

Briefing note to the 2nd Session of the
UN High-Level Task Force on the Implementation of the Right to Development

**ADDRESSING STRUCTURAL OBSTACLES AND
ADVANCING ACCOUNTABILITY FOR HUMAN RIGHTS:
A CONTRIBUTION OF THE RIGHT TO DEVELOPMENT TO MDG 8**

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The Millennium Development Goal 8 on a Global Partnership for Development reflects the important role of developed countries in the realization of the MDGs. It constitutes a political commitment on behalf of rich countries in the areas of aid, trade, debt relief and implicitly, global governance.¹ While MDG 8 relates to developing a global partnership between rich and poor countries, the weight of the responsibility for giving effect to the partnership is understood to rest with developed countries and it is those countries that report against it.² Goal 8 is focused on action to be taken at the international level and is essential to advancing the other seven Goals.³

The significance attached to Goal 8 in making possible the achievement of the MDGs confirms the importance today given to international cooperation and shared responsibility⁴ in the creation of an international environment conducive to having the

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¹ The targets under MDG 8 address: developing further a rules-based trading and financial system; the needs of least developed countries, focusing on aspects of the international trading system (tariffs and market access), enhancing debt relief, cancellation and sustainability, and increasing official development assistance; strategies for productive work for youth in developing countries; the provision of affordable essential drugs in developing countries in cooperation with pharmaceutical companies, and; furthering the availability of new technologies in the areas of communication and information in cooperation with the private sector.

² www.undp.org/mdg/donorcountryreports.html

³ The MDGs are: a reduction by half of the proportion of people living in extreme poverty; achieving universal primary education; promoting gender equality; reducing the child mortality rate; improving maternal health; combating HIV/AIDS and other diseases; furthering sustainable development which includes reducing by half the proportion of people without access to safe drinking water and improving the lives of slum dwellers, and; developing a global partnership for development.

⁴ The Millennium Declaration entrenches the principle of a shared responsibility and links it to the principles of equity and social justice – principles reflected in the duty of international assistance and cooperation as codified in international human rights law. The Millennium Declaration states: ‘We recognize that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level.’ (Values and Principles, para. 2); ‘Solidarity. Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most (Values and Principles, para. 6); ‘Shared responsibility. Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the

people of developing countries secure food, water, housing and sustainable livelihoods, and ensure access to healthcare and education; in sum, to emerge from conditions of egregious poverty.

A first step in meeting these commitments of international cooperation and of a shared responsibility would be for developed countries to remove the structural obstacles over which they have influence - barriers that impede the ability of people in developing countries to realize their fundamental human rights.⁵ In a world of plenty the figures on global inequality and deprivation remain astounding.⁶ Yet international economic policies detrimental to poverty alleviation and development are maintained by those states that reap its advantages, and the institutional order that facilitates and produces the factors that perpetuate these conditions remains in place.⁷

The normative basis of the Millennium Declaration's call to eradicate extreme poverty is derived from the right to development.⁸ The UN Declaration on the Right to Development (1986)⁹ denotes human participation in and benefit from economic, social, cultural and political development processes; the individual and collective duty of states in the creation of national and international conditions conducive to the realization of human rights; and it focuses on a process that is informed by the procedures and substance of the international law of human rights. The Goals which were drawn from the Millennium Declaration, are underpinned by existing human rights including - the rights to food and to water, to an adequate standard of living, to housing, to health, to education, the rights of women and the rights of children, the participation rights found throughout human rights instruments, and the overarching right to development.

nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role.' (Values and Principles, para. 6). Millennium Declaration, General Assembly Res. A/55/2 (2000). The General Assembly reaffirmed these values and principles at its 2005 World Summit: 'We reaffirm that our common fundamental values, including freedom, equality, solidarity, tolerance, respect for all human rights, respect for nature and shared responsibility, are essential to international relations.' 2005 World Summit Outcome, UN Doc. A/60/L.1, (15 Sept. 2005), Values and Principles, para. 4.

⁵ 'We judge that the problems we have identified are not due to globalization as such but to deficiencies in its governance... There is concern about the unfairness of key global rules on trade and finance and their asymmetric effects on rich and poor countries.' *A Fair Globalization*, Report of the World Commission on the Social Dimension of Globalization (ILO, 2004) xi.

⁶ In developing countries more than 850 million people, 300 million of whom are children, go to bed hungry every night. Of these 300 million children, 90% are suffering long-term malnourishment and 6 million children die annually of malnourishment. More than 40% of Africans do not even have the ability to obtain sufficient food on a day to day basis. All the while, the international trading system is rigged in favour of the rich countries. *Fast Facts The Faces of Poverty*, UN Millennium Project (2005); *International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World*, UNDP, Human Development Report (Oxford University Press, 2005) Ch. 1.

⁷ On the rigged system see, *International Cooperation at a Crossroads*, *supra* n. 6, at Ch. 4.

⁸ 'We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want' (III. Development and poverty eradication, para. 11); 'We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development'. V. Human Rights, Democracy and Good Governance, para. 24.

⁹ The Declaration on the Right to Development, General Assembly Res. A/RES/41/128, 4 Dec. 1986, annex, 41 UN GAOR Supp. (No. 53) 186, UN Doc. A/RES/41/53 (1986).

There are corresponding duties necessary for the fulfilment of these rights, principally falling to the state within which the people denied their rights are located. Significantly, there are also corresponding duties that fall to the international community of states, that is, to 'those in a position to assist'.¹⁰ The International Covenant on Economic, Social and Cultural Rights (ICESCR) enshrines rights to which are attached obligations of 'international assistance and cooperation'¹¹ – an obligation undertaken by the 151 states that have ratified the Covenant. Similar obligations focused on the role of international cooperation in fulfilling certain human rights of people in developing countries exist under the Convention on the Rights of the Child (CRC), which has almost universal ratification at 192 states parties. In giving meaning to these obligations we face the problem that states acting internationally are not merely assisting too little but are also preventing development too much. A notable example being the international trade regime that favours the interests of developed countries through trade barriers, agricultural subsidies, rules on investment¹² and intellectual property.¹³

Consistent with the ICESCR which preceded it, and followed by the entry into force of the CRC a few years later, the Declaration on the Right to Development likewise entrenches the notion that states are duty-bearers not only at the national level, but at the international level as well.¹⁴ The Declaration perhaps takes the scope of duties a step further in seeking to provide a juridical framework for oft-repeated claims against the public international order, for the failure of our international economic arrangement to allow for an environment in which the human rights of all people can be met.¹⁵ The debates and negotiations that took place during the drafting and

¹⁰ '... [A]ll duty-holders, including states and international organizations, are [to be] held to account for their conduct in relation to international human rights law'. CESCR, General Comment No. 3, *On the Nature of States Parties' Obligations*, UN Doc.E/1991/23, Annex III, 1990, para. 14. The Committee elsewhere remarks that '... the core [ESC] obligations [are] particularly incumbent on all who can assist'. CESCR, *Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights*, 25th session, 2001, UN Doc. E/C.12/2001/10, paras. 14 - 18. (Relative to their exercise of power, non-state actors are also recognized as having particular human rights duties).

¹¹ ICESCR, art. 2.1.

¹² The WTO's Agreement on Trade-Related Investment Measures (TRIMS) is roundly criticized for prohibiting tools that would maximize the local benefits of foreign investment (eg.: technology transfer, local employment); tools that were earlier used by developed countries as elsewhere. The UNDP concludes that: '... the current regime is entirely out of step with what is required to strengthen the links between trade and human development. The starting point for reform should be a recognition that the purpose of multilateralism is not to impose common rules or a free market blueprint on countries with different approaches and different levels of development, but to accept the case for diverse public policies.' *International Cooperation at a Crossroads supra* n. 6, Ch. 4 at 135.

¹³ Negative impact on developing countries include lack of food security and access to essential medicines and to knowledge under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Bilateral and regional trade deals (TRIPS Plus) strengthen and extend existing multilateral provisions and further reduce the limited flexibilities provided for in TRIPS. The current intellectual property regime is criticized for striking the wrong balance between the interests of technology holders and the wider public interest, and leaves developing countries limited space to determine national policies. Attempts to address these concerns can be seen in the position of the states constituting the 'Friends of Development' sponsors at the World Intellectual Property Organization (WIPO).

¹⁴ DRD, *supra* n. 9, arts. 3.2, 3.3, 4.1, 4.2 and 6.

¹⁵ See, M.E. Salomon, 'Towards a Just Institutional Order: A Commentary on the First Session of the UN Task Force on the Right to Development', *Netherlands Quarterly of Human Rights*, 3 (2005) 409; M.E. Salomon, 'The Right to Development and the Search For Global Justice', in B-A. Andreassen and

adoption of the Declaration left no doubt that what the proponents of the right to development requested was an economic and social order based on equity and justice. This approach continues to inform its interpretation today.¹⁶

At the heart of the right to development lies the demand that global structural disadvantage be addressed in order that human rights might be realized.¹⁷ The first level of this duty of international cooperation is the negative duty to respect human rights, requiring the removal of unjust impediments built into the existing modalities of the asymmetrical institutional order. Duties of international cooperation entail, initially, a duty to remedy the causes of on-going violations caused by the power differential between developed and developing states which affords the former the influence to shape the global order to their benefit. The result is skewed access by the people in developing countries to that which is necessary to live, and to live in conditions of dignity, as the human rights regime demands.

To be sure, some states have been very successful in cooperating internationally in keeping certain regions impoverished. As the current system reflects, cooperation can also have grave repercussions; it does not represent a value in itself. From the UN Charter to date the international legal duty to cooperate has clearly defined purposes – the promotion of social progress and higher standards of living and of universal respect for and observance of human rights and fundamental freedoms. The duty of international cooperation as entrenched in international human rights law strengthens Millennium Goal 8 by bringing to bear these critical objectives, and the principles and standards that underpin them.

HUMAN RIGHTS TARGETS AND INDICATORS UNDER GOAL 8

Advancing accountability:

Where there are rights there are duties; where there are duties a priority of the human rights regime is to identify the duty-bearers and ensure a system within which actors can be held to account for meeting their various responsibilities. At its first session in 2004, the Task Force on the Right to Development remarked on the necessity to address the accountability failure that is undermining the attainment of the MDGs¹⁸ through the establishment and use of suitable mechanisms,¹⁹ a position subsequently

S.P. Marks, (eds.), *Processes of Expanding Freedom: The Right to Development and Human Rights in Development*, (Harvard University Press, forthcoming 2006).

¹⁶ See, *Report of the Intergovernmental Working Group on the Right to Development*, UN Doc. E/CN.4/1983/11. See also, A. Sengupta, 'On the Theory and Practice of the Right to Development', *Human Rights Quarterly*, 4 (2002) 837 at 849-850.

¹⁷ The first paragraph of the Declaration on the Right to Development reaffirms the purposes and principles of the UN Charter being the achievement of international cooperation in solving international economic and social problems and promoting human rights. This is soon followed by a reaffirmation of the entitlement of everyone, as per Article 28 of the Universal Declaration of Human Rights, 'to a social and international order in which all rights and freedoms (...) can be fully realized'.

¹⁸ *Report of the High-Level Task Force on the Implementation of the Right to Development*, 1st session, 2004, UN Doc. E/CN.4/2005/WG.18.2, para. 40.

¹⁹ *Id.* para. 37.

endorsed by the intergovernmental Working Group on the Right to Development at its 6th session in 2005.²⁰

In relation to Goal 8 we are currently far from such a system. It is unclear who is being reported to and how these reports are being linked to reporting under the human rights treaties that entrench obligations of international cooperation. Further, there is insufficient focus on what the specific responsibilities and indicators, required to expedite a just institutional economic order aimed at better contributing to the realization of human rights of half the world's people, would entail.²¹ *A necessary step in providing for a system of human rights accountability would be through a comprehensive and effective independent monitoring mechanism authorized to determine whether the international policies of developed states, when acting singly or collectively, are consistent with contemporary human rights duties, including the right to development.*

In its effort to link the MDGs more closely to the human rights framework and address the accountability gap, *the Task Force might consider recommending the establishment of a special procedure that would be mandated to receive complaints from private persons against either individual states or groups of states concerning the implementation of MDGs consistent with the right to development.*²² A mechanism of this type would complement the work of the Secretary-General's Millennium Project,²³ while furthering the requirement under international human rights law for the provision of remedies and a system of accountability, including at the international level.²⁴ *Support for the creation of an accountability mechanism could itself constitute an indicator under Goal 8 aimed at improving the effectiveness of global partnerships from the perspective of the right to development.*

The creation of human rights indicators, including right to development indicators, that would form the basis for human rights monitoring of the Global Partnership for Development could also serve to generate much needed empirical data as well as 'jurisprudence' on what it means to give effect to the right to development at the

²⁰ *Report of the Working Group on the Right to Development*, 6th session, 2005, UN Doc. E/CN.4/2005/25.

para. 51.

²¹ Almost half the world population, 2.7 billion people concentrated in developing countries, live in poverty. *Fast Facts The Faces of Poverty*, *supra* n. 6.

²² For detailed coverage of existing mechanisms for private complainants within the IFIs and analysis of institutional arrangements developed to promote, in this case, the accountability of international organizations to affected or potentially affected people, see, D.D. Bradlow, 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions', *Georgetown Journal of International Law* 36 (2005) 403.

²³ See, www.unmillenniumproject.org/

²⁴ CESCR, General Comment No. 9, *On the domestic application of the Covenant*, UN Doc. C.12/1998/24, para. 4 ('The existence and further development of international procedures for the pursuit of individual claims is important ...'); see also, *inter alia*, CESCR, General Comment No. 12, *On the right to adequate food*, UN Doc. C.12/1999/5, para. 32 ('Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition ...').

international level, and on the scope and content of obligations of international cooperation as codified in other human rights instruments.²⁵

International trade:

Market access

The Task Force recognized that development had to be grounded in policies that fostered economic growth with equity.²⁶ Similarly, the UNDP recently wrote ‘... greater openness to trade, like economic growth, is not an end in itself: it is a means to expanding human capabilities. Indicators for increased openness—such as export growth and rising trade to GDP ratios—are important, but they are not proxies for human development.’²⁷

The UNDP reports that on average, low-income developing countries exporting to high-income countries face tariffs three to four times higher than the barriers applied in trade between high-income countries. Developing countries account for less than one-third of developed countries imports but for two-thirds of tariff revenues collected.²⁸ These are just a few among innumerable examples that suggest that developed states are directly responsible for the creation of conditions in which the human rights of people in developing countries are violated. It also reflects a failure to create an environment conducive to the realization of the right to development.

Intellectual property rules

The intellectual property rules (patent, trademark, copyright) also favour the richest countries.²⁹ The regime under TRIPS threatens access by the people of developing

²⁵ ‘The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries...’ CESCR, General Comment No. 3, *supra* n. 10, para. 14.

Suggestions regarding the promotion by Treaty-bodies of the MDGs include 1) requesting states parties to report on MDG progress in the ‘core document’ 2) having states parties set up a single institutional framework at the national level for preparing both human rights and MDG reports or address MDG reporting in the human rights reports they submit and, 3) having the relevant Treaty-bodies place a greater focus on measures that need to be taken to achieve the individual MDGs, including through international assistance and cooperation, in their Concluding Observations and in their follow-up. 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’, *Human Rights Quarterly*, 27 (2005) 755 at 823-825.

²⁶ *Report of the High-Level Task Force* (2004), *supra* n. 18, para. 31.

²⁷ *International Cooperation at a Crossroads*, *supra* n. 6, Ch. 4 at 113.

²⁸ *Id.* Ch. 4 at 127.

²⁹ TRIPS establishes a global regime for intellectual property based on the level of protection provided in the most developed countries. Yet, one size fits all for intellectual property protection is criticized for not taking into consideration the needs of developing countries and for undermining poverty reduction. *The Report of the Commission on Intellectual Property Rights: Integrating Intellectual*

countries to essential medicines by limiting the domestic ability to develop and pay for pharmaceuticals. While the (WTO Ministerial) Doha Declaration on TRIPS and Public Health (2001)³⁰ authoritatively reaffirms that all WTO members can use the flexibilities provided by the TRIPS agreement to ensure access to affordable medicines, concerns remain as to whether the Declaration will be interpreted as intended, including whether ‘TRIPS Plus’ provisions will serve to undermine the Declaration’s objectives.³¹ The intellectual property regime raises similar concerns in the areas of access to food and food security of people in developing countries,³² access to education and knowledge,³³ including traditional knowledge of indigenous peoples,³⁴ and regarding environmental protection and the conservation and sustainable use of biological diversity.³⁵

In its consideration of Goal 8 and the targets related to, *inter alia*, the ‘international trading system’ and the ‘special needs of least developed countries’ the Task Force might take a position on whether the intellectual property rules as formulated and applied are counterproductive to the achievement of the Millennium Development Goals. The MDGs include reducing hunger, achieving universal primary education, combating HIV/AIDS and ensuring environmental sustainability, areas caught up in the net of an intellectual property regime that seems highly inconsistent with the requirements of meeting human rights obligations.

Property Rights and Development Policy (UK, 2002). Notably, firms in developed countries currently account for 96% of royalties from patents, or \$71 billion a year. *International Cooperation at a Crossroads*, *supra* n. 6, Ch. 4 at 135.

³⁰ WT/MIN(01)/DEC/2 (20 Nov. 2001).

³¹ ‘[TRIPS Plus] provisions explicitly strengthen the protection afforded to pharmaceutical companies beyond WTO provisions and circumscribe the policy space for governments.’ *International Cooperation at a Crossroads*, *supra* n. 6, Ch. 4 at 136; see also, P. Hunt, *Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Health: Mission to the WTO*, UN Doc. E/CN.4/2004/49/Add.1.

³² For example, patents and other means of intellectual property protection on plants and their genes prevent farmers from saving and reusing seeds and may undermine agricultural diversity negatively impacting on food security.

³³ Education through access to: information available on the internet (copyright resulting in costly subscription-only databases); radio broadcasts (criticism levelled against the proposed WIPO broadcasting treaty); affordable and up to date school textbooks.

Notably, the cultural rights provided for in article 15 of the International Covenant on Economic, Social and Cultural Rights while seeking to protect the interests of authors (ICESCR, art. 15.1.c.), explicitly balances these rights against the interests of the wider community, for example, to enjoy the benefits of scientific progress (ICESCR, art.15.1.b.). See generally, Background note, *Intellectual Property, Human Rights and the Drafting of the General Comment on article 15.1.c ICESCR*, January 2005.

