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## PART I

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### Poverty and international law

Setting out the framework

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## Poverty, obligations, and the international economic legal system

What are our duties to the global poor?

KRISTA NADAKAVUKAREN SCHEFER\*

Poverty has had a powerful influence on social history. While it was only with the predominance of capitalism that the numbers of the poor spurred the popular recognition of “poverty as a social phenomenon,”<sup>1</sup> the history of pre-industrialization is rife with evidence that societies have struggled to find the most effective way to address “those suspected of idle inclinations and rebellious tendencies.”<sup>2</sup>

Effective governments from all periods have established rules and customized practices to ensure the effects of poverty remain bounded. The rules and practices of poverty management developed in a reflexive relationship with religious convictions and ethics of the time, but the rules also shaped the secular laws and institutional structures of the world's societies. The efforts, which continue today, all strive to answer the question of what – if anything – the financially secure should, can, or must do about the poor.<sup>3</sup>

Religious and philosophical examinations of poverty have revolved mainly around the questions of the extent of an individual's duty to assist the poor – asking, for example, whether the individual must give

\* I would like to acknowledge and thank several colleagues for their valuable comments on this chapter. The suggestions made by Christian Arnsperger, Stephanie Leinhardt, and Markus Schefer were extremely helpful. All errors, of course, remain mine, but there are now fewer of them.

1 See B. Geremek, *Poverty: A History* (Oxford/Cambridge, MA: Blackwell Publishers, 1994/1997ppb), pp. 5–13 (the introductory chapter gives an overview of the development of the study of poverty throughout history).

2 B. Pullan, “Foreword” in Geremek, *Poverty: A History*, p. viii.

3 For an excellent oversight of poverty reduction efforts since 1945 and a focus on five particular contemporary programs for global aid, see S. Ilcan and A. Lacey, *Governing the Poor: Exercises of Poverty Reduction, Practices of Global Aid* (Montreal and Kingston/London/Ithaca: McGill–Queen's University Press, 2011).

money to one's hungry neighbor and how much an individual must sacrifice for the sake of a stranger in need. While not all aspects of the answers have been agreed upon, the fact that every major religion calls for its members to give to those in need (thereby making charity one of the most obvious commonalities among religions today) shows that an ethical answer to the question of how to approach poverty will likely include at least a degree of individual beneficence.

The laws and institutions that have emerged out of the quest to address poverty on a national scale – from the Bread and Circuses of the Roman empire and Britain's notorious Poor Laws to the US Great Society programs and numerous implementations of states of emergency – are a result of a combination of ethical convictions and realist assessments of poverty as a political force. The latter is not only relevant in democracies, either. The revolutionary potential of the poor's dissatisfaction with the material conditions of their lives has changed history in the numerous times it was actualized. We need not look far back to recognize this – the Arab Spring of 2011 was (in its initial stages) a demand for government attention to the problems of poverty.

Recognizing this change-inducing potential, governments today accept that alleviating the deprivations facing the poor is one of their core functions as well as a survival plan. Direct funding of services – including educational and health systems as well as welfare payments, unemployment compensation, and pension plans – join progressive taxation as the most widely used systems to relieve the effects of poverty and ensure a subsistence-level income for all. Such efforts are not considered a luxury – even the governments of the least developed countries devote a portion of their GDP to finance education, health, and welfare programs,<sup>4</sup> while OECD states spend an average of more than one-fifth of their GDP on such protections. Given this, the answer to addressing poverty will most likely also include a continued emphasis on national legal structures for transfer payments and on governmental programs for the direct funding of institutions serving the poor.

The question of what to do about poverty, however, does not stop at the national border. Even setting aside the question of what duties states have to relieve the plight of the poor living in distant countries, the fact that governmental efforts to reduce poverty at home may be affected by

4 Estimate from World Bank, World Health Organization, and International Monetary Fund indicators of governmental spending. See N. Prasad, *Policies for Redistribution: The Use of Taxes and Social Transfers*, DPS/194/2008 (Geneva: ILO, 2008).

international rules and institutions makes poverty reduction an issue that can only be effectively addressed by examining the global framework.

Politically, efforts to reduce poverty took on an international focus following World War II, thus coinciding with the establishment of the modern international economic law structures. The IMF loans to France in 1947 as well as the Marshall Plan's program (1948–52) to reestablish the productive capacities in Europe were inextricably linked to the reduction of poverty in the target states. Poverty, the post-war planners recognized, was not just a condition that made individuals pitiful, it was a condition that – when widespread – would hamper economic growth by preventing consumer markets from deepening and condemn production to a sub-optimal scale. Global poverty reduction thus became a goal for international economic governance.

