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GLOBAL POVERTY AND THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

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ABSTRACT

This Article advances an account of the right to development as a legal instrument that holds the international legal order accountable for its role in the production and reproduction of global poverty. It first distinguishes moral conceptions of human rights, as instruments that protect universal features of humanity, from legal conceptions, which tie their existence to their specification in international instruments promulgated in compliance with international legal norms governing the creation of legal rights and obligations. Despite textual ambiguities in the various instruments in which it finds expression, the right to development vests in individuals and communities who have yet to benefit from development. It imposes internal obligations on states in which they live to address conditions that contribute to their plight. The right also imposes external obligations on international legal actors, including developed states and international organizations, to assist developing states in poverty reduction. The right's external obligations are negative and positive in nature. Its negative dimensions require states and international institutions to fashion rules and policies governing the global economy in ways that do not exacerbate global poverty. Its positive dimensions require states and international institutions to provide assistance to developing states in the form of development aid and debt relief. Both drawing on and departing from debates about global justice in contemporary political theory, it justifies these obligations by linking the purpose of the right to development to international law's engagement with colonialism and economic globalization.

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INTRODUCTION

Although experts may dispute precise figures, more than one billion people – virtually all of whom live in developing countries – live on less than one dollar a day.¹ Close to three billion – more than forty per cent of the world’s population – live on less than two dollars a day. The top five per cent of the world’s population receive about one-third of total world income; ten per cent receive one-half of total income.² The bottom five and ten per cent of the world’s population receive 0.2 and 0.7 per cent of total world income respectively. The richest people earn in about 48 hours as much as the poorest people earn in a year.³

International law imposes legal obligations on states to provide their citizens with access to a set of basic social resources, such as food, shelter, a basic income, health care, and education. In the name of poverty reduction, most, if not all, developed states also provide development assistance in the form of bilateral loans, grants, and debt relief to developing states, and make contributions to multilateral institutions such as the World Bank and regional development banks, which in turn provide various forms of development assistance to recipient states. But international law typically is not understood as requiring a state to address poverty beyond its borders. It comprehends bilateral and multilateral development

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¹ Francisco H.G. Ferreira & Martin Ravallion, “Global Poverty and Inequality: A Review of the Evidence,” World Bank Policy Research Working Paper 4623 (2008); see also Shaohua Chen & Martin Ravallion, “Absolute Poverty Measures for the Developing World, 1981-2004,” *Proceedings of the National Academy of Sciences of the United States of America*, 104/43: 16757-62.

² These data are available on PovcalNet, on-line tool for poverty measurement developed by the Development Research Group of the World Bank. For discussion of global poverty trends, see UN General Assembly, *Rethinking Poverty: Report on the World Social Situation, 2010*, ST/ESA/324, pp. 13-43.

³ Branko Milanovic, “Global Income Inequality: What It Is And Why It Matters,” DESA Working Paper No. 26, ST/ESA/2006IDWP/26 (August 2006), at 9.

assistance in charitable terms. Global – as opposed to domestic – poverty historically has been seen as possessing no international legal significance.

The international legal insignificance of global poverty rests on two dominant and interlocking assumptions about the nature of our international legal order. The first relates to the role of human rights in international law. To the extent international law protects human rights, it does so under the sway of a conception of human rights as corresponding to obligations that individuals owe to all in ethical recognition of universal features of what it means to be a human being. This conception struggles with accepting the legitimacy of the proposition that human rights generate duties to assist others in need. The second relates to the role of sovereignty in international law. To the extent international law protects the sovereignty of states, it does so on the premise that sovereignty imposes no legal obligations on wealthy states to provide financial assistance to poorer states. Sovereignty in international law imposes obligations on states not to interfere with the sovereignty of other states but it does not legally obligate states to take positive measures to alleviate adverse social and economic conditions around the world.

Contrary to both assumptions, this Article argues that global poverty assumes international legal significance because of the right to development. It does so, in part, by challenging the assumption that human rights and their corresponding obligations in international law should be understood in universal terms. This assumption underpins what this Article refers to as a *moral* conception of human rights, which conceives of international human rights as legal instruments that impose obligations on all of us to protect essential characteristics or features that all of us share. On this account, human rights do not speak to global poverty. This is because, although the meeting of certain basic needs such as food, water and shelter, is essential to the ability of all of us to survive, these needs do not generate universal and identifiable obligations on all of us to meet them. In the absence of such

obligations, it is a category mistake to refer to human needs as human rights. While international and domestic legal orders might entrench obligations to assist others in need, they are not obligations we owe to all in ethical recognition of what it means to be human and therefore the rights to which they correspond are not, properly understood, human rights.

In contrast, this Article offers a *legal* conception of international human rights, one that ties their existence to their specification in international instruments promulgated in compliance with international legal norms governing the creation of legal rights and obligations. A legal account marshals a variety of legal sources, including the text of these instruments, the intent of those who drafted them, and measures designed to implement their terms, to determine the content of a human right. But legal sources typically underdetermine a human right's content, rendering broader interpretive inquiries into its purpose necessary to clarify its legal consequences. And, while moral considerations play a part determining the international legal purpose of a human right, they do not manifest themselves as the demands of abstract morality. Instead, they emphasize the normative role that international human rights law plays in the structure and operation of the international legal order. On the legal conception offered in this Article, the role that human rights play in international law is to mitigate injustices produced by the organization of global politics into an international legal order.

This account of international human rights and the right to development also challenges the second assumption about the nature of our international legal order mentioned previously, namely, that sovereignty in international law does not obligate states to take measures to alleviate global poverty. The challenge is not to its truth but the commitment to sovereignty that lies behind it. Global poverty is, in part, a consequence of the terms by which international law aspires to bring legal order to global politics. It is precisely *because*

sovereignty is an essential feature of the structure and operation of international law that the right to development generates international legal obligations to alleviate global poverty.

This Article identifies two features of the structure and operation of international law that provide a normative basis for comprehending the right to development in these terms. The first refers to the way in which international law extends legal validity to processes of economic globalization and integration that have dramatically transformed the relations between and among states in recent years – processes that possess at least the potential to exacerbate global inequality. The second is the set of rules governing the incorporation of colonized peoples as sovereign legal actors. To be sure, these two features of our international legal order are not the only causes of global poverty. But they participate in its production and persistence, and the purpose of the right to development is to mitigate their contribution to the disparity of wealth and resources that exists between developed and developing states.

Part II of this Article contrasts a moral conception of human rights with its legal counterpart. Part III details the legal emergence of the right to development in international law, culminating in the 1986 UN Declaration on the Right to Development. It argues that criticism of the Declaration rests on a moral conception of human rights, and that understanding the right in legal terms brings interpretive coherence to the Declaration's terms. Part IV details subsequent initiatives by a variety of international legal actors to affirm, elaborate and implement the right to development that answer many of the questions surrounding the content of the right left open by the Declaration. Some of these initiatives, such as those developed by the UN Working Group on the Right to Development and the World Bank and the International Monetary Fund, help to clarify internal obligations that a state owes to its own population. Other initiatives, such as the UN Millennium Development Goals, provide content to the external obligations on international legal actors, including

developed states and international legal organizations, to assist developing states in poverty reduction. What these initiatives don't provide is a normative account of why the right to development should give rise to internal and external obligations on states and international legal actors. Both drawing on and departing from debates about global distributive justice in contemporary political theory, Part V attempts to answer this question by linking the purpose of the right to international law's engagements with economic globalization and colonialism.

I. TWO CONCEPTS OF INTERNATIONAL HUMAN RIGHTS

A. Human Rights as Moral Concepts

Despite the multiplicity of its constituent legal sources and instruments, the dominant approach to the normative foundations of international human rights law regards human rights as moral entitlements that all human beings possess by virtue of our common humanity.⁴ What constitutes a human right, according to this approach, is not determined by a positive legal instrument or institution. Human rights are prior to and independent of positive international human rights law. Just because a legal order declares something to be a human right does not make it so. Conversely, the fact that a human right does not receive international legal protection does not mean that it is not a human right. The existence or non-existence of a human right rests on abstract features of what it means to be human and the obligations to which these features give rise.

Immanuel Kant wrote of a single, innate "right belonging to man by virtue of his humanity" from which all other rights flow.⁵ Kant's conception of rights sweeps in much more of moral life than contemporary human rights law, but many contemporary moral

⁴ See, for example, Donnelly, *Universal Human Rights in Theory and Practice*, *supra*, at 10 ("[h]uman rights are, literally, the rights that one has simply because one is a human being"); A. John Simmonds, *Justification and Legitimacy: Essays on Rights and Obligation* (Cambridge University Press, 2001), at 185 ((emphasis in original)).

⁵ Immanuel Kant, *Critique of Pure Reason* (1788), translated by L.W. Beck (New York: Bobbs-Merrill, 1956).

accounts of human rights draw from the principle of universality on which it rests. James Griffin, for example, conceives of human rights as protections of “personhood,” and argues that they “must be universal, because they are possessed by human agents simply in virtue of their normative agency.”⁶ John Tasioulas defines human rights as “moral entitlements possessed by all simply in virtue of their humanity.”⁷ Similarly, John Simmonds argues that “*human* rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity.”⁸

On moral accounts such as these, human rights protect essential characteristics or features that all of us share despite the innumerable historical, geographical, cultural, communal, and other contingencies that shape our lives and our relations with others in unique ways. They give rise to specifiable duties that we all owe each other in ethical recognition of what it means to be human. This is not to say that rights and obligations cannot also arise from the bonds of history, community, religion, culture or nation. But if such rights relate simply to contingent features of human existence, they don’t constitute human rights and don’t merit a place on the international legal register. And if we owe each other duties for reasons other than our common humanity – say, because of friendship, kinship, or citizenship – then these duties do not correspond to human rights and should not be identified as such by international legal instruments.

With the International Covenant on Economic, Social, and Cultural Rights⁹ and other international and regional instruments, international human rights law includes a broad set of social and economic rights that guarantee individuals access to a set of basic social resources,

⁶ James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), at 48.

⁷ John Tasioulas, “The Moral Reality of Human Rights,” in T. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford: Oxford University Press, 2007) 75-101, at 76 (emphasis deleted).

⁸ A. John Simmonds, *Justification and Legitimacy: Essays on Rights and Obligation* (Cambridge: Cambridge University Press, 2001) at 185.

⁹ *Adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

such as food, housing, an adequate standard of living, health care, and education.¹⁰ It conceives of these rights as imposing obligations on states to take measures to secure their protection.¹¹ But social and economic rights and the obligations that accompany them fit awkwardly into universal conceptions of human rights. Basic needs, such as food and shelter, are essential features of what it means to be human. To take from someone something essential to one's existence is a human rights violation. It is a matter of deep controversy, however, whether the set of duties that we do owe each other directly in moral recognition of our common humanity includes positive obligations to assist others in need. While moral accounts easily generate negative obligations of non-interference, they do not easily generate universal and specifiable obligations of assistance. What positive obligations accompany the right to food, for example, and who bears these obligations?

This has led some moral theorists to claim that social and economic rights that entail positive obligations are not human rights at all. While such positive obligations can be specified in law, their specification is conditional on political and legal institutions and not on a pre-institutional conception of the obligations we owe each other by virtue of being human. In the name of social justice, a political community may opt to entrench domestic rights protecting the welfare of its members by imposing positive obligations on state actors and institutions to provide food to those in need – and on individuals to contribute to the cost of such benefits. In the absence of such allocation of obligations, however, we cannot identify inaction that would violate one's right to food. Nor can we identify which actors from whom a right to food might require action. A human right, such as a right to life, may entail positive obligations to secure its protection, but such secondary obligations flow from a primary

¹⁰ *Adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), Arts. 11 (food, housing, adequate standard of living), 12 (health), 13 (education).

¹¹ *Ibid.*, Art. 2. See also General Comment No. 3 in *Report of the Fifth Session*, U.N. ESCOR, Comm'n on Economic, Social and Cultural Rights, 5th Sess., Supp. No. 3, Annex 3, U.N. Doc. E/1991/23. E/C.12/1990/8 (1990).

obligation that attaches to all of us not to infringe this right.¹²

This is not to say that moral theorists have not addressed this challenge. Griffin argues that human rights provide “at least the minimum provision of resources and capabilities” necessary to be a human agent. He does so by drawing a distinction between general and particular obligations. For Griffin, we all bear obligations to assist others in distress, but who bears these obligations in particular instances – and what they amount to – rest on a host of contingencies such as which person or institution is in the best position and best able to act. They are also shaped by competing considerations that arise from deep commitments that form our moral identities, such as commitments to one’s own family and community. Tasioulas has suggested that human rights enjoy a “temporally constrained form of universality,” which permits features of the social world that we inhabit to play a role in determining their existence.¹³ Tasioulas also takes issue with the requirement that correlative duties must be universal in nature. In his view, the existence of a human right is conditional only on it being grounded in an interest we all share as humans “significant enough to generate duties on the part of others,” such as freedom from poverty.¹⁴ But meeting this challenge – whether by distinguishing between general and particular obligations, conceptualizing universal claims in temporal terms, or accepting the contingency of duties – requires relaxing the properties of universality on which moral conceptions of human rights typically rest their case.

This challenge is compounded when a human right is said to impose duties on individuals and collectivities in political communities other than where the bearers of rights are located. If A has a right to x, then B has a duty not to interfere with A’s enjoyment of right x. A’s right to x, however, does not typically obligate B to give x to A, especially if A and B are citizens of

¹² See, for example, Onara O’Neill, “The Dark Side of Human Rights,” 81(2) *International Affairs* 427 (2005). See also Carl Wellman, *Welfare Rights* (Totawa: Rowman and Allanheld, 1982), at 181.

¹³ *Supra*, at 76.

¹⁴ *Supra*, at 77.

different states. Again, this is not to say that moral theorists have not addressed this challenge. Griffin writes that “if poor central governments are unable to shoulder the burden” of poverty within their midst, “then perhaps the time has come for us to consider whether the burden should not also be placed on a group of wealthy nations.”¹⁵ But the fact remains: moral conceptions of human rights grounded in universality struggle with rights that impose positive obligations on states to provide benefits to their own citizens and on citizens to contribute to their cost. They struggle even more with rights with external dimensions that mandate international redistributive measures to address global poverty.¹⁶

B. Human Rights as Legal Concepts

Understanding international human rights as legal concepts starts with the premise that international law, not moral theory, determines their existence. An international human right to food, for example, exists because the International Covenant on Economic, Social and Cultural Rights enshrines such a right.¹⁷ Its international legal status as a human right derives from the fact that international law, according to the principle *pacta sunt servanda*, provides that a treaty in force between two or more sovereign states is binding upon the parties to it and must be performed by them in good faith.¹⁸ Similarly, the right to development is a human right in international law because the UN General Assembly has declared its legal existence.¹⁹ The international legal validity of a norm – what makes it part of international

¹⁵ *Supra*, at 104. Griffin adds that “a lot of work would have to go into deciding which nations count as ‘rich’ for this purpose, how great a demand can be made of them, and what a fair distribution of the burden would be.”

¹⁶ But see Phillip Alston and Gerard Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social, and Cultural Rights,” 9 *Human Rights Quarterly* 156 (1987) (the ICESCR gives rise to a duty on rich states to assist poor states when poor states do not have resources necessary to fulfil their obligations under the ICESCR to their citizens).

¹⁷ ICESCR, *supra*, Art. 11.

¹⁸ Article 26, Vienna Convention on the Law of Treaties (1969) 1155 U.N.T.S. 331, in force 1980.

¹⁹ See, e.g., Richard Bilder, “Rethinking International Human Rights: Some Basic Questions,” [1969] *Wisc. L. Rev.* 171, at 173 (In practice a claim is an international human right if the United Nations General Assembly says it is”). The authority of the General Assembly to proclaim human rights, according to Philip Alston, is derived from the terms of the UN Charter. See Philip Alston, “Conjuring Up New Human Rights: A Proposal for Quality Control” 78 *Am. J. Int’l Law* 607 (1984).

law – rests on a relatively straightforward exercise in legal positivism: a norm possesses international legal validity if its enactment, promulgation or specification is in accordance with more general rules that international law lays down for the creation of specific legal rights and obligations.²⁰

This is not to downplay the politics behind the legal production of an international human right. Human rights in international law are legal outcomes of deep political contestation over the international legal validity of the exercise of certain forms of power – contestation that occurs in particular contexts as diverse as individual or collective disputes requiring international legal resolution, opinions or views offered by international legal actors on state compliance with treaty obligations, juridical determinations of the boundaries between domestic and international legal arrangements, and negotiations among or between state actors that yield binding or non-binding articulations of international legal obligations. Once transformed from political claim into legal right, human rights in turn empower new political projects based on the rules they establish to govern the distribution and exercise of power.

The legal existence of an international human right, however, underdetermines its content. The interests that a human right protects, the nature of the obligations to which it gives rise, the actors who bear these obligations – these and other questions typically remain open to legal interpretation. Various interpretive sources assist in resolving questions surrounding the content of an international human right, including the intent of those who participated in the politics that led to its legal existence.²¹ But unless one is a strict proponent

²⁰ For classic articulations of legal positivism, see Austin, *The Province of Jurisprudence Determined* (a law is valid because it is the command of a sovereign); Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Clark, NJ: Lawbook Exchange, 1999) (a legal norm is valid if authorized by another legal norm of a higher rank); and H.L.A. Hart, *The Concept of Law* (a law is valid if it conforms with “secondary rules” or laws that authorize the enactment of a law). Some have drawn a distinction between political and analytic positivism, the former an interpretive strategy and the latter an objective description. See Ronald Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006), at 26-33. For a defence of political positivism in international law, see Benedict Kingsbury, “Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law,” 13 *European Journal of International Law* 401 (2002).

²¹ Article 31 of the Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331, in force 1980, requires “[a] treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to the

of original intent, the content of an international human right is not determined by the politics of its legal production. Textual considerations also play a role in determining the scope and content of an international human right. Often the legal instrument in which a human right is enshrined sets out clearly, for example, what obligations it entails and on whom they fall. The practice of legal and political actors seeking to implement a human right in a variety of institutional contexts also helps to answer questions about its content.²² But, equally as often, text, intent and practice underdetermine the meaning of a human right, and its content will rest on a normative account of its purpose.²³

Whereas moral conceptions of human rights locate their legitimacy outside of law and face challenging questions about their legal validity, legal conceptions thus confront an opposite set of challenges. Determining the legal validity of an international human right is a relatively straightforward exercise of international legal positivism. But legal validity does not determine the purpose of a right, and legal conceptions of human rights that seek to explain their purpose in terms that go beyond positivistic accounts of their legal production threaten to reintroduce moral considerations into the picture, which undermines the possibility that human rights can be understood in distinctly legal terms. For example, if the reason why the right to development imposes obligations on developed states to combat global poverty is because global poverty is morally unjust, then morality, not law, determines the purpose of the right. And if, as we have seen, moral theory struggles with casting the moral wrong of global poverty in terms of human rights, then these struggles will simply

terms of the treaty in their context and in the light of its object and purpose.” Article 32 of the Vienna Convention refers to the “preparatory work of the treaty,” from which one might infer the intent of the parties, as merely a “supplementary means of interpretation” to be examined only “to confirm the meaning resulting from the application of Article 31,” or when such a meaning is “ambiguous or obscure” or “leads to a result that is manifestly absurd or unreasonable.

²²What Charles Beitz might refer to as a “practical conception” of human rights. See Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009) at 96-127.

²³ An interpretive method that international lawyers obliquely refer to as the “teleological” approach to treaty interpretation. See, generally, G.G. Fitzmaurice, “The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points” (1951), 28 *Brit. Y.B. Int’l L.* 1.

reproduce themselves in legal accounts of understanding the right to development in these terms.

But a legal conception of human rights need not conflate law and morality to ground the purpose of a human right in more than the mere fact of its legal validity. Human rights in international law are not so much as formal expressions of what justice requires as a matter of abstract morality as they are legal instruments that aim to do justice in the actual international legal order in which we live. Their purposes ultimately rest on how we comprehend their relationship to the structure and operation of international law. On the legal conception offered here, human rights serve as mechanisms or instruments that mitigate some of the adverse consequences of how international law organizes global politics into an international legal system. They speak to certain consequences of how international law deploys the concept of sovereignty to organize global politics into a legal order – consequences that generate political projects aimed at their amelioration. Some of these projects successfully receive international legal validation in the form of human rights. Determining the purpose of an international human right thus involves identifying the ameliorative role that it plays in relation to the structure and operation of international law itself.

As a result, the possibility that human rights might possess universal and non-universal properties doesn't threaten the legitimacy of legally comprehending them in these terms. Their role in our broader international legal order makes sense of the fact that some international human rights legally vest entitlements in – and impose obligations on – some individuals and populations and not others. Nor does the possibility that an international human right imposes positive obligations on others threaten its legitimacy. If the point of international human rights law is to mitigate harms produced by the structure and operation of international law, then – depending on the nature of these harms and the ways in which international law participates in their production – international human rights may well give

rise to positive legal obligations to provide assistance to others. And, although their purposes rest on moral considerations that extend beyond the positive fact of their legal existence, the morality on which they rely is one that is internal – not external – to international law. The purpose of international human right law, in general, is to do justice to the structure and operation of the actual international legal order in which we find ourselves. The purpose of a particular international human right is to mitigate harms produced by international norms that relate to its text, the reasons for its entrenchment, and its implementation.

As the next Part seeks to demonstrate, the right to development imposes internal obligations on all states to address poverty within their midst and external obligations on developed states to address poverty within developing states. To interpret the right otherwise does interpretive violence to the terms by which it receives legal instantiation, and relies – implicitly or explicitly – on a moral conception of human rights that misconstrues the object that it seeks to identify. Part IV provides detail on the nature and content of these obligations, by examining concrete efforts to affirm, elaborate and implement the right. As Part V seeks to demonstrate, comprehending the right to development as imposing obligations on developed states to reduce global poverty rests not on the fact that dramatic inequalities that characterize global poverty today are moral wrongs – although no doubt they are. It is because global poverty is constituted partly by the structure and operation of international law itself. By imposing obligations on developed states to provide assistance to developing states, the right to development holds the international legal order accountable for its role in the perpetuation of global poverty.

III. THE EMERGENCE OF THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

The right to development first surfaced in international law in the 1981 African Charter

on Human and Peoples' Rights. Article 22 of the African Charter states that "[a] peoples have the right to their economic, social and cultural development," and imposes on states "the duty, individually or collectively, to ensure the exercise of the right to development."²⁴ It next received legal expression in the 1986 UN Declaration on the Right to Development,²⁵ one of several instruments to emerge from the UN General Assembly as a result of efforts by developing states to reshape the international legal order in ways that would address social and economic concerns of the global south.

The Declaration is not, in itself, a legally binding instrument.²⁶ Its preamble, however, expressly refers to the purposes and principles of the UN Charter and thus it may be regarded as an authoritative interpretation of the Charter.²⁷ It also contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding – such as the International Covenant on Civil and Political Rights (ICCPR)²⁸ and the International Covenant on Economic, Cultural and Social Rights (ICESCR).²⁹ The ICESCR enshrines more specific rights to international cooperation and assistance that are contained in the Declaration. Both the ICCPR and the ICESCR enshrine the right of self-determination, and specify that self-determination entitles "[a]ll peoples" to "freely pursue their economic, social and cultural development."³⁰

²⁴ Adopted by the Organization of African Unity in 1981; entry into force on 21 October 1986.

²⁵ UN Doc. A/RES/41/128 (1987).

²⁶ But see Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford: Oxford University Press, 1963) (arguing that the General Assembly can enact legally binding declarations). For a refutation of this view, see Stephen M. Schwebel, "Book Review," 75 *Yale Law Journal* 677 (1966). General Assembly declarations can participate in the formation of customary international law by standing as evidence of the *opinion juris* of states. See Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ" (2006) 16 *EJIL* 879. For the view that declarations participate in the formation of customary international law by standing as evidence of state practice, see Charlesworth, "Customary International Law and the Nicaragua Case," 11 *Australian Year Book of Int'l Law* (1984-87) 1, at 24. For the contrary view, see Charney, "Customary International Law in the Nicaragua Case Judgment on the Merits," 1 *Hague Yearbook of Int'l Law* (1988) 16, at 22.

²⁷ James Crawford (ed.), *Brownlie's Principles of Public International Law*, 8th ed., (Oxford: Clarendon Press, 2012) ("[w]hen a resolution of the General Assembly touches on subjects dealt with in the United Nations Charter, it may be regarded as an authoritative interpretation of the Charter").

²⁸ Adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

²⁹ *Supra* note xx.

³⁰ Art. 1, ICCPR; Art. 1, ICESCR.

As will be seen, the relationship between the right to development and global poverty turns less on questions about the binding nature of treaties versus declarations and more on the content of the right and the extent to which it imposes obligations on states to combat global poverty. This Part first traces the emergence of the Declaration on the Right to Development. It then identifies textual ambiguities in the Declaration on which critics of the Declaration have seized to characterize it as an essentially meaningless human rights instrument. It argues that a moral conception of human rights, grounded in universalism, lies behind these criticisms. Abandoning the view that the right to development and its attendant obligations are universal in nature brings interpretive coherence to the Declaration's terms, which contemplate that the right to development imposes internal obligations on all states to address poverty within their midst and external obligations on developed states to address poverty in developing states.³¹

A. Emergence of the Right

Global poverty was not among the primary factors behind the establishment of the United Nations in 1945. Article 55 of the UN Charter calls on the United Nations to promote higher standards of living, conditions of economic and social progress and development, and solutions of international economic, social and health-related problems.³² Article 56 of the Charter further stipulates that member states “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of these purposes.” The Universal Declaration of Human Rights, adopted in 1948, enshrines rights to social security,

³¹ This and the following Parts are indebted to the work of Margot E. Salomon and Stephen P. Marks, two leading scholars on the right to development. For a sampling of their many publications, see Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007); and Bård Anders Andreassen and Stephen P. Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, Harvard University Press, 2006).

³² *Charter of the United Nations*, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (June 26, 1945), entered into force Oct. 24, 1945, Art. 55.

work, an adequate standard of living, and education.³³ But, despite these social and economic commitments, the original organizational thrust of the United Nations was to structure the international legal order around an inclusive commitment to the sovereign equality of states – *albeit* one weighted in favor of the great powers – to minimize threats to international peace and security.³⁴

Not long after the creation of the United Nations, however, the General Assembly, under the auspices of Articles 55 and 56 of the Charter, began to turn its attention to some of the proximate causes of global poverty. In 1952, galvanized by decolonized member states concerned about their economic independence, the General Assembly adopted a Resolution on a right to exploit freely natural wealth and resources.³⁵ The 1952 Resolution referred to “a right of peoples freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development.”³⁶ It stated that such a right of peoples is “inherent in their sovereignty” and recommended that all states “refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources.”³⁷ In 1958, the General Assembly established a Commission on Permanent Sovereignty over Natural Resources, and instructed it to conduct a survey of the status of permanent sovereignty over natural wealth and resources as an element of the right of self-determination.³⁸ This in turn prompted a 1962 General Assembly Resolution on Permanent Sovereignty over Natural Resources (Resolution 1803), which reaffirmed the “right of peoples and nations to permanent sovereignty over their natural wealth and

³³ G.A. Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, Arts. 22, 23, 25, and 26, respectively.

³⁴ See Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009), at 198 (the UN’s “relaxed criteria for entry were designed to encourage universality of membership precisely to avoid the creation of international factions and rival alliances outside the world body”).

³⁵ G.A. Res. 626 (VII) (21 December 1952).

³⁶ *Ibid.*, third preambular paragraph.

³⁷ *Ibid.*, Art. 1.

³⁸ G.A. Res. 1315 (XIII) (12 December 1958).

resources.”³⁹ It also called for international cooperation in the economic development of developing countries. Such cooperation, “whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information,” must “further their independent national development” and “be based upon respect for their sovereignty over their natural resources.”⁴⁰

These developments were precursors of a much bolder set of international initiatives introduced in the 1970s by developing states seeking to reshape the international legal order in ways that would address economic and political inequalities between the developed and developing worlds. In 1974, the General Assembly adopted a “Declaration and Programme of Action on a New International Economic Order.”⁴¹ The 1974 Declaration and Programme of Action called for an international order that would “correct inequalities and redress existing injustices, making it possible to eliminate the widening gap between the developed and the developing countries.”⁴² It was accompanied by a Charter of Economic Rights and Duties of States that stipulated that all states were under a responsibility to promote economic, social and cultural development for all people everywhere.⁴³

Three years later, the UN Human Rights Commission recommended that the Secretary General undertake a study of “the international dimensions of the right to development as a human right” in light of “the requirements of the New International Economic Order.”⁴⁴ The ensuing Report led the UN General Assembly to affirm the existence of the right to development in 1979,⁴⁵ and a Working Group of Governmental Experts on the Right to

³⁹ G.A. Res. 1803 (XVII) (14 December 1962), Article 1.

⁴⁰ *Ibid.*, Article 6.

⁴¹ *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Special Sess., Agenda Item 6, 2229th Plen. Mtg. at 1, U.N. Doc. A/RES/3201 (S-VI) (1974) See generally Gabe S. Vargas, *The New International Economic Order Legal Debate* (Frankfurt: P. Lang, 1983).

⁴² *Ibid.*, third preambular paragraph.

⁴³ G.A. Res. 3281 (XXIX), U.N. GAOR, 2d Comm., 29th Sess., Agenda Item 48, arts. 7 & 9, U.N. Doc. A/RES/3281 (XXIX) (1975).

⁴⁴ Commission on Human Rights, Report on the Thirty-Third Session, 62 U.N. ESCOR Supp. (No. 6), UN Doc. E/5927 (1978), Res. 4, para. 6.

⁴⁵ UN Doc. a/C.3/34/SR.24-30, 33-38, 41.

Development was established in 1981. Assigned the task of drafting a declaration on the right to development, the Working Group reported regularly on its progress.⁴⁶ These initiatives eventually culminated in the adoption by the General Assembly of the Declaration on the Right to Development in 1986.⁴⁷

The Declaration on the Right to Development refers to the right to development as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁴⁸ It defines the right as an entitlement to “a comprehensive economic, social, cultural and political process.” It comprehends the alleviation of poverty as an objective of development, by referring to development as aiming “at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”⁴⁹

It further comprehends the right to development as imposing negative and positive obligations on both the internal and external exercise of sovereign power.⁵⁰ The internal dimensions of the right require states to exercise their sovereign power over resources and revenues in ways that promote development for the benefit of its population. Article 2(3) of the Declaration, for example, imposes on states “the duty to formulate appropriate national development policies.”⁵¹ Article 8 requires states to undertake “at the national level all necessary measures for the realization of the right to development.”⁵² The external dimensions of the right speak to the exercise of sovereign power in the international arena.

⁴⁶ UN Doc. E/CN.4/1489, UN Doc. E/CN.4/1983/11; UN Doc. E/CN.4/1984/14.

⁴⁷ Supra note xx. The Resolution passed by a recorded vote of 146 in favor, 1 against (U.S.), and 8 abstentions.

⁴⁸ U.N. GAOR, 41st Sess., Annex, Agenda Item 101; UN Doc. A/RES/41/128 (1987).

⁴⁹ Second preambular paragraph.

⁵⁰ Margot E. Salomon, “Legal Cosmopolitanism and the Normative Contribution of the Right to Development” LSE Working Paper Series (2008) (on file with author).

⁵¹ Article 2(3).

⁵² Article 8.

Article 3(1), for example, imposes positive obligations on states to create “international conditions favourable to the realization of the right to development.”⁵³ Article 4(1) provides that states are under an individual and collective obligation “to formulate international development policies with a view to facilitating the full realization of the right to development.”⁵⁴ Other Articles refer to duties of international cooperation and assistance, further specifying the external dimensions of the right.⁵⁵

The Declaration on the Right to Development thus verifies the international legal existence of the right to development and validates its international legal character as a human right. The Declaration defines development in comprehensive and participatory terms, and comprehends development as requiring the alleviation of poverty. And it imposes internal obligations on all states to promote development for the benefit of their respective populations, and imposes external obligations on states to facilitate development beyond their borders.

B. Textual Ambiguities

Enshrining the right to development in the pantheon of international human rights law was not without its skeptics. In a famously scathing critique, Jack Donnelly argued that proponents of the Declaration failed to adequately specify the legal actors in whom the right to development vests.⁵⁶ Some proponents formulated the right in collective terms. Some envisioned the right-holder to be people.⁵⁷ For others, it was the state.⁵⁸ Other proponents saw

⁵³ Article 3(1).

⁵⁴ Article 4(1).

⁵⁵ Articles 3(3), 4(2). For a similar, more detailed, interpretation of the Declaration, see Anne Orford, “Globalization and the Right to Development,” in Philip Alston (ed.), *Peoples’ Rights* (Oxford: Oxford University Press, 2001) 127-184, at 135-45.

⁵⁶ Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development” 15 Cal. W. Int’l L.J. 473 (1985).

⁵⁷ See Georges Abi-Saab, “The Legal Formulation of a Right to Development,” in Rene-Jean Dupuy, ed., *The Right to Development at the International Level* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1980) 159-75.

the right as vesting in individuals.⁵⁹ Still others treated the right as vesting in both collectivities and individuals.⁶⁰ Lack of specificity on this front produced ambiguities on another front. It is said that all legal rights create legal duties.⁶¹ But who are the legal actors who bear duties created by the right to development? In Donnelly's words, "if the right to development is primarily a right of States, it would be held primarily in relation to other States, while as a right of peoples it would be held against States (one's own or others), and perhaps even individuals as well."⁶² If it is an individual right, then, according to Donnelly, it generates duties on the state in which the individual is located.⁶³

The text of the Declaration, for Donnelly, does little to resolve these questions.⁶⁴ Article 1 states that "every human person" and "all peoples" possess the right to development, suggesting that it vests in both individuals and peoples. Article 2(1), however, states that "[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development,"⁶⁵ implying that any collective dimensions of the right are secondary to its individual dimensions. Article 2(2) complicates matters further by declaring that "[s]tates have the right ... to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and

⁵⁸ Haquani, "Le droit au developpement: fondements et sources," in Academie de Droit International de la Haye, *Colloque 1979, Le Droit du Developpement au Plan International* (R.-J. Dupuy ed. 1980), at 31.

⁵⁹ Jennifer Myers, *Human Rights and Development: Using Advanced Technology to Promote Human Rights in Sub-Saharan Africa*, 30 Case Western Res. J. Int'l L. 343 (1998).

⁶⁰ Keba M'Baye, "Le Droit au developpement," in Dupuy (ed.), *supra*, at 74-75. See also Isabella D. Bunn, "The Right to Development: Implications for International Economic Law," 15 Am. U. Int'l L. Rev. 1425, 1446 (2000) ("[w]hile the human being is the primary subject and beneficiary of the right to development, the right also holds a societal dimension in its application to peoples").

⁶¹ See Wesley Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).

⁶² Donnelly, *supra*, at 501, n. 107.

⁶³ *Ibid.*

⁶⁴ Yash Gai, "Whose Human Right to Development?" Human Rights Unit Occasional Paper, 5-6 (Commonwealth Secretariat, Nov. 1989), at 12 ("[I]n the case of the right to development, it is not clear who are the right and duty bearers").

⁶⁵ Article 2(1).

of all individuals.”⁶⁶ The Declaration, in other words, appears to contemplate that the right to development vests in individuals, peoples and states.

It is less ambiguous about who bears duties created by the right. Although Article 2(2) declares that “[a]ll human beings have a responsibility for development,”⁶⁷ suggesting that the right creates duties in individuals, the Declaration speaks primarily of duties that the right imposes on states. Article 2(3) provides that states have not only the “right” but also “the duty to formulate appropriate national development policies.”⁶⁸ Article 3(1) stipulates a duty of states to create “international conditions favourable to the realization of the right to development.”⁶⁹ Article 3(3) refers to a duty of states “to co-operate with each other in ensuring development and eliminating obstacles to development.”⁷⁰ Article 4 provides that “[s]tates have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.”⁷¹

Least convincing, for Donnelly, are accounts of the right’s relationship to other international human rights and what it actually protects. Mohammed Bedjaoui, one of the first legal scholars to engage these questions, wrote prosaically of the right to development as the “alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights, in short it is the *core right* from which all others stem.”⁷² Others regarded the right to development as intimately related to the right to self-determination. Some saw self-determination as an element of the right to development; others

⁶⁶ Article 2(2).

⁶⁷ Article 2(2).

⁶⁸ Article 2(3).

⁶⁹ Article 3(1).

⁷⁰ Article 3(3).

⁷¹ Article 4.

⁷² Mohammed Bedjaoui, “The Right to Development,” in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff, 1991), at 1182.

saw the right to development as an element of the right of self-determination.⁷³ Still others saw the right as a composite of social and economic rights. Abi-Saab, for example, suggested that the right to development is an aggregation of the social, economic and cultural rights of all individuals in a political community.⁷⁴ Philip Aston presented the right as “a synthesis of existing rights” that emphasizes “the interdependence and indivisibility” of social and economic rights and civil and political rights.”⁷⁵

Each of these formulations has textual support in the Declaration itself. The Preamble and Article 1(1) speak of development as a “comprehensive economic, social, cultural and political process.”⁷⁶ Article 1(2) states that the right to development “implies the full realization of the right of peoples to self-determination.”⁷⁷ Article 8 specifically identifies social and economic interests, including equal access to basic resources, education, health services, food, housing, employment, and the fair distribution of income, as necessary measures for the realization of the right to development.⁷⁸ Article 6 affirms that “[all human rights and fundamental freedoms are indivisible and interdependent,” and calls for “the implementation, promotion and protection of civil, political, economic, social and cultural rights.”⁷⁹

Such formulations treated development either as a valuable consequence or as a necessary condition of protecting human rights that are more firmly grounded in international human rights law, such as economic, social and cultural rights, civil and political rights, the right to self-determination, or some combination thereof. For Donnelly, however, neither approach

⁷³ For the first view, see Ruth L. Gana, “Which ‘Self’? Race and Gender in the Right to Self-Determination as a Prerequisite to the Right to Development,” 14 Wisc. Int’l L.J. 133; for the second, see Georges Abi-Saab, “The Legal Formulation of a Right to Development,” in Hague Academy of International Law, R.-J. Dupuy (ed.) *The Right to Development at the International Level* (Sijthoff & Noordhoff, 1980), at 163.

⁷⁴ *Ibid.*

⁷⁵ Philip Alston, “Development and the Rule of Law: Prevention versus Cure as a Human Rights Strategy,” in Int’l Comm’n of Jurists, *Development, Human Rights and the Rule of Law* (Conference Report Apr. 27 – May 1, 1981), at 102, 107 (cited in Donnelly, *supra*, at 501, n. 108).

⁷⁶ Second preambular paragraph, Article 1(1).

⁷⁷ Article 1(2).

⁷⁸ Article 8.

⁷⁹ Article 6.

justifies treating development itself as a right. The first approach wrongly conceptualizes an outcome of a right's protection as a right itself as opposed to simply an outcome. The second wrongly assumes that because development is necessary to the full enjoyment of other rights, development itself is a right. In Donnelly's words, "the instrumental necessity of *x* for the enjoyment of A's right *r* simply does not establish that A has a right to *x*."⁸⁰ Both approaches incorrectly assume that the aggregation of certain human rights into a more general right to development will result in greater protection than their disaggregation. Since neither actually performs this function, the right to development, in Donnelly's words, is a "mythical creature."⁸¹

C. Universalism and the Right

Donnelly is making a deeper claim about the right to development than one of analytic confusion. His critique ultimately rests on a universal conception of human rights that draws a sharp distinction between moral obligation and human right. Human rights give rise to certain obligations but not all moral obligations possess a counterpart in the form of a human right. "In a just world," Donnelly writes, "underdevelopment would not be permitted; morality and justice demand development."⁸² But human rights aren't co-extensive with morality and justice; for Donnelly, they protect essential features of what it means to be a human being. "[I]t is logically and phenomenologically quite possible," he writes, "to be a human being, and thus possessed of human rights, without perceiving oneself or being considered by others to be a member of the international community, and thus a beneficiary of rights or duties of solidarity."⁸³ The source of an obligation to assist others in need "reflects special bonds between members of a community, which establish reciprocal

⁸⁰ *Supra*, at 485.

⁸¹ Specifically, "a run-down horse with a plastic horn glued to its head." Donnelly, *supra*, at 508.

⁸² *Ibid.*, at 490.

⁸³ *Ibid.*, at 493.

obligations of assistance owed by each member to any other member in special need.”⁸⁴ It does not correlate with a right that vests in all of us by virtue of our common humanity.

Donnelly’s point is not that such communal bonds are present only at the national level; he is open to the possibility that international bonds of solidarity ground moral obligations that transcend one’s own political community. It is instead that such bonds – whether national or international in nature –establish, at best, “a moral obligation to act to promote development.”⁸⁵ A human right to development, for Donnelly, is nothing more than an individual “right to pursue full personal development along all major dimensions of human life;” it thus “stands as a summary of traditional rights.”⁸⁶ The obligations to which it gives rise call on others to not interfere with its exercise and to perhaps promote its realization. They don’t amount to anything more than the sum of obligations that correspond to the more specific human rights that comprise the canon of international human rights law. Most importantly, they do not include international legal obligations to assist strangers in need or, more generally, to take positive measures to address global poverty. Such obligations might be required as a matter of morality and justice, but they are not owed as of human right.

Donnelly’s distinction between obligations that correspond to human rights and those that reflect special bonds of solidarity echoes a distinction more formally drawn by H.L.A. Hart between general and special rights. For Hart, general rights are “rights which all men capable of choice have” whereas special rights are “rights that arise out of special transactions between individuals or out of some special relationship in which they stand to each other.”⁸⁷ Although Hart did not specifically equate general rights with human rights, he believed that some rights are general in nature because they vest in men ‘*qua* men and not only if they are

⁸⁴ *Ibid.*, at 491.

⁸⁵ *Ibid.*, at 491.

⁸⁶ *Ibid.*, at 501. Compare P. Uvin, *Human Rights and Development* (West Hatford: Kumerian Press, 2004), at 43 (“affirming that all people have the RTD, and that ... development consists of and is realized through the realization of every existing right category of human rights, adds nothing to our knowledge. ... It adds only verbiage.”).

⁸⁷ H.L.A. Hart, “Are There any Natural Rights?” 64(2) *Philosophical Review* 175-191 (1955) at 188, 183.

members of some society or stand in some special relation to each other.”⁸⁸ Special rights, in contrast, arise from particular relationships that we have with others, whether voluntarily, as in contract, or by virtue of belonging to a particular social or political community. General rights impose obligations on “everyone” whereas special rights impose obligations on only “parties to the special transaction or relationship.”⁸⁹

Donnelly treats human rights as general rights. They arise from the fact of humanity, they can be claimed by all, and they impose obligations on all. Human rights are not special rights. They don’t reflect special bonds that exist among members of particular communities, they don’t vest in some people and not others, and they don’t require us to be partial to some at the expense of others. To speak of a right to development as a human right must mean something other than what justice requires in the context of contingent relationships in which we find ourselves. It must mean an entitlement grounded in a universal feature of what it means to be human, regardless of the diverse circumstances that define our places in the world.

This account, focused on conditioning the existence of rights on abstract moral duties we owe others directly, offers little reason to comprehend the right to development as yielding positive duties on all of us to improve the social and economic condition of impoverished people around the world. To the extent that it accepts that the right to development is a human right, it comprehends it as vesting in individuals and as an aggregate of more specific civil, political, social economic and cultural rights. The duties that it imposes on others are primarily negative in nature. The possibility that the right to development yields positive duties beyond voluntary measures to address global poverty quickly becomes subsumed in a larger debate within classical political theory about the nature of one’s moral obligations to assist strangers in need.

⁸⁸ *Ibid.*, at 175. Beitz makes the same point about Hart’s distinction. See Charles Beitz, “Human Rights and the Law of Peoples” in D.K. Chatterjee (ed.), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge: Cambridge University Press, 2004) 193-214, at 199.

⁸⁹ *Ibid.*, at 183.

D. The Content of the Right

The right to development is far from mythical in legal terms. The Declaration affirms the right to development as a human right in international law, and imposes internal obligations on all states to promote development for the benefit of their respective populations and external obligations on states to facilitate development beyond their borders. The International Covenant on Social, Economic and Cultural Rights is binding on the more than 150 states party to its terms, and it imposes obligations on states “to take steps, individually and through international assistance and co-operation,” to protect social, economic and cultural rights enshrined in the Covenant.⁹⁰ The Economic, Social and Cultural Rights Committee has stated that these obligations give rise to “international responsibilities for developed States” to address global poverty.”⁹¹ And both International Covenants stipulate that, by virtue of the right of self-determination, “all peoples ... freely pursue their economic, social and cultural development.”⁹² From the perspective of positive international law, the relevant questions concerning the right to development relate not to its existence as a human right but instead to its content. In whom does the right to development vest? What does development mean? What does the right protect? And what are the nature and scope of obligations it imposes on international legal actors?

The legal existence of a right to development doesn’t foreclose construing its content in universal terms, as protecting certain features that we all share as human beings. But, as Donnelly convincingly argues, this would mean that the right to development performs no independent legal function at all, rendering it legally meaningless. The features of humanity

⁹⁰ Article 2(1).

⁹¹ CESCR, “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights,” E/C.12/2001/10, para. 16.

⁹² Article 1, *ICCPR*; Article 1, *ICESCR*.

that it could plausibly be interpreted to protect already receive legal protection as a result of other, more specific human rights that comprise the field. But if a universal account renders the right unintelligible, then it is not at all clear why it should be construed in universal terms. Unintelligibility doesn't inhere in the text of the Declaration; the text is unintelligible only if the yardstick of intelligibility is a universal conception of the right. If the text doesn't cohere with a universal conception, then universalism is the wrong frame of reference by which to comprehend the nature and scope of the right.

Freed from the conceptual constraints of universalism, the text of the Declaration becomes much less ambiguous than Donnelly's account. The right to development enshrined in the Declaration promotes "the constant improvement of the well-being of the entire population" of a state.⁹³ It does so by protecting the capacity of a state's population to "participate in, contribute to, and enjoy economic, social, cultural and political development."⁹⁴ It provides this protection by imposing negative and positive obligations on both the internal and external exercise of sovereign power.⁹⁵ The internal dimensions of the right to development police the relationship between a state and its citizens by imposing obligations on states to exercise their sovereign power over resources and revenues in ways that promote development for the benefit of its population. The external dimensions of the right speak to the exercise of sovereign power in the international arena.

Understanding the content of the right to development as including obligations on states to promote development at home and abroad is also consistent with the intent of the drafters of the Declaration. One of the reasons why the United States voted against the Declaration – and why eight other states abstained from voting – was precisely because of fears that it imposes positive obligations on developed states to assist developing states in promoting

⁹³ Second preambular paragraph.

⁹⁴ Art. 1.

⁹⁵ Margot E. Salomon, "Legal Cosmopolitanism and the Normative Contribution of the Right to Development" LSE Working Paper Series (2008) (on file with author).

development.⁹⁶ But the United States was the only state that voted against the Declaration, which suggests that the 148 states that voted in favor of its adoption did so on the understanding that the right imposes positive obligations on states to promote development at home and abroad.

Textual considerations and the intent of those responsible for its drafting do not end interpretive ambiguities over the content of the right. These sources fail to specify in sufficient detail the meaning of development, its relationship to the alleviation of poverty, and, most importantly, the precise nature of the obligations that the right to development imposes on states in the exercise of internal and external sovereign power. The Declaration makes it clear that a state is under an obligation to exercise sovereign power in ways that promote development for the benefit of its population, and that a state's actions in the international arena must aim to realize the right to development, but what do these internal and external obligations actually require of states? The text of the Declaration does not answer this question. Nor are answers readily available from the intent of its framers. And no doubt a multiplicity of intentions motivated those responsible for its drafting, making intent an unreliable guide to ascertaining the content of the right. As demonstrated in the next Part, many of the questions surrounding the content of the right to development left open by the Declaration have been resolved by efforts by a variety of international legal actors to affirm, elaborate and implement the right to development subsequent to its formal entrance onto the international stage as a human right.

⁹⁶ See Stephen Marks, "The Human Right to Development: Between Rhetoric and Reality" 17 *Harvard Human Rights Law Journal* 137 (2004) for an overview of initial and ongoing objections raised by the United States to the right to development.

IV. IMPLEMENTING THE RIGHT TO DEVELOPMENT

After an initial wave of academic interest in the right to development, there was a flurry of activity within the United Nations devoted to its affirmation, elaboration and implementation. Most if not all of the efforts to affirm and elaborate the right to development emphasize its procedural and participatory dimensions, and seek to demonstrate that it possesses meaning above and beyond the civil, political, social, economic and cultural rights that are said to form its constituent components. Measures to implement the right to development have been proposed and introduced in several international and regional institutions involved in development projects. Framed in procedural and participatory terms, the right to development has, in varying degrees, been internalized by international legal actors involved in concessional aid, debt relief, and poverty reduction. These various efforts to affirm, elaborate and implement the right to development make clear that the right to development possesses internal and external dimensions, requiring states to promote development at home and abroad in ways that address global poverty. They provide greater clarity on what the right to development requires of states in the internal exercise of sovereign power. They also suggest what the right to development might also require of states in the external exercise of sovereign power.

A. Initial Steps

Initial steps to affirm, elaborate and implement the Declaration on the Right to Development yielded little concrete guidance on the content of its terms. They began with a request by the UN Commission on Human Rights to the working group of governmental experts responsible for initiating the Declaration that it clarify the right to development and its implications. After three sessions between 1986 and 1989, the working group was

unsuccessful in generating concrete recommendations for the implementation of the right.⁹⁷ As a result, the UN Commission on Human Rights asked the Secretary General to organize a “global consultation” on the issue, involving experts, UN representatives, regional inter-governmental organizations and relevant non-governmental organizations.⁹⁸ Participants produced a report that echoed most, if not all, of the provisions of the Declaration, but it focused on the operational activities of the UN and, perhaps more than the Declaration itself, underlined participation as the principal means of implementing the right.⁹⁹ It emphasized the need for indicators to monitor the form, quality, democratic nature and effectiveness of participatory processes in development initiatives. In particular, it called for the democratization of decision-making in international institutions dealing with trade, monetary policy and development assistance. The Commission also established a working group in 1993 for a period of three years to report on obstacles to implementation of the right.¹⁰⁰

These recommendations had no immediate effect on international institutions, and the right to development received little attention at the international level until the Vienna World Conference on Human Rights in 1993. One hundred and seventy one states unanimously approved the Vienna Declaration and Programme of Action, which affirmed the right to development as “a universal and inalienable right and an integral part of fundamental human rights.”¹⁰¹ The Vienna Declaration called on states to cooperate with each other in ensuring development and eliminating obstacles to development, and called for “effective international

⁹⁷ The Working Group published its last report in 1989: Report of the Working Group of Governmental Experts on the Right to Development, UN Doc. E/CN.4/1989/10 (1989).

⁹⁸ Comm’n Res. 1989/45 (1989).

⁹⁹ See *Global Consultation on the Realization of the Right to Development as a Human Right*, U.N. Commission on Human Rights, 46th Sess., Agenda Item 8, U.N. Doc. E/CN.4/1990/9/Rev.1. (1990). See generally Russell Lawrence Barsh, “The Right to Development as a Human Right: Results of the Global Consultation,” 13(3) *Human Rights Quarterly* 322.

¹⁰⁰ The three reports of the 1993 working group identified the main obstacles to implementation to be globalization, the debt burdens of developing states, development assistance conditionality, and decreasing levels of development assistance: see E/CN.4/1994/21; E/CN.4/1995/11; E/CN.4/1996/10.

¹⁰¹ See *Vienna Declaration on Human Rights, UN World Conference on Human Rights*, UN GAOR, at 23-24, U.N. Doc. A/CONF.157/24 (Part I) (1993)

cooperation for the realization of the right to development.”¹⁰² It also called on the international community to help alleviate the external debt burden of developing countries, and declared that “extreme poverty and social exclusion constitute a violation of human dignity,” noting that some of the causes of extreme poverty relate to “the problem of development.”¹⁰³

At the conclusion of the 1995 World Summit for Social Development, participating states issued the “Copenhagen Declaration on Social Development” and a “Programme of Action.”¹⁰⁴ The Copenhagen Declaration called for sustainable and equitable development, defined as a process that respected and promoted democracy, social justice, environmental protection, accountable governance and human rights.¹⁰⁵ It called on other members of the international community, including specialized agencies of the UN, to support developing countries in their efforts to achieve sustainable development. It was only after the Copenhagen Declaration that efforts to affirm, elaborate and implement the Declaration on the Right to Development began to bear fruit.

B. The UN Working Group

In the wake of the Copenhagen Declaration, the UN established a second working group on the right to development in 1996 with a two year mandate which made a series of recommendations, including an increase in the amount of development assistance from developed countries to 0.7% of GDP, and the “mainstreaming” of the right to development in the policies of international financial institutions, such as the World Bank and the IMF.¹⁰⁶ In 1998, the working group was made open-ended and was provided with an independent expert

¹⁰² Article 10.

¹⁰³ Articles 14, 25.

¹⁰⁴ *Copenhagen Declaration on Social Development*, in *Report of the U.N. World Summit for Social Development*, UN Doc. A/CONF.166/9 (1995); *Programme of Action of the World Summit for Social Development*, in *Report of the U.N. World Summit for Social Development*, *ibid.*

¹⁰⁵ *Supra* at para. 26.

¹⁰⁶ E/CN.4/1997/22

who would prepare a series of reports to focus discussion.¹⁰⁷ The independent expert, Arjun Sengupta, has written six reports on the topic, which provide greater clarity on the nature and scope of the right.¹⁰⁸ In his reports, Sengupta characterizes the Declaration on the Right to Development as an instrument that bridges the divide between civil and political rights and social and economic rights. In his words, these two categories of rights “have to be fulfilled together and the violation of one would be as offensive as the other.”¹⁰⁹ This is because “[t]he right to development unifies civil and political rights with economic, social and cultural rights into an indivisible and interdependent set of human rights and fundamental freedoms, to be enjoyed by all human beings.”¹¹⁰ Affirming the view that there is value in comprehending the right in aggregate terms, Sengupta speaks of the right to development as a “vector” that consists of “a large number of elements such as income, employment, health, education or opportunities in general which include all forms of freedoms.”¹¹¹ Aggregating these freedoms in a single overarching right underscores his view that their cumulative realization is development.

Sengupta’s conception of the right to development as an aggregation of civil and political rights and social and economic rights is a juridical formulation of Amartya Sen’s theory of development. In *Development as Freedom*, Sen argues that freedom is both the end and the means of development. Freedom is the end of development because development means the protection and enhancement of “elementary capabilities” of individuals to be free to avoid

¹⁰⁷ The UN Human Rights Commission also asked the UN High Commissioner for Human Rights to report to the working group on the activities of her office and other UN agencies. For her report, see A/55/302.

¹⁰⁸ First report: E/CN.4/1999/WG.18/2; second report: A/55/306; third report: E/CN.4/2001/WG.18/2; fourth report: E/CN.4/2002/WG.18/2; fifth report: E/CN.4/2002/WG.18/6 and E/CN.4/2003/WG.18/2; sixth report: E/CN.4/2004/WG.18/2. In 2004, the Commission established a High-Level Task Force on the Right to Development, and requested analysis and recommendations on the relationship between the Millennium Development Goals and the right to development; social impact assessment in the areas of trade and development; and best practices in the implementation of the right to development: 2004/49. For the Task Force Reports, see E/CN.4/2004/WG.18/2; E/CN.4/2005/WG.18/TF/3. For commentary on the first Task Force Report, see Margot E. Salomon, “Towards a Just Institutional Order: A Commentary on the First Session of the UN Task Force on the Right to Development” (2005) 23 *Netherlands Quarterly of Human Rights* 409.

¹⁰⁹ First Report. E/CN.4/1999/WG.1/2, para. 13.

¹¹⁰ *Ibid.*, para. 11.

¹¹¹ *Ibid.*, para. 67.

certain “deprivations” such as starvation and premature mortality and be able to enrich their lives by exercising civil and political freedom.¹¹² Freedom is also the means of development because “different kinds of freedom interrelate with one another, and freedom of one type may greatly help in advancing freedom of other kinds,” which both constitutes and facilitates development.¹¹³

Enlisting Sen’s theory of development, Sengupta casts development as a process in which all are entitled to participate as of right, one that promotes human development in terms that extend “well beyond the conventional notions of economic growth to the expansion of opportunities and capabilities to enjoy those opportunities.”¹¹⁴ As a result, development policies should not be focused solely on maximizing gross domestic product, industrialization, technological change, and aggregate consumption; instead they should make considerations of equity and justice “the primary determinants of development” and shape development by these determinants.¹¹⁵ The right to development, for Sengupta, guarantees a process that enables individual participation at all stages of decision-making and protects civil and political rights as well as social, economic and cultural rights, equal opportunity to access to resources, and a fair distribution of the benefits of development and of income, and promotes international cooperation to achieve these ends.

Sengupta builds on his procedural, participatory conception of the right to development by combining it with the idea of a “development compact” as a mechanism for implementing the right.¹¹⁶ If a country finds itself unable, because of a lack of resources, to pursue rights-based development that includes provisioning for public goods and public participation, it should be free to enter a development compact with relevant UN institutions, bilateral donors,

¹¹² Sen, *Development as Freedom* (New York: Anchor Books, 1999), at 36.

¹¹³ *Ibid.*, at 37.

¹¹⁴ *Ibid.*, para. 47.

¹¹⁵ *Ibid.*, para. 53.

¹¹⁶ Compare T. Stoltenberg, “Towards a World Development Strategy,” in Louis Emmerij, ed., *One World or Several* (Paris: OECD, 1989) (development contracts as comprehensive long-term commitments by industrial countries for development assistance to implement long-term development plans of the third world countries).

and international financial institutions to seek assistance in meeting its goals. For Sengupta, a compact is essentially the acceptance of a mutual obligation. If developing countries comply with specified obligations geared toward realizing the right to development in accordance with arrangements worked out with their consent, then the international community, donors, and financial institutions promise to provide the necessary financial, technical and other assistance.¹¹⁷

C. Poverty Reduction Strategies

Multilateral lending practices with developing countries developed by the International Monetary Fund and the World Bank help to further clarify the internal obligations that a state might owe to its citizens by virtue of the right to development. The IMF and the World Bank rely on development compacts that bear similarities to those proposed by Sengupta. Both institutions provide development assistance to developing countries in the form of concessional financing and debt relief. Both attach conditions to the receipt of development assistance that generally require recipient states to make structural adjustments to their economic and regulatory environments deemed necessary by the IMF and the World Bank to foster development. Neither institution has openly acknowledged the fact that structural adjustment policies designed to promote development might actually limit a population's capacity to freely pursue their economic, social and cultural development.¹¹⁸ Both, however, have begun to promote development compacts as mechanisms that promote a participatory approach to development that is consistent with, although not referenced to, the internal dimensions of the right to development.

¹¹⁷ Fifth Report, para. 74.

¹¹⁸ See Anne Orford, "Globalization and the Right to Development," *supra* for an extended analysis of the ways in which the structural adjustment policies of the IMF and the World Bank violate the right to development.

Known as Poverty Reduction Strategy Papers (“PRSPs”), these instruments incorporate a set of policies that aim to reduce poverty in countries that qualify for development assistance from the World Bank and the IMF. First introduced in 1999, PRSPs have become central features of the provision of multilateral development assistance to countries in need. A PRSP is a document in which a state seeking multilateral development assistance details the measures it undertakes to introduce to address poverty within its midst over a three year period. It provides a comprehensive, country-specific analysis of poverty, including macroeconomic and structural impediments to poverty reduction. A PRSP is expected to be the result of a participatory process, where the recipient government engages the active participation of the population as well as relevant governmental officials, ministries and agencies. It aims to “reflect the multidimensional nature of poverty, identifying not just the economic but also the social, political, and cultural constraints that need to be overcome” to reduce poverty in the country.¹¹⁹ Finally, it presents a detailed plan to reduce poverty that links inputs to outputs, sets intermediate and long-term targets, and identifies indicators of progress to enable monitoring of implementation of its terms.

PRSPs do not appear to protect a population’s capacity to choose a model of development at variance with the conditions that the IMF and the World Bank typically attach to the provision of development assistance. And the extent to which they promote the more modest goal of ensuring the active participation of its citizens in the formulation and implementation of policies designed to promote development turns on a host of factors, such as who is involved in participation, how participation is organized, and the policy choices that participation is designed to engage.¹²⁰ One would also expect their success to turn on a host

¹¹⁹ Gobind Nankani, John Page, and Lindsay Judge, “Human Rights and Poverty Reduction: Moving Towards Convergence?” in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005) 475-497, at 489.

¹²⁰ For an assessment of these factors, see Frances Stewart and Michael Wang, “Poverty Reduction Strategy Papers within the Human Rights Perspective,” in Alston & Robinson (eds) *Human Rights and Development*, *supra*, 447-474.

of variables that are country-specific, such as the extent of political instability in any given state.¹²¹ Nor do they refer to participation as an incident of the right to development, and there remains significant resistance to transforming PRSPs into human rights instruments.¹²² However, they are nonetheless consistent with a conception of the right to development that requires states to take measures to ensure that its citizens have the capacity to actively participate in the formulation and implementation of development policy.

D. Millennium Development Goals

While the rise of PRSPs is consistent with a conception of the right to development that possesses internal dimensions, the formulation of the Millennium Development Goals (“MDGs”), and the monitoring mechanisms in place to chart progress toward their realization, help to clarify some of the right’s external dimensions. Established in 2000 at the UN Millennium Summit and affirmed at the 2002 International Conference on Financing for Development in Monterrey, Mexico, the eight MDGs call for the eradication of extreme poverty and hunger, the achievement of universal primary education, the promotion of gender equality and the empowerment of women, the reduction of child mortality, the improvement of maternal health, the combat of HIV/AIDS, malaria, and other diseases, environmental sustainability, and the development of a global partnership for development.¹²³ Participants at the Millennium Summit and the Monterrey Conference agreed to achieving the MDGs by 2015. The World Bank and the IMF issue annual Global Monitoring Reports that monitor progress to this end. These reports provide detailed assessments of the contributions of developing countries, developed countries, and international financial institutions toward

¹²¹ *Ibid.*, at 461 (“participation may be less in countries with unstable and fractionalized polities than in more stable and unified countries”).

¹²² See Laure-Helene Piron, “Are ‘Development Compacts’ Required to Realise the Right to Development?” in *The Right to Development Book: Reflections on the First Four Reports of the Independent Expert on the Right to Development* (Geneva: Franciscans International, 2004) 46-61.

¹²³ UN Millennium Development Goals, available at www.unmillenniumproject.org/html/about.shtml.

meeting development commitments, and propose specific recommendations to achieve greater compliance.

The 2006 Global Monitoring Report, for example, details the fact that many countries are off track in meeting the MDGs, particularly in Africa and South Asia, but provides evidence that higher quality aid and better policy environments are accelerating progress in some countries, and that the benefits of this progress are reaching poor families. It also argues that sustained monitoring is needed to ensure continued progress, and to prevent the cycle of accumulating unsustainable debt from repeating itself. It argues further that international financial institutions, for their part, need to focus on development outcomes rather than on inputs, and support the efforts of developing countries to strengthen their statistical and institutional capacities.¹²⁴

Whether development will occur any time soon on the scale imagined by the Millennium Summit will depend on the willingness and capacity of developing countries to formulate and execute poverty reduction strategies that increase public investments, strengthen governance, promote human rights, and engage civil society and the private sector. It will also, of course, depend on the willingness of developed countries to provide extensive debt relief and increase their official development assistance to developing countries.¹²⁵ The participatory conception of development informing the project improves conditions for the receipt of assistance; it is much less ambitious in addressing conditions for the provision of assistance. Development assistance overall has fallen dramatically from the early 1980s, when it constituted .36 per cent of gross domestic product of all donors, to 2004, when it constituted .25 of gross domestic product of all donors.¹²⁶ One estimate suggests that, for the MDGs to be realized by 2015, each developed country will need to increase its official development

¹²⁴ World Bank and the International Monetary Fund, *Global Monitoring Report on the Millennium Development Goals; Mutual Accountability – Aid, Trade and Governance* (April 20, 2006).

¹²⁵ For a detailed assessment, see UN Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (New York: United Nations Development Programme, 2005).

¹²⁶ UN General Assembly, *Report on the World Social Situation, 2005* (13 July 2005), A/60/117, at para. 362.

assistance to developing countries to 0.7 percent of its gross domestic product by 2015. To date, only five countries – Denmark, Luxembourg, Netherlands, Norway, and Sweden – have met or surpassed this target. Only six others – Belgium, Finland, France, Ireland, Spain, and the United Kingdom – have committed themselves to specific timetables to achieve the target by 2015.¹²⁷

Regardless of the accuracy of predictions about their success, the Millennium Development Goals promote a conception of development that does not sacrifice human rights in the name of economic growth and industrialization – a conception shared by the right to development as enshrined in the Declaration on the Right to Development. Moreover, the eighth MDG – the establishment of a global partnership for development – includes numerous measures that can be said to clarify the content of the right to development. It calls for the development of a trading and financial system that is committed to development and poverty reduction, tariff- and quota-free access for the exports of least developed countries, enhanced debt relief for heavily indebted countries, cancellation of official bilateral debt, and more generous development assistance for countries committed to poverty reduction.¹²⁸

The objectives of the Millennium Summit, like the PSRPs employed by the World Bank and the IMF, however, are voluntary initiatives that tackle global poverty. They don't mandate development assistance; they identify obligations that attach to donor states that voluntarily agree to provide development assistance. In the eyes of the World Bank and the IMF, recipient states should adopt measures to promote development, and they require international assistance to do so. But neither institution envisions development in terms that

¹²⁷ *Ibid.*, at 58-59.

¹²⁸ See Margaret Salomon, "Legal Cosmopolitanism and the Normative Contribution of the Right to Development" (LSE working paper on file with author), at 16 ("The Global Partnership for Development, envisioned under Millennium Development Goal 8, reflects [the right to development's] current expression"), and text accompanying notes xx-xx, *infra*. For a detailed exploration of the MDGs and international human rights, including but not restricted to the right to development, see Philip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals" (2005) 27 Human Rights Quarterly 755.

generate legal obligations on donor states or the international community to provide international financial assistance. Similarly, although Sengupta speaks of development as a participatory right, the process in which the right-holder is entitled to participate is a voluntary one – in his terms, a “development compact.”

What these various initiatives to implement the right to development nonetheless offer is clarification of what the right to development requires of states in the internal exercise of sovereign power. The Millennium Summit initiative also suggests what the right to development might require of states in the external exercise of sovereign power. What it doesn't is a normative account of why the right to development should impose external obligations on developed states to alleviate global poverty. The next Part of this Article attempts to answer this question by providing an account of the purpose of the right to development in light of the role that it plays in the structure and operation of the international legal order.

V. FROM GLOBAL POVERTY TO INTERNATIONAL LAW

The obligations enshrined in the Declaration on the Right to Development become less ambiguous when understood in light of its basic thrust, which is to call for a new international economic order that would benefit populations in the developing world. The Declaration emerged out of a belief by many developing countries that the international legal commitment to the formal sovereign equality of states needs to be supplemented with a more equitable distribution of the world's economic resources. Its preamble speaks of the human rights of “peoples and individuals affected by colonialism, neo-colonialism, apartheid, and all

forms of racism and racial discrimination.”¹²⁹ Article 4 declares that “as a complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.”¹³⁰ Understood as an instrument that promotes international distributive justice, the right to development, in the words of Bedjaoui, is a right “to an equitable share in the economic and social well-being of the world.”¹³¹

A. From Global Poverty to Global Justice

But what constitutes an equitable share, who might justifiably claim one, and why is attending to global poverty required as a matter of justice? In recent years, there has been an explosion of scholarship exploring the thesis that distributive justice is not a matter to be determined within the boundaries of states. Instead, what constitutes a just distribution of wealth and resources should be determined globally. Political theorists engaging questions of global justice offer different accounts of what constitutes a globally just distribution. Charles Beitz has argued that distributive justice requires that global socioeconomic inequalities be arranged to the greatest benefit of the least advantaged.¹³² Simon Caney defends a similar egalitarian global distributive vision, one that includes “subsistence rights, a principle of global equality of opportunity, rules of fair play, and a commitment to prioritizing the least

¹²⁹ *Supra*, ninth preambular paragraph.

¹³⁰ Article 4.

¹³¹ Mohammed Bedjaoui, “The Right to Development,” in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Dordrecht: Nijhoff, 1991), at 181.

¹³² Beitz, *Political Theory and International Relations* (2d ed.) (Princeton: Princeton University Press, 1999); Pogge, *World Poverty and Human Rights*, *supra*; see also Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004), at 60-61 (“a just global distributive scheme would be one that meets [Rawls’] second principle of justice – equality of opportunity and the regulation of global equality by the difference principle” and which “would keep the plight of the worst-off individuals (globally situated) firmly in its sight”).

advantaged.”¹³³ Hillel Steiner goes further, arguing that global justice mandates an equal portion of the world’s natural resources to all.¹³⁴

Theorists also offer different accounts of among whom global justice is to be sought. Building on a cosmopolitan ideal that individuals are the ultimate unit of moral concern, some argue that global justice requires a just distribution of resources among citizens of the world.¹³⁵ Others treat nations or peoples as the subjects of global justice.¹³⁶ Still others see states as the subjects of global justice, maintain that states are not wholly responsible for the poverty within their midst, and argue for global redistributive measures to reduce the disparity of wealth and resources that exists among states.¹³⁷

Notwithstanding differences among scholars over the proper subjects of global justice, most of the reasons they offer to explain why global justice requires attending to global poverty build on the proposition that natural, geographical and social contingencies that contribute to global poverty – such as the state into which one is born, its location, and its resources – are morally arbitrary determinants of one’s station in life.¹³⁸ The fact that one

¹³³ Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005), at 264.

¹³⁴ Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994).

¹³⁵ See Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999); Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1999); Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005); Darrel Moellendorf, *Cosmopolitan Justice* (Boulder: Westview Press, 2002); Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism Responsibilities and Reforms* (Cambridge: Polity, 2002). For an illuminating analysis of how international legal scholarship and political theorists conceptualize cosmopolitanism, see Başak Çali, “On Legal Cosmopolitanism: Divergences in Political Theory and International Law,” 19 *Leiden Journal of International Law* 1149 (2006).

¹³⁶ John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999).

¹³⁷ Brian Barry, “Do Countries Have Moral Obligations: The Case of World Poverty,” in Seterling McMurrin (ed.), *The Tanner Lectures on Human Values Volume II* (Salt Lake City: University of Utah Press, 1981).

¹³⁸ The normative force of this claim is grounded in “luck egalitarianism,” a term coined by Elizabeth Anderson, in “What is the Point of Equality?” 109(2) *Ethics* 287 (1999), in critique of an account of distributive justice that identifies its relevance in the proposition that “there is injustice in distribution when the inequality of goods reflects not such things as differences in the arduousness of different people’s labors or people’s different preferences and choices with respect to income and leisure, but myriad forms of lucky and unlucky circumstances.” G.A. Cohen, *If You’re an Egalitarian, How Come You’re so Rich?* (Cambridge: Harvard University Press, 2000), at 130. Ronald Dworkin has refined this claim with a distinction between “option luck,” “a matter of how deliberate and calculated gambles turn out,” and “brute luck,” which happens independently of choice,” and treating the latter only as a matter of distributive justice. Roald Dworkin, *Sovereign Virtue* (Cambridge: Cambridge University Press, 2000), at 73. Within this school of thought, “there is no consensus as

individual is born into a poverty-stricken country in Africa and another is born into a developed state in western Europe, for example, may explain but does not justify the poverty that the former endures and the benefits that the latter enjoys.¹³⁹ The geographical distribution of natural resources around the world means that some regions are resource-rich and others are resource-poor for reasons that are morally arbitrary. The distribution itself is not unjust; questions of justice enter the picture because the fact that country A is arbitrarily resource-rich does not provide a normative justification for entitling it to exclude others from its resources.¹⁴⁰

Others extend reasons for addressing poverty in the domestic sphere to the global arena, arguing that “the two realms are sufficiently similar that whatever principles of justice we are prepared to acknowledge in the domestic case, we should be prepared to acknowledge in the international case as well.”¹⁴¹ There are, of course, conceptions of justice that reject attending to poverty and economic inequality in domestic political communities.¹⁴² But some have argued that principles of justice that ground obligations to attend to poverty within a political community also ground obligations to attend to global poverty. If justice requires attending to economic inequalities in a political community because, in the words of John Rawls, a political community is “a system of cooperation designed to advance the good of those taking

to the precise cut between what is luck and what is choice, or between brute luck and option luck, and there is a lively ongoing debate on what luck is, and how to place the cut between luck and choice.” Kok-Chor Tan, *Justice, Institutions & Luck: The Site, Ground and Scope of Equality* (Oxford: Oxford University Press, 2012), at 95.

¹³⁹ See David A.J. Richards, “International Distributive Justice,” in J.R. Pennock and J.W. Chapman (eds), *Ethics, Economics, and the Law* (New York: New York University Press, 1982); Robert Goodin, “What is so Special About our Fellow Countrymen?” 98(4) *Ethics* 663-86 (1988).

¹⁴⁰ See Beitz, *Political Theory and International Relations*, *supra*, at 136-43. For discussion, see Álvaro de Vita, “Inequality and Poverty in Global Perspective,” in Pogge (ed.), *Freedom from Poverty as a Human Right*, *supra*, 103, at 120-22.

¹⁴¹ Charles Beitz, *Political Theory and International Relations*, *supra*, at 200.

¹⁴² Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974).

part in it,”¹⁴³ then justice requires addressing global poverty because similar relations of mutual reciprocity and social cooperation exist at the global level.¹⁴⁴

The challenge confronting such calls for global wealth redistribution is twofold. First, in the words of Kok-Chor Tan, they need “to show how the aspiration for justice without borders can be reconciled with what seems to be a basic moral fact that people may, and are indeed obliged to, give special concern to their compatriots.”¹⁴⁵ This challenge recalls Hart’s distinction between general rights, “which all men capable of choice have,” and special rights, which “arise out of special transactions between individuals or out of some special relationship in which they have to each other.”¹⁴⁶ Critics argue that an aspiration for global justice cannot be reconciled with the fact that we owe special obligations to members of our own political community because the conditions that give rise to these special obligations simply don’t exist in the international realm.

Thomas Nagel, for example, conceding that we are under a duty to provide humanitarian assistance to those in dire need in other countries, argues that any additional obligations that promote distributive justice are only appropriate between members of political communities constituted as states. It is the fact that “we are both putative joint authors of the coercively imposed system, and subject to its norms ... that creates the special presumption against

¹⁴³ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

¹⁴⁴ Charles Beitz, *Political Theory and International Relation*, *supra*. Rawls does not believe that the international community manifests the requisite degree of social cooperation to ground an obligation to address global poverty. He locates “a duty of assistance” instead in the need to ensure that states possess the capacity to operate in accordance with a public conception of justice. See also Joshua Cohen & Charles Sabel, “Extra Rempublicam Nulla Justitia?” 34 *Philosophy and Public Affairs* 147 (2006) (the existence of common institutions and collective interdependence across state borders calls for a weak form of international distributive justice).

¹⁴⁵ Kok-Chor Tan, *Justice Without Borders*, *supra*. Tan advances a version of cosmopolitan distributive justice that accommodates but limits patriotic concerns. Compare Samuel Scheffler, *Boundaries and Allegiances* (New York: Oxford University Press, 2001), at 111 (distinguishing between cosmopolitanism as a “doctrine about culture” and cosmopolitanism as a “doctrine about justice”). Scheffler seeks to defend a theory of cosmopolitanism that takes seriously the particular ties and associative relationships that arise in particular communities of value.

¹⁴⁶ Hart, “Are There any Natural Rights?” *supra*, at 188, 183.

arbitrary inequalities in our treatment by the system.”¹⁴⁷ Nagel argues that international institutions do not possess coercive power putatively delegated by individuals whose lives they affect; “the responsibility of those institutions towards individuals is filtered through the states that represent and bear primary responsibility for those individuals.”¹⁴⁸

Andrea Sangiovanni makes a slightly different claim, pointing not to the coercive nature of the state but to the reciprocity that exists among citizens of a state in “the mutual provision of collective goods necessary to protect us from physical attack and to maintain and reproduce a stable system of property rights and entitlements.”¹⁴⁹ For Sangiovanni, “we owe obligations of egalitarian reciprocity to fellow citizens and residents in the state, who provide us with the basic conditions and guarantees necessary to develop and act on a plan of life but not to noncitizens, who do not.”¹⁵⁰ Institutionally mediated relationships of reciprocity do exist at the global level, but their nature and character yield different principles of justice “in both form and content than those at the domestic level.”¹⁵¹ For Sangiovanni, international reciprocal relationships cannot plausibly ground an obligation to address global economic inequality.

¹⁴⁷ Thomas Nagel, “The Problem of Global Justice,” 33(2) *Philosophy & Public Affairs* 113-47, at 128-29. (2005). For Michael Blake, it is the fact that the state restricts the autonomy of citizens that generates a concern for distributive justice. See Michael Blake, “Distributive Justice, State Coercion, and Autonomy,” 30 *Philosophy and Public Affairs* 257-96 (2001). For critique, see Arash Abizadeh, “Cooperation, Persuasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice,” 35 *Philosophy & Public Affairs* 318, 348-350 (2007); A.J. Julius, “Nagel’s Atlas,” 34 *Philosophy & Public Affairs* 176 (2006); Chris Armstrong, “Coercion, Reciprocity and Equality beyond the State” 40(3) *Journal of Social Philosophy* 297 (2009).

¹⁴⁸ *Ibid.*, at 138.

¹⁴⁹ Andrea Sangiovanni, “Global Justice, Reciprocity, and the State,” 35(1) *Philosophy and Public Affairs* 3-39, at 19-20 (2007).

¹⁵⁰ *Ibid.*, at 19. See also Brian Barry, *Liberty and Justice: Essays in Political Theory, Volume 2* (Oxford: Oxford University Press, 1991), at 182-210.

¹⁵¹ *Ibid.*, at 35. For critique, see Arash Abizadeh, “Cooperation, Persuasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice,” 35 *Philosophy & Public Affairs* 318, 336-337 (2007); Chris Armstrong, “Coercion, Reciprocity and Equality beyond the State,” *supra.*

B. From Global Justice to International Economic Law

What both advocates and critics of global wealth redistribution overlook is the structure and operation of the international legal order in which global poverty is situated. Political theorists who advocate global wealth distribution tend to miss the normative significance of the relationship between the *legal structure* of our international order and the distributive injustice of global poverty.¹⁵² It is no doubt true that the natural, geographical and social contingencies that contribute to global poverty – such as the state into which one is born, its location, and its resources – are morally arbitrary determinants of one’s station in life. But the poverty experienced by person born in, say, Chad, is not simply a matter of natural, geographical and social contingency. That person is born into a legal jurisdiction recognized by the international legal order as vested with sovereignty over its people and territory.

The prominence of sovereignty as a legal entitlement that international law relies on to bring legal order to global politics has been defended in terms of a need “for a presumptive monopoly of the last word on public order in any given territory.”¹⁵³ And sovereignty in international law possesses a measure of normative purchase to the extent that people can and do flourish by being organized into particular political communities and, in doing so, generate a complex set of interests that merit protection.¹⁵⁴ One of the consequences of deploying sovereignty to organize global politics into an international legal order, however, is

¹⁵² One significant exception lies in the work of Kok-Chor Tan, who weds an international institutional approach to distributive justice with luck egalitarianism, rendering morally relevant the fact “that there is a global social arrangement – consisting of specific institutional entities, and institutionally entrenched or enforced social and legal norms and expectations – that has the effect of rendering random facts about persons and the natural world into actual social inequalities.” Tan, *Justice, Institutions, & Luck*, *supra*, at 158. Tan focuses specifically on “global norms such as those governing sovereignty, resource ownership, territorial rights), economic practices (sch as trade laws, intellectual property rights laws), and international laws and principles (such as those regulating movement of persons across borders).” Tan, *supra*, at 151-158. Another exception is the work of Thomas Pogge: see discussion surrounding notes xx-xx, *infra*.

¹⁵³ Brad R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (Oxford: Oxford University Press, 2011), at 7.

¹⁵⁴ Compare Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (New York: Cambridge University Press, 2003) 64-65 (because humanity has yet to devise ways that people can flourish without being organized into particular political communities, we should attach moral weight to what is essential for particular communities to survive).

that it extends legal validity to certain natural, geographical and social contingencies into which we are born. The capacity of a sovereign state to address poverty in its midst is in no small measure a function of its location, boundaries, and resources – variables whose limits and possibilities are determined by the nature and extent of that state’s sovereign powers.

Moreover, a sovereign state is one of many participating in a distribution of sovereignty by an international legal order committed to the principle of the formal equality of sovereign states. International law treats states as juridically equal legal actors, in possession of the same rights in international law, and equal in their formal capacity to exercise these rights.¹⁵⁵ This commitment is also a critical feature of how international law organizes global politics into an international legal order. The principle of the formal equality of sovereign states, in Benedict Kingsbury’s words, “has attained an almost ontological position in the structure of the international legal system.”¹⁵⁶ The normative value of this principle should not be overstated, but nor should it be understated. It enables economically, politically and militarily weak states to exercise the same formal legal authority as powerful states, revealing the international legal order’s capacity to check, in particular institutional settings, the very real power imbalances that exist among states.

One of the consequences of international law’s foundational commitment to formal equality of states, however, is that substantive equality of states plays a marginal role in the normative architecture of the international legal order. International law domesticates questions of substantive equality, treating its potential normative significance as a domestic question of distributive justice among citizens, subject to the vagaries of domestic political

¹⁵⁵ See, e.g., UN Charter, *supra*, Art. 2(1) (“The Organization is based on the principle of the sovereign equality of all its Members”); *Montevideo Convention on the Rights and Duties of States*, adopted Dec. 26, 1933, 165 LNTS 19; 49 Stat 3097 (entered into force Dec. 26, 1934), Art. 4 (“States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but on the simple fact of its existence as a person under international law.”).

¹⁵⁶ Benedict Kingsbury, “Sovereignty and Inequality” (1998) 9 *European Journal of International Law* 559, at 600.

contestation. However valuable international law's commitment to the formal equality of states, its banishment of substantive equality to the domestic realm further implicates the structure of the international legal order in the natural, geographical and social contingencies that contribute to global poverty. International law conceives of the people of Chad as constituting a sovereign state, materially vesting in them only the meager resources within their territory, preventing them from accessing resources elsewhere, and imposing stiff barriers to those seeking to emigrate to escape the conditions of poverty in which they find themselves.¹⁵⁷

As for those skeptical of treating global wealth distribution as mandated by distributive justice, it may well be the case that international institutions do not wield anything akin to the coercive power of a state or generate reciprocal relations of the kind that exist within domestic political communities. But the skeptics miss the normative significance of the relationship between the *operation* of the international legal order and global poverty. Many of the international organizations that currently play a major role in managing and coordinating relations between and among states, such as the United Nations, the World Bank and the International Monetary Fund, owe their international legal existence to a raft of multilateral treaties resulting from an unprecedented burst of international cooperation after the Second World War.¹⁵⁸ These organizations give institutional voice and legal effect to a dense network of international interaction between and among sovereign states by subjecting states to various forms and degrees of international legal authority, including legislative, regulatory and adjudicative authority, monitoring and enforcement of treaty obligations, agenda setting and norm production, research and advice, and policy implementation.

¹⁵⁷ Joseph Carens argues that more porous borders would mitigate some of these morally arbitrary determinants: see Carens, "Aliens and Citizens: The Case for Open Borders," in R. Beiner (ed.), *Theorizing Citizenship* (Albany: SUNY Press, 1995) 229-255.

¹⁵⁸ Not all international organizations owe their origins to this period – the International Labour Organization, created in 1919 as part of peace negotiations, has a longer institutional pedigree, and the World Trade Organization was established much more recently in 1995.

Of particular concern are contemporary bilateral and multilateral agreements that mandate reciprocal tariff reductions and the elimination of non-tariff import barriers by signatory states. Such agreements typically are premised on the assumption that regional and international liberalization of trade, services and investment enhances global productivity by enabling economic actors to compete on the basis of comparative advantage, that is, the capacity to produce a product at a comparatively lower cost than another economic actor because of particular resource or regulatory endowments associated with the national economies in which production occurs. Because international law stipulates that a state possess the legal capacity to create mutually binding rights and obligations by entering into a treaty with another state or group of states, these agreements legally structure economic relations among states by imposing legal obligations on states to exercise their sovereign power in particular ways and, in some cases, establishing organizations that possess the legal authority to interpret and enforce their terms.

Proponents of these various international and regional institutions, arenas, principles and rules that states have created to promote liberalization of trade, services and investment argue that they will ultimately work to reduce global poverty by improving the social and economic conditions of all. Opponents argue that the legal norms and institutions that facilitate economic globalization will exacerbate global poverty. Despite their opposite predictions, what both share is the insight that international economic law has distributive consequences for the global poor. A conception of the right to development that imposes negative external obligations on states, when participating in the international realm, to address global poverty is one that holds international economic law accountable for its potential to exacerbate global poverty. Given that both the structure and operation of international law are implicated in the fact of global poverty, the right to development imposes negative obligations on states and

international legal institutions to fashion rules and policies governing the global economy in ways that do not exacerbate global poverty.¹⁵⁹

The work of Thomas Pogge is especially illuminating in this respect.¹⁶⁰ Pogge argues that human rights, properly conceived, should focus less on “perfect” or abstract duties that we owe others directly and more on what justice requires of the establishment and operation of institutional orders that govern our lives. Those responsible for the establishment of international order (for Pogge, this means all of us) confront an array of possible institutional options, and respecting human rights requires certain institutional choices over others when constructing and operating institutions to govern global matters. He refers specifically to the structure and operation of international institutions, such as the WTO, which, he argues, enable economically powerful states to secure “the lion’s share of the benefits of global economic growth.”¹⁶¹ Pogge argues that global justice requires institutional choices that decrease rather than increase world poverty. This requirement is not a positive obligation to share one’s wealth or resources with strangers in need. It is a negative obligation on international legal actors – including states – to not act in ways that exacerbate global poverty.

Although Pogge does not address the nature and scope of the right to development, his analysis sheds light on some of its role in the international legal order. As noted previously, the right to development, as enshrined in the Declaration, promotes “the constant improvement of the well-being of the entire population” of a state.¹⁶² It does so by protecting the capacity of a state’s population to “participate in, contribute to, and enjoy economic, social, cultural and political development.”¹⁶³ It provides this protection by imposing

¹⁵⁹ For a similar, more detailed view, see Salomon, *Global Responsibility for Human Rights*, *supra*.

¹⁶⁰ Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002).

¹⁶¹ *Ibid.*, at 20.

¹⁶² *Supra*, second preambular paragraph.

¹⁶³ Art. 1.

negative and positive obligations on both the internal and external exercise of sovereign power.¹⁶⁴ While its internal dimensions police the relationship between a state and its own citizens, its external dimensions speak to the exercise of sovereign power in the international arena. It obligates states and other international legal actors, when participating in the formulation of international legal norms governing global markets in labor and capital, trade and investment, and monetary policy, to protect the capacity of developing states to promote development in order to address poverty within their borders.¹⁶⁵ The right to development, in other words, imposes a negative obligation on states, when exercising sovereign power in the international arena, not to fashion rules and policies governing the global economy in ways that exacerbate global poverty.

Compliance with the right's negative obligations thus requires changes to the ways that international financial institutions formulate international economic law and policy. As detailed in the previous Part, Millennium Development Goal 8 outlines some of the changes required by the right. It calls for the development of a trading and financial system that is committed to development and poverty reduction; tariff- and quota-free access for the exports of least developed countries; enhanced debt relief for heavily indebted countries; cancellation of official bilateral debt; and more generous development assistance for countries committed to poverty reduction.¹⁶⁶

In this vein, Robert Howse has argued that, in the context of the WTO, the right to development also requires “a different methodology for determining what policies and laws ought to be on the negotiating agenda, how they might be crafted, what goals they are to be interpreted as aiming at, and how their effects might be predicted *ex ante*, as well as

¹⁶⁴ Margot E. Salomon, “Legal Cosmopolitanism and the Normative Contribution of the Right to Development” LSE Working Paper Series (2008) (on file with author).

¹⁶⁵ See Anne Orford, “Globalization and the Right to Development,” *supra*, at 157-170 (detailing how trade and investment liberalization limits the capacity of people to participate, control and share in the benefits of development).

¹⁶⁶ See text accompanying notes xx-xx, *supra*.

evaluated ex post.”¹⁶⁷ Howse suggests that such a methodology entails the exploration of policies that enable the mutual reinforcement of economic growth and human rights protection, more open consultation with civil society, direct citizen access to WTO policy making processes, and greater coordination between the WTO, the Office of the High Commissioner on Human Rights and other relevant international institutions in the implementation of the right to development.¹⁶⁸ Similarly, the UN Working Group has proposed that states assess the impact of proposed trade agreements on the right to development in all relevant international trade forums.¹⁶⁹

In the context of the World Bank and the IMF, Anne Orford argues that institutional reform is also necessary to ensure that their decision making processes enable “the people of target states to determine the nature of the economic, and thus the political, system in which they live.”¹⁷⁰ While both the World Bank and, to a lesser extent, the IMF, has taken some steps in this direction by their engagement with a participatory conception of development as illustrated by their reliance on PRSPs, Orford argues that both institutions rely on processes and practices that fail to guarantee equitable and fair access to the benefits of development.¹⁷¹ Moreover, both institutions now acknowledge that development involves the promotion of not simply economic growth but also human freedom, and that the protection of human rights is a means and end of development. But they continue to privilege civil and political rights at

¹⁶⁷ Robert Howse, “Mainstreaming the Right to Development into International Trade Law and Policy at the World Health Organization,” UN Doc. E/CN.4/Sub.2/2004/17, at 15.

¹⁶⁸ *Ibid.*, at paras. 14-24. Isabella Dunn suggests that international economic law should attend to the right to development by: continuing to affirm the principle of special and differential treatment for developing states in ways that provide a lower level of obligations, more flexible implementation timetables, a lower level of “best endeavor” commitments; providing greater technical assistance; ensuring that the agriculture, textiles and clothing sectors be brought into WTO disciplines; reducing tariff and non-tariff barriers in developed states; and monitoring intellectual property rights policy in light of increased costs and reduced access to technology transfers faced by developing states. Isabella D. Dunn, “The Right to Development: Implications for International Economic Law,” 15 Am. U. Int’l L. Rev. 1425 (2000), at 1464-65.

¹⁶⁹ Report of the Working Group on the Right to Development, 6th session, UN Doc. E/CN.4/2005/25, para. 54(e).

¹⁷⁰ Orford, *supra*, at 152.

¹⁷¹ *Ibid.*, at 152-57.

the expense of social and economic rights, and actively resist a conception of the right to development that would subject their policies and initiatives to human rights scrutiny.¹⁷²

Conceiving of the right to development as an instrument that mitigates some of the adverse consequences of international economic law thus explains why the right entails a negative obligation on states and international financial institutions to not formulate rules that further diminish the capacity of developing states to address poverty within their midst. But does this account explain why the right to development imposes positive, external obligations on developed states to provide development assistance in the form of bilateral loans, grants, and debt relief to developing states, make contributions to multilateral institutions, and require multilateral institutions to provide development assistance to recipient states?

Some have rested the case for obligations of this kind on the ways in which international legal norms governing global markets in labor and capital, trade and investment, monetary policy and other components of international economic law possess the potential to exacerbate global poverty. Margaret Salomon, for example, argues that the right to development imposes obligations on donor states to provide assistance to developing states our “skewed international economic environment ... by definition undermines the ability of less commanding states to give effect to human rights.”¹⁷³

Others conceptualize a duty to provide financial assistance in less systemic terms. Charles Beitz argues that “members of affluent societies are likely to have some reason to act to reduce poverty or to mitigate its effects in most poor countries with which they interact, but ... these reasons will vary in strength.”¹⁷⁴ He points to bilateral relationships between rich and poor countries that render poor states worse off than they would have been absent the relationship; past relationships that place a poor state in a position worse than it would have

¹⁷² See Kerry Rittich, “The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social” 26 Mich. J. Int’l L. 199 (2004).

¹⁷³ Salomon, *Legal Cosmopolitanism*, *supra*, at 8.

¹⁷⁴ Charles Beitz, *The Idea of Human Rights* (Princeton: Princeton University Press, 2009), at 172.

been if these relationships had not occurred; relationships in which a poor state's gain is less than its fair share of the social product of its relationship with a wealthy state; and relationships the termination of which would be asymmetrically costly for the poor state.¹⁷⁵ Beitz adds that a more systemic reason for positive, external obligations of financial assistance might present itself to the extent that international economic law facilitates these kinds of relations between and among states, but such obligations will arise in any event only when poor states cannot live up to their own internal obligations and their content will depend on features specific to the case at hand.¹⁷⁶

Grounding a positive obligation to provide financial assistance to developing states in the structure of international economic law, however, requires assuming – if not proving – that the rules and institutions that constitute our international economic order contribute to global poverty. It is an open question whether this assumption, on its own, can ground a positive obligation on developed states to provide financial assistance to developing states in the name of global poverty alleviation – especially in light of ongoing debates about the relationship between globalization and poverty in the global south that show no sign of abating in the near or even distant future. International economic law, however, operates against the backdrop of another set of international legal norms that speak more directly to the distribution and exercise of sovereign power. As suggested below, an additional normative foundation of a positive obligation on developed states to share some of their wealth and resources with developing states to reduce global poverty lies in the international legal history of the rise and fall of colonialism.

¹⁷⁵ *Ibid.*, at 171.

¹⁷⁶ *Ibid.*, at 172-73.

C. *The Right to Development and the Rise and Fall of Colonialism*

Positive obligations associated with the right to development in international law receive greater normative clarity when one begins to delve more deeply into the possible ways that the international legal order has contributed to the production and reproduction of global poverty. The international legal commitment to the formal equality of states and its concomitant banishment of substantive equality to the domestic realm not only implicates the structure of the international legal order in the natural, geographical and social contingencies that contribute to global poverty. Behind this commitment are three background legal norms that structure the capacity of communities to participate as states in the international legal order.

First, international law provides that existing states, generally speaking, are entitled to have their territorial integrity respected by other states.¹⁷⁷ Second, it also confers legal validity on a claim of sovereignty by a community if it meets the criteria that it supplies to determine whether it constitutes a state.¹⁷⁸ Third, international law vests the right of self-determination in peoples, entitling colonized peoples, who did not otherwise meet the criteria of statehood, to acquire sovereign independence.¹⁷⁹ These norms determine the legality of countless claims of sovereign power and authorize the reallocation of sovereignty in international law occasioned by the demise of existing states and the creation of new states by recognition or right.

¹⁷⁷ UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514, UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 (1960), para. 6 (“[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations”). See also UN General Assembly, *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8018 (1970), Annex, at 122.

¹⁷⁸ For a classic formulation of this principle, see Hans Kelsen, “Recognition in International Law: Theoretical Observations,” 35 Am. J. Int’l L. 605 (1941).

¹⁷⁹ See text accompanying notes xx-xx, *infra*.

International legal sources supporting the third legal norm – that of a right of self-determination – include the UN Charter, which lists the principle of self-determination as one of the purposes of the United Nations.¹⁸⁰ The Charter also calls for the promotion of a number of social and economic goals “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”¹⁸¹ Similarly, the International Covenant on Civil and Political Rights provides that “all peoples have the right of self-determination [and to] freely determine their political status and freely pursue their economic, social and cultural development.”¹⁸²

Before the First World War, however, the concept of self-determination – to the extent it received legal recognition – simply reinforced the then-existing distribution of sovereignty in the international legal order: “if international law enforced any conception of self-determination, it meant one thing: established states had a right to be left alone by other states.”¹⁸³ The field traditionally understood self-determination as vesting in the entire population of an existing state, co-extensive with sovereignty itself, and the territory of a state extended to the territory of any and all colonies under its imperial control. Any attempt by a colonial population to free itself of its colonial status was comprehended as a threat to the territorial integrity of its colonizing master and an international illegality. International law, in other words, conferred legal validity on colonialism.

While self-determination began to take on a modicum of meaning beyond that of sovereignty itself after the First World War, international law only began to comprehend it as

¹⁸⁰ UN Charter, *supra* note (“[t]he purposes of the United Nations are ... [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”).

¹⁸¹ *Ibid.*, Art. 55.

¹⁸² ICCPR, *supra*, Art. 1. Article 1 of the ICESCR contains identical language. In *Namibia*, [1971] I.C.J. 16, at 31, and *Western Sahara*, [1975] I.C.J. 12, at 31, the International Court of Justice held that a peoples possess self-determination as of international right.

¹⁸³ Diane Orentlicher, “Separation Anxiety: International Responses to Ethno-Separatist Claims,” 23 *Yale Journal of International Law* 1, 22 (1998).

a right vesting in a collectivity that does not necessarily constitute the whole of a state's population after the Second World War. It did as a means of managing and legitimating the legal transformation of colonial territories in Africa and elsewhere into sovereign states. In 1960, The General Assembly enacted the Declaration on the Granting of Independence to Colonial Countries and Peoples, proclaiming that colonial populations constitute peoples entitled to exercise the right of self-determination and acquire sovereign independence.¹⁸⁴ In 1970, the General Assembly enacted the Declaration on Friendly Relations, clarifying the relationship between the right of self-determination and the principle of territorial integrity of states.¹⁸⁵ The 1970 Declaration specified that the territory of a colony has “a status separate and distinct from the territory of the state administering it,” thereby providing a formal explanation as to why the acquisition of sovereign independence by a colonial population does not interfere with the sovereign integrity of its parent state.

One important consequence of this dramatic international legalization of decolonization was that ex-colonies only acquired the incidents of sovereignty when they acquired sovereignty itself. Before they achieved sovereign recognition, control over natural resources vested in their colonial masters, as did all other incidents of international sovereign power. International law could have governed the transition from colony to sovereign state differently. This is partly what developing countries sought to achieve in their push for a new international economic order. Antony Anghie points out that Resolution 1803 vests a right to sovereignty over natural resources in peoples and nations, suggesting “that even colonized peoples who had not yet become independent were granted certain rights that could protect

¹⁸⁴ GA Res. 1514 (XV), 15 UN GAOR Supp. (No. 16) at 66, UN Doc. A/4684 (1961).

¹⁸⁵ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, at 121, UN Doc. A/8028 (1971), adopted by consensus on October 24, 1970.

their resources.”¹⁸⁶ Moreover, the right is to “permanent” sovereignty, which also suggests that it always vests – and more importantly, always vested – in a people, regardless of when they achieve complete sovereign independence in international law. In Anghie’s words, “the wording of the 1962 Resolution could have been used as a basis for peoples seeking compensation for colonial exploitation upon becoming independent, sovereign peoples.”¹⁸⁷

But developing countries were unsuccessful in their efforts to change the ground rules governing the acquisition of sovereignty beyond the incorporation of a right of self-determination validating their quests for sovereign independence. When international law extended its distribution of sovereignty to include colonies that had achieved sovereign independence, it vested ex-colonies with the incidents of sovereignty only at the moment of their independence. In the words of the Permanent Court of International Justice, sovereign independence means “a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.”¹⁸⁸ But states acquire “the sole right of decision in all matters economic, political, financial or other” only when they become states. Whether an ex-colony is resource-rich or resource-poor turns in part on what resources were left by colonial authorities when international law vested it with sovereign power.

As Anghie and others have pointed out, additional international legal doctrines also shaped the extent of resources available to third world states at the moment of their inclusion in the international distribution of sovereign power. The doctrine of state succession holds that rights granted by a sovereign power to a private entity are to be respected by the

¹⁸⁶ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), at 218.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Advisory Opinion No. 41, Customs Régime Between Germany and Austria*, 1931 PCIL Ser. A/B, No. 41 (5 September).

successor sovereign.¹⁸⁹ In the context of decolonization, the predecessor sovereigns were, of course, colonial powers. Some colonial powers also entered into agreements with their colonies shortly before sovereign independence in which the colony undertook to protect all territorial rights acquired by achieving independence.¹⁹⁰ Before colonies participated in the distribution of sovereignty, in other words, international law vested the legal power to exploit their natural resources in colonial powers, and when colonies became subjects in the distribution, international law vested them with power only over those resources that remained at the date that they achieved sovereign statehood. This temporal dimension to the acquisition of sovereignty in international law has the effect of privileging states with a history of colonizing others over states with a history of being colonized, thereby contributing to the disparity of resources that exists between developed and developing states.

International law thus withheld sovereignty from colonized populations and prevented them from exercising control over the natural resources of their territories by conferring international legal validity on colonialism, thereby preventing development from occurring in a manner that would benefit the populations of colonies. It authorized colonizing powers to treat the natural resources of their colonies as their own. And when international law finally extended legal validity to decolonization projects, it vested in newly decolonized states power over only those resources that remained when they acquired sovereignty and held them to contractual obligations undertaken by their colonial predecessors. Conceiving of the right to development as imposing a positive obligation on developed states to attend to global poverty constitutes a legal means of addressing adverse distributional consequences caused by the ways in which international law excluded – and eventually included – collectivities subject to colonial rule into its distribution of sovereign power.

¹⁸⁹ For a contemporaneous theoretical engagement with the law of state succession, see Lucius Caflisch, “The Law of State Succession: Theoretical Observations,” 10 *Netherlands International Law Review* 337 (1963).

¹⁹⁰ Anghe, *supra*, at 214-216; Okon Udokang, *Succession of New States to International Treaties* (New York: Oceana Publications, 1972).

This conception need not lead to the conclusion that positive obligations only fall on developed states with a history of colonizing others, although it might justify more stringent positive obligations on such states to the extent that their level of development is a function of the sovereignty they historically possessed over their colonial subjects. It supports the imposition of positive obligations on all developed states to come to the aid of poor states because all states participated in the formation of international legal norms that vested colonizing projects with a veneer of international legality – colonizing projects that contributed to global poverty. These norms not only include those that authorized colonization itself – norms that refused to recognize extant political communities as possessing sovereignty over their members and territories. They also include norms that rendered lawful whatever colonizing powers saw fit to do with the natural resources of their colonial territories. And they include legal norms that governed the transition from colony to sovereign statehood. One would be hard-pressed to argue that these features of the structure and operation of international law have not contributed to the fact of global poverty, and the right to development thus stands as a means of mitigating their contribution.

Determining the extent to which these international legal norms have contributed to global poverty turns on how much we attribute to the operation of the international legal order and how much can be attributed to other factors, such as geography, climate, and disease, as well as the failure of poorer states to take advantage of the resources over which they exercise sovereign power. But this question of attribution is a normative matter, not a matter of financial accounting.¹⁹¹ Conceiving of the right to development in distributive terms yields normative reasons to interpret it as mandating global wealth redistribution. The obligations corresponding to this interpretation of the right to development do not necessarily

¹⁹¹ A normative matter that Tan would likely describe as raising questions about “the precise cut between what is luck and what is choice, ... between brute luck and option luck, ... what luck is, and how to place the cut between luck and choice.” Tan, *supra*, at 95.

correspond to abstract duties that we owe each other by virtue of our common humanity. Instead, these obligations lend legitimacy to an international distribution of sovereign power tainted by the ways in which developing states were legally disadvantaged in the process of their incorporation in the international legal order.

This account of the right to development comprehends bilateral and multilateral participation in global redistributive projects in compulsory terms. It entails treating development assistance levels as required as a matter of international human right, setting levels in light of available data, and revising levels as new data come to light. It also entails revising, and if necessary replacing, such projects with alternative strategies if monitoring reveals deficiencies and reform possibilities. Alternative strategies include taxes on currency transactions, arms sales, and consumption of fuels producing greenhouse gases, as well as special drawing rights in times of crisis to provide emergency financing.¹⁹² Whatever the means used to implement the right, their effectiveness will depend on sufficient funds flowing from rich to poor countries, from contributors richer than beneficiaries, and from contributors who are relatively rich in their own country to beneficiaries who are relatively poor in their country. Otherwise, transfers will end up in the hands of the rich elite in poor countries because they contemplate the possibility that contributors might be relatively poor people in a rich country and beneficiaries might be relatively rich people in a poor country.¹⁹³

¹⁹² For analyses of these and other alternatives, see A.B. Atkinson (ed.), *New Sources of Development Finance* (New York: Oxford University Press, 2004). For a defence of a “birthright citizenship tax” that would “distribute the social benefits that derive from membership in well-off polities across borders to those who are left outside for reason other than their station of birth,” see Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard: Harvard University Press, 2009).

¹⁹³ Branko Milanovic, “Global Income Inequality: What It Is And Why It Matters,” DESA Working Paper No. 26, ST/ESA/2006/DWP/26 (August 2006), at 14-15.

VI. CONCLUSION

This Article has advanced an account of the right to development that speaks to how the structure and operation of international law participates in the production of global poverty. Despite textual ambiguities in the various instruments in which it finds expression, the right to development vests in individuals and communities who have yet to benefit from development. It imposes internal obligations on the states in which they live to address conditions that contribute to their plight. Internal obligations are both negative and positive in nature. A state's negative obligations require it to not act in ways that interfere with the exercise of the right to development. A state's positive obligations require it to enable its population to participate in and benefit from economic, social, cultural and political development.

The right to development also imposes external obligations on international legal actors, including developed states and international organizations, to assist developing states in poverty reduction. The external obligations associated with the right to development are also negative and positive in nature. Its negative dimensions require states and international institutions to fashion rules and policies governing the global economy in ways that do not exacerbate global poverty. Its positive dimensions require states and international institutions to provide assistance to developing states in the form of development aid and debt relief.

This account of the right to development both draws on and departs from conceptions of international distributive justice in contemporary international political theory. It adopts a narrower focus than such conceptions by attending to the effects of how and when international law distinguishes between valid and invalid claims of sovereign power. It works with the existing international legal order, including its commitment to sovereignty. It treats sovereignty as a good that international law distributes among a variety of legal actors for

reasons that relate to the nature of sovereignty itself, including the fact that it protects associative relationships in political communities. Yet legal norms that instantiate international law's commitment to sovereignty also participate in the production and reproduction of global poverty. On the account offered here, the right to development serves as a legal instrument to mitigate some of the adverse distributional consequences produced by these legal norms. In doing so, it seeks to do justice in an international legal order that protects, by its commitment to state sovereignty, a plurality of political communities and the multiple associative ties and obligations that they engender.