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An Agricultural Law Research Article

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

Part 2

by

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sum of their parts, and the parts consist of member states, some with more influence than others. Member states do not leave their human rights obligations at the door when entering these corridors of power.[252] All European Union countries have ratified the ICESCR and are obligated to comply with its provisions.[253] Japan, which plays an influential role in lending to Asian countries, has also ratified the ICESCR.[254] Notably, the United States has not. It has, however, signed the ICESCR.[255] On a technical reading, it must therefore still refrain from taking action that would go against the object and purpose of the treaty.[256] When the World Bank or the IMF disregard or violate human rights, it reflects the failure of these member states to abide by their international human rights obligations. The World Bank's Senior Counsel agrees insofar as he states that the Bank must account for its members' treaty obligations:

> Because governments are the owners of the institutions like the World Bank, and are bound to comply with the treaties they have ratified, multilateral financial institutions must be careful to ensure that if these treaties are implicated in their projects, the treaties are appropriately taken into account in project design and finance.[257]

The notion that states can be held responsible for implementing international agreements that violate their international human rights obligations is not new to international law. As early as

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252. *See General Comment 8*, *supra* note 179, ¶¶ 11–14 (describing the human rights obligations of a party or parties responsible for the imposition of sanctions, be they a state, a group of states, the international community or an international or regional organization).

253. For example, the United Kingdom ratified the ICESCR on August 20, 1976; Germany ratified the ICESCR on January 3, 1976; France ratified the ICESCR on February 4, 1982. OFFICE OF THE U.N. HIGH COMM. FOR HUM. RTS, *supra* note 77, at 5, 11.

254. Japan ratified the ICESCR on September 21, 1979. *Id.* at 6.

255. The United States signed the ICESCR on October 5, 1977. *Id.* at 11.

256. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. For such a doctrine to be controlling in the context of U.S. participation in IFIs, it would have to be shown that international cooperation is central to the object and purpose of the ICESCR. As noted above, the critical role of international cooperation has repeatedly been affirmed by the ESCR Committee in its interpretation of States Parties' obligations under the ICESCR. Moreover, under economic globalization, effective implementation of the ICESCR is greatly undermined without some degree of international cooperation. Still, concrete conclusions in this regard are likely premature. As a result, the problem of the non-ratifying state must be confronted on multiple fronts. As explored in Part III, the obligations of non-ratifying states can also be addressed by locating the right to food in customary international law. For a discussion of U.S. state practice and opinio juris on the right to food, see *infra* Part III.D.

257. Charles E. Di Leva, *International Environmental Law and Development*, 10 GEO. INT'L ENVTL. L. REV. 501, 501–02 (1998).

1958, the European Commission on Human Rights observed that if a State party to the European Convention on Human Rights (ECHR) concludes an international agreement that disables it from performing its functions under the ECHR, it will be answerable for any resultant breach of its Convention obligations.[258] In *X & X v. F.R.G.*, the Commission held that "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty."[259] In other words, earlier human rights treaty obligations must prevail over inconsistent agreements entered into at a later stage.

A similar line of reasoning was taken by the European Commission in the 1990 case of *M & Co. v. F.R.G.* which also addressed a state's obligation under the ECHR. The Commission stated:

> Under Article 1 of the Convention the Member States are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations.[260]

Citing with approval *X & X v. F.R.G.*, the Commission added that while states may transfer power to an international organization, "a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers."[261] Accordingly, the Commission concluded that "the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection."[262]

In 1999, the European Court of Human Rights reaffirmed this doctrine and held in *Matthews v. the U.K.*, that "[t]he Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured.' Member States' responsibility therefore continues even

258. X & X v. F.R.G., 1958 Y.B. Eur. Conv. on H.R. 256, 300 (Eur. Comm'n on H.R.).

259. *Id.*

260. M & Co. v. F.R.G., 1990 Y.B. Eur. Conv. on H.R. 51 (Eur. Comm'n on H.R.).

261. *Id.*

262. *Id.* In other words, fundamental rights must continue to be protected within such an organization.

after such a transfer."[263] Whether such a doctrine implicates the collective responsibility of all member states (in this case EU Member States) to ensure that ECHR rights are secured is as yet unresolved. A review of a number of cases before the European Court of Justice and the European Court of Human Rights on these issues has led at least one commentator to conclude that case law in this area is unsettled: "An unambiguous doctrine of 'Member State responsibility' is yet to be developed. But the trend in the Court's case-law is clear: at the very least a State is responsible where its own authorities, in implementing EU law, violate the ECHR."[264]

Such a reading mirrors the normative guidance on States Parties' obligations under the ICESCR. Where a State Party enters an agreement with an international financial institution that undermines its ability to respect, protect, and fulfill the right to food, it will be held responsible for breaches of its obligations.[265] The thornier question is raised by the as yet unsettled question of Member States responsibility which would provide that IMF member states must ensure that ICESCR rights continue to be secured when they act as a collective to shape the economic policies of weaker states. If we define the obligation of international cooperation to mean that States Parties must respect and protect the right to food extraterritorially, then such obligation could be applied to a state's participation in IFIs.

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263. Matthews v. U.K., 1999-I Eur. Ct. H.R. 251, ¶ 32.

264. Rick Lawson, *The Contribution of the Agency to the Implementation in the EU of International and European Human Rights Instruments*, *in* MONITORING FUNDAMENTAL RIGHTS IN THE EU: THE CONTRIBUTION OF THE FUNDAMENTAL RIGHTS AGENCY 243 (Philip Alston & Olivier De Schutter eds., 2005).

265. Such an interpretation is consistent with the *Maastricht Guidelines*, which provide that violations under the ICESCR can occur when a state fails to "take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations." *Maastricht Guidelines*, *supra* note 180, § 15(j). It is also consistent with the argument that ensuring the fulfillment of the right to be free from hunger constitutes an *erga omnes* obligation that is incumbent upon all States Parties to the ICCPR and the ICESCR. The Human Rights Committee has emphasized that, "[E]very State Party has a legal interest in the performance by every other State Party of its obligations." U.N. CHR, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 2, CCPR/C/74/CRP.4/Rev.6 (Mar. 29, 2004). While the jurisdiction of the HRC relates to the ICCPR and the specific interpretation refers to the implementation of Article 2 of the Convention (non-discrimination), the argument here of an *erga omnes* obligation to help other states to realize their human rights commitments is based on a reading of the U.N. Charter and is, therefore, arguably broader. Consequently, States Parties' obligations extend not only to individuals within their jurisdictions but also, at a minimum, to ensuring that their actions, either unilaterally or multilaterally, do not negatively impact the realization of human rights for individuals in other jurisdictions.

3. Respecting and Protecting the Right to Food under IFI Agreements

In 1998 the ESCR Committee called upon the IMF and the World Bank "to pay enhanced attention in their activities to respect for economic, social and cultural rights."[266] In addition, the Committee has specifically noted that "international financial institutions, notably the IMF and the World Bank, should pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the debt crisis."[267] As described below, IFIs can move closer to the goal of respecting and protecting the right to food by recognizing the importance of safety nets, by focusing not only on processes, but on outcomes, and by giving developing countries greater freedom to comply with their international human rights obligations.

A close examination of the right to food in the ICESCR suggests that market-based economic reform and respect for the right to food need not be in conflict. As noted earlier, Article 11(2) of the ICESCR calls on States Parties to undertake measures, individually and through international cooperation, to improve methods of production, conservation and distribution of food by, inter alia, developing or reforming agrarian systems to achieve the most efficient development and utilization of natural resources.[268] The General Comment of the ESCR Committee adds that States Parties must ensure the *availability* and *accessibility* of adequate food.[269] Availability refers to "the possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand."[270] A careful reading of these Covenant obligations suggests that governments must institute agricultural and market reforms that lead to greater access to adequate food. Economic reforms that lend themselves to such outcomes are therefore consistent with a rights-based approach to food security, as discussed in the introduction to this Article.

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266. U.N. CESCR, *Statement on Globalization and Economic, Social and Cultural Rights*, 18th Sess. (May 11, 1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/adc44375895aa10d8025668f003cc06e?Opendocument.

267. *General Comment 12*, *supra* note 43, ¶ 41.

268. ICESCR, *supra* note 35, art. 11(2).

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

270. *Id.* ¶ 12.

Nonetheless, the question of whether IMF prescriptions exacerbate or abate food insecurity remains. As discussed above, much has been written about the effect of IMF policies on economic growth,[271] poverty, and food security. Part of the critique has centered on accusations that IMF-supported programs (and IMF bailouts) are designed to favor foreign investors rather than local populations.[272] The IMF has responded to critics by noting that its policies are designed to restore investor confidence and attract foreign capital that is essential for economic growth and employment.[273] Supporters of a free market approach to alleviating food insecurity also emphasize the need to reduce inefficiencies that result from government involvement in the food market, such as regulation of food prices, over-valued exchange rates, and government-run marketing boards.[274]

Even if the free market approach is correct, respect for the right to food requires institutionalizing safety nets to ensure that the vulnerable are protected during a transition to liberalized agricultural markets, and setting up monitoring systems to measure the impact of such policies on the population's right to food. IFIs themselves have begun to recognize the importance of social safety nets when programs call for cuts in government spending. Similarly, ensuring that safety nets are in place before privatization of government sectors takes place is critical to mitigating the negative effects of privatization described above. Notable economists have also concluded that social safety nets are essential to cushion the transition during economic reforms.[275] As one author notes:

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271. *See generally* STIGLITZ, *supra* note 88; Mark Weisbrot et al., *Growth May Be Good for the Poor—But are IMF and World Bank Policies Good for Growth?: A Closer Look at the World Bank's Most Recent Defense of Its Policies* (Centre for Econ. & Pol'y Res., 2000), *available at* http://www.cepr.net/response_to_dollar_kraay.htm.

272. IFI Watchnet, *supra* note 233, § 2.2.

273. *See Common Criticisms*, *supra* note 247 (noting that countries "come to the IMF when, through some combination of bad luck and bad policies, they have already run into deep financial difficulties").

274. *See* 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).

275. *See, e.g.*, SACHS, *supra* note 12, at 115 (arguing that "social safety nets, such as pensions, health care, and other benefits for the elderly and the poor, are needed to cushion the transition to a market economy"); *see also* Amartya Sen, *A Plan for Asia's Growth: Build on Much that is Good in the "Eastern Strategy,"* ASIA WEEK.COM, Vol. 25, No. 40 (Oct. 8, 1999), *available at* http://www.pathfinder.com/asiaweek/magazine/99/1008/viewpoint.html (arguing that arrangements for social safety nets are a form of "protective security" and an important instrumental freedom).

> [The b]uilding of an economic "pie" is a necessary but not sufficient condition for food security. Transfers must occur between "haves" and "have nots" to provide food security but without a pie there is nothing to transfer. . . . The public safety net is for those unable to depend on themselves, the market, family, or other private sources for sustenance. Landless peasants, smallholders, and urban poor are especially vulnerable. Options include targeted humanitarian food assistance and food for work.[276]

Providing food directly to hunger-stricken populations will not solve their long-term problems, but it will save lives in the interim as economic development takes hold. A case study from Argentina provides an example of the importance of maintaining safety nets. In 1998, the Argentine government obtained a World Bank structural adjustment loan of roughly $2.5 billion in order to avoid currency devaluation.[277] The government was required to drastically reduce fiscal expenditure as a requirement of the loan. A social clause in the agreement, however, mandated that the government maintain a safety net of social programs worth about $680 million.[278] The Garden or Pro-Huerta Program was among these social programs. With an annual budget of roughly $11 million it assisted nearly three million people in achieving self-sufficient food production through seed distribution and technical assistance.[279] During the 1999 national elections, the government reallocated funds from the Garden Program to fund projects in areas where it needed votes. As a result, the budget of the Program was cut from $11 million to $4 million.[280]

Program recipients began organizing themselves in protest and eventually approached the Centro de Estudios Legales y Sociales (CELS or Center for Legal and Social Studies) for assistance. CELS, a non-governmental organization (NGO), brought the situation to the attention of the World Bank's Inspection Panel.[281] While the NGO

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276. Tweeten, *supra* note 24, at 8.

277. Victor Abramovich, *World Bank Inspection Panel: Challenging Structural Adjustment Programmes*, *in* LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ACHIEVEMENTS, CHALLENGES AND STRATEGIES 172 (Centre on Housing Rights and Evictions, 2003), *available at* http://www.cohre.org/library/Litigating%20ESCR%20Report.pdf.

278. *Id.*

279. *Id.*

280. *Id.*

281. The Inspection Panel was established by the Executive Directors of the World Bank in 1993. Its primary purpose is to address the concerns of those affected by Bank

invoked the right to food, its central argument was that the Bank management's lack of supervision failed to ensure compliance with the loan's social clause.[282] This complaint and the accompanying mobilization surrounding the case placed significant pressure on Bank management, which in turn pressured the government to restore full funding to the Program.[283]

Focusing on safety nets, as a preliminary step, may be productive for a variety of reasons. In response to critiques of the impact of IFI policies on the poor, both the IMF and the World Bank now increasingly make provisions for social safety nets to cushion the impact of financial crises through continued spending on certain social services.[284] Moreover, the detrimental impact of eliminating certain public programs on the right to food is much clearer and far less controversial than the complex causation issues surrounding other IMF economic prescriptions.

Social safety nets alone, however, will not solve the broader problem of the impact of IFI policies on the right to food. First, social safety nets are not immune from being cut. Second, the privatization of state-owned enterprises often kicks in before safety nets are properly functioning. And third, even where they function properly, they do not adequately compensate for the failure of various IMF policies to generate employment and increase income.[285]

Broader consideration must therefore be given to the impact of liberalization and other IFI policies on the right to food.

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projects and to ensure that the Bank adheres to its operational policies and procedures in the design, preparation, and implementation of its projects. The Panel consists of three members who are appointed by the Board for five-year periods. For more information, see The Inspection Panel, http://www.inspectionpanel.org.

282. The Bank's initial response to a complaint from CELS was that it could not dictate how much money should be put into a specific program. CELS responded that the Garden Program was part of the original package of programs that the Bank itself concluded would be disproportionately affected by the structural adjustment plan. CELS further argued that the budget cut affected the viability of the program and that its elimination violated the country's poverty reduction strategy. Abramovich, *supra* note 277, at 172.

283. *Id.*

284. *See Common Criticisms*, *supra* note 247.

285. IFI Watchnet, *supra* note 233, § 1.3. A 2003 report by the international human rights NGO Foodfirst Information and Action Network (FIAN International) claims that structural adjustment programs pursued by the World Bank and the IMF in Argentina had a "devastating effect" on employment levels in the country which in turn had a corresponding negative impact on people's right to food. FIAN, RIGHT TO FOOD IN ARGENTINA: REPORT OF THE INTERNATIONAL FACT FINDING MISSION TO ARGENTINA 21 (Apr. 2003), *available at* http://www.eed.de/dyn/download?entry=page.en.pub.en.11; *see also* U.N. OHCHR, HUMAN RIGHTS AND POVERTY REDUCTION: A CONCEPTUAL FRAMEWORK, U.N. Doc. HR/PUB/04/1 (2004), available at http://www.ohchr.org/english/issues/poverty/docs/povertyE.pdf.

