Monitoring Human Rights Aspects of Sustainable Development

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MONITORING HUMAN RIGHTS ASPECTS OF SUSTAINABLE DEVELOPMENT

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INTRODUCTION

Monitoring the human rights aspects of sustainable development remains impossible as long as no conceptual framework exists to define precisely what should be monitored and how this ought to be accomplished. In order to develop such a framework, insufficiencies in both human rights and development policies and development interventions must be identified and overcome. This paper addresses the main insufficiencies to be surmounted and describes the prerequisites for monitoring human rights aspects of sustainable development. This paper also sets forth a formulation of substantive criteria that should be developed in order for monitoring to be effective.

The obvious first step in discussing a conceptual framework to monitor human rights aspects of sustainable development, a definition of development, is not dealt with here. Defining what development should be rather than what it is, has been a favorite theme for many decades and this text does not intend to contribute to the variety of proposed definitions. Nevertheless, it is worth recalling that no consensus has

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1. The term “development intervention” is used here to encompass development projects and programs.
ever been reached in theory, policy or practice. There is more agreement on what development should not be, than on what development is. Another controversy which is avoided is whether a definition of development includes human rights or not.\(^2\) The title of this paper suggests that human rights are included in the notion of sustainable development, implicitly postulating that development that does not recognize human rights is not sustainable.

The notion of sustainable development emerged with the awareness that self-destructive development can only be short-lived. Evidence that non-renewable environmental resources must be protected has generated such an awareness. Individual human beings, however, have been treated as a renewable resource. The idea that destruction of a single human being jeopardizes humanity as a species has not attained acceptance in the development policy formulation. People are still often referred to as “human capital”\(^3\) or, at best, human resources. However, the notion of human rights attributes value to every human being. An underlying assumption of human rights is that all individuals have equal rights, and that jeopardy of the rights of any single individual challenges the “human” aspect of human rights.

Once human rights are accepted as universal, human rights obligations must be accepted as universal as well. Such universality must, by definition, extend beyond national borders. Wide disparities in opportunities for human beings to enjoy their rights thereby become the principal challenge for human rights, and for development. People whose luck of birth has failed them have no access to education or health care unless they can pay for it, and no prospects of generating income to be able to pay. Those who attempt to improve their opportunities by “voting with their feet” are severely constrained by the increasingly restrictive policies of admission in the North.

The awareness that human rights entail redressing unequal opportunities is emerging slowly. The earlier decades divided human rights into three generations, relegated economic and social rights to the second

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3. See World Commission on Environment and Development (1987), Our Common Future (“The Brundtland Report”), at 8 (defining sustainable development as development that satisfies present needs without harming the ability of future generations to satisfy their needs).

Human rights activism focuses on purposeful governmental acts against individuals, particularly on the use of physical force. Human rights activism does not focus on governmental obligations emanating from the entitlements of individuals to the necessities of survival. Perhaps not surprisingly, there is no policy relating to solidarity in the global context of development. A United Nations General Assembly Resolution on human rights, however, demonstrated an awareness of the issue by expressing the view that worldwide suffering beckons the strengthening of human solidarity.

The lack of intergovernmental policies and conceptual tools to analyze the implications of solidarity on human rights and on development, however, has not completely precluded actions based on a shared sense of solidarity. A heightened level of awareness of the severity of human rights violations has resulted in a greater concern, and a greater obligation to act.

I. BACKWARD-LOOKING

A. NEW OLD IDEAS: PLUS ÇA CHANGE . . .

Although the theory and policy of international development cooperation did not originally include a consideration of human rights, an awareness of human rights has emerged in practice. This awareness has proven that the myth of disassociating economic from political development, while arguable in theory, is untenable and unsustainable in practice. This does not, however, change the fact that development cooperation has included a human rights component only as an afterthought.

Many have enthusiastically embraced the newly discovered concept of linking economic and financial development with notions of human rights in an effort to promote both human rights and economic development. Examining how this idea has been applied historically may result in the avoidance of errors committed earlier, as evidenced by the development of ideas with regard to incorporating human rights into development. There are surprisingly few novelties in the last several decades. As one authority has noted, however, there is a need for innovative

5. See H. Gross Espiell, The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches, in INTERNATIONAL FORUM ON HUMAN RIGHTS, HUMAN RIGHTS: THIRTY YEARS AFTER UNIVERSAL DECLARATION 51 (Dr. B.G. Ramaharas ed., 1979) (stating that civil and political freedoms were thought to be more important than economic, social, and cultural rights).

ideas given the lack of funds for use in economic development during the next decade.\(^7\)

When ideas from the 1960s regarding integration of human rights and development are compared with contemporary proposals, no significant progress is evident. For example, the review and appraisal of the first United Nations Development Decade (1961-1970) criticized development ideas for perceiving human beings merely as means of production. Such criticism continues to be applicable today. The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities reproached the adverse effects of mainstream development policies upon human rights and the exclusion of democratic principles from development decision-making process on all levels (internationally, nationally, and locally). The Commission expressed the view that conditions of labor and use of natural resources are factors that influence the nature of international trade and as a consequence, a policy of free trade may encourage infringement upon human rights in countries where the population is unable to make improvements through political participation.\(^8\)

B. CONTROVERSIAL PRACTICE

An interest in human rights has much popular appeal and serves as a slogan that mobilizes public support. Such support has sometimes resulted in the denunciation of governments for human rights violations and economic sanctions in the form of the termination of aid. There exists a high and increasing level of public support for the linkage of human rights with development aid in most donor countries. Recent public opinion surveys confirm increased public interest in the human rights problems of developing countries. Public support for linking aid to human rights considerations remains high even while the support for aid itself has decreased.

