECOLOGY* 1, 32, 35-36 (2012), available at https://www.boell.de/sites/default/files/Critique_of_the_Green_Economy.pdf (arguing that none of the deliberations on a green economy include considerations relating to human rights, issues of distribution or democratic rights of participation as key components of a green economy).

71. Andrea Bassi et al., *Green Economy: Measuring Progress Towards a Green Economy* 8 (UNEP, Draft Working Paper, June 2012), available at http://www.unep.org/greeneconomy/Portals/88/documents/research_products/MeasuringProgress.pdf.

72. *Id.* at 10-11, 14.

economy” laws,⁷³ eliminating food waste and those practices that contribute to ongoing food waste would transition from being marginal issues in national, regional and international policymaking to human security and sustainability priorities. Specifically, a “green economy” effort focused on these indicators would be an appropriate measure to achieving specific obligations of states to achieve “conservation . . . of food” under the “right to food.”

C. *Connecting the Right to Food with the Green Economy*

The World Food Summit Plan of Action and the “green economy” described above are products of international political consensus. What this means practically is that neither of the efforts have binding effect on states and achievement depends entirely on political will. They are merely guidance documents that may or may not be considered priorities for states. Based on the national plans by countries such as Bangladesh and Pakistan, there is an explicit recognition of the connection between practices that lead to food waste and food security.⁷⁴ While this is significant in terms of demonstrating government awareness of the problem, it does not mean that governments must initiate actions under the plans. In fact, a State can argue that because reducing food waste is just one alternative among many for achieving food security goals, it has instead chosen other paths for achieving food security such as increasing food production through, for example, large agribusiness investments.⁷⁵ For communities that currently lack appropriate food harvesting technology, food storage, food processing capacity, or access to markets, there are few means to ensure government accountability under the national plans.

Linking food waste to the fulfillment of a “right to food” might create new channels for accountability. The value in approaching the food waste challenge through the well-accepted legal “right to food” is that it makes explicit that states have legal human rights-based obligations not just to ensure opportunities for individuals to produce food but also to protect food that has been produced. This presents an important policy development because it opens the possibility for private ventures such as family farms to receive public support probably in the form of subsidies for the construction of food storage and processing facilities as well as the facilitation of food transport and marketing networks. While countries may prefer to pursue this type of infrastructure via public-private partnerships

73. See e.g., CAMERON ALLEN & STUART CLOUTH, A GUIDEBOOK TO THE GREEN ECONOMY, DIVISION FOR SUSTAINABLE DEVELOPMENT (2012), available at <http://sustainabledevelopment.un.org/content/documents/GE%20Guidebook.pdf>; Keshore Kumar Heeramun, *National Initiatives on Green Economy: The Case Study of Mauritius*, available at http://www.oecd.org/dac/environment-development/Presentation%20on%20Green%20Economy%20-%20Mauritius_K.Kumar%20Heeramun.pdf (explaining how Mauritius is mainstreaming “green economy” principles in existing laws and emerging policy frameworks).

74. FOOD PLANNING & MONITORING UNIT MINISTRY OF FOOD & DISASTER MGMT., *supra* note 43; MINISTRY OF FOOD, AGRIC. & LIVESTOCK, *supra* note 44.

75. *Fact Sheet—IFC and Food Security*, INT'L FIN. CORP. (2011), <http://www.ifc.org/wps/wcm/connect/837565804cf33c85aa12eff81ee631cc/Fact+Sheet+IFC+and+Food+Security.pdf?MOD=AJPERES>.

because it requires less financing from the government, the inclusion of food waste within the contours of the legal “right to food” does not rule out the possibilities of these types of liaisons between the public and private sector. Instead, the inclusion of food waste in a legally cognizable “right to food” centers attention on the adequacy of the government’s policies to address its most impoverished populations who have for over a decade lived marginal lives without fundamental publicly-supported community infrastructure to assist them in achieving basic economic development objectives.

Addressing the food waste concern has the potential to also contribute to progressive realization of other human rights including the right to water. Agriculture, particularly in the developing world, is one of the lead users of water.⁷⁶ To the extent that freshwater that has already been applied to grow food, eliminating food waste will also conserve water resources rather than lead to unnecessary water losses that benefit neither humans nor ecosystems. While statistics are not easily available in the Global South, one analysis found that the water and energy contained in food waste represent twenty-five percent of the total water usage and four percent of the total oil consumption in the United States.⁷⁷ If the numbers are equally high in the Global South, then addressing food waste becomes even more imperative given the concerns over an impending freshwater crisis.⁷⁸

Finally, explicitly connecting food waste to the achievement of the “right to food” may trigger the obligations of states both individually and as members of intergovernmental organizations to transfer technology and provide financing. While some organizations such as the International Fund for Agriculture and Development may already be pursuing efforts to reduce food waste in the programs that they oversee, there is no obligation for them to act. Linking food waste to the “right to food” makes it explicit to the states individually and as members of international organizations that there is an affirmative obligation on the part of each organization to cooperatively assist states in their efforts to achieve the “right to food.” The Committee on Economic, Social and Cultural Rights has indicated that international organizations “have a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways which are compatible with their human rights obligations and to seek to devise policies and programmes which promote respect for those rights.”⁷⁹ In the

76. U.N. WATER, WORLD WATER DEVELOPMENT REPORT 3: WATER IN A CHANGING WORLD 8 (2009), *available at* http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/WWDR3_Facts_and_Figures.pdf.

77. Kevin D. Hall et al., *The Progressive Increase of Food Waste in America and Its Environmental Impact*, PLOS ONE, Nov. 25, 2009, at 4, *available at* <http://www.plosone.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pone.0007940&representation=PDF>.

