



An Agricultural Law Research Article

The Right to Food: Holding Global Actors Accountable Under International Law

Part 1

by

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Articles

The Right to Food: Holding Global Actors Accountable Under International Law

SMITA NARULA*

Economic globalization represents both an unmet opportunity and a significant challenge for the fulfillment of social and economic rights, including the right to food. While corporate sector accountability and the responsibility of international financial institutions (IFIs) to ensure social and economic rights are now at the forefront of the globalization discourse, greater attention must be paid to how these actors can be held accountable under international law. The existing human rights legal framework is ill-equipped to deal with violations committed by non-state actors, such as transnational corporations (TNCs), and multi-state actors, such as IFIs. Using the right to food as an entry point, this Article argues that international law is in need of rethinking under globalization. Part I examines the impact of IFIs and TNCs on the right to food and argues that effective implementation of the right to food is undermined by international human rights law's state-centric focus and jurisdictional constraints. Part II asserts that under the obligation of international cooperation, States Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) must respect and protect the right to food extraterritorially.

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This includes an obligation to regulate the activities of TNCs and IFIs over which they exercise influence or control. Part III addresses the need to locate the right to food outside of the international treaty law framework to ensure the accountability of non-ICESCR ratifying states. It analyzes the right to food as customary international law and concludes that the minimum core component of the right to food—the right to be free from hunger—may have already achieved customary status.

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INTRODUCTION

The foundational paradigm of international human rights law is the accountability of sovereign states for ensuring the rights of individuals living within their jurisdiction. This paradigm is increasingly challenged by the fragmentation and transformation of state sovereignty in response to economic globalization. The global power exerted by a handful of states, transnational corporations (TNCs), and international financial institutions (IFIs) represents a significant shift in the international order. The power imbalances

created by this shift make it increasingly difficult for weaker states to assert full control over policies that are central to their ability to fulfill their social and economic rights obligations. This Article examines this dilemma in the context of promoting the right to food.

Under the International Covenant on Economic, Social and Cultural Rights (ICESCR) the “right to food” is defined as the right to be free from hunger and to have sustainable access to food in a quantity and quality sufficient to satisfy one’s dietary and cultural needs. States that have ratified this Covenant are obligated to take steps to progressively achieve the full realization of the right to food for those within their territory or under their jurisdiction. Implicit in this state-centric approach is the rationale that human rights are the byproduct of relationships between governments and the individuals they govern, rather than relationships between global actors and individuals worldwide whose rights are affected by their actions. In the age of economic globalization, a variety of state and non-state actors may be contributing to the state of world hunger, but not all actors are given equal consideration under international law.

The existing human rights legal framework is ill-equipped to deal with these actors and the effects of their policies abroad: It does not adequately address the obligations of TNCs and IFIs; States Parties’ obligations are limited to individuals in their territory or under their jurisdiction; and states that do not ratify the ICESCR may escape right to food obligations altogether. This Article seeks to close some of these accountability gaps. It proposes that three major doctrinal issues must be resolved if we are serious about using international law to promote the right to food. These are: 1) Defining the extraterritorial application of the ICESCR; 2) Holding transnational corporations and international financial institutions accountable via their relationship to powerful states; and 3) Locating the right to food outside the treaty framework in customary international law.

This Article begins with a comparison of economic and rights-based approaches to food security. Part I articulates the normative content of the right to food and examines threats to the right to food from states, IFIs, and TNCs. It also argues that effective implementation of the right to food is undermined by the state-centric focus and jurisdictional constraints of international human rights law. Part II asserts that under the obligation of international cooperation, States Parties to the ICESCR must respect and protect the right to food extraterritorially. This includes an obligation to regulate the activities of TNCs and IFIs over which they exercise influence or control.

States often have obligations under multiple legal regimes, including conditions of contracts with IFIs and TNCs, which may come into conflict with their human rights obligations. The development of norms outside the covenant model to reconcile the incompatibility of multiple legal regimes and to hold non-ICESCR ratifying states accountable for violations of the right to food is a necessary precursor to the realization of the right to food under globalization. Part III analyzes the right to food as customary international law and concludes that the minimum core component of the right to food—the right to be free from hunger—may have already achieved customary status.

In many respects the right to food is a useful entry point for looking at the ways in which international law is in need of rethinking under globalization. The problem is not with globalization *per se*; globalization actually represents an enormous opportunity to involve multiple actors in solving pervasive human rights problems. The end of world hunger and extreme poverty reduction is potentially within our grasp. Addressing the accountability of powerful states, TNCs and IFIs can lend support to this weighty effort. If the state-centric and territorial constraints of international law remain unaddressed, however, the potential of the international human rights framework itself may be undermined.

A. *Why Focus on Global Actors?*

In 2000, the U.N. Millennium Summit declared that halving the proportion of people who suffer from hunger between 1990 and 2015 is a key Millennium Development Goal.¹ Also in 2000, the U.N. Commission on Human Rights appointed a Special Rapporteur on the Right to Food in order to “respond fully to the necessity for an integrated and coordinated approach in the promotion and protection of the right to food.”² In 2004, the U.N. Food and Agricultural Organization unveiled the Voluntary Guidelines on the Right to

1. The World Bank, About Us: Millennium Development Goals, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20104132~menuPK:250991~pagePK:43912~piPK:44037~theSitePK:29708,00.html> (last visited Apr. 25, 2006).

2. See U.N. Comm’n on Human Rights [CHR], *The Right to Food*, U.N. Doc. E/CN.4/RES/2000/10 (Apr. 17, 2000), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/9dabffd5aa972cc2802568ce00570a46?Opendocument>. The Rapporteur’s mandate was extended in 2003 for another three years. See U.N. CHR, *The Right to Food*, U.N. Doc. E/CN.4/RES/2003/25 (Apr. 22, 2003), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/5dee8b5bc96f78e5c1256d1d003570ef?Opendocument>.

Adequate Food.³

Right to food campaigns have also firmly taken root in countries all over the globe, including Brazil,⁴ India,⁵ South Africa,⁶ and New Zealand.⁷ Many of these campaigns have availed of protections offered by domestic constitutions. To date, at least twenty countries explicitly refer to the right to food or a related norm in their constitutions.⁸ Domestic right to food campaigns have met with some success.⁹ These campaigns thrive in large part because of the democratic spaces in which they operate.¹⁰ Campaigns in India and South Africa, for example, have made ample use of a free media, have mobilized civil society in support of their demands, and have called for judicial intervention to check against government inaction.¹¹ The success of these campaigns, albeit measured,

3. U.N. Food & Agriculture Organization [FAO], *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, ¶ 16 (Nov. 2004), available at <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm> (last visited Apr. 20, 2006).

4. See ActionAid Brasil, <http://www.actionaid.org.br/eng/home.htm> (last visited Apr. 20, 2006). ActionAid Brasil runs three campaigns to safeguard poor people's right to food and education—the National Campaign for the Right to Education, the GMO Free Brazil Campaign, and the Trade Campaign. *Id.* See also Food First: Institute for Food and Development Policy, Brazil: Rural Women Workers Struggle for their Rights, <http://www.foodfirst.org> (last visited Jan. 30, 2006).

5. The “Right to Food Campaign” in India is an informal network of organizations and individuals committed to the realization of the right to food. See generally Right to Food Campaign, Foundation Statement, <http://www.righttofoodindia.org> (last visited Mar. 26, 2006) [hereinafter Right to Food Foundation Statement].

6. The Right to Food Campaign in South Africa, initiated by the Community Law Centre, University of Western Cape, mobilizes support, disseminates information, coordinates activities, and organizes joint events focused on the right to food. See generally Right to Food Campaign: South Africa, http://www.communitylawcentre.org.za/set/right_to_food_pamphlet.html (last visited Mar. 26, 2006).

7. New Zealand's Natural Food Commission, organized as a public service by the Natural Law Party, focuses on the issue of genetically engineered food and more specifically on the right of consumers to be informed about whether the food they purchase has been genetically engineered. See Green Party of Aotearoa New Zealand, Green Action, Food Revolution, Safe Food? Join the Food Revolution, <http://www.greens.org.nz/food-revolution/default.asp> (describing the campaign by the Green Party on the right to information about safe food) (last visited Apr. 20, 2006).

8. See U.N. FAO Legal Office, *The Right to Food in National Constitutions*, in THE RIGHT TO FOOD IN THEORY AND PRACTICE, available at <http://www.fao.org/Legal/rtf/bkl.htm> (last visited Apr. 25, 2006). A related norm is a norm that has an impact on or is interconnected with the right to food, such as the right to life.

9. See *infra* note 11.

10. For example, Amartya Sen is frequently cited for the assertion that democracy—the existence of a free press therein—can prevent or avert famines. Amartya Sen, *Democracy as a Universal Value*, 10 J. DEMOCRACY 3, 8 (1999).

11. The “Mid-Day Meal Scheme” in India is an example. As a result of public interest litigation on the right to food, the Supreme Court of India directed State Governments and

necessarily raises the question of whether social and economic rights are best protected by using a civil and political rights framework that holds domestic government accountable for their failure to ensure the right to food. If so, then why focus on the social and economic rights obligations of global actors? And does such a focus merely externalize a problem whose roots are in fact domestic?

The focus on domestic factors—such as governmental oppression or ruling elite corruption—is not misplaced. In Zimbabwe, for example, recent violations of the right to food were a result of policies pursued by the national government independent of—and even opposed to—policies advocated by international institutions.¹² Still, the notion that hunger and poverty can today be *fully* explained in terms of national and local factors is a fallacy. Trade liberalization, the inability to effectively regulate the power of TNCs, and burdensome external debt servicing obligations¹³ may restrict the state's ability to fashion appropriate tools to promote the realization of the right to food.¹⁴ Here one could argue that developing country leaders have too often failed to protect the interests of their populations when negotiating the terms of foreign direct investment inflows, or of international trade and loan agreements. While this may be true, it does not take adequate account of the dramatically unequal bargaining power that frequently prevails in such dealings, nor does it factor in the extent of foreign

Union Territories to implement a scheme providing every child in every government and government-assisted primary school with a prepared mid-day meal. See Right to Food Campaign, Mid-Day Meals, Supreme Court Orders, http://www.righttofoodindia.org/mdm/mdm_scorders.html (last visited Apr. 20, 2006).

12. For more on violations of the right to food in Zimbabwe, see *infra* Part I.A.1. See also JEFFREY SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 194 (2005) (arguing that Zimbabwe is a case where “the traditional explanation of miserable rule is a sufficient explanation for a country’s ills”).

13. Though beyond the scope of this Article, the need for debt relief, increased aid, and balanced trade liberalization—and an examination of their potential impact on food security in developing countries—must ultimately also enter the right to food conversation. See SACHS, *supra* note 12, at 80; see generally JANET DINE, *COMPANIES, INTERNATIONAL TRADE AND HUMAN RIGHTS* (2005).

14. Vandana Shiva, *The Real Reasons for Hunger*, *THE OBSERVER*, June 3, 2002, available at <http://observer.guardian.co.uk/international/story/0,6903,742149,00.html> (criticizing Amartya Sen’s famine studies as ignoring trade liberalization and globalization as significant factors for hunger today, including in India’s “starvation deaths”). According to the U.N. Special Rapporteur on the Right to Food, the combination of international trade liberalization under the World Trade Organization (WTO) regime and the liberalization of agriculture under structural adjustment programs has proved to be a fatal mix for global food security and has led to increased hunger, and even starvation, for populations in the developing world. See U.N. CHR, *Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food*, ¶ 73, U.N. Doc. A/56/210 (July 23, 2001) (prepared by Jean Ziegler) [hereinafter Ziegler Report I].

complicity in domestic corruption.¹⁵

This Article focuses on the accountability of global actors in order to supplement, and to some extent counterbalance, the existing legal scholarship's focus on the enforceability of the right to food in the domestic setting.¹⁶ Unless and until the accountability of global actors is more clearly defined under international law, the potential impact of both domestic and U.N.-related initiatives will continue to be undermined. The focus on global actors is not, however, an attempt to externalize the problem or to minimize the importance of ensuring domestic accountability. Holding local actors accountable is of fundamental importance—not least because it is a means of enabling societies to achieve a more equitable distribution of resources between the country's wealthy elite and its majority poor.

B. *Economic v. Rights-Based Approaches to Food Security*

Almost sixty percent of annual deaths worldwide—roughly 36 million—are a direct or indirect result of hunger and nutritional deficiencies.¹⁷ More than 840 million people worldwide are malnourished.¹⁸ Over ninety-five percent live in the developing world.¹⁹ 153 million of them are children under the age of five.²⁰ Hunger is both a cause and consequence of poverty. Hungry workers

15. See THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 238 (2002). Pogge argues that:

[L]ocal elites can afford to be oppressive and corrupt because, with foreign loans and military aid, they can stay in power even without popular support. And they are so often oppressive and corrupt, because it is, in light of the prevailing extreme international inequalities, far more lucrative for them to cater to the interests of the foreign governments and firms rather than to those of their impoverished compatriots.

Id.

16. For arguments supporting an individualized complaint system and urging against formal international adjudication of rights to food, see Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462 (2004); Ramin Pejan, *The Right to Water: The Road to Justiciability*, 36 GEO. WASH. INT'L L. REV. 1181 (2004); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992–1993).

17. This figure includes deaths that result from “nutritional deficiencies, infections, epidemics or diseases which attack the body when its resistance and immunity have been weakened by undernourishment or hunger.” UNDP, *Human Development Report* (2000), available at <http://hdr.undp.org/reports/global/2000/en>.

18. Care USA, Campaigns: Hunger, Hunger Facts: Statistics on Hunger, <http://www.careusa.org/campaigns/world-hunger/facts.asp> (last visited Apr. 26, 2006).

19. *Id.*

20. *Id.*

produce less and therefore earn less. In turn, their poverty exacerbates their hunger.²¹ Malnourishment is also the largest single contributor to disease. Undernourished mothers give birth to underweight children who are more susceptible to diseases that lead to their premature deaths.²² Children who are sick and hungry also do poorly in school.²³ As a result they are more likely to end up as unskilled laborers, who do not earn enough to feed themselves or their families. The cycle of poverty, disease, and hunger continues.