The termination of aid due to human rights violations is perhaps the most widely known aspect of linking human rights to development cooperation. This practice was associated with political conditionality.\(^9\)

The main features of conditioning aid upon human rights violations are


\(^9\) See Katarina Tomasevski, *Development and Human Rights* 68 (1989) (describing the United States practice of terminating aid to India by $15 million because India did not support the United States effort before the Commission on Human Rights to invoke a resolution against Cuba).
punitiveness, arbitrariness, and the cummulation of roles of the donor country as investigator, judge, and executioner.\textsuperscript{10}

As a reflection of this approach, the existing literature and documentation concerning the merger of human rights and development focuses primarily on the human rights records of developing countries. Thus far, human rights have been too often reduced to ranking countries according to subjective assessments of their human rights record and attempting to quantify human rights violations and thus present "objective" rankings. A recent example is the 1991 Human Development Report,\textsuperscript{11} which created a political freedom index separate from the human development index. While the political freedom index uses human rights terminology, the human development index does not.\textsuperscript{12} Such a framework challenges the indivisibility of human rights. Human rights are not included in analyzing development; and thus, development and freedom are presented as two distinct, separate, and sometimes unrelated facets in "measuring" the performance of countries.

As the 1991 Human Development Report points out, there exists a shortage of literature ranking countries according to their human rights performance.\textsuperscript{13} This reluctance to indulge in summary measures and rankings, however, is based on a solid rationale. To measure performance, there must be an assessment of the efforts and accomplishments. This can only be done by analyzing and then quantifying what the respective governments have done during a specified time period. This is a tedious and time-consuming effort because data is, at best, scattered, incomplete, and often difficult to verify. Thus, to "measure" countries according to perceptions of what freedoms they guarantee or deny to their population may indeed seem to be a convenient shortcut.

The level of respect for human rights in a country where development intervention is being planned or implemented should be monitored. If human rights are disregarded elsewhere, it is unrealistic to expect them to be observed within a country experiencing development intervention. The experience in Indonesia provides a good example. The annexation of West Papua and East Timor did not elicit much protest and occasional United Nations condemnations of human rights viola-

\begin{footnotes}
\item[10] Id. at 63-65.
\item[12] Id. at 20.
\item[13] See id. at 21 (stating that significant changes have taken place in many countries between 1985 and 1991, but that there exists no systematic study of human freedom).
\end{footnotes}
tions in East Timor have obviously not inhibited their perpetuation. The control over peripheral islands of the archipelago emerged, however, as an important issue in the Transmigration Programme.\textsuperscript{14} The military aspects of the organized relocation to "sensitive regions" or "trouble spots" attained publicity in the numerous critiques of the Transmigration Programme.\textsuperscript{15}

Human rights concerns are visible in the practice of international development cooperation. Specific mechanisms are designed to enable development interventions to achieve some human rights objectives, even if human rights are rarely mentioned. Thus, targeted projects were designed to bypass the national distribution system and to assist directly those who are excluded. Material assistance proved necessary but insufficient, hence, targeted assistance promoted empowerment. This "bottom-up" approach was logically followed by its "top-down" counterpart—the accountability of the government for its treatment of its population. Where human rights were infringed, the withdrawal of aid resulted.

Assistance to victims of human rights violations emerged to redress the unwanted consequence of the withdrawal of external aid where people were, in essence, punished for the "sins" of their rulers. International humanitarian agencies provided direct assistance and supervision to the intended beneficiaries because victims of human rights violations could not rely on assistance from the very government that violated their rights.

Because the application of human rights in international development cooperation raises controversies, this issue appears on the agenda of inter-governmental human rights bodies. For example, the Human Rights Committee recently questioned the representatives of Finland about the relationship between development aid and human rights. The Minister of Foreign Affairs expressed the view that in formulating policies on development cooperation, Finnish concerns about human rights should not be used as a criteria for extending either a reward or punishment.

\textsuperscript{14} See Carmel Budiardjo, \textit{The Politics of Transmigration}, 16 \textit{The Ecologist} 111 (1986) (giving an historical perspective and a critical analysis of the transmigration that took place in Indonesia).

\textsuperscript{15} \textit{Id.} at 112-15.
II. OBSTACLES TO MONITORING

A. LIMITATIONS OF HUMAN RIGHTS PROCEDURES

The most important obstacle for the effective application of human rights in the development process is the lack of means of redress for those harmed by development interventions. Because human rights activism always emerges in response to what are perceived as violations of human rights, the lack of remedies precludes such activism from being effective. The basic notion of access to remedies for human rights violations is still, and likely to remain, exclusively individualistic, such that remedies can be sought by those whose individual rights have been allegedly violated. This is obviously unsuitable to challenge structural issues and policy problems in development.

The United Nations human rights work has evolved from defining what constitutes human rights violations, to condemning violations of human rights, to developing procedures to prevent violations. The first steps in the 1940s to the 1960s set forth the main substantive human rights standards in order to develop a globally applicable yardstick. In 1947, when the United Nations Commission on Human Rights was created, it explicitly rejected the power to consider complaints for human rights violations. In the 1970s it became possible to institute international complaint procedures by permitting individuals to demand the investigation of human rights violations by their own state. Critics of the international human rights system regularly emphasize that not all governments violating human rights are condemned. These critics, however, seldom stress the importance of one profound change, which is that the government is no longer the judge in its own case and can be held accountable internationally for its actions toward its own people.

The dominant mode of human rights work is denunciatory, that is, governments are singled out for condemnation. Assistance to ameliorate the harmful consequences of oppressive government conduct constitutes a minuscule component of United Nations human rights activities. Its focus on meetings and publications rather than projects is often criticized.

Condemning governments for human rights violations is neither the end nor the necessary means of human rights work. However effective such condemnation is in an inter-governmental system, it always comes too late, thus rendering the condemnation ineffective. Hence, proce-

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dures aimed at preventing the occurrence of violations were developed for those types of human rights violations that are universally considered to constitute violations such as, torture, summary and arbitrary executions, and disappearances. Ideas about what constitutes violations of economic, social, and cultural rights are, however, still vague. The Limburg Principles suggest that a state would be violating its human rights obligations, _inter alia_,

- if it willfully fails to meet a generally accepted international minimum standard of achievement, which is within its power to meet;
- if it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or _force majeure_.

In the 1990s, the emphasis is likely to shift from denouncing human rights violations to preventing them. While private charity may alleviate the consequences of bad government, public action is needed to eradicate its causes. This focus on countering the underlying causes of man-made disasters entails addressing the most likely contributing factors, which can be described as accountability (control over the exercise of power) and empowerment (increased access to power for the disempowered). It is well established that lack of empowerment and impoverishment reinforce each other, negate human rights and undermine development. Hence, the notions of accountability and empowerment have become the core terms in addressing human rights aspects of development. The concept of accountability is derived from the conditions that a government must fulfill to be legitimate, and the human rights requirements of democratic procedure (access to public office, elections, and limited mandate) set the framework for representativeness and accountability. The notion of empowerment, which affords increased opportunities for people to decide on issues that affect them, developed in response to the need for a countervailing power to that exercised by the government which often, in practice, represents a monolithic, centralized, hierarchical structure.

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19. _Realization of Economic, Social and Cultural Rights_, U.N. Doc. E/CN.4/Sub.2/1990/19, ¶ 167 (1990). Impoverishment is described as "the road from relative poverty to extreme poverty, and thus towards extreme dependence on the goodwill of others in economic, social, political and cultural matters - as a succession of passive discriminations, or discriminatory omissions in respect of recognized fundamental rights, and the impossibility of securing justice." _Id._
The United Nations instruments dealing with abuse of power have come the closest to recognizing that victims, individual or collective, are entitled to redress for the harm that they have suffered, individually and collectively; however, no specific procedures have been advanced. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power set forth the basic norms and introduced the notion of "criminal abuse of power." It is important to note that this process was initiated to give standing to victims of crime, evidencing that private, not public misdeeds were initially the target. This initial focus made the exercise feasible, whereas it would not have been accepted by the United Nations had the main target been victims of abuse of power. By arguing for the need to provide compensation to victims, this notion of victims of abuses of power was placed on the human rights agenda to strengthen the accountability for human rights violations.

B. LIMITATIONS OF HUMAN RIGHTS CONCEPTS

Freedom from governmental incursions upon individual liberty is a dominant feature of human rights. However, this freedom is difficult to apply because "the State receives no mandate to support the individual beyond its duty to protect his opportunity to act freely, however useless that opportunity might be in fact." While human rights obligations reach far beyond governmental self-restraint, their precise definitions in the context of sustainable development are lacking. Moreover, the definition of what constitutes a human rights violation has emerged regarding only discrimination, while there are no remedies for violations of developmental rights.

20. United Nations, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Annex to G.A. Res. 40/34, Nov. 29, 1985, § A, ¶ 1. This Declaration defines victims of crime as follows: "'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power." Id.


22. See LEON E. TRAKMAN, REASONING WITH THE CHARTER 7 (1991) (comparing and contrasting positive and negative concepts of liberty in relation to the Canadian Charter of Rights and Freedoms). A negative concept of liberty envisions individual freedom to the extent the individual herself can pursue her own ends, despite personal or external obstacles. Thus, the state's mandate is limited to the protection of an individual's ability to act freely. Id. In contrast, a positive view of liberty requires the state to provide the individual with resources necessary to overcome internal and external obstacles. Id. Thus, the state may intervene to aid a disadvantaged group.
The excessive individualism that permeates human rights continues to be criticized and challenged, particularly by organizations striving to apply human rights within development. Most change has been accomplished in the area of indigenous rights where conventional human rights concepts are successfully redesigned to fit indigenous circumstances. The new designs take account of the notion of collective rights, the relevance of land or culture, and the explicit policies adopted by international development and finance agencies. The notion of collective rights outside the indigenous area, however, has not made much progress, whether in the definition of minorities as beneficiaries of minority rights or in the operation of the notion of "peoples" and "self-determination" in the International Bill of Human Rights.

Failure to recognize family rights is illustrative of the individualistic aspect of human rights. Individual members of the family, for example, the children, are accorded rights, but not the family as the "basic unit of society." In development planning, however, family is the basic unit. With regard to human rights for migrant workers, the recognition of the family was proposed in early drafts of the Convention on the Protection of Basic Human Rights of Migrant Workers and Their Families, but was rejected in the final text. It should be noted that development interventions that entail relocation, for example, Polonoroeste Projects in Brazil or the Transmigration Programme in Indonesia, utilize the family as the basic unit for planning.