The emergence of “development” as an economic agenda followed closely. By the 1960s, the New International Economic Order (NIEO) had brought the dissatisfaction with the unequal distribution of gains from global economic activity to the floors of international governance institutions. Developing countries with large portions of their populations living in poverty became the demandeurs of legally differentiated treatment in the international economic system. Debates on the necessary conditions for industrialization as a presumed prerequisite for poverty reduction became the focus of the international trade and financial institutions in the 1960s and 1970s – should exceptions to liberalization rules be permitted for developing countries? Should special rules be created to ease the integration of developing countries into the global commercial regime? Could industrialized economies offer trade preferences to developing country partners? What institutional changes could be demanded of developing countries in exchange for access to capital for development?

Poverty itself remained on the sidelines of the discussions. The Charter of Economic Rights and Duties of States, the clearest statement of the NIEO's vision, clearly attempts to refocus global market institutions toward creating different conditions for economic growth than toward alleviating the poor's sufferings more directly. Having mentioned “higher standards of living for all peoples” in the Preamble, governmental leaders of the developing world absolved themselves from questioning the growth-poverty reduction causation and expressed what they aimed to secure in the text: more control over sovereign resources, equal partnership in international commercial activities, and the ability to determine their own paths to development. Article 14 of the Charter encapsulates the developing countries' desires:

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... States shall take measures aimed at securing additional benefits for the international trade ... so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports, the acceleration of the rate of growth of their trade, taking into account their development needs, an improvement in the possibilities for these countries to participate in the expansion of world trade and a balance more favourable to developing countries in the sharing of the advantages resulting from this expansion, through ... a substantial improvement in the conditions of access for the products of interest to the developing countries and ... measures designed to attain stable, equitable and remunerative prices for primary products.<sup>5</sup>

The path was thus laid – to an extent by the developing countries themselves – to equating poverty reduction with development, masking the individual's daily struggle with aggregated measures of national economic performance.

As a result, although global economic growth has increased per capita incomes in all regions of the world since 1950,<sup>6</sup> life for the world's most destitute remains one of severe – often life-threatening – deprivation.<sup>7</sup> Today, for far too many people (1 billion is a conservative estimate) aspirations for adequate food and formal housing remain unrealized, basic sanitation is lacking, healthcare is the exception, and the survival of a child beyond the age of five is a reason to celebrate.

Focusing on macroeconomic growth also permits economic institutions to ignore the problem of unequal access to resources that can be the result of the very growth that creates wealthy communities. Poverty in wealthy communities is different from poverty in impoverished communities. For the poor among the rich, the problem of inequality in the distribution of resources is often more severe than that of resource insufficiency. Objectively, the persons experiencing such inequality are much better off in many respects than those of the dollar-a-day poor: food and shelter are generally provided by the government or charitable organizations, healthcare is often subsidized, and their children receive a basic education. Yet there are clear objective disadvantages faced by those who

5 Charter of Economic Rights and Duties of States, Art. 14.

6 See S. S. Bhalla, *Imagine There's No Country* (Washington, DC: Institute for International Economics, 2002), pp. 16, 18 (text and figures setting out growth rates and per capita income in different regions of the world for time periods 1950–80 and 1980–2000).

7 P. Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done about It* (New York: Oxford University Press, 2007), p. 3. (Collier compares the lives of today's poorest populations with those of the past. They “coexist with the twenty-first century, but their reality is the fourteenth century: civil war, plague, ignorance.”)

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are “relatively” poor<sup>8</sup> – the weak financial base making quality education, housing, and healthcare rare. As significantly, perhaps, the individual experiencing relative poverty is often handicapped subjectively, with her lack of financial resources creating, reinforcing, and perpetuating a cycle of underachievement. This, in turn, can lead to lower economic productivity and discouragement, and in severe or long-lasting cases, to strife or open conflict in the socio-political arena.