The best antidote to hunger and poverty is sustained and equitable economic growth. Consequently, the right to food is deeply connected to the economic health of a country. Economic growth in East, South, and Southeast Asia was largely responsible for the 158 million reduction in the number of undernourished people from 1979–1981 to 1990–1992.²⁴ For many developing countries, improved agricultural productivity can also be an engine of non-agricultural growth.²⁵ A noted difference between Asia's economic successes and Africa's economic stagnation is Asia's high and rising food production per capita during recent decades.²⁶ Nutritional gains were also a critical factor in economic growth in Europe over the past two centuries.²⁷

Though economic growth and increased food production are mutually reinforcing, they are not in and of themselves sufficient to ensure food security if economic growth bypasses poor and vulnerable populations. Moreover, hunger today cannot be blamed on a general shortage of food. Overall food production is not falling behind population growth.²⁸ People are hungry because they are poor and as a result lack the "substantive freedom" to be able to

21. U.N. FAO, *New Estimates Shed Light on Crushing Economic Costs of Hunger* (2004), http://www.fao.org/newsroom/en/focus/2004/51786/article_51795en.html (last visited Apr. 25, 2006).

22. U.N. FAO, *The Human Costs of Hunger* (2004), http://www.fao.org/newsroom/en/focus/2004/51786/article_51793en.html (last visited Apr. 26, 2006).

23. Care USA, *supra* note 18.

24. Luther Tweeten, *The Economics of Global Food Security 2* (Anderson Chair Publication 1998), available at http://aede.osu.edu/programs/Anderson/papers_old/EconomicsGlobalFoodSecurity.pdf.

25. See generally Wendy S. Ayres & Alex F. McCalla, *Rural Development, Agriculture, and Food Security*, 33 FIN. & DEV. 8 (1996).

26. Africa, on the other hand, has experienced low and falling food production per capita. See SACHS, *supra* note 12, at 70.

27. Varun Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, 32 WORLD DEV. 465, 469 (2004).

28. See generally AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1981); Amartya Sen, *Ingredients of Famine Analysis: Availability and Entitlements*, 96 Q.J. ECON. 433 (1981); Amartya Sen, *World Economy*, NIEMAN REPORTS 32 (Fall 1995).

establish ownership over an adequate amount of food, either by growing the food themselves, or by buying it in the market. Amartya Sen convincingly argues that efforts to combat hunger must focus on the “entitlement” that each person enjoys over food, rather than the total food supply in the economy.²⁹ Because of low incomes, landlessness, or other factors, the poor lack these entitlements and, as a result, experience greater food insecurity. Economic growth can therefore only guarantee food security for all if it is coupled with an emphasis on poverty reduction.³⁰

Human rights proponents and economists around the world have begun to address issues of poverty and hunger in both economic and human rights terms. For far too long, however, economic and rights discourses have operated on separate planes, with proponents on each side assuming that they have little to learn from one another. The rights-based approach emphasizes government obligations—rooted in domestic constitutions and international human rights treaties—to ensure immediately that people are free from hunger and ultimately that they have sustainable access to adequate and nutritious food. A rights-based approach includes four essential elements: evaluating the claims of rights holders and the corresponding obligations of duty bearers; developing strategies to build the capacity of rights holders’ to claim their rights and of duty bearers to fulfill their obligations; monitoring and evaluating outcomes and processes using human rights principles and standards; and finally, incorporating the recommendations of international human rights bodies to inform each step of the process.³¹

The mainstream development economics approach toward promoting economic growth and food security has traditionally been premised on neo-classical economic philosophy, which stresses the importance of removing government distortions to the market.³² Indeed, evidence from developing countries suggests that

29. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 161–62 (1999).

30. Poul Nielson, European Union Commissioner for Development and Humanitarian Aid, Keynote Address, *Promoting Broad-Based Economic Growth and Food Security: A View from the European Union* ch. 13 (Sept. 4–6, 2001), <http://www.ifpri.org/pubs/books/2020conpro/ch13.pdf>.

31. See United Nations, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the U.N. Agencies* (May 2003), available at http://www.crin.org/docs/resources/publications/hrbap/HR_common_understanding.doc.

32. See NICHOLAS VAN DE WALLE, *AFRICAN ECONOMIES AND THE POLITICS OF PERMANENT CRISIS, 1979–1999* 8 (2001) (describing the International Monetary Fund’s stabilization prescriptions, including cuts to fiscal deficits and devaluing overvalued currencies, and the World Bank’s promotion of price liberalization, deregulation and divestiture of state-owned enterprises).

inefficiencies from government policies can negatively impact food security.³³ Such an approach emphasizes limitations on government spending, the privatization of state-owned enterprises, the removal of barriers to trade, and government interference in financial and capital markets.

At first blush, the differences between a free market approach and a rights-based approach may seem insurmountable. Most fundamentally, a free market approach emphasizes non-interference by the state, while international human rights law is founded on the notion that states must intervene to respect, protect, and fulfill the right to food. Closer examination, however, reveals that the two approaches can reinforce each other. Increasingly, economic thought also acknowledges the importance of government intervention to address market failures.³⁴ The human rights mentality has also changed over time. Most significantly, there is now greater recognition that the role of human rights advocacy must be to complement market mechanisms, not circumvent them. Moreover, a rights-based approach calls on governments to pursue reforms, both individually and through international cooperation, which improve methods of production, conservation, and distribution of food.³⁵ In other words, human rights law requires appropriate economic reforms. In this sense, economic and social rights are both ends of and instruments for economic development. To the extent that they are instruments, “the policy consequences of a rights approach overlap considerably with a modern economic approach” to

33. John Beghin, Jean-Christophe Bureau & Sung Joon Park, *Food Security and Agricultural Protection in South Korea*, 85 AM. J. AGR. ECON. 618, 630 (2003) (demonstrating empirically that producer transfers and input subsidies had a negative impact on consumer welfare in South Korea); Eltighani M. Elamin, Dirdivi H.M. & Nassir A. El Naam, *Pricing Policies and Agricultural Export Performance in Sudan: The Lessons from the 1970s through 1990s* 11 (Aug. 8, 2000) (finding that the pricing policies of the government commodity boards in Sudan decreased the incentives to adopt new technology or increase output); see also Carol Lancaster, *Aid Debates and Food Needs*, in COPING WITH AFRICA'S FOOD CRISIS 42–43 (Naomi Chazan & Timothy Shaw eds., 1998); Jon Kraus, *The Political Economy of Food in Ghana*, in COPING WITH AFRICA'S FOOD CRISIS 81 (Naomi Chazan & Timothy Shaw eds., 1998).

34. See, e.g., SACHS, *supra* note 12, at 348. (Even traditional economic thought emphasized the government's role. Much of Book V of Adam Smith's *Wealth of Nations* explains “why the state has responsibilities regarding defense, justice, infrastructure, and education, areas in which collective action is required to complement, or substitute, private-market forces.”) Amartya Sen has also argued that the role of the government must be integrated with both economic and social institutions, including markets, trade, political parties, and civil society. See SEN, *supra* note 29, at 162.

35. International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

development.³⁶

As World Bank economist Varun Gauri persuasively argues with regard to the provision of health care and education, human rights and economics-oriented approaches converge in several other ways.³⁷ An economics-oriented approach would begin with an assessment of whether market mechanisms can provide desirable services in sufficient quantities. If the market would provide these services at suboptimal levels, government intervention becomes necessary. In order to ensure the effectiveness of government provision of such services, economists would then stress strengthening mechanisms of government accountability to the intended recipients.³⁸ This concept can be linked to a central feature of human rights-based approaches, which emphasizes government accountability for ensuring fulfillment of rights. In fact, both approaches emphasize principles of empowerment, transparency, and accountability.³⁹

Still, differences remain. 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. A rights-based approach is premised on the notion that each and every individual can lay claim to basic rights and basic services. A focus on averages may not reveal that “economic growth is rarely uniformly distributed across a country.”⁴⁰ Even when average economic growth is high, parts of a country or particular populations may be bypassed. Growth may enrich households linked to good market opportunities while bypassing the poor who are disconnected from market forces because they lack the requisite human capital (good nutrition and health, or an adequate education). In Asian countries that have experienced significant economic growth, extreme poverty—defined as the inability to meet basic needs for survival—continues to afflict certain parts of the population.⁴¹ An economic approach may also fail to highlight the role of discrimination against particular ethnic, religious, racial, or caste groups as a reason for their economic exclusion. The market, though not normatively opposed to such standards, has no means of ensuring that discrimination does not take place. A rights-based approach attempts to provide checks against

36. Gauri, *supra* note 27, at 469.

37. *See id.* at 470–72.

38. *Id.* at 470.

39. *Id.*

40. SACHS, *supra* note 12, at 72.

41. *Id.*

such behavior by obligating governments to ensure the fulfillment of socio-economic rights without discrimination.

An economic approach also tolerates negative short-term consequences in return for long-term progress.⁴² In the long run, market forces will hopefully spur economic growth, increase food production, and raise income levels to the point that people can afford to buy their own food. But in the interim the poorest of the poor may not be able to afford food or agricultural inputs offered at market rates and may suffer disproportionately from restrictions in government spending on food and welfare programs. A rights-based approach does not tolerate such trade-offs; it calls on governments to subsidize agricultural inputs or provide food when people cannot afford to feed themselves.⁴³ The use of subsidies is also a point of divergence. An economic approach would argue that subsidies distort the market; by changing relative prices, they encourage individuals to make economically inefficient decisions.⁴⁴ However, in some instances, redefining a market good as an entitlement based on human rights principles can also have positive consequences.⁴⁵

Even if, on aggregate, removing market distortions in the agricultural market and enhancing economic growth may enhance food production, there is still the likelihood that the poor and other vulnerable groups may be harmed in the process. It is consistent with both a human rights approach and an economic-oriented approach to food security to require an assessment and plan to address any possible market failures prior to any major intervention that might have an implication for food security.⁴⁶ Consequently, various agencies and commentators have stressed the need for provision of

42. See Gauri, *supra* note 27, at 466, 473.

43. ECOSOC, U.N. Comm. On Econ., Soc., & Cultural Rights, *General Comment No. 12, The Right to Adequate Food*, at 106, ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter *General Comment 12*].

44. See Gauri, *supra* note 27, at 473. Indeed empirical studies confirm that in some countries, agricultural input subsidies had a negative impact on consumer welfare, while government pricing policies for commodities decreased incentives to adopt new technologies or to increase output. See generally Beghin et al., *supra* note 33; Elamin et al., *supra* note 33.

45. See Gauri, *supra* note 27, at 473. For example, the demand for a right to anti-retroviral treatment from Brazil, India, and civil society organizations resulted in lower prices worldwide, while the recognition of the right to education in Uganda led to a surge in enrollments far beyond what was predicted by creating a new norm of universal school attendance. *Id.*

46. U.N. FAO, *World Food and Agriculture: A 20-year Perspective*, in WORLD AGRICULTURE: TOWARDS 2010 (Nikos Alexandatos ed., 1995), available at http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/V4200E/V4200E00.htm.

appropriate social safety nets to protect such groups.⁴⁷

As detailed below, while free market policies have in many cases been both necessary and beneficial, some approaches to market liberalization have clearly exacerbated food insecurity in many countries following IFI-mandated structural adjustment programs.⁴⁸ Similarly, whatever their otherwise beneficial impacts, there are many cases in which irresponsible and unregulated activities undertaken by some TNCs have also contributed to hunger and decreased agricultural production in their host communities. Meanwhile, the rights-based approach has relied too much on government intervention, which itself can be riddled with corruption and inefficiencies. Even effective governments are not provided with sufficient guidance on how to prioritize the fulfillment of their socio-economic rights obligations, or how to ensure the most efficient use of limited resources. The lack of formulas or goal posts does however give governments and international actors significant leeway in the formulation of economic responses to human rights problems.

The purpose of this Article is not to set out the best economic policy options for growth and poverty reduction. Rather, it is to argue that those making such decisions need to be cognizant of their own legal human rights obligations, as well as those of governments in poor countries who ultimately hold primary responsibility for ensuring the fulfillment of their population's social and economic rights. Hunger-related deaths are neither natural nor inevitable—they can be significantly reduced by targeted policies. This Article addresses the role that international human rights law can play in forming this policy framework.

I. THE RIGHT TO FOOD UNDER INTERNATIONAL HUMAN RIGHTS LAW: THREATS AND ACCOUNTABILITY GAPS

A. *The Right to Food under International Human Rights Law*

The genesis of the modern international human rights system is often traced to the post-World War II prosecution of Nazi war

47. U.N. FAO, *Agriculture and Rural Poverty*, in *WORLD AGRICULTURE: TOWARDS 2010*, *supra* note 46, ch. 9, § 7; Luc Christiaensen et al., *Growth, Distribution, and Poverty in Africa* 33–34 (World Bank, Poverty Research Working Paper, Mar. 2002) (emphasizing that rainfall variability and fluctuation in global commodity prices make social protection measures in the agricultural sector important).

48. *See infra* Part I.B.1.a.

criminals in the Nuremberg trials and the international community's collective desire to "prevent the recurrence of such crimes against humanity through development of new standards for the protection of human rights."⁴⁹ These standards were subsequently codified in four stages: the articulation of human rights concerns in the U.N. Charter;⁵⁰ the identification of specific rights in the Universal Declaration of Human Rights (UDHR);⁵¹ the elaboration of each of the rights in the International Covenant on Civil and Political Rights (ICCPR)⁵² and the ICESCR,⁵³ and the adoption of additional conventions and declarations concerning various human rights issues, including gender and racial discrimination, children's rights, torture, and genocide.⁵⁴

The right to food has been part of the international human rights regime since its inception. The right first found expression in Article 25 of the UDHR, which states that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food"⁵⁵ The right was

49. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 10 (1982).

50. U.N. Charter art. 1 (purpose of the United Nations is to achieve international cooperation to solve economic, social, cultural and humanitarian problems while promoting human rights for all without distinction); *id.* art. 13 (role of General Assembly is to study and make recommendations to promote international cooperation and the realization of human rights); *id.* art. 55 (U.N. shall promote respect for human rights).

51. The UDHR is considered to be an "authoritative interpretation of the Charter of the United Nations" and "the common standard to which the legislation of all the Member States of the United Nations should aspire." Sohn, *supra* note 49, at 15 (citing Professor Cassin, one of the principal authors of the Declaration).

