

## DO INTERNATIONAL HUMAN RIGHTS TREATIES PROTECT THE POOR?

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### ABSTRACT

*This paper attempts to fill the lacunae in the voluminous academic literature analysing the relationship between human rights and poverty – the failure to engage with the existing international human rights law framework and articulate legal arguments vis-à-vis the responsibility of particular duty holders for violating enunciated human rights. It is not the author’s claim that international law alone can provide all the solutions. Instead, international law may be only one of the ways to focus on this issue of serious concern. Accordingly, the merits and demerits of a rights-bases approached as compared to other approaches are first examined. The author has then selected four situations which evidence how different human rights interact along with different stakeholders – the citizen on one hand and the host state, other states, international financial institutions, and multinational corporations on the other. While there appears to be a case for international responsibility of host states in most circumstances, the limitations of the present legal framework are also exposed in undertaking this exercise. In particular, it is ambitious to attach legal responsibility to international institutions and private actors. This, however, aids in formulating adequate reforms to remedy the drawbacks in international human rights law. Only then can it be possible to have an informed answer to the question - ‘do international human rights treaties protect the poor’?*

### I. INTRODUCTION

The latest Millenium Development Goals report of 2011 places the world’s ‘poor’ population at 1.4 billion.<sup>1</sup> Since the 1990s, the United Nations has been unequivocal in suggesting that eradication of poverty is a priority and a pre-requisite in achieving development.<sup>2</sup> In fact, at the World Summit for Social

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1 This is according to World Bank’s calculated standard of \$ 1.25 a day. United Nations, *Millennium Development Goals Report*, 6 (2011) available at [http://www.un.org/millenniumgoals/11\\_MDG%20Report\\_EN.pdf](http://www.un.org/millenniumgoals/11_MDG%20Report_EN.pdf) (last visited August 19, 2012).

2 See United Nations General Assembly Resolution 51/178, First United Nations Decade for the Eradication of Poverty, UN Doc. A/RES/51/178 (1996) – “*Recognizing that the international*

Development, 117 heads of State and Government and the representatives of 186 countries stated that the eradication of poverty was an “*ethical, social, political and economic imperative of mankind*”.<sup>3</sup> These efforts culminated in the formulation of the first millennium development goal – ‘Eradicate extreme poverty and hunger’.<sup>4</sup> More significantly, it was recognised that the eradication of poverty was a key requirement in the achievement of other goals identified by the United Nations.<sup>5</sup> As a corollary to this resolve to eradicate poverty, there was a debate on the best possible method to achieve the same. The international financial institutions stressed on the need for ‘sustained economic growth’ as the *sine quo non* of poverty reduction.<sup>6</sup> Other United Nations Agencies advocated for a ‘human rights based approach’ to poverty reduction. Notably, the Commission on Human Rights appointed an independent expert to “*to evaluate the relationship between the promotion and protection of human rights and extreme poverty...*”<sup>7</sup>

The global fascination with the human rights based approach to poverty eradication was not restricted to the United Nations. This approach by the United Nations has led to vast academic scholarship on the subject. Consequently, it is very important to define the scope of the present paper in order for it to contribute to existing academic literature. Paul Collier’s ‘the Bottom Billion’ is reflective of the economic approach to eradicating poverty. In the book, he advocates for the opening of markets and considers global poverty in mainly aggregative terms. It is his opinion that trade liberalisation is vital for development in the poorest states.<sup>8</sup> In

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*community, at the highest political level, has already reached a consensus on and committed itself to the eradication of poverty through declarations and programmes of action of the major United Nations conferences and summits organized since 1990...*”

3 Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development, UN Doc. A/CONF.166/9, chapter I.

4 United Nations General Assembly Resolution 55/2, United Nations Millennium Declaration, UN Doc. A/RES/55/2 (2000).

5 Secretary General’s Millennium Report, Freedom from Want, 19 (2000) available at <http://www.un.org/millennium/sg/report/ch2.pdf> (last visited August 19, 2012).

6 World Bank, *Development and Human Rights: The Role of the World Bank*, 8 (1998) available at [http://www.fao.org/righttofood/kc/downloads/vl/docs/HR%20and%20development\\_the%20role%20of%20the%20WB.pdf](http://www.fao.org/righttofood/kc/downloads/vl/docs/HR%20and%20development_the%20role%20of%20the%20WB.pdf) (last visited August 19, 2012).

7 United Nations Commission of Human Rights (as it then was) Resolution 1998/25, Human rights and extreme poverty, UN Doc. E/CN.4/1998/25 (1998).

8 Collier, *The Bottom Billion: Why the poorest countries are failing and what can be done about it* 155 - 163 (2008). Other than trade liberalisation, he also suggests more radical measures like military intervention. For a brief analysis of his submission, see Susan Marks, *Human rights and the bottom billion*, 2009(1) *European Human Rights Law Review* 37, 37-39.

contrast with this, the Commission on Human Rights [hereinafter “OHCHR”] approached the issue of poverty eradication by formulating the ‘principles and guidelines for a human rights approach to poverty reduction strategies.’<sup>9</sup> The objective of these guidelines was to emphasize on the relevance of human rights in poverty reduction. It remarked that the strategies of governments to tackle poverty must not solely be concerned by aggregated growth and development but should also consider rights-related matters like equality, non-discrimination, participation et al.<sup>10</sup> On a related note, some scholars have examined the philosophical, moral, ethical foundations of a human right to freedom from poverty.<sup>11</sup> Such scholars opine that the legitimacy of a human rights regime and corresponding duties depends on its conformity with independent moral standards. Once these standards are complied with, positive duties on part of states to provide basic necessities can be derived.<sup>12</sup> These positive duties are distinct from the imperfect (unenforceable) duties of charity, humanity or solidarity.<sup>13</sup> On the other hand, the ‘libertarian’ school strongly stresses on the voluntary nature of any development aid or positive action on behalf of the state. The only human rights justiciable, according to this view, are negative rights and states cannot be forced to benefit certain people.<sup>14</sup>

These academic writings do not consider the international human rights regime and how existing human rights, as provided in treaties, interact in causing poverty and its consequences. Ethical and moral underpinnings apart, scholars have failed to base their arguments in international human rights law and treaty interpretation which, according to the author, reduces the legitimacy of their claims. Indeed, as elaborated below, proving a ‘*violation*’ of an international norm

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9 Office of the United Nations High Commissioner for Human Rights, Principles and guidelines for a human rights approach to poverty reduction strategies, UN Doc. HR/PUB/06/12 (2006) [hereinafter “UNHCHR Guidelines”].

10 Office of the United Nations High Commissioner for Human Rights, Human Rights and Poverty Reduction A Conceptual Framework, UN Doc. HR/PUB/04/1, 9-12 (2004).

11 See Tasioulas, *The Moral Reality of Human Rights in Freedom from poverty as a human right* 75 (Pogge ed., 2007).

12 Caney, *Global Poverty and Human Rights: The case for positive duties in Freedom from poverty as a human right* 275 (Pogge ed., 2007).

13 Gewirth, *Duties to fulfill the Human Rights of the Poor in Freedom from poverty as a human right* 219 (Pogge ed., 2007).

14 Patten, *Should we stop thinking about poverty in terms of helping the poor?*, 19(1) *Ethics and International Affairs* 19, 19 – 21 (2005).

would at least call for international reprimand if nothing else.<sup>15</sup> Likewise, the OHCHR's guidelines emphasises the importance of taking these human rights seriously while formulating strategies but fall short of the violation of the same human rights that it professes. In any event, they adopt a very 'state-centric' approach of eradicating poverty through implementation of national strategies.<sup>16</sup> Furthermore, it does not examine existing institutional arrangements and their contribution to poverty.<sup>17</sup>

An approach which has exemplified the role of international institutional arrangements in contributing to poverty can be seen in the works of Thomas Pogge. He argues that the existing normative and institutional international order in the form of WTO, World Bank and the IMF systematically violates the international human rights regime along with which it co-exists.<sup>18</sup> In fact, he even suggests that the affluent countries are in violation of their 'negative duties' by constructing an institutional structure that creates poverty in the least developed nations.<sup>19</sup> He explains: "*the poor are systematically impoverished by present institutional arrangements and have been so impoverished for a long time during which our advantage and their disadvantage have been compounded...*"<sup>20</sup> However, Pogge's writings, it is humbly submitted, suffer from similar flaws outlined above – *first*, in his pursuit to prove violations of human rights, he frequently *conflates* the minimalist stance of 'negative duties', that he professes to abide by, and a more substantive view of justice which includes 'positive duties';<sup>21</sup> *secondly*, while he insists on the '*responsibility*' of the affluent nations, he does not specifically identify

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15 Sengupta, *Poverty Eradication and Human Rights* in Freedom from poverty as a human right 323 at 326 (Pogge ed., 2007).

16 For a comparative constitutional analysis of the relationship between poverty and fundamental rights, see Bilchitz, *Poverty and Fundamental Rights, The Justification and Enforcement of Socio-Economic Rights* 47 – 74 (2007); see also, Ferraz, *Poverty and Human Rights*, 28(3) Oxford Journal of Legal Studies 585 (2008).

17 Susan Marks, *Human rights and the bottom billion*, 2009(1) European Human Rights Law Review 37, 42.

18 Pogge, *World Poverty and Human Rights* 26-26, 215-216 (2002).

19 Pogge, *Severe Poverty as a violation of negative duties*, 19(1) Ethics and International Affairs 55 (2005).

20 Pogge, *Recognized and Violated by International Law: The Human Rights of the Global Poor*, 18 Leiden Journal of International Law 717, 741 (2005).

21 *Supra* note 14, at 27. Patten concludes: "I don't see, therefore, that Pogge has succeeded at deriving a strong conclusion about our duties to the global poor from a minimal normative injunction against causing harm. He may be able to reach the strong conclusion from *an* injunction against causing harm, but it is not the *minimal* injunction that libertarians acknowledge. Instead, it is an injunction that has built into it the moral imperative of assisting people who are in dire need."

the duty holders which are responsible for a particular violation or the specific human right violated in a particular case; *thirdly*, once he successfully establishes the causal relationship between the institutional order and the suffering of peoples, he assumes a violation of human right and passes over complicated questions of extra-territoriality and other issues of interpretation. In other words, while Pogge claims that there is a violation of a right, he fails to clarify who has violated what right and how.

*The question that follows this brief survey of existing academic literature on the issue is what are the scope, aim and objectives of the present paper?* The paper attempts to fill the lacunae identified in the preceding paragraphs –the failure to engage with the existing international human rights law framework and articulate legal arguments vis-à-vis the responsibility of particular duty holders for violating enunciated human rights. It is not the author’s claim that international law alone can provide all the solutions. Instead, as UNDP has put it: “*If international law can be one way of focusing attention on the need for action, then so much the better?*”<sup>22</sup> Accordingly, the author selects four situations which evidence how different human rights interact along with different stakeholders. In doing so, the limitations of the present legal framework are also exposed. This, in turn, aids in formulating adequate reforms to remedy the drawbacks in international human rights law. Finally, it would be possible to answer the question - ‘*do international human rights treaties protect the poor?*’ But this question assumes that human rights treaties *should* protect the poor. Therefore, *first*, it is important to examine the merits and demerits of a rights-based approach vis-à-vis other approaches.

