

**TOWARDS DEVELOPMENT JUSTICE: RE-VISITING THE ACCOUNTABILITY OF
THE WORLD BANK AND THE IMF FROM A RIGHT TO DEVELOPMENT
PERSPECTIVE**

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ABSTRACT

This dissertation investigates how development justice can be realized through an international accountability praxis that is grounded on the core principles of the United Nations Declaration on the Right to Development, one that recognizes the imperative of direct and distinct accountability of the World Bank and the IMF for their development practices. Empirically, amid the intensification of human rights deprivations and mounting development injustices in the Global South, the dominant development praxis has been typified by the marked absence of direct and distinct accountability of international financial institutions. The normative frameworks of international accountability in the realm of development are institutionally weak and assume a statist outlook, delegitimizing any attempt to locate the causes of inequalitarian development outcomes in the character of the global development policy system. And yet, the global policy system has a significantly determinative, manipulating and subordinating character on the national development outcomes. This dissertation discerns that through legal doctrines and traditions that it constructs and reconstructs, international law tends to sanction, rationalize and legitimize accountability avoidance, disconnection, and obstruction, particularly when international financial institutions are the objects of censure in development policymaking and practice. It is this quality and architecture that render the functionalities of extant accountability regimes unsuitable and ill-adapted to aid the securement of the kind of development justice foreseen by the right to development norm. Simply, contemporary regimes cannot assure the protection of people in the Global South against harms causally linked to the interventions of the World Bank and IMF. Responding to this feature, this dissertation proposes that development accountability thought, and practice must be contextually-aware and sensitive to the rights in question. Thus, it resorts to the core element of the right to development to “participate in, and contribute to,” development to propose what I call participatory accountability from below in international law. Participatory accountability offers the most pragmatic approach, premises the imperative of direct and distinct accountability of international financial institutions, recognizes Third World agency, autonomy and resistance in development practices, and adds into the repertoire of international law tools with which the Third World can confront development injustices.

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DEDICATION

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CHAPTER ONE

INTRODUCTORY NOTE AND OVERVIEW OF THE DISSERTATION

1. INTRODUCTION

The primary aim of this dissertation is to offer a contribution to the resolution of the question of how development justice can be realized through an international accountability praxis that is, for the most part, grounded on the core principles of the United Nations Declaration on the Right to Development (the Declaration).¹ I intend to describe and critically analyze the ways in which development justice can be actualized through an international mechanism that recognizes the imperative of ensuring the direct and distinct accountability of international financial institutions (IFIs) for their development practices. I rely on the Declaration as the (underpinning) normative framework for development justice and one of the instruments guiding the implementation and realization of the 2030 Sustainable Development Goals (SDGs).²

The specific question of accountability for the realization of development justice has not received any incisive and sustained attention in legal scholarship, as is fully attempted in this dissertation. It requires a broader consideration from a right to development (RTD) perspective. Noticeably, there are some earnest debates and policy commitments on mainstreaming the RTD in the implementation of the SDGs Agenda.³ However, given their wide scope of “implementation”, they do not sufficiently focus on the narrow question of the accountability of IFIs as a mechanism for the realization of development justice. They cannot therefore suffice. The

¹ See *Declaration on the Right to Development*, GA Res 41/28, UNGAOR, 41st Sess, Supp No 53, UN Doc A/RES/41/128 (1986) (the Declaration).

² For the idea that SDGs elevates and provide a platform for the operationalization of the RTD in development policymaking, see Mihir Kanade, “The Right to Development and the 2030 Agenda for Sustainable Development”, in Mihir Kanade and Shyami Puvimanasinghe eds, *Operationalizing the Right to Development for Implementation of the Sustainable Development Goals, E-learning Module* (OHCHR, UPEACE, and UNU-IIGH, 2018) online: <<https://www.ohchr.org/Documents/Issues/Development/SR/AddisAbaba/MihirKanade.pdf> >.

³ The policy commitments and debates are mostly at the UN level. They include the zero draft of a legally binding instrument on the right to development that has been prepared by the Working Group on the Right to Development and which is the basis for the ongoing negotiations at the UN Human Rights Council for a draft convention, hopefully to be adopted soon. See Draft Convention on the Right to Development, with commentaries A/HRC/WG.2/21/2/Add.1. Other recent developments include the United Nations Human Rights Council resolution 33/14, adopted on 29 September 2016 appointing the Special Rapporteur on the right to development to contribute to “the promotion, protection and fulfilment of the right to development in the context of the implementation of the 2030 Agenda.” The other new development is the establishment of a UN Expert Mechanism on the RTD by the Human Rights Council including the recent appointments made to that mechanism. The role of the experts would be to “provide the Council with thematic expertise on the right to development in searching for, identifying and sharing best practices with Member States and to promote the implementation of the right to development worldwide.” See Resolution adopted by the Human Rights Council on 27 September 2019 A/HRC/RES/42/23.

lack of conceptual clarity or a focused attention on the development justice accountability question requires rethinking in theory and practice. This dissertation makes that contribution, the first to do so.

From an interdisciplinary perspective, I assess an unexplored and less understood problem in international law: how the somewhat hybridized principles of human rights and development, as they are enshrined in the Declaration's framework, can be applied to shape the redress and amelioration of the accountability deficits and dysfunctions attendant to the interventions of IFIs in development policymaking and practice.⁴ I investigate the most suitable and effective ways for holding IFIs accountable to the extent that they create certain barriers to the realization of the RTD. These barriers are presented by the rules, policies, processes and institutional arrangements for the governance of international economic activities.

Within the larger corpus of human rights norms, the RTD stands out, to a significant degree, as both *sui generis* and a counter-hegemonic norm.⁵ This is evidenced, at least in part, in its provenance in the geopolitical struggle for development justice, a feature reflected in its espousal of a radical cosmopolitan vision of a fair, just, and equitable international order.⁶ As an integral part of the human rights corpus, the Declaration integrates concepts of development with human rights ideologies and values. It seeks to ground and rest the value of global redistributive justice on this normative foundation, which it extends to international decision-making at the level of international economic governance.⁷ As interestingly, grounded on, and normatively linked to,

⁴ The core attributes of the RTD norm are participation based on human rights, human-centred development, and social justice and equity. See *Report of the High-level Taskforce on the Implementation of the Right to Development on its sixth session A/HRC/15/WG.2/TF/2/Add.2* 14-22 January 2010 at 9 [Hereinafter *HLTF Report*].

⁵ Margot E Salomon, "Legal Cosmopolitanism and the Normative Contribution of the Right to Development" in Stephen P Marks ed., *Implementing the Right to Development: The Role of International Law* (Geneva: Friedrich Herbert Stiftung, 2008) at 22 [Salomon, "Legal Cosmopolitanism"]; Bonny Ibhawoh, "The Right to Development: The Politics and Polemics of Power and Resistance" (2011) 33 *Hum Rts Q* 76 at 78.

⁶ Salomon, "Legal Cosmopolitanism" *ibid* at 26.

⁷ The Declaration mandates, in its various provisions, the international community to eliminate obstacles to development and promote a new international economic order favourable to the realization of the RTD. See e.g Margot E Salomon, "Towards a Just Institutional Order: A Commentary on the First Session of the UN Taskforce on the Right to Development" (2005) 23:3 *Netherlands Q Hum Rts* 409 at 412. The central role of the state and the international community in eliminating barriers to the national and international development, which extends to the realm of international financial institutions and international arrangements is reiterated in most of the Declaration's articles. Article 2(2) of the Declaration places a duty on all persons, including all organs of society, to promote development; Article 3(1) stipulates states' duties to create national and international conditions favourable to the realization of the right to development; Article 3(3) mandates their cooperation in ensuring development and elimination of obstacles to development and the creation of a new international economic order; Article 4(1) refers to individual and collective duties of states to formulate enabling policies conducive to realization of development; Article 4(2) recognizes the central role of cooperation in complementing efforts of developing countries in development initiatives while Article

human rights instruments, chief among them the Declaration on the RTD, the SDGs explicitly articulate bold policy objectives designed to render a more people-centric and rights-based notion of development.⁸

I critically examine the adequacy and effectiveness of three regimes of accountability: the law of international responsibility;⁹ the mechanisms of accountability such as the SDGs policy schema of follow-up and review of progress; and the internal institutional accountability of IFIs.¹⁰ I interrogate as well the adaptability of these regimes for ensuring the direct and distinct accountability of IFIs in their interventions in international development policymaking and practice and in economic and financial governance.

I examine this accountability question as it relates to the development interventions of the World Bank (the Bank) and the International Monetary Fund (the IMF or the Fund) in the provision of “global public goods.”¹¹ In the context of the 2030 Sustainable Development Agenda, the two global public goods are development financing and financial stabilization operations.¹² I examine how the Bank and the Fund can be held accountable for the roles they perform that directly impact the alleviation of poverty and inequality, the implementation of the RTD, and the global partnerships for sustainable development.

10 requires states while acting nationally and internationally to take “steps to ensure the full exercise and progressive enhancement of the right through the formulation, adoption and implementation of policy, legislative and other measures”. See also United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013) at 10, 13 [OHCHR, *Realizing the Right to Development*].

⁸ United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development* Resolution A/RES/70/1 adopted by the General Assembly on 27 September 2015. See reference to the bold ambition to fulfil human rights for all in the Preamble and paragraphs, 8, 10, 19, 20, and 35 [United Nations, *Transforming Our World*].

⁹ These are: Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries (United Nations, 2001) adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session, annex to General Assembly resolution 56/83 of 12 December 2001 and corrected by document A/56/49(Vol. I)/Corr.4.

; and Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts, adopted by the International Law Commission at its sixty-third session, in 2011 (A/66/10, para. 87), welcomed by the United Nations General Assembly in resolution 66/100 of 9 December 2011.

¹⁰ Such as the Inspection Panels and the Independent Evaluation Office of the Bank and the IMF respectively.

¹¹ Joseph E Stiglitz, “International Financial Institutions and the Provision of International Public Goods” (1998) 3:2 *European Investment Bank Papers* 116 at 117 and Michel Camdessus, “International Financial and Monetary Stability: A Global Public Good?” in Peter B Kenen and Alexander K Swobada, *Reforming the International Monetary and Financial System* (IMF, 2000) at 9. For usage of the term in the context of international cooperation, see Inge Kaul, Isabelle Grunberg & Marc A Stern eds, *Global Public Goods: International Cooperation in the 21st Century* (New York: UNDP & Oxford University Press, 1999) [hereinafter Kaul et al, *Global Public Goods*].

¹² For the argument that the roles that the IMF perform constitute global public goods, see Annamaria Viterbo, *International Economic Law and Monetary Measures: Limitations to States’ Sovereignty and Dispute Settlement* (Cheltenham: Edward Elgar Publishing, 2012).

Both the Bank and the IMF, in collaboration, play crucial roles in the global economy. They are meant to support developing countries' efforts to address those trade, investment, and finance-related policies deemed to be engines of growth, innovation, shared prosperity, as well as vehicles for tackling the pandemic of poverty. They are also meant to help developing countries solve debt vulnerabilities and formulate measures designed to catalyze job creation and productivity as crucial engines for the realization of SDGs.¹³ In this regard, the IMF's mandate relates to the totality of the SDGs agenda.¹⁴ In the Bank's own view, its role in financing development is a pivotal hinge for the viability of all dimensions of sustainability, including eradicating extreme poverty and boosting shared prosperity.¹⁵

2. DEFINITIONS OF TERMS

2.1 Accountability

I deploy the concept of accountability in a broad and meta-juristic sense. Drawing from a wide variety of authoritative sources and utilizing various disciplinary prisms, I adopt a conception of accountability that goes beyond, while remaining inclusive of, legal accountability. This eclectic conception encompasses the following: legal and extra-legal accountability, judicial and non-judicial accountability, and the modes of accountability in use in public administration, governance, politics, law, and development practices. Guided by the most related academic work on this theme, I proceed from the premise that accountability consists of three elements: responsibility, answerability and enforceability.¹⁶ Incorporating this tripartite typology, I define accountability as the process by which those who have *responsibility* to undertake certain

¹³ World Bank, "Our Mission Is More Urgent Than Ever" online:

<<https://www.worldbank.org/en/news/feature/2019/04/13/our-mission-is-more-urgent-than-ever>>.

¹⁴ Section 1 of Article IV of Articles of *Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22, 1944*, amended effective January 26, 2016 by the modifications approved by the Board of Governors in Resolution No. 66-2, adopted December 15, 2010.

¹⁵ Development Committee, "Update: The Forward Look and IBRD-IFC Capital Package Implementation" April 2019 online: <<https://www.devcommittee.org/sites/www.devcommittee.org/files/download/Documents/2019-04/DC2019-0003-PIBRDIFC%20capital%20package%204-13.pdf>>.

¹⁶ I have benefited enormously in this conceptualization of accountability from the recent work of the Office of the High Commissioner for Human Rights & Center for Economic and Social Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (New York/Geneva: United Nations, 2013) at 10 [OHCHR & CESR, *Who Will Be Accountable?*]. These three elements first appeared in the writings of Peter Newell & Shaula Bellour, *Mapping Accountability: Origins, Context and Implications for Development* (Brighton: Institute of Development Studies, 2002) and Andreas Schedler, "Conceptualizing Accountability" in Andreas Schedler, Larry Diamond & Marc Plattner, *The Self-restraining State: Power and Accountability in New Democracies* (Boulder, Colorado: Lynne Rienner Publishers, 1999) at 14.

obligations defined by specific performance standards can be held *answerable* for the implementation of those standards and are subject to the *enforcement* of *sanctions* where a violation has occurred. A violation or breach, I surmise, can consist of rules, structures, processes, or practices that may be incompatible with the paramount universal norms.

Conceptually, I assume that both the answerability and enforceability flow from the fact of the assignment of responsibility to actors and the specification of performance criteria. The answerability of actors deemed responsible can be engaged *ex-ante* either at the policymaking level or in the course of decision-making, while enforcement in the form of sanctions may be imposed *ex-post* upon outcomes so as to remedy rights infringement.¹⁷ Hence, answerability is the requirement imposed on “public officials and institutions to provide reasoned justifications for their actions and decisions to those they affect.”¹⁸ Answerability thus seems to require process-based accountability involving other such rights as participation, scrutiny of actions, and the provision of both explanations and information, all of which seek to achieve institutional responsiveness, transparency at the decision-making level. Enforceability is defined as the institutional modalities “that monitor the degree to which public officials and institutions comply with established standards, impose sanctions on officials who do not comply, and ensure that appropriate corrective and remedial action is taken when required.”¹⁹ This triadic typology of accountability (responsibility, answerability and enforceability) is human rights’ greatest contribution to the conceptualization of accountability in the field of development.²⁰

2.2 Counter-hegemony

My concept of counter-hegemony counter-poses the Gramscian notion of hegemony as a cultivation of “popular consent” by the dominant social group. Gramsci’s notion of hegemony

¹⁷ Compare, for example, Willem Van Genugten, *The World Bank Group, the IMF and Human Rights: A Contextualized Way Forward* (Cambridge; Antwerp; Portland: Intersentia Publishers, 2015) at 41, 43 [Genugten, *Way Forward*] and Anne Marie Goetz & Rob Jenkins, *Reinventing Accountability: Making Democracy Work for Human Development* (New York: Palgrave Macmillan; 2005) at 17[hereinafter Goetz and Jenkins, *Reinventing Accountability*] at 12.

¹⁸ Rob Jenkins & Ann Marie Goetz, “Accounts and Accountability: Theoretical Implications of the Right to Information in India” (1999) 20:3 Third World Q at 606.

¹⁹ OHCHR & CESR, *Who Will Be Accountable?* *supra* note 16; Schedler, *supra* note 16 at 15, 26. Sanctions may be punitive or non-punitive and may take the form of public censure, media censure, naming and shaming, pushing public authority to vacate office. See also Ruth W Grant & Robert O Keohane, “Accountability and Abuses of Power in World Politics” (2005) 99:1 Am Pol Sc Rev at 29.

²⁰ OHCHR and SERI, *Who Will be Accountable*, *supra* note 16 at 11.

denotes a phenomenon in which a dominant social group achieves control or “domination” by inducing others to submit to and accept as normal and universal the superior group’s perspectives, practices and institutions without the threat of physical coercion.²¹ In this respect, I draw on the work of Rajagopal, himself relying on Gramsci’s work, who holds that hegemony implies the “production, reproduction and mobilization of popular consent [by] any dominant group.”²² As a part of his broad discussion of social movements praxis as a form of Third World resistance in international law, Rajagopal’s conceptualization of mass mobilization from below as a power of resistance against hegemony is innovative. Rajagopal grasps, and consequently demonstrates, counter-hegemony as constituted by the “alternative visions” and other “valid ways” of describing the universe, contrary to the political, social, and economic constructions of the dominant classes.²³ I use counter-hegemony, therefore, as an analytical category to refer to how the substance, ethos, and theory of the RTD furnishes alternative visions, perceptions, and ideations in contesting and challenging the dominant (global) social group’s ways of conceiving of and legitimating the world of human rights and development.

2.3 Development justice

Development justice refers to an understanding of justice that entails the fairness and equity in the rules, processes, institutional setup, and outcomes of development. Development justice seeks to apply the basic principles of fairness and equity to the injustices immanent in the realm of development entrepreneurship. I adopt Khan’s approach to the theme of development justice, specifically her examination of global policies and their distributive outcomes in the context of the implementation of the SDGs agenda. According to her, the term development justice refers to an alternative model of development concerned with achieving diverse goals, among them the global redistribution (of power, wealth, income, resources, and opportunities) and social and economic justice and equity.²⁴ Guided by Khan’s work, I adopt a definition of development justice to refer

²¹ This is an interpretation of the Gramscian concept of hegemony by Douglas Litowitz, “Gramsci, Hegemony, and the Law” (2000) *BYU L Rev* 515 at 518 citing Quintin Hoare & Geoffrey Nowell Smith eds, *Selection from the Prison Notebooks of Antonio Gramsci* (1971) at 57-58.

²² Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at 18 [Rajagopal, *International Law from Below*].

²³ *Ibid* at 10-11. See further Balakrishnan Rajagopal, “Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy” (2006) 27:5 *Third World Q* 767-783.

²⁴ See Tessa Khan, *Delivering Development Justice? Financing the 2030 Agenda for Sustainable Development No. 10* (UN Women, 2016) at 1.

to a category of justice that deploys a structural and distributive understanding of phenomena.²⁵ A structural approach appropriates rules, policies, structures, and processes of development into the understanding of the engenderment of incidences of human rights deprivations (in this case poverty and inequality especially).²⁶ A distributive understanding also deploys a structural approach. It looks into how “institutional schemes” allocate the benefits and harms of development.²⁷

I examine the accountability question from a development justice perspective. Looked at from an accountability perspective, development justice is concerned with the responsibility, answerability, and sanctionability of actors for distributive injustices linked to the structures, processes, rules, policies, and operations of the global policy system.²⁸ Here, development justice is conceived of as an ideal that explicitly embraces the RTD’s emancipatory and egalitarian vision of human-centred development, social justice and equity, and participatory development. Holistically, these are further linked to SDG1—ending poverty in all its forms; SDG10—reducing inequality within and between nations; and SDG17—strengthening the means of implementation and revitalizing global partnerships to achieve these goals.²⁹

2.4 Development injustice

The term “development injustice” refers to socio-economic conditions, inequities, experiences, afflictions, abuses, subjugation, and deprivations that are contingent on the global development policy system. More often, these manifest in outcomes of extreme poverty and the endurance of

²⁵ See also Loretta Capeheart and Reagan Milovanovi, *Social Justice: Theory, Issues and Movements* (New Brunswick: Rutgers University Press, 2007) at 2.

²⁶ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform*, 2nd ed (Cambridge: Polity Press, 2008) at 70, 175 [Pogge, *World Poverty and Human Rights*]. But see generally chapters 1,2 and 4 and Thomas Pogge, “Cosmopolitanism and Sovereignty” (1992) 103:1 *Ethics*.

²⁷ Pogge, *World Poverty and Human Rights*, *ibid* at 176.

²⁸ For a good view of the structural linkage between poverty and underdevelopment as human rights violations in the context of global arrangements, see Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007) at 113 [Salomon, *Global Responsibility for Human Rights*]. See also Margot E Salomon, Arne Tostensen & Wouter Vandenhoele eds, *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Antwerp; Oxford: Intersentia, 2007) at 14 (Hereinafter Salomon et al, *Casting the Net Wider*).

²⁹ In reflecting and clarifying the scope and relevance of his mandate, the Special Rapporteur maintains that the RTD is important given that it “addresses systemic and structural issues and root causes of poverty, inequality and conflict. Its effective implementation will help to reduce poverty and inequality, prevent conflict and promote progress, leaving no one behind, so that all individuals and peoples may live with freedom, equality and dignity and enjoy lasting peace.” Saad Alfaragi, “United Nations Special Rapporteur on the Right to Development: An Introduction to the Mandate” (United Nations: Geneva, 2017) at 5.

unjustifiable inequalities.³⁰ Similarly, the persistence of external structural relationships that are characterized by great disadvantages and asymmetries also constitute development injustices. Logically therefore, in this dissertation, the term “development injustice” denotes the institutional practices, processes, and outcomes constituting violations of the RTD that are linked to the development interventions of the World Bank and the IMF. I charge that development injustices are distributive outcomes shaped by global parochial objectives and institutional arrangements deliberately fashioned to subjugate Third World peoples and render them incapable of exercising autonomy and capabilities in self-determined development.³¹

2.5 Global public goods

“Global public goods” is a technical expression that has been modified from development economics and customized to refer to those standards, rules, policies, outcomes, goals or “...issues that are broadly conceived as important to the international community, that for the most part cannot or will not be adequately addressed by individual countries acting alone, and that are defined through a broad international consensus or a legitimate process of decision-making.”³² This concept has been instrumental to IFIs’ understanding, justification, and rationalization of their interventions in the global economy and the development realm. The allocative role of development financing and financial and monetary stabilization is one aspect of IFIs’ provision of global public goods.

2.6 Intermingle effect

The concept of intermingle effect presupposes that there is always an entanglement and interaction of global rules, policies, institutions, and norms with the policy infrastructure and institutions of

³⁰ For the idea that poverty is a structural injustice, see for example Carol Chi Ngang & Serges Djoyou Kamga, “Poverty Eradication Through Global Partnerships and the Question of the Right to Development Under International Law” (2017) 47:3 Africa Insight.

³¹ I rely on the conceptualizations of Thomas Pogge, “World Poverty and Human Rights” (2005) 19:1 Ethics and International Affairs at 3 and Margot E Salomon, “International Economic Governance and Human Rights Accountability” LSE Law, Society and Economy Working Paper No 9/2007 online: <<http://eprints.lse.ac.uk/24622/>>.

³² International Task Force on Global Public Goods, *Meeting Global Challenges: International Cooperation in the National Interest*, Final Report (Stockholm: Erlanders Infologistics Väst AB, 2006) at 13. For its academic debut in international development cooperation, see Kaul et al, *Global Public Goods*, *supra* note 13; Inge Kaul ed, *Providing Global Public Goods: Managing Globalization* (New York; Oxford: Oxford University Press, 2003). For a critique of the concept as imprecise and rhetorical, see David Long and Frances Woolley, “Critique of a UN Discourse” (2009) 15:1 Global Governance 107-122.

nation-states as well as other national factors. It is in the complex interface and entanglement of various factors that an admixture of foreseeable and unforeseeable, and avoidable and unavoidable, outcomes to human development are produced and sustained. I argue later in this dissertation that the intermingling effect complicates accountability in several important respects: it makes it difficult to identify the breach of primary obligations (wrongfulness), trace the chain of causation, discern the identity of responsible actors, and estimate harms or attribute conduct to a given actor.³³

2.7 Structural contingency dynamic

The “structural contingency” of development is a dynamic which shows that the intricate intermingling of policy and the interplay of different mediating factors happen in circumstances in which the global forces are more decisive, manipulative, and determinative of national outcomes than the domestic ones. It is a dynamic that locates the main causes of poverty and inequality within and between states in the unfair and unjust global policy system and models of development. It emphasizes that supranational actors less visibly take on more determinative roles in the perpetuation of development injustices and the violation of human rights.

2.8 Third World

Following scholars such as Rajagopal, Mickelson, Okafor and Baxi, I define the Third World not as geographies or nations *per se* but as a people and states defined by common and shared experiences of subjugation and marginalization in the international institutional order.³⁴ The term Third World is a contingent category. It is not absolute in its expression or invocation of certain meanings. It has been understood differently in the ideological, geopolitical, historical and representational senses.³⁵ As an analytical category, it expresses “the existence of a group of states and populations that have tended to self-identify as such—coalescing around a historical and

³³ This is an analogization taken directly from Thomas Pogge, *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (UNESCO; Oxford; New York: Oxford University Press, 2007) at 17 [Hereinafter Pogge, *Freedom From Poverty*].

³⁴ Obiora Chinedu Okafor, “Newness, Imperialism, International Legal Reform in Our Time: A TWAAIL Perspective” (2005) 43:1 &2 Osgoode Hall L J at 174 [Okafor, “Newness”]. See also Boaventura de Sousa Santos and César A. Rodríguez-Garavito eds., *Law and Globalization From Below: Towards a Cosmopolitan Legality* (Cambridge; New York: Cambridge University Press, 2005) at 14.

³⁵ Balakrishnan Rajagopal, “Locating the Third World in Cultural Geography” (1999) 15:1/2Third World Legal Studies 1. See also Karin Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1998) 16 Wis Intl L J 353.

continuing experience of subordination at the global level that they feel they share.”³⁶ The emphasis is on the sense of a shared experience of subordination, subjugation, and marginalization of these states and peoples in the unjust global institutional system.³⁷ For example, because of a similar historical experience of subordination, in most diplomatic circles, China still self-identifies (geopolitically) as Third World despite its economic power and prowess. This self-identity captures how Baxi has defined the Third World as “geographies of injustices.”³⁸ Therefore, the ideological underpinning of Third World challenges the modernist notion of progress, focuses on the hegemonic usages of power as an exercise of subjugation, and the history of colonialism and imperialism, even in their current iterations, that have been key to the production of such injustices.³⁹ I use the term Global South within the same meaning as Third World.

3. DELIMITATION OF THE RESEARCH PROBLEM

3.1 The Impetus for Development Justice

In both older and contemporary contexts of the “*development encounter*,”⁴⁰ Bretton Woods institutions have enjoyed tremendous influence in our increasingly networked global system. Their dominance in this realm has been enabled by the technical assistance, surveillance, advisory facilities, and lending that they extend or practice.⁴¹ The assumption of these roles by IFIs in

³⁶ Okafor, *supra* note 34 “Newness” at 174.

³⁷ As Prasad conceives it, Third World refers to those “galvanized by the mass movements and by the failures of capitalist mal-development.” Vijay Prasad, *The Poorer Nations: A Possible History of the Global South* (Brooklyn: Verso, 2012) at 1.

³⁸ Upendra Baxi, “Operation Enduring Freedom: Toward a New International Law and Order?” in Antony Anghie et al eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003) at 46.

³⁹ Rajagopal, “Cultural Geography” *supra* note 35 at 2-3.

⁴⁰ As a concept crafted by Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, NJ: Princeton University Press, 1995), development encounter describes the processes through which international law, human rights law, and a wide range of international endeavours interacted, at times in conflictual terms, with models of development that were advanced by the North. The contestations and antagonisms were often pitting the geo-political constituencies of the North and the Third World. In particular, the focus was on the pervasive global policy system and structures determining the production, distribution, and sharing of the benefits of development. Development models have been fairly critiqued by discourses of modernity, post-modernism, post-development. See also Balakrishnan Rajagopal, “International Law and the Development Encounter: Violence and Resistance at the Margins” (1999) 93 ASIL Proceedings 16 [Rajagopal, “Violence and Resistance at the Margins”].

⁴¹ The massive influence of international financial institutions come through proffered development policies coincidental to development financing and concessional and non-concessional lending. These are too often coupled with research, advisory, technical assistance, advocacy, standard- and norm-setting, and rulemaking. Some of the areas where they are instrumental include sustainable debt management, debt restructuring, public borrowing, public spending, fiscal prudence, national and international financial fragility, and financial sector regulation. This list is just illustrative, though not exhaustive.

international economic policymaking has always complicated the asymmetrical structure and outlook of the global policy system.⁴² As a result, the Global North–dominated IFIs have always amassed and maintained relative dominance over the economies of most developing countries that seek from them financial bailout during periods of economic strain.⁴³

The domination by IFIs is highlighted by several factors. One is the significantly manipulative, subordinating, and determinative character of the global development policy system.⁴⁴ Another factor is the technocratic production of knowledge as a different form of control in development practice.⁴⁵ There is also the participatory development deficits.⁴⁶ The last is economic rationalism by which IFIs’ disavow rights normativity as irrelevant to their domains of practice.⁴⁷ By their refusal to accept rights obligations as binding on them, at the altar of economic rationalism, IFIs enjoy a wide leverage to proliferate economic standards for the implementation of development without any obligation to accommodate countervailing values in the increasingly proliferating regimes of regulation.

⁴² This appears in the Report of the Secretary General E/CN.4/1334) of 21 February 1979 as reproduced in OHCHR *Realizing the Right to Development*, *supra* note 7 at 9 [OHCHR, *Realizing the Right to Development*]:

The global development process faces many obstacles which are of a largely transnational character. In the economic sphere, these obstacles include continuing patterns of domination and dependency, unequal trade relations, and restrictions from external sources on the right of every nation to exercise full sovereignty over its national wealth. Thus, underdevelopment has been said to be the consequence of plunging a society and its economy into a world whose structures condemn them to a subordinate status and stagnation or internal imbalance.

See also Goetz and Jenkins, *Reinventing Accountability*, *supra* note 17 at 17.

⁴³ Margot E Salomon, *Global Responsibility for Human Rights*, *supra* note 28 at 40; Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Oxford; Portland: Hart Publications, 2012) at 174 [Bunn, *Legal and Moral Dimensions*]; Anne Orford, “Globalization and the Right to Development” in Philip Alston ed, *People’s Rights* (New York: Oxford University Press, 2001) at 146.

⁴⁴ See Pogge, *World Poverty and Human Rights*, *supra* note 26 at 39.

⁴⁵ Post-development scholarship emphasizes that development is a regime of control and technocratic exercise of control through “apparatuses of knowledge and power” that constructs the Third World and development to correspond to parochial interests of the modernist development models. See Escobar, *Encountering Development* *supra* note 40 at 23-24; 159; John Harald Sande Lie, *Developmentality: An Ethnography of the World Bank-Uganda Partnership* (Bergham Books, 2015) [Sande Lie, *Developmentality*].

⁴⁶ Pogge, *World Poverty and Human Rights*, *supra* note 26 at 122. For recent claims for reforms based on voice and participation, there is a bulging scholarship in development studies. See, for example, Jakob Vestergaard & Robert H Wade, “Still in the Woods: Gridlock in the IMF and the World Bank Puts Multilateralism at Risk” (2015) 6 *Global Policy*.

⁴⁷ Galit Sarfaty, “Measuring Justice: Internal Conflict over the World Bank’s Empirical Approach to Human Rights” in Kamari Clarke & Mark Goodale eds., *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge University Press, 2009). For analysis regarding the institutional culture of vacillation towards human rights, see Galit Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford: Stanford University Press, 2012) Galit Sarfaty, “Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank (2009) 103 *AJIL* 647.

All of these factors, in one way or another, prominently feature in the account of how development injustices are produced and sustained by technocratic and predatory development practices.⁴⁸ The reason is that the roles IFIs perform, the control they exert, and the supranational measures they recommend invariably shape national contexts, including the manipulation of development outcomes. Without a doubt, the regulatory and allocative roles of development institutions and the control they exert have some liberating and deleterious potential. Potentially, the attainment or non-attainment of development priorities by weak states thus is structurally hinged on the global policy system.⁴⁹ These measures also impact the realization of the RTD as the rights of individuals and peoples to a favourable national and international order for the attainment of a just, equitable, participatory, and human-centred development respectful of all human rights.⁵⁰

Indeed, in empirical terms, a great number of development policies have proven to be human rights retrogressive.⁵¹ They are human rights retrogressive because they are predicated on a different vision of development—namely, the neoliberal creed; an economic rationalism that has historically been blamed for the human suffering in the Global South.⁵²

A true spectre of how the ascendancy of the neoliberal development creed has historically subverted the development aspirations of a majority of people living in the Global South cannot be lost to us.⁵³ A daunting amount of literature documents the fact that development practice, even

⁴⁸ Margot Salomon, “Legal Cosmopolitanism”, *supra* note 5 at 22; M Rodwan Abouharb & David Cingranelli, *Human Rights and Structural Adjustments* (Cambridge: Cambridge University Press, 2007) at 4 [Abouharb & Cingranelli].

⁴⁹ See also OHCHR & CESR, *Who Will Be Accountable?* *supra* note 16 (that fulfilment of states’ rights mandate is structured and strained by the global political economy at 28).

⁵⁰ See *HLTF Report*, *supra* note 4 at 9.

⁵¹ Abouharb Cingranelli, *supra* note 48. For further take, see Joe Oloka Onyango, “Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa” (1995) 26 *Cal W Int’l LJ* 20-29.

⁵² Ali Burak Güven, “Whither the Post-Washington Consensus? International Financial Institutions and Development Policy Before and After the Crisis” (2018) 25:3 *Rev of Intl Pol Economy* (argues that “the perceived shift from Washington Consensus to Post-Washington Consensus was “not a paradigm shift but a paradigm expansion within mainstream wisdom” at 394).

⁵³ *Report of the Independent Expert on the Effects of Structural Adjustment Policies on the Full Enjoyment of Human Rights*, Commission on Human Rights, 55th Session Provisional Agenda Item 10, para 28, E/CN.4/1999/50 (1999). It observed at 49 that:

...literature points to the conclusion that, while there are significant gains to be derived from liberalization as a result of structural adjustment programmes, such reforms do not provide the best outcome for all. The experience of the last 20 years in Africa and Latin America shows that structural adjustment policies are not consistent with long-term development needs of developing countries. The evidence challenges the assertion by the World Bank and the IMF that SAPs alleviate poverty and strengthen democracy. Instead, SAPs have been guided by laissez-faire market principles that privilege efficiency, productivity and groups engaged in export and international trade at the expense of civil liberty and self-government.

in its current (post-Washington) models, continue to wreak structural injustices on communities of the Global South.⁵⁴ Development injustices continue to escalate in defiance of the deepening awareness that development must be “normatively based on” and “operationally directed to”⁵⁵ the realization of individual freedoms and human capabilities. More often, these manifest in distributional outcomes of extreme poverty, the endurance of inequalities, and the persistence of external relationships that are characterized by power asymmetries, paternalism, and undemocratic policymaking. This history of development entrepreneurship is a history affirming the direct implication of IFIs in these perversions.

Empirically, development injustices that have been associated with the logic of the market are wide ranging: breeding inequalities, plunging large segments of society into extreme material deprivation,⁵⁶ and emasculating the “values of humane development.”⁵⁷ But the true extent of these maladies is at times grossly under-acknowledged, therefore misrepresented, in empirical terms. Extreme poverty, in its various forms and manifestations, remains endemic in the Global South, amid sustained fiscal efforts to boost growth and make development sustainable.⁵⁸ Debt distress and vulnerability in the Global South continues to surge unabated, thus undermining states’ resource capacities to satisfy social justice obligations incumbent upon them.⁵⁹ Inequality, in its various structures and forms, within and between countries, remains on an upward trend.⁶⁰ In the

See further, World Bank, *World Development Report 2006: Equity and Development* (Washington, DC: World Bank/Oxford University Press, 2006) at 16; United Nations Development Programme, *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (New York: Oxford University Press, 2005) at 36-37.

⁵⁴ Ngang & Kanga, *supra* note 30; Jason Hickel, “The True Extent of Global Poverty and Hunger: Questioning the Good News Narrative of the Millennium Development Goals” (2016) *Third World Q*; See also *World Inequality Report 2018* by World Inequality Lab, 2017 suggesting that income inequalities has been on the rise within countries since the 1980s. Online: <<https://wir2018.wid.world/files/download/wir2018-summary-english.pdf>>.

⁵⁵ OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (New York and Geneva, United Nations, 2004) section 2.

⁵⁶ Koen De Feyter, *Human Rights: Social Justice in the Age of the Market* (Cambridge; New York: Cambridge University Press, 2008) at 13.

⁵⁷ Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (Oxford: Oxford University Press, 2009) at 155 [Baxi, *Human Rights in a Posthuman World*]; Joseph E Stiglitz, *Globalization and Its Discontents* (New York: W.W Norton & Co., 2002) at 16-17; Salomon et al, *Casting the Net Wider*, *supra* note 28 at 10.

⁵⁸ Hickel, *supra* note 54.

⁵⁹ IMF, “Macroeconomic Developments and Prospects in Low-Income Developing Countries” (22 March 2018), online: <<https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/03/22/pp021518macroeconomic-developments-and-prospects-in-lidcs>>; IDA, “Debt Vulnerabilities in Poor Countries” (4 October 2018), online: <http://documents.worldbank.org/curated/en/896041540087366658/pdf/debt-vulnerabilities-in-ida-countries-10042018-636756697620872725.pdf>>.

⁶⁰ Thomas Picketty, *Capital in the 21st Century* (Cambridge: Belknap Press, 2014) at 242, 430, critically analyzes the various kinds of wealth inequalities: first, income inequality, which constitutes two prongs of inequality of income from labour (wage earnings) and inequality of income from capital. Capital is itself a function of ownership of

face of these growing maladies, international cooperation for development and global partnerships—embedded in the SDG policy framework, and expected to mobilize public and private resources, ameliorate structural barriers and enhance states’ capacities for tackling development perversions—remains glib and state-centric.

The fact that even the UN admits that the “existing global economic and social governance structures are woefully inadequate” to confront challenges of sustainable development gives impetus to the quest for development justice.⁶¹ Said differently, the push to realize development justice arises due to the intensification of human rights deprivations and escalating development injustices posed by the hegemonization of development policy practice.

3.2 The Imperative of Accountability for Development (In)justice

Meanwhile, the mounting injustices of development have unleashed profound social upheavals and political polarization across the globe. We continue to witness, within national boundaries, the masses questioning the fundamentals of the global economy.⁶² As they question the prevailing economic models, they also assail the often imperialist logic of “governance through development.”⁶³ These realities have meant, as well, that in order to secure their rights and capabilities, many vulnerable people (especially in the Third World) whose states are so weak that they cannot secure any protection against these structural challenges, now make more robust claims of direct and distinct accountability of IFIs in development decision-making.⁶⁴

property, rents, dividends, interest, profits, royalties. There is also global inequality, to which Picketty devotes an elaborate analysis. For details on the rise on global wealth inequality, see *ibid* at 433-439. Picketty empiricizes that by 2014 the wealthiest one percent owned fifty percent of the total aggregated global wealth, and that the huge disparities and material hierarchies are rooted in international inequalities. *Ibid* at 438. He goes on to weave the linkage between the rise of inequality and the renewed search for poverty alleviations: “Today, in the second decade of the twenty-first century, inequalities of wealth that had supposedly disappeared are close to regaining or even surpassing their historical highs. The new global economy has brought with it both immense hopes (such as the eradication of poverty) and equally immense inequalities...” *Ibid* at 471.

⁶¹ United Nations, *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change (New York, United Nations, 2004) at para 56.

⁶² The IMF admits that excessive inequality has the potential to cause erosion of “social cohesion,” increase “political polarization” and “lower economic growth.” IMF, *Fiscal Monitor: Tackling Inequality* (Washington: IMF Publication Services, October 2017) at 1.

⁶³ Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Oxford; New York, Routledge, 2011) at 2.

⁶⁴ See Daniel D Bradlow, “The World Commission on Dams’ Contribution to the Broader Debate on Development Decision-Making” (2001) 16:16 *Am Uni Intl L Rev* 1531 at 1535. A good example is Sudan, which on 11 April 2019 witnessed her long-term dictator Omar el Bashir toppled in a civilian-led revolution. This culmination arose from protests against economic constraints, dictated particularly by IMF interventions and austerity measures such as elimination of food subsidies and liberalization that had been pursued by the government since 2013. During the

The demand for greater and more effective direct and distinct accountability of IFIs arises and gathers steam in response to the lack of effective accountability mechanisms and institutions that can constrain their dominant roles in the perversions and violence of the global development enterprise.⁶⁵ This fact is also the reason more attention needs to be directed to the imperative of instituting much greater accountability for IFIs, toward the greater realization of development justice.

This dissertation discerns, in part, that the scale of development injustices continues to escalate, unabated and unmitigated—despite deliberate global efforts to mainstream accountability as a paramount standard in the implementation of the RTD and SDGs.⁶⁶ What makes the persistence of the development justice accountability deficit more acute is the characteristic feature of accountability avoidance, disconnection, and obstruction in international law and politics of development, particularly in relation to the praxis of IFIs. That is to say that, international law rationalizes and legitimizes accountability avoidance, disconnection, and obstruction, particularly when IFIs are the objects of censure in development policymaking and practice.⁶⁷ I contend that international law doctrines tend to embody strong statist versions of accountability that cannot secure the direct and distinct accountability of IFIs.

One explanation for this feature, I argue in this dissertation, is that because international law is not hewn out of, nor grounded in, the diverse contexts, experiences, or thoughts of different

civilian protests, people have continued to demand an end to corruption and status quo authoritarian rule and return to democracy. See “What is Behind the Economic and Political Crisis in Sudan” online <<https://africasacountry.com/2018/03/current-sudan-crisis/>>.

Goetz and Jenkins, *Reinventing Accountability*, *supra* note 17 at 43 concede that the increasing demand for accountability is a new relationship however, “What is new,” they argue, “is that the actions of these state and non-state agents are now increasingly scrutinized in terms of their impacts on the opportunities for poor people to realize substantive freedoms, and that the conventional mechanisms through which these and other actors account for their actions—via state-run oversight mechanisms—are seen as insufficient to produce pro-poor outcomes.” It is this scenario that leads to citizens piling pressure and demanding accountability of the government in development decision-making in light of the externally dictated structural reform measures.

⁶⁵ For a comprehensive account of the perversions and scale of violence unleashed by development enterprise, see Rajagopal, “Violence and Resistance at the Margins” *supra* note 40. For a recent historical account of how this form of hegemony raises serious accountability questions, see Jason Hickel, *The Divide: Global Inequality from Conquest to Free Markets* (New York: WW Norton and Company, 2018) at 147, 154-157; Goetz & Jenkins *Reinventing Accountability*, *supra* note 17 at 17 above remark that globalization and its interdependence is responsible for the proliferation of the accountability agenda.

⁶⁶ For the idea that accountability is a critical cog in the implementation of the post-2015 development agenda, see OHCHR & CESR, *Who Will Be Accountable*, *supra* note 16; United Nations, *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet, Synthesis Report of the Secretary-General On the Post-2015 Agenda* (New York: United Nations, 2014) para 147.

⁶⁷ Chapters 4,5 & 6.

societies, it is “utopian” and “incomplete”.⁶⁸ In its element, it embodies rigid, linear, and monocultural doctrines that are ill-adapted to contemporary complex challenges. It is on this account that even the most cosmopolitan deployments of rights praxis that have emanated from the Third World aiming to challenge international economic governance, end poverty, reduce material inequalities, and eliminate structural barriers to development have not been able to temper the hegemonization of development discourse. Such efforts have also failed to stem the corresponding avoidance and evasion of accountability by IFIs. I observe that this anachronism of international law has been carried forward, unabashedly, into the implementation of the SDGs agenda.

The six chapters of this dissertation engage the hypothesis that the avoidance, disconnection, and obstruction of the accountability of international institutions (especially IFIs) has not, however, been *absolute*. It is the hypothesis of this dissertation that what we are dealing with is a *highly qualified* accountability system; one that is sanctioned, rationalized, and legitimized through historically preconceived legal precepts, doctrines, idioms, traditions, and conventions that international law constructs and reconstructs. The due diligence principle, the law of responsibility, political prohibition doctrine, and the rationality of global public goods, appear to be some of the conceptual tools that have been so pivotal to facilitating the way international law constructs a qualified accountability system. It is also hypothesized that all these idioms and doctrines have come to be clothed with a large measure of acceptance and supposed universality in international law. This level of universality has been conferred, notwithstanding that the proclamation of their universality is done in a way that is too often oblivious of the experiences of different peoples of the world.

It is likely that the qualification of the accountability of IFIs is part of the legacy of the hegemonization of development and sustenance of relations of domination and subjugation.⁶⁹ It is also likely that their purported universality is the very mechanism through which international law masks the disturbing accountability depleting quality of the dominant development praxis.

⁶⁸ Martti Koskonniemi, “Histories of International Law: Significance and Problems for A Critical View” (2013) Temple Intl L & Comp L J 215 at 216, 217; Elizabeth Beyerly, *Eurocentric International Law: Contemporary Doctrinal Perspectives* (New York: William S Hein & Co Inc, 1998) at 10.

⁶⁹ See e.g. Siba N’Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-determination in International Law* (Minneapolis: University of Minnesota Press, 1996) at 16, 24.

The dissertation also examines the hypothesis that it is with the aid of such doctrines that the international law of development tends to formulate discourses that delegitimize any attempt to locate the causes of inegalitarian development outcomes in the character of the global development policy system. The hypothesis here is that this process of delegitimization proceeds through shifting the responsibility for such injustice almost completely to the agency of the (Third World) state.⁷⁰ In the classical international law discourse of accountability, it is only the state that can be held accountable for human rights violations related to development pursuits.⁷¹ International law has constructed a normative framework and practice whereby poor and indebted countries, in desperate need of financial assistance, tend to be more accountable to supranational development institutions than to their own citizens.⁷² This occurs mainly when they are forced to accept and implement policies and policy conditionalities prescribed by supranational institutions, such as IFIs.⁷³ No matter the multifaceted nature of the causes, and the multidimensionality of the harms at issue, in the development realm, the traditional human rights doctrinal position applies. The position is that the onus is on the state to “protect, respect and fulfil” human rights obligations.⁷⁴ This is now shifting a little, albeit still unsatisfactorily, with the adoption of bodies of norms like the United Nations Guidelines on Business and Human Rights⁷⁵ and the draft Convention on the Right to Development.⁷⁶

⁷⁰ Sundhya Pahuja, “Global Poverty and the Politics of Good Intentions” in Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford; Portland: Hart Publishing, 2014) at 32, 37-38.

⁷¹ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) at 9-10.

⁷² For this view, see also Margot E Salomon, “Of Austerity, Human Rights and International Institutions” (2015)21:4 *European L J* 521 at 535.

Daniel Bradlow, “The Reform of the Governance of the IFIs A Critical Assessment” in Hassane Cissé, Daniel D Bradlow & Benedict Kingsbury eds, *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* Vol. 3 (Washington, D.C: World Bank, 2012) at 39:

Today, the major IFIs, de facto, are important actors in the policymaking processes of many of the member states that rely on their financial services. The IFIs have become more sensitive to the interests of those member states that use their financial services and are gaining international power and influence while remaining subject to the influence of the IFI’s richer and more powerful member states.

⁷⁴ Henry Shue, *Basic Rights, Subsistence, Affluence, and U.S. Foreign Policy* (Princeton; New Jersey: Princeton University Press, 1996); Centre for Human Rights, *Right to Adequate Food as a Human Right* (New York: United Nations, 1989); Asbjorn Eide, “Economic, Social and Cultural Rights As Human Rights” in Asbjorn Eide, Catarina Krause & Allan Rosas eds *Economic, Social and Cultural Rights: A Textbook* 2nd Rev ed, (Dordrecht; Boston: M. Nijhoff Publishers, 1995) at 21-40.

⁷⁵ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (United Nations: New York and Geneva, 2011) HR/PUB/11/04.

⁷⁶ See *supra* note 3.

It is a classic feature of human rights accountability praxis that the breach of the “protect, respect, and fulfil” obligations constitutes internationally wrongful conduct and triggers the application of state responsibility principles. Such a statist outlook on human rights accountability praxis is a derivative norm of a classical international law preoccupied with creating norms of behaviour and mechanisms of accountability solely for states on the basis of a traditional understanding of state responsibility.⁷⁷ This feature is one that facilitates accountability avoidance, disconnection, and obstruction for non-state actors. Its corollary effect is that, though supranational actors have visibly taken up dominant roles in driving the global policy agenda, accompanied by the production of development injustice, they remain, paradoxically, unduly distant from being held accountable when such injustices occur.⁷⁸ Such violations, however arising or caused, are then attributed, for the most part, to national rather than international regimes, institutions, and practices.⁷⁹ In other words, the “international causes of poverty are not on the table in the development story” and attempts “to locate responsibility for global poverty at the global level do not have any bite.”⁸⁰

At the pinnacle of this state-centric proclivity of international law is responsibility avoidance and accountability obstruction and disconnections on the part of IFIs. Thus, actors who generate policies that are more decisive and determinative of the structural conditions within states and that are more causative of development injustices are insulated from accountability. They are insulated from accountability at the primary decision-making stages. They are unaccountable to states—the parties with decision-making responsibility in development planning. They are immunized from accountability to the people affected or to any machineries of state accountability.

What further intensely accentuates the development accountability deficit and complicates the search for development justice is what I have referred to, earlier in this chapter, as the intermingle effect. The intermingle effect makes it impossible to identify conduct that constitutes wrongfulness; it renders uncertain attempts to trace the chain of causation; it makes it hard to

⁷⁷ Andrew Claphan, “Non-State Actors” in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumara, *International Human Rights Law* (New York: Oxford University Press: 2010) at 562. For a state-centric conception of international law, see Jan Klabbers, “(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors” in Jarna Petman & Jan Klabbers eds, *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Leiden/Boston: Martinus Nijhoff 2003) 351; Barbara K Woodward, *Global Civil Society in International Lawmaking and Global Governance* (Leiden/Boston: Martinus Nijhoff 2010) 2.

⁷⁸ Philip Alston, “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?” in Philip Alston ed, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) at 6.

⁷⁹ Pahuja, *supra* note 70 at 37.

⁸⁰ *Ibid.*

discern the identity of responsible actors; it makes it difficult to estimate harms or attribute conduct to a given actor.⁸¹ Thus, these indiscernibilities and indeterminacies call into question the traditional accountability mechanisms known to international law.

Further impediments, though not legally insurmountable,⁸² emanate from the legal precepts of jurisdiction and procedural immunity of international organizations.⁸³ Thus, it is because of such preconceived doctrines of international law that IFIs are assured of invisibility and a convenient unaccountability distance. The question of immunity and jurisdiction are however beyond the scope of this dissertation.

Furthermore, the available internal mechanisms of accountability within the relevant IFIs that entertain (marginal) citizen participation and claims of redress are fraught. They are inward looking, largely oblivious of the development–human rights interface, and all-too often neglect policing or enforcing compliance with universal norms and standards.⁸⁴ This dissertation will engage with the hypothesis that the Inspection Panels and the Independent Evaluation Office that emerged out of the perceived political necessity to “deradicalize” the Third World are, at most, qualified and ineffective schemes of accountability.⁸⁵ The praxis of the World Bank’s Inspection Panel, for instance, reveals instances of the avoidance and obstruction of accountability whenever the interventions in the global economy by IFIs are challenged.⁸⁶ An associated hypothesis is that they also miss a crucial understanding of how development injustices are produced, perpetuated, and sustained by the global policy system and multiple interacting regimes (i.e., the intermingle effect).⁸⁷

⁸¹ This is an analogization taken directly from Pogge, *Freedom From Poverty*, *supra* note 33 at 17. See also Thomas Pogge, “The First United Nations Millennium Development Goal: A Cause for Celebration?” (2004) 5 *Journal of Hum Dev* at 391.

⁸² The legacy of surmountability of procedural immunity of international organizations in national courts has just been set by *Jam v International Finance Corporation* (2019) 586 U. S.

⁸³ Olivier De Schutter, “Human Rights and the Rise of Organizations: The Logic of Sliding Scales in the Law of International Responsibility” in Jan Wouters et al, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010) at 77; August Reinisch ed *Privileges and Immunities of International Organizations in Domestic Courts* (Oxford: Oxford University Press, 2013).

⁸⁴ Daniel D Bradlow & Andria Naude Faurie, “The Operational Policies of the World Bank and the International Finance Corporation Creating Law-Making and Law-Governed Institutions?” (2013) 10 *Intl Org L Rev* 3.

⁸⁵ Rajagopal, *International Law from Below*, *supra* note 22 at 53, 66, 68, 71.

⁸⁶ Rekha Oleschak-Pilla, “Accountability of International Organizations: An Analysis of the World Bank Inspection Panel” in Jan Wouters et al, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010).

⁸⁷ OHCHR & SERI, *Who Will be Accountable*, *supra* note 16, at 25 arguing that in addition, they are both shorn of uniformity of standards, cannot be monitored, are based on discretionary unenforceable rules and bereft of universal language that human rights exact in international law. According to Natalie Bugalski, “The Demise of Accountability at the World Bank” (2016) 31 *Am U Intl L Rev* at 1, these are vehicles for instilling accountability to internal rules

Lastly, the regime of “follow-up and review of progress” of implementation so prevalent and dominant in the sustainable development field typifies the marked absence of significantly direct and distinct accountability of IFIs. Their replication of the problematic state-centred model leaves little doubt that there is no real intention among the dominant founders and operators of the system to cure the perverse accountability deficits in the development field.

Significantly, this dissertation understands that fundamental problems with the design of most contemporary (human rights) accountability practices tend to be explainable within the frameworks of two contrasting paradigms: *interactional* and *institutional* approaches to violations.⁸⁸ These flaws in the fundamental architecture render the functionalities of extant accountability regimes unsuitable and ill-adapted to the vindication of development injustices. Pogge adeptly discerns a deference in practice to an interactional tradition over an institutional approach to responsibility assignment for distributive injustices.⁸⁹ The interactional approach is a linear approach that assesses conduct and their outcomes (i.e., secondary violations and their causation attributable to identifiable actors).⁹⁰ The interactional paradigm is the standard approach in human rights accountability practices. An institutional assessment, to the contrary, avoids the clear-cut, state-focused approach to causality, wrongfulness and attribution of conduct deployed within extant accountability regimes. This tradition looks to the primary multiple causal elements embedded in the globalized institutional framework.⁹¹ It assesses structural violations wedded to

and policies and not rights obligations. Based on this profile, these mechanisms remain internal to operations of these institutions while human rights come to bear on them only indirectly, not because they constitute binding norms on these institutions, but because they are merely incorporated into their policies or evaluation criteria. For this fundamental defect in the institutional design and functional scope, they ignore asymmetrical relationships between and within institutions as well as knowledge technologies with which these institutions produce the very conditions that undermine state policy and oversight structures. For these reasons there is serious doubt on their suitability to the RTD regime that looks to structures and processes as issues that need to be resolved by accountability relations.

⁸⁸ Pogge, *Freedom from Poverty*, *supra* note 33 at 16-53.

⁸⁹ Pogge does not use the word accountability but repetitively refers to responsibility, a colloquial term referring to assigning blame and liability, if not in a legal sense, for harms related or causally linked to the global institutional arrangements.

⁹⁰ Pogge refers to interactional violations as “actions, and effects of actions performed by individual and collective agents.” See Andreas Follesdal & Thomas Pogge, *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions* (Netherlands: Springer, 2005) at 2 [Pogge & Follesdal, *Real World Justice*].

⁹¹ Pogge, *Freedom from Poverty*, *supra* note 33 at 26, we need to focus on multicausality including rules: “the rules governing economic transaction—both nationally and internationally—are the most important causal determinants of the incidence and depth of poverty.” Elsewhere he refers to the institutional school as that which appreciates “effects of how our social world is structured” by rules, conventions, practices and social agents. Pogge & Follesdal, *Real World Justice*, *ibid*.

the global policy system, consisting mainly of rules, policies, and processes that engender deprivations.⁹²

The institutional approach goes further to expose how the global policy system sanctions massive development injustices in elusive ways not grasped by conventional human rights approaches. It focuses on locating causal chains of harms in the global policy system and not simply attributing those causes to the agency of the state. It appreciates that supranational factors invisibly take on significantly more determinative, manipulative, and subordinating roles in the creation of national and international conditions that perpetuate development injustices. Locating and attributing “causalities” for harms in global institutional schemes has yet to be as fully grasped as it ought to be in the development field, or by the statist international law of responsibility (the doctrinal anchor of international legal accountability). It is not also grasped, as nearly enough by the SDG policy schema or the international development discourse of mutual accountability, both of which tend to overly focus on state accountability, and not institutional accountability at the global level. Furthermore, the internal accountability mechanisms of IFIs (such as the Inspection Panels and the Independent Evaluation Office of the Bank and IMF respectively), in their current formulation, are deficient tools for protecting against harms linked to the global policy system.

Yet, there has not been a significant level of sustained scholarship assessing the question of materializing development justice through the sufficiently enhanced accountability of IFIs. There has not been any incisive study explaining as fully as is attempted here the ways hegemonic international law and development are implicated in the embedment of accountability dysfunctions and deficits in the arena of international development praxis. The accountability avoidance/evasion dimension of the hegemonization of development interventions has not drawn sufficient attention in theory or practice. Rather, international legal accountability practice tends to be too accustomed to human rights claims of justice and are rarely specifically focused on development justice *per se*. But the radical emancipatory and egalitarian vision that the UN Declaration on the Right to Development infuses into development praxis has made attempts to alter this flawed tradition. It permits claims of justice seeking the redress of abuses that are produced to a significant degree by the global policy system to be invoked in international human rights law.

⁹² Pogge, *World Poverty and Human Rights*, *supra* note 26 at 39.

4. THE RESEARCH QUESTION

Thus, throughout this dissertation I am guided by the following main research question: *How can the World Bank and the International Monetary Fund be much more effectively held accountable for their interventions in the global economy, and for development outcomes linked to such interventions, that tend to impede significantly the realization of the right to development of people in the Global South?*

In addition to the main question, I seek to answer a series of other related and supplemental questions: How can development justice be realized, in much greater measure, through an international mechanism that recognizes the imperative of direct and distinct accountability of IFIs in development practices? What is the relevance and to what extent can the RTD shape the conceptualization of a normative accountability framework suitable for effectively governing the global development praxis of the IFIs? Are extant accountability mechanisms adequate and suitable to the protection of the peoples of the Global South against the institutional practices and rights violations linked to the development interventions of IFIs? Which of the three dimensions of accountability (responsibility, answerability, and enforceability) is best suited to the realization of development justice and why?

5. EXPLORING TWO THESES

I explore one basic claim and a series of interrelated contentions. The main claim in this dissertation is that international law and development praxis do sanction and legitimize the avoidance of, disconnection from, and obstruction of, the direct and distinct accountability of IFIs for their interventions in the global economy and the development realm. The dissertation therefore draws the conclusion that accountability regimes that have been mostly “Western-derived” (constituted by certain explicit and implicit rules, norms, procedures, institutions, and practices) are ill-suited to aid the securement of the kind of development justice foreseen by the RTD norm. They cannot sufficiently assure the protection of people in the Global South against harms and rights violations causally linked to the interventions and development practices of the World Bank and IMF. It is my argument that the fundamental premises of extant human rights accountability regimes are shaky and questionable for the actualization of development justice. Conceptually bounded doctrines and practices of accountability that *Liberal* and positivist international law has so far produced and normalized seem inadequate and ill-adapted to securing development justice.

I argue that indeed some core doctrines constructed and reconstructed by international law do not address the development accountability quandary.

Ultimately, having noted the anachronism, incompleteness, restrictiveness, and minimalism of international law entrenched in the various iterations of accountability praxis, I develop the central thesis of this dissertation that to realize development justice, development accountability thought and practice must be contextually-aware and sensitive to the rights in question. Context-awareness implies, accordingly, that a robust appreciation of the nature and workings of the technocratic global policy system and how it produces development injustices ought to be had.

And just to reiterate, in developing the second thesis of this dissertation, more specifically, I discern the conservatism of international law insofar as it constructs and reconstructs flawed and deficient doctrines and praxes of accountability in development practice. I am particularly aware of the fundamental failings of the internal accountability practices of IFIs. Similarly, this dissertation recognizes the internal contradictions of statist accountability structures founded on the doctrine of state responsibility. I am cognisant of their all-too-familiar failures to prevent or mitigate harms of global development policy practice.⁹³ As a result, I resort to the core element of the RTD to “participate in, and contribute to,” development.⁹⁴ This qualitative property espouses a solidaristic and cosmopolitan conception of legality. It is capable of being relied upon by those facing exclusion to clamour for development justice. I break ranks with conventional international law thinking to propose what I call *participatory accountability from below* in international law. I propose that participatory accountability brings forth a sense of justice from below. Participatory accountability is the next best thing to do, in the face of frailties of contemporary accountability mechanisms. It promises far greater potential of “firming up”⁹⁵ the backbone of the RTD regime. It adds into the repertoire of tools with which the Third World can confront development injustices.

⁹³ This consciousness has been raised, among other scholars, by Obiora Chinedu Okafor, “A Regional Perspective: Article 22 of the African Charter on Human and Peoples’ Rights” in Office of the High Commissioner for Human Rights, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York, Geneva: United Nations, 2013) at 380; Philip Alston, “The Myopia of the Handmaidens: International Lawyers and Globalization” (1997) 3 EUJL at 442.

⁹⁴ Article 1 of the Declaration on the RTD.

⁹⁵ I have borrowed this word from Obiora Chinedu Okafor, “African Lessons for Post-2015 Global Right to Development Conceptualization and Practice” (2015) 2 *The Trans Hum Rts Rev* 169.

6. LITERATURE REVIEW

A vast and inexhaustible amount of standard international law scholarship has explored the question of the human rights accountability of IFIs.⁹⁶ However, the development justice dimension introduced by the RTD has not been pursued to any significant extent. A narrow aperture, which brings into view the distributive and structural understanding of violations, refreshes a human rights accountability scholarship that often neglects structural issues.⁹⁷

The development justice question is often portrayed in simplistic, and often misleading, ways as human rights accountability of IFIs. We need a more comprehensive treatment of the over-proliferated, but often misunderstood, question of the accountability of IFIs from a development justice perspective. Looking at the development accountability question from the prism of *development justice* is theoretically different and certainly conceptually narrower than the human rights accountability approach. The development justice take transcends the bland human rights accountability approach. Unlike the human rights approaches, which work from within the contours of international law, a development justice perspective provides a better way to interrogate the suitability of the fundamental premises of Westphalian international law to the structural violations that are engendered by institutional development models. This crucial insight is not adequately theorized in conventional human rights or the RTD scholarship.⁹⁸

Following Pogge's broad distinction between an *interactional* and an *institutional* approach to violations, human rights accountability practices may be said to be accustomed to interactional forms of violations and ignore institutional violations innate to the global structural

⁹⁶ Some leading and recent collections are: Jan Wouters, Eva Brems, Stefaan Smis & Pierre Schmitt eds, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010); Genugten, *Contextualised Way Forward*, *supra* note 17; Math Noortmann, August Reinisch & Cedric Ryngaert, eds, *Non-State Actors in International Law* (Oxford and Portland: Hart Publishing Ltd, 2015); Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford; Portland: Hart Publishing, 2003); Clapham, *Human Rights Obligations of Non-State Actors*, *supra* note 71; Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Oxford University Press, 1993); Alston, *Non-State Actors and Human Rights*, *supra* note 78.

⁹⁷ See, for example, Khan, *supra* note 24.

⁹⁸ Furthermore, I show that the catch-all doctrinal anchors of accountability, such as the law of state responsibility and its replica the law of responsibility of international organizations for internationally wrongful acts, were not fashioned for complex systems with multiple and undifferentiated causal agents and multifaceted consequences, issues at the root of indeterminacy and indiscernibility of causation, responsibility, wrongfulness, but which are often ignored in the claims that neoliberalism has disrupted the statist international order. This is one phenomenon of neoliberal globalization that obfuscates the development accountability conundrum but is not fully grasped by claims seeking the direct and distinct accountability of international financial institutions. I also show that the catch-all doctrines of international law such as the law of responsibility of international organizations for internationally wrongful acts may well be unsuited for sui generis rights, where those rights are of a hybrid pedigree.

arrangements.⁹⁹ In the law of responsibility for example, an interactional approach focuses on overt, *ex-post* forms of breaches constituting wrongfulness.¹⁰⁰ An interactional perspective focuses on wrongfulness of conduct. That is, human rights accountability theories only focus on outcomes of violations. A development justice perspective, however, goes further to appreciate the institutional context of those violations, which it treats as questions warranting accountability.¹⁰¹ Accordingly, conventional human rights approaches tend to follow linear approaches to the accountability question.¹⁰² On the other hand, the development justice perspective, which relies on the institutional approach, avoids the clear-cut approach to accountability deployed within the law of responsibility. It goes beyond conduct or outcomes of breach and looks to the primary causal elements that are linked to the globalized institutional framework.¹⁰³ Development justice brings into perspective rules, policies, norms, and structures as elements that ought to be subjected to the determination of breach. The RTD critique introduces this perspective.