52. The ICCPR principally embodies two sets of rights: those pertaining to the physical integrity of the person (such as the right not to be tortured, executed, or enslaved) and those pertaining to legal proceedings, legal status, and the right to hold and profess one's beliefs (such as the right to counsel, freedom of speech, and freedom of religion). International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

53. The ICESCR generally protects the rights to self-determination, work and good work conditions, social security, family, an adequate standard of living (including housing and food), health, education, and cultural life. *See, e.g.*, ICESCR, *supra* note 35, arts. 1, 7, 10-11,

54. *See, e.g.*, Convention on the Rights of the Child [CRC], G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. 49 at 167, U.N. Doc. A/44/49 (Nov. 20, 1989); Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], U.N. GAOR, 34th Sess., G.A. Res. 34/180, Supp. No. 46 at 193, U.N. Doc. A/34/46 (Dec. 18, 1979); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

55. Universal Declaration of Human Rights [UDHR] art. 25(1), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). The right to food can also be found in Principle 4 of the United Nations Declaration on the Rights of the

subsequently codified in Article 11 of the ICESCR, which encompasses two separate, but related norms: the right to adequate food and the right to be free from hunger.⁵⁶ Article 11 reads:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.⁵⁷

The right to adequate food (Article 11(1)) is a “relative” standard. In contrast, the right to be free from hunger (Article 11(2)) is “absolute”⁵⁸ and is the only right to be qualified as “fundamental” in both the ICCPR and the ICESCR.⁵⁹ States Parties to the ICESCR

Child., G.A. Res. 1386 (XIV), ¶ 4, U.N. Doc. A/4354 (Nov. 20, 1959) (“The child shall have the right to adequate nutrition. . .”).

56. See Philip Alston, *International Law and the Human Right to Food*, in *THE RIGHT TO FOOD* 32 (Alston & Tomasevski eds., 1984).

57. ICESCR, *supra* note 35, art. 11.

58. *THE RIGHT TO FOOD: GUIDE THROUGH APPLICABLE INTERNATIONAL LAW* xviii (Katarina Tomasevski ed., 1987).

59. ICESCR, *supra* note 35, art. 11(2). The ICCPR implies a right to food as part of the fundamental right to life found in Article 6. See U.N. FAO, *Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, Implications of the Voluntary Guidelines for Parties and Non-Parties to the International*

are required to take steps to progressively achieve the right to adequate food.⁶⁰ Progressive realization implies moving “as expeditiously as possible” towards this goal.⁶¹ As a minimum core obligation, States Parties must act immediately “to mitigate and alleviate hunger . . . even in times of natural or other disasters.”⁶² Articulating the normative content of a relative standard such as the *right to adequate food* presents a greater challenge. The Committee on Economic, Social and Cultural Rights (ESCR Committee or Committee)⁶³ has concluded that the “core content” of the right to adequate food implies ensuring:

The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; [and] [t]he accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.⁶⁴

In his study on the right to adequate food as a human right, Asbjørn Eide developed a three-level typology of states’ duties, which is now a widely used framework for analyzing states’ human rights obligations generally.⁶⁵ These are: the duty to respect, the

Covenant on Economic, Social and Cultural Rights, available at <http://www.fao.org/docrep/meeting/007/j1632e.htm> (last visited Apr. 25, 2006); see also U.N. CHR, *General Comment 6*, 16th Sess. (1982), at 6, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994) (“The protection of [the right to life] requires that States adopt positive measures [T]he Committee considers that it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”).

60. ICESCR, *supra* note 35, art. 2(1). For further discussion of Article 2(1), see *infra* Part II.A.2. see also U.N. Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment 3: The Nature of States Parties’ Obligations*, 5th Sess. (1990), at 48–49, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

61. *General Comment 12*, *supra* note 43, ¶ 14.

62. *Id.* ¶ 6.

63. The ESCR Committee, established by virtue of the ECOSOC Res. 1985/17, is empowered to carry out the monitoring functions assigned to the ECOSOC in order to ensure states’ compliance with the ICESCR. *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. ECOSOC Res. 1985/17 (May 28, 1985). In fulfilling its obligations, the ESCR Committee began adopting General Comments “with a view to assisting the States Parties in fulfilling their reporting obligations.” U.N. ECOSOC, *Report on the Twentieth and Twenty-First Sessions*, ¶ 49, U.N. Doc. E/C.12/1999/11 (Jan. 1, 2000). While the status of the General Comments under international law is unclear, and potentially contestable, they still constitute carefully considered and systematic analyses emanating from a body uniquely placed to offer an interpretation of the norms contained in the ICESCR.

64. *General Comment 12*, *supra* note 43, ¶ 8.

65. U.N. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of

duty to protect, and the duty to facilitate or fulfill human rights.⁶⁶ The duty to *respect* the right to food is essentially a duty of non-interference with existing access to adequate food. It requires States Parties to refrain from measures that prevent such access. The duty to *protect* the right to food requires State Parties “to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.”⁶⁷ The duty to *fulfill* the right to food is a positive obligation that the ESCR Committee has interpreted to include the duty to facilitate and to provide. The duty to *facilitate* means that “the State must pro-actively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security.”⁶⁸ “Whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly.”⁶⁹

1. Violations of the Right to Food in Zimbabwe

Violations of the right to food in Zimbabwe provide an illustrative example of a government’s failure to fulfill its obligation to respect, protect, fulfill, and facilitate the right to food within its territory. In 2000 and 2001, following years of inequitable land distribution inherited from Zimbabwe’s colonial past, the Zimbabwean government backed groups of war veterans, youth “militias,” and other landless citizens in their forcible invasion of farms. In addition, the government designated thousands of farms for “compulsory acquisition” without compensating the farmers for the cost of the appropriated land.⁷⁰ The implementation of the land

Minorities, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987) (submitted by Asbjørn Eide).

66. *Id.* ¶¶ 112–14.

67. *General Comment 12*, *supra* note 43, ¶ 15. The Special Rapporteur adds that General Comment 15 on the right to water requires the adoption of “necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.” ECOSOC, U.N. CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 15 (2002): The Right to Water*, ¶ 23, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *General Comment 15*].

68. *General Comment 12*, *supra* note 43, ¶ 15.

69. *Id.*

70. AMNESTY INT’L, ZIMBABWE: POWER AND HUNGER—VIOLATIONS OF THE RIGHT TO FOOD 10–14, 18–29 (2004) [hereinafter AI-ZIMBABWE], available at [http://web.amnesty.org/library/pdf/AFR460262004ENGLISH/\\$File/AFR4602604.pdf](http://web.amnesty.org/library/pdf/AFR460262004ENGLISH/$File/AFR4602604.pdf).

reform program had a disastrous impact on access to food in the country. In 2001, Zimbabwe's maize production fell by twenty-eight percent, largely as a result of reduced plantings on large-scale commercial farms seized as part of the land reform process.⁷¹ When combined with a drought in 2002, the already-reduced food production declined further.⁷² Between 2001 and 2003, 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."⁷³

Zimbabwe's government responded to the food shortage by restricting international food aid to the country and denying food to its political opponents. The government's Grain Marketing Board, which was given a monopoly on the purchase and distribution of grain, pursued discriminatory policies by denying opposition party supporters access to food.⁷⁴ Suspicious that international humanitarian efforts masked support for opposition parties, some local authorities obstructed food aid programs and harassed aid workers.⁷⁵ In May 2004, despite independent predictions of another grain production shortfall and estimates that up to 5.5 million Zimbabweans would require food assistance, the national government refused help from the international community, announcing that the country did not need food aid.⁷⁶

As a party to the ICESCR,⁷⁷ among other relevant

71. U.N. FAO, GLOBAL INFORMATION AND EARLY WARNING SYSTEM ON FOOD AND AGRICULTURE [GIEWS], FOOD SUPPLY SITUATION AND CROP PROSPECTS IN SUB-SAHARAN AFRICA No. 3 65 (Dec. 2002) [hereinafter FAO/GIEWS], available at <ftp://ftp.fao.org/docrep/fao/005/y8255e/y8255e00.pdf>.

72. *Id.* at 63. At the same time, many Zimbabweans' income declined: Seventy percent of farm workers lost their jobs as a direct result of the land reform program. *Id.* at 65.

73. AI-ZIMBABWE, *supra* note 70, at 34–35. According to the FAO, food security exists when "all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life." *Id.* at i.

74. *Id.* at 38–39.

75. *Id.*

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

77. See generally ICESCR, *supra* note 35; see also OFFICE OF THE U.N. HIGH COMM. FOR HUM. RTS., STATUS OF RATIFICATION OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (June 3, 2005), available at <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>. While Zimbabwe acceded to the ICESCR on August 13, 1999, *id.*, the treaty must be incorporated by an Act of Parliament to become part of Zimbabwean law. See AI-ZIMBABWE, *supra* note 70, at 18. Nevertheless, the act of accession does indicate the state's intention to be bound by the terms of the treaty. See Int'l Network for Social, Cultural, and Economic Rights, Section 5: *Background Information on the ICESCR*,

international treaties,⁷⁸ the Zimbabwean government's actions were in clear violation of international law. The government violated its duty to respect, protect, and fulfill the right to food in significant ways. When it took measures to prevent access to food it violated its duty to respect the right to food. When it allowed other actors to deprive individuals of their access to adequate food it failed in its duty to protect the right to food. And when it refused to *provide* food for those who were unable to feed themselves, or to *facilitate* access to food by proactively engaging in activities aimed at strengthening people's utilization of resources and means to ensure their livelihood, it violated the duty to fulfill the right to food. Even where resource constraints existed, the government of Zimbabwe was obligated to meet its core obligation to ensure that everyone in its jurisdiction had the minimum essential food to ensure freedom from hunger. In addition, the government was under an obligation to guarantee, with immediate effect, that the right to food was exercised without discrimination of any kind, including discrimination on the basis of political or other opinion.⁷⁹ The ESCR Committee has also emphasized that "food should never be used as an instrument of political and economic pressure."⁸⁰ The government was clearly in violation of this norm.⁸¹

Zimbabwe is but one example where local actors facilitated widespread food insecurity. Incidents of national governments violating the right to food abound, such as the Taliban's policy

http://www.escr-net.org/EngGeneral/op_rp_5.asp (last visited Jan. 15, 2006).

78. Zimbabwe is also party to the ICCPR, the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, the Convention on the Rights of the Child, and the Convention on the Elimination of all forms of Discrimination Against Women. See *infra* Part III.C.1; see also *supra* notes 52, 54.

79. See ICESCR, *supra* note 35, art. 2(2).

80. *General Comment 12*, *supra* note 43, ¶ 37.

81. In addition, in May 2005 the Government of Zimbabwe suddenly launched "Operation Restore Order," a country-wide initiative to "clean-up" its cities. Anna Kajumulo Tibaijuka, U.N. Special Envoy on Human Settlements Issues in Zimbabwe, *Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina* 7 (July 18, 2005), available at <http://www.unhabitat.org/documents/ZimbabweReport.pdf>. The Operation developed into a nationwide demolition and eviction campaign that led to the destruction of homes and/or sources of livelihood of more than 700,000 people. The displacement caused by the operation disrupted normal means of accessing food, destroyed people's sources of income, and largely dismantled the informal sector of the economy. The government once again violated international human rights law by, inter alia, disrupting access to food, arbitrarily depriving people of their homes and sources of livelihood, and, more generally, launching an operation that worsened the already-deteriorating food security situation in the country. At the time of this writing, the government had failed to meaningfully cooperate with the international community to redress the humanitarian crises created by the Operation. *Id.* at 7-9, 38.

prohibiting widowed mothers from working to feed their families in Afghanistan;⁸² the North Korean government's attempt to hide the country's worst cases of hunger through restricting freedom of movement within the country (including placing restrictions on international aid agencies), and punishing citizens found foraging for food outside their villages without a travel permit;⁸³ and countless cases of government corruption or economic mismanagement linked to increased levels of poverty.⁸⁴

B. *The Impact of IFIs and TNCs on the Right to Food*

While Zimbabwe is a paradigmatic example of a local government violating its own citizens' right to food through independently-made policy choices, even in Zimbabwe international actors have had significant and detrimental impacts on food security.⁸⁵ In many other cases, reduction in food security may stem from the actions of IFIs and TNCs, and cannot be explained so easily as the sole result of local government policies and actions.

1. The Impact of IFI Policies and Programs on the Right to Food

The economic prescriptions of the International Monetary Fund (IMF) have been subject to much scrutiny in the past decade, spurred in part by the failure of structural adjustment programs in the 1980s and 1990s,⁸⁶ growing protests by grassroots anti-globalization movements,⁸⁷ and the Asian financial crisis of the 1990s.⁸⁸ Powerful members of the IMF have been charged with dictating the economic

82. Julian West, *U.N. is Poised to Quit Afghanistan in Food Aid Row*, SUNDAY TELEGRAPH (UK), June 3, 2001, § News, Int'l (reporting that Taliban officials also assaulted international aid workers and obstructed aid programs at a time when the country was almost entirely dependent on international food aid).

83. AMNESTY INT'L, STARVED OF RIGHTS: HUMAN RIGHTS AND THE FOOD CRISIS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA (NORTH KOREA) 15–19 (Jan. 2004), available at [http://web.amnesty.org/library/pdf/ASA240032004ENGLISH/\\$File/ASA2400304.pdf](http://web.amnesty.org/library/pdf/ASA240032004ENGLISH/$File/ASA2400304.pdf).

84. See generally Southern African Regional Poverty Network, *Poverty Brief: Hunger and Food Security* (2003), <http://www.sarpn.org.za/documents/d0000285/index.php>; ERIC CHETWYND, FRANCES CHETWYND & BERTRAM SPECTOR, *CORRUPTION AND POVERTY: A REVIEW OF RECENT LITERATURE* (2003), available at http://pdf.dec.org/pdf_docs/PNACW645.pdf

85. See *infra* Part I.B.1.a.

86. See SACHS, *supra* note 12, at 82.

87. See, e.g., 50 Years is Enough: U.S. Network for Global Economic Justice, <http://www.50years.org>.

88. See generally JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003).

policies of weaker states through structural adjustment programs and the forced liberalization of developing country markets. Critics have argued that the conditions imposed in return for IMF financial assistance undermine national sovereignty.⁸⁹ Most importantly for this discussion, the IMF has also come under sharp attack for the impact that its policies have on the social and economic rights of populations in borrowing countries, including the right to food.⁹⁰

a. *The Structural Adjustment Era*

The IFI-mandated structural adjustment era of the 1980s–1990s was ostensibly designed to correct four perceived causes of a nation’s economic problems: excessive government intervention in markets, excessive government spending, excessive state-ownership, and poor governance.⁹¹ The package of economic reforms mandated by structural adjustment programs therefore focused on promoting the efficiency of the free market through liberalization, budget cuts, privatization, and good governance.⁹² The structural adjustment agenda was not without merit. Closed markets and excessive state control were at the heart of many economic crises facing poor countries.⁹³ By many accounts, however, structural adjustment failed to deliver, particularly with regard to improving food security in borrowing countries.⁹⁴

89. *Id.* at 9.

90. See Philip Alston, Symposium, *Immediate Constraints on Achieving the Right to Food: The International Monetary Fund and the Right to Food*, 30 HOW. L.J. 473 (1987); Sigrun I. Skogly, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* (2001).

91. SACHS, *supra* note 12, at 81.

92. *Id.*

93. *Id.* at 81–82.

94. See generally AMITAVA MUKHERJEE, *STRUCTURAL ADJUSTMENT PROGRAMME AND FOOD SECURITY: HUNGER AND POVERTY IN INDIA* (1994); P. ROBBINS & R.S.B. FERRIS, *THE IMPACT OF GLOBALIZATION ON THE AGRICULTURAL SECTORS OF EAST AND CENTRAL AFRICAN COUNTRIES* (2003); The Whirled Bank Group, *Structural Adjustment Program*, <http://www.whirledbank.org/development/sap.html> (last visited Apr. 20, 2006); Oxfam Policy Department, *A Case for Reform: Fifty Years of the IMF and the World Bank* (1995) available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1999/09/25/000178830_98101911304260/Rendered/PDF/multi_page.pdf; Friends of the Earth & The Development Group for Alternative Policies, *On the Wrong Track: A Summary Assessment of IMF Interventions in Selected Countries* (Jan. 1998), <http://www.developmentgap.org/wrong.html>; Public Citizen, *Survey of IMF Impact on African Countries*, http://www.citizen.org/trade/africa/house_fight/articles.cfm?ID=7688 (last visited Apr. 20, 2006); Ross Hammond, Evangelical Lutheran Church of Tanzania, *The Impact of IMF Structural Adjustment Policies on Tanzanian Agriculture*, <http://www.developmentgap.org/wrong.html#Tanzania> (last visited Feb. 6, 2006).

Countries under structural adjustment were often required to remove price controls and state subsidies. Budget balancing was achieved through cuts in government spending on social programs, including social services to feed poor and hungry populations.⁹⁵ Additionally, structural adjustment programs mandated the removal of food subsidies, often resulting in substantial price hikes, with a disproportionate impact on the poorest and most vulnerable in the population.⁹⁶ Many countries under structural adjustment were also required to remove subsidies from agricultural inputs, such as fertilizer and pesticides, resulting in an increase in input prices and decrease in their use for subsistence crop production.⁹⁷

Structural adjustment programs also encouraged countries to focus on the production and export of “cash crops,” such as cocoa and coffee, to earn foreign exchange while foregoing the production of basic food crops. The prices of such cash crops continued to fluctuate erratically on the global market, depressing prices and reducing returns on the country’s investment.⁹⁸ Currency devaluation, when combined with the removal of price controls, resulted in further extreme price hikes, increasing poverty to such an extent that riots erupted in a number of countries.⁹⁹ Moreover, currency devaluations and the removal of price controls further increased cash crop production relative to basic food crops.¹⁰⁰

According to a World Bank study, countries in Africa adhering to the IMF structural adjustment policies experienced slower growth in agricultural production than countries that did not adhere to them.¹⁰¹ An IMF structural adjustment program in Senegal that began in 1986 led to a drop in the production of basic food crops, such as vegetables, corn, and millet, and undermined food security.¹⁰² By 1995, forty percent of the population was classified

95. Ziegler Report, *supra* note 14, at 21 (noting that upwards of twenty percent of national budgets are sometimes dedicated to debt servicing programs).

96. MUKHERJEE, *supra* note 94, at 119–20, 124–25.

97. Christina H. Gladwin & Anne M. Thomson, *Food or Cash Crops: Which is the Key to Food Security?*, available at <http://www.fred.ifas.ufl.edu/CRSP/food.htm> (last visited Feb. 5, 2006); ROBBINS & FERRIS, *supra* note 94, at 16–17; MUKHERJEE, *supra* note 94, at 82.

98. The Whirled Bank Group, *supra* note 94.

99. In India, for example, the landless class and small farmers had to reduce food consumption by up to fifty percent as a result of higher prices after the implementation of structural adjustment. MUKHERJEE, *supra* note 94, at 203–05; *see also* SACHS, *supra* note 12, at 74 (“In the past, IMF-led austerity has frequently led to riots, coups, and the collapse of public services.”); The Whirled Bank Group, *supra* note 94.

100. SACHS, *supra* note 12, at 156.

101. Oxfam Policy Department, *supra* note 94, at 15 (citing WORLD BANK, ADJUSTMENT IN AFRICA: REFORM, RESULTS AND THE ROAD AHEAD (1994)).

102. Friends of the Earth, *supra* note 94 (summarizing Yassine Fall, Partners for African

as hungry—up seven percent from 1990.¹⁰³ In Tanzania, where a structural adjustment program also began in 1986, the Tanzanian government likewise implemented currency devaluations, cuts in agricultural subsidies, and trade liberalization. By 1996, Tanzania faced a severe food shortage due in part to the removal of subsidies for fertilizers.¹⁰⁴ The World Bank concluded that infant mortality, nutrition, and primary school enrollment were “stagnant or worse, compared to the level of the 1970s or early 1980s,” prior to IMF structural adjustment.¹⁰⁵ The increased costs of agricultural inputs and a growing emphasis on cash crop production under structural adjustment policies in Zimbabwe reduced the capacity of communities to produce food for local consumption and had a devastating impact on food security. By the end of the 1990s, thirty percent of children under the age of five were considered chronically malnourished.¹⁰⁶

In the aggregate, the traditional refrain that short-term pain would lead to long-term economic gains did not hold true under structural adjustment. By some estimates, at the start of the twenty-first century, Africa as a whole was poorer than it was during the 1960s.¹⁰⁷ Correspondingly, the food security situation in Africa worsened considerably over the past three decades due to a combination of policy choices and population growth.¹⁰⁸ Without substantial food policy reforms and enhanced international and

Development and Economic Justice, *Gender and Social Dimensions of IMF Policies in Senegal*, in *THE ALL-TOO-VISIBLE HAND: A FIVE COUNTRY LOOK AT THE LONG AND DESTRUCTIVE REACH OF THE IMF* (The Development Group for Alternative Policies ed., 1999)), available at http://www.developmentgap.org/imf/title_and_overview.html.

103. *Id.*; Public Citizen, *supra* note 94.

104. Friends of the Earth, *supra* note 94.

105. Hammond, *supra* note 94.

106. STRUCTURAL ADJUSTMENT PARTICIPATORY REVIEW INT’L NETWORK, A MULTI-COUNTRY PARTICIPATORY ASSESSMENT OF STRUCTURAL ADJUSTMENT 118 (Apr. 2002). IMF structural adjustment policies also hurt poor farmers in Zambia by restricting their access to credit for production and marketing. See OXFAM POLICY DEPARTMENT, A CASE FOR REFORM: FIFTY YEARS OF THE IMF AND THE WORLD BANK 11 (1995). In Ghana, public spending on health, education, and agriculture fell under IMF structural adjustment programs. Public Citizen, *Survey of IMF Impact on African Countries*, available at http://www.citizen.org/trade/africa/house_fight/articles.cfm?ID=7688 (last visited Apr. 20, 2006).

107. See SACHS, *supra* note 12, at 189.

108. Mark W. Rosegrant et al., *Looking Ahead: Long-Term Prospects for Africa’s Agricultural Development and Food Security* xi (Int’l Food Policy Research Institute, 2020 Discussion Paper 41, Aug. 2005) (“Although the proportion of malnourished individuals in Sub-Saharan Africa has remained in the range of 33–35 percent since around 1970, the absolute number of malnourished people in Africa has increased substantially with population growth, from around 88 million in 1970 to an estimate of over 200 million in 1999–2001.”)

national investment in the agricultural sector, the absolute numbers of malnourished children in sub-Saharan Africa will continue to rise, according to 2005 projections.¹⁰⁹ The negative effects of structural adjustment are not limited to Africa. According to a multi-country study conducted by civil society organizations in partnership with the World Bank, the net effects of structural adjustment in Bangladesh, Ecuador, Hungary, Mexico, and the Philippines were greater impoverishment and marginalization of local communities.¹¹⁰

b. A New Era?: Reforms to IFI Lending Programs

Following nearly two decades of economic upheavals in borrowing countries, international financial institutions are now searching for more effective approaches to tackling poverty.¹¹¹ Most notably, in 1996 donor countries committed themselves to addressing the debt crisis faced by Heavily Indebted Poor Countries (HIPC) through an initiative to reduce debt and make funds available for poverty reduction.¹¹² In 1999, the World Bank and IMF initiated the Poverty Reduction Strategy Papers (PRSPs) process, which, according to the IMF, “result[ed] in a comprehensive country-based strategy for poverty reduction.”¹¹³ The PRSPs underpin the HIPC initiative and attempt to make aid more effective in reducing poverty. Significant efforts have also been made to reform IFI conditionality in recent years, particularly by the World Bank.¹¹⁴

109. *Id.* at 12.

110. STRUCTURAL ADJUSTMENT PARTICIPATORY REVIEW INT’L NETWORK, *supra* note 106, at 173–87. This conclusion is consistent with an econometric analysis of participation in IMF agreements, which found that, after controlling for selection bias of countries entering into such agreements, IMF policies are regressively redistributive and hurt growth. JAMES RAYMOND VREELAND, *THE IMF AND ECONOMIC DEVELOPMENT* 153–54 (2003).

111. *See* SACHS, *supra* note 12, at 74.

112. *See* The World Bank, *The Enhanced HIPC Initiative*, available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20260411~menuPK:64166739~pagePK:64166689~piPK:64166646~theSitePK:469043,0,0.html> (last visited Apr. 25, 2006); The World Bank Group, *The HIPC History*, available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20263277~menuPK:528655~pagePK:64166689~piPK:64166646~theSitePK:469043,0,0.html> (last visited Apr. 25, 2006).

113. Int’l Monetary Fund [IMF], *A Factsheet: Poverty Reduction Strategy Papers* (Sept. 2005), available at <http://www.imf.org/external/np/exr/facts/prsp.htm>.

114. For example, the World Bank in 2004 revised its conditionality guidelines with an aim to “help poor people by making the Bank a more effective development partner in supporting countries’ strategies for growth and poverty reduction and for reaching the Millennium Development Goals.” WORLD BANK, *FROM ADJUSTMENT LENDING TO DEVELOPMENT POLICY LENDING: UPDATE OF WORLD BANK POLICY 1* (Aug. 2004).

These efforts have not, however, succeeded in solving many of the problems created by structural adjustment. While conditionality has been reduced in several areas, the increasing number of “non-binding conditions” has generally been perceived as requirements by loan recipients.¹¹⁵ A United Nations Development Programme (UNDP) review of PRSPs concluded that the macroeconomic prescriptions contained in the documents were largely similar to earlier stabilization policies.¹¹⁶ In sum, countries are still required to emphasize macroeconomic considerations, fiscal reform, and privatization,¹¹⁷ without adequately addressing the impact of these policies on poverty reduction.¹¹⁸

The 2005 famine in Niger is a case study in the negative impact of policies implemented with an emphasis on macroeconomic considerations and without a focus on preserving a population’s right to food. The aid group Médecins Sans Frontières (MSF) contends that economic policies encouraged by IFIs contributed to the famine that struck Niger in 2005.¹¹⁹ The drought and locusts that reduced Niger’s harvest in 2004 do not fully explain the subsequent epidemic of hunger; despite the diminished yield, the country still produced sufficient food to feed its own population.¹²⁰ According to MSF, the effects of natural events could have been mitigated when the first signs of a food crisis appeared in early 2005.¹²¹ The Nigerien government, however, was urged by international financial

115. Hetty Kovach, *European Network on Debt and Development, Loosening the Leash? World Bank Conditionality Review: Eurodad Policy Briefing 4-5* (Aug. 2005).

116. UNDP, *Review of the Poverty Reduction Strategy Paper 5* (2001)

117. The privatization of state-owned enterprises is not in and of itself a bad thing. The privatization of certain social services can lead to greater efficiencies. But as discussed below, privatization does not always bring the benefits it promises. See *infra* notes 146–48 and accompanying text.

118. Fantu Cheru, *The Highly Indebted Countries (HIPC) Initiative: A Human Rights Assessment of the Poverty Reduction Strategy Papers (PRSP)*, ESOCOR, U.N. CHR, 57th Sess., at 11–14, U.N. Doc. E/CN.4/2001/56 (Jan. 2001); see also IRÜNGÜ HOUGHTON, ACTIONAIDUSA, UP AGAINST THE WIND: ACTIONAID’S PRS EXPERIENCE 4 (Apr. 2002), available at www.actionaidusa.org/pdf/Upagainstwinds.pdf (concluding that, while reforms to public enterprises and the social service sector are assessed in relation to their poverty reduction potential, “core monetary, fiscal, structural reform provisions are not being subjected to a clear analysis of their impact on poverty and poor people”).

119. *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 (last visited Feb. 9, 2006).

120. Interview by Margaret Warner with Christopher Barrett, Co-Director, African Food Security and Natural Resources Management (Aug. 4, 2005), available at http://www.pbs.org/newshour/bb/africa/july-dec05/niger_8-04.html.

121. *August Will be the Worst Month in Niger*, *supra* note 119.

institutions, key donor countries, and U.N. agencies to refrain from acting in a manner that would destabilize the local food market or drain resources from ongoing development projects. As a result, instead of organizing free food distributions to vulnerable populations, officials attempted a series of “market-based” approaches, including offering cereals at reduced prices to families that could ill-afford even the subsidized rate.¹²² As the situation deteriorated, authorities attempted to loan grain to people. Ultimately, “[e]ven as thousands perished by late June [2005], some donors praised the Nigerien government for respecting the market and not distributing free food.”¹²³

The drought and locusts also struck Niger’s western neighbor Mali, along with a number of other countries throughout western and central Africa. Mali, however, was able to escape “famine” by reportedly breaking with the strictly “market-based” approaches to dealing with its shortfalls. Upon ascertaining that the previous year’s harvest was below average, Mali’s government immediately distributed 10,000 tons of free millet to those who were hardest hit; as of August 12, 2005, the government had handed out an additional 11,000 tons.¹²⁴ According to the World Food Programme (WFP), these timely interventions averted a larger-scale crisis like the one facing Niger.¹²⁵

In response to allegations that its policies played a role in creating famine conditions in Niger, Thomas Dawson, the Director of External Relations at the IMF claimed that Niger’s structural adjustment program accommodated famine-related spending.¹²⁶ The IMF further argued that structural adjustment measures, like a short-lived Value-Added Tax (VAT) to milk, sugar, and wheat in January 2005, were necessary to increase domestic revenue for poverty-reduction programs.¹²⁷ These explanations, however, did not stem criticism from aid groups who felt that “[t]here ha[d] to be a better

122. *Id.*

123. *Id.*; see also Alex Duval Smith, *IMF and EU Are Blamed for Starvation in Niger*, INDEPENDENT (UK), Aug. 1, 2005, at 23; Craig Timberg, *The Rise of a Market Mentality Means Many Go Hungry in Niger*, WASHINGTON POST, Aug. 11, 2005, at A17.

124. Jeevan Vasagar, *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>; 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.

125. Vasagar, *supra* note 124.

126. Thomas C. Dawson, *IMF Is Combating Niger Famine*, INDEPENDENT (UK), Aug. 5, 2005, at 36.

127. *Id.*

safety net for the poorest of the poor during a crisis even while long term development continue[d].”¹²⁸

The Nigerien government’s refusal to distribute free food to its population is arguably in violation of its human rights obligations under the ICESCR¹²⁹ which, according to the ESCR Committee, require states to directly provide food “[w]henver an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal.”¹³⁰ Like many poor countries, Niger essentially faced a conflict between its obligations to comply with binding U.N. treaty commitments and its obligations to live up to IFI agreements. 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.”¹³¹

As the case of Niger illustrates, a main concern of IFI lending practices and conditionality is that they deflect accountability of states to their citizens (and their human rights obligations) and instead engender government accountability only to IFI commitments. If these commitments are negotiated and monitored without a concern for international human rights obligations, then human rights commitments—which have relatively weak enforcement provisions when compared to IFI commitments—lose out. The extent to which macroeconomic policy reforms may run counter to a borrowing country’s human rights obligations under the ICESCR or other international human rights treaties, however, is virtually absent from IFI policy considerations. The IMF/World Bank also does not consider the human rights obligations of member states to refrain from enforcing conditions that undermine human rights obligations of borrowing countries. Incorporating a human rights framework into IFI policies may help borrowing countries avoid these conflicts between competing international obligations and may mitigate the resulting impact on poor and vulnerable populations. Part II.B of this Article argues that it is possible to hold IFIs accountable for violations of the right to food through IFI member states, many of which have ratified the ICESCR.

128. *August Will Be the Worst Month in Niger*, *supra* note 119 (quoting Dr. Milton Tectonidis, a nutritional specialist for MSF in Niger).

129. Niger acceded to the ICESCR on June 7, 1986. OFFICE OF THE U.N. HIGH COMM. FOR HUM. RTS., *supra* note 77, at 8.

130. *General Comment 12*, *supra* note 43, ¶ 15.

131. Canadian Council for International Co-operation, *Reality of Aid 2004* (2004), available at http://www.ccic.ca/e/docs/002_aid_roa_2004.pdf.

2. The Impact of TNCs on the Right to Food

In addition to international financial institutions, transnational corporations are increasingly playing a role in determining the level of food security for populations around the world. As national economic policies, which are often dictated by international financial institutions, encourage the replacement of diverse crops intended for local consumption with commercial crops intended for export,¹³² investment in the agricultural sector by transnational corporations has, in many instances, had a negative impact on food production. It is estimated that every year an extra million hectares are being transferred from food crop to export crop production—a process driven in large part by TNCs.¹³³ In Central America, for example, transnational corporations have been heavily involved in the production of non-traditional exports—mainly fruits, vegetables, and flowers—for sale in the North American market.¹³⁴ As a result of this emphasis, land used for cultivation of basic food crops in Chile decreased by nearly thirty percent from 1989 to 1993, as non-traditional exports replaced beans, wheat, and other staple foods.¹³⁵

The replacement of varied local food crops with commercial cash crops can also damage local ecosystems, leading to decreased food production over the long-term. While seed and fertilizer developments during the Green Revolution of the 1960s initially increased food production, TNCs subsequently purchased many of the family seed companies, and the technology proved unsustainable. Rice yields have steadily declined since the 1960s, from ten tons to seven tons per hectare, according to studies by the International Rice Research Institute.¹³⁶ Additionally, due to marketing of seeds by TNCs, thousands of traditional plant varieties have been lost. This dramatic reduction in biodiversity threatens agriculture and food security, as it decreases the available range of genetic material for developing crops with increased yields and enhanced pest and disease resistance.¹³⁷

132. See *supra* Part I.B.1.

133. JOHN MADELEY, *BIG BUSINESS, POOR PEOPLES: THE IMPACT OF TRANSNATIONAL CORPORATIONS ON THE WORLD'S POOR* 39 (1999).

134. For example, TNCs control about twenty-five percent of the total production of non-traditional export crops and handle the distribution and transport of a significant portion of these crops. MADELEY, *supra* note 133, at 65.

135. *Id.* (noting that foreign corporations own three of the top four companies involved in the trade of non-traditional exports).

136. *Id.*

137. *Id.*

Accompanying the growth of the non-traditional export market, food producers have increasingly relied on pesticides in order to satisfy North American consumers' demand for blemish-free fruit and vegetables.¹³⁸ A major side-effect of pesticide over-use is new pests and viruses that have significantly harmed food crop production, including bean production in Brazil and Chile.¹³⁹ Additionally, tobacco producers are cutting down large numbers of trees in semi-arid environments in order to service the growing international market. The resulting deforestation and soil erosion has negatively impacted food production in countries like Kenya, which are already at risk of food shortages.¹⁴⁰ TNCs have also contributed to over-fishing. Large trawlers, owned by TNCs from northern countries, are responsible for the unsustainable depletion of the world's fish supplies. They have also damaged near-shore fishing areas in some developing countries, decreasing the availability of this low-cost source of protein for many people living in coastal communities.¹⁴¹

Outside of the agricultural sector, there are numerous documented instances in which the activities of TNCs, particularly those engaged in resource extraction, have interfered with food production in their areas of operation. In southeastern Nigeria, repeated oil spills on fields and pipelines operated by Royal/Dutch Shell and other TNCs destroyed the water supplies and farmlands of the Ogoni people. After a spill affecting the village of Yaata in April 2001, for example, maize, cassava, and yam crops were stained with crude oil. Much of the village's livestock had either died or was dying from eating polluted vegetation and drinking contaminated water, while "dead fish rose to the surface of creeks and ponds."¹⁴² Residents of the Oriente Region of Ecuador, meanwhile, have testified to a seventy percent decline in agricultural productivity, as well as increased rates of cancer and other serious diseases, as a result of massive amounts of oil wastewater dumped into local

138. *Id.* at 67.

139. *Id.*

140. *Id.* at 54–55. Approximately seventy percent of tobacco is produced by five major corporations. They are Philip Morris, BAT Industries, RJF Nabisco, Rothmans, and Japan Tobacco. *Id.* at 48. Four-fifths of tobacco is produced in developing countries. *Id.* at 49.

141. *Id.* at 80–81, 83.

142. IRIN NEWS, *Nigeria: IRIN Focus on Ogoni Oil Spill*, www.irinnews.org/report.asp?ReportID=8131&SelectREgion=West_Africa&SelectCountry=Nigeria (last visited Feb. 21, 2006); see also David Kinley & Junko Tadaki, *From Talk to Walk: The Emergency of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 934 (2004) (citing Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L. J. 1963, 1964–65 (1996)).

waterways by ChevronTexaco over a period of two decades.¹⁴³ PT Inco's mining and smelting facilities in Soroako, Indonesia occupy what was formerly the community's prime agricultural land. Its mining activities have depleted the fish and shellfish stocks in the local lake and decreased the agricultural productivity of the remaining lands, due to heavy water, air pollution, and erosion.¹⁴⁴ In Plachimada, India, a Coca-Cola bottling plant was forced to shut down after local activists complained that the company had usurped local water supplies, destroyed paddy fields, and distributed toxic cadmium-laden sludge from the plant as free "fertilizer" to local farmers.¹⁴⁵

When accompanied by monopolization by TNCs, the privatization of the water sector can also be detrimental to food security because of its effects on local producers.¹⁴⁶ Privatization often occurs before adequate regulatory or competition frameworks are put into place. Moreover, TNCs may be able to persuade governments, sometimes through corruption, to give them a monopoly over the privatized sector. When water sources are privatized in a manner that deprives farmers of water for use in irrigation, or that makes the provision of water unaffordable, then the right to food is affected.¹⁴⁷ As noted by the Special Rapporteur on the Right to Food, "[s]afe drinking water is essential to adequate nutrition" and highly important for irrigation purposes, "given that this is essential for food production and for ensuring food

143. Amazon Watch, *Pressure Mounts on ChevronTexaco to Confront its Responsibility for the "Rainforest Chernobyl"* (Apr. 26, 2004), available at http://www.amazonwatch.org/newsroom/view_news.php?id=781; Miguel San Sebastián & Juan Antonio Córdoba, "Yana Curi" Report: *The Impact of Oil Development on the Health of the People of the Ecuadorian Amazon* (1999), available at http://www.amazonwatch.org/amazon/EC/toxicol/downloads/yanacuri_eng.pdf; Amnesty Int'l, Business and Human Rights, *Ecuador—Oil Rights or Human Rights?*, <http://www.amnestyusa.org/business/ecuador.html> (last visited Apr. 20, 2006).

144. Chris Ballard, *Human Rights and the Mining Sector in Indonesia: A Baseline Study* 20–22 (Mining, Minerals, and Sustainable Development No. 182, Oct. 2001), http://www.natural-resources.org/minerals/CD/docs/mmsd/othercountries/indonesia_hr_baseline.pdf.

145. D. Rajeev, *Sludge Dirt on Coca-Cola*, ASIA TIMES ONLINE, Aug. 22, 2005, http://www.atimes.com/atimes/South_Asia/GH23Df02.html.

146. See generally VANDANA SHIVA, *WATER WARS: PRIVATIZATION, POLLUTION AND PROFIT* (2002).

147. STIGLITZ, *supra* note 88, at 54–58; see also U.N. CHR, *Second Submission of Jean Ziegler, Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights to the Intergovernmental Working Group for the Voluntary Guidelines on the Right to Adequate Food*, available at <http://www.righttofood.org/SECOND%20SUBMISSION%20SR%20RIGHT%20TO%20FOOD.htm> (last visited Apr. 20, 2006) ("Water is a key element of the right to food.").

availability, particularly in countries where the poor depend primarily on their own production.”¹⁴⁸

Finally, TNCs can also have detrimental effects on the right to food in their role as employers. There are many documented instances in which TNCs, or their suppliers in developing countries, have failed to pay their workers enough to purchase sufficient food for their families. The National Labor Committee has published reports documenting insufficient wage payment, as well as many other labor abuses, in TNC supplier factories in Honduras,¹⁴⁹ China,¹⁵⁰ and Bangladesh,¹⁵¹ among other countries. While TNCs often argue that their supplier factories pay average or above-average wages for the countries in which they operate—and workers often express the sentiment that it is better to be underpaid than unemployed—the workers’ families’ right to food is nevertheless being affected when they cannot afford to provide their children with adequate nutrition.

With increasing consolidation in the agri-food industry, transnational corporations have also been able to exert control over prices of both agricultural inputs and outputs: five corporations control the global trade in grain, while ten corporations control thirty-two percent of the global commercial seed market, including one hundred percent of the genetically modified seed.¹⁵² High prices for

148. ECOSOC, U.N. CHR, *Report Submitted by the Special Rapporteur on the Right to Food in Accordance with Commission on Human Rights Resolution 2002/25*, 59th Sess., ¶ 35, U.N. Doc. E/CN.4/2003/54 (Jan. 10, 2003) (prepared by Jean Zielger) [hereinafter Ziegler Report II]; see also *General Comment 15*, supra note 67, ¶ 7; *Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses*, U.N. Doc. A/51/869 (Apr. 11, 1997).

149. See, e.g., Nat’l Labor Comm., *Han-Soll Factory: Sweating for the NBA and NFL* (July 2005), available at http://www.nlcnet.org/news/han_sol_report_web.pdf.

150. See, e.g., Nat’l Labor Committee & Students and Scholars Against Corporate Misbehavior, *Disney’s Children’s Books Made with the Blood Sweat and Tears of Young Workers in China* (Aug. 18, 2005), available at http://www.nlcnet.org/news/china/pdfs/hung_hing.pdf.

151. See, e.g., National Labor Comm., *Ending the Race to the Bottom* (undated), available at <http://www.nlcnet.org/campaigns/shahmakhdum/1001/bangla%20rpt%20final.pdf>; National Labor Comm., *Disney Sweatshop in Bangladesh* (2004), available at <http://www.nlcnet.org/campaigns/niagra/niagra-bangladesh.pdf>.