78. Stewart Patrick, *The Coming Global Water Crisis*, COUNSEL ON FOREIGN REL. (May 8, 2012), <http://www.theatlantic.com/international/archive/2012/05/the-coming-global-water-crisis/256896>.

79. U.N. Comm. on Econ., Soc. & Cultural Rights, *Globalization and Economic, Social and Cultural Rights*, ¶ 5, U.N. Doc. E/1999/22 (May 15, 1998).

case of food waste, this applies not just to food-specific organizations such as the Food and Agriculture Organization or the World Food Programme, but also to financing organizations such as the regional development banks and trade organizations such as the World Trade Organization. Each international institution should consider how a “right to food” that includes elimination of systemic food waste can be effectively implemented using the functions and powers of the international institution. As will be explored in Part III below, the most immediate need for states in the Global South is small-scale financing for small-scale harvest, storage, and processing technologies.

III. MILLENNIUM DEVELOPMENT GOALS, ZERO HUNGER CHALLENGE, SUSTAINABLE DEVELOPMENT GOALS AND FOOD WASTE

International social and environmental indicators as measures of sustainable development achievement do not yet exist.⁸⁰ At the close of 2015, there is a global expectation that states will agree to a series of sustainable development goals (“SDGs”) in order to extend some of the successes of the millennium development goals (“MDGs”) in motivating states to make systemic changes. This article argues that reduction of food waste should be made a top priority in the ongoing negotiations for SDGs. The inclusion of a SDG on reduction of food waste with long-term and short-term objectives would clarify that eliminating food waste is essential to achieving a robust “fight to food” not just for this generation but also for future generations.⁸¹

A. *Millennium Development Goals*

The current normative regime for achieving human development objectives is shaped by the MDGs. Four of the MDGs have direct relevance to reducing food waste particularly in the Global South. The most relevant goal for food security is Goal 1, which encourages states to eradicate extreme poverty and hunger by halving the number of people who suffer from hunger by 2015.⁸² Goal 4 urges states to reduce by two-thirds the number of children dying before the age of five by 2015.⁸³ Goal 7 suggests that states should “integrate the principles of sustainable development into country policies and programmes” in order to “reverse the loss of environmental resources.”⁸⁴ Finally, Goal 8 requests states to “[a]ddress the special needs of least developed countries.”⁸⁵ Measured progress

80. See UNEP (2011), *supra* note 62, at 43, suggesting proposals for establishing indicators.

81. See, for example, Edith Brown Weiss, *Our Rights and Obligation to Future Generations*, 84 AM. J. INT'L L. 198, 198-207 (1990), for a description an intergenerational obligation principle called “conservation of options.”

82. U.N. Dept. of Public Info., Millennium Development Goals and Beyond 2015 Fact Sheet: Goal 1 (Sep. 2013), http://www.un.org/millenniumgoals/pdf/Goal_1_fs.pdf.

83. U.N. Dept. of Public Info., Millennium Development Goals and Beyond 2015 Fact Sheet: Goal 4 (Sep. 2013), http://www.un.org/millenniumgoals/pdf/Goal_4_fs.pdf.

84. U.N. Dept. of Public Info., Millennium Development Goals and Beyond 2015 Fact Sheet: Goal 7 (Sep. 2013), http://www.un.org/millenniumgoals/pdf/Goal_7_fs.pdf.

85. U.N. Dept. of Public Info., Millennium Development Goals and Beyond 2015 Fact Sheet: Goal 8 (Sep. 2013), http://www.un.org/millenniumgoals/pdf/Goal_8_fs.pdf.

has been made on each of these goals, though it is unclear that concerted efforts to reduce food waste played much of a role in any the progress that has been made.⁸⁶ Even with the reduction in number of chronically hungry individuals, it remains to be seen whether Goal 1 on hunger will be achieved. The 2013 UNDP report on the status of the MDGs indicated that many smallholder farmers are net buyers of food.⁸⁷ While the report does not indicate whether this is the result of a lack of arable land, a lack of seed, or climate events, it is also reasonable to assume that smallholder farmers may also be victims of food waste where seasonal crops are unable to be processed or sold during to a lack of basic storage and transport infrastructure. In the short term, addressing food waste caused by inadequate community infrastructure also has the potential to contribute to climate adaptation for communities that continue to go hungry in the face of unpredictable weather.⁸⁸

B. Zero Hunger Challenge

Full implementation of the MDGs would still not eliminate chronic hunger faced by millions.⁸⁹ In fact, while states have collectively almost met the MDG goal on hunger, there are still 870 million people (one in eight people) who lacked adequate food between 2010 and 2012.⁹⁰ Most of these individuals are in the Global South, where some regions such as Sub-Saharan Africa and Oceania are struggling with meeting the targets for MDG Goal 1.⁹¹ At least fifty-seven million children in Southern Asia and thirty million children in Sub-Saharan Africa lack sufficient food.⁹²

In response to this ongoing hunger crisis, General Ban Ki-Moon launched the Zero Hunger Challenge in 2012 at the United Nations Convention on Sustainable Development (Rio+20).⁹³ Supporting the argument in this article that a “right to food” requires reducing food waste as part of the implementation of the right, the Secretary-General’s multi-stakeholder initiative includes among his five specific

86. U.N. DEP’T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT REPORT 2013, at 11 (2013) [hereinafter MDG Report] (referencing food waste in the report by discussing FAO’s investments to improve the quality of basic data on food production and food storage).

87. *Id.*

88. See, for example., U.N. News Centre, Over 2 Million People in Zimbabwe to Require Food Assistance, Warns UN Agency (Sep. 3, 2013), <http://www.un.org/apps/news/story.asp?NewsID=45756&Cr=zimbabwe&Cr1=#.UuQ1F-vTlcw>, indicating that some of the shortfall for grain is due to adverse weather conditions and the unavailability of agricultural supplies such as seeds and fertilizers which could be addressed in part through construction of community-based adequate storage facilities that could be used to store harvests for multiple seasons as a sort of rural food bank.

89. Millennium Development Goal 1, *supra* note 82 (intending to halve the proportion of people who suffer from hunger and not to fully eliminate hunger).

90. MDG Report, *supra* note 86, at 10.

91. *Id.*

92. *Id.* at 11.

93. U.N. Secretary-General, Remarks at the Launch of the Zero Hunger Challenge (June 21, 2012), http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1580#.UuQ9C-vTlcw.

objectives a call for Zero Hunger Challenge partners to take measures to prevent food from being lost or wasted.⁹⁴

Unlike previous global efforts such as the World Food Summit Plan of Action or the MDGs, the challenge is open to more than just states. It was initiated in part as a call for involvement from civil society and businesses in meeting the hunger reduction targets. Secretary-General Ban Ki-Moon is doing an admirable job in focusing high-level political attention on the need for even more progress towards global food security. Yet it remains to be seen whether this approach will yield results where they are needed most – in food insecure states. However, a review of the webpages linked to the Zero Hunger Challenge reveals surprisingly little about how any of the named participants are seeking means to reduce waste.⁹⁵ Only a handful of countries have adopted the challenge⁹⁶ and it is unclear what they have done or are planning to do in response to the challenge.

Based on the limited results of two years of implementation, there is some question as to whether the multi-stakeholder approach is an ample approach for reducing food waste, particularly for those countries where the food waste is a systemic problem because of a lack of basic infrastructure. In the end, states, not NGOs or businesses, need to be held accountable for their failures to seek long-term solutions to the food waste problems. While NGOs and businesses can contribute to the realization of the “right to food” through financial support or contributions of technical resources that will provide the needed storage and processing of food in the Global South, it is the states themselves that have the legal obligations to fulfill their citizens “right to food” and to support other states in their efforts.

There is one interesting twist to the Zero Hunger Challenge that needs to be mentioned in light of the call for accountability. More than just states, NGOs, and intergovernmental groups have pledged to meet the challenge. So too have global leaders who have committed to language in signing the pledge “to hold myself accountable to deliver on my promise.”⁹⁷ While it is the position of this paper that

94. *Id.*

95. Most of the webpages simply link to general homepages. The Food and Agriculture Organization has a specific webpage designed to highlight FAO efforts. FAO: ZERO HUNGER CHALLENGE, <http://www.fao.org/zhc/en/> (last visited June 29, 2014). None of the highlighted efforts deal with implementation of infrastructure to address food losses in the Global South. See, for example, *Reduce Your Food Waste and Save Money and Our Natural Resources*, FAO (Dec. 18, 2013), <http://www.fao.org/zhc/detail-events/en/c/211072>, providing the following advice which is unlikely to be of any practical use to members of the Global South: “Buy only what you need . . . Don’t throw away perfectly good food . . . Store food properly . . . Reduce or share your portions.”

96. U.N. Secretary-General, Remarks at Closing Session of the High-Level Consultation on Hunger, Food Security and Nutrition in the Post-2015 Development Framework (Apr. 4, 2013), http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1810#.UzR8cfdWS0.

97. *Global Leaders From Business and Civil Society Sign Zero Hunger Challenge at Davos*, U.N. WORLD FOOD PROGRAMME (January 24, 2014), <http://www.wfp.org/news/news-release/global-leaders-business-and-civil-society-sign-zero-hunger-challenge-davos>; ZERO HUNGER CHALLENGE: JOIN THE CHALLENGE, <http://zhc.feedingideas.com/join-the-challenge/> (last visited June 29, 2014) (joining the Challenge individuals declare: “I am actively working to eradicate hunger; I align myself with all

only states under their obligations to achieve the “right to food” can and should be held legally accountable for any failures to address food waste, the Zero Hunger Challenge introduces a second set of potentially accountable actors—the individuals who have made the pledge to reduce food waste. On the one hand, this is an exciting development to have business and government agency leaders making these commitments. The choice of the word “accountable” in the pledge, however, seems to be a strange choice in light of its technical legal meaning. Is the pledge empty rhetoric or is there some possibility that those individuals with decision-making power⁹⁸ who have signed the pledge could be held accountable when there are gaps in implementation? What if the U.S. Agency for International Development (“USAID”) Administrator Rajiv Shah, one of the signatories to the Zero Hunger Challenge, does not prioritize food loss as part of the agency’s development financing programs? What if Unilever Chief Executive Officer Paul Polman fails to make a good faith effort to reduce food waste associated with processing from Unilever factories in spite of his pledge? Can these individuals really only be personally accountable to themselves for their individual consumer food waste choices or can they be held socially accountable for their professional decisions that have system-wide implication? It is an intriguing puzzle; even if governments have the legal obligations under the “right to food,” it will ultimately be non-state actors who will have the power to effectively reduce waste at key junctures in the food production business.

While it is difficult to critique a well-meaning and ambitious initiative such as the Zero Hunger Challenge, the effort does raise questions about short-term effectiveness for communities who are currently relying on food aid because of a failed crop and no stored provisions. In an effort to create collective willpower across all sectors of society and perhaps achieve some of the positive features associated with polycentric governance such as adaptability,⁹⁹ will the international community fail to reach out to those who need help the most possibly because of coordination challenges among the various regional and national actors? While Secretary General Ban Ki-Moon is today actively championing the challenge and providing necessary leadership, what will come of the challenge in 2017 when the Secretary-General’s term has ended? If we have not achieved the Challenge, then who will be responsible? Arguably, responsibility will remain with the states, most of which have not taken on the challenge. Since it is the states that have ongoing human rights obligations to realize a “right to food,” there is an urgent need for states to accept and act upon the objectives of the Challenge. One means for generating system-wide food waste reductions might be the adoption of a SDG focused on zero food waste.

elements of the Zero Hunger Challenge; I encourage others to join in my activities and to take the challenge; I advocate for actions and policies that deliver Zero Hunger; and I will hold myself accountable to deliver on my promise.”).