Although several human rights studies exploring the legal dimensions of the RTD have examined the structural violations—such as discrimination, inequities, and inequality—of the international development system, clear perspectives on the imperative of accountability as a tool for the actualization of development justice is lacking.¹⁰⁴ The literature that examines the determinative and subordinating character of the allocative and regulatory measures of supranational institutions do not grasp how these dynamics impact traditional accountability praxis.¹⁰⁵ The decline of state regulatory autonomy has been recognized even by global justice

⁹⁹ For a prolific explanation and distinction between institutional and interactional approaches in the causal explanation and incidence of global distributive injustices, see Thomas Pogge, *Freedom from Poverty*, *supra* note 33 at 16-53.

¹⁰⁰ *Ibid* at 16.

¹⁰¹ Pogge argues that an interactional approach that fails to account for the systemic root causes embedded in the global institutional order may be a deficient device for assessing the global responsibility for poverty. Pogge, *Freedom from Poverty*, *supra* note 33 at 16.

¹⁰² On the question of attribution of conduct, see Chapter II of part I of Articles of Responsibility of States for Internationally Wrongful Acts.

¹⁰³ Pogge, *Freedom from Poverty*, *supra* note 33 (that we need to focus on multicausality including rules: “the rules governing economic transaction—both nationally and internationally—are the most important causal determinants of the incidence and depth of poverty” at 26).

¹⁰⁴ Some of them are: Salomon, “Legal Cosmopolitanism”, *supra* note 5; Salomon, *Global Responsibility for Human Rights*, *supra* note 28; Bunn, *Legal and Moral Dimensions*, *supra* note 43; Orford, “Globalization and the Right to Development,” *supra* note 43.

¹⁰⁵ Obiora C Okafor, “Re-Conceiving ‘Third World’ Legitimate Governance Struggles In Our Time: Emergent Imperatives for Rights Activism” (2000) 6 Buffalo Hum Rts L Rev 1; Sirgun Skogly, “The Role of International Financial Institutions in a Rights-Based Approach to the Process of Development” in Bård A Andreassen & Stephen P Marks eds, *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard School of Public Health & Francois-Xavier Bagnoud Center for Health and Human Rights, 2006) at 288; Goetz and Jenkins, *Reinventing Accountability*, *supra* note 17.

theories, but without introspection on the question of direct and distinct accountability of supranational actors.¹⁰⁶

The sustainable development agenda—as a specific policy issue that affirms the link between human rights and development, together with the delimited question of development justice—gives due attention to the phenomenon as a distinct field of inquiry for both the human rights and development scholarship. No standard account in the sustainable development agenda scholarship has given *detailed* attention to the imperative of accountability in the realization of development justice. Even then, the inquiry on direct and distinct accountability of IFIs is missing. Similarly, standard critiques of the internal institutional accountability praxis of the Bank and IMF miss the crucial insight of institutionally sanctioned violations.¹⁰⁷ In the same vein, scholarship chronicling deep-seated structural violations and distributive injustices that inhere in global development practices (what may be said to be the development justice scholarship) has not addressed exhaustively and specifically, the question of direct and distinct accountability of IFIs. In theorizing development justice, scholars have failed to capture the accountability deficit or conduct a comprehensive analysis of accountability relationships or politics in development policy practice. Among the works limited in this way are some law and development scholarship (Baxi,¹⁰⁸ Pahuja,¹⁰⁹ Shivji,¹¹⁰ Rist¹¹¹), dependency theories¹¹² or their apologists,¹¹³ and post-development scholarship.¹¹⁴ While structural injustice does feature in this strand of research, accountability

¹⁰⁶ See for example, Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford University Press, 2001); Gillian Brocks, *Global Justice: A Cosmopolitan Account* (Oxford; New York: Oxford University Press, 2009).

¹⁰⁷ Pogge, *Freedom from Poverty as a Human Right*, *supra* note 33.

¹⁰⁸ Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2006); Upendra Baxi, *Human Rights in a Posthuman World*, *supra* note 57.

¹⁰⁹ Pahuja, “Global and the Politics of Good Intentions” *supra* note 70; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge; New York: Cambridge University Press, 2011).

¹¹⁰ Issa G Shivji, *Accumulation in an African Periphery: A Theoretical Framework* (Dar es Salaam: Mbuku na Nyota Publishers, 2009); Issa G Shivji, “Constructing a New Rights Regime: Promises, Prospects and Problems” (1999) 8:2 *Social and Legal Studies* 253; Issa G Shivji, “Human Rights and Development: A Fragmented Discourse” in Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford; Portland: Hart Publishing, 2014).

¹¹¹ Gilbert Rist, *The History of Development: From Western Origins to Global Faith*, 4th edition (Zed Books, 2015).

¹¹² Rumu Sarkar, *International Development Law: Rule of Law, Human Rights, and Global Finance* (New York; Oxford: Oxford University Press, 2009).

¹¹³ See for example Adeoye Akinsanya & Arthur Davies, “Third World Quest For a New International Economic Order: An Overview” (1984) 33:1 *ICLQ* 208; Mohammed Bedjaoui, *Towards a New International Economic Order* (Paris: UNESCO, 1979).

¹¹⁴ Escobar, *Encountering Development*, *supra* note 40; Wolfgang Sachs ed, *The Development Dictionary: A Guide to Knowledge as Power* (New York: Zed Books, 2010); Gustavo Esteva and Mandhu Suri Prakash, *Grassroots Post-modernism: Remaking the Soil of Cultures* (London: Zed Books, 2014).

seldom takes centre stage in their inquiries. This is no sustained attention to the question of development justice accountability. This illustrates that more work needs to be done to improve their conceptual content and deepen our understanding of accountability for development justice. This dissertation fills that gap.

All too often, the global debate on the accountability of IFIs comes down to a few imaginative—and certainly robust—claims that do not accurately capture the complexity of development justice. They fail to demonstrate how to realize it through the imperative of accountability. They discuss how an unbridled trend that accompanies globalization has enormously redefined the normative architecture of the Westphalian international order.¹¹⁵ Their discussions of the development justice question are limited to the coercive arrangements, policies, and decisions that accompany the discharge of development and macro-economic stabilization capital to states in need.¹¹⁶ The assumption is that non-state actors exact considerable challenges to the normative structure of a statist international system.¹¹⁷ It is claimed that they present new sources of threats at a time when state-based institutions, rules, and norms of accountability have not been adjusted to confront the unprecedented dispersal of power to global institutions.¹¹⁸ Others explain that the market creed filters into the domains of the state, culminating in the diminution of

¹¹⁵ Robert McCorquodale, “An Inclusive International Legal System” (2004) 17 EJIL at 481 quoting the work of Fernando Teson “The Kantian Theory of International Law” (1992) 92 Col L Rev at 53-54; Richard Falk, *Predatory Globalization: A Critique* (Malden, Massachusetts: Polity Press, 1999); Namita Wahi, “Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability” (2006) 12 University of California Davis J Intl L & Policy 350-362. For the view that private ordering challenges and side-steps state-based norm making processes and accountability, see Peer Zumbansen, “The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Effectiveness and a New Concept of “Context” (2012) 13 German Law Journal; De Feyter, *supra* note 56.

¹¹⁶ Margot E Salomon, “International Economic Governance and Human Rights Accountability” in Salomon *et al*, *Casting the Net Wider*, *supra* note 28 at 153; Frank J Garcia, “Global Justice and the Bretton Woods Institutions” (2007) 10:3 J of Intl Econ L 461 at 470; Jonathan Cahn, “Challenging the New Imperial Authority: The World Bank and the Democratization of Development” (1993) 6 Harv Hum Rts J 159.

¹¹⁷ For contrasting views see Jean d’Aspremont, “Non-state Actors in International Law: Oscillating Between Concepts and Dynamics” in Jean d’Aspremont eds, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (New York: Routledge, 2011) at 26. See also Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (Albany: State University of New York Press, 2016) at 23.

¹¹⁸ De Schutter, *supra* note 83 (“the classical problem of the transfer of powers unmatched by corresponding responsibilities” at 52). See also August Reinisch in Alston at August Reinisch, “The Changing International Legal Framework for Dealing with Non-State Actors” in Philip Alston, ed, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) at 74.

both its protective role and its democratic accountability to its people, consequently leaving a state that is accountable only to IFIs.¹¹⁹

Quite clearly, these discourses pay only scant attention to three key aspects of neoliberal globalization that have catalyzed a fierce sense of urgency for accountability in development practices. The first of those aspects is the degree to which the global economic policy system is an overweening obstruction of accountability.¹²⁰ The second aspect that requires interrogation is the hypothesis that development is a technocratic practice structured by knowledge technologies woven into the market episteme.¹²¹ And the third aspect of neoliberal globalization that requires sustained attention are the “conflicting rationalities”,¹²² or value disjunctures, that arise from “clashes of rationalities” in competing objectives pursued in different policy domains.”¹²³ These are clear dynamics that exert new and subtle forms of control and power that require scholars rethink accountability politics in development cooperation and the provision of global public goods.¹²⁴

There is also what I call the “responsibilization” literature dealing with the contested normative status of rights obligations for IFIs. The focus of this scholarship was narrow and limited only to the responsibility dimension of accountability,¹²⁵ and it overlooked the concept of

¹¹⁹ This view has been held by Obiora Chinedu Okafor “Assessing Baxi’s Thesis on an Emergent Trade-Related Market-Friendly Human Rights Paradigm: Recent Evidence from Nigerian Labour-led Struggles” *Law, Social Justice & Global Development (An Electronic Law Journal)*.

¹²⁰ See Pogge, *World Poverty and Human Rights*, *supra* note 33 (“In the contemporary world, human lives are profoundly affected by non-domestic social institutions—by global rules of governance, trade, and diplomacy”... “national basic structures are heavily influenced by foreign and supranational social institutions” at 39).

¹²¹ Sande Lie, *Developmentality*, *supra* note 45.

¹²² For a conceptualization of regimes or norm conflict, see Jeffrey L. Dunoff, “How to Avoid Regime Conflict” in Kerstin Blome, Andreas Fischer-Lescano, Hannah Franzki, Nora Markard and Stefan Oeter eds., *Contested Regime Collisions: Norm Fragmentation in World Society* (Cambridge: Cambridge University Press, 2016) at 54 [Blome *et al eds.*, *Contested Regime Collisions*]. The concept originates from Fischer-Lescano and Teubner, “Regime Collisions” in Blome *et al eds.*, *Contested Regime Collisions*, *ibid* (argued that norm conflict is not purely a legal problem, but a deeper societal problem underpinned by competing global objectives. In their view, “at [its] core, the fragmentation of global law is not simply about legal norm collisions or policy-conflicts, but rather has its origins in contradictions between society-wide institutionalized rationalities, which law cannot solve . . .” at 1005-1007).

¹²³ Sebastian Oberthür, “Regime-interplay Management” in Blome *et al eds.*, *Contested Regime Collisions*, *ibid* at 94.

¹²⁴ Escobar, *Encountering Development*, *supra* 40 at 23-24; 159; Sande Lie, *Developmentality*, *supra* note 45.

¹²⁵ Olivier De Schutter, “The International Dimensions of the Right to Development: A Fresh Start Towards Improving Accountability” A/HRC/WG.2/19/CRP.1[De Schutter, “A Fresh Start”]. He identifies and clarifies the normative content of duties imposed by national, extraterritorial, and global obligations. This digression incarcerates us, once more, on the issue of resistance to normative rights obligations by international financial institutions. On the contested normative status of rights for the non-state actor, the RTD has also suffered the traditional rejectionist attitudes that questioned the idea of direct application of rights obligations on non-state actors on the rigid understanding that obligations embodied in the Declaration are enforceable only against the state, because human rights, in the Lockian sense, are merely to guarantee protection against the state; suggesting otherwise would entail the creation of new subjects of international law and even portend “a dangerous reconceptualization of human rights that defies the

accountability as both a broader subject and one that is distinct from the traditional international law concept of “responsibility.”¹²⁶ “Responsibilization” scholars were drawn to critiquing overly state-centred human rights law for its austere trait of delegitimizing rights “responsibility” of the non-state.¹²⁷ This scholarship therefore generated various perspectives for expanding rights normativity into the private realm. One perspective is that the UN Charter obligations take precedence and supersede any contravening obligations in any other treaties that states have entered into.¹²⁸

traditional conception of rights as instrumental protection against the state.” For this view, see also Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development” (1985) 15 *California Western International Law* at 498-499. Apart from misgivings on the pedigree of the RTD norm, it has been argued that identifying international organizations as “new duty bearers” in the human rights regime would conflict with their respective specialized mandates specified in the constitutive documents. These objections go as far as “that vital economic matters such as global trade and investment, financial and lending policy” cannot be amenable to regulation by human rights norms. See Daniel Aguirre, *The Human Right to Development in a Globalized World* (Burlington, VT: Ashgate Publishers, 2008) at 214-215. The general view in conventional rights discourses regards human rights treaties or customary norms as imposing obligations on states that do not apply to non-state actors who are not signatories to treaties and therefore not bound by obligations arising therefrom: Jack Donnelly, “The Theology of the Right to Development: A Reply to Alston” (1985) 15 *Cal W Int’l LJ* 519 at 521; Clapham, *Human Rights Obligations supra* note 91 at 8 that “the traditional understanding of the human rights dynamic—as protecting individuals from an overarching state—is inadequate.”) For a summary of these arguments Serges Djoyou Kamga, *The Right to Development in the African Human Rights System* (Abingdon, New York: Routledge, 2018) at 22-34.

¹²⁶ Ige F Dekker, “Accountability of International Organizations: An Evolving Legal Concept?” in Jan Wouters, Eva Brems, Stefaan Smis & Pierre Schmitt, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010) at 21.

¹²⁷ The general view in conventional rights discourses regards human rights treaties or customary norms as imposing obligations on states that do not apply to non-state actors who are not signatories to treaties and therefore not bound by obligations arising therefrom. See, e.g., Report of the Special Representative of the Secretary General John Ruggie, on the issue of Human Rights and Transnational Corporations and other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate acts*, A/HRC/4/35, para 57.

¹²⁸ Article 103 of UN Charter has been said to establish the hierarchical supremacy of the UN Charter objectives over others:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Rights obligations stipulated in Article 55 and 56 thereto are considered to be binding on the international organizations when entering into agreements with states. For those who support this view, see e.g. Obiora Chinedu Okafor, “The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North Entente” (1995) 7 *Afr J Intl & Comp L* at 872. For a view that rights are the fundament of the international constitutional order, see e.g. Nigel White, “The United Nations System: Conference, Contract or Constitutional Order?” (2000) 4 *Singapore J Intl and Comp L* (that the UN Charter system is “one of societal values shaping, informing and regulating the operation of a complex set of institutions, within a system framed by legal instruments of foundational significance” at 291); Erica de Wet, “The International Constitutional Order” (2006) 55 *ICLQ* at 57; Sanae Fujita, *The World Bank, Asian Development Bank and Human Rights* (Cheltenham, Northampton: Edward Elgar Publishing, 2013) at 11; Sirgun I Skogly, *Human Rights Obligations of the World Bank and IMF* (London: Taylor & Francis, 2001) at 101-102; De Schutter, *supra* note 83 at 29-30.

Debates about the implementation of the RTD remain fixated on corresponding national and international obligations, even where it is assumed that attention is being given to accountability.¹²⁹ In this dissertation, I step back to emphasize that the accountability quandary for development justice cannot only be understood, unproblematically, in such a legalistic manner. I propose to work from perspectives not limited to the legal sphere. I adopt an interdisciplinarity that reveals often-neglected aspects that are crucial for resolving accountability dysfunctions as a development justice question.¹³⁰

The conversation around Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) has mostly dealt with the extraterritoriality question, that is, the scope of human rights obligations of *states* beyond borders in development. Two aspects of this “responsibility approach” so far discussed are the individual responsibility of the state and the collective responsibility of states as members of multilateral/international organizations. The dominant question raised is: what legal principles apply in ascertaining the direct responsibility of international organizations for their conduct or actions or those of their organs.¹³¹ There is also some marginal discussion of the direct and distinct human rights obligations of international organizations as autonomous legal entities.¹³² In these discussions, however, some of the debates favour derivative accountability.¹³³ But perspectives proposing indirect accountability of international organizations through the state, it is argued, lose sight of autonomy, personality, and “distinct will” of international organizations¹³⁴ given that international organizations are independent actors that can be susceptible to accountability.¹³⁵

¹²⁹ The most recent scholarship is De Schutter, “A Fresh Start”, *supra* note 125.

¹³⁰ Like Young, to address a practical question: “How ought moral agents, whether individual or institutional, conceptualize their responsibilities in relation to global injustice?” Iris Marion Young, “Responsibility and Global Justice: A Social Connection Model”, (2006) 23:1 *Social Phil and Pol* 102. This is both a political and international law question that cannot be relegated solely to the domain of law, the discipline of development must also contribute perspectives to this quandary.

¹³¹ This is mainly in the context of socio-economic rights. See Salomon et al, *Casting the Net Wider*, *supra* note 19; Michael Langford, Wouter Vandenhoe, Martin Scheinin & Willem van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (New York: Cambridge University Press, 2013).

¹³² Willem Van Genugten, “The World Bank Group, the IMF and Human Rights: About Direct Obligations and Attribution of Unlawful Conduct” in Wouter Vandenhoe ed, *Challenging Territoriality in Human Rights: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge, 2015).

¹³³ Salomon, *Global Responsibility for Human Rights*, *supra* note 16 at 180.

¹³⁴ On the issue of who may incur liability for voting conduct of members constituting an international organization, see for example, Ana Sofia Barros and Cedric Ryngaert, “The Position of Member States in (Autonomous) Institutional Decision-Making” (2014)11 *Intl Org L Rev* 58-82.

¹³⁵ Niels M Blokker, “International Organizations as Independent Actors: Sweet Memory or Functionally Necessary?” in Jan Wouters *et al* eds, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp;

Scholarship on Draft Articles on the Responsibility of International Organizations (DARIO), on the other hand, has not interrogated the way those rules and precepts can be adapted to the realization of development justice.¹³⁶ This line of inquiry has followed a strict textual interpretation of a range of legal rules applicable to DARIO. Scholarship has pored over the challenges of collective decision-making to disaggregation of conduct and the difficulties of determining, with any certainty, who is “in control” or the party to which conduct is to be attributed.¹³⁷ There is a further dilemma of discerning causation in the intertwined actions of actors; that is, how to establish “a sufficient causal link between an activity of an international financial institution and its [Member State] and a specific human rights violation, in order to hold an actor responsible.”¹³⁸ Notably, this body of scholarship has critiqued the law of state responsibility from a doctrinal or textual standpoint. It has not, however, engaged with other disciplinary perspectives on the appropriateness of relying on doctrines and positivist law to deliver development justice. And it has not offered a resolution to the “paradox of many hands” or what this dissertation calls the intermingle effect that defies the law of responsibility in several respects.

This scholarship has not unmasked the conceptual defects inherent in the formalistic and doctrinal study and critiques of the law of responsibility. First, whereas scholars taking doctrinal approach have exposed defects in the conceptual formulation of various legal precepts of the ARSIWA and DARIO regimes, they have omitted from their linear analyses institutionally sanctioned violations and have not given a proper account of the intermingle effect. They also have

Portland: Intersentia, 2010) at 37; Ramses A Wessel, “International Governmental Organizations as Non-state Actors” in Math Noortmann, August Reinisch & Cedric Ryngaert, eds, *Non-State Actors in International Law* (Oxford and Portland: Hart Publishing Ltd, 2015) at 200.

¹³⁶ Sirgun I Skogly, “Causality and Extraterritorial Human Rights Obligations” in Michael Langford, Wouter Vandenhole, Martin Scheinin & Willem van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) at 251, 235, 237-240.

¹³⁷ Salomon, *Global Responsibility for Human Rights*, *supra* note 28 at 186; Olivier De Schutter eds, *Economic, Social and Cultural Rights as Human Rights* (Cheltenham; Northampton: Edward Igar Publishers; 2013) at XLIII.

¹³⁸ Genugten, *Way Forward*, *supra* note 17 at 31; Margot E Salomon, “Deprivation, Causation and the Law of International Cooperation” in Michael Langford, Wouter Vandenhole, Martin Scheinin & Willem van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) at 275, 278; Cedrick Ryngaert, “Jurisdiction: Towards a Reasonableness Test” in Michael Langford, Wouter Vandenhole, Martin Scheinin & Willem van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) at 198; Wouter Vandehole, “Obligations and Responsibility in a Multiple and Diverse Duty-bearer Human Rights Regime” in Wouter Vandenhole ed, *Challenging Territoriality in Human Rights: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (London & New York: Routledge 2015).

not adequately considered what cosmopolitans call the “cooperating causes” of the global economy that engender accountability disconnections.¹³⁹ The scholarship on the RTD as a counter-hegemonic discourse and a *sui generis* right makes this new contribution through its appreciation of the global policy system as a hindrance to and derogation from human rights normative standards. It offers this as the first point of entry into the inquiry of the development justice accountability project. None of the aforementioned literature has grasped this insight.

Secondly, whereas academic studies of ARSIWA and DARIO have taken up the traditional black letter international law analysis as signalled by the leading works of James Crawford, among others,¹⁴⁰ in this dissertation I employ Third World Approaches to International Law (TWAIL) in the deconstruction of the Western doctrines of state responsibility and other regimes and traits of accountability that it has since constructed and naturalized.¹⁴¹ In this research, while acknowledging that the RTD perspective adds a fresh layer of critique, I intend to go further by enlisting TWAIL’s core creed, which Okafor has designated as a brand of “intellectual ... struggle to expose, reform, or even retrench those features of the international system that help create or maintain the generally unequal, unfair, or unjust global order.”¹⁴² I intend to use these properties to “understand how international law’s imperial history affects structures and understandings of contemporary international institutions.”¹⁴³ One aim of this inquiry is to understand what dynamics and logics enable international institutions to continue perpetuating imperialist and hegemonic development as they avoid and stay disconnected from accountability in international law. Could such a dynamic entail the logic of capitalist accumulation as the context within which international law principles enable imperialism, both in a historical sense and in the contemporary context of international institutions’ hegemony?¹⁴⁴ Such a crucial aperture is essential in assessing not just

¹³⁹ Pogge, *Freedom from Poverty supra* note 33 at 16.

¹⁴⁰ James Crawford, *State Responsibility* (New York: Cambridge University Press, 2013); James Crawford, Alain Pellet & Simon Olleson, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010).

¹⁴¹ Bhupinder S Chimni, “Customary International Law: A Third World Perspective” (2018)112:1 *The Am J of Intl L* (argues that such an approach has the potential to unearth “the foundational role of the interests of European states, European legal consciousness, and European social and political theories in the making of modern international law” at 12); Okafor, “Newness” *supra* note 34 at 176.

¹⁴² Okafor, “Newness”, *ibid.* Compare John D Haskell, “Trail-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law” 391; Ibrionke T Odumosu, “Present, Past and Future of TWAIL” (2008) 10 *Intl Comm L Rev* 468.

¹⁴³ Michael Fakhri, “Law as the Interplay of Ideas, Institutions, and Interests: Using Polanyi (and Foucault) to Ask TWAIL Questions” (2008) 10 *Intl Comm L Rev* 456.

¹⁴⁴ Bhupinder S Chimni, “Capitalism, Imperialism, and International Law in the Twenty-First Century” (2012)14 *Or Rev Intl L*.

the historiography, but also how the logics of power and interests structured the substance of the law of responsibility as it has developed over the years.

I note that the International Law Commission's debates that preceded the formulation of ARSIWA and DARIO, and indeed some other historical accounts of customary international law by Galindo and Yip, lack the sensitivity to Third World contributions and actual experiences to the development of the law of international responsibility.¹⁴⁵ A TWAIL critique of ARSIWA and DARIO will be a major contribution of my study, something that mainstream international law literature has not done before.

7. THE ORIGINALITY OF THE DISSERTATION AND MY CONTRIBUTION

In this dissertation, I intend to make two contributions, the first theoretical and the second policy oriented. I am arguing for a form of development accountability that is grounded, for the most part in the RTD norms as the precondition for the realization of development justice for almost all those in the periphery. I take a development justice perspective, which assumes an institutional approach to the accountability question, as opposed to a traditional human rights perspective that is often interactional. My objective is to construct a theoretical understanding of development justice in the framework of the RTD and sustainable development scholarship. This is a narrower and more focused contribution to the question of accountability than that offered by human rights accountability scholarship. In distinguishing itself from human rights accountability theories, a development justice perspective focuses on the structural constraints implicated in the perpetuation and sustenance of poverty and inequality within a global development framework.¹⁴⁶

The particular development justice perspective that this dissertation recommends addresses some basic assumptions of the conventional accountability discourse. It seeks to unearth the flaws and discrepancies that are invisible to standard narratives of interactional accountability. By its characteristic distributive understanding of phenomena, development justice emphasizes an institutional approach to accountability.¹⁴⁷ Unlike legalistic and interactional human rights theories

¹⁴⁵ George Rodrigo Bandeira Galindo & Ce'sar Yip, "Customary International Law and the Third World: Do Not Step on the Grass" (2017) 16:2 Chinese J of Intl L 252.

¹⁴⁶ The concept of development justice is however under-theorised. See, for example Khan, *supra* note 24 at 24. For a distinction with human rights accountability, see a thematic range of topics covered in Wouters, *Accountability for Human Rights Violations by International Organization*, *supra* note 83.

¹⁴⁷ I am grateful to Thomas Pogge, who discusses how an institutional approach relates to a conception of distributive justice and understands human rights. As I understand him to be saying, a conception of distributive justice focuses on how social and economic status are affected by the design and rules of an institutional order that regulates exchange,

of accountability that examine only causalities and outcomes of rights violations, a development justice lens focuses on the narrower issue of structural injustices.¹⁴⁸ A structural understanding of injustice allows for deeper insights into and analyses of the fundamental causes, contexts, and consequences of violations. Human rights approaches fall far too short of this endeavour. Further, development justice enlarges the conceptualization of accountability beyond the linear and restrictive understandings constructed by international law and liberal rights theory. It is for this reason that I break ranks with conventional international law thinking to propose participatory accountability from below. This model, I argue, can be relied upon to contest and seek revocation or alteration of rationalities with which global institutions construct and reconstruct development paradigms.

I theorize the question of direct and distinct accountability for structural injustice in development, taking human rights as the main point of entry while development justice remains the principal lens.¹⁴⁹ In doing so, I draw from theoretical perspectives outside the domain of international law and human rights. One such perspective is social movements praxis which grounds a theory of participatory accountability from below. A theory of participatory accountability from below introduces a cosmopolitan conception of justice into our understanding of direct and distinct accountability of IFIs for structural injustice. Narrower in scope and distinct from human rights accountability, development justice accountability thus offers a fresh theoretical and scholarly perspective. I set out to synthesize how an interdisciplinary lens (borrowing from theories of development and social movements as well as post-development scholarship) promises to recover invisible theoretical elements not neatly explained by international law scholarship. Pogge's institutional cosmopolitanism, a political philosophical account of global responsibility for poverty is an interdisciplinary theory that I weave and test against assumptions and theories of accountability dominant in international law.¹⁵⁰

production, and distribution. The focus is pre-eminently not on outcomes but how schemes of arrangements, comprised as well of rules, allocates harms and benefits. See Pogge, *World Poverty and Human Rights*, *supra* note 26 at 182.

¹⁴⁸ The idea of the institutionalist approach, as used in this context, is drawn from its application by two authors, albeit in different contexts of international cooperation and global justice: Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press: 1984) at 7; and Pogge, *World Poverty and Human Rights*, *ibid* at 176.

¹⁴⁹ Most human rights theories of accountability emphasize the collective duties of states, which means that even when acting at the multilateral level, it is the state that is to be held accountable.

¹⁵⁰ See debate in section 8.1 of this chapter.

In breaking ranks (in great measure) with conventional international law thinking, which understands accountability narrowly as the *ex-post* attribution of responsibility and the enforcement of sanctions for breach of obligations, this dissertation critically conceptualizes and then commends the *theory of participatory accountability from below*. My contribution alters the way in which the imperative of direct and distinct accountability for global distributive injustices should be understood. The participatory accountability from below that I propose is an *ex-ante* form of accountability that mimics the answerability prong of accountability. In both domestic law and in the international arena, some form of answerability in decision-making (as a necessary component of participatory accountability) do exist.¹⁵¹ This happens where actors, be they international or public institutions, are made to explain, justify and communicate the decisions they have taken either to the people, parliament or some other oversight authority.¹⁵² In some way, this practice may bring a sense of direct and distinct accountability of actors or institutions that are impelled to explain, justify and communicate their decisions to the public. This form of accountability may exist either as a matter of political or democratic practice, or as administrative procedures in decision-making.¹⁵³ Notwithstanding its potential to instill direct and distinct accountability of institutions in development, research has seldom explained the normative potential of this form of accountability to tackle structural and distributive injustice. This dissertation investigates how participatory accountability from below can accomplish this potential. It deploys an institutional account of violations that radically departs from international legal accountability theories and other mechanisms that largely deploy interactional approaches. Not within the mainstream international legal thought and practice has the insight about structural violations and the imperative of distributive justice permeated the discourse on IFIs accountability in development policymaking and practice. By advancing this new theory of participatory accountability from below, this dissertation expands our knowledge about what is known about the answerability dimension of accountability. While the responsibility and enforceability prongs of accountability have been overtheorized, I advance a new debate on the answerability aspect.

¹⁵¹ Peter Newell, “Civil Society, Corporate Accountability and the Politics of Climate Change” (2008) 8 (3) *Global Environmental Politics* 122 at 124, Grant & Koehane, *supra* note at 40-42, Newell & Bellour, *supra* note 18; Dekker

¹⁵² See e.g. Mark Bovens, “Analysing and Assessing Accountability: A Conceptual Framework” (2007) 3:4 *European LJ* 447 at 450, 454.

¹⁵³ Goetz and Jenkins, *supra* note 17.

As a policy contribution, this dissertation is a response to a pertinent call made during the commemoration of twenty-five years of existence of the RTD. While chronicling the progress made in the implementation of the RTD in international law, Obiora Okafor, the then Chairperson of the UN Human Rights Advisory Council, called attention to the necessity of addressing the accountability of non-state actors as part of the post-2015 development agenda.¹⁵⁴ Okafor called for policymakers, scholars, and human rights advocates to firm up the backbone of the RTD by focusing on the issue of accountability. Sadly, since then even policy gurus, including the Special Rapporteur on the RTD, Saad Alfarargi, have not pursued this call. Recent policy discussion by De Schutter is one of the few examples of a systematic response to this call in the RTD scholarship. However, by restricting himself to a human rights responsibility approach, De Schutter's work also tended to miss, to a significant extent, the development justice perspective which brings into view the structural contexts of violations as crucial considerations for a much broader understanding of the concept of responsibility.¹⁵⁵

8. THEORETICAL FRAMEWORK AND METHODOLOGY

The recourse to theory in this dissertation stems from the necessity of finding an intellectual, political, or conceptual tool with which to study, observe, analyze, explain, or think about international law, and the phenomena and realities that shape it, in a systematic manner.¹⁵⁶ In pursuing the question of the international accountability of IFIs as development actors, I employ institutional cosmopolitanism. This theoretical perspective allows me to investigate and understand both the global impediments to the much fuller realization of development justice and the human rights implications within broader structures of power, a theme that the RTD discourse vehemently enunciates. I am also relying on TWAIL's methods, techniques, and sensibilities to analyze the practices, doctrines, norms, and concepts of international law. As I do so, I am not unaware that TWAIL can be a theory, method, and an approach or school of thought in the study of international law.¹⁵⁷

¹⁵⁴ Obiora Chinedu Okafor, "African Lessons for Post-2015 Global Right to Development Conceptualization and Practice" (2015) 2 *The Trans Hum Rts Rev* 169.

¹⁵⁵ De Schutter, "A Fresh Start", *supra* note 125.

¹⁵⁶ Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking*, 1st ed (New York: Oxford University Press, 2016) at 1; Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10 *Intl Comm L Rev* 373 [Okafor, "Theory or Methodology"].

¹⁵⁷ Okafor, "Theory or Methodology", *ibid* at 371.

8.1 Institutional Cosmopolitanism

Thomas Pogge has formulated an institutional cosmopolitan approach to understanding human rights deficits or engendered deprivations by the global institutional order.¹⁵⁸ Cosmopolitanism is an ideology that holds that humanity, through political, economic, and social relationships, is joined together based on shared moral norms. Pogge uses institutional cosmopolitanism, a variant of moral philosophy that pays attention to the international institutional arrangements and attendant baseline rules and practices that condition human relations. Institutional cosmopolitanism *specifies* the assignment of human rights responsibilities within that institutional order for actions that render others more vulnerable to domination and coercion.¹⁵⁹ Institutional cosmopolitanism characteristically conceptualizes the globalized order and policy system as a site in which human rights norms generate moral demands and constraints on collective and individual acts of persons who stand in relation to each other in a structural and institutional system.¹⁶⁰ According to this moral theory, human rights norms need to be viewed as moral constraints or ethical expectations on all persons, “human conduct, practices and institutions,”¹⁶¹ including the state and the non-state institutions that may engage in actions harmful to the human person.¹⁶² This claim leads to a narrowing of the language of human rights in the interest of the recipient: a conferment of ability to demand protection from threats to their well-being.

For Pogge, the language of human rights protects not only against official violations but official “disrespect” more broadly, and it does so not only from “those whose violations of a relevant right would count as human-rights violations, but also those in whose names those officials are acting.”¹⁶³ This conception has two elements. It addresses the violator and those to whom the benefits of the violation accrues.¹⁶⁴ Thus, rights are construed to impose “the negative

¹⁵⁸ Pogge, *World Poverty and Human Rights*, *supra* note 26 at 70,175, chapters 1, 2 and 4; Pogge, “Cosmopolitanism and Sovereignty” *supra* note 26.

¹⁵⁹ For the view that institutional cosmopolitans see rights from a global and not a national perspective, see Jones *supra* note 106 at 17; Brock, *supra* note 106 at 30.

¹⁶⁰ Tom Campbell, “Human Rights: Moral or Legal?” in David Kinley, Wojciech Sadurski and Kevin Walton, *Human Rights: Old Problems, New Possibilities* (Cheltenham: Edward Elgar, 2013); Kevin Walton, “Human Rights as Moral Rights” in David Kinley, Wojciech Sadurski and Kevin Walton, *Human Rights: Old Problems, New Possibilities* (Cheltenham: Edward Elgar, 2013).

¹⁶¹ See Pogge, *World Poverty and Human Rights*, *supra* note 26 at 60; 176.

¹⁶² *Ibid* at 64.

¹⁶³ *Ibid* (“Official disrespect occurs when governments or their agents or agencies or their high and low echelons of authority violate human rights under the color of law, in the statutes, regulations”).

¹⁶⁴ Here, Pogge is referring to Western governments or their agents and institutions that they control who perpetuate, through international agencies that they control, an unjust international order for the benefit of their peoples, and to the disadvantage of the weak in the developing world.

duty not to harm” in accord with libertarians’ characterization of rights as negative qualifications.¹⁶⁵ In Pogge’s view, the concrete difference between libertarian/liberal and cosmopolitan approaches is that the negative sanction to do no harm is directed not only against the state, it is imposed against any social agents and institutions that may enact “a coercive institutional order” that harms persons.¹⁶⁶ In Pogge’s conciliatory view, the salutary value of an institutionalist approach is its ability to conceive rights anew, without necessarily disturbing the central tenets of classical liberalism.¹⁶⁷ That is, an institutionalist understanding of human rights does not alter the dominant anti-state posture of rights but merely seeks to recalibrate it, in a sense retooling the theory with the fresh insight that rights are moral constraints and qualifications on social institutions or organizations, including sovereign and non-sovereign repositories of power that are vested with the capacity to harm or create adverse arrangements that harm persons and human wellbeing.¹⁶⁸

Institutional cosmopolitanism’s central proposition seems to shift the ideology of rights and rights jurisprudence beyond a positivist conception of rights as demarcations of power to rights as moral constraints or demands on social institutions or arrangements.¹⁶⁹ An institutional conception of human rights “postulates certain fundamental principles of social justice” invariably applicable to “institutional schemes.”¹⁷⁰ In effect, this institutional understanding broadens the ambit of human rights normative values, even carrying their moral persuasion into constraining the global institutional order, comprised of states, institutions, and the global economic system of laws, rights, and markets.¹⁷¹

The true intellectual tradition of an institutional cosmopolitan outlook is that it presupposes that “duties would correspond roughly to how well an institution would appear to fit into a global institutional scheme that actually would fulfil cosmopolitan aims for rights promotion and

¹⁶⁵ Pogge, *World Poverty and Human Rights*, *supra* note 26 at 72.

¹⁶⁶ *Ibid* at 73; 174-178; Pogge, “Cosmopolitanism and Sovereignty” *supra* note 26 at 51.

¹⁶⁷ *Ibid* at 72.

¹⁶⁸ *Ibid* at 73. See also Amartya Sen, “Elements of a Theory of Human Rights” (2004) 32:4 *Philosophy and Public Affairs* 321 [Sen, “Elements of a Theory of Human Rights”]. Sen refers to them as others constrained by imperfect obligations that is, those other than to whom there is a specific duty not to harm.

¹⁶⁹ Sen, “Elements of a Theory of Human Rights” *ibid* at 319. Such pluralization of the theory of human rights away from positivist conservatism are held by Sen. Noting the controversy and skepticism that have too often attended new genre of rights that expand the scope of the human rights paradigm, Sen argues that “a theory of human rights cannot be sensibly confined within the juridical models in which it is frequently incarcerated,” rather, human rights are “primarily ethical demands,” the fact that they are legal is “a further fact rather than a constitutive characteristic.”

¹⁷⁰ Pogge, *World Poverty and Human Rights*, *supra* note 26 at 176.

¹⁷¹ *Ibid* at 177.

protections and related global moral goods.”¹⁷² Pogge’s cosmopolitan view rests substantially on the variability or heterogeneous explanatory interpretation, seeing the proposition of rights as negative qualifications (austerity of liberalism) as irrelevant to the discipline and utility of rights. Above all, he goes against a rigid positivist theory of law. The RTD has to be construed as drawing from, or at least assuming some of the precepts of, this intellectual foundation.

I am of the view that the cosmopolitan approach answers and discounts some of the mainstream scholarship that proceeded from puritanical positivist standpoints and rationalized their contentions within those constructs. These black letter international law scholars tended to critique the idea of a RTD, *à la* Donnelly, as a “conceptual obfuscation” of human rights theory, based on individualist understanding of rights. In any event, the philosophical foundations of rights cannot be reduced to one account, it must be pluralized. Insofar as it offers a pluralized vision of the universal rights paradigm, thereby expanding human rights theory beyond the juridico-centric models of positivism, institutional cosmopolitanism provides a philosophical basis for the idea of development as a right and the corresponding development justice that it enunciates. That is, an institutional cosmopolitan approach allows us to map the rationale for a collectively shared responsibility for institutional justice that transcends national borders. It does this based on the view that the creation and sustenance of global institutional schemes happen at the instance and agency of powerful governments through supranational institutions that they control. There is thus an imperative for constraining their conduct by the fundamentals and core values of the global community.

Institutional cosmopolitanism is also suitable for theorizing the development accountability deficit phenomenon in a number of respects. It is so, first, in relation to the question of power in the global political economy, power being a primary element for the demand of answerability or sanctionability of agents. From an institutionalist lens, the RTD, otherwise regarded as a composite of and a precondition for the exercise of all other rights, would not be fixated on the state as the sole repository of power to be constrained by a normative or regulatory system but rather on power as a by-product of “social systems” with coercive or productive potentials.¹⁷³ Non-coercive agents encompass those vested with a capacity to help in the realization

¹⁷² Luis Cabrera, “Reform, Resist, Create: Institutional Cosmopolitanism and Duties Toward Supra-state Institutions” in Luis Cabrera, *Institutional Cosmopolitanism* (Oxford: Oxford University Press, 2018) at 131.

¹⁷³ Pogge, “Cosmopolitanism and Sovereignty” *supra* note 26 at 53.

of the right's stated objectives.¹⁷⁴ As such, the global structural arrangements and the actors who have created it constitute the social systems capable of harming persons "near and far," and ought therefore to be constrained by rights as moral demands.¹⁷⁵ The standard of the demand is a negative one, restraining all actors not to harm or create development models that harm others.¹⁷⁶ In other words, from an institutional cosmopolitan standpoint, power exists within and without state structures, above and below state institutions. Power is in the overt and covert unbalanced institutional arrangements as exemplified by paternalistic models of development such as structural adjustments, foreign direct investment, structural conditionalities, or other unobtrusive paradigms of development that create and perpetuate inequalities and exact harm on the global poor.

Second, institutional cosmopolitanism is also suitable for understanding how institutional constraints inhibit the fulfilment and realization of the RTD or what is often referred to as a rights-based global order or what this dissertation terms development justice. Institutional cosmopolitanism holds that the under-fulfilment of all human rights on the global stage is an international redistributive justice concern.¹⁷⁷ Its preoccupation is that there be a justifiable global institutional framework in which all rights of individuals are viably protected and the objects of rights, human flourishing or human well-being, is realized globally.

Third, likewise, from the RTD perspective, institutional cosmopolitanism address how a series of relations and structures of the global economy engender and sustain levels of poverty and vulnerability experienced by the global poor.¹⁷⁸ This is what gives rise to a concern with the plight of strangers abroad. From a cosmopolitan perspective, it has been emphasized that material factors influencing and determining the plight of all of humanity, such as inequality between and within states, are increasingly of international scope, consisting of supranational forces.¹⁷⁹ On this consensus, cosmopolitans are always intrigued by the degree to which the contemporary global economic arrangements promote or undermine human flourishing as well as redistributive

¹⁷⁴ Sen, "Elements of a Theory of Human Rights" *supra* note 168 at 319.

¹⁷⁵ Jones, *supra* note 106 at 5; Thomas Pogge, "Severe Poverty as a Human Rights Violation" in Thomas Pogge, *Freedom from Poverty as a Human Right: Who Owes What to the Poor* ((UNESCO; Oxford; New York: Oxford University Press, 2007) at 24-25.

¹⁷⁶ Pogge, "Cosmopolitanism and Sovereignty", *supra* note 26 at 51.

¹⁷⁷ Pogge, *World Poverty and Human Rights* *supra* note 26 at 178.

¹⁷⁸ Pogge, "Cosmopolitanism and sovereignty" *supra* note 26 at 53.

¹⁷⁹ Jones, *supra* note 106 at 9.

egalitarianism.¹⁸⁰ Their specific concern is with the question of where and with whom the blame (causality and attribution) lies for the underachievement of human rights, a dilemma that evokes great difficulty for international law. This is particularly in relation to ascribing responsibility in the context of interdependence, where actions of actors intermingle and intermesh. These very questions, and more, are also the enunciated focus of the RTD regime.

It may seem, then, that the richness of institutional cosmopolitanism, like other approaches, does not advance a completely new rights theory but merely proposes an internal variegation (by proposing additional duty bearers, such as international development institutions) from a moral optic, “without losing the commonality of the agreed principle.”¹⁸¹

8.2 Third World Approaches to International Law (TWAIL)

Okafor argues that, as a theory, TWAIL provides “a predictive, logical and testable” mechanism for analyzing and studying objective reality.¹⁸² Okafor conceptualizes TWAIL as a theory, a method, and an approach to international law that augments other theories and methods of studying international law. As a system of ideas, a tool for studying international law, and body of scholarship, TWAIL relies on a number of “techniques and sensibilities,” including: paying more attention to the Third World’s actual experiences in a variety of sites where international law, norms, doctrines, and institutions operate; rejecting the notion of differentness and otherness by insisting on formal equality of all of humanity; tracing continuities of injustices and subordination in the ruptures of history; disavowing the purported “universalism” that masks Western motives for exploitation and domination; and writing “epistemic and ideational resistance” against hegemonic forces.¹⁸³

In this dissertation, I deploy two of TWAIL’s sensibilities and techniques. First, I chronicle and historicize the global experiences of the Third World in my analysis of international law.¹⁸⁴ Second, I disavow the rather glib universalist tendency of much of international law by positing

¹⁸⁰ Brock, *supra* note 106 at 237.

¹⁸¹ Sen, “Elements of a Theory of Human Rights”, *supra* note 168 at 323.

¹⁸² Okafor, “Theory or Methodology”, *supra* note 156 at 373.

¹⁸³ Okafor, “Newness”, *supra* note 34 at 178-179; Gathii has contended that TWAIL provides “a historically aware methodology”. James T Gathii, “TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography” (2011) 3:1 Trade, Law & Development at 34.

¹⁸⁴ Upendra Baxi, “What May the “Third World” Expect from International Law” (2006) 27 Third World Q at 713-714 [Baxi, “What May the Third World expect from International Law”].

a counter-hegemonic critique of dominant approaches of international law,¹⁸⁵ including detesting the subordinating character of international financial and economic governance.¹⁸⁶

In terms of historical awareness, I document a wide gamut of experiences from within the geopolitical realities of the Global South's interactions with, and within, international law. I draw from these lived experiences in the development encounter to discount the purported universalization and generalization of regimes of accountability.¹⁸⁷ The wide ranging experiences I document include the experiential difficulties in the enforcement of socio-economic rights, Third World resistance to IFIs' development projects, Uganda's conformity to the rationalities of knowledge as a technology of governance from a distance, IFIs' usurpation of economic policy space and control in countries such as Greece and Nigeria, and Third World national and transnational social movements' praxes of resistance to global and national development institutions. I have mapped these experiences into the evaluation of IFIs' accountability praxis in international development. In this regard, I assess the doctrines of law and relevant institutions of accountability for the realization of the RTD. Through this exercise, I have probed the extent to which international law doctrines have been influenced or drawn from Third World peoples' lived realities.

With regard to TWAIL's skeptical stances to, and contingent distrust of, universal international law doctrines, I set out to examine the extent to which some doctrines or values—such as state responsibility, sovereignty, due diligence, or global public goods, among other precepts—can be relied upon to achieve justice, fairness, and equity in the international order; or whether they conceal the Western-dominated view of international law that facilitates the hegemonization of development and the eclipses and displacements of the accountability of IFIs.¹⁸⁸

¹⁸⁵ James Thuo Gathii "Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy" (2000) 98:6 Michigan L Rev 1997. Joel Ngugi, "The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa" (2001) 20 Wis Intl LJ 297 at 303 has noted that "the international system evolves in a partisan way that freezes a "western" rationality into the international legal discourse even as it presents itself as a developing system that increasingly represents most of the world population."

¹⁸⁶ Okafor, "Newness", *supra* note 34 at 171, 176.

¹⁸⁷ Okafor, "Theory, Methodology, or Both?", *supra* note 156 at 377.

¹⁸⁸ Mutua discusses the variants of TWAIL's disavowal creed. He shares the intellectual preoccupation of TWAIL to insist on the "justice or fairness of norms, institutions, processes and practices" to the extent that they are "of significance to, or affects in an important way, the Third World." Makau Mutua, "What is TWAIL?" (2000) 94 Am Society of Intl L 31 at 36.

Guided by TWAIL's techniques and sensibilities, particularly the work of Rajagopal, I propose what I call *participatory accountability from below* in international law.¹⁸⁹ Embodying what Santos and Rodriguez-Garavito refer to as "subaltern cosmopolitan legality,"¹⁹⁰ this model has the potential to exalt the agency and autonomy of the people in development; it can mobilize the masses in the articulation and struggle for responsive development, and is capable of creating localized terrains for counter-hegemonic engagement with global institutions.¹⁹¹ It departs fundamentally from international law's Liberal proclivities. It advances the aims of accountability far beyond remedy, prevention, and mitigation to include responsiveness, transparency, and self-improvement of the very institutions sought to account. The dissertation commends the theory of participatory accountability from below in international law; a model operationalizable through process-based answerability at the policymaking stages. The main tenet of the answerability dimension of accountability, among others, is its reliance (outside the domain of international law) on counter-hegemonic knowledges of the people to contest and seek the revocation of rationalities with which global institutions construct and reconstruct development paradigms.

On the whole, the paramount reason for the deviation from the Western Liberal models is informed by TWAIL's sensibility of rooting new visions of legality and futures in the "historical, civilizational, developmental and cultural struggles" of the Third World.¹⁹² I recognize that if we are to reconfigure a viable model of accountability that can, at least, assure "modest harvest" in the actualization of development justice, it must take account of Third World experiences and lived realities.

This dissertation recognizes that TWAIL and institutional cosmopolitanism have some conceptual convergences and departures. They work together and supplement each other in certain instances, but also have some tensions and may be conflictual at times. Both offer heterogenous explanatory interpretations of rights, in critique of the orthodoxy and rigidities of Liberalism. Institutional cosmopolitan understanding broadens the ambit of human rights normative values, carrying their moral persuasion into constraining the global economic system. In the same way that cosmopolitans conceive of rights as moral demands by discounting the excessive

¹⁸⁹ Rajagopal, *International Law from Below*, *supra* note 22.

¹⁹⁰ Boaventura de Sousa Santos and César A. Rodríguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge; New York: Cambridge University Press, 2005) at 12.

¹⁹¹ *Ibid* at 12-18; William K Carroll, *Expose, Oppose, Propose: Alternative Policy Groups and Struggle for Global Justice* (London: Zed Books, 2016) at 6-16.

¹⁹² Upendra Baxi, "What May the Third World Expect from International law", *supra* note 184 at 714.

individualization of rights talk and deification of the state in human rights discourse of justice, TWAILers also take similar stance.

Both offer a political economy critique of global institutional schemes of arrangements, norms, practices and baseline rules that condition relations of domination, inequality, subjugation and suffering. In this regard, they are united in their dialectical challenge to the hegemonic paradigms of the international system in that whereas TWAIL focuses on the imperialist and exclusionary character of positivist international law, institutional cosmopolitanism focuses on the institutionally sanctioned injustices of such a system and how it produces and reproduces the inequities that harm the global poor. They are both disenchanted by the global institutional order which they deem as being exploitative, oppressive, unfair and antithetical to the Third World plight and conditions. They both offer unapologetic oppositional stances to international economic order.

One of their divergence is that while TWAIL distrusts the universalist rationalization of human rights discourse of justice, institutional cosmopolitans endorse the universalist claims of the human rights paradigm, reconceiving rights from a moral perspective, on the understanding that universal human rights ethos places constraints on all social agents and should be the basis of international justice.¹⁹³

8.3 Critical Discourse Analysis

Critical discourse analysis is an analytical research tool that examines how language (in its written, spoken, or image forms) acts not only as an expression of thought but as a practice that orders and shapes social relations.¹⁹⁴ It also implies an approach that examines the material roles of language in the functioning of hegemony and power within social institutions.¹⁹⁵ According to Weiss and Wodak, critical discourse analysis is “fundamentally interested in analysing opaque as well as transparent structural relationships of dominance, discrimination, power and control as manifested in the language.”¹⁹⁶ For those who rely on this methodology, their focus is principally on the role of ideology and mobilization of “meaning” in the production and maintenance of relations of

¹⁹³ Compare for example Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2002).

¹⁹⁴ Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language* (New York: Routledge) at 3.

¹⁹⁵ Gilbert Weiss & Ruth Wodak eds, *Critical Discourse Analysis: Theory and Interdisciplinarity* (Palgrave Macmillan Limited, 2002) at 15 online:

<<http://ebookcentral.proquest.com/lib/york/detail.action?docID=259526>>.

¹⁹⁶ *Ibid* at 16.

domination and social inequality.¹⁹⁷ Critical discourse analysis tries to understand complex social phenomena as discursive constructions.¹⁹⁸ Chief in their inquiry is relations of domination manifested in the broader contexts of power and power abuse, including the role of discourse in the production of inequality in social relations.¹⁹⁹ Fairclough notes that its concern is with the “effect of power relations and inequalities in producing social wrongs.”²⁰⁰

Apart from assessing the role of discourse in the functioning of hegemony and power relations, critical discourse analysis also explores the constitutive sensibility of language. That is, it investigates how language is deployed to shape peoples’ interpretations of their own behavior, interests, positionality, or identities. In this regard, discourse often tends to be conceived not as “language *per se*, but [as] a system that under-girds the language as well as the values and beliefs hidden in language, including the ways such beliefs construct subject positions for people.”²⁰¹ This conceptualization of discourse as constitutive of reality emphasizes that discourse as a practice shapes social relations, with its own conditioning rules and parameters.²⁰²

This dissertation interrogates, in the main, ways in which certain legal doctrines are deployed to facilitate IFIs’ avoidance of, disconnection from, and obstruction of direct and distinct accountability as part of the legacy of the hegemonization of development and international law’s creation of subject peoples. I examine the way accountability dysfunctions and deficits in the realm of development is a phenomenon constructed by international law’s discursive practices. I assess how the reliance on parochial language and idioms of law are subtly used to misrepresent and mask accountability avoidance for global development institutions. Typical to critical discourse analysis, I also analyze how the invocation and discursivity of particular policy discourses in development produce relations of domination, subjugation, and inequality. I illustrate how the deployment of these discourses undergirds the perpetuation of certain parochial interests and projects in the realm of development. In particular, I examine how the discourse of accountability in both the implementation of the sustainable development agenda and in the understanding of global development institutions relies on “constructed meanings” that enables the perversions of

¹⁹⁷ Teun A van Dijk, “Principles of Critical Discourse Analysis” (1993) 4:2 *Discourse & Society* 249.

¹⁹⁸ *Ibid* at 254.

¹⁹⁹ *Ibid* at 252, 254. Weiss and Wodak, *supra* note 195 at 15.

²⁰⁰ Fairclough, *supra* note 194 at 8.

²⁰¹ Violet Bridget Lunga, “Unpacking Stanbic Bank’s Pan African Brand Campaign Using Critical Discourse Analysis”, (2007)14 *Lex ET Scientia Intl J* 102 at 104.

²⁰² Escobar, *Encountering Development*, *supra* note 40 at 216; Fairclough, *supra* note 194 at 4.

development to continue unabated even as these meanings delegitimize the imperatives of development justice.²⁰³

I also investigate how the phenomenon of the accountability avoidance, disconnection, and obstruction by IFIs is discursively constructed (formulated, articulated, rationalized, and legitimized) by international law languages, vocabularies, doctrines, and precepts. I examine the way language is deployed to construct these doctrines as devices for domination, hierarchization, and legitimization of power.²⁰⁴ This dissertation describes and analyzes in detail the deployment of the political prohibition doctrine, the dominant application of the state responsibility doctrine, precepts of shared responsibility, the notion of collective duties of state, the due diligence rule, the rationality of global public goods, and so forth.

Lastly, it is the nature of critical discourse analysis to insist on interdisciplinary research.²⁰⁵ Critical discourse analysis “emphasizes the need for interdisciplinary work in order to gain a proper understanding of how language functions in constituting and transmitting knowledge, in organizing social institutions or in exercising power.”²⁰⁶ In this dissertation, I put purely doctrinal methods into conversation with perspectives drawn from other academic fields, as is typical of legal-interdisciplinary research.²⁰⁷ The interdisciplinary discourse that I explore draws perspectives from socio-legal scholarship, international relations, political theories, law and development, and development on wide-ranging themes related to the development justice accountability question.

Interdisciplinary discourse analysis has the enormous potential to enrich the study of international law and norms (doctrinal analysis) with new perspectives drawn from outside the technical confines of law. This cross-fertilization entails a “borrowing” that injects different thought traditions “useful in creating spaces in which the constraints of what has become orthodox international legal thinking [can be] consciously cast off in pursuit of new kinds of thinking, more suitable for the rapidly transforming social and political landscape.”²⁰⁸ Interdisciplinary

²⁰³ Rajagopal sees the formulation of the inspection model as a relic of colonial praxis drawn from the Mandate system of the League of Nations but whose covert purpose was the deradicalization and containment of the Third World claims for emancipation. Rajagopal, *International Law from Below*, *supra* note 22 at 68.

²⁰⁴ Weiss and Wodak, *supra* note 195 at 15.

²⁰⁵ Fairclough, *supra* note 194 at 4; Weiss and Wodak, *supra* note 151 at 17.

²⁰⁶ Weiss & Wodak, *supra* note 195 at 14.

²⁰⁷ Mathias M Siems, “The Taxonomy of Interdisciplinary Legal Research: Finding a Way Out of the Desert” (2009)7:1 *Journal of Commonwealth Law and Legal Education* 6.

²⁰⁸ Moshe Hirsch & Andrew Land, *Research Handbook on the Sociology of International Law* (Cheltenham, Northampton: Edward Elgar Publishing, 2018) at 1.

interventions foster a better understanding of the contemporary, complex, and new phenomena that arise and challenge the theory and practice of law.²⁰⁹

Moreover, the interdisciplinarity of this project seeks to identify competing, contrasting, and complementary claims in the scholarship to determine which of those claims may withstand intellectual rigour and be the foundation for making logical, coherent, and tenable normative propositions.

Data used in this study were derived from both primary and secondary material, including academic writing, other publications, UN reports, international court decisions in law reports and websites. In analyzing these materials, I tracked and labelled opinions of experts, states, NGOs, multinational corporations, and international organizations on the question of accountability in human rights and development practices. The information so gleaned was clustered along themes as I have arranged in the various chapters and further clarified in the separate sections and subsections of every chapter. I was able to interrogate dominant claims, especially doctrinal legal claims in mainstream international legal scholarship, judicial pronouncements, academic thoughts, policy discourses, and emerging practices. I contrasted, assessed, and merged these sets of data against other disciplinary perspectives and theories to come up with the central claims, arguments, and conclusions of this dissertation.²¹⁰

9. THE ROADMAP

Chapter one is the introduction and presents an overview of the whole dissertation. Chapter two examines the political dimensions of the development encounter. It sets out to demonstrate that throughout the history of the Third World struggles, the RTD discourse has been the most assertive and enduring front of counter-hegemony in international politics and relations, courtesy of the discursive spaces, often diametrically opposed, that the development agenda catalyzed in the postwar period. It articulates how the RTD discourse reframed and appropriated as human rights causes the explicit political economy questions, such as unjust economic arrangements or

²⁰⁹ Through this interdisciplinarity, Zumbansen and Buchanan argue that legal scholars have been able to demonstrate “a growing interest in better understanding the widely varied phenomena of globalization and its impact on law, legal research and legal education.” Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford and Portland, Oregon: Hart Publishing, 2014) at 5.

²¹⁰ Siems, *supra* note 207 at argues that interdisciplinarity avoids “‘intellectual tunnel-vision’ through an unhealthy preoccupation with technicalities; of placing ‘an intellectual strait-jacket on understandings of law and society’; and of ‘impoverish[ing] the questioning spirit of both law student and teacher.’”

questions of equity. It gives an account of how this discourse culminated into what this dissertation notes to be a *sui generis* and counter-hegemonic norm. It demonstrates that the RTD norm has a different genealogy and is itself an embodiment of radically reconceptualized doctrines of international law. It also depicts ways in which the RTD constitutes an alternative understanding of development, posing a challenge to the understanding of development as modernization—an important consideration in the search for an effective accountability regime. This chapter is key to advancing the argument that the RTD is a radical departure from orthodox understandings of international human rights law. On this basis, therefore, the premises of contemporary accountability praxis ought to be rethought. This chapter presages the central thesis of this dissertation laid out in chapter six.

Chapter three maps the extent to which the evolving conception and practice of development as interlinked with human rights continue to alter the global development agenda and spur disparate accountability discourses at the theoretical and policy levels. It traces how the RTD discourse has been a central feature of the conceptualization and praxis of human rights as interlinked and interconnected with development objectives. The accountability debates highlighted by the human rights dimension of the development encounter include the intellectual notion of a human rights approach to development as a discourse of accountability; the policy debates of human rights responsibility in development; and the SDGs policy schema of follow-up and review. The main contribution of this chapter is to support the thesis of this dissertation that typifying development policy practice is the marked absence of the direct and distinct accountability of IFIs in their interventions in the global economy and in the development arena. This conclusion regarding the absence of institutional accountability derives from a critical examination of how international law locates the responsibility for consequential development injustices in the agency of the developing state. The localization of accountability at the national level is so pronounced in the SDGs implementation endeavour that one is in no doubt that the very conception of accountability is state-based and state-focused.

In chapter four, I discuss the way the Bank and the Fund understand accountability praxis in relation to their core functions of the provision of global public goods. I demonstrate how the development justice accountability dysfunctions and deficits reflect a constructed reality that is constantly rationalized and legitimized by formal international law discourses and the very practice of development. This chapter carries forth the arguments from the previous chapter about the

evolving conception and practice of development that is marked by mandate expansion for Bretton Woods institutions amid the escalating accountability avoidance, disconnection and obstruction.

In chapter five, I critically examine and critique the formative principles of accountability that DARIO reproduces from ARSIWA, the supposed norms and rules that it anchors as the precepts governing the direct and distinct legal accountability of international organizations. It is here where I expand on Pogge's insights on institutional cosmopolitanism to assess whether international law discourses have been integral to the way we ought to understand the imperative of accountability for development justice. My contention is that the law of international responsibility as the dominant frame of reference for accountability is ill-suited to guaranteeing the direct and distinct accountability of IFIs both in their interventions in the global economy and for the adverse outcomes that constitute a derogation from the RTD norm. In other words, the law of responsibility is ill-adapted to address the distributive harms and effects of the global policy system. It is my further claim that by its responsibility-for-wrongfulness approach (fixated on breach and excessively focused on conduct and not effects), the regimes of the law of responsibility omit the necessary insight of the institutionally sanctioned violations. Conceived as a regime for *ex-post* redress of breach of international obligations, it does not look to the compatibility of structures and processes of development with desired distributive outcomes. Simply, DARIO is grossly inadequate for vindication of structural injustices.

In chapter six, where I elaborate my thesis, I make the case for firming up the backbone of the RTD norm in the realization of development justice. Toward this cardinal objective, I propose that for accountability politics and practice of rights with operational linkage to development, such as the RTD, to be effectively deployed to materialize development justice, a robust appreciation of the normative distinctiveness of the right ought to be had. This entails a consciousness that the practice must be contextually aware and sensitive to the nature and normative character of the RTD. It is in chapter six where I offer a compelling case of how the counter-hegemonic persona plays out, demonstrating further that the RTD imaginary reveals the severe conceptual limitations of Westphalian international law and its doctrines of accountability. I argue in chapter six that accountability for actualizing development justice must be sufficiently sensitive to the nature and peculiarities of the undergirding norm (or the right in question). This insight is drawn from TWAIL's sensibilities and techniques. As well, it relies on the institutional cosmopolitan critique on the responsibility allocation, the premises from which I proceed to propound the answerability

prong of accountability by proposing participation from below as accountability in international law. I build on the RTD's cosmopolitan ethos to make this proposition. I argue that this core property espouses a solidaristic and cosmopolitan understanding of legality that can be relied upon by the people facing the cruel dynamics of marginalization to clamour for development justice. I propose that this as a pragmatic approach that can supplement extant accountability regimes. The last chapter contains the general concluding remarks of this dissertation.

CHAPTER TWO

THE RIGHT TO DEVELOPMENT AS A COUNTER-HEGEMONIC DISCOURSE

1. INTRODUCTION

Without any doubt, the move to mainstream human rights into the then prevailing modernist development discourse owes its origins to postcolonial Third World counter-hegemonic forays into the development field. The RTD has been a central feature of Third World counter-discourses that sought to affirm the operational linkage of development to human rights objectives (at least as they imagined these). It is this imagination that conferred on the RTD a counter-hegemonic character in international law. In this chapter, I show that the RTD is a type of right that has a distinctive normative character from almost all other recognized rights; in terms of its non-Western genesis, substance, persona, vision of accountability, and obligations imposed. There is therefore a need, I argue, to take account of this special normative character of the RTD norm in the international development discourse of accountability. I demonstrate that the RTD was born outside the Liberal tradition of constraining sovereignty, and that it is not exclusively concerned with the welfarist ethic of the provision of minimum needs. It is in the light of this that this chapter defends a reading of the RTD norm as a counter-hegemonic discourse. Accordingly, therefore, its accountability praxis, particularly in relation to the securement of development justice in international development ought to be rethought. I elaborate this argument in chapter six.

The main argument of this chapter is that the RTD's counter-hegemonic nature has considerably shaped its *sui generis* normative character, and that this ought to be considered much more in formulating and rethinking accountability for the implementation or violation of development justice. The discussion in this chapter therefore sets the stage for one of the overarching claims I make in this dissertation that the thought/practice on development accountability must be aware of the contexts of violation, and sensitive to, the RTD normative distinctiveness. I tease out the counter-hegemonic character of the RTD in two dimensions: the *sui generis* character that demonstrates its distinctiveness from all other rights. Secondly, through a concept that I call "the structural contingency dynamic", I argue that the nature and workings of the technocratic global policy system constitute the context of violation of the RTD. The global policy system is intricately implicated in the production of development injustices which must be accounted for in development thought and practice. In chapter six, I elaborate on these two important factors as the important considerations that determine the effectiveness and efficacy of

accountability praxis. I argue, in part, that any assessment of the accountability of actors must take account of these two important factors. This realization is important and indispensable to a complete and proper grasp of the type of accountability measures that can adequately secure the objectives of the RTD, which espouses a different conception of justice in the international development scheme of arrangement. This chapter also sets the stage for the imagination of alternative practices of justice regarding the international development agenda and development praxis—a radically different vision of the future of human rights.

This chapter investigates how the normative and ideological underpinnings of the Declaration on the RTD emerged out of the deployment of human rights and development discourses in the clamour for development justice as well as the geopolitical struggles for equity in the international political economy. And so, it will be argued that any attempt to understand the RTD norm must revisit the postcolonial social context that has shaped and given it the distinctive posture and persona it currently bears. I locate the RTD’s radical imaginary in sites where it upsets and dissents from the fundamental assumptions of both development and international law with alternative visions of reality and counter-imaginings of the social universe.¹

This chapter proceeds as follows: In the section that follows the present one, I conceptualize the notion of counter-hegemony that undergirds my argument in this chapter. In section three, I then discuss the non-liberal foundation of the RTD norm. I show that in the decolonization era a Third World (especially African) driven international redistributive agenda catalysed the entry of human rights discourse into the development terrain, resulting in the development justice question as it is articulated in the Declaration on the RTD. The clamour for development justice was substantially anchored in the RTD discourse, which framed explicit global political reform questions (participation, democracy, representation, and inclusion). In addition, that very struggle formulated issues of equity and redistribution as human rights concerns. It is in this way that the RTD constitutes a radical reconceptualization of the Western

¹ The chasm between human rights and development and their failure to capture the immiseration of the Third World is highlighted by Shivji’s argument that the “the liberal theory ruled out of court any link between individual rights and economic justice, while development theory was prepared to sacrifice individual rights in the pursuit of economic justice.” Issa G Shivji, “Constructing a New Rights Regime: Promises, Prospects and Problems” (1999) 8:2 *Social and Legal Studies* 253 at 260.

understanding of universal human rights and departs from its liberal and welfarist rights counterparts.²

In section four, I critically assess how this reimagination of human rights has originated a *sui generis* genre of rights that questions the fundamental assumptions of international law and development. Accordingly, I continue the argument that the evolution, legalization, and normativization of the notion of a peoples' right to development in international law has produced a distinctive character in the RTD norm. This appears in the way the hybridization of core conceptions of development and human rights has conferred on the RTD a pedigree, nature, and persona that radically departs from conventional rights paradigms. I delve into the RTD's *sui generis* identity, which appears markedly in its compositeness, hybridity, credo, vision, object, and conceptual formulation. I contend that these must bear upon the critique of the suitability, adequacy, and adaptability of standardized accountability models that seek the realization of development justice.

In section five, I make the case for what I call the structural contingency dynamic, which the RTD norm and practice reveals more clearly. This complex phenomenon describes the ways in which supranational actors take on more determinative and manipulative roles in the perpetuation of development injustices in ways that are too often invisible or invisibilized. The structural contingency dynamic renders it possible to explain accountability eclipses and displacements at the global level but also to locate the causes and responsibility for poverty and inequalities in the global economic and political systems.³

² See for example, Jack Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development" (1985) 15 Cal West Intl L; Yash Ghai and Y K Yao, "Whose Human Right to Development" Human Rights Unit Occasional Paper (Commonwealth Secretariat, 1989) at 5,6, 12 For a contrary opinion, see Philip Alston, "The Shortcomings of a Garfield the Cat Approach to the Right to Development" (1985) 15 Cal W Intl L J 510 at 512. He defined the Declaration's redistributive pedigree and ancestry as a "mobilizing power" towards a cherished agenda of development. He would dismiss Donnelly's positivist leanings and rationalizations, discounting his unbridled positivist rigidity on grounds that it overlooked "the sense of outrage" that developing countries' peoples needed to consolidate towards this cause. Offering a cosmopolitan conception of rights and shrewdly re-interpreting international doctrines, was, for these proponents, one way of deepening the awareness that some rights have a different historical emergence and seek to ordain a favourable international order.

³ I rely on Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform*, 2nd ed, (Cambridge: Polity Press, 2008) at 39 [Pogge, *World Poverty and Human Rights*] to expound the argument throughout this dissertation that accountability relationships ought to recognize causalities for injustices in supranational realms.

2. CONCEPTUALIZING COUNTER-HEGEMONY

As I argued in the previous chapter, the concept of counter-hegemony is used here to mean that the substance, theory, and practice of the RTD presents alternative visions, perceptions, and ideation in contesting and challenging the dominant (global) social group's ways of conceiving and legitimating the international economic order. In over thirty years, the RTD discourse has relied on a range of strategies and methods to present "alternative visions" and other "valid ways" of describing the universe, contrary to the political, social, and economic constructions of the dominant global classes and societies.

RTD's counter-hegemonic imagination has been demonstrated in various fora, such as multilateral institutions, where ideas, views, and positions are exchanged, and voting takes place. To borrow from Nancy Fraser's conception, I see the RTD as a mode of discourse that availed itself of "parallel discursive arenas" for the oppressed to "invent and circulate counter-discourses, which in turn permitted them to formulate oppositional interpretations of their identities, interests, and needs."⁴ Indeed, contemporary accounts see the RTD norm in this very light. Baxi opines that the cosmopolitan character of the RTD tends to be viewed as an "irritating moral nuisance" to Western mercantilist ideologies of development.⁵ Salomon argues that the right "typifies a cosmopolitan ethos that reveals its most distinctive and vital component" and that "the ideas of equity that animate the right to development are heretical to those with power and advantage since it proposes in the language of human rights modifications of the very system that provides for their dominance."⁶ And Ibhawoh has argued that the RTD's project in international law is to serve as "a language of resistance" and oppositional power against the "inequities of the global political economy."⁷

As will become clear, RTD exponents and adherents have organized and fostered a resistance and struggle that has relied on alternative knowledges, strategies, and visions seeking to alter, on the global stage, the conventions, relations, and practices of domination associated with the

⁴ Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" (1990) 25/26 *Social Text* 67.

⁵ Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (Oxford: Oxford University Press, 2009) at 130, 133 [Baxi, *Human Rights in a Posthuman World*].

⁶ Margot E Salomon, "Legal Cosmopolitanism and the Normative Contribution of the Right to Development" in Stephen P Marks ed., *Implementing the Right to Development: The Role of International Law* (Geneva: Friedrich Herbert Stiftung, 2008) at 22, 26 [Salomon, "Legal Cosmopolitanism"].

⁷ Bonny Ibhawoh, "The Right to Development: The Politics and Polemics of Power and Resistance" (2011) 33 *Hum Rts Q* 76 at 78.

expansion and constant refocusing of the development enterprise. Most of those conventions, relations and practices are thought to be grounded in hegemonic international law.⁸ It is this quality that produced the non-Western origins of the RTD, which later made it into a right of distinctive normative character in the human rights corpus. This very quality also enforces the dynamic of “structural contingency” of development that it extends into our contemporary understanding of the redress and amelioration of accountability deficits in development praxis.

3. THE NON-WESTERN GENEALOGY OF THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

In this section, I set out to demonstrate that the RTD has a non-Western genesis and heritage that questions, to some extent, the mainstream theoretical and philosophical rationalizations on which the universal human rights paradigm is understood.⁹ These deviations appear in the RTD’s provenance in the struggle against injustice, the inspiration by the Bandung ethic of global equality, the politicization of Third World developmentalism, in the questioning of the fundamental assumptions of development, and its interrogation of the governance frameworks of IFIs.

3.1 Provenance in the Third World Struggle Against Structural Injustice

The history of the RTD is that of the deployment of international law discourses of “human rights law” and “development” in the quest for development justice; an expectation that structures, rules, and policies of development shall be compatible with the ends of equity, social justice, human well-being, and participation.¹⁰ The deployment of human rights and development into the quest

⁸ Some of the literature on hegemonic international law include: Detlev F Vagts, “Hegemonic International Law” (2001) 95 Am J of Intl L 843; Jose’ E Alvarez, “Hegemonic International Law Revisited” (2003) 97:4 Am J Intl L; Nico Krisch, “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order” (2005) 16:3 EJIL 369. Major characteristics of hegemonic international law include: “patron-client relationships”; “indeterminate rules” advantaging the hegemon; and magnification of authority at the level of international organizations.

⁹ It may be said that the RTD has tended to be viewed, for the most part, as a norm which “breaks with the classical assumptions of international human rights law, which is rooted in the protection of individuals against abuse by their own state.” See Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007) at 6 [Salomon, *Global Responsibility for Human Rights*].

¹⁰ This history has been revisited by none other than the United Nations High Commissioner for Human Rights admission, upon the commemoration of thirty years since the Declaration was adopted, that the right “demanded equal opportunities, and the equitable distribution of economic resources; [better] governance of the international economic framework [and] re-defined development as far deeper, broader and more complex than the narrow, growth-and-profit

for a much more just international order reflects what Falk calls “look[ing] at the human rights models from the standpoint of the historically oppressed groups as the foundational imperative of a counter-hegemonic human rights movement.”¹¹

As historical and international law accounts show, the development’s turn to human rights in the decolonization period focused on the alleviation of poverty, the reduction of inequalities between and within nations, and the elimination of structural barriers to development. As the Tehran Proclamation of 1968 emphasized, the challenges to making these accomplishments were presented by the nature of existing international law and international institutions.¹² The discourse about structural impediments to the realization of the socio-economic aspirations of the Third World had earlier been shared by nationalists such as Leopold Senghor, the then Senegalese President in his book on African socialism.¹³

What is common about these accounts is that they emphasize how the deep-seated structural inequities of the international economic order precipitated the entry of human rights into development discourse leading to the adoption of the Declaration.¹⁴ When in 1977 the Social and Economic Council endorsed a report of the then Human Rights Commission instructing the UN Secretary General to conduct a primary study on the RTD, the main focus was on its international dimension “taking into account the requirements of the New International Economic Order and the fundamental human needs.”¹⁵ No doubt therefore that the 1979 Secretary General’s Report on this question viewed the notion of a right to development largely as “a new conception of the redistribution of power and decision-making and sharing of the world’s resources based on

focus of previous decades.” Statement of the High Commissioner for Human Rights at the commemoration of thirty years of the existence of the right to development:

Online: <<http://www.ohchr.org/EN/Issues/Development/Pages/AnniversaryMessage.aspx>>.

¹¹ Richard Falk, “The Power of Rights and the Rights of Power: What Future for Human Rights?” (2008) 1:1-2 *Ethics & Global Politics* 81 at 91.

¹² It was the Tehran Proclamation that made explicit reference to structural inequality as a human rights concern. See *Proclamation of Tehran, Final Act of the International Conference on Human Rights*, Tehran, 22 April to 13 May 1968, UN Doc. A/CONF.32/41 (1968), para 12 where it was stated that “[t]he widening gap between the economically developed and developing countries impedes the realization of human rights in the international community.”

¹³ Léopold Sédar Senghor, *On African Socialism*, translated by Mercer Cook (New York, 1964) at 133. He argued that “The social problem today is less a class struggle within a nation, than a global struggle ‘between the ‘have’ nations... and the proletarian nations ... and we are one of.. those ‘have-not’ nation”.

¹⁴ Peter Uvin, “From the Right to Development to the Rights-based Approach: How ‘human Rights’ Entered Development” (2007) 17:4-5 *Development in Practice* 597.

¹⁵ Commission on Human Rights, Report on the Thirty-Third Session, 62 U.N. ESCOR Supp. (No.6) U.N. Doc. E/5927 (7 February- 11 March 1977) para 41 and Resolution 4 (XXXII) para 4.

needs”.¹⁶ As another UN Report affirmed in 1990, their concern was with the economic and political asymmetries of power, which tended to favour the North.¹⁷

Alston and Robinson who have reflected on this history are categorical that it is the RTD discourse that instigated the entry of human rights agenda into the international development arena. This began from as early as the 1968 World Conference on Human Rights in Tehran when the RTD discourse came to “broaden the focus of international human rights debates to include a range of economic and other issues which had previously been considered to lie squarely and exclusively within the domain of the national and international development agencies.”¹⁸ Such “a structural phase”¹⁹ of the human rights corpus was unusual. It was unusual because until the emergence of the idea of a peoples’ right to development, the specific kinds of human rights values that dominated the global discourse had not been concerned with global structural disadvantage and deprivation.²⁰ The rigid notions and dogmas of (largely Western-centric) human rights could not “address policy quandaries surrounding a host of problems that spill over national borders.”²¹ Before the structural phase had been inaugurated by the RTD discourse, human rights had never envisioned global structural reordering with the purpose of rebalancing and making inclusive, participatory, and just the international institutional system.²²

¹⁶ *Report Report of the Secretary General* (E/CN.4/1334) of 21 February 1979 para 74.

¹⁷ *Global Consultation on the Right to Development*, E/CN.4/1990/9/Rev.1, 26 Sep 1990 [Global Consultation Report] para 167-168 observed that “the concentration of economic and political power in the most industrialized countries” stymies development. It is perpetuated by the non- democratic decision-making processes of international economic, financial and trade institutions”.

¹⁸ See Philip Alston & Mary Robinson, “The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours” in Philip Alston & Mary Robinson eds, *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005) at 1.

¹⁹ Philip Alston, “Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy” International Commission of Jurists Conference on Development and the Rule of Law, The Hague, 27 April- 1 May 1981 at 9 [Alston, “Prevention or Cure”].

²⁰ Samuel Moyn, *Not Enough: Human Rights in An Unequal World* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2018) at 176 [Moyn, *Not Enough*]. (“with their moral focus on a floor of sufficient protection in a globalizing economy, human rights did nothing to interfere with the obliteration of any ceiling on distributive inequality. Deprived of the ambiance of national welfare, human rights emerged in a neoliberal age as weak tools to aim at sufficient provision alone.”) Also see Samuel Moyn, “A Powerless Companion: Human Rights in the Age of Neoliberalism” (2014) 77:4 *Law and Contemporary Problems* 147 [Moyn, “A Powerless Companion”] (he argues that “while human rights have been preoccupied with providing basic minimum conditions of life, they have not responded to neoliberalism’s obliteration of the ceiling on inequality” at 149). But see Margot Salomon, “Why Should it Matter that Others Have More? Poverty, Inequality and the Potential of International Human Rights Law”, (2011) 37 *Rev of Intl Studies* at 2144 [Salomon, “Why it Matters that Others Have More”].

²¹ Steven Vertec and Robin Cohen eds, “Introduction” in eds *Conceiving Cosmopolitanism: Theory, Context and Practice* (Oxford: Oxford University Press) at 11.

²² It is a revisionism that was widely embraced by those postcolonial agitators who sought to correct the imbalances embedded in the colonial and imperial international structures, through law and politics. In fact, the true motivation for bestowing a juridical status of a RTD was to eliminate structural barriers; which were seen as constituted by the

What marked the RTD's departure from convention, both in its ideological and political foundations, at least in the human rights realm, was its shrewd reintroduction of the controversial New International Economic Order (NIEO) rationales that sought to dismantle the economic structures of exploitation and domination, eliminate disparities, windup neo-colonialism in the interest of total emancipation and the common interest and equality of developing countries.²³ Without the RTD being introduced, these geopolitical issues, as virtuous as they were, should have been confined to the political realm. But they found articulation in Third World advocacy for a new international law of development that would preside over international economic governance.²⁴ This affirmed the RTD as a norm of a different moral and political persuasion and genealogy.

When Doudou Thiam first expressed the idea of a RTD in 1967²⁵ and then Keba M'Baye followed in 1972, the landscape was already prepared, the seeds were already sown and the mood was already rife for disenchanting international law with this new and non-Western idea that emphasized the deployment of rights ideologies in the realms of geopolitical struggles.²⁶ Thiam's and M'Baye's propositions signalled that there would emerge a new right of a different ancestry,

allocative and regulatory functions of international financial institutions. Such barriers consisted in the international architectural inequities ("dependency, biases in the system and management of international trade"). See Salomon, "Towards a Just Institutional Order: A Commentary on the First Session of the UN Task Force on the Right to Development" (2005) 23:3 *Netherlands Q of Hum Rts* 409 at 414.

²³ Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (The Hague: Kluwer Law International, 2003) at 298. For one of the critiques of NIEO see William L Scully, "The Brandt Commission: Deluding the Third World" (30 April 1982). He decried "international redistributive schemes" as presenting "a degree of coercion, the abrogation of sovereignty, and the denial that man has a fundamental right to the fruits of his labor." Online <http://s3.amazonaws.com/thf_media/1982/pdf/bg182.pdf>.

²⁴ F V Garcia-Amador, *The Emerging International Law of Development: A New Dimension of International Economic Law* (New York; London; Rome: Ocean Publications, 1990) at 36; James Thuo Gathii, "Third World Approaches to International Economic Governance" in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens eds, *International Law and the Third World: Reshaping Justice* (New York: Routledge-Cavendish, 2008) at 258. It is during this time that decolonized countries' resistance politics, which later crystallized into the clamour for development (the RTD movement), peaked and embraced the egalitarian ethic of global equality and equity as their mantra and vision, as demonstrated by the Bandung's anti-imperial, anticolonial, and antiracial campaign momentum. This particular ethic was largely driven by the political desire to reverse imbalances deeply embedded in the international economic relations and systems, imbalances which perpetuated unfair distribution of the benefits and costs of the international economic order.

²⁵ Cited in Daniel J Whelan, "Conflicting Human Rights and Economic Justice-A Genealogy of the Right to Development" in Melissa Labonte & Kurt Mills, *Human Rights and Justice: Philosophical, Economic, and Social Perspectives* (New York: Routledge, 2018) at 59.

²⁶ Keba M'Baye, "Le droit au développement comme un droit de l'homme" *REVUE DES DROITS DE L'HOMME* (1972) 505; M'Baye (paper delivered at UNESCO Meeting of Experts on Human Rights, Human Needs and the Establishment of a New International Economic Order, in Paris, (June 19-23, 1978)), reprinted in UNESCO Doc. SS-78/CONF.630/8 at 1 all as cited in Donnelly, "In Search of the Unicorn", *supra* note 2.

one that would centralize a host of claims against structural injustice. These claims, rooted in a disenchantment with the global economic order that fostered postcolonial forms of exploitation included: seeking economic sovereignty, challenging hegemony, aspiring to redistributive equity, global restructuring, and envisaging a new international law of development, among others²⁷ There was also the equality ethic as one of the geopolitical issues that prompted the search for a RTD. This had particularly been invoked in the 1967 G77 conference in Algiers by a Senegalese jurist Doudou Thiam.²⁸

It is for the struggle against structural injustice that proponents feared that the RTD idea would disturb convention. While proposing the idea, and consequently a new vocabulary in the international law lexicon, M'Baye is reported to have acknowledged, in 1972, that doing so involved some measure of “temerity.”²⁹ Later, in 1978, after the right had percolated through the United Nations human rights systems, he is quoted as remarking that the idea was “somewhat venturesome.”³⁰ Such fears emanated from, and were coincidental to, the reinvigoration of the RTD discourse “as a law which contained the seeds of a new international economic order.”³¹

It is by taking this posture that M'Baye's and Thiam's entrepreneurial ideas pointed more to the way a people's right to development significantly deviates from convention. For one, in their respective speeches, as norm entrepreneurs, they direct attention, for the first time in the history of

²⁷ Of late there is a resurgence of scholarship on NIEO. The different goals and objectives of NIEO have recently been revisited by authors at Harvard and the London School Economics whose recent review enumerates the following as NIEO's core though disparate agenda. They see NIEO as, among other things, “a critique of legal formalism”; “the genealogical starting point for ‘the right to development’”; “an extension of the principle of sovereignty from the political to the economic realm”; “an incrementalist approach to reforming global economic and political power arrangements”; “‘completing’ decolonization”; “a call for global redistribution—including financial, resource, and technology transfer—from rich to poor countries”; “a radical challenge to the historic hegemony of the North Atlantic industrial core.” See Nils Gilman, “The New International Economic Order: A Reintroduction” (2015) 6:1 *Humanity: An International J of Hum Rts, Humanitarianism and Development* at 2.

²⁸ “What is our task? We must lay the foundations for a new world society; we must bring about a new revolution; we must tear down all the practices, institutions and rules on which international economic relations are based, in so far as these practices, institutions and rules sanction injustice and exploitation and maintain the unjustified domination of a minority over the majority of men. Not only must we reaffirm our right to development, but we must also take the steps which will enable this right to become a reality. We must build a new system, based not only on the theoretical affirmation of the sacred rights of peoples and nations but on the actual enjoyment of these rights. The right of peoples to self-determination, the sovereign equality of peoples, international solidarity—all these will remain empty words, and, forgive me for saying so, hypocritical words, until relations between nations are viewed in the light of economic and social facts.” Cited in Whelan, *supra* note 25 at 59.

²⁹ As quoted in Donnelly, “In Search of the Unicorn”, *supra* note 2 at 474.

³⁰ *Ibid.*

³¹ Mohammed Bedjaoui, “The Right to Development” in Mohammed Bedjaoui, ed, *International Law: Achievements and Prospects* (Dordrecht, The Netherlands: Martinus Nijhoff and UNESCO, 1991) 1177 at 1179 [Bedjaoui, “The Right to Development”]; Donnelly, “In Search of the Unicorn”, *supra* note 2 at 482.

the dominant Liberal version of human rights, that underdevelopment, brought about by an unjust and inequitable international order, is a human rights issue. The second key point is that they presented a new perspective of a post-coloniality bent on forging other ways of being and doing based on a new norm that they anticipated. It is for these two reasons that the emergent norm was being seen in light of its general (troubling) tendency as “a device to obtain concessions” in the global economic restructuring or even that global restructuring was seen as the avenue for realizing human rights.³² This is something that was then unique in the human rights discourses of justice.

The third point of significance in M'Baye's and Thiam's ideational entrepreneurship is that their persuasion brought forth their own diverse imagination of alternative practices of justice regarding the international development agenda and development praxis—a radically different vision of the future of human rights. Such an entrepreneurship cemented a new conception that focused on development justice by what they imagined to be a completed postcolonial search for an equitable international order. M'Baye's greatest input was to cement the ideal of development as a right as “a new conception of the redistribution of power and decision-making and the sharing of the world's resources based on needs.”³³ This kind of framing of development justice in human rights terms was before then unknown and could even be regarded a heretical international human rights discourse of justice.³⁴ As it would later emerge, such unusual linking of human rights with structural issues was certainly bound to spark dogged diplomatic opposition, and therefore imperil the RTD's future cascade. True to M'Baye's fears, over the years, the right's proselytism would face immense prejudicial preconceptions, based on a misunderstanding of its pedigree and object, most of which it has yet to overcome.³⁵ Quite clearly, therefore, it is in bestowing juridical stature on a new norm to address structural disadvantage that seems to significantly depart and even question the doctrinaire and conservative rights orthodoxies.³⁶

³² Donnelly, “In Search of the Unicorn”, *supra* note 2 at 504.

³³ Report Report of the Secretary General (E/CN.4/1334) of 21 February 1979 para 74.

³⁴ Salomon, “Legal Cosmopolitanism”, *supra* note 6 at 22, 26.

³⁵ *Report of the Working Group on the Right to Development on its Nineteenth Session 23 to 26 April 2018, A/HRC/39/56*. (As a matter of fact, as the Working Group reports in 2018: “Divergent views in the understanding of the right to development [remains] with the European Union which maintains that “it was not in favour of the elaboration of an international standard of a binding nature”)

³⁶ Stephen Marks & Rajeev Malhotra, “The Future of the Right to Development” at 3 observe thus:

However, by the time the drafting got started in 1981, Ronald Reagan was in the White House and Margaret Thatcher was in 10 Downing Street, heralding a strong shift to the right in domestic and international affairs.... Thus from the beginning the North American and European delegations resisted using the human rights institutions to restrain the dominant economic powers in the global economy and especially to impose any legal obligations, which NAM countries favoured. This tension continues today.

3.2 Inspiration by the Bandung Ethic of Equality

The emergence of the RTD as a human right of a different pedigree and ancestry and as instance of the radical reimagination of international law and development is traceable to the Bandung Conference of April 1955 and a host of other subsequent discussions and alignments, including the Non-Alligned Movement, the NIEO,³⁷ the NIEO's Program of Action,³⁸ the Second Development Decade, and the Brandt Commission³⁹ among others.⁴⁰

The Bandung Conference also known as the Asian-African Conference was attended by 29 African and Asian countries including Afghanistan, Burma, Cambodia, China, Cyprus, Egypt, Ethiopia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Laos, Lebanon, Liberia, Libya, Nepal, Pakistan, the Philippines, Saudi Arabia, Sudan, Syria, Thailand, Turkey, the Vietnam Democratic Republic of Vietnam, the State of Vietnam, and Yemen. Among the leaders in attendance were Prime Minister Jawaharlal Nehru (India), Prime Minister Mohammed Ali of Pakistan, Prime Minister U nu of Myanmar, Sir John Kotelawala of Sri Lanka, and Gamal Abdel Nasser of Egypt, Prime Minister Zhou Enlai of China. Indonesian President Achmed Sukarno described the conference as the “first intercontinental conference of coloured peoples in the history of mankind.”⁴¹

Lined up for debate were issues grouped as economic cooperation, cultural cooperation, human rights and self-determination, problems of dependent peoples, and promotion of world

online <<https://cdn1.sph.harvard.edu/wp-content/uploads/sites/134/2018/06/Marks-Malhotra-The-Future-of-the-Right-to-Development-2017.pdf>>.

³⁷ In its preambular section, it declared that it shall correct inequalities and redress existing injustices, making it possible to redress the widening gap between the developing and developed countries and ensure steadily accelerating economic development.”

³⁸ Called on the international community to “assist” developing countries facing “severe economic imbalance” in their relations with developed countries and to mitigate their “current economic difficulties.”

³⁹ Named after Willy Brandt, a former socialist German Chancellor who was appointed with other experts to the inquiry by MacNamara, the then World Bank President, to investigate the misadventures of development as growth of the First Development Decade which sought “accelerat[ing] progress towards self-sustaining growth of the economy” and to make “substantial increase in the rate of growth.” See Vijay Prashad, *The Poorer Nations: A Possible History of the Global South* (Brooklyn: Verso, 2012) at 15 notes the sad irony is that the World Bank sanctioned the report, noted its blistering critical recommendations, but ironically both the IMF and the Bank ignored or rejected its humanist approach to geopolitical issues. See further, General Assembly Resolution 1710 (XVI) “United Nations Development Decade: A Programme for International Economic Co-operation” (19 December 1961), para 1.

⁴⁰ United Nations, *International Development Strategy for the Second United Nations Development Decade*, Resolution 2626/XXV, 24 October 1970.

⁴¹ Speech by President Sukarno of Indonesia at the Opening of the Conference in Asia-Africa Speaks from Bandung, 5-15, Jakarta, Ministry of Foreign Affairs cited in Amitav Acharya, “Studying the Bandung Conference from a Global IR Perspective” (2016) 70:4 *Australian J Intl Aff* 342 at 342.

peace and cooperation.⁴² The first two themes were considered by two committees between 19 to 22 April 1955. From 23 April 1955, the heads of delegations considered the remaining issues in another three committees to consider questions of racial discrimination and racial problems, weapons of mass destruction and disarmament, and the third committee was to consider other ancillary issues of the UN. Five other drafting committees were constituted to draft necessary resolutions on these range of issues. Prompting most of these discourses/programs and texts were the propositions of economic justice, economic development, and reform of the international economic system. For example, prominently featuring in the Final Communique of the conference was economic development and cooperation between Asian and African countries, the need for stabilization of commodity prices, enhancing inter-regional trade and promoting technical assistance.⁴³

Commentators see the significance of the Bandung Declaration in the institutional history of the Global South in quite an intriguing light. As the first international meeting of former colonies to address the postcolonial struggle for distributive justice, the Bandung Conference embodied a bold “ethic of global equality.”⁴⁴ This inaugural moment catalysed the increasing visibility of Third World identity and agency in the postwar international politics. It served as a strategic launching pad for future Third World intellectual, political, and socio-economic mobilization and resistance in the international arena.⁴⁵ It lent impetus to the anti-imperialist agenda and postcolonial aspiration of altering the global economic structures that legitimated inequality between nations.⁴⁶ According to Okafor, the Bandung Conference was a significant historical moment for its stimulation of the various Third World solidarity movements that challenged hegemony of the North.⁴⁷ Such movements included the Resolution on Permanent Sovereignty Over National Resources (PSNR)(1962), the Declaration on the NIEO and Programme of Action

⁴² A Appadorai, *The Bandung Conference* (New Delhi: Indian Council of World Affairs, 1955) at 212.

⁴³ *Ibid* at 213, 215.

⁴⁴ Obiora Chinedu Okafor, “The Bandung Ethic and International Human Rights Praxis” in Luis Eslava, Michael Fakhri, Vasuki Nesiah eds, *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge, United Kingdom; New York: Cambridge University Press, 2017) at 517 [Okafor, “Bandung Ethic”].

⁴⁵ Robert Mortimer, *The Third World in International Politics* (New York: Praeger, 1984).

⁴⁶ Prashad, *The Poorer Nations*, *supra* note 39 at 2 notes that: “The Bandung dynamic inaugurated the Third World Project, a seemingly incoherent set of demands that were carefully worked out through the institutions of the United Nations and what would become, in 1961 the Non-Aligned Movement (NAM).”

⁴⁷ Okafor, “The Bandung Ethic”, *supra* note 44 at 515; Luis Eslava, Michael Fakhri, Vasuki Nesiah eds, *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge, United Kingdom; New York: Cambridge University Press, 2017) at 13.

(1974),⁴⁸ the Charter of Economic Rights and Duties of States (CERDS) (1975), and the Declaration on the RTD (1986).⁴⁹

As recently the reconstruction of this all important history shows that Bandung ethic converged on (a particular) “discourse of developmentalism.”⁵⁰ It is said that human rights also featured in the vision of a new world it anticipated.⁵¹ The Bandung Conference thus became one of the first heterodox moves that signalled the imperative of hybridizing development and human rights objectives to tackle structural injustices. It could be viewed as a shift from, or at the very least, as a moment that inspired the Third World contestation of the universe constructed by Western episteme and its imperialist logics.⁵² This is a dynamic that the Declaration would later perfectly personify in its legal formulation, contrary to the Western and Liberal accounts of the human rights historiography.⁵³

3.3 A History of the Politicization of the Third World Developmentalism

The Bandung spirit of solidarity effectively captured the Third World aspiration for development.⁵⁴ It is these Third World postcolonial developmentalist claims that set a foundation for the

⁴⁸ UN General Assembly Res 3201 (S-VI), 29 U.N GAOR Supp. No. I, p 3 UN Doc.A/9559(1974); UN General Assembly Res. 3202 (S-VI), 29 UN GAOR Supp No. I, p 5 UN Doc. A/9559 (1974)

⁴⁹ Eslava et al *Bandung Global History*, *supra* note 47 at 22.

⁵⁰ *Ibid* at 21.

⁵¹ For this view see Roland Burke, “‘The Compelling Dialogue of Freedom’: Human Rights at the Bandung Conference” (2006) 28:4 Hum Rts. Q 947-965.

⁵² Tukumbi Lumumba-Kasongo, “Rethinking the Bandung Conference in an Era of “Unipolar Liberal Globalization” and Movements Toward a “Multipolar Politics” (2015) 2:9 Journal of the Global South 1.

⁵³ For the idea of human rights as a constraints against the state, see Jack Donnelly, *Universal Human Rights in Theory and Practice* 3rd edn (Ithaka, New York, Cornell University, 2013) at 33; Rhoda Howard, “Cultural Absolutism and the Nostalgia for Community” (1993) 15 *Hum Rts Q* at 315; Manfred Nowak and Karolina Miriam Januszewski, “Non-State Actors and Human Rights” in Math Noortmann, August Reinisch & Cedric Ryngaert, eds, *Non-State Actors in International Law* (Oxford and Portland: Hart Publishing Ltd, 2015) at 131[Nowak & Januszewski, “Non-state Actors and Human Rights”].

⁵⁴ Kerry Rittich, “Theorizing International Law and Development” in Anne Orford and Florian Hoffmann eds, *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Online) at 824 (Her argument in this regard is instructive:

“resistance to colonial policies and practices and efforts on the part of postcolonial states to undo the colonial legacy and fundamentally reground international legal doctrines and obligations were also frequently articulated in the language of development. Development aspirations animated virtually every important international initiative emanating from the Third World in the post-war era, from the Bandung Conference and the creation of the United Nations Conference on Trade and Development to efforts to construct a New International Economic Order (NIEO) culminating in the Charter of Economic Rights and Duties of States that included both specific rights, such as recognition of permanent sovereignty over natural resources, and a general elaboration of the right and duties associated with development”.

See also Balakrishnan Rajagopal, “Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy” (2006) 27:5 Third World Q 767-783; Balakrishnan Rajagopal, “Global Governance: Old and New Challenges” in United Nations, Office of the High Commissioner for Human Rights, ed,

emergence of an international norm that radically departs from Western Liberal bases. It goes without saying that the RTD “emerged from the legitimate preoccupation of newly independent countries with problems of development.”⁵⁵

Developmentalist claims are traceable to as far back as 1944 at the debate on the formation of Bretton Woods Institutions. It is at this conference that Third World delegates (Mexico and India) had made a clear demand that the development of “economically backward” countries be a high priority for the new institutions being founded.⁵⁶ Throughout the subsequent clamour for international development justice, the Third World intention was to draw urgent and serious attention to the economic plight—for example, unequal economic relations and the indigence of their people—of the newly won sovereignties. They also sought to institute social and economic justice as the remedy to backwardness. They endeavoured to pursue a form of political democracy in the international economic system based on the ideal of equality and equity. Inevitably, development would become the ideological tool for navigating this cause in international politics and diplomacy. Partly, the explanation was that once decolonization was achieved, development would be the next obvious step in realizing better living conditions for people who had been exploited during the years of colonial encounter.

While development has been seen as the new criteria for the categorization of the West and the non-West,⁵⁷ it provided the first terrain on which the Third World would encounter and exert dogged opposition (in the interests of political and economic self-determination) to hegemonic international law.⁵⁸ Then, as now, development has served as an arena for the perpetuation of

Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development (New York/Geneva: United Nations, 2013) at 172[Rajagopal, “Old and New Challenges”].

⁵⁵ Stephen P Marks, “The Human Right to Development: Between Rhetoric and Reality” (2004) 17 *Harv Hum Rts J* 137 at 141.

⁵⁶ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge; New York: Cambridge University Press, 2011) at 17, 48.

⁵⁷ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, UK; New York: Cambridge University Press, 2007) at 203

[T]he achievement of development became the central and defining preoccupation of the new states, as reflected by the fact that these states were also termed developing states. It was principally in the language of development, then, that the new states approached the balancing of interests and creating a truly universal international law. Consequently, the gap between the colonizers and the formerly colonized was no longer located in the juridical distinctions of the civilized and the uncivilized, but in economic distinctions between the developed and the developing.

⁵⁸ Balakrishnan Rajagopal, “International Law and the Development Encounter: Violence and Resistance at the Margins” (March 24-27, 1999) ASIL Proceedings of the 93rd Annual Meeting 16-27 [Rajagopal, “The Development Encounter”]; Antony Anghie, “Whose Utopia?: Human Rights, Development, and the Third World” (2013) 22:1 *Qui Parle: Critical Humanities and Social Sciences* at 66.

divergent worldviews. It has been the fertile ground for alternative political practices in contestation of the modes of marshalling consent advanced by the hegemonic social classes.⁵⁹ For instance, unlike the international Bill of Rights, the political, moral and ideological underpinnings of the Declaration are seen as rooted in the notion of equitable development.

Inspired by the equality ethic and struggle against structural injustice, the RTD mantra became a new “vision” possessing an egalitarian ethic that departed from the prevalent economic paradigms. The kind of Third World politics was exemplified in the fact that the RTD debate provided a new outlook on development from the perspective of the subjugated groups by channelling and tending to concerns of poverty, inequalities, and other structural barriers to development. This historical occurrence disturbs conventions in the development enterprise. From a development perspective, this appears in the RTD’s partial reconception of development in non-economic terms. The RTD imaginary assumes a multidimensional approach that takes account of, for instance, people’s social conditions of life or the maximization of people’s well-being as indicators of development, which reveals the unique ancestry of the right.⁶⁰

The non-economic formulation can be said to be a Post-Bandung developmentalist thinking that was preoccupied with the balancing of interests and the ending of inequality between nations. This kind of developmental politics became the device of engagement with an imperial and colonial international system. In the 1970s, this developmental politics co-opted human rights into that contestation as developed countries were coerced to accept added responsibilities in development planning and poverty eradication. A good example of this “venturesome” politics was the framing the Declaration as an instrument harnessing “categorical imperatives” of human rights to compel dominant states to renegotiate the global economy.⁶¹ As alternative imagination of development, the kind of resistance that the Third World succeeded to write in international

⁵⁹ *Ibid.*

⁶⁰ Arjun Sengupta, “On the Theory and Practice of the Right to Development” (2002) 24:4 Hum Rts Q at 848 [Sengupta, “Theory and Practice of the Right to Development”]; Arjun Sengupta, *Realizing the Right to Development* (Oxford: Blackwell Publishers, 2000) at 567 [Sengupta, *Realizing the Right to Development*]; Tamara Kunanayakam, “The Declaration on the Right to Development in the Context of the United Nations Standard-setting” in United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013) at 29; Obiora Chinedu Okafor, “The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North Entente” (1995)7 Afr J Intl & Comp L 865 at 869 [Okafor, “South-North Entente”].

⁶¹ See also Stephen Marks, *The Politics of the Possible: Achievements and Challenges of International Agreement on the Right to Development* (Friedrich Erbert Stiftung, 2011) at 3-4.

politics underscored that dominant yardsticks were rapidly unravelling and losing grip as competing imaginations and counter-narratives inundated international law.

As international debates raged, concurrent debates within nation-states articulated alternative versions and new development aspirations that were, in some sense, economic in conception but obviously in deviation from Western intellectual and philosophical thought. At first, in decolonized Africa, for example, ongoing developmentalism debates were mainly conducted within an economic growth and development frame, all in the name of a fundamental “restructuring of under-developed societies.”⁶² From as early as the 1960s, developmentalism was so common in the language of decolonized countries that in the postcolonial dispensation it became the central ideology defining almost all facets of their policy aims for economic and political transformation.

For instance, the African Socialism that Tom Mboya, Julius Nyerere, Kwame Nkrumah, and Leopold Senghor fervently commended for adoption as Africa’s new philosophy of economic independence calcified into the socialist blueprint for economic development in Tanzania and Ghana, while Kenya amalgamated the socialist and market economy models.⁶³ Espoused as the policy tool for meeting the challenge of underdevelopment, African Socialism was conceived as the basis of the new relationship with foreigners in the intervening period.⁶⁴ It contextualized development teleologically within the decolonization imperatives: fighting poverty and a clear intention of reducing the developmental divide between the industrial West and the underdeveloped South.⁶⁵ With the appreciation of the power and economic differentials between states, especially discussions surrounding a new international economic order, domestic debates on development were couched in largely economic terms, and the very politics of development of states was perceived in the “catching up” mental framework.⁶⁶

⁶² *Ibid.*

⁶³ Jason Hickel, *The Divide: Global Inequality from Conquest to Free Markets* (New York: WW Norton and Company, 2018) at 106 [Hickel, *The Divide*]; Daniel Speich, “The Kenyan Style of “African Socialism”: Developmental Knowledge Claims and the Explanatory Limits of the Cold War” (2009) 33:3 *Diplomatic History*.

⁶⁴ Tom Mboya, “African Socialism” (1963) 8 *Transition* at 19. See also Julius K Nyerere, *Nyerere on Socialism* (Dar es Salaam, 1969) at 19; Julius K Nyerere, *Ujamaa: Essays on Socialism* (Dar es Salaam, 1968) at 110.

⁶⁵ A James Gregor, “African Socialism, Socialism and Fascism” (1967) 29:3 *The Rev of Politics* at 326. In Kenya for instance, at independence three challenges were identified as the new focus of government: poverty, disease and ignorance.

⁶⁶ Rajagopal, “The Development Encounter”, *supra* note 58 at 19; Jagdish Bhagwati, ed, *The New International Economic Order: The North-South Debate* (Cambridge: MIT Press, 1978) chapter 1.

One leading African nationalist was Mboya, who, like most revolutionaries at the time, recognized that the underdevelopment of newly decolonized territories was not a culmination of some natural order of things. Mboya saw underdevelopment from a not so purely economic perspective. For him, rather, the “acquisitive instinct” of capitalism that was “largely responsible for the vicious excesses and exploitation” engendered underdevelopment and poverty of a people, and thus he believed that there was something that African values could contribute.⁶⁷ He readily embraced endogeneity and the cultural superiority of African “thought processes and cosmological ideas” as integral to reimagining postcolonial development policies. Such policies were summed up as “industrial modernity and national development,” but their central plank was meeting the expectations of the people by providing basic conditions of living.⁶⁸

The political concern with development therefore readily found a suitable refuge in African political thought at the time, in large part as a historically specific project of mimicking Western trends, even though some alternative objectives such as addressing poverty and inequality were also being advanced.⁶⁹ The shortest expression of it all, as put by Hickel, is that developmentalist thinking “wanted a fairer global economic system with the latitude to determine their own economic policies.”⁷⁰

The politicization of Third World developmentalism, though economistic in substance, were the ideological forerunner to the unique idea of a right to development. It brought with it an imagination of development as a human right issue. This is something that was always unknown to Western Liberal thought, including the liberal economic understanding of the development paradigm, perhaps until the 1970s when the idea of international development law was jostling for attention in the international discourse.⁷¹ By this time, development was anchored on very broad ideals and in fact a new usage of the term was now being deployed, and new institutions were brought into the purview of censure. For example, by focusing on the international economic order with his political critique of the “international system of poverty and poverty of the international system,” Bedjaoui reckoned that “a body of new norms should be matched by new institutions to

⁶⁷ Mboya *supra* note 64 at 18.

⁶⁸ On this point I am hugely indebted to Moyn, *Not Enough*, *supra* note 20 at 100-101.

⁶⁹ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, NJ: Princeton University Press, 1995) note 53 (“Indeed, it seemed impossible to conceptualize social reality in other terms. Wherever one looked, one found repetitive and omnipresent reality of development...” at 5).

⁷⁰ Hickel, *The Divide*, *supra* note 63 at 132.

⁷¹ Rumu Sarkar, *International Development Law: Rule of Law, Human Rights, and Global Finance* (New York; Oxford: Oxford University Press, 2009) at 55.

be responsible for the application of those norms.”⁷² This kind of politics that had gathered steam affirmed the peculiar and unique emergence of a norm in the Third World imaginations of radically transformed developmental models. Strong affirmation of this politics was echoed by Doudou Thiam, Senegal’s foreign minister at the time who declared that the “old colonial past, of which the present is merely an extension, should be denounced” and that states should “proclaim, loud and clear, the right to development for the nations of the Third World.”⁷³

More generally, the deeper undertone of the new notion of the RTD that had been compelling and rupturing the international human rights discourse was that “a new human right to development be created.”⁷⁴ Notions of development as a human right rooted in a new international law of development crept out of this compelling necessity to prioritize Third World development to achieve socio-economic justice. These notions were ideologically inspired by post-Bandung alternative conceptions of development. For instance, in seeing the RTD emerge as “a rhetorical centrepiece for achieving global distributive justice between states,”⁷⁵ the North would regard Third World international politics as “violating hallowed and classical principles of international law.”⁷⁶ However, it was not only the heretical views that the new norm was couched in that rankled in the West, it was its ideational challenge to the development paradigm and human rights corpus. All in all, the Third World developmentalist clamour was to affirm that development was not just the new criteria of distinction between the North and South, but a device that could be deployed to their cause and plight.⁷⁷

3.4 Questioning the Fundamental Assumptions of Development

3.4.1 Dependency Theory’s Critique of Economistic Development Models

I recognize that development traditionally stands out as one of the most contested concepts and ideals, with no common ground on what it means. Development has been theorized and defined in

⁷² Mohammed Bedjaoui, *Towards a New International Economic Order* (Paris: UNESCO, 1979) at 216 [Bedjaoui, *Towards NIEO*].

⁷³ Ougergouz, *supra* note 23 at 298.

⁷⁴ Sarkar, *supra* note 71 at 56.

⁷⁵ Whelan, *supra* note 25 at 59.

⁷⁶ Anghie, *Sovereignty, Imperialism and International Law*, *supra* note 57 at 198.

⁷⁷ Escobar, *Encountering Development*, *supra* note 69 at 4 recounts that the “dream [of replicating industrial development models] was not solely Western-driven, but “the result of the specific historical conjuncture at the end of the Second World War. Within a few years, the dream was universally embraced by those in power.”

competing and diverse ways and from different ideological standpoints.⁷⁸ The three schools of thought that have produced pluralism in the conceptual understanding of development that I want to address in the limited space I have in this chapter are dependency theories, post-development theory, and the RTD discourse.

In general, the way in which Western narratives propagated the idea of development was said to overlook the comprehensive nature of development as a totality of political, social, and cultural transformation. This reality dawned when dependency theorists supplied the alternative imaginations necessary for contesting the meanings, assumptions, outmodedness, and utility of development.⁷⁹ For instance, Escobar's main argument has been that the ethnocentric discourse of development that emerged in the postwar period and heightened in the 1950s produced massive underdevelopment that is marked by misery, exploitation and oppression.⁸⁰ Similar views echoing Escobar's called for a revision of several planks of, as well as "blind faith" in, modernization discourse.⁸¹

As Rist's historical and post-development telling of the genealogy of the development enterprise reveals, dependency theories questioned the fundamental premises of classical and neo-

⁷⁸ Bull Benedicte & Morten Bøa's, "Between Ruptures and Continuity: Modernisation, Dependency and the Evolution of Development Theory" (2012) 39:3 *Forum for Dev Stud* 319.

⁷⁹ Sarkar, *supra* note 71 at 54. Dependency theory emerged in the 1950s to discredit and critique the linearity of Western development models based on a particular ideology of development called modernization, whose key pillars included macro-economic factors and growth indicators. According to Sarkar, modernization theory defines (economic) development through an ethnocentric Western development lens that views development as an evolving process by which developing states and their institutions acquire an outlook and stature of Western institutions and civilization, including models governing the social and economic life. This progression can only be realized if fashioned and aligned to Western ideals of individualism, free markets, rule of law and democracy *ibid* at 46. On the other hand, dependency theory argues that capitalism as a model of economic organization is exploitative and that it fosters and perpetuates dependence relations between states *ibid* at 54. See also Gilbert Rist, *The History of Development: From Western Origins to Global Faith 4th edn* (London; New York: Zed Books, 2014) at 110. See also Adeoye Akinsanya & Arthur Davies, "Third World Quest For a New International Economic Order: An Overview" (1984) 33:1 *ICLQ* 208 at 208; Bedjaoui, *Towards NIEO*, *supra* note 72 at 46.

⁸⁰ Escobar, *Encountering Development*, *supra* note 69 at 4.

⁸¹ Tariq Banuri, "Development and the Politics of Knowledge: A Critical Interpretation of the Social Role of Modernization Theories in the Development of the Third World" in Frédérique Apffel Marglin and Stephen A Marglin eds, *Dominating Knowledge: Development, Culture, and Resistance* (Oxford: Scholarship Online, 1990) at 30 lists some of the values of modernization as:

the need for and the desirability of transferring modern Western technology to Third World countries in order to bring about increases in per capita output (particularly in the high-productivity industrial sector), or the expanded provision of 'basic needs' (i.e. formal education, modern health facilities, piped water-supply, and so forth). Such a transfer is argued to be facilitated by other forms of institutional and structural change such as 'state-building' (i.e. the expansion of state power conjointly with the introduction of parliamentary and democratic institutions), and the inculcation of a particular set of development-enhancing 'modern' (i.e. 'Western') values and habits among the people of traditional societies.

classical economic development theories.⁸² By the 1960s, the leftist dependency theory had surged to levels of respectability and was in vogue for offering differing views of development and contesting the linear conceptions and Western development orthodoxies in the guise of growth, employment, industrialization, international trade, raw materials export, capital accumulation, private investments, savings, and so forth.⁸³ The central tenet of this school is that the dynamic of underdevelopment is located in global structures. It criticizes the development promise of modernization for: its failure to “expand human freedoms”; its “extremely uneven record of development; its role in the persistence of poverty amid increasing affluence; its role in the increase in unemployment despite expanding production; its contribution to the failure to ameliorate the impoverished conditions of people in the poorest countries of Africa and Asia”; and its “increasing association ... with ecological disasters”.⁸⁴

The fledgling debate over the RTD, a confrontation between hegemonic and counter-hegemonic geopolitical perspectives, was shaped and characterized by these sensibilities and a deep-seated disillusionment with Western perspectives on development. It is these perspectives that also assimilated the entry of social objectives into the UN thought and practices of development.

3.4.2 Assimilating Social Objectives into Development

One of the earlier policy documents that relied on the radical interrogation of development by dependency theories to conceptualize the notion of the RTD was the 1979 Secretary General’s Report, which acknowledged that development has a capacious nature.⁸⁵ Adopting a leftist view (echoing preceding counter-discourses such as dependency theories), the Secretary General’s Report discussed the fluidity of development and admitted the conceptual fallacies of pre-existing

⁸² Rist, *supra* note 79.

⁸³ See Arjun Sengupta, “On the Theory and Practice of the Right to Development” in Arjun Sengupta, Archana Negi & Moushumi Basu eds, *Reflections on the Right to Development* (New Delhi; Thousand Oaks: Sage Publications, 2005) at 68 [Sengupta, “Theory and Practice II”]. On development as needs as a critique of development as growth that was inspired by dependency theories, see for example James Gathii, “Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law” (1999) *Buff Hum Rts L Rev* at 123 [Gathii, “Good Governance”].

⁸⁴ Banuri *supra* note 81 at 31.

⁸⁵ *The International Dimension of the Right to Development as a Human Right in Relation to Other Human Rights Based on International Cooperation, Including the Right to Peace, Taking Into Account the Requirements of the New International Economic Order and the Fundamental Human Needs*, Report of the Secretary General, UN Doc. C/CN.4/1334 of 2 January 1979. [Secretary General’s Report]

development theory and practice. Rights, the Report declared, are integral to the development process, as conditions and as aims of development.⁸⁶

Since then, it is no longer tenable to hold onto the orthodoxies and definitions of development in the traditional unilinear fashion.⁸⁷ It has been recognized that the concept of development is expansive enough to encompass other elements and that “that an effective development strategy, whether at the national or international level, must be based on respect for human rights and incorporate measures to promote the realization of such rights if it is to be effective in fostering development in the most meaningful way.”⁸⁸ This new appeal rests on the recognition that human rights and development are so interrelated in object that, although they are different in strategy and implementation, they are compatible and intertwined.

The Secretary General’s Report noted further that “[g]rowing awareness of the complexity of the development process has served to underline the difficulty of describing it within the confines of a single definition.”⁸⁹ The complexity and dynamism referred to entailed additional phenomena that development now had to account for, such as equity, the well-being of the human person as the subject (not object) of development, and the promotion of human rights. The capaciousness of development thus called for re-inscription of the social (political, cultural, and economic) dimensions into development. This is a view that unidimensional growth theories had fiercely de-emphasized. But ironically, social objectives had to be made the objective aims of economic growth or development in the economic sense. Development was now a dynamic

⁸⁶ *Ibid* para 129.

⁸⁷ “Our overall conception of Human Rights is marked by the Right to Development since it integrates all economic, social and cultural rights, and, also civil and political rights. Development is first and foremost a change of the quality of life and not only an economic growth required at all cost, particularly in the blind repression of individuals and peoples. It means the full development of every man in his community”. See Meeting of African Experts Preparing the Draft African Charter on Human and Peoples’ Rights in Africa, address delivered by H.E Leopold Sedar Senghor, President of the Republic of Senegal, 28 November 1979, OAU Doc. CAB/LEG/67/5 at 4 as quoted by in W Benedek & K Ginther eds *New Perspectives and Conceptions of International Law: An Afro-European Dialogue* ((Springer-Verlag, 1983) at 156.

⁸⁸ Secretary General’s Report, *supra* note 85 at para 24. In the contemporary context, the Special Rapporteur on the RTD affirms that: “The view that development is only an economic outcome is incomplete since it is possible for the development priorities of a population to remain unfulfilled despite economic growth. The regional consultations have also demonstrated that development should not be conceived as merely a sequential process whereby economic growth is sought to finance social policies. Rather, the right to development conceptualizes development as a holistic process requiring the input and involvement of diverse stakeholders, including States, international organizations, civil society, academia and the private sector, to achieve sustainable results”. *Statement by Mr. Saad Alfarargi Special Rapporteur on the right to development 42nd session of the Human Rights Council* online:

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25017&LangID=E>>.

⁸⁹ *Ibid* para 14.

reality, a variegated phenomenon partially constituted by the economic, on the one hand, and the social, on the other.

The (re)definition of development as a comprehensive and dynamic reality was later captured in the Preamble to the Declaration, upholding development as “a comprehensive economic, social, cultural and political process, which aims 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.”⁹⁰

Even though these Third World perspectives were new, the environment in which they were articulated were not. The legacy of Bandung and the subsequent Third World coalescence around RTD advocacy had cemented this fact. It can be argued that [as much as these perspectives] “did not constitute an alternative to development, they amounted to a different view of development and an important critique of bourgeois development economics.”⁹¹ Such ideological effervescence opened up new spaces for contesting the meaning, philosophical bases, and the practice of development. The RTD discourse, while reflecting a different strand of critique, also questioned the assumptions of modernization theory. It is this move that saw it assume an ineradicable, and certainly the most enduring, counter-hegemony to this day. Thus, we now have, for the first time in the history of human rights, a right that questions the modernist and neoliberal development praxis. The RTD marks a fundamental departure from Western-liberal notions of development measured in terms of economic metrics and physical transformation, instead linking development to the fulfilment of human rights objectives.⁹²

3.5 The RTD and the Interrogation of the Governance of the International Order

The RTD discourse also opened a battlefield with IFIs, where new postcolonial human rights visions were articulated as relevant to the development discourse. The proponents of this discourse pursued deeply shared cosmopolitan convictions that global distributive justice had a realistic chance of attainability only if the international community pursued reform of the architecture and orientations of international public bureaucracies to make them participatory, representative,

⁹⁰ See also *International Development Strategy for the Third United Nations Development Decade* (1980) para 8.

⁹¹ Escobar, *Encountering Development* supra note 69 at 82.

⁹² Margot Salomon, “Towards a Just Institutional Order: A Commentary on the First Session of the UN Task Force on the Right to Development” (2005) 23:3 *Netherlands Q of Hum Rts* 409 at 412.

inclusive, and democratic—to the benefit of all humanity.⁹³ Pulling international public bureaucracies into the developmentalist debate resulted in some semblance of counter-hegemonic censure.

IFIs are always assumed to have more political power, resources, considerable intellectual power, and influence over policies of developing countries—though which they overreach into the economic and social policies and development agendas, including poverty reduction programs, of developing states.⁹⁴ Besides, they tend to be viewed as gatekeepers. But it is Third World oppositional human rights and development thinking, as opposed to Western ideological frames, that tended to see international bureaucracies as imbalanced inter-state formations championing a sinister growth and development agenda. Because of the roles IFIs perform and their determinative influence, Third World “radical” and dissenting perceptions often tended to view them as the foremost coercive social institutions inimical to their claims for egalitarian developmentalism.

One area that drew immense critique was the mantra of basic needs approaches to development, where the World Bank led the pack, a move that the IMF would only grudgingly embrace much later in the nineties when pressure became overwhelming against its macroeconomic orientation.⁹⁵ Earlier Third World opponents such as Galtung understood the basic needs approach as “an instrument to enlarge the First World market in the Third World” and “make the Third World less of a threat to the First World hegemony.”⁹⁶ For some, the social welfarism intrinsic to the basic needs approach would sanction “an international regime based on redistribution of income (concessional aid) rather than sharing of productive resources and technology.”⁹⁷ More recently, Sharma has argued that this was a deliberate strategy by the Bank to distract from NIEO demands and promote its own parochial vision of development.⁹⁸ For the

⁹³ Global Consultation Report, *supra* note 17 para 167-168 observed this point that “the concentration of economic and political power in the most industrialized countries” stymies development. It is “perpetuated by the non-democratic decision-making processes of international economic, financial and trade institutions.”

⁹⁴ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at 95-96.

⁹⁵ *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, Philip Alston, A/HRC/38/33 [Alston, 2015 Special Report]. Alston notes that the social dimensions of development are now encapsulated in the macro-critical approach of the Fund.

⁹⁶ These views were expressed by J Galtung, “The New International Economic Order and Basic Needs Approach” (1978-1979) IV Alternatives, as quoted in Upendra Baxi, “New International Economic Order, Basic Needs and Rights: Notes Towards Development of the Right to Development” (1983) 23 *Indian J Intl L* at 233.

⁹⁷ Russel Lawrence Barsh, “The Right to Development as a Human Right: Results of the Global Consultation” (1991) 13:3 *Hum. Rgts Q* at 327.

⁹⁸ Patrick Sharma, “Between North and South: The World Bank and the New International Economic Order” (2015) 6:1 *Humanity: An International Journal of Human Rights, Humanitarianism and Development* at 190. See also Patrick

indignant Third World, there was no egalitarian or redistributive objectives in the basic needs approach to development, as it was seen as “too perfectly timed to avoid” and “outflank” the emanations of cosmopolitan visions that NIEO claims had accentuated in international discourse.⁹⁹

In the eyes of the Third World, despite the good intentions of global bureaucracies such as those that mimic the basic needs approach, IFIs were seen as decidedly a hindrance to Third World aspirations for development justice and equity. As it has been observed, since the 1980s, the RTD’s focus still remains the dismantling of international structural impediments to development—such as the democratic deficit of international institutions—economic and political power imbalances, “the rigged rules of the system” harming developing countries, and structural conditions of neoliberal economic orthodoxy that debilitate the economic functionality of developing states.¹⁰⁰

Opening a battlefield with IFIs as agents of the North marked a structural approach under the RTD movement. This structural approach seemed to have *exposed* something new for human rights vocabularies, far beyond the circumscribed capacity of conventional understandings of human rights theory. By seeking the recognition of human rights responsibilities beyond sovereign repositories of power to include all “social institutions”, the RTD discourse availed a new way of thinking and articulating global redistributive justice through human right paradigms.¹⁰¹

The other issue of disaffection that the Third World brought into the human rights and development discourse was the insistence on restructuring the imbalanced structural arrangements for the governance of the international economic order.¹⁰² These imbalances were seen from the prism of democratic deficit and unequal relationships, for which participation and self-

Allan Sharma, *Robert McNamara’s Other War: The World Bank and International Development* (Philadelphia: University of Pennsylvania Press, 2017) (“In order to prevent [maladies] from erupting elsewhere, McNamara, the World Banker insisted that the Western world involve itself more extensively in the affairs of developing countries”).

⁹⁹ Moyn, *Not Enough*, *supra* note 20 at 121. Further views solidly illustrative of the death of reform and rebalancing agenda by Moyn are that: “An emphasis on sufficiency looked to many like a consolation prize for the abandonment of equality. Committing to a vision of sufficient fulfillment of basic needs tacked between the outrage of ongoing penury in a postcolonial world and the costly prospect of egalitarian justice that the same postcolonial world proposed. As the pursuit of global social rights got underway, though its full endorsement awaited the end of the Cold War, the distributive ideal of sufficiency alone survived, and the ideal of equality died.” *Ibid.*

¹⁰⁰ Rajagopal, “Old and New Challenges”, *supra* note 54 at 172.

¹⁰¹ For a view that the Bank and IMF are social institutions, see for example Frank J Garcia, “Global Justice and the Bretton Woods Institutions” (2007) 10: 3 *Journal of Intl Econ L* at 462.

¹⁰² Gathii, “Good Governance” *supra* note 83 at 117 (talks of the mission of NIEO as restructuring “unequal relationships between developing and developed countries” in areas of aid, trade and investment); Anne Orford, “Globalization and the Right to Development” in Philip Alston ed, *People’s Rights* (New York: Oxford University Press, 2001) at 130. For a comprehensive history see Bedjaoui, *Towards NIEO supra* note 72 at 12.

determination in international institutions would be the antidote.¹⁰³ What this narrative emphasizes is that the invention and emergence of the RTD uncovered the inability of conventional human rights approaches to recognize and respond to the root causes of vulnerability embedded within institutional arrangements and models of economic organization. The UN General Assembly made this recognition three years after the NIEO Declaration.¹⁰⁴ The import of the resolution was to focus on the global order's contradictory and ambiguous potential to be a facilitator of as well as a real hindrance to development as the vehicle through which socio-economic goods can be attained. This, in my view, was the inception of the aspiration for a cosmopolitan polity. It was an anticipation of new relationships in the provision of global public goods. The envisaged polity would be one that would be "more democratic, however, in the sense of all states enjoying effective self-determination, equal access to resources and economic opportunities, and an equal role in macroeconomic decision-making."¹⁰⁵ Equality of states in decision-making at the multilateral level was as predominant preoccupation of the RTD norm.

What we may conclude at this stage is that instead of the totalizing individualist-cum-anti-state conception of rights, the RTD emerged as a norm that enforces a cosmopolitan understanding of the human rights paradigm. The quintessence of cosmopolitanism is the idea that all of humanity ("citizens of the world") are inextricably joined in a single polity (that supplants a nation-state normative order) based on, and committed to, commonly shared values. These values derive from human rights as the fundamentals that the international society, including international institutions has agreed to abide by.¹⁰⁶ For me, this is how the Declaration on the RTD has presented its intransigence in seeking to regulate all international development institutions engaged in international economic governance.

¹⁰³ NIEO Declaration Preamble stated: "[i]t has proved impossible to achieve an even and balanced development of the international community under the existing international order".

¹⁰⁴ General Assembly Resolution 32/130 of 1977:

(a) ...the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development", as recognized by the Proclamation of Teheran of 1968;

(f) The realization of the new international economic order is an essential element for the effective promotion of human rights and fundamental freedoms and should also be accorded priority;

See also Alston, "Prevention or Cure", *supra* note 19 at 83.

¹⁰⁵ Barsh, *supra* note 97 at 325.

¹⁰⁶ Steven Vertoc & Robin Cohen eds, *Conceiving Cosmopolitanism: Theory, Context and Practice* (Oxford: Oxford University Press) at 4, 10.

To sum up, I have demonstrated that the RTD has peculiar political, legal, moral, and philosophical bases that stand in contradistinction to the Western and the classical Liberal account of the human rights tradition. As a Third World idea, it installed a different approach and a way of knowing that radically departs from the Western practices and worldviews. Its historical emergence reveals that the idea of a peoples' right to development espouses pluralized visions in questioning structural inequality of the global economic system. Given its evolution in the counter-hegemonic ideation and strategies of the Third World, we have now a genre of right that draws the nexus between the global institutional order and the under-fulfilment of human rights commitments. It frames these issues as development justice concerns.¹⁰⁷ This feature captures the true essence of institutional cosmopolitanism. The neglect of material inequality innate to the neoliberal development enterprise, as Moyn argues, is something that conventional human rights discourse has perfected.¹⁰⁸ Human rights, as we all know, were preoccupied with constraining sovereignty (civil and political rights) and the provision of social welfare goods (in the case of socio-economic rights). However, the “juridical re-imagining” of the utility of human rights in the global justice project¹⁰⁹ that the RTD discourse has brought forth signifies an enlarged scope for the human rights agenda.

In the next section, I address how the distinctive and *sui generis* character of the RTD as influenced by its counter-hegemonic persona ought to be considered in formulating and rethinking accountability for the materialization of development justice.

4. THE DISTINCTIVE CHARACTER OF THE RIGHT TO DEVELOPMENT NORM IN CONTEMPORARY HUMAN RIGHTS PRACTICES

In this section, I highlight instances of the *sui generis* character of the RTD norm that has crystallized from the historical antecedence of questioning the fundamental assumptions of international law and development. It is the aim of this section to show that the RTD espouses a conception of justice that calls into question the usual accountability regimes in use in the realm of development practice. The enumeration of the particularities and peculiarities of the RTD norm

¹⁰⁷ I lean on Thomas Pogge, *World Poverty and Human Rights*, *supra* note 3 at 178.

¹⁰⁸ Moyn, *Not Enough*, *supra* note 20; Moyn, “A Powerless Companion”, *supra* note 20 at 149. See separately, Antony Anghie, “Legal Aspects of the New International Economic Order” (2015) 6:1 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 145 at 146.

¹⁰⁹ Margot E Salomon, “From NIEO to Now and the Unfinishable Story of Economic Justice” (2013) 62 *ICLQ* 31 at 52.

is very crucial for the thesis I develop in chapter 6 that the normatively distinct character of the RTD calls into question the principles forged within Western understandings of international law of accountability. It may be applied to challenge those universalized and standardized principles that ignore the direct and distinct accountability of international financial institutions.

I contend that, as a *sui generis* right, the RTD significantly departs from conventional human rights understandings, by going far beyond state-citizen dichotomization.¹¹⁰ As Brownlie notes, the RTD embodies “the enthusiastic legal literature to develop an isolated genre ... completely outside the mainstream of diplomacy and international law.”¹¹¹ Others argue that in the entire human rights gamut, the RTD is “somewhat distinct” from other rights.¹¹² This identity and peculiarity of the RTD as an “isolated genre” appears markedly in several facets of the RTD norm: in its compositeness, hybridity, credo, vision, object, and conceptual formulation. Peculiarities of the RTD in those respects ought to be accorded critical reflection in thinking about accountability and implementation of the RTD going forward.

First, as a composite right, the RTD integrates into its purview all rights—civil, political, social, cultural, and economic rights—into an umbrella right.¹¹³ This may be a feature worth pondering whenever the global community thinks of implementing the RTD through the accountability functionality. According to Sengupta, it is *sui generis* in that it is the only right that integrates civil and political rights with socio-economic rights, and indeed all rights into “a vector of human rights.”¹¹⁴ As such, the RTD is regarded as the composite of, and a precondition for, the exercise of all other rights. This makes the RTD all the more different from other rights, for its actualization translates into the fulfillment of all other rights, and all of them together, without a deterioration in any one of the rights.¹¹⁵ In formulating a suitable accountability model, one must

¹¹⁰ Salomon, *Global Responsibility for Human Rights*, *supra* note 9 at 6.

¹¹¹ Ian Brownlie, “The Rights of Peoples in Modern International Law” in James Crawford ed, *The Rights of Peoples* (Clarendon Press, 1988) at 14.

¹¹² Rajeev Malhotra, “Towards Operational Criteria and a Monitoring Framework” in OHCHR, *Realizing the Right to Development*, *supra* note 54 at 388.

¹¹³ Fourth Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, submitted in accordance with Commission resolution 2001/9 E/CN.4/2002/WG.18/2 20 December 2001 para 3.

¹¹⁴ Sengupta, “On the Theory and Practice of the Right to Development” *supra* note 60 at 868-9; Sidiqur R. Osmani, “Some thoughts on the RTD” in *The Right to Development Reflections on the First Four Reports of the Independent Expert on the Right to Development*, *Franciscans International*, ed. (Geneva, Franciscans International 2003) at 34-45 that “the right to development is the right of everyone to enjoy the full array of socio-economic –cultural rights as well as civil-political rights equitably and sustainably through a process that satisfies the principles of participation, non-discrimination, transparency, and accountability.”

¹¹⁵ Sengupta, “On the Theory and Practice of the Right to Development”, *supra* note 60 at 841, 846.

appreciate this aspect. One must appreciate that the non-realization of all rights together cannot be questioned *ex-post* through a sanctions-heavy approach. Such default cannot be remedied through periodic review, monitoring, and follow-up. Perhaps an elaborate *ex-ante* accountability at the policymaking stage may provide a suitable alternative.

In terms of vision, by appropriating the concerns of poverty, inequalities, and other structural barriers of the international economic system as human rights claims, the RTD offers a new outlook on human rights from the perspective of subaltern groups. Unlike the conventional political and welfarist agenda of human rights discourses, the RTD norm incorporates the redistributive agenda as a historical concern of Third World peoples. It particularizes the collective plight of the Third World (for example poverty, material inequalities and social justice) in contesting the economic forces behind the hegemonic interests of the North.¹¹⁶ By heightening consciousness of global poverty and inequality and stirring demands for redistributive justice, the RTD questions the vested interests that IFIs champion through default rules and standard norms of trade, finance, and investment.¹¹⁷

¹¹⁶ Thus far, it goes beyond socio-economic rights claims, which insist on the provision of basic conditions of living without questioning the very root of those violations.

¹¹⁷ See, for example, Salomon, a devout defender of the RTD and its extraterritorial scope, who takes to a textualist interpretation of some of the principles in the text of the Declaration, which she believes retain NIEO's radical potential. Salomon, "From NIEO to Now", *supra* note 109 at 50. Most of her focus is on the legal reinterpretation of the articles of the Declaration, especially concepts such as resurgence of sovereign autonomy, elimination of obstacles to development as a collective duty of states, and international cooperation mediated by states for development and to overcome inequalities. See, for example, how Salomon reconceives several provisions of the Declaration: First, she focuses on the preamble to the Declaration, which enunciates "that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order" (Preamble para 15); Second, she argues, on a textual reading, that the RTD entails "full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources" (Art 1(2); preambular para 7); The third aspect manifesting assertion of sovereign rights, in Salomon's view, is to be found in the injunction that "states have the right and the duty to formulate appropriate national development policies" (Article 2(3), preambular para 2) as read together with Article 3(1), which stipulates that "states have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development. This is followed by express provision in Article 3(3), which stipulates that "states should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights." Other important provisions embodying the NIEO agenda include the "duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development" (Art 4(1)) and the duty of "international co-operation [which] is essential in providing [developing] countries with appropriate means and facilities to foster their comprehensive development" (Art 4(2)).

In their present formulation, conventional human rights ideology and practice, as Shivji argues, ignore the “social injustice inherent in the international imperialist order.”¹¹⁸ By such an audacious resort to battle inequality and inequity at the level of formal international law and institutions, the RTD discourse is seen to be highlighting the potent power of law in the global movement toward a cosmopolitan international polity. In this way, it departs significantly from the old international human rights law conceived as a regulative order of states. Traditionally, human rights law does not countenance directly and distinctly calling Bretton Woods institutions to a common regulative order.¹¹⁹

Thus, we must be alive to the fact that to impose accountability for those structural violations intrinsic to the nature of the global economy, Westphalian international law must be reclaimed from its conceptual limitations and incompleteness and be rendered capable of remedying economic injustices inherent in the global institutional order.¹²⁰ The simple question is how to formulate accountability politics that are pro-poor, pro-Third World, and capable of delivering development justice (through the equitable redistribution of global wealth and power). Doubtless, as I will show in chapters 5 and 6, the received legal doctrines such as “extraterritoriality,” “due diligence,” and “respect, protect, and fulfil” have all been unsatisfactory to the task of delivering pro-poor justice.¹²¹ I will propose that it is incumbent upon us to critically examine how we can craft a new accountability architecture “from the standpoint of historically oppressed groups.”¹²²

The other *sui generis* character of the RTD norm that is relevant in the development calculus is the Declaration’s humanistic credo. The Declaration defines development as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals.”¹²³ This humanistic credo to realize the enjoyment of all rights through development (others call it the capabilities

¹¹⁸ Issa G Shivji, “Human Rights and Development: A Fragmented Discourse” in Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford; Portland: Hart Publishing, 2014) at 59.

¹¹⁹ Nowak & Januszewski, “Non-state Actors and Human Rights”, *supra* note 53 at 131.

¹²⁰ Salomon and Alston have lamented the weakness of human rights in this regard. See Philip Alston, “Making Space for New Human Rights: The Case of the Right to Development,” (1988) 1 Harv Hum Rts Ybk at 12; Salomon, *Global Responsibility for Poverty*, *supra* note 9 at 6.

¹²¹ See e.g. Balakrishnan Rajagopal, “Pro-human Rights but Anti-poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective” (2007) 8 Hum Rts Rev 157.

¹²² Quote taken from Falk, *supra* note 11 at 91.

¹²³ Article 1 of the Declaration on the RTD.

approach) affirms the close linkage between the two projects.¹²⁴ On this unique premise, development can no longer be defined as one monolithic construct or from the perspective of some expert knowledges.¹²⁵ Such a radical reconceptualization of development as interlinked with human rights illustrates the utility of rights standards and principles in the development enterprise (rights as constitutive of and instrumental to development).¹²⁶ The entry of human rights into development concerns or the merger of the two flags the question of what effective development strategies should look like, including the undergirding accountability as a policy issue and a human right standard.

On a broader spectrum, the evolving conception of development as interlinked with human rights calls into question the conventional legal accountability praxis. It interrogates whether a conception of justice that the merger of the two projects envisions can be materialized through accountability measures constructed by traditional understandings of international law and development. The question is: are pure legal doctrines of accountability applicable to norms that hybridize development and rights concerns? Or ought there be a shift to accommodate the normative hybridity of the RTD? This question is answered in chapter 3. Again, given that the rights and development interface has only been rhetorically emphasized but not practically experienced or actualized, is there cause for asserting *ex-ante* compatibility of policy measures with rights norms? Would this render functionally obsolete the practice of *ex-post* accountability for violations? If so, how do we translate this policy commitment into a legal position so that all development agencies could adhere to rights norms as a legal obligation and be held accountable, in law or through other public measures? These questions are answered in chapters 4, 5, 6 and in the concluding chapter.

As I have argued above, given that the Declaration radically departs in its vision from the trickle-down growth and economistic vision of neoliberal development, it suggests an alternative imagination of the development paradigm. The Declaration frames development in terms of three core attributes: development is conceived of as a process and an outcome determined by conducive

¹²⁴ The capabilities approach as a specific policy paradigm appears in the work of Amartya Sen, *Development as Freedom* (New York: Oxford University Press, 1999) at 24,36; Sengupta, “On the Theory and Practice of the Right to Development”, *supra* note 50 at 851.

¹²⁵ Irene I Hadiprayitno, “Poverty” in OHCHR, *Realizing the Right to Development*, *supra* note 32 at 140.

¹²⁶ Sen, *supra* note 124 at 36.

structural environments enabling people’s participation and contribution,¹²⁷ in which human well-being is the definitive objective,¹²⁸ which is accomplished on the basis and in pursuance of equity and social justice.¹²⁹ It therefore means that when development is claimed as a right in the sense understood within the Declaration, the objects are also markedly different—human well-being is valued above market flourish or growth. Sengupta argues that looking at development differently, as social and human development and not as income growth or capital accumulation, is “in a way, introducing a paradigmatic shift in the thinking about development.”¹³⁰ I argue in the subsequent chapters that it is imperative that by looking at the development paradigm through this prism, we must also begin to rethink traditional customary practices of accountability in development, including those that human rights have assimilated into development.

Furthermore, the attainment of the RTD—in terms of the core attributes of constraining the national and international order—ought to be assessed structurally according to three broad rubrics: the (enabling) structures, processes, and outcomes of development.¹³¹ In structural terms, the norm contemplates national and international order with conditions favourable to development. Regarding processes, the RTD is conceived of as an entitlement to a process of development that is based on equal and meaningful participation of the people, at all levels of developmental decision-making. In terms of outcomes, the norm supposes that development shall sustain human well-being and freedoms that people enjoy, and fairly and equitably distributes the benefits and costs of development. Such a distributive conception premises the development justice question

¹²⁷ Article 1 provides that every human person is entitled to participate in and contribute to the development process; Article 2(3) requires state development initiatives to achieve well-being of “individuals and populations on the basis of their active, free and meaningful participation.”

¹²⁸ The significance of human beings as the subject and not object of development is recognized in Article 1, which emphasizes the constant improvement of well-being; Article 2(1) “The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”

¹²⁹ Article 2(3) vests states with the duty to formulate national development policies aimed at the fair distribution of benefits of development; Article 8 provides that in taking those steps, the state shall ensure “equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. The state is also mandated to ensure that “women have an active role in the development process” and to develop “appropriate economic and social reforms” capable of “eradicating all social injustices.”

¹³⁰ Sengupta, “Theory and Practice II”, *supra* note 83 at 70.

¹³¹ *Report of the High-level Taskforce on the Implementation of the Right to Development on its sixth session A/HRC/15/WG.2/TF/2/Add.2 and Corr.1 14-22 January 2010 [HLTF Report]* para 18; United Nations, Office of the High Commissioner for Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, 12 July 1993 (“Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level” at para 10).

that is radically different from the human rights conception of justice. The Declaration breaks new ground in bringing this perspective into the human rights paradigm.

Moreover, the fact that the RTD contemplates national and international order with conditions favourable to development is a distinctive feature that reveals an uncommon vision for human rights ideology.¹³² It also establishes salient claims of equity in development practices, which is a fundamental deviation from the market creed and the associated principle of efficiency. From a human rights perspective, a claim to a national and international order in which rights can be fully realized requires that the making of rules and policies of development be subject to accountability relations. This dynamic redirects human rights ideology away from its traditional conception as constraints on public authority. The question then is, how do we reconceive the state-based and state-centred accountability regimes that international law has constructed? It follows therefore, that, in implementing accountability for the non-attainment of the RTD—and its complimentary SDG variant on strengthening global partnerships for sustainable development—it is also necessary to assess the compatibility of extant structures and processes with the desired outcomes of development. This calls for the accountability of institutions, as well as accountability within institutions, that generate and steer development initiatives. For accountability within institutions, perhaps participation is the sure method that adverts process-based, decisional level (*ex-ante*) accountability, in a departure from current voluntary internal accountability practices that are based on organizational standards and rules.¹³³

Lastly, as explained above, the RTD stands for the idea that human rights have operational linkages to development. Rights that have operational linkage with development and ordain the creation of a conducive, just, and equitable international order for development are certainly different from those accustomed to constraining sovereignty or those aimed at guaranteeing basic minimum necessities of livelihood. Essentially, this ideal signals a new imperative for both international law and development. Such a reconceptualization makes it necessary that new criteria for ascertaining progress in the realization of the RTD need to be formulated. The reformed accountability regimes may have to contend with the fact that structures and rules constituting a model of economic organization have to be questioned for their compatibility with the objective

¹³² Compare for instance with Zehra F Kabasakal Arat, “Human Rights Ideology and Dimensions of Power: A Radical Approach to the State, Property, and Discrimination” (2008) 30 Hum Rts Q 906.

¹³³ These same arguments are expounded in chapter 6.

of the RTD to eliminate barriers to development.¹³⁴ As currently constituted, neither state reporting, review, and follow-up nor sanctioning non-compliant rules can secure this goal of a social and international order for development.¹³⁵

The foregoing debate has highlighted the various ways in which the RTD norm deviates from and questions the fundamental assumptions of international law and development. I argue that these qualities are relevant in rethinking and reformulating a regime of accountability suitable for securing development justice. Certainly, it is these core attributes and the counter-hegemonic character that raise the question of the suitability of existing models of accountability not only in the remedying of breach, but also in the prevention and mitigation of institutional constraints such as asymmetries of power, state subordination, and paternalism that hinder further realization of the RTD. The next section discusses how the RTD exposes the way international development practice obstructs direct and distinct accountability of supranational actors through a complex that I call the structural contingency of development.

5. THE STRUCTURAL CONTINGENCY DYNAMIC AS THE CORE OF THE CASE FOR DEVELOPMENT JUSTICE

In this section, I want to lay the foundation for the discussion in chapters 4, 5, and 6 of how the RTD practice emphasizes that structural arrangements and rationalities of the global policy system shape development injustices in various national contexts while blurring the possibility of ascertaining the direct and distinct accountability of supranational actors for such harms. This approach is critical and indispensable to rethinking the distinct and direct accountability of the

¹³⁴ The reference here is to interventions in situations of lending for development by the World Bank and financial and monetary stabilization by the IMF. In these situations, these institutions constrain states to adopt development policies and institutional reform measures in conformity with certain policy instruments that express certain interests, even when those interests are incompatible with values or universal commitments. The answerability aspect of accountability seems best suited to such situations whereby actors can assert and invoke rights obligations in economic decision-making processes.

¹³⁵ CESCR, *Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights* 25th session, 2001, UN Doc E/C12/2001/10. para. 21. The Committee on Economic, Social and Cultural Rights urged that it is necessary that “measures be urgently taken to remove these impediments, such as unsustainable foreign debt, the widening gap between rich and poor, and the absence of an equitable multilateral trade, investment, and financial system.” See also CESCR, *Statement on the World Food Crisis* (40th session, 2008), UN Doc E/C.12/2008/1, paras 12–3.

Bank and the Fund especially in so far as their domains of practice constitute “structural constraints on the social mobility”¹³⁶ of peoples of the Third World.

A synopsis of the argument is that the global policy system creates international economic conditions that are more determinative than, and have a disproportionate influence on, the national development outcomes in developing states.¹³⁷ In these complexes, supranational actors invisibly take on greater influence in shaping policy outcomes in weak countries.¹³⁸

The dynamic of structural contingency has a historical context. It may be traced in the Third World agitation for eliminating disparities, asserting self-determination, and rebalancing the institutional order. In their full tenor, these impassioned debates were conscious of the structural injustices rooted in the global arrangements. Among the first to locate the causes of poverty in the international political and economic systems was Doudou Thiam, the then Senegalese foreign minister and later member of UN’s International Law Commission. He was bold in asserting that “we must tear down all practices, institutions and rules on which international economic relations are based, in so far as these practices, institutions and rules sanction injustice and exploitation and maintain the unjust domination of a minority over the majority of men [and women].”¹³⁹ It is this perception that would later on be reflected in the common refrain “that despite their political independence, [developing countries] were locked into unequal and unfavorable economic relations with their former colonial masters that constrained their ability to develop.”¹⁴⁰

The consciousness of the structural contingency of development deepened in the 1970s heyday of the RTD debate.¹⁴¹ At its peak, this institutional sensibility even drew favour among

¹³⁶ Andreas Follesdal & Thomas Pogge, *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions* (Netherlands: Springer, 2005) at 4.

¹³⁷ Office of the High Commissioner for Human Rights & Center for Economic and Social Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (New York/Geneva: United Nations, 2013) [OHCHR & CESR, *Who Will be Accountable?*] (that fulfilment of states’ rights mandate is structured and strained by the global political economy at 28). For a thorough critique of modernity’s dominant paradigm of market economics, its unviability, and its failure to foster development, see Christian Comelieau, *The Impasse of Modernity: Debating the Future of Global Market Economy* (London; New York: Zed Books, 2001). Comelieau draws two conclusions: that the market economics paradigm perpetuates alienation and is not, in its current construct, sustainable in the long term. See further David Harvey, *A Brief History of Neoliberalism* (Oxford; New York: Oxford University Press, 2005).

¹³⁸ Pogge, *World Poverty and Human Rights*, *supra* note 3 at 39; Obiora Chinedu Okafor, “Re-Conceiving “Third World” Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism” (2000) 6 *Buff Hum Rts L Rev* 1 at 4-5 [Okafor, “Legitimate Third World Framework Governance”].

¹³⁹ UN General Assembly, 21st Session, 1414th Plenary Meeting (23 September 1966), para 228 as cited in Whelan, *supra* note 25 at 59.

¹⁴⁰ Daniel D Bradlow, “Development Decision-Making and the Content of International Development Law” (2004) 27 *BC Intl & Comp L Rev* 195 at 196.

¹⁴¹ According to Keba M’Baye, the rich countries had overwhelming responsibility to secure the enjoyment of rights of all because “the developed countries were responsible for international events and their consequences. They caused

and resonated with leading United Nations agencies. UNESCO could not shy away from letting known its views on the engendered inequalities and indigence of the international order. In one of the most popular refrains that gained resonance among Third Worldists, UNESCO posited that underdevelopment which may manifest in the form of poverty and inequality, is a direct “consequence of plunging a society and its economy into a world whose structures condemn them to a subordinate status and stagnation or internal imbalance.”¹⁴² In the same vein, the then United Nations Special Rapporteur of the Commission on Human Rights, Manouchehr Ganji further stressed that “under-development (as a system of self-reproducing hard-core poverty and stagnation) ... is a complex system of mutually supporting internal and external factors that allows the less developed countries only a lop-sided development process.”¹⁴³ The same sentiments were expressed by Bedjaoui while examining the possibility of a new international economic order, principally animated by the idea of a RTD.¹⁴⁴ Bedjaoui had called attention to schemes of arrangements that deny autonomies to nations, maintaining that underdevelopment rooted in the world economy is a “structural phenomenon linked to a given form of international economic relations.”¹⁴⁵

These nuanced views tended to highlight a dependency (to an extent), of states’ development and outcomes, on the structures and processes of the global economy.¹⁴⁶ For once, there was a mounting consciousness in the human rights discourse (among RTD exponents) that development injustices are rooted in the structural impediments of the global economy. Such views brought into the human rights purview a deep awareness that structural injustices such as poverty

events with only their own interests in mind and should therefore share the disadvantages, since they benefited from the advantages. They must realize that the right to development was the natural outcome of the international solidarity among States embodied in the [UN] Charter.” UN Doc. E/CN.4/SR.1269 (22 February 1974) para 30 cited in Whelan, *supra* note 25 at 65.

¹⁴² UNESCO, Medium-Term Plan (1977-1982), Doc. 19 c/4 at 57, paragraph f cited in The Secretary General’s Report, *supra* note 75 at 17.

¹⁴³ United Nations, *The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress by Manouchehr Ganji, Special Rapporteur of the Commission on Human Rights* (New York: United Nations 1975) (He showed that claims of indigence, and even inequalities are rooted in structural constraints of the global economy. “Under-development (as a system of self-reproducing hard-core poverty and stagnation),” he stated, “is a complex system of mutually supporting internal and external factors that allows the less developed countries only a lop-sided development process” para 308 at 114).

¹⁴⁴ Detailed in the seminal work of Bedjaoui, included unfair trading terms, international financial disequilibrium, deteriorating commodity prices, heavy indebtedness, demand for technology and resources transfer, and overweening focus on profit by multinational corporations. Bedjaoui, *Towards NIEO*, *supra* note 72 at 12-63. See also Alston, “Prevention or Cure”, *supra* note 19 at 20-21.

¹⁴⁵ Bedjaoui, “*The Right to Development*”, *supra* note 31 at 1181.

¹⁴⁶ World Bank, *World Development Report*, 1978 (Washington DC 1978) at 68; Salomon, *Global Responsibility for Human Rights*, *supra* note 9 at 50.

and material inequality constitute and are constituted by development paradigms that subject poor countries and their peoples through social schemes of domination and exploitation. Such schemes not only create subject peoples but debilitate autonomies within national jurisdictions, allowing others to manipulate the system to their advantage.¹⁴⁷

This refrain has become a powerful intellectual narrative among international law scholars and policy formulators, particularly human rights scholars who embrace a structural approach to the realization of human rights as a Third World cause.¹⁴⁸ As Marks notes, poverty can be deciphered as a causal outcome of the strategic and deliberate policy measures of others.¹⁴⁹ Even the United Nations Office of the High Commission for Human Rights shares the widely held view that the fulfilment of the states' rights mandate, as well as accountability for that, is structured and strained by the global political economy.¹⁵⁰ Indeed, article 3(3) of the Declaration on the RTD enshrines the obligation that states work toward the elimination of all national and international barriers to development that may inhibit the enjoyment of human-centred development.

The RTD is, however, not grounded merely in a critique of structures since the development injustices it seeks to redress are still seen as produced by (to an extent) and steeped in the history of colonialism and imperialism, a praxis in which the economic “advantages” were/are predicated on rules of trade and so on designed to perpetuate not comparative advantage but the very advantages of colonial legacy.¹⁵¹ It is therefore easy to see how the RTD episteme was informed, if only in part, by a Marxist political and intellectual tradition. The common belief of Marxists and structuralists is that historical material processes underpinned by “patrimonial” capitalism and imperialism were central to the production and perpetuation of the conditions of

¹⁴⁷ Alston, “Prevention or Cure”, *supra* note 19 (maintained the position that a human rights approach to development justice requires “the removal of inequities, such as those which deny the right of individuals and nations to participate in making decisions which affect them and which have in many instances become entrenched features of national and international society” at 9). For other versions of structural impediments, see Theresa D Gonzales, “The Political Sources of Procedural Debates in the United Nations: Structural Impediments to Implementation of Human Rights” (1981) 13 Intl L & Politics 427 at 471.

¹⁴⁸ Alston for example argues that the World Bank is so powerful that “its seal of approval frequently encourages the participation of other donors or investors” or their engagement with developing countries. Alston, 2015 Special Report, *supra* note 95 para 1.

¹⁴⁹ Susan Marks, “Exploitation as an International Legal Concept” in Susan Marks ed, *International Law on the Left: Re-examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008) (arguing that exploitation is a structural feature of the “global distribution of power and wealth in the contemporary world” at 282); Susan Marks, “Human Rights and the Bottom Billion” (2009) 1 EU Hum Rts L Rev at 37 [Marks, “The Bottom Billion”].

¹⁵⁰ See also OHCHR & CESR, *Who Will Be Accountable?* *supra* note 137 at 28.

¹⁵¹ Prashad, *The Poorer Nations*, *supra* note 39 at 2.

vulnerability of the colonized peoples over several decades of a colonial encounter with the West.¹⁵²

A word of caution is that despite such prominence of the supranational over national actors, structuralists may not simply turn a blind eye to “explanatory nationalism.”¹⁵³ Explanatory nationalism asserts that injustices existing within a country must be explained from national and not international perspectives. This sort of explanation tends to focus on the national institutional frameworks which must be interrogated for their implications in development injustices.¹⁵⁴ While the structuralist school of thought does not, of course, entirely discount the role of national factors in determining and explaining certain maladies within states, it still demonstrates the growing complexity of the global economy as a potent force in determining outcomes in national contexts. For the structuralists, it is unthinkable that no account would be taken of the undue determinative effect of the global factors and actors on national policy systems. As Pogge explains:

The eradication of poverty in the poor countries indeed depends strongly on their governments and social institutions: on how their economies are structured and on whether there exists genuine democratic competition for political office which gives politicians an incentive to be responsive to the interests of the poor majority. But this analysis is nevertheless ultimately unsatisfactory, because it portrays the corrupt social institutions and corrupt elites prevalent in the poor countries as an exogenous fact: as a fact that explains but does not itself stand in need of explanation.... An adequate explanation of persistent global poverty must not merely adduce the prevalence of flawed social institutions and of corrupt, oppressive, incompetent elites in the poor countries but must also provide an explanation for this prevalence.... Social scientists do indeed provide deeper explanations responsive to this need.... These are nationalist explanations which trace flaws in a country’s political and economic institutions and the corruption and incompetence of its ruling elite back to the country’s history, culture, or natural environment.... From this it does not follow, however that the global economic order does not also play a substantial causal role by shaping how the culture of each poor country evolves and by influencing how a poor country’s history, culture

¹⁵² This argument has been perfectly made by by Ann Seidmann & Robert B Seidmann, “On International Law, Political Economy and the Process of Development” in W Benedek & K Ginther eds *New Perspectives and Conceptions of International Law: An Afro-European Dialogue* (New York: Springer-Verlag 1983) (where they show that “institutionalists” such as Gunnar Myrdal, Samir Amir, and Gunder Frank had focused attention on the institutional explanation of poverty, especially on the inherited colonial structures that existed during the decolonization period. They critique some of the bold neo-classical assumptions as ignoring, therefore inadequate, in giving full account of the structural contingency in their worldview of poverty at 16).

¹⁵³ See Pogge, *World Poverty and Human Rights*, *supra* note 3 at 55.

¹⁵⁴ *Ibid* at 146, 149.

and natural environment affect the development of its domestic institutional order, ruling elite, economic growth and income distribution.¹⁵⁵

This explanatory emphasizes the overly determinative and manipulative role of supranational factors in shaping the direction and outcomes of national policies.¹⁵⁶ This dynamic implies an externalization of framework governance from the Third World state to the global realm whereby “macro” decisions are made by supranational institutions while Third World states are consigned to merely making “micro” decisions. As Okafor notes, “while these “third world” governments still make most of the day-to-day (micro) decisions that affects the lives of their peoples, the framework (macro) decisions as well as the most crucial decisions are increasingly being made and outlined by forces much more powerful than these “third world” states.”¹⁵⁷ The ultimate result is debilitation of states from fulfilling their international obligations. Salomon’s reflections in the context of the RTD sees such disadvantage as rooted in the structural arrangements of the global economy:

The failure to secure the socioeconomic rights of so many people is largely a consequence of a global system that structurally disadvantages half the world population. The contemporary global institutional order—a creation of powerful States—has provided conditions under which extraordinary deprivation continues to be the plight of many, and inequality has been able to flourish. The inequality we know today did not come about under a scheme of equal opportunity and mutual advantage; inequality is not the result of some accidental deviation from neoliberal capitalism, but rather a deliberate product of the international political economy.¹⁵⁸

Institutionally embedded constraints consist of some rules and policies set by international financial institutions as best standards and practices to be emulated across economies.¹⁵⁹ As Salomon has maintained, “[the] continued occurrence of world poverty cannot be disassociated

¹⁵⁵ *Ibid* at 117-118.

¹⁵⁶ Thomas Pogge, “The Role of International Law in Producing Massive Poverty” in Samantha Besson & John Tasioulas eds, *The Philosophies of International Law* (Oxford: Oxford University Press, 2010) 418-419. For a contrary view that the Third World could ignore the global forces, see Franz Fanon, *The Wretched of the Earth* (1963) at 104. Fanon was convinced that if Europe continued its inequitable treatment of the Third World as they had continuously done even after independence, they had the option of choosing to “continue their evolution inside a collective autarky...”

¹⁵⁷ Okafor, “Legitimate Third World Framework Governance,” *supra* note 138 at 18.

¹⁵⁸ Salomon has made this point, while making the case for human rights preoccupation with, and antagonism to, poverty and material inequality. Salomon, “Why it Matters that Others Have More”, *supra* note 20 at 2145.

¹⁵⁹ See further, Margot E Salomon, “International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice” in Bård Anders Andreassen and Stephen P. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd ed. (Antwerp: Intersentia, 2010) at 121; Marks, “The Bottom Billion” *supra* note 139 at 37.

from the global structural environment that produces and perpetuates it, and from the political economy that sustains it and provides some with a disproportionate opportunity for access to wealth.”¹⁶⁰

The structural contingency sensibility suggests a new account of justice in the international development system that radically departs from Western liberal thought on human rights justice. Invariably, this exposes the rigid character of human rights accountability praxis as it stands constructed by conventional international law. Alston has argued that human rights and development disciplines are too rigid and often lose sight of structural violations. In his view:

On the one hand human rights initiatives have foundered because they have sought to treat the symptoms of repression without paying adequate regard to the deeper structural problems which gave rise to the symptoms in the first place. In many instances these problems are rooted in underdevelopment or maldevelopment. On the other hand, development programmes have made only very limited headway, due in large part to their overriding preoccupation with growth in macro-economic terms and their consequent neglect of the human factor. Even today the vast majority of economists and development planners look upon human rights issues as extraneous and largely irrelevant matters, the consideration of which can only hinder efficiency and provoke political controversy.¹⁶¹

In international law, the default principle is that the responsibility of the state that is engaged equally for both its wrongful omission or action, and for failure to restrain harmful conduct of third parties.¹⁶² The structural contingency paradigm discredits these sovereigntist conceptions of justice as shaky and questionable when development justice is sought in the international institutional order. It does so by recognizing the determinative roles of the global institutional order and insisting on an expanded scope of responsibility for justice that encompasses influential supranational actors. The Committee on Economic Social and Cultural Rights has recognized this fact.¹⁶³ Ultimately therefore, the dynamic of structural contingency repudiates the default principle of accountability of the state. It discounts it as a flawed doctrine that too

¹⁶⁰ Margot Salomon, “Legal Cosmopolitanism” *supra* note 6 at 22.

¹⁶¹ Alston, “Prevention or Cure”, *supra* note 19 at 1.

¹⁶² Chapter 5, section 4.1

¹⁶³ This admission has been made by CESCR, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, Geneva, 23 April - 11 May 2001, UN Document: E/C.12/2001/10, 10 May 2001 para 21 “[s]ome of the structural obstacles confronting developing States’ anti-poverty strategies lie beyond their control in the contemporary international order. In the Committee’s view, it is imperative that measures be urgently taken to remove these impediments, such as unsustainable foreign debt, the widening gap between rich and poor, and the absence of an equitable multilateral trade, investment, and financial system.”

simplistically reflects the positivist legalism of rights as negative claims of individuals against public authority. Not much of this sensibility permeates the imperative of accountability as a global justice question.

Second, the dynamic of structural contingency underpins the imperative that the securement of development justice is hinged on constraining the global actors and factors. This is now reflected in the settled understanding of the RTD as the entitlement to “a national and global enabling environment conducive to just, equitable, participatory and human-centred development respectful of all human rights.”¹⁶⁴ This understanding of the RTD as a regulator of the international order helps direct attention to the real root causes of poverty and inequality in the agency and structures of international arrangements.¹⁶⁵ This conception of justice in the international development praxis uncovers the spectre that countries coexist in a world of mutual dependence and growing interconnectedness; a world in which the aspirations of some hinge on, and are imperilled by, barriers inherent in the institutional structures governing development and the international economy.¹⁶⁶ It is this broad perspective that informs the imperative that the realization of development justice would have to incorporate supranational actors into the global accountability politics.

There is a third insight to be derived from the dynamic of structural contingency of development. We get an explanation of the way international law is implicated in the avoidance and evasion of accountability for global development injustices by IFIs. This dynamic blurs the possibility of ascertaining the distinct identity of actors through what I called the intermingle effect.¹⁶⁷ In the guise of collective decision-making (in which states are bound to adhere to

¹⁶⁴ *HLTF Report*, *supra* note 131 at 9. See also preambular paragraph 11 and 22 of the draft Convention on the Right to Development.

¹⁶⁵ Arjun Sengupta, “Conceptualizing the Right to Development for the Twenty-first Century” in United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013) at 80 [Sengupta, “Conceptualizing the Right to Development”]. He contextualizes this phenomenon in the contemporary context from a RTD perspective. “The process of managing market-based global economic integration to deliver a desired process of development in general, and the fulfilment and realization of the right to development in particular, is bound by a major inherent constraint. The constraint arises because such a process of globalization tends to favour those with better endowments and greater command over resources....”

¹⁶⁶ Carol Chi Ngang & Serges Djoyou Kamga, “Poverty Eradication Through Global Partnerships and the Question of the Right to Development Under International Law” (2017) 47:3 *Africa Insight* (“...the narrative in developing countries has rather meant programmed poverty, shaped by global politics and a structured world order that is designed to deprive developing countries of the capability to compete on a fair and equitable basis with the rest of the world at 44). See also Salomon, “Why it Matters that Others Have More”, *supra* note 20 at 2145.

¹⁶⁷ I draw guidance from Iris Marion Young, “Responsibility Across Borders” in Iris Marion Young, *Responsibility for Justice* (New York; Oxford: Oxford University Press, 2011).

standardized norms and rules), the structure of the global policy system unifies into an integrated and complex whole. In these complexes, there is an intermingling of global with national factors. Because of the intermingle effect, actors become undifferentiated, actions become aggregated, multiple policies entangle, causal links dissipate, and distributional outcomes cannot effectively be linked to any specific agent in the assignment of responsibility.¹⁶⁸ This makes it improbable to ascertain the identifiability of actors, the discernibility of effects or outcomes of decisions, for purposes of allocating responsibility for harms.

I contend that contemporary accountability discourse ought to reflect or account for the structural contingency of development, which operates through the intermingle effect. This is a crucial insight brought about by the RTD counter-hegemonic view of the universe. Mainstream international law and development scholarship has articulated this crucial insight in nearly insufficient and un-penetrating detail. In fact, development accountability theories have often tended to empiricize and attribute a large degree of agency for the structural maladies to the state.¹⁶⁹ The reason for this is that international law does not, sufficiently enough, treat causes of global maladies (i.e. poverty, inequality, climate change migrations, forced displacements and refugee crisis, transnational crimes) as traceable or linkable to the agency and complicity of the international institutional setup. By this neglect, the global financial regimes or transnational factors are treated as epiphenomenon, often within the rubric that “the effects of IFIs [are] additional independent factors affecting the level of governments’ respect for human rights of their citizens.”¹⁷⁰ This interactional and statist way of understanding causes of development injustices makes it difficult to easily locate and recognize the responsibility for such maladies in the international institutional structures. Therefore, to realize development justice, international politics and practices of accountability ought to recognize, account for, and articulate the structural nature of violations rooted in the unfair and unjust global system and political practices.

¹⁶⁸ Salomon, *Global Responsibility for Human Rights* *supra* note 9 at 186.

¹⁶⁹ Sundhya Pahuja, “Global Poverty and the Politics of Good Intentions” in Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford; Portland: Hart Publishing, 2014) at 37.

¹⁷⁰ M Rodwan Abouharb & David Cingranelli, *Human Rights and Structural Adjustments* (Cambridge: Cambridge University Press, 2007) at 57.

6. CONCLUSION

This chapter has argued that the legalization of the Third World claims for development justice, the contestations of the global structural arrangements as human rights claims, and the subsequent merger of human rights principles with development conceptions reflected in the RTD normative framework are the ultimate exemplifications of counter-hegemony. I have argued that the unusual trend of hybridizing rights and development to oppose paradigms of domination is one sense in which the Declaration confers into the broader human rights corpus a counter-hegemonic right standard. This way, the RTD episteme challenges the core assumptions of development and international law. This is a feature that ought to be considered in the conceptualization of an effective accountability praxis for the furtherance of development justice. Two ways in which the Declaration enforces this dynamic is its entrenchment of a *sui generis* right and the notion of the structural contingency of development. The consciousness about the structural contingency of development is a dynamic that recognizes the causes of development injustices in, and looks to accountability at, the global level. In the next chapter, I discuss how the assimilation of human rights objectives into global development objectives has sparked off divergent thoughts and practices of accountability that ignore the structural contingency phenomenon.

CHAPTER THREE

THE INTEGRATION OF A HUMAN RIGHTS AGENDA INTO DEVELOPMENT POLICY PRACTICE

1. INTRODUCTION

Contemporary cosmopolitan usages of rights such as the integration of human rights and development that has been infused within the RTD discourse have tended to tackle the question of redressing and ameliorating the accountability deficits in the realm of development.¹ And yet such discourses tend to be defanged of the capacity to secure the direct and distinct accountability of global development institutions. Discourses such as a human rights approach to development (HRAD) and the regime of follow-up and review deployed in the implementation of SDGs are some of the accountability debates embracing the vision of the accountability of all actors in development. They tend not to focus, as vigorously enough, on remedying and ameliorating the structural injustices. Simply stated, they do not present a genuinely transformative ambition to root out structural injustices and inequities present in international development policy practices. In this chapter, I critically examine this discrepancy by looking at the effect of contemporary policy debates and practices that seek to integrate human rights and development. The integration of human rights and development becomes transformative and radical when infused with the RTD discourse.² The notion of human rights and development being mutually beneficial is, of course, now fairly axiomatic, having even been accepted as a policy paradigm in the mainstream development thinking of the UN.³ Notably, the integration of development and human rights has

¹ OHCHR, “Integrating Human Rights into the Post-2015 Development Agenda Follow-up and Review: Ensuring Accountability for the SDGs”

online: <<http://www.ohchr.org/Documents/Issues/MDGs/Post2015/AccountabilityAndThePost2015Agenda.pdf>> [OHCHR, “Ensuring Accountability for SDGs”]; United Nations General Assembly, “*The Road to Dignity by 2030: Ending Poverty, Transforming all Lives and Protecting the Planet*” Synthesis Report of the Secretary-General on the Post-2015 Sustainable Development Agenda A/69/700 4 December 2014 at para 146 [UNGA, *The Road to Dignity*]; OHCHR, Statement by the High Commissioner, “Looking Back at History: Building the Post-2015 Agenda on the Foundation of Human Rights”, UN Trusteeship Chamber, 13 December, 2013.

² The question of “mutual reinforcement” of human rights and development or their “tremendous coalescence” form the substratum of the first two chapters of Alston and Robinson’s edited book. See Philip Alston & Mary Robinson, “The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours” in eds, *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005) at 1 [Alston & Robinson, *Towards Mutual Reinforcement*]; James D Wolfensohn, “Some Reflections on Human Rights and Development” in Alston and Robinson, *Towards Mutual Reinforcement*, *ibid*.

³ United Nations General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development* Resolution adopted by the General Assembly on 25 September 2015 A/RES/70/1 para 7-10 [UN, *Transforming Our World*]; Katarina Tomaveski, *Development and Human Rights* (London: Printer Publishers, 1989) at 21 traces the

produced and reproduced the constant alteration of the global development agenda to encompass far broader commitments such as sustainable development goals (SDGs) and accountability. The RTD has been an integral part of this ambitiously ascendant discourse.

This chapter investigates the way the human rights and development interface is being embedded into the debate on mainstreaming and operationalizing the RTD discourse in international law and development. I examine how this interface continues to spur policy shifts and adjustments in both the thinking and practice of development, particularly in relation to the question of accountability for the actualization of development justice. I probe the notion of structural transformation undergirding attempts to integrate human rights and development. I examine the implication of this transformation on the question of the accountability of international financial institutions (IFIs) for their development policies and practices that further engender poverty and material inequality.

In section two of this chapter, I delve into a brief historical overview of the human rights and development interface. I focus on its implication as a specific strategy for deepening the struggle for development justice in the Global South. In this regard, I examine changing policy paradigms in development, from Millennium Development Goals (MDGs) to SDGs—global commitments grounded on, and linked to, furthering the realization of the RTD.⁴ Specific to this inquiry is an examination of how the RTD discourse/praxis has been one integral part of this transformation. I explore how the RTD sensibility has broadened the scope of the international human rights corpus by assimilating into its purview the social objectives of development.

In section three, I examine the implications of human rights' crossover into development. Along these lines, I critically examine how the ideal of development justice has become embodied in both the RTD regime and the SDGs policy framework. The first way in which this has occurred is their (partly) shared push against poverty and material inequality. The second conception of development justice that the RTD and SDGs share (albeit to varying extent) is the duty of cooperation and enhancement of global partnerships for the elimination of structural barriers to development.

linkage of human rights and development in the UN language from 1966 where it was reported that everything done in the name of the United Nations was to promote the implementation of human rights.

⁴ UN, *Transforming Our World*, *ibid.*

Against this background, section four then examines the way in which the endurance of human rights talk in development continues to shape different normative understandings of accountability politics in relation to states, IFIs, and private actors. I discuss, broadly, (i) the policy rhetoric of a human rights approach to development (HRAD); (ii) the issue of the differentiation of the responsibilities of various development actors (or the question of “to whom are the responsibilities addressed”); and (iii) the regime of “follow-up and review of progress” instituted within the SDGs agenda. In general, these are some of the dominant discourses representing different perspectives on accountability in the realm development policy practice.

I note that the HRAD continues to resonate in much academic and mainstream development thinking as an approach primarily concerned with accountability, predicated on the idea that rights imply duties on actors. Debates on the question of “to whom are the responsibilities addressed” seeks to clarify the differentiated and direct obligations of actors and performance criteria in relation to the duties imposed by the Declaration on the RTD. The regime of “follow up and review of progress” is strongly emerging as the desired accountability regime in the implementation of SDGs at the UN level.⁵ This chapter pursues the claim that these regimes are also the sites where the challenge of the direct and distinct accountability of IFIs in development cooperation is profoundly entrenched.

2. AN OVERVIEW OF THE INTEGRATION OF DEVELOPMENT AND HUMAN RIGHTS

This subsection discusses the history of the integration of human rights and development. It discusses how their integration came to be transformed into the SDGs push against poverty and material inequality.⁶ It demonstrates that the RTD has been a key and unaltered feature of the human rights and development interface as part of the human rights framing of justice in development.

Historically, the Declaration on the RTD has been viewed by many as one of the UN instruments that integrated these two realms of practice. By this perceived hybridization, the

⁵ *Ibid.*

⁶ For a historical overview of human rights and development interconnectedness, see Hans-Otto, “Development and Human Rights: The Necessary, But Partial Integration of Human Rights and Development” (2000) 22 Hum Rts Q 741-742.

Declaration provided a normative framework for development's turn to human rights.⁷ Put differently, the Declaration authoritatively reclaims the notion of the deep interconnectedness of human rights and development from the level of abstraction, gives it operational expression, and specifies its underlying principles.⁸

This character of the RTD in the context of the development enterprise may seem a very recent phenomenon. However, its pedigree is long and deep. It predates previous global development commitments such as the UN Millennium Declaration or the current 2030 Sustainable Development Agenda.⁹ Indeed, the reconceptualization of “development as freedom,” or the utility of rights standards and principles in the development enterprise, was instantiated much earlier by the Third World approach to development.¹⁰ It was a narrative that emphasized that the development process has a complex character and that human rights (the social) was only one of its multiple dimensions.¹¹ At the UN level, this debate on the RTD focused on the structural injustices present in the development process.¹² The UN Debates made explicit reference to structural inequality as a human rights concern, an incipient form of the human rights framing of justice in development.¹³ But even with these early acknowledgements of the interconnectedness

⁷ See Peter Uvin, “From the Right to Development to the Rights-based Approach: How ‘human Rights’ Entered Development” (2007) 17:4-5 *Development in Practice* at 597 [Uvin, “How Human Rights Entered Development”].

⁸ Alston & Mary Robinson, *Towards Mutual Reinforcement*, *supra* note 2 at 2.

⁹ Pellet argued that the relationship or confluence between international development and human rights was not previously emphasized, though there was close linkage between the two if one was to examine the broader UN Charter (Articles 1(3) and 55); Articles 22 and 28 of UDHR, paragraphs 3 of the Preambles of ICCPR and ICESCR and paragraphs 12 and 13 of Tehran Declaration. Alain Pellet, “The Functions of the Right to Development: A Right of Self-realization” (1984)3:9 *Third W Legal Stud* 129 at 131.

¹⁰ “Development appears less as a separate right than as the totality of the means which will make economic and social rights effective for the masses of people who are grievously deprived of them.” This quote appears in *The International Dimension of the Right to Development as a Human Right in Relation to Other Human Rights Based on International Cooperation, Including the Right to Peace, Taking Into Account the Requirements of the New International Economic Order and the Fundamental Human Needs*, Report of the Secretary General, UN Doc. C/CN.4/1334 of 2 January 1979. [Secretary General’s Report] at 35 quoting Jean Rivero, “Sur le, Sur le droit au développement” (paper SS-78/CONF,650/2), p. 3.

¹¹ Tamara Kunanayakam, “The Declaration on the Right to Development in the Context of the United Nations Standard-setting” in United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013) (argues that the various principles enshrined in the RTD to development draw from and were already identified in the United Nations instruments and the Declaration of Philadelphia, General Conference of the International Labour Organization (1944), UDHR, among others at 18).

¹² Issa G Shivji, “Constructing a New Rights Regime: Promises, Prospects and Problems” (1999) 8:2 *Social and Legal Studies* 253; Philip Alston, “Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy” International Commission of Jurists Conference on Development and the Rule of Law, The Hague, 27 April- 1 May 1981 at 9.

¹³ See Proclamation of Tehran, Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968, UN Doc. A/CONF.32/41 (1968), para 12. See also “The Widening Gap: A Study of the Realization of Economic, Social and Cultural Rights”, UN Doc. E/CN.4/1131 (1 January 1974) later published by the Commission

of development and human rights, in the field of development practice, human rights were often neglected as it was not yet clear what relevance, let alone role, they would play in development. This explains why human rights and development existed in almost impenetrable isolation for a long time, until the 1970s, when it was being urged that there should be respect for human rights in the development agenda and its practices.¹⁴

Today, however, it is axiomatic that development has enormously expanded both its target and objectives to include myriad issues, such as the environment, governance, poverty, the rule of law, inequality, and human rights, among others.¹⁵ Linked to this fundamentally altered conception of development is the concept of “sustainable development,” itself part of the evolving conception of development as normatively based on and operationally directed to the promotion of human rights. The UN human rights agenda reflects this as the contemporary paradigm.¹⁶

The true import of this interconnectedness is that relevant human rights norms, principles, and standards are applicable to development policy practice.¹⁷ This integration also signals that development has to secure the enjoyment of all freedoms; and all of them together, or as an integrated whole.¹⁸

on Human Rights as Manouchehr Ganji, “The Realization of Economic, Social and Cultural Rights: Problems, Policies”, UN Doc. E/CN.4/ 1108/Rev.1 (1975).

¹⁴ This issue has been theorized in major works. For similar views from development and human rights policy practice at the level of the United Nations, see Report of the Secretary-General, “In Larger Freedom: Towards Development, Security and Human Rights for All” UN doc. A/59/2005, March 2005, 21 March 2005 at para 14[UN, *In Larger Freedom*].

According to Rittich, the shift to a new strategy in the 1990s, in which development is required to correspond to social objectives, was kindled by two factors. One factor was the mounting discontentment (from Third World counter-hegemony) with the parochial Washington Consensus and its associated policy instruments. These policies were perceived to be leaning in favour of markets and were discredited on numerous grounds, chief among them being their rigid conception and narrow purview, failure to sustain growth and stem the tide of poverty, and perceptions of mandate creep into the sovereign domains of states through policy advisories. Two, she argues that the reforms that international financial institutions adopted in the turn of the millennium cannot only be rationalized from the perspective of failure of growth-centred development, they must also be construed in light of the emerging academic imaginations such as the work of Amartya Sen on Development as Freedom that fundamentally reconceived development as the furtherance of capabilities (ability and freedom to choose) and live a fulfilling life. Kerry Rittich, “The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social” (2004) 26 *Mich J Intl L* at 201-202 [Rittich, “The Future of Law and Development”].

¹⁵ Hans-Otto, *supra* note 6.

¹⁶ United Nations Office of the High Commissioner for Human Rights, *Frequently Asked Questions: Fact Sheet No. 37* (United Nations: New York and Geneva, 2016) at 14 [OHCHR, *Frequently Asked Questions*]

¹⁷ Andrea Cornwall & Celestine Nyamu-Musembi, “Putting the ‘Rights-Based’ Approach to Development into Perspective” (2004) 25:8 *Third World Q* 1415.

¹⁸ This is the gist of Article 1 of the Declaration on the RTD read together with the Preamble, which defines development as “a comprehensive economic, social, cultural and political process, which aims 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.”

This ideal of justice, which the Declaration on the RTD embodies, as a matter of legal commitment, is reflected in the ambitious and sophisticated notion of development as “normatively based on and operationally directed” to the promotion of human rights.¹⁹ It is for this reason that the principles that the Declaration enshrines are also viewed as constituting the guiding values for the SDGs, particularly in relation to the social and economic sustainability of development.²⁰ This commitment to a human rights framing of justice in development is expressed, in part, in the Declaration’s push against poverty and inequality and in the vision of eliminating structural barriers to development through international cooperation and global partnerships.²¹ This is what I call the human rights framing of justice, a framing that presupposes the elimination of structural causes of poverty and inequality. It is in this way that I see the Declaration on the RTD as embodying a clear global commitment to development justice.

The quest for a new form of justice is reflected in the way the SDGs are viewed as being predicated on a sense of moral obligation to leave “no one behind.”²² This is further reinforced by “an ethic of global citizenship and shared responsibility” as the new basis of solidarity and justice of the international community.²³ This rationalization affirms a people-centric and rights-based approach to development. It is this type of cosmopolitan justice that is reflected in the increasing articulation of the SDGs as bearing the imprint of “a transformative human rights-based development agenda.”²⁴ This form of justice is anchored to human rights standards, based on an overstatement of the post-2015 global agenda as being explicitly premised and “grounded on the UN Charter, the Universal Declaration of Human Rights, international human rights treaties and other instruments, including the Declaration on the Right to Development.”²⁵ Accordingly, the emergent human rights framing of justice in development seems to be rationalized on the sensibility that the new framework is unequivocally anchored to rights standards, its ultimate aim

¹⁹ The phraseology “normatively based” and “operationally directed” is derived from OHCHR, *Frequently Asked Questions on a Human-Rights-based Approach to Development* (New York & Geneva: United Nations, 2006) at 14 [OHCHR, *Frequently Asked Questions on a HRA*].

²⁰ United Nations, *Addis Ababa Action Agenda on the Third International Conference on Financing Development* (New York: United Nations, 2015).

²¹ Margot Salomon, “Why Should it Matter that Others Have More? Poverty, Inequality and the Potential of International Human Rights Law”, (2011) 37 *Rev of Intl Studies* 2137 at 2143.

²² UN, *Transforming Our World*, *supra* note 3 para 4.

²³ *Ibid* para 36.

²⁴ OHCHR, “Ensuring Accountability for SDGs” *supra* note 1.

²⁵ UN, *Transforming Our World*, *supra* note 3 para 10.

to realize the well-being of all humans. The Declaration avails that framework in seeking a new vision of justice in development.

The new vision of justice espoused in the sustainable development agenda, in its social and economic dimensions, is one of the contemporary discourses articulating a strong commitment to the RTD's core promises of human-centred development, social justice, and equity. These aspirations are enmeshed into the vision of eradicating poverty, reducing inequality, and enhancing global cooperation (partnerships) for development.²⁶ Indeed, this promise of justice has been the overarching posture of the RTD in policy and diplomatic debates, where it is seen as a commitment to tackle “the failure of a half-century [and more] of decolonization and development cooperation to eliminate poverty and achieve the objectives of numerous development strategies.”²⁷ By building on the “core promise” of the Declaration, the SDGs express a bold consensus by the international community to a rights-based development agenda, with accountability of all actors being at the centre of policy focus.²⁸ The SDGs agenda is significant for the realization of the RTD in international development practice.²⁹ Policy analyses do indeed acknowledge that, as a framework of universal and common understanding, the SDG framework is anchored to, mutually reinforces, complements, and advances most of the RTD's core values of human development, equity, and social justice.³⁰

As I have stated in the introduction of this chapter, the integration of human rights and development signified a normative change in the way development has been historically viewed. By foregrounding an awareness about human rights as the underpinning framework for the materialization of development justice, this interface became an indication that it was no longer tenable to hold onto the orthodoxies and definitions of development in the conventional

²⁶ Sustainable development has environmental, economic and social dimensions. According to International Law Association, *Report of the Sixty-Sixth Conference, 67 International Law Association Reports of Conferences* (1996) at 290, sustainable development implies “a programme of global validity, shared by environmentalists, economists and developmentalists, which should be attuned to human and environmental needs alike, anywhere in the world.”

²⁷ Stephen P Marks, “The Human Right to Development: Between Rhetoric and Reality” (2004) 17 *Harv Hum Rts J* 137 at 139.

²⁸ UNGA, *The Road to Dignity*, *supra* note 1 paras 7, 18-19, 146.

²⁹ UN, *In Larger Freedom*, *supra* note 14 at para 14, 16.

³⁰ UN, *Transforming Our World*, *supra* note 3 para 7-10; Mac Darrow, “The Millennium Development Goals: Milestones or Milstones? Human Rights Priorities for the Post-2016 Development” 15 *Yale Hum Rts & Development L J* 55.

(modernist) fashion. It also served to illustrate that the concept of development is capacious enough and capable of accommodating alternative understandings of justice in the economic realm.³¹

Accompanying this change in the ways in which development has been conceptualized is the projection of the human person as the central subject, not the object, of development.³² Today, this view is dominant in the idea that human rights realized through development initiatives should foster human well-being. This reworking of the meaning of justice in development within human rights frames continue to spur fundamental shift even in development thinking. Thus, the freedoms that people enjoy are nowadays considered the means, ends, and parameters of development geared toward “expanding the capabilities and choices of individuals and peoples to improve their well-being and to realize what they value.”³³ This new appeal rests on the recognition that human rights and development are so interrelated in object that, although they are different in strategy and implementation, they are compatible and intertwined. Influenced by human rights theories, this specific policy paradigm of development thinking emphasizes the social objectives in development, a broader vision of development as operationally directed to the improvement of well-being. The common academic thinking about the social objectives of development is captured in the dominant conception that rights are constitutive of, and instrumental to, development.³⁴

This framing—accompanied by an enlarged vision of development as constituted by social, human, governance, structural, and environmental dimensions—has percolated deeply through international development discourses. It has been the central plank of human development strategies implemented by development institutions such as the UNDP and the Bank since the 1990s. What is most crucial about the expansion and transformation of development vision is that it has centred the human rights dimension of development within the development enterprise.³⁵

³¹ Ali Burak Güven, “The World Bank and Emerging Powers: Beyond the Multipolarity–Multilateralism Conundrum” (2017) 22:5 *New Pol Econ* 496 at 500. See also Ben Fine, Costas Lapavistas and Jonathan Pincus eds, *Development Policy in the 21st Century: Beyond the Post-Washington Consensus* (London: Routledge, 2001) at xii.

³² United Nations, Office of the High Commissioner for Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, 12 July 1993.

³³ The conceptualization has been formulated by Amartya Sen, *Development as Freedom* (New York: Oxford University Press, 1999) at 24-5, 36. However, it has been extrapolated into the context of the RTD by Arjun Sengupta, “On the Theory and Practice of the Right to Development” (2002) 24:4 *Hum Rts Q* at 851 [Sengupta, “Theory and Practice of the Right to Development”].

³⁴ Sen, *ibid* at 36.

³⁵ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) [Rajagopal, *International Law from Below*] 137; Tahmina Karimova, *Human Rights and Development in International Law* (London/New York: Routledge, 2016) at 50 [Karimova, *Human Rights and Development*].

This “developmentalization of human rights” has been witnessed in the Bank’s practice of constantly adjusting its development strategies to focus on broader social issues such as poverty, education, gender, health in, for instance, the Comprehensive Development Framework and the Poverty Reduction Strategy Papers.³⁶

The other aspect of the expansion of the development agenda is its contribution to the search for a fair and equitable international order based on the respect for human rights. This is one area where the RTD discourse has made a significant contribution. As I stated in the previous chapter, the institutional and normative expansion of development apparatus was ignited by the aspiration for structural transformation underpinning development’s embrace of human rights. The Declaration on the RTD particularly espouses structural change as a strategy in the quest for development justice.³⁷ This is to be found in the various UN policy documents showing a concern with development injustices rooted in the structural organization of the global economy. The global justice agenda that the RTD has inspired focuses on, among other commitments, alleviating extreme poverty, reducing inequalities, and eliminating structural barriers to development in the Global South.

The integration of human rights and development is however not without its downsides. For example, the good governance narrative that represents neo-liberal logic has been championed by the Bank as being consistent with human rights, but only if human rights can be rationalized in terms of free market values in the areas of trade, finance, commerce. As Gathii argues, “[the] World Bank has, therefore tended to support only those rights that fit within the ascendant laissez-faire commitments.”³⁸ Baxi has also argued that ultimately, within this paradigm, it is only those rights that privilege private property and freedom of contract that attract the support the Bank and IMF.³⁹ In other words, at the level of development policy practice, there is a policy hypocrisy masking the deep fragmentation between human rights objectives and the development agenda. Shivji maintains that the reason for the development and human rights fragmentation, at least in their divergent visions of justice, is due to what he calls the “grafting” of development agenda onto

³⁶ Rittich, “The Future of Law and Development”, *supra* note 14 at 202; Ronald Janse, “(Why) Was the World Bank Supposed to Be a Non-political Organization? An Interpretation of the Original Meaning and Rationale of Article 4(10) of the Articles of Agreement of the International Bank for Reconstruction and Development, 1941–1948” (2014) 16 *Journal of the History of Intl L* 16 at 115.

³⁷ Karimova, *Human Rights and Development*, *supra* note 35 at 56.

³⁸ James Gathii, “Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law” *Buffalo Human Rights Law Review*, 107 (1999) 107 at 122.

³⁹ Upendra Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2006) at 289-294.

the hegemonic human rights discourse.⁴⁰ In other words, even though international law recognizes the interface and mutuality of the human rights and the development realms, one fundamental drawback is that it has not crystallized a language of distinct and direct obligations for IFIs in this regard.

3. THE CONTEMPORARY IMPLICATIONS FOR DEVELOPMENT JUSTICE OF THE INTEGRATION OF HUMAN RIGHTS AND DEVELOPMENT

The main aim of this section is to examine how old and new invocations of the human rights dimension of development have both constructed and continue to construct the quest for development justice. Development justice is the very thing for which an effective regime of accountability is being sought. I examine two spaces where the RTD regime envisions the protection of human rights in development policy, practice, and processes. These are: (i) the push against poverty and material inequality; and (ii) the aspiration of eliminating structural barriers to development.⁴¹ It is by focusing on these two issues that I can advance this dissertation's hypothesis that there ought to be a reformulation and recalibration of our understandings and assumptions of accountability in the merged disciplines of development and human rights.

3.1 The RTD's Push Against Poverty and Material Inequality

That global poverty and material inequalities is a development justice question for which the RTD seeks to find a panacea is not in doubt.⁴² Concerns for poverty and inequality informed the Millennium Declaration, which sought to free humanity from the "abject and dehumanizing conditions of extreme poverty" and of "making the realization of the right to development a reality for everyone."⁴³ The Millennium Declaration gave birth to the MDGs and called for "special

⁴⁰ Issa G Shivji, "Human Rights and Development: A Fragmented Discourse" in Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford; Portland: Hart Publishing, 2014) at 61.

⁴¹ In this section, I narrow my focus to the UN's 2030 SDGs policy schema, one of the global policy commitments that explicitly enumerates a development agenda that overlaps with, strengthens, and aims to further the realization of the RTD.

⁴² Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007) at 113. The concern with poverty and inequality in the context of the implementation of SDGs has been highlighted by Saad Alfaragi, *United Nations Special Rapporteur on the Right to Development: An introduction to the Mandate* (United Nations Human Rights Special Procedures: 2017) at 5 online: <https://www.ohchr.org/Documents/Issues/Development/SR/SRRightDevelopment_IntroductiontoMandate.pdf>

⁴³ United Nations Millennium Declaration General Assembly resolution 55/2 of 8 September 2000:

III. *Development and poverty eradication*, para. 11:

measures to address the challenges of poverty eradication and sustainable development in Africa.”⁴⁴ The MDGs marked a global policy shift toward recognizing the clear intersection or overlap between human rights and development objectives.⁴⁵ The MDGs served to prioritize—to an extent—the realization of economic, social, and cultural rights.⁴⁶ Even though there were misgivings about the MDGs not being sufficiently aligned with the human rights agenda as well as concerns that the linkages between development and human rights were not quite clearly explained or understood in the Millennium Declaration⁴⁷ the MDGs were nonetheless adopted as a commitment to tackling poverty across the globe.

Subsequently, the SDGs have also come to endorse the consensus and commitment by the international community to ending poverty and reducing inequalities as part of the broader vision of social transformation in development.⁴⁸ As the current Special Rapporteur on the RTD has made clear in his first statement, poverty and inequalities are a concern for the RTD community.⁴⁹ Even Bretton Woods Institutions have embraced the social sustainability dimension of the 2030 Agenda for Sustainable Development (which gave rise to the SDGs) as part of their commitment to tackling extreme poverty through explicit strategies.⁵⁰ The UN General Assembly has lauded this commitment by its special agencies, funds and programmes urging them “to mainstream the right

“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”.

V. *Human rights, democracy and good governance*, para. 24:

“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”.

See also UN, *Transforming Our World*, *supra* note 3 para 7-10.

⁴⁴ Millennium Declaration, *ibid* para 28.

⁴⁵ UNDP, *Human Development Report 2003-Millennium Development Goals: A Compact Among Nations to End Human Poverty* (New York & Oxford: Oxford University Press, 2003) at 29.

⁴⁶ United Nations General Assembly, *Road Map Towards the Implementation of the of the United Nations Millennium Declaration (Secretary General Report)*, UN Doc. A/56/326 (2001) para 262.

⁴⁷ Office of the High Commissioner for Human Rights, *Claiming the Millennium Development Goals (MDGs)* (Geneva: OHCHR; 2008); Philip 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” (2005) 27 *Hum Rts Q* at 760. Further, for the view that MDGs were not sufficiently defined in human rights terms, see Takhmina Karimova, “The Nature and Meaning of ‘International Assistance and Cooperation’ Under the International Covenant on Economic, Social and Cultural Rights”, in Eibe Riedel, Gilles Giacca, and Christophe Golay eds, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014) at 183.

⁴⁸ UNGA, *The Road to Dignity*, *supra* note 1 para 7, 18-19.

⁴⁹ Alfaragi, *supra* note 42 at 5.

⁵⁰ Development Committee, “Update: The Forward Look and IBRD-IFC Capital Package Implementation” April 2019 online: <<https://www.devcommittee.org/sites/www.devcommittee.org/files/download/Documents/2019-04/DC2019-0003-PIBRDIFC%20capital%20package%204-13.pdf>>.

to development into their objectives, policies, programmes and operational activities, as well as into development and development related processes.”⁵¹

This conception of justice in the international development order marks a development approach that introduces certain hard questions regarding the need for development justice. This form of justice emphasizes that structural issues, such as the eradication of poverty and inequality, falling explicitly within the purview of economic development objectives ought to be translated from charitable claims or benevolence into a language of obligations and duties.⁵² As the Special Rapporteur on the RTD has said, the SDGs address “systemic and structural issues and root causes of poverty, inequality and conflict ... so that individuals and peoples may live with freedom.”⁵³ The real issues raised by this form of justice are threefold: first, to quote Salomon, “why it matters that others have more?”⁵⁴ (SDG 10 on reducing inequalities between and within nations), and second, issues of material deprivation and the debilitation of human capabilities (SDG 1 on ending poverty). Addressing systemic root causes introduces the third issue, which is about the alleviation of institutionalized structural constraints (SDG 17 on strengthening the means of implementation and revitalizing global partnerships for development).

The import of this is that certain SDGs not only converge but also elevate and provide a platform for the realization of the RTD’s objective of attaining human well-being, social justice, and equity in development.⁵⁵ SDG 1 on ending poverty enunciates this focus on human development and the improvement of human well-being.⁵⁶ On the other hand, SDG 10 on reducing

⁵¹ General Assembly Resolution adopted by the General Assembly on 18 December 2019 A/RES/74/152.

⁵² Cornwall and Nyamu-Musembi, *supra* note 17 at 1417.

⁵³ Alfaraagi, *supra* note 42.

⁵⁴ Salomon, ‘Why Should it Matter that Others Have More?’ *supra* note 21 (“So their poverty is, in important ways, a result of being dispossessed of what belongs to them and if ‘returned’ would redress their dire state. Put another way, why should it matter that others have more? Because much of what they have belongs to other people, and moreover, those people do not have enough. Second, as noted above, financial resources necessary to eradicate poverty exist alongside the persistence of mass deprivation. This establishes that the problem of world poverty is not one of scarcity but of unequal distribution” at 2144).

⁵⁵ See Mihir Kanade, “The Right to Development and the 2030 Agenda for Sustainable Development”, in Mihir Kanade and Shyami Puvimanasinghe eds, *Operationalizing the Right to Development for Implementation of the Sustainable Development Goals, E-learning module* (OHCHR, UPEACE, and UNU-IIGH, 2018) online: <<https://www.ohchr.org/Documents/Issues/Development/SR/AddisAbaba/MihirKanade.pdf>>. For these two goals, the ideal of development justice, undergirded by the goal of alleviating poverty and reducing inequality between and within nations, strikes at the core of a conception of development as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the wellbeing of the entire population and of all individuals.”

⁵⁶ Sumudu Atapatu & Sean S Fraser, “SDG 1 On Ending Poverty in All its Forms: Contributions of International Law, Policy and Governance” at 3 online: <http://cisdl.org/public/SDG%20Icons/SDG_1_Poverty_-_Issue_Brief_-_UNEP_CISDL_-_13.07.2016_-_Final.pdf>.

inequalities within and among countries is another economic dimension of the SDGs agenda directly linked to the RTD.⁵⁷ Accordingly, the logic of a poverty-free world and a world of reduced inequality is consistent with the RTD's ethos of well-being, social justice, and equity in the distribution and outcomes of development. It is this very dynamic that partially grounds the notion of development justice, the idea that there must be equity and fairness in the distributive outcomes of development.

Sadly, the World Bank itself concedes that, as novel as it is, this relatively more robust policy paradigm (of deepening the social transformation potential of development) has not permeated as deeply as it ought international development institutions' understanding of their legal commitments.⁵⁸ It observes that this kind of policy thinking has also not translated into a legal position at the level of development financing or development cooperation so as to utilize legal sanctions to encourage or cajole aid agencies to adhere to a legal obligation to work toward development justice.⁵⁹ And yet, the imperative of accountability is so paramount for the development donor industry and for the success of international development cooperation.⁶⁰ The apt question is: what legal obligations does this framing of justice (push against poverty and material inequality) impose in international development cooperation and global partnerships for the realization of SDGs? How can we strengthen principles that presuppose the direct and distinct accountability of actors in global partnerships for development?

On poverty as a human rights question with specific reference to the RTD, see Irene I Hadiprayitno, "Poverty" in OHCHR, *Realizing the Right to Development*, *supra* note 11 at 137-149.

⁵⁷ For the idea that inequality constitutes a challenge to the realization of the RTD's objective of development justice, see "UN Experts Urge More Action on Inequalities that Threaten Peace and Security, Development, and Human Rights" online:

<<https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=23969&LangID=E>>. For the idea that inequality is a human rights question, see Juan Pablo Bohoslavsky, "Economic Inequality, Debt Crises and Human Rights" (2016) 41: 2 *The Yale J Intl L Online* 177 at 179; *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights*, Juan Pablo Bohoslavsky UN Doc. No. A/HRC/28/59.

⁵⁸ The Bank and OECD have acknowledged this fact. See, World Bank & OECD, *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges*, 3rd ed, (Washington DC: World Bank, 2016) at 13.

⁵⁹ *Ibid.*

⁶⁰ See Kunibert Raffer, "International Financial Institutions and Financial Accountability" (2004) 18:2 *Ethics Intl Aff* 61 at 63.

3.2 The Duty of Cooperation and Global Partnerships in the Elimination of Structural Barriers to Development

Concerns with the alleviation of institutionalized structural constraints are reflected in SDG 17 on strengthening the means of implementation and revitalizing global partnerships for development, which reflects the RTD concern with eliminating structural barriers to development.⁶¹ Indeed various provisions of the Declaration on the RTD are interpreted as endorsing a transformed sense of the duty of states to cooperate within a contemporary understanding of global partnerships.⁶² According to the General Assembly, the envisaged duty is that of “effective international cooperation, in particular to revitalize a global partnership for development, for the realization of the right to development and the elimination of obstacles to development.”⁶³ By and large, these obligations are conceived as tools for eliminating structures and impediments to development that engender national and global inequalities and poverty.⁶⁴ These provisions have been interpreted as imposing legal obligations on states to promote human rights and development through international cooperation.⁶⁵ Read from the RTD perspective, these provisions emphasize that elements of a programme to implement international development cooperation should focus attention on those forms of structural impediments and disequilibrium in development financing that may impair the realization of human well-being.

Sanctioning global cooperation for development reflects (a rights-based) global partnership at the bilateral and multilateral levels for the attainment of sustainable development goals. Langford contends that this legal injunction needs to permeate “other spheres ... in the design of policies such as loan and development programmes through multilateral agencies.”⁶⁶ The General

⁶¹ See for example Radhika Balakrishnan, James Heintz and Diane Elson, *Rethinking Economic Policy for Social Justice: The Radical Potential of Human Rights* (London and New York: Routledge, 2016) at 45.

⁶² See Articles 3(2) of the Declaration on cooperation of states based on friendly relations consistent with the UN Charter; Art 3(3) declares that “States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development”; Article 4 on individual and sustained action by states to assist the less privileged countries; and Article 7 on collective responsibility to marshal resources for development. The duty to cooperate is also stipulated in Art 2(1) on international cooperation for the realization of socio-economic rights and Maastricht Guideline Principle 30. Of relevance to the SGG 17 is the multilateral partnerships of states on global and regional development initiatives.

⁶³ General Assembly Resolution A/RES/74/152, *supra* note 51.

⁶⁴ For this view, see Joel E Ostreich “SDG 10: Reduce inequality in and among countries” (2018) 37:1 Social Alternatives 34.

⁶⁵ Michael Langford, F Coomans and F G Isa, “Extraterritorial Duties in International Law” in Michael Langford, Wouters Vandenhoe, Martin Scheinin and Willem Van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Socio-economic and Cultural Rights* (New York: Cambridge University Press, 2013) at 54.

⁶⁶ *Ibid* at 55.

Assembly has aptly articulated the role of international cooperation as a facilitator of global partnerships in development, eliminating obstacles to development and furthering the realization of the RTD.⁶⁷

The duty to cooperate is, however, couched in a (deliberately) watered down and normatively weak language in SDG 17 (requiring strengthening the means of implementation and revitalizing global partnerships toward the achievement of all the goals). Nonetheless, this goal aligns with and compliments the RTD injunction of international cooperation to eliminate all barriers to development. Goal 17 highlights the focus areas of finance, trade, capacity building, technology, and systemic issues as fronts where structural injustices lie and where strengthening the means of implementation is needed. The vision of tackling systemic issues underpinning targets 17.13, 17.14, and 17.15 of SDG 17 reinforces this ideal of development justice. These targets align with the Declaration's injunction "to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals,"⁶⁸ that is, to create national and international conditions and policies favourable to development, eliminate all obstacles to development, and cooperate to attain development and realize human rights.⁶⁹ Contextually interpreted, goal 17 therefore recognizes that the realization of some socio-economic aspects of the goals through the objective of development programming, prioritization, implementation, and the allocation of resources is pegged on those global policies impacting technology, finance, and institutional arrangements.⁷⁰

Accordingly, therefore, goal 17 is important to the RTD's objective of eliminating structural injustices that imperil the attainment of human-centred development. Various reasons inform this perspective. First, revitalizing partnerships and cooperation that goal 17 envisages are specifically indispensable to marshalling the resources that are crucial for the realization of all SDGs. Secondly, considering the reality of interdependence and economic integration, the duty to

⁶⁷ United Nations General Assembly, Resolution adopted by the General Assembly on 17 December 2018: *The Right to development* A/RES/73/166:

Recognizing also that Member States should cooperate with one another in ensuring development and eliminating obstacles to development, that the international community should promote effective international cooperation, in particular to revitalize a global partnership for development, for the realization of the right to development and the elimination of obstacles to development and that lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.

⁶⁸ Article 2(3).

⁶⁹ Article 3.

⁷⁰ Sengupta, "On the Theory and Practice of the Right to Development" *supra* note 33 at 847.

cooperate or to honour partnerships supposes coordinated and collective policy action on global public goods (e.g., financing development, macroeconomic stabilization, elimination of barriers to trade, etc.).⁷¹ Third, partnerships can be an important hinge in the elimination of structural and systemic barriers to development, particularly discriminatory and undemocratic practices of development and other social dislocations during the planning, financing, and execution of development strategies by countries.⁷²

In sum, the constant refashioning of the global development agenda, resulting in it encompassing broader social objectives, has relied, in important respects, on the Declaration on the RTD's key legal commitments. This has ultimately been applied to frame anew the vision of justice in development. Thus, the contemporary understanding of the human rights framing of justice in development is that the elimination of the structural causes of poverty, inequality and other forms of economic disparity is a critical hinge for the realization and promotion of the RTD and indispensable to the attainment of SDGs.⁷³ This a matter of consensus (if not purely a legal commitment) by the international community.

The question then is, are these understandings of justice adequately captured in the contemporary discourses of accountability in the development policy practice? Do these reflect the real intention of accountability as a key pillar in the implementation of the RTD in the context of SDGs?

Sections two and three have provided some historical background to the human rights and development interface as well as the development justice question that is articulated within the 2030 Sustainable Development Agenda. I now examine what kind of accountability discourse and praxis, if any, this interface has brought about in development thought and practice.

⁷¹ Targets 17.13, 17.14 and 17.16.

⁷² As pointed out by Malhotra, some factors that constitute an environment/structures that may constrain state capacities to deliver on human development are, to name a few:- resource impediments, the lop-sided international trade, unstable international finance regimes and asymmetries of relations in multilateral institutions. Rajeev Malhotra, "Towards Operational Criteria and a Monitoring Framework" in OHCHR, *Realizing the Right to Development*, *supra* note 11 at 392. These issues therefore require that coherence and consistency between policies and programmes of multilateral and bilateral development institutions be addressed through partnerships and cooperation that reflects the RTD ethos. See also "The Right to Development: Study on Existing Bilateral and Multilateral Programmes and Policies for Development Partnerships" (E/CN.4/Sub.2/2004/15) at 11-12.

⁷³ Preamble to General Assembly Resolution, *supra* note 51.

4. DISCOURSES OF ACCOUNTABILITY IN THE CONTEXT OF DEVELOPMENT POLICY AND PRACTICE

This section examines how the above policy shifts have spurred differing understandings and practices of accountability in development.

4.1 The Human Rights Approach to Development

Most policy thinkers and academic writers tend to emphasize core qualities and properties of the RTD, such as social justice, human well-being, and participation. Another important principle that has equally received immense attention in the discourse on mainstreaming the RTD in international law and development practice, in part because of its relevance to the discourse of accountability, is the notion of a human rights approach to development (HRAD).

The inexhaustive list of elements and principles constituting a HRAD conceptual framework have been enumerated by OHCHR, to wit: linkage (of development) to human rights, accountability, participation, non-discrimination, social justice, capabilities, human development, prioritization of vulnerable groups, and so forth.⁷⁴

At its core, the HRAD entails the integration of human rights principles into development policies and practice so that the development agenda is normatively predicated and operationally focussed on respecting and promoting human rights.⁷⁵ That is to say that as an agreed principle, the HRAD ethic presupposes that human rights are not only relevant but indispensable to development policy practice.⁷⁶ Thus the HRAD affirms the interface between development and human rights. It stands for the idea of the protection of rights bearers in the context of development

⁷⁴ Britha Mikkelsen, *Methods for Development Work and Research: A New Guide for Practitioners* (New Delhi: SAGE Publications; 2005) at 204.

⁷⁵ J K Boasen and O Sano in Bård A Andreassen & Stephen P Marks, eds, *Development as a Human Right: Legal, Political and Economic Dimensions* (Boston: Harvard School of Public Health & Francois-Xavier Bagnoud Center for Health and Human Rights, 2006) at 45.

⁷⁶ I have derived this point from OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, HR/PUB/06/12 at 4 [OHCHR, “Principles and Guidelines”]:

The essential idea underlying the adoption of a human rights approach to poverty reduction is that policies and institutions for poverty reduction should be based explicitly on the norms and values set out in international human rights law. Whether explicit or implicit, norms and values shape policies and institutions. The human rights approach offers an explicit normative framework—that of international human rights. Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies, including poverty reduction strategies.

See also OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (New York and Geneva, United Nations, 2004) Section 2.

interventions (in relation to the development focus areas of finance, technology, trade, capacity-building, and systemic issues). This policy paradigm insists that the objectives of all these initiatives aim to attain individuals' and peoples' well-being consistent with the full enjoyment of human rights.⁷⁷ One can therefore surmise that the HRAD envisages a normative basis for integrating rights standards into all development processes, policymaking, and cooperation.⁷⁸

It is increasingly being recognized, particularly in the policy discourse, that by integrating human rights into the development framework, the Declaration on the RTD operationalizes the HRAD ideal.⁷⁹ This awareness runs in parallel to the ongoing discussion of a HRAD as embodying certain accountability principles. One of the first such acknowledgements appeared in the Fourth Report of the then Independent Expert on the Right to Development, Mr. Arjun Sengupta.⁸⁰ In his discussion with the IMF and the Bank, the Special Rapporteur explained what rights-based development cooperation means; to whom international financial institutions are accountable; the meaning of development compact; and the added value of the RTD in the IMF's mandate of fiscal discipline and macroeconomic stabilization.⁸¹ But this discussion avoided the perverse structural barriers to development that would necessitate a critical rethinking of the existing accountability praxis.

Since then, other policy commentators and experts, such as Marks, Osmani, Cornwall and Nyamu-Musembi, have relied on the HRAD, a catchword in the development jargon to demonstrate how the transformation of the development agenda constructs new theories and discourses of accountability.⁸² Emphatically emerging in their intellectual and policy interlocation is the sensibility that the HRAD is one among many key tenets that the mainstreaming and entry

⁷⁷ Patrick Twomey, "Human Rights-Based Approaches to Development" in Mashood Baderin and Robert McCorquodale, *Economic, Social, and Cultural Rights in Action* (Oxford: Oxford University Press, 2007) at 49; Arjun Sengupta, "On the theory and Practice of the Right to Development", *supra* note 33 at 874.

⁷⁸ Karimova, *Development and Human Rights in International Law* *supra* note 35 at 114.

⁷⁹ Siddiquir Rahman Osmani, "An Essay on Human Rights Approach to Development" in Arjun Sengupta, Archna Negi & Moushumi Basu eds, *Reflections on the Right to Development* (New Delhi; Thousand Oaks: Sage Publications, 2005) at 110-126.

⁸⁰ Submitted in accordance with Commission resolution 2001/9 E/CN.4/2002/WG.18/2 20 December 2001. See also Sengupta, "On the Theory and Practice of the Right to Development", *supra* note 33 at 873.

⁸¹ *Fourth Report of the Independent Expert Fourth report of the independent expert on the right to development, Mr. Arjun Sengupta, submitted in accordance with Commission resolution 2001/9 E/CN.4/2002/WG.18/2/Add.1* paras 20, 48, 50.

⁸² Sengupta, "On the Theory and Practice of the Right to Development", *supra* note 33 at 843; Stephen Marks, "The Human Rights Framework of Development: Seven Approaches" in Arjun Sengupta, Archna Negi & Moushumi Basu eds, *Reflections On the Right to Development* (New Delhi; Thousand Oaks: Sage Publications, 2005) at 40-41 [Marks, "The Human Rights Framework for Development"]; OHCHR, *Frequently Asked Questions on a HRA*, *supra* note 19 at 15.

of human rights into development offers the field of development practice.⁸³ They also argue that most of the principles underpinned by the Declaration on the RTD are also subsumed within the HRAD framework. I am referring to participation, non-discrimination, equity, social justice, and accountability.⁸⁴ For instance, Sengupta reckons that the “human rights approach helps establish accountability, and where possible culpability” through the right-duty correspondence principle.⁸⁵ Marks has argued that the RTD embodies the core elements of a human rights/rights-based approach to development.⁸⁶ Further support for this view can be found in the work of Karimova, who argues that a HRAD is “normatively” linked to the Declaration.⁸⁷

This leads me to another crucial question: What accountability principles does the HRAD espouse in the putatively merged arenas of human rights and development practice? Does this mean that IFIs who disavow human rights duties, are now bound by the legal principles that HRAD espouses?

Policy thinkers have a general tendency to surmise that the HRAD implies accountability, based on the understanding that human rights impose duties on actors. But this thought does not adequately offer a convincing explanatory account of the nature of that principle. Cornwall and Nyamu-Musembi argue that the HRAD consensus, first and foremost, introduces the right-duty binary, the notion of responsibility (duties, obligations, and performance criteria) of actors in development, while simultaneously reinforcing the concept of entitlements, which create corresponding legal obligations on development actors.⁸⁸ Responsibilization, expressed in terms

⁸³ Uvin, “How ‘Human Rights’ Entered Development”, *supra* note 7 at 602; Peter Uvin, *Human Rights and Development* (Bloomfield, CT: Kumarian Press, 2004) at 131.

⁸⁴ Oche Onazi, *Human Rights from Community: A Rights-Based Approach to Development* (Edinburgh: Edinburgh University Press, 2013) at 27.

⁸⁵ Sengupta, “On the Theory and Practice of the Right to Development”, *supra* note 33 at 873.

⁸⁶ The Working Group on the Right to Development E/CN.4/1995/11, 4 September 1994, para 44 stated:

The right to development is more than development itself; it implies a human rights approach to development, which is something new.”

Marks enumerates six other important approaches within which the human rights worldview may be said to have permeated development thinking. These are: the holistic approach, the RTD approach, the capabilities approach, the responsibilities approach, the human rights education approach, and the social justice approach. Marks goes ahead to contend that the RTD “builds on the holistic approach to human rights and on the human rights-based approach to development,” which “relates to the principles of equity, non-discrimination, participation, transparency and accountability.” Marks, “The Human Rights Framework for Development”, *supra* note 82 at 40.

⁸⁷ Karimova, *Development and Human Rights in International Law*, *supra* note 35 at 74. These conclusions draw from the fact that the Declaration, apart from specifying rights and entitlements, embodies norms and legal commitments that require that development decision-making and specific policy choices conform to these broad principles, much as development agenda is traditionally formulated within circumscribed and specific policy motivations often at variance with social values.

⁸⁸ Cornwall & Nyamu-Musembi, *supra* note 17; Mikkelsen, *supra* note 74 at 200, 205.

of the specification of duties and performance standards—what Kant referred to as the “capacity to obligate others to duty”⁸⁹—is said to be human rights’ greatest contribution to development praxis.

Cornwall and Nyamu-Musembi maintain that “the language of a rights-based approach in the development context also offers the possibilities for an expanded notion of accountability for rights to non-state actors.”⁹⁰ The OHCHR, likewise, seeks to make this more visible. It maintains that “Rights imply duties, and duties demand accountability” and that this principle is applied to all actors, including IFIs.⁹¹ This postulate appropriates the language of responsibility into development through law. Its real legal and political effect is that all actors are now constrained to adhere to certain universal principles and norms in the practice of development.⁹² It is, however, not only the language of obligations that human rights “law” adds to development, it brings a new orientation toward assessing the status of development and underdevelopment through the lens of rights—given that rights proffer standards governing behaviour.

But how does the sensibility that “rights imply duties” (even in its theoretical sense) apply to IFIs who otherwise perceive human rights as not applicable to their domains of practice? Bear in mind that the Bank and the IMF are irrevocably convinced that they are neither bound by human rights duties as a legal commitment nor are they ready to embrace this as the agreed principle in the SDGs implementation.⁹³ I ask this question because the Bank and the IMF’s positions on a HRAD policy have been marred by conceptual obfuscation. This is the reason the Independent Expert on the RTD at one time lamented that the IMF is totally oblivious of the ideals of the HRAD. And even though the Bank is the foremost exponent of a HRAD ethic, there is, in its

⁸⁹ This is extracted from Immanuel Kant’s moral theorization of rights as is directly quoted in Marks, “The Human Rights Framework for Development”, *supra* note 82 at 41. The full Kantian reflection on what has come to be known as the rights-duty correspondence appears as follows: “we know our freedom (from which all moral laws and hence all rights as well as duties are derived) only through the moral imperative, which is a proposition commanding duties; the capacity to obligate others to duty, that is the concept of a right, can be subsequently derived from this imperative.”

⁹⁰ Cornwall and Nyamu-Musembi, *supra* note 17 at 1417.

⁹¹ OHCHR, *Principles and Guidelines*, *supra* note 76 at 5 emphasize that:

Perhaps the most important source of added value in the human rights approach is the emphasis it places on the accountability of policymakers and other actors whose actions have an impact on the rights of people. Rights imply duties, and duties demand accountability.

⁹² See World Bank & OECD, *supra* note 58.

⁹³ *Ibid* at 13. See further Galit Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford: Stanford University Press, 2012) Galit Sarfaty, “Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank (2009) 103 AJIL 647.

internal policy documents, a frustratingly inconclusive and deliberate misconception of the HRAD.⁹⁴

As explained previously, exponents espouse and articulate what they understand to be the accountability facets embodied in the HRAD ideal. First, as pointed out earlier, the HRAD ethic presupposes that all development actors are constrained to respect and promote fundamental norms and standards that international human rights frameworks enshrine. Second, the HRAD ethic is an injunction that rights should not only be a guiding value that permeates the design and conduct of development strategies, assistance, lending, and cooperation (normatively based). Rather, it is a principle of the HRAD ethic that rights norms, principles, and standards are effectively applicable to development policy planning and financing, as well as to grievance redress mechanisms and institutions of accountability of development actors.

However, this formulation is as abstract as it is unclear. It does not capture the redistributionist agenda and the radical (accountability) politics of the RTD implied in the structural contingency dynamic. The approved language of obligations central to the HRAD ethic offers no clarity on tackling some of the North-South power and economic differentials that breed inequality and indigence. As Uvin points out:

If the development community is serious about human rights, then the rights focus cannot be limited to projects. This is an issue of coherence: why use the approach for one part of life and not for another? If donors, be they governments, NGOs, or international organisations, profess attachment to human rights in their development aims, they must be willing to apply the rights agenda to all of their own actions (the inward focus), and to the global political economy of inequality within which they occupy such privileged places (the outward focus). In the absence of such moves, the human-rights focus is little more than a projection of power, and the world has had enough of that already... In other words, the promotion of human rights begins with oneself.⁹⁵

Uvin suggests that unlike its purport, this schema is deficient of details of how peoples in the throes of marginalization can rely on its dialect to demand a social and economic international order based on equity. It ignores the institutional cosmopolitan view of rights as constraints on social agents in the institutional systems that harm human flourishing. Simply stated, the HRAD

⁹⁴ See for example Koen De Feyter, “The International Financial Institutions and Human Rights – Law and Practice” Institute of Development Policy and Management, University of Antwerp, Discussion Paper, December 2002 at 10. He cites Shihata’s previous legal opinions in Ibrahim Shihata, *The World Bank in A Changing World* (Dordrecht: M.Nijhoff, 1991) at 107.

⁹⁵ Uvin, “How Human rights Entered Development”, *supra* note 7 at 604.

does not really show an anti-poverty ethic to the same extent and with the same fervour as the RTD.

It is even said that multilateral development institutions are so scornful of the HRAD ethic that they regard it as “a new bottle for old wine, ... easy enough ... simply to repackage” with “what they have always done.”⁹⁶ Because the IMF and the Bank’s development thought and practice are not anchored to human rights principles, one can plausibly say that their ambivalence rests on the disinclination not to internalize what the HRAD is technically all about.⁹⁷ In fact, Uvin has an uncomfortable and blistering truth for the vacillation of multilateral development and aid agencies toward a HRAD ethic. He decries the imperviousness of multilateral development institutions to the HRAD ethic, taking up its rhetoric when in fact they are allergic to its operationalization toward their internal operations, programmes, and policies.⁹⁸

The general point that “rights imply duties” (as the agreed principle of a HRAD), even if at the level of academic discourse, seems hollow. It is bereft of specifics for its actualization in practice, given the economic rationalism by which development institutions constantly disavow rights normativity in their domains of practice. I deal comprehensively with this issue in the next chapter.

It is, however, discernible that the rhetorical purchase of the HRAD is largely due to its conception within statist human rights understandings, a limited approach that does not address the quandary of disaggregating the direct and distinct duties and obligations of every actor in the context of collective decision-making in international realms.⁹⁹ What this implies is that the HRAD ideal is not sufficiently conceptualized to offer a theoretical account of its applicability or relation to supranational actors. In fact, what we have is the state-centric understanding of human rights obligations in development, in sync with the traditional view that states should take their human rights obligations into account as members of international organizations when entering into agreements with third parties.¹⁰⁰ The real implication is that those obligations are limited to

⁹⁶ Celestine Nyamu Musembi & Andrea Cornwall, “What is the “rights-based approach” all About? Perspectives from International Development Agencies” (2004) IDS Working Paper No. 234.

⁹⁷ Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford & Portland, Oregon: Hart Publishing, 2014) (add that “contemporary approaches that posit human rights and development as not only potentially congenial, but also axiomatically and self-evidently so, beg further inquiry” at 15).

⁹⁸ Uvin, “How Human Rights Entered Development”, *supra* note 7 at 604.

⁹⁹ International law’s anachronism of ascribing duties of international institutions as collective state duties when acting at the multilateral level is pronounced in the views of CESCR. Traditional black letter scholarship affirms this position.

¹⁰⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000): The right to the highest attainable standard of health (art. 12) (E/C.12/2000/4) (2000) para. 39; Committee on Economic, Social and Cultural

constraining state behaviour even at the multilateral platforms where states' voices are subordinated to the vested interests of stronger members.¹⁰¹

All this adds up to the well-founded perception that, stripped to its essentials, the much-vaunted HRAD, as a specific discourse of accountability, is facile consensus. It comes across as that universalist discourse that masks the global development practices of domination and subjugation of the weak. This is because it lacks details as to how to ensure the realization of the RTD's emancipatory and egalitarian agenda of eliminating the structural barriers to a humane, just, and equitable international order. As a matter of fact, according to Rittich, the intellectual debate of a HRAD has not only relegated to the periphery, but delegitimized these concerns of the global redistributive agenda.¹⁰² This conclusion lends credence to Nyamu-Musembi and Cornwall, who have declared that the HRAD is not genuine given that "accountability of multilateral institutions to beneficiaries of their programmes is an issue that is still in flux."¹⁰³

4.2 The Organized Hypocrisy Regarding Accountability for the 2030 SDG Agenda

4.2.1 To Whom are the Responsibilities Addressed?

The challenge for the materialization of development justice is that of a lack of specification of clear and differentiated responsibilities of IFIs in development cooperation. This effectively poses a challenge to the institutionalization of direct and distinct accountability of these key global development actors. In legal terms, the real problem relates to the scope of human rights obligations and duties incumbent on IFIs as autonomous and independent development actors. This question was raised when Egypt questioned the over-assignment of responsibility to the states and not supranational institutions. In a presentation before the Human Right Council, Egypt, on behalf of NAM, lamented the inclusion of indicators in the High-Level Taskforce on the RTD report of 2010, claiming that it "marginalizes developing countries by emphasizing national responsibilities

Rights, General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights).

¹⁰¹ Olivier De Schutter, "The International Dimensions of the Right to Development: A Fresh Start Towards Improving Accountability" A/HRC/WG.2/19/CRP.1 at 27 [De Schutter, "A Fresh Start"].

¹⁰² Kerry Rittich, "Theorizing International Law and Development" in Anne Orford and Florian Hoffmann eds, *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Online) at 824.

¹⁰³ Nyamu-Musembi and Cornwall, "What is the rights-based approach" supra note 96 at 5.

while not guaranteeing fulfilment of international obligations and a proper enabling environment.”¹⁰⁴

The overarching dilemma relates to the clarification and specification of various actors’ distinct responsibilities when the RTD standard is mainstreamed in the context of global partnerships.¹⁰⁵ As interestingly, there are some progressive views proposing the recognition of direct responsibilities of IFIs. It has been contended that the human rights and development interface, as reflected in contemporary development thinking, should give scope for IFIs not only to respect human rights in their domains of practice but also to be receptive to claims of accountability for development-related violations.¹⁰⁶ However, the practice and mindset of IFIs show the contrary. The Bank and the IMF continue their principled non-embrace of obligations specified by human rights instruments, in part as a move to retain their predominant economic stature but also to retain their safety from accountability. This is highlighted by the fact that as development actors they do not think of themselves as constrained by any responsibilities for which they need to be held accountable. This is a demonstration of the ready embrace of principles and credo without a pragmatic embrace of obligations at the level of practice.¹⁰⁷

When in 2010 the High-Level Taskforce (HLTF) on the RTD by way of consensus came up with what is now known as the core norm, attributes and operation criteria and sub-criteria, the question of responsibilities remained contentious.¹⁰⁸ The core norm refers to substantive content of the RTD as the “the right of peoples and individuals to the constant improvement of their well-being and to a national and global enabling environment conducive to just, equitable, participatory and human-centred development respectful of all human rights.” The three attributes (participatory development process based on human rights, comprehensive human-centred development, and social justice and equity in development) clarify the essential features and particularities of the RTD. The operational criteria and sub-criteria are the indicators to be evaluated and measured in the implementation of the RTD.

¹⁰⁴ “Submission in follow-up to HRC resolution 15/25 ‘The Right to development.’ Egypt on behalf of the Non-Aligned Movement (NAM),” online: <<http://www.ohchr.org/Documents/Issues/Development/Session12/NAM.pdf>>.

¹⁰⁵ See Human Rights Council Resolution 4/4, adopted 30 March 2007; Resolution 9/3, adopted 17 September 2008.

¹⁰⁶ Margot E Salomon, “International Economic Governance and Human Rights Accountability” LSE Law, Society and Economy Working Papers 9/2007 at 5 online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013505>.

¹⁰⁷ Ananya Murkherjee, “Rights and Development” in Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford and Portland, Oregon: Hart Publishing, 2014); Karimova, *Development and Human Rights in International Law*, *supra* note 35 at 84-85.

¹⁰⁸ *Report of the High-level Taskforce on the Implementation of the Right to Development on its sixth session A/HRC/15/WG.2/TF/2/Add.2* 14-22 January 2010 at 8 [HLTF Report].

The HLTF submitted its report to the Inter-governmental Working Group and Human Rights Council with the intention of translating the RTD from political rhetoric to development policy practice,¹⁰⁹ but the one question that drew disagreement was that of differentiated responsibility. It was framed as: “to whom the standards are addressed.”¹¹⁰ It is here that the HLTF discussion took an accountability perspective. It flatly rejected the idea of the RTD imposing differentiated responsibilities that directly apply to international institutions in their capacity as legal persons.¹¹¹

By such a preference for collective responsibility of states over direct responsibilities of international institutions, the HLTF diluted the imperative of differentiated and distinct responsibilities of IFIs in development practice.¹¹² This principled non-embrace of human rights in development is one instance in which the mainstream understanding of the human rights corpus maintains a consonance with state-centric international law. At the same time, it facilitates the evasion and avoidance of accountability for those whose actions are more determinative in development. This kind of obstruction is directed more eminently to the insulation of supranational development actors from scrutiny or oversight undergirded by universal standards.

Sengupta had offered a compromised path on this protracted controversy, arguing that one way forward would be to understand a development compact as a vehicle for “pursuing a rights-based approach to development that is anchored on a framework of mutual commitment or reciprocal obligations between the State and the international community to recognize, promote and protect the universal realization of all human rights.”¹¹³ But Sengupta’s option is not very satisfactory to the task. As the OHCHR and CESR note, it is not helpful enough in specifying how

¹⁰⁹ Karimova, *Human Rights and Development in International Law*, supra note 35 at 109.

¹¹⁰ HLTF Report, supra note 108 para 16.

¹¹¹ *Ibid.* The High Level Taskforce rendered itself thus:

When considering what is required to create such an enabling environment, *many* would have in mind international regimes and institutions that make the rules and allocate the resources. They are the products of States acting collectively, as are their policies and programmes. In this sense, the right to development is the responsibility of States acting collectively in global and regional partnerships. Some might prefer to address this responsibility as belonging to the legal entity of an international institution. While international institutions, as legal persons, have rights and duties, the task force preferred to draw from the above-mentioned article 3 the concept of responsibility of States acting collectively.

¹¹² Plausible explanations as to why the HLTF preferred such consolidation of state-centrism on the question of accountability in the context of global partnerships can be seen in light of the subsequent discussion in 2014 at the level of Human Rights Council. See Karimova, *Human Rights and Development in International Law*, supra note 35 at 108-109. She discusses the hardline position taken by the EU against extraterritorial responsibility of states in the implementation of global partnerships.

¹¹³ Sengupta, “On the Theory and Practice of the Right to Development” in Arjun Sengupta, Archana Negi & Moushumi Basu eds, *Reflections On the Right to Development* (New Delhi; Thousand Oaks: Sage Publications, 2005) at 83.

international organizations will “assume and comply with their human rights responsibilities.”¹¹⁴ This limitation suggests that without specifying direct and distinct responsibilities of international organizations, IFIs principled non-embrace of human rights obligations persists. And yet, IFIs are not only autonomous, they are also distinct from states and take rational and conscious decisions away from states or state influence.

It is apposite to state here that the foregoing debates, because they reveal the limitations of conceptualizing the RTD’s progressive accountability politics in consonance with the international law anachronism of shared responsibility of states, provide a basis for losing faith in international justice. International law shows no conceptual inclination to adopt a direct and distinct responsibility formula for international organizations in the context of partnerships for development. And yet, as Abugre pointed out, symmetrical and reciprocal relationships that require distinct responsibilities are critical in the context of partnerships, because “partnership cannot operate on the basis of asymmetrical relationships.”¹¹⁵ Abugre underscored the imperative of differentiating responsibilities of actors in development cooperation. His salient point critiques the anachronism of international law to confine accountability for collective decisions and policies to the states as a matter of individual state responsibility.

The tendency to sideline international institutions in the scheme of assigning responsibilities in development is prevalent in similar kinds of development policy debates. For example, in 2004 in a report to the UN Secretary General, responsibility differentiation was being discussed in terms only of sharing responsibilities between affluent and developing economies.¹¹⁶ No development institutions’ responsibilities were fronted as subject of discussion. This tendency to avoid distinct responsibilities of IFIs is predominant even today in the realm of international cooperation and global partnerships for SDGs. As contemplated in target 17.1 and 17.3, implementing the SDGs is hinged on the bilateral and multilateral mobilization of resources and facilities, formulation of international economic policies, and the creation of favourable

¹¹⁴ Office of the High Commissioner for Human Rights & Center for Economic and Social Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (New York/Geneva: United Nations, 2013) [OHCHR & CESR, *Who Will be Accountable?*] at 30.

¹¹⁵ Charles Abugre, “Partners, Collaborators, or Patrons-Clients: Defining Relationships in the Aid Industry- A Survey of the Issues” (Ghana, ISODC, 1999).

¹¹⁶ United Nations, *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change* (New York, United Nations, 2004) at para 56.

environments for sustainable development and the realization of rights.¹¹⁷ In these debates, no mention of direct responsibilities of IFIs is made.

The exclusive location of responsibility in the state, including the duty of cooperation, emanates from the generally held view of the duty of states to cooperate as a sanction directed only to states. Hence, the duties enshrined in the 2030 Agenda for Sustainable Development, including global partnerships, primarily assume this rationalization. Thus, strengthening the implementation of the SDGs and enhancing global partnerships tends to be understood purely as the development duties of states.¹¹⁸ Yet this understanding of the responsibility in development cooperation ignores the reality that “development cooperation, [is] the last sphere where damage can still be inflicted with impunity and even financial gain.”¹¹⁹

Historically, the aid architecture is viewed as a practice that confers so much authority upward, in the supranational institutions. Lamentably, this conferment has not been accompanied by the dispersal of responsibility upward to the supranational actors. This is what may be referred to, in the view of Pahuja, as the “structural homology” complex.¹²⁰ According to Pahuja, in the realm of development cooperation, international law authorizes mandate expansion for Bretton Woods Institutions as it legitimizes the avoidance of their responsibility, all the while locating the responsibility in the agency of the developing state.¹²¹ Such perversion often occurs without direct and distinct constraints specified against the very powerful and influential actors. As Ebrahim and Herz emphasize, accountability in development financing is not as clear, notwithstanding the acknowledgement that development may harm the very people it is intended to help.¹²²

¹¹⁷ Jan Aart Scholte & Fredrik Söderbaum, “A Changing Global Development Agenda?” (2017) 44:1 *Forum for Development Studies*. (“Strong focus is placed on meeting global challenges and providing global and regional public goods for matters ranging from climate change and financial stability to peace and global health” at 4). See also Inge Kaul, “Making the Case for a New Global Development Research Agenda” (2017) 44:1 *Forum for Development Studies* 141 at 143; OECD, “Multilateral Aid 2015: Better Partnerships for a Post-2015 World” Online: <<https://www.oecd.org/dac/aid-architecture/OverviewChapter-MEP.pdf>>.

¹¹⁸ Tessa Khan, *Delivering Development Justice: Financing the 2030 Agenda for Sustainable Development* (UN Women, No 10, 2016) at 21.

¹¹⁹ Raffer, *supra* note 60 at 64.

¹²⁰ Sundhya Pahuja, “Global Poverty and the Politics of Good Intentions” in Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford; Portland: Hart Publishing, 2014) at 37.

¹²¹ *Ibid* at 37, 38.

¹²² Alnoor Ebrahim & Steve Herz, “Accountability in Complex Organizations: World Bank Responses to Civil Society” (2007) 2 *Harv Bus Sch Working Paper No. 08-027*; Natalie Bugalski, “The Demise of Accountability at the World Bank” (2016) 31 *Am U Intl L Rev* at 6.

Even in the implementation of socio-economic rights, both circumspection toward constraining IFIs with differentiated responsibilities in development and the mindset that tends to shift obligations to the state are still prevalent.¹²³ The general conclusion that those obligations are limited to constraining state behaviour speaks to how doctrines and conventions have been constructed and reproduced in international law to legitimize responsibility avoidance by private actors and IFIs. By such reproduction of minimalist, restrictive, and parochial doctrines, international law formalizes the hegemonization of development and the corresponding obliteration of the accountability of those dominant actors, which furthers the subordination and marginalization of the weak in international economic governance.

As Bexell and Jönsson reiterate, therein lies the folly of having faith in asymmetrical and paternalistic relationships.¹²⁴ They point out that there is a hollowness in the SDG accountability agenda because it does “not explicitly assign blame in terms of agency or acknowledge contemporary implications or of historical causes of structural problems.”¹²⁵ This point captures the lack of grasp of institutionally sanctioned violations or the structural contingency of development. First, it was Rajagopal who exposed the folly of integrating human rights standards in development as the shared responsibilities of states, claiming that “the normative framework for imposing responsibilities on development institutions is underdeveloped.”¹²⁶ It is in this same light that Okafor observes that the “now quite tired and historically less than effective platitudes” cannot constrain the institutionally sanctioned domination and inequality in development policy practice.¹²⁷

The evasion and avoidance of accountability by IFIs, as shown in the foregoing debate is, now changing a little, albeit unsatisfactorily. This inadequate level of change is reflected in the propositions and shift toward soft law norms like the United Nations Guiding Principles on Business and Human Rights (widely known as Ruggie framework)¹²⁸ and hard law norms like the

¹²³ Even when acting at the multilateral platforms where states’ voices are subordinated to the vested interests of stronger members’ voting powers, yet states are the addressees of all obligations. See e.g. De Schutter, “A Fresh Start”, *supra* note 101 at 27.

¹²⁴ Magdalena Bexell & Kristina Jönsson, “Responsibility and the United Nations’ Sustainable Development Goals” (2017) 4:1 Forum for Dev Stud at 18.

¹²⁵ *Ibid* at 20.

¹²⁶ Rajagopal, *International Law from Below*, *supra* note 35 at 230.

¹²⁷ Obiora C Okafor & Uchechukwu Ngwaba, “International Accountability in the Implementation of the Right to Development and the “Wonderful Artificiality” of Law: An African Perspective” (2020) 7 Trans Hum Rts Rev 1 at 2.

¹²⁸ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, HRC UNGAOR, 17th Sess, UN Doc A/HRC/17/31

2020 Draft Convention on the Right to Development.¹²⁹ Take, for example, the Ruggie framework, which establishes, on the one hand, the duty of businesses to respect human rights, while the state, on the other hand, has the duty to both protect—through regulation and policies—and remedy rights violations, though the foundational principle of the framework rests on an understanding that states are the primary duty bearers.¹³⁰ Accountability by way of soft law and voluntary measures such as the Ruggie framework, to name a few, are inefficacious, because soft law measures are “non-justiciable” codes that can be “flaunted” or “ignored altogether” or applied “inconsistently”,¹³¹ and often utilized as veils against media censure with major shortcoming being that they are accompanied by “weak enforcement mechanisms”, “lack of independent oversight”.¹³²

The conclusion of this part is that the language of human rights responsibilities is constantly disavowed by IFIs as a strategic manoeuvre not only to retain a safety from accountability in development but also to assure they bear no direct and distinct responsibilities.

4.2.2 The Regime of Follow-up and Review in the Implementation of Progress

In intergovernmental policy debates on mainstreaming the RTD in the context of the defunct MDGs framework, the question of accountability was not ignored.¹³³ Subsequently, as the 2030 Sustainable Development Agenda commenced its life, accountability was deemed an essential cog

(2011) [Ruggie Principles]. In 2017, OHCHR guidelines on the respect, protect, and remedy framework of the Ruggie framework, which has acknowledged that the clarification on the human rights accountability of business contained in the Ruggie principles, apply to the right to development as well. See Human Rights Council, *Improving accountability and access to remedy for victims of business-related human rights abuse*, Report of the United Nations High Commissioner for Human Rights, A/HRC/32/19 Agenda items 2 and 3 10 May 2016. See further Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance* A/HRC/32/19/Add.1 Introduction paras 6, 7, 9, and draft article 9.

¹²⁹ Draft Convention on the Right to Development, with commentaries A/HRC/WG.2/21/2/Add.1 20 January, 2020.

¹³⁰ The Ruggie Principles, *supra* note 128 Commentary to principle 4.

¹³¹ Lee McConnell, *Extracting Accountability from Non-State Actors in International Law: Assessing the Scope for Direct Regulation* (New York: Routledge, 2017) 120.

¹³² *Ibid* 122.

¹³³ Salomon, *Global Responsibility for Human Rights*, *supra* note 42 at 149. While referring to this issue, she noted that the HLTf has captured the problematic aspects of this phenomenon: “among the challenges, as identified by the Task Force, was to put into practice several distinctive features of human rights, including the need for human rights accountability to inform the MDG process, and the need to establish and make use of clearly defined accountability mechanisms at the national and international levels which are participatory in nature, accessible, transparent and effective and are based on identification of rights-holders, duty-bearers and procedures for claiming human rights through judicial or other means.”

in the implementation of the goals.¹³⁴ Consequently, United Nations policies have been strongly in favour of the accountability of actors, including private actors, being assessed within the existing accountability regimes. The accountability regimes that were initially envisaged include periodic reviews, special procedures, national human rights institutions, and other institutions provided by the diverse human rights treaties which rely on data to generate evidence-based reports that can be integrated into the SDG monitoring framework.¹³⁵

However, due to the polarized nature of intergovernmental debates,¹³⁶ in the conceptualization of post-2015 accountability theory and praxis, the OHCHR and the UN human rights system in general seem to favour the traditional (horizontal) mechanisms of “follow-up,” and “review” of progress on goals, promises, and targets by actors; duties that are addressed only to the state.¹³⁷ The first evidence of this is to be seen in the endorsement of the reporting mechanism by the United Nations Human Rights Council’s High Level Panel of experts.¹³⁸ The body charged with this mandate is referred to as the High Level Political Forum. It is convened under the auspices of the Economic and Social Council. It is stipulated that its specialized mandate shall be to “provide political leadership, guidance and recommendations for sustainable development, follow up and review progress in the implementation of sustainable development commitments, enhance the integration of the three dimensions of sustainable development in a holistic and cross-sectoral manner at all levels and have a focused, dynamic and action-oriented agenda.”¹³⁹ The Forum is an intergovernmental mechanism open to participation by all states and specialized United Nations agencies such as the Bank and the IMF, who may voluntarily participate in the review and follow-up on the commitments to UN declarations and resolutions.¹⁴⁰

¹³⁴ UN, *Transforming Our World*, *supra* note 3 para 45, 47, 73; OHCHR, “Ensuring Accountability for SDGs” *supra* note 1.

¹³⁵ OHCHR, “Frequently Asked Questions” *supra* note 19 at 15; UNGA, *The Road to Dignity*, *supra* note 1 para 146-150.

¹³⁶ For this discussion, see Kate Donald and Sally-Anne Way, “Accountability for the Sustainable Development Goals: A Lost Opportunity?” (2016) 30:2 *Ethics & Intl Aff* 201.

¹³⁷ OHCHR, “Ensuring Accountability for SDGs” *supra* note 1; Donald and Way *supra* note 136 at 201.

¹³⁸ United Nations, *A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development* (New York: United Nations, 2013) at 22. It was recommended that the “UN identifies a single locus of accountability for the post-2015 agenda that would be responsible for consolidating its multiple reports on development into one review of how well the post-2015 agenda is being implemented.”

¹³⁹ The High-Level Political Forum is the chief United Nations forum on sustainable development with a central role in the follow-up and review of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals at the global level. See *The Format and Organizational Aspects of the Forum*, General Assembly Resolution A/RES/67/290 online:

<<https://documents-dds.ny.un.org/doc/UNDOC/GEN/N12/496/00/DOC/N1249600.DOC>>.

¹⁴⁰ *Report of the Special Rapporteur on the right to development* A/HRC/36/49 2 August 2017 para 18.

On the face of it, even without further interrogation, it strikes one that the UN policy rhetoric of ensuring accountability for the SDGs is organized hypocrisy. The follow-up and review regime comes forth as a normatively weak approach, bearing the counter-statist outlook now ubiquitous in human rights practice. This regime is marked by the absence of direct and distinct accountability of international financial institutions. This particular architecture of SDGs accountability constitutes a drawback to the robust debates on the accountability of “all actors” or the need for institutional accountability in the implementation of SDGs. Its demerits lie in the conservative approach of the traditional reporting of progress in the implementation of commitments that is now dominant in the UN human rights system of accountability. This system is not only voluntary but also excludes international institutions and private actors. At best, this design of the regime of accountability praxis as a voluntary mechanism gives a wider discretion to actors. At worst, it enables the most influential actors to cloak themselves from oversight or scrutiny and stay at a safe distance from accountability.

Another issue, in addition to the voluntary nature of the SDGs’ accountability processes, is the reliance on disaggregated “high quality, timely and reliable” data and indicators (SDG 17, goal 17.18) to track and monitor progress on states’ adoption of institutional frameworks, implementation of commitments, and other concrete achievements.¹⁴¹ Reliance on data for quantification of phenomena points to evidence-based accountability in the achievement of targets.¹⁴² As well, the essential premise of this model is the role of participation in these processes, including “a commitment to making information publicly available, facilitating multi-stakeholder inputs into the monitoring and reporting process, and ensuring an enabling environment in which all stakeholders are free to engage without exception,”¹⁴³

Indubitably, evidence-based accountability relying on data is a form of quantitative accountability in development practice. Its other feature, in the tradition of the UN reporting processes, is an emphasis on mutual accountability that is marked by horizontal relationships and the responsiveness of partners to each other. This model introduces a new conception of

¹⁴¹ UNGA, *The Road to Dignity*, *supra* note 1 para 149; UN, *Transforming Our World*, *supra* note 3 para 72-90. Similar views in the context of state accountability in the implementation of the RTD are expressed by De Schutter, “A Fresh Start”, *supra* note 101 at 31.

¹⁴² See Women’s Major Group Recommendations for Accountability, Monitoring, and Review of the Post-2015 Agenda, online: <www.womenmajorgroup.org/wp-content/uploads/2015/05/WMGPositionPaperonAccountability.docx-2.pdf>. (talking of “data-driven, evidence-based and verifiable” accountability).

¹⁴³ OHCHR, “Ensuring Accountability for SDGs” *supra* note 1.

accountability at great variance with its human rights counterpart.¹⁴⁴ In development practice, mutual accountability relies on actors' good faith, commitments, and promises, including transparency on and provision of data to monitor progress.

In the context of SDGs governance, this model relies on the measurability of targets, based on a country's fulfilment of commitments and goals, as assessed from its submitted reports and data disaggregation.¹⁴⁵ This model of accountability has its own weaknesses. Measurability of states' progress in the achievement of targets cannot by any account be relied upon as an all-encompassing accountability measure that ensures that institutions are individually and autonomously answerable in the design of models of development that states implement at the national or international level. It is a system designed to track progress and not to directly and distinctly question institutions for failures of collective international policy decisions. In the field of development, Buchanan and others go further to warn that measurements are not as objective as they may seem; they can be used to produce and maintain hierarchies and biases that actors may wish to advance in development practice.¹⁴⁶ Activists and thinkers keen on real accountability politics in the global arena must be wary of the preference for data disaggregation as the new modality of accountability. The crucial insight by Buchanan and others that "data [is] a technology of knowing and governance" should already be an alarm bell that measurability and data disaggregation are embedded technologies, that is, an "orchestrated strategy for consolidating and monopolizing power by experts in a way that conceals the real objectives of measurements."¹⁴⁷

The subjectivity and biases of measurements casts further suspicion on the UN policy framework of accountability in the implementation of SDGs, not because it deviates from the traditional vertical or *ex-post* remedial accountability but because it cannot be reconciled with one ineradicable reality. As Escobar had long enlightened us, development is "a technocratic practice" and "a technical intervention" where people are regarded "as abstract concepts, statistical figures,

¹⁴⁴ Liesbet Steer, Cecilie Wathne & Ruth Driscoll, "Mutual Accountability at the Country Level – A Concept and Emerging Good Practice Paper", Overseas Development Institute (ODI), 2008; James Droop, Paul Isenman & Baki Mlalazi, "Paris Declaration on Aid Effectiveness: Study of Existing Mechanisms to Promote Mutual Accountability Between Donors and Partner Countries at the International Level", Oxford Policy Management, 2008; UNDP, *Mutual Accountability Mechanisms: Accountability, Voice and Responsiveness* (UNDP, 2006).

¹⁴⁵ Bexell & Kristina Jönsson, *supra* note 124 at 24.

¹⁴⁶ Ruth Buchanan, Kimberly Byers & Kristina Mansveld, "What Gets Measured Gets Done: Exploring the Social Construction of Globalized Knowledge for Development" in Moshe Hirsch & Andrew Lang eds, *Research Handbook on the Sociology of International Law* (Cheltenham/Northampton: Edward Elgar Publishing, 2018).

¹⁴⁷ *Ibid.*

to be moved up and down in the charts of progress.”¹⁴⁸ As such, in development thinking, evidence-based accountability may, at times, be directed to serve the covert and unstated interests of development bureaucracies.¹⁴⁹ This is a reminder that the very galvanization of the methodology of measurements and indicators is no more than a technocratic practice of “knowing” the intended beneficiaries.¹⁵⁰

Furthermore, in mimicking the traditional reporting, review and monitoring procedures of the UN and other pan-continental human rights systems, the contemporary SDG policy imaginary gives a short shrift to the fact that in their current formulation as state-based regimes of oversight, they cannot sanction any violations by the states or enforce their commitments.¹⁵¹ Such a configuration of the SDG policy schema ignores the fact that statist models of accountability do not allow for the incorporation of a wide range of actors whose influence is determinative, paternalistic, and subordinating in development policy making and implementation. Follow-up and review, as they are currently imagined, leave out IFIs. By this normative feature, SDG accountability schema fall short of providing a clear strategy for incorporating international institutions into future mechanisms of reporting and monitoring.

In addition, the current sustainable development discourse does not address the imperative of common and differentiated responsibilities as a function of accountability in international development policy formulation.¹⁵² By such omission, contemporary debates merely focus on

¹⁴⁸ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, NJ: Princeton University Press, 1995) at 44.

¹⁴⁹ Jason Hickel, “The True Extent of Global Poverty and Hunger: Questioning the Good News Narrative of the Millennium Development Goals” (2016) 37:5 *Third World Q* 749.

¹⁵⁰ Susanne Schech & Sanjuga vas Dev, “Governing Through Participation? The World Bank’s New Approach to the Poor” in David Moore ed, *The World Bank : Development, Poverty, Hegemony* (Durban: University of KwaZulu Natal Press, 2007) (“...while the elimination of poverty is the declared focus of the World Bank’s work, the production, collection and dissemination of knowledge about development has become the main vehicle through which to convey the multifaceted, complex interactions between these areas, and between the various stakeholders in development policy” at 174).

¹⁵¹ For a very thorough analysis of the monitoring and review of accountability in the specific context of the defunct MDG 8, see OHCHR and CERI, *Who Will be Accountable*, *supra* note 114 at 52-54.

¹⁵² “In conclusion, we would like to emphasize that in an era of globalization, all our actions have implications for people in other parts of the world, and rights and responsibilities of all are interrelated and interdependent. The importance of collective and shared responsibilities, a sense of inter and intra-generational equity and common but differentiated responsibilities should be highlighted in the context of an equitable, inclusive and sustainable development. The challenge faced by the international community is to mobilize the political will to create an enabling environment that takes all these principles into consideration and eliminates the obstacles to the full realization of the right to development.” This is extracted from *Joint Contribution on the Implementation of the Right to Development for the 19th Session of the Intergovernmental Working Group* (23–27 April 2018) A/HRC/WG.2/19/NGO/1 online: <https://www.ohchr.org/Documents/Issues/Development/Session19/A_HRC_WG.2_19_19_NGO.1.docx>. (Emphasis mine).

framing principles of accountability of states as members of international institutions. This focus is evidenced in the compromise reached in the SDG accountability vision that the issue of accountability will, “more precisely, [be] the question of how governments will be held to account for implementing the commitments made in this new agenda.”¹⁵³ This compromised vision of accountability reeks of a re-enactment of the statist conception of accountability built on exceedingly abstract and arbitrary maxims that have no relation to contemporary challenges. As abstract and arbitrary, this vision of accountability gives a short shrift to the imperative of holding actors directly responsible for their commitments and actions. Shared and collective responsibility, if specified, could have targeted, even in a weak fashion, the direct and distinct accountability of international institutions, on account of their capacity for state subordination and paternalism.¹⁵⁴

The other legitimate area of concern for accountability policy debates is the question of value disjuncture in the formulation of some targets of SDG 17. As a paramount policy objective, strengthening the means of implementing SDGs through financing strategies and the imperative of coordination and policy coherence in development is reflected in targets 17.13 and 17.17. These targets focus on institutional and policy coherence as a systemic theme of SDG 17. In themselves, they furnish the challenge of value disjuncture in the context of global partnerships and the duty of state cooperation to eliminate obstacles to development. Value disjuncture arises from a clash between respect for sovereign policy space (target 17.15)¹⁵⁵ and the rationality of policy coordination and coherence (targets 17.13 and 17.14). This raises the issue of which governing standards are to be applied in policy formulation and whether such policies honour international standards or respect states’ “policy space” (or the right of states to regulate to achieve national development priorities)?¹⁵⁶ The clash between the sensibility of policy coherence and coordination and respect for policy space comes with several disturbing accountability avoidance dimensions. The first is the ambivalence toward the applicable standards to evaluate policy formulation.

¹⁵³ Donald and Way, *supra* note 136 at 201.

¹⁵⁴ David Kinley, *Civilising Globalization: Human Rights and the Global Economy* (Cambridge: Cambridge University Press, 2009) at 108.

¹⁵⁵ Provides for a commitment to “respect each country’s policy space and leadership to establish and implement policies for poverty eradication and sustainable development”.

¹⁵⁶ Kevin Gallagher, *Putting Development First: The Importance of Policy Space in the WTO and IFIs* (London, Zed Books, 2005); South Centre, “Policy Space for the Development of the South” (2005)1 T.R.A.D.E. Policy Brief 1-8; Ha-Joon Chang, “Policy Space in Historical Perspective with Special Reference to Trade and Industrial Policies” (2006) 41:7 Economic and Political Weekly 627.

The fact that SDG 17 privileges the macro-structural view of things under the rubric of policy coherence and coordination presents a second accountability challenge. The macro-structural view of development relates to the determinative and manipulative roles of IFIs relative to developing states. Ordinarily, development financing and stabilization lending are often tied to a host of policy prescriptions and standardized norms of supranational institutions.¹⁵⁷ While these structural conditions are tailored to ensure coherent economic policies and a stable international economic system, they overly preserve the idiosyncratic preferences of development institutions.¹⁵⁸ Their policy effects impact a wide gamut of domestic policy areas, such as public spending, national budget spending, trade policies, currency valuation, and debt repayment.¹⁵⁹ Macrostructural policy streamlining that international financial institutions prescribe or advice on these issues have been proven to have far reaching negative ramifications in developing economies.¹⁶⁰ Studies have shown that they hamper tax revenue generation, cause redirection of social welfare spending, and in effect limit states' capacities to protect local economic sectors and vulnerable populations.¹⁶¹ Whenever the prescriptions are made, they come with a variety of justifications, such as triggering inclusive growth, creating fiscal prudence, assuring macro-economic financial stability, ensuring trade and financial liberalization, or safeguarding social dimensions of development. It is well known that by these prescriptions, the sovereign policy space of states has constricted while the authoritative influence of these institutions has enormously expanded and strengthened.¹⁶² The mandate creep happens in the context of the absence of

¹⁵⁷ Daniel Bradlow, "The Reform of the Governance of the IFIs: A Critical Assessment" in Hassane Cissé, Daniel D. Bradlow and Benedict Kingsbury eds, *The World Bank Legal Review: International Financial Institutions and Global Legal Governance Vol. 3* (Washington, DC: World Bank, 2012) at 39; Jakob Vestergaard & Robert H Wade, "Still in the Woods: Gridlock in the IMF and the World Bank Puts Multilateralism at Risk" (2015) 6 *Global Policy*.

¹⁵⁸ Ali Burak Güven, "Whither the Post-Washington Consensus? International Financial Institutions and Development Policy Before and After the Crisis" (2018) 25:3 *Rev of Intl Pol Economy* at 394.

¹⁵⁹ Most of these policy objectives are framed as targets in SDG 10 and 17. Trade falls in the mandate of IMF Article I (ii) and IBRD Article I but not IDA.

¹⁶⁰ See an earlier publication by World Bank, *World Development Report 2006: Equity and Development* (Washington, DC: World Bank/Oxford University Press, 2006) at 16. The Bank was categorical that "...global markets are far from equitable, and the rules governing their functioning have a disproportionately negative effect on developing countries. These rules are the outcome of complex negotiating processes in which developing countries have less voice". Similar views have been expressed by UNDP, *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (New York: Oxford University Press, 2005) at 36-37.

¹⁶¹ See e.g Khan, *supra* note 118 at 3; June Nash, *Mayan Visions: The Quest for Autonomy in an Age of Globalization* (New York and London: Routledge, 2001).

¹⁶² Salomon refers to policy coherence as "a unified approach among international economic organizations to economic growth strategies that limits scope for diversity in both international and national policies, models which may serve to lift the world's poorest out of poverty in a manner more consistent with universal human rights standards and objectives." Salomon, "International Economic Governance" *supra* note 106 at 17.

oversight and the lack of answerability of dominant policy formulators to the people affected by those very policies.

4.2.3 Concluding Remarks

The evolving conception of development as interlinked with human rights has continued to shape discourses of accountability that marginalize the RTD's agenda of bringing IFIs into the regulative order and tackling structural injustice. Effectively, development justice vision of eliminating the structural causes of poverty and inequality has not been part and parcel of the new conceptions of accountability, in both the academic and policy discourses. Three regimes of accountability suffer this anomaly. These are: the human rights approach to development (HRAD) as a discourse of accountability; the debate on the responsibility dimension of accountability in relation to IFIs; and the SDGs policy agenda of accountability

Despite the foregoing misgivings expressed in relation to the SDGs' accountability agenda, some positive attributes may be mentioned. This model is based on a non-punitive approach to examining failure to accomplish obligations and commitments on polycentric issues involving the eradication of poverty and the elimination of inequality. They establish the accountability of institutions and states to each other—thus shifting from command and control. They deviate from the sanction-based approach to accountability—which only relieves breaches while neglecting institutional relationships that produce and sustain such breaches.¹⁶³

All in all, what emerges from this subsection is that the RTD vision of materializing development justice through accountability praxis seems to be strategically diminished, or rendered effete, in the SDGs' accountability agenda. The accountability-depleting dimension is brought about by the absence of a policy specification of “distinct accountabilities” that is at the heart of the notion of partnerships for development.¹⁶⁴ While development partnership places a premium on distinct accountability as a key pillar of shared responsibilities, this logic does not boldly permeate the implementation of the 2030 SDGs agenda.¹⁶⁵ Accountability as envisaged in

¹⁶³ See e.g. Anna Drake, *Locating Accountability: Conceptual and Categorical Challenges in the Literature* (Stockholm: Entwined/International Institute for Sustainable Development, 2012) at 10.

¹⁶⁴ Robert Picciotto, *The Logic of Partnership: A Development Perspective* (Washington, DC, OED, World Bank, 1998) cited in C Abugre, “Partners, Collaborators, or Patrons-Clients: Defining Relationships in the Aid Industry- A Survey of the Issues” (Ghana, ISODC, 1999), who defined partnership as “A means to an end—a collaborative relationship towards mutually agreed objectives involving shared responsibility for outcomes, distinct accountabilities and reciprocal obligations.”

¹⁶⁵ See further discussion of the accountability voids by Fateh Azzam, “The Right to Development and Implementation of the Millennium Development Goals” in OHCHR, *Realizing the Right to Development supra* 11 at 358.

the “follow-up and review” mechanism does not adequately address the imperative of distinct accountabilities in development cooperation.

This deliberate policy anomaly is poised to severely undermine the expectation that the 2030 Agenda will be a vehicle for the implementation of the RTD in the post-2015 development era. The reason is that the accountability politics and ideals that the RTD impose seem to take on effete and hypocritical meanings. The selected regime of follow-up and review of progress of implementation under the aegis of the High-Level Political Forum is a product of “little political will for solid accountability processes and mechanisms.”¹⁶⁶ It is deficient because it neither cures the deep power asymmetries nor guarantees the direct and distinct accountability of international organizations. This architectural anomaly renders the SDG regime of accountability incapable of focusing on locating causal chains of harms in the global policy system. It simply pins accountability on the agency of the state. It does not appreciate that supranational factors invisibly take on more determinative, manipulative, and subordinating roles in the creation of national and international conditions that perpetuate development injustices and therefore ought to be constrained by accountability standards.

A second general insight of this chapter is that the human rights and development interface has generated myriad new ideals, such as human development, rights-based development cooperation, global partnerships, social dimensions of development, and so forth. On the contrary, accountability as a concept in human rights theory seems not to have undergone any radical recalibration by this new overture, at least not in the sense that it can potentially hold international financial institutions’ feet to the fire. Basic conceptions of accountability are unscathed and remain tethered to abstract and minimalist statist understandings. They rehash old “platitudes” forged within statist paradigms.¹⁶⁷ They are silent on distinct and direct accountability of non-state actors. Conceptions of accountability retain the traditional rights-centric approach. Even in the face of the integration of human rights and development as affirmed by SDGs policy commitments, the discourse is bereft of real accountability of non-state actors. This negates the structural transformation in development that would have necessitated the recalibration of the fundamental assumptions of the existing accountability praxis to comport with the ideal of distinct accountability in development partnerships.

¹⁶⁶ Donald and Way, *supra* note 136 at 205.

¹⁶⁷ Okafor & Ngwaba, *supra* note 127.

Moreover, in the contemporary context, the Declaration on the RTD embraces a wider vision of eliminating the structural impediments that cause poverty and inequality. It makes human rights values the basis of sustained development policy mainstreaming. This is the essence of development justice, which necessitates a distinct narrative of accountability that fundamentally deviates from human rights rhetoric of accountability. However, in this new vision of development, there is still an unfulfilled impulse to incorporate IFIs to adopt human rights standards, as these institutions still consider themselves as “human rights free zones.”¹⁶⁸ What this reveals is that the RTD discursivity has laid the groundwork for human rights norms and principles to permeate development practice and to demand a just and equitable development order. However, the drawback is that the pragmatics for the actualization of this ideal are totally subordinated to the strategic priorities of the dominant development institutions. Nothing is more implicit than this in the new SDGs agenda, which proselytizes normatively weak and abstract maxims incapable of delivering development justice.

5. CONCLUSION

This chapter investigated two main issues of the human rights dimension of development, which, through UN debates on the RTD, transformed the development justice: (i) antagonism against poverty and inequality; and (ii) the specification of the duty of cooperation and global partnerships as means to eliminate structural barriers to development. In this regard, I discussed the historical evolution of a structural transformation in the international human rights discourse that was marked by the integration of development and human rights. I critically examined both the constant alteration and repurposing of the global development agenda to encompass broad ideals such as SDGs (and their push against poverty and material inequality) and the discourse of accountability aimed at the implementation of the RTD.

I have demonstrated how this transformation has spawned different understandings of the accountability praxis that applies differently to states and IFIs. I have argued that conceptions of accountability such as the HRAD and the state-based and state-focused High-Level Political Forum for follow-up and review of progress bear no radical promise for securing development

¹⁶⁸ UN General Assembly, *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston: World Bank and Human Rights*, UN Doc A/70/274 (04.08.2015) and Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston., A/HRC/38/33.

justice. It was the principal argument of this chapter that the contemporary understanding of the human rights and development interface is fraught with relics and “platitudes”¹⁶⁹ that largely rehash state-centric accountability practices. Such mechanisms have often evaded, and are therefore irreconcilable with, the question of the direct and distinct accountability of IFIs in development policy practice. Related to this was a contention that extant accountability theories as applied in practice are devoid of specific details and bereft of any potential to enforce the RTD’s inherent redistributionist agenda and the elimination of structural barriers to development. This weakness undermines the promise and potential of the SDGs accountability policy, however genuine and earnest. It also renders them irreconcilable with the imperative of development justice. I have argued that without detailing modalities of distinguishing and differentiating the responsibilities of IFIs in collective development policymaking and implementation, the SDGs policy agenda of accountability and the HRAD logic fall far too short of being a reliable and effective model.

The main contribution of this chapter to the overall dissertation is to show that international development policy practice, although eminently stated to be “normatively based on” and “operationally directed” to the promotion of a human rights agenda (which the RTD enunciates), lacks specificity on the direct and distinct accountability of IFIs. As a matter of fact, the existing SDG policy debates are implicated in the embedment of accountability deficits for IFIs.

¹⁶⁹ Okafor & Ngwaba, *supra* note 127.

CHAPTER FOUR

THE ACCOUNTABILITY PRAXIS OF INTERNATIONAL FINANCIAL INSTITUTIONS: FUNCTIONAL DOMAINS AND ACCOUNTABILITY CHALLENGES

1. INTRODUCTION

In this chapter I discuss international financial institutions' (IFIs') understandings of their accountability for the policies they make and actions they take within their their core areas of functioning to provide certain global public goods (e.g. development financing and international financial and monetary stabilization).¹ I discuss four key challenges to accountability in this sphere that impede the realization of a national and international order favourable to a just, equitable, participatory, and human-centred development. I focus on how the idea of the provision of global public goods by IFIs facilitates accountability avoidance, disconnections, and obstructions in the realm of development policy practice. This kind of facilitation of accountability dysfunctions is key to understanding development as “a structural relationship of dominance, discrimination, power and control.”²

I ask the following questions: how does international law formulate the accountability of IFIs in development practice? In the development realm, is there an *absolute* or a *qualified* accountability system for IFIs? I further inquire whether there is an international mechanism that recognizes the imperative of the direct and distinct accountability of IFIs in development practice. The answer to these questions is to be found in the central argument of this chapter: that international law and the discipline of development legitimize and rationalize accountability avoidance, disconnection, and obstruction by IFIs in their interventions in the realm of development. This phenomenon is pronounced within the work of the Bank and the IMF in the provision of global public goods. I discuss the idea of global public goods, particularly how it has been “mobilized” to produce “meanings”³ that are then used to usurp “Third World legitimate governance frameworks,”⁴ perpetuate various accountability challenges, produce relations of

¹ Bram van der Eem, “Financial Stability as a Global Public Good and Private International Law as an Instrument for its Transnational Governance—Some Basic Thoughts” in Horatia Muir Watt and Diego P Fernández Arroyo eds, *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014) at 295.

² Gilbert Weiss & Ruth Wodak eds, *Critical Discourse Analysis: Theory and Interdisciplinarity* (Palgrave Macmillan Limited, 2002) at 15.

³ For the constitutive role of discourse in producing meanings to which practices correspond, see Teun A Van Dijk, “Principles of Critical Discourse Analysis” (1993) 4:2 *Discourse & Society* 249.

⁴ Obiora Chinedu Okafor, “Re-Conceiving “Third World” Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism” (2000) 6 *Buff Hum Rts L Rev* 1.

domination and social inequality, and expand the mandate of IFIs amid the changing dynamics of the international development project.

This chapter is divided into four sections. The first section is the introduction. The second section is an overview of IFIs' allocative, regulatory, and policy advisory roles. I reconceive these functions as the provision of global public goods. Section three discusses how IFIs' policies and actions related to the provision of global public goods constitute entrenched accountability challenges that further compound development injustices afflicting the poor. I then discuss in section four the Bank's and the IMF's understanding of their own accountability praxis and relations. I examine the functional and institutional strengths and weaknesses of the Independent Evaluation Office and the Inspection Panels of the IMF and the Bank respectively.

In developing my arguments in this chapter, I draw some guidance from David Kennedy, who describes the global policy system as a site of "knowledge practices" and competing "projects," an "uneven terrain of powers and vulnerabilities" and "parochial objectives" that blunt "responsibility for distributional outcomes."⁵ In my view, these are some of the illustrative, though not exhaustive, ways in which the international political economy constructs the hegemonization of development and the corresponding depletion of the accountability of IFIs.

2. THE TECHNOCRATIC NATURE OF THE ALLOCATIVE, REGULATORY, AND ADVISORY ROLES OF THE BANK AND THE IMF

2.1 The World Bank's Development Financing & Research and Knowledge Generation as Global Public Goods

The World Bank Group has five main institutions within it: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). In this dissertation I focus on the IBRD and the IDA, which I refer to jointly as the World Bank.

The Bank performs the role of financing developing and transition-economy countries' long-term economic development and poverty reduction through the provision of technical,

⁵ David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016) at 5-6. (He goes on to argue: "When distribution is accomplished without the use of force, the coercion may not be obvious on the surface. But it is there. When people agree or go along, the discourses that persuade them may reflect a hegemony forged in an earlier distributional settlement" at 59).

capital, and financial assistance.⁶ The main lending institution, the IBRD, grants non-concessional loans to middle-income and credit-worthy client states.⁷ The IDA focuses on extending grants and loans, otherwise known as credits, to very poor and low-income developing countries on concessional terms.⁸ Concessional loans are those that are pegged on zero to low interest rates, depending on debt distress and credit risk of the country concerned. The IDA provides the biggest reservoir of development capital for the development of basic social services in poor and highly indebted countries.⁹ Aside from the loans and grants, the IDA has other two facilities: the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative (MDRI), which provide debt relief and restructuring for poor countries.¹⁰ The IFC is the private lending arm of the Bank, extending loans and credits to private investors, while MIGA undertakes financial guarantees against risks for private investments.

The Bank provides financing for development in three ways. First, it provides long-term loans, at times allowing up to twenty years for repayment, that may be pegged at commercial interest rates. There are also very long-term loans, referred to as credits, with a maturation period of up to thirty years, whose interest rates may be below commercial rates. The IDA also offers grants. Most of the borrowing from the IDA nowadays is from developing countries, a fact which has made the Bank the pre-eminent development financing institution in the world.

Essentially, the Bank provides finances in the form of loans to governments to undertake development projects or to provide budgetary support by availing funds for government programs. This mandate is provided in Article I of the IBRD's Articles of Agreement, which stipulates that the purpose of the Bank shall be to "assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less

⁶ Factsheet: The IMF and the World Bank February 25 2019 online:

<<https://www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/31/IMF-World-Bank>>.

⁷ The World Bank, "What We Do" online: <<https://projects.worldbank.org/en/projects-operations/products-and-services>>.

⁸ International Development Association, online: <http://ida.worldbank.org/sites/default/files/pdfs/1-ida_brochure_2018.pdf>.

⁹ Development Finance Vice Presidency of the World Bank Group, "International Development Association" Washington D.C September 2019 at 3. Basic services include support of primary education, basic health infrastructure, development water and sanitation utilities, support for agriculture, business, and investment climate improvements, infrastructure development, and institutional restructuring.

¹⁰ *Ibid.*

developed countries.”¹¹ In the operational policies, this kind of lending is known as Investment Project Financing.¹² Investment Project Financing targets infrastructure development, the agricultural sector, and public administration sectors with major capital investment in service delivery, community projects, and institutional building and reform.¹³ Lending for development projects such as building schools, roads, hospitals, dams, major infrastructure, and other facilities is falls within the Investment Project Financing¹⁴ The Bank notes that project financing is always accompanied by knowledge transfer and technical advice in the design, management, and implementation of the project, including on fiduciary, environmental, and safeguard responsibilities.

The second type of financing the Bank provides for development is what the Bank describes as Development Policy Financing, which supports a government’s budgetary programs and institutional policy actions and reforms for delivering sustainable development.¹⁵ This kind of financing accounts for a quarter of the Bank’s whole lending and is provided in the form of “non-earmarked loans,” credits, grants, or policy-based guarantees.¹⁶ It is aimed at supporting government initiatives, institutional and policy programs with various objectives, such as the improvement of fiscal management, the investment climate, and economic diversification. It is governed by the rules of the Operational Policy OP/ BP8.60. The third type of financing the Bank provides for development is through the Program for Results Financing (PfoR), which is a financing facility linked to the achievement of specific program results. PfoR is aimed at strengthening institutional capacity and processes and building efficiency and effectiveness within

¹¹ Article I, International Bank for Reconstruction and Development Articles of Agreement (As Amended February 16, 1989), 1944.

¹² Investment Project Financing Project Preparation: Guidance Note April 9, 2013 online: <http://siteresources.worldbank.org/PROJECTS/Resources/409401365611011935/Guidance_Note_Project_Preparation.pdf>.

¹³ The World Bank, “What We Do” *supra* note 7.

¹⁴ Operational Policy/Bank Procedure (OP/BP) 10.00.

¹⁵ The World Bank Group, *2015 Development Policy Financing: Retrospective Results and Sustainability at 1* online: <<http://pubdocs.worldbank.org/en/420441457100264616/DevelopmentPolicyRetrospective2015.pdf>>.

¹⁶ *Ibid.*

a country's governance setup in order to deliver concrete results. Other financing instruments include Trust Funds,¹⁷ grants, and Multiphase Programmatic Approach.¹⁸

The Bank also conducts research on a vast number of issues and disseminates publications, academic articles, working papers, reports, policy reviews and data analysis, impact evaluations, and consultancies from time to time. The Bank has become a leading research and knowledge institution, churning out a copious amount of publications that are viewed by many as skewed in favour of the neoliberal market episteme.¹⁹ I will come back to this issue in the next section when discussing challenges to accountability presented by the research and knowledge generated by the Bank.

2.2 The IMF's Lending, Surveillance and Advisory as Global Public Goods

The IMF is an overseer, in collaboration with states, of a critical global common interest: international monetary and financial stability as global public goods.²⁰ It prides itself as the chief intergovernmental organization promoting and managing the "health" of the global financial system, a role it performs by getting "involved in international financial market oversight and in reviewing its member states' financial regulatory frameworks."²¹ In this regard, the IMF performs

¹⁷ "Trust funds, including Financial Intermediary Funds (FIFs), are an important source of development finance and partnership, providing support for global public goods, fragile and conflict-affected states, disaster prevention and relief, global partnerships, knowledge and innovation. Trust funds complement IDA and IBRD and account for 10 percent of Bank disbursements to our clients (17 percent in the case of IDA countries). Nearly 50 percent of all trust fund disbursements go to fragile states. Finally, trust funds are essential to the knowledge agenda, financing roughly two-thirds of all World Bank Advisory Services and Analytics". See World Bank, "2017 Annual Trust Fund Report" online <<https://www.worldbank.org/en/publication/trust-fund-annual-report-2017/trust-fund-reform>>

¹⁸ World Bank, "Multiphase Programmatic Approach" 18 July, 2017 online:

<<http://documents.worldbank.org/curated/en/203081501525641125/Multiphase-Programmatic-Approach>>

¹⁹ See for example, Robin Broad, "Research, Knowledge, and the Art of 'paradigm maintenance': The World Bank's Development Economics Vice-Presidency (DEC)" (2006) 13:3 *Rev of Intl Pol Econ* 387. This is what Kingsbury calls international organizations' "epistemic influences". Benedict Kingsbury, "Introduction: Global Administrative Law in the Institutional Practice of Global Regulatory Governance" in Hassane Cissé, Daniel D Bradlow & Benedict Kingsbury eds, *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* Vol. 3 (Washington, D.C: World Bank, 2012) at 10.

²⁰ Annamaria Viterbo, *International Economic Law and Monetary Measures: Limitations to State Sovereignty and Dispute Settlement* (Cheltenham: Edward Elgar Publishing, 2012) at 13; Joseph E Stiglitz, "Global Public Goods and Global Finance: Does Global Governance Ensure That the Global Public Interest Is Served" in Jean-Philippe Touffut ed, *Advancing Public Goods* (Cheltenham: Edward Elgar Publishing, 2006).

²¹ Daniel D Bradlow, "The Reform of the Governance of the IFIs: A Critical Assessment", Hassane Cissé, Daniel D. Bradlow and Benedict Kingsbury eds, *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* (Washington, DC: World Bank, 2011) at 38

three key functions, what it calls “the Big Three”, namely lending, surveillance, and capacity development.²²

Its lending role has to do with availing hard currencies in the form of loans to member states to offset their balance of payment deficits and foreign exchange shortages that arise when a country cannot meet such external financial obligations as making payments that exceed foreign exchange earnings. Balance of payment deficits arise in ordinary transactions in which countries find themselves short of foreign exchange when their external payments are depleted or exceed their foreign exchange earnings. Providing short and medium-term finances to offset this maladjustment is known as stabilization financing. The rationale for this role is that the funds derived from this loan facility are a safety net. They are utilized to cushion a country’s currency from volatility and instability that may trigger other distortions and disequilibrium in the international financial markets. This helps borrowing states restore their foreign exchange reserves, from which they can continue drawing to pay for import, and to maintain economic trends within the country without having to resort to adverse measures. Under its Articles of Agreement, the IMF provides member countries “with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.”²³

Like the Bank, the IMF has two kinds of lending: concessional loans with low or no interests rates, often extended to low-income developing countries, and non-concessional loans with interest rates.²⁴ Non-concessional lending is conducted through the General Resources Account (GRA), the main IMF portfolio, made up of financial resources (i.e., the aggregate of currencies and reserve assets) from member countries’ paid-up subscriptions based on their respective quotas. Under the GRA, there are a number of non-concessional credit facilities, such as Stand-By Arrangements, Extended Fund Facility, Flexible Credit Line, Precautionary and Liquidity Line, and Rapid Financing Instrument, each with its own distinct purpose, conditions, phasing, monitoring of disbursement, access limits, charges, and repayment periods.²⁵ There are three lending facilities for low income developing countries. These include Extended Credit Facility, Stand-By Credit Facility, and Rapid Credit Facility, again each with its special objective,

²² IMF Annual Report 2018 at 4 online <<https://www.imf.org/external/pubs/ft/ar/2018/eng/assets/pdf/imf-annual-report-2018.pdf>>. [IMF Annual Report 2018]

²³ Article I (V) of IMF Articles of Agreement.

²⁴ IMF Annual Report 2018, *supra* note 22 at 44.

²⁵ *Ibid* at 45.

purpose, eligibility, qualification, requirement of Poverty Reduction and Growth Strategy document, conditionality, access policies, financing terms, and terms of usage.

IMF financing operates according to a conditionality regime (in one form or another), which applies to access, program design, disbursements, and post-program monitoring. In their own words, these are “conditions intended to ensure that IMF resources support the program’s objectives, with adequate safeguards to the IMF resources.”²⁶ Categorically, the IMF justifies conditional lending on the idea that “all who play by the rules benefit.”²⁷ In general, this is how global development institutions create a global policy system—with its own rules and standards of borrowing—as well as domestic economic governance tethered to external policy paradigms. For instance, in order to access IMF funds, countries are required to meet some or all of the following prerequisite conditions: implement poverty reduction strategies that aim to foster growth and “safeguard social and priority spending”; “establish a further track record of good performance under an IMF program”; and “implement other key structural reforms” that have been agreed on.²⁸ The further rationale for conditionality, in the IMF’s own words, is to ensure that the Fund diminishes lending risks, that is, “risks of programs not achieving their intended objectives.”²⁹ Conditionality also guarantees debt repayment.

The second of the IMF’s three key functions is *surveillance*.³⁰ Surveillance enables the IMF to oversee and monitor the global economy in general, assess trends, policies, and development of countries.³¹ Under the surveillance mandate, the IMF supervises the global monetary and financial system, monitors trends in global economic developments, engages in a health check (annual appraisal) of the economic and financial policies of member countries, and provides policy advice to member states “on adopting policies to achieve macroeconomic stability, accelerate economic growth, and alleviate poverty.”³² It does so by sensitizing countries to potential financial risks to economies and outlining policy steps that countries or the international community need to take to remedy or avert threats and foster economic development. The IMF

²⁶ *Ibid* at 50.

²⁷ James A Haley, “Lagarde’s Fight for the Rules-based Order” online: <<https://www.cigionline.org/articles/lagardes-fight-rules-based-order>>.

²⁸ IMF Annual Report 2018, *supra* note 22 at 51; IMF, “Key Questions on Somali” online: <<https://www.imf.org/en/Countries/SOM/key-questions-on-somalia>>.

²⁹ IMF Annual Report 2018, *supra* note 22 at 79.

³⁰ Article IV (3) of IMF Articles of Agreement.

³¹ For a discussion of regulation pursuant to surveillance role of the IMF, see Adam Feibelman, “Law in the Global Order: The IMF and Financial Regulation” (2017) 49 NYU J Intl L & Pol 687.

³² IMF Annual Report 2018 *supra* note 22 at 4, 28.

Articles of Agreement stipulate that the IMF shall “respect the domestic social and political policies of members” in its surveillance and lending roles.³³ The actual surveillance takes place at either the country or international level. The “financial health check” is conducted annually, either bilaterally (IMF-country level appraisal) or multilaterally (the general oversight of the global economy).³⁴ Bilateral surveillance is conducted pursuant to Article IV *consultation*, which requires a review and evaluation of both a country’s “macro-critical” economic policies in a range of areas—financial, fiscal, foreign exchange, monetary—and the extent to which these policies are sensitive to risks and grasp vulnerabilities as well as response measures.³⁵

The consultation process involves some form of dialogue, in which the IMF and country officials, together with other stakeholders, confer on the pertinent policy issues. After this, a report is presented to the Executive Board, which then publishes its assessments and findings.³⁶ Multilateral surveillance focuses on the analysis and prediction of regional or global economic trends and macroeconomic policies of individual members that may present risks or spillover threats to the integrated global economy.³⁷ The IMF has recognized the value of integrating multilateral and bilateral surveillance as crucial for discerning risks and spillover effects.³⁸ The IMF has its main focus on the provision of global public goods.

The third of the IMF’s key functions is capacity development through technical assistance, training, and institution and capacity building. This is normally prompted by requests from states in need of effective economic policy design, strong institutions, and enhanced financial management.³⁹ The IMF believes that capacity building is integral to and mutually reinforces its lending and surveillance roles. It argues that “[strengthening] economic policies through capacity development also helps increase the understanding of IMF policy advice in the country, keeps institutions up to date on global innovations and risks, and helps address crisis-related challenges and spillovers.”⁴⁰ This may happen through short- or long-term placement of its team of advisors

³³ Article IV, section 3 (b) of Articles of Agreement; the Guidelines on Conditionality (Decision No. 6056-(79/38)).

³⁴ IMF Annual Report 2016 at 43 online: <https://www.imf.org/external/pubs/ft/ar/2016/eng/pdf/ar16_eng.pdf>.

³⁵ IMF Annual Report 2018, *supra* note 22 at 28.

³⁶ *Ibid* at 29.

³⁷ *Ibid*.

³⁸ *Ibid* at 30.

³⁹ IMF Annual Report 2016, *supra* note 34 at 42.

⁴⁰ IMF Annual Report 2018, *supra* note 22 at 57.

with countries' bureaucracies or through its sixteen regional capacity development centers, which can "respond quickly to a country's emerging needs".⁴¹

Capacity development, coupled with technical advice and research extend to a host of areas, such as fiscal policies (revenue, tax, customs, budgeting, public finance management, debt portfolio, and safety nets), monetary and financial policies, legal and regulatory reforms, measures for reducing inequality, statistical capacity, and so forth. The IMF notes that capacity development requires partnerships as the vital tool in the sustainable development agenda since multilateral and regional partnerships harness resources for capacity building on global development needs.⁴² Like the Bank, it is the vast capacity for knowledge generation that has aided the IMF to conduct its capacity development.⁴³

2.3 The Changing Roles of Development Institutions in the Provision of Global Public Goods

The roles that IFIs play in contemporary development have undergone fundamental shifts and recalibrations since their founding at Bretton Woods. The IMF has noted that the Articles vests it with the "enabling authority" to adopt policies that can be adjusted to the "changing circumstances" provided that such adjustments are consistent with and "provide more specific content to these powers and members' obligations."⁴⁴ Part of the justification for these shifts and recalibrations is that IFIs, through such practices as financial stabilization and development financing, constitute the provision global public goods. Thus, we now see IFIs constantly bringing within their ambit a growing repertoire of missions, such as poverty, global economic health, sustainable development, sustainable debts, governance, corruption, climate change. Importantly, the admission that human rights are relevant in the work of the Bank is also part of the recalibration of IFIs.⁴⁵

⁴¹ *Ibid.*

⁴² IMF Annual Report 2018, *supra* note 22 at 69.

⁴³ İnci Ötker-Robe "Global Risks and Collective Action Failures: What Can the International Community Do?" IMF Working Paper WP/14/195. 2014 at 7 online: <<https://www.imf.org/external/pubs/ft/wp/2014/wp14195.pdf>>. The IMF notes, "Extensive cross-country analyses provided by IFIs, for instance, can provide a broad, impartial knowledge base, raise risk awareness, especially where countries fail to recognize far-reaching and long-term implications of their actions."

⁴⁴ IMF, "The Fund's Mandate-The Legal Framework" 22 February, 2010.

⁴⁵ United Nations General Assembly, *Report of the Special Rapporteur on extreme poverty and human rights*, Philip Alston A/HRC/38/33 [Alston, "Special Rapporteur Report on Extreme Poverty"].

When the Bank and the IMF were created under the direction of Britain and the United States in 1944 during the World War II period with the intention of formulating a post-World war II international economic order, international monetary and financial governance were top on the agenda.⁴⁶ Their envisioned role was to create a “world with expanding trade and easily convertible currencies”; establish an international clearing union with a stabilization facility; mobilize finances for the reconstruction of Europe; and respond to the United States implicit desire to dethrone European imperialism and replace it with open markets for America’s commercial entities.⁴⁷ Freedom in exchange and financial stability underpinned the envisaged system, thus the elimination of exchange controls and restrictions was prioritized, alongside the imperative of currency stabilization.⁴⁸ Furthermore, besides financial governance, a common fund for economic development and reconstruction in the postwar period was also another necessity. In the end, the Articles of Agreement that were drafted overshadowed the trade agenda. The World Bank’s mandate was to provide capital for the reconstruction and development of war-ravaged economies in Europe, while the IMF was, among other purposes, responsible for international financial stabilization (monitoring exchange rates of states, overseeing monetary cooperation, and financing balance of payment maladjustments, etc.).⁴⁹

However, today, the functional domains of the twin institutions have expanded enormously to include sustainable and inclusive economic growth, poverty eradication, and development.⁵⁰ One is in doubt as to what does not fall within the ambit of promoting growth and development that these institutions now embrace. Today, the Bank and the IMF see their roles assisting developing countries address trade, investment, and finance-related policies (deemed the engines of growth, innovation), solving debt vulnerabilities, and promoting job creation and productivity

⁴⁶ Sarah Babb & Alexander Kentikelenis, “International Financial Institutions as Agents of Neoliberalism” in Daniel Cahill eds, *The SAGE Handbook of Neoliberalism: International Financial Institutions as Agents of Neoliberalism* (London: Sage Publications, 2018) at 17.

⁴⁷ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge; New York: Cambridge University Press, 2011) at 14.

⁴⁸ Babb & Kentikelenis, *supra* note 46.

⁴⁹ Article I (V) of Articles of Agreement of the International Monetary Fund.

⁵⁰ Section 1 of Article IV of the Articles of Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22, 1944, amended effective January 26, 2016 by the modifications approved by the Board of Governors in Resolution No. 66-2, adopted December 15, 2010.

as both crucial to the global economy and the means of realizing human development.⁵¹ The Fund now considers its primary role to be promoting inclusive global growth.

The Bank's and the IMF's imagined roles are at much variance with those specified in the Articles. While the Bank began operation with the main agenda of financing European infrastructural reconstruction, it now posits its foremost mandate as fighting poverty, and it prides itself on financing development as a pivotal hinge for the viability of all dimensions of sustainability, including eradicating extreme poverty and boosting shared prosperity.⁵² The Bank has, for example, receptively embraced its central role in the UN mandated Post-2015 Development Agenda and Financing for Development, through which it envisions providing technical expertise, assistance in project design, risk management, and advice.⁵³

There could probably be many explanations for this constant transformation of the development mandate of IFIs, such as what Rajagopal refers to as the political necessity of international bureaucratization.⁵⁴ However, for now, I want to limit myself to the concept of global public goods, which has provided a relevant explanation of the constant transformation and bureaucratization of development institutions, at least in the more recent past. As an insider at the time, Stiglitz relied on this concept to explain the shift toward "equilibrium" amid competing demands and expectations in the international development juggernaut.⁵⁵ In 1998, Stiglitz observed that we have to look at the changing dynamics of the global economy as the force that constantly caused these institutions to modify and understand anew their mandates, and to apply new knowledge technologies toward adaptation and equilibrium.⁵⁶ While still the chief economist

⁵¹ World Bank "Our Mission Is More Urgent Than Ever"

online <<https://www.worldbank.org/en/news/feature/2019/04/13/our-mission-is-more-urgent-than-ever>>.

⁵² Development Committee, "Update: The Forward Look and IBRD-IFC Capital Package Implementation" April 2019 Online: <<https://www.devcommittee.org/sites/www.devcommittee.org/files/download/Documents/2019-04/DC2019-0003-PIBRDIFC%20capital%20package%204-13.pdf>>.

⁵³ *The World Bank Group A-Z 2016* (Washington D.C: World Bank, 2016) at 130.

⁵⁴ Rajagopal sees the shift in the mandate of the Bank from lending to projects to programs as resulting from a political necessity to keep up with the pressure of Cold War, which saw an expansion of the scope of World Bank focus. The new areas included poverty, health, and agriculture. The "instrumental effect of this change have involved a dramatic expansion of the BWIs into every conceivable sphere of human activity in the Third World." Rajagopal argues that these are institutions of neither exploitation nor benevolence. "Looked at this way, these international institutions are neither simply benevolent vehicles for development (whatever that means) nor ineluctably exploitative mechanisms of global capitalism, but rather, a terrain on which multiple ideological and other forces intersected, thus producing the expansion and reproduction of these very institutions." Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at 100, 104 [Rajagopal, *International Law from Below*].

⁵⁵ Joseph E Stiglitz, "International Financial Institutions and the Provision of International Public Goods" (1998) 3:2 European Investment Bank Papers 116 [Stiglitz, "Provision of International Public Goods"].

⁵⁶ *Ibid.*

at the Bank, Stiglitz thought that changes “in the international economic environment, and, most importantly, our better understanding of economics in general require that we rethink the role of international financial institutions.”⁵⁷

Stiglitz had in mind an evolving world, which called for regeneration in the face of “crisis management.” The evolving international financial setup, in his view, made the projection of future roles ever more uncertain, thus IFIs had to rethink their roles afresh, expedient with the changing dynamics of development.⁵⁸ Stiglitz set out to show that because the roles IFIs perform constitute policy interventions with cross-boundary and even cross-generational effects, they should be seen as the “provision of global public goods.” This sensibility has prompted both the World Bank and the IMF, in their own policy debates, to reconceive their mandate of financial and monetary stabilization, development financing, and knowledge generation as crucial facets of the provision of global public goods.⁵⁹ Global public goods are those issues—peace, economic stability, the safekeeping of the environment, and the provision of development knowledge—that are so important that they require effective international coordination and collective action to solve, manage, mitigate, or eliminate. The idea of global public goods is derived from discussions in the field of economics, where it was defined as follows:

Issues that are broadly conceived as important to the international community, that for the most part cannot or will not be adequately addressed by individual countries acting alone and that are defined through a broad international consensus or a legitimate process of decision-making.⁶⁰

In the classical economic usage, the concept of “global public goods” was first popularized in 1954 by American economist Paul Samuelson. He distinguished between “private consumption goods,” those goods sharable between individuals, and “collective consumption goods,” those goods “which all enjoy in common in the sense that each individual’s consumption of such a good

⁵⁷ *Ibid* 117.

⁵⁸ *Ibid*.

⁵⁹ For the argument that international monetary and financial systems constitute global public goods, see Michel Camdessus, “International Financial and Monetary Stability: A Global Public Good?” in Peter B Kenen and Alexander K Swobada eds, *Reforming the International Monetary and Financial System* (IMF, 2000) at 9. For an express recognition of the Bank and IMF’s involvement in global public goods, see Development Committee, “Global Public Goods: A Framework for the Role of the World Bank” September 28, 2007 <online <https://www.cbd.int/financial/interdevinno/wb-globalpublicgoods2007.pdf>>.

⁶⁰ International Task Force on Global Public Goods, *Meeting Global Challenges: International Cooperation in the National Interest, Final Report* (Stockholm, 2006) at 13. For a critique of the concept as imprecise and rhetorical, see David Long and Frances Woolley “Critique of a UN Discourse” (2009) 15:1 *Global Governance* 107-122.

leads to no subtraction from any other individual consumption of that good.”⁶¹ Samuelson’s point was that the state has public authority over the management of national public goods since the oversight and provision of citizens’ welfare—which central planning and the economy are implicated in—fall under the aegis of the state. The concept of “global public goods” was later expanded on by Musgrave, who outlined two components of publicness (non-rivalry and non-excludability) in the consumption of the goods. Non-rivalry implies that the consumption of a good does not affect its availability to other people. Non-excludability entails that the enjoyment of a good by one or more people does preclude others.⁶² The notion of publicness in consumption has been construed to have three important dimensions: worldwide application (a spatial dimension); cross-boundary application (an impact dimension); and durability effect (a temporal dimension).⁶³ As a concept, “global public goods” has been used and popularized, mainly by the Bank, in the expanded national, regional, or international sense. Therefore, global public goods may be regional or national, and can extend beyond one geographical boundary or nation, and may be considered regional public good or national public good.⁶⁴

The concept has seen an explosion in usage across many disciplines, especially after its popularization by the United Nations Development Programme (UNDP) in 1999.⁶⁵ It has been applied in such diverse disciplines as international law, development economics, human rights, political science, and international development. In the field of development economics, it has been used as a lens through which to capture and describe conditions arising from neoliberal globalization, natural factors, and other areas of human activity that require collective action to

⁶¹ Paul A Samuelson, “Pure Theory of Public Expenditure” (1954) 36:4 Rev of Econ & Stat at 387. See also Maurizio Carbone, “Supporting or Resisting Global Public Goods? The Policy Dimension of a Contested Concept” (2007) 13:2 Global Governance at 181.

⁶² Richard A Musgrave, “Public Goods” in Cary E Brown and Solow M Robert eds, *Paul Samuelson and Modern Economic Theory* (New York: McGraw Hill, 1983).

⁶³ Inge Kaul, “Making the Case for a New Global Development Research Agenda” (2017) 44:1 Forum for Dev Stud 141 at 143.

⁶⁴ On regional public goods, see Daniel G Arce and Todd Sandier, *Regional Public Goods: Typologies, Provision, Financing, and Development Assistance* (Stockholm: Almqvist and Wicksell International, 2002); Antoni Estevadeordal, Brian Frantz, and Tarn Robert Nguyen eds, *Regional Public Goods: From Theory to Practice* (Washington, DC: Inter-American Development Bank, 2004); Marco Ferroni and Ashoka Mody eds, *International Public Goods: Incentives, Measurement, and Financing* (Dordrecht: Kluwer Academic, 2002).

⁶⁵ For its use in international development cooperation, see Inge Kaul, Isabelle Grunberg & Marc A Stern eds, *Global Public Goods: International Cooperation in the 21st Century* (New York: UNDP & Oxford University Press, 1999); Inge Kaul et al, *Providing Global Public Goods: Managing Globalization* (New York; Oxford: Oxford University Press, 2003).

avert global risks.⁶⁶ Global public goods also describe the way we can describe “immaterial values carrying ethical and humane significance”⁶⁷ of which human rights, rule of law, good governance, or even norms and standards of accountability constitute an essential part.⁶⁸

The concept of global public goods has been used to justify the intervention of the Bank and the IMF in the international economic framework, under the guise of collective action and cooperation to tackle global challenges. Covertly, the provision of global public goods has effectively supplied the rationale for the *de facto* expansion of the IFI’s mandate. IFIs argue that collective action and cooperation on common interests (a euphemism for IFIs’ interventionary measures) do tackle a vast array of problems affecting the stability of the global economy, sustainable development, global norm-making, and effective international policymaking.⁶⁹ As Stiglitz has been bold in arguing, “the main *raison d’etre* for international financial institutions is the provision of international public goods such as peace, economic stability, the safekeeping of the environment and the provision of [development] knowledge.”⁷⁰ Some of the potential causes of global instability warranting multilateral interventions through the Bank’s and Fund’s policy advisories, technical assistance, and resource allocation include financial meltdown, unsustainable international development practices, ecological disasters, inequalities, endemic poverty, and so

⁶⁶ Global public goods, encompassed in the three categories, may include a broad range of issues or conditions that are not limited to: economic interdependence; regulating financial stability; financing and tackling challenges to development; strengthening the multilateral trading system; harnessing knowledge for development; issues of climate change; issues of international peace and security; global poverty and so forth. See Carbone, *supra* note 61 at 182; Joseph Stiglitz, “Knowledge as a Global Public Good” in Inge Kaul, Isabelle Grunberg & Marc A Stern eds, *Global Public Goods: International Cooperation in the 21st Century* (New York: UNDP & Oxford University Press, 1999) at 310.

⁶⁷ Erik André Andersen & Birgit Lindsnaes eds, *Towards New Global Strategies: Public Goods and Human Rights* (Leiden; Boston: Martinus Nijhoff Publishers, 2007) at xiii.

⁶⁸ Erik André Andersen & Birgit Lindsnaes, “Public Goods: Concept, Definition and Method” in Erik André Andersen & Birgit Lindsnaes eds, *Towards New Global Strategies: Public Goods and Human Rights* (Leiden; Boston: Martinus Nijhoff Publishers, 2007) at 45.

⁶⁹ Carbone, *supra* note 61 at 182; Stiglitz, “Knowledge as a Global Public Good”, *supra* note 66 at 310.

⁷⁰ Stiglitz, “Provision of International Public Goods” *supra* note 55 at 116.

forth.⁷¹ The rationale for the interventions of IFIs is often that “only international public institutions are capable of providing these goods.”⁷²

In the next section, I explain that the provision and administration of global public goods, which the Bank and the IMF proudly embrace and spearhead, manifests significant accountability-obliterating dimensions and fosters entrenched development injustices in various forms.

3. ACCOUNTABILITY CHALLENGES IN THE PROVISION OF GLOBAL PUBLIC GOODS

I identify four key challenges to holding the IFIs accountable for their policies and actions in their provision of certain global public goods: (i) the global policy system as a structural constraint to development justice; (ii) knowledge encumbrances; (iii) the rationalization of human rights as a non-economic agenda; and (iv) the participatory development deficit. These challenges also constitute the impediments to the realization of development justice, that is, a claim for a development model whose rules, structures and processes can secure the global redistribution—of power, wealth, resources and opportunities—and social justice. I commence the analysis by first understanding the nature of the contemporary global economy in which interventionary policy measures, practices, and ideas of the Bank and the IMF exert manipulative, determinative, and subordinating influence.

3.1 The Global Policy System as a Structural Encumbrance to Development Justice

In many ways, the deployment of the notion of the provision of global public goods by IFIs is very much implicated in the way the global policy system constitutes an encumbrance to the accountability of development institutions. This can be explained in many ways. We have to begin by understanding how IFIs have justified their interventions in terms of the provision of global public goods.

⁷¹ Carbone, *supra* note 61 at 183; Stiglitz, “Provision of International Public Goods” *supra* note 55; Viterbo, *supra* note at 20. Stephany Griffith, “New Financial Architecture as a Global Public Good” observes that:

International financial stability and efficiency is a very important global public good, especially significant for poor people in developing and emerging countries. Financial stability and efficiency can make an important contribution to development; lack of financial stability—both nationally and internationally—can be an important obstacle to growth, development and poverty reduction.

Online: <<https://www.ids.ac.uk/files/griffithj4.pdf>>.

⁷² Stiglitz, “Provision of International Public Goods” *supra* note 55 at 116.

An underpinning logic for the interventions of IFIs is the need for, what Kaul calls, the collective action for “common interest regulation” and the “compulsion to cooperate” to avert global challenges.⁷³ The justification is that there is need for coordinated international response and regulation in the context of globalization fraught with unprecedented risks. By this justification, the IFIs attach the label of global public goods to most of their development work, and the rules and advisory policies that these institutions proliferate at the international level are considered best practices and norms to be used and re-used by borrowing economies.⁷⁴ These rules require standardized replication in the borrowing economies, it is argued, because they assure a stable and sustainable world order.

For example, by looking at the financial regulatory role of the IMF, it has been argued that there are certain issues, especially risks and emergencies, that “a single country, however powerful it may be,” cannot address alone.⁷⁵ It is argued that neoliberal globalization has both liberating and debilitating potential, and therefore it constitutes externalities with potential harmful effects (“malprovision” or “underprovision” of global public goods). There is thus a need for cooperative approaches to global governance. It is claimed that if global threats are not keenly monitored and restrained, they may spill across boundaries to harm our common good, now and in the future.⁷⁶ By looking at threats through a “global instability” optic, the assumption is that collective policy action or oversight by states would restrain the spillover effects that may trigger even more grave harms to the detriment of the global community.⁷⁷ In a working paper, one IMF official has argued that “managing global risks requires a cohesive international community that enables its stakeholders to work collectively around common goals by facilitating sharing of knowledge,

⁷³ Inge Kaul, D Blondin & N Nahtigal, “Understanding Global Public Goods: Where We Are and Where to Next” (2016) online:

<https://www-elgaronlinecom.ezproxy.library.yorku.ca/view/Research_Reviews/9781783472994/intro.xml>. [Kaul *et al*, “Understanding Global Public Goods”]; Inge Kaul, Isabelle Grunberg & Marc A Stern eds, *Global Public Goods: International Cooperation in the 21st Century* (New York: UNDP & Oxford University Press, 1999)

⁷⁴ Joseph Stiglitz, “The Future of Global Governance” in Narcis Serra & Joseph E Stiglitz eds, *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford: Oxford University Press, 2008) (“This has become especially true as the IMF and the World Bank have argued that problems of development are related to inadequacies in governance in developing countries” at 310).

⁷⁵ Viterbo, *supra* note 20 at 16.

⁷⁶ Carbone, *supra* note 61 at 182. Further see Ban Ki-Moon, “Securing the Common Good in a Time of Global Crises” Speech at the John F Kennedy School of Government, Harvard University, 21 October 2008 where he mentions global financial stability, climate change, terrorism as issues requiring global solidarity.

⁷⁷ Carbone, *supra* note 61 at 183; Kaul *et al*, “Understanding Global Public Goods”, *supra* note 73 at 4. Such adverse effects may result from market failures, financial meltdown, unsustainable international development practices, ecological disasters, endemic poverty and other global pandemics and global insecurity.

devoting resources to capacity building, and protecting the vulnerable.”⁷⁸ This common-interest approach to development governance provides the overriding rationale for the compulsion to cooperate in the provision of public good. This rationalization results in indirect governance techniques, anchored to the logic that certain policy issues are of general importance to the global community.

But woven into this rationality of collective action for common interests are serious accountability avoidances. These accountability avoidances reveal the way language is deployed in the hierarchization, domination and legitimization of power. The first challenge is presented by norm conflict or a clash between national and international norms and standards. The global policy system always imposes on Third World states a model of development complete with its own rules and ethos of governance. Those rules and ethos that are often justified as the provision of global public goods may themselves constitute a contravention of other universally accepted values such as a rights-based international order.⁷⁹ Whether in the area of trade, investment, or finance, for the Third World people, the ultimate challenge is that of a clash of norms. A clash of norms raises the question of what relevant rules are to be applied as the basis of development policymaking and implementation, which can then be interrogated by the people or their legitimate institutions.⁸⁰

The second challenge is what Okafor calls the re-location of “framework governance” for policymaking from national to the supranational institutions.⁸¹ This phenomenon has been the reason for the decline of state policy control in the Third World; state subordination is sanctioned through policymaking that neither respects a democratic ethos nor gives scope for individual state autonomy.⁸² This in itself constitutes a violation of the RTD principle of self-determined development. Kaul argues that the roles that the Bank and IMF perform in the provision of global public goods constitute another danger, “contravening another core principle of our present world

⁷⁸ Ötker-Robe, *supra* note 43 at 1.

⁷⁹ For the concept of norm conflict, see Jeffrey L Dunoff, “How to Avoid Regime Conflict” in Kerstin Blome, Andreas Fischer-Lescano, Hannah Franzki, Nora Markard and Stefan Oeter eds, *Contested Regime Collisions: Norm Fragmentation in World Society* (Cambridge: Cambridge University Press, 2016) at 54. The concept originates from Fischer-Lescano and Teubner, “Regime Collisions” in eds, *ibid* at 1005-1007

⁸⁰ For a conflict between human rights and other regulatory orders, see Mihir Kanade, *The Multilateral Trading System and Human Rights: A Governance Space Theory on Linkage* (Oxford: Routledge, 2018); James Harrison, *The Human Rights Impacts of the World Trade Organization* (Portland: Hart Publishing, 2007).

⁸¹ Okafor, “Third World’ Legitimate Governance”, *supra* note 4 at 8-9.

⁸² *Ibid.* As Kaul argues, of the provision of global public goods undermines sovereignty by the rationality of the “compulsion to cooperate,” a danger “contravening another core principle of our present world order: national policymaking sovereignty.” Kaul *et al*, “Understanding Global Public Goods”, *supra* note 73 at 14.

order: national policymaking sovereignty.”⁸³ On a broader spectrum, this usurpation of Third World governance has meant that a powerful network of supranational development institutions now permeates the autonomy and regulatory authority of weak states. This has often tended to occasion the detriment of some public values, albeit without the possibility of recourse to oversight, mitigation, or vindication within the traditional state-based accountability mechanism.

Kennedy refers to this as the parochialism of the international political economy “blunting responsibility for distributional outcomes.”⁸⁴ As such, globalization has provided an arena, often characterized by asymmetrical relations of power, for IFIs to be illegitimately involved in the management of global public goods.⁸⁵ Such interventions are not accompanied by adequate internal accountability processes or external accountability to the implementing state or the people experiencing adverse outcomes.⁸⁶ This relationship manifests some of the subtle ways in which globalization compounds the challenges of accountability in the Third World. It is trite knowledge that governance and policymaking has shifted to supranational institutions that are detached and safely distanced from accountability constraints. In other words, globalization obliterates accountability of IFIs by making them invisible and even invisibilized from accountability in the complex interdependent structures.

The third dilemma presented by the notion of global public goods complicates the *ex-post* accountability approach. The fundamental question in this regard relates to how this powerful network of non-state actors can be held accountable whenever their interventions result in a global economic order uncondusive and unfavourable to just, equitable, and human-centred development. Take, for example, the reported case of Ghana, where macro-economic prescriptions contained in the 2015-2019 joint lending by the IMF and the Bank is said to have led to a reduction of public expenditures by 17 percent per person as part of the conditions of the loans. In that lending

⁸³ *Ibid.*

⁸⁴ Kennedy, *supra* note 5.

⁸⁵ Inge Kaul & Pedro Conceicao eds, *The New Public Finance: Responding to Global Challenges* (New York: Oxford University Press, 2006) at 11.

⁸⁶ Taekyoon Kim, “Contradictions of Global Accountability: The World Bank, Development NGOs, and Global Social Governance” (2011) 18:2 *Journal of International and Area Studies* 23 (that “power politics within international institutions debilitates internal accountability, which refers to organizational mechanisms in which internal members can directly hold the powerful to account, mainly through transparent and equal elections for the Executive Board” at 27). See further Okafor, “Third World Legitimate Governance”, *supra* note 4 at 6:

What is being urged is a devotion of much more activist attention, energy and resources to campaigns that aim at influencing significantly the external entities and processes that, without any real accountability to anyone in the “third world” so profoundly affects the lives and rights of “third world,” peoples.

arrangement, the freed funds are said to have been directed to paying external loans at interest rates of 8-10 percent.⁸⁷ This usurpation of autonomy raises the problem of how to address such adverse policy outcomes. It also raises the question of how to hold autonomous institutions accountable (separately and independently) in the context of collaborative and collective bureaucratic decision making.⁸⁸ The real problem is that in the course of collective policymaking, the global policy system integrates into one whole and affects national policy outcomes. When, however, harms occur, the problem is that individual actors and actions cannot be differentiated in the responsibility allocation. The consequence is that tracing causal links of harms to actors becomes uncertain and indeterminate.

The other aspect in which we can perceive the rationality of the provision of global public goods as an accountability hindrance is its justification of mandate expansion and regeneration for Bretton Woods Institutions. As Okafor argues, the “internationalization and externalization of governance” comes not only with the assumption of Third World policy space, but also the usurpation and influence in determining, shaping, and driving policy priorities in the global economy.⁸⁹ Some see the idea of providing global public goods as enabling IFIs mandates to creep into other domains of practice.⁹⁰ This is “a conjunctural paradox” between international law and development, whereby international law and development praxis continually vest so much determinative authority upward in international institutions and yet confer all the responsibility downward in the nation-state.⁹¹ In other words, the global policy system provides wider operational scope but restrained accountability for global development institutions. As Pahuja adds, the responsibility for consequential harms is too often localized at the level of state institutions and not at global agencies.⁹² It is this dynamic that further compounds the development quandary of “governance without government.”⁹³ This obliteration of accountability has been brought about by “a particularistic” way of understanding of social reality and the discourse of

⁸⁷ Dina Musindarwezo & Tim Jones, “Debt and Gender Equality: How Debt Servicing Conditions Harm Women in Africa” online: <<https://www.brettonwoodsproject.org/wp-content/uploads/2019/03/Cover-1.png>>.

⁸⁸ Thomas D Zweifel, *International Organizations & Democracy: Accountability, Politics, and Power* (Boulder & London: Lynne Reiner Publishers, 2006).

⁸⁹ Okafor, “Third World Legitimate Governance” *supra* note 4 at 4.

⁹⁰ Sundhya Pahuja, “Global Poverty and the Politics of Good Intentions” in Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford; Portland: Hart Publishing, 2014) at 38 [Pahuja, “The Politics of Good Intentions”].

⁹¹ *Ibid* at 32.

⁹² *Ibid* at 37.

⁹³ Kim, *supra* note 86 at 24.

development as the provision of global public goods. As Ngugi argues, “the creation of a discourse allows for a particularistic articulation of knowledge and power, the process through which social reality comes into being.”⁹⁴ This nuance has attracted very marginal attention, if any at all, in the international institutions’ understanding of the accountability praxis.

The other way in which global development institutions create a global policy system that undermines sovereign autonomies and institutionally “bypasses”⁹⁵ states’ own internal oversight and accountability processes is through the “conditionality regime.” Conditionality denotes the requirement of conformity to a raft of rules and standards of borrowing set by lending institutions. In practice, financing by the Bank and IMF is subject not only to key policy documents (operational directives and operational policies and procedures)⁹⁶ but also generalized standard practices and policy blueprints. Good examples of these are: the Poverty Reduction and Growth Framework (PRGF) of the IMF and the Poverty Reduction Strategy Papers (PRSPs) and the Comprehensive Development Framework (CDF) of the Bank respectively.⁹⁷ The PRSPs were invented in 1999 when the Bank’s President Wolfensohn made it a requirement for funding to be subject to the preparation of PRSPs.⁹⁸ The IMF followed suit and its poverty reduction strategies became a key global benchmark for access to concessional loans and debt relief.⁹⁹

⁹⁴ Joel Ngugi, “The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa” (2001-2002) 20 *Wis Intl LJ* 297 at 298.

⁹⁵ See for example Mariana Mota Prado & Michael J Trebilcock, *Institutional Bypasses: A Strategy to Promote Reforms for Development* (Cambridge: Cambridge University Press, 2018).

⁹⁶ These include Bank Policy: Investment Project Financing (formerly Operational Policy 10.00); Bank Directive: Investment Project Financing (formerly Bank Procedure 10.00); Bank Policy: Development Policy Financing (formerly Operational Policy 8.60); Bank Procedure 8.60: Development Policy Financing; and Environmental and Social Framework.

⁹⁷ “A PRSP is primary a document outlining a country’s national economic policy with a focus on a programme for poverty reduction, developed nationally through a participatory process involving a cross-section of stakeholders. Aside from identifying the nature, sources and incidences of poverty in the country, a PRSP must detail how the country’s resources-chiefly those provided through debt relief and concessional financing-will be disbursed to ameliorate these problems.” Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Oxford; New York, Routledge, 2011) at 2.

⁹⁸ For an insider discussion and perspectives on the rationale for the shift to the new modality of development financing at the World Bank, see James Wolfensohn, *Proposal for a Comprehensive Development Framework* (Washington, DC, World Bank, 1999); World Bank, “Partnership for Development: Proposed Action for the World Bank” (discussion paper presented at an informal meeting of the partnerships group, 20 May 1998) online: <<http://documents.worldbank.org/curated/en/789141468153858137/Partnership-for-development-proposed-actions-for-the-World-Bank-a-discussion-paper>>. A major emphasis of this earlier shift was toward “ownership,” “partnership,” “consultation,” and “accountability.”

⁹⁹ Tan, *supra* note 97 at 2. Take, for example, that in the most recent case of the IMF’s and the Bank’s plan of debt relief, “Somalia has committed to maintaining macroeconomic stability; implementing a poverty reduction strategy; and putting in place a set of reforms focused on fiscal stability, improving governance and debt management, strengthening social conditions, and supporting inclusive growth in order to reach the HIPC Completion Point.” See Somalia to Receive Debt Relief under the Enhanced HIPC Initiative March 25, 2020, Press release no. 20/104 online:

This adaptation to a new policy framework marked the move from the Washington to the Post-Washington Consensus, or the alteration of the regime of structural adjustment and conditionality to that of partnership, ownership, participation, and accountability in the implementation of social objectives.¹⁰⁰ Unsurprisingly, even with the shift to a new development policy paradigm, nothing has always remained as clear as the fact that the IMF conditionality regimes connote macro-structural reform in the target states (in one form or another). It is always said that the structural reforms and imposed conditionalities are aimed at maintaining, among other things, fiscal stability, improving sustainable debt management, and strengthening general governance climate. Similarly, the Bank still requires structural reform measures, in keeping with the neoliberal creed of development. Commentators have noted that the “neoliberal-globalist core was never disputed” in the technocratic shift from Washington Consensus to a new variant, the post-Washington Consensus (of PRSPs) as a development policy.¹⁰¹ Others have even argued that the perceived shift does not tell the whole story. They observe that the policy accoutrements constituting the post-Washington Consensus represent “not a paradigm shift but a paradigm expansion within mainstream wisdom”.¹⁰²

A conditionality regime, in whatever form it comes and despite its justification, is another way in which the contrived global policy system exerts influence and control that subordinates policy autonomies in the borrowing countries. A conditionality regime affords the IMF room to maneuver, to exert influence, and to exercise control as it perpetuates the parochial interests of hegemonic states who may not be held to account because of their invisibility in this scheme of

<<https://www.imf.org/en/News/Articles/2020/03/25/pr20104-somalia-somalia-to-receive-debt-relief-under-the-enhanced-hipc-initiative>>.

¹⁰⁰ See, for example, Ali Burak Güven, “Whither the post-Washington Consensus? International Financial Institutions and Development Policy Before and After the Crisis” (2018) 25:3 *Review of International Political Economy* 392-417.

According to some observers, this shift was a tactical response to the onslaught on neoliberal policies from a counter-hegemonic Third World discontented with the destructive structural adjustment and conditionality regimes of the Bank and IMF that had dominated development strategies during the “lost decades.” See William Easterly, “The Lost Decades: Developing Countries’ Stagnation in Spite of Policy Reform, 1980– 1998” (2001) 6 *Journal of Econ Growth* 135; Gustavo Esteva, Salvatore Babones & Philip Babcicky, *The Future of Development: A Radical Manifesto* (Bristol; Chicago: Policy Press, 2013) at 52.

¹⁰¹ Güven, *ibid* at 395 citing Sarah Babb, “The Washington Consensus as Transnational Policy Paradigm: Its Origins, Trajectory and Likely Successor” (2013) 20:2 *Review of International Political Economy* 268–297. Washington Consensus is “a dominant development paradigm” that emerged in the 1980s to describe policy convergence between the United States Treasury and Bretton Woods Institutions. See Rumu Sarkar, *International Development Law: Rule of Law, Human Rights and Global Finance* (New York: Oxford University Press) at 42.

¹⁰² Güven, *supra* note 100 at 394.

institutional deceit.¹⁰³ Conditionality poses a different form of control that questions the traditional accountability relationships. For example, it is argued that PRSPs serve as “a regulatory restraint” insofar as a recipient state has to demonstrate its “discipline” to a set of core principles and operational directives underpinning the PRSPs.¹⁰⁴ Under the guise of national ownership, states involuntarily adopted universal economic plans, governance structures, “uniform development targets,” and the “common prioritization of public policy” in compliance with the rules of the global policy system.¹⁰⁵ The adoption of predetermined policy measures defeats the objective of answerability by bypassing the oversight mechanisms of the government at the policymaking level. This accountability distortion arises from the fact that the predetermined conditions defeat any attempts to hold institutions or governments answerable in the course of decision-making.

The development model of standardization of norms and universal codes therefore implies a fundamental distortion of traditional accountability relationships. By this policy paradigm, states’ bureaucratic institutions and governance structures are supposed to be responsive and accountable to international development institutions and not to their own citizenry in the design and implementation of development. Whenever development policies result in adverse economic and social effects, international institutions are invisible, standing at a safe distance from accountability while the state must account for and even repair the adverse distributional outcomes.

Even as Raffer calls international development a “perverted incentive system [of] rewarding errors,” it is also very much a fettered system obsessed with the accountability of borrowers.¹⁰⁶ It is therefore easy to discern that part of the aim of adjusting to a new policy paradigm was to ensure the direct and distinct accountability of the state in the delivery of results

¹⁰³ “Northern governments and private international banks assigned the IMF with responsibility for establishing the system of rules and decision-making procedures that determine which developing country receive capital and under what conditions. The IMF is essentially the head of the international creditor cartel and, when it declares that a government’s economic reform program is “off track,” governments and banks usually withhold most financing from the government.” M Rodwan Abouharb & David Cingranelli, *Human Rights and Structural Adjustments* (Cambridge: Cambridge University Press, 2007) at 56.

¹⁰⁴ Tan, *supra* note 97 at 5.

¹⁰⁵ *Ibid.*

¹⁰⁶ Raffer laments that in development financing, “tortious damage caused by IFIs must be paid by IFIs’ borrowers, including many of the world’s poorest people. IFIs may even gain financially from their own negligence by extending new loans necessary to repair damages done by their prior loans. One failed adjustment program calls for the next. This mechanism makes IFI-flops generate IFI-jobs and additional income. This perverted incentive system rewarding errors, negligence, and even violations of the very constitutions of IFIs is absolutely at odds with the principles on which Western market economies rest. It must be brought to an end”. See Kunibert Raffer, “International Financial Institutions and Financial Accountability” (2004) 18:2 *Ethics Intl Affairs*.

and targets and not of development institutions in their dealings with developing states.¹⁰⁷ Effectively, we have a global policy system where the demarcating lines and direction of accountability seem to look only toward the state. The development accountability praxis is not made to be inward-looking toward IFIs. This is how the global policy system and the retention of conditionality regimes undermine and obstruct the accountability of IFIs.

The other way the global policy system undermines and obstructs IFI accountability is through technocratic surveillance of global monetary and financial stability, which the IMF defends as crucial for discerning risks and spillover effects.¹⁰⁸ In this way, the IMF maintains its focus on the provision of global public goods through the “[b]ilateral and multilateral surveillance [that] are underpinned by a shared and deeper understanding of global interconnectedness and linkages across sectors.”¹⁰⁹ But as Goetz and Jenkins argue, discounting this rationale, the advisory role is one that enables the IMF to evade accountability by staying in the shadows of policy implementation.¹¹⁰ The guise of the provision of global public goods is therefore a kind of institutional deceit. Surveillance, and the institutional deceit that informs it, allows the IMF to remain disconnected from claims of accountability for policy effects that may endure from its macro-structural measures and prescriptions.

On the whole, the global policy system, seen through the prism of development justice, is an organized scheme of accountability avoidance for IFIs. Accountability avoidance and disconnection is rationalized and even legitimized, most prominently, by the idiom of “global public goods.”

¹⁰⁷ This is well pronounced in the logic that the World Bank continues to advocate; one that centralizes the state as the singular institution to be constrained by human rights and accountability praxis. “The intrinsic reasons for integrating human rights in development include those related to the legal obligations that emanate from the international human rights framework. States parties to human rights instruments are under a duty to respect, protect, and fulfil human rights”. World Bank & OECD, *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges*, 3rd ed, (Washington DC: World Bank, 2016) at xxii.

See more particularly the pronounced language of accountability of the state in CDF Secretariat, The World Bank, “Comprehensive Development Framework: Meeting the Promise? Early Experience and Emerging Issues” September 17, 2001 para 21, 78, 81.

¹⁰⁸ *Ibid* at 30.

¹⁰⁹ IMF Annual Report 2018, *supra* note 22 at 30.

¹¹⁰ Anne Marie Goetz & Rob Jenkins, *Reinventing Accountability: Making Democracy Work for Human Development* (New York: Palgrave Macmillan; 2005) at 24.

3.2 Encumbrances of Knowledge Technologies as Accountability Challenges

The Bank and the IMF have become influential institutions and regulatory regimes in the international economy, courtesy of knowledge generation and practice, which they apply to the processes of development and stabilization capital lending. Knowledge practice may come in the form of financing instruments¹¹¹ and/or hegemonic thoughts and particular rationalities.¹¹² Traditionally, Bretton Woods Institutions justify knowledge generation and practice as a global public good because of its potential to “contribute, or limit damage to stability and development.”¹¹³ The understanding is that:

Lack of relevant knowledge is a key obstacle to effective risk management. Knowledge deficiencies become more formidable as risks grow in intensity and complexity and as the uncertainties about their sources, drivers, and potential impacts deepen.¹¹⁴

It is the necessity of risk avoidance that gives impetus to knowledge generation as a global public good.¹¹⁵ Hence, the Bank has come to enjoy enormous influence in the development financing industry through knowledge and research. Commentators observe that IFIs have, more or less, relied on knowledge generation and practice as a technology of power, in its productive senses, and as a form of governance.¹¹⁶ This happens through the vast research resources and capacity available to IFIs, which places them at a relative knowledge-power advantage. Consequently, IFIs have consolidated an enormous capacity to shape policies and development

¹¹¹ “Traditionally, the IMF – through its surveillance, technical assistance, intellectual leadership, and lending conditions – has been associated with an orthodox macro-economic view promoting a small and open state, prioritising fiscal prudence over other considerations, including social and economic inequality. Consequently, the twin aims of this orthodox approach to fiscal policy are macro-economic stability and growth, which in theory establish confidence in the sovereign bond markets to keep borrowing costs manageable.” This view is extracted from Kate Donald & Nicholas Lusiani, “The IMF, Gender Equality and Expenditure Policy: The Gendered Costs of Austerity: Assessing the IMF’s Role in Budget Cuts which Threaten Women’s Rights” (Bretton Woods Project; September 2017) at 6.

Some of the Fund’s conditionality instruments which enable them achieve the macro-economic objectives include: Standby Arrangements, Extended Fund Facilities and the Extended Credit Facilities while the Bank’s major governance instrument is the Comprehensive Development Framework. See on;one: <<https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality>>.

¹¹² For the role of hegemony and ideology in the Bank’s development work, see generally David Moore, “The World Bank and the Gramsci Effect: Towards a Transnational State and Global Hegemony” in David Moore ed, *The World Bank: Development, Poverty, Hegemony* (Durban: University of KwaZulu Natal Press, 2007) at 27-62. For a discussion of the Bank’s capture of policy discourses in development through ideation and knowledge see Schech and Vas Dev, “Governing Through Participation” in David Moore ed, *ibid* at 173.

¹¹³ Ötker-Robe, *supra* note 43 at 7.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ One commentator observes that the dominant influence the World Bank enjoys in the generation of norms and standards is because of its “unique position in multilateral lending, combined with its vast expert bureaucracy and research presence.” Ali Burak Güven, “The World Bank and Emerging Powers: Beyond the Multipolarity–Multilateralism Conundrum” (2017) 22:5 *New Pol Econ* at 498.

discourse in their preferred direction, notwithstanding the inherent policy fallibilities, even as they delegitimize other views that may contest their policy paradigms. As Verger notes, most of the Bank's publications have biased economic leanings and are impervious "to external ideas and, even less, to the concrete effect of external participation in the Bank's policies."¹¹⁷ This consolidation of governance through knowledge is so strong, in fact, that some countries prefer borrowing from the Bank because of its repertoire of technical advice, without paying much attention to the interest charged on loans.¹¹⁸

Governance through knowledge in the form of a "vast expert bureaucracy and research presence,"¹¹⁹ as Güven remarks, undermines Third World governance. It is not difficult to see this, in the language of Okafor, as "a colonial praxis of tutelage" by empires in the subjugation of the subaltern classes, either in the over-production of development themes, or in the "inequalities of the global norm-negotiation processes, amidst a veneer of formal equality."¹²⁰ Some policy experts refer to this as knowledge practice, whose pervasive dominance in the national economies of nation-states is often facilitated by a combination of policy and regulatory interventions that accompany lending and surveillance in developing countries.¹²¹

Apart from undermining Third World governance, such a resource and knowledge advantage has tended to delegitimize any alternative worldviews that stakeholders may wish to express. By way of example, the Bank and IMF rely on their deep knowledge of global economic trends to construct economies and control borrowing in Third World countries in ways that they paternalistically argue benefits them.¹²² Except for the Bank's technocrats and consultants, very few people or even scholars participate in the generation of such knowledge resources. In fact, this

¹¹⁷ Antoni Verger, D Brent Edwards Jr. & Hulya Kosar Altinyelken, "Learning from All? The World Bank, Aid Agencies and the Construction of Hegemony in Education for Development" (2014) 50:4 Comparative Education at 381-2 [Verger *et al*].

¹¹⁸ *Ibid* ("An active loan portfolio would include demonstration projects and considerable knowledge transfer, assuring unbroken access to the organisation's analytical and advisory activities (AAA)" at 500).

¹¹⁹ *Ibid* at 498.

¹²⁰ Obiora Chinedu Okafor, "Marxian Embraces (and de-couplings) in Upendra Baxi's Human Rights Scholarship: A Case Study" in Susan Marks ed, *International Law on the Left: Re-examining Marxist Legacies* (Cambridge: Cambridge University Press, 2008) at 259.

¹²¹ See for example, Adam Feibelman, "Law in the Global Order: The IMF and Financial Regulation" (2017) 49 NYU J Intl L & Pol 687; Daniel Bradlow, "The World Bank, the International Monetary Fund and Human Rights" (1996) 6 Journal of Trans L & Contemp Prob 68; Frank J Garcia, "Global Justice and the Bretton Woods Institutions" (2007)10:3 Journal of Intl Econ L at 462.

¹²² Tebeje Molla, "Knowledge Aid as Instrument of Regulation: World Bank's Non-Lending Higher Education Support for Ethiopia" (2014) 50:2 Comparative Education 229.

is always de-emphasized as necessary in order to overcome or grasp policy failures and human-induced disasters.

The first concern regarding knowledge aid as an impediment to accountability in international development relationships stems from the understanding that governance through knowledge is a form of governance from a distance.¹²³ IFIs not only use their research power as a modality of governance but also rely on their financial wherewithal, aura of authority, and reputable image as “a symbolic power” to predetermine, steer, and shape policy agenda.¹²⁴ This means that IFIs’ reliance on information as a technology of knowing occurs when they do not govern but their interest does. Knowledge-based regulation represents an ideologically guided vision of transformation. It is a symbol of development institutions’ fetishized understanding of the world. These ideologies and fetishes are pushed by IFIs in the form of recommendations for best practices, research findings, expert opinions, and generated statistical data. These are then used to sway state behaviour, social policy spending, public opinion, and actual policy practice—in uncritical ways that fail to take account of developmental circumstances of states in the Global South.¹²⁵ Implicit in this praxis is the paradigm of governance from a distance in which the research and advisory roles of the Bank and the IMF constitute hegemonic tools for constructing, manipulating, and shaping “policy directions in aid-recipient countries.”¹²⁶ Because of the influence and ideational power of lenders, state policy formulators always tend not to defer to countervailing values such as human-wellbeing, equity and social justice as specific concerns to be prioritized in development programme and projects.

In reality, the act of swaying a state behaviour in a particular direction suggests that some governance machineries have shifted and are now exercised by IFIs that are detached and distanced from oversight or from any claims of accountability that citizens may raise. In this scenario, IFIs stand at a distance from, and are invisible in, policy implementation. This dynamic poses a hindrance to the answerability of the Bank and IMF. Governance from a distance through knowledge also creates relationships for possible responsibility avoidance. It ensures that

¹²³ *Ibid* at 230. The fact is that knowledge is non-neutral, it continues to be used to “induce compliance to [the Bank’s] neoliberal policy prescriptions”

¹²⁴ *Ibid* at 231.

¹²⁵ See e.g Miyawa Maxwell, “Covid-19 and the Continued Imposition of Global Institutions’ Fetishized Way of Understanding the World” *AfronomicsLaw* June 22, 2020 online: <<https://www.afronomicslaw.org/2020/06/22/covid-19-and-the-continued-imposition-of-global-institutions-fetishized-way-of-understanding-the-world/>>.

¹²⁶ Molla, *supra* note 122 at 231.

development institutions are distant from accountability in the planning and implementation of projects. And whenever “any project fails to materialize its target, the blame goes to the victims and their culture, not the planners”.¹²⁷ Accountability and development justice discourses omit this crucial dynamic.

Furthermore, knowledge technologies that development institutions exercise with asymmetric power generate nuances and significations to which performative practices correspond.¹²⁸ In effect this correspondence phenomenon produces forms of domination, subordination, and paternalism that do not explicitly lend themselves to the cognitive grasp of conventional accountability mechanisms. Sande Lie argues that contemporary development models establish a façade of freedom.¹²⁹ A façade of freedom arises from arrangements in which there is a compulsion on states’ policies and programs to conform to a litany of Bank and IMF internal policy instruments (which, almost entirely, deploy a macroeconomic view of development).¹³⁰ For him, in the context of economic or political power differentials, it is easy to generate knowledge to which practices correspond. This is explained by the way the perceived shift away from old policy paradigms, such as conditionalities and structural adjustments, to paradigms emphasizing ownership, partnership, and participation have been accepted without deep interrogation. While some development scholars have argued that such a shift marked an “escalating commitment to hypocrisy,”¹³¹ Sande Lie saw in them a façade of freedom in control. The façade of freedom that they underpin arises in arrangements in which states are free to plan, own, and implement their own development strategies. But this freedom occurs under the fetters that such states’ policies and programs must conform to Bank and IMF internal policy instruments.¹³² Under this façade of freedom as a specific exercise of power from a distance, traditional accountability relations and chains are distorted. States are accountable to development institutions rather than their own citizens.

¹²⁷ Md Saidul Islam, *Development, Power, and the Environment: Neoliberal Paradox in the Age of Vulnerability* (New York, London: Routledge, 2013) at 53.

¹²⁸ I rely on John Harald Sande Lie, *Developmentality: An Ethnography of the World Bank-Uganda Partnership* (Bergham Books, 2015).

¹²⁹ *Ibid* at 53.

¹³⁰ *Ibid*.

¹³¹ Alexander E Kentikelenis, Thomas H Stubbs & Lawrence P King, “IMF Conditionality and Development Policy Space, 1985–2014” (2016) 23:4 *Rev of Intl Pol Econ* 543 at 543.

¹³² Sande Lie, *supra* note 128 at 53. See also Rajagopal, *International Law from Below*, *supra* note at 54.

A good example of this façade of freedom are the PRSPs or PRGFs that borrowing states are required to prepare, outlining concrete actions to be implemented as prerequisites for qualifying for loans. States were expected to “institutionalize procedural and institutional reform” measures that development financial assistance ought to achieve in line with the CDF.¹³³ PRSPs are prepared by borrowing countries but evaluated and assessed by the Bank and IMF through a Joint Staff Advisory Note, subsequent to which they form the benchmark for lending by other multilateral and private financiers. In content, PRSPs had to specify the government’s development priorities, macroeconomic, social, and structural measures and programs, as well as the policy framework and strategies for achieving growth and poverty reduction.¹³⁴ Under this lending instrument, a state has the right and discretion to formulate these papers in compliance with the Bank’s recommendations. In other words, the borrowing state is accountable in policy formulation to the lending institution. The Bank requires that “[c]onsulting directly with civil society [is] a key input ... in the preparation of [a country’s development strategies and policies].”¹³⁵ This is, however, honoured more in the breach than observance. Besides, there is an attendant paradox to it.¹³⁶ From a RTD perspective, these knowledge practices offend Article 1 of the Declaration on the RTD, which provides the right to participate in and contribute to the processes of development. People in the affected states lack ways of asserting their real autonomy, ownership and self-determination in development.¹³⁷

In conclusion, the hegemonic thoughts of Bretton Woods Institutions and the rationalities that underpin them has enabled them to capture, or in some way recolonize, the development policy discourse. This recolonization happens through knowledge practices, too often heartedly justified as the provision of global public goods. Stripped to their bare essentials, the practices of the provision of global public goods reveal the role of development discourse in the functionings of

¹³³ Tan, *supra* note 97 at 4.

¹³⁴ World Bank, *Poverty Reduction Strategies: A Sourcebook* (Washington, DC: World Bank, 2000); World Bank, *A Guide to World Bank (2011) Third Edition* at 58 online: <<https://openknowledge.worldbank.org/handle/10986/2342>>.

¹³⁵ World Bank, *Issues and Options for Improving Engagement Between the World Bank and Civil Society Organizations* (Washington, DC: World Bank, 2005) at 12.

¹³⁶ Verger, *et al*, *supra* note 117. “PRSPs are perceived by many as an opportunity for external actors to influence development policy dialogue, they have continued to centre on the prerogatives of the World Bank, including structural adjustment measures”.

¹³⁷ Anne Orford, “Globalization and the Right to Development” in Philip Alston ed, *People’s Rights* (New York: Oxford University Press, 2001) at 152 [Orford, “Globalization and the Right to Dev”]; Isabella D Bunn, “The Right to Development: Implications for International Economic Law” (2000) 15:6 Am U L Rev 1425 at 1466 [Bunn, “Implications for Economic Law”].

hegemony and power subjugation in social relations. This is evident in the manner in which global development practice tends to subordinate Third World states, mobilizing them to pursue values that do not comport with the universal commitments and standards.¹³⁸ These parochial values often tend to engender an unfavourable national and international environment that breeds wanton vulnerabilities for subject peoples.¹³⁹ The practical effect of this circumvention is that there can be no real accountability of culpable international institutions on the basis of those values. I elaborate on this below.

3.3 The Disavowal of Human Rights Normativity Through the Dominance of Economic Rationalism

One of the persistent accountability challenges is the Bank's and the IMF's push against being bound by international human rights law. The Bank has consistently disavowed any binding human rights obligations, and it is difficult to see how the RTD could have been spared this disclaimer. The Bank still "shirks from openly embracing their own member States' human rights treaty obligations as the normative template for their development mandates, preferring to refer strictly to their internal mandates under their respective Articles of Agreement."¹⁴⁰ This in itself raises the question of how accountable IFIs are in development.

As a matter of fact, one can argue that, more likely than not, the Bank's policy documents feature more of human capital than human rights. And those of the IMF feature economic stability and growth more than human well-being. Simply, there is an overwhelming focus on economic rationality at the expense of the human dimensions of development.

Historically, this refusal to bind economic rationalism by human rights norms is done in consonance with the political prohibition doctrine, under which Bretton Woods Institutions are to take into account only economic considerations.¹⁴¹ There are, of course, dissenting views that the

¹³⁸ Moore, *supra* note 112. For a discussion of the Bank's capture of policy discourses in development through ideation and knowledge see Schech and Vas Dev, "Governing Through Participation" *supra* note 112 at 173.

¹³⁹ Kennedy, *supra* note 5 ("Criticism of the technocratic nature of global decision making, as I hear it, is simply a way of arguing that the wrong interests and technical arguments have won" at 3). See also Donald and Lusiani, *supra* note 111 at 6.

¹⁴⁰ Diane Desierto, "Lingering Asymmetries in SDGs and Human Rights: How Accountable are International Financial Institutions in the International Accountability Network?" online <<https://www.ejiltalk.org/how-accountable-are-international-financial-institutions-in-the-international-accountability-network/>>.

¹⁴¹ Article IV, Section 10 of the IBRD Articles of Agreement ("The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned"). This interpretation also applies to the equivalent provision of the IDA Articles (Article V,

political prohibition is a specious neutrality that readily supplied an ideological cloak for powerful Western states to perpetuate their parochial policy objectives in the global economy.¹⁴² It is thought that the insulation from political ideologies that was intended by this clause was long hijacked by other ideologies, more often mercantilist projects.¹⁴³ Thus, the notion propounded by the Bank's legal counsel Ibrahim Shihata that "the Bank cannot act on behalf of donor countries in influencing the political orientation or behaviour of client countries" flies in the face of reality.¹⁴⁴

Though excessive economic rationalism is dominant within the Bank's understanding of its technocratic mandate, it has never been the case for human rights as a political question.¹⁴⁵ In certain cases, the Bank has even entertained general exceptions to the political prohibition doctrine.¹⁴⁶ In the 2015 report to the Human Rights Council, Alston, the Special Rapporteur on human rights and extreme poverty, had lamented the disclaimer by the Bank on the question of the relevance of human rights to its work.¹⁴⁷ However, a 2015 Bank policy paper is cited as admitting that there is a "growing recognition of the need of the Bank to address human rights in a more explicit fashion" and that "there have been significant advances in the Bank's thinking on this issue."¹⁴⁸ Such a policy position is merely an indication, but not evidence, of the Bank's

Section 6). See also Article III section 5(b) of the IBRD ("The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.")

¹⁴² Richard Swedberg, "The Doctrine of Economic Neutrality of the IMF and the World Bank" (1986) 23:4 *Journal of Peace Research* 377-390.

¹⁴³ *Ibid.*

¹⁴⁴ Ronald Janse, "(Why) Was the World Bank Supposed to Be a Non-political Organization? An Interpretation of the Original Meaning and Rationale of Article 4(10) of the Articles of Agreement of the International Bank for Reconstruction and Development, 1941-1948" (2014) 16 *J of the Hist of Intl L* at 116.

¹⁴⁵ Fergus Mackay, "Universal Rights or a Universe Unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples" (2002) 17:3 *Ame U Intl L Rev* 527 at 539, 544.

¹⁴⁶ Koen De Feyter, "The International Financial Institutions and Human Rights- Law and Practice" Institute of Development Policy and Management, University of Antwerp, Discussion Paper, December 2002 at 10. He cites Shihata's previous legal opinions in Ibrahim Shihata, *The World Bank in a Changing World* (Dordrecht: M.Nijhoff, 1991) at 107.

¹⁴⁷ UN General Assembly, *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston: World Bank and Human Rights*, UN Doc A/70/274 (04.08.2015) at paragraph 12:

As the legal approach of the World Bank to human rights currently stands, the most problematic aspect is that it is based on double standards. On the one hand, successive General Counsels have found convincing rationales to facilitate the wish of the management to work on issues as diverse as corruption, money laundering, terrorist financing, governance and the rule of law, but on the other hand, human rights remains on a very short blacklist.

¹⁴⁸ Cited in Willem van Genugten, "The World Bank Group, IMF and Human Rights: About Direct Obligations and the Attribution of Unlawful Conduct" in Wouter Vandenhoele ed, *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (London and New York: Routledge, 2015) at 45.

willingness to recognize human rights as an intrinsic part of its mandate.¹⁴⁹ It does not reflect a clear position of legal significance on the matter. For this line of disavowal of human rights, one scholar has labelled it the demise of accountability praxis at the level of the World Bank.¹⁵⁰

The IMF too has over the years maintained the stance of economic rationalism, on account that it is an economic institution. Human rights, they argue, falls in the realm of the non-economic and is accordingly not relevant in its work. This posturing first emerged in the opinion of the former IMF General Counsel, Gianviti, in a 2002 legal opinion, referring to ICESCR.¹⁵¹ Informing this conclusion was his thinking that the IMF is “a monetary agency, not a development agency,” and that it is tasked with maintaining “orderly exchange rates and a multilateral system of payments free of restrictions on current payments.”¹⁵²

It is not just their disavowal of rights through economic rationalism, the twin institutions blow hot and cold when it comes to embracing into their mandate the globally accepted rights-based development agenda. I am referring to the SDGs held out as the means for realizing the RTD among other rights.¹⁵³ Both the Bank and the IMF acknowledge they have a duty, particularly of financing, supporting, and cooperating with the UN, to help the global community meet the SDGs that are explicitly linked and geared to the promotion of a human rights agenda.¹⁵⁴ But this narrative is without any formal legal commitment.

¹⁴⁹ Fergus, *supra* note 145 at 541. For earlier legal opinions that the Bank is under no obligation to respect human rights in development, and therefore not amenable to be held accountable for breach of human rights obligations, see Ibrahim F I Shihata, “Democracy and Development” (1997) 46 Intl & Comp L Q 635 at 638; Ibrahim F I Shihata, “Human Rights, Development and International Financial Institutions” (1992) 8 Am U J Intl L & Pol 27 at 28.

¹⁵⁰ Natalie Bugalski, “The Demise of Accountability at the World Bank” (2016) 31 Am U Intl L Rev 1 at 2.

¹⁵¹ Francois Gianviti, “Economic, Social and Cultural Rights and the International Monetary Fund” in Philip Alston ed, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) at 135:

There are three reasons for concluding that the Covenant does not apply to the Fund: the Fund is not a party to the Covenant; the obligations imposed by the Covenant apply to States, not to international organizations; and the Covenant, in its Article 24, explicitly recognizes that ‘nothing in the present Covenant shall be interpreted as impairing the provisions...of the constitutions of the specialized agencies which define the respective responsibilities...of the specialized agencies in regard to the matters dealt with in the present Covenant.

¹⁵² *Ibid.*

¹⁵³ Sumudu Atapatu & Sean S Fraser, “SDG 1 on ending Poverty in All its Forms: Contributions of International Law, Policy and Governance” at 3 online: <http://cisdl.org/public/SDG%20Icons/SDG_1_Poverty_-_Issue_Brief_-_UNEP_CISDL_-_13.07.2016_-_Final.pdf>

¹⁵⁴ UN-World Bank Group Joint Statement on Signing of a Strategic Partnership Framework for the 2030 Agenda online:<<https://www.worldbank.org/en/news/press-release/2018/05/18/un-world-bank-group-joint-statement-on-signing-of-a-strategic-partnership-framework-for-the-2030-agenda>>; The International Monetary Fund, “Review of Implementation of IMF Commitments in Support of the 2030 Agenda for Sustainable Development” June 3, 2019 online:<<https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/06/03/Review-of-Implementation-of-IMF-Commitments-in-Support-of-the-2030-Agenda-for-Sustainable-46960>>.

The same is true for IMF policy statements, which express the IMF's amenity to broadening the scope of issues that may be considered macro-critical in lending relationships.¹⁵⁵ Like in the case of the Bank, Alston's examination of the IMF's internal documents unearths a degree of vacillation when it comes to accepting that human rights are relevant in their development interventions. He concedes that there has been a shift away from pure economic rationalism, marked by the IMF's willingness to broaden the scope of issues that may be considered macro-critical, a policy flexibility that comports with the powers conferred on the institution.¹⁵⁶ He discerns that the IMF has embraced such social issues as inequality reduction, poverty eradication, debt management—policy issues which it deems important to economic stability, social inclusion, and inclusive economic growth.¹⁵⁷ But Alston complains that, despite the IMF's declared policy flexibility in mandate practice as well as in giving scope to staff for innovation on issues relevant to its work and its tendency to treat a broad range of issues as macro-critical,¹⁵⁸ it has consistently maintained its human rights disclaimer with a blatant assumption that human rights are “not relevant to macroeconomic policy.”¹⁵⁹ Alston observes that the IMF has no official position on human rights. Essentially, the broader implication is that the IMF position is that human rights are still regarded as “taboos” even in the enlarged conception of development as interlinked and interconnected with human rights.¹⁶⁰

Excessive economic rationalism and vacillation toward human rights has an accountability obstruction, disconnection and avoidance dimension to it. These accountability dysfunctions lie in the fact that IFIs are yet to come to grips with the imperative that for better development, human rights ought to provide alternative and external criteria to economic decision-making.¹⁶¹ In a world in which the economic rationalism of the structural adjustments and conditionality regimes hurt

¹⁵⁵ IMF, “Revised Operational Guidance to IMF Staff on the 2002 Conditionality Guidelines” (August 2014) at 10 online: <<https://www.imf.org/external/np/pp/eng/2014/072314.pdf>>.

¹⁵⁶ Alston, “Special Rapporteur Report”, *supra* note 45 at 5.

¹⁵⁷ “IMF Fiscal Monitor: Tackling Inequality, October 2017” online:

<<https://www.imf.org/en/Publications/FM/Issues/2017/10/05/fiscal-monitor-october-2017>>. See also Prakash Loungani & Jonathan D Ostry, “The IMF’s Work on Inequality: Bridging Research and Reality”, February 22, 2017 online: <<https://blogs.imf.org/2017/02/22/the-imfs-work-on-inequality-bridging-research-and-reality/>>. See further IMF Factsheet online: <<https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance>>.

¹⁵⁸ IMF, “Guidance Note for Surveillance under Article IV” (May 2015) at 36, 39. The Guidance state that “there is scope ... to innovate and push the analytical content beyond current practices”.

¹⁵⁹ Alston, Special Rapporteur Report, *supra* note 45 at 21.

¹⁶⁰ *Ibid* 18.

¹⁶¹ Margot E Salomon & Colin Arnott, “Better Development Decision-making: Applying International Human Rights Law to Neoclassical Economics” (2014)32:1 Nordic J of Hum Rts 44.

the weak more than they assure their social transformation, there is need for countervailing values. In practice, however, this is not the case. The rejection of rights obligations translates into the spectre that there cannot be a corresponding (formal) dispersal of binding obligations to the Bank and IMF consistent with their mandate expansion. The practical consequence of this is the exclusion of any possibility of assessing the compatibility of global economic policies and rules with values such as equity, social justice, or human well-being that are implied in the integration of development and human rights.

3.4 Participatory Development Deficits

The contemporary development model is that of shrunken policy leverage and no meaningful participation for developing countries in development policymaking at the global level. This exclusion applies to states acting on behalf of, or as agents of their people and human persons or entire populations or as sub-sets or groups or communities. One exception is the Bank's Operational Directive, Indigenous Peoples (OD 4.20) and Operational Policy/Bank Procedures on Indigenous Peoples (OP/BP 4.10) which require participation and respect for their rights in the development projects.¹⁶² OD 4.20 requires among other things, "informed participation," "direct consultation" and "incorporation of indigenous knowledge," requirements which the Bank does not fully abide by.¹⁶³

A defining characteristic feature of global development practice is that not so many people participate, through their states, in their economic and financial governance. The injustice inherent in the international development policy practice is that technocratic development practices subordinate peoples' voices, choices, and active, free, and meaningful participation in development. The participatory deficit and influence asymmetries that pervade the processes and procedures of decision-making extend to the way treasuries in developing countries conduct business with development institutions. In these arrangements, the preferences of development institutions impinge on national autonomies. And in addition to this participatory deficit, historically, the provision of global public goods has been characterized by an acute political and democratic accountability deficit.

¹⁶² Fergus, *supra* note 145 at 539

¹⁶³ Section 8. James Anaya, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State" (2004) 21:1 Arizona J of Intl & Comp L 13 at 58 see text accompanying footnote 179.

Theoretically, in development policymaking, developing countries have the onus to initiate and prepare policy documents containing the terms for lending that reflect national priorities and aims. However, this is not the case, as donors are continuously enmeshed and deeply entangled in national policy discussions and dialogue. Their consultation has become the norm.¹⁶⁴ In the high noon of the structural adjustment regime, it was observed that “The Negotiation stage of the project cycle is seen by many Borrowers as a largely coercive exercise designed to ‘impose’ the Bank’s philosophy.”¹⁶⁵ This dynamic of the heavy presence and manipulation of IFIs in developing states’ policy formulation is evident in many sites. One of these sites is the technical assistance and secondment of foreign advisors within the ministries or country missions where international economic institutions are involved in the day-to-day formulation of economic policies through consultation and advisory.¹⁶⁶ The procedure for loan approval is that domestic officials initiate proposals, which are intensely negotiated with IMF or Bank staff—often, development institutions’ terms hold sway¹⁶⁷—and then recommendations are submitted to the Executive Board for approval.¹⁶⁸

The common critique is that development policies and stabilization conditionalities are paternalistic; they tend to reflect predetermined donor priorities and preferences, while recipient countries take ownership and responsibility for their implementation—as donors retain control.¹⁶⁹ When “policy formulation is treated as a matter of technical expertise rather than political choices and prioritisation,”¹⁷⁰ development policy misses the imperative of participation of wider constituencies.

The technocratic nature of development further undermines participation (through which people may demand the answerability of institutions) through donors relying on what is known in

¹⁶⁴ Malin Hasselskog, Peter J Mugume, Eric Ndushabandi & Isabell Schierenbeck, “National Ownership and Donor Involvement: An Aid Paradox Illustrated by the Case of Rwanda” (2017) 38:8 Third W Q at 1817.

¹⁶⁵ *Effective Implementation: Key to Development Impact, Portfolio Management Task Force September 22, 1992* at para 38 [Wapenhas Report].

¹⁶⁶ See Rita Abrahamsen, “The Power of Partnerships in Global Governance” (2004) 25:8 Third World Q1453; Lindsay Whitfield ed, *The Politics of Aid: African Strategies for Dealing with Donors* (Oxford: Oxford University Press, 2009).

¹⁶⁷ Chris Rogers, *The IMF and European Economies: Crisis and Conditionality* (New York: Palgrave Macmillan, 2012) at 11.

¹⁶⁸ *Ibid* at 15.

¹⁶⁹ Rachel Hayman, “From Rome to Accra via Kigali: ‘Aid Effectiveness’ in Rwanda” (2009) 27:5 Development Policy Rev at 593.

¹⁷⁰ Hasselskog, et al, *supra* note 164 at 1818.

development jargon as “policy instruments.”¹⁷¹ These are standardized norms and rules that these institutions proffer to be replicated in borrowing economies on the grounds that they are prerequisites for a stable and sustainable world. Apart from their dominant posture of embodying the specific knowledge concerns and advisory preferences of the Bank and IMF, they seldom reflect the legitimate governmental or peoples’ economic preferences. Precisely, their formulation is not open and transparent and/or susceptible to public interrogation.

I am aware of the participatory ethic enacted within the Comprehensive Development Framework (CDF). This framework stipulates as lending criteria that borrowing countries own and align programs, consult with stakeholders on the design of reform measures, coordinate with donors, and manage risk in relation to environmental, social, and sustainability aspects.¹⁷² CDF defined anew the donor-recipient relationship, by emphasizing such ideals as national ownership, participation, and accountability, and policy effectiveness.¹⁷³ This kind of lending is also subject to borrowing countries maintaining sound macroeconomic frameworks and properly assessing poverty and social impacts as determined by the Bank and IMF.¹⁷⁴ As Sande Lie argues, its participatory deficit lies in the requirement of compliance with the predetermined policy prerogatives of development institutions:

[The] Bank, already at the structural level and from the very outset, is not completely disengaged from the government’s own PRSP process, but that it plays a role in scrutinising and monitoring the government’s performance. Herein lays a route to power in the form of an indirect, tacit trusteeship—or developmentality. Moreover, the client government needs to have its PRSP accepted by the Bank’s board in order to become effective and open the Bank’s purse of concessional lending. Yet having an approved PRSP is no guarantee of the Bank’s full financial support. Because the PRSP is formally the government’s document, the Bank merely selects those policies it is willing to support financially.¹⁷⁵

The requirement of conformity to external standards is a perfect exemplification of the way development models undermine objectives and contravene the purport of participation as the pillar

¹⁷¹ Joseph E Stiglitz, *Globalization and Its Discontents* (New York: W.W Norton & Co.; 2002) at 16; Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO* 2nd ed (London; New York: Zed Books, 2009) at 15.

¹⁷² OP 8.60 - Development Policy Lending para 3.

¹⁷³ Hasselskog *et al*, *supra* note 164.

¹⁷⁴ OP 8.60 Development Policy Lending paras 5, 10.

¹⁷⁵ Jon Harald Sande Lie, “Developmentality: Indirect Governance in the World Bank–Uganda Partnership (2015) 36:4 Third World Q 723 at 727 [Sande Lie, “Developmentality: Indirect Governance”].

of PRSPs. By extension, such a negation also contravenes the core value of the Declaration which requires active and meaningful participation in development.

On closer scrutiny, the supposed participatory ideal of PRSPs actually serve a different rationale of state accountability. Development scholars such as Sande Lie have argued that the participatory approach of PRSPs have allowed the Bank to shift its focus to the state as “an effective partner and facilitator aligned to” its discourse.¹⁷⁶ Supposedly, this shift was to foster accountability of the state to the people, on the one hand, given the wider view by the Bank and IMF on participation of the people as a mechanism for the mutual accountability of the state to its citizens and financiers, and of financing institutions to the constituent governments, on the other hand.¹⁷⁷

One thing must be emphasized: PRSPs fundamentally altered aid topography, introducing a new lending architecture of tacit and indirect governance whereby the Bank is in control of the terms of partnership and therefore controls the levers of freedom enjoyed by the recipient state.¹⁷⁸ While the PRSPs have extensively altered the relationships and engagement between indebted and poor states with their donors, their drawback is that they have instituted a participatory accountability that is predominantly outward facing (toward the state) rather than inward facing (toward development institutions). A framework really concerned with the participation of the people, stakeholders, and social movements would focus on the content and design processes of conditionalities and structural reform measures. The fact that this is not the case is a negation of the answerability prong of accountability. It is only through answerability that people can demand information and explanation from development institutions.

Furthermore, structural reform measures that IFIs impose on borrowing countries as the prerequisites for lending are not only politically and democratically unsound when used to restructure and rewrite key economic policy domains of developing countries, they are also accompanied by a participatory deficit.¹⁷⁹ Imposed unilaterally by these institutions, there is often no room for participation through which the people can be consulted and institutions become answerable.

¹⁷⁶ Sande Lie, *Developmentality: An Ethnography*, *supra* note 128 at 64.

¹⁷⁷ Tan, *supra* note 93 at 5.

¹⁷⁸ Sande Lie, “Developmentality: Indirect Governance”, *supra* note 175 at 724.

¹⁷⁹ Pahuja, “The Politics of Good Intentions”, *supra* note 90 at 40.

Besides, borrowing governments are often coerced and subordinated that they cannot be able to exert their influence nor challenge the policy instruments that development institutions justify as safeguards against economic stability. For example, the World Bank is clear that in development policy financing, funds are disbursed to client countries subject to “(a) maintenance of an adequate macroeconomic policy framework, as determined by the Bank with inputs from IMF assessments; (b) satisfactory implementation of the overall reform program; and (c) completion of a set of critical policy and institutional actions agreed between the Bank and the client.”¹⁸⁰ While to some, this non-participatory development model is a mechanism for “disciplining of the [Third World],”¹⁸¹ to others this constitutes illegitimate governance framework and processes that derogate from the participatory edict of the Declaration in development. Essentially, participation is negated by the fact that the knowledge technologies in use by development institutions already offer nuanced meanings and modes of practice to which policies should correspond in development practice.¹⁸²

Another good example of the deficit of meaningful participation is the Article IV *consultation* mandate. The IMF is required to review and evaluate a borrowing country’s “macro-critical” economic policies—financial, fiscal, foreign exchange, monetary—and the extent to which these policies are sensitive to risk, grasp vulnerabilities, and elaborate response measures.¹⁸³ The consultation process often involves some form of dialogue, in which only the IMF and country officials together with stakeholders (whose selection criteria is unknown), confer on pertinent policy issues. After this consultation, a report is presented to the Executive Board, which then publishes its assessments and findings.¹⁸⁴ These processes are always complex, highly professional, and far removed from the people. Hiding behind the veil of its advisory role, this is how the IMF influences and manipulates weak states and avoids scrutiny of their decisions through a façade of participation.

All in all, the totality of the development policy instruments and their formulation, together with the new development policy paradigm of ownership, partnership, participation, and accountability are still fraught. They are hegemonic. They obliterate political, democratic, and

¹⁸⁰ World Bank Group, “Development Policy Financing (DPF)” online: <<https://ieg.worldbankgroup.org/topic/development-policy-financing-dpf>>.

¹⁸¹ Tan, *supra* note 97 at 2.

¹⁸² Sande Lie, *Developmentality: An Ethnography*, *supra* note 128 at 23.

¹⁸³ IMF Annual Report 2018, *supra* note 22 at 28.

¹⁸⁴ *Ibid* at 29.

participatory accountability in the sphere of economic governance of developing countries. If anything, the participatory development models deployed by the Bank and IMF are parochial and idiosyncratic. They perpetuate the very vested interests that usurp both legitimate Third World governance and people's voices in their own governance. They transfer vital decision-making to unresponsive multilateral institutions.¹⁸⁵ These external policy measures violate Article 1 of the Declaration on the right to participate in and contribute to the processes of development.¹⁸⁶ On account of this subversion of sovereignty, people in the affected states lack ways of asserting their autonomy and self-determination in development.

4. THE WORLD BANK AND IMF UNDERSTANDINGS OF THEIR ACCOUNTABILITY AS INTERNAL INSTITUTIONAL PROCESSES

The existing institutional accountability mechanisms of the World Bank and the IMF do not address or account for any of the discussed challenges posed by the technocratic development policies, practices, and processes. In the section that follows, I discuss the IMF's Independent Evaluation Office and the Bank's Inspection Panels; the way they understand accountability as well as the limitations in theory and practice of that understanding. In this section I will be arguing that the precepts, doctrines, and procedures of accountability of international financial institutions seem to have been conceived for single-cause, single-effect mechanisms and not for development injustices that may have multiple causalities, particularly in the structural arrangements of the global economy. I will argue that by understanding their own accountability in the way they do, we are given to and fixated on the notion of accountability as redress of grievances and potential outcomes of harms. Such a breach-focused approach to accountability omits structural violations that imperil the realization of all rights together, the idea animating the notion of the RTD.

4.1 The IMF's Independent Evaluation Office

The Independent Evaluation Office (IEO) performs the task of "review and evaluation" of the Fund's work by consulting other informed and interested parties. Created so recently as 2001, it has the most circumscribed mandate and is the weakest accountability mechanism of multilateral

¹⁸⁵ Okafor, "Third World Legitimate Governance", *supra* note 4; Anne Orford, "Locating the International: Military and Monetary Interventions after the Cold War (1997) 38 Harv Intl L J at 465 at 470, 476.

¹⁸⁶ Orford, "Globalization and the Right to Development" *supra* note 137 at 152; Bunn, "Implications for Economic Law" *supra* note 137 at 1466.

development institutions. This is evidenced by the fact that it is “intended to serve as a means to enhance the learning culture within the Fund, strengthen the Fund’s external credibility, and support the Executive Board’s institutional governance and oversight responsibilities.”¹⁸⁷ This fact limits its capacity to offer any meaningful and practical accountability function that can constrain the injustices of the global policy system or countermand knowledge technologies with which bureaucratic development institutions obstruct, avoid, and stay disconnected from oversight or scrutiny in their development interventions.

The shortcoming of the IEO as an effective accountability regime appears in the fact that it has been designed in such a way that it does not entertain complaints from victims or parties affected by IMF programmes and policies. McBeth observes that it is “the IEO rather than the complainant [who] holds the ability to initiate the process.”¹⁸⁸ A further weakness of the IEO is that in its constrained review-and-evaluation objective it provides institutional advice for self-improvement and “institutional learning” to the Fund rather than address the Funds’ accountability or redress complaints of persons in recipient countries. The IEO also stands in a very weak position relative to the Executive Board,¹⁸⁹ and thus this model of accountability is fraught with possibilities for obstruction and countermanding. The IEO is a highly fettered creature, especially by the requirement to honour the guidelines of the Board.¹⁹⁰

Another constraint relates to what is known as the “zone of privacy”¹⁹¹ and the duty of confidentiality.¹⁹² The rule of confidentiality and privacy establishes a real hindrance to the answerability aspect of accountability, by which stakeholders may demand information and full disclosure and explanation of policy rationales. One other common limitation of the IEO is that, just like the Inspection Panel, this regime of accountability does not assess the behavior of the Fund according to the international human rights standards and its procedures are inconsistent with

¹⁸⁷ Online: <<https://ieo.imf.org/en/our-mandate/Terms-of-Reference>>.

¹⁸⁸ Adam McBeth, “A Right by Other Name: The Evasive Engagement of International Financial Institutions with Human Rights” (2009) 40:4 *The George Washington Intl L Rev* at 1153.

¹⁸⁹ Paragraph 8 of Terms of Reference provides that “the Director will take into account the Executive Board’s reactions to its reports and assessments of the performance of the IEO. The Director and personnel of the IEO will cooperate with the conduct of assessments of IEO’s effectiveness that are undertaken by the Executive Board”.

¹⁹⁰ Paragraph 10 of Terms of Reference.

¹⁹¹ Refers to “confidential communications of management with persons or institutions outside the Fund, and within and between their immediate offices”. See Management Guidance to Staff on Cooperation with the IEO online: <<https://ieo.imf.org/en/our-mandate/cooperation-with-imf-staff>>.

¹⁹² Para 11 and 12 of Terms of Reference.

human rights standards.¹⁹³ In summary the IMF’s understanding and mechanism of accountability is a highly qualified accountability system, fettered in its discretion and limited in its functional utility. The IEO is completely different from that of the Bank.¹⁹⁴ I demonstrate this below.

4.2 The Bank’s Inspection Panels

The Inspection Panel of the IBRD and the IDA provides what is believed by some to be an independent complaints mechanism.¹⁹⁵ The Inspection Panel (the Panel) was created in the 1993 after massive outcry and protestation against the Bank’s lack of transparency, accountability, and responsiveness in relation to project financing.¹⁹⁶ The Panel was also instigated by internal operational inefficiencies exposed by the Wapenhas Report of November 1992. The Report uncovered a pervasive “approval culture,” a tendency to approve new project loans without attention to such key considerations as a borrower’s commitment to and safeguard guarantee for a project’s effectiveness.¹⁹⁷ The Report to the Executive Board noted, in addition to internal factors related to the Bank’s operations, other exogenous global factors that caused a decline in developing countries’ macroeconomic and institutional capacities.¹⁹⁸ The Report also cited questionable conduct on the part of the Bank, such as its failure to comply with procedures in the design, appraisal, approval, management, and implementation—as well as the poor performance—of projects, which led to “declining portfolio performance” between the years 1981 and 1989.¹⁹⁹

The Inspection Panel was a pioneering accountability mechanism in international law, based primarily on its “citizen driven” nature and complaints procedures. According to this progress narrative, these features heralded the first international institutional transformation of the Bank, marking its transition from “a lawless institution” to one open to scrutiny by individuals and

¹⁹³ Office of the High Commissioner for Human Rights & Center for Economic and Social Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (New York/Geneva: United Nations, 2013) [OHCHR & CESR, *Who Will be Accountable?*] at 28.

¹⁹⁴ Daniel D Bradlow, “Operational Policies and Procedures and an Ombudsman, in Accountability of the International Monetary Fund” in Barry Carin & Angela Wood ed, *Accountability of the International Monetary Fund* (Ottawa: Ashgate, 2005) at 88.

¹⁹⁵ International Bank for Reconstruction & Development & International Development Association, World Bank Inspection Panel, Resolution No. IBRD 93-10/IDA 93-6 (September 22, 1993).

¹⁹⁶ Ibrahim Shihata, *The World Bank Inspection Panel in Practice* (Oxford, Oxford University Press 2000) at 2.

¹⁹⁷ Wapenhas Report, *supra* note 165 at 3. In the Report, this was termed as the “Bank’s pervasive preoccupation with new lending.”

¹⁹⁸ *Ibid* at 6.

¹⁹⁹ *Ibid* at ii-iii.

communities.²⁰⁰ The progress narrative follows from the perception that these mechanisms have created new legal relationships (between people and international organizations) in international law, though it remains uncertain what these relationships are.²⁰¹

Since the advent of the Panel model, the Bank understands accountability as internal institutional accountability, or what is popularly known as an independent (internal) accountability mechanism.²⁰² This derives from the mandate of the Panel, which is to look into complaints that “rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank.”²⁰³ Strictly speaking, this is an accountability process that seeks the Bank’s compliance with its own rules and operational procedures. The logic of compliance with own rules is not a regime of instilling compliance with international law, unless the law complained of arises directly from the Bank’s operational policies.²⁰⁴

The Panel has bifurcated procedures for, first, assessing the admissibility (eligibility) of Requests for Inspection and then getting approval for an investigation of an eligible request. At the eligibility phase, the Panel receives the Request for Inspection from the Requesters (who can be aggrieved members of a community or people). It then decides whether the request is merited and within its mandate or frivolous. If admissible, the Panel has first to inform the Management of the Bank and seek approval for investigation from the Board of Executive Directors (the Board), notwithstanding that the Panel is an independent arm of the Bank. In this procedure, the Board is vested with the ultimate decision-making power, deciding whether or not a Panel investigation should be launched. If granted permission to investigate, the Panel visits the complaints’ area for

²⁰⁰ Schlemmer-Schulte, “The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights” (1999) 6 Hum Rights Brief 1. For the transformation from the veil insulating the Bank from accountability making it a lawless institution, see David Hunter, “Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People,” (2003) 4:1 Chicago Intl L Rev 201.

²⁰¹ See Ellen Hey, “The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law” (1997) 2 The Hofstra L & Policy Symposium 61.

²⁰² Benjamin Sovacool, “Cooperative or Inoperative? Accountability and Transparency at the World Bank’s Inspection Panel” (2017) Case Studies in the Environment 1 at 1[Sovacool, “Cooperative or Inoperative”].

²⁰³ Para 12 of Resolution No. 93-10. See also Daniel D Bradlow, “International Organizations and Private Complaints: The Case of the World Bank Inspection Panel” (1993-1994) 34 Virginia Journal of Intl L 553.

²⁰⁴ See e.g Daniel D Bradlow & Andria Naude Faurie, “The Operational Policies of the World Bank and the International Finance Corporation Creating Law-Making and Law-Governed Institutions?” (2013) 10 Intl Org L Rev 3.

a pilot study, after which it issues an eligibility report and a recommendation whether to investigate.

4.2.1 Far from Independent

Yet again, investigations are subject to the Board's approval.²⁰⁵ This is one instance in which the institutional architecture of the Panel may permit the Board to invoke its powers to obstruct or avoid accountability of the Bank for political purposes or other motives.²⁰⁶

At the investigations stage, the chair assigns one or more panel members to investigate/conduct the inspection, and while doing so they are to consult with the Bank's various departments and officers as well as the borrower and its Executive Director. They are also to conduct fact-finding in the affected area. The Panel is to submit an investigation report to the Executive Directors and the management (President), with a finding on the facts, highlighting whether the Bank complied with "all relevant Bank policies and procedures." Management then responds to the report's findings by making recommendations to the Executive Directors (an action plan). The Board then deliberates on the report and Management's recommendations. It then informs the requesters of the Board's decision and the steps to remedy the complaints, after which it makes public its decision.²⁰⁷ These procedures have been criticized as a limitation on the autonomy and independence of the Panel from the Bank.²⁰⁸ To the extent that the investigation procedure is subject to the Board's approval, the Board is merely an administrative body and not a judicial one.²⁰⁹ The "Board has ultimate authority to interpret the Panel's resolution to authorise inspection."²¹⁰ More than anything else, this is one clear way in which the institutional architecture of the Panel has been designed to ensure that whenever expedient, the Board can offer the Bank accountability obstruction and, where possible, even avoidance, so as to meet the "functionalist

²⁰⁵ Resolution 93-10 paras 17-20.

²⁰⁶ Andria Naude Faurie, *The World Bank Inspection Panel and Quasi-Judicial Oversight in Search of the 'Judicial Spirit' in Public International Law* (Utrecht: 2009, Eleven International Publishing) at 294.

²⁰⁷ Resolution 93-10 paras 20-23.

²⁰⁸ Orford, "Globalization and the Right to Development", *supra* note 137 at 153.

²⁰⁹ Sanae Fujita, *The World Bank, Asian Development Bank and Human Rights* (Cheltenham, Northampton: Edward Elgar Publishing, 2013) at 11.

²¹⁰ *Ibid* at 214.

needs” of the Bank.²¹¹ The Panel claims it is an independent accountability mechanism, but the truth of the matter is that it is far from independent.

This lack of independence is largely due to the Panel’s relationship to the Board of Directors and is evident in the fact that its decisions lack any binding force and that it lacks systems to follow-up on or monitor compliance with its recommendations.²¹² The Board has override authority, which may trump and render ineffective the Panel’s deliberations and recommendations. Such override powers make the inspection procedure a highly qualified accountability model. Such powers can often be invoked to ensure the avoidance of complete obstruction of the Bank’s accountability to the people affected by development. This qualification of accountability is further amplified by the restriction of compliance standards to operational rules and not international norms and standards.²¹³

Given that the Board has override authority on the Panel’s mandate, this power may be exercised to obstruct or countermand the Panel’s deliberations and recommendations, which may lead to accountability avoidance by the Bank.²¹⁴ This politics of “manipulated accountability,” witnessed in the *China Western Poverty Reduction Project*, is what some have called “institutional shackles to internalize screening processes designed for softening external challenges from NGOs.”²¹⁵ Such institutional processes, in which the Board enjoys override powers, may be applied to facilitate accountability avoidance.

A good example of this kind of obstruction by the Board is the case of the *India Ecodevelopment Project* of 1998, for which the Panel was limited in its investigation to determining whether the Bank’s directives had been complied with.²¹⁶ The Panel’s investigations found a number of violations of the right of indigenous people displaced from the forest and recommended further investigation be authorized by the Executive Directors. However, the Board

²¹¹ Compare with Rajagopal, *International Law from Below*, *supra* note 54 at 68 that the technique of petition that has now been replicated as the Bank’s inspection panels served more as “a tool of information” than “as a tool of grievance-redressal.”

²¹² Rekha Oleschak-Pillai, “Accountability of International Organizations: An Analysis of the World Bank Inspection Panel” in Jan Wouters et al, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010) at 403.

²¹³ *Ibid* at 414. See Resolution No. 93-10 para 12.

²¹⁴ *Ibid*.

²¹⁵ Kim, *supra* note 86 at 31. He goes ahead to note that the “Panels intended functions to improve accountability are overshadowed by its internal constraints that manipulate processes, which, ultimately, results in weakening accountability or no particular progress at all in terms of accountability.”

²¹⁶ Oleschak-Pillai, *supra* note 212 at 418.

decided that no investigation was necessary, an act that served to countermand or obstructed the Panel's work. No follow up could then be done by the Panel.²¹⁷ Another example of accountability obstruction is a thermal power construction project where complaints of environmental degradation and forced evictions were raised but the Board denied the Panel the right to do field visits, though they still went ahead to indict the project.²¹⁸

The Board's final authority also implies that the Panel's recommendations may be ignored, such as in the *Mumbai Urban Transport Project*, where the contested implementation was stopped but resumed within a short period of time.²¹⁹ These are manifestations of the manipulation of internal processes to assure the Bank a disconnection from peoples' scrutiny and claims of answerability. In some cases, they depict the avoidance and obstruction of the accountability of IFIs in development. As Kim argues, such inbuilt accountability deficits inhere in the wider discretion given to the Board or Management. The discretions are present in the various phases of registration, eligibility, and investigation, all of which are susceptible to political manipulation either by the Management or the Board.²²⁰

4.2.2 The Logic of Adherence to Operational Procedures and Policies as Human Rights Accountability Avoidance

It is not in doubt that the Panel does not apply human rights standards in the assessment of the Bank's behaviour.²²¹ Critics point out that the avoidance of human rights standards in the jurisdiction of the Panel is a design weakness that undermines the integration of human rights and development.²²² In response to the lingering question, "what are international organizations responsible for?" the Bank, as a development institution, offers the following rebuttal: the Panel has no clear human rights mandate and therefore is not a human-rights-compliant body.²²³ As such,

²¹⁷ *Ibid* at 419.

²¹⁸ *Ibid* at 420.

²¹⁹ *Ibid* 428-429

²²⁰ Kim, *supra* note 86 at 34-35.

²²¹ The IFC Policy on Environment and Social Sustainability contained in the Sustainability Framework 2012 not only refers to human rights and human rights due diligence many times but requires their observance. See IFC, "Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts 2012" online:

<https://www.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES>.

²²² See Fergus, *supra* note 145.

²²³ Daniel D Bradlow & Naude Andria Fourie, "The Evolution of Operational Policies and Procedures at International Financial Institutions: Normative Significance and Enforcement Potential" (April 6, 2011) at 1.

the Panel cannot conduct human rights due diligence in its work due to the conception and design of its mandate. This is signaled by the fact that rules governing the procedures of the Panel on questions of evictions, environment, Indigenous communities, and resettlement are not grounded in international human rights standards, and the Bank's approach does not seek to assimilate human rights norms into its policies.²²⁴ The clear avoidance of human rights obligations in the design of the Panel procedures and rules is a clear avoidance of human rights standards as the undergirding norms for development practices and processes.

The Panel only examines the Bank's compliance with the Operational Policies and Procedures, which include directives and internal policies governing development lending operations.²²⁵ The operational policy framework and the operational policy procedures serve as safeguards against environmental, social, and economic risks.²²⁶ By this delimitation of risk-prevention, the Panel rarely references or seeks compliance with human rights.²²⁷ This shows a different understanding of accountability; completely divorced from any sense of human rights accountability of the Bank. This is accountability avoidance and evasion at the level of applicable standards. The inspection model, for instance, is predicated on a conception of accountability as the execution of "relevant operational policy frameworks" and the "[strengthening of management] and governance structures" through the Panel's functions "of fact-finding, problem-solving, compliance review, policy advice, and monitoring."²²⁸

One exception to the human rights accountability avoidance attitude/praxis of the Panel was the case of *Chad-Cameroon Petroleum and Pipeline Project*, in which questions of human rights and governance were raised by the requesters, among other alleged violations relating to social and environmental violations. This case raised an issue of Indigenous communities' involuntary resettlement between 1994 and June 2002. After a full investigation, the Panel was of the opinion that it had to consider human rights violations insofar as the alleged violations would

²²⁴ Bugalski, *supra* note 150 at 9.

²²⁵ Resolution N0. 93-10 para 12.

²²⁶ Naudé A Fourie, "Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research: Experiences with Studying the Practice of Independent Accountability Mechanisms at Multilateral Development Banks" (2015) 3 Environmental L Rep 95 at 100.

²²⁷ Desierto, *supra* note 140.

²²⁸ Fourie, *supra* note 226 at 100.

constitute impediments to the implementation of the project in accordance with the Bank's policies.²²⁹

But the dominant posture of shirking human rights standards remains. Even though the Bank and IMF as development institutions have recognized the mutuality of human rights and development, they are yet to internalize the instrumental value of such integration. Plainly stated, they are yet to appreciate the purpose that such an operational interface is to serve at the level of practice.

Although the Bank has in some instances accepted the relevance of human rights to its work, it has yet to grasp the full tenor and implication of the HRAD that it continues to proselytize.²³⁰ Its imperviousness to the HRAD ethic and the logic of operational procedures and policies amounts to human rights accountability avoidance and disconnection. The fact that only internal institutional standards are applicable to development financing has come to undermine the core idea that “development is not simply an economic concern, and does not just mean growth in the sense of more of the same.”²³¹ It negates the highest ideal that development now embraces broad ideals that cannot be pigeonholed within operational rules and internal procedures.

Furthermore, it shows that the Panel was not, *per se*, institutionalized with the understanding or clear endorsement of accountability based on international legal standards. Clearly, this is a qualification of accountability processes and standards. It shows a political necessity to allow the Bank to operate outside the rules and norms that the international community has propagated and therefore avoid and stay disconnected from accountability based on those rules. In Bugalski's view, these mechanisms remain internal to operations of these institutions, while human rights come to bear on them only indirectly, not because they constitute binding norms on them but because they are merely incorporated into their policies or evaluation criteria.²³²

²²⁹ Inspection Panel, “The Inspection Panel Investigation Report: Chad-Cameroon Petroleum and Pipeline Project: (Loan No. 4558-CD); Petroleum Centre Management Capacity Building Project (Credit No. 3373-CD); and Management of the Petroleum Economy (Credit No. 3316-CD)” [Chad-Cameroon Case] para 35 online: <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ChadInvestigationReporFinal.pdf>>.

²³⁰ The first time the Bank acknowledged its role in the promotion of human rights in the course of economic endeavours was in 1998, where it affirmed that “sustainable development is impossible without human rights.” See, The International Bank for Reconstruction and Development/ The World Bank, *Development and Human Rights: The Role of the World Bank*, (Washington DC, 1998) at 2,3.

²³¹ Ibrahim F I Shihata, “Human Rights, Development, and International Financial Institutions” (1992) 8:1 Am Univ Intl L Rev 27 at 28.

²³² Bugalski, *supra* note 150 at 1.

What makes this kind of shirking of human rights standards a deeply problematic issue is the Bank's and the IMF's ambivalence. They expressly acknowledge that they have direct roles to play in the alleviation of poverty, ending inequality and underdevelopment and other structural issues. By this acceptance it is expected that they would be bound by the precepts that require them to respect the values governing such relations. This is however not the case because of the permissive culture of the international society that allows international institutions to hide under the pretexts of legal technicalities to avoid oversight and stay disconnected from responsibility and scrutiny.

On the contrary, however, De Schutter mentions something worth appreciating. He does not see anything wrong with shirking human rights standards in the internal accountability praxis of IFIs. He contends that it allows international institutions to navigate the "two apparently irreconcilable worlds" of human rights and their specified institutional mandates.²³³ He believes that this navigation permits them to tailor an accountability process sufficiently in consonance with their operational mandate as provided in constitutive documents and international, customary, or general principles of law.²³⁴ He does not, however, understand that a mechanism that only instills the compliance with operational mandates and procedures is a clear avoidance of, and a disconnection from, accountability in accordance with universal norms and standards.

Finally, according to the OHCHR & SERI, these internal accountability praxes are shorn of uniformity of standards, not subject to monitoring, based on discretionary unenforceable rules, and bereft of the universal language that human rights exact in international law.²³⁵

4.2.3 The Fixation on a Conception of Accountability as Redress/Prevention of Harms as a Retention of the Quintessential (restrictive) Legal Accountability Paradigm

Notably, the crucial trait of legal accountability deployed in this model is that of redress or remedy, which is entailed in the fact that people can bring requests and the Panel can make a report or the Bank can respond through an Action Plan. Presumably, these measures are directed to addressing grievances that are based on real or foreseeable harms. The panel mechanism is therefore rooted

²³³ Olivier De Schutter, "Human Rights and the Rise of Organizations: The Logic of Sliding Scales in the Law of International Responsibility" in Jan Wouters *et al* eds *Accountability for Human Rights Violations by International Organization* (Antwerp; Portland: Intersentia, 2010) at 108.

²³⁴ *Ibid* at 109-110.

²³⁵ OHCHR & CESR, *Who Will be Accountable?* *supra* note 193 at 25.

in the classical principles of accountability as constraints of power or redress of excesses of power. This conception of accountability cannot address the four accountability challenges I discussed above (i.e. the challenges of the global policy system, the encumbrances of knowledge as a technology of governance, participatory development deficits, and human rights avoidance through excessive economic rationalism).

One dominant feature of the Panel is its image as an institution of recourse whose mandate is fixated on a conception of accountability as redress of complaints or potential harms.²³⁶ Some think of the panel as retaining “a quasi-judicial oversight mechanism,”²³⁷ adjudicating claims of project-affected people and breach of some internal rules and standards. The inspection process is, however, not vested with remedial powers. Instead, Management submits a raft of measures that would mitigate the problems complained of to the Board. It is upon the Management to implement those remedial measures proposed in the plan of action.²³⁸

The redress of harms approach is evident in the operational procedures of the Panel and the dominantly held view that the Panel is a grievance redress mechanism for communities and peoples whose interests have been harmed.²³⁹ The rules of the Panel require that the allegations made by Requesters must contain evidence of violations of “a serious character,” implying that harms must be visible and occurring or have occurred, or are anticipated and knowable.²⁴⁰ In other words, the Panel’s modality retains a key notion of traditional legal accountability. It shall only entertain facts in proof of (actual or potential) harm suffered or threatened to be suffered. As such, particularized facts must be directly linked to action or omission of the Bank.²⁴¹ For instance, in the *Chad-Cameroon* case, the Panel stated that it was only considering “Management’s actions and omissions as they relate to the Projects.”²⁴²

²³⁶ Schlemmer-Schulte, *supra* note 200, arguing that the “implementation of the Bank’s policy standards in projects does not result in substantive rights that individuals in borrowing countries may claim against the Bank, nor does the Inspection Panel represent a legal remedy mechanism through which positions described in the Bank’s policies or rights referred to in the Resolution could be enforced against the Bank”.

²³⁷ A Gowlland Gualtieri, “The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel” (2001) *The Brit Yr Bk of Intl L* at 252-253.

²³⁸ Resolution No.93-10 para 23.

²³⁹ The Panel is empowered “to receive claims directly from project-affected people and/or their authorised (civil society) representatives, concerning claims of actual or potential harm suffered as a result of the MDB’s non-compliance with the relevant operational policy framework”. Fourie, *supra* note 226 at 100.

²⁴⁰ Resolution No. 93-10 para 12.

²⁴¹ *Chad-Cameroon Case* para 16.

²⁴² *Ibid* at 23.

The inspection model is thus both backward and forward-looking in its approach to breach, especially those related to projects. Besides, the Panel will be tasked with resolving any conflicts between the rules of the Bank and other specified standards, and it typically seeks either to harmonize the project to the Bank's operational rules or to rule in favour of the complainants' infringed interests. Essentially, the Panel privileges one set of standards, exalting its status over another.

Overall, the inspection mechanism leans heavily on the politico-legal understanding of accountability as fact-finding, fault-finding, and remedy, mitigation, or prevention.²⁴³ This is somewhat similar to domestic law and legal systems way of adjudicating normal rights of action. Internal institutional accountability is necessarily reactive, and not proactive. It is therefore interactional in that the Panel focuses on discrete circumstances of actual or potential harm, either in the past or of some likelihood. The Panel determines whether an institution's actions followed some set guidelines, or in other words, whether some internal legal codes and norms were violated. This accountability mechanism therefore mirrors conventional legal accountability in some respects.

Further, the fact that responsibility for noncompliance, as a trait of accountability, is pegged on such internal frameworks, policies, and procedures as the Environmental and Social Framework, means that there must be performance criteria against which conduct is assessed. Such criteria of performance can be likened to what Lindberg calls "standards or measurable expectations".²⁴⁴ This is an accountability mechanism that does not necessarily question the very rules on which development is conducted. These accountability mechanisms allow the Bank to neglect the fact that its policies and rules, in one way or another, may themselves be the structural constraint to a rights-based vision of development.

In sum therefore, by retaining a violations approach (breach-focused in nature and oriented to remedy), this model neglects the kinds of violations innate to global economic patterns of arrangements. By this retention of the quintessential model, the inspection regimes of accountability omit the necessary insight that remedial accountability neither contemplates *ex-ante*

²⁴³ Benjamin K Sovacool, Andria Naud'é Fourie & May Tan-Mullins, "Disequilibrium in Development Finance: The Contested Politics of Institutional Accountability and Transparency at the World Bank Inspection Panel" (2018) *Development and Change* 1 at 5 [Sovacool *et al.*, "Disequilibrium in Development"].

²⁴⁴ Staffan I Lindberg, "Mapping Accountability: Core Concept and Subtypes" (2013) 79:2 *International Rev of Admin Sci* 202 at 211.

accountability within institutions nor looks to the compatibility of structures and processes with desired distributive outcomes. Because they are often applied to the Bank's projects in client countries, the inspection cannot account for the broader structural issues or correctly redress their distributive consequences. This is especially the case in the Bank's projects which are implemented at the domestic levels. As the only international accountability institution applicable to the Bank's work, it is inadequate and ill-adapted to structural violations.

The fact that even in domestic legal systems legal redress does not focus on deeper underlying structural issues does not mean that there are no models that can question structural violations and attend to distributive injustices. Accountability mechanisms and processes can be designed to deal with structural violations *ex-post* or *ex-ante*. As we will see in chapter six, judiciaries in Kenya, South Africa and Colombia have adopted measures that seek distributive justice by addressing structural violations, *ex-post*, albeit with a measure of political and practical difficulties and conceptual challenges. An *ex-ante* method has the potential of ensuring the answerability of the institution sought to account, thus avoiding the redress and remedy approach. While this already exists, such as in cases where indigenous communities are consulted in project activities, there is no so much clarity as to how answerability can be applied to bypass the institutional failures of the panel or how it can be effected to overcome the systemic challenges of the global policy system.

4.2.4 The Unknowability of Actuality, Extent, or Potential of Harms: Lesotho Highlands Water Project

The Panel's website declares that it is "an independent complaints mechanism for people and communities who believe that they have been, or are likely to be, adversely affected by a World Bank-funded project."²⁴⁵ The deployment of the language of complaints that is so central to its mechanism assumes that harms are either threatened or actual and must be discernible or knowable. This is, however, not the case in the global policy system, where far-reaching consequences of a given development project or program may not have immediate and decipherable consequences. This is what I referred to in chapter 1 as the indiscernibility crisis in integrated economic decision-making that is brought about by the intermingle effect. In fact, the Panel lacks a mandate to entertain complaints related to harms or violations that are causally linked

²⁴⁵ Online:< <https://www.inspectionpanel.org/>>.

to projects and that arise subsequent to or after their completion. People who may be affected by harms subsequent to completion of Bank projects have no recourse to accountability.²⁴⁶

As part of the conditions of eligibility, actual harms or the knowability of anticipated harms must be proved. For instance, the Requester must show that they “have been or are likely to be adversely affected by project activities”; that “they may suffer actual or future harm resulting from a failure by the Bank to comply with its policies and procedures.”²⁴⁷ According to the operational policies, the request should provide “an explanation of how the Bank policies, procedures or contractual documents were seriously violated” together with “a description of how the act or omission on the part of the Bank has led or may lead to a violation of the specific provision.”²⁴⁸ Actual harm, breach, and a well-founded belief in the likelihood of harm is a predominant feature replicated from traditional legal accountability. This fixation on harms ignores the internal rules and procedures according to which the Bank’s projects are conducted. These rules may in themselves constitute harm insofar as they contradict universal values and norms.

The Panel’s fixation on a notion of accountability as redress of harms or potential harms reaffirms an understanding of accountability as prevention or mitigation or redress of outcomes of harm that must be linked to particular conduct or omission. For example, it is often observed that the mandate of the Panel is restricted to receiving complaints from project-affected people regarding the Bank’s compliance with its Operational Directives and policies during the financing and implementation of projects. Some of the major projects include mega infrastructural financing, which have development impact on indigenous and local communities.²⁴⁹ The Panel targets the social and environmental harms, not the human rights, that Indigenous and local communities may suffer during the life of the projects. All these are overwhelming factual indications that the Bank’s accountability mechanism mirrors key features of standard legal accountability praxis that looks to redress infringements of an affected party, *ex-post*, or *ex-ante*, provided the requesters can identify the potential harm and sufficiently link it to a specific violation of the Bank’s

²⁴⁶ Dana Clark, Jonathan Fox & Kay Treakle eds, *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (Rowman & Littlefield Publishers: Lanham/ Boulder/New York/Oxford, 2003) at 267.

²⁴⁷ See Inspection Panel website.

²⁴⁸ Inspection Panel, Operating Procedures para 5 reprinted in *The Inspection Panel: Annual Report, August 1, 2000 to July 31 2001* (World Bank: Washington DC, 2001) at 47.

²⁴⁹ See for example *How a Group of Mongolian Herders Took on a Mining Giant — and Won*. Online: <<https://www.devex.com/news/how-a-group-of-mongolian-herders-took-on-a-mining-giant-and-won-90765>>.

procedures.²⁵⁰ This requirement of “identifiability” of harm and “link” means that where there are harms that cannot be linked to a specific violation of the Bank’s operational policies or procedures—for instance, in cases of subsequent human rights violations—no complaint can be entertained. Such a rule assures the Bank a safe distance from accountability distance when their policies infringe on human rights.