³⁴ Of particular significance to indigenous peoples are also the rights ‘to take part in cultural life’ (ICESCR art. 15.1.a) and ‘[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production’ authored by them (ICESCR, art. 15.1.c). See generally, F. Mackay, ‘Cultural Rights’ in M.E. Salomon (ed.), *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* (MRG, 2005). On reconciling cultural rights and intellectual property ‘rights’ see n. 37.

³⁵ See generally, *Indigenous Peoples and the International and Domestic Protection of Traditional Knowledge*, Working paper prepared for the UN Working Group on Indigenous Populations by the Secretariat of the Convention on Biological Diversity, UN Doc. E/CN.4/Sub.2/AC.4/2005/CRP.2 (reporting on the loss of traditional knowledge and the scarcity of measures to reverse this trend; and notes the CBD’s Memorandum of Understanding with WIPO aimed at furthering cooperation on intellectual property issues such as enhancing genetic resources, benefit sharing and environmental sustainability).

A related concern centres on the relationship between the regimes of international human rights law and that of international trade. In meeting human rights obligations within the rules governing intellectual property attention is given to exceptions that are meant to provide space within which developing countries can address domestic priorities.³⁶ *The Task Force might reflect on having the international human rights regime be taken as the starting point, and for intellectual property to align itself to the flexibilities provided for under international human rights law, rather than the other way around.*³⁷ It would be important that the Task Force consider in this regard, the discussions taking place in preparation of a General Comment by the Committee on Economic, Social and Cultural Rights in relation to article 15.1.c of the Covenant.

Regarding international trade more generally, the Task Force might address the practice that has developing countries required to make trade-offs in return for any concessions, without adequate influence to address whether what is being forfeited is linked to their existing human rights obligations. In addition to norms of customary international law,³⁸ the international obligation to respect human rights is *erga omnes*; it is incumbent on all states in relation to the international community as a whole, and every state has a legal interest in the protection of human rights.³⁹ The fundamental value of human rights provides that they be given primacy among the laws that govern nations and where a conflict exists, between universally recognized human rights and a commitment ensuing from international treaty law such as a trade agreement, the latter must be interpreted to be consistent with the former.⁴⁰

³⁶ For example, 'compulsory licensing' allows third parties to use a patented invention without the patentee's permission. A less stringent application of the international exhaustion of intellectual property rights will allow for the 'parallel importation' of cheaper patent products than might be produced domestically.

³⁷ Let us consider some elements that this model might provide: international human rights law allows for certain rights (for example the right to seek and receive information) to be limited on public interest grounds thus requiring that human rights infringements, due for example to copyright, meet a high threshold of justification; international human rights law requires the application of the proportionality principle which is inherent in evaluating the rights of the person (eg.: a person requiring access to medicine) and the general interests of society (today this might include international society and address the requirement that pharmaceutical companies recoup their research and development costs); and, international human rights law reads the rights of authors and inventors (eg.: ICESCR, art. 15.1.c) against the duty of states to take steps 'necessary for the conservation, the development and the diffusion of science and culture' (ICESCR, art. 15.2) and to ensure that 'benefits [are] derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields' (ICESCR, art. 15.4). International human rights law also requires that the right protecting an authors scientific, literary or artistic production is consistent with the exercise by all people of the other rights in the Covenant, for example, the right to food and the right to the highest attainable standard of health, as well as with international human rights standards read as a whole. Taking human rights as the point of departure, would require that the system and application of intellectual property protection – which notably has corporations has the main beneficiaries - be consistent with the human rights of people.

³⁸ See, Restatement of the Law (Third), Foreign Relations Law of the United States', *ALI* 2(1987) 165; CESCR has also concluded that 'basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law.' CESCR Concluding Observations: Israel, 30th session, 2003, UN Doc. E/C.12/1/Add.9, para. 31; Alston provides analysis to support the submission '... that at least some of the MDGs reflect norms of customary international law'. Alston, *supra* n. 25, 755 at 774.

³⁹ *Barcelona Traction, Light and Power Company Limited (Second Phase)*, (Belgium v. Spain) ICJ Rep. (1970) 3 at paras. 33- 34; see further, M.E. Salomon, *International Cooperation and the Global Responsibility for Human Rights* (Oxford University Press, forthcoming 2006).

⁴⁰ See, R. Howse and M. Mutua, *Protecting Human Rights in the Global Economy: Challenges for the WTO* (ICHRDD, 2000).

Debt:

There continues to be grave concern over the impact foreign debt has on the exercise of fundamental human rights in debtor countries. NGOs and academics are emphasizing the need to look beyond assessing the ‘sustainability’ of debt servicing, to the ‘legitimacy’ of certain debts themselves.⁴¹ How can it be that loans that were made to dictators without any guarantee of democratic accountability and for purposes that were plainly not for the public benefit be considered legitimate? What are the implications for the creation of stable democracies when large debts incurred by corrupt predecessors are imposed upon democratic successor regimes? Conclusions point to the likelihood that they undermine the ability of the government to undertake the necessary structural reforms that would further the rights to food, to health and to education in their countries while strengthening democratic accountability. Furthermore, as a result of their compromised effectiveness these governments are rendered less stable than they would otherwise be.⁴² *In considering the targets and indicators in relation to debt specifically and in forging targets and indicators in relation to global governance, the Task Force might consider addressing, 1) the need to align the IMF monetary policies imposed on debtor governments with the MDGs,⁴³ and 2) the features of the global order itself that help to explain the persistence of poverty.⁴⁴*

The Task Force might consider recommending the creation of an appropriate debt arbitration mechanism to ensure that creditor and debtor nations are able to resolve debt crises in a manner consistent with their human rights obligations, and aligned to meeting the MDGs, and that conditionality attached to debt forgiveness and reduction do not undermine fundamental rights, including those expressed through the MDGs.⁴⁵ An independent and transparent mechanism could have jurisdiction over past debt including illegitimate debt accumulated by previous undemocratic regimes in

⁴¹ See, Lutheran World Federation, Statement to the 61st session, 2005, Commission on Human Rights, www.lutheranworld.org/News/LWI/EN/1660.EN.html

⁴² T.W. Pogge, ‘Priorities of Global Justice’, in T.W. Pogge, (ed.), *Global Justice* (Blackwell Publishers, 2001) 6 at 20.

⁴³ Recent case studies in 13 countries undertaken by Action Aid International highlight the fundamental contradiction between the need to scale-up social spending, e.g.: to tackle HIV/AIDS, and what can actually be spent under the IMF’s low inflation monetary policy. The Secretary-General’s UN Millennium Project report similarly noted that: ‘IMF program design has paid almost no systematic attention to the [Millennium Development] Goals when considering a country’s budget or macroeconomic framework’. *Square Pegs, Round Holes and Contradicting Commitments: How the Achievement of Education for All is Being Undermined by the International Monetary Fund* (Action Aid International, 2005); *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (UNDP, 2005).

⁴⁴ For example, as noted by Pogge ‘... oppression and corruption are very substantially encouraged and sustained by global factors such as the international resource and borrowing privileges, the still poorly policed bribe-paying practices of multinational corporations, and the international arms trade’. T.W. Pogge, *The First UN Millennium Development Goal* (2003), Oslo Lecture in Moral Philosophy, University of Oslo, 2003, www.etikk.no/globaljustice.

⁴⁵ Following on from the G7 decision at the summit in July 2005, the World Bank and IMF annual meeting 24-25 Sept. 2005 concluded that eighteen countries stand to have their debts cancelled by the end of the year. While this could free up money to invest towards meeting the MDGs, existing IFI imposed economic conditionality limiting countries’ spending on social goods could counter these objectives. On the decision to cancel multilateral debt see, IMF Press Release, No. 05/210 (24 Sept. 2005); ‘World Bank, IMF Strike Debt Deal, Shift Sights to WTO’, *Bridges Weekly Trade News Digest* (28 Sept. 2005).

developing countries. An independent mechanism of this sort would oversee decisions taken by the World Bank and IMF as to what constitutes sustainability also from a human rights perspective, rather than prioritizing economic efficiency often at the expense of fundamental rights for all. Adjudicators would include human rights experts to ensure that economic structural reforms arising from foreign debt do not undermine the ability of a state to meet its human rights obligations. *Active support by developed states for a target recommending the establishment of a human rights-sensitive adjudication mechanism might form an indicator under MDG 8.*⁴⁶

Aid:

Improving the quality and increasing the quantity of aid while important, particularly for certain countries, do not address the global structural disadvantages that contribute to the continued impoverishment of developing countries. Aid is underpinned by a relationship based on dependency - an ill-suited foundation for a partnership.⁴⁷ Still, in light of the focus of many donors on human rights and development, and the Task Force's concern over the issue of accountability for the realization of the right to development, the current session might consider the matter of furthering donor accountability.⁴⁸ Notably though, reliance on aid generally would diminish if the international trade regime were fair.

The need to address the democratic requirement of a government's accountability to their electorate rather than to the World Bank and IMF is another area that might warrant the attention of the Task Force. The right to development places emphasis on the interdependence and indivisibility of civil, political, economic, social and cultural rights,⁴⁹ an element found repeatedly in the Millennium Declaration which includes, *inter alia*, a call for democratic and participatory governance based on the will of the people as the best assurance of human rights.⁵⁰ The social contract between a state and its people may be undermined by the condition that states are in large part

⁴⁶ On the call for an appropriate debt mechanism see, *EU Heroes and Villains: Which Countries are Living up to their Promises on Aid, Trade, and Debt?*, Joint NGO Briefing Paper, Action Aid, Eurodad and Oxfam (2005) 16; B. Mudho, *Report of the Independent Expert on the Effects of Structural Adjustment Policies and Foreign Debt on the Full Enjoyment of all Human Rights, particularly Economic, Social and Cultural Rights*, UN Doc. E/CN.4/2005/42, para. 45.

Notably, the disqualification of odious debt related to arms purchases and debt accumulated by previous non-democratic or corrupt regimes are not included in the IMF's Sovereign Debt Restructuring Mechanism, nor does the SDRM target low-income (HIPC) countries. See, www.imf.org/external/np/exr/facts/sdrm.htm#qa, D10 (last update at 12 Sept. 2005).

⁴⁷ See comments by Venezuela and South Africa in, Salomon (2005), *supra* n. 15, 409 at 433.

⁴⁸ See, P. Uvin, *Can Human Rights Make Aid Agencies More Accountable?*, Human Rights and Poverty Reduction Meeting Series, 31 January 2005, Overseas Development Institute (summary at www.odi.org.uk/speeches/rights2005).

⁴⁹ Declaration on the Right to Development; preambular para. 10, arts. 1.1, 6.2, 9.1. Art. 1.1: 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'; art. 6.2: 'All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights'. See, A. Sengupta, *Fourth Report of the Independent Expert on the Right to Development*, UN Doc. E/CN.4/2002/WG.18/2, para. 8.

⁵⁰ Millennium Declaration, *supra* n. 4, para. 6.

answerable to the international financial institutions for the economic and social policies they pursue.⁵¹

Global governance:

The ‘partnership’ defined in Goal 8 is based on unequal power relations including within the institutions that shape the policies considered by the Goal 8 indicators. Addressing the lack of influence developing countries exercise at the international level is essential if we seek to modify the rules that keep them impoverished.⁵² Writing on international trade, the UNDP concludes in its most recent *Human Development Report* that within the existing rules-based multilateral system ‘costs and benefits have been unevenly distributed across and within countries, perpetuating a pattern of globalization that builds prosperity for some amid mass poverty and deepening inequality for others’.⁵³ The rules arranged to benefit developed countries at the impoverishment of the people in low-income countries are based on a foundation of ‘hypocrisy and double standards’⁵⁴ ‘... [t]he critical challenge for a multilateral system is to provide a framework in which the voices of the weaker members carry weight’.⁵⁵ In the context of the international financial institutions, outgoing president of the World Bank James Wolfensohn highlighted the need ‘to strengthen the Bank’s governance system to ... reflect modern practices, with clear accountability ... and with appropriate representation of all stakeholders’, emphasizing that ‘voice and participation ... [are] crucial to address if in the longer run the institution is to retain its legitimacy ...’.⁵⁶ *The inability of developing countries to represent adequately the interests of their people on the international stage and the current consideration of governance reform of the World Bank and IMF needs to be assessed also for the impact it has on the violation of the fundamental human rights of people living in developing countries - the same people the MDGs*

⁵¹ Action Aid reports on the findings of its recent study citing Tanzanian President, Benjamin Mkapa: ‘We are caught between a rock and a hard place in terms of managing IMF requirements and then dealing with the demands of our electorate.’ A senior official from the Ministry of Education in Kenya, who spoke to Action Aid researchers under conditions of anonymity was quoted as saying: ‘The general feeling among the citizenry is that government decisions are subordinate to the IMF rules and directions, and that the country is held captive by these decisions without much recourse.’ ‘Global Democracy Endangered, Says New Report’, Press Release, Action Aid International, 15 Sept. 2005, www.actionaid.org/index.asp?page_id=573. Indeed the UK government and IFIs seem to be drawing similar conclusions: ‘Questions remain about the amount of genuine autonomy enjoyed by countries, given the greater financial power and technical capacity of donors in some aid dependent countries.’ *Partnerships for Poverty Reduction: Rethinking Conditionality*, Department for International Development, UK Policy Paper (March 2005) para. 5.17. The World Bank and IMF remarked likewise, see, para. 6.1.

⁵² Recent studies calling for the democratization of the WTO, IMF and World Bank include: *Final Report and Recommendations Derived from the Multi-Stakeholder Consultations Organized by the New Rules for Global Finance Coalition (Nov. 2004-Sept. 2005) On Addressing Systemic Issues, Section F, Monterrey Consensus Document*, Financing For Development/New Rules for Global Finance (2005); *International Cooperation at a Crossroads*, supra n. 6; *Investing in Development*, supra n. 43; *Our Common Interest*, Report of the Commission for Africa (2005), www.commissionforafrica.org; *EU Heroes and Villains*, supra n. 46; *A Fair Globalization*, supra n. 5.

⁵³ *International Cooperation at a Crossroads*, supra n. 6, Ch. 4 at 113.

⁵⁴ *Id.*

⁵⁵ *Id.* Ch. 4 at 146.

⁵⁶ J. Wolfensohn, *Note from the President of the World Bank to the Joint Ministerial Development Committee of the Board of Governors of the Bank and the Fund*, DC2005-0005 (12 April 2005), para. 61.

seek to lift from hunger and poverty.⁵⁷ Targets and indicators under Goal 8 could include those related to the creation of a system of global governance consistent with human rights procedural requirements and with an aim of meeting human rights obligations.⁵⁸

CONCLUSION

The right to development provides a claim against the international order exercised also by the state on behalf its people.⁵⁹ A corresponding duty imposed on developed countries regarding the fulfillment of the right to development includes addressing structural impediments – biases in the system and management of international trade, the operation and reach of international financial institutions, and international arrangements that entrench dependency and poverty.

The Millennium Declaration recognizes a shared responsibility among the nations of the world for managing worldwide economic and social development as a fundamental value essential to international relations in the 21st century.⁶⁰ At the same time the international law of cooperation upon which the post 1945 legal order is based, ‘takes into consideration the specific conditions of each State and doses its rights and obligations accordingly’.⁶¹

While all countries (not to the exclusion of other actors) are to contribute to the common objective of eradicating world poverty, the responsibility of a state for the creation of a just institutional order is in accordance largely with its weight and capacity in the world economy.⁶² The content of this principle of common but differentiated responsibilities in the context of international cooperation for human rights is informed by the contribution that a state has made to the emergence of the problem;⁶³ because it wields relative power at the international level that is manifested

⁵⁷ Of course, it would be equally hypocritical for states that are not actively moving towards systems of democratic governance domestically, to be seeking a democratic system of representation at the international level.

⁵⁸ Issues related to the need for greater policy coherence are also addressed in some of the MDG donor country reports, see, in particular, *Finland's Report on the MDGs* (2004), www.undp.org/mdg/donorcountryreports.html.

⁵⁹ Declaration on the Right to Development, preambular para. ‘Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations’; art. 2.3.: ‘States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.’ See further, M.E. Salomon and A. Sengupta, *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples* (MRG, 2003) 23-26; Salomon (2005), *supra* n. 15, 409 at 414.

⁶⁰ Millennium Declaration, *supra* n. 4, para. 6.

⁶¹ See, G. Abi-Saab, ‘The Legal Formulation of the Right to Development’, in *The Right to Development at the International Level*, R-J. Dupuy (ed.), Workshop of the Hague Academy of International Law (1979), *Hague Academy of International Law* (1980) 170–171.

⁶² See, for example, the Final Act of the United Nations Conference on Trade and Development VII (1987) as cited in *Analytical compilation of comments and views on the implementation and further enhancement of the Declaration on the Right to Development*, UN. Doc. E/CN.4/AC.39/1989/1, at 22.

⁶³ See, *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 70th Conference of the International Law Association, Res. 3/2002, para. 3

as influence over the direction of finance, trade and development; because it is in a position to assist,⁶⁴ and; because the state benefits most from the existing distribution of global wealth and resources.⁶⁵

The ability to influence global policy upon which the realization of the fundamental human rights of so many people in poor countries depends and to structure the arrangements for the access to the pool of benefits from which the entire world draws is severely unequal.⁶⁶ This inequality results in a profound failure of the international community of states to secure the human rights to which each and every person is entitled. The partnership referred to in Goal 8, as its current targets and indicators would suggest, is in fact a partnership among the rich and powerful. While all countries, including poor and middle-income countries have human rights obligations both domestically and internationally, certain responsibilities in the alleviation of world poverty - the cornerstone of the right to development - attach themselves to a particular set of developed countries and are essential complements to the domestic fulfilment of rights elsewhere. The Task Force in its capacity as advisor on the implementation of the right to development has before it an important challenge in its current mandate of improving the effectiveness of global partnerships for development. What is needed for MDG 8 to be consistent with the right to development is the removal of structural obstacles to the realization of human rights, a reorganization of the governance and priorities of the global economic system that sustains gross and systematic inequality, and mechanisms for ensuring international accountability related to the exercise of human rights, everywhere.

⁶⁴ CESCR, *Statement on Poverty*, *supra* n. 10.

⁶⁵ While this paper focuses on the duties of states, a similar analysis of contemporary legal responsibility could be applied to non-state actors.

⁶⁶ 'We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed...' Millennium Declaration, para. 5.