23. See Jack Donnelly, Universal Human Rights In Theory & Practice 57-60 (comparing western and non-western notions of individualism with regard to international human rights).

24. See Natan Lenner, Group Rights And Discrimination In International Law 111 (discussing the application of human rights to indigenous groups). It is estimated that indigenous populations, Aborigines, and tribal people account for 300 million human beings, underscoring the importance of this issue. Id.

25. See Robert Goodland, Tribal Peoples and Economic Development, Human Ecologic Considerations 1-3 (1982) (discussing aspects of indigenous populations that must be considered when assessing economic and cultural development). Until recently, development planning did not adequately address the human, economic, and social consequences of development. Id. at iii. The unique needs of tribal and indigenous peoples are not necessarily at odds with development; a consensus position can be reached. Id.

26. See id. at 40-41 (summarizing the major international conventions providing for human rights, and implicating the dearth of collective human rights).

27. See id. (implicating the lack of human rights protection for the family unit).

C. Development Policy-Formulation

Efforts to construct a bridge between human rights and development have focused on basic human needs and concern for the poorest members of society. Neither a basic needs program nor concern for the poorest members of society are accorded priority in development planning, nor are they likely to in the future. Development planning is based on macro-economic and sectoral assessments, largely to the exclusion of other factors. Demands by United Nations’ human rights bodies to incorporate human rights into development policy-formulation are surprisingly modest. The Commission on Human Rights merely “invited” member states to include policies to promote the protection of human rights in development.

If international human rights law were put into practice, human rights would be accorded priority in resource allocation. In theory, development is indispensable for the full realization of human rights because all human rights, not only economic and social rights, are realized progressively. In practice, little attention is paid to introducing human rights into development planning. While the ultimate goals of development may be similar to those of human rights, the means differ significantly. Much criticism of the development policy and practice was generated, for example, by the adverse effects of structural adjustment on conditions for the enjoyment of human rights.

This paper discusses development at three levels: the macro, or international level; the meso, or national level; and the micro, or project level. The reason for a discussion presenting development on all three levels is that development planning has been internationalized to such an extent that national sovereignty (economic or developmental) no longer constitutes an operative concept for most developing countries. Contrary to constant reiterations in United Nations policy-documents with regard to decisions concerning development as part of the sovereign powers of individual countries, in practice, national governments are responsible for the implementation of development interventions, while policy-design and supervision is exercised by international development finance agencies.

There exists a noticeable correlation between the priorities in resource allocation at the international and national level. The factors that determine government expenditure aimed at creating conditions for the “progressive realization” of human rights are not *opinio juris* (namely, the sense of having an obligation under human rights treaties), nor is it the demand for specific investments or services by the population. An International Monetary Fund (“IMF”) study of govern-
ment expenditure in developing countries, for example, found that demand had no statistically significant influence on health spending, and identified the following determining factors as having a negative effect on the amount of foreign debt, the infant mortality rate, and the size of the urban population relative to the whole.\(^{29}\)

D. **Rule of Law?**

Human rights may be legitimately promoted in other countries because human rights are universal. It has been accepted, though reluctantly by some governments, that human rights are an international concern. The rights of people anywhere are a legitimate concern for people everywhere. Many factors determine the ability of international and foreign development (finance) agencies to promote and protect human rights through development co-operation. The authority of international law is not based on an international capacity to govern, but on the willingness of states to abide by the rule of law.

Unlike human rights, development has had little to do with the rule of law. Development is prone to conflicts, however, because by definition it is an intervention to affect change whereby benefits accrue to some, while burdens are imposed on others. Despite the insistence of developing countries, democracy has eluded the decision-making process in international development finance policies. Consequently, accountability remains blurred at all three levels — macro, meso, and micro.\(^{30}\) The crucial and unanswered question continues to be how to ensure that economic and/or development policies do not conflict with human rights obligations.

Although there has been much documentation on the state of human rights law in various countries, the task remains to determine the law

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29. See Peter S. Heler & Jack Diamond, *International Monetary Fund, International Comparisons of Government Expenditure Revisited: The Developing Countries, 1975-86* 16 (1990) (providing an econometric framework for discussing health care expenditures in developing countries). The study suggests: (1) the size of the foreign debt is a competitor for health care expenditures; (2) the negative relationship between health care and infant mortality rates may indicate the success of higher spending in this area, in contrast to governmental priority in this area; and (3) the negative relationship between expenditures on health and urban youth is less explainable. Id. Economic analysis suggests that urbanization would increase the demand for government health care, while the costs per capita would decrease because the population is more concentrated. Id.

30. See A. Gray, *Declaration on the Right to Development, 1987* IWGIA Y.B. 168 (1988) (noting that “[d]evelopment appears as . . . a process which is beyond anyone’s control or responsibility”). The author notes that all involved nations must become involved in the decision-making process if development is to succeed on a long-term basis. Id. at 169-74.
that governs development and whether that law will incorporate human rights standards. The procedure for adopting laws (or development policies, for that matter) influences the content of the laws. As a result, developing countries insist on democratic decision-making as the proper procedure. As noted above, however, economic and/or developmental decision-making is not subjected to the requirements of democracy or the rule of law.

Developing countries insist on the rule of law in human rights because governance is the exercise of power and therefore should be subject to rules and institutions designed to prevent its arbitrary use. The reduction of government intervention in the public sphere through increased privatization reinforces the lack of attention to public law in development. It seems that only environmental protection, primary education, and infrastructure development continue to remain in the public sphere.31

Such a reduction in government intervention could be interpreted to diminish the prospects for the rule of law in development planning at the macro level. The World Bank recently addressed the legal framework of development, focusing primarily on the meso level. Starting with the much-debated 1989 study of Africa,32 the World Bank’s publicly available papers seem to confirm the “trend towards the disengagement of the state from productive activities;” however, the World Bank’s role remains to establish “the environment for economic activity, thereby determining the distribution of assets and benefits.”33

The legal framework for development remains controversial because of disagreements as to whether the law should be oriented toward an ideal or whether it should follow prevalent practice. Indeed, some dispute whether there is any “international law of development.”34


32. See From Crisis to Sustainable Growth: The Long Term Perspective Study on Sub-Saharan Africa, World Bank (1989) (finding that the key challenge to reversing the economic decline in the region is to raise agricultural production beyond the rate of population growth; however, this goal is out of reach unless more resources, better management of those resources, and further debt relief are provided). See also Michael Holman, Economic Development in Sub-Saharan Africa Declining, FIN. TIMES, World Econ. and Bus. Rev., Sept. 21, 1992, at xiv (reviewing World Bank’s analysis of the potential further economic decline of the region).


34. See George Schwarzenberger, Meanings and Functions of International Development Law, in INTERNATIONAL LAW OF DEVELOPMENT 49-55 (Snyder and Slinn eds.,
status of human rights policies exemplifies the difficulties in determining what principles and norms should be deemed to govern development. Different international and national development (finance) agencies have adopted various human rights policy-documents, but the uncertain status of the documents inhibits demands for compliance. It may be self-evident that such documents are generally not binding, if only because there is no evidence that they are not being translated into practice, but their status remains difficult to ascertain. Because such documents are by definition general and vague, they must be interpreted before they may be applied. However, the institutionalized rules and operational procedures of the development finance agencies seldom refer to documents that advocate or pledge respect for human rights.

The example of discrimination best illustrates the implications of the neglect of human rights law in development at the meso level. Elimination of discrimination is the core demand of human rights. The legal framework influences access to economic opportunities and to public services; hence the framework is crucial in development interventions which aim to improve access. Because discrimination cannot be eliminated without appropriate legislation (legislation alone is insufficient, but indispensable), the legal status of the intended beneficiaries of development interventions is important. Discrimination entails the notion of targeting individuals. The notion must be broadened in the context of development. For example, discrimination in the human rights of environmental development could be defined as those development interventions that submit part of the population to severe ecological risks.

As another example, human rights and women-in-development approaches mutually reinforce each other. In order to enhance the visibility of gender issues in development, agencies first adopted policy-documents that urged redressing gender discrimination by increasing women’s role in the development process. The agencies then develope-
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oped remedies based on the documents, such as re-assessing existing projects to apply the gender dimension.37

III. FORWARD-LOOKING

A. REVERSING THE BURDEN OF PROOF: HUMAN RIGHTS IMPACT ASSESSMENT

Thus far, advocates of human rights have had the burden of proving that human rights are (or could be) beneficial for development; and toward this end, analysts have conducted much research in the attempt to demonstrate that development which negates human rights cannot be sustained.38 Similarly, those claiming that development has hurt the process of human rights have, first, the burden of proving that specific development interventions have had harmful effects on human rights and, second, that such development should not be tolerated.

By using the same line of reasoning that is used with respect to securing human rights in accordance with environmental protection, the burden of proof may, likewise, be switched with respect to human rights. Whereas environmental degradation should never be the goal or the means of development; similarly, the negation and violation of human rights contradicts the declared aim of development and should not be an accepted means of development. Also, similar to the way in which the argument for environmental protection is incorporated into development planning, the burden of proving that development intervention will not harm human rights should be on those responsible for its design and implementation.

The model of the environmental impact assessment is useful in developing a feasible scheme for monitoring human rights aspects of development because of the conceptual proximity of both issues to each other. Both environmental protection and human rights protection are

37. See Women in Development: A Progress Report on the World Bank Initiative, World Bank (1990) (discussing the increased participation of women in economic development in many developing nations, as well as the differences in progress between individual nations).

38. See Challenge of Development, Fin. Times, July 8, 1991, at 10 (citing World Development Report (World Bank 1991)) (noting that the evidence does not demonstrate that democratic governments, because of their democratic nature, spur economic growth; likewise the evidence does not demonstrate that authoritarian governments, by their very nature, achieve more rapid growth). A correlation between the respect for human rights and economic growth has recently been studied a great deal following the increased emphasis on links between democracy in developing countries and development finance. Conclusions are, however, far from necessarily supportive.
inherently cross-cutting issues, spanning the entire process of development. In addition, such protections also necessitate substantial investment without immediate financial return which benefits the population as a whole, but often imposes immediate costs on the powerful industrial and commercial actors. Another similarity is the focus on harmful side-effects of development projects. In cases where the side-effects are severe and irreversible, the necessity of introducing safeguards becomes persuasive and serves to mobilize public support.

Many of the arguments used in favor of the environmental impact assessment can be applied to human rights by analogy once the notion of sustainable development is broadened to include human rights in addition to natural resources. Extending the analogy of the environmental impact assessment to human rights may result in a beneficial, and favorable political connotation because the development cooperation system has accepted, at least in theory, that environmental impact assessment does not constitute "a new form of conditionality in aid."40

Following the environmental impact assessment as a model, a human rights impact assessment has been suggested as a useful tool for monitoring the effects of a planned development intervention on human rights. In particular, such an assessment would serve to identify possible adverse effects, and would also provide for the introduction of safeguards for the prevention or mitigation of the possible adverse effects identified. As in environmental protection, methods of redress and/or compensation would be possible. In fact, some donors have established special funds to redress environmental damage inadvertently caused by earlier development projects.41

The concept of a human rights impact assessment is based on two distinct but mutually reinforcing factors: (1) development co-operation is a continuum—an ongoing process; and (2) human rights are universal. This means that human rights criteria cannot apply only to donors or only to recipients, but must necessarily apply to both. Moreover, the protection of human rights (or the lack thereof) in the country in which

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39. In practice, objections to conditionality have been voiced, for example, concerning environmental protection of the Amazon by the governments of Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, and Venezuela. Such objections focus on the "attempts to impose conditionality in the distribution of international resources for development." The Amazon Declaration, U.N. GAOR, 44th Sess., Annex, Agenda Items 63, 66, 83 and 85, ¶ 8, U.N. Doc. A/44/275-E/1989/79 (1989).
41. Sweden was reported to have set up "a special fund for environmental activities to compensate inhabitants of countries where settlements, water, trees or land had directly suffered from industrial projects funded by Sweden." Reaching for that 0.7%, Development Forum, July/August 1989, at 10.
a development project is to be implemented has an influential role on the likelihood of its implementation and also its outcome. Consequently, the human rights situation in the recipient country is relevant.

The planned development project itself may, however, not necessarily be beneficial for human rights, nor indeed compatible with human rights requirements. This was noted by the Committee on Economic, Social and Cultural Rights, which recognized that development does not instantaneously contribute to the promotion of even human rights, and that many actions undertaken on behalf of development, per se, have "been recognized as ill-conceived and even counter-productive in human rights terms." An additional reason for a uniform set of criteria to apply to both donors and recipients of development funds is the objection by quite a few governments of developing countries to "political conditionality," which is the punitive use of human rights criteria with regard only to the recipients of aid. Human rights criteria are credible only when the pillar of the very notion of human rights, which is their universality, is observed.

It is important to recall that the United Nations first suggested the need for the human rights impact assessment in 1979. Perhaps because the United Nations proposed the assessment in the context of the right to development, it met more opposition than it would have on its own merits. A recent explanation of the human rights impact assessment is that it would address any possible adverse effects of the proposed activity, whether the adverse effects are temporary and/or long term. It would further examine the human rights contribution of the proposed activity. The human rights impact assessment would establish participatory mechanisms for monitoring and evaluating the proposed activity.

While the criteria used to identify development interventions that ought to incorporate human rights safeguards have yet to be developed, the existing knowledge suggests that any large-scale industrial project, particularly a project involving migration and resettlement, is likely to

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entail human rights problems, unless safeguards are incorporated into the design and implementation of the project. Further, with regard to all development interventions that entail population transfer, the SubCommission on Prevention of Discrimination and Protection of Minorities stated that such movements, particularly as a result of governmental authority and involvement, invariably have a serious, adverse effect on human rights.

Establishing human rights safeguards is a formidable task. The report of the Global Consultation on the Right to Development as a Human Right is a recent example. This Report concerns the protection of indigenous human rights, fundamental freedoms, and the right of self-determination. The Report further sets forth a detailed and far-reaching set of requirements, including: the requirement that those affected by a proposed development project are also the beneficiaries of the project; that long-term and non-monetary effects of the proposed development project be taken into consideration; that full consideration is given to alternative means of attaining the same benefit; that efforts be made to accommodate indigenous economic and social aspects of development, in addition to the “conventional” criteria; that both a positive and/or a negative recommendation resulting from a human rights impact assessment may be used as a determining factor in obtaining international financing; and lastly, that the proposed project or activity is halted as a consequence of a negative recommendation.

B. Capacity Building: Establishing Monitoring Structures

In theory, the primary responsibility for both development and human rights rests in the state itself. As evidenced by reports promulgated under the auspices of human rights treaties, most states, however, do not monitor the realization of human rights. The first step in analyzing human rights aspects of development should therefore be to have states establish a structure that would monitor the human rights aspect of development. This, however, is a formidable task in developing countries.

The goal of monitoring the human rights aspect of development is to discern changes that can be used to develop specific policies and interventions related to development. The rationale is based on the premise that the object of monitoring human rights is to effect change since there is no “perfect” attainable state of human rights. Accordingly, process indicators need to be developed because they imply continuity and “measure” the particular country against its own recent past. The development of indicators necessitates the establishment of basic crite-
ria, which in turn requires examination of mechanisms to ensure that human rights standards are implemented by the government and its governmental authorities. Most developing countries have a limited capacity for implementation of human rights, as well as other areas, such as environmental protection.45

To make the monitoring of human rights aspects of development possible in developing countries, that is, where development interventions occur, the existing (or necessary) infrastructure can be assessed in accordance with the following questions:

1. In the case of non-observance of human rights, does the country have legislation which includes the essential substantive standards protecting human rights in the process of development and its procedures?
2. Is there intersectoral co-ordination between the governmental structure responsible for development and that dealing with human rights?
3. Is there documentation for the assessment of the pre-existing situation (e.g., a baseline survey) in order to determine the circumstances into which the development intervention is planned to be introduced?
4. Is there a body empowered to monitor compliance with the human rights protection as envisaged in the pertinent legislation?
5. Is there a body empowered to enforce compliance?
6. Who has standing to initiate a procedure to assess whether a development intervention is compatible with human rights legislation?

In many countries, and also at the international level, non-governmental organizations ("NGOs") rather than the government, or intergovernmental organizations, have initiated human rights monitoring. A prime example, from conventional human rights work, is the United Nations' procedure of listing countries to be investigated for allegations of gross and systematic human rights violations. During the 1980s, the focus was on Latin American countries, due in large part to the work of NGOs in the region. Largely as a consequence of the increasing activity of African NGOs, African countries were placed on the agenda in 1990.

Additionally NGOs, rather than governments, drew attention to the negative social, environmental, and human rights aspects of development. It is not surprising then, that many human rights and other public interest organizations, based in developing countries, devote much of their work on development issues. This important difference in the focus of human rights work between the South and the North, while easily comprehensible, has yet to achieve recognition. There is a noticeable

45. See Morris Schaefer, *Controlling the Hazards of Development. Are the Developing Countries Ready?*, 40 WHO CHRONICLE 1 (1986) (discussing the difficulties of developing countries in dealing with environmental hazards and developing national policies and programs to protect their citizens against environmental hazards).
division between “human rights” and “development” organizations, as well as a difference in the priority attached to developmental human rights problems between organizations based in the North versus organizations based in the South.

As noted above, the lack of procedures and mechanisms providing redress in cases of human rights violations stemming from development interventions constitutes an obstacle to human rights activism. This obstacle spans all three levels—the micro, the meso and the macro.

C. Access to Information

The Narmada Project in India exemplifies the detrimental consequences of lack of access to information which could be used to support demands for respect of human rights in development interventions. Although the resettlement and rehabilitation provisions regarding displaced tribal people were written into the loan agreement between the World Bank and the Government of India in May of 1985, the text of this agreement was not available, even to those whose rights it purported to protect.

Most people who have had access to documents issued by international development (finance) agencies are familiar with the “For Official Use Only” mark on the cover page. There is no international equivalent of the United States’ Freedom of Information Act; as a consequence, developing countries are excluded from access to information. While much has been written about the need for transparency in developmental decision-making in order to prevent corruption, incompetence, and ignorance, no increased openness of this “closed” decision-making system is visible. Without access to information, monitoring cannot be established.

IV. TOWARDS HUMAN RIGHTS CRITERIA IN MONITORING

A. Narrowing the Focus: Human Rights Most Affected in Development

The traditional human rights discourse prioritizes specific human rights according to their importance. While some rights have been declared fundamental and non-derogable, others have not. Generally, declaration of fundamental human rights does not help in identifying those human rights that are particularly relevant in the context of development. To identify those human rights and fundamental freedoms that are primarily and directly affected, either positively or negatively, dur-
ing the process of development, the criterion of "relevance" should be developed and applied.\textsuperscript{46} Existing research has identified certain clusters of human rights that are frequently affected by development interventions, such as land rights, freedom of movement, and choice of residence (particularly involving forced removal),\textsuperscript{47} and also safeguards which should apply, in general, and in labor-intensive projects (particularly those concerning child labor).\textsuperscript{48}

Human rights can be defined by relying on two sources: the substantive standards set forth in the relevant international human rights instruments and the sectoral guidelines enunciated by international development agencies. In most cases the existing international human rights treaties provide sufficient definitions of the nature and scope of specific human rights and fundamental freedoms. Nevertheless, in quite a few important areas the existing international human rights law does not include specific norms applicable to development. The following examples illustrate.

1. Health and Human Rights

The absence of effective health entitlements is evidenced by indicators which often show retrogression rather than "progressive realization" of better health for all. In development, the issue of health and fostering health care has not made adequate progress. Malaria control in the Northwest Region Health Project in Brazil is one example illustrating how the health component of development intervention is evaluated. The economic effectiveness of malaria control with respect to the cost-effectiveness of such control was measured, particularly with respect to the anticipated value of additional agricultural output.\textsuperscript{49}

\textsuperscript{46} See Landell-Mills & Serageldin, supra note 33, at 15 (discussing how governance, free exercise of political power to manage a nation's affairs, is being increasingly thought of as a critical detriment of the economic performance of developing countries). Also noted is that external aid agencies have been hesitant to help in strengthening judicial systems because of the view that its link to development is indirect. \textit{Id.}

\textsuperscript{47} See Michael M. Cernea, \textit{Involuntary Resettlement in Development Projects: Policy Guidelines in World Bank-Financed Projects}, The World Bank, Technical Paper No. 80, (1988) (discussing the need for adequate policy, and for implementation of such policy to minimize and reverse the negative effects of compulsory relocation on individuals forced to resettle because of development projects).


The Human Rights Committee made an effort to define the role of the state in the protection of human life, concluding that the states' obligation is to undertake measures "to eliminate epidemics and malnutrition." It, thus, reinforced the traditional responsibility of public health authorities regarding epidemics and also added malnutrition. Law-making has not achieved the elimination of malnutrition, largely because food is considered a commodity, rather than an entitlement, in international law. The human rights bodies of the United Nations have proposed individual entitlements aimed at preventing and reducing malnutrition. The World Health Organization (WHO) recently defined malnutrition as a "preventable noncommunicable disease." Despite this, the recognition of legal entitlements is still lacking. The responsibility of the state in curbing malnutrition remains as blurred as that for providing health services, generally.

It is difficult to define health within the context of development, largely because development increases the natural resistance of human beings to disease; and, thus, improves the health status of the population. Similarly, improved health also promotes development. Maldevelopment, in contrast, produces negative effects on health. Nevertheless, causality and the contributing factors remain subject to much dispute. The World Health Organization recently summarized the following consequences:

1. Analyses and evaluations of development policies tend not to examine the implications for health;
2. Research on health problems in developing countries tend to ignore the role of development policies as an underlying cause of ill-health; and
3. Even when knowledge and good documentation exist . . . numerous obstacles . . . can still hinder the effective implementation of policy changes to improve health.

To illustrate the low priority that exists for human health, it is sufficient to recall the lack of effective safeguards for the oldest known environmental health hazards, which are unsafe water and poor sanitation. The International Drinking Water Supply and Sanitation Decade (1981-1990), which was initiated because of "the serious health conse-

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quences of a lack of safe water supply and sanitation," was launched with the slogan "Clean Water and Adequate Sanitation for All by 1990." The Decade ended without achieving its goals. During the preparations of the 1992 Conference on Environment and Development, the United Nations Environmental Program ("UNEP") reiterated the goal by stating that, of the five billion people in the world, one billion and seven hundred million lack safe drinking water and one billion and two-hundred million are without proper sanitation. The availability of data (or lack thereof) confirms the general rule that the least information is available where the needs are the greatest; and as a result, there is a lack of knowledge of the incidence of diarrhoeal morbidity attributable to unsafe water and poor sanitation.

2. Access to Land Versus Property Rights

Access to land and land tenure is one of the crucial issues both in development and in human rights. A systematic examination of pertinent human rights considerations, however, is yet to be undertaken. Land rights are sometimes encompassed in the study of development interventions, but the lack of suggestions on how to reconcile the existing property rights with the demands for access to land impedes the application of a human rights approach. Many international pronouncements have been made concerning access to land and land reform, but these represent recommendations rather than binding instruments. Unfortunately, the binding human rights instruments which exist do not address land rights.

There does seem to be a move, however, within the United Nations' human rights bodies toward recognition of property rights as human

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rights. Recent international policy documents require additional efforts in setting standards and in demanding the protection of property rights as human rights. This is a significant departure from the previous view that human rights, per se, necessitate a reconsideration of property rights, and can result in wide-ranging implications for defining human rights in policy-formulation at the macro level of development. This change of approach could result in treating land as a commodity to be bought and sold rather than as an essential resource to which access is necessary for those whose livelihood depend on it.

The United Nations Special Rapporteur on Economic, Social and Cultural Rights reviewed the existing human rights provisions relating to land rights in a 1990 Report. The United Nations Special Rapporteur pointed out that land rights give states power to mold land tenure and restrict land ownership. Such state power, however, is seldom used. As a result, the United Nations Special Rapporteur questioned whether the United Nations’ human rights bodies can “encourage or persuade” states to act in a manner which promotes more equity in land distribution.

3. Employment

The importance of access to income-generation in development has been reiterated many times. A recent United Nations statement explained that employment and income, as a result of the “productive occupation” of land, is an important method to eliminate poverty. This is because a lack of productive land occupation results in insufficient income and lack of opportunities for work and, consequently, contributes to poverty.


60. See Progress Report on the Realization of Economic, Social and Cultural Rights, ¶ 137, U.N. Doc. E/CN.4/Sub.2/1990/19 (1990) (Danila Türk, Special Rapporteur) (presenting other issues such as whether land rights should be considered in the context of human rights or as an entitlement, whether a right to land or property should necessarily imply a right to ownership, and whether United Nations human rights organs should encourage or persuade states to provide for an equitable distribution of land).

While the right to work is considered the core economic right, it does not have a priority status in development policies and practices. Not only have the World Bank and the International Monetary Fund been criticized for downgrading access to employment in their policy formulation, but also the key United Nations' agency for the promotion of employment, the International Labour Organization, appears not to be endorsing access to employment as an entitlement and/or human right. Labor rights form one of the contentious issues in international trade and aid because of the dual role of labor rights. On the one hand, cheap labor constitutes a comparative advantage. On the other hand, such an advantage is considered unfair competition. Accordingly, international policies are vague and national practices vary greatly, as well.

4. Participation

Participation in the process of development is an area in which human rights and development overlap the most. International development agencies are increasingly calling for enhanced participation. The existing international human rights norms, however, lack specific operational guidance applicable in the context of development. "Participation" is defined differently in various disciplines and institutions. In development the articulated aim is beneficiary participation, which is the involvement of those who are the intended beneficiaries of the development intervention in its design and implementation. In human rights, the focus historically is on "victim-participation," thus enabling those who have been harmed by development intervention to obtain redress.

Much has been attained in promoting the participation of potential beneficiaries in development projects. In addition, participation of those who may be harmed has been envisaged within environmental protection safeguards. Thus, the Organization of Economic and Cultural Development (OECD) recommended, in its environmental checklist for development assistance, that the following question be included when considering mitigation: "Have concerned populations and groups been involved and have their interests been adequately taken into consideration in project preparation?"
Efforts to define participation by the intended beneficiaries in development projects have been undertaken in the area of indigenous rights, while the general framework of participation in the context of human rights has not yet been elaborated upon. The Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended the establishment of mechanisms to promote direct participation in the programs, thus providing rights to the indigenous peoples, and the Commission on Human Rights is reiterating the need to study "the question of the extent to which the right to participation has been established and has evolved at the national level."²⁶⁴