Fundamentally, this may require a shift from the IMF's standardized and process-oriented approach, to a tailored outcomes-oriented approach. Critics have charged that the IMF does not undertake a differential diagnosis specific to country conditions and instead offers standardized advice relating to budget cuts, trade liberalization, and privatization of state-owned enterprises without due regard to the specific context. The IMF has, for example, overlooked problems related to climate, disease, cultural conditions, and agronomy.[286] A country's performance is also often judged by whether or not it carries out IFI advice and not by whether or not it has achieved particular development objectives, such as poverty reduction. As a result, "the debate rarely centers on whether or not a policy is correct, but whether the policy was carried out."[287] There remains a need for providing developing country governments, as well as parliamentarians and civil society stakeholders, with a greater degree of ownership and control over the policy recommendations arrived at through the PRSP processes.[288] Furthermore, there should be greater emphasis on the use of outcome indicators related to poverty reduction, with consideration given to conditionality based on progress towards achieving outcomes.[289]

The ESCR Committee notes that ensuring accessibility to adequate food implies that:

> personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. . . . Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.[290]

The Committee's reading of Covenant obligations speaks to keeping the cost of food at a level that does not infringe on other rights (such that households do not have to forgo other basic needs in order to have sufficient food) and instituting special programs to address the needs of particularly impoverished sections of the population. Controlling for sudden price hikes resulting from the removal of food

286. SACHS, *supra* note 12, at 76, 79, 83.

287. *Id.* at 80.

288. Hetty Kovach, *Loosening the Leash?* 4–5 (Enrodad Policy Briefing, 2005) *available at* http://www.eurodad.org/uploadstore/cms/docs/Microsoft_Word_Eurodad_Policy_Briefing_on_World_Bank_Conditionality_Review.pdf.

289. *See id.* at 9.

290. *General Comment 12*, *supra* note 43, ¶ 13.

subsidies and price controls would therefore have to be addressed, either through a revision of these strategies or through special programs geared toward affected populations.

As detailed above, economic reforms can be instituted in a manner that protects vulnerable populations in the short term, and helps ensure that they are not bypassed by economic progress in the long run. Emphasizing IFI member states' obligations to respect and protect the right to food extraterritorially also gives borrowing countries greater autonomy to fashion their economic policies in line with their social and economic rights obligations.

C. *Holding Transnational Corporations Accountable Via the State*

The liberalization of trade and the privatization and deregulation of economies have substantially reduced the state's influence over the daily economic lives of its citizens. The so-called "decline of the nation State" is accompanied by the rise of another powerful actor—the TNC.[291] As described in Part I, TNCs can have an immense impact on the production, trade, processing, marketing, and retailing of food. They can, for example, determine the types of food produced, the technologies associated with that production, and the prices at which such resources are made available to local sectors. In essence, TNCs shift the focus away from meeting the needs and requirements of the local population and toward profit-maximization.[292] Environmental disasters and water pollution caused by TNCs can also threaten the right to food.[293]

Imposing social and economic rights obligations on TNCs presents a significant and unmet challenge. As explored in Part I, human rights law organizes itself around the relationship between a state and the individuals under the state's jurisdiction. As such it does not provide a viable mechanism for holding TNCs directly accountable. International legal accountability for TNCs remains virtually nonexistent.[294] While legal regulation of domestic

291. Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, *in* THE EU AND HUMAN RIGHTS 553 (Philip Alston ed., 1999).

292. *See* Ziegler Report II, *supra* note 148, ¶ 37 (discussing tendency of TNCs to invest in cash crops rather than crops important to the food security of the poor); U.N. CHR, *The Right to Food: Note by the Secretary-General*, U.N. GAOR, 58th Sess., ¶ 31, U.N. Doc. A/58/330 (Aug. 28, 2003) (*prepared by* Jean Ziegler) [hereinafter Ziegler Report III].

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

294. For a comprehensive framework proposal for imposing international obligations on

corporate activity affecting human rights is becoming commonplace,[295] by and large these laws do not apply to the extraterritorial operations of TNCs.[296] Private sector initiatives aimed at creating mechanisms of corporate accountability remain limited in scope and are self-regulating.[297] To the extent that international human rights law holds a state responsible for the actions of TNCs, such responsibility normally attaches to the host state.[298] Economic arrangements between the host state and the TNC may, however, restrict the ability of the host state to regulate the TNC in practical and legal terms.[299] Meanwhile, the responsibility of home states—that provide extensive political and financial support to TNCs that violate the right to food abroad—remains largely unaddressed. This section proposes home state accountability where the home state exercises *decisive influence* over the ability of TNCs to operate in an unregulated manner abroad.

1. Current Mechanisms to Hold TNCs Directly Accountable

a. "Soft Law"

The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, adopted by the Sub-Commission on the Promotion and

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TNCs, *see generally* Kinley & Tadaki, *supra* note 142. TNC duties vis-à-vis the right to food remain largely unaddressed by Kinley and Tadaki in their article.

295. *See generally* David Kinley, *Human Rights as Legally Binding or Merely Relevant?*, *in* COMMERCIAL LAW AND HUMAN RIGHTS 25 (Stephen Bottomley & David Kinley eds., 2002) (stating that legal regulation of corporate activity affecting human rights can be found in areas such as criminal law, and in anti-discrimination, health, work safety, environmental protection, and labor rights laws).

296. Kinley & Tadaki, *supra* note 142, at 937–39.

297. On a regional level, both the European Union (EU) and the Organization of American States (OAS) have taken steps toward regulating the conduct of TNCs, although they too are inadequate in ensuring the right to food. The EU has developed a Code of Conduct, which is directed at states and focuses exclusively on arms exports. *See* Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L L. J. 89, 126–29 (2001); *see also* Federation of American Scientists, *Arms Transfers Codes of Conduct*, http://www.fas.org/asmp/campaigns/codecon.html (last visited Apr. 25, 2006). The OAS created the Inter-American Convention Against Corruption, which criminalizes acts of bribery. Inter-American Convention Against Corruption, 3d plen. Sess. (Mar. 29, 1996), *available at* http://www.oas.org/juridico/English/Treaties/b-58.html. However, the Convention is narrow in scope and is not self-executing, and even ratifying countries have not taken any steps towards its implementation. *See* Baker, *supra* note 297, at 128–29.

298. *See infra* Part II.C.2.

299. *Id.*

Protection of Human Rights (Norms)[300] are, to date, the clearest articulation of TNCs' affirmative obligation (within their spheres of activity and influence) to promote, respect, and protect "human rights recognized in international as well as national law."[301] TNCs are called upon to respect economic, social and cultural rights, including "the rights to development, adequate food and drinking water,"[302] and to "refrain from actions which obstruct or impede the realization of those rights."[303] The Norms, however, are nonbinding and have yet to be adopted by the Commission on Human Rights.[304]

The Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the U.N. General Assembly in March 1999, states that private actors have an "important role and responsibility . . . in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized."[305] It too is nonbinding.[306]

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300. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Subcomm'n on the Promotion and Protection of Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (Aug 26, 2003).

301. *Id.* ¶ 1.

302. *Id.* ¶ 12.

303. *Id.*

304. The resolution on the Norms has yet to be adopted by the U.N. Commission on Human Rights. Major business lobby groups (such as the International Chamber of Commerce, the International Organization of Employers, and the U.S. International Business Council) have specifically opposed the Norms, arguing that they conflict with the voluntary nature of existing approaches to corporate social responsibility. *See, e.g.*, CSR Europe, *Background Note: United Nations Norms on the Responsibility of Transnational Companies*, http://www.csreurope.org/UNnormsbriefingsheet_pdf_media_public.aspx (last visited Apr. 25, 2006); *see also* U.N. CHR, *The Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights: Report of the U.N. High Commissioner for Human Rights* (Mar. 2005), http://www.ohchr.org/english/issues/globalization/business/reportbusiness.htm.

305. U.N. CHR, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* art. 18, ¶ 2, 53d Sess., 85th plen. Mtg., Supp. No. 49, U.N. Doc. A/RES/53/144 (Mar. 8, 1999).

306. Additionally, in 1996 the U.N. General Assembly adopted a Code of Conduct for Public Officials, also a nonbinding document. *See* Baker, *supra* note 297, at 126–27; *see also* Erin L. Borg, Note, *Sharing the Blame for September Eleventh: The Case for a New Law to Regulate the Activities of American Corporations Abroad*, 20 ARIZ. J. INT'L & COMP. LAW 607, 628–29 (2003). Subsequently, the U.N. Commission on Transnational Corporations drafted a Code of Conduct for Transnational Corporations in 1998; the Code

Other "soft law" attempts at TNC regulation are also non-binding and ultimately inadequate. The U.N. Global Compact, implemented in 1999, includes principles that call on corporations to respect workers' rights and human rights, counter corruption, and practice environmental responsibility.[307] Corporations that sign on to the Global Compact are allowed to brand their products with the U.N. logo, signifying their compliance with the Global Compact Principles. Compliance in this case requires simply that the TNC post on a U.N. website the steps that it is taking to comply with the Principles,[308] making it possible for a company to formally comply with the Principles without taking any actual steps to protect human rights.

The Organization for Economic Co-operation and Development's (OECD) 1976 Guidelines for Multinational Enterprises (revised in 2000) call on enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."[309] The Guidelines focus on labor laws, environmental protections, combating bribery, protecting consumer interests, issues related to competition and taxation, and the development of science and technology. The ILO's 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy urges governments of member states, corporations operating in their territories, and employers' and workers' organizations to respect the UDHR, its corresponding international covenants, and core labor-related rights.[310] While the Guidelines and the Declaration address TNCs directly, they too are nonbinding and lacking in sufficient monitoring mechanisms. As a result, host states are free to adopt

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was never adopted.

307. United Nations, *U.N. Global Compact*, princs. 3–6 (labor rights), princs. 1, 2 (human rights), princs. 7–9 (environment), princ. 10 (corruption) (Jul. 26, 2000), http://www.unglobalcompact.org.

308. *See* United Nations, *U.N. Global Compact: Policy on the Use of Global Compact Name and Logos*, http://www.unglobalcompact.org/AboutTheGC/gc_logo_policy.html; *see also* Meaghan Shaughnessy, *Human Rights and the Environment: The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y, 159 (2000); William H. Meyer & Boyka Stefanova, Symposium, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501 (2001).

309. OECD, The OECD Guidelines for Multinational Enterprises 29 (June 2000), *available at* http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html.

310. ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 204th Sess., 83 I.L.O. Official Bull. (2000), *available at* http://www.ilo.org/public/english/standards/norm/sources/mne.htm.

(and TNCs can take advantage of) lax environmental and labor standards.[311]

b. Codes of Conduct

Voluntary codes of corporate conduct introduced by numerous corporations also appear to do little to secure TNC respect for fundamental human rights. A sampling of codes reveals a general lack of consistency.[312] Common to many codes, however, is a focus on employment practices and the protection of labor rights.[313] NGOs have also attempted to influence TNC behavior through certification programs.[314] These too are largely restricted in scope to labor and environmental practices.[315]

While codes of conduct and certification programs remain relevant to the fulfillment of the right to food (adequate wages translate into better access to food while protecting the environment guards water supplies and agricultural land), these programs are self-regulating; compliance cannot be ensured. Public pressure to enact voluntary codes of conduct tends to affect only the most prominent corporations, allowing smaller and less well-known companies to continue their rights violations with impunity.[316] Moreover, a TNC can technically be in compliance with labor and environmental standards and still have a detrimental impact on the right to food.

311. Kinley, *supra* note 295, at 949–50.

312. *See* Baker, *supra* note 297, at 138–40.

313. *See, e.g.*, Reebok.com, Reebok Human Rights Programs: Our Business Practices, http://www.reebok.com/Static/global/initiatives/rights/business (last visited Apr. 25, 2006); Nikebiz.com, Worker & Factories: Code of Conduct, http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=code#code (last visited Apr. 25, 2006); Gap Inc., Social Responsibility, http://www.gapinc.com/public/SocialResponsibility/socialres.shtml (last visited Apr. 25, 2006). Levi's Code of Conduct differs slightly in that its global sourcing and operating guideline claims to assess the "human rights environment" as well as the "political, economic and social environment" in making its decisions on whether or not to conduct business in a particular country. Levi Strauss & Co., Social Responsibility/Global Sourcing & Operating Guideline, http://www.levistrauss.com/responsibility/conduct/guidelines.htm (last visited Apr. 25, 2006).

314. One such initiative, launched by Reverend Leon Sullivan, was instrumental in the fight against apartheid in South Africa. *See* Mallenbaker.net, The Global Sullivan Principles of Corporate Social Responsibility, http://www.mallenbaker.net/csr/CSRfiles/ Sullivan.html (last visited Apr. 25, 2006).

315. *See, e.g.*, Social Accountability International, http://www.sa-intl.org (last visited Apr. 25, 2006); Rugmark, *How Certification Works*, *available at* http://www.rugmark.org/cert.htm (last visited Apr. 25, 2006); *see also*, Baker, *supra* note 297, at 131–32.

316. Kenneth Roth, *Rules on Corporate Ethics Could Help, Not Hinder, Multinationals*, FINANCIAL TIMES (U.K.), June 21, 2005, at 19.

Illustrating what Olivier De Schutter terms a "micro" approach to corporate responsibility,[317] codes of conduct confine themselves to the impact of a particular investment, project, or industry on labor and environmental conditions. No attempt is made to examine the overall contribution of the TNC to general development.[318] They thus fall short of ensuring that TNC investment in developing countries benefit the citizenry on a macroeconomic level and do not consider the number of ways in which TNC operations affect the right to food.

Still, codes of conduct, certification programs, and soft law guidelines are arguably a step in the right direction and potentially helpful complements to other mechanisms of accountability. Some commentators have argued that the codes have "an important normative impact on the development of domestic and international laws."[319] David Kinley and Junko Tadaki, for example, survey the potential legal and normative impact of corporate codes. Legally, codes may influence contractual agreements between corporations and their employees. Regulatory agencies may adopt standards expressed in industry codes to fashion binding reporting requirements.[320] Normatively, the behavior of non-state actors in promoting, adopting, and implementing voluntary standards can in turn influence state behavior and perhaps even invite legislative support.[321] It is therefore all the more important that codes of conduct include appropriate reference to the right to food and not be limited in scope to environmental and labor standards. In a similar vein, attempts at creating soft law instruments demonstrate the willingness of multilateral institutions to rein in the impact of TNCs on human rights, and, according to one commentator, may over time ripen into customary international law.[322]

317. *See* Olivier De Schutter, *Transnational Corporations as Instruments of Human Development*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 403, 406 (Philip Alston & Mary Robinson eds., 2005) (arguing that tools to ensure accountability must address the structural and macroeconomic questions raised by foreign direct investment).

318. *See id.*

319. Kinley & Tadaki, *supra* note 142, at 936.

320. *Id.* at 956–57.

321. *Id.* at 958–59.

322. *See id.* at 952 (citing Hans Baade's argument that the follow up procedures of the OECD Guidelines constitute the requisite state practice). For a discussion of state practice and opinio juris with respect to the right to food, see *infra* Part III.C.

2. Indirect Accountability—The Role of the State

Given the current inadequacy of mechanisms to hold TNCs directly accountable, the focus on indirect accountability—that is, the accountability of the state for TNCs actions—must be sharpened. International human rights law obligates states to regulate the behavior of non-state actors, whether individuals or corporations. 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."[323] Accordingly, a state must protect individuals against the harmful activities of TNCs investing and operating in the state ("host state obligations").

To the extent that international human rights jurisprudence has considered state accountability for the actions of TNCs, it has limited its consideration to host state accountability. In the Ogoniland case, the African Commission on Human and Peoples' Rights found that the Nigerian government had failed to regulate the harmful activities of oil companies against the Ogoni People.[324] Commenting specifically on the right to food, the Commission held that there was a violation because Nigeria had, inter alia, "allowed private oil companies[325] to destroy food sources."[326] While the Ogoniland case held a state liable for failing to regulate corporate activity, its findings are limited to the host state (in this case Nigeria).[327]

There are many sound reasons to expect the host state to regulate TNC activity. The host state has primary responsibility for the protection of human rights in its territory or under its jurisdiction, the host state negotiates the terms under which TNCs can operate in the country, and the host state's administrative and judicial machinery can provide a regulatory framework. Economic arrangements between a TNC and the state may, however, restrict the

323. *See supra* Part I.A; *General Comment 12*, *supra* note 43; *see also General Comment 15*, *supra* note 67, ¶ 23.

324. Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rts. (SERACESR) v. Nigeria, Communication No. 155/96, (prepared by African Commission on Human and Peoples' Rights) (2001), *available at* http://www1.umn.edu/humanrts/africa/comcases/155-96.html.

325. The corporation in the case was a joint venture between the Nigerian National Petroleum Corporation (a majority partner with a fifty-five percent stake) and Shell Petroleum Development Corporation. Shell operated the consortium.

326. SERACESR v. Nigeria, Communication No. 155/96, (prepared by African Commission on Human and Peoples' Rights), ¶ 66.

327. The Commission reaffirmed that: "The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation." *Id.* ¶ 65.

host state's ability to perform its duties.[328]

One example is the "stability" clause that is common to agreements between foreign investors and the host state, which provides that the state will not impose further regulations on the investor that could diminish the profitability of the investment.[329] In addition, the wealth of the TNCs may serve as a bargaining chip capable of shaping the state's economic and political stance vis-à-vis the TNC.[330] According to the U.N. Conference on Trade and Development, approximately one third of the world's top 100 economies are corporations.[331] According to other estimates, the top twenty-five TNCs may be richer than approximately 170 nations.[332] As Mark Baker points out, many small underdeveloped nations with low GDPs are unable to cope with the power of TNCs.[333] The attraction of capital investment from a TNC to a poor nation may be so great that "it could be argued that political leaders in poor nations would be abusing their discretion if they did not allow their nation to be infiltrated by [a TNC]."[334] Exacerbating the problem is the fact that, in many instances, developing country governments and their ruling elites actually benefit from TNCs' unregulated behavior to the detriment of the countries' poorer populations.[335] Privileges accorded to TNCs are also often the result of government corruption and acceptance of bribes by government officials.[336] Moreover, TNCs are not motivated by the same interests as the state. Their

328. *See, e.g.*, AMNESTY INT'L, CONTRACTING OUT OF HUMAN RIGHTS: THE CHAD-CAMEROON PIPELINE PROJECT 7 (2005), *available at* http://web.amnesty.org/library/Index/engpol340122005 (stating that state-investor "project agreements could encourage the governments of Chad and Cameroon to ignore their human rights obligations").

329. *See* De Schutter, *supra* note 317, at 414–16.

330. Baker, *supra* note 297, at 95–96; *see also* Su-Ping Lu, Note, *Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 605–06 (2000).

331. U.N. Conference on Trade and Development, *Are Transnationals Bigger than Countries?*, U.N. Doc. TAD/INF/PR/47 (Dec. 8, 2002), *available at* http://www.unctad.org/Templates/Webflyer.asp?docID=2426&intItemID=1528&lang=1.

332. Baker, *supra* note 297, at 94.

333. *Id.*

334. *Id.* at 95–96.

335. According to one study, "foreign investment dependence benefits the elite segments of the income-earning population over the poorer eighty percent." Linda Beer & Terry Boswell, *The Resilience of Dependency Effects in Explaining Income Inequality in the Global Economy: A Cross-National Analysis, 1975–1995*, 8 J. OF WORLD SYSTEMS RESEARCH 30, 52 (2002), *available at* http://jwsr.ucr.edu/archive/vol8/number1/pdf/jwsr-v8n1-beerboswell.pdf.

336. STIGLITZ, *supra* note 88, at 71–72; *see also* Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), *available at* http://www.hrw.org/reports/1999/enron.

fiduciary duty to their shareholders arguably puts profit-seeking ahead of the interests of the local communities in which they operate.

To be clear, the issue is not whether TNCs should be allowed to invest in developing countries. Indeed, in many instances TNCs may provide much-needed capital and may help spur economic growth in a manner that promotes regular access to food.[337] The concern, therefore, is not with foreign direct investment per se, but with investments that give TNCs unfettered control over natural and economic resources without the requisite level of review and accountability. With appropriate regulation, TNCs have enormous potential to contribute to hunger and poverty solutions. They employ the world's best technologies, have the leading research units, and possess organizational and logistical operations that are superior to most public sector institutions. Article 11(2) of the ICESCR itself provides that countries should make full use of scientific and technical knowledge to improve methods of food production, conservation, and distribution.[338] The potential for real partnership between developing country governments and TNCs in this regard, however, remains largely untapped.

As indicated earlier, this Article does not dismiss the ability or obligation of host states to honor their commitments under the ICESCR. Moreover, international law on this point is quite clear. What remains unclear is the responsibility of the home state. While home states negotiate an advantageous framework and provide other essential services critical to the operation of TNCs abroad, they are not held responsible for the consequences.[339]

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337. Kamminga, *supra* note 291, at 554 ("In many cases foreign direct investment by MNCs has a positive effect on respect for social and economic rights in the host State, through the creations of jobs and by generally raising the standards of living.").

338. ICESCR, *supra* note 35, art. 11(2).

339. For example, in 1998, the U.S. administration and members of Congress pursued fast-track authorization for trade agreements that would remove labor rights standards from bilateral treaty negotiations. HUMAN RIGHTS WATCH, WORLD REPORT 1998: UNITED STATES—HUMAN RIGHTS DEVELOPMENT, *available at* http://www.hrw.org/worldreport/Back.htm. However, compare this to the Caribbean Basin Initiative (CBI), 19 U.S.C. § 2702(c)(8) (2004), which is one of the programs granting favorable terms of trade for developing nations, requiring that one of the discretionary criteria which the President must take into account in designating a country as eligible for CBI is the degree to which workers in such a country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collectively; and the Generalized System of Preferences (GSP), 19 U.S.C. § 2462 (2004), which requires the recipients to respect "internationally recognized worker rights" in order to receive the benefits, defining internationally recognized worker rights as: "(A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health," Trade Act of 1974, § 502(a)(4)

3. Home State Accountability

Globalization increasingly blurs the line between state and non-state actors. In particular, the relationship between home states and TNCs has become significantly more interdependent. Home states actively provide financial and political support to TNCs, without which the TNCs would be unable to operate abroad. Accordingly, the Special Rapporteur on the Right to Food notes that states have a duty to prevent violations by their companies and corporations operating abroad.[340] If the obligation of international cooperation includes the duty to protect individuals from the extraterritorial activities of TNCs, then such accountability must be rooted in a doctrinal framework that supports imputing a TNC's actions in the host state to the home state on jurisdictional grounds.

Under international law, states are 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."[341] At the same time, human rights jurisprudence suggests a more expansive standard: States must exercise *due diligence* in protecting individuals from abuses committed by unknown or non-state actors, regardless of their relationship to those actors.[342] A merging of these standards, hinted at in the *Maastricht Guidelines*, may provide a means of bridging this gap.

The *Maastricht Guidelines* provide that the obligation to protect includes:

> [T]he State's responsibility to ensure that private entities or individuals, including transnational corporations *over which they exercise jurisdiction*, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise *due diligence* in controlling the behavior of such non-state actors.[343]

How then do we determine whether a home state exercises jurisdiction over a TNC operating abroad? And what might the due

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(codified as amended at 19 U.S.C. § 2467(a)(4) (2004)).

340. Ziegler Report III, *supra* note 292, ¶ 31.

341. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 170, art. 8.

342. *See infra* Part II.C.3.c.

343. *Maastricht Guidelines*, *supra* note 180, at Guideline 18 (emphasis added).

diligence standard require of a state where jurisdiction is established? There is to date no international law jurisprudence on the issue of home state accountability for TNC actions. Jurisprudence focusing on state jurisdiction over non-state actors in other contexts may offer some guidance and suggest a paradigm that may be applied to the relationship between home states and TNCs.

a. The Effective or Overall Control Standard

State liability for non-state actors has been largely restricted to acts of de facto state agents. However, the category of "agents" is gradually broadening. Apart from strict agency relationship, international law holds states accountable for actions of non-state parties over which the state exercises jurisdiction.[344] A series of cases have attempted to answer the question of when a state can be said to exercise jurisdiction over non-state actors. The answer ultimately rests on the degree of control that a state exerts over the activities of the non-state actors in question.

In the seminal case of *Nicaragua v. United States*, the ICJ held that that the acts of contras could not be attributed to the United States on the reasoning that:

> [U.S.] participation . . . in the financing, organizing, training, supplying and equipping of the contras, the selection of . . . targets, and the planning . . . of the operation, is still insufficient in itself . . . for the purpose of attributing to the United States the acts committed by the contras . . . .[345]

The Court said that in order to hold the United States responsible, it would have to be proved that the United States had "effective control" of the contras.[346]

The "effective control" test in *Nicaragua* should not be confused with the language of "effective control" cited by the European Court of Human Rights and the Human Rights Committee in defining state jurisdiction for the purposes of the conventions they

344. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 115 (June 27).

345. *Id.* ¶¶ 92--96.

346. *Id.* Gibney, Tomasevski, and Vedsted-Hansen criticize the ICJ's decision in *Nicaragua* as having set the bar too high and treating "control" as an either-or proposition, failing to take into account the continuum that exists in practice. Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 286 (1999).

monitor.[347] The *Nicaragua* test deals with responsibilities that flow from a state's control over non-state agents while the latter deals with responsibilities that flow from a state having control over a specific piece of territory. The two do not always coincide. For example, a state could be held responsible for having effective control over mercenaries operating abroad even where the state lacks effective control over the territory in which the mercenaries operate.

More recently, in *Prosecutor v. Tadic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) rejected the "effective control" test in favor of the "overall control" test.[348] In addressing the issue of what measure of state control international law requires for organized military groups, the Tribunal looked to the U.N. Security Council Resolutions and debates surrounding, inter alia, South African raids into Zambia to destroy bases of the SWAPO in 1976, Israeli raids in Lebanon in June 1982, the South African raid in Lesotho in December 1982, and the decision in the *Nicaragua* case.[349] The Tribunal concluded:

> [I]t would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State. . . . [I]t must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[350]

The *Tadic* case must be distinguished from *Nicaragua* on multiple grounds. Unlike *Nicaragua*, the non-state actor in *Tadic* was an organized armed force. The issue before the Tribunal in *Tadic* was whether the conflict in question could be characterized as an international armed conflict such that the application of certain international humanitarian norms was justified.[351] Moreover, *Nicaragua* dealt with the issue of state responsibility while *Tadic* dealt with individual responsibility. It could therefore be argued that

347. *See supra* Part II.A.1.
348. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 120 (July 15, 1999).
349. *Id.* ¶ 130.
350. *Id.* ¶¶ 130–31.
351. *Id.* ¶ 103.

the *Tadic* decision is confined to its facts.[352] Regardless, under either standard, states can easily sidestep any responsibility for the acts of TNCs by claiming that they do not exercise such a high degree of control.[353] Although TNCs receive substantial support and backing from their home states, to suggest that they are under the state's effective or overall control would be to ignore the substantial autonomy TNCs enjoy in the conduct of day to day affairs, both at home and abroad.

b. The Decisive Influence Standard

A 2004 European Court of Human Rights case suggests that the standard is loosening.[354] In *Ilascu and others v. Moldova and Russia* the Court found that Russia was responsible for harm caused to the applicants by the authorities in the breakaway region of the Moldavian Republic of Transdniestria (MRT).[355] It reasoned that MRT forces were under the "effective control, *or at the very least decisive influence*" of Russia, adding that the forces survived "by virtue of the military, economic, financial and political support given to [them] by the Russian Federation."[356] The Court also attributed responsibility to Russia for not taking foreseeable actions that would have prevented the abuses in question.[357] Using the *Ilascu* "decisive influence" standard, one could argue that a home state should be held responsible for the actions of a TNC abroad where it can be shown that the TNC survives by virtue of the home state's economic, financial and political support.[358] One could further argue that the

352. In adopting the *Draft Articles*, the International Law Commission did not interpret *Tadic* as meriting a departure from the standard articulated in *Nicaragua*. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 170, at 104.

353. Gibney et al., *supra* note 346, at 287 (arguing that the "effective control" test in *Nicaragua* is prone to evasion by states that deny control over the TNC in question).

354. *See* Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83, 84–85 (2003). Jinks argued that the U.S. actions in Afghanistan post-September 11, 2001 subtly loosened the effective control standard because the U.S. invasion of Afghanistan was justified on the grounds that the Taliban "supported and harbored" al Qaeda. *Id.* The Security Council's support of the invasion signaled a relaxing of international law standards on state responsibility. *Id.*

355. Ilascu v. Russia & Moldova, App. No. 48787/99, 2004 Eur. Ct. H.R. 318. Although the case deals specifically with the issue of jurisdiction, it is nonetheless informative on the question of state responsibility.

356. *Id.* ¶ 392 (emphasis added).

357. *Id.* ¶ 393.

358. The *Draft Articles* note that in theory, the conduct of all human beings, corporations or collectivities linked to the state by nationality, habitual residence or incorporation might be attributed to the state, whether or not they have any connection to the

home state should take foreseeable actions to prevent the abuses in question.

Home state support for TNCs comes in a variety of forms: states negotiate bilateral and multilateral investment treaties that define the framework legal rights of TNCs;[359] government export credit agencies offer overseas investment insurance to cover political risks, and in some cases commercial risks borne by TNCs;[360] and regional and national development finance institutions offer private sector financing.[361] Politically, home states have also played a role in the negotiation, rewriting, or enforcement of contracts that are heavily titled in TNCs' favor.[362] Home states have, for example, pushed developing countries to live up to "vastly unfair" contracts, even when those contracts were signed by corrupt host state officials who are no longer in power.[363] The negotiating power of the TNC was, in these cases, fortified by the muscle power of the home state.[364]

To be clear, the argument here is not that home states control every decision or move that TNCs make. As noted above, TNCs

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government. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 170, at 80. However, the *Draft Articles* caution that "in international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the state as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of public authority." *Id.* Accordingly, the *Draft Articles* note that the general rule is that "only conduct attributed to the state at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the state." *Id.*

359. Bilateral and multilateral investment agreements can play a significant role in framing the legal rights of foreign investors and can impede the ability of the host state to regulate TNC activity with respect to human rights. *See* De Schutter, *supra* note 317, 435–37 (arguing that bilateral investment treaties are the "main tool" in "organizing the legal framework of foreign direct investment in the way most favourable to the interests of the foreign investors"). For a detailed discussion on the absence of social responsibility clauses in multilateral investments, see Bonnie Penfold, *Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities* (Int'l Lab. Off., Working Paper No. 95, 2005), *available at* http://www-ilo-mirror.cornell.edu/public/english/employment/multi/download/wp95.pdf.

360. Penfold, *supra* note 359, at 10–14.

361. *Id.* at vii, 23–24 (discussing the significant role of development finance institutions in funding foreign direct investment).

362. STIGLITZ, *supra* note 88, at 71 ("In Argentina, the French government reportedly weighed in pushing for a rewriting of the terms of concessions for a water utility (Aguas Argentinas), after the French parent company (Suez Lyonnaise) that had signed the agreements found them less profitable than it had thought.").

363. *Id.*

364. *Id.* (describing cases in which the U.S. government, following the overthrow of Mohammed Suharto in 1998 and Nawaz Sharif in 1999, put pressure on the new Indonesian and Pakistani governments to live up to agreements signed by their corrupt predecessors).

enjoy great autonomy in their day-to-day operations. The argument, rather, is that home states can play a considerable role in financing and fashioning an advantageous and deregulated framework for TNCs' operations abroad. Without insurance, their risks may not be covered; without capital, they may not be able to finance their ventures abroad; without trade agreements, they may not be able to do business abroad; and without the home states' political muscle, they may not enjoy such a high degree of deregulation or profit from contracts that are tilted heavily in their favor. It is therefore not unreasonable to conclude that in many cases (though not all) home state support is vital to TNCs' survival in host states. If so, then home states must exercise due diligence in regulating the activities of TNCs abroad.

c. The Due Diligence Standard

The principle that states must exercise due diligence in protecting individuals from abuses committed by unknown or non-state actors is reiterated throughout human rights jurisprudence.[365] In *Velásquez Rodriguez v. Honduras*, a case concerning the disappearance of Manfredo Velásquez, the Inter-American Court of Human Rights stated that:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [Inter-American Convention on Human Rights].[366]

365. See, for example, the *Tellini* case of 1923, which involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. *Tellini* case, *reprinted in* League of Nations, *Official Journal*, 5th Year, No. 4 (Apr. 1924); *see also Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 170, at 81.

