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Upendra Acharya

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## The Future of Human Development: The Right to Survive as a Fundamental Element of the Right to Development

### Keywords

International Finance, International Trade, World Trade Organization, Economics, Human Rights Law, Indian Law, Politics

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

UPENDRA ACHARYA\*

## I. INTRODUCTION

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

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

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\* Associate Professor of Law, Gonzaga University Law School. This is an expanded version of the presentation delivered at the 46th Annual Leonard V. B. Sutton Colloquium "International Legal Perspectives on the Future of Development" conducted by the Nanda Center for International and Comparative Law, University of Denver Sturm College of Law on November 9, 2013. I would like to thank Professor Ved P. Nanda for the opportunity and his insights with this article, as well as the panel members and participants for their valuable suggestions. I would like to thank Attorney Jeannie Young for her insightful suggestions. I would also like to specially thank my research assistant Mary Rupert for her valuable time, hard work and insights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. THE MODERN CONTEXT OF DEVELOPMENT IN INTERNATIONAL LAW

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

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

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

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

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

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

10. *Id.* pmbl.

11. *Id.* art. 55.

12. See U.N. Dep't of Econ. and Soc. Affairs, *The United Nations Development Agenda: Development for All*, U.N. Doc. ST/ESA/316, at 1 (2007), available at [http://www.un.org/esa/devagenda/UNDA\\_BW5\\_Final.pdf](http://www.un.org/esa/devagenda/UNDA_BW5_Final.pdf).

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

14. *Id.*

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

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

Later, the New International Economic Order was created in order to advance trade and development by improving terms of trade, increasing development assistance, reducing tariffs, and imposing other economic measures.<sup>18</sup> Next came the Declaration on Social Progress and Development<sup>19</sup> and then in 1966 the United Nations Development Programme ("UNDP"), founded in order to assist economic

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

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

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

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

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

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

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

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

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

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

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

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

25. *Id.*; see also Stephen Browne, *Whatever Happened to ‘Development’?*, OPEN DEMOCRACY (Apr. 17, 2007), [http://www.opendemocracy.net/globalization-institutions\\_government/development\\_browne\\_4535.jsp](http://www.opendemocracy.net/globalization-institutions_government/development_browne_4535.jsp) (“Development was conceived as a do-as-we-did process in which developing countries should follow the patterns of the developed countries. Capital was the principal ingredient to fuel growth.”).

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



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

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

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

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

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

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

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

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

33. Browne, *supra* note 25.

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

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

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

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

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

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

36. *Id.*

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

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

39. *Id.* at 26-31.

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

development. Hunger, unsafe drinking water, HIV/AIDS, malaria, and other impairments would be cut in half by 2015.<sup>41</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55. See AN INTRODUCTION TO THE HUMAN DEVELOPMENT AND CAPABILITY APPROACH: FREEDOM AND AGENCY 66-68 (Severine Deneulin et al. eds., Earthscan 2009). See also NAILA KABEER, INSTITUTE OF DEVELOPMENT STUDIES, CAN THE MDGS PROVIDE A PATHWAY TO SOCIAL JUSTICE? THE CHALLENGE OF INTERSECTING INEQUALITIES 6 (2010), available at <http://www.ids.ac.uk/files/dmfile/MDGreportwebsite2WC.pdf>; THE E-CONSULTATION ON HUNGER, FOOD AND NUTRITION SECURITY: COLLECTION OF THE CONTRIBUTION RECEIVED FROM THE 19TH NOVEMBER 2012 TO 10TH JANUARY 2013, at 390 (2013) [hereinafter CYINDEP] (describing the Cyprus Island-Wide NGO Development Platform).

56. CYINDEP, *supra* note 55.

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

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

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

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

59. *Id.* ¶¶ 53, 55.

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

#### IV. SUSTAINABLE DEVELOPMENT AND INEQUALITY CYCLE?

Yet another popular 21st century trend of human development is sustainable development. Sustainable development is the notion that development should facilitate a "sustained yield;" each country should balance consumption with reproduction of resources in order to sustain and balance resources over time.<sup>62</sup> Sustainable development became a staple of human development starting with its début in the famous Brundtland Commission report *Our Common Future* in 1987.<sup>63</sup> While historically sustainable development has been couched in the context of environmental law, the 2013 report of the U.N. Conference on Sustainable Development described voluntary commitments to creating sustainable

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

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

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

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

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

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

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

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

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

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

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

66. *Id.* at 404.

67. *Id.* at 410.

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

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

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

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

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

#### V. THE FUTURE OF HUMAN DEVELOPMENT: LESSONS LEARNED

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

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

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

73. See Roger Keil, *Sustaining Modernity, Modernizing Nature: The Environmental Crisis and the Survival of Capitalism*, in *THE SUSTAINABLE DEVELOPMENT PARADOX: URBAN POLITICAL ECONOMY IN THE UNITED STATES* 41, 49 (Rob Krueger & David Gibbs eds., 2007) (citation omitted) (“Inadequate responses to ecological exhaustion abound. Corporate elites and most governments promote a form of sustainability that is more about sustaining capitalism, growth, and profits than sustaining living environments.”). See also OLANIKE F. DEJI, *GENDER AND RURAL DEVELOPMENT: INTRODUCTION* 363, 369 (2011) (citation omitted) (quoting Joan Veon) (“Sustainable development has continued to evolve as that of protecting the world’s resources while its true agenda to control the world’s resources. It should be noted that [it] sets up the global infrastructure needed to manage, count, and control all of the world’s assets.”). This sentiment is echoed by Mary Jo Anderson, who stated “the real purpose of sustainable development is to contain and limit economic development in developing countries and in so doing control population growth.” See Austin Aneke, *Principle of Sustainable Development; One of the Greatest Impediments to Africa Development*, HUFFINGTON POST BLOG (June 20, 2012, 7:00 AM), [http://www.huffingtonpost.co.uk/austin-aneke/principle-of-sustainable-\\_b\\_1610720.html?view=print&comm\\_ref=false](http://www.huffingtonpost.co.uk/austin-aneke/principle-of-sustainable-_b_1610720.html?view=print&comm_ref=false).

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

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



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

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

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

76. *Id.* at 73-74.

77. *Id.*

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

79. See *supra* p. 6.

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

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

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

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

## VI. RESPONSIBLE PARTIES TO THE RIGHT TO SURVIVE

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

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

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

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

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

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

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

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

*A. Right to Survive and International Financial Institutions*

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

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

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

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

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

91. *Id.*

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

93. *Id.* art. I.

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

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

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

### B. *Right to Survive and Developed Countries*

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

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

95. *Id.* at 267-69.

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

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

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

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

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

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

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

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

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

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

102. *Id.* at 51.

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

104. *Id.*

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

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

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

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

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

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

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

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

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

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

112. See *supra* note 111.

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

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

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

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

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

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

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

116. *Id.* at 960.

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

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

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

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

#### A. *International Organizations*

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

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

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

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

123. *E.g.*, G.A. Res. 66/100, ¶ 4, U.N. Doc. A/RES/66/100 (Feb. 27, 2012) (stating that, “the subject of responsibility of international organizations is of major importance in the relations of States and international organizations”). Compare U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework: Rep. of the Secretary-General*, at 15, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (the Ruggie Principle, though non-binding, are a perfect example of the multitude of non-binding principles which impute a duty on corporations to practice due diligence in their international relations), and YANN QUEINNEC, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: AN EVOLVING LEGAL STATUS* 25 (2007), available at [http://oecdwatch.org/publications-en/Publication\\_3064](http://oecdwatch.org/publications-en/Publication_3064) (arguing that Corporate Social Responsibility (“CSR”) guidelines have become customary among states and enterprises, and therefore, the OECD Guidelines and Ruggie Principles, which are based on CSR, are customary international law), with Christian Schliemann, *Procedural Rules for the Implementation of the OECD Guidelines for Multinational Enterprise—A Public International Law Perspective*, 13 GERMAN L.J. 51, 57 (2012) (positing that while the guidelines themselves have not reached the level of customary law, “it should be kept in mind that the Guidelines are referring, in large part, to already-existing international standards, of which some present binding law.”).



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

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

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

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

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

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

125. *Id.*

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

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

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

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

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

### B. Corporations

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

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

131. *Id.*

132. *Id.*

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

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

135. See, *e.g.*, Cmty. Legal Educ. Ctr. v. Am. Sugar Ref. Inc. (Cambodia v. U.S.), Case No. 276, (U.S. Nat'l Contact Point 2013), available at [http://oecdwatch.org/cases/Case\\_276](http://oecdwatch.org/cases/Case_276) (the NCP engaged in mediation involving the illegal eviction of Cambodian residence by the American Sugar Refining Co.); Clean Clothes Campaign v. Adidas (Austria v. Ger.), Case No. 27, (Ger. Nat'l Contact Point 2004), available at [http://oecdwatch.org/cases/Case\\_27](http://oecdwatch.org/cases/Case_27) (The NCP negotiated positive steps improving labor condition for workers in Adidas' factories).

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

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

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

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

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

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

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

139. *Id.* ¶¶ 1-2.

140. *Id.* ¶¶ 5-10.

141. *Id.* ¶¶ 11-12.

142. *Id.* ¶¶ 12.

143. *Id.* ¶¶ 17-21.

144. *Id.* ¶ 25.

145. *Id.* ¶¶ 26-31.

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

### C. *Sovereigns*

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

146. See NUREMBERG HUMAN RIGHTS CTR., THE ROAD TO THE INTERNATIONAL CRIMINAL COURT: NUREMBERG TO THE HAGUE 8, 16 (2007) available at [http://www.iccnw.org/documents/FromNurembergttoHague\\_07july\\_eng.pdf](http://www.iccnw.org/documents/FromNurembergttoHague_07july_eng.pdf).

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

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

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

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

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

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

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

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

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

##### A. *A Permanent Survival Court*

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

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

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

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

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

### *B. Already Existing Domestic and International Courts*

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

## IX. CONCLUSION

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

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155. William O. Douglas said of the Nuremberg Trials, "I thought at the time and still think that the Nuremberg trials were unprincipled," he wrote. "Law was created ex post facto to suit the passion and clamor of the time." However, the Tribunal denied that the London Charter created ex post facto as that law had been articulated in some manner already in the Covenant of the League of Nations and the Hague Convention. Further, these principles on trial were *jus cogens* norms of human rights. See Mark Weber, *Nuremberg Trials and the Holocaust*, INST. FOR HIST. REV., [http://www.ihr.org/jhr/v12/v12p167\\_Webera.html](http://www.ihr.org/jhr/v12/v12p167_Webera.html) (last visited July 13, 2014).