A good example of this is the complaint filed against the *Lesotho Highlands Water Project*, where, out of genuine apprehension of future harms, requesters complained and demanded that the implementation of a dam project located in Lesotho, which was meant to supply water to Gauteng province in the Republic of South Africa, be halted until proper assessment of “demand-side” issues were completed.²⁵¹ Requesters alleged that if the project was not delayed and proper assessment done, unresolved “demand-side” management issues in Alexandra township would lead to a corresponding increase in the cost of water, cut-offs, and inaccessibility, and cause other sanitation issues in Alexandra, a poor informal dwelling in Johannesburg.

The Panel set three issues for determination: “whether there is preliminary evidence that *prima facie* the Bank has failed to follow its policies and procedures”; and, “if so, whether there is preliminary evidence of alleged material harm”; and, “if so, whether such harm *prima facie* appears to be a result of a Bank failure to follow its policies and procedures.”²⁵² In particular, the Requesters complained that the project would raise undue burden on the poor, and the Panel acknowledged this issue implicated Paragraph 28 of OD 4.15 on Poverty Reduction, which requires the Bank to “eliminate institutional and policy biases against the poor.”²⁵³

The Panel acknowledged the deeply entrenched systemic problems of broken infrastructure and frequent water shortages as inequalities rooted in the legacy of apartheid. It indeed made a finding that there had been historical neglect of infrastructure in Alexandra and Soweto, that the poor communities “suffered widespread inequities” which “imposed enormous hardships,” and

²⁵⁰ See Michelo Hansungule, “Access to Panel – The Notion of Affected Party, Issues of Collective and Material Interest”, in Gudmundur Alfredsson & Rolf Ring, eds., *The Inspection Panel of the World Bank: A Different Complaints Procedure* (The Hague, London, and Boston: Martinus Nijhoff Publishers 2001) at 150 suggesting that even though the Panel is clearly “not a court of law and not even like a court of law,” the general stature mirroring a judicial forum remains outstanding if we take into account “the dispute resolution triad” comprised of a complainant (project affected people or requesters), the (Bank) defendant and the adjudicator (Panel and Board).

²⁵¹ The Inspection Panel, *Request for Inspection Lesotho/South Africa: Phase 1B of Lesotho Highlands Water Project Panel Report and Recommendation August 18, 1998* online: <<https://www.inspectionpanel.org/panel-cases/proposed-phase-1b-lesotho-highland-water-project-first-request-south-africa>>.

²⁵² *Ibid* at 10.

²⁵³ *Ibid* at 18.

that “conditions were harsh and unsanitary” for people living in these areas. It found, however, that proper assessments of both the adequacy of the investment portfolio and the policies directed at reducing poverty need to be taken holistically and not in an isolated focus on one project.²⁵⁴ It stated that this legacy of poverty “neither stems from, nor should it be aggravated by, the decision to proceed with” the project. It found therefore, that the Bank was not in violation of OD 4.15.²⁵⁵

In rejecting the request for investigation, the Panel was of the view that the claimants had failed to prove the linkage between the alleged human rights violations to any specific policy of the Bank. The Panel recommended that the Executive Board should not authorize investigations into the Request. Here, by the criteria that there was no “linkage,” of the harm to any of the Bank’s policies meant that the Panel lamentably deferred to that technical rule so that it could sanction the avoidance of human rights accountability of the Bank. By this technical rule, the demand-side issues of the project that would occasion inordinate and undue burden on the residents, which were acknowledged by the Bank as a potential cause of harm, could easily be ignored as irrelevant because it was not in the Panel’s remit to consider issues not directly related to, and touching on, the Bank’s operational rules and procedures. By deferring to this technical rule, the Panel avoids an institutional approach to accountability capable of interrogating deeper and complex underlying issues.

The Panel was affirming and reiterating an interactional criterion for accountability that has always ensured the Bank a complete avoidance of and disconnection from being held accountable for development injustices that raise human rights concerns. This is to be seen in the principle that the Bank is not accountable for harms directly related to the project if those potential violations do not arise from noncompliance with operational procedures and policies. The failure to prove “linkage” between harm and rule is not the problem in the Inspection modality. Rather, it is this logic of “compliance with operational rules and procedures” that obstructs the direct accountability of the Bank where universal standards are alleged to have been infringed. A system of accountability based on universal norms and standards would ameliorate this deficiency.

Inspection therefore turns out to be an interactional accountability model that focuses on conduct and omits the engendered deprivations. The *Lesotho Highlands* case suggest that we need a mechanism of accountability that focuses on structural violations. As some decisions from the

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

Canadian Human Rights Tribunal have shown, these violations are a result of historical prejudices, stereotypes, and practices and that are now deeply embedded in the work of institutions.²⁵⁶

Structural violations “implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations.”²⁵⁷ A structural remedy goes beyond conduct causative of harms and focuses on correcting the systemic root causes of the failures of programs and policies of government.²⁵⁸ In South Africa, causes of these kinds have been remedied by judicial reliefs known as “structural interdict,” which by their very nature allow the court to remain seized of the matter after judgment so as to supervise or monitor its orders.²⁵⁹ Colombian socio-economic rights litigation points to the Constitutional Court’s power to issue structural remedies that address systemic violations of socio-economic rights by the actions and omissions of public authorities.²⁶⁰ Courts have defied the *functus officio* doctrine to retain jurisdiction after handing their judgments with the aim of supervising compliance with their orders.

In the case of *T-025/04*²⁶¹ the Colombian Constitutional Court joined the constitutional claims (*tutelas*) of over 1,150 displaced families which it heard in a consolidated proceeding. The claimants sued several agencies and departments of government. One of the legal issues for determination was “whether problems in the design, implementation, evaluation and follow-up of the corresponding State policy contribute, in a constitutionally relevant way, to the violation of displaced persons’ fundamental constitutional rights?”²⁶² The Court made a declaration that there was an existence of an “unconstitutional state of affairs” concerning the conditions of the displaced population. This decision took account of the inadequacy of allocated financial resources and apparent constitutional deficiency in legislative measures meant to guarantee the protection of the

²⁵⁶ Gwen Brodsky, Shelagh Day & Frances Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies” (2017) 6:1 Can J of Hum Rts 1.

²⁵⁷ César Rodríguez Garavito, “Beyond the Courtroom: The Impact of Judicial Activism on Socio-economic Rights in Latin America” (2010-2011) 89 Texas Law Review (2010-2011)1669 at 1671.

²⁵⁸ Kent Roach, “The Challenges of Crafting Remedies for Violations of Socio-economic Rights” in Malcom Langford ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 49; Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (Pretoria: Pretoria University Law Press, 2009) at 176.

²⁵⁹ Mitra Ebadolahi, “Notes: Using Structural Interdicts and The South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa” (2008) 83 New York Uni L Rev 1565 at 1590.

²⁶⁰ See e.g Magdalena Sepulveda, “Colombia: The Constitutional Court’s Role in Addressing Social Justice” in Malcom Langford ed, *Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2008)144-162

²⁶¹ Colombian Constitutional Court, Decision T-025 of 2004 online: <https://www.brookings.edu/wp-content/uploads/2016/07/Colombia_T-025_2004.pdf>.

²⁶² Paragraph 2.1.1.

rights of the countrywide displaced persons. Importantly, the Court observed that the violations of the displaced persons' rights "were not attributable to a single authority, but are rather derived from a structural problem that affects the entire assistance policy designed by the State, as well as its different components, on account of the insufficiency of the resources allocated to finance such policy, and the precarious institutional capacity to implement."²⁶³ The Court was cognisant that the claims were due to "deep-seated structural failures."²⁶⁴ It then gave its ground-breaking judgment which required a number of structural measures.

One, the judgment's implementation was to be taken over a period of time supervised by the Court.²⁶⁵ Second, to effectively remedy the complaints of all the countrywide internally displaced persons, the court ordered a number of measures. There was to be a follow-up on the implementation. The order also directed several government agencies to remove the unconstitutional state of affairs of the displaced persons by allocating the necessary financial resources and to take some practical steps to guarantee and protect the affected persons' basic rights. The Court directed that the representative of the displaced communities be allowed to participate effectively in the adoption of the alleviation measures and that the Court be regularly informed of all the relevant progress made. The Court was particularly concerned with authorities' compliance with its orders, and to that effect directed that the judgment be transmitted to the Public Ombudsman and the General Controller of the Nation (*Procurador General de la Nación*), so that they could, "within their spheres of jurisdiction, carry out a follow-up of the implementation of (the) judgment, and oversee the activities of the authorities."²⁶⁶ Other cases in which the Colombian Constitutional Court ordered a redesign of government programs, including orders touching on budgetary matters are *T-0153/98*²⁶⁷ and *T-060/08*.²⁶⁸ In *T-060/98* for example, the Court ordered a restructuring of the government's healthcare system complete with an elaborate

²⁶³ Paragraph 2.2.

²⁶⁴ Manuel José Cepeda-Espinosa, "How far may Colombia's Constitutional Court go to Protect IDP Rights?" online: <<https://www.fmreview.org/brookings/cepedaespinoza#:~:text=The%20Court%20delivered%20judgment%20T,all%20of%20the%20competent%20authorities>>.

²⁶⁵ César Rodríguez-Garavito, "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2011) 89 *Texas L Rev* 1669 at 1688.

²⁶⁶ Paragraph 10.2. 9 of the Judgment.

²⁶⁷ *T-153/98* online <<http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm>>.

²⁶⁸ *T-760/08* July 31 2008 online: <http://www.escri-net.org/usr_doc/English_summary_T-760.pdf>.

process of monitoring the compliance with its orders that would address the entrenched infrastructural impediments.²⁶⁹

This institutional approach is the kind that the Panel ought to have adopted in the *Lesotho Highlands* case to broaden its inquiry into systemic violations. But it chose to limit itself to the circumscribed jurisdiction of “compliance with operation rules, directives and procedures.” By neglecting the institutional approach to violations, the inspection model omits the perspective that, in most cases, potential harms or pervasive failures of development projects and programs are unknowable and even unforeseeable by the very authorities that design them. Thus, to posit an accountability regime that does not contemplate this possibility is to ensure the avoidance of actors’ accountability for harms that are deeply rooted in policy design or that subsequently result from long-term project implementation. More often, in development financing, it is not conduct of an institution but the engendered effects that constitute the way development affects people it is intended to help. Accountability in development financing does not seem to reflect this reality of the unknowability of subsequent harmful effects.

4.2.5 Deradicalization of the Third World and Subordination to the Subaltern Position

The fact that the global policy environment is a determinative factor that shapes the performance and outcomes of national policy projects was not considered in the formulation of the inspection panels or the IEO. Indeed, it is disturbing that even after the Bank’s Wapenhas Report made clear that the global policy system is a determining factor that affects project performance, no attention was directed to the formulation of an accountability mechanism that could deal with such a situation. The Report was categorical in its statement that “[country] factors, often conditioned by changes in the global environment, have a strong impact on project outcomes”.²⁷⁰

Nothing was more revealing than that in assessing the correlation between national and global factors in project failures as the impetus for internal accountability, global factors were more to blame than national. In other words, according to the Report, the effectiveness of project portfolios was largely contingent on the global policy environment and external shocks.²⁷¹ Having

²⁶⁹ For the orders made see Section III of the judgment titled “Decision.” See Rodríguez-Garavito, *supra* note 265 at 1675.

²⁷⁰ Wapenhas Report, *supra* note 165 at 7.

²⁷¹ *Ibid.* In its corroboration, the Report observed that “between projected economic rates of return (ERRs) for these projects on the one hand and trade distortions, exchange rate distortions, interest rate distortions, and the government

reached this conclusion, it was reasonable to expect that this would be sufficient reason to look to accountability procedures that would constrain uncertainties and instabilities of the global policy environment. What we ended up with is an institution with severely circumscribed jurisdiction. Such a curtailment of remit would ensure that the global policy system would always remain unscathed by future Third World resistance movements. Due to this deliberate design, there would be no direct accountability in the international system for policy failures of the global policy system.

Chimni has argued that indeed the deliberate curtailment of structures of accountability coupled with restricted Board representation in these institutions is deliberate and serves to diminish the leverage of developing countries and to keep them in “a subaltern position.”²⁷² Chimni’s views confirm the political necessity doctrine that made it imperative for the creation of weak inspection panels. Rajagopal’s incisive historical observations affirm this fact. He argues that demands for reform in the 1990s that produced internal and voluntary dispute settlement processes had no real intention of creating genuine redress fora for grievances and only served to “deradicalize” Third World resistance movements.²⁷³ Criticisms and staunch oppositional stances mounted against international institutions that have stimulated such reforms, he argues, always provide these institutions an opportunity to reimagine and recreate themselves. They offer them moments of reflection and moments to mobilize knowledge for purposes of self-proliferation and expansion of remit.²⁷⁴

It can be said that the sort of mandate expansion by Bretton Woods Institutions came with the responsibility avoidance given that the genuine search for effective accountability of these institutions was thwarted by the deradicalization mission. In Rajagopal’s view, this is the reason the engagement with alternative conceptions from the Third World is a constant attribute of international institutions’ evolution since the Mandate system. It is an engagement key to the refocusing and reconfiguration of these institutions. It is an experience key to the proliferation of others, in response to the constant engagement with Third world public resistance.²⁷⁵ Noticeably,

deficit on the other, it was found that, by every measure, ERRs were highest in undistorted markets, and lowest in distorted market.”

²⁷² B S Chimni, “International Financial Institutions and International Law: A Third World Perspective” in Daniel D Bradlow & David Hunter eds, *International Financial Institutions and International Law* (Alphen aan den Rijn: Kluwer Law International, 2010).

²⁷³ Rajagopal, *International Law from Below*, *supra* note 54 at 68. See also pages 53, 66, 69, 70.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid* at 126.

the expansion of the sphere of authority of international institutions in the domain of development is always marked by a characteristic silence on accountability for outcomes of poverty and inequality.²⁷⁶

4.2.6 Some Positive Attributes

Some commentators have, however, seen this modality of internal accountability as progressive for an international organization to adopt, notwithstanding the neglect of human rights as an area of concern in development projects. It is argued that it “proves how seriously the Bank takes its commitment to abide by its own standards.”²⁷⁷ This internal mechanism, it is argued, has brought “a significant impact on responsibility and answerability within the Bank.”²⁷⁸

This internal accountability mechanism is also seen as the first of its kind in which an international organization can be brought to accountability, directly to the people. It marked “a watershed moment” in the international jurisprudential landscape²⁷⁹ and could “influence substantive areas of international law.”²⁸⁰ It improves internal governance: the complaints process can correct flaws and risks in the design and implementation of development, lead to self-improvement; acts as checks and balances and as feedback loop on the work of international development institutions.²⁸¹ They help improve the Bank’s compliance with its rules and policies through decentralized community and people-driven processes, signaling “an evolving form of transnational governance ... within the pluralist and complex development context” marked by de-formalization of governance and regulatory arrangements and the collapse of public-private and international-national divides.²⁸² Darrow commends these as “incremental steps towards transparency of decision-making and public consultation on significant policy matters [in] administrative international law.”²⁸³ And De Schutter is optimistic that these mechanisms of self-regulation are neither completely devoid of merits nor as deficient as alleged. They leave institutions with a measure of autonomy and avoid control by member states in their decisions;

²⁷⁶ Pahuja, “The Politics of Good Intentions”, *supra* note 90 at 37-40.

²⁷⁷ Schlemmer-Schulte, *supra* note 200.

²⁷⁸ OHCHR & CESR, *Who Will be Accountable?*, *supra* note 193 at 52.

²⁷⁹ Sovacool, *et al* “Disequilibrium in Development Finance”, *supra* note 243 at 2.

²⁸⁰ Bradlow, “International Organizations and Private Complaints”, *supra* note 203 at 555.

²⁸¹ Sovacool, *et al*, “Disequilibrium in Development”, *supra* note 243 at 2.

²⁸² *Ibid* at 3; Fourie, *supra* note 220 at 98.

²⁸³ Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford; Portland: Hart Publishing, 2003) at 148.

they are preferable over an undesirable situation of subservience to an international or national framework of accountability which may limit their scope of manoeuvre or render them functionally ineffective. But all these praises overlook the fact that to hold an actor accountable to its own rules and policies and not to universal standards cannot really be an impactful accountability.

4.2.7 Summary Remarks

Before I conclude this chapter, I want to make the following summary remarks: First, the foregoing debate reveals that development practice is a discourse of representing and constituting the world into binaries. One side of the divide enforces a Western and monocultural way of life, is defined by parochialism and paternalism, and understands development as a colonial practice of domination.²⁸⁴ It is Escobar who argued that development was not supposed to be about people. He questioned the neutrality of development enterprise, which he saw as a technique of power laced with insidious motivations.²⁸⁵ Esteva and Prakash too see development as a mono-cultural global project of the West that, for the most part, tends to railroad its various paradigms: that is, its norms of behaviour and attitudes, institutions, and rules.²⁸⁶ It is therefore foolhardy to expect that the very creators, either by themselves or through their appendages or agents, can enforce an accountability praxis for their own violence or those of their own institutions. Plainly stated, international development discourse sanctions such entrenched accountability avoidance, disconnection, and instances of obstruction. International law does not construct and reconstruct *absolute* accountability evasions for IFIs but rather a highly *qualified* accountability system in development practice. International development accountability praxis tends to leave the development juggernaut unscathed.

It is irrefutable that there are internal bureaucratic procedures of development institutions that lend themselves as the only existing and functioning modalities of accountability. It is irrefutable, too, that they are normatively weak and conceptually fraught, with serious institutional

²⁸⁴ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, NJ: Princeton University Press, 1995) at 4-5.

²⁸⁵ *Ibid* at 44.

²⁸⁶ Gustavo Esteva & Mandhu Suri Prakash, *Grassroots Post-modernism: Remaking the Soil of Cultures* (London: Zed Books, 2014) at 31. Ruth Buchanan, Kimberly Byers & Kristina Mansveld, “What Gets Measured Gets Done: Exploring the Social Construction of Globalized Knowledge for Development” in Moshe Hirsch & Andrew Lang eds, *Research Handbook on the Sociology of International Law* (Cheltenham/Northampton: Edward Elgar Publishing, 2018) too see development in the same light, namely that, it is “a particular (western) project that incorporates both a way of seeing the world as well as a process of initiation or enculturation into that way of seeing.”

and functional shortcomings. The adoption of internal institutional accountability modes did not dislodge such unsatisfactory conceptions of accountability as redress or prevention of breach. They do not contemplate addressing, preventing, mitigating, or remedying distributional outcomes and other structural injustices linked to the broader global policy system. They adopt the cause-and-effect standard of accountability. They ignore the spectre that development injustices are produced, perpetuated, and sustained by global structural constraints and multiple interacting regimes (consisting of rules, policies, processes, and structures of development). Because they are forms of *ex-post* accountability mechanisms, they cannot assess, *ex-ante*, the extent of compatibility of structures and processes of development with the desired outcomes. Ultimately, they can be faulted as severely “limited creatures” given their heavily circumscribed jurisdiction.²⁸⁷ Simply stated, they cannot secure development justice.

5. CONCLUSION

This chapter has analyzed the understanding of accountability by IFIs in relation to their domains of practice and competence. It critiqued the inspection models of the World Bank and Independent Evaluation Office of the IMF. It has demonstrated how the technocratic practice of development and the allocative, advisory, and regulatory roles of international financial institutions in the international financial governance and development policy practice present tremendous accountability obliterating dimensions. It demonstrated that the Bank and IMF understand their accountability as internal institutional accountability. The very architecture of internal accountability mechanisms, I have argued, cannot account for the severe accountability challenges attendant to the technocratic development policy practice. The narrative woven throughout this chapter is that the accountability dysfunctions and deficits innate to the development policy practice and international financial governance reflect a constructed reality that is constantly rationalized and legitimized by international law and the very practice of development.

In my analysis of the IFIs’ understandings of the accountability praxis, I conclude as follows: Bretton Woods Institutions’ view of accountability is so conceptually and normatively flawed and cannot guarantee the protection of the people of the Global South against the vagaries of development (i.e., institutionally embedded constraints of the global economy, knowledge encumbrances, participatory development deficits, and excessive economic rationalism). Indeed,

²⁸⁷ Sovacool, “Cooperative or Inoperative”, *supra* note 202 at 5.

the inspection model reveals instances of the avoidance of, a disconnection from, and obstruction of accountability whenever Bretton Woods Institutions' interventions in countries' development are challenged. This is perfected by several institutional design strategies: (i) the selective interpretation and application of jurisdiction of the Panel and IEO; (ii) the "rubric" or criteria of compliance with operational rules, policies, directives, and internal procedures; (iii) a fixation with reforming the behaviour of institutions; (iv) the disavowal of rights normativity in the economic sphere; and (v) the manipulative and override powers of the Boards.

The selective application of the Inspection Panels' jurisdiction reveals how international law constructs convenient principles and defines meanings of law for usage in ways that delegitimize subaltern resistance. This is what Rajagopal refers to as the "deradicalization" of the Third World. By such institutional flaws, the existing internal accountability mechanisms exemplify international law's implication in the immiseration and deflection of claims of justice and emancipation from the marginalized social classes. At another level, the rationality of compliance with internal operational directives and procedures provides a convenient mask for the avoidance of accountability based on universal standards and norms. And so, does the economic rationalism by which IFIs refuse to accept binding rights obligations. I have demonstrated that such normative weaknesses of the Inspection Panel and IEO are deliberate and parochial manoeuvres to diminish the responsibility of IFIs in the realm of development practice. Implicit in such manoeuvres, I conclude, are the accountability dysfunctions and deficits key to facilitating the functionings of hegemony and power in the international development arena. It is for this reason that IFIs' understanding of the development accountability praxis remains unsatisfactory and inadequate. So far, the experiment with the Bank's and the IMF's understanding of their own accountability as internal institutional accountability bears no promise or potential for eradicating those injustices that inhere in the international development project.

CHAPTER FIVE

THE LAW OF INTERNATIONAL RESPONSIBILITY AS THE MAIN DOCTRINAL ANCHOR OF INTERNATIONAL LEGAL ACCOUNTABILITY

1. INTRODUCTION

This chapter presents a critical review and analysis of the law of international responsibility as the main doctrinal anchor of the norms of legal accountability applicable to international financial institutions (IFIs). It examines the suitability and applicability of the general principles of the law of international responsibility to the peculiar and complex situations of the kinds of structural injustices that constitute derogations from the RTD norm. Insofar as the responsibility of states and international organizations are concerned, the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)¹ and the Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (DARIO)² are the main compendia of the relevant legal principles and doctrines that undergird and capture the way accountability is understood in international law. I will however focus only on DARIO because it reproduces ARSIWA's paradigm and that although ARSIWA is relevant to this dissertation I will limit myself on DARIO as the *lex specialis*. The law of responsibility for internationally wrongful acts sets out parameters for defining wrongfulness/breach or violations, attributing conduct, discerning causation, imputing responsibility on actors, and setting out legal consequences in connection thereto.

Throughout this chapter, I examine the norms and processes of establishing the responsibility of IFIs for wrongful acts that entail a breach of primary rules. In a judicial mechanism of accountability, a breach of obligations/primary rules is followed by the allocation of responsibility and possibly the making of satisfactory reparations.³ This is what I refer to as

¹ Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries (United Nations, 2001) adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session, annex to General Assembly resolution 56/83 of 12 December 2001 and corrected by document A/56/49(Vol. I)/Corr.4.

² Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts, adopted by the International Law Commission at its sixty-third session, in 2011 (A/66/10, para. 87), welcomed by the United Nations General Assembly in resolution 66/100 of 9 December 2011.

³ See *Jaloud v The Netherlands*, App no. 47708/08, ECtHR, 20 November 2014, para 154-155. *Kaliña and Lokono Peoples v. Suriname*, (Merits, Reparations and Costs) Judgment of November 25, 2015 para 269.

international legal accountability. The regime of DARIO provides a comprehensive accountability praxis distinguishable from follow-up and review as well as the internal institutional models discussed in the previous chapters or the participatory models of accountability in the next chapter.

The central argument of this chapter is that the legal formulation of DARIO constructs and legitimizes the acute accountability avoidance, disconnection, and obstruction practiced by IFIs. It does so both at the level of the specification of obligations and in terms of the assignment of responsibility for breaches and harmful outcomes. I expound on how the international law of responsibility is replete with various flaws deliberately designed to elide the structural violations linked to the development interventions of the Bank and the IMF. I contend that for the most part, and in several instances, international legal accountability is inadequate for dealing with development injustices produced by the contemporary model of economic arrangements.

The law of international responsibility is inadequate in two ways, the one concerning norms, and the other in regard to process. The first is due to the circumspection shown by IFIs toward the specification of a normative system of obligations (primary rules) that would constrain their development praxis toward what this dissertation views as development justice, based on the basic tenet that human rights obligations have historically remained largely a state-centric discourse that focuses on the state as the sole duty bearer.⁴ I argue and conclude that by perfecting a circumspection toward primary rules, DARIO, even in its thus expanded conceptions, furthers international law's characteristic feature of contesting the normativity of human rights in the domains of IFIs praxis. Thus, responsibility for conduct infringing on certain new guiding values and norms in the development arena may not be enforced. The second inadequacy is located in the tenuous and hazy rules governing the process of attributing and allocating direct and distinct responsibility for wrongful acts to international organizations.

This chapter is written from a TWAIL perspective. Key techniques of TWAIL that I will use include the following: historicizing Third World experiences into the analysis of ARSIWA and DARIO; disavowing the various precepts that enable the avoidance and obstruction of, and disconnection from accountability by supranational institutions therefore oppressing the Third World; discerning “continuities and discontinuities” of marginalization and even subjugation in

⁴ Wouter Vandenhole, “Obligations and Responsibility in a Plural and Diverse Duty-bearer Human Rights Regime” in Wouter Vandenhole ed, *Challenging Territoriality in Human Rights: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (London & New York: Routledge, 2015) at 116 [Vandenhole, “Obligations and Responsibility”].

these doctrines of law.⁵ This chapter is also shaped by institutional cosmopolitan insights, with the aid of which I theorize the fundamental defects of the *conception* and *praxis* of the law of international responsibility, especially as they apply to the IFIs' accountability avoidance and evasion as a legitimization of the oppression of the Third World. I rely on Thomas Pogge's philosophical differentiation of the institutional from the interactional approaches to the problematique of responsibility allocation in the global institutional order. Pogge has extensively applied these two standards, relying on moral philosophy to critique the conventional ways of ascertaining responsibility for global injustices. Throughout his moral theorization of the question of global responsibility for poverty, apart from perceiving the phenomenon as a question of distributive injustice, Pogge's political philosophy gave very little attention to international law precepts or the law of responsibility within that body of norms. This gap needs to be closed, or at least narrowed. This is the contribution I make in this chapter by weaving together certain interdisciplinary theoretical insights and TWAIL to critique international law and international institutions' accountability deficit, especially as it relates to TWAIL. I surmise that existing accountability practices in international law are predominantly interactional, and that this is the greatest mark of their defectiveness and unsuitability to the realization of development justice.

This chapter proceeds as follows: In the next section, I expound on Pogge's two paradigms of understanding accountability deficits. In section three, I define the legal concept of responsibility for wrongfulness as understood within the DARIO framework. Section four examines two related and interlinked issues: the first is DARIO's evasive engagement with human rights as primary obligations; and the second is the problematic nature of the process of attributing wrongful conduct to international organizations, especially IFIs. I then make the conclusion of this chapter in section five.

⁵ For this view, see Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10 Intl Com L Rev 371 at 377 [Okafor, "Theory or Method"]; Obiora Chinedu Okafor, "Newness, Imperialism, International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43:1&2 Osgoode Hall Law Journal, 171 at 175 [Okafor, "Newness"].

2. APPRAISING POGGE'S TWO STANDARDS OF RESPONSIBILITY ASCERTAINMENT: THE INSTITUTIONAL VERSUS THE INTERACTIONAL APPROACHES

It is apposite to go deeper into a differentiation of the interactional and institutional paradigms of accountability that I briefly stated in chapter one. This is warranted here because this is the first time the norms and practices of international law of responsibility are being critiqued from the perspective of moral philosophy. Therefore, a much more nuanced understanding of the differentiation between the two approaches is required. Thomas Pogge dichotomizes two approaches to the allocation of responsibility for global distributive injustices by differentiating the institutional from the interactional accounts of the causes of global distributive injustices. He takes poverty as a good case study.⁶ An interactional approach, in his account, takes a clear-cut approach to causality, wrongfulness, and attribution of conduct and assumes that wrongful acts are either foreseeable and avoidable or immediate and can be directly attributed to an actor.⁷ On the contrary, an institutional approach employs a holistic understanding of global injustices as distributive injustices sanctioned by the global structural arrangements. It outright avoids a linear and straightforward approach to violations.

An interactional perspective focuses on overt *ex-post* forms of internationally wrongful acts or breaches that occur at the secondary stages when states give effect to global economic policies. He calls these incidences “clear-cut human rights violations.”⁸ An interactional account of rights violations, according to Pogge, is the standard approach in human rights accountability practices that focuses on the more experiential and more visible harms produced by the more easily identifiable conduct and action of one or more actors. In its emphasis on the visibility and easier discernibility of responsible actors and their actions, an interactional account seeks to hold actors accountable for wrongful conduct or failure to prevent harms more easily and directly attributed to them. By this approach, it can be said that is fixated on redressing outcomes. It adopts an *ex-post* approach on the responsibility ascertainment. Accordingly, an interactional method is a straightforward exercise that follows a linear approach to causation and attribution of conduct to

⁶ See Thomas Pogge, *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (UNESCO; Oxford; New York: Oxford University Press, 2007) at 15-53 [Pogge, *Freedom from Poverty as a Human Right*].

⁷ *Ibid* at 16.

⁸ *Ibid*.

actors.⁹ From this perspective, violations can be likened to those direct cases where conduct or omission of identifiable actor/s “must constitute a breach of an international legal obligation.”¹⁰ Underlying this approach, which is also implicit in the human rights jurisprudence of accountability, is the assumption that agents, as the case may be, “act in such a way that they foreseeably and avoidably deprive others of their livelihood.”¹¹

In contrast, an institutional account offers a broader and fundamentally different optic. It avoids the direct approach to causality, wrongfulness, and attribution of conduct deployed within ARSIWA and its progeny, DARIO.¹² Pogge argues that instead of focusing on the outcomes of the conduct of a single actor and characterizing them as human rights violations, an institutional optic looks to the multiple primary causal elements that are linked to the globalized institutional framework.¹³ An institutionalist optic, Pogge reflects, appreciates that multiple “cooperating causes” (multicausality) inherent in global institutional arrangements defy the conventional unilinear mechanics and dynamics, and make intractable the exercise of assessing causation and wrongfulness in the conservative manner of the law of state responsibility or its replica.¹⁴

Pogge argues that an interactional approach that fails to account for the global institutional order’s engenderment of poverty may be a deficient device for assessing the global responsibility for poverty.¹⁵ Such an approach is defective because it sidesteps the institutionally embedded constraints consisting of rules and policies that structure and condition international relationships and outcomes. Pogge calls this phenomenon “engendered deprivations,” which he ably distinguishes from “established deprivations.”¹⁶ An institutional system “engenders deprivations” through effects that it predictably and actually produces, while an interactional order, on the

⁹ On the question of attribution of conduct, see ARSIWA, part I Chapter II.

¹⁰ ARSIWA at 34.

¹¹ Pogge, *Freedom from Poverty as a Human Right*, *supra* note 6 at 16. For a most comprehensive discussion of this issue as an international legal question, see Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007) [Salomon, *Global Responsibility for Human Rights*].

¹² DARIO is a replication of most of the provisions and principles of ARSIWA even though it specifically applies to the international responsibility of international organizations for their conduct which may be considered internationally wrongful. The International Law Commission (ILC) has stated that DARIO’s principles “follow the approach adopted with regard to state responsibility”. DARIO commentary at 2.

¹³ Pogge, *Freedom from Poverty as a Human Right*, *supra* note 6 at 26 has argued that we need to focus on multicausality including rules: “the rules governing economic transaction—both nationally and internationally—are the most important causal determinants of the incidence and depth of poverty”.

¹⁴ *Ibid* at 16.

¹⁵ *Ibid*.

¹⁶ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform*, 2nd ed (Cambridge: Polity Press, 2008) [Pogge, *World Poverty and Human Rights*] at 179.

contrary, “establishes deprivations” by that which it “mandates or at least authorizes.”¹⁷ At the core of this differentiation is the notion of effects/consequences produced, on the one hand, and the idea of authorized conduct, on the other.

Pogge postulates that global institutional processes intermingle with decisions of other actors in national contexts, where they condition and produce various outcomes.¹⁸ An intermingle effect presupposes that there is “a holistic understanding of how the living conditions of persons are shaped through the interplay of various institutional regimes, which influence one another and intermingle in their effects.”¹⁹

An interactional account, on the contrary, does not appreciate the intermingle effect in its assessment and explanation of structural violations. It fails to recognize that the endemic vulnerabilities of people in developing countries are quite often not the direct causal effect of a single and identifiable actor’s conduct, but are rather a consequence of an interlocking matrix of cooperating constraints rooted in international economic systems. These may include contravening provisions, rules, or principles of investor protection treaties, predetermined structural and macro-economic reforms prescribed by multilateral lending institutions, or global trading rules whose implementation may create certain policy effects such as social exclusion, inequality, or poverty. Often unforeseeable though avoidable, such harms have no immediate and knowable repercussions on human development.

Leaning on the interactional/institutional binary, I charge that the law of international responsibility, the shorthand for international legal accountability, is strongly inclined to the interactional version.

¹⁷ *Ibid.*

¹⁸ Pogge, *Freedom from Poverty as a Human Right*, *supra* note 6 at 17.

¹⁹ Pogge, *World Poverty and Human Rights*, *supra* note 16 at 39.

3. THE INTERNATIONAL LEGAL CONCEPT OF RESPONSIBILITY FOR WRONGFULNESS

For the most part, ARSIWA and DARIO formulate the way legal accountability is understood in international law. The predominant form of accountability in international law is that of enforceability. This order relies on the rules relating to the attribution of wrongfulness, and the ascertainment of culpability and liability, which then leads to the enforcement of sanctions (reparations) or other forms of remedies.

ARSIWA and DARIO codify a body of norms referred to as secondary rules. Secondary rules are those rules that govern the legal consequences that flow from conduct or omission of the state or the international organization that constitute a breach of primary rules.²⁰ Primary rules are those basic rules defined by international law such as treaties and conventions, custom, declarations or general principles that stipulate the content, substance or the nature of international obligations binding on actors. In the broader conceptualization of the law of international responsibility, conduct or omission in breach of primary obligations are otherwise known as “internationally wrongful acts.”²¹ What constitutes an international obligation is broadly defined by the domain of law. Human rights norms and standards fit into the category of primary obligations and must therefore be brought within the purview of the laws of state responsibility and the responsibility of international organizations, unless exempted by the *lex specialis* rule.²²

Fragmented international and regional human rights regimes enshrine a constellation of primary obligations and norms. The Declaration on the RTD is one component of the fragmented human rights corpus enshrining primary obligations and norms, and as such it defines and contributes to the gamut of rights that we now call the right to development, a norm constituting

²⁰ Robert Kolb, *The International Law of State Responsibility: An Introduction* (Massachusetts: Edward Elgar Publishing, 2017) at 1. General Commentary of DARIO para 3: “primary rules of international law...establish obligations for international organizations, and secondary rules...consider the existence of a breach of an international obligation and its consequences for the responsible international organization.”

²¹ ARSIWA Art 1 is the foundation of state responsibility and provides that “every international wrongful act of a state entails the international responsibility of that State.” Article 2 outlines the elements of an internationally wrongful act as (i) conduct attributable to the state (ii) and is inconsistent with its international obligations. Note should be taken that DARIO replicates this formulation in its Article 4.

²² United Nations, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi* A/CN.4/L.682 13 April 2006 at 34 [Koskenniemi, “Fragmentation of International Law”]. See also Art 55 of ARSIWA.

the primary rules of international law. The Declaration on the RTD spells out the content, nature, and performance standards of primary obligations incumbent on actors.

4. FORMALIZATION OF THE EVASION OF DIRECT AND DISTINCT ACCOUNTABILITY BY INTERNATIONAL ORGANIZATIONS (SUCH AS IFIs)

4.1 Circumspection Towards Primary Rules

The rejection of human rights obligations as binding on non-state actors (such as IFIs) is also to be found in the circumspect and tenuous way in which DARIO specifies primary rules for international institutions. It is a rejection that reflects what Roberto Ago had sensationalized as the need to avoid “*un mélange de genres*” (a mixing of categories).²³ DARIO’s circumspection toward primary obligations is reflected in the International Law Commission’s (ILC) obfuscation of the issue when it states the following in the General Commentary to the DARIO: “Nothing in the draft articles should be read as implying the existence or otherwise of any particular primary rule binding on organizations.”²⁴ The ILC’s point is rather blatant. It is also willfully blind to the obvious imperative that IFIs’ conduct now needs to respect the commonly agreed universal values of the international society.²⁵

It is, however, understandable that ILC leaves a margin for those who seek to enforce responsibility for breach of international norms, to source those primary obligations elsewhere—in treaties, custom, or general principles of law.²⁶ This view applies as well to ARSIWA. It cannot therefore be said that DARIO’s evasion of primary rules is a special isolated case, as both instruments were not meant to deal with primary rules. What must be said is that this homogenizing avoidance of primary rules in the formulation of ARSIWA and DARIO is not natural. It is a

²³ Cited in Eric David, “Primary and Secondary Rules” in James Crawford, Alain Pellet & Simon Olleson, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) at 28 [Crawford et al, *The International Law of Responsibility*].

²⁴ DARIO General Commentary 3.

²⁵ The juridical and normative paramountcy of rights is stipulated in Article 55 as read together with Article 103 of the UN Charter. Article 103 enshrines the paramountcy of Charter obligations and principles as superseding all other conflicting international agreements or treaties including agreements concluded between international institutions and states. For this view, see Sanae Fujita, *The World Bank, Asian Development Bank and Human Rights: Developing Standards of Transparency, Participation and Accountability* (Cheltenham; Northampton: Edward Elgar, 2013) 11; Olivier De Schutter, “Human Rights and the Rise of Organizations: The Logic of Sliding Scales in the Law of International Responsibility” in Jan Wouters et al, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010) at 96 [De Schutter, “The Logic of Sliding Scales”].

²⁶ Mirka Moldner, “Responsibility of International Organizations” (2012) 16 Max Plank UNYB 281 at 295.

product of international lawyers which embodies dominant and homogenizing viewpoints and positions expressed by traditional international law scholars. These positions and viewpoints have found their way in contemporary legal norms, notwithstanding their fundamental flaws. Such homogenizing positions are reflected in the ILC's circumspection toward primary rules—which invokes Roberto Ago's irreverence for primary obligations as the “mixing of categories.” Effectively, such positions and worldviews are a manifestation of a willful attempt to construct a body of norms that reflect particular positions and persuasions.

No doubt, such positions and persuasions (i.e. DARIO as only a body of secondary rules) have their deeper justifications in law and ideology. One of the justifications that is now widely embraced supposes that ARSIWA and DARIO were to be applied only to the process of establishing the responsibility of an actor for a wrongful act. A corollary to this reasoning holds that primary rules or a body of norms governing the behaviour of actors falls outside the province of DARIO and ARSIWA. According to this consensus, these two instruments would leave it open for primary rules to be sourced elsewhere. This fact, this position that DARIO was not meant to contain primary rules is not contested. But as I see it, the ILC intended to bifurcate the regime of obligations from that of allocating/assigning responsibility for wrongfulness. By this bifurcation, the ILC conveniently and expediently avoided answering the question of the conflict of norms or international rules. That way, it would be easy to apply the subjective view that responsibility of an actor is invoked not by fault but by conduct in breach of an international obligation stated in some other treaty or body of international law.

This deliberate framing of DARIO whereby primary rules are to be sourced elsewhere is very problematic. The problem first appears in the flawed definition of wrongful conduct. Articles 2 (ARSIWA) and 4 (DARIO) stipulate that a wrongful act is comprised of conduct or omission attributable to an actor and that the conduct or omission must constitute *a breach of international obligations/norms*.²⁷ The criterion of conduct/omission in breach of an obligation is a very fluid and vague definition of wrongful conduct. This is because what may be considered an international obligation incumbent on an international organization remains contested in a fragmented international legal order. And due to the fragmentation of international law, marked by norm conflict, what may be assumed to be a breach of primary obligation may not even be as clear-cut

²⁷ Brigitte Stern, “The Elements of an Internationally Wrongful Act” in James Crawford, Alain Pellet & Simon Olleson, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) at 201.

(or interactional) in the context of multilateral development relationships. Article 10 of DARIO provides that a breach of an international obligation arises when “an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.” The underlying rule is that IFIs conduct must conform to that which it is “required of” by an international obligation. This essential rule (“required of”) shows how DARIO takes an interactional and highly abstract approach to the question of ascertaining breach of primary rules.

How is the abstract nature of Article 10 manifested? In reality, IFIs are governed by their constituting documents, which set the rules of behaviour and bounds of competencies, which may be referred to as primary rules. This, however, does not preclude international organizations from respecting other international rules, including customary international law.²⁸ But in the context of their mandate to provide global public goods that impact human rights, the most apt question is: do human rights norms constitute international legal obligations to which the conduct of international organizations is required to comply with? In the guise of avoiding “mixing of categories,” DARIO is circumspect on the question of what obligations an international organization is “required of.” If the ILC gave deeper introspection to this problem of regime conflict and norm fragmentation, one would be presented with a more accurate and satisfactory rubric for determining what constitutes a breach of international obligations. As it is, ILC was very circumspect of the question, thus effectively giving a badge of approval to the fragmentation of international law that facilitates obligations avoidance for IFIs. Such a flaw typifies the fragmented character of international law that has failed to provide a common regulatory framework for different forms of international reality.²⁹

The lacuna is also exposed by the traditional conception of the international law of human rights as a specific relationship operating only between the state and the individual. This reignites the unresolved question of whether human rights obligations are primary rules binding on IFIs in

²⁸ This can be traced in the 1951 ICJ decision that held that international organizations are “bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”. See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980 para 37.

²⁹ Koskenniemi, “Fragmentation of International Law”, *supra* note 22 para 8. See further, Olivier De Schutter, “The International Dimensions of the Right to Development: A Fresh Start Towards Improving Accountability” A/HRC/WG.2/19/CRP.1[De Schutter, “A Fresh Start Towards Accountability”] at 8. De Schutter appreciates the phenomenon of multiple regimes intersecting. Because of a plurality of actions in “a multiple duty-bearer regime,” there is no baseline criteria for determining which values are binding on an international organization.

their domains of practice. DARIO completely avoids this question, following what the law of state responsibility traditionally did.

If we go further, we find that in itself, the criteria of “breach of an international obligation” or “breach of primary rule” is conceptually problematic. This is because it does not appreciate the dilemma of norm and rationality conflict presented by the fragmentation of international law.³⁰ That is, it does not address whether human rights norms constitute international obligations “required of” or in conflict with international organizations’ other duties. Because of its flawed framing, DARIO’s definition of wrongfulness as breach of obligation shirks resolving the contestation as to what obligations are applicable to actors when primary rules of one regime are offended by decisions or policies competently undertaken within other competing arrangements. I acknowledge that this is something that human rights law should clarify, but the fact that DARIO doesn’t address it adds to the lacunae of international legal accountability of IFIs.

The other fundamental flaw of the “breach of primary rule”/ “breach of primary obligation” approach is that it is predicated on an interactional view of reality. Its assumption is that any conduct that does not honour internationally recognized obligations constitutes wrongfulness for which the responsibility of an actor is invoked. Yet, such a traditional international law view of breach is too linear and does not account for distributive injustices. Distributive injustices such as poverty and inequality are sanctioned by rules and policies which are otherwise lawfully made by international institutions within their enabling regimes. Even though such policies could have produced impugned outcomes (breach), such as the failure to equitably and fairly allocate the benefits and burdens of development, the resultant wrongfulness is not necessarily a consequence of the easily disentangled and discernible conduct of actors. They are a consequence of the entanglement of various policy actions whereby breaches are contingent on policy changes. They take the form of policy effects that may take a considerably long time to manifest as violations. Looking at such misallocations (maldistribution) from “a breach of primary obligation” approach misses how the complex of distributive injustices are produced by the global policy system. Since the definition of wrongful conduct is narrow, it excludes subsequent injuries and does not cover

³⁰ For a view of rationality conflict, see Sebastian Oberthür, “Regime-Interplay Management” in Kerstin Blome, Andreas Fischer-Lescano, Hannah Franzki, Nora Markard and Stefan Oeter eds, *Contested Regime Collisions: Norm Fragmentation in World Society* (Cambridge: Cambridge University Press, 2016) at 94.

effects such as those resulting from policy actions that may constitute an unfavourable economic environment hindering the realization of human rights.³¹

Furthermore, judicial practice of the international law of responsibility predominantly reflects a statist understanding of the notion of “breach of primary obligations.” It is argued that ARSIWA (and therefore DARIO) have come as a legacy of the aphorism that “if one attempts ... to deny the idea of State responsibility because it allegedly conflicts with the idea of sovereignty, one is forced to deny the existence of an international legal order.”³² Such a mindset has always assured international organizations (such as IFIs) and private non-state actors a high degree of safety from accountability. This pervasiveness of a statist understanding of the breach of primary obligations, together with the question of *locus standi*, was reflected in the *Ogoni* case.³³ Here, the perception that states are the signatories to human rights instruments and therefore the only duty bearers resulted in the African Commission on Human and Peoples’ Rights resorting to the technical interpretation of state responsibility, by which human rights obligations are deemed incumbent only on states. In this case, Shell Petroleum Development Limited, an oil mining consortium was accused of a range of indictable human rights misconduct, including environmental degradation of the Ogoni land where its activities were concentrated. In its reasoning that rights “generate at least four levels of duties” for the state, the Commission took guidance from judicial precedents that set the expectation of the due diligence standard on the state’s duty to protect.³⁴ The due diligence rule originated in the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez versus Honduras*.³⁵ In this case, it was held that:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself,

³¹ De Schutter, “A Fresh Start Towards Accountability”, *supra* note 29 at 17.

³² Alain Pellet, “The Definition of Responsibility in International Law” in James Crawford, Alain Pellet & Simon Olleson, eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) at 4 citing Roberto Ago, “Third Report on State Responsibility” (1971)II:1 ILC Yearbook 199, 205 (para 31).

³³ *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, African Commission on Human and People’s Rights, Communication No. 155/1996 [*Ogoni* case] online: <http://www1.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/Cases/SERAC1.pdf>.

³⁴ *Ibid* at para 44.

³⁵ Inter-Am Ct HR (Ser C) No 4, *Annual Report of the Inter-American Court of Human Rights: 1988*, OAS/Ser.L/V/III.19 doc. 13 (1988) 71.

but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.³⁶

It is this jurisprudence that has established what is now called the due diligence standard that has gained judicial endorsement and practice across human rights jurisdictions.³⁷ The due diligence rule reflects the thinking that “the interpretation of human rights treaties has been shaped in notable ways by the general law of State responsibility.”³⁸ Relying on this rule in the *Ogoni* case, the African Commission considered that it is the duty of the state to take positive measures to enact legislation to protect people against violations, including restraining private parties from inflicting human rights violations.³⁹ That dictum therefore meant that Shell Petroleum Development Corporation could not be held directly liable for massive violations of the rights of the Ogoni people. Okafor points out that though the African Commission found indictable human rights breaches that could be directly imputed on Shell Petroleum, its legally constrained decision to interpret the duties as only incumbent on states meant that attribution of conduct for breach of the Charter’s obligations could only target the Nigerian state.⁴⁰

Put to its full effect, this form of derivative accountability is an embedment of and justification for accountability disconnection and obstruction for private actors in international law. It is this conservative understanding, based on the classical liberal conception of rights as negative qualifications of state sovereignty, that has constructed and naturalized the conceptually defective and functionally ineffective statist and state-based accountability regimes.⁴¹

³⁶ *Ibid* para 172.

³⁷ For a discussion of the due diligence standard in the context of state responsibility for human rights violations, see Susan Marks & Fiorentina Azizi, “Responsibility for Violations of Human Rights Obligations: International Mechanisms” in James Crawford, Alain Pellet & Simon Olleson eds, *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) at 725.

³⁸ *Ibid* at 736.

³⁹ Obiora Chinedu Okafor, “A Regional Perspective: Article 22 of the African Charter on Human and Peoples’ Rights” in United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013) at 380 [Okafor, “A Regional Perspective”]; *Ogoni* case, *supra* note 35 at para 58.

⁴⁰ Okafor, “A Regional Perspective” *ibid* at 380.

⁴¹ Clapham argues that the dominant statist understanding of rights produced the bias in the models of accountability as we know them today. Andrew Clapham, “Non-State Actors” in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumara, *International Human Rights Law* (New York: Oxford University Press, 2010) at 562. But see in an indigenous context the relation conception and qualification of sovereignty as responsibility, respect and renewal in Heidi Kiiwetinepinesiiik Stark, “Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada” (2010) 34:2 *American Indian Culture and Research Journal* 145.

The statist conception of the law of responsibility (reflecting international institutions' circumspection toward the assumption of primary obligations), which is captured in the notion that the state is the "addressee" of, and has the onus (responsibility) to secure human rights protection, is pervasive in judicial thinking in other jurisdictions. Take, for example, the judicial adjudication of Greece's structural adjustment and bailout measures. In *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece* (hereinafter the *Greece Troika* case),⁴² the European Committee of Social Rights (the Committee) found Greece liable for the cumulative effects of austerity measures and conditionalities that offended social security protection. Even when it was clear that Greece implemented those policies at the behest and with the oversight of the European Commission, the European Central Bank, and the IMF (the Troika), the Committee adopted a statist understanding of breach. Greece had argued that the structural reform measures it adopted in response to the escalating economic catastrophe were specific obligations deriving from its contractual agreements with the Troika, as antecedent conditions for the continuation of the financing arrangement, for which it could exercise no control or direction.⁴³ As a matter of fact, Greece argued that the implementation of the bailout conditionalities were to be overseen directly by the Troika.⁴⁴ The austerity policies stipulated, among other reforms, drastic reductions in public spending, privatization of public assets, and labour reforms as part of measures which would stem the total collapse of the Greek economy.⁴⁵ In the end, the measures worsened the economic environment, causing massive socio-economic havoc that further limited Greece's social welfare spending capacity.⁴⁶

The Committee rejected the contentions that the Troika bailout conditions were more determinative of the outcomes or that Greece lacked any policy discretion or autonomy on those

⁴² *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece*, European Committee of Social Rights, Decision on the Merits, Complaint No. 76/2012 [*Greece-Troika* case].

⁴³ At para 10: "The Government argues that the modifications of the pensioners' social protection have been approved by the national parliament, are necessary for the protection of public interests, having resulted from Greece's grave financial situation, and, in addition, result from the Government's other international obligations, namely those deriving from a financial support mechanism agreed upon by the Government together with the European Commission, the European Central Bank and the International Monetary Fund ("the Troika") in 2010."

⁴⁴ Alexander Kentikelenis, Marina Karanikolos, Aaron Reeves, Martin McKee, David Stuckler, "Greece's Health Crisis: From Austerity to Denialism"

Online:

<http://www.gulbenkianmhplatform.com/conteudos/00/79/00/02/Greece%E2%80%99s-health-crisis_9280.pdf>

⁴⁵ Margot E Salomon, "Of Austerity, Human Rights and International Institutions" (2015)21:4 European L J 521.

⁴⁶ George Katrougalos, "The Greek Austerity Measures: Violations of Socio-Economic Rights"

Online: <<http://www.iconnectblog.com/2013/01/the-greek-austerity-measures-violations-of-socio-economic-rights/>>

bailout packages. Indeed the Committee found no breach on the part of the Troika in the *ratio* that “the requirements of [such] legal obligations does not remove them from the ambit of the Charter”⁴⁷ and “that despite the later international obligations of Greece, there is nothing to absolve the state party from fulfilling its obligations under the 1961 Charter.”⁴⁸ This seems to be a conservative statist reading of the obligations incumbent on international organizations. It is one that legitimizes the IFIs avoidance of human rights obligations. It ensures that IFIs are disconnected from scrutiny or oversight for harms related to their interventions in the economies of weak nation-states. Even when their interventions in weak economies are so direct, visible, and determinative of the adverse outcomes, through “meanings” applied in practice, international law constructs doctrines that assure international institutions safe distance from accountability.

The *Greece-Troika* and the *Ogoni* cases are a classic study of how international law, through its doctrines and practices, rationalizes international institutions’ avoidance of and disconnection from accountability.⁴⁹ Such a rationalization is explicit in the anachronism that the state has a duty to honour obligations entailed in human rights even when acting as constituent members of international organizations. This anachronism ignores the reality that IFIs are nowadays in the driver’s seat in the perpetration of socio-economic injustices through predatory development interventions. This anachronism, however, assures a safety and disconnection from accountability when IFIs are the objects of censure in development. These cases further illustrate that the reason for the avoidance, and the substantial rebuttal of rights by IFIs, has some political underpinning to it. It ensures that parochial goals that IFIs champion, and which do not comport with the social objectives of development, can always go unquestioned.

Happily, by now, a daunting number of experiences with global development institutions, as the *Greece-Troika* case demonstrates, have cast doubt on the dominant Western-Liberal notions of the international legal accountability of IFIs. Different philosophical accounts continue to

⁴⁷ *Greece-Troika* case, *supra* note 42 para 50.

⁴⁸ *Ibid* at 51.

⁴⁹ While I recognize that relying on the *Greek-Troika* austerity case is methodologically problematic for the reason that Greece does not belong within the demarcated boundary of the Global South, its experiences with coercive global institutions in the context of economic turmoil marked by externally dictated measures, however, puts it on the same footing as and into the Third World geography of subjugation and subordination by hegemonic supranational institutions. Its experiences with IMF conditionality are therefore categorizable as being in line with those of the Third World. After all, the epistemic category “Third World” is not geographically bounded, but refers to a “geography of injustices” in the broader matrices of power. I rely on Upendra Baxi, “Operation Enduring Freedom: Toward a New International Law and Order?” in Antony Anghie et al eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff, 2003) at 46.

discount the traditional assumptions of human rights theory. They maintain that these theories misconceive the historiography, philosophy, and functions of rights.⁵⁰ Some maintain that the objects of human rights can be expanded to constrain market supremacy.⁵¹ Notwithstanding this dissension, however, the articulation and practice of the language of human rights obligations, and the doctrines of law that ground them, inescapably bear the imprint and permanent cast of Western Liberalism. The disavowal of obligations as primary rules incumbent on international institutions continues unabated. This is so even as contemporary pluralist accounts emphasize that in a world of multi-variegated value systems, there certainly are manifold political and moral lenses through which the human rights paradigm can be deployed in the remediation of global distributive injustices.⁵²

The focus on the state in the conceptualization of breach is as overwhelming as it is vehement in its denial of the direct human rights obligations of international institutions. This spiral of denial is so stark and yet has not drawn serious attention, even in the very articulation of the 2011 Maastricht ETO Principles.⁵³ Oddly still, for its exclusive focus on state conduct within intergovernmental organizations, the Maastricht ETO Principles, like the Tilburg Principles,⁵⁴ do

⁵⁰ Only a few scholarly work can be mentioned in this space: Arjun Sengupta, "Poverty Eradication and Human Rights" in Thomas Pogge, *Freedom from Poverty as a Human Right: Who Owes What to the Poor* (UNESCO; Oxford; New York: Oxford University Press, 2007) at 328. He argues that in any case, the Lockian conception of rights stands evacuated of soundness. Sengupta pointed out that historical accounts that confined rights to relationships of power between the individual and the state were at all time baseless. In his view, historicity of human rights show that rights were "foundational norms of a society, [entailing] obligations for all agents or members of the society, whose actions can have an impact on the fulfilment of the rights." Steven Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111:3 Yale LJ 443 at 468 also argues that the focus on states as the sole duty bearers is highly doubtable even from Locke's contractarian conception of the state and rights. Taking a specific and exclusive cultural standpoint, Makau Mutua has argued that there exists African communitarian notions of human rights, an approach that differs fundamentally from the Western conception. Western understanding, he argues, is sorely limited and incomplete. Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002) at 72-73,80.

⁵¹ Margot E Salomon, "Challenges of Market Primacy for the Human Rights Project" in Wouter Vandenhoe ed, *Challenging Territoriality in Human Rights: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (London & New York: Routledge, 2015) at 188-204.

⁵² Philip Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control" (1984) 78 Am J of Intl L 615 urges that "rights should reflect a fundamentally important social value; be relevant, inevitably to varying degrees, throughout a world of diverse value systems ... be capable of achieving a very high degree of international consensus."

⁵³ "Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" 2011. For this critique see Vandenhoe, "Obligations and Responsibilities", *supra* note 4 at 129.

⁵⁴ Willem Van Genugten, "Tilburg-GLOTHRO Guiding Principles on the World Bank Group, the International Monetary Fund and Human Rights" in *The World Bank Group, the IMF and Human Rights: A Contextualized Way Forward*, ed (Intersentia, 2015) 55.

not adequately interrogate the dominant state-centric human rights praxis.⁵⁵ The dominant understanding is that for there to be a breach, one must seek to find responsibility either territorially or extraterritorially, based on the international law principle that states have territorial (national) and extraterritorial (international) human rights obligations.⁵⁶

For the extraterritorial method of ascertaining responsibility, the assumption is that while acting within the decision-making framework of international institutions, states' conduct adversely impacts the enjoyment of human rights in other countries, for which they should be jointly or severally held responsible. This fixation on the state endures, even when the debate on extraterritoriality signals the manipulative agency and culpability of international institutions in the perpetuation of development injustices.

Thus, it is not difficult to see these restatements of the law of extraterritorial human rights obligations as missing the structural contingency dynamic. They do not reflect the institutional cosmopolitan view of rights obligations as constraining all social schemes and institutions.⁵⁷ For instance the Maastricht Principles state in the preamble that "human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States." This view misses the crucial dynamic that some violations are embedded in the kind of institutional schemes that govern inter-state relations. Therefore, to have an institutional view is to be aware that international organizations are nowadays in the driver's seat in the perpetration of socio-economic injustices through predatory development interventions.

In conclusion, circumspection toward the normativity of human rights in the international organizations' context, is predominant even in the conceptualization and practice of the law of responsibility of these bodies. This is proven by the experience that statist understandings permeate the very interpretation and application of the concept of breach/wrongfulness. Articulated through idioms such as due diligence (or derivative accountability) or extraterritoriality, such

⁵⁵ Particularly the state-focused regimes that erase direct and distinct human rights duties for international institutions. See Vandenhoe, "Obligations and Responsibilities", *ibid* (notes that Tillburg Principles are "quite silent on the question of apportioning responsibility between IFIs themselves and their member States" at 127).

⁵⁶ Extraterritorial obligations are those "obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory" Maastrich Principles, *supra* note 53 para 8.

⁵⁷ Pogge argues thus: "The institutional view thus broadens the circle of those who share responsibility for certain deprivations and abuses beyond what a simple libertarianism would justify, and it does so without having to affirm positive duties". Pogge, *World Poverty and Human Rights*, *supra* note 6 at 178.

rationalizations are designed to shield IFIs from the normative practices of human rights obligations.

It seems to me, therefore, that what classical international law regards as the avoidance of the mixing of categories has today become a justification for IFIs avoidance of and disconnection from accountability at the first level of the specification of obligations and performance criteria.

4.2 Circumspection Towards the Assignment of Direct and Distinct Responsibility of International Organizations for Wrongful Conduct

4.2.1 The Intermingle Effect and Accountability Obstruction

I want to revisit my discussion in chapter 2 of the structural contingency of development as a crucial aperture to understanding how international law complicates the process of establishing the direct and distinct responsibility of IFIs for wrongful conduct done jointly with others. I want to explain how this phenomenon permits IFIs' avoidance of and disconnection from accountability in development. Underlying the structural contingency dynamic is the fact that global factors, in their interface with domestic conditions, are the engines of economic growth, or of development defined in economistic terms. This is what I mean when I say that the realization of the RTD—or a rights-based international framework—is structurally contingent on global systemic factors.⁵⁸ As I explained in chapter 2, due to levels of interdependence and interconnectedness in the global economy, decisions of significant effect are made at the global stage through lawful (if not always legitimate) processes, through arrangements in which supranational institutions have assumed what are all-too-often the most determinative roles.⁵⁹

The determinative and manipulative character of global over national factors is due, in large part, to their great impact on the production, distribution, and allocation of both economic endowments and rewards in the respective countries to which the policies, regulations, or rules are applied.⁶⁰ That policy decisions of supranational institutions are always the most consequential as

⁵⁸ Salomon, *Global Responsibility for Human Rights*, *supra* note 11 at 40; Isabella D Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Oxford/Portland: Hart Publications, 2012) at 174 [Bunn, *Legal and Moral Dimensions*].

⁵⁹ Daniel D Bradlow, "The Reform of the Governance of the IFIs: A Critical Assessment Global Governance" in Hassan Cissé, Daniel D Bradlow & Benedict Kingsbury eds, *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* Vol. 3 (Washington, D.C: World Bank, 2012) at 39.

⁶⁰ For a most elaborate discussion on this, see Bob Deacon, "Social Policy in a Global Context" in Andrew Hurrell & Ngaire Woods eds, *Inequality, Globalization and World Politics* (Oxford: Oxford University Press, 1999) at 212-230; Thomas Pogge, "Severe Poverty as a Human Rights Violation" in Pogge, *Freedom from Poverty as a Human Right*, *supra* note 6 at 26; Goran Therborn, "Meanings, Mechanisms, Patterns, and Forces: An Introduction" in Goran

they intermesh with actions of state bureaucracies at various levels in the national contexts is one issue that I underscored as an important consideration in accountability praxis.⁶¹ Thus, global determinants are seen as an overweening force that has precipitated “a pervading sense of impotence” on the regulatory capacity of nation-states and that “no economy can any longer be national” in the traditional statist fashion, the statist structures and autonomy having been subordinated by the assignment of vital functions to supranational institutions.⁶²

The shriveled autonomy of the state is an important factor in rethinking accountability relationships in development. This is because of an important concept that the law of responsibility refers to as “control.” As I am about to expound, the RTD episteme introduces the perspective that in instances of global structural violations we cannot focus only on single-cause, single-effect mechanisms and direct cases of control.

While focusing on international organizations as institutions exercising “international public authority,”⁶³ we must reflect on a complex policy system. Such a policy system has multiple undifferentiated actors, complex causal chains of events, and different kinds of control (exerted by different social agents) that result in multifaceted consequences. The complex global economic system is characterized by the “entanglement” of global and the national policy factors in the production of distributive injustices. The idea of entanglement refers to the “imbrication of institutions, the intertwining of different sets of actors, national and global, local and global” to shape the trajectories and structures of inequality and poverty in national contexts.⁶⁴ Often, the rules, structures, and processes of the global economy have no consequence in national contexts except when they interact and amalgamate with decisions, policies, and regulatory frameworks of states. This interface produces various outcomes, some intended and beneficial, and others

Therborn ed, *Inequalities of the World: New Theoretical Frameworks, Multiple Empirical Approaches* (London: Verso, 2006) at 45 (referring to “global entanglements”).

⁶¹ Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (Oxford: Oxford University Press, 2009) at 154 [Baxi, *Human Rights in a Posthuman World*]; B S Chimni, “Anti-Imperialism” in Luis Eslava, Michael Fakhri & Vasuki Nesiah eds, *Bandung, Global History, and International Law: Critical Past and Pending Futures* (Cambridge: Cambridge University Press, 2017) at 36. On this point, Chimni argues that global capitalism extensively “integrates and penetrates” the national economies of the South, debilitating their capacity “of pursuing independent paths of development” as they take on the role of facilitating and “implementing global standards agreed on through multilateral processes [and] bilateral agreements.”

⁶² Gustavo Esteva & Mandhu Suri Prakash, *Grassroots Post-modernism: Remaking the Soil of Cultures* (London: Zed Books, 2014) at 40.

⁶³ Armin von Bogdandy, Matthias Goldmann & Ingo Venzke, “From Public International to International Public Law: Translating World Public Opinion into International Public Authority” (2017) 28:1 EJIL 115.

⁶⁴ Therborn, *supra* note 60 at 44.

unintended, unforeseeable, or harmful to human development. This complex is what I call the *intermingle effect*, which presents the second puzzle to the *ex-post* apportioning of responsibility for wrongfulness.⁶⁵ The intermingling complexity mainly complicates the domain of legal redress in international legal accountability, which relies on the (linear) precepts of DARIO and ARSIWA. The puzzle is that of attributing wrongful conduct to an actor in circumstances in which actions of a plