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## Aid and human rights

### Introduction

The relationship between human rights and economic aid is fundamentally different from that which human rights have with trade and with commerce, even if the problems of conceptual tension and institutional practice and culture turn out to be somewhat similar. Aid's *raison d'être* to alleviate poverty by promoting economic and social development is more *directly* focused on achieving human rights goals. With the trade or commerce components of the global economy, human rights are seen as possible *derivative* beneficiaries of the principal concerns of trade liberalisation and commercial enterprise.

Development thinking has, at least in certain quarters, always seen the relevance and importance of human rights. When the UN Economic and Social Council was established under the UN Charter it had functions and powers that related equally to 'international economic, social, cultural, educational, [and] health matters', and to 'promoting respect for, and observance of, human rights and fundamental freedoms for all' (Article 62). The very essence of what development means to the individual was initially captured in Article 25 of the UDHR 1948, which states that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

This expression of development goals in human rights terms was repeated in various subsequent UN human rights treaties, in particular the International Covenant on Economic, Social and Cultural Rights 1966, the Convention on the Elimination of All Forms of Discrimination against Women 1981 and the Convention on the Rights of the Child 1990, and variously reiterated in numerous statements of each of their overseeing committees. There is even a body of opinion that asserts a right to

development and a UN Declaration in 1986 that proclaims such right, though this is not without contestation as I further discuss later in this chapter. The interdependency of the two notions has also been expressly recognised and relied upon. Thus, the final communiqué of the first World Conference on Human Rights held in Teheran in 1968 pronounced that ‘the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development’;<sup>1</sup> and Kofi Annan, in his *In Larger Freedom* report in 2005 which heralded a reconfiguration of parts of the UN’s human rights and humanitarian apparatus, identified development as inextricably linked to both the enjoyment of human rights and security.<sup>2</sup>

However, despite the effort invested in asserting their interrelationship in formal, declaratory terms, in practice the outcomes fall well short of the ideal. As Philip Alston and Mary Robinson note in the introduction to their jointly edited collection of essays on *Human Rights and Development*,

debates in the United Nations and in other international fora do not necessarily translate into change on the ground, let alone within the different disciplines which need to adjust their working assumptions and methods in order to embrace, or at least accommodate, change. While the human rights community had recognized the need to engage with their [*sic*] development counterparts, they were not necessarily prepared to change their modus operandi. And, perhaps unsurprisingly, the latter group proved generally reluctant to engage in debates about international legal obligations and how to reflect the relevant norms in policies at the domestic and international levels.<sup>3</sup>

### *Responding to poverty*

To understand why there is this dislocation and what its implications are, it is necessary to place the debate within the context of the wider development movement. The South-driven ‘New International Economic Order’ movement in the 1970s initially captured the imagination of the UN and, it seemed, many rich states in the North, with its strident call

1 Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, UN Doc. A/CONF. 32/41 at 3 (1968), para. 13.

2 *In Larger Freedom: Towards Security, Development and Human Rights for All* (2005), www.un.org/largerfreedom, para. 17.

3 ‘The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours’, in Philip Alston and Mary Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford and New York: Oxford University Press, 2005), pp. 1–2.

for a radical rebalancing of global wealth, even if it was eventually to falter in the face of dissipating commitment among developed states and disagreement among the developing states.<sup>4</sup> It was only during the 1980s, driven by visions of what Bob Geldof called the ‘pornography of poverty that is on our news screens’ relating to the successive famines in the Horn of Africa countries, and popular movements such as the high-profile campaigns of Oxfam, War on Want, Save the Children, and the Geldof-orchestrated fund-raising Live Aid concerts (and the Band Aid and Comic Relief that followed them), that the alleviation of abject poverty became politicised for many people and governments in the West.

The particular association between human rights and development aid is also relatively young, even if accepting that it has amorphous roots dating back at least to the mid 1960s. As Katarina Tomasevski reports, it was in 1966 that the UN stated that: ‘It may be said that, in a broad sense, everything that is being done by the United Nations family of organizations . . . to promote economic and social development contributes to the implementation of human rights.’<sup>5</sup> That said, Tomasevski places the real genesis of the movement in the clearer linkages between development and human rights that emerged in the 1970s in the thinking of Western governments as well as international organisations such as the UN, the World Bank and the EEC (as it then was) as they wrestled with how to deal with blatant human rights abusing states such as Chile, Ethiopia, Kampuchea (now Cambodia), Sri Lanka and Haiti.<sup>6</sup> In the case of these countries, many donors chose to use the withdrawal of aid as a means to punish the human rights abusing governments. And while such action was controversial at the time – being considered by some to be counter-productive to human rights ends – it certainly highlighted to many the linkages between human rights and development aid.

At about the same time as all these deliberations were taking place, a junior economics professor at Chittagong University in Bangladesh was formulating a radical, home grown, aid programme in poor villages that surrounded the university campus that was to prove to be something of a harbinger for wholesale changes in the ways that the rich Western government aid agencies were to frame and administer their own aid programmes. Shocked by the appalling scenes of the consequences of

4 See Craig Murphy, *Emergence of the NIEO Ideology* (Boulder, CO: Westview Press, 1984).

5 UN, *Human Rights and the United Nations Family* (1966), para. 309, as quoted by Katarina Tomasevski, *Development and Human Rights* (London: Pinter Publishers, 1989), p. 21.

6 *Ibid.* chapter 5.

the famine that gripped Bangladesh in 1974, Muhammad Yunus was profoundly moved to act both personally and, crucially, professionally.

I used to get excited teaching my students how economics theories provided answers to economic problems of all types. I got carried away by the beauty and elegance of these theories. Now all of a sudden I started having an empty feeling. What good were all these elegant theories when people died of starvation on the pavements and on door steps.

My classroom now seemed to me like a cinema where you could relax because you knew that the good guy in the film would ultimately win. In the classroom I knew, right from the beginning, that each economic problem would have an elegant ending. But when I came out of the classroom I was faced with the real world. Here, good guys were mercilessly beaten and trampled. I saw daily life getting worse, and the poor getting poorer. For them death through starvation looked like their only destiny.

Where was the economic theory that reflected their real life?<sup>7</sup>

The Grameen Bank, a micro-credit banking system that Yunus established in an effort to address abject poverty from the ground up rather than from the classroom down, developed into an enormous success and proved ‘that the poor are bankable.’<sup>8</sup> It was, and still is, essentially a self-help scheme through which the bank lent very small amounts (often less than the equivalent of \$10), at very low interest, to be paid back in tiny, but regular, instalments over a relatively short period. Crucially, it lent only to women, precisely because ‘they constitute the majority of the poor, the under-employed and the economically and socially disadvantaged.’<sup>9</sup> Not only did this revolutionary tack empower women personally and socially, that investment of confidence and respect was literally repaid by remarkably high rates of compliance with the repayment schedules.<sup>10</sup> The loans enabled women and their families to break free from the vicious cycles of hand-to-mouth, subsistence living financed (or rather extorted) by old-fashioned usuries. They could invest even these tiny amounts of

7 *Banker to the Poor: The Story of the Grameen Bank* (London: Aurum Press, 1999), p. 4.

8 *Ibid.* p. 24. In terms purely of turnover, it grew astonishingly ‘from \$27 lent to forty-two people in 1976 to \$2.3 billion lent to 2.3 million families by 1998’; p. 13. And, as I write, the *Washington Post* reports on the recently opened offices of the Grameen Bank in New York (the first in a developed country), and records the fact that loan disbursements in Bangladesh to date now total some \$6 billion, spread across 7.4 million borrowers; Robin Shulman, ‘Small Loans, Significant Impact’, *Washington Post*, 10 March 2008, p. A03. Muhammad Yunus was awarded the Nobel Peace Prize in 2006.

9 *Ibid.* p. 89.

10 The repayment rate ranges between 92 and 98 per cent. P. K. Rao, *Development Finance* (Berlin and New York: Springer, 2003), p. 66.

capital into raw materials to be used to make tradable goods and so build up a micro-business: the first step on the ladder to financial independence.

The aid package that the Grameen Bank represents is certainly not typical. It is private sector based, commercial (though on a break-even rather than a profit maximisation basis), targeted at, and directly delivered to, the poorest of the poor, strategically long-term in its objectives, remarkably free of corruption or wastage. It delivers, what is more, palpably concrete results with businesses established, lands cultivated and houses built. Yunus pithily sums up his philosophy as follows: 'Poverty is a chronic disease. It cannot be cured with *ad hoc* measures. There may be short-term measures, but one must have a long-term strategy in mind when taking a quick tactical step.'<sup>11</sup>

During the late 1980s and the 1990s the same concerns with systemic, long-term approaches to poverty alleviation increasingly became the focus of national and multilateral aid agencies worldwide. The 1980s experiment with 'structural adjustment' planning – whereby severe and instant austerity measures in respect of public spending, monetary supply and fiscal accountability were imposed upon states as conditions of any assistance rendered either by the World Bank or the IMF – is now widely regarded as a failure. Danilo Türk's biting 1991 critique of the wider development and human rights implications of the structural adjustment programmes concluded that:

[t]he 1980s . . . will go down in history as the 'lost decade' for development. In spite of remarkable progress (due in part to the availability of external financing) during the 1960s and 1970s for virtually all social and economic indicators, those covering the 1980s show largely either negligible improvement or in many cases dramatic decline. To cite but one example, over two thirds of the world's developing countries registered negative or negligible economic growth during this decade.<sup>12</sup>

The economic interventionist focus of structural adjustment gradually gave way to increased attention on the facilitation of institutional reforms in governments and also, latterly, greater engagement with the private sector in integrated efforts to bolster economic development and to install self-sustaining market economies in target states. Indeed these developments represented two strands to what amounts to a revolution in aid, the

11 *Ibid.* p. 103.

12 *The Realisation of Economic, Social and Cultural Rights*, Second Progress Report prepared by Mr Danilo Türk, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1991/17, 18 July 1991, para. 55.

implications of which are still apparent today and which have direct bearing on the relationship between aid and the protection and promotion of human rights.

The first strand manifested itself in a shift away from the more traditional objects of aid and modes of delivery, namely the provision of a mixture of untied grants and loans and the underwriting of major infrastructure projects such as building bridges, dams, pipelines and power stations, roads, schools and hospitals. There has been a move towards substantial investment in governmental and institutional capacity-building through technical assistance, training and education, underpinned by a belief in the principles of good governance, transparency, combating corruption, strengthening civil society, the rule of law and respect for human rights. Indeed, defining governance broadly to include all of these principles and activities, it is estimated that about one quarter of the total of the World Bank's annual allocated budget is now directed towards governance-related projects. Somewhere between 10 and 25 per cent of each of the budgets of key bilateral aid agencies – including, for example, Australia, Canada, Denmark, the Netherlands, Sweden, the UK and the US – is also dedicated to improvements in governance.<sup>13</sup> Paul Collier's illuminating research considers 'the trap of bad governance' to be one of the most important points of leverage for aid today. In his book *The Bottom Billion* he describes three ways in which aid can be used to help turnarounds in the governance of poor states: (i) as an incentive to improve (or continue improving); (ii) as the provision of skills (directly, or indirectly by way of education and training); and (iii) as a reinforcement of sudden or tipping-point, positive changes in a country's political circumstances.<sup>14</sup> In Collier's view the three ways have various degrees of success, but, that aside, what his analysis demonstrates is that seeking ways to improve governance in poor countries has become big business within aid agencies. What makes the governance movement significant for my purposes is that it also encompassed particular human rights oriented initiatives. The joint UNDP–OHCHR programme for Human Rights Institutional Strengthening (HURIST), for example, though relatively

13 It is very difficult to be any more accurate because each agency breaks down its aid 'sectors' differently. However, according to OECD Development Assistance Committee (DAC) statistics for 2006, the total of all DAC donor countries allocations to the 'Government and Civil Society' sector was \$14.4 billion, which represented nearly 15 per cent of all DAC official development assistance (ODA) for that year. See OECD-DAC Statistics Online, *Dataset 3: ODA by Sector*, at [http://stats.oecd.org/wbos/Index.aspx?DatasetCode=ODA\\_SECTOR](http://stats.oecd.org/wbos/Index.aspx?DatasetCode=ODA_SECTOR).

14 Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done about It* (New York: Oxford University Press, 2007), pp. 108–17.

short-lived, managed to encourage the growth of national human rights commissions and agencies and to integrate specific human rights goals by way of 'human rights action plans' into the wider, cross-government, capacity-building exercises in many developing countries.<sup>15</sup>

The second strand comprises the growing collaboration between public sector aid and private sector investment in developing economies. There have always been important private avenues of overseas aid, especially charitable organisations such as Oxfam, Médecins sans Frontières, Save the Children or World Vision, though these have usually operated independently of donor government aid agencies. There has also, of course, always been corporate investment (or FDI) in developing states, but this has traditionally been, if anything, even more removed from an association with state aid work. What has changed significantly since the mid 1990s has been both the nature of the relationship between corporate and state development oriented activities and, most dramatically, the enormous growth in FDI which has both spurred, and been spurred by, the growth in economic capacity of many developing countries and so-called 'emerging economies' (a sort of promising halfway house between developing and developed states). It was only just over a decade ago that William Meyer was able to argue for the importance of official foreign aid because of its 'sheer size . . . as compared to foreign investment'. Drawing on the work of David Lumsdaine, he calculated that the annual totals of official aid from all donor countries was, on average, double that of foreign direct investment in the forty years from 1949 to 1989.<sup>16</sup> Today the picture has changed entirely. The latest figures available (for 2007) show that worldwide FDI in developing states is now more than six times greater than that for total of ODA: that is, \$500 billion for FDI,<sup>17</sup> against \$73 billion for ODA.<sup>18</sup> The wider picture of financial flows into developing countries drives home still further the nature of the changed

15 HURIST's first phase (1999–2002) was dedicated to these objects; its second phase (2002–5) was concerned more with constructing and applying a human rights based approach to development programming, which I discuss later in this chapter. For a review of HURIST see *Human Rights Strengthening: HURIST (UNDP/OHCHR/UNOPS) – Evaluation Report (May–July 2005)*; also see [www.undp.org/governance/programmes/hurist.htm](http://www.undp.org/governance/programmes/hurist.htm).

16 William Meyer, *Human Rights and International Political Economy in Third World Nations* (Westport, CT: Praeger, 1998), pp. 113–14; Lumsdaine's work was published in *Moral Vision in International Politics: The Foreign Aid Regime 1949–1989* (Princeton: Princeton University Press, 1993).

17 UNCTAD, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge* (New York and Geneva: UN, 2008), p. 3.

18 Extracted from the OECD statistics database. The ODA figure represents the total aid from OECD countries. <http://stats.oecd.org/wbos/index.aspx>.

circumstances of aid. Private giving (charitable donations and corporate philanthropy) from the US, the UK, France and Norway alone amounted to \$37 billion in 2006<sup>19</sup> and remittances (effected by individuals from developing states working in developed states sending money home) had ballooned to \$251 billion in 2007.<sup>20</sup>

To some extent the changes in the nature of the relationship between official aid agencies and private enterprise have been forced by the very scale of the latter's investment in developing states. Not only can such a level of investment – like the proverbial scale-breaking gorilla – not be ignored, there is also a growing body of opinion that this is an important opportunity to advance aid and development on another front. It was perhaps unsurprising, therefore, that one of the key issues raised by the Commission on the Private Sector and Development in its 2004 report *Unleashing Entrepreneurship* was to warn against overlooking this potential. '[M]any critical resources for private sector development are under the radar screen of development, since they are not carried out by traditional development players and do not occur under the explicit label of development',<sup>21</sup> it noted. Seeking, with varying degrees of success, to exploit these resources, there have emerged in recent years a wide variety of mechanisms by which partnerships between public aid agencies and private commercial enterprises in the field of development have been facilitated and encouraged.

The International Finance Corporation (IFC), the private sector arm of the World Bank, has grown enormously in size and scope since the late 1990s, as has the Multilateral Investment Guarantee Agency (MIGA), another arm of the Bank, which provides insurance against political risk for corporations investing in developing states.<sup>22</sup> National Export Credit Agencies (ECAs) are government bodies that perform the same service on behalf of individual states in respect of corporations registered in their jurisdictions investing in the developing world, and they too have recorded marked increases in business.<sup>23</sup> There has also been a marked

19 Centre for Global Prosperity, *The Index of Global Philanthropy 2008* (Washington, DC: Hudson Institute, 2008) p. 48.

20 Dilip Ratha *et al.*, 'Revisions to Remittance Trends 2007', Migration and Development Brief 5, 10 July 2008; for this Brief, and the latest World Bank figures on remittances, see [www.worldbank.org/prospects/migrationandremittances](http://www.worldbank.org/prospects/migrationandremittances).

21 *Unleashing Entrepreneurship: Making Business Work for the Poor* (New York: UNDP, 2004), at p. 29.

22 As detailed and discussed below, pp. 137–39.

23 The global growth throughout the 1990s of ECAs is noted by Delio Gianturco, *Export Credit Agencies: The Unsung Giants of International Trade and Finance* (Westport, CT:



increase in the instances and sophistication of public–private partnerships developed by state aid agencies, led by initiatives initially in the energy and water supply sectors, and latterly in the provision of health services.<sup>24</sup>

Most dramatic of all, however, has been exponential growth of Bilateral Investment Treaties (BITs), now numbering more than 2,500 worldwide. These are agreements between states (predominantly between Western and developing states, but increasingly between developing states themselves) which govern the conditions under which private sector investment from the former is made in the latter, and especially what guarantees the investor demands from the recipient state, including in respect of the settlement of disputes.<sup>25</sup> The International Institute for Sustainable Development (IISD) monitors the negotiations that establish the BITs and seeks to address their implications for sustainable development. It notes the crucial fact that the international development agenda is now being driven ‘at a dizzying pace’ by such agreements,<sup>26</sup> in the absence of any modern multilateral framework for their regulation. Predictably, this unregulated environment has favoured the richer and more powerful investor states, with an overwhelming focus on ‘just one aspect of the investment process: the protection of foreign capital and investments.’<sup>27</sup> The consequences for developing states that seek to implement any human rights initiatives that potentially contravene the terms of a BIT have been equally grave, *despite* the fact that the purported contravening action might itself be based on the need to meet obligations under international human rights law.<sup>28</sup> For example, there have been a number of arbitration cases brought by large corporations against the South African

Quorum Books, 2001), pp. 41–4. And Karyn Keenan, of Halifax Initiative Coalition notes that, according to data collected by the OECD, ECAs in OECD member states ‘provided US\$125 billion in credits, insurance, guarantees and interest support’ in 2005; *Export Credit Agencies and the International Law of Human Rights* (January 2008), p. 1.

24 See, for example, *The Global Fund to Fight AIDS, Tuberculosis and Malaria* and the *Global Alliance for Vaccines and Immunization*, both of which are financial instruments rather than implementing entities, comprising multi-stakeholder partnerships of UN agencies, governments, civil society organisations, the private sector and philanthropic organisations.

25 BITs are discussed further in [chapter 4](#) below.

26 See IISD’s website, [www.iisd.org/investment/bits](http://www.iisd.org/investment/bits).

27 This quotation is taken from the *IISD Model International Agreement on Investment for Sustainable Development* (Winnipeg: International Institute for Sustainable Development, 2005), p. x, which is a proposal designed to fill this regulatory hole.

28 Andrea Shemberg, *Stabilization Clauses and Human Rights* (11 March 2008), paper prepared for the IFC and the UN Secretary General’s Special Representative on Business and Human Rights, paras. 33–6; available at [www.ifc.org/ifcext/media.nsf/Content/Stabilization\\_Clauses\\_Human\\_Rights](http://www.ifc.org/ifcext/media.nsf/Content/Stabilization_Clauses_Human_Rights).

Government claiming that its black empowerment legislation imposes financial costs on them proscribed by relevant BITs signed by South Africa.<sup>29</sup> Evidently, therefore, the utilisation of the market for aid and development goals does have its limits. But within the broad context of development assistance, greater private sector engagement with the poorest of the poor – those at the ‘bottom of the pyramid’ of wealth – must generally be welcomed by the poor, corporations and development agencies alike. To be sure, propositions like C. K. Prahalad’s assertion that there is a need to unlock the ‘significant latent purchasing power’<sup>30</sup> of the estimated four billion poor at the bottom of the pyramid<sup>31</sup> are premised on the prospects of corporations making mighty profits.<sup>32</sup> But, at the same time, there can be no denying the potent force of parallel arguments that if corporations prove themselves to be sufficiently perceptive and innovative to garner the market, the poor that comprise the target market will not only want to participate, but understand and covet the developmental potential of so doing, as Prahalad argues.<sup>33</sup> It is noteworthy that in the pursuit of what he sees as the goal of ‘the morphing of the pyramid into a diamond’ (see [Figure 4](#)), Prahalad stresses that the market-based system he envisages comprises an array of public and private sector actors including corporations (of all sizes), informal traders, cooperatives, NGOs and state law enforcement agencies.<sup>34</sup>

So, the new world order of international aid and development sees a two-way insinuation between the private and state sectors. Going one way, the private sector – to the extent that it operates in the developing world (which is significant) – is being drawn into greater public gaze through the scrutiny and expectations that attend its operations, especially when those operations are associated with public development projects (via, for example, the Equator Principles),<sup>35</sup> be they state aid agencies or multilateral ones. The particular matter of the human rights

29 See further Luke Peterson, *South Africa’s Bilateral Investment Treaties: Implications for Development and Human Rights*, Dialogue on Globalization Occasional Paper No. 26 (Geneva: Friedrich-Ebert-Stiftung, 2006). I discuss this case further, as well as other human rights related matters concerning corporations and BITs, in [chapter 4](#).

30 C. K. Prahalad, *The Fortune at the Bottom of the Pyramid: Eradicating Poverty through Profits* (Upper Saddle River, NJ: Wharton School Publishing, 2005), p. 11.

31 Calculated as those having less than \$1,500 p.a. purchasing power; *ibid.* p. 4.

32 Though this contention is now the subject of considerable and heated debate, see Mallen Baker, ‘Is There Really a Fortune at the Bottom of the Pyramid?’, *Ethical Corporation* (3 September 2006).

33 Prahalad, *The Fortune at the Bottom of the Pyramid*, [chapter 3](#).

34 *Ibid.* pp. 63–6.      35 See further below, [chapter 3](#), note 159.

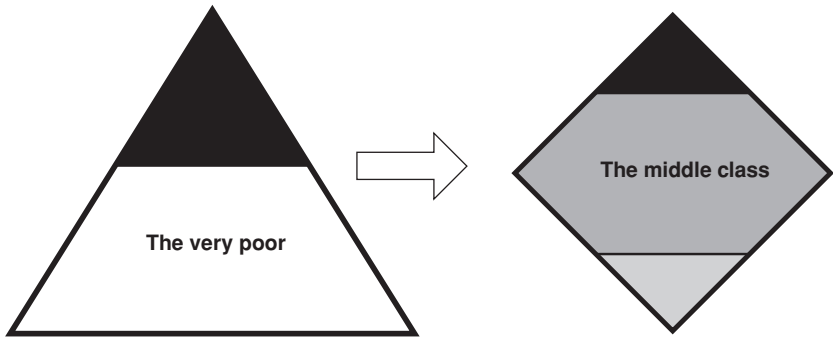


Fig. 4 The morphing of the pyramid into a diamond. Source: Prahalad, *The Fortune at the Bottom of the Pyramid* (2005), at p. 110.

implications of this dimension of the aid/commerce overlap will be analysed in the next chapter. What concerns me here, in this chapter, is the insinuation going the other way. That is, the accommodation by state aid of more private sector partnerships and practices, and what implications this has for human rights. The challenge this poses – especially given the rapidity and depth of the changes in the aid landscape catalogued above – can be encapsulated in the simply stated aim of how to exploit the new environment while, at the same time, avoiding being exploited by it.

Dani Rodrik frames this challenge in the broader terms of what impact globalisation (effected through the tremendous expansion of private enterprise through trade) has on the institutional capacity of states, and especially developing states. He argues that globalisation undercuts their ability ‘to erect regulatory and redistributive institutions, and does so at the same time that it increases the premium on solid national institutions.’<sup>36</sup> This presents a serious dilemma to bilateral and multilateral aid agencies who are today trying to bolster such capacity, and to do so, at least in part, by way of the instrument of globalisation. This tension is a fine example of what Rodrik labels ‘the central economic paradox of our time’, namely:

that ‘development’ is working while ‘development policy’ is not. On the one hand the last quarter century has witnessed a tremendous and historically unprecedented improvement in the material conditions of hundreds of millions of people living in some of the poorest parts of the world. On

36 Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton: Princeton University Press, 2007), p. 195.

the other hand, development policy as it is commonly understood and advocated by influential multilateral organizations, aid agencies, Northern academics, and Northern-trained technocrats has largely failed to live up to its promise.<sup>37</sup>

It might be, as some argue (but not Rodrik himself), that by adopting a human rights approach to development, greater clarity of purpose and process might be given to development policy. I consider these arguments and their counter-arguments later in this chapter, but first we need to delineate the precise nature of the link between poverty alleviation and human rights generally, and human rights law in particular.

### Poverty alleviation and human rights

There are two important dimensions to the link between poverty alleviation and human rights: one moral, the other legal.

#### *Moral and legal arguments*

Thomas Pogge's challenging book *World Poverty and Human Rights*, which I referred to earlier, presents a most forthright set of arguments for why, morally, the link between poverty and human rights is important and what implications flow from it. He is concerned with deconstructing and rebutting the various defences that are raised against charges that the levels of abject poverty existing in the world today are morally repugnant, *and* that we who are not suffering so are to some degree morally responsible for the continuing plight of those who are. These are charges that Pogge essentially believes in.<sup>38</sup> Pogge accepts the part of these defences that asserts there is a morally significant difference between causing poverty and merely failing to reduce it. In this respect, he can be distinguished from Edmund Burke who famously held that 'all it takes for evil to triumph is for good men to do nothing'. However, Pogge then continues:

And I grant at least for argument's sake that, notwithstanding the enormous complexity of modern economic interaction, such a distinction can be applied, at least roughly, to the global order. My argument conceives, then, both human rights and justice as involving solely negative duties: specific minimal constraints – more minimal in the case of human rights – on what harms persons may inflict on others . . .

37 *Ibid.* p. 85.

38 Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002), pp. 11–15.

I challenge the claim that the existing global order is not causing poverty, not harming the poor. This dispute is about the explanation of the persistence of severe poverty: why is global economic inequality increasing so rapidly that, despite an impressive rise in human affluence overall, hundreds of millions still barely survive from one day to the next?<sup>39</sup>

Moreover, Pogge adds, as the prevailing global institutional order is a product of, and driven by, *our* governments, then *we* – on whose behalf the governments act – ‘bear primary responsibility’ for the outcomes.<sup>40</sup> Pogge is right to challenge the complacency that is so often the response to accusations that the current global order may indeed be harming the poor as much as, or more than, helping them, and to rail against the absence of conclusive proof that it is *not* doing so. But equally he (like everyone else for that matter) is unable to demonstrate how, in fact, the current order *is* directly causing such damage; he also provides very little by way of comprehensive suggestions as to how the current order could be reformed or replaced to address poverty better.<sup>41</sup> The value of Pogge’s critique, however, lies in its trenchant conscious-pricking assignment of the responsibility better to address poverty to *we* who are in a position to do something about it. By ‘*we*’ he means us as individuals, our governments and the global institutions, instruments and regimes they have created; and by ‘doing something’ he exhorts us to invoke ‘the global moral force of human rights’ as the object of global institutional change and the vivification of legal obligations to ensure human rights to all that would flow therefrom.<sup>42</sup>

This brings us, then, to the point where the legal dimension of the poverty/human rights relationship becomes apparent. It is a dimension that is fundamentally about ‘the empowerment of the poor’.<sup>43</sup> Empowerment that stems from the rights that those in poverty are (or should be) able to claim against states, and the concomitant legal obligations placed on states (by international or domestic laws, or both) to meet those claims. The conditions of poverty that people are forced to live in violate many rights, such as those noted in the opening page of this chapter. As Nelson Mandela pronounces, ‘overcoming poverty is not a gesture of charity. It

39 *Ibid.* p. 13. 40 *Ibid.* pp. 13, 15–20.

41 His suggestion of a ‘Global Resources Dividend’ for raising the necessary funds to tackle global poverty (his chapters 5–8) is short of any detailed consideration of the practicalities of how to ensure their appropriate distribution, application or sustainability. That said, Pogge might (fairly) argue that that is a next step for others to take.

42 *Ibid.* pp. 169–77.

43 As the UN’s OHCHR puts it in its 2004 report, *Human Rights and Poverty Reduction: A Conceptual Framework*, p. 13.

is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life. While poverty persists, there is no true freedom.<sup>44</sup>

This much is incontrovertible, but there are nonetheless inherent limits to what international human rights *law* actually demands in this respect, as opposed to what we may fervently hope of it. For although there can be no question that human rights treaties mandate states to ensure the protection of all rights therein to all persons within their respective jurisdictions, international instruments are at best equivocal on what are the obligations of states to those beyond their borders whose human rights are being violated as a consequence of the poverty they must endure.

Certainly, to the extent that the situation threatens international peace, then there is some provision for the Security Council to take steps to address the problem, whether by force or by peaceable means. Furthermore, post-Kosovo, a case has been made by some for egregious humanitarian need to be a valid ground for military intervention, in addition to the accepted ground of self-defence. But these are essentially vehicles for the short-term management of political crises rather than long-term strategies for dealing with human rights by alleviating poverty. The International Covenant on Economic, Social and Cultural Rights is more aspirational than directorial in this regard. The eponymous committee that oversees the Covenant has stressed 'the *potential* inherent in the articles of the Covenant that refer to "international cooperation" as a powerful basis for the Committee on which to base its work on globalisation and based on which states parties *could* contribute to creating a climate whereby economic globalisation does not lead to the violation of economic, social and cultural rights'.<sup>45</sup> The much discussed 'right to development' (RTD) remains unfinished business in terms of international law, marooned in a Declaration since 1986, its path to binding Covenant status having been effectively blocked by a combination of political opposition, textual uncertainty and purported impracticability of implementation and enforcement. Much of the dispute centres on the ambiguity of the allocation of development responsibilities and rights in the text of the

44 Nelson Mandela, Speech for the Make Poverty History campaign, Trafalgar Square, London, 3 February 2005, available at [news.bbc.co.uk/2/hi/uk\\_news/politics/4232603.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4232603.stm).

45 *Record of the Workshop on International Trade, Investment and Finance and Economic, Social and Cultural Rights*, 6 May 2000; [www.unhcr.ch/tbs/doc.nsf/0/11d06750ac4e7acbc125691f002f01f0?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/0/11d06750ac4e7acbc125691f002f01f0?Opendocument). The record refers specifically to Articles 2(1), 11, 15, 22 and 23 of the Covenant that themselves build upon the exhortation for international cooperation in Articles 55 and 56 of the UN Charter.

Declaration itself. Articles 2 and 3 invest in individuals the status of an 'active participant and beneficiary of the right', while at the same time stipulating that 'all human beings have a responsibility for development', and that 'States have the right and the duty' and the 'primary responsibility' to advance development, as well as having the 'duty to co-operate with each other in ensuring development'. The capacity therein for confusion and argument over the expectations that might be made of the various parties – individuals, developing states and developed states – is manifest and has, predictably, been exploited to the full, especially in the confrontations between rich and poor states over whose responsibility development is. The situation has not been saved by the emphasis that Arjun Sengupta (the former UN Special Representative on the RTD) placed on the right being merely 'a process of development which leads to the realization of . . . human right[s]',<sup>46</sup> largely because such a characterisation does nothing to resolve the responsibility dilemma *between* states. And although a High Level Task Force on the Implementation of the Right to Development was established by the UN in 2004, which gained some impetus from linking the RTD to the achievement of the Millennium Development Goals by 2015,<sup>47</sup> it remains the case that, whatever value the RTD has today, it lies more in rhetorical argument than in any sense of legal entitlement or obligation.

Protestations, therefore, that assert that the international community has 'a clear legal obligation to provide assistance under international human rights law' to poor states, when in fact no effort is made to demonstrate any such clear obligation, are unhelpfully misleading, even if well intended.<sup>48</sup> The sentiment would be better situated in political and moral arguments about what ought to be done about the abomination that is egregious poverty. What is more, it may be that even the valiant efforts to construct such an unequivocal legal obligation may be a mistake. Smita Narula, for example, has produced a tightly argued case for the obligation of international cooperation to implement economic, social and cultural rights, based on Article 2(1) and – in respect of the right to food which is

46 Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24(4) *Human Rights Quarterly* 837, at 846.

47 See Sabine van Schorlemer, 'The Right to Development and the UN Development Goals: Critical Perspectives', in C. Raj Kumar and D. K. Srivastava (eds.), *Human Rights and Development* (Hong Kong: LexisNexis, 2006), pp. 253–69.

48 Kirsty Nowlan and Tim Costello, 'When Right Equals Rights: The International Obligation to Provide Assistance to Developing Countries' (2005) 30(4) *Alternative Law Journal* p. 159.

her particular interest – Article 11 of the ICESCR.<sup>49</sup> I am in agreement with Narula that economic and social rights are justiciable; they are certainly not rendered *non-justiciable* because they are equivocal (though that does make them more challenging for courts), but equivocal they are nonetheless. The nature of the states parties' obligations regarding the rights in the Covenant are that they have agreed to 'undertake to take steps, individually and through international assistance and co-operation . . . to the maximum of available resources, with a view to achieving progressively the full realization of the rights' (Article 2(1)). With such terms, legal certainty in answering what is in effect the core question of 'how much is enough?' is lost on the rough seas of political and economic argument. Narula herself appreciates the practical problems that one faces when striving to insist on states' 'aid-giving in legal obligation terms', suggesting instead that better results might come from focusing on 'the vehicles through which extraterritorial violations occur – namely, international financial institutions and transnational corporations',<sup>50</sup> and the *indirect* responsibilities on states that flow therefrom.

In the end, however, it must be accepted that human rights law cannot be relied upon to secure economic development, still less to 'solve' poverty alleviation. David Kennedy is right to talk of the deleterious distortions that result from framing such tasks in human rights language alone, or even primarily.<sup>51</sup> It is better to cajole and persuade all states, individually and collectively, to tackle development using all the persuasive resources to hand, including legal instruments, rather than to try to do battle on the narrow ledge of definitive legal interpretation alone. For these other persuasive resources – the moral, philosophical, political and economic imperatives to advance the development goals of peoples and countries – can be, in practice, no less compelling than legal prescription.

### *Politics and policies*

The moral and legal dimensions of the association between poverty alleviation and human rights are, crucially, the key components that determine the levels of *political* determination that states possess to address the manifest problems of poverty, global and local. At present, that determination

49 Smita Narula, 'The Right to Food: Holding Global Actors Accountable under International Law' (2006) 44 *Columbia Journal of Transnational Law* 691, at 735–7.

50 *Ibid.* 737.

51 David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101, 108–9.



– no matter the moral or legal arguments – is still lacking in comprehensive, concrete outcomes. Jeffrey Sachs’s monumental analysis of the political and economic causes of global poverty has led him to conclude that ‘[t]he very hardest part of economic development is getting the first foothold on the ladder. Households and countries at the very bottom of the world’s income distribution, in extreme poverty, tend to be stuck.’ What, therefore, he sees as ‘our generation’s challenge’ is that:

we should ensure that the international rules of the game in economic management do not advertently or inadvertently set snares along the lower rungs of the ladder in the form of inadequate development assistance, protectionist trade barriers, destabilizing global financial practices, poorly designed rules for intellectual property, and the like, that prevent the low-income world from climbing up the rungs of development.<sup>52</sup>

Economists like Sachs essentially believe in the need for aid – albeit massively increased and its serious ‘plumbing’ problems sorted out (which issue is discussed in the final section of this chapter when I focus on the global institutional apparatus of aid). That is in contrast to economists like Martin Wolf. Wolf sees the aid goals of the World Bank as untenable and its problems as insurmountable,<sup>53</sup> and that promotion of the ‘magic of the market’ through free trade and commerce is the only sustainable way forward.<sup>54</sup> This may be considered somewhat extreme. There is no need to see aid on the one hand, and trade on the other, as mutually exclusive. The long-term sustainability of whatever development gains come from the provision of aid is only possible if viable commercial, trade, technological and governmental activities are established locally, thereby allowing the aid tap to be turned off. Above all else, the crucial role that aid plays is to provide the initial economic leg-up noted by Sachs, with the express intention then to engage more surely with the normal, self-sustaining features of a market economy.

All arms of the global economy recognise this leg-up role of aid and are, to varying extents, intersecting accordingly. We see this in respect of the alliances between private sector commerce and aid discussed earlier. The fortunes of both commerce and aid are closely linked to engendering thriving trade relations inside and especially outside the countries in question. The arguments made for development-oriented

52 Jeffrey Sachs, *The End of Poverty* (London: Penguin, 2005), pp. 24–5.

53 To this end Wolf quotes, approvingly, Montek Ahluwalia (a former senior IMF economist) once telling him that ‘the Bank was a growing business in a dying industry’; Martin Wolf, *Why Globalization Works* (New Haven, CT: Yale University Press, 2004), p. xv.

54 *Ibid.* chapter 4.

trade as discussed in the [last chapter](#), as well as initiatives such as ‘aid for trade’, preferential trade agreements for developing states and the Doha Round of trade talks itself, are all geared towards the integration of trade and aid goals (and amount to some 25 per cent of all aid),<sup>55</sup> even if their implementation in practice leaves much to be desired. It is true that there remains a lack of consensus among economists as to whether, to what extent and under what conditions more trade openness is good for the poor,<sup>56</sup> but that has not stopped a great deal of attention being trained on the possibilities and potential of such.

The World Bank, for example, directed no less than 8.1 per cent of its total budgetary commitments between 1987 and 2004 (some \$38 billion) towards boosting freer trade in 117 poor countries, though with mixed success, according to a 2006 report by the Bank’s own Independent Evaluation Group.<sup>57</sup> The UNDP has pursued a sustained interest in how to harness the undoubted development advantages of growth, while minimising the equally evident instances of disadvantage, such as the absence of measures to protect the vulnerable from trade liberalisation shocks, or the inadequacy of processes for the redistribution of trade gains. A detailed and intelligently argued report that it commissioned in 2003, for example, emphasised the importance of the two-way, mutually reinforcing, relationship between aid and trade, while highlighting that ‘none of these benefits are guaranteed’, and that, ultimately, it was essential that

55 ‘The average share of aid for trade in the total of all aid was 34% between 2002 and 2005, during which time commitments rose by 22% in real terms. The share fell slightly from 35% to 32% during that period, reflecting high levels of donors spending on social sectors, such as education and health’: OECD and WTO, *Aid for Trade at a Glance 2007: First Global Review* (Paris: OECD and Geneva: WTO, 2007), p. 10, [www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/a4t\\_at\\_a\\_glance07\\_e.pdf](http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_at_a_glance07_e.pdf). In late 2007, Pascal Lamy noted, following a conference of WTO members and heads of international organisations on the Aid for Trade Global Review, that ‘donors have made commitments that would lead to \$8 billion in new financing for Aid-for-Trade by 2010 and bring the total support to \$30 billion’. Pascal Lamy, ‘Aid for Trade Global Review’, 3 December 2007, at [www.ideas4development.org/aid-for-trade-global-review/en/](http://www.ideas4development.org/aid-for-trade-global-review/en/).

56 See James Harrison, *The Human Rights Impact of the World Trade Organisation* (Portland, OR: Hart, 2007), p. 42.

57 World Bank Independent Evaluation Group, *Assessing World Bank Support for Trade, 1987–2004* (Washington, DC: World Bank, 2006). The IEG’s Director-General, Vinod Thomas, summed up the tenor of the Report thus: ‘The evaluation confirms that liberalizing trade alone is not enough to generate growth and fight poverty . . . The World Bank has done the right thing in promoting more open trade worldwide, but not necessarily done everything to help generate the desired payoffs.’ See IEG Press Release, ‘World Bank’s Independent Evaluation Group Issues Report Assessing Two Decades of Global Trade Programs’, 22 March 2006, available from <http://go.worldbank.org/7QI0S4WU00>.

‘trade should be seen as a means to development rather than an end’.<sup>58</sup> Furthermore, in its 2005 *Human Development Report*, the UNDP pursued this line into the arena of the prevailing multilateral trade system by criticising what it sees as the system’s bias in favour of rich nations and against the interests of the developing world, where rather than there being too much free trade, there is not enough. The selective protectionist measures of rich states that effectively lock out or restrict trade from developing states in such crucial markets as commodities and agriculture were identified as the key obstacles to the latter’s exploitation of the development dividends of trade.<sup>59</sup>

The importance of the political question of what to do about poverty and the human rights abuses it occasions has also been represented in a number of specific initiatives that the developed world has signed up to in order to promote aid provided to the developing world. These are all somewhat grandly heralded and are directed at alleviating the consequences of poverty as a whole rather than to addressing human rights abuses per se, but in respect of the latter they nevertheless have important, usually indirect, impacts.

### *The shibboleth of the 0.7 per cent GNI target*

There is always pressure on developed states to provide more aid to the developing states. The most conspicuous campaign in this respect has been the push for countries to agree to pledge 0.7 per cent of their gross national income (GNI) to aid, and then to fulfil the promise. The target, which has been touted for around fifty years, was originally based on a crude calculus of what amount of aid was needed to lift poor countries out of poverty. Whatever the concerns about its provenance, methodology and sufficiency – and there are plenty on all these fronts<sup>60</sup> – the target has obtained something of an iconic status: a ‘*cause célèbre*’ for aid activists . . . [that] has been accepted in many official quarters as the legitimate target

58 UNDP, *Making Global Trade Work for People* (London and Sterling, VA: Earthscan, 2003), pp. 24–6, 41.

59 UNDP, *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (New York: UNDP, 2005), chapter 4.

60 For example Michael Clemens and Todd Moss, ‘Ghost of 0.7%: Origins and Relevance of the International Aid Target’, Centre for Global Development, Working Paper No. 68, September 2005, note, rather startlingly, that ‘when we use essentially the same method used to arrive at 0.7% in the early 1960s and apply today’s conditions, it yields an aid goal of just 0.01% of rich-country GDP for the poorest countries and *negative* aid flows to the developing world as a whole’, at p. 2.

for aid budgets', as Michael Clemens and Todd Moss have put it.<sup>61</sup> The target was affirmed in a 1970 UN General Assembly Resolution,<sup>62</sup> and was agreed to by many states (including all major donors, as well as the World Bank, the IMF and the WTO) in the 2002 Monterrey Consensus.<sup>63</sup> And yet, even if we just take the figure to be merely a lobbying instrument (as was originally intended), to get rich states to increase their aid budgets, this apparently modest goal is achieved by only very few states – namely: Sweden, Luxemburg, Norway, the Netherlands and Denmark. Some countries (as figure 5 shows) fall well short of the target: Australia, Canada, Japan and the USA are all at 0.3 per cent GNI or below (the USA is the lowest, at just 0.16 per cent, though it is still by far the largest donor in dollar terms).

There are those who have calculated that the 'real aid' contributions of the donor countries is much lower (roughly 50 per cent lower) than even these figures. The methodology here is contentious, but the basic premise is that any aid that fails certain quality, effectiveness or poverty-focus standards is discounted from the final total. The sort of aid penalised in this way includes technical assistance; poorly coordinated projects or projects that impose unconscionably heavy administrative burdens on recipient countries; aid that is not focused on poverty alleviation; and also debt relief.<sup>64</sup> My own view is that not all of these aspects of modern aid should be regarded as equally lamentable; at least not when placed in context. As ActionAid – an especially trenchant critic of 'phantom aid' – rightly argues, development assistance needs to address the chronic failure to meet people's basic economic and social rights that comes with their impoverishment.<sup>65</sup> And for aid to do so, not only must its quantum be massively increased, but its quality too. The effectiveness of aid is, however, an especially difficult thing to measure. For while it is broadly agreed that aid cannot be focused only on short-term, damage control (providing immediate provision of food, water, clothing and shelter), it must also, to a substantial degree, facilitate long-term sustainability within the recipient state itself by securing all aspects of modern society: health services, education, power, transport, communications,

61 *Ibid.* 62 UN General Assembly Resolution 2626 (XXV), 24 October 1970, para. 43.

63 UN, *Report of the International Conference on Financing for Development: Monterrey, Mexico, 18–22 March 2002*, UN Doc. A/CONF.198/11 (New York: UN, 2002), pp. 9–10, para. 42.

64 See ActionAid, *Real Aid: An Agenda for Making Aid Work* (Johannesburg: ActionAid International, 2005), especially chapter 2.

65 *Ibid.*

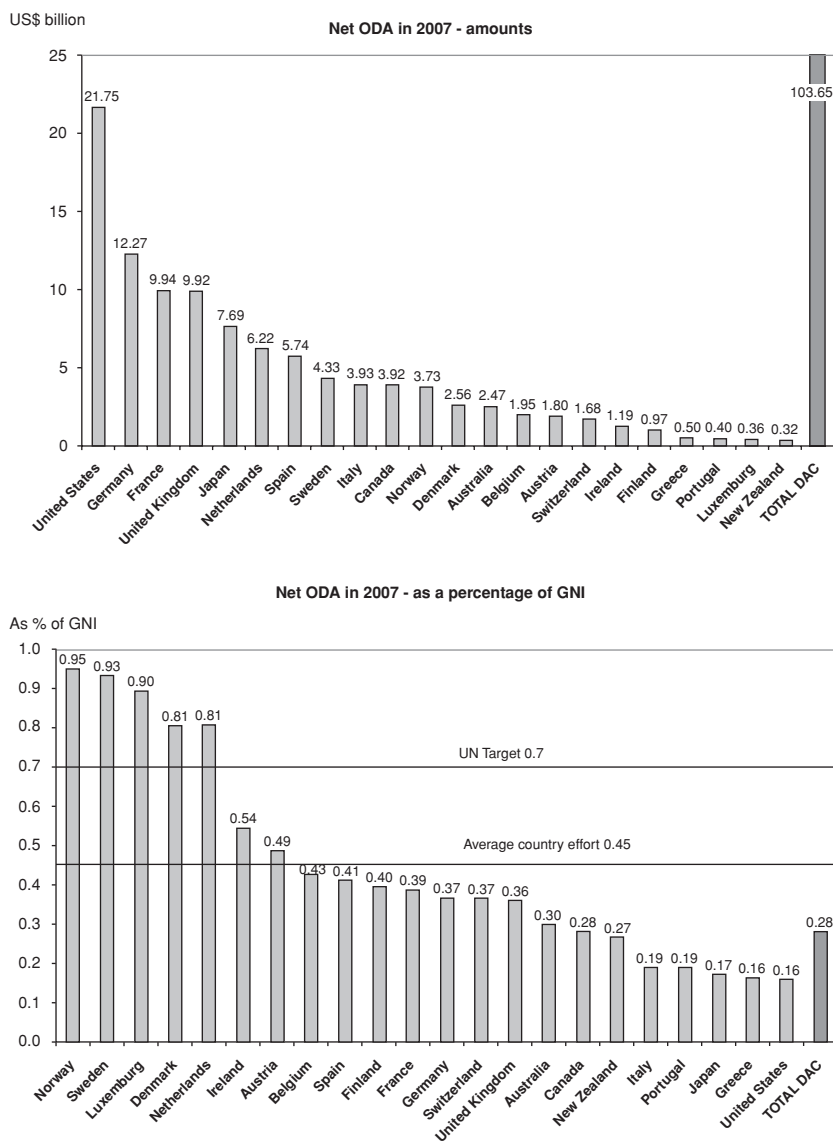


Fig. 5 Net official development assistance in 2007. *Source:* OECD Statistics Online, [www.oecd.org/dataoecd/27/55/40381862.pdf](http://www.oecd.org/dataoecd/27/55/40381862.pdf).

governance, legal regulation and much else. Such services are only made possible when crippling burdens of servicing aid debts are removed or drastically reduced (thereby staunching ‘money bleeding out of developing countries’<sup>66</sup> and reversing the perversity of situations in which more funds are flowing *from* poor countries *to* rich ones, than the other way around); technical assistance is rendered and technology transfers instigated; governmental structures are built or strengthened, and personnel trained. To be sure, these latter initiatives cannot be a *carte blanche* simply to siphon money back into the economies of the donors via the payment of consultants or mandated purchases from donor state firms, and to impose formulaic, burdensome and counter-productive accountability measures on recipient state agencies, but some significant degree of such assistance is necessary, and can and should be recognised as such.

### *Increasing aid and forgiving debt*

Fundamentally, what is beyond doubt is that more – much more – aid is needed if there is to be any realistic hope of addressing the consequences of severe poverty including egregious human rights failures. Recently, there have been calls ‘to go back to the future’ in respect of providing more aid by way of simple, unadorned grants (often called budget support) that would allow state governments to build up their public sectors (and not just pin so much hope on the private sector) better to provide basic public services.<sup>67</sup> The nature of the apparently fast-growing size and spread of Chinese aid is very much in this traditional format, being more direct, with a particular focus for example on large infrastructure projects, and less conditional than has become the fashion in the West (though still with the usual expectations of strategic spin-offs that characterise all aid to greater or lesser extents, no matter who is the donor).<sup>68</sup> Also, during the first half

66 These are Joseph Stiglitz’s words: *Making Globalization Work* (New York: W. W. Norton, 2006), p. 212. Stiglitz cites the example of Argentina’s situation immediately before it defaulted on its foreign debts in 2002, when the country’s foreign debt stood at nearly \$150 billion, and the servicing of which amounted to a staggering \$16 billion in 2001, comprising fully 10% of its total GDP for that year; *ibid*.

67 See Oxfam, *In the Public Interest: Health, Education, and Water and Sanitation for All* (Oxford: Oxfam International, 2006).

68 See for example Martyn Davies *et al.*, *How China Delivers Development Assistance to Africa* (Centre for Chinese Studies, University of Stellenbosch, 2008), a report prepared for the UK’s Department for International Development. The qualifier of ‘apparently’ is necessary because China does not issue any official figures for its aid programme; see *The Economist*, *Pocket World in Figures* (2008 edition), p. 45.

of 2008, the aid responses to the global food crisis that had seen the prices of staple foods such as rice and flour in many poor countries nearly double in price over the previous year were characteristically traditional in format. For example, the UN's World Food Programme was urging rich countries to provide immediate, large-scale injections of funds to supply food, and President Bush requested Congress to approve an extra \$770 million for USAID 'to provide new emergency food assistance to those in need . . . [and to] help meet immediate needs in countries already experiencing food shortages and . . . target new food insecure populations'.<sup>69</sup>

There have also been sporadic efforts in recent years to address the ruinously destructive problem of massive foreign debts owed by some developing states. The West's overwhelming concern not to allow a situation of global moral hazard – in which the rich countries and international financial institutions fear that to forgive debt will send the wrong message to poor country borrowers that they can always, ultimately, rely on rich country lenders to write off the debt should they get into difficulties with their repayments – has been very hard to shake off. The IMF has been especially hard-headed on this point. Such that even when in 1996 a 'Highly Indebted Poor Countries' (HIPC) programme was established in order systematically to provide debt relief, the conditions imposed by the IMF, which was overseeing the initiative, were so onerous that only four countries (Uganda, Bolivia, Guyana and Mozambique) were granted relief by 2000. As public outcry mounted against what was widely perceived to be a scandalous myopia of the Fund, and the Jubilee 2000 Campaign was launched to lobby for wider and deeper debt relief, HIPC was expanded and liberalised somewhat, so that by 2005 twenty-eight countries had received some sort of dispensation on their debt repayments. Further, the leaders of the G8 countries agreed at their Gleneagles summit in the same year to provide 100 per cent debt relief for eighteen of the poorest and most indebted states (most of which were in Africa). Such 'deep' (i.e. complete) relief is considered to be fundamentally necessary for many heavily indebted states as 'any dollar spent in Washington or London or Bonn is a dollar not available for attacking poverty at home', as Joseph Stiglitz puts it.<sup>70</sup> And yet, even these gains are under threat from so-called 'vulture funds' – whose venal speciality is to feed off the carcass of a poor country's foreign indebtedness by purchasing it (that is paying off the

69 See USAID Press Release, 'USAID Stands Prepared To Increase Food Aid Efforts', 1 May 2008, [www.usaid.gov/press/releases/2008/ps080501.html](http://www.usaid.gov/press/releases/2008/ps080501.html).

70 Stiglitz, *Making Globalization Work*, p. 227.

creditors) at a hugely discounted rate and then suing the poor states for the full balance of the outstanding debt. In late 2007, the IMF calculated that such legal actions worth nearly \$2 billion worldwide were outstanding, and were being brought against some of the very countries that were party to the Gleneagles agreement.<sup>71</sup>

Whether inspired by immediate humanitarian concerns or a reform of aid philosophy or debt forgiveness, any designs to increase the flow of aid to developing countries should not be thwarted by what Jeffrey Sachs scathingly calls ‘the current favorite explanation of donors for not doing more to help the poorest countries: the alleged lack of “absorptive capacity” to use more aid’.<sup>72</sup> Certainly, poor countries will have fairly limited abilities to utilise multiple, immediate and large injections of aid; such limitations are one of the reasons why they are poor and in need of aid in the first place. But with coordination (between donor and recipient states, and between donors themselves) and long-term planning, these limitations can be managed. My own experiences working with domestic human rights agencies in Indonesia and Vietnam, which were being festooned with aid offers from all quarters in the years immediately following the two countries’ respective domestic reforms and international reintegration, bear this point out. What is needed to handle such situations must include medium- to long-range needs assessments conducted in close cooperation with the relevant recipient state agencies and incorporating the positions and expectations of the donor community.<sup>73</sup> ‘Getting from here to there’, as Sachs continues, ‘is a matter of routine planning, not heroics.’<sup>74</sup>

### *The Millennium Development Goals (MDGs)*

Of all the global initiatives launched to tackle poverty, the MDGs are the grandest of all. The UN’s Millennium Declaration 2000 reiterated the central aims of the UN and its member states, and identified as key strategic concerns: international peace and security, global economic development and universal respect for human rights.<sup>75</sup> From the Declaration, the eight

71 Ashley Seager and James Lewis, ‘Vulture Funds Devour Their Prey’, *Guardian Weekly*, 26 October 2007, p. 16.

72 Sachs, *The End of Poverty*, p. 274.

73 For an example, see Inter-Agency Steering Committee/Ministry of Justice, ‘Comprehensive Needs Assessment for the Development of Viet Nam’s Legal System to the year 2010’, Hanoi, 2002.

74 Sachs, *The End of Poverty*, p. 274.

75 UN General Assembly Resolution 55/2, 8 September 2000, UN Doc.A/RES/55/2. All of the then 189 member states of the UN signed the Declaration.



MDGs have been drawn, most of which are timetabled to be achieved by 2015. Collectively, the Goals are intended to address the main global development needs that face us today; they are:

- Goal 1 – Eradicate extreme poverty and hunger
- Goal 2 – Achieve universal primary education
- Goal 3 – Promote gender equality and empower women
- Goal 4 – Reduce child mortality
- Goal 5 – Improve maternal health
- Goal 6 – Combat HIV and AIDS, malaria and other diseases
- Goal 7 – Ensure environmental sustainability
- Goal 8 – Develop a global partnership for development

Each goal has specific internal targets to which progress indicators have been added: thus, for example, a specific target under Goal 1 is to halve, between 1990 and 2015, the proportion of people who suffer from hunger, and the progress indicators nominate specific sorts of data (the prevalence of underweight children under five years of age, and the proportion of population below minimum level of dietary energy consumption), and their sources (UNICEF-WHO and FAO, respectively).

The MDGs have succeeded in achieving a sort of totemic status within the development community – they are, for example, emblazoned on banners in the entrance hall of the World Bank headquarters on H Street in Washington DC – and they are regularly cited by states (in ‘MDG National Plans’) and multilateral organisations alike.<sup>76</sup> Their progress is monitored – officially by the UN’s MDGs Monitor,<sup>77</sup> and unofficially by many NGOs. It is fair to say that progress has been patchy. Certainly, according to the 2007 MDGs Report,<sup>78</sup> there has been some success in combating the incidence of extreme poverty, women’s participation in political processes has been growing (slowly),<sup>79</sup> child mortality rates have

76 Though not, ‘amazingly’, as Jeffrey Sachs remarks, by the Bush Administration, which ‘refus[es] to use the phrase “Millennium Development Goals”’. Jeffrey Sachs, ‘No Time To Waste’, *Guardian Weekly*, 16–22 September 2005, Special Report on *Towards a Fairer World*, p. 2.

77 See [www.mdgmonitor.org](http://www.mdgmonitor.org). Between 2002 and 2006 the Millennium Project, headed by Jeffrey Sachs, performed an advisory role to the UN Secretary-General; see [www.un-millenniumproject.org](http://www.un-millenniumproject.org).

78 See United Nations, *The Millennium Development Goals Report 2007* (New York: UN Department of Economic and Social Affairs, 2007).

79 Notably, at the time of writing, Rwanda was reported as being the first country ever to have a majority of women members sitting in its legislature (44 of 80 members); Barney Jopson, ‘Rwandan Women Outnumber Men in Parliament’, *Financial Times*, 18 September 2008.

been dropping, and more children are now in primary education globally. But on the other side of the ledger, the Report notes that over 500,000 women still die each year from treatable and preventable complications in pregnancy and childbirth, the decline in malnourished and underweight children is still woefully slow (especially in Sub-Saharan Africa), the numbers of people dying from AIDS is increasing rather than decreasing, and, of particular concern given its impact on so many aspects of poverty, half the population of the developing world lack basic sanitation. On this last point, the Report graphically notes the scale of the problem by stating that 'in order to meet the MDG target, an additional 1.6 billion people will need access to improved sanitation over the period 2005–2015. If trends since 1990 continue, the world is likely to miss the target by almost 600 million.'<sup>80</sup>

The lack of adequate progress is for many both morally and politically unacceptable. For some it is also economically reprehensible. For not only does the rich world possess the means to achieve the goals – 'rich countries can readily afford . . . to close the financing gap'<sup>81</sup> – but by addressing the fundamentals of poverty, the productivity and self-sustainability of the developing world will be lifted, and the prospects of greater global economic (and political) security better assured.

There is, evidently, an overlap or intersection between human rights objectives and the MDGs. The latter 'reflect a human rights agenda – rights to food, education, health care and decent living standards', as the UNDP's Human Development Report 2003 puts it.<sup>82</sup> The importance of the relationship cannot be denied, but it is implicit rather than explicit, and it is incomplete – civil and political rights hardly feature at all in the MDGs. As Philip Alston, the former Special Advisor to the UN High Commissioner for Human Rights on the MDGs, has counselled, there are differences between the MDGs and human rights which 'need to be acknowledged and strategies need to be identified for ensuring authentic compatibility'.<sup>83</sup> Alston's typically insightful analysis laments the lack of enthusiasm or conviction in either the development or human rights communities for better exploring, explaining or exploiting the

80 *Ibid.* p. 4.      81 Sachs, 'No Time To Waste'.

82 UNDP, *Human Development Report 2003: Millennium Development Goals: A Compact among Nations to End Human Poverty* (New York and Oxford: Oxford University Press, 2003), p. 29.

83 Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate as Seen through the Lens of the Millennium Development Goals' (2005) 27(3) *Human Rights Quarterly* 755, at 760.

linkages that do exist; ‘the two agendas resemble ships passing in the night, even though they are both headed for very similar destinations’, he concludes.<sup>84</sup>

The key to the communicating door between the two agendas is the accountability that a human rights framework – that is, especially one based in international law – brings to the practice of implementing the development goals. Many, including Alston, have stressed the significance of this feature in rendering mutually beneficial results for both agendas. The UN High Commissioner for Human Rights has argued that:

the international human rights framework is essential for achieving the goals, as it increases the understanding of the policies and institutions required to achieve them, strengthens the national and international accountability framework necessary for making progress towards their achievement, and empowers individuals to claim their rights and take part in the decision-making processes that affect their lives.<sup>85</sup>

The use of a human rights approach to achieving the MDGs is part of a wider debate on whether and how a human rights based approach to development can be formulated and implemented in practice.

### A Human Rights Based Approach (HRBA) to development

Development, we have established, is, at base, about poverty alleviation. Underpinning poverty there are certain causal structural factors that concern human rights: ‘structural inequalities and discrimination – based on class, race, gender and other characteristics – within and between countries’,<sup>86</sup> as a 2003 UN report puts it. So, it is argued, there is not just room to approach development objectives by way of human rights, there is an imperative to do so.

The so-called HRBA to development is in fact a range of arguments, some of which are better than others. All, however, insist on the relevance and utility not only of aligning the *substantive* goals of human rights with those of development, but also, crucially, of the *process* of

84 *Ibid.* 755.

85 Report of the High Commissioner for Human Rights, ‘The Right to Development’, UN Doc. E/CN.4/2005/24, 5 January 2005, para. 19. This necessary symbiosis has been stressed further, especially in respect of the potential for human rights to empower and enforce development goals, in the OHCHR’s recent paper entitled *Claiming the Millennium Development Goals: A Human Rights Approach* (New York and Geneva: UN, 2008), chapter 2.

86 UNDP, *Making Global Trade Work for People*, p. 24.

human rights. Framed as they are in international and domestic laws, human rights bring with them a significant (if imperfect and incomplete) apparatus that identifies responsibilities, guides implementation and demands accountability.

Development and human rights are not, of course, the same,<sup>87</sup> nor are their ends coterminous, but their association can be mutually beneficial. The UNDP's Human Development Report 2000 described the linkage thus:

Human development and human rights are close enough in motivation and concern to be compatible and congruous, and they are different enough in strategy and design to supplement each other fruitfully. A more integrated approach can thus bring significant rewards, and facilitate in practical ways the shared attempts to advance the dignity, well-being and freedom of individuals in general.<sup>88</sup>

In *Voices of the Poor*, an extensive survey of some 60,000 of the world's poor, the World Bank was able to draw up a list of what the poor themselves said were their primary needs to improve their lives.<sup>89</sup> The results (abbreviated in the box below) were surprising in respect of their congruity with human rights goals. As Mac Darrow and Amparo Tomas commented in their review of the survey's results:

contrary to much of the orthodoxy, the interviewees perceived poverty not merely as the absence of commodities and services to meet basic needs, but rather as a question of disempowerment. When asked what was needed most to increase their freedom of choice and improve their lives, the answers read like the Universal Declaration of Human Rights.<sup>90</sup>

87 While accepting that convergence does exist, Hans-Otto Sano has characterised the differences between the two traditions thus: '[h]uman rights has as its subject norms, rules, and duties together with their institutional foundations, whereas development theory has general processes of change, resource control/conflict, and resource allocation at its core'; in 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development' (2000) 22 *Human Rights Quarterly* 734, at 741–2.

88 UNDP, *Human Development Report 2000: Human Rights and Human Development* (New York and Oxford: Oxford University Press, 2000) p. 19.

89 Deepa Narayan, Raj Patel, Kai Schafft, Anne Rademacher and Sarah Koch-Schulte, *Voices of the Poor: Can Anyone Hear Us?* (New York: Oxford University Press for the World Bank, 2000); Deepa Narayan, Robert Chambers, Meera Kaul Shah and Patti Petesch, *Voices of the Poor: Crying Out for Change* (New York: Oxford University Press for the World Bank, 2000); Deepa Narayan and Patti Petesch, *Voices of the Poor: From Many Lands* (New York: Oxford University Press for the World Bank, 2002).

90 Mac Darrow and Amparo Tomas, 'Power, Capture and Conflict: A Call for Human Rights Accountability in Development Cooperation' (2005) 27 *Human Rights Quarterly* 471, at 477–8.

‘VOICES OF THE POOR’: ASSETS AND CAPABILITY EXAMPLES  
MENTIONED BY POOR PEOPLE TO INCREASE THEIR FREEDOM OF  
CHOICE AND IMPROVE THEIR LIVES

**Material assets** – Employment; ownership of productive assets; land; house; boat; savings

**Bodily health** – Freedoms from hunger and disease; strong, healthy-looking bodies

**Bodily integrity** – Freedom from violence and abuse; sexual and reproductive choice; freedom of physical movement

**Emotional integrity** – Freedom from fear and anxiety; love

**Respect and dignity** – Self-respect; respect from others and the community

**Social belonging** – Belonging to a collective; honour, respect and trust within and across social groups

**Cultural identity** – Living in accordance with one’s values; participation in rituals that give meaning; sense of cultural continuity

**Imagination, inventiveness, information and education** – Informed and educated decision making; literacy; entrepreneurship; problem solving capacity; expressive arts

**Organisational capacity** – Ability to organise and mobilise; participation in representative organisations

**Political representation and accountability** – Ability to influence those in power; accountability of those in power

Source: Darrow and Tomas, ‘Power, Capture and Conflict’, p. 478

The information in the box was compiled by the two authors drawing on the results of the World Bank study in order to highlight the ‘ten “assets and capabilities” (or in human rights terms, constitutive and legally enforceable characteristics of human dignity and freedom) identified through these investigations.’<sup>91</sup>

What value is added by conceiving these needs as human rights is the key question we must ask of any advocate of a HRBA to development. Is it the rhetorical power of rights discourse; or the provision of a mechanism by which responsibility can be assigned and accountability extracted; or the assignment of legal means by which individuals can identify legitimate claims and have them enforced? The added value is in fact drawn from the answers to all of these questions, though to varying degrees depending on circumstances and perspective. The legal spine that the HRBA is said to

91 *Ibid.* 478.

insert into development policy-making and implementation is born of the express standards set by international human rights laws, the empowerment of individuals identified as rights-holders and states identified as the associated duty-bearers, and the establishment of mechanisms through which the parameters of the rights/duties relationship are set and disputes between their respective bearers settled.

The human rights approach has been held to be ‘more fundamental’ than social justice or welfare oriented approaches to development. André Frankovits and Patrick Earle take this line, arguing that ‘it is not premised upon government largesse. It is not discretionary and it establishes a very different relationship between the individual or group and the state. A right confers power. A human right enables even the most marginalized and ostensibly powerless person or group to make a claim against the state.’<sup>92</sup> The UN thinks along similar lines. In 2003 it formulated a proposed ‘common understanding’ among UN agencies as to the human rights based approach to development cooperation. It pronounced that all development programmes should promote human rights objectives; that international human rights laws ‘guide all development cooperation and programming in all sectors and in all phases of the programming process’, and that development will enhance the capacities of the duty-bearers, as well as of the rights-holders.<sup>93</sup>

All that said, the efforts to promote the idea of a HRBA to development are still in their ‘fledgling’ stages,<sup>94</sup> though what they lack in maturity they make up for in vigour. This enthusiasm, however, has itself been problematic. Darrow and Tomas note that

human rights-based approaches have proliferated in myriad forms and contexts, from community-based capacity development to the integration of human rights in macro-policy contexts and national development planning. But the rhetoric has so far not been matched by conceptual rigor, systematization of practice, or lessons-learning – shortcomings that threaten continuing support for such approaches.<sup>95</sup>

Peter Uvin concludes his frank and thought-provoking critique of the notion by noting that its ‘great *potential* to alter profoundly the way

92 Human Rights Council of Australia, *The Rights Way to Development: A Human Rights Approach to Development Assistance, Policy and Practice* (Sydney: Human Rights Council of Australia, 2001), p. 28.

93 ‘The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies’, available at [www.undp.org/governance/docs/HR\\_Guides\\_CommonUnderstanding.pdf](http://www.undp.org/governance/docs/HR_Guides_CommonUnderstanding.pdf), p. 2.

94 Alston, ‘Ships Passing in the Night’, 807.

95 Darrow and Tomas, ‘Power, Capture, and Conflict’, 472.

the development enterprise goes about its business' is something, as yet, unrealised in practice.<sup>96</sup>

Some development agencies such as UNESCO, UNICEF and (especially) the UNDP profess to follow a HRBA; the UNDP has indeed conducted a series of country programme reviews based on human rights criteria.<sup>97</sup> Some bilateral aid agencies – notably, those of Denmark (DANIDA), Sweden (SIDA) and the UK (DFID) – have also inserted human rights approaches into their strategic planning and in their implemented programmes. For example, DFID's rights based approach has been summarised as essentially a recognition of 'the centrality of the relationship between human rights and poverty reduction',<sup>98</sup> and further, a relatively recent government review of the role of conditionality in DFID's poverty reduction objectives declared that for its aid partnerships with recipient countries to be effective there must be a shared commitment to human rights (alongside achieving the MDGs and instituting domestic financial management and accountability).<sup>99</sup> Other national aid agencies, such as those of Australia (AusAID) and the US (USAID), abjure any adherence to a HRBA, but still engage in substantial human rights programmes, for example providing human rights training, addressing gender discrimination, treating HIV/AIDS sufferers, deploying anti-people-trafficking mechanisms, supporting community groups pursuing human rights initiatives of their own, and undertaking formalised, high-level human rights dialogues (which AusAID does with China and Vietnam).<sup>100</sup> In the case of the US, many of its human rights oriented initiatives have, since 2004, been driven and directed by the Millennium Challenge Corporation (MCC), which sits outside USAID. MCC funds are made available only to countries that meet certain standards grouped under the three broad categories of good governance ('ruling justly'), investment in

96 Peter Uvin, *Human Rights and Development* (Sterling, VA: Kumarian Press, 2004), p. 166.

97 See the *Human Rights-Based Reviews of UNDP Programmes: Working Guidelines* (June 2003). These Guidelines (and their updated version of 2005) were piloted in a number of states including Argentina, Bosnia, Ecuador, Macedonia and Kyrgyzstan; see *Human Rights Strengthening: HURIST (UNDP/OHCHR/UNOPS) – Evaluation Report (May–July 2005)*, pp. 29–31.

98 Laure-Hélène Piron, 'Learning from the UK Department for International Development's Rights-Based Approach to Development Assistance', Overseas Development Institute, July 2003, para. 3.1.1; [www.odi.org.uk/RIGHTS/Publications/DFID%20RBA%20Final%20Doc%20July%202003.pdf](http://www.odi.org.uk/RIGHTS/Publications/DFID%20RBA%20Final%20Doc%20July%202003.pdf).

99 *Partnerships for Poverty Reduction: Rethinking Conditionality – A UK Policy Paper* (London: DFID, 2005), para. 1.3.

100 See, for example, AusAID, *Human Rights and Australia's Aid Program*, at [www.ausaid.gov.au/keyaid/humanrights.cfm](http://www.ausaid.gov.au/keyaid/humanrights.cfm).

people (meaning health, education and safety) and economic probity (liberalisation and sustainable growth). The first two of these are especially closely related to human rights protection.<sup>101</sup> The fact, however, that the funds are distributed on such an explicitly conditional basis inevitably courts controversy over the nature and composition of the conditions and the methods used to measure compliance, as well as the slowness of the distribution process.<sup>102</sup>

In practice I have to say that, from my own experiences working with and alongside a number of these agencies, the differences between those that expressly state human rights as primary goals and those that see them as derivatively important (that is derivations of successful poverty reduction and increased economic growth) are hard to discern.<sup>103</sup> What seems to be important is that they all see human rights protection as being a fundamentally necessary outcome of their efforts, whatever the precise processes. How aid agencies might *better* achieve this result is the key to what a HRBA to development seeks to offer.

### *Good governance and the rule of law*

Running parallel to the whole HRBA debate, there has developed in aid circles a huge interest in the promotion of institutional and regulatory assistance driven by the long-term goals of self-sufficiency and sustainability, as well as an adaptation of the old proverb that it is better to help a man learn how to govern for a lifetime than simply to give him government for today. The heading I have given this sub-section refers to what are perhaps the most prominent of these parallel initiatives. In truth they are legion, ranging (in addition to good governance and the rule of law) from investments in education, health and housing, the empowerment of women, family planning and the protection of indigenous peoples, through anti-corruption, transparency and environmental protection, to participatory decision-making, humanitarian aid, food security and

101 See further, [www.mca.gov/about/index.php](http://www.mca.gov/about/index.php).

102 For criticism of the conditions, and the methods of country selection, see Emma Mawdsley, 'The Millennium Challenge Account: Neo-liberalism, Poverty and Security' (2007) 14 *Review of International Political Economy* 487, and on the slowness point see Celia Dugger, 'US Agency's Slow Pace Endangers Foreign Aid', *New York Times*, 7 December 2007, p. A1.

103 Indeed, an Australian Parliamentary Committee reviewing AusAID's human rights programmes reached a similar conclusion. See Joint Standing Committee on Foreign Affairs, Defence and Trade, *The Link between Aid and Human Rights* (Canberra: Parliament of Australia, 2001), Appendix A, p. 34.



peace-building. As Philip Alston has noted: ‘a careful review of a typical selection of development policy documents will yield a veritable thesaurus full of terms which might be considered to be adequate synonyms for human rights.’<sup>104</sup> The issues concerned stretch across economic, social and cultural as well as civil and political rights. The World Bank, no less, has made the point explicitly in a milestone policy paper written in 1998, in part to mark the fiftieth anniversary of the UDHR:

The Bank contributes directly to the fulfillment of many rights articulated in the Universal Declaration. Through its support for primary education, health care and nutrition, sanitation, housing and the environment, the Bank has helped hundreds of millions of people attain crucial economic and social rights.<sup>105</sup>

There is no doubt that governance and human rights are intimately associated. A dramatic illustration of this can be found in a recent Oxfam study of what happens when governance is bad or non-existent. Oxfam has calculated that the economic costs of the conflicts that have plagued Africa since the end of the Cold War in 1990, rendering it almost governmentless at certain times and in certain places, amount to some \$300 billion – roughly equivalent to the total of all the foreign aid Africa received over the same period.<sup>106</sup> The flow-on social and economic costs have, predictably, been horrendous: GDP per capita reduced by 63 per cent; 50 per cent more infant deaths; 15 per cent more undernourished people; life expectancy reduced by five years; 20 per cent more adult illiteracy; and 2.5 times fewer doctors per patient.<sup>107</sup> Conversely, as Todd Landman demonstrates in his study of seventeen Latin American countries between 1976 and 2000, when states free themselves from the scourge of conflict they experience human rights dividends which, if not necessarily universal and consistent, are nonetheless palpable.<sup>108</sup>

104 Philip Alston, ‘What’s in a Name: Does It Really Matter if Development Policies Refer to Goals, Ideals or Human Rights?’, in H. Helmich (ed.), *Human Rights in Development Co-operation* (Utrecht: SIM, 1998), p. 95.

105 World Bank, *Development and Human Rights: The Role of the World Bank* (Washington, DC: World Bank, 1998), p. 3.

106 IANSA and Oxfam, *Africa’s Missing Billions*, Oxfam Briefing Paper 107 (October 2007), [www.oxfam.org/en/policy/bp107\\_africas\\_missing\\_billions](http://www.oxfam.org/en/policy/bp107_africas_missing_billions).

107 *Ibid.* p. 6.

108 Todd Landman, ‘Development, Democracy and Human Rights in Latin America, 1976–2000’, in Janet Dine and Andrew Fagan (eds.), *Human Rights and Capitalism* (Cheltenham: Edward Elgar, 2006). In particular, Landman notes that while ‘the raw pursuit of economic gain’ will not necessarily deliver political freedoms and rights protection,

Closely aligned to governance is the notion of the rule of law – as distinct from the capriciousness-prone rule of man – which certainly has the potential to establish and promote order and justice. In his reflections on what it has and could bring to the Eastern European states formerly behind the Iron Curtain, Martin Krygier has, with typical panache, defined the notion as:

when the law in general does not take you by surprise or keep you guessing, when it is as accessible to you as is the thought that you might use it, when legal institutions are relatively independent of other significant social actors but not of legal doctrine, and when the powerful forces in society, including the government, are required to act, and come in significant measure to think, within the law; when the limits of what we imagine our options to be are set in significant part by the law and where these limits are widely taken seriously – when the law has integrity and it matters what the law allows and what it forbids.<sup>109</sup>

But all that said, express recognition of the intimacy or surrogacy of human rights and governance/rule of law issues in development is not readily discernible among some agencies. The World Bank, for example, has had a history of awkwardness over this issue which I and many others have documented,<sup>110</sup> though that seems to be changing at least in respect of the Bank's rhetoric, if not practice (see more below). The IMF, on the other hand, has simply rejected any suggestion that it should be concerned with the human rights consequences of its actions; a position that has changed little despite the attention focused on it since the late 1990s (on which more below). The dim lights shone on human rights by the leading international financial institutions have further had the curious effect of dulling the use of human rights language by civil society organisations that criticise the Bank over the adverse social consequences of its operations. In a report on human rights criticisms of the Bank's private sector development projects that my colleague Tom Davis and

'political choices among elites combined with social mobilisation from below' (that includes the cessation of conflict) do appear to promote 'advances in democratization and rights protection'; *ibid.* at pp. 354–5.

109 Martin Krygier, 'The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law', in Andras Sajó (ed.), *Out of and into Authoritarian Law* (The Hague and London: Kluwer Law International, 2003), p. 221.

110 See David Kinley, 'Human Rights and the World Bank: Practice, Politics and Law', in Caroline Sage and Michael Woolcock (eds.), *World Bank Legal Review*, Vol. II, *Law, Equity, and Development* (Washington, DC: The World Bank; The Hague: Martinus Nijhoff, 2006), p. 353, at pp. 359–66. See also the story I relate in the Preface to this book.

I were commissioned to write for the Bank in 2004, we were surprised to find a veritable dearth of appeals to breaches of human rights in the many and various criticisms made by NGOs.<sup>111</sup> The criticisms of large infrastructure projects over lack of adequate information for, and consultation with, communities; the suppression of dissent and restrictions on movement; environmental and health hazards; labour and workplace standards; access to clean water; and various problems associated with relocation of communities: all clearly provided the opportunity to add in a human rights angle, but it appeared that the critics either were unaware of the relevance of human rights standards, or considered that the employment of such language was less likely to be effective against the Bank than specifically economic, social or environmental criticisms, possibly because they anticipated resistance on the Bank's part to human rights arguments.<sup>112</sup>

Indeed at least since the late 1990s, international financial institutions generally, and the World Bank in particular, have engaged in a variety of activities that impact directly on human rights, as the above quote from the Bank illustrates. Herbert Morais – who has held senior legal counsel positions in the World Bank, the Asian Development Bank and the IMF – noted in an article in 2000 that these activities included:

reform of the civil service, reform of public sector enterprises, legal and judicial reform, reform of local governments, land titling and registration reform, combating corruption, the rights of indigenous people and minorities, the rights of people displaced or resettled as a result of projects funded by international development banks, family planning, and enhancing the rights of women.<sup>113</sup>

In respect of the World Bank, this list remains representative today of its quasi-human rights activities, with the notable addition of operations combating environmental degradation and promoting environmental sustainability.

It is through good governance initiatives that development programmes come nearest to the express recognition of the relevance of

111 David Kinley and Tom Davis, *Human Rights Criticism of the World Bank's Private Sector Development and Privatization Projects*, Sydney Law School Research Paper No. 08/53, February 2004, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1133179](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133179).

112 *Ibid.* pp. 35–6.

113 Herbert Morais, 'The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights' (2000) 33 *George Washington International Law Review* 71, at 90.

promoting human rights, for the adjective 'good' is, crucially, almost invariably taken to mean some form of democratic governance, and with democracy comes certain minimum civil and political rights, and through them the better servicing of economic and social rights. A prime example of this linkage is the EU's recently relaunched European Instrument for Democracy and Human Rights,<sup>114</sup> the mandate of which is to provide financial support to a wide range of bodies (from local authorities and chambers of commerce to small businesses, NGOs and universities) for the implementation of projects that enhance human rights, democratic reform and the rule of law.<sup>115</sup> The work of the World Bank Institute (the Bank's think-tank) has been especially influential in this area. Daniel Kaufmann and a number of colleagues have developed a sophisticated set of worldwide governance indicators that try to measure how 'good' the governance is in states as against criteria that reflect many international human rights standards.<sup>116</sup> In a paper analysing what the data collected show about the particular relationship between governance and human rights, Kaufmann concludes that while '[s]ome analysts have argued that there is a trade-off between liberties and development... we find the opposite evidence, that suppressing liberties is likely to be inimical to [development] project performance. This has obvious implications for development assistance.'<sup>117</sup> Such a conclusion drawn from extensive empirical evidence provides emphatic support for Amartya Sen's thesis that fundamental freedoms are essential ingredients to any meaningful pursuit and achievement of a state of development, as captured in his pithy remark that 'freedoms are not only the primary ends of development, they are among its principal means.'<sup>118</sup>

114 Formerly known as the *European Initiative for Democracy of Human Rights*. The subtleties of distinguishing an 'Instrument' from an 'Initiative' are not immediately (if at all) obvious!

115 See [www.welcomeurope.com/default.asp?id=11108&idpgm=11816](http://www.welcomeurope.com/default.asp?id=11108&idpgm=11816); the Instrument has been allocated a €1.1billion budget for the period 2007–13.

116 The indicators are broadly grouped under: voice and accountability; political stability; government effectiveness; regulatory quality; rule of law; and control of corruption. See [www.govindicators.org](http://www.govindicators.org); and for an analysis of the data collected between 1996 and 2006, see Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators: 1996–2006*, World Bank Policy Research Working Paper No. 4280 (July 2007); at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979).

117 Daniel Kaufmann, 'Human Rights and Governance: The Empirical Challenge', in Alston and Robinson (eds.), *Human Rights and Development*, p. 352, at p. 365.

118 Amartya Sen, *Development as Freedom* (New York and Oxford: Oxford University Press, 1999), p. 10.

*Human rights critiques of governance and rule of law programmes*

It cannot be said, however, that every programme that promotes such ends is ‘an unqualified human good’.<sup>119</sup> There is a tendency for example, as Frankovits and Earle have noted, for development programmes to overemphasise the importance of institution- or capacity-building and not to pay sufficient attention to what the institutions are being built for. ‘We are not dismissing the need for efficient, well managed and effective institutions’, they say, ‘on the contrary, they are crucial. What we *are* saying is that the governance debate has got it back to front: the institutions are the instruments.’<sup>120</sup> Many argue that when conditionality, including human rights conditionality, constitutes a part of governance programmes it can be ineffective or even counterproductive. This is because ‘conditionality by its very nature destroys the very domestic accountability and social transformation it seeks to achieve’.<sup>121</sup> Reflecting the consensus of the 2005 Paris Declaration on Aid Effectiveness,<sup>122</sup> multilateral and bilateral aid agencies are today much concerned with building ‘partnerships’ with developing states and ensuring their ‘ownership’ of the programmes (and results) that flow therefrom. For example, the new lending framework of the World Bank and IMF is now constructed through revamped Poverty Reduction Strategy Papers (PRSPs),<sup>123</sup> which are supposed to be more negotiated agreements between the donor institution and the recipient country than a didactic imposition of the views of the former onto the latter. Still, it cannot be said that these shifts in approach and alignment have been especially successful in practice. As Ngaire Woods notes, ‘the result, however, is not the kind of “ownership”

119 To paraphrase the noted Marxist historian E. P. Thompson’s infamous remark that ‘the rule of law is an unqualified good’, and was so even in eighteenth-century England. It was controversial because some thought that it effectively endorsed the many unjust laws of that time and of today, while others believed that it was perfectly consistent with the strongest criticism of such injustice; see Daniel Cole, ‘An Unqualified Human Good: E. P. Thompson and the Rule of Law’ (2001) 28(2) *Journal of Law and Society* 177.

120 Human Rights Council of Australia, *The Rights Way to Development*, p. 46.

121 Uvin, *Human Rights and Development*, p. 68.

122 The Declaration was signed by more than a hundred ministers, heads of agencies and senior officials from aid organisations, see [www.oecd.org/document/18/0,2340,en\\_2649\\_3236398\\_35401554\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,2340,en_2649_3236398_35401554_1_1_1_1,00.html).

123 PRSPs are often framed as five- to ten-year country plans for achieving economic growth and reducing poverty. They are usually broadly focused and can, depending on the circumstances, contain explicit reference to human rights concerns. See, for instance, Afghanistan’s *National Development Strategy 2008–13* (May 2008), at [http://siteresources.worldbank.org/INT/PRSI/Resources/Afghanistan\\_PRSP\(May2008\).pdf](http://siteresources.worldbank.org/INT/PRSI/Resources/Afghanistan_PRSP(May2008).pdf).

their [the Bank and the Fund] experience suggests is necessary. Lacking is any shift in responsibility, priority-setting, and choice which has been indicated by previous failures of conditionality.<sup>124</sup>

There are also examples of development initiatives in which governance issues are deemed crucial and yet human rights concerns rate little or no mention. A topical illustration of this circumstance is the global food crisis that is unfolding as I write these words in the middle of 2008. The astronomical price rises for staple foods in many developing countries (rice, wheat, maize) require not only an effective short-term humanitarian response, but also better long-term management of global food supplies by the governments of developing and developed states, individually and together. Yet this crisis of governance has almost completely ignored its human rights dimension. In his report as the newly appointed UN Special Rapporteur on the right to food, Olivier de Schutter lamented,

that neither in the policy responses to the current food crisis, nor in the exploration of long-term solutions to enhance food supply, is the human right to adequate food [ICESCR, Article 12] even mentioned – let alone, used as a guide for the implementation of international cooperation and national strategies. This constitutes a failure which the Special Rapporteur calls upon the Human Rights Council to remedy. In terms of improving accountability, monitoring and participation, and because it will lead to emphasize the dimension of non-discrimination, the reference to the human right to adequate food may constitute a significant contribution to the development of national strategies, and it can guide the identification of best practices.<sup>125</sup>

The slavish promotion of the rule of law is also not without serious complications. Law is, after all, merely an instrument of political, social and economic views on order and justice, not any guarantee of order and justice in and of itself. This applies to human rights law as much as to any other type. It is an instrument in the hands of tyrants and despots, as it is in the hands of the elected and virtuous. At its most basic, therefore, it can be used for good or ill; what are important are the motives and objectives that lie behind its use. David Kennedy has been especially critical of what he sees as too eager a desire within the development community to avoid

124 Ngaire Woods, *The Globalizers: The IMF, the World Bank and Their Borrowers* (Ithaca, NY: Cornell University Press, 2006), p. 190.

125 Olivier de Schutter, *Background Note: Analysis of the World Food Crisis by the UN Special Rapporteur on the Right to Food* (2 May 2008), p. 14, [www2.ohchr.org/english/issues/food/docs/SRRTFnotefoodcrisis.pdf](http://www2.ohchr.org/english/issues/food/docs/SRRTFnotefoodcrisis.pdf). Article 12 of the ICESCR provides for the ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food’.

making hard economic and political choices by preferring instead 'the softer – and often legal – vocabularies of ethics or human rights'.<sup>126</sup> He continues:

the idea that building the 'rule of law' might *itself* be a development strategy encourages the hope that choosing law *in general* could substitute for all the perplexing political and economic choices which have been at the centre of development policy making for half a century. Although a legal regime offers an arena to contest the choices, it cannot substitute for them. The campaign to promote the rule of law as a development path has encouraged policy makers to forgo pragmatic analysis of the choices they make in building a legal regime – or to think that the choices embedded in the particular regime they graft onto a developing society represent the only possible alternative.<sup>127</sup>

The vagaries and virtues of the rule of law must be better understood within development circles, if the pitfalls of the former are to be avoided, and the latter more fully exploited. Lawyers and others who care to think more carefully on the issue are aware of this need. In one of Amartya Sen's forays into legal philosophy he rightly points to the limits of the law in respect of what we can reasonably expect it to achieve in protecting human rights, which depends so much on non-legal factors such as culture, religion, community consensus, political power and economics; and this is especially so in developing states where the legal apparatus is likely to be far less extensive and robust.<sup>128</sup> I have argued elsewhere that, within the context of globalisation, it is quite possible for the different aspects of the notion of the rule of law to be differently stressed by different global actors. Commercial or economic interests, for example, tend to be especially interested in the formal features of the promised certainty and predictability of the rule of law, while human rights advocates emphasise the substantive requirements that law must be representative, fair and just if it is to be considered law at all.<sup>129</sup> Far from being preordained then, the mixing and matching of these (and other) perspectives of the rule of law is an ongoing challenge for development specialists.

126 David Kennedy, 'The Rule of Law as a Strategy for Economic Development', in his *The Dark Sides of Virtue* (Princeton: Princeton University Press, 2004), p. 152.

127 *Ibid.* p. 151.

128 Amartya Sen, 'Human Rights and the Limits of the Law' (2006) 27(6) *Cardozo Law Review* 2913.

129 David Kinley, 'Human Rights, Globalization and the Rule of Law: Friends, Foes or Family' (2002) *University of California, Los Angeles Journal of International Law and Foreign Affairs* 239.

### 'The Globalisers'<sup>130</sup> – development agencies and human rights

Whether, how and to what extent human rights will be better protected and promoted through aid and development programmes is, to a large degree, dependent on the quality of the ideas that inform such programmes and of their implementation. In both those respects the institutions most directly and comprehensively concerned with generating ideas about development and putting them into practice will play a vital role. That being so, I conclude this chapter by looking more closely at the critiques of the roles that international public and private development bodies play, and *should* play, in the promotion and protection of human rights.

I will here focus largely on the World Bank and the IMF (and the role of states in their functioning), but the category also includes the states in their own rights, the regional development banks (in Africa, Asia, South America and Europe),<sup>131</sup> and multilateral agencies such as the UNDP and UNICEF. I also include large private bodies such as globally active development NGOs and institutionalised corporate philanthropy such as the Gates Foundation and the Helú Foundation, as well as the older Carnegie, Ford and Rockefeller Foundations, whose funding of development projects has, collectively, increased markedly in recent years, especially in such human rights related areas as education and health.<sup>132</sup>

#### *Engaging with human rights*

Reflecting its people's respect for past tragedies, it is sometimes said that the history of Ireland is written on its tombstones. You might fairly say that the histories of the Bank's and the Fund's relationships with human rights have been determined by the words etched out of the stone of their

130 A label borrowed from Ngaire Wood's book of that title.

131 It is perhaps worth noting in passing that these are not necessarily marginal organisations with only limited finances. For example, the European Investment Bank's (EIB) budget is significantly larger than that of the World Bank, divesting around \$300 billion in loans between 2003 and 2007, as against just over \$20 billion per year for the World Bank; see Heather Stewart, 'A Bank Shrouded in Mystery', *Guardian Weekly*, 28 March 2008, p. 42. However, its objects are really very different from the World Bank and the other regional development banks, for although the EIB does invest considerable sums in developing countries (especially in Africa), it does so with the express aim to further the economic, social and political interests of the member states of the European Union, see [www.eib.org/about/index.htm](http://www.eib.org/about/index.htm).

132 See Paul Maidment, 'Billionaires Who Give It Away' (Forbes.com), March 2008; at <http://money.ninemsn.com.au/article.aspx?id=390627>.



respective Articles of Agreement (AA). In both cases it has been a story of narrow legal interpretation that has restricted their engagement with human rights.

The AAs of the two institutions make clear their broad economic purposes – to promote long-term economic growth through increasing productivity, international trade and foreign investment, and thereby to promote employment, real income and standards of living.<sup>133</sup> The principal differences between the two lie in the instruments and methods they use to achieve these ends. The IMF is primarily concerned with the macro-economic issue of international monetary cooperation and stability, which it seeks to manage by manipulating the monetary policies of states in return for the loans it provides them, regarding, in particular, money supply, exchange and interest rates, inflation and fiscal rectitude. It normally steps in only at times of financial crises, or when trying to avert them when they appear imminent. It is, in other words, an international lender of last resort. The World Bank, on the other hand, is more focused on micro-economic matters and its activities are much broader and ongoing.<sup>134</sup> The World Bank Group comprises five institutions<sup>135</sup> which separately and together sponsor the development and maintenance of essential services in developing economies, such as power, water, health, transport, communications, government, and environmental protection. It does so by way of a range of facilities including grants, loans, private sector partnerships, insurance guarantees and dispute settlement services. The interlinks and distinctions between the two institutions are explained in part by the fact that they were established simultaneously at a conference of forty-four states parties at the Mount Washington Hotel in the

133 See Article 1 of both the AAs of the International Bank for Reconstruction and Development (<http://go.worldbank.org/7H3J47PV51>) and the IMF ([www.imf.org/external/pubs/ft/aa/index.htm](http://www.imf.org/external/pubs/ft/aa/index.htm)).

134 The relative sizes and locations of their staff reflect these differences: the Bank has almost 10,000 staff situated in offices all over the world as well as in Washington DC, whereas the IMF has fewer than 3,000 (and at the time of writing (mid 2008) it was set to make very substantial staff cuts to address its budgetary difficulties born of a drop in countries requiring its services), the vast majority of whom are stationed in the Fund's Washington DC headquarters.

135 The Bank itself comprises the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA), and then there are in addition three affiliates that make up the full complement of the World Bank Group, namely, the International Finance Corporation (IFC), the Multi-lateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).

New Hampshire resort town of Bretton Woods in 1944. There, the delegates sought to create global mechanisms by which to minimise future economic shock and turmoil, and maximise economic growth and stability. This emphasis on economic development and management is an important point to grasp, for it was intended that the handling of the social and humanitarian concerns of the post-war world would be addressed by another multilateral organisation, namely the UN, to be established the following year, together with the pre-existing International Labour Organisation (ILO) focusing on the specific issues of labour rights, workplace relations, health and safety.

It is the rigidity with which this global division of responsibilities was and is maintained that has given rise to so much of the debate and disquiet concerning the relationship of the Bretton Woods institutions with human rights. There are a number of provisions within the Bank's AAs that appear to underscore the division by stressing that 'the Bank and its officers shall not interfere in the political affairs of any member' and that 'only economic considerations shall be relevant to their decisions' (International Bank of Reconstruction and Development (IBRD, Article IV, section 10)).<sup>136</sup> Curiously, no such express provisions are made in the AAs of the Fund, and yet in practice and philosophical inclination the Fund has been far less amenable to any arguments as to the relevance of human rights to its work. The constitutional basis for such a stance appears to rely on what the Articles do say about the narrowness of the Fund's mandate. Such disclaimers regarding political considerations and human rights have, as Mac Darrow, in his seminal work on this question, succinctly puts it, 'usually relied on more foundational assertions of mandate specificity and technical specialisation'.<sup>137</sup> To a degree, one can understand (if not necessarily endorse) the Fund's attitude in this regard – its mandate, capacity, competence and expertise are all geared towards the pulling of macro-economic levers, rather than overtly political or social ones, still less specifically human rights ones. However, from the human rights perspective, one of the most frustrating aspects of the Fund's attitude in this regard is its refusal to see the human rights implications of its actions, and to dismiss any such derivation as beyond its remit and

136 Further prohibitions against considerations of political or 'non-economic considerations' are also made in respect of the IBRD concerning its loan arrangements (Article 3(5)), and similar provisions also exist in the Articles of Agreement of the International Development Agency.

137 Mac Darrow, *Between Light and Shadow: The World Bank, the IMF, and International Human Rights Law* (Oxford and Portland, OR: Hart, 2003), p. 114.

therefore responsibility. There are some at the Fund who recognise this as a legitimate concern, even if they are not able to see an easy way to fix the problem. But, certainly in my experience, many Fund officials are either ignorant of the issue altogether or dismissive (often condescendingly so) of any suggestions that there is a question of responsibility here that is at least worth considering. I am not alone in this regard, as there is no shortage of critics of the Fund and its officers regarding the adverse social (as well as economic) consequences of its activities. Economists such as Stiglitz (who once acidly remarked that the Fund was full of third rate economists from first rate universities) laments the Fund's exacerbation of the economic and social crises in Indonesia in the late 1990s and Argentina in 2002;<sup>138</sup> Woods relates how ineffective the Fund's structural adjustment programmes were in alleviating poverty in Sub-Saharan Africa in the 1980s;<sup>139</sup> and Sachs tells a similarly sorry story about the IMF's inflexibility in the face of manifest deprivation in Ethiopia in 2003–4.<sup>140</sup> Human rights commentators and lawyers such as Sigrun Skogly and Mac Darrow have also, separately, criticised the Fund's 'command and control' management structure which when coupled with the disciplinary homogeneity of its staff strongly mitigates consideration of matters outside the purview of macro-economics.<sup>141</sup> Allied to this, Margot Salomon has argued for the Fund to reverse its current reading of the recurring instruction in its AAs – that it 'shall pay due regard to the circumstances of members' – which has typically been interpreted not only as an interdiction against domestic interference, but apparently as a reason not to take into account *any* political or social matters (including human rights) in its deliberations. As she points out, there are in fact greater reasons to interpret this provision to require doing just that, than there are in support of the currently preferred understanding.<sup>142</sup> There are, further, a number of vociferous, informed and skilful NGOs such as the Bretton Woods Project and the Bank Information Centre,<sup>143</sup> which have long histories of trenchant criticism of the Fund's studied disengagement with human rights.

138 Joseph Stiglitz, *Globalization and its Discontents* (New York and London: W. W. Norton, 2002), pp. 77, 117, and *Making Globalization Work*, pp. 222–4, respectively.

139 Woods, *The Globalizers*, pp. 158–9. 140 Sachs, *The End of Poverty*, pp. 267–8.

141 Darrow, *Between Light and Shadow*, p. 201; and Sigrun Skogly, *Human Rights Obligations of the World Bank and the IMF* (London: Cavendish Publishing, 2001), pp. 19–23.

142 Margot Salomon, 'International Economic Governance and Human Rights Accountability', LSE Legal Studies Working Paper No. 9/2007 (September 2007), p. 12; at <http://ssrn.com/abstract=1013505>.

143 See <http://brettonwoodsproject.org> and [www.bicusa.org/en/index.aspx](http://www.bicusa.org/en/index.aspx), respectively.

The Bank too has been on the receiving end of many criticisms regarding its reluctance both to engage with human rights concerns within its scope of operations and to acknowledge the human rights impact of its economic footprints. As Siobhán McInerney-Lankford – a lawyer working in the Legal Vice-Presidency of the Bank – has written, ‘these are challenges which have either not been acknowledged, or the significance of which has not fully been appreciated’.<sup>144</sup> Still, it has to be said that, within parts of the Bank’s establishment and operationally, there have been signs of a greater openness to the idea that human rights concerns do have a role, even an important role, to play in the fulfilment of the Bank’s objectives.

The task before those who are amenable to this line is nevertheless limited by the AA provisions noted above. McInerney-Lankford is right to say that the many ‘calls for drastic policy changes’ of the Bank are naïve in thinking that these provisions can simply be overlooked, for they have not only some textual meaning, but also what she calls ‘normative significance’.<sup>145</sup> The latter is especially important within the traditional thinking of the Bank and of the member states themselves, and provides a considerable political obstacle, though not one, in my view, that is insurmountable. The point about the limitations of textual meaning, however, is less convincing. After all, as Mac Darrow reminds us, legal interpretation (especially in the arena of international law) is more art than science, even if ‘it is a characteristic or part of the art to disguise it as a science’.<sup>146</sup> Indeed confirmation of the evident open-endedness of such terms as ‘political affairs’ and ‘economic considerations’ comes from McInerney-Lankford herself, later in her article, as well as from her boss, Roberto Dañino, when he was still General Counsel of the Bank, who pronounced that in his view ‘there is no stark distinction between economic and political considerations’, and therefore ‘it is consistent with the Articles that the decision-making processes of the Bank [should] incorporate social, political, and any other relevant factors which may have an impact on its economic decisions’.<sup>147</sup>

144 Siobhán McInerney-Lankford, ‘Human Rights and Development: Some Institutional Perspectives’ (2007) 25(3) *Netherlands Quarterly of Human Rights* 459, at 461.

145 *Ibid.* p. 491.

146 Darrow, *Between Light and Shadow*, p. 115; Darrow is, as he notes, here borrowing from Robert Jennings’s famous epithet on this point.

147 Roberto Dañino, ‘The Legal Aspects of the World Bank’s Work on Human Rights: Some Preliminary Thoughts’, in Sage and Woolcock (eds.), *World Bank Legal Review*, Vol. II, *Law, Equity, and Development*, p. 295, at p. 305.

In point of fact, this whole matter has been a case of theory catching up with practice, for in the field it has always been well-nigh impossible for the Bank to avoid involvement in human rights matters. Laurence Boisson de Chazournes (a former senior counsel in the Bank) has shown how, during the 1970s and 1980s, the Bank was inevitably drawn into political imbroglios with overtly human rights concerns, such as with Apartheid South Africa, Portugal's colonial repression in Angola and Mozambique, the military Junta in Myanmar, Iran's theocratic repression, and Mobutu's genocidal mania in Zaïre; and the Bank's 'non-economic' impacts in these circumstances applied just as much when it withheld aid as when it provided aid.<sup>148</sup> Since these times, the insinuation of human rights matters in the planning and operational mandates of the Bank has, as noted earlier, become more apparent, even if not always explicitly labelled as such. Human rights have also become of increasing concern to the Bank's private sector development projects, especially in respect of the work of its associate agencies, the IFC and MIGA. Indeed, Peter Woicke, the former Executive Vice-President of the IFC, referred to the agency's task of 'navigat[ing] a path through human rights, as one of the burning issues of our day'.<sup>149</sup> The exponential growth of the Bank's involvement in private sector development projects is reflected in the expansion of the IFC's work in facilitating joint Bank–corporate initiatives in developing countries and in the size of the IFC's project funding, which has quadrupled in the last five years.<sup>150</sup> It is also apparent from the dollar amounts being underwritten by MIGA against the frustration of private sector projects caused by political circumstances in developing countries, which have risen tenfold from the early 1990s to today.<sup>151</sup> Both agencies have been criticised for their involvement in backing corporate initiatives

148 Laurence Boisson de Chazournes, 'The Bretton Woods Institutions and Human Rights Converging Tendencies', in Wolfgang Benedek *et al.* (eds.), *Economic Globalisation and Human Rights* (Cambridge: Cambridge University Press, 2007), pp. 213–18.

149 Peter Woicke, 'Putting Human Rights Principles into Development Practice through Finance: The Experience of the International Finance Corporation', in Alston and Robinson (eds.), *Human Rights and Development* p. 327, at p. 351.

150 Funding has risen from \$2.6 billion in 2003 to 8.2 billion in 2007, and 'commitments in FY08 are expected to be in the range of \$10.5 to \$12.5 billion'; see IFC, *FY09–11, Business Plan and Budget* (26 June 2008), para. 1.6 and graph 6.1 on p. 43.

151 That is, from less than \$200 million in 1990 to nearly \$2 billion in 2008. See Independent Evaluation Group–MIGA, *2008 Annual Report: Evaluating MIGA's FY05–08 Strategic Directions* (15 April 2008), fig. 2.1 at p. 26. Notwithstanding such growth, the Report notes that MIGA's share of the political risk industry has declined in recent years, from 6 per cent in 2004 to 4 per cent in 2007, which 'reflects increased supply of political risk Insurance', *ibid.*

that have caused serious and well-documented human rights problems. These have included accusations of breaches of land rights, health and clean environment rights, rights to water, and indigenous rights regarding the building of two huge pulp mills by European firms on the River Plate border between Uruguay and Argentina;<sup>152</sup> restrictions on rights to free expression, participation and assembly, and to remedies, as well as endangering the right to health and safe working conditions in respect of the 1,000 km Chad–Cameroon pipeline;<sup>153</sup> and complicity in crimes against humanity by an Australian mining corporation in its operations in the Democratic Republic of Congo.<sup>154</sup>

Both MIGA and the IFC have responded to these criticisms in various ways including, in MIGA's case, engaging specialists in assessing the social (as well as the environmental) implications of the activities of the corporations they work with, and entering into dialogues with its critics by responding to criticisms.<sup>155</sup> The IFC has also reacted by professing that it has 'learnt lessons' from its experiences.<sup>156</sup> It has also engaged in more proactive efforts to reform its policies and practices. In 2005 it undertook a review of its safeguard policies (against which the performance of projects was measured to try to 'safeguard' against their adverse impacts) with a view to embracing more substantial and explicit social standards including human rights and labour conditions. But following pressure from within the Bank proper and some of the member states,

152 Projects backed by both the IFC and MIGA; see Jorge Daniel Taillant, 'International Development Finance and Global Governance: Human Rights and Sustainable Development' (2007), paper obtainable from CEDHA ([www.cedha.org.ar](http://www.cedha.org.ar)).

153 The IFC invested in and worked with the consortium of oil giants, ExxonMobil, Petronas and Chevron, who built the pipeline; see Amnesty International, *Contracting Out of Human Rights: The Chad–Cameroon Pipeline Project* (London: Amnesty International UK, 2005).

154 Tricia Feeney from the UK-based NGO Rights and Accountability in Development (RAID) has been especially effective in exposing these atrocities and lobbying the Bank to take appropriate action; see her correspondence with the then Bank President, Paul Wolfowitz, appended to the Bank's Compliance Advisor/Ombudsman's Report: *CAO Audit of MIGA's Due Diligence of the Dikulushi Copper-Silver Mining Project in The Democratic Republic of the Congo* (November 2005), an audit that Feeney's letter helped instigate; [www.cao-ombudsman.org/html-english/documents/DikulushiDRCfinalversion02-01-06.pdf](http://www.cao-ombudsman.org/html-english/documents/DikulushiDRCfinalversion02-01-06.pdf).

155 See MIGA's July and September 2001 responses to the Friends of the Earth Report: 'Risky Business: How the World Bank's Insurance Arm Fails the Poor and Harms the Environment' (July 2001); [www.miga.org](http://www.miga.org) and [www.foe.org](http://www.foe.org), respectively.

156 See the two *Lessons of Experience* reports it launched in October 2006 on the Chad–Cameroon pipeline and the Baku–Tbilisi–Ceyhan pipeline, [www.ifc.org/ifcext/media.nsf/Content/LOE.BTC.Chad](http://www.ifc.org/ifcext/media.nsf/Content/LOE.BTC.Chad).

the resultant new Performance Standards were diluted so as to focus largely on environmental concerns, with the muted 'human rights' component represented mainly in surrogate provisions covering consultation and disclosure, labour conditions, community health and the protection for indigenous peoples. It is notable that throughout the whole thirty-four-page document, there is not a single mention of the term human rights.<sup>157</sup>

Still, it should be recognised that in the activities of the IFC and (to a lesser extent) MIGA, the Bank is potentially able to exert leverage over private sector partners in respect of human rights. Mac Darrow, for example, believes that 'the leveraging of the Bank's [and IFC's] social safeguard policies through relatively modest contributions (in financial terms) to joint ventures with private actors represents an important and emerging area of Bank influence'.<sup>158</sup> Notably, the World Bank's Inspection Panel in its consideration of the Chad–Cameroon pipeline case<sup>159</sup> has iterated the importance of human rights to the decision-making processes that the Bank must take not only in such public–private partnerships as this, but also, by extension, in all Bank activities where human rights issues arise. Notably, the IFC has also directly influenced related initiatives in the (pure) private sector. The Equator Principles, for example, which comprise 'a financial industry benchmark for determining, assessing and managing social and environmental risk in project financing', were established as a private sector off-shoot of the IFC's safeguard policies/performance standards.<sup>160</sup>

Real obstacles to the more meaningful integration of human rights in the Bank's strategic thinking, policy-planning and project implementation are still very evident. Politically, the views of some member states, as channelled through the Bank's Boards (both of Executive Directors and

157 IFC's Performance Standards on Social and Environmental Sustainability (2006), available at [www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards](http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards).

158 Darrow, *Between Light and Shadow*, p. 217. Currently there are eleven World Bank environmental and social safeguard policies (each of which comprises combinations of Operational Policies (OPs) and Bank Procedures (BPs)). The most relevant to human rights are those covering the preservation of natural habitats, involuntary settlements and the protection of indigenous peoples. See <http://go.worldbank.org/WTA1ODE7T0>.

159 The Inspection Panel, *Investigation Report: Chad–Cameroon Petroleum and Pipeline Project* (2002), paras. 212–14, available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ChadInvestigationReporFinal.pdf>.

160 The Equator Principles have been adopted by more than sixty private banks and other financial institutions; see [www.equator-principles.com/principles.shtml](http://www.equator-principles.com/principles.shtml).

of Governors),<sup>161</sup> are equivocal, if not hostile in some cases, to the notion entering the Bank's core domain. One of Galit Sarfaty's conclusions to her extensive empirical study of World Bank culture is that the impasse between the members of the Board of Executive Directors regarding the role of human rights in the Bank's operations has 'simply resulted in inaction' on the part of the Board, prompting management to make 'incremental changes in operations' that pass "under the radar" of member states.<sup>162</sup> However, as evidenced by their uptake of those human rights related programmes that the World Bank does administer, the poorest and neediest states that constitute the Bank's clientele can and do welcome human rights matters being taken into account, provided they comprise part of a wider consideration of their social needs, and provided that they do not crystallise into unyielding conditionality. This, then, constitutes yet another reason for the need to push ahead with reforming the governance structures of both the Bank and the Fund. Naigre Woods notes ruefully that:

more than three-quarters of the members of each of the IMF and the World Bank are not directly represented on the Board of Executive Directors. Nor are they represented in the senior management of either institution. Many have virtually no nationals working on the staff. These are the countries who are most deeply affected by each of the institutions.<sup>163</sup>

There is also the obstacle of bureaucratic intransigence. Born of a combination of a maligned 'approvals culture' (emphasising and rewarding getting projects started and completed rather than necessarily their substantive merits or efficacy), lack of relevant expertise, and an innate reluctance to take on anything new (the pervasive curse of all bureaucracies), any significant and lasting incorporation of human rights considerations into the work of the Bank faces an uphill battle.<sup>164</sup> This is so

161 The Board of Governors comprises representatives from every member state. The Board of Executive Directors, to which nearly all power is delegated by the Board of Governors, comprises only twenty-four, including seats reserved for the biggest shareholder (i.e. financier) states; the voting system is also weighted in their favour. See <http://go.worldbank.org/UVCJX4BN00>.

162 Galit Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank' (2009, forthcoming) *American Journal of International Law*, at 15 (of draft). She notes, in particular, the implacable opposition of countries such as China and Saudi Arabia, the transaction costs concerns of states like Brazil and India, and the disagreements between those Western states who broadly support greater account being taken of human rights as to how that should be effected.

163 Woods, *The Globalizers*, p. 190.

164 See Kinley and Davis, *Human Rights Criticism of the World Bank's Private Sector Development and Privatization Projects*, pp. 85–102.



even when the word comes from the very top, as occurred when James Wolfensohn was President. Wolfensohn, who once said that dealing with the Bank's bureaucracy was 'like grappling with an octopus',<sup>165</sup> sought to reform it by, among other measures, attempting to inject the rhetoric of human rights into the veins of the monster. The Bank's 1998 report on Development and Human Rights, previously mentioned, was a case in point, proclaiming that:

The World Bank believes that creating the conditions for the attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being – especially the poorest – at the very foundation of its approach to development, the Bank helps people in every part of the world build lives of purpose and hope.<sup>166</sup>

More than ten years on it cannot be said that these words have been followed through in practice to the extent of their promise.

### *Fixing the plumbing and other ways forward*

At the centre of Jeffrey Sachs's prescriptions for ending global poverty there lies the need to 'fix the plumbing' through which development funding flows.<sup>167</sup> It is no good turning on the taps of more funding (the other great need at the heart of the Sachs vision), if the pipes are blocked or don't service the right places. Multilateral institutions like the IMF and the World Bank, as well as state aid agencies, development NGOs and private sector development projects, need, to varying degrees, to be more innovative (like the Grameen Bank's development of micro-financing, and the 'One Laptop per Child' campaign),<sup>168</sup> more flexible (fashioning programmes to meet demand and need rather than imposing 'one size fits all' programmes that are held in stock), and more aware of the social consequences of their economic footprints, whereby not only should institutions abide by the principle of 'do no harm' in their operations,<sup>169</sup> they should actively promote recognition of human rights concerns in their mainstream activities.<sup>170</sup>

165 As quoted by Sebastian Mallaby, *The World's Banker* (Sydney: UNSW Press, 2004), p. 148.

166 World Bank, *Development and Human Rights*, p. 2.

167 *The End of Poverty*, pp. 269–70. 168 See <http://laptop.org/vision/index.shtml>.

169 As advocated, for example, by the OECD, Development Assistance Committee, *Action-Oriented Policy Paper on Human Rights and Development*, DCD/DAC(2007)15/FINAL (23 February 2007), at p. 15.

170 As employed by a number of UN and bilateral development agencies in the particular sectors of women's and children's rights, the rights of minorities and indigenous peoples,

In terms specifically of human rights I think the biggest problem facing their intersection with development, and the as yet elusive goal of their mutual reinforcement, is the matter of how human rights are perceived by many economists, development specialists and aid agencies. There is a tendency to view them as definitive, unyieldingly prescriptive, and mandatory. This is to over-stretch the legal dimension of human rights. To be sure, human rights are more often than not expressed in legal terms, but those terms are not imbued with the characteristics listed. Few laws are. But laws that seek to regulate such fundamental principles of individual and social existence as human rights are certainly more open-textured than many suppose. I have written about this both in broad philosophical and political contexts,<sup>171</sup> and in the particular respect of the World Bank,<sup>172</sup> arguing for a more nuanced approach to the presentation and interpretation of human rights standards. This is not only to reflect what is, in fact, the reality and practice of human rights. It is also, quite deliberately, to countermand what so many who resist engaging with human rights, including those in the development community, see as the malign rigidity of human rights laws. To reassure and persuade them, as it were, that while human rights laws typically do bring with them compliance expectations and accountability mechanisms, the substance of human rights is in many respects open to subtle differences in interpretation (necessarily so if their quest to be universal is to mean anything) and their goals are not only broadly similar to those of development, they are constitutive of its full realisation.

Human rights and human rights laws are not above politics, but rather immersed in it; they are, indeed, the very stuff of politics in the broadest sense, concerned with how and on what basis states treat those within their jurisdiction . . . The implication of disaggregating the notion of international human rights in this way is that it provides the opportunity, if not the requirement, to rethink . . . attitude[s] towards human rights.<sup>173</sup>

It remains the case that, at the level of international law, responsibility for the protection and promotion of human rights lies with states, and indeed it is, generally speaking, the states, not international institutions, that

health and education; see accounts compiled by OECD, *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges* (Paris: OECD, 2006), at pp. 44–51.

171 David Kinley, 'Human Rights Fundamentalisms' (2007) 29(4) *Sydney Law Review* 545.

172 Kinley, 'Human Rights and the World Bank', pp. 367–75. 173 *Ibid.* pp. 370–1.

have the established means to meet these obligations, whether individually, or collectively acting through such international bodies. This does not, of course, absolve organisations like the IMF or the World Bank from taking human rights seriously. It is, rather, to stress that their role should be seen as aiding states – both rich and poor – to meet their human rights obligations at home and, where relevant, abroad.<sup>174</sup>

## Conclusion

The question of how development policies and practices can better aid the efforts to fulfil the human rights of the poorest and most marginalised on our planet ultimately centres on how well we design them. Our efforts thus far cannot be said to be satisfactory. Far from it. William Easterly, in his polemic *The White Man's Burden*, calculates that the West has spent \$2.3 trillion on foreign aid over the past 50 years and yet has not managed to address many of the most basic and persistent problems of extreme poverty, disease and preventable deaths to anything like the level that one might fairly expect of such a sum.<sup>175</sup> Put this way, the record is lamentable. But if we are to be serious about raising the standards in which the poorest live and thereby to accord to them even the barest minimum respect for their human rights, what are needed are better plans, not no plans at all, as Easterly advocates.<sup>176</sup> Certainly, he is correct to criticise the formulaic and unresponsive attitudes of development 'planners' (as he calls them) when the results of their plans are so abjectly ineffective. But not all development policies have been, or are so, as the discussion in this chapter illustrates, and as Easterly himself admits. Leaving it wholly to the market place of adaptable and responsive 'searchers' to eek out the most effective and efficient means to address the many and varied development problems is not only fanciful,<sup>177</sup> it would lead to results just as reprehensible as

174 An important ancillary role stressed by the 'Tilburg Guiding Principles on World Bank, IMF and Human Rights', in Willem van Genugten, Paul Hunt and Susan Mathews (eds.), *World Bank, IMF and Human Rights* (Nijmegen: Wolf Legal Publishers, 2003), p. 247, at paras. 23–7.

175 William Easterly, *The White Man's Burden* (New York: Penguin, 2006), p. 4.

176 *Ibid.* p. 5.

177 Not even Fredrick Hayek, the doyen of laissez-faire liberalism, advocated such a free market; see Simon Deakin, 'Social Rights in a Globalized Economy', in Philip Alston (ed.), *Labour Rights as Human Rights* (Oxford and New York: Oxford University Press, 2005), pp. 52–5, in which he quotes Hayek's acceptance of a role for 'the provision by government of certain services which are of special importance to some unfortunate minorities, the weak or those unable to provide for themselves'.

the world's score-card on poverty alleviation thus far.<sup>178</sup> The market fails; searchers/entrepreneurs are not always looking in the places of most need; and such responses that there are may not be interested in long-term sustainability. One need only consider the consequences in development and human rights terms of those situations such as Myanmar, North Korea and Zimbabwe, in which Western aid programmes are almost non-existent,<sup>179</sup> to realise how the 'aid market' can fail to deliver.

For these reasons any development strategy must entail state-based intervention through planning, regulation, incentive and sanction. The structure and objects of international human rights regimes – in their political and legal guises – have been developed with the same needs in mind. The challenge is to design and implement plans that integrate the developmental and human rights needs of the poor, and thereby better serve them.

This must be done conceptually through institutional recognition of the interdependency of the human rights and global economy relationship in the context of economic aid, and in practice by an acceptance of the need to design and implement the means to leverage the relationship for the benefit of human rights ends, especially in respect of the world's poor. These are themes and arguments as to consequences and responsibilities that I return to in the [final chapter](#), when I integrate all three dimensions of the global economy – aid, trade and commerce – to consider how best they can, collectively, advance the protection and promotion of human rights.

178 See Amartya Sen's critique of Easterly's book: 'The Man without a Plan', *Foreign Affairs*, March/April 2006, p. 171.

179 Excepting the humanitarian aid rendered to Myanmar in the extraordinary circumstances following the devastation of Cyclone Nargis in May 2008. The International Crisis Group (ICG) has been damning about such disengagement, the dire consequences of which the aftermath of Nargis graphically exposed. In the ICG's view, 'in its attempt to defeat the regime by isolating it, the West has sacrificed opportunities to promote economic reform, strengthen social services and empower local communities. Despite the fact Myanmar is prone to natural calamities, very little has been done to support disaster prevention and preparedness'; *Burma/Myanmar after Nargis: Time To Normalise Aid Relations*, Asia Report No. 161 (October 2008), p. 16, available at [www.crisisgroup.org](http://www.crisisgroup.org).