## **II. EVALUATING A RIGHTS-BASED APPROACH**

This section explores the added value, if any, of adopting a rights-based approach. The apparent advantages of a rights-based approach are three-fold. *First*, a rights-based approach draws links between otherwise disparate issues and gives legal bases to many of the concepts that are traditionally analysed through the rubric of development, management, or welfare.<sup>23</sup> The corollary of entitlement and

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22 United Nations Development Program, *Human Development Report*, 25 (1996) available at [http://hdr.undp.org/en/media/hdr\\_1996\\_en\\_chap1.pdf](http://hdr.undp.org/en/media/hdr_1996_en_chap1.pdf) (Last visited August 19, 2012).

23 Henry Steiner, *Social Rights and Economic Development: Converging Discourses* (1998) 4 Buffalo Human Rights Law Review 25, 38.

obligation is the identification of rights and duty-holders.<sup>24</sup> ‘Duties’ engage the responsibility of states and other international actors in international law. Indeed, as one scholar notes, “[r]ights rhetoric provides a mechanism for re-analysing and renaming ‘problems’ as ‘violations’ and, as such as something that need not and should not be tolerated.”<sup>25</sup> Nor is poverty ‘natural and inevitable’ but rather a denial of rights in the implementation of deliberately chosen policies.<sup>26</sup> As such it can be reversed by the same means. Denial of rights also attracts international admonishment.<sup>27</sup> Accordingly, government actions must be considered in the light of the obligations inherent in human rights that are those of individual entitlement and accountability for failure to perform.<sup>28</sup>

*Secondly*, an economic approach tends to emphasize averages and not individuals. Economic success is measured by the total average growth, such as a rise in gross domestic product or per capita income. However, a focus on averages may not reveal that “*economic growth is rarely uniformly distributed across a country.*”<sup>29</sup> On the other hand, a rights-based approach is premised on the notion that each and every individual can lay claim to basic rights and basic services. For instance, Sen has pertinently observed that efforts to combat hunger must focus on the ‘entitlement’ that each person enjoys over food, rather than the total food

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24 Office of the UN High Commissioner on Human Rights, Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation, UN Doc.HR/PUB/06/8, 16 (2006). A recent example from Malawi provides an excellent illustration of the rights-based approach, particularly because it linked village level rights education and activism with Government-level legal advocacy. In this way, the campaign worked with (a) duty-bearers, to ensure that the necessary rights were enshrined legally at national and local levels; and (b) rights-holders, to inform them of what rights they had, how those rights related to their food security and how they could go about claiming those rights. Finally, the campaign culminated into a legally enforceable right to food for all citizens.

25 Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights* (1999) 21 Human Rights Quarterly 56, 59.

26 Chinkin, *The United Nations Decade for the Elimination of Poverty: What role for international law?* 54 Current Legal Problems 553, 565 (2001).

27 Campbell, *Poverty as a violation of Human Rights: Inhumanity or Injustice?*, Ethical and Human Rights Dimensions of Poverty: Towards a new paradigm in the fight against poverty, 2 – 4 (2003) available at <http://portal.unesco.org/shs/en/files/4412/10797127961Campbell.pdf/Campbell.pdf> (Last visited August 19, 2012).

28 Economic and Social Council, Human rights and extreme poverty, UN Doc. E/CN.4/1999/48 at ¶34 (1999).

29 Sachs, *The End of Poverty: Economic Possibilities for Our Time* 194 (2005) as cited in Narula, *The right to food: holding global actors accountable under international law*, 44 Columbia Journal of Transnational Law 691 (2006).

supply in the economy.<sup>30</sup> An economic approach also tolerates negative short-term consequences in return for long-term progress.<sup>31</sup> A rights-based approach does not tolerate such trade-offs; it cautions against any trade-off that leads to the retrogression of a human right from status quo at least.<sup>32</sup>

*Thirdly*, the rights based approach places poverty alleviation and associated demands for rights in a forum in which the right-holder and the duty-holder are on an equal footing.<sup>33</sup> These ‘*sites of dialogue*’ ensure that claim rights are not overlooked when priorities are considered and resources allocated.<sup>34</sup> Indeed, they provide an opportunity for actual stakeholders to participate in the formulation of policy and its enforcement. As a corollary, this also ensures the accountability of the duty-holder.<sup>35</sup>

In spite of the merits of the rights-based approach evident from the preceding paragraphs, there have been various criticisms levied on the same. Sen responding to these criticisms classifies them under three main critiques that of ‘legitimacy’, ‘coherence’ and ‘cultural imperialism’. The *legitimacy* critique argues that human rights confuse consequences of legal systems, in which people enjoy legally ascertained rights, with pre-legal moral rights that do not bestow justiciable entitlement.<sup>36</sup> However, once there is a *legally-binding* instrument in the form of a human rights treaty, it is submitted that the first part of the argument is moot. As regards the issue of justiciability, it is now well settled that socio-economic rights are not merely aspirational goals but may be violated.<sup>37</sup> There is an increasing body of jurisprudence on the enforcement of such rights in national courts most notably

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30 Sen, *Development as Freedom* 161-62 (1999).

31 Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, 32 *World Development* 465, 473 (2004).

32 UNHCHR Guidelines at ¶¶ 22, 50 (2006).

33 *Supra* note 26, at 566.

34 Bueren, *Alleviating Poverty through the Constitutional Court* 15 *South African Journal on Human Rights* 52 (1999).

35 Office of the United Nations High Commissioner for Human Rights, Summary of the Draft guidelines for a human rights approach to poverty reduction strategies ¶¶ 22–25 (2004) *available at* <http://www2.ohchr.org/english/issues/poverty/guidelines.htm> (Last visited August 19, 2012).

36 *Supra* note 30, at 227.

37 Danilo Turk, The realization of economic, social and cultural rights, UN Doc. E/CN4/Sub2/1992/16 at ¶ 184 (1992).

South Africa, India and Philippines.<sup>38</sup> According to the *coherence* critique, socio-economic rights are open-ended and their content remains indeterminate and vague at best.<sup>39</sup> Philosophically, the Kantian idea of perfect-imperfect obligations is utilised to rebut this criticism -<sup>40</sup> Kantian contractualism focuses on the recipient's perspective which can even justify a positive duty to provide basic necessities as sufficiently morally justified. Legally, the content of these rights have been reduced to settled legal standards like the 'minimum core obligation'.<sup>41</sup> Additionally, the duty bearers, as illustrated below, have been properly identified. *Last*, the *cultural imperialism* critique argues that human rights are essentially a Western construct which are inapplicable to essentially different social orderings in other parts of the World.<sup>42</sup> While Sen's starting point is that even the concept of an Asian's values is simplistic and meaningless, it is another commentator who most pertinently notes:<sup>43</sup> "*the tackling of poverty ought to be one of the less challenging areas of human rights as most aspects of poverty eradication do not raise issues of cultural hegemony. Access to water is not culture specific but is a universally embraced value.*"

In conclusion, it is apposite to suggest that the rights-based approach to poverty eradication is indeed justified and even necessary.

### III. INTERNATIONAL HUMAN RIGHTS TREATY REGIME AND ITS INTERACTION WITH POVERTY

Contemporary international human rights law consists of a massive body of individual and group rights proclaimed in a large number of international and regional human rights instruments as well as a voluminous human rights jurisprudence emitted by international courts and quasi-judicial bodies interpreting and applying these instruments.<sup>44</sup> The centre-piece of this effort was the

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38 For an extensive survey of the enforcement of economic, social and cultural rights, see International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* 107 – 116 (2008).

39 *Supra* note 30, at 230.

40 *Supra* note 13, at 213.

41 Vizard, *Poverty and Human Rights: Sen's 'Capability Perspective' Explored* 141 (2006)

42 See Gai, *Human Rights and Governance: The Asia Debate* 15 *Australian Yearbook of International Law* 5 (1994).

43 *Supra* note 34, at 54.

44 Buergethal, *Human Rights*, *Max Planck Encyclopaedia of Public International Law* at ¶10 (2007).



proclamation of the Universal Declaration of Human Rights in 1948.<sup>45</sup> On 16 December 1966, after twelve years of discussion, the United Nations completed the drafting of two treaties designed to transform the principles of the Universal Declaration of Human Rights into binding, detailed rules of law:<sup>46</sup> the International Covenant on Civil and Political Rights,<sup>47</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>48</sup> Both Covenants came into force in 1976.

*It is submitted that the denial of human rights is both a cause and a consequence of poverty.*<sup>49</sup> Admittedly, no provision in the aforementioned treaties expressly provides for a right to be free from poverty. Nevertheless, many provisions are relevant. First of all, there is the ‘extraordinary assertion’<sup>50</sup> of the right to social security and adequate livelihood in the UDHR.<sup>51</sup> Understandably, this was subsequently diluted in the ICESCR. Still, Articles 9 and 11 of ICESCR continue the theme by recognising *the right of everyone to an adequate standard of living.*<sup>52</sup> Furthermore, in the language of rights, one may say that a person living in poverty is one for whom a number of human rights remain unfulfilled—<sup>53</sup>such as the rights to food, health, political participation and so on. Such rights have *constitutive* relevance for poverty if a person’s lack of command over economic resources plays a role in causing their non-realization.<sup>54</sup> Some human rights are such that their fulfilment will help realize other human rights that have constitutive relevance for poverty. For instance, if the right to work is guaranteed, it will help empower the people to realise the right to food themselves. Such rights can be said to have

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45 Universal Declaration of Human Rights, General Assembly Resolution 217A(III), UN Doc. A/810 at 71 (1948) [hereinafter “UDHR”].

46 Malanczuk, Akehurst’s Modern Introduction to International Law 215 (7<sup>th</sup> edn., 1997).

47 International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 19 December 1966, entered into force 23 March 1976) [hereinafter “ICCPR”].

48 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976) [hereinafter “ICESCR”].

49 Imbert, *Rights of the Poor, Poor Rights? Reflections on Economic, Social and Cultural Rights* (1995) 55 The Review 85, 93.

50 *Supra* note 26, at 559.

51 Article 25, UDHR: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

52 Article 11, ICESCR.

53 UNHCHR Guidelines at ¶7.

54 Campbell, *Poverty as a Violation of Human Rights* in Freedom from poverty as a human right 55, 59 (Pogge ed., 2007).

*instrumental* relevance for poverty.<sup>55</sup> The same human right may, of course, have both constitutive and instrumental relevance.

The matrix of human rights, engaged with the poor – constitutive or instrumental, begs the question as to the nature and scope of the correlative obligations on the state or other actors vis-à-vis these human rights. The exercise to ascertain the nature of these obligations must be based primarily in principles of treaty interpretation.<sup>56</sup> Article 31(1) of the Vienna Convention on the Law of Treaties requires a provision to be interpreted in the ordinary meaning of the words understood along with the context (*in light of the object and purpose*) in which the provision was drafted.<sup>57</sup> Additionally, the Committee on Economic, Social and Cultural Rights [hereinafter “CESCR”] published general comments, discussions and reports from time to time. The opinion of such treaty bodies have to be given ‘great weight’, according to the International Court of Justice in *Diallo*,<sup>58</sup> in the course of interpreting treaties.

The CESCR has consistently endorsed a tripartite typology of obligations first suggested by Eide – obligations to *respect, protect* and *fulfil* human rights.<sup>60</sup> These obligations are explained by taking the right to water<sup>61</sup> as an illustration. Indeed, the CESCR has recognised the inextricable relationship between the right to water and poverty – “*the continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty.*”<sup>62</sup> The obligation to *respect* entails obligations not to interfere with the enjoyment of human rights. Respecting

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55 Osmani, *Poverty and Human Rights: Building on the Capability Approach*, 6(2) Journal of Human Development, 205, 206 (2005).

56 The customary law principles relating to the interpretation of treaty provisions have been codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties; AUST, MODERN TREATY LAW AND PRACTICE 188-189 (2000).

57 Article 31, Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969).

58 Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo) (Merits), 2007 ICJ General List No. 103 at ¶66.

59 Eide, *The Right to Adequate Food as a Human Right*, UN Doc. E/CN.4/Sub.2/1987/23 at ¶66 (1987).

60 This has even been followed in other human rights court. See eg. The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, Communication 155/96 (2001) *African Human Rights Law Reports* 60.

61 In fact, right to water has not been explicitly provided in the ICESCR. Nevertheless, Article 11 says ‘including...’ and this was interpreted by the ICESCR in its General Comment No. 6 (1995) UN Doc.E/1996/22 at ¶¶5, 32.

62 CESCR, General Comment No. 15, Right to Water, UN Doc. E/C.12/2002/11 at ¶1.

ESC rights obliges states parties, inter alia, not to adopt laws or other measures, and to repeal laws and rescind policies, administrative measures and programmes that do not conform to ESC rights protected by human rights treaties.<sup>63</sup> For instance, the right to water includes the right to maintain access to existing water supplies, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies through waste from State-owned facilities or through use and testing of weapons.<sup>64</sup>

The obligation to *protect* requires states to take measures that prevent third parties including individuals, groups, corporations and other entities from interfering in any way with human rights.<sup>65</sup> This generally entails the establishment of a framework of laws, regulations and other measures so that individuals and groups are able to realise their rights and freedoms.<sup>66</sup> With regard to water, the obligation would require states to implement laws to prevent pollution of water by corporations and facilitating access to water where there is discrimination by a private party.<sup>67</sup> Lastly, the obligation to *fulfil* requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure full realisation of human rights to those who cannot secure these rights through their personal efforts.<sup>68</sup> Indeed, this is most relevant for poverty eradication wherein the poor are unable to access clean water.<sup>69</sup>

Additionally, the CESCR has also formulated a '*minimum core obligation*' -to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.<sup>70</sup> In other words, the absence of such a standard would frustrate its object. At the same

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63 Ssenyonjo, *Economic, Social and Cultural Rights in International Law* 23 (2009).

64 CESCR, General Comment No. 15 at ¶¶10, 21.

65 Both the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) have interpreted the obligation to protect in regional human rights treaties in a similar manner - *Velasquez Rodriguez v Honduras*, judgment of 29 July 1988, Inter-AmCtHR (Ser C) No 4 (1988); *E and Others v United Kingdom* (App No 33218/96), judgment of 26 November 2002 [2002] ECHR 763.

66 *Supra* note 63, at 24.

67 Pejan, *The right to water: the road to justiciability*, 36 *George Washington International Law Review* 1181, 1189 (2004).

68 *Supra* note 63, at 25.

69 Skogly, *Is There a Right Not To Be Poor?* 2(1) *Human Rights Law Review* 59, 79–80 (2002).

70 CESCR, General Comment No. 3, *The nature of States parties obligations*, UN Doc. E/1991/23 at ¶10 (1991).

time, whether a country has discharged this obligation must be considered in light of the resource availability.

In light of the nature and scope of obligations discussed above, the following section seeks to analyse the interplay of these different obligations through actual scenarios witnessed in the past.

### **A. Case Study I – Zimbabwe and the right to food**

In early 2000's, the Zimbabwean government assisted landless citizens to invade agricultural fields. This was accompanied by a strong drive of compulsory land acquisition.<sup>71</sup> Along with a drought in 2002, the food supplies inside the nation were disproportionately less to its population.<sup>72</sup> Additionally, the government restricted the entry of international food aid and denied it completely to its political opponents. Finally in May 2005, it altogether refused any help from the international community.<sup>73</sup>

Zimbabwe is a state party to the ICESCR. Clearly, the acts of the Zimbabwean government constituted a violation of the right to food.<sup>74</sup> The correlative duty to this right required the government not to interfere with the rights of people to get adequate food.<sup>75</sup> Instead, the State actively adopted measures to violate this most basic duty. Furthermore, the government violated the direct mandate of the CESCR not to use food as an instrument of political and economic pressure.<sup>76</sup>

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71 Amnesty International, *Zimbabwe: Power and Hunger--Violations of the Right to Food* 10-14, 18-29 (2004) available at [http://web.amnesty.org/library/pdf/AFR460262004ENGLISH/\\$File/AFR4602604.pdf](http://web.amnesty.org/library/pdf/AFR460262004ENGLISH/$File/AFR4602604.pdf).

72 The U.N. Food and Agriculture Organization (FAO) and U.N. World Food Programme assessments indicated that about half of Zimbabwe's population was "food insecure." UN FAO, *Global Information and Early Warning System on Food and Agriculture, Food Supply Situation and Crop Prospects in Sub-Saharan Africa*, 65 (Dec. 2002) available at <ftp://ftp.fao.org/docrep/fao/005/y8255e/y8255e00.pdf>.

73 *Zimbabwe Halts Emergency Food Aid*, BBC News, May 11, 2004, <http://news.bbc.co.uk/1/hi/world/africa/3704211.stm>

74 Article 11, ICESCR.

75 CESCR, General Comment No. 12, *The Right to Adequate Food*, UN Doc. E/C.12/1999/5, 106 ¶15 (1999).

76 *Id* at ¶37.

What is the relevance of the above example? *First*, international human rights treaties *do* guard the rights of citizens against oppressive measures of their own governments. Thus, in a way, the international human rights treaties *did protect* the poor. However, more significantly, *the treaty regime failed to provide a mechanism to these victims for redressal against such egregious violations*. It seems ironic that it failed to abide by its own standard of ‘*protect*’. Indeed, this critique is shared more broadly with other areas of international law.<sup>77</sup> Nevertheless, it is submitted that this argument cannot be used in defence of the treaty regime. The drawback is best tackled through the establishment of regional human rights treaties regimes. Judicial forums, established by such treaties, allow individuals to bring a claim against the state.<sup>78</sup> The international community, in its attempt to remedy this defect, has formulated the Optional Protocol to the ICESCR to establish a complaints mechanism.<sup>79</sup> At this time, due to only a few ratifications, the success of this move remains uncertain.

## **B. Case Study II – India and Housing the Urban Poor**

Before analysing the situation below, it is important to note that the right to adequate housing has both *constitutive* and *instrumental* relevance for poverty. Lack of secure and safe shelter is an indicator of poverty and leads to denial of other rights like access to health, social services, employment *et al.* Conversely, protecting the right to adequate shelter not only addresses a condition of poverty but also facilitates actions for the alleviation of poverty such as acquiring employment.<sup>80</sup>

The situation considered by the Delhi High Court in *Sudama Singh v. Government of Delhi*<sup>81</sup> is examined here. The government of Delhi, in pursuance of construction for the Commonwealth Games, had demolished the ‘jhuggies’ (hutments) of slum-dwellers living in a particular area. The aggrieved people filed a petition before the Court seeking its intervention to rehabilitate and relocate them to a suitable place and providing them alternative land with ownership rights. The Master Plan for Delhi-2021 envisaged the relocation (by provision of alternative

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77 *Supra*note 26, at 567.

78 From Bilateralism to Community Interest: Essays in Honour of Bruno Simma 1132 (2011).

79 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. Doc.A/63/435 (2008).

80 *Supra* note 26, at 574.

81 *Sudama Singh and Ors.v.Government of Delhi and Anr. MANU/DE/0353/2010* (Delhi High Court).

accommodation) of the dwellers if the land on which their jhuggies exist was required for a public purpose.

The present example differs from the previous one in two key respects. *First*, here, the aggrieved party had approach a judicial forum which gives us an insight into how national courts deal with international human rights treaties. *Secondly*, while the previous situation involved a direct application of the duty to respect [a negative duty]; here, there is a conflation of negative and positive duties which gives rise to important questions – is the state’s duty not to interfere independent of the legality of the settlement?; correspondingly, is there also a positive duty on the state to provide alternative housing?; if so, can such a duty be enforced in a domestic court?

The CESCR had the occasion to consider a similar situation in Philippines. It told the government that it did not condone illegal use of property but “*in the absence of concerted measures to address these problems [squatters] resort should not be had in the first instance to measures of criminal law or to demolition.*”<sup>82</sup> This indicates that the Committee advocates for a positive duty for the state to provide adequate housing to the people.<sup>83</sup> Such a positive duty begs the question of the degree of compliance required by the treaty of the government. In the landmark *Grootboom* case,<sup>84</sup> the South African Constitutional Court considered the enforceability of economic and social rights under its Constitution. The Court accepted that the government could not immediately provide shelter for all those without accommodation but issued a declaratory order requiring the government to ‘devise and implement’ within its available resources a comprehensive and co-ordinated programme progressively to realize the right of adequate housing.<sup>85</sup>

Previously, the Indian Supreme Court, in *Olga Tellis*,<sup>86</sup> recognised the right to shelter. However, at the same time, it held that the government had the right to clear the illegally occupied streets and the duty to provide alternate shelter, if any,

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82 Observations to the Initial Report of the Government of the Philippines, 29th meeting, 19 May 1995 at ¶15.

83 CESCR, General Comment No. 4, UN Doc. E/1992/23 at ¶¶11-12.

84 Government of the Republic of South Africa v. Grootboom 2000 (11) BCLR 1169.

85 Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law 243 (2008).

86 *Olga Tellis v. Municipal Corporation of Greater Bombay* AIR 1986 SC 180 at ¶51.

was not legally enforceable before the court. Subsequently, in *Ahmedabad Municipal Corporation*,<sup>87</sup> the Court only allowed the petitioner to avail himself of the right to alternative housing. This kind of judicial strategy has been termed as ‘*Individualized Enforcement*’ by Landau in a recent article.<sup>88</sup> He convincingly argues that such individualised enforcement, in fact, goes against the rubric of human rights and benefits the advantaged groups even more. In this judicial background, the Delhi High Court *boldly* held that since the government had already initiated a policy plan to provide adequate housing to the aggrieved people, it was the government’s duty to provide *that* alternate housing as a pre-requisite for eviction.<sup>89</sup> In fact, in reaching this conclusion, the Court took into account India’s international obligations including Article 11 of the ICESCR.

### C. Case Study III –Niger and the famine – can global actors be held accountable?

The 2005 famine in Niger is an example of the negative impact of policies implemented by global institutions on the human rights of people. While the first two illustrations have been restricted to the relations between the state and its citizens, the present case provides an opportunity to examine the possible responsibility of actors other than the ‘home state’. Droughts and locusts struck western and central Africa in 2004 reducing adversely the harvest of the affected countries. An NGO contended that the effects of these natural events could have been mitigated but for the subsequent inaction of the government.<sup>90</sup> In fact, Mali which reacted promptly by diverging from market-based approaches and distributing free-millet was not struck by the famine.<sup>91</sup> Instead, the Nigerian government was persuaded by the international financial institutional and key donor nations to abide by their bilateral agreements.<sup>92</sup>

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87 *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan* (1997) 11 SCC 121.

88 Landau, *The reality of social rights enforcement*, 53 *Harvard International Law Journal* 189, 209 (2012).

89 *Sudama Singh and Ors.v.Government of Delhi and Anr.* MANU/DE/0353/2010 (Delhi High Court).

90 *August Will Be the Worst Month in Niger*, Médecins Sans Frontières News, Aug. 8, 2005, available at [http://www.msf.org/msfinternational/invoke.cfm?objectid=949B295A-E018-0C72-099A049D222E25A1&component=toolkit.article&method=full\\_html](http://www.msf.org/msfinternational/invoke.cfm?objectid=949B295A-E018-0C72-099A049D222E25A1&component=toolkit.article&method=full_html).

91 U.N. Office for the Coordination of Humanitarian Affairs, *Mali: No Famine, But a Perennial Problem of Poverty*, Integrated Regional Information Network News [IRIN News], Aug. 15, 2005, available at [http://www.irinnews.org/report.asp?ReportID=48586&SelectRegion=West\\_Africa](http://www.irinnews.org/report.asp?ReportID=48586&SelectRegion=West_Africa).

92 JeevanVasagar, *Don't Blame the Locusts*, *Guardian* (U.K.), Aug. 12, 2005, available at <http://www.guardian.co.uk/famine/story/0,12128,1547852,00.html>.

Niger committed a violation of its obligation to fulfil the right to food which requires the State to directly provide food or make it more accessible by increasing subsidies and so on.<sup>93</sup> Niger essentially faced a *conflict* between its obligations to comply with binding human rights commitments and its obligations under the agreements with the international financial institutions.<sup>94</sup> In such a situation, a government like Niger may be left with no choice but simply to “*ignore the human rights treaty obligations, as the pressure from largely donor-imposed [IFI] conditionality is stronger. Countries may be punished for violating IFI and WTO conditions, but not those of the UN.*”<sup>95</sup> However, it is submitted that in international law, it is human rights obligations which take precedence over all other obligations. The International Law Commission noted that due to the special character of human rights treaties seeking to regulate all other laws in force in a particular nation, all other treaty commitments need to be circumscribed by a state’s human rights obligations.<sup>96</sup> Indeed, this is consistent with the jurisprudence of regional human rights courts.<sup>97</sup> Hence, abiding by other treaty obligations is not a defence to the violation of a human rights treaty. Indeed, this is one of the merits of the rights-based approach as outline above – prioritization.

a) *International Financial Institutions and Powerful Developed States*

International financial institutions are not bound by international human rights treaties. Hence, the treaty regime cannot protect the violations of human rights attributable to such organisations. This clearly is a lacunae in state-centric international law. Nevertheless, the World Bank's Senior Counsel notes that “[b]ecause governments are the owners of the institutions like the World Bank, and are bound to comply with the treaties they have ratified, multilateral financial institutions must be careful to ensure that if these treaties are implicated in their projects, the treaties are appropriately taken into account ...”<sup>98</sup> This suggests that it

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93 CESCR, General Comment No. 12 at ¶15.

94 *Supra* note 29, at 717-718.

95 Canadian Council for International Co-operation, Reality of Aid 2004 (2004), available at [http://www.ccic.ca/e/docs/002\\_aid\\_roa\\_2004.pdf](http://www.ccic.ca/e/docs/002_aid_roa_2004.pdf).

96 International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, UN Doc. A/CN.4/L.682 at ¶¶ 246-247 (2006).

97 *Slivenko v. Latvia*, ECtHR, Application no. 48321/99, ¶120 (2003); *Case of the Moiwana Community v. Suriname*, Serie C No. 124, Inter-American Court of Human Rights (IACrHR), 15 June 2005.

98 Leva, *International Environmental Law and Development*, 10 Georgetown International Environmental Law Review 501, 501-02 (1998)



may be possible to hold strongly influential nations responsible for the conduct of the international financial institutions. This is particularly true for International Financial Institutions where not every nation has equal votes but the votes are weighted in accordance with the member's donations. It is submitted that these member states may be held responsible as: *first*, negative obligations have extraterritorial application; and *secondly*, the conduct of states in the functioning of another international organisation may attract responsibility.

*First*, in conformity with the fundamental principle of 'universality' of human rights protection, acts producing effects *outside the State's territory* also give rise to State's obligations under such treaties. It may be contended that extra-territorial application is premised on a narrow construction of 'effective control'.<sup>99</sup> However, the ICESCR, unlike other human rights treaties, does not make any reference to its scope of application. In fact, the ICJ in *Wall* held that Israel was "*under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.*"<sup>100</sup> Thus, the Court drew a distinction between positive and negative obligations extending the latter *even beyond territorial control*.<sup>101</sup> The CESCR also adopts this distinction to extend negative obligations extra-territorially.<sup>102</sup>

*Secondly*, conduct of states in the working of international organisations may attract responsibility if it is contrary to its obligations under other agreements. The ICJ had occasion to consider such a situation in *Greece v. Macedonia*<sup>103</sup> wherein it held that Greece, by even voting against a resolution inducting Macedonia in the NATO was contrary to the bilateral agreement between the two countries. Similarly, if a powerful state votes in favour of an IFI resolution which

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99 *Loizidou v Turkey* (Preliminary Objections) (App No 15318/89) 1995 20 EHRR 99, ¶¶52,62.

100 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ 136 at ¶112.

101 Milanovic, *Extraterritorial Application of Human Rights* 210 (2011).

102 CESCR, General Comment No. 8, *Economic Sanctions on ESC Rights* UN Doc. E/C.12/1997/8 ¶3 (1997); Craven, *The violence of Dispossession- Extra-territoriality* in *Economic, Social and Cultural Rights in Action* 75, 77 (2010); In fact, Ecuador in the *Aerial Herbicides Case* has specifically alleged that the Columbian authorities, acting within their territory, violated the rights of its nationals under the ICESCR - Ecuador - Application to institute proceedings - Areal Herbicides (ICJ) p. 26 (31 March 2008).

103 *Application of the Interim Accord of 13 September 1995* (The Former Yugoslav Republic of Macedonia v. Greece), 2009 ICJ General List No. 142; Also *see* *Matthews v. U.K.*, 1999-I Eur. Ct. H.R. 251 at ¶32.

leads to human rights violations in the ‘home’ state, an argument can be made for its indirect responsibility.

#### **D. Case Study IV – Bangladesh and ‘the hidden face of globalisation’<sup>104</sup>**

In the documentary, it is shown how American multi-national corporations have outsourced their manual work to factories in Bangladesh. From the conditions in the factories and the interview of the workers, it appears that the right to work of these people is being continuously violated. For the purposes of the paper, it is presumed such human rights violations are indeed occurring. The stakeholders involved in this institutional arrangement are the home state – Bangladesh, a transnational corporation and its state of origin – a developed country.

##### *a) Transnational Corporation and its state of origin*

Obviously, transnational corporations are not bound by human rights obligations.<sup>105</sup> The question that arises is whether the state of origin is under any obligation to regulate the outsourcing activities of companies incorporated on its own territories. As previously submitted, the extra-territorial obligations of states only extend to negative obligations of states. On the other hand, an obligation to regulate would come within the ambit of the duty to protect – a positive duty. Hence, it is difficult to argue for an obligation on part of the state of origin.<sup>106</sup> At the same time, however, CESCR urges nations “*to promote the right to work in other countries as well as in bilateral and multilateral negotiations.*”<sup>107</sup>

##### *b) Bangladesh*

Understandably, Bangladesh has a duty to protect its citizens by establishing a legislative framework that protects the workers’ rights. However, two concerns are voiced by developing countries on this count. *First*, any regulation would decrease the chances of investment in the nation which would further deteriorate the

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104 This refers to a documentary Hidden Face of Globalization available at <http://www.youtube.com/watch?v=8Bhodyt4fmU>.

105 But there are soft law guidelines to regulate their behaviour: *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

106 *Supra* note 29, at 751.

107 CESCR, General Comment No. 18, Right to Work UN Doc. E/C.12/GC/18 at ¶30 (2005).

employment rates. In fact, in the documentary, it is shown that Walt Disney withdraws its investment from Bangladesh after some regulations are put in place. However, a rights-based approach does not offer the state the opportunity to make such trade-offs as was elaborated above. *Secondly*, bilateral investment treaties reduce the scope of state intervention in investment related activities. However, as previously submitted, human rights treaties take precedence over other international commitments. Particularly in the case of investment law, there is recent writing in support of including human rights standards in substantive obligations in BITs.<sup>108</sup>

#### IV. CONCLUSION

*“Poverty is the gravest human rights challenge facing the world today.”*<sup>109</sup> Poverty may be both the cause and the consequence of a human rights violation. Since 1990’s when the United Nations was actively seized with the idea of a rights-based approach to poverty eradication, there has been a continuous growth in the volume of academic scholarship on the subject. In that scholarship, the author has attempted to carve out a niche area by viewing the issue through the rubric of international law. Accordingly, different situations were selected to identify the duty-holders and the nature of their obligations. The suggestion that this is an all-encompassing solution to the problem is not made in the paper. On the contrary, drawbacks have been seen through the interaction of human rights treaty regime with actual situations.

The inferences that can be drawn are the following. *First*, the home state is responsible to respect and protect the human rights of all its citizens. While the obligation to fulfil is subject to the available resources, in some cases, courts are willing to enforce even such positive duties. Furthermore, human rights obligations take precedence over other commitments like those to IFIs or investors. *Secondly*, international financial institutions are not directly accountable for any human rights violations. However, an argument may be made to hold the powerful states in such organisations accountable. In any event, the extra-territorial application of negative duties of such states may even be attracted independently. *Thirdly*, there

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108 See ‘Proportional’ by What Measure(s)? *Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration* in Human Rights in International Investment Law and Arbitration 423 (Dupuy *et al* eds., 2009).

109 UNHCHR Guidelines, 1.

are certain limitations to the human rights treaties regime in protecting the poor – the absence of a complaints mechanism in ICESCR makes it difficult for victims to get redressal or even voice their concerns; and international financial institutions and transnational corporations are not bound by human rights law; and a state’s extraterritorial obligations are only restricted to the duty of respect and does not extend to positive duties.

In sum, while a rights-based approach has a definite edge over other approaches in tackling poverty, the answer to “whether international human rights treaties protect the poor?” remains uncertain.