98. *Global Leaders From Business and Civil Society Sign Zero Hunger Challenge at Davos*, *supra* note 97.

99. Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 *GLOBAL ENVTL. CHANGE* 550, 552 (2010).

C. Sustainable Development Goals

In July 2014, parties in a U.N. open working group negotiated SDG 12 which may, if adopted by the U.N. General Assembly, “[p]romote sustainable consumption and production patterns.”¹⁰⁰ Target 12.2 to achieve this goal calls for states to “by 2030 reduce by half global food waste and production and post-harvest food losses and those along food supply chains.”¹⁰¹

This outcome of a target rather than a food waste goal is somewhat disappointing given the attention that food waste had been receiving from intergovernmental groups and non-governmental groups. In the case prior to 2014, food waste was specifically called out as a development problem by the U.N. Secretary-General’s High-Level Panel Of Eminent Persons on the Post-2015 Development Agenda, including such politically influential individuals as the President of Indonesia and the Prime Minister of the United Kingdom.¹⁰² Including a food waste goal as one of the SDGs rather than simply as a target for a vaguely worded goal would have reflected a reasonable policy-making trajectory based on the already existing efforts under the MDGs to reduce hunger by half and Secretary-General Ban Ki-Moon’s Zero Hunger Challenge clear objective to reduce food waste.¹⁰³

When the High-Level Panel suggested focusing on food waste as a development problem, it did not recommend any specific percentage for states to reduce food waste. Instead it suggested a universal goal of ensuring food security and good nutrition with a national target to “[r]educe postharvest loss and food waste by x%.”¹⁰⁴ In notes, the High-Level Panel explained that further research is needed to decide what the appropriate indicator for food waste might be.¹⁰⁵ While

100. Introduction and Proposed Goals and Targets on Sustainable Development in the Post 2015 Development Agenda, at 10 (July 14, 2014) <http://sustainabledevelopment.un.org/content/documents/4523zerodraft.pdf> [hereinafter Proposed SDGs].

101. *Id.*

102. HIGH-LEVEL PANEL OF EMINENT PERSONS ON THE POST-2015 DEVELOPMENT AGENDA, A NEW GLOBAL PARTNERSHIP: ERADICATE POVERTY AND TRANSFORM ECONOMIES THROUGH SUSTAINABLE DEVELOPMENT 41 (2013), available at <http://www.post2015hlp.org/wp-content/uploads/2013/05/UN-Report.pdf> [hereinafter High-Level Panel Report] (discussing the appearance of the stresses of unsustainable production and consumption patterns, in areas like deforestation, water scarcity, food waste, and high carbon emissions).

103. In fact the Zero-Hunger Challenge is not just a political initiative of the UN but also a personal initiative of Secretary-General Ban Ki-Moon who has recently pledged to actively ensure the adoption of the challenge. In a set of remarks at the World Economic Forum, he made the following public pledge “I am actively working to eradicate hunger. I align myself with all elements of the Zero Hunger Challenge. I encourage others to join in my activities and to take the Challenge. I advocate for actions and policies that achieve Zero Hunger. I will hold myself accountable to deliver on my promise.” See U.N. Secretary-General, Remarks at World Economic Forum World Food Programme Dinner (Jan. 23, 2014), http://www.un.org/apps/news/infocus/sgspeeches/statements_full.asp?statID=2115#_UuREmevTlcw

(indicating that the Zero Hunger challenge is a personal initiative of Secretary-General Ban Ki-moon).

104. High-Level Panel Report, *supra* note 102, at 30.

105. *Id.*

there may be food losses or waste that occur because of droughts and whether events, these types of unanticipated events would not be covered by the proposed collective effort to end food waste, which the High-Level Panel suggested should only apply to “postharvest” losses. Therefore, the goal has been proposed to be “zero food waste” with “food waste” specifically defined to encompass any crop or meat product ordinarily consumed by humans in the country where it is produced.

Even though a “zero food waste” target supporting a “zero hunger” goal will be likely difficult to implement due to the realities of food distribution and current consumption habits, it will still be important to set the standard for food waste at zero as a clear expression that states are obliged to take affirmative steps to eliminate to the greatest extent possible both waste and wasteful practices. A useful analogy for “zero food waste” is the “no litter” policy in many countries. While the reality may not be an environment free of litter due to the inattention and the malfeasance of various actors, there is a shared understanding that it is better for communities to have a standard of “no litter” than an arbitrarily negotiated acceptable amount of litter. A complete prohibition on post-harvest food waste has a greater chance of creating a normative shift in states that have not prioritized basic food protection as well as helping the states to raise financing more quickly to address the problems.

Food waste is not being given the attention it deserves in the SDG process. While a negotiated target reflects some level of institutional commitment, each proposed target under the proposed SDGs will end up competing for the attention of policymakers operating with limited budgets. In the case of Goal 12, efforts to reduce food waste will also compete for funding and support on hazardous chemical reduction and other broader recycling efforts. Food waste should have been assigned its own goal with targets on how to achieve food waste reductions to indicate that it is a priority issue. The current proposed goals lack the needed clarity and structure for creating national and collective action on critical environmental security issues. In addition to the problem of setting vague goals, it is regrettable that the various U.N. stakeholders in their outcome document opted to characterize food waste as a primarily consumption and production issue under Goal 12 rather than as a food security issue under Goal 2. National implementation of these goals will likely be assigned to individual national agencies. Because the extent of existing food waste is a problem for long-term hunger and nutrition, it would have been better classified as a target for Goal 2 to “[e]nd hunger, improve nutrition, and promote sustainable agriculture”¹⁰⁶ so that food and nutrition related national agencies would be in charge of identifying opportunities to reduce food waste. Assuming that food waste remains as a target rather than being designated as a goal when the U.N. General Assembly reviews the goals, the food waste target really should be incorporated across multiple goals including Proposed Goal 2, Proposed Goal 6 on ensuring availability of water, and Proposed Goal 14 on conserving ocean resources.¹⁰⁷

106. Proposed SDGs, *supra* note 100, at 4.

107. *Id.* at 4, 7, 11.

If the U.N. General Assembly in September 2014 adopts any of the proposed SDGs, it is likely that states will adopt the abstract goal of ensuring sustainable consumption and production. Even with the adoption of such a goal, there will remain the question of what the next steps might be and what role, if any, international laws, regional laws, and national laws will play in achieving the food waste reduction targets. The final part of this article shares a number of suggestions about why law matters in systematically reducing food waste.

IV. NEEDED LAW AND POLICY INTERVENTIONS TO ACHIEVE A GOAL OF NEAR ZERO FOOD WASTE

Reducing food waste is not a panacea for achieving food security but it is a critical first step to re-establishing a baseline from which rational food production decisions can be made about where and how to invest in additional food production. Law plays a number of key roles in achieving a new sustainable development goal based on waste at the international, regional, and national level. Assuming that a state has some (albeit not much) financial capabilities, the most important interventions to be taken are those at the national level.

A. *International interventions*

At the international level, as described in Part II, most states accept a human “right to food.” Implementing this right in relation to reducing food waste particularly in food insecure countries has two parts. States that are chronically food insecure due to large levels of post-harvest waste resulting from lack of storage processing infrastructure or market infrastructure have a legal obligation to their citizens to ask for international assistance. Countries that are capable of delivering overseas development assistance have an obligation to support the efforts of states to assist their communities in reducing post-harvest waste. Part III of the Voluntary Guidelines on the Right to Food provides that, “[c]onsistent with the Monterrey Consensus, developed countries should assist developing countries in attaining international development goals, including those contained in the Millennium Declaration, by providing adequate technical and financial assistance.”¹⁰⁸ Countries that receive aid are expected to spend the money effectively to achieve development goals and targets and be accountable for the aid.¹⁰⁹

In the context of food waste, this means that states, either individually through their development aid agencies, or collectively through multilateral financial institutions, such as the Asian Development Bank, Inter-American Development Bank, the African Development Bank, and the World Bank, should be supplying loans and grants to states to address pro-poor reduction of food waste. The current structure of agricultural aid that puts close to ninety-five percent of support funds into crop production and only five percent into post-harvest challenges needs to be

108. THE RIGHT TO FOOD, *supra* note 40, at 36, ¶ 12.

109. *Id.*

reconceived.¹¹⁰ States are beginning to make contributions targeted at addressing the chronic food waste problems associated with poor storage options. For example, the United States through the USAID Program as part of its “Feed the Future” program is creating opportunities in Rwanda for strengthening the food chain post-harvest and avoiding waste by providing funding for rehabilitating rural feeder roads so that farmers will be able to better transport their crops.¹¹¹ While this support should make a definite positive contribution to “field to market” transportation, the strategy paper also raises some interesting tensions regarding which activities are best underwritten by development donors and which activities belong in the realm of private capital. In order to counter the post-harvest losses of beans and maize, which can be as high as thirty percent,¹¹² the USAID “Feed the Future” program has been supporting the Government of Rwanda with investments to improve “post-harvest handling practices and technologies, engaging private investors in the construction of new storage infrastructure, and linking farmers to storage, conditioning, and processing centers.”¹¹³ This program may indeed deliver better food security at a national level but its approach raises some questions for individual food-poor communities. Should storage infrastructure be under the control of private investors as the Rwanda program seems to provide? Are these investors required to make any concessions to the most vulnerable farmers to ensure that their crops can be stored? Equity needs to be a primary factor in developing food loss programs that support the most marginalized and likely most food-deficient groups. Otherwise, infrastructure programs may end up creating new and unintentional sharecropping relations.

Therefore, any international cooperation programs designed to reduce food waste must not interfere with the priorities of individual states to create long-term national food security strategies. Even though many donor states condition their aid in part to protect against corruption practices, recipient states should have some control over how aid will be distributed to the public. Depending on the ideology of a given state, recipient states should have the ability to directly invest greater resources in publicly shared benefits, such as a government facilitated market designed for the most vulnerable populations, rather than being required to indirectly support private investors such as the owners of storage warehouses. International interventions in law that are undertaken for the purpose of achieving a “right to food” should focus on creating an inclusive economy. The “right to food” creates not only positive obligations for states to ensure access to food for its citizens by eliminating waste, but also creates obligations of restraint for third-

110. UNEP, THE ENVIRONMENTAL FOOD CRISIS, *supra* note 9, at 35.

111. U.S. AGENCY FOR INT’L DEV., RWANDA: FY 2011-2015 MULTI-YEAR STRATEGY 23 (2011), available at <http://www.feedthefuture.gov/sites/default/files/country/strategies/files/RwandaFeedtheFutureMulti-YearStrategy.pdf>

112. *Id.* at 21.

113. *Id.*

party cooperating states who provide financial and technical support to states needing external assistance.¹¹⁴

The “Feed the Future” program is an important United States’ development program. But more needs to be done to ensure that producers are supported in protecting what they are already growing. The United States keeps a scorecard of its progress to reduce global poverty and hunger as part of its internal accountability.¹¹⁵ Surprisingly, the scorecard does not address waste as one of its metrics.¹¹⁶ One recommendation for the future of “Feed the Future” is for USAID to include specific reduction of post-harvest food waste as one of its key indicators of success. Until waste is systematically tackled, future new food production may also end up being inadvertently wasted.

B. Regional Interventions

One of the recurring triggers for food waste in developing countries is the lack of a viable market for surplus goods. Presently, groups of African farmers sell their goods into European markets because European companies have assisted them with creating distribution chains. This very same food could be consumed regionally with lower transportation emissions and lower waste rates. Due to a variety of aesthetic standards that have been imposed on food,¹¹⁷ there have been repeat incidents of food waste. Once a shipment has been rejected on potential aesthetic quality grounds then it is difficult for local wholesalers or growers to locate an alternative market in a timely fashion.

Regionally, greater attention needs to be given to growing functional intraregional markets among some of the low value regional economic communities, including the Economic Community of West African States and the Economic Community of Central African States,¹¹⁸ so that growers will have a broader array of alternatives markets where they can sell their produce, livestock,

114. Carmen Gonzalez, *International Economic Law and the Right to Food*, in *RETHINKING FOOD SYSTEMS: STRUCTURAL CHALLENGES, NEW STRATEGIES AND THE LAW* 1, 4 (Nadia Lambek et al. eds., 2013), available at <http://ssrn.com/abstract=2315311> (arguing that states contracting in bilateral and multilateral trade and investment agreements have an obligation to “ensure that these agreements do not violate the right to food of vulnerable populations in other nations”).

115. U.S. AGENCY FOR INT’L DEV., *FEED THE FUTURE: PROGRESS SCORECARD 1-2*, 5 (U.S. Agency for Int’l Dev. eds., 2013), available at http://feedthefuture.gov/sites/default/files/resource/files/feed_the_future_scorecard_2013.pdf (including specific metrics on reducing poverty rates and stunting rates in certain States with targets of reducing poverty and stunting by 20% by 2017).

116. *Id.*

117. TRISTRAM STUART, *WASTE: UNCOVERING THE GLOBAL FOOD SCANDAL* 106-107 (W.W. Norton & Co. eds., 2009) (some aesthetic standards in the European Union were removed in 2008 so that a banana for the EU market does not need to curve and a cucumber does not need to be straight; other standards remain in place for apples, citrus fruits, peaches, pears, strawberries and tomatoes).

118. Mwangi S. Kimenyi et al., *Introduction: Intra-African Trade in Context*, in *ACCELERATING GROWTH THROUGH IMPROVED INTRA-AFRICAN TRADE* 1, 3 (The Brookings Institution eds., 2012), available at http://www.brookings.edu/~media/research/files/reports/2012/1/intra%20african%20trade/01_intra_african_trade_full_report.pdf.

or dairy. In Africa as of 2009, intra-African trade only accounts for ten percent of the trade, which is a far lower intraregional trade rate than in other regions of the world.¹¹⁹

Achieving these potential common markets will require a high degree of legal harmonization in rules and regulations involving customs, transport, trade tariffs and cross-border financing. For example, one of the current barriers to regional trade in Western Africa is interpretive differences between Francophone and Anglophone banking regulations leading to a lack of exchange.¹²⁰ With chronic technical barriers such as these, there is an urgency for the introduction of a combination of regional public and private law mechanisms coupled with public education to help create new markets that may absorb some of the food products that are currently going to waste. Some of the tools already exist but there has been a lack of attention by states in entering into legal arrangements that would bolster individual state efforts to fulfill their “right to food” obligations by eliminating waste. For example, in 1970, an international agreement was introduced by the United Nations Economic Commission for Europe requiring states to handle any perishable food using the appropriate equipment necessary for handling the given food product.¹²¹ By December 2011, among the North African states who would otherwise be eligible, only the government of Tunisia has signed the agreement.¹²² The non-participation of the other North African states might be interpreted as a reflection that food waste arising through trade is not a priority.¹²³

A second regional intervention that may generate concrete opportunities for food waste reduction is South-to-South technology transfers. For decades, there has been an assumption that the flow of technology transfer is from the Global North to the Global South. Yet, there are a number of innovations designed in the Global South to handle geographical and climate specific challenges that should be mainstreamed throughout the Global South. FAO is well-positioned to organize a Global South learning network to reduce food waste. Three recent technologies with their roots in the Global South are illustrative of the value of a South-to-South

119. *Id.* at 1-2 (citing Asian intraregional trade at 17% of total trade and European Union intraregional trade at 60%).

120. African Trade Policy Centre of the U.N. Econ. Comm’n for Africa, Gender and Intra African Trade: The Case of West Africa, 2, No. 9 (2010), *available at* <http://www.uneca.org/sites/default/files/publications/atpcpolicybriefs9.pdf> (prepared by Amal Nagah Elbeshbishi).

121. Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP), Sept. 1, 1970, 1028 U.N.T.S. 121, *available at* http://www.unece.org/fileadmin/DAM/trans/main/wp11/wp11doc/ATP-2013_e.pdf (even though this treaty might be considered primarily a health and safety treaty, it is also a treaty that can lead to a reduction in waste if properly implemented.).

122. U.N. ECON. COMM’N FOR AFRICA, HARMONIZING POLICIES TO TRANSFORM THE TRADING ENVIRONMENT: ASSESSING REGIONAL INTEGRATION IN AFRICA VI, at 27, U.N. Sales No. 14.II.K.1 (2013), *available at* http://www.uneca.org/sites/default/files/publications/aria_vi_english_full.pdf (citing Table 4.3).

123. *Id.* (stating the countries that have not yet signed include Algeria, Morocco, Libya, and Mauritania).

technology network. First, Cede Greenhouses in South Africa has designed a tunnel greenhouse called the Africa house, which is designed to withstand harsh growing conditions based on fluctuations between savannah winds and scorching heat.¹²⁴ Second, researchers at Universiti Sains Malaysia have developed FruitPlast by converting tropical fruit waste into flour.¹²⁵ This material can be fabricated into a biodegradable plastic film that can be used like normal plastic wrap.¹²⁶ The material will naturally degrade in three to six months, will last one to two years on the shelf, and will cost ten percent less than the current non-biodegradable plastic bags commercially used.¹²⁷ Finally, there are also refined technologies based on traditional designs that can be widely disseminated in areas where high-tech solutions are not viable. In Sudan, Mohammed Bah Abba designed a “zeer,” which is an evaporative cooler based on two vessels separated by wet sand which is re-wet twice a day, and which extended shelf life of vegetables from two days up to twenty days.¹²⁸ This technology has been further refined to create a “zero energy cool chamber” that is capable of cooling up to 100 kilograms of food.¹²⁹ Each of these technologies has a role to play in food waste reduction and can be incorporated into national strategies.

Law should play a role in South-to-South technology networks not just by creating distribution chains for the new technologies, but also in protecting the intellectual investment in new ideas with potentially large markets, such as Malaysian researchers’ FruitPlast idea. In order to support this type of food loss reduction innovation, the donor states discussed in the subpart above may want to invest through structured grants or regional business enterprise contests in supporting dissemination of technology within the Global South.

C. National Interventions

While this section started with international and regional interventions, the most important interventions in eliminating food waste will ultimately be at the national level, since this is where decision-makers are likely able to respond swiftly to the demands of “ordinary” food insecurity.¹³⁰ While states may work

124. *Community*, CEDE GREENHOUSES, <http://cedegreenhouses.co.za/Community.html> (last visited June 29, 2014); see also *Structures*, CEDE GREENHOUSE, <http://cedegreenhouses.co.za/images/Basic-Structure-Design.jpg> (last visited June 29, 2014) (describing additional UVA and wind protection to address Southern African weather conditions).

125. Andrea Filmer, *USM Invents Cheap Biodegradable Plastic Bags*, ECOTOURISMHUB.COM (May 14, 2010), <http://ecotourismhub.com/fruitplast.html>.

126. *Id.*

127. *Id.*

128. Musa Elkheir, *The Zeer Pot: A Nigerian Invention Keeps Food Fresh Without Electricity*, SCIENCE IN AFRICA (Sept. 2004), <http://www.sciencein africa.co.za/2004/september/refrigeration.htm>.

129. Brian Lipinski et al., *Reducing Food Loss and Waste, Working Paper 14* (UNEP World Res. Inst., Working Paper, June 2013), available at http://pdf.wri.org/reducing_food_loss_and_waste.pdf.

130. As noted earlier in this paper, there are numerous causes for food insecurity including armed conflict, internal displacement, and unusual disasters. This paper is not addressing food waste in the context of these extraordinary tragedies but is focused instead on “ordinary” food insecurity caused by

cooperatively in seeking financial and technical cooperation, much of the effort to fulfill the human “right to food” by eliminating systemic food waste will be territorially based. The situation in Kenya in 2011 exemplified the need for greater national political investment, particularly in infrastructure. During 2011, communities in North Kenya were going hungry from a lack of access to basic foods while farmers in the Rift Valley had surpluses that were going to waste.¹³¹

The most urgent national need is for physical infrastructure. Farmers need storage units, and, depending on the product, the units may need to be refrigerated, or at least designed to keep food relatively cool. The same farmers (if they do not sell to wholesalers) will need to have access to either processing facilities for surpluses or to markets that can absorb the surplus. In either case, there is likely to be a need for a reliable transport network. Africa is a young region with much of the available infrastructure being either a product of European colonialism or the Chinese expansion.¹³²

But physical infrastructure alone will not serve to reduce waste; law has a facilitative role to play. In a number of instances, law, or at least what is perceived as “law”, may be contributing to systems of food waste. In some regions of Africa, it is difficult to get food to market not simply because of the hurdles of infrastructure but also due to frequent police roadblocks and checkpoints where taxes might be collected and bribes are often paid.¹³³ In other parts of Africa such as Tunisia, burdensome licensing processes can prevent food from coming to market.¹³⁴ These roadblocks and licensing requirements may be sufficiently onerous to prevent sellers from putting their surplus goods into the channels of commerce.

Just as existing law and legal practices may end up encouraging waste, the law can also remove hurdles by creating incentives or removing disincentives. For example, as an incentive for communities to invest in food waste reduction technologies, the national government could make available pro-poor grants or loans that would supply a public subsidy for farmers in need of storage or cooling facilities. Governments must also contribute to planning for intermediary markets, not just subsistence farmers. Here, governments can provide assistance in the form of producer organizations that can coordinate production among members to

lack of community infrastructure and lack of government support to rural food producers. *See supra* Part II.

131. Olumide Taiwo & Nelipher Moyo, *Eliminating Barriers to Internal Commerce to Facilitate Intra-regional Trade*, in ACCELERATING GROWTH THROUGH IMPROVED INTRA-AFRICAN TRADE 8 (The Brookings Institute eds., 2012), available at http://www.brookings.edu/~media/research/files/reports/2012/1/intra%20african%20trade/01_intra_african_trade_full_report.pdf.

132. *Id.* at 10 (describing the boom in road infrastructure in Africa due to Chinese investments).

133. *Id.* at 11 (describing a particular problematic stretch of road in Cameroon with forty-seven roadblocks and twenty-seven from Mombasa, Kenya to the Ugandan border).

134. *How a Fruit Seller Caused Revolution in Tunisia*, CNN (Jan, 16, 2011), <http://www.cnn.com/2011/WORLD/africa/01/16/tunisia.fruit.seller.bouazizi> (describing the individual who sparked the protests in Tunisia that started the revolution in that State as a fruit/vegetable retailer who was unable to easily obtain a vendor permit from the government).

ensure a diversity of products that can withstand fluctuations in market prices. With sufficient numbers, a producer organization may have sufficient clout to lobby for future public sector investment in food processing and food storage. Producer organizations may also be able to better share risks associated with being a farm producer. East African dairy farmers represent a successful example of the economic clout of a medium sized producer organization.¹³⁵ Operating within a collective governance framework, East African dairy farmers who previously competed against each other now operate group owned and run refrigerated milk collection centers and milk processing facilities.¹³⁶

In terms of removing disincentives, states can create regulations that eliminate existing unfair trading practices, particularly between Global North companies and Global South producers. Global South countries may forbid contracts that currently permit large processing companies or retailers from rejecting products on the basis of aesthetics.¹³⁷ If the companies cannot prove that they are rejecting goods on the basis of human safety reasons, then the companies will be expected to fully perform on their contracts. This intervention will be particularly important in the case of resource-limited countries that export food needed to other countries where “quality” regulations continue to dictate appearances of products and not just the nutritional values. Arguably, this approach could lead to a reduction in off-shoring of agriculture to Africa from certain retailers who may insist on certain food aesthetics. Given the pressures that this export-oriented agriculture has already placed on parts of Africa’s food chain, the focus on Africa’s food markets rather than foreign markets may be the needed stimulus to generate production for regional markets.

Given that the government has limited funding and many Africa states confront ongoing challenges with petty corruption, one possible way of funding national food waste reduction reforms is social impact bonds. These bonds could be funded by private investors who would receive bond payments from the government when specific service providers deliver on pre-defined service goals. In the Global North, these bonds have been used to cover the gamut from prisoner rehabilitation¹³⁸ to asthma management.¹³⁹ Using a social impact bond to reduce

135. Jennifer Wheary, *In East Africa, Milk is Money*, WORLD ARK MAG. (Spring 2013), <http://www.heifer.org/join-the-conversation/magazine/2013/spring/in-east-africa-milk-is-money.html>.

136. *Id.*

137. See Sarah Bentley, *Who's to Blame for Supermarket Rejection of Ugly Fruit and Vegetables?*, ECOLOGIST (Dec. 29, 2011), http://www.theecologist.org/News/news_analysis/1174157/whos_to_blame_for_supermarket_rejection_of_ugly_fruit_and_vegetables.html, for a description of the 90% of a wasted crop in a UK field because of the failure to meet aesthetic standards described as “technical specifications.”

138. David W. Chen, *Goldman to Invest in City Jail Program, Profiting if Recidivism Falls Sharply*, N.Y. TIMES, (Aug. 2, 2012), http://www.nytimes.com/2012/08/02/nyregion/goldman-to-invest-in-new-york-city-jail-program.html?_r=0.

139. Press Release, Social Finance, Inc., The California Endowment Awards Grant to Social Finance and Collective Health (Mar. 25, 2013), available at <http://www.socialfinanceus.org/sites/socialfinanceus.org/files/Fresno%20Asthma%20Demonstration%20Project%20Press%20Release.pdf>.

hunger by reducing food waste would be a conceivable investment that NGOs and private investors particularly through corporate social responsibility programs might finance.

V. CONCLUSION

It is essential that any discussions of the human “right to food” contain some recognition that states have an obligation to reduce food waste based on the already existing human “right to food.” With nearly 1.3 billion tons of food being wasted annually, there is room for improvement at many levels. This essay assumes that because of the attention being given to problem with excessive food waste as part of the Zero Hunger Challenge, international policymakers will adopt at least a SDG target that will prioritize eliminating food waste. This is significant because the SDGs will provide the needed international framework for creating an accountability regime to measure progress towards sustainability.¹⁴⁰ Unfortunately, the specific goal and target that have been proposed by the international community to reduce food waste are inadequate to address the food security challenges related to the massive inefficiencies that currently exist in the food production, distribution, and retail system. As part of food security strategies, insufficient funding has been allocated to address food waste elimination; most funding is provided instead to increase production that may eventually go to waste. A zero food waste SDG or target would prioritize the political need for protecting long-term food resources by reducing waste and should contribute meaningfully to achieving a green economy.

Due to limited technical and financial capacities, states in the Global South experience greater challenges with reducing food waste in part because of a lack of both commercial infrastructure and access to basic storage technologies that will protect agricultural yields. There are a number of legal interventions that are possible from increasing targeted aid from the Global North to the Global South for food waste reduction, creating regional markets, and introducing national “fair trade” laws that prevent food from being wasted on the basis of aesthetics. With population projections at nine billion by 2050,¹⁴¹ and much of this growth in the Global South, we collectively must do more to achieve the “right to food” in order to “waste not, want not.”

140. SAKIKO FUKUDA-PARR, INT’L POLICY CENTRE FOR INCLUSIVE GROWTH, GLOBAL GOALS AS A POLICY TOOL: INTENDED AND UNINTENDED CONSEQUENCES 1 (2013), *available at* <http://sustainabledevelopment.un.org/content/documents/864IPCOnePager193.pdf>.

141. U.S. CENSUS BUREAU, INTERNATIONAL DATA BASE WORLD POPULATION: 1950-2050 (June 2011), *available at* <http://www.census.gov/population/international/data/idb/worldpopgraph.php>.



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