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Duties to the World's Poor  
Krista Nadakavukaren Schefer  
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POVERTY AND THE  
INTERNATIONAL ECONOMIC  
LEGAL SYSTEM

Duties to the World's Poor

With a focus on how trade, foreign investment, commercial arbitration and financial regulation rules affect impoverished individuals, *Poverty and the International Economic Legal System* examines the relationship between the legal rules of the international economic law system and states' obligations to reduce poverty. The contributors include leading practitioners, practice-oriented scholars and legal theorists who discuss the human aspects of global economic activity without resorting to either overly dogmatic human rights approaches or technocratic economic views. The essays extend beyond development discussions by encouraging further efforts to study, improve and develop legal mechanisms for the benefit of the world's poor and challenging traditionally de-personified legal areas to engage with their real-world impacts.

KRISTA NADAKAVUKAREN SCHEFER holds a Swiss National Research Foundation Professorship at the University of Basel Law School, where she teaches international economic law. She also teaches at the World Trade Institute, University of Bern.

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KRISTA NADAKAVUKAREN SCHEFER



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For my parents, who taught me to value giving and wanting  
to make this world a better place for those who have less  
than I

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## CONTRIBUTORS

The authors of this volume, all specialists in their respective areas of IEL, have written their chapters specifically for this book. Addressing poverty as they have done, with differing views and differing approaches to the problem, is an innovative – even courageous – step to begin a process of systematically analysing and using the legal tools of the international economic law system for the benefit of the world's financially disadvantaged inhabitants.

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## PREFACE

The international economic law (IEL) system, composed of a loose network of trade, investment, and financial agreements, institutions, and practices, is rapidly evolving. From the solidification of the law of international trade from a forum of negotiations to one with approximately 150 binding decisions, to the widely commented-upon proliferation of arbitration-based resolutions of investment disputes between states and individual investors, to the increasing attempts to develop binding legal rules governing international financial markets, each of these areas of international economic law is changing how states and economic actors interact as well as how they respond to the problems posed by political and social pressures. Much scholarly attention has been given to these developments, examining the mechanics and effects of such impacts. One area that has received too little attention by the IEL field, however, is poverty.

In the wider international system, there is a new appreciation of the significance of poverty not just on those directly suffering from its effects, but on the entire world community. Poverty's central role in the Millennium Development Goals has been joined by statements by heads of states, international institutions (including the economic institutions), non-governmental organizations, religious foundations, and privately funded efforts of the need to eliminate absolute poverty and to reduce poverty. As the concept of poverty has been expanded from one focusing on income to one examining capabilities, the result has been that poverty has become a topic related to nearly every field of international relations – war, environment, migration, health, and economics among others.

In October 2011, the University of Basel hosted a conference as a first step toward establishing a research agenda on the specific topic of poverty's relationship to the laws of trade, investment, and finance.<sup>1</sup> The conference, *Poverty and the International Economic Law System: Duties*

1 See "Conference on Poverty and the International Economic Law System," <http://iel.ius.unibas.ch/wordpress>.

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*to the World's Poor*, addressed the linkage between poverty and trade, poverty and commercial arbitration and investment law, as well as poverty and financial regulation. Speakers also investigated how international economic law rules impacted individuals in groups that are particularly susceptible to poverty and, significantly, asked whether there are, in fact, any international legal duties requiring states to act positively to reduce poverty. This volume is the result of that conference, although the papers have been significantly revised and new ones added.

### The volume

#### *International economic law and poverty reduction*

Clearly an implied goal of the trade law regime, poverty reduction within the legal rules of the multilateral and regional trade frameworks is almost exclusively an interest pursued through hortatory provisions or permissions for voluntary actions aimed at development rather than at poverty. Arguably not even an aim of the complex network of agreements for the protection of foreign investments, poverty considerations play a minor role in the current investment law framework and, not surprisingly, are barely a consideration in commercial arbitration. The role of poverty in the law of financial regulation is more apparent, with many of the international financial institutions' programs directly aiming to reduce poverty. Even there, however, the interests of the poor are frequently forgotten or undermined by the competing interest in upholding the state's sovereignty, as is the case with the laws on debt repayment.

And yet, in each of the areas of IEL, there are rules with significant, often even direct, impacts on the poor. More importantly, perhaps, IEL rules affect states' ability and willingness to address poverty within their own territory, not to mention their readiness to act in (or with effects in) others' jurisdictions.

#### *Our focus*

This volume aims to analyze the different legal rules of the international economic system from the perspective of their relationship to states' obligations to reduce poverty. Given the serious human impacts of both absolute and relative poverty, it is important to examine the impacts of trade, investment, and financial regulation rules on subsistence needs and these rules' effects on how states may and do respond to increasing inequalities of wealth in their societies. While the impacts on the one



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may be positive, impacts on the other may be negative, neutral, or simply different.

Our book's focus on the legally binding rules of the system is also important. We are asking not only what impacts does international economic activity have on levels of poverty, but are these impacts *due to the rules* of the trade regimes, investment agreements, or financial architecture? Are the rules, in other words, themselves a problem or is it the interpretation of the rules that is the problem? Or is the problem due to governments' undeniably political implementation of the rules? Of course, the problem may be a combination of these possibilities. Whatever the answer, ultimately we hope to shed light on whether the world needs a new framework of international economic rules if we want to be serious about reducing global poverty.

Convinced that the first step to addressing a problem is recognition that there is a problem to address, the contributions in Parts II to IV examine how the international laws of trade, investment, arbitration, and finance impact on states' abilities to fulfill their duty to reduce poverty. Taking a capabilities approach to the examination, the chapters of Part V address IEL's effects on populations that are particularly susceptible to poverty or its effects. Finally, the contributions in Part VI take a step back to question whether states actually have such duties and, if so, what the character of such duties is. The authors ask the very significant question, do states in fact have legal duties to relieve the effects of poverty and, if so, are there positive duties toward individuals?

### *Background considerations*

Integral to the current project are three particular background questions. One is what forms of "poverty" will be considered. The second is what is the role of positive duties in addressing the international legal concern for poverty. Third is the question of the geographical scope of states' legal obligations to act. The following provides a brief introduction to these topics.

### Forms of poverty

"Poverty" is a term used to indicate a general lack of resources.<sup>2</sup> Among the ways this lack of resources can be regarded are: absolutely and relatively.

2 B. Geremek, *Poverty: A History* (Oxford/Cambridge, MA: Blackwell Publishers, 1994/1997 ppb), p. 7. (Stemming from the Latin "paupertas," the word referred to the condition characterizing the life of the poor person – an absence of that which one wants or needs, a state of unproductivity. As a description of the lives of persons, the use of "poverty"

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Absolute poverty is a lack of resources sufficient to sustain life. Relative poverty refers to an inequality in resource distribution, and is commonly defined as living with less than X percent of the mean (or median) income of a community.<sup>3</sup> These two aspects are independent of each other, and while societies with high levels of absolute poverty often display highly unequal patterns of asset ownership, either aspect can be present without the other.

Recognizing both aspects of poverty is important for studies such as those in this volume that analyze a legal system's impacts on "poverty." With the importance of absolute poverty as a problem for global concern, the significance is clear. The international economic system, as one aiming to improve standards of living through the use of resources, must take into account its impacts on the weakest.

Conceivably not as urgent, attention to relative poverty is as important for the IEL system, both conceptually and practically. On a conceptual level, attention to inequality implies a broader scope for investigation, requiring us to consider how the legal tools of economic regulation might entrench existing preferences or worsen existing disadvantages faced by the persons engaged in or affected by global commercial activities. For international economic law in particular, with its concern for discrimination and its commitment to equal access to markets for producers, scrutiny of the system's rules on resource inequalities among individuals poses an important test of the consistency of its norms with the societal norms of its members' communities.

The practical reasons for addressing IEL's effects on relative poverty are just as important: economic inequalities within a society and across societies can lead to a rejection of rules or institutions that are seen to be causing such differentials. With the documented sharpening of the wealth gap,<sup>4</sup> the IEL system's rules are under increasing attack by those who see

was sometimes associated with baseness and begging as well as the simple lack of material wealth. This connotation has dwindled, although poverty itself continues to be thought of as "an unambiguously bad thing," as something that degrades the individual.) For a fascinating account of how the poor define themselves, see D. Narayan, R. Patel, K. Schafft, A. Rademacher, and S. Koch-Schulte, *Voices of the Poor: Can Anyone Hear Us?* (New York: Oxford University Press, 2000) (published for the World Bank), ch. 2, <http://go.worldbank.org/6Z9P1DKL51>.

3 The exact percentage used as the benchmark varies. Most OECD and the EU members use a standard of "less than sixty percent" of the average income while the United States uses a "less than fifty percent" measure.

4 See M. E. Salomon, "Why Should it Matter that Others Have More? Poverty, Inequality, and the Potential of International Human Rights Law," *Rev. Int'l Studies*, 37 (2011),

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them as the cause. Unless the system can demonstrate a commitment to reducing gross inequalities, its legitimacy – and thus its effectiveness – will be threatened. An analysis of the rules to detect such results is a first step in determining whether the charges are justified and what could be done to readjust them to be more palatable.

A second practical consideration for emphasizing relative poverty is political. While absolute poverty is found only exceptionally in industrialized countries, relative poverty is prevalent and obvious. The widely reported-upon gap between rich and poor in OECD Member States is something that trade policymakers in those countries cannot ignore. Domestic political pressures, if not international law, will bring questions of how the trade, investment, and financial treaties' affect relative poverty to the forefront of the IEL policy negotiations. The system cannot afford to ignore such pressures if it expects to enjoy legitimacy among publics.

### Positive duties

The second element of the authors' engagement in the poverty-IEL relationship is that of the extent the legal duties of trade, investment, and finance correspond to or conflict with state duties to actively engage in poverty reduction. Because poverty leaves individuals in a situation of reduced capacity to fulfill their potential, in many cases duties on states to reduce poverty will be obligations to act rather than to avoid acting.<sup>5</sup>

The ethical argument for a general duty to actively help persons in need of assistance is not difficult in itself. Set out in the holy books of every major world religion as well as recurring through centuries of philosophical thought, the idea of a moral obligation to aid – of “beneficence” – is firmly established. While questions of who should have such duty in a particular case and to what degree the duty demands sacrifice by the duty-bearer cause controversies, the underlying idea is rarely questioned.<sup>6</sup>

2137, 2138 at n. 7 (describing the results of different studies on levels of inequality over time).

5 Pogge's position on obligations to alleviate poverty is based on his view that states have violated their negative duties to not cause poverty. E.g. T. Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002). Pogge distinguishes this position from his “moral sympathies” for seeing poverty as a condition giving rise to positive duties. See T. Pogge, “Severe Poverty as a Human Rights Violation” in T. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (New York: Oxford University Press, 2007), pp. 18–25.

6 See S. Gosepath, “Poverty and responsibility” in E. Mack, M. Schramm, S. Klassen, and T. Pogge (eds.), *Absolute Poverty and Global Justice* (Surrey/Burlington, VT: Ashgate, 2009), p. 114.

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On the legal plane, however, a claim of positive duties to reduce poverty is highly contestable. While the Millennium Development Goals focus on “poverty,” the binding international instruments from which anti-poverty duties can be extracted do not use the term “poverty” itself. As a result, “international poverty law”<sup>7</sup> is based on a collection of rights emerging from numerous legal and soft-law instruments.<sup>8</sup>

As an issue of basic human rights, the character of absolute poverty as a phenomenon largely outside of the control of the individual living with it makes the state’s duties to protect and to fulfill them of particular significance. For the majority of those living at the financial margins who were born into poverty, or who slipped into poverty as a result of natural occurrences or war, positive actions by an external provider will be the only way to secure the resources necessary to escape financial deprivation.<sup>9</sup>

### Extraterritoriality

There is a final difficult issue to be noted – the determination of the geographic extent of a duty to alleviate poverty. Can charity be required beyond a state’s own citizens, to those on the other side of the globe? The question of the extraterritorial reach of positive duties is important for any legal study of global poverty.

Today’s international legal system remains centered around the state as a discrete political entity. Accepted international law grants states full jurisdiction within their borders, permitting them to be politically self-contained. Removed from the threat of intervention by others, states

7 Lucy Williams suggested this term to refer to “global poverty reduction and to transnational, multi-disciplinary legal research and dialogue dedicated to that goal.” L. Williams, “Towards an emerging international poverty law” in L. Williams (ed.), *International Poverty Law: An Emerging Discourse* (London/New York: Zed Books, 2006), p. 1.

8 The most significant of these instruments are the Universal Declaration of Human Rights (particularly Art. 25) and the International Covenant on Economic, Social and Cultural Rights (e.g. Art. 11). See G. Amitsis, “Developing universal anti-poverty regimes: the role of the United Nations in the establishment of international poverty law” in Williams, *International Poverty Law*, p. 215 (indicating the Universal Declaration of Human Rights as the “cornerstone of international anti-poverty law”).

9 Literature postulating the existence of “poverty traps” supports this view. For an overview of the literature, see, e.g. C. Azariadis, “The Theory of Poverty Traps: What Have We Learned?” in S. Bowles, S. Durlauf, and K. Hoff (eds.), *Poverty Traps* (Princeton University Press, 2006), pp. 17–40; and R. J. Sampson and J. D. Morenoff, “Durable Inequality: Spatial Dynamics, Social Processes, and the Persistence of Poverty in Chicago Neighborhoods” in Bowles et al., *Poverty Traps*, pp. 189–92 (noting consequences of wealth inequality include: the breakdown of “collective efficacy” and the development of “subcultures of moral and legal cynicism;” each leads to the perpetuation of poverty within a community).

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under the traditional view correspondingly lack jurisdiction beyond their borders. Until the latter years of the twentieth century, the sovereignty model of international law meant that not only did states not need to assist suffering foreign populations without the request of the ruling government, they were not permitted to aid absent a request from the foreign sovereign. This idea held whether the suffering was due to poor governance, financial breakdown, or natural catastrophe.

Typified by the emergence of the doctrine of “Responsibility to Protect” (R2P),<sup>10</sup> however, competing views of international law have been gaining influence.<sup>11</sup> Now, despite the continuing emphasis on state sovereignty, an active debate is transforming the Westphalian legal framework to a more cosmopolitan view. Under such a view, legal rights of individuals would be valid globally, indicating that states’ duties to ensure the protection of such rights would apply extraterritorially if the responsible government were unable or unwilling to act.<sup>12</sup>

10 The concept of the Responsibility to Protect was proffered by the International Commission on Intervention and State Sovereignty in its report, “The Responsibility to Protect” (December 2001). Many of the ideas were subsequently adopted by the UN Secretary-General’s High-level Panel on Threats, Challenges and Change in their Report, “A More Secure World: Our Shared Responsibility,” A/59/565 (December 2, 2004). The General Assembly adopted the Responsibility to Protect as set out in its adoption of the 2005 World Summit’s Outcome Document, where paras. 138 and 139 set forth the international community’s duty to lend assistance to states whose populations are experiencing or threatened with massive human rights violations.

11 The obligation to cooperate is another example of an outward-activity orientation in international law. Such a duty clearly may arise from treaties (environmental and criminal law treaties are particularly frequent sources of cooperation obligations) and Security Council Resolutions as well as from the UN Charter. Whether such an obligation exists where there is no specific provision providing for it is debated. See P. Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals,” *Hum. Rts. Q.*, 27 (2005), 755, 771, 775 (pointing to a customary law norm of cooperation); D. M. Ong, “Joint Development of Common Offshore Oil and Gas Deposits: ‘Mere’ State Practice or Customary International Law?” *Am. J. Int’l L.*, 93 (1999), 771, 780–95 (setting forth treaty provisions and evidence of customary duties of cooperation); and G. Sluiter, “Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case,” *J. Int. Criminal Justice*, 8(2) (2010), 365. But see S. Fukuda-Parr, “International Obligations for Economic and Social Rights: The Case of the Millennium Development Goal Eight” in S. Hertel and L. Minkler (eds.), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, 2007), p. 285 (arguing that “the idea of development cooperation is still rooted in the logic of charity, rather than the logic of shared responsibilities”).

12 Within the specific framework of R2P, it is “the international community” that would have duties to protect foreign populations. Who the precise duty-bearers would be is debated. See, e.g. A. Peters, “The Security Council’s Responsibility to Protect,” *Int’l Orgs. L. Rev.*, 8 (2011), 1.

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Extending the sovereignty as responsibility concept to include poverty reduction would put upon states a duty to take steps to ensure that individuals around the world are given the resources and support they need to escape from their manifold deprivations. Accepting the responsibility – whether moral or legal – does not imply accepting a duty to act in a particular way. Poverty is a multifaceted phenomenon – as varied in its causes as in its effects – suggesting that there is no right way to fight it. That fact does not reduce the imperative to address it. If anything, it emphasizes the need to address it on many levels and from many angles.

### *The contributions*

The contributions of this volume look at the poverty-international economic law relationship from objective and normative perspectives: the authors ask what the international economic legal system does, does not, or could do, to help the poor. The focus on the legal rules rather than solely on the practical effects of international economic activities allows the reader to judge for her/himself whether the rules are sufficient as they are or whether states must change the legal framework if significant long-lasting poverty reduction is to be achieved.

### Part I

Part I of this volume introduces the topic of poverty and international economic law by giving the reader an overview of both poverty and the international legal discussions relevant to states' positive duties to reduce poverty.

Chapter 1 provides a brief overview of the themes examined in the rest of the volume after setting out the significance of poverty as an area of international legal attention. As the international law of poverty is heavily oriented around human rights, the major provisions are set forth along with their implications for states.

Chapter 2, written by COLIN PICKER, complements this introduction by reminding the reader that the expectations, behaviors, and actions of individuals in a particular legal system can differ dramatically from those same elements in a different legal system. This "legal culture" of IEL, in turn, affects its potential for reducing poverty. Picker sets out a detailed analysis of how the study of IEL's effects on poverty differs from studies on IEL and development – a key distinction for this volume. Picker then gives insights on four elements of particular importance to explain the lack of