366. Velásquez Rodriguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988). The Court's articulation of a state's duty to protect (interpreted in this case as a duty to effectively investigate disappearances) concerned violations that took place within the national territory of the state (where it presumptively exercises effective control). Arguably, a similar standard of due diligence would apply where it can be shown that a state's international human rights obligations extend beyond its physical territory, as discussed above.

In the case of *Herrera Rubio v. Colombia*, the Human Rights Committee found a violation based on Colombia's lack of investigatory vigor even though it was not clear that the culprit of the alleged abuse was a state agent.[367] The case was an individual complaint submitted by Mr. Herrera Rubio to the Human Rights Committee pursuant to Article 5, paragraph 4, of the Optional Protocol to the ICCPR. The applicant claimed that he was tortured and that his parents were tortured and killed by individuals in military uniforms, identified as members of the "counterguerrilla[s]."[368] The Committee held that irrespective of whether the paramilitaries were state agents, Colombia is under an obligation, in accordance with the provisions of Article 2 of the ICCPR, to take "effective measures to remedy the violations that Mr. Herrera Rubio has suffered and further to investigate said violations, take action thereon as appropriate and to take steps to ensure that similar violations do not occur in the future."[369]

In *Mahmut Kaya v. Turkey*, a case involving the kidnapping, torture, and murder of two alleged supporters of the Kurdistan Worker's Party, the European Court of Human Rights held that while it could not be established whether a state agent was involved in the killing, the Turkish government had an obligation to take reasonable measures available to them to prevent a real and immediate risk to the lives of the deceased.[370] Failure to take such measures constituted a violation of Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[371]

What do these cases tell us about what is required of a state under the due diligence standard? In *Velásquez*, the Inter-American Court of Human Rights held Honduras responsible for its lack of due

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367. Herrera Rubio v. Colombia, Comm. No. 161/1983 (Nov. 2, 1987), U.N. Doc. CCPR/C/OP/2, at 192 (1990), *available at* http://www1.umn.edu/humanrts/undocs/newscans/161-1983.html.

368. *Id.* ¶ 1.5.

369. *Id.* ¶ 12.

370. Mahmut Kaya v. Turkey, 2000-III, Eur. Ct. H.R. 129, ¶ 87.

371. Article 2 provides:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
> (a) in defence of any person from unlawful violence;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, as amended by Protocol No. 11, Nov. 4, 1950, 213 U.N.T.S. 221.

diligence in preventing the violation or responding to it as required.[372] In *Herrera*, the Human Rights Committee ruled that Colombia must take effective measures to remedy the violations suffered by the complainant, must investigate the violations, and must take steps to ensure that similar violations do not occur in the future.[373] And finally, in *Mahmut Kaya*, the European Court of Human Rights held that the Turkish government had an obligation to take reasonable measures available to them to prevent a real and immediate risk to the lives of the deceased.[374] Read together, the cases impose on the state, at the very least, an obligation to prevent violations by non-state actors.

Such a reading is consistent with the *Maastricht Guidelines* which, as noted above, provide that states are responsible for violations of economic, social, and cultural rights that result from their failure to exercise due diligence in controlling the behavior of non-state actors, including corporations.[375] The Special Rapporteur on the Right to Food adds that the obligation to protect implies that states "have a duty to regulate their companies and corporations that operate in other countries to prevent violations."[376] Under the obligation of international cooperation discussed above, the regulation of corporations fulfills a State Party's obligation to protect.

d. Domestic Regulation of TNC Activity Abroad

One means of satisfying the due diligence obligation is for home states to regulate corporate activity through the enactment of domestic legislation with extraterritorial reach. Though states have historically resisted opening their courts for adjudication of violations committed outside their territory,[377] such an interpretation of a state's

372. *See supra* notes 365–66 and accompanying text.

373. *See supra* notes 367–69 and accompanying text.

374. *See supra* notes 370–71 and accompanying text.

375. *See supra* note 343.

376. Ziegler Report II, *supra* note 148, ¶ 29; *see also* U.N. Subcomm'n on the Promotion & Prot. of Hum. Rts., *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, 57th Sess., Provisional Agenda Item 6, U.N. Doc. E/CN.4/Sub.2/2005 (June 16, 2005) (outlining states' obligations to regulate the manufacture, possession, and transfer of small arms, in order to prevent their use in the commission of human rights abuses by private actors, including abuses that may occur abroad).

377. *See, e.g.*, Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 123–24 (1996) (discussing judicial presumption against extraterritoriality of U.S. labor

obligations under the ICESCR resonates with other international treaties. The United Nations Convention Against Transnational Organized Crime and the Convention Against Torture are both examples of agreements mandating state actions with extraterritorial reach.[378] In addition, in the context of child trafficking, the Convention on the Rights of the Child (CRC)'s Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography provides that a state must exercise extraterritorial jurisdiction in order to criminalize the acts of its nationals or residents when they abuse children in another country.[379] Similarly, a resolution on the sexual exploitation of children, adopted by the Council of Europe encouraged member states "to include in their criminal legislation the principle of extraterritorial prosecution and conviction for offences."[380]

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is of particular interest in that it encourages extraterritorial application of domestic laws to regulate business conduct.[381] Specifically, Article 4(2) of the Convention provides:

> Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction. . . . 4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.[382]

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laws).

378. Convention Against Transnational Organized Crime arts. 5, 6, 15, 18, 30(1), G.A. Res. 25, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (2001); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5, G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93rd plen. mtg., Supp. No. 51, U.N. Doc. A/Res/39/46 (Dec. 10, 1984) (requiring the establishment of jurisdiction over certain offenses, even if committed outside the state's territory) [hereinafter CAT].

379. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography art. 4, G.A. Res. 54/263, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/263 (May 16, 2000).

380. Resolution on the Sexual Exploitation of Children, EUR. PARL. DOC. (RES 1099) ¶ 12 (Sept. 25, 1996), *available at* http://assembly.coe.int/Documents/AdoptedText/ta96/eres1099.htm#1.

381. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, OECD Doc. DAFFE/IME/BR(97)20, 37 I.L.M. 1 (1998), *available at* http://www.oecd.org/document/20/0,2340,en_2649_34859_2017813_1_1_1_1,00.html.

382. *Id.*

Commentary to Article 4 notes that "[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required."[383] While the Convention itself is of limited use as a vehicle for curbing TNC violations of the right to food,[384] its approach to extraterritoriality may serve as a model for domestic legislation regulating TNC activity abroad. The proposed legislation could, for example, provide guidelines on respecting and protecting the right to food; include requirements to institute and adhere to codes of conduct; include environmental and labor protections; and sanction violations of these standards with both civil and criminal penalties. To ensure effectiveness, the legislation could also allow for private actions that are not plagued by the same difficulties currently faced under statutes like the U.S. Alien Torts Claim Act.[385] One suggested model for such a regulatory framework, at least in the United States, is a modified version of the Foreign Corrupt Practices Act of 1977 (FCPA), which prohibits foreign bribery and creates record-keeping and accounting requirements for corporations.[386] The FCPA contains civil and criminal penalties for violators but does not contain a right of private action.[387]

The OECD's Guidelines for Multinational Enterprises, which so far remain voluntary, could also serve as a model for a regulatory framework since they call on enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments."[388] The Guidelines' broad focus on labor laws, environmental protections, combating bribery, protecting consumer interests, issues related to competition and taxation, and the development of science and technology could also cover the variety of ways in which TNCs affect the right to food. At least one commentator has suggested the OECD should use its anti-bribery convention as a model and a adopt

383. *Id.*

384. The Convention does not apply to forms of corruption other than bribery, bribery which is purely domestic, or bribery in which the direct, indirect, or intended recipient of the benefit is not a public official. It also does not include cases where the bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining of some undue advantage in such business. *Id.* art. I(1)

385. *See* Borg, *supra* note 306, at 609–10. Violations of social and economic rights, which are most prone to abuse by TNCs, fall outside the ambit of the statute all together. For a discussion of the procedural and substantive limitations of using the Alien Tort Claims Act to hold corporations accountable, see Kinley, *supra* note 295, at 940–43.

386. *See* Borg, *supra* note 306, at 639–42.

387. *Id.*

388. OECD, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 29 (2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.

a treaty:

> [R]equiring member states to enact laws similar to its guidelines that would be enforceable under national criminal or civil codes, carrying penalties such as fines or in extreme cases, imprisonment. Like anti-bribery laws, this national legislation would bind any company operating in that nation's jurisdiction. In addition, the United Nations, which has already drafted non-binding norms on corporate conduct, might provide a forum to negotiate a universally applicable treaty.[389]

Though the presumption against extraterritorial application of domestic legislation in countries such as the United States presents a formidable obstacle,[390] it is not insurmountable. The application of the presumption has been inconsistent at best. Courts often find exception to the territoriality principle where activities taking place outside the United States are seen as having some kind of "effect" inside the United States.[391] The presumption is readily abandoned, for example, in cases dealing with securities and anti-trust cases, but firmly kept in claims of labor laws violations.[392] Mark Gibney and David Emerick argue that the case law focuses (perhaps unsurprisingly) on what will benefit the United States, such that monopolistic practices that negatively affect the American economy can be reached by U.S. domestic law.[393] The same is true for criminal behavior that occurs outside U.S. borders, but which may have negative consequences within them.[394] On the other hand, applying domestic safety standards to nuclear reactors sold to Third World countries is perceived as not being in the national interest of the United States, especially when such regulations might hamper the ability of U.S. corporations to compete for business in the global

389. Roth, *supra* note 316, at 19.

390. *See, e,g.*, Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested."); EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)). In 2003, Belgium repealed its "universal jurisdiction" law, which allowed victims to file complaints in Belgium for atrocities committed abroad. *See* Human Rights Watch, *Belgium: Universal Jurisdiction Law Repealed* (Aug. 1, 2003), *available at* http://www.hrw.org/press/2003/08/belgium080103.htm.

391. *See* Gibney & Emerick, *supra* note 377, at 128.

392. *Id.* at 132.

393. *Id.* at 128.

394. *Id.* at 128–29.

market.[395] In such cases, courts are more reluctant to find an exception to the principle of territoriality.[396]

Creating a regulatory framework for monitoring (and sanctioning) TNCs' activities abroad similarly has costs for TNCs, consumers, shareholders, and the home state. Overcoming a presumption against extraterritorial application therefore necessitates a strong articulation of the benefits of such regulation for countries such as the United States. In short, one may need to show that the long-term benefits of regulating TNCs' activities abroad outweigh the burdens that such regulation imposes.[397] One could argue, for example, that regulating the impact of TNC activity abroad may in the long run contribute to the economic, social, and political stability of the countries in which TNCs operate, which in turn creates a more hospitable investment climate.[398] Such regulation is also consistent with a "macro-approach" to corporate social responsibility described above.[399] Domestic governance of TNCs' activities abroad could also improve the home state's image abroad. TNCs' actions may be viewed as representative of their home states' views and practices.[400] Accordingly, abusive practices of TNCs may damage a home state's reputation abroad, and, in some circumstances, may result in real costs to the home state.[401]

Subjecting TNCs to their home state's jurisdiction raises a number of complex legal questions. Would home state jurisdiction infringe on the national sovereignty of the host state? Under what circumstances could parent companies be held liable for the actions of their subsidiaries abroad? Can plaintiffs overcome the defense that home state courts are forum non conveniens for claims against TNCs operating abroad? These questions will require sufficient airing and review for the proposed domestic legislation to be effective. Traditionally, the use of the forum non conveniens defense has allowed TNCs to avoid liability in the home state while simultaneously shielding themselves from the actions of subsidiaries

395. *Id.* at 139–40.

396. *Id.*

397. *See, e.g.*, Borg, *supra* note 306, at 633–39 (arguing that effective sanctions for U.S. corporate misconduct would benefit the United States).

398. *See* De Schutter, *supra* note 317, at 424; *see also* SACHS, *supra* note 12, at 330–34 (arguing that hard evidence has established strong links between extreme poverty abroad and the threats to national security).

399. *See* De Schutter, *supra* note 317, at 406.

400. *See* Borg, *supra* note 306, at 635, 643 ("When American MNCs perpetrate abuses abroad, their actions cast a dark shadow on the United States and its policies.").

401. *Id.*

operating abroad.[402] However, as noted above, home state jurisdiction has been successfully achieved in other contexts.[403]

Creating a regulatory framework may also have costs for the host state. Prescriptions for reining in TNC behavior in host countries regularly come up against the caution that such regulations should not act as a disincentive for the very foreign direct investment that is needed to support economic growth.[404] Though foreign direct investment may help alleviate poverty, it does so more effectively if grounded in positive corporate conduct. Providing a uniformly-enforced regulatory framework may actually encourage foreign investment in developing countries by leveling the business playing field for ethical corporations.[405] Some western companies have begun to recognize the merits of operating under enforceable standards that apply to all their competitors, rather than voluntary standards that only really affect companies with prominent public profiles.[406] Involving the home state in both normative and practical terms in such regulations could provide an effective means of protecting the right to food where accountability gaps exist.

III. NON-RATIFYING STATES: ACCOUNTABILITY VIA CUSTOMARY INTERNATIONAL LAW

Even if the issues surrounding extraterritoriality, TNCs, and IFIs were appropriately resolved, one still has to contend with the fact that the ICESCR, and other treaties establishing the right to food or a related norm, are not universally ratified. Even when ratified, states' human rights obligations often come into conflict with obligations under other legal regimes.[407] To some extent, the problems of non-ratification and the incompatibility of multiple legal regimes can be addressed by locating the right to food in customary international law. Norms that have achieved the status of customary international law will bind non-states-parties[408] and may encourage

402. Kinley, *supra* note 295, at 943–44.

403. *See supra* notes 392–98 and accompanying text.

404. SACHS, *supra* note 12, at 356 (stating that a number of studies confirm that countries with higher levels of foreign direct investment positively correlate with high economic growth and higher GNP per capita).

405. Roth, *supra* note 316, at 19.

406. *Id.*

407. Such regimes include bilateral trade agreements or structural adjustment programs. *See supra* Part I.B.

408. A persistent objection to the establishment of a norm while it is becoming law may exempt the objector from such a norm (the so-called "persistent objector rule"). Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 538 (1993). *See generally*

states to implement international agreements in line with customary human rights norms.[409]

The objective of this section is to analyze the status of the right to food as a norm of customary international law. In the absence of universal ratification of the ICESCR and in the face of a proliferation of international agreements that greatly undermine a state's ability to respect, protect, and fulfill the right to food, this exercise takes on a timely and utilitarian character. In addition, meaningful developments in promoting the right to food in practice and in law merit a consideration of what impact, if any, these developments have on the status of the right to food in customary international law. To be clear, this is not an easy endeavor, nor does it lend itself to easy conclusions. The formation and modification of customary international law is an uncertain process because it lacks procedural clarity and authoritative guidance.[410] Moreover, custom is a fluid source of law, the content of which is not fixed.[411]

While some have argued that updating or revising custom dilutes the power of such norms,[412] equally compelling are arguments that point to the biases inherent in the current delineation of customary norms that render them meaningless for much of the

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Ted Stein, *The Approach of A Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985) (discussing the persistent objector rule and arguing that while it has historically been invoked only rarely it is likely to play a larger role in coming decades due to changes in international law). Some norms are exempt from the persistent objector rule. For example, jus cogens norms bind all states regardless of objections made. Charney, *supra*, at 538–39. Some principles of customary law have achieved the force of peremptory or jus cogens norms, which cannot be violated or altered except by a norm of comparable character. Vienna Convention, *supra* note 256, art. 53; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1987) (defining jus cogens norms as peremptory and specifying torture as one such norm) [hereinafter RESTATEMENT]; Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 741–42 n.6 ("A 'peremptory norm,' also known as *jus cogens*, is defined as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.'" (citing CHRISTOS L. ROZAKIS, THE CONCEPT OF *JUS COGENS* IN THE LAW OF TREATIES (1976); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 203 (2d ed. 1984); JERZY SZTUCKI, *JUS COGENS* AND THE VIENNA CONVENTION ON THE LAW OF TREATIES (1974))).

409. Achieving customary international law status may also allow access to remedies not contemplated by human rights treaties. One example is the ability to bring suit before the ICJ. ICJ Statute, *supra* note 200, art. 38.

410. It is also a slow process of growth in which courses of conduct once considered optional "become first habitual or usual, and then obligatory." Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 784 (2001) (quoting H.L.A. HART, THE CONCEPT OF LAW 183 (1961)).

411. Roberts, *supra* note 410, at 784.

412. For an overview, see *id.*; *see also* Charney, *supra* note 408.

world's population.[413] This section argues that the analysis of state practice and opinio juris (the two indicators of customary international law) must appropriately reflect changes in the global order that have an impact on the formation of custom. Although states are the relevant actors in the formation of custom, globalization necessitates an approach that acknowledges that states no longer act alone and that the formation of custom and international law is often the result of collective state action in international forums. Our analysis begins with how the hierarchy of human rights has, to date, influenced the formation of customary human rights law.

A. The Human Rights Hierarchy

Though economic, social, and cultural rights formed a core part of the post-World War II body of human rights doctrine, they were soon delinked from civil and political rights. The drafters of the UDHR had intended it to be the precursor of a single Human Rights Covenant that would make the principles of the Declaration binding on ratifying states.[414] As the Cold War intensified, and the Soviet Union promoted the inclusion of economic, social, and cultural rights in a single covenant, the United States insisted on extricating these rights and including them in a separate document.[415] In the end, a 1952 General Assembly resolution mandated the creation of two covenants instead of one.[416] Despite the obvious interdependence and indivisibility of the two sets of rights,[417] economic, social, and cultural rights were essentially subordinated to their civil and

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413. Commenting on the *Restatement*'s emphasis on civil and political rights, Bruno Simma and Philip Alston poignantly ask:

> [W]hether any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not capital punishment for crimes committed by juveniles or death by starvation and which finds no place for a right of access to primary health care, is not flawed in terms both of the theory of human rights and the United Nations doctrine.

Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom,* Jus Cogens, *and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 95 (1988–1989).

414. Supporters of this approach maintained that:

> human rights could not be clearly divided into different categories, nor could they be so classified as to represent a hierarchy of values. . . . Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic and social and cultural rights could not be long ensured . . . .

Annotations, *supra* note 182, at 7.

415. Lyon, *supra* note 171, at 539–41.

416. *Id.* For arguments in favor of two separate covenants, see generally *Annotations*, *supra* note 182.

417. *See supra* note 195.

political counterparts[418] and became the "casualties" of Cold War politics.[419]

At the time of the drafting of the ICCPR and the ICESCR—and in the four decades since their adoption—a number of arguments have been put forth to justify the primacy of civil and political rights. These include the notion that civil and political rights (or "first generation" rights) are "negative rights" that require only that a state refrain from certain types of behavior.[420] They can therefore be implemented with immediate effect and with limited strain on state resources. By contrast, economic and social rights (or "second generation" rights) require "positive" action by the state.[421] They can only be implemented gradually and at great cost to the state. Both sets of assumptions have been challenged elsewhere, typically by showing that a variety of civil and political rights require great state expenditure (such as the right to counsel) and that a number of social and economic rights can be implemented immediately through the adoption and enforcement of legislation that sets minimum wage standards or ensures the right to form trade unions.[422]

The hierarchy privileging civil and political rights over social and economic rights is also ingrained in the language of the ICCPR and the ICESCR, their enforcement mechanisms (or lack thereof), and in the setup of each Covenant's monitoring bodies. While States Parties are obligated to immediately implement the rights contained in the ICCPR, under the ICESCR they can work toward their "progressive implementation."[423] Unlike the ICCPR,[424] the ICESCR currently lacks an Optional Protocol that would enable the ESCR Committee to investigate claimed violations (although a Draft Optional Protocol to the ICESCR is being considered).[425] The ESCR

418. Attempts to include economic, social, and cultural rights in the UDHR also faced strong opposition. *See* Henry J. Steiner & Philip Alston, *Economic and Social Rights*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 244 (2d ed. 2000).

419. Lyon, *supra* note 171, at 536.

420. *See, e.g.*, Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT'L L. 689, 712 (1998).

421. *See id.* at 711; Lyon, *supra* note 171, at 549–50; *see also* Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT'L L.J. 763, 764–65 (2003).

422. *See* Gordon, *supra* note 422, at 711–12.

423. *See, e.g.*, ICESCR, *supra* note 35, arts. 2, 14; ICCPR, *supra* note 52, arts. 1–2. Certain obligations under the ICESCR take immediate effect, such as the duty to guarantee that ICESCR rights will be exercised without discrimination and the duty to ensure freedom from hunger. *Id.* arts. 2(2), 11(2); *see also supra* Part I.A.

424. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_opt.htm.

425. Status of the International Covenants on Human Rights, U.N. ESCOR, U.N.

Committee is also the only one of the six major human rights treaty bodies that was not created by the treaty it was set up to monitor, and is comparatively under-resourced.[426]

This hierarchy of rights causes some to dismiss obligations under the right to food, like other social and economic rights, as "soft law" that is "nonbinding" and whose primary function is to provide a set of guidelines that states may or may not choose to follow.[427] On the other side of the spectrum is the characterization of the right to food as part of customary international law, or even a peremptory norm of general international law.[428] Both of these positions are problematic. The right to food is hard law; it is binding on states upon ratification of the ICESCR. To characterize the right to food as soft law misrepresents and undermines the legal obligations of states to respect fundamental human rights norms. The problem lies not with the binding nature of the norm, but with weaknesses in implementation, enforcement, and a lack of universal ratification.[429] At the same time, characterizations of the right to food as a norm of customary international law are often unaccompanied by meaningful legal analysis and leave open gaping theoretical holes that dissenters can easily attack. As a result, the claims of human rights advocates

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Comm'n on Hum. Rts. at 1, U.N. Doc. E/CN.4/1997/105 (Dec. 18, 1996)

426. The Committee was created by U.N. Economic and Social Council Resolution 1985/17. Office of the High Commissioner for Human Rights, *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the ICESCR.* ECOSOC Res. 1985/17, U.N. ESCOR, 1st Sess., 22d mtg., U.N. Doc. E/RES/1985/17 (May 28, 1985), *available at* http://193.194.138.190/Huridocda/Huridoca.nsf/(Symbol)/E.RES.1985.17.En?Opendocument; *see also* Lyon, *supra* note 171, at 541–42. In contrast, the ICESCR merely orders states who are parties to the agreement to submit their reports to the U.N. Economic and Social Council. ICESCR, *supra* note 35, art. 16; *see also* UNHCHR, *Introduction to Treaty-Monitoring Bodies*, *available at* http://www.unhchr.ch/ html/menu2/6/intro.htm (last visited Apr. 25, 2006).

427. *See generally* Robert L. Bard, Symposium, *The Right to Food*, 70 IOWA L. REV. 1279 (1985) (arguing that under a positivistic concept of law—which identifies valid rules by the process employed to establish the rules, rather than their content—no legally cognizable right to food exists).

428. Anthony Paul Kearns, Note, *The Right to Food Exists Via Customary International Law*, 22 SUFFOLK TRANSNAT'L L. REV. 223, 255–56 (1998) (arguing that the right to food has achieved jus cogens status). Given the status of a jus cogens norm as the ultimate trump card that supersedes all other rules of international law (including the persistent objector rule), it is tempting to leap to the conclusion that the right to food is among these norms, but the status of the right to food as a jus cogens norm is not a given.

429. In Louis Sohn's words, "[I]t is not the law that is soft, but the governments." Sohn, *supra* note 49, at 13. Much of international law gives rise to the procedural challenge that governments, who are the international lawmakers, are not going to "declare punishable an act that they may some day wish to commit." *Id.*

can more easily be dismissed as impassioned rhetoric.[430]

The hierarchy of rights has affected the development of customary human rights law in a manner that heavily favors civil and political rights. Under § 702 on Customary International Law of Human Rights, *The Restatement (Third) of the Foreign Relations Law of the United States* (*Restatement*), a state violates international law if:

> as a matter of state policy, it practices, encourages, or condones
>
> (a) genocide,
>
> (b) slavery or slave trade,
>
> (c) the murder or causing the disappearance of individuals,
>
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
>
> (e) prolonged arbitrary detention,
>
> (f) systematic racial discrimination, or
>
> (g) a consistent pattern of gross violations of internationally recognized human rights.[431]

Commentary to this section notes that "only those human rights whose status as customary law is generally accepted (as of 1987) and whose scope and content are generally agreed" upon are included in the list.[432] The commentary clarifies that the "list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future."[433]

Customary international law in general, and the *Restatement*'s articulation of customary human rights norms in particular, has been criticized as reflecting the priorities of Western societies,[434] for its inherent gender bias,[435] and for assuming that American values are

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430. *See, e.g.*, Andras Sajo, *Socioeconomic Rights and the International Economic Order*, 35 N.Y.U. J. INT'L L. & POL. 221, 224 (2002).

431. RESTATEMENT, *supra* note 408, § 702.

432. *Id.* cmt. a.

433. *Id.* Article 64 of the Vienna Convention of the Law of Treaties also makes room for the possibility that new jus cogens norms may emerge in the future. *See* Vienna Convention, *supra* note 256, art. 64; Steiner & Alston, *supra* note 418, at 225.

434. Commentators have, for example, noted that international human rights norms give primacy to individual rights over communal or group needs. Roberts, *supra* note 410, at 768–69.

435. *See* Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 65, 69–74 (1995) (arguing that rights are "defined according to what men fear

synonymous with those reflected in international law.[436] Despite these criticisms, the *Restatement* remains the clearest (and most cited) articulation of customary international law norms.

B. The Formation of Customary Human Rights Law

Evaluating the right to food as customary international law requires an analysis of the two elements that combine to make up customary international law: general state practice and opinio juris, the belief that the practice is obligatory.[437] These two conditions are set out in § 702 of the *Restatement*, and are widely accepted as indicators of customary international law.[438] State practice and opinio juris on the right to food have evolved significantly since the adoption of the UDHR in 1948 and the ICESCR in 1966.[439] The categories of state practice and opinio juris are by no means separate and distinct; they exhibit a great deal of overlap and often come into conflict.[440] The overlap is in essence an expression of the complementary nature of state practice and opinio juris. In many cases, states will not act unless they feel obligated to, and states will not obligate themselves unless it is consistent with how they wish to act.

Over the past several decades, the formation of custom has undergone substantial changes. States acting in isolation are no longer the sole contributors to the formation of custom. Decisions affecting state behavior are increasingly made in collectives through conferences, declarations, resolutions, and compacts.[441] Our

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will happen to them" and are reflective of a dominant male perspective in the public sphere that may not be shared by women or supported by women's experience in the private sphere).

436. *See* Simma & Alston, *supra* note 413, at 95.

437. *See* North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20) ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.").

438. *See* Steiner & Alston, *supra* note 418, at 70; *see also* ICJ Statute, *supra* note 200, art. 38(1)(b) (defining the sources of international law to include "international custom, as evidence of a general practice accepted as law").

439. *See infra* Part III.C.

440. Very few states, for example, assert the right to torture individuals. To the contrary, they often recognize the customary international law norm against torture, even when their agents are found to be violating the norm. *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS, Apr. 28, 2004, http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml (discussing investigation of abuse of Iraqi prisoners at Abu Ghraib and quoting Brig. Gen. Mark Kimmitt describing the abuse as "criminal behavior").

441. *See infra* Part III.C.3–4.

understanding of the elements of customary international law must adapt to these changes in the global order. In particular, we must look beyond the practice of individual states or explicit expressions of legal obligations.

Traditionally, state practice was gleaned from claims and counter-claims between two states, while opinio juris was gleaned from the expression of legal views by states, as embodied in official statements of nations (by heads of state, organs of government, or those contained in declarations and laws), or through statements concerning other nations' practice or opinions.[442] As Oscar Schachter points out, these constructions of state practice and opinio juris are inappropriate for the formation of custom in the area of human rights, where states do not usually make claims directly on other states and rarely protest one-on-one another state's violations that do not affect their nationals.[443] Rather, human rights issues are debated and sometimes resolved in international forums.[444] State practice and opinio juris is therefore more likely to be found in states' behavior in such forums. The *Restatement* itself recognizes collective state action as evidence of state practice. It notes that state practice includes "governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states . . . ."[445]

In the context of human rights law, opinio juris need not be verbal or explicit.[446] Insisting on a state's explicit expression that it is acting out of legal obligation is at best unrealistic. At worst, it acts as a disincentive to the formation of customary human rights norms. From the perspective of states, as long as they do not announce that their actions are in furtherance of a legal obligation, the human rights norm will never be part of customary international law and the state will never be bound to respect it. Such an approach also severely undermines both the credibility and enforceability of human rights law and creates an impediment to the development of customary human rights law. This is particularly undesirable in the context of social and economic rights, whose development into customary norms has already been impeded by the biases discussed earlier in the section.[447] Moreover, insisting on explicit expression of legal

442. RESTATEMENT, *supra* note 408, § 102.

443. Oscar Schachter, *International Law in Theory and Practice*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 226, 228 (Steiner & Alston eds., 2000).

444. *Id.* at 229.

445. RESTATEMENT, *supra* note 408, § 102 cmt. b.

446. Steiner & Alston, *supra* note 418, at 70.

447. *See supra* Part III.A.

obligation also discounts the overwhelming evidence, described below, of state practice in favor of ensuring the right to food.

Evidence of state practice and opinio juris should therefore be derived from U.N. resolutions,[448] declarations, plans of action; and statements by government officials to the legislature, to the press, at international conferences and at meetings of international organizations.[449] The ratification of human rights treaties also provides compelling evidence of both state practice and opinio juris.[450] Similarly, an examination of humanitarian law offers insight into the right to food as a norm that states pledge to uphold even in times of armed conflict.

Judicial decisions can also have a formative effect on custom by "crystallizing emerging rules and thus influencing state behavior."[451] Similarly, constitutional provisions provide the strongest articulation of a state's domestic legal obligations. They too offer evidence of opinio juris and, when implemented, of state practice.[452] In addition, non-state actors can affect both the determination and development of custom in a variety of ways.[453] Writings by influential publicists, for example, can help shape interpretations of international law.[454] The role of civil society and NGOs in defining what should be customary practice is also an important part of this equation. NGOs are now prominent players in international forums and significant contributors to the formation of customary human rights law.[455] NGOs can help articulate emerging customs and monitor state compliance with international law by

448. In the *Nicaragua* case, the ICJ suggested that U.N. General Assembly resolutions also fulfilled the role of opinio juris. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 184, 188–93 (June 27). In addition, a commission of the Institute of International Law, headed by Krzysztof Skubiszewski, concluded that "a resolution may constitute evidence of customary law or of one of its ingredients (opinio juris, custom-creating practice) . . . ." 61 ANN. INST. DE DR. INT., pt. I (Helsinki Sess.) (1985) at 29-358, *cited in* Oscar Schachter, *New Custom: Power, Opinio Juris, and Contrary Practice*, *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 531, 532 (Jerzy Makarczyk ed., 1996).

449. Steiner & Alston, *supra* note 418, at 39, 69, 70.

450. *See, e.g.*, RESTATEMENT, *supra* note 408, § 102, rep. n.5.

451. *See* Roberts, *supra* note 410, at 774–75.

452. Schachter, *supra* note 443, at 228–29; *see also* Steiner & Alston, *supra* note 418, at 39, 69, 70.

453. Roberts, *supra* note 410, at 774 (citing Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579, 595 (1999)); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 959–60 (1996).

454. Roberts, *supra* note 410, at 774.

455. *Id.* at 775.

investigating and exposing violations of human rights.[456] Amnesty International's aggressive campaign against torture, instrumental in elevating the status of the right to be free from torture to a jus cogens norm,[457] is a case in point. What it tells us about the role of NGOs in promoting the right to food as customary international law is discussed at the end of this section.

With these parameters in mind, we now turn to an analysis of whether the right to food may be said to have become part of customary international law. As described in Part I, the right to food actually encompasses two separate but related norms: the right to adequate food and the right to be free from hunger. While the right to adequate food is a "relative" standard, the right to be free from hunger is "absolute" and fundamental.[458] The right to adequate food—defined as sustainable access to food in a quantity and quality sufficient to satisfy one's dietary and cultural needs[459]—may not yet be part of customary law, but a strong case can be made that the right to be free from hunger has achieved this status.

C. *Analysis of the Right to Food as Customary International Law*

The question of whether the right to food can be characterized as customary international law has not been sufficiently analyzed. A shortcut taken by some is to claim that the right is part of customary international law by virtue of its inclusion in the UDHR, the substance of which can now be regarded as customary law in its entirety.[460] Donald Buckingham, for example, argues that the UDHR is an authoritative interpretation of U.N. Charter Articles 1(3), 55 and 56, indicative of state practice among U.N. member states, and repeatedly referred to as though it has binding legal effect.[461]

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456. *Id.*

457. *See infra* notes 558–59 and accompanying text.

458. Tomasevski, THE RIGHT TO FOOD, *supra* note 58, at xviii.

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

460. Simma & Alston, *supra* note 413, at 84 (citing, inter alia, Humphrey, *The Universal Declaration of Human Rights: Its History Impact and Juridical Character*, *in* HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 37 (Ramcharan ed., 1979); Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT. L.J. 129, 133 (1977)).

461. Donald E. Buckingham, *A Recipe for Change: Towards and Integrated Approach to Food Under International Law*, 6 PACE INT'L L. REV. 285, 293 (1994); Office of the High Commissioner for Human Rights, *The Universal Declaration of Human Rights*, U.N. Doc. DPI/1937/A (Dec. 1997), *available at* http://www.unhchr.ch/udhr/miscinfo/carta.htm.

The *Restatement* takes the position that "[p]ractice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights, even if only in principle."[462] Under this approach, provisions of the UDHR that proclaim the fundamental right to food may be cited as evidence of state practice moving towards recognizing the right to food as a customary international norm.[463] But the conclusion that the right to food is a norm of customary international law solely by virtue of its inclusion in the UDHR is misguided.

While some UDHR norms have become customary international law,[464] the sequence of events leading to and following the adoption of the UDHR raises serious doubts as to whether *all* of its norms can claim such status. The historic deprioritization of social and economic rights, coupled with the human rights community's longstanding practice of monitoring and promoting primarily "first generation" rights, have affected the development of customary human rights law in a manner that heavily favors civil and political rights.[465] To argue that all rights contained in the UDHR have acquired customary international law status essentially ignores historical developments and contemporary articulations of customary human rights law.[466] It is therefore necessary to determine whether, apart from the UDHR, evidence exists pointing to widespread state practice and opinio juris supporting the treatment of the right to food as customary international law.

1. Human Rights Treaties

While human rights treaties are often cited as evidence of state practice, given that they effectively signal a state's acceptance of legal obligation, they may also be cited as evidence of opinio juris.[467] As stated in Part I, the right to food is most clearly

462. RESTATEMENT, *supra* note 408, § 701, rep. n.2.

463. *See* Universal Declaration of Human Rights art. 25, G.A. Res. 217 A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

464. The right to be free from slavery and the right to be free from torture are examples of UDHR norms that are widely considered to have achieved customary international law status. All states are bound by these norms, even those that have not ratified the ICCPR (prohibiting slavery or servitude) or CAT. *See* RESTATEMENT, *supra* note 408, § 702.

465. *See supra* Part III.A.

466. Kearns, *supra* note 428, at 255–56 (arguing that the right to food has achieved jus cogens status).

467. RESTATEMENT, *supra* note 408, § 102, rep. n.5.

pronounced in Article 11 of the ICESCR.[468] Like the ICCPR, the ICESCR has been widely ratified.[469] Additionally, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States Parties to ensure adequate nutrition for women during pregnancy and lactation.[470] It has been ratified by 179 states.[471] The CRC has 192 States Parties. Each State Party is called upon to take appropriate measures to combat disease and malnutrition through, inter alia, the provision of adequate nutritious foods and clean drinking water.[472] According to the *Restatement*, while general state practice need not be universal, it should include those states most directly affected.[473] In the case of the ICESCR, CEDAW and CRC, not only have the conventions been widely ratified, but their States Parties include countries that are most affected by world hunger, including India and the countries of sub-Saharan Africa.[474] In addition to human rights treaties, the right to food can be found under humanitarian law,[475] in U.N. resolutions,[476] and in countless international declarations.[477] According to one commentator, the international community's attempts to actualize the right to food can be found in "over one hundred instruments relevant to the right to food's definition and establishment as a human right."[478]

2. Humanitarian Law

The Geneva Conventions, considered the cornerstones of international humanitarian law and widely claimed as customary

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

469. The ICESCR has been ratified by 149 states and signed by an additional 7. The ICCPR has 152 States Parties. U.N. OFFICE OF THE HIGH COMM. FOR HUM. RTS., *supra* note 77.

470. CEDAW, *supra* note 54, art. 12(2).

471. U.N. OFFICE OF THE HIGH COMM. FOR HUM. RTS., *supra* note 77.

472. CRC, *supra* note 54, arts. 24(2)(c), 27.

473. Steiner & Alston, *supra* note 418, at 70. The Law of the Sea, for example, matters much more to states that are coastal than to those that are landlocked.

474. U.N. OFFICE OF THE HIGH COMM. FOR HUM. RTS., *supra* note 77; U.N. FAO, *23 Countries in Sub-Saharan Africa are Facing Food Emergencies*, July 23, 2003, *available at* http://www.fao.org/english/newsroom/news/2003/20863-en.html. All of these countries have ratified at least one of the mentioned conventions.

475. *See infra* Part III.C.2.

476. *See infra* Part III.C.3.

477. *See infra* Part III.C.4.

478. Kearns, *supra* note 428, at 232, 254 (citing Tomasevski, *supra* note 58, and arguing that the continuous reinforcement of the right through human rights instruments and other vehicles is part of the "ongoing and evolving process that represents customary international law").

international law,[479] ensure the availability of food in cases of armed conflict. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I) requires a state that has captured medical personnel from a neutral country, who were providing medical assistance to an enemy party, to provide such individuals with the same food as is granted to the corresponding personnel in the state's own armed forces, and to ensure that "[t]he food shall in any case be sufficient as regards quantity, quality and variety to keep the said personnel in a normal state of health."[480]

Similarly, the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) requires the detaining power to "supply prisoners of war who are being evacuated with sufficient food" and to ensure that "[t]he basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies."[481] A number of other provisions in the same Convention also relate to the right to food.[482] The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) contains several articles that address the right to food.[483] Article 55 is of particular importance as it imposes an affirmative duty on the occupying power to ensure food and medical supplies for the occupied population.[484] Two Protocols to the Geneva Conventions also address the right to food.[485] In particular,

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479. Major Joseph P. "Dutch" Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 37 (2001); *see also* Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621, 624 n.11 (1995).

480. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field art. 32, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950).

481. Geneva Convention Relative to the Treatment of Prisoners of War arts. 20, 26, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

482. *See, e.g.*, *id.* arts. 28, 31, 46, 72.

483. Geneva Convention Relative to the Protection of Civilian Personnel in Time of War arts. 15, 23, 36, 40, 49, 50–51, 55, 59, 60–62, 76, 87, 89, 91, 100, 108, 127, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

484. *Id.* art. 55.

485. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 54, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979) [hereinafter Protocol I], *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS RESOLUTIONS AND OTHER DOCUMENTS 712711 (Dietrich Schindler & Jirí Toman eds., 4th rev. ed. 2004); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 5(1)(b),(c), 14, 18, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II].

they provide that the "[s]tarvation of civilians as a method of combat is prohibited."[486] The Protocols also impose a positive obligation, stating that relief actions must be undertaken if the civilian population is lacking food supplies, subject to the consent of the party or parties concerned.[487]

While a detailed examination of the Geneva Conventions and other norms of humanitarian law is beyond the scope of this Article, two points are worth noting. First, under humanitarian law, both the right to be free from hunger and the right to adequate food are firmly established as rights that must be respected in times of armed conflict. Second, states have exhibited virtually universal adherence to the Conventions.[488] While the applicability of the Conventions to detainees in the "war on terror" has recently been challenged by the United States,[489] no state has rejected the application of provisions ensuring access to food in times of armed conflict.

Because the Geneva Conventions are only applicable to situations of armed conflict, it could be argued that the norms encapsulated in these documents cannot be presumed to carry the same weight in non-conflict situations. On the other hand, a number of human rights (including the right to life) are routinely suspended for the duration of hostilities.[490] Those norms that are observed even in times of conflict can easily be seen as having the status of fundamental rights. Additionally, humanitarian law is increasingly seen as incorporating those norms that are already established under human rights law.[491]

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486. Protocol I, *supra* note 485, art. 54(1); Protocol II, *supra* note 485, art. 14.

487. Protocol I, *supra* note 485, art. 70(1); Protocol II, *supra* note 485, art. 18(2); *see also* Rome Statute of the International Criminal Court art. 7(1)–(2), July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) (addressing issues of access to food).

488. International Committee of the Red Cross, The Geneva Conventions: The Core of International Humanitarian Law (2004), http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions.

489. The United States has taken the position that the Geneva Conventions do not apply to al Qaeda members and only partially apply to members of the Taliban, with the result that neither Taliban nor al Qaeda detainees are considered by the United States to be prisoners of war. *See* Memorandum from President Bush, to the Vice President et al., regarding Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf.

490. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 256 (2000); *see also* U.N. Human Rts. Comm., *General Comment 29: States of Emergency*, ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (noting that states may derogate from the ICCPR in times of armed conflict).

491. *See* Meron, *supra* note 490, at 239; Yoram Dinstein, *The International Law of Inter-State Wars and Human Rights*, 7 ISR. Y.B. HUM. RTS. 139, 148 (1977); *see also* Theodor Meron, Note & Comment, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for A New Instrument*, 77 AM. J. INT'L L. 589 (1983).

3. U.N. Resolutions

Resolutions made by multi-state actors in international forums are an important indication of state practice, and depending on their content, may also provide evidence of opinio juris.[492] The U.N. General Assembly resolutions are of particular importance because they reflect the views and actions of a plurality of states. U.N. General Assembly resolutions repeatedly reference the right to food and/or the obligation to refrain from endangering food security. Resolution 57/226, *The Right to Food*, for example, states that "food should not be used as an instrument of political or economic pressure" and reaffirms "the importance of international cooperation and solidarity, as well as the necessity of refraining from unilateral measures that are not in accordance with international law and the Charter of the United Nations and that endanger food security."[493] The Resolution also reaffirms "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger so as to be able fully to develop and maintain their physical and mental capacities."[494]

Similar statements are made in General Assembly Resolution 58/186, *The Right to Food.* That Resolution goes even further, noting that:

> [E]ach State *must* adopt a strategy consistent with its resources and capacities to achieve its individual goals in implementing the recommendations contained in the Rome Declaration and the World Food Summit Plan of Action and, at the same time, cooperate regionally and internationally in order to organize collective solutions to global issues of food security in a world of increasingly interlinked institutions, societies and economies where coordinated efforts and shared responsibilities are essential.[495]

Sanctions-imposing resolutions also evince recognition of the right to be free from hunger as a fundamental human rights norm.[496]

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492. *See supra* note 448.

493. The Right to Food, U.N. GAOR, 57th Sess., Supp. No. 49, at 2, U.N. Doc. A/RES/57/226 (Feb. 26, 2003).

494. *Id.*

495. The Right to Food, U.N. GAOR, 58th Sess., Supp. No. 49, at 2, U.N. Doc. A/RES/58/186 (Mar. 18, 2004) (emphasis added). For more on the Rome Declaration and the World Food Summit Plan of Action, see *supra* note 216.

496. A 2004 working paper outlining basic criteria for the imposition of sanctions states, "Decisions on sanctions must not create situations in which fundamental human rights not

In its imposition of sanctions, the Security Council increasingly strives to balance the requisite degree of effectiveness with the need to minimize collateral injuries to the population, such as the deprivation of food or essential medicines.[497] Multilateral sanctions against Iraq, perhaps the most comprehensive in history, are a case in point.[498] During the first phase—from August 1990 to April 1997—all Iraqi exports and all Iraqi imports, with the exception of essential foodstuffs and medical supplies, were banned.[499] The exception for food was a narrow one and ultimately, a lack of information and the "red tape of the Sanctions Committee" severely restricted the flow of food to Iraq, resulting in severe hunger and malnutrition in the Iraqi population.[500] In an attempt to counter the devastation caused by years of sanctions, the United Nations established the Oil-for-Food program in 1996.[501] In April 1997, the program began, allowing Iraq

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subject to suspension even in an emergency situation would be violated, above all the right to life, the right to freedom from hunger and the right to effective health care and medical services for all." Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, *Declaration on the Basic Conditions and Standard Criteria for the Introduction and Implementation of Sanctions and other Coercive Measures: Revised Working Paper Submitted by the Russian Federation*, ¶ 14, U.N. Doc. A/AC.182/L.114/Rev.1/Annex I(14) (Mar. 17, 2004).

497. For example, each of the arms embargoes imposed against Rwanda, S.C. Res. 918, ¶ 12, U.N. Doc. S/RES/918 (May 17, 1994), S.C. Res 997, ¶ 3(c), U.N. Doc. S/RES/997 (June 9, 1995); Liberia, S.C. Res. 788, ¶ 12, U.N. Doc. S/RES/788 (Nov. 19, 1992); and Somalia, S.C. Res. 733, ¶ 9, U.N. Doc. S/RES/733 (Jan. 23, 1992), highlight the importance of increasing humanitarian assistance to the affected population. *See also* S.C. Res. 1333 pmbl., ¶ 17, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (recognizing vis-à-vis the Taliban regime that the "necessity for sanctions to contain adequate and effective exemptions to avoid adverse humanitarian consequences"); S.C. Res. 943, pmbl., ¶ 9, U.N. Doc. S/RES/943 (Sept. 23, 1994) (calling upon "the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) to maintain the effective closure of the border between Federal Republic of Yugoslavia (Serbia and Montenegro) and the Republic of Bosnia and Herzegovina with respect to all goods except foodstuffs, medical supplies and clothing for essential humanitarian needs").

498. *See* John Rempel, Liaison, Mennonite Central Committee United Nations Office, *A Brief History of United Nations Sanctions Against Iraq*, http://peace.mennolink.org/articles/iraqsancthist.html (last visited Apr. 25, 2006); *see also* Richard Garfield, *Changes in Health and Well-Being in Iraq during the 1990s: What Do We Know and How Do We Know It?*, *in* SANCTIONS ON IRAQ–BACKGROUND, CONSEQUENCES, STRATEGIES: PROCEEDINGS OF THE CONFERENCE HOSTED BY THE CAMPAIGN AGAINST SANCTIONS ON IRAQ 32, 38–42 (1999), *available at* http://www.casi.org.uk/conf99/proceedings.pdf.

499. Roger Normand & Christoph Wilcke, Symposium, *Human Rights, Sanctions and Terrorist Threats: The United Nations Sanctions Against Iraq*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 299, 309–10 (2001).

500. Cassandra LaRae-Perez, Note, *Economic Sanctions as a Use of Force: Re-Evaluating the Legality of Sanctions from an Effects-Based Perspective*, 20 B.U. INT'L L.J. 161, 166–67 (2002).

501. Global Policy Forum, Sanctions Against Iraq, http://www.globalpolicy.org/security/sanction/indexone.htm (last visited Apr. 25, 2006).

to pay for the importation of humanitarian goods through an escrow account containing Iraqi oil revenues and administered by the Security Council.[502] The program ended in 2003 and has since been dogged by revelations of corruption.[503] Still, the program helped establish that even the most comprehensive sanctions regimes must carve out exceptions for the importation of food.[504]

4. Declarations

Declarations provide additional evidence of state practice and, in some circumstances, opinio juris. Multi-state declarations are gaining importance as states increasingly act collectively by forming conferences, groups, and compacts. It is in these forums that states are likely to pronounce their positions on legal rights and obligations.[505]

The right to be free from hunger and, to some degree, the right to adequate food has been reaffirmed by states in a number of conferences and declarations, beginning as early as 1967, when eighteen states signed a Food Aid Convention (FAC), declaring their intention to supply a minimum amount of food aid to countries in need.[506] In 1997, members of the Food Aid Committee (Argentina, Australia, Canada, the European Community and its Member States, Japan, Norway, Switzerland, and the United States) negotiated a new FAC, which came into effect on July 1, 1999, with an initial duration period of three years.[507] The overarching objective of the FAC is "[t]o contribute to world food security and to improve the ability of the international community to respond to emergency food situations and other food needs of developing countries."[508] The FAC was extended by two years in June 2003.[509]

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502. Normand & Wilcke, *supra* note 499, at 309–10.

503. *Oil-for-Fraud: UN Oil-for-Food Scandal*, ECONOMIST.COM, Apr. 22, 2004, *available at* http://www.economist.com/agenda/displaystory.cfm?story_id=E1_NGTRNGD.

504. *See General Comment 8*, *supra* note 179, ¶ 12 (discussing the need to take economic, social, and cultural human rights "fully into account when designing an appropriate sanctions regime").

505. *See* RESTATEMENT, supra note 408, § 102, rep. n.5.

506. International Grains Arrangement 1967: Wheat Trade Convention and Food Aid Convention art. I, Oct. 15, 1967, TIAS 6537, 727 U.N.T.S. 2, *available at* http://www.austlii.edu.au/au/other/dfat/treaties/1968/14.html ("The purpose of this Convention is to carry out a food aid program . . . for the benefit of developing countries.").

507. Food Aid Convention, Apr. 13, 1999, KAV 6136, 2073 U.N.T.S. 135, *available at* http://www.fao.org/Legal/rtf/fac99-e.htm [hereinafter FAC].

508. *Id.* art. I.

509. U.N. FAO, *Food Outlook: Food Aid—Developments Related to the Food Aid Convention*, Apr. 2004, *available at* http://www.fao.org/documents/show_cdr.asp?url_file=/

In 1974, the Universal Declaration on the Eradication of Hunger and Malnutrition proclaimed the unequivocal right of every individual to be free from hunger.[510] In 1984, the U.N. General Assembly resolved that "the right to food is a universal human right which should be guaranteed to all people, and, in that context, [the General Assembly] believes in the general principle that food should not be used as an instrument of political pressure."[511] A year later, the World Food Security Compact reaffirmed the fundamental right to be free from hunger.[512]

In 1996, the World Food Summit held by the FAO once again reaffirmed "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger."[513] The World Food Summit was attended by 185 countries and the European Community, as well as 790 NGO delegates representing a total of 457 organizations.[514] The Rome Declaration on Food Security (which was a product of the Summit) emphasized "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger."[515] The Food Summit resulted in a detailed Plan of Action, which outlined steps towards achieving food security.[516]

While the declarations confirm states' recognition of the right to food as a fundamental human right, it could be argued that the declarations do not represent universal acceptance of the right to food as a legal right. On the other hand, these declarations formed part of the process that led to the promulgation of the Millennium Development Goals (MDGs), which have been universally

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docrep/006/J2084e/j2084e08.htm (last visited Apr. 25, 2006).

510. World Food Conference, Universal Declaration on the Eradication of Hunger and Malnutrition, ¶ 1, U.N. Doc. E/CONF.65/20 (Nov. 16, 1974), *available at* http://www.ohchr.org/english/law/malnutrition.htm (World Food Conference convened under G.A. Res. 3180 (XXVIII), U.N. Doc. A/9030 (Dec. 17, 1973); Declaration endorsed by G.A. Res. 3348 (XXIX), U.N. Doc. A/9631 (Dec. 17, 1974)).

511. *Food and Agricultural Problems*, G.A. Res. 166, ¶ 6, U.N. GAOR, 39th Sess., Supp. No. 5, U.N. Doc. A/RES/39/166 (Dec. 17, 1984).

512. U.N. FAO, *Adoption of the World Food Security Compact: Report of the Conference of FAO*, item V.E, 23d Sess. (Nov. 9–28, 1985), *available at* http://www.fao.org/docrep/x5562E/X5562e00.htm.

513. Rome Declaration on World Food Security, *supra* note 216.

514. U.N. FAO, *World Food Summit*, Nov. 13–17, 1996 (June 1999), http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/X2051e/X2051e00.htm (follow "Attendance" hyperlink).

515. *Rome Declaration on World Food Security*, *supra* note 216.

516. *Id.*

recognized.[517] The MDGs were adopted by all members of the United Nations.[518] The first MDG concerns the eradication of extreme poverty and hunger. Specifically, it calls for reducing the proportion of people living on less than $1 a day to half the 1990 level by 2015.[519] It also calls for halving the proportion of people who suffer from hunger between 1990 and 2015.[520]

The MDGs represent virtually universal acceptance of the right to be free from hunger, which is the core minimum component of the right to food. The *Restatement* itself provides that "virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights" can be evidence of customary international law.[521] Because of the universal participation of states in the preparation and adoption of the MDGs,[522] the MDGs should be viewed as evidence of customary international law. Commitments to the MDGs have also been reinforced or confirmed in other forums, including the WTO's Doha Ministerial Declaration,[523] the Monterrey Consensus,[524] and most recently, the FAO's Voluntary Guidelines for the Implementation of the Right to Adequate Food.[525]

In addition to MDGs and other declarations, the right to be free from hunger and, to some extent, the broader right to adequate food have been reaffirmed or read into regional charters, conventions, and declarations, including the American Declaration of

517. *See supra* note 1.

518. *See Road Map Towards the Implementation of the United Nations Millennium Declaration*, U.N. GAOR, 56th Sess., Agenda Item 40, U.N. Doc. A/56/326 (Sept. 6, 2001) (refining some of MDGs).

519. *Id.*

520. World Bank Group, *Millennium Development Goals: Eradicate Extreme Poverty and Hunger*, http://ddp-ext.worldbank.org/ext/GMIS/gdmis.do?siteId=2&goalId=5&targetId=15&menuId=LNAV01GOAL1SUB1 (last visited Apr. 25, 2006).

521. RESTATEMENT, *supra* note 408, § 701.

522. Gordon Brown, U.K. Chancellor of the Exchequer, Speech at the Nat'l Gallery of Scotland (Jan. 6, 2005), *in* BBC NEWS, Jan. 6, 2005, *available at* http://news.bbc.co.uk/1/hi/uk_politics/4151525.stm.

523. WTO, Doha WTO Ministerial 2001, Ministerial Declaration adopted on 14 November 2001, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

524. The Monterrey Consensus came out of the March 2002 International Conference on Financing for Development in Monterrey, Mexico. *See* U.N. Dep't of Economic and Social Affairs, Follow-Up Process to the International Conference on Financing for Development, http://www.un.org/esa/ffd (last visited Apr. 25, 2006).

525. U.N. Press Release SAG/299, Committee on World Food Security Adopts Right to Food Guidelines, Sept. 24, 2004, *available at* http://www.un.org/News/Press/docs/2004/sag299.doc.htm; *see also* Press Release, U.N. FAO Newsroom, Committee on World Food Security Adopts Right to Food Guidelines, Sept. 24, 2004, http://www.fao.org/newsroom/en/news/2004/50821.

the Rights and Duties of Man (1948),[526] the Charter of the Organization of American States (1948),[527] the Inter-American Charter of Social Guarantees,[528] the Additional Protocol to the American Convention on Human Rights,[529] the Cairo Declaration on Human Rights,[530] and the African Charter on Human and Peoples' Rights (and its accompanying Protocol).[531]

5. Constitutional Rights and Domestic Jurisprudence

The right to food has also been incorporated or read into national constitutions. At least twenty countries now explicitly refer to the right to be free from hunger (and to some degree the right to adequate food) or a related norm in their national constitutions.[532] In some countries the judiciary has also played an active role in promoting the right to food. The Supreme Court of India, for

526. American Declaration of the Rights and Duties of Man art. XI, Apr. 30, 1948, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, *available at* http://www.oas.org/juridico/English/ga-Res98/Eres1591.htm ("Every person has the right to the preservation of his health through sanitary and social measures relating to food . . . to the extent permitted by public and community resources.").

527. Charter of the Organization of American States art. 34(j), Apr. 30, 1948, T.I.A.S. 2361, 119 U.N.T.S. 3, *amended by* Protocol of Buenos Aires, O.A.S.T.S. No. 1-A (1967), *further amended by* Protocol of Cartagena, O.A.S.T.S. No. 66 (1985), *further amended by* Protocol of Washington, OEA/Ser.A/2 Add. 3 (SEPF) (1992), *further amended by* Protocol of Managua, OEA/Ser.A/2 Add. (1993), *available at* http://www.oas.org/juridico/english/charter.html.

528. Inter-American Charter of Social Guarantees art. 5, Apr. 30, 1948, *in* Int'l Conferences of Am. States, 2d Supp., 1942–1954, Pan Am. Union, 1958, at 262.

529. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) art. 12(1), Nov. 17, 1988, O.A.S.T.S. No. 69. The Additional Protocol has been ratified by thirteen countries. Inter-American Commission on Human Rights, Signatures and Current Status of Ratifications, http://www.iachr.org/Basicos/basic6.htm (last visited Apr. 25, 2006).

530. Cairo Declaration on Human Rights in Islam art. 17(c), Aug. 5, 1990, Organization of the Islamic Conference A/CONF.157/PC/62/Add.18 (1993).

531. African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 15, July 11, 2003, 2d Ordinary Session of the Assembly of the Union, *available at* http://www.achpr.org/english/_info/women_en.html. The right to food exists implicitly in the African Charter on Human and Peoples' Rights, as determined in *SERACESR v. Nigeria*. Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rts. (SERACESR) v. Nigeria, Communication No. 155/96, (prepared by African Commission on Human and Peoples' Rights) (2001).

532. The countries are Bangladesh, Brazil, Colombia, Congo, Cuba, Ecuador, Ethiopia, Guatemala, Haiti, India, Islamic Republic of Iran, Malawi, Nicaragua, Nigeria, Pakistan, Paraguay, South Africa, Sri Lanka, Uganda, and Ukraine. *See* THE RIGHT TO FOOD IN THEORY AND PRACTICE, *supra* note 8, at 42–43. Ironically, developed countries, which do not suffer the same resource constraints as developing countries, do not appear in this list.

example, affirmed that where people are unable to feed themselves adequately, governments have an obligation to ensure that they are not exposed to malnourishment, starvation, and other related problems.[533] In South Africa, the implementation of the right to food has been strengthened by the establishment of the South African Human Rights Commission to ensure the progressive realization of economic, social and cultural rights.[534]

D. The Right to be Free from Hunger as Customary International Law

As demonstrated above, a plethora of treaties, resolutions, and declarations at the international level, and a growing number of constitutional and judicial interpretations at the domestic level, evince the evolution of the right to food into a customary norm. It could nevertheless be argued that recognition of the right to food as a legal right with corresponding legal obligations is nowhere near universal and that conclusions regarding its status as custom are premature. A particularly strong argument, however, can be made that the right to be free from hunger has already achieved the status of customary international law.

While the number of documents affirming the right to be free from hunger has already been outlined above, the nearly universal commitment to reducing hunger under the MDGs bears repeating. In the words of U.K. Chancellor Gordon Brown:

> The Millennium Development Goals were not a casual commitment. Every world leader signed up. Every international body signed up. Almost every single country signed up. The world in unison accepting the challenge and agreeing the changes necessary to fulfil it—rights and responsibilities accepted by rich and poor alike.[535]

Still, additional evidence is required to support the claim that the right to be free from hunger may already be customary international law. The ESCR Committee has held that "basic

533. 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).

534. The Commission is required, under the Constitution, to report annually to Parliament on the realization of economic and social rights. U.N. Econ. & Soc. Council, Comm. on Human Rights, *The Right to Food* 58th Sess., Agenda Item 10, ¶¶ 46, 48–49, 52, U.N. Doc. E/CN.4/2002/58 (Jan. 10, 2002) (*prepared by* Jean Ziegler).

535. Brown, *supra* note 522.

economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law . . . ."[536] As explained in Part I, the right to be free from hunger is a minimum core component of the broader right to food. While the right to adequate food is a "relative" standard, the right to be free from hunger is "absolute" and fundamental.[537] Indeed it is the only right to be qualified as "fundamental" in both the ICCPR and the ICESCR.[538]

A comparative reading of the language of the ICESCR also supports the distinct status of the right to be free from hunger. Article 11(1) requires states to recognize the right of everyone to adequate food and to "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.*"[539] The language of Article 11(2), however, is markedly different:

> 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* to improve methods of production, conservation and distribution of food by . . . [t]aking 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.[540]

In contrast to the right to adequate food, the right to be free from hunger is considered a fundamental right; states must take whatever steps are needed to ensure its realization and international cooperation is mandatory and not subject to consent. In other words, the obligation to ensure the right to be free from hunger takes immediate effect (unlike the right to adequate food) and is not subject to the standard of progressive realization that applies to other social and economic rights. The ESCR Committee's General Comment 12

536. U.N. CESCR, *CESCR Concluding Observations: Israel*, ¶ 31, 13th Sess., U.N. Doc. E/C.12/1/Add.90 (May 23, 2003); *see also* Schachter, *supra* note 443, at 231 ("Present tendencies also suggest that other human rights may be on their way to acceptance as general international law . . . in particular, the right to basic sustenance . . . ."); Buckingham, *supra* note 461, at 293.

537. Tomasevski, THE RIGHT TO FOOD, *supra* note 58, at xviii.

538. ICESCR, *supra* note 35, art. 11(2); *see also Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food*, *supra* note 59, ¶ 16; *General Comment 6*, *supra* note 59.

539. ICESCR, *supra* note 35, art. 11(1) (emphasis added).

540. *Id.* art. 11(2). (emphasis added)

recognized, pursuant to Article 11(2), "that more immediate and urgent steps may be needed" to realize the right to be free from hunger.[541] Moreover, while "[t]he right to adequate food will have to be realized progressively. . . . States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters."[542]

Even states that have not ratified the ICESCR or constitutionalized the right to food (or read the right into a fundamental right already contained in the constitution) often act consistently with a recognition that people should not go hungry. Examples abound of foreign food aid to countries in need,[543] and of domestic food aid through programs that subsidize or provide food to vulnerable populations.[544] Food drives initiated by NGOs and other non-state actors further evince recognition of the right to be free from hunger. The unprecedented outpouring of both governmental and private aid in response to the December 2004 Indian Ocean tsunami is the most recent and telling example. Within two weeks of the disaster, the U.N.'s World Food Programme confidently announced that none of the survivors of the tsunami would lose their lives to hunger, adding that food aid had reached "nearly everyone who has been harmed by the disaster."[545]

Even the United States, which has consistently opposed the recognition of social and economic rights in general—it has not ratified the ICESCR—and the right to food in particular, supports efforts to ensure freedom from hunger, at home and abroad. Domestically, the cornerstone of America's anti-hunger strategy is federal food assistance in the form of programs such as the Food Stamp Program, child nutrition programs, and the Special

541. *General Comment 12*, *supra* note 43, ¶1.

542. *Id.* ¶6.

543. *See generally* Charles E. Hanrahan & Carol Canada, *CRS Report for Congress: International Food Aid: U.S. and Other Donor Contributions* (2005), *available at* http://www.nationalaglawcenter.org/assets/crs/RS21279.pdf.

544. *See, e.g.*, U.S. Dep't of Agric., Food and Nutrition Service, Food Stamp Program, http://www.fns.usda.gov/fsp (last visited Apr. 25, 2006).

545. U.N. Upbeat on Tsunami Hunger Aid, BBC NEWS, Jan. 9, 2005, *available at* http://news.bbc.co.uk/1/hi/world/asia-pacific/4157947.stm. However, there are risks associated with food aid, including encouraging dependency and discouraging local production. Canadian Foodgrains Bank, Risks of Food Aid, http://www.foodgrainsbank.ca/programming/planning_reporting/tips/tips/tips402.pdf (last visited Mar. 20, 2006); *see also* FRANCES MOORE LAPPE ET AL., WORLD HUNGER: 12 MYTHS 136–37 (2d ed. 1998), *reprinted in* Globalissues.org, Myth: More U.S. Aid Will Help the Hungry, Food Aid Forestalls Development (Nov. 25, 2000), http://www.globalissues.org/TradeRelated/Poverty/FoodDumping/FoodFirst/Consequence4.asp.

Supplemental Nutrition Program for Women, Infants, and Children (WIC).[546] Internationally, the United States supplied fifty-nine percent of food aid from major donors between 1995 and 2003, and over forty-eight percent of food aid contributions to the World Food Programme between 1996 and April 2005.[547] While the United States initially announced post-tsunami aid in the amount of $35 million, it eventually increased its aid budget to $950 million, partly in response to criticism that it was being "stingy."[548]

While the United States could argue—and in the past has argued—that it is under "no international legal obligation to feed others,"[549] it is unlikely that the United States could have ignored calls to increase aid. While its compulsion to act may not be couched

546. *See* A BLUEPRINT TO END HUNGER 4 (National Anti-Hunger Organizations, 2004), *available at* http://www.alliancetoendhunger.org/pdfs/Blueprint%20to%20End%20Hunger.pdf. U.S. courts have acknowledged that the Eighth Amendment requires that inmates be allowed access to necessary medical care. *See* Estelle v. Gamble, 429 U.S. 97, 103–05 (1976). Additionally, the courts acknowledge inmates' right to a special diet if such an accommodation is medically necessary. Byrd v. Wilson, 701 F.2d 592 (6th Cir. 1983); Frazier v. Dep't of Corr., No. 97-2086, 1997 WL 603773 (10th Cir. Oct. 1, 1997). Courts have also held that the First Amendment guarantees inmates the right to "food sufficient to sustain them in good health that satisfies the dietary laws of their religion." Fox v. Erickson, No. 94-2997, 1995 WL 29540 (8th Cir. Jan. 27, 1995) (quoting McElyea v. Babbitt, 833 F.2d 196, 198 (9th Cir. 1987)). Indeed, as one court has observed, "Some have suggested that there is, in the American Constitutional system, a fundamental right to food for the destitute. It seems clear that without food, and its corollary, physical survival, all of the other rights embodied in the Constitution lose their meaning." West v. Bowen, 879 F.2d 1122, 1145 n.15 (3d Cir. 1989) (citing, inter alia, Universal Declaration of Human Rights, G.A. Res. 217(A) at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948)); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 778–79 (1988) ("The day may indeed come when a general doctrine under the fifth and fourteenth amendments recognizes for each individual a constitutional right to a decent level of affirmative governmental protection in meeting the basic human needs of physical survival."); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 19–48 (1987); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (arguing that the Supreme Court should protect the poor through a right to minimum welfare); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (discussing the support that Rawls provides for a theory of justiciable welfare rights); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (1979) (responding to criticisms of his theory of minimum welfare rights).

547. Hanrahan & Canada, *supra* note 543, at 1–2.

548. Bill Sammon, *U.N. Official Slams U.S. as "Stingy" Over Aid*, WASH. TIMES, Dec. 28, 2004, at A1, *available at* http://www.washtimes.com/national/20041228-122330-7268r.htm; *see also* Bob Deans, *Bush Nearly Triples Request for Tsunami Relief*, SEATTLE POST-INTELLIGENCER, Feb. 10, 2005, § Nation/World *available at* http://seattlepi.nwsource.com/national/211462_tsunamifunds10.html.

549. Press Release, U.S. Mission to the United Nations, Statement by Lucy Tamlyn, Senior Advisor, on Agenda Item 105: Human Rights Questions, in the Third Committee (Oct. 27, 2004), *available at* http://www.un.int/usa/04_211.htm.

in legal obligation terms, it nevertheless felt compelled to respond, reflecting some understanding of its broader responsibilities as a rich nation. A more careful examination of the U.S. objections to the right to food also shows that it too maintains a distinction between the right to adequate food and freedom from hunger. In its reservation to the 2002 World Food Summit Declaration, the U.S. objections centered on the existence of international obligations and on the justiciability of the right to adequate food in the domestic context.[550] The statement supported the progressive realization of the right to adequate food as a component of the right to an adequate standard of living,[551] adding that the "real work" at hand is the reduction of poverty and hunger.[552] It is noteworthy that the only other reservation to the Declaration was submitted by Norway, indicating its preference for stronger language and a binding Code of Conduct.[553] The United States was also the only country to vote against the U.N. resolution on the right to food.[554] Here too the United States supported the right to adequate food as a component of the right to an adequate standard of living and added that the "[U.S.] Government's commitment to providing food aid and ending hunger [is] unquestionable."[555]

In sum, despite opposition to the broader right to food as a legal obligation, even the United States demonstrates some recognition of the fundamental right to be free from hunger through its state practice. Still one could argue that the United States has been a "persistent objector" to the right to food.[556] Yet the analysis above shows that its objections have not been consistent and have distinguished between the right to adequate food and freedom from hunger. Moreover, the United States' position does not negate the possibility that the right to be free from hunger has become a customary international norm—it simply determines whether or not

550. *See* Remarks by Marc Leland, *supra* note 225.

551. *Id.*

552. JONATHAN SHEFF, THE RIGHT TO FOOD AND THE WORLD FOOD SUMMIT: FIVE YEARS LATER 15 (The Carr Center for Human Rights Policy, Summer Report 2002), *available at* http://www.ksg.harvard.edu/cchrp/pdf/The%20Right%20to%20Food%20Report02.pdf.

553. *Id.* at 15 n.i.

554. *The Right to Food*, G.A. Res. 56/155, U.N. GAOR, 56th Sess., Supp. No. 49, U.N. Doc. A/RES/56/155 (Feb. 15, 2002).

555. *Summary Record of the 56th Meeting, held at the Palais des Nations, Geneva, on Tuesday, 22 April 2003*, U.N. CHR, 59th Sess., U.N. Doc. E/CN.4/2003/SR.56 (May 19, 2003). The United States also voiced its objections to the justiciability of the right to food during the Third Committee of the General Assembly meeting in 2001. Peter Rosset, *U.S. Opposes Right to Food at World Summit*, FOODFIRST, June 30, 2002, http://www.foodfirst.org/archive/media/opeds/2002/usopposes.html.

556. *See supra* note 408.

the United States is bound by the norm.[557]

While strong evidence exists to support the status of the right to be free from hunger as customary international law, additional steps must be taken to elevate the broader right to adequate food to this status. The following section addresses the role of non-state actors, including NGOs, in crystallizing the right to food as a norm of customary international law.

E. The Role of Non-governmental Organizations

NGOs in both the developed and developing world—as veritable "enforcers" of human rights—have a significant role to play in shaping public perception and promoting the right to food as customary international law. Left to their own devices, states may have little incentive to implement or enforce human rights norms that often act as restraints on state behavior. The contribution of NGOs in the formation of customary human rights law cannot be underestimated. Amnesty International's role in elevating the status of the right to be free from torture into a jus cogens norm is a case in point. The NGO's early monitoring and campaigning against torture worldwide helped define practices prohibited under the norm.[558] Through consistent pressure and support for governmental initiatives, it also enabled the adoption of the Declaration on Protection of All Persons from Being Subjected to Torture and other Cruel, Inhumane or Degrading Punishment by the General Assembly in 1975, and the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in 1984.[559]

Though state practice and opinio juris on the right to be free from torture often come into direct conflict,[560] NGOs have played a crucial role in bridging this gap by closely monitoring states' compliance with this norm.[561] The same could be done with respect

557. Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18) (observing that even if there were a customary rule prohibiting the enclosure of bays by baselines over ten miles long, Norway would not be bound by it because Norway had persistently objected to the rule); *see also* Asylum (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20).

558. Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 96–97 (2001); *see also* Joaquin Tacsan, Letter from the Chair, 2 INT'L LEGAL THEORY 1, 5–8 (III(2)) (1996), *available at* http://law.ubalt.edu/cicl/ilt/2_1_1996.pdf (discussing the role of human actors, including non-governmental organizations, in the development of international law).

559. Nagan & Atkins, *supra* note 558, at 87, 96–97.

560. *See supra* note 440.

561. *See, e.g.*, Amnesty Int'l, *Stop Torture and Ill-Treatment in the "War on Terror,"*

to social and economic rights. Those states that recognize the right to food should be held accountable for their failure to fulfill their obligations, both individually and through their relationship with TNCs and IFIs. Those states that do not accept legal obligation but act consistently with the recognition of the right to food should be called upon to acknowledge that their actions stem from a widely accepted norm of customary international law.

In response to the critique that "socioeconomic rights are simply not providing the guidance that a rule of law should provide,"[562] it is imperative to develop such guidance. The *Maastricht Guidelines* and General Comments of the ESCR Committee are steps in the right direction, but much more remains to be done. Here too NGOs can play a role. Greater certainty and specificity in the form of indicators and benchmarks, greater clarity in formulating state obligations, and more stringent monitoring mechanisms are required in order for the right to food to make its way boldly and comfortably into customary international law.

CONCLUSION

The millions of people who continue to suffer and die from hunger or hunger-related illnesses are a testament to the failure of the international community to use the "right to food" as an effective weapon in the fight against hunger. International human rights law and the bodies, activists, and scholars who promote human rights norms have not kept pace with the changing economic order. While the right to food is both hard law and a strong moral imperative, the inability to reconcile states' obligations with global processes has allowed the world's most powerful actors (transnational corporations, international financial institutions, and influential states) to opt out of legal obligation. This Article begins the process of closing these accountability gaps.

Given the fundamental nature of the right to food, and its relationship to the economic environment, even subtle changes in the global economic order can have profound and often devastating effects on one's ability to be free from hunger or have sustainable

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http://web.amnesty.org/pages/stoptorture-index-eng (last visited Apr. 25, 2006); Human Rts. Watch: United States, *Prison: Torture/Mistreatment, Recent Human Rights Work on the Torture and Abuse of U.S. Detainees*, http://www.hrw.org/doc/?t=usa_torture (last visited Apr. 25, 2006); World Organisation Against Torture, http://www.omct.org (last visited Apr. 25, 2006).

562. Sajo, *supra* note 430, at 224.

access to adequate food. In the introduction to this Article, I demonstrated how economic and rights-based approaches to food security can reinforce one another while compensating for each other's shortcomings. Part I examined the threats to the right to food from states, TNCs, and IFIs. It exposed the accountability gaps in international law that undermine effective implementation of the right to food by allowing TNCs and IFIs to slip through the cracks. It further argued that normative guidance on the obligation of states to uphold the right to food extraterritorially conflicts with the more conservative articulations of states' obligations under international law. In Part II.A, I proposed that the ICESCR can be extraterritorially applied using the obligation of international cooperation, particularly with regard to the duties to respect and protect social and economic rights.

International financial institutions such as the World Bank and the IMF are essentially *multi-state* actors. They are comprised of member states, many of which are States Parties to the ICESCR. In Part II.B, I argued that member states can be required to take into account their international human rights treaty obligations when participating in IFIs. Given significant weaknesses in mechanisms to hold TNCs directly accountable, or indirectly accountable via the host state, in Part II.C I argued that TNCs can be held indirectly accountable via the home state by adapting the due diligence and decisive influence standards to the relationship between home states and TNCs. I further proposed that home states regulate corporate activity through the enactment of domestic legislation or multi-lateral conventions with extraterritorial reach.

The development of norms outside the ICESCR to reconcile the incompatibility of multiple legal regimes and to hold non-ICESCR ratifying states accountable is a necessary precursor to the realization of the right to food under globalization. In Part III, I addressed the accountability of non-ratifying states by locating the right to food in customary international law. Globalization necessitates an approach that acknowledges that states no longer act alone and that the formation of custom and international law is often the result of collective state action in international forums. Through an analysis of the right to food under international and regional human rights instruments, humanitarian law, U.N. resolutions, declarations, as well as domestic constitutions and jurisprudence, I demonstrated that state practice and opinio juris on the right food has expanded dramatically since the adoption of the UDHR in 1948 and the ICESCR in 1966. I further concluded that the minimum core component of the right to food—the right to be free from hunger—may have already achieved customary status.

The changes called for in this Article necessarily require the willing participation of states' governments and the international community. Scholars, the judiciary, and the NGO sector also have a role to play in moving the discussion forward. Yet a review of legal scholarship on the subject finds surprisingly little on the extraterritorial application of economic and social rights in general and nothing of substance on the right to food in particular. The *Restatement*, which has not been updated since 1987, must also be brought in line with developments in state practice and opinio juris over the past two decades. In addition, more exploration of the legal obligation of international cooperation is needed both in terms of its theoretical foundations and its evolution in international law.

While this Article begins to fill the doctrinal gaps in a legal structure that is quickly losing its relevance in a globalized world, the development of norms must go hand in hand with evolutions in public perception.[563] Civil society in both developed and developing countries must embrace and demand the right to food as a legal entitlement. NGOs can help shape public perception of the right to food and, ultimately, help ensure its effective enforcement. NGOs can, for example, monitor the impact of IFI and TNC policies on the right to food, and other social and economic rights; they can assist in the development of appropriate indicators to measure the implementation of social and economic rights at home; and they can document and report on failures of governments to ensure non-interference with the enjoyment of social and economic rights abroad. Finally, NGOs can focus on the fact that many powerful countries that are drivers of economic globalization, including the United States, have not ratified the ICESCR.[564] Promoting the ratification of the ICESCR by these countries improves the chances that they will be held accountable for their actions on the global stage.

Despite the historic deprioritization of social and economic rights, the negative effects of globalization have recently brought them to the forefront of human rights and development discourse. As articulations, interpretations, and even commitments to promoting the right to food become more commonplace, the ability to enforce these commitments, or to reconcile them with global processes and global actors, remains relatively weak. In order to ensure the right to food

563. *See* Jean Dreze, *Democracy and the Right to Food*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARD MUTUAL REINFORCEMENT 45 (Philip Alston et al. eds., 2005).

564. Other countries that have not ratified the ICESCR include Indonesia, Malaysia, Myanmar, Pakistan, and Singapore, as well as a number of Middle Eastern countries. *See* U.N. OFFICE OF THE HIGH COMM. FOR HUM. RTS., *supra* note 77.

for all, it is necessary to re-examine the human rights framework in light of globalization. Though by no means exhaustive, the doctrinal changes proposed in this Article are a first and necessary step.