152. *Talking with Vandana Shiva*, PEACEWORK, July–Aug. 2000, available at <http://www.afsc.org/pwork/0700/072k12.htm> (reviewing VANDANA SHIVA, *STOLEN HARVEST: THE HIJACKING OF THE GLOBAL FOOD SUPPLY* (2000)). In addition to its effect on farmers in developing countries, the increasingly consolidated control over international food production and supply affects the choices of consumers in developed countries, making it increasingly difficult and expensive in many areas to find fresh, locally-grown produce, or food grown from non-genetically modified seeds, without the use of commercial pesticides and fertilizers. *Id.*

chemical pesticides, fertilizers, and seeds distributed by large TNCs such as Monsanto have raised the cost of agricultural production while the prices paid to farmers for their produce have in many cases stagnated or declined; as a result, farmers in developing countries often lose money on the sale of their crops and can barely afford to feed their own families.¹⁵³

Would it stretch traditional conceptions of corporate duty too far to hold corporations responsible for the types of rights violations described above? The U.N. Global Compact, launched in 2000,¹⁵⁴ urges corporations to support and respect the protection of international human rights within their “sphere[s] of influence.”¹⁵⁵ Steven Ratner employs a concept similar to the “sphere of influence” when he claims that corporate duties are a function of, among other factors, the corporation’s “nexus” to the population whose rights have been affected.¹⁵⁶

In many of the cases described above, the affected populations clearly fall within the TNC’s sphere of influence. The nexus between the TNC and the population is easy to see, for example, where the TNC is the employer of the affected persons or where the TNC’s physical operations destroy the food supplies of its neighbors. In other cases, the link is less direct, but a case for regulation of TNC activity may still be made. Where a corporation is the sole or primary supplier of agricultural inputs and/or purchaser of agricultural products from a region, for example, the farmers in that region could arguably fall within the corporation’s sphere of influence. Returning to Amartya Sen’s argument that hunger results in large part from an individual’s lack of “entitlement” over the means to either purchase food (through earning a sufficient income) or produce food (through favorable agricultural conditions and access to agricultural inputs), the cases above demonstrate the role of TNCs in contributing to violations of the right to food by obstructing access

153. ActionAid Int’l, *Power Hungry: Six Reasons to Regulate Global Food Corporations* 11–17 (2005), <http://www.eldis.org/static/DOC17252.htm>; Peter O’Driscoll, *Part of the Problem: Trade, Transnational Corporations, and Hunger*, CENTER FOCUS (Mar. 2005), <http://www.globalpolicy.org/soecon/tncs/2005/03problem.pdf>; see also VANDANA SHIVA, *STOLEN HARVEST: THE HIJACKING OF THE GLOBAL FOOD SUPPLY* (2000).

154. Amnesty Int’l, *U.N. Global Compact: The Nine Principles*, available at <http://web.amnesty.org/pages/ec-globalcompact9principles-eng> (last visited Apr. 25, 2006); see also *infra* notes 307–08.

155. While the Compact is non-binding, corporations that choose to join the Compact commit to upholding nine basic principles for safeguarding human rights, labor standards, and the environment. *Id.*

156. Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 506–11 (2001).

to these vital entitlements.¹⁵⁷ Part II.C of this Article argues that TNCs can be held indirectly accountable for these violations via their relationship to their home state.

C. *The State-centric and Jurisdictional Constraints of International Human Rights Law*

Implementation of human rights obligations has traditionally focused on the actions of States Parties within their own territory, but as the discussion above has shown, the right to food is threatened not only by states, but by IFIs and TNCs whose actions decrease the ability of individuals to meet their food needs. In addition, many states may have an effect on the right to food outside their own territory through their membership in IFIs or their support for TNCs. An effective approach to implementing the right to food will require mechanisms to hold IFIs and TNCs accountable for violations, and to hold states accountable to individuals located outside their jurisdiction.

While the content of the right to food is increasingly well-defined, the jurisdictional constraints and the state-centric nature of the international human rights legal framework undermine its effective implementation. States Parties' obligations to individuals are largely limited to those who are located within their territory or under their jurisdiction.¹⁵⁸ The responsibility of states to those outside their jurisdiction is therefore unclear. Moreover, human rights law is state-centric: States bear exclusive legal responsibility for ensuring human rights. Non-state actors, such as TNCs, are not subjects under international human rights law. Effective implementation of the right to food therefore requires a clearer articulation of the extraterritorial obligations of States Parties to the ICESCR, and a means to hold TNCs and IFIs accountable for human rights violations via their relationship to the state. Such accountability must also be rooted in a doctrinal framework that can be reconciled with the more conservative articulations of state responsibility under international law jurisprudence.

The reports of the U.N. Special Rapporteur on the Right to Food have attempted to address these constraints by expanding the extraterritorial application of the ICESCR and by addressing the

157. See generally Amartya Sen, *Ingredients of Famine Analysis: Availability and Entitlements*, 96 Q.J. ECON. 433 (1981).

158. For a discussion of the meaning of jurisdiction under international human rights law, see *infra* Part II.A.

accountability of TNCs and IFIs via their relationship to the state.¹⁵⁹ While asserting that the primary obligation to realize the right to food rests with national governments,¹⁶⁰ the Special Rapporteur notes that governments also have “extranational obligations” to respect, protect, and facilitate the right to food.¹⁶¹ He argues that the duty to respect extends to actions that have a negative impact on the right to food for people in other countries.¹⁶² Accordingly, a country must refrain from imposing food-related sanctions or embargoes and must ensure that its trade policies and relations do not violate the right to food of people in other countries.¹⁶³ Under the duty to protect, a state must protect individuals against the harmful activities of TNCs investing and operating in that state (what we will call *host* state obligations). The Special Rapporteur adds that states also have a duty to prevent violations by their companies and corporations operating abroad (what we will call *home* state obligations).¹⁶⁴ The obligation to facilitate has also been interpreted to require states to build a social and international order in which the right to food can be fully realized.¹⁶⁵ In part this requires that states “take account of their ‘extranational obligations’ in their deliberations in multilateral organizations, including the IMF, World Bank and the World Trade Organization (WTO).”¹⁶⁶

In essence, the Special Rapporteur is expanding the extraterritorial application of states’ obligations under the ICESCR. Under the view that states’ duties must arise wherever their actions

159. Ziegler Report II, *supra* note 148, ¶¶ 26-27; U.N. CHR, *Submission of Jean Ziegler, Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights to the March 2003 Meeting of the IGWG for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, ¶ 18 (2003), available at http://www.fao.org/righttofood/common/ecg/23811_en_un.rapp.i.pdf (last visited Apr. 25, 2006) [hereinafter *Submission of Jean Ziegler*]; Press Release, U.N. GA, 57th Sess., Third Committee (Social, Humanitarian, Cultural), 43d, 44th mtgs., U.N. Doc. GA/SHC/3721, *Anyone Dying From Hunger was Dying From Murder, Special Rapporteur Tells Third Committee, as Discussion on Human Rights Continues*, U.N. Doc. 6A/SHC/3721 (Nov. 11, 2002) [hereinafter *Anyone Dying*]; U.N. CHR, *Right to Food: U. N. Special Rapporteur's Report to UNCHR: New Developments Offer Hope for the Right to Food*, 59th Sess. (2003) [hereinafter *Right to Food*].

160. Ziegler Report II, *supra* note 148, ¶ 29; *Submission of Jean Ziegler, supra* note 159, ¶ 18; *Anyone Dying, supra* note 159.

161. Ziegler Report II, *supra* note 148, ¶ 29.

162. *Id.*

163. *Id.*

164. *Right to Food, supra* note 159.

165. Ziegler Report II, *supra* note 148, ¶ 29.

166. *Id.*

have a human rights effect,¹⁶⁷ such an approach is plausible. Under a justice and morality framework, it is even laudable.¹⁶⁸ Ultimately, and problematically, such normative guidance is at odds with international law in three respects.

First, as noted above, the state only bears responsibility for respecting, protecting, and fulfilling the rights of those within its territory or under its jurisdiction. Jurisdiction has been narrowly interpreted by international law jurisprudence to apply only to situations where a state exercises “effective control.”¹⁶⁹ How then can a state be obligated to ensure that its policy-setting in international financial institutions does not violate the right to food of people in territories over which it does not exercise effective control?

Second, non-state actors are not legal subjects under international human rights law. They must therefore be regulated via the state. Yet the indirect regulation of TNCs via states is fraught with problems. Economic arrangements between a TNC and its host state may restrict the host state’s ability to regulate TNC activity in practical and legal terms. Moreover, under international law, the home state is generally not liable for the conduct of non-state actors unless the non-state actors are de facto agents of the state, or the non-state actors were acting “on the instructions of, or under the direction or control of, that State in carrying out the [wrongful] conduct.”¹⁷⁰ Invoking home state accountability also implicates the extraterritorial reach of the ICESCR beyond a state’s jurisdiction.

Third, states have obligations under multiple legal regimes, including contracts with IFIs and TNCs, that may come into conflict with their human rights obligations. The development of norms outside the covenant model to cover other areas of international law and to reconcile the incompatibility of multiple legal regimes is a precursor to building an international order where the right to food can be realized. Moreover, powerful actors such as the United States have yet to ratify the Covenant. Their responsibility may best be addressed under customary international law. The remainder of this Article attempts to resolve the incompatibilities described above by holding TNCs and IFIs accountable via their relationship to the state

167. See, e.g., Fons Coomans, *Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 183, 187 (Fons Coomans & Menno T. Kamminga eds., 2004).

168. See generally POGGE, *supra* note 15.

169. See *infra* Part II.A.1.

170. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session*, U.N. GAOR, 56th Sess, Supp. No. 10 at 43, UN Doc A/56/10 (2001); see also *infra* notes 341 and accompanying text.

and by locating the right to food in customary international law.

II. INTERNATIONAL FINANCIAL INSTITUTIONS AND TRANSNATIONAL CORPORATIONS: ACCOUNTABILITY VIA THE STATE

Globalization is characterized by the expansion of transnational corporations, by an increased role for international financial institutions, and by a proliferation of multilateral agreements and arrangements. As described in Part I, IFIs, such as the IMF, have actively promoted macroeconomic reforms in the global south that have facilitated the expansion of TNCs and the promotion of free trade. The IMF has also conditioned loans to developing countries on reductions in social spending and re-tooling production to service international markets, sometimes at great costs to social welfare and domestic markets.¹⁷¹ These processes make it increasingly difficult for weaker states to assert full control over many of the aspects of policy-making that are central to their ability to fulfill their right to food obligations.

International human rights law does not impose direct obligations on IFIs and TNCs.¹⁷² These actors can, however, be held indirectly accountable via their relationship to powerful states.¹⁷³ Though IFIs and TNCs are the twin engines of economic globalization, powerful states remain the central drivers. IFIs (such as the World Bank and the IMF) are essentially multi-state actors; they are comprised of member states. Member state decisions often dictate economic policies in weaker countries.¹⁷⁴ Powerful states also provide their TNCs with significant financial and political backing that may allow TNCs to control resources and markets in countries in which they operate or where their products are sold. These controls may heighten the potential for, and broaden the scope of, violations of the right to food.¹⁷⁵

This Part asserts that States Parties to the ICESCR are obligated to ensure that the right to food is respected and protected in IFI agreements. It further proposes that home states must exercise

171. Beth Lyon, *Discourse in Development: A Post-Colonial "Agenda" for the United Nations Committee on Economic, Social and Cultural Rights*, 10 AM. U.J. GENDER SOC. POL'Y & L. 535, 556 (2002).

172. See *supra* Part I.C.

173. See *infra* Part II.B-C.

174. See *infra* Part II.B.1

175. See *supra* Part I.B.2.

due diligence in regulating the activities of TNCs where it can be shown that the home state exercises decisive influence over the ability of TNCs to operate in an unregulated manner abroad. The due diligence and decisive influence standards have been shaped and defined by international law jurisprudence. While case law has not applied these standards to the relationship between home states and TNCs, this Part proposes that they may be useful in defining the obligations of home states vis-à-vis their TNCs. We begin with an analysis of the jurisdictional scope of the ICESCR.

A. *Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*

Unlike other human rights treaties, the ICESCR contains no provision specifying its jurisdictional scope of action. As discussed in Part I, effective implementation of the right to food requires that the ICESCR be applied extraterritorially. There are two distinct approaches to expanding the scope of ICESCR beyond a state's territory. The first approach argues that the ICESCR can be applied extraterritorially where a state exercises jurisdiction through "effective control."¹⁷⁶ The second approach argues that, under the obligation of international cooperation, State Parties to the ICESCR must respect and protect social and economic rights extraterritorially regardless of whether jurisdiction is exercised abroad.¹⁷⁷ As explored below, each approach is problematic in its own right. The doctrine of effective control is too restrictive. Situations in which states have been found to exercise effective control are primarily limited to occupation and the exercise of control over armed forces.¹⁷⁸ The obligation of international cooperation suffers from the opposite problem—it is too expansive and ill-defined. Moreover, it does not provide the kind of guidance that a rule of law must provide to enable states to understand and fulfill their obligations.

1. *Extraterritorial Application Where Jurisdiction is Exercised Through "Effective Control"*

Though the ICESCR contains no jurisdictional clause, the ESCR Committee has taken a jurisdictional rather than territorial approach to defining ICESCR obligations. The Committee has noted

176. See *infra* Part II.A.1.

177. See *infra* Part II.A.2.

178. See *infra* Part II.A.1.

that “Every State is obliged to ensure for everyone *under its jurisdiction* access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.”¹⁷⁹ The *Maastricht Guidelines*¹⁸⁰ provide that state responsibility for violations of the ICESCR are in principle imputable to the state within whose jurisdiction they occur.¹⁸¹ Such a view also conforms to judicial interpretations of human rights treaties that do contain a jurisdiction clause. The ICCPR,¹⁸² the American

179. *General Comment 12, supra* note 43, ¶ 14 (emphasis added). The ESCR Committee has consistently used the jurisdiction standard in its comments on rights contained in the ICESCR. See U.N. CESCR, *General Comment 4: The Right to Adequate Housing*, 6th Sess., ¶ 13, U.N. Doc. E/1992/23 (Dec. 13, 1991); U.N. CESCR, *General Comment 13: Implementation of the ICESCR, The Right to Education (Article 13 of the ICESCR)*, 21st Sess., ¶¶ 6(a), (b), U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999); U.N. CESCR, *Substantive Issues Arising in the Implementation of the ICESCR, General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12 of the ICESCR)*, 22d Sess., ¶¶ 12(b), 51, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); *General Comment 15, supra* note 67, ¶¶ 12(c), 31, 44(b), 53; U.N. CESCR, *Implementation of the ICESCR, General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, 17th Sess., ¶ 10, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997); U.N. CESCR, *Substantive Issues Arising in the Implementation of the ICESCR, General Comment 9: The Domestic Application of the Covenant*, 19th Sess., ¶ 9, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998).

180. U.N. ESOCOR, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 24th Sess., at 16, U.N. Doc. E/C.12/2000/13 (Oct. 2, 2000) [hereinafter *Maastricht Guidelines*]. The *Maastricht Guidelines* are an elaboration of the nature and scope of economic, social, and cultural rights violations, responses, and remedies agreed upon by members of the International Commission of Jurists. Though not legally binding, the Guidelines are an influential source of guidance on the implementation of the ICESCR.

181. *Id.* ¶ 16.

182. Article 2(1) of the ICCPR provides that each State party must respect and ensure “all individuals within its territory and subject to its jurisdiction” the rights recognized in the ICCPR. ICCPR, *supra* note 52, art. 2(1). However, the interpretation of the phrase “within its territory and subject to its jurisdiction” has been subject to debate. If territory and jurisdiction are read in conjunction then only people who are within the territory *and* subject to a state’s jurisdiction would be protected. The *travaux préparatoires* to the ICCPR, however, provide for a broader interpretation. See U.N. GAOR, *Annotations on the Text of the Draft International Covenants on Human Rights*, 10th Sess., pt. 2, U.N. Doc. A/2929 (July 1, 1955) (asserting that “a State should not be relieved of its obligations . . . to persons who remained within its jurisdiction merely because they were not within its territory”) [hereinafter *Annotations*]. As a result, legal scholars have adopted the interpretation that the ICCPR requires States Parties to grant protection to individuals within its territory *or* under its jurisdiction, such that a State party must protect individuals within its jurisdiction, regardless of whether they are within its territory. See Theodor Meron, *Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78 (1995); see also U.N. CHR, *General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); *Saldias de Lopez v. Uruguay*, Communication No. 52/1979 (July 29, 1981), at 88, U.N. Doc. CCPR/C/OP/1 (1984) (“It would be unconscionable to so interpret [this provision] as to permit a State party to perpetrate

Convention on Human Rights,¹⁸³ and the European Convention on Human Rights and Fundamental Freedoms all refer to a state's jurisdiction, rather than its territory, in defining the scope of treaty obligation application.¹⁸⁴

It has been recognized that under certain factual circumstances a state can be found to have jurisdiction outside its territory where it exercises "effective control."¹⁸⁵ Occupation and the exercise of control over military or paramilitary forces are often cited as the clearest examples of a state exercising effective control abroad. The extraterritorial application of human rights treaties in such a context has been confirmed by the European Court of Human Rights¹⁸⁶ and the Human Rights Committee in several important cases.¹⁸⁷

In the 1996 case of *Loizidou v. Turkey*, the European Court of Human Rights held that "the concept of 'jurisdiction' under [this provision] is not restricted to the national territory of the Contracting States. . . . [T]he responsibility of a Contracting Party could also arise when . . . it exercises *effective control* of an area outside its national territory."¹⁸⁸ The Court's decision in *Loizidou* became the basis for

violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."); *supra* note 181.

183. Article 1 of the American Convention on Human Rights calls on States Parties to "ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" recognized in the Convention. American Convention on Human Rights, Nov. 22, 1969, 144 U.N.T.S. 123.

184. The European Convention's Article 1 provides that the "High Contracting Parties shall secure to everyone within their jurisdiction" the Convention's rights and freedoms. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

185. See *General Comment No. 31*, *supra* note 182, ¶ 10 ("[A] State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. . . ."); *Comments of the Human Rights Committee: Republic of Bosnia-Herzegovina*, ¶ 4, U.N. Doc. CCPR/C/79/Add.14 (Dec. 28, 1992) (confirming that Republic of Bosnia-Herzegovina is legally responsible for acts in territory over which it had factual and effective control).

186. See *Drozd & Janousek v. France & Spain*, App. No. 12747/87, 14 Eur. H.R. Rep. 745, ¶ 91 (1992).

187. The Human Rights Committee was established to monitor the implementation of the ICCPR and the Protocols to the ICCPR. See U.N. Office of the High Commissioner for Human Rights, Introduction to the Human Rights Comm., available at <http://www.unhchr.ch/html/menu2/6/a/introhrc.htm> (last visited Apr. 25, 2006). In reviewing Iraq's periodic report in July 1991, the Committee noted the "failure of the report to address events in Kuwait after 2 August 1990, given Iraq's clear responsibility under international law for the observance of human rights during its occupation of that country," U.N. HRC, *Report of the Human Rights Committee*, U.N. GAOR, 46th Sess., § 652, U.N. Doc. A/46/40 (Oct. 10, 1991).

188. *Loizidou v. Turkey*, App. No. 15318/8923, Eur. H.R. Rep. 513, ¶ 52 (1996)

holding Turkey responsible for violations that took place on the territory of the Turkish Republic of Northern Cyprus (TRNC) in *Cyprus v. Turkey*.¹⁸⁹ In that case, the Court held that TRNC was within Turkey's jurisdiction under the "effective overall control" test enunciated by the Court in *Loizidou*. The Court stressed that Turkey's responsibility extended to the acts of the local administration,¹⁹⁰ which survived by virtue of Turkey's military and other support.¹⁹¹ In *Bankovic v. Belgium and Others*, the European Court of Human Rights, while affirming that jurisdiction is essentially limited by the sovereign territorial rights of states, concluded that the exercise of extraterritorial jurisdiction can exist when, through *effective control* of a territory, a state "exercises all or some of the public powers normally to be exercised by" the government of that territory.¹⁹²

Moreover, the Inter-American Commission on Human Rights has also accepted state control as the decisive test for the extraterritorial application of the American Convention on Human Rights. In 1999, in the case of *Coard et al. v. United States*, the

(emphasis added). The case involved a landowner in the Republic of Cyprus who claimed that she was denied her property rights by Turkish forces in the area. The Court supported her claim, stating that Turkey was responsible due to its exercise of "effective overall control over that part of the island." *Id.* ¶ 56.

189. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 327.

190. *Loizidou v. Turkey*, App. No. 15318/8923, Eur. H.R. Rep. 513, ¶ 56 (1996)

191. *Id.* ¶¶ 16–17.

192. *Bankovic v. Belgium and Others*, 2001-XII Eur. Ct. H.R. 335. The case was brought against seventeen NATO member states by the relatives of those killed during the NATO bombing of Radio-Television Serbia (RTS) headquarters during the Kosovo conflict. The applicants argued that the bombing of RTS violated Article 2 (right to life), Article 10 (freedom of expression), and Article 13 (right to an effective remedy) of the European Convention on Human Rights. The Court concluded that because NATO states did not exercise "effective control" over the bombed territory, these states did not have jurisdiction over the applicants and their deceased relatives. *Id.* ¶¶ 71–72, 80. Though the *Bankovic* decision addressed human rights obligations under a regional instrument (the European Convention on Human Rights), such that its findings may be limited to the Council of European Member States, the case is included here to illustrate the broader trend in other human rights treaties to extend jurisdiction beyond a state's territory. A similar conclusion was reached by the European Court of Human Rights in the case of *Issa and Others v. Turkey*. *Issa and Others v. Turkey* App. No. 31821/96, 2004 Eur. Ct. H.R. 629. In *Issa*, the Court noted that in exceptional circumstances the acts of contracting states performed outside their territory or which produced effects there might amount to exercise by them of their jurisdiction within the meaning of Article 1 of the European Convention. Thus, a state's responsibility might be engaged where, as a consequence of military action—whether lawful or unlawful—that state in practice exercised effective control of an area situated outside its national territory. *Id.* ¶ 69. The Court further noted that "accountability in such situations stemmed from the fact that art. 1 of the Convention could not be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory." *Id.* ¶ 71.

Commission found that the United States was responsible for human rights violations against people in its custody on Grenada's soil.¹⁹³ Three years later, the Inter-American Commission on Human Rights called on the United States to take precautionary measures towards detainees in Guantánamo Bay. In making the request the Commission noted that the rights "prescribed under the American Declaration of the Rights and Duties of Man, [constitute] a source of legal obligation for all [Organization of American States] member states in respect of persons subject to their authority and control."¹⁹⁴

The cases discussed above deal almost exclusively with violations of civil and political rights. Given that social and economic rights are *interdependent* with civil and political rights,¹⁹⁵ a strong policy argument can be made that a state's ICESCR obligations, like its civil and political rights obligations, should extend beyond its territory to situations where it exercises "effective control." The right to food, for example, is interdependent with civil and political rights such as the right to life, the right to self-determination, and the right to information. Without food the right to life would be rendered meaningless.¹⁹⁶ Similarly, the right to self-determination, as defined by Articles 1 of the ICCPR and ICESCR,¹⁹⁷ is violated when a state permits "the exploitation of the country's food-producing capacity in the exclusive interests of a small part of the population or of foreign (public or private) corporate interests while a large number of the State's inhabitants are starving

193. *Coard et al. v. U.S.*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, ¶ 37 (1999).

194. Inter-Am. C.H.R., *Detainees in Guantánamo Bay, Cuba (Request for Precautionary Measures)* (Mar. 13, 2002), available at <http://www.law.wits.ac.za/humanrts/iachr/guantanamomeasures2002.html>.

195. See generally Craig Scott, *The Interdependence and Permeability of Human Right Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L.J. 769 (1989); see also CHR Res. 2001/30, *Question of the Realization in all Countries of the Economic, Social and Cultural rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems which the Developing Countries Face in their Efforts to Achieve these Human Rights*, ¶ 4(d), U.N. Doc. E/CN.4/RES2001/30 (Apr. 20, 2001) (reaffirming "the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms," and positing that "promoting and protecting one category of rights should therefore never exempt or excuse States from the promotion and protection of other rights").

196. See, e.g., *Kishen Pattanayak & Another v. State of Orissa*, A.I.R. 1989 S.C. 677; *People's Union for Civil Liberties v. Union of India & Ors.* (S.C. 2001), Writ Petition (Civil) No. 196/2001, reprinted in *RIGHT TO FOOD* 48 (Colin Gonsalves ed., 2004); see also *supra* note 59. But see Alston, *supra* note 56, at 24 (summarizing arguments against a broad conceptualization of the right to life).

197. ICCPR, *supra* note 52, art. 1; ICESCR, *supra* note 35, art. 1.

or malnourished.”¹⁹⁸ Additionally, the failure to disclose information about food nutrition, production, and safety are all direct violations of the right to information as articulated in Article 19 of the ICCPR.¹⁹⁹ This symbiotic relationship between civil and political rights, and social and economic rights argues against differential treatment of the two sets of norms.

A 2004 advisory opinion by the International Court of Justice (ICJ) points to a similar conclusion. While not legally binding, the advisory opinion, issued in this case by the highest judicial organ in international law, can provide authoritative interpretation on questions of law.²⁰⁰ In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ addressed whether the ICESCR, which Israel has ratified, applied extraterritorially in the West Bank and the Gaza Strip.²⁰¹ Israel argued against extraterritorial application claiming that the effective control argument was inapplicable to Israel because humanitarian law, rather than human rights law, governed the West Bank and Gaza Strip.²⁰² The ICJ rejected Israel’s argument, holding that “the protection offered by human rights conventions does not cease in the case of armed conflict” and that “the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power.”²⁰³ The Court further held that “[i]n the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights” and “is 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.”²⁰⁴ The Court specifically

198. Alston, *supra* note 56, at 23.

199. The Special Rapporteur on the Right to Food has noted that “[f]ood sovereignty demands the protection of consumer interests, including regulation for food safety that embodies the precautionary principle and the accurate labeling of food and animal feed products for information about content and origins.” *The Right to Food, supra* note 159, ¶ 32; U.N. CHR, *The Right to Adequate Food and to be Free From Hunger: Updated Study on the Right to Food*, 51st Sess., U.N. Doc. E/CN.4/Sub.2/1999/12 (June 28, 1999); Convention on the Rights of the Child, *supra* note 54, art. 24(e) (States Parties must take appropriate measures “[t]o ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition.”).

200. Statute of the International Court of Justice art. 65(1), June 26, 1945, 59 Stat. 1055, T.S. No. 933 [hereinafter ICJ Statute].

201. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, ¶ 1 (July 9).

202. *Id.* ¶ 102.

203. *Id.* ¶¶ 106, 112.

204. *Id.* ¶ 112. The position of the Court is consistent with the position taken by the U.N. Human Rights Committee with respect to the applicability of the ICCPR in the

noted the impact of the wall construction on the right to food but stopped short of imposing a positive obligation on Israel to ensure social and economic rights.²⁰⁵ Instead, the Court restricted its ruling to the so-called negative obligations—the obligations to respect and protect.

Even assuming that the effective control doctrine applies to States Parties' obligations under the ICESCR, ultimately, its utility is extremely limited. Though international human rights jurisprudence tells us that a state can exercise "effective control" in situations of occupation or armed conflict, the majority of extraterritorial violations of the right to food under globalization are committed outside these limited scenarios. For the effective control doctrine to be useful in this regard, it would have to include those situations in which states exercise *effective economic control* over economic policies or markets outside their territories. Using an economic control standard to define the jurisdictional scope of the ICESCR does have some appeal. By their very nature, social and economic rights are more easily violated under globalization's deterioration of economic sovereignty. The same cannot be said of civil and political rights under globalization. Even states that yield some degree of economic control still retain a high level of sovereignty in the civil and political arena.²⁰⁶ One could therefore argue that the jurisdictional scope of the ICESCR should be adapted to reflect erosions and expansions of economic jurisdiction.

Proposing such a provocative departure from current interpretations of jurisdiction under international law raises numerous pressing questions. Chief among them is the question of when states' actions can give rise to the claim that they are exercising economic control. While these questions are beyond the scope of this Article, future research, policy initiatives, and ultimately jurisprudence on

occupied territories. See Human Rights Comm., *Concluding Observations of the Human Rights Committee: Israel*, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003).

205. *Legal Consequences of the Construction of a Wall*, 2004 I.C.J. 131, ¶ 112.

206. Zambia, for example, adhered to strict structural adjustment programs even as the government continued to maintain a stronghold in the area of civil and political rights. Priscilla Jere-Mwiindilila, *The Effects of Structural Adjustment on Women in Zambia*, in FAITH, ECONOMICS AND AFRICA 44 (1994), available at <http://www.warc.ch/pc/rw942/02.html>; cf. U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices 2004: Zambia* (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41633.htm>. A summary of IMF structural adjustment programs shows that states that adopted the programs gave up a certain degree of economic sovereignty. Yet the majority of the listed states routinely resist any foreign interference into their civil and political governance (e.g., Russia, Sudan). See Double Standards, *IMF Structural Adjustment Programs: The Globalization of Poverty, Summary* (Dec. 5, 2005), <http://www.doublestandards.org/sap1.html>.

effective implementation of social and economic rights may benefit from consideration of a state's economic jurisdiction.

2. Extraterritorial Application Under the Obligation of International Cooperation

The obligation of international cooperation with respect to the implementation of the right to food is embodied in Article 2(1) and Article 11 of the ICESCR. Article 2(1) of the ICESCR provides:

Each State Party to the present Covenant undertakes to take steps, individually *and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.²⁰⁷

Article 11(1), articulating the right to adequate food, further provides that "States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."²⁰⁸ Article 11(2) calls on States Parties to take measures, "individually and through international co-operation," to ensure the fundamental right to be free from hunger.²⁰⁹

In its General Comment 12 on the right to adequate food, the ESCR Committee provides guidance on the interpretation of the obligation of international cooperation. The Committee notes that states "should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food."²¹⁰ The Comment provides that "States Parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required."²¹¹ In international agreements, where relevant, States Parties should ensure that the right to adequate food is given due attention. States Parties should also "refrain at all times from food embargoes or similar measures which endanger conditions

207. ICESCR, *supra* note 35, art. 2(1) (emphasis added).

208. *Id.* art. 11(1).

209. *Id.* art. 11(2).

210. *General Comment 12*, *supra* note 43, ¶ 36.

211. *Id.*

for food production and access to food in other countries.”²¹² And finally, food should never be used as an instrument of political and economic pressure. The Committee looks to the “spirit” of Article 56 of the Charter of the United Nations,²¹³ specific provisions contained in Articles 11,²¹⁴ 21, and 23 of the ICESCR,²¹⁵ and the Rome Declaration of the World Food Summit²¹⁶ in reaching its conclusions.²¹⁷

The Committee has also spelled out the content of such international obligations with regard to the right to health²¹⁸ and the right to water.²¹⁹ In all three Comments, the Committee highlights the obligations to respect and protect, or the negative obligations of international cooperation, over the obligation to fulfill. In the right to food context, the Committee does provide, however, that States Parties should “facilitate access to food” and “provide the necessary aid” in other countries when required.²²⁰ At least one commentator has pointed to the ESCR Committee’s General Comment on the nature of States Parties’ obligations (General Comment 3) as evidence of a “duty to fulfill” placed on third-party states.²²¹ The

212. *Id.* ¶ 37.

213. U.N. Charter art. 56, 55(a).

214. For a discussion of Article 11 of the ICESCR, see notes 49–69 and accompanying text.

215. ICESCR, *supra* note 35, art. 23 (stating that international action to achieve the rights included in the ICESCR includes conventions, recommendations, technical assistance, and regional meetings).

216. The Rome Declaration on World Food Security and the World Food Summit Plan of Action were adopted at the end of the 1996 World Food Summit, which brought together nearly 10,000 participants from 185 countries and the European Community. See U.N. FAO, *Rome Declaration on World Food Security* (Nov. 13–17, 1996), available at http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/003/w3613e/w3613e00.htm. The Rome Declaration sets forth commitments that present the basis for achieving sustainable food security. Commitment Seven stresses that governments are required to involve “all elements of civil society,” and the involvement of the international community and the U.N. is recommended. *Id.* ¶¶ 56–57.

217. *General Comment 12, supra* note 43, ¶¶ 36–37; see also *General Comment 3, supra* note 60, ¶¶ 13–14 (stating that international obligations should be seen in connection with Articles 1(3), 55, and 56 of the U.N. Charter).

218. *General Comment 14, supra* note 179, ¶ 39 (“States Parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means . . .”).

219. *General Comment 15, supra* note 67, ¶ 31 (“States Parties have to respect the enjoyment of the right in other countries. International cooperation requires States Parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries.”).

220. *General Comment 12, supra* note 43, ¶ 36.

221. Coomans, *supra* note 167, at 196.

Committee notes that “international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.”²²² The commentator suggests that this statement by the ESCR Committee forms the foundation for the imposition of the “duty to fulfill” on third-party states.²²³

The obligation of international cooperation, as interpreted under the General Comments, gets us on the road to broadening the extraterritorial application of the ICESCR. Still, we encounter the problem that the obligation is ill-defined. Taken to its extreme, the obligation could be interpreted as a general call for the transfer of resources and wealth from rich states to poor states.²²⁴ The articulation of the obligation in a manner that includes a duty to fulfill social and economic rights in other countries may also be met with a great deal of political resistance by states that do not wish to cast their aid-giving in legal obligation terms.²²⁵ A more fruitful approach is to emphasize the obligations to respect and protect economic and social rights extraterritorially and to focus on the vehicles through which extraterritorial violations occur—namely IFIs and TNCs. Ensuring that States Parties’ obligations extend to their relationship with these actors may be the most effective means of establishing extraterritorial application of the ICESCR in theory and in practice.

222. *General Comment 3*, *supra* note 60, ¶ 14; Coomans, *supra* note 167, at 196.

223. Coomans, *supra* note 167, at 196.

224. See, e.g., United Nations Development Programme, Human Development Report 2003, ch. 8 (Sakiko Fukunda-Parr ed., 2003), available at http://hdr.undp.org/reports/global/2003/pdf/hdr03_frontmatter.pdf.

225. There are numerous examples of such statements by U.S. representatives on economic, social, and cultural rights generally, and on the right to food in particular. See, e.g., Remarks by Marc Leland, Public Delegate to the 60th U.N. Comm’n on Hum. Rts. (Mar. 29, 2004), available at <http://www.humanrights-usa.net/2004/statements/0329Leland.htm> (“The progressive realization of economic, social and cultural rights will not be achieved through shifting blame from a country’s government to the international community”); Explanation of Vote on the Resolution on the Right to Food by Jeffrey de Laurentis (Apr. 16, 2004), available at <http://www.humanrights-usa.net/2004/statements/0421Food.htm> (“The attainment of [the right to adequate food as a component of the right to an adequate standard of living] is a goal or aspiration to be realized progressively—it does not give rise to international obligations or domestic legal entitlements, nor does it diminish the responsibilities of national governments toward their citizens.”).

B. *Holding International Financial Institutions Accountable Via the State*

Both the World Bank and the IMF are essentially *multi-state* actors. They are comprised of member states, many of which have ratified the ICESCR. Legal scholarship on these IFIs often mischaracterizes them as non-state actors,²²⁶ implying that they are not subjects of international human rights law. In reality, their status as multi-state actors can provide a basis for subjecting them to the requirements of international human rights law through the many member states that have ratified human rights treaties. Because the obligations imposed on these institutions are indirect (they are imposed via their member states), it is important to consider how such obligations can better inform member states' participation in, and influence over, IFI decision-making.

The *Maastricht Guidelines* provide that States Parties' duty to protect extends to their "participation in international organizations, where they act collectively."²²⁷ They provide that states should "use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members."²²⁸ International organizations, including international financial institutions, are further called upon to "correct their policies so that they do not result in deprivation of economic, social and cultural rights"²²⁹ and should take these rights into account when policies and programs are "implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights."²³⁰

The Guidelines raise key questions that must be answered in order to assign states extraterritorial obligations to respect the right to food: Do member states exert sufficient influence within IFIs such that they can use their influence to ensure that violations do not result from IFI programs and policies? And how can the right to food be taken into account in the design of policies and programs? Both questions are addressed below. For the purpose of our analysis we will focus on the IMF and to a lesser extent the World Bank.

226. See generally Eric Allen Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIPIAC L. REV. 23 (2004); Thomas M. McDonnell et al., *Human Rights and Non-State Actors*, 11 PACE INT'L L. REV. 205 (1999).

227. *Maastricht Guidelines*, *supra* note 180, ¶ 19.

228. *Id.*

229. *Id.*

230. *Id.*

1. The Relative Influence of IFI Member States

Both the World Bank and the IMF are composed of and driven by signatory states. The World Bank is made up of 184 member countries, which are jointly responsible for how the institution is financed and how its money is spent.²³¹ The IMF is also made up of the same 184 member countries, which are jointly responsible for the IMF's functions.²³² Still, some member countries have much more influence than others.

The voting power of IMF member states is based on their subscriptions (quotas).²³³ The United States holds about seventeen percent of the total voting power.²³⁴ Collectively, rich countries currently control over sixty percent of the votes.²³⁵ As a result, the United States can veto decisions requiring a super-majority (eighty-five percent of the vote).²³⁶ Similarly, a coalition of industrial countries can veto decisions that require a seventy percent majority or even a simple majority (fifty-one percent of the vote).²³⁷ Conversely, the forty-six sub-Saharan African countries, many of which are also borrowing countries, have only 4.4% of the total voting power.²³⁸ The IMF asserts that apportionment of voting power must reflect member states' financial shares to ensure that creditor nations continue to contribute to the fund, and maintains that most decisions are in fact made by consensus so that all states have an opportunity to be heard.²³⁹ Critics point out that such informal voting still allows large vote holders to exert considerable influence over discussions and that informal proceedings reduce the transparency of IMF operations.²⁴⁰

The disproportionate influence of rich states within IFIs is also borne out by empirical research analyzing the pattern of lending

231. Both the World Bank and the IMF came out of the Bretton Woods Agreement of 1944. To become part of the World Bank, countries must first be admitted to the IMF. See Ricardo Faini & Enzo Grilli, *Who Runs the IFIs?* 7 (Centre for Economic and Policy Research, Discussion Paper No. 4666, 2004), available at <http://www.cepr.org/pubs/new-dps/showdp.asp?dpno=4666>.

232. *Id.*

233. Quotas are shares in the Fund capital. IFI Watchnet, *Reality Bites: A Rebuttal of the IMF's "Common Criticism: Some Responses"* § 5.1 (Sept. 2003), available at <http://ifiwatchnet.org/doc/realitybites.pdf>.

234. *Id.*

235. *Id.* § 5.2.

236. Decisions on matters of capital expansion require a super-majority. *Id.* § 5.1.

237. *Id.*

238. *Id.* §§ 5.1–5.2.

239. *Id.* § 5.1.

240. See *id.* §§ 5.1–5.3; Faini & Grilli, *supra* note 232, at 4.

of both the World Bank and the IMF as a function of the interests of their large shareholders. In a discussion paper titled "Who Runs the IFIs?," the Centre for Economic Policy Research concludes that the lending pattern of both institutions "is influenced by the commercial and the financial interests of the U.S. and, to a lesser extent, of the E.U."²⁴¹ Many lending decisions are political in nature, responding to the national interests of one or several large shareholders "who can mass enough support from the others to carry them through or to block them."²⁴² An informal power sharing agreement between Europe and the United States also determines the nationality of the heads of the two institutions. The Managing Director of the IMF is always a European, while the President of the World Bank is always an American.²⁴³ Maintaining a certain national in these influential positions "is in itself an indicator of influence."²⁴⁴ In particular, the research highlights the influence, through the top management of both institutions, of the United States (the largest shareholder), the United Kingdom, France and, more recently, Germany. The Executive Directors of each of these countries are particularly influential inside the two Boards. In addition, the U.S. Treasury has "been able to exert a relatively stronger day to day monitoring and 'control' over both organizations because of its locational advantage."²⁴⁵

The substantial influence of powerful states within the IMF suggests that they are capable of influencing the organization to act in accordance with international law, as suggested by the *Maastricht Guidelines*. Their influence also undermines the IMF's assertion that it negotiates rather than dictates the terms of a loan agreement. Countries seeking IMF assistance are often in desperate need of funds. Their desperation weakens their negotiating position. As a result, the balance of power lies with the IMF.²⁴⁶ As a self-proclaimed lender of last resort,²⁴⁷ the IMF too recognizes and capitalizes on its ability to impose specific economic reforms. Like any banker, the IMF should in principle be allowed to impose conditions on borrowers that make it more likely that the loan will be

241. Faini & Grilli, *supra* note 232, at abstract. The researchers add that Japan's role is "smaller and more regional, being largely confined to decisions concerning Asia." *Id.* at 21.

242. *Id.* at 5.

243. *Id.* at 6; STIGLITZ, *supra* note 88, at 19.

244. Faini & Grilli, *supra* note 232, at 6.

245. *Id.* at 10.

246. STIGLITZ, *supra* note 88, at 42.

247. See IMF, *Common Criticisms of the IMF: Some Responses*, available at <http://www.imf.org/external/np/exr/ccrit/eng/crans.htm> (Feb. 16, 2006) [hereinafter *Common Criticisms*].

repaid. But critics point out that the conditionality imposed by the IMF, and in some cases the World Bank, may reduce the likelihood of repayment.²⁴⁸ Moreover, in many instances, the problem is not that rulers of borrowing governments have no control vis-à-vis the IMF, but rather that they have no accountability to their own citizens, allowing them to implement only those reforms that favor members of the ruling elite.²⁴⁹ As discussed further below, conditionality can be imposed in a manner that safeguards human rights, such as the right to food, and with the active participation of those most affected by the reforms.

2. The Human Rights Obligations of IFI Member States

Commentators have argued that institutions such as the World Bank and the IMF have international personalities, and as such, have rights and duties under international law that are separate from and in addition to the duties of their member states.²⁵⁰ Even assuming this to be true, the World Bank and the IMF would not be bound by the provisions of the ICESCR (the central document affirming the right to food) or other treaties since those documents focus solely on the responsibility of the state. However, these institutions would arguably be bound by the terms of customary international law.²⁵¹ For an analysis of whether the right to food has achieved the status of customary international law, see Part III.

A more direct approach may be to address the human rights obligations of IFI member states. As described above, IFIs are the

248. STIGLITZ, *supra* note 88, at 44–46.

249. VAN DE WALLE, *supra* note 32, at 48; *see generally* Adam Przeworski & James Raymond Vreeland, *The Effect of IMF Programs on Economic Growth*, 62 J. DEV. ECON. 403 (2000) (arguing that governments facing economic crises enter into agreements with the IMF either to gain access to needed foreign reserve or to rely on the agreement as a means to gain necessary political leverage to impose unpopular austerity measures).

250. *See, e.g.*, Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527, 560 (2002); Skogly, *supra* note 90, at 134 (asserting that the World Bank has an international personality); Daniel Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47, 51 (1996) (stating that the World Bank is a subject of international law because it is an international organization and, therefore, cannot violate customary international law); Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 323, 325 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999) (stating that the Bank may have legal obligations of consultation deriving from the Bank's constitutive documents and legal relations with its member states).

251. *See The Right to Food, supra* note 159, ¶¶ 37–38.