

FOCUS SECTION

Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism*

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A. The Rules of the Game

This study is an exploration of the ways in which international law both facilitates and accommodates privilege. While the poverty to which almost half the global population is relegated forms our subject of concern, our object of study is not the “global poor” but the “global rich,” and the role of international law in securing their privilege: To confine our enquiry to poverty would reveal only a partial account of its occurrence, in that “[t]o comprehend and explain poverty is also to comprehend and explain riches.”¹

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¹ *Peter Townsend*, *Poverty in the United Kingdom* (1979), 337. According to the World Health Organization (WHO) 2.7 billion people representing 43 % of the world’s population live on less than US\$ 2 a day. WHO, *Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property: Annex*, para. 2, available at: www.who.int/gb/ebwha/pdf_files/A61/A61_R21-en.pdf.

Economists,² philosophers³ and international lawyers⁴ concerned with poverty all have focused on the dominance of rich states⁵ in the making of the contemporary global institutional order and the construction by these states of structural conditions under which extraordinary deprivation continues to be the plight of many and inequality has been able to flourish.⁶ At least two fundamental premises can be said to underpin this general structural thesis the ramifications of which are illustrated by the following figures:

[T]he number of poor people continued to increase in Sub-Saharan Africa [between 1990–2004], rising by almost 60 million. ... More than 10 million children in develop-

² “Structuralists [such as *Myrdal* (1956) and *Seers* (1983) also] point to the way that richer countries dominate global institutions, often leading to a bias against poorer countries in the way they operate.” *Richard Jolly*, *Global Inequality*, in: David Alexander Clark (ed.), *The Elgar Companion to Development Studies* (2006), 196, 199.

³ “In the modern world, the rules governing economic transactions – both nationally and internationally – are the most important causal determinants of the incidence and depth of poverty.” *Thomas Pogge*, *Severe Poverty as a Human Rights Violation* (2003), available at: www.etikk.no/globaljustice.

⁴ *Margot E. Salomon*, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (2007). This list is not an exhaustive reflection of disciplinary engagement in this matter, see also the work of political scientists working in the field of International Political Economy, among others.

⁵ In this article I take the liberty of using a number of terms interchangeably when referring to the affluent and poor states respectively (developed and developing *etc.*) unless the context requires the use of a specific institutional term *e.g.* least-developed countries. While recognizing the cleavages and alliances that exist within the two broad categories of rich and poor states and the like, the general concerns highlighted herein address the interests that accompany particular levels of economic development and degree of international influence, allowing for considerations along this axis.

⁶ “The gap between the world’s richest country and the world’s poorest increased from about 3:1 in 1820 to about 70:1 in 2000.” *Jolly* (note 2), 197. “Measured at the extremes the average American was 38 times richer than the average Tanzanian in 1990. Today the average American is 61 times richer.” United Nations Development Programme (UNDP), *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (2005), 37. “For most of the world’s poorest countries, the past decade has continued a disheartening trend: not only have they failed to reduce poverty, but they are falling further behind rich countries.” *Ibid.*, 36. The World Bank asks: “How do we view large average improvements in the world set against this picture of unacceptable inequalities between countries?” To which *Amartya Sen* replies: “Even though the world is incomparably richer than ever before, ours is also a world of extraordinary deprivation and staggering inequality. [...] Whether there have been some gains for all is not as important as whether the distribution of gains has been fair. Inequalities in affluence – and in political, social, and economic power among countries – are central to the debate on globalization.” World Bank, *World Development Report 2006: Equity and Development* (2005), 55.

ing countries die before the age of five every year, mostly from preventable illnesses. Child mortality has declined in every region since 1990 but progress is slow: only 35 countries are on track to meet the Millennium Development Goals of reducing under-five mortality by two-thirds between 1990–2015. Progress is particularly slow in Sub-Saharan Africa, where AIDS, malaria, and malnutrition are driving up mortality rates.⁷

The first premise informing this structural thesis is that of the interdependence of advantage and disadvantage under conditions of globalization. Examples might include the income and power built up by rich countries that create “backwash effects” in which poorer countries fall further behind,⁸ and unequal bargaining power, negotiating expertise and influence that come from economic inequality leading to outcomes benefitting the stronger parties.⁹ The nature of this relationship results in “redistributive exploitation” whereby “the advantage of some is bought at the cost of the disadvantage of others.”¹⁰

The second core premise is that the global economic order is justified through law. This serves to cloak the economic system in legitimacy safe under the pretext that it reflects state consent.¹¹ But the independence and autonomy formally afforded states as sovereign equals under international law does not endow them with functional equality in the shaping or enforcement of the rules of the game.¹² Disparities in size, population, and particularly, wealth create power differentials between and among states that mock notions of substantive sovereign equality; yet “[t]he fiction of equality is preserved through such

⁷ World Bank, *World Development Indicators* (2007), 4 and 6. The number of people living on less than US\$ 1 a day in developing countries fell thanks in large part to massive poverty reduction in China. *Ibid.*

⁸ Jolly (note 2), 199 (describing the “structural paradigm” as per, e.g., *Myrdal and Seers*).

⁹ “[A]ny inequality in wealth produces transactions that would be refused by the disadvantaged in the absence of inequality. It is inequality in wealth, and not poverty as such, which generates a comparative advantage between the rich and the poor, and causes induced trading.” *Marc Fleurbaey*, *Poverty as a Form of Opression*, in: Thomas Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007), 133, 145.

¹⁰ *Susan Marks*, *Exploitation as an International Legal Concept*, in: Susan Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008), 281, 301.

¹¹ “Some argue that global inequality simply reflects the outcomes of differences in productivity and governance between countries and people, and as such should be of no international concern *providing that the international processes creating them have been legal.*” Jolly (note 2), 199 (emphasis added).

¹² See Art. 2(1) UN Charter: “The [UN] is based on the principle of the sovereign equality of all its Members.” Charter of the United Nations, 26 June 1945, UNCIO 15, 335.

arrangements being presented as dependent on the consent of all states parties.”¹³ The “presumption of juridical equality”¹⁴ serves to legitimize unjust rules and excuse the inequalities derived from them.

This notion of consent implies a voluntarism, but there is no real freedom of action when choices are between lesser evils. Poor countries need to trade in order to develop and to be in a position best to fulfill the socio-economic rights of their people.¹⁵ That participation in the international trading system as currently conceived represents the preferred option to remaining outside of it, where growth opportunity would be curtailed more severely, does not suggest that what they get, for example within the World Trade Organization (WTO), is optimal or even fair.¹⁶ Rational consent should not be mistaken for approval.¹⁷ Moreover, a focus on the problems of membership should not obscure the sacrifices made in seeking eligibility for membership by developing and least-developed countries.¹⁸ Policy prescriptions requiring an openness to global economic integration and removal of barriers to market access are imposed as conditions for entry into the WTO¹⁹ and for receipt of funds from international

¹³ Hilary Charlesworth/Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), 124. Sometimes this power differential is formalized, as in the case of the weighted voting in the World Bank and International Monetary Fund (based on the size of the member’s economy), and sometimes it is implicit, as in the case of the WTO: while formally based on a system of “one-country one vote” “[...] powerful forces can chisel away at developing country interests (through separate bilateral agreements, for example). And the capacity for developing countries to make decisions can be limited.” World Bank, *Equity and Development* (note 6), 66.

¹⁴ A. Claire Cutler, *Toward a Radical Political Economy Critique of Transnational Economic Law*, in: Susan Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008), 199, 211.

¹⁵ “There is a huge difference in saying that trade is essential for economic development and saying that free trade is best.” Ha-Joon Chang, *Protecting the Global Poor*, *Prospect Magazine*, Issue 136 (2007).

¹⁶ See the interesting insider’s account in the book by the Head of the South African Delegation to the WTO, Faizel Ismail, *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* (2007), including in relation to the WTO’s home-grown solution of Special and Differential Treatment for developing countries aimed at addressing inequities yet widely criticized as unsatisfactory.

¹⁷ Thomas Pogge, *Recognized and Violated by International Law: The Human Rights of the Global Poor*, *Leiden Journal of International Law (LJIL)* 18 (2005), 717, 732.

¹⁸ Anne Orford, *Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice*, *LJIL* 18 (2005), 179, 207.

¹⁹ *Ibid.*, “The idea that openness to trade is inherently good for both growth and human development now enjoys almost universal support. Translated into policy terms,

financial institutions (IFIs),²⁰ even though they may not serve poor countries well.²¹

Marxist theories suggest that the problems with capitalism are a consequence of contradictions within the capitalist mode of production itself,²² serving to highlight a certain antagonism between favorable conditions for capitalist expansion and human well being, and drawing attention to national and international inequalities as a central part of the analysis. International law concerned

this belief has led to an emphasis on the merits of rapid import liberalization as the key to successful integration into global markets. When countries such as Cambodia and Viet Nam join the WTO, they are required as a condition of entry to implement deep cuts in tariffs on agriculture and manufacturing, as though this were a test of their trade policy credentials.” UNDP, *International Cooperation at a Crossroads* (note 6), 119.

²⁰ “The IFIs exert considerable influence through providing policy advice and have not generally elaborated alternative policies to those involving privatization and liberalization. [...] Both the World Bank and IMF continue to advocate trade liberalization and export oriented growth.” *Benedicte Bull/Alf Morten Jerve/Erlend Sigvaldsen*, *The World Bank’s and the IMF’s use of Conditionality to Encourage Privatization and Liberalization: Current Issues and Practices*, Report Prepared for the Norwegian Ministry of Foreign Affairs, Background Document for the Oslo Conditionality Conference (2006), vii and 30.

²¹ See, UK Policy Paper, *Partnerships for Poverty Reduction: Rethinking Conditionality* (March 2005). “The movement of economies towards more trade oriented profiles typically involves processes of trade liberalization, often under the auspices of the WTO, the World Bank, the IMF, or regional trade agreements. The transition costs associated with these reforms can be significant and may actually worsen poverty for some classes of households. For this reason, as developing countries consider the role that increased trade can play in poverty alleviation, they need to guard against the real possibility of increasing the poverty of some groups.” *Ian Goldin/Kenneth Reinert*, *Globalization for Development: Trade, Finance, Aid, Migration, and Policy* (2006), 76.

²² *Leslie Sklair*, *Globalisation and Development*, in: David Alexander Clark (ed.), *The Elgar Companion to Development Studies* (2006), 200, 203. *Falk* highlights the antagonism given expression by the Marxist/Leninist tradition when he writes: “Any effort to use capital surpluses, that is, profits for the sake of human betterment, rather than for either enrichment of the capitalist class or reinvestment to achieve even greater profits, is doomed, Lenin argues. In his words, ‘if capitalism did these things it would not be capitalism.’” *Richard Falk*, *Interpreting the Interaction of Global Markets and Human Rights*, in: Alison Brysk (ed.), *Globalization and Human Rights* (2002), 61, 64. *Marks* notes in her study on the legal concept of exploitation that a feature of exploitation is the extraction of profit out of labor spurred on by “[s]ystemic imperatives within capitalism [that] generate organisational pressures for more and more exploitation.” *Marks* (note 10), 300. And further: “Late capitalist and postmodern trade law today take the form of a transnational regulatory order that is hegemonic in facilitating the transnational expansion of capitalism and privatised regimes of accumulation, which secure the interests of an increasingly transnational capitalist class.” *Cutler* (note 14), 201.

with the economic relations among states (and with regard to their transnational corporations)²³ has been built on and is serving to entrench these problems by facilitating privilege. International law concerned with the right of everyone to an adequate standard of living,²⁴ the rights to be free from hunger²⁵ and to food security,²⁶ is accommodating this privilege in important ways. The costs are borne out as widespread poverty and colossal inequality globally.

I. Neoliberalism and the Millennium Development Goals

International law is not neutral but rather has served to bolster political and economic dominance. More specifically, it has been shaped by, and around, advantage. The legal legitimacy bestowed on colonial exploitation under the guise of the “civilizing mission” of European states provides an illustration of this dominance historically.²⁷ But it is also an enduring example. Today the drivers and primary beneficiaries of our economic order advance and legitimate their wealth-generating schemes under various guises of mutual advantage, common benefit, and superior knowledge and proficiency in the relevant fields. Yet, in an era where poverty afflicts almost half the global population concen-

²³ See, for example, A. Claire Cutler’s analysis of The WTO’s General Agreement on Trade in Services (GATS): “While GATS was resisted by many states, and particularly less developed states in the past, the shift to [privatising services, transforming them into commodities to be regulated in the same delocalized manner as trade in goods] [...] was driven initially by powerful transnational corporations seeking to expand their market opportunities in the services sectors and to lock [developing country] governments in to hard legal disciplines that limit their abilities to regulate foreign service providers.” *Ibid.*, 212.

²⁴ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993, 3, Art. 11(1) (ICESCR); Convention on the Rights of the Child, 20 November 1989, UNTS 1577, 3, Art. 27(1) (CRC).

²⁵ ICESCR (note 24), Art. 11(2); CRC (note 24), Art. 24(c).

²⁶ ICESCR (note 24), Arts. 11(1) and 11(2) and Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12, The Right to Adequate Food (Art. 11), UN Doc. E/C12/1999/5 (1999), paras. 7 and 15.

²⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), 6. Anghie’s conclusions as to the defining incidents and ordering relevant to the making of international law differ from the conventional version in which “the European model of sovereignty, established by the defining event of the Peace of Westphalia, was gradually extended to the non-European peripheries. My argument, by contrast, is that sovereignty was improvised out of the colonial encounter [...] [T]he colonial encounter shaped the underlying strictures of the doctrine.” *Ibid.*

trated in the South, rendering them unable to exercise their minimum essential levels of human rights, we must question the methods by which international law and policy continue to subordinate developing countries and their people.²⁸

Reflecting on world poverty leads us to consider neoliberalism which has been the prevailing global economic model for several decades having been sustained through the support of international law. Who imposed it? Who does it favor? Who does it benefit? Has it served the poor as well as it has served the rich? Has it served the rich at the expense of the poor?

Neoliberalism has been the dominant ideology since the 1980s under British Prime Minister *Thatcher* and United States President *Reagan*, receiving further legitimation with the 1989–1990 collapse of communism in the Soviet Union and Central Europe.²⁹ While the state interventionism of British economist *John Maynard Keynes* was mainly favored over laissez-faire approaches in the decades following World War II,³⁰ from the late 1960s there had been a move away from “National Keynesianism to Global Neoliberalism.”³¹ As *William Tabb* explains: “The ideologically hegemonic position has been the neoliberal agenda (widely called the Washington Consensus). It calls for trade and financial liberalization, privatization, deregulation, openness to foreign investment, a competitive exchange rate, fiscal discipline, lower taxes and small government.”³²

It is largely acknowledged that neoliberalism has worsened social and material inequality intra and inter state, an important point which nonetheless obscures a more general concern that: “Income inequality is exceptionally high however it is measured and regardless of whether it is rising or falling.”³³ This model has

²⁸ That newly independent states sought to use international law in order to advance their interests in the early decades of the United Nations, and continue to do so now with a majority in the UN General Assembly, as well as through strategic groupings at the WTO, does not alter the basic fact that international law has not been a law for the underdog.

²⁹ *Manfred B. Steger*, *Globalization: A Very Short Introduction* (2003), 40.

³⁰ *Ibid.*

³¹ *William K. Tabb*, *Economic Governance in the Age of Globalization* (2004), 33.

³² *Ibid.*, 3 (footnote omitted).

³³ UNDP, *International Cooperation at a Crossroads* (note 6), 37. On the rise in inequality within states, the UNDP provides that: “[T]here has been a clear trend over the past two decades towards rising inequality within countries. Of the 73 countries for which data are available, 53 (with more than 80 % of the world’s population) have seen inequality rise, while only 9 (with 4 % of the population) have seen it narrow. This holds true in both high and low growth situations (such as China in the first case and Bolivia in the second) and across all regions.” *Ibid.*, 55.

been criticized for focusing on net benefits at the expense of distributional issues such as how markets allocate costs and benefits,³⁴ and is derived of a system that advantages industrialized countries, not least through their superior negotiating leverage. Its backing by powerful states and the resultant influence in shaping the international economic order has resulted in a negligent disregard for approaches to economic activity that are more compassionate,³⁵ or indeed more effective when it comes to poverty reduction and narrowing the gap on inequality,³⁶ as well as with regard to economic growth in developing countries.³⁷

From the perspective of human rights theory, we can see quite fundamental ontological and legal incompatibilities between this model of Darwinian economics and a favoring of private (corporate) property on the one hand, and the notions of dignity, universal minimum entitlements and the state as active duty-bearer on the other.³⁸ It has been, in the words of *Noreena Hertz*, a version of capitalism that has “decoupled the economy from social justice.”³⁹

³⁴ *Tabb* (note 31), 337.

³⁵ *Falk* (note 22), 64.

³⁶ See *Peter Townsend*, *The Right to Social Security and National Development: Lessons from OECD Experience for Low-Income Countries*, International Labour Organization Discussion Paper 18 (2007), viii.

³⁷ “Growth failure has been particularly noticeable in Latin America and Africa, where orthodox neoliberal programmes were implemented more thoroughly than in Asia. [...] Since the 1980’s [Africa] has seen a fall in living standards. There are, of course, many reasons for this failure, but it is nonetheless a damning indictment of the neoliberal orthodoxy, because most of the African economies have been practically run by the IMF and World Bank over the past quarter of a century.” *Chang* (note 15).

³⁸ “[Social movements] in these pairings reject the universal commodification by the [market efficiency advocates] in which the rights which have primacy are property rights and justice is reduced to utility maximization in a market setting.” *Tabb* (note 31), 362 (footnotes omitted). See also *Salomon* (note 4), 128–132 (“Rights-based economic growth”); and for a clear and thoughtful exposition on the “ontological” tensions, *Paul O’Connell*, *On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights*, *Human Rights Law Review* 7 (2007), 483; and *Philip Alston*, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, *European Journal of International Law* 13 (2002), 815 (on the risks of “epistemological misappropriation” of international human rights law by trade law given “the fundamentally different ideological underpinning of human rights law”).

³⁹ *Noreena Hertz*, *The Death of Gucci Capitalism*, *New Statesman* of 27 October 2008, 27. “The belief in self-interest as the guiding principle of commerce is as old as Adam Smith. What happened with the Anglo-Saxon model of capitalism was something different: the principle of rational self-interest was elevated to replace regulation and the state.” *Paul Mason*, *A Last Chance* (World Economic Conference 2008), *New Statesman*

The weaknesses of neoliberalism have been met by a parallel track – an explicit commitment to poverty reduction articulated through the Millennium Development Goals (MDGs). The Goals represent a global endorsement to do what the international economic system is not; however, the rhetoric around the MDGs' poverty reduction commitments masks menacing realities. First, these Goals pertaining to poverty are not insulated from neoliberalism's indirect approach to, or preferred means of, attempting poverty reduction. Second, the Goals would seem to represent a superficial fix, rather than seeking to address the structural causes of poverty. They do not challenge or modify commitments in the areas of trade and investment that benefit powerful states and their industries at the expense of achieving the MDGs. The Goals are declarations of intent rather than policies and the poverty reduction objective is confounded by the neoliberal policy base that persists.⁴⁰ On this account, at best the MDGs might

of 10 November 2008, 22. International human rights law does not prescribe a particular economic system; it is neutral in so far as its principles do not favor one economic model over another. It does, however, contain both principles and standards that seek to ensure that the methods for achieving economic growth are just, and that its benefits are fairly distributed. At its most basic, human rights are egalitarian, all individuals are equal. The dominant market-based strategies for growth, on the other hand, tend to be maximizing and collectivizing: they seek activities that are likely to bring the highest growth rate and are justified in terms of aggregate benefit. As the UN Committee on Economic, Social and Cultural Rights explains: "[T]he undertaking 'to take steps [...] by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development." CESCR, General Comment No. 3, The Nature of States Parties' Obligations (Art. 2(1)), UN Doc. E/1991/23 (1990), annex III, para. 8.

⁴⁰ I thank *Richard Peet* for this point and for sharing his thoughts on the topic. See similarly, "[...] efforts to gauge the role accorded to human rights in the MDG context should not be confined to eclectic, conceptually broad-minded, and avowedly human rights sympathetic analyses such as the Human Development Reports but must also focus on the more operational analyses that describe what is actually going on and what tangible policy prescriptions are being sold in the context of the operationalization of the MDG package." *Philip Alston*, *Ships Passing in the Night: The Current State of the*

be understood as a feeble complement to the international economic regime, at worst as a vehicle for advancing the will and preferences of influential states and their industries.

II. Affluence under the International Human Rights Legal Regime

International human rights law articulates the principal ethical discourse of our time, with poverty and the exercise of human rights today recognized as intertwined phenomenon.⁴¹ Why then has international human rights law not provided more of a counterweight to the ills that plague the world's poor? We might point to certain key doctrinal limits within international human rights that are serving inadequately to mitigate those harmful tendencies and practices. In Part D we will turn our attention to three rudiments of international human rights law and question how they might be reconceived were they to focus some concern on the rich in addition to the poor, in order to address better the conditions of the poor. For there to be any success in the human rights undertaking of attending meaningfully to poverty globally there will need to be a shift in focus from the poor to the rich, from the powerless to the powerful and to the rules and policies that govern that interchange.

One difficulty in this regard stems from the conventional approach to human rights law that is rooted in securing the "minimum" essential conditions necessary for a person to live a life of dignity, while not also including a doctrine premised on people possessing a "maximum" degree of rights. Under conditions of interdependence this might be recognized as an untenable omission. A second problem area is the narrow interpretation so far of the obligation upon a state party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Convention on the Rights of the Child (CRC) to provide international cooperation (and assistance) to "the maximum of its available resources." A third problem is the outmoded primary focus of international human rights law on domestic obligations in the area of socio-economic rights,

Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals, *Human Rights Quarterly* 27 (2005), 755, 783.

⁴¹ See CESCR, Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C12/2001/10 (2001); *Christine Chinkin*, The United Nations Decade for the Elimination of Poverty: What Role for International Law?, *Current Legal Problems* 54 (2001), 553.

rather than on international (*i.e.* external or transnational) obligations as provided for in a range of instruments.

As will have become clear, in this exploration of the ways in which international legal regimes serve privilege, our attention will be less on the victims of poverty – as the logic of human rights law favors with its assumed subjects being those left out, discriminated against, marginalized – but on the perpetrators and beneficiaries of world poverty.⁴² When considering the distribution and division of resources internationally we would be remiss to focus our analysis primarily on those denied access to wealth, without considering those whose access – far from being denied – has been largely unimpeded. While the theory of economic globalization is not premised on a zero-sum situation, the practice and outcomes are less definite, offering up quite clear winners and losers. The inequality in wealth that this model has generated is now the comparative advantage of the rich states.⁴³ *David Gordon* and *Peter Townsend* rightly highlight in this regard that: “What has been neglected is not so much the conditions of poverty or of exclusion, but rather those of acquisition and affluence at the other extreme of the population experience, and the mechanics or agents of the entire distribution.”⁴⁴

B. The Legal Construction of Poverty

The brutal and exploitative imperialist and colonialist “civilizing mission” of the nineteenth century rested on the ideology that far off territories and their peoples could be improved upon, saved and redeemed.⁴⁵ In many ways, the international “monetary interventions” that have taken place in the past 30 years by the public international financial institutions have been tacitly or explicitly

⁴² See *Marks* (note 10) on *Mamdani*'s “beneficiary thesis.”

⁴³ *Fleurbaey* (note 9), 145.

⁴⁴ *David Gordon/Peter Townsend*, *The Human Condition is Structurally Unequal*, in: *Peter Townsend/David Gordon* (eds.), *World Poverty: New Policies to Defeat an Old Enemy* (2002), xi, xv.

⁴⁵ *Anne Orford*, *Locating the International: Military and Monetary Interventions after the Cold War*, *Harvard International Law Journal* 38 (1997), 443, 482–483. Of course, “[d]espite the focus on salvation and redemption, the ‘civilising mission’ was never in fact conducted benevolently, but ‘was always accompanied by domination’ and exploitation.” *Ibid.* (Footnote omitted).

shaped by this same philosophy: that external actors know better and that while it may hurt what is being done is for their own good.⁴⁶

Antony Anghie argues that, in many respects, the real successor to the Mandate System under the League of Nations was not the Trusteeship System of the United Nations (UN), but rather the two Bretton Woods Institutions (BWIs) – the World Bank and International Monetary Fund (IMF);⁴⁷ the discourse merely shifted from one based on race to one based on economics.⁴⁸ The basic premise of the civilizing mission was maintained and reproduced “embodied in the very structure, logic and identity of international institutions.”⁴⁹ A variation on the civilizing mission motive and the interventions necessary to improve the welfare of economically deprived peoples justified the work of the BWIs. The neutral and scientific realm of economics validated the “expanding and increasingly sophisticated forms of intervention.”⁵⁰ The Mandate System posited that the route to joining the (civilized) international community of (European) states was via integration into the global economy, an ethos that was transferred to development and the international financial institutions.⁵¹ Influenced by powerful states, today these institutions, along with the WTO, shape multilateral trade, investment and finance.⁵²

⁴⁶ “Justification for military and monetary intervention draw strongly upon these stories of those who cannot govern themselves, who beseech dominance.” *Ibid.*, 483.

⁴⁷ *Anghie* (note 27), 207.

⁴⁸ *Ibid.*, 193. “The Mandate System sought to protect previously colonized and dependent peoples, to promote self-government and to integrate them into the international system as sovereign, independent nation-states.” *Ibid.*, 116. “[It] furthered the cause of international justice in significant ways.” *Ibid.*, 191.

⁴⁹ *Ibid.*, 193. This is not to imply that, as *Anghie* notes: “[I]nternational institutions invariably and inevitably reproduce this logic of the civilizing mission and always operate against the interests of developing countries.” *Ibid.*, 194.

⁵⁰ *Ibid.*, 193.

⁵¹ *Ibid.*, 207.

⁵² “With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.” Agreement Establishing the World Trade Organization, 15 April 1994, UNTS 1867, 3, Art. III:5 (Marrakesh Agreement). See generally *Tabb* (note 31), 5.

I. The Myth of Neutrality and Inevitability

This myth that the international economic order represents an objective state of affairs, an inevitable model, has underpinned the project of economic liberalization shaming dissident voices and crowding out potential alternatives. The liberalization and integration of global markets have so far been presented “as a ‘natural’ phenomena that further individual liberty and material progress in the world.”⁵³ Assigning responsibility for the vast negative influences on human well-being in poor countries where absolute poverty remains rife, and for the chasm created between the rich and poor globally is obscured by the popular myth that the neoliberal course of history is foreordained, irreversible, and that no one commandeers it.⁵⁴ As such, the international market is said to function as an autonomous phenomenon, outside the realm of human choice and the decisions of dominant states, and not as a deliberate project, sanctioned, then legally constructed and advanced by a range of international institutions lead by powerful states.⁵⁵ Far from being immaculately conceived, it is a system that is structured to disadvantage some, albeit as a consequence of advantaging others.⁵⁶ *Susan Marks* speaks of a “false contingency” that situates exploitation under conditions of capitalism and the injustice derived of it as arbitrary or accidental rather than reflective of “systemic logics at work.”⁵⁷ Poverty then, “is not simply an occurrence but a policy option and practical project. It is something that certain groups of people do to others”⁵⁸ and its efficacy is assisted by interna-

⁵³ *Steger* (note 29), 97.

⁵⁴ Notably, these “deterministic perspectives” are also at odds with the emphasis on participation as a core human right. *Robert Howse*, Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization, UN Doc. E/CN.4/Sub.2/2004/17 (2004), para. 24.

⁵⁵ *Bhupinder S. Chimni*, Third World Approaches to International Law: A Manifesto, in: Antony Anghie/Bhupinder Chimni/Karin Mickelson/Obiora Okafor (eds.), *The Third World and International Order: Law, Politics and Globalization* (2003), 47, 52; *David Kennedy*, Introduction, *International Symposium on the International Legal Order*, LJIL 16 (2003), 839, 841.

⁵⁶ *Margot E. Salomon*, International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice, in: Bard-Anders Andreassen/Stephen P. Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions* (2006), 96.

⁵⁷ *Marks* (note 10), 302.

⁵⁸ *Susan Marks*, Human Rights and the Bottom Billion, *European Human Rights Law Review* 1 (2009), 37, 48.

tional legal regimes that both favor the powerful (trade and investment), while inadequately constraining their worst tendencies (human rights).

Taking this one step further, trade commentators point to the widely held belief that a commitment to markets seems to dictate a particular set of policy choices. Arguments rejecting this false premise rest on the idea that “there is more than one way of translating ‘market principles’ of economic freedom and free competition into concrete policy proposals,”⁵⁹ but this is set against a general belief that the market economy is equated with “a particular, historically contingent set of economic institutions and practices.”⁶⁰ Closely tied to this narrative about the fated nature of contemporary economic globalization is the claim that globalization benefits everyone, that it is a universal, common good. The figures on world poverty and inequality force a rejection of this “false ideology of mutual advantage.”⁶¹

There may be signs of “the old epistemic community based on technocracy of neo-liberal economics” losing its grip on the multilateral trading system,⁶² and for several years now the Washington Consensus has had its edges softened with increased attention to the human impact of “market failures.”⁶³ Yet, while neoliberalism (Washington Consensus) is widely understood by even mainstream economists and policymakers to have failed in terms of its announced goals of more rapid economic growth, reduced poverty and more stable econo-

⁵⁹ *Andrew T. F. Lang*, *The Thirteenth Chime: Experimentalism and the Global Economy* (Review Article: *Roberto Mangabeira Unger*, *Free Trade Reimagined: The World Division of Labor and the Method of Economics*), *Modern Law Review* 71 (2008), 984, 985.

⁶⁰ *Roberto Mangabeira Unger*, *Free Trade Reimagined: The World Division of Labor and the Method of Economics* (2007) as cited in *Lang* (note 59), 986.

⁶¹ *Marks* (note 10), 302–303.

⁶² *Howse* (note 54), para. 51.

⁶³ It is a convenient strategy to dismiss critics as mere “anti-globalizers” but this is a facile conclusion that attempts to silence dissent and ignores the range of views, not least, along the spectrum of free-trade *v.* protectionism. By way of example, *Rodrik* remarks on the “strong diminishing returns” that may be impacting on the prevailing liberalization agenda in suggesting the need for the creation of policy space for nations to handle the problems that liberalization creates, while arguing that “losses from a real retreat from today’s globalization [*i.e.* a collapse towards protectionism and bilateralism] would be catastrophic.” *Dani Rodrik*, *How to Save Globalization from its Cheerleaders*, Faculty Research Working Paper Series, John F. Kennedy School of Government, Harvard University (September 2007), 19–20, available at: <http://ssrn.com/abstract=1019015>.

mies,⁶⁴ this recognition has not led to a meaningful overhaul of the system.⁶⁵ Some highlight a trend toward “blam[ing] client states and not the global state economic governance institutions or transnational capital for these failures” under the popular notion of national ownership.⁶⁶

II. Poverty as Endogenous to Developing States

For the main international financial institutions, development and poverty reduction is seen largely as a domestic challenge, with good governance, transparency, anti-corruption measures and macro-economic restructuring central to their approaches. Poverty and underdevelopment is understood to arise from factors which are largely endogenous to developing states.⁶⁷ All the while, the IFIs have among their purposes “to promote private foreign investment [...] and

⁶⁴ *Tabb* (note 31), 3. This point was put concisely by the 2008 Nobel prize winning economist (Professor) *Paul Krugman* when he stated: “The welfare benefits of globalization were oversold.” *Paul Krugman*, *Globalization and Welfare*, London School of Economics, June 2007. Notes on file with author. Lecture available at: www.lse.ac.uk. *Tabb* concludes that: “[O]ver the years of neoliberal hegemony growth has slowed, poverty has increased, and economic and financial crises have plagued most countries of the world economy. The data on this is overwhelming.” *Tabb* (note 31), 3. *Chang’s* findings are: “[M]any developing countries have actually been performing quite badly over the last two and half decades. The annual per capita growth rate of the developing world has halved in this period, compared with the ‘bad old days’ of protectionism and government intervention in the 1960s and the 1970s. Even this modest rate has been achieved only because the average includes China and India – two fast growing giants, which have gradually liberalised their economies but have resolutely refused to put on Thomas Friedman’s golden straitjacket.” *Chang* (note 15).

⁶⁵ The “post-Washington Consensus” policies are described as “maintain[ing] a neoliberal approach to globalization, pursuing privatization, liberalization and deregulation – although with some attention to institutional contexts and social consequences.” UN Research Institute for Social Development (UNRISD), *The Sources of Neoliberal Globalization*, Report of UNRISD Seminar on Improving Knowledge on Social Development in International Organizations II (2002), 4.

⁶⁶ *Tabb* (note 31), 4. *Rodrik’s* conclusion on the “Augmented Washington Consensus” is: “Far from endorsing this enlarged agenda, my purpose in drawing it up (as a summary of where I felt policy advice had moved) was to bemoan its lack of realism and relevance [in relation to] the needs of developing societies.” *Dani Rodrik’s* weblog available at: http://rodrik.typepad.com/dani_rodriks_weblog/2007/12/dont-believe-ev.html.

⁶⁷ See *Anghie* (note 27), 268.

[...] international trade.”⁶⁸ A selective disregard for the integral links between domestic and international factors distance the World Bank and IMF from creatively seeking to reform the fundamental structures of the international economy itself – structures which operate largely to the disadvantage of the countries that they seek to assist. Quite the opposite, the IFIs (in particular through their influential member states) make a central contribution in maintaining the structures.

In the WTO it would seem a similar schism plays out whereby the idea that the multilateral trading system should be used for development objectives remains controversial. The UK Department for International Development concludes that turning trade into development outcomes and poverty reduction is felt within the WTO to be a role for national governments in conjunction with the IFIs, and not as part of the trading system itself.⁶⁹ This approach serves to reinforce the increasingly discredited view that trade should be understood as an end unto itself, as well as to ignore the role the trading system, as currently designed, plays in actually exacerbating poverty and its attendant deprivations, such as the rights of everyone to an adequate standard of living, to adequate food, clothing and housing, and to the highest attainable standard of physical

⁶⁸ Articles of Agreement of the International Bank for Reconstruction and Development, 27 December 1945, UNTS 134, 2 (as amended effective 1989), Arts. I(ii) and (iii). The IMF’s work in trade is rooted in Article I(ii) of its Articles of Agreement, which states that it shall “facilitate the expansion and balanced growth of world trade.” Articles of Agreement of the International Monetary Fund, 27 December 1945, UNTS 39, 2 (as amended 1969, 1978, 1992). Trade policy forms a fundamental aspect of the Fund’s core macroeconomic agenda, with conditionality related to trade liberalization found in 80 % of the Enhanced Structural Adjustment Facility/Poverty Reduction and Growth Facility programs, and with only 20 % of borrowing countries never having had any binding conditionalities related to trade imposed by the IMF. Recent research indicates that the IMF’s use of trade conditionality has followed only a slightly different pattern than that of the Bank. *Bull/Jerve/Sigvaldsen* (note 20), 31. See further *Margot E. Salomon*, *International Economic Governance and Human Rights Accountability*, in: *Margot E. Salomon/Arne Tostensen/Wouter Vandenhole* (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (2007), 153.

⁶⁹ *Susan Prowse*, *Trade and Poverty Panel, Does International Law Mean Business?: A Partnership for Progress*, International Law Association, British Branch Annual Conference, London, May 2008. Notes on file with author. Trade reform is necessary but not sufficient to address poverty. Economic evidence does not show that trade reform contributes to poverty reduction. *Ibid.* See also, *Arjun K. Sengupta*, *Working Group on the Right to Development*, Sixth Report of the Independent Expert on the Right to Development: *Implementing the Right to Development in the Current Global Context*, UN Doc. E/CN.4/2004/WG.18/2 (2004), para. 11.

and mental health.⁷⁰ An important aspect of this split between the domestic and international realms is reflected in the traditional view found within the WTO that it is a “member-driven” organization and as such responsibility and accountability to citizens falls to individual member states in relation to their domestic polities.⁷¹ As will be demonstrated in Part D, the application of international human rights law remains similarly bifurcated, too readily neglecting the role and responsibilities of states acting internationally.

Debates on human rights and development within the UN reflect similar cleavages. Although all states are attentive to the existence of both domestic and international factors relevant to poverty reduction and the exercise of human rights, Northern states prioritize the need for the fulfillment of human rights in developing countries, including good governance and anti-corruption measures, while Southern countries emphasize the need for an international economic environment conducive to being able to develop economically, socially and culturally.⁷² The point here is not to disregard country-specific factors in explaining variation from one country to another but to emphasize – as *Thomas Pogge* and others have – that there are germane factors external to the developing state that impact on its poverty and degree and type of development.⁷³

C. The Millennium Development Goals and the Guise of Humanitarianism

From within the dominion of global neoliberalism we see the emergence of a parallel track focused on poverty reduction – given recent voice in large part

⁷⁰ ICESCR (note 24), Arts. 11 and 12. Concerns regarding negative impacts on human rights and human development are also raised in the context of regional and bilateral free trade agreements. See *Paul Hunt*, Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Health: Mission to the WTO, UN Doc. E/CN.4/2004/49/Add.1 (2004); UNDP, *International Cooperation at a Crossroads* (note 6), 137.

⁷¹ *Howse* (note 54), para. 16.

⁷² *Margot E. Salomon*, *Towards a Just Institutional Order: A Commentary on the First Session of the UN Task Force on the Right to Development*, *Netherlands Quarterly of Human Rights* 23 (2005), 409, 409–410.

⁷³ *Thomas Pogge*, *The First United Nations Millennium Development Goal: A Cause for Celebration?*, *Journal of Human Development* 5 (2004), 377, 390; *Salomon/Tostensen/Vandenhole* (note 68).

by the Millennium Development Goals. The MDGs reflect seven measurable time-bound global commitments (goals and targets) to address poverty and its attendant ills in poor countries by 2015.⁷⁴

MDG 8 is a pledge among developed states to pursue international cooperative endeavors to achieve these ends, including by increasing Official Development Assistance (ODA) to 0.7 % gross national income (GNI) by 2010, improving market access for developing countries and by engaging key industries within the private sector. While rhetorically MDG 8 concerns developing “a global partnership,” the weight of the responsibility for giving effect to the partnership is understood to rest with developed countries and it is those countries that report against it.⁷⁵ Goal 8 is focused on action to be taken at the international level and is essential to advancing the other seven Goals. While adherence is measurable via its indicators (*e.g.* ODA, market access, debt relief, proportion of people with access to medicine, technology transfer) it contains no enforcement mechanism. The Goals grew out of the UN Millennium Declaration adopted in September 2000 by 189 states attending the Millennium Summit at the UN headquarters in New York⁷⁶ and have since been endorsed, *inter alia*, by the World Bank, the IMF, and the European Union (EU), and over 100 African, Caribbean and Pacific countries as part of the Cotonou agreement.

Valid criticisms of the MDGs from a human rights perspective notwithstanding, including their focus on averages and the commitment to addressing the development of only some people rather than “everyone,”⁷⁷ the Goals can be

⁷⁴ Details available at: www.un.org/millenniumgoals.

⁷⁵ Available at: www.undp.org/mdg/donorcountryreports.html.

⁷⁶ UN Millennium Declaration, GA Res. A/55/2 of 18 September 2000.

⁷⁷ For human rights appraisals of the MDGs see, CESCR, The UN Millennium Development Goals and Economic, Social and Cultural Rights, A Joint Statement by the UN Committee on Economic, Social and Cultural Rights and the UN Commission on Human Rights’ Special Rapporteurs on Economic, Social and Cultural Rights (2002), available at: www.unhchr.ch/housing/MDG.doc; Asia-Pacific Civil Society Forum, Statement of the Asia-Pacific Civil Society Forum on the Millennium Development Goals and the Eradication of Extreme Poverty and Hunger, Bangkok 6–9 October 2008; UN Millennium Project and Center for Human Rights and Global Justice (NYU), Human Rights Perspectives on the Millennium Development Goal, Conference Report, 11 November 2003; UNDP, Human Development Report 2003, Millennium Development Goals: A Compact among Nations to End Human Poverty (2003); UN Permanent Forum on Indigenous Issues, Report on the 5th session, UN Doc. E/C.19/2006/11 (2006); Office of the High Commissioner of Human Rights (OHCHR), Claiming the Millennium Development Goals: A Human Rights Approach (2008).

seen as an arrangement for the realization of socio-economic rights (but of a proportion of the world's poor).⁷⁸ As such, for the purposes of this paper, MDGs 1–7 will generally be taken to indicate the rhetorical commitment of the international community of states, individually and collectively, to give effect to basic socio-economic rights of the poor in developing countries. MDG commitments include: reducing by half the proportion of people living in extreme poverty and the proportion of people who suffer from hunger; the achievement of universal primary education; reducing by two-thirds the rate of child mortality and by three-quarters the maternal mortality ratio; the achievement (by 2010) of universal access to treatment for HIV/AIDS for all those who need it; halting and beginning to reverse the incidence of malaria and other major diseases; reducing by half the proportion of people without sustainable access to clean drinking water; improvement in the lives of slum-dwellers (by 2020); and ensuring environmental sustainability.

Pursuit of the MDGs are well underway. What has emerged are profound conflicts between the achievement of these alleged global objectives and the existing international economic system for the accumulation and distribution of wealth, particularly as regards Sub-Saharan Africa, and the rules or application of rules in place to advance this system. The Goals were not set up to address the structural conditions antagonistic to their achievement and they are now serving to advance the economic interests of wealthy states even under the guise of the humanitarianism of addressing world poverty. These benefits can take various forms.

I. Advancing the Interests of Wealthy States: The Notion of Common Benefit

MDG 8 on a Global Partnership for Development provides some general policy prescriptions for what is otherwise essentially a set of Goals reflective of (professed) intent, not concrete policy. Perhaps unsurprisingly MDG 8's main target

⁷⁸ The MDGs might also contribute to advancing the legal status of socio-economic rights. *Alston* suggests that at least some of the MDGs constitute norms of customary international law on the basis that they reflect a bare minimum selection of socio-economic rights and that this narrow core has been widely and repeatedly endorsed by states thereby generating legal consequences. *Alston* (note 40), 771–775. On the existence of a customary international legal norm to respect and observe basic human rights, see *Salomon* (note 4), 160 *et seq.*

is to “further development of a rules-based, predictable, non-discriminatory trading and financial system,” merely “including” a “commitment to good governance, development, and poverty reduction nationally and internationally.”

While multilateral trade rules (in various areas of economic policy) are justified on the basis of being of benefit to all, *Susan Marks* echoes an increasingly familiar refrain in her reference to the “false ideology of mutual advantage.” The target of a rules-based system tells us little about which rules and whose rules, or even why rules are the primary objective at all rather than being framed clearly as a means to an end. Consistent with a familiar pro-poor and pro-development critique of the international trade regime generally, this target reads as if the “further development” of a rules-based trading system is an end in itself. All the while affluent countries are charged with a hypocritical use of this system,⁷⁹ while the market share of developing countries in world exports is only marginally higher than it was fifteen years ago (and many of these countries now face significant new challenges with high import prices for food and fuel).⁸⁰ An inter-agency UN Task Force on MDG 8 (the Members of which include the IFIs and the WTO, among others) has recently stressed that: “Seven years on, the failure to conclude a development round constitutes the largest implementation gap in the area of trade, and arguably within the realm of MDG 8. International effort must be redirected to complete the Round in accordance with its original intention of being development-focused, and thus of special benefit to the lowest income countries.”⁸¹

There are many examples of how this disconnect between the MDGs and trade rules – allegedly of common benefit – plays out and the coverage here can be merely illustrative. The intellectual property regime raises longstanding concerns in the areas of access to medicines⁸² – even with WTO developments

⁷⁹ See the critical analysis in, *Martin Wolf*, *Why Globalization Works: The Case for the Global Market Economy* (2005), 212 *et seq.*

⁸⁰ UN MDG Gap Task Force, *Millennium Development Goal 8: Delivering on the Global Partnership for Achieving the MDGs* (2008), 19.

⁸¹ *Ibid.*, ix.

⁸² Access to the goods themselves as a result of unaffordable prices as a direct result of the proprietary control afforded by intellectual property rights and products being physically unavailable or inaccessible to consumers as an indirect outcome of the proprietary regime of intellectual property rights. *Ruth L. Okediji*, *Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations*, in: *Salomon/Tostensen/Vandenhoele* (note 68), 211, 231–230.

that have sought, in part, to address this.⁸³ Despite commitments under Goal 6 aimed at giving effect to the right to health by combating HIV/AIDS and other diseases, we have seen little change to a legal regime designed for countries with industries in research and development to protect, and *not* for countries with people who need drugs. As *Ruth Okediji* explains: “The design of the global system is deliberately configured to address needs and interests of suppliers of global public goods without any serious regard for the interests and/or priorities of net importers of such goods.”⁸⁴ Despite the explicit reference in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs),⁸⁵ it is highly questionable whether social welfare is, in any observable sense, the objective of the multilateral regulation of intellectual property rights. MDG 6 objectives are merely annexed on to an international economic legal regime used to serve other interests.

MDG 1 focused on reducing hunger is but an annex to an intellectual property regime that is also criticized for exacerbating poverty, hunger and food insecurity of people in developing countries. An effect of the regime has been the patenting of plants and their genes by large transnational agribusiness which prevents farmers from saving and reusing seeds. The 2008 Concluding Observations on India by the UN Committee on Economic, Social and Cultural Rights (CESCR)

⁸³ WTO, Doha Declaration on Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs) and Public Health, WT/MIN(01)/DEC/2 of 20 November 2001 and the amendment to Article 31(f) of the TRIPs Agreement. *Okediji* concludes: “[F]ormal mechanism[s] such as the Doha Declaration [...] ostensibly designed to alleviate the legal burdens imposed by the global intellectual property system, [has] failed in practice to redress the inadequate dissemination and diffusion of knowledge goods to the vast majority of the world.” *Okediji* (note 82), 213. On the alleged need for an amendment *Howse* concludes that: “It should have been possible to interpret Article 31 through the general exceptions clause at Article 30 of the Agreement to allow for the export of medicines produced under compulsory licensing, however the WTO Secretariat and the US Trade Representative had ‘established’ the interpretation that simply didn’t allow for it, requiring nothing short of an amendment to the treaty. [...] Power at the WTO is about the control of ideas, of information and interpretation to advance the ideologies of the powerful members.” *Robert Howse*, Accountability Issues in International Economic Governance, Conference on the Accountability for Human Rights Violations by International Organizations, International Law Association Belgian Branch, Brussels, March 2007. Notes on file with author.

⁸⁴ *Okediji* (note 82), 232.

⁸⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, UNTS 1869, 299.

attributes the extreme poverty among small hold farmers, and the increasing rates of suicide over the past decade in part to the introduction of genetically modified seeds by multinational corporations and the corresponding escalation in the prices of seeds, fertilizers and pesticides, particularly in the cotton industry.⁸⁶

Notably, while the Millennium Declaration upon which these Goals were based called for an “equitable” trading system, this word was omitted from the Goal 8 target.⁸⁷ An alternative point of departure for a global commitment that convincingly seeks to reduce poverty, hunger and related deprivations through the critical component of international cooperation or partnerships is to offer a human-centered framework of analysis and policy construction that identifies rights violations and potential violations – as well as potential beneficiaries of the policies applied – and is neutral in the sense that it allows for an open investigation of, and debate about, the strength of various alternative approaches and solutions to world poverty. To do so it would need to place international political inequalities at the heart of both the development and trade agendas by addressing *inter alia* issues of representation in international decision-making and the need for effective institutional cross-fertilization. Increasingly mandates in one area cannot be implemented without undermining the objectives of other key international organizations.⁸⁸

⁸⁶ CESCR, Concluding Observations: India (40th session), UN Doc. E/C.12/IND/CO/5 (2008), para. 29.

⁸⁷ UN Millennium Declaration (note 76), Art.13.

⁸⁸ The UN High-Level Panel on Threats, Challenges and Change remarks that “[...] decision-making on international economic matters, particularly in the areas of finance and trade, has long left the United Nations and no amount of institutional reform will bring it back.” Report of the Secretary-General’s High-level Panel, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565 (2004), para. 274. In the words of *Saith*: “Participation and democracy, good democratic government and power-sharing are sought in the developing countries, while the international global decisions making structures are arbitrarily dominated by a tiny minority of powerful countries that cannot be seriously held accountable to any democratic global authority. This applies to the global economic and political decision-making architecture where the UN system is arguably being reduced and distressed to the role of an implementing agency of deals struck outside its purview by the dominant global power [...]” *Ashwani Saith*, *From Universal Values to Millennium Development Goals: Lost in Translation, Development and Change* 27 (2006), 1167, 1193.

II. Advancing the Interests of Wealthy States: Explicit Unilateral Benefits

Advantages to the wealthy states (and their industries) can underpin policy explicitly. The US' Millennium Challenge Account administered by the Millennium Corporation is set up to offer Official Development Assistance to countries that govern well and invest in people.⁸⁹ But there are concerns regarding the criteria for the determination of "economic freedom" in recipient countries understood as open markets and "policies that foster enterprise and entrepreneurship."⁹⁰ The result is "to disadvantage countries that engage in redistributive programmes, seek improvements in the condition of marginalized groups through regulation of business and other policies based on equity, participation and accountability."⁹¹ In this way policies in developing countries are shaped to pursue the donor's economic interests, while ostensibly promoting development.

Distortions in the agricultural markets of developed economies continue to provide a wonderful benefit to rich countries, not to mention an illegal disregard for the rules-based trading system. By way of example, the subsidies paid by the US to its 25,000 cotton farmers exceed the entire gross national income of virtually every cotton-exporting country in West and Central Africa.⁹² In Benin alone, the fall in cotton prices in 2001–2002 was linked to an increase in poverty from 37 % to 59 %.⁹³ Developed country support to agriculture, led by the EU and US as the "subsidy superpowers," amounts to US\$ 350 billion a year⁹⁴ and thus even though agriculture is an area of comparative advantage for many developing countries, they have hardly managed to raise their share of world exports.⁹⁵ The agricultural support is almost four times Official Development

⁸⁹ Available at: www.mcc.gov/selection/indicators/index.php.

⁹⁰ *Stephen P. Marks*, *The Human Right to Development: Between Rhetoric and Reality*, *Harvard Human Rights Journal* 17 (2004), 137, 164.

⁹¹ *Ibid.*

⁹² *Brendan McGivern*, *WTO Appellate Body Report: United States-Cotton Case Summary*, 10 June 2008, White and Case LLP, Geneva. On file with author.

⁹³ UNDP, *International Cooperation at a Crossroads* (note 6), 131. More than 40 % of Africans do not have the ability to obtain sufficient food on a day-to-day basis and 40 % of farmers in Africa are women. UN Millennium Project, *Fast Facts: The Faces of Poverty* (2005).

⁹⁴ UNDP, *International Cooperation at a Crossroads* (note 6), 129.

⁹⁵ *Wolf* (note 79), 215.

Assistance,⁹⁶ which, contrary to the MDG commitments, has been in decline for the second consecutive year anyway.⁹⁷ In ruling against the US on its cotton subsidies, including for failure to implement the original ruling against it, the WTO Appellate Body affirms that the world market price for cotton would have increased significantly “but for these subsidies.”⁹⁸

MDG 1 seems not to have figured in the calculation for the targets related to first generation biofuels. A recent study cited in *Foreign Policy* suggests that Northern government decisions, especially by the US, to encourage their farmers to divert production away from crops for human consumption and toward ethanol and other biofuels “are responsible for more than 50 % of the recent increase in food prices and will account for more than 33 % of food inflation in the next decade.”⁹⁹ Recent World Bank findings indicate that the US and EU drive for biofuels has in fact forced global food prices up by 75 % (far more than the 3 % previously estimated). The rising food prices have pushed an estimated 100 million people worldwide below the poverty line.¹⁰⁰

Not only do these policies undermine MDG commitments, they constitute serious human rights violations. There are obligations under human rights treaties for states not to pursue policies that have a negative impact on the right to adequate food or the right to the highest attainable standard of health beyond their borders; to protect the ability of people outside their respective territories to exercise these rights by appropriately regulating the transnational private sector; and an obligation to cooperate internationally in order to contribute to the fulfillment of these rights. Expert suggestions such as the establishment of

⁹⁶ “Trade-distorting agricultural support in Organization for Economic Cooperation and Development (OECD) countries has been declining both in value as a percentage of GDP and in farm receipts, but at \$ 363 billion in 2006 (or \$ 355 billion in 2005 prices) remains very high in absolute terms, almost four times ODA.” UN MDG Gap Task Force (note 80), 21.

⁹⁷ UN Millennium Development Goals Report (2008), 44. Available at: www.un.org/millenniumgoals.

⁹⁸ WTO, *United States – Subsidies on Upland Cotton (Brazil v. United States)*, Report of the Appellate Body of 3 March 2005, WT/DS267/AB/R, para. 763(c)(i)(B); WTO, *United States – Subsidies on Upland Cotton (recourse to Article 21.5 of the DSU by Brazil)*, Report of the Appellate Body of 2 June 2008, WT/DS267/AB/RW (US failed to implement the original 2005 ruling).

⁹⁹ *Moisés Naím*, *The Global Food Fight*, *Foreign Policy* of 10 July 2008.

¹⁰⁰ *Aditya Chakraborty*, *Secret Report: Biofuel Caused Food Crisis*, *The Guardian* of 4 July 2008.

international human rights and environmental guidelines on the production of biofuels, compliance with which would be necessary for access to international markets¹⁰¹ represent the type of potential solution that should have been sought by the relevant states as part of an *ex ante* human rights and MDG impact assessment consistent with their positive obligations to exercise due diligence in order to *prevent* human rights violations.

Similarly, it is extremely difficult to see where the MDGs figure in the move towards having industrialised countries and their industries buy and lease fertile land in developing countries to ensure their own food security – or in the latter case profit from a food crisis should it occur at home, or if that does not transpire then through exports elsewhere. Recent reports indicate that Daewoo Logistics of South Korea is expected to pay nothing for a 99 year lease of 1.3 million hectares – almost half of Madagascar’s arable land – while 70 % of Madagascar’s population lives below the poverty line, 50 % of children under three years of age suffer retarded growth due to a chronically inadequate diet,¹⁰² and the World Food Programme provides food relief to 3.5 % of the population.¹⁰³

We see similar bilateral investment agreements being arranged with Middle Eastern states securing land in Sudan and Ethiopia even though 5.6 million Sudanese and ten million Ethiopians are currently in need of food aid.¹⁰⁴ Undoubtedly these situations give rise to grave concerns over the domestic responsibilities of the relevant states, as it remains highly questionable what benefits the local community or country (beyond the elites) will derive from these arrangements.¹⁰⁵ However, that these deals may represent scandalous domestic “development”

¹⁰¹ *Olivier De Schutter*, Report of the Special Rapporteur on the Right to Food, Building Resilience: A Human Rights Framework for World Food and Nutrition Security, UN Doc. A/HRC/9/23 (2008), para. 32.

¹⁰² *Song Junga/Christian Oliver/Tom Burgis*, Daewoo to Cultivate Madagascar Land for Free, Financial Times of 19 November 2008. Claims that Madagascar will benefit from the investment in roads, irrigation and grain storage facilities prompted an EU diplomat in southern Africa to retort: “We suspect very little benefits for Madagascar. Extractive projects have very little spill-over to broader industrialisation.” *Ibid.*

¹⁰³ BBC World Service, Daewoo Leases Madagascar Land for Crops, Broadcast of 20 November 2008, available at: www.bbc.co.uk/worldservice/news/2008/11/081120_madagascar_wt_sl.shtml.

¹⁰⁴ *George Monbiot*, Rich Countries Once Used Gunboats Now they Use Trade Deals, The Guardian of 26 August 2008, 25; *Jeffrey Gettleman*, Darfur Withers as Sudan Sells Food, The New York Times of 10 August 2008.

¹⁰⁵ Possible benefits to local populations are overshadowed by the basic fact that the agreements are between partners with vastly unequal power.

policies¹⁰⁶ and *prima facie* violations under several human rights treaties, does not detract from the international responsibilities of foreign states to respect and protect the right to be free from hunger and to food security of people in other countries.¹⁰⁷ It is difficult to assume that this situation represents anything but an utter disregard for MDG 8. This Goal is meant to reflect a commitment to develop global partnerships for development, including with the private sector, in meeting the other seven goals, the first being to reduce poverty and hunger.

We have an international legal and regulatory system that tacitly or explicitly favors powerful and wealthy states and their commercial sectors. The neoliberal development policies are made possible by “elaborate legal regimes – of both public and private law – to support policies of free trade and private investment.”¹⁰⁸ In concrete terms they trump international law and policy focused on justice and fairness. The issues pertaining to poverty, access to food and food security, and medicines are marginalized as human rights issues or development issues and recognized instead by the powerful as “non-trade concerns.” It reinforces the assumption that international trade and investment is the primary game in town against which other values – values that are critical to poor countries and their people – may be considered. The risk is that the function of the rule of international law is reduced largely to furthering commerce, with the protection and promotion of human rights reduced to a source of competitive disadvantage.¹⁰⁹

D. Revisiting International Human Rights Law

I. The Minimum Essential Level of Rights and the Capping of Entitlements

The theory of international human rights is underpinned by a concern with securing the minimum essential conditions necessary for all to live in dignity.

¹⁰⁶ “The dark side of all this development is displacement [...] Development in Sudan often means uprooting other rural subsistence farmers for large-scale commercial projects. Smallholder food production goes down, commercial food production goes up, and food relief serves as a subsidy to this transformation, keeping the displaced alive.” *Alex de Waal*, Social Science Research Council as quoted in *Gettleman* (note 104).

¹⁰⁷ CESCR, General Comment No.12, The Right to Adequate Food (note 26), paras. 36 and 41.

¹⁰⁸ *David Kennedy*, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004), 149.

¹⁰⁹ On the latter point, *Tabb* (note 31), 335–336.

People have claims on the satisfaction of the minimum rights we should all have.¹¹⁰ “Minimum” then, is the threshold that pertains to the downtrodden, to the deprived, to the victims of human rights violations. However, by confining the focus on those whose socio-economic rights have been violated, the doctrine serves to overlook the significance of appraising a “maximum” level of rights: those whose rights are “oversubscribed.”¹¹¹ Our concern should be with those who possess not only less than the minimum, but *far more* than the minimum.¹¹² On this broader account, we consider not merely the victims of human rights abuses, the perpetrators and/or duty-bearers, but the beneficiaries too, especially in so far as world poverty and world privilege are today inextricably part of the same phenomenon. Beyond the binary repertory of rights-holders and duty-bearers, the human rights project might concern itself with those who have profited and prospered at the expense of others. An entry point for international law into the role of beneficiaries is through the concept of exploitation, a subject long the concern of human and labor rights standard-setting.¹¹³

Arguably, this differential between those whose rights are undersubscribed and those whose rights are oversubscribed would matter less in a clear non-zero-sum situation or where equality of opportunity was greater. But in an era where external policy decisions and internal decisions with external effect in the capitals and boardrooms of industrialized countries resonate around the world and a level playing field in economic affairs remains illusive,¹¹⁴ we must think differently about who may suffer for another to benefit. A consequence of the advantages gained by some under capitalism’s current expression is to render

¹¹⁰ CESCR, General Comment No. 3, The Nature of States Parties Obligations (note 39), para. 10; CESCR, Statement on Poverty (note 41), paras. 17–18.

¹¹¹ I owe this term to *Peter Townsend*.

¹¹² African Union intervention, UN High Level Task Force on the Implementation of the Right to Development (4th session 2008). On file with author.

¹¹³ *Marks* (note 10).

¹¹⁴ “If we choose to abide by a neoliberal model then it must be general and not partial; what is needed is a level playing field.” *Georges Abi-Saab* (Member, WTO Appellate Body) UN High-Level Seminar on the Right to Development: Global Partnership for Development, February 2004. Notes on file with author. And while on some issues certain groupings of developing countries are on the offensive, and we are apparently witnessing an increase in negotiating leverage of middle-income developing countries as well as the poorest among the developing countries, a WTO Deputy Director-General offers a long list of imbalances that would need to be corrected if the multilateral trading system were to be fair to developing countries. *Valentine Sendanyoye-Rugwabiza*, *Is the Doha Development Round a Development Round?*, London School of Economics, March 2006.

disadvantaged others under this same scheme. Despite international law's potential as a source of empowerment and as a site of strategy, this is a project in which it is also complicit. A. Claire Cutler speaks of "the co-extensivity of law and capitalism."¹¹⁵

How might this principle of entitlement capping be conceived? Climate change discussions have introduced the concept of "luxury emissions," explicit recognition that the wishes of industrialized countries to pollute (in order to grow economically/maintain standards of living) will be at the *expense of others*.¹¹⁶ This recognizes the need for a cap on the claiming of entitlements or privileges of rich countries beyond that which is required for the poor/less economically developed countries to claim their rights, given necessary emission reduction targets globally.

Is this notion of restricting entitlements anathema to human rights theory? First, human rights are not all absolute, in fact a good many are qualified, subject to limitations to enable the rights of others and the general public interest to be taken into account. Second, the suggestion here is not to focus on the recipients of largesse *instead* of those who seek to secure their basic rights. Human rights standard-setting unavoidably begins by setting a minimum level after which the substantive content is gradually developed. The question to pose in determining the merits of a given proposal is: what does this approach do for the poor?¹¹⁷ Indeed, when it comes to giving effect to socio-economic rights and addressing world poverty, the human rights framework requires that we look at the entire distribution of activity and resources in society, both domestically and internationally.

II. "Maximum Available Resources"

Article 2.1 of the ICESCR provides that: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means

¹¹⁵ Cutler (note 14), 219.

¹¹⁶ See Henry Shue, *Subsistence Emissions and Luxury Emissions*, Law and Policy 15 (1993), 39.

¹¹⁷ Thanks goes to *Chaloka Beyani* for this point.

[...]”¹¹⁸ A similar obligation pertaining to economic, social and cultural rights is found in the CRC at Article 4.¹¹⁹ The phrase “to the maximum of available resources” was intended by the drafters of the Covenant to refer to resources available within a state as well as those available from the international community through international assistance and cooperation.¹²⁰

The determination of what constitutes the maximum available resources of external states has been based on what a state can afford to spend by its *own* estimation rather than what is *required* to secure immediately those minimum essential levels of basic socio-economic rights globally.¹²¹ So the first problem is the disconnect between the scope of the codified rights and the content of the international (*i.e.* external) obligation. The second and related problem is that this subjective determination as to what constitutes the maximum available resources of high-income states has now been converted into an objective sum, equated with the globally endorsed 0.7 % gross national income in ODA deemed necessary to meet the MDGs.¹²² Its phased achievement is used by the

¹¹⁸ Emphasis added.

¹¹⁹ CRC (note 24), Art. 4: “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

¹²⁰ CESCR, General Comment No.3, The Nature of States Parties Obligations (note 39), para. 13. While the coverage here is limited to financial resources, the term “available resources” also includes human and organizational resources.

¹²¹ Economic, social and cultural rights are subject to progressive realization only once the minimum essential levels have been reached, before which obligations on states parties acting domestically and through international assistance and cooperation require immediate action. *Ibid.*, paras. 10, 13–14; CESCR, General Comment No.15, The Right to Water (Arts. 11 and 12), UN Doc. E/C12/2002/11 (2002), paras. 37–38.

¹²² Outcome of the International Conference on Financing for Development (Monterrey Consensus), UN Doc. A/CONF 198/3 (2000); Plan of Implementation of the World Summit on Sustainable Development, UN Doc. A/CONF199/20 (2002); see also, G8 Summits at Gleneagles 2005, Heiligendamm 2007, Hokkaido 2008, and the (highly qualified) reaffirmation in the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, UN Doc. A/CONF.212/L.1/Rev.1 (2008). CESCR, Concluding Observations: France (40th session) UN Doc. E/C.12/FRA/CO/3 (2008), para. 12: “The Committee regrets that in 2007 the State party devoted only 0.39 % of its gross domestic product (GDP) to official development assistance (ODA), whereas the United Nations target for ODA is 0.7 % of GDP for industrialized countries. The Committee further regrets that the achievement of the objective of devoting 0.7 % of its GDP to international cooperation has been postponed from 2012 to 2015.” See also, CRC, General Comment No.5 on Arts. 4, 42 and 44,

CESCR as a yardstick to measure whether a developed country is taking steps to the maximum of its available resources. Its use as an objective form of evaluation does not address the fact that it has been set in order to lift only half, and not all, of the world's poor from extreme poverty by 2015 – contrary to the rights of “everyone,” and that *incremental* – rather than immediate – increases of ODA (when it happens) have come to represent compliance.¹²³

There is less discretion in the *domestic* assessment of what constitutes maximum available resources, offering lessons as to how the international component of this obligation might be more rigorously evaluated. The CESCR decided recently that it will apply an “adequate or reasonable” test in determining an alleged failure of a state party, acting at the domestic level, to take steps to the maximum of available resources.¹²⁴ While the state has discretion in the allocation of resources, CESCR has shown a willingness to consider issues of government expenditure domestically. Consideration as to the appropriate use of funds is determined based on whether, *inter alia*, the state adopts the policy option that least restricts Covenant rights, the time frame in which the steps were taken, and whether it prioritized grave situations or situations of risk.¹²⁵ Might similar tests be applied to states acting internationally?¹²⁶ This would invite an assessment of the legality under the Covenant of funds spent on, for example, developed countries' agricultural subsidies; the compliance implications of a state parties'

General Measures of Implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (2003), paras. 60–61; CRC, Report on the Forty-Sixth Session (Day of General Discussion on Resources for the Rights of the Child: Responsibility of States), UN Doc. CRC/C/46/3 (2007).

¹²³ The 0.7 % GNI in ODA has been met only by a small minority of donor states (Denmark, Luxembourg, the Netherlands, Norway and Sweden at 2008) with the ODA total net aid flows from OECD DAC members just 0.45 % GNI. When weighted by the size of their economies total net aid flows from DAC members represents 0.28 % of their combined national incomes. UN MDG Gap Task Force (note 80), vii.

¹²⁴ CESCR, Statement on An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Option Protocol to the Covenant, UN Doc. E/C12/2007/1 (2007), para. 8.

¹²⁵ *Ibid.*

¹²⁶ This could form part of the examination by the Committee of state reports or eventually under the Optional Protocol's (opt-in) inter-state complaint mechanism and inquiry procedure into grave or systematic violations of Covenant rights.

absolute and relative military expenditure;¹²⁷ as well as the massive domestic bail out packages triggered by the recent global financial crisis.

The CESCR has long held that the burden of proof rests with the state party acting domestically to show that a given course of action was based on the “the most careful consideration and can be justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources,” including with regard to any retrogression in the exercise of rights.¹²⁸ As poverty, hunger and ill-health sweep across low-income countries in the wake of the food and financial crises instigated in the North exacerbating existing scarcity, surely states acting internationally could be required to meet these same standards.

III. International Obligations

A third reason international human rights law has not adequately challenged the worst tendencies of this global economic enterprise has been a reticence to embrace meaningfully the duties of states acting individually and collectively on the *international* plane. While this international aspect is undoubtedly reflected in the development of obligations of international cooperation since 1945,¹²⁹ the human rights apparatus continues to concern itself primarily with the *domestic* obligations of states to give effect to socio-economic rights, rather than recognizing fully the complementary nature of this “shared responsibility”¹³⁰ under conditions of economic globalization.¹³¹ To do otherwise would, of course, place a far greater onus on the industrialized states, a move that has thus

¹²⁷ Questions could relate to the portion of military expenditure that could be diverted to poverty reduction and in terms of poverty averted through the avoidance of war. This could form part of an assessment of “the policy option that least restricts Covenant rights.”

¹²⁸ CESCR, General Comment No.3, The Nature of States Parties Obligations (note 39), paras. 9 and 10; CESCR, Statement on An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” (note 124), para. 9.

¹²⁹ See *Salomon* (note 4).

¹³⁰ UN Millennium Declaration (note 76), Art. 6

¹³¹ See *Margot E. Salomon*, Legal Cosmopolitanism and the Normative Contribution of the Right to Development, in: Stephen P. Marks (ed.), *Implementing the Right to Development: The Role of International Law* (2008), 17.

far been challenged quite vigorously by them¹³² (although certain advances must be noted).¹³³

The normative basis of the Millennium Declaration's call to eradicate extreme poverty is derived from the right to development.¹³⁴ The 1986 UN Declaration on the Right to Development denotes human participation in and benefit from economic, social, cultural and political development processes; the duties of states in the creation of national and international environments conducive to the realization of human rights; and it focuses on a process that is informed by the procedures and substance of the international law of human rights.¹³⁵ The duties necessary for the fulfillment of these rights principally fall to the state within which the people denied their rights are located. Significantly, there are also corresponding duties that fall to the international community of states, that is, to "those in a position to assist."¹³⁶

Yet the ability to shape global policy upon which the realization of the fundamental human rights of so many people in poor countries depends and to influence arrangements for access to the pool of benefits from which the entire world draws is severely unequal. This inequality reflects a profound failure of the powerful states to secure the human rights to which each and every person is entitled. The partnership referred to in Goal 8, as its current targets and indicators

¹³² Most recently this can be seen in the Optional Protocol (OP) to the ICESCR adopted by the UN General Assembly on 10 December 2008. The OP allows for the submission of "communications" by or on behalf of individuals or groups of individuals, under the jurisdiction of a state party, claiming to be victims of a violation of any Covenant right. A highly contentious issue during the negotiations was whether claims could be made by people against foreign states for alleged violations of their rights to an adequate standard of living, food, health *etc.* Clawing back from the extraterritorial jurisdiction established under the ICESCR itself, the OP establishes that communications need come from persons under the jurisdiction of a state party alleging a violation by *that* state party.

¹³³ For example, the establishment in 2004 of a UN High Level Task Force on the Implementation of the Right to Development.

¹³⁴ "We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want." UN Millennium Declaration (note 76), para. 11; "We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development." *Ibid.*, para. 24.

¹³⁵ Declaration on the Right to Development, GA Res. 41/128 of 4 December 1986.

¹³⁶ See CESCR, General Comment No.3, The Nature of States Parties Obligations (note 39), para. 14.

would suggest, is in fact a partnership among the rich and powerful. We might thus be forgiven for assuming that the MDG project – and the international human rights legal regime that informs it – is an important humanitarian venture only as long as the various structures of the neoliberal mission are not seriously challenged, nor its beneficiaries displaced.

E. Conclusion

We are told that the global financial crisis of 2008 has heralded the end of belief in the unfettered market. Talk has turned to calls for a post-Keynesian critique of the international political economy. Despite this opportunity for global reconstruction will it be enough to dislodge a model that has so superbly benefited some?

An institutional framework for an alternative program of globalization must be “functionally agnostic,” allowing for the promotion of different and distinctive social and economic programs and for a continuous assessment of each program,¹³⁷ with success measured in terms of how it benefits the least privileged. The model we have relied on for the past several decades was never set up to alleviate poverty, it was constructed to create profit.¹³⁸ Crucially, an institutional framework developed as part of any alternative global agenda must invite a pluralism of ideas and competing tenets of social development with respect to the particular institutions which constitute the framework itself.¹³⁹ But real and sustainable poverty reduction will take more than new policies and programs or even institutional reform; it will require “curbing the power and curtailing the privilege of those on the ‘winning’ side of current global relations.”¹⁴⁰ An inclusive global order will not come about until the various beneficiaries,

¹³⁷ *Leopold Specht*, *An Argument for Alternative Globalization*, International Symposium on the International Legal Order, LJIL 16 (2003), 849, 853. *Specht* borrows the concept of functional agnosticism from *Nathaniel Berman*.

¹³⁸ In a harrowing assessment *Saith* notes: “[T]he poor are increasingly viewed as the last unconquered market, and making poverty reduction profitable is an emerging dictum in the design and practice of public-private partnerships for sustainable pro-poor development.” *Saith* (note 88), 1196.

¹³⁹ *Specht* (note 137), 852–853.

¹⁴⁰ *Marks* (note 58), 47.

beginning with powerful states, reconfigure the system that so munificently provides for their benefits (or until the downtrodden rise up to claim it).

The framing and application of international rules critical to the generation of wealth need also to be understood as central to the perpetuation or alleviation of poverty. If we are to address poverty it is counterproductive to bifurcate the approaches to increasing wealth and to decreasing poverty, as has so far been the case in international law and policy. The result is a failure to appreciate fully how these two elements co-exist, and significantly, how the privilege and benefits international law has helped sustain have succeeded also in engendering poverty. The last decade of the twentieth century and the first years of the 21st century, have “witnessed a vigorous campaign to assert the interests of the developed world and multinational corporations.”¹⁴¹ In important ways, international economic law became an instrument for facilitating the particular objectives of global capitalism; while international human rights law did far too little to transform those objectives.

International law’s sting, that which is said to distinguish it from other social scientific approaches to addressing poverty, is the principle of accountability. Yet there has been little accountability to the poor and impoverished, to the hungry, and to those without access to the basic necessities of life struggling on the other side of this small planet. Accountability remains all but absent in the wake of the financial crisis as poor people in poor countries pay the heaviest price for a disaster they had no hand in creating,¹⁴² and we can anticipate that climate change will apportion its retribution similarly. The MDGs are not being achieved because they exist as a discrete humanitarian project rooted in the idea of collective good and shared responsibility, appended to the far grander economic project resting on a belief in individualized gain and minimal regulation. As a result, the MDGs were not set up to challenge structural inequality, nor to present economic alternatives, nor were they given any teeth with which to confront the demands of poverty reduction.

It would seem we need to turn our attention from the poor to the rich, from the victims to the beneficiaries, because it is only by addressing the apparatuses

¹⁴¹ *Muthucumaraswamy Sornarajah*, *Economic Neo-Liberalism and the International Law on Foreign Investment*, in: Antony Anghie/Bhupinder Chimni/Karin Mickelson/Obiora Okafor (eds.), *The Third World and International Order: Law, Politics and Globalization* (2003), 173, 177.

¹⁴² See, *Kofi Annan/Michel Camdessus/Robert Rubin*, *Amid the Turmoil, Do Not Forget the Poor*, 15, *Financial Times* of 31 October 2008.

that sustain world privilege that we can understand and hope to confront the mechanisms that maintain world poverty. The adoption and enforcement of legal regimes have, and will continue to play, a critical role in this process. Let us entreat the international legal system to do more than protect those who need its protection least.