Since the 1990s, the international community has progressed on the topic of poverty. The members of the United Nations, numerous inter-governmental agencies, and charitable organizations have been working to make the plight of those living without the means of subsistence, the “absolutely” poor, a high-profile target for relief. Efforts such as those by Jeffrey Sachs<sup>9</sup> and Paul Collier to describe and prescribe pathways out of extreme poverty have spurred further investigations to understand both the structural mechanisms<sup>10</sup> behind such poverty and the ways in which individuals live each day in the insecurity of comprehensive want.<sup>11,12</sup>

As important as these steps are, the legal progress on poverty is of even more significance to the work presented in this volume. The continued development of human rights law, in particular, has made the fact of poverty an issue of individual rights and simultaneously one that parallel legal systems – including those of the trade, investment, and financial regulation regimes – cannot ignore.

### 1.1 International law of poverty

Despite the unavoidable prominence of life-threatening poverty as an issue in international politics and of inequality-poverty as an issue

8 Collier, *The Bottom Billion*.

9 E.g. J. D. Sachs, *The End of Poverty* (New York: Penguin Books, 2005).

10 E.g. S. Bowles, S. N. Durlauf, and K. Hoff, *Poverty Traps* (Princeton University Press, 2006); A. V. Banerjee and E. Duflo, *Poor Economics* (New York: Public Affairs, 2011); and R. D. Cooter and H.–B. Schäfer, *Solomon's Knot: How Law Can End the Poverty of Nations* (Princeton, NJ/Oxford: Princeton University Press, 2012).

11 E.g. D. Collins, J. Morduch, S. Rutherford, and O. Ruthven, *Portfolios of the Poor: How the World's Poor Live on \$2 a Day* (Princeton, NJ/Oxford: Princeton University Press, 2009); D. Narayan, R. Chambers, M. Shah, and P. Petesch, *Voices of the Poor: Crying Out for Change* (New York: Oxford University Press, 1999) (the second of a trilogy of publications coming out of the World Bank's project to let the poor speak of their lives); and P. Sainath, *Everybody Loves a Good Drought: Stories from India's Poorest Districts* (New Delhi: Penguin Books, 1996).

12 See generally, T. Smiley and C. West, *The Rich and the Rest of Us* (New York: SmileyBooks, 2012) (discussing the hardship of life for the poor in the United States).

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in national law, attention to the phenomenon of poverty remained largely absent from the international legal agenda until the late twentieth century.<sup>13</sup> Even as both economic liberalization and human rights became objects of direct international regulation, poverty reduction itself has remained a derivative benefit of the international legal architecture: from the human rights perspective, the protection of separate human rights to basic necessities and prohibitions on discrimination based on economic status would substitute for attention to the overall phenomenon of poverty; while from the economic perspective, growth would reduce poverty, so economic regulation need only focus on ensuring growth.

## 1.2 The human rights approach to absolute poverty

As a condition affecting people's fundamental ability to survive, it is natural that the international law on poverty is firmly grounded in the principles of human rights. Because a lack of financial resources is often the direct cause of an individual's starvation, inability to garner life-saving medicines, or shelter, poverty can be seen as an immediate cause of individuals' inability to enjoy many of the rights recognized as fundamental.

While there is no recognized "right to be free from poverty," the Universal Declaration of Human Rights (UDHR) sets out the framework within which poverty can be addressed. The UDHR's Preamble notes that "freedom from fear and want has been proclaimed as the highest aspiration of the common people." This previews the rights contained in its articles. Article 25(1), particularly, speaks to the interest of those in poverty:

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

The Declaration's transformation into treaty law as the United Nations' International Covenants on Civil and Political Rights and on Economic,

13 Lucy Williams, in her introduction to her book published in 2006 on international poverty law, calls the field "an emerging legal discipline." L. Williams, "Towards an Emerging International Poverty Law" in *International Poverty Law: An Emerging Discourse* (London/New York: Zed Books, 2006), pp. 1–13. See also T. K. Kuhner, "International Poverty Law: A Response to Economic Globalization," *Buff. Pub. Interest L. J.*, 22 (2003/04), 75 (advocating that poverty law specialists become more attuned to globalization's effects on domestic poverty).



Social and Cultural Rights promoted the elaboration of its basic content. The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains several provisions that can be particularly potent claims for relief from absolute poverty:

- the right to adequate food and water (Article 11);
- the right to health (Article 12);
- the right to adequate housing (Article 11); and
- the right to education (Article 13).

Considered by the Committee on Economic, Social and Cultural Rights (CESCR) as a basis for concretizing the necessary aspects of freedom from poverty,<sup>14</sup> the Committee's elaboration of these rights underscores their characterization as core human rights. General Comment 4<sup>15</sup> (right to adequate housing), General Comment 12<sup>16</sup> (right to adequate food), General Comment 13<sup>17</sup> (right to education), General Comment 14<sup>18</sup> (right to the highest attainable standard of health), and General Comment 15<sup>19</sup> (right to water) express the Committee's conviction that the enjoyment of these rights are prerequisites to the enjoyment of other human rights, and therefore their realization is weighted particularly heavily. The General Comments, moreover, explicitly confirm that the rights are meant to assure economically feasible access to the resources as well as their physical availability. Linking "accessibility" and "affordability,"<sup>20</sup> the Comments speak directly of the need for "impoverished segments"<sup>21</sup> of the population and "poorer households"<sup>22</sup> to be able to secure shelter, food, education, health, and water, and set forth explicit obligations on states

14 Poverty and the International Covenant on Economic, Social and Cultural Rights, E/C.12/2001/10 (May 10, 2001), paras. 1, 3, 9.

15 OHCHR, *The Right to Adequate Housing (Art. 11(1))* (General comments, CESCR General comment 4, Sixth session, December 13, 1991).

16 CESCR, *The Right to Adequate Food (Art. 11)*, E/C.12/1999/5 (General Comment 12 (1999), Twentieth session, May 12, 1999).

17 CESCR, *The Right to Education, (Art. 13)*, E/C.12/1999/10 (General Comment 13 (1999), Twenty-first session, December 8, 1999).

18 CESCR, *The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4 (General Comment No. 14 (2000), Twenty-second session, August 11, 2000).

19 CESCR, *The Right to Water (Arts. 11 and 12)*, E/C.12/2002/11 (General Comment No. 15 (2002), Twenty-ninth session, January 20, 2003).

20 E.g. E/C.12/2002/11 6, para. 12(c)(ii) (the Comments to the right to food, health, and water label affordability "economic accessibility," but define this term to indicate that the resource must be "affordable for all").

21 E/C.12/1999/5, para. 13; December 13, 1991, para. 8(e).

22 E/C.12/2000/4, para. 12(b)(iii).

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to ensure their access to everyone. Looking to the implementation of the rights, the Limburg Principles (1986) underlined their fundamental nature by eliminating the possibility of invoking inadequate financial resources as a defense for a state's failing to act to respect ICESCR rights.<sup>23</sup>

The recognition of a spectrum of duties arising from the existence of a human right was an important development in the evolution of human rights in general, and for the relief of poverty in particular. Following an analysis set out nearly two decades earlier by Henry Shue,<sup>24</sup> the Maastricht Guidelines on Violations of Economic and Social and Cultural Rights<sup>25</sup> (1997) explain that holding economic, social, and cultural rights to be fully-fledged human rights means subjecting States Parties to obligations of respecting, protecting, and fulfilling them. The state, says the Guidelines, has duties of result as well as of conduct for poverty-related rights.<sup>26</sup> Thus, while states have discretion in determining how to abide by their obligations, they should be found in violation of their obligations if "minimum essential levels" of rights required for basic survival are left unfulfilled for a "significant number" of persons.<sup>27</sup> The Guidelines make explicit that "resource scarcity does not relieve States" of these core obligations.<sup>28</sup> Clearly, then, these duties would apply to any situation in which individuals are living in absolute poverty. To the extent that the elaborations of the ICESCR's bundle of rights are followed, they place states under an obligation to reduce the life-threatening effects of poverty.

### 1.3 Relative poverty

The international law of relative poverty is less obvious than that of absolute poverty. Recall that the problem of relative poverty is that of an

23 Commission of Jurists et al., "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" (1986).

24 E.g. H. Shue, *Basic Rights*, 2nd edn. (Princeton University Press, 1996) (the first edition appeared in 1980).

25 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht, January 22–6, 1997).

26 Maastricht Guidelines, para. 7. 27 Maastricht Guidelines, paras. 8–9.

28 Maastricht Guidelines, para. 10. See also Limburg Principles, para. 23 ("The obligation of progressive achievement exists independently of the increase in resources"), para. 25 ("States parties are obligated regardless of the level of economic development, to ensure respect for minimum subsistence rights for all"); and CESCR, E/C.12/1999/5 (General Comment 12 (1999)), para. 17 ("Should a State party argue that resource constraints make it impossible to provide access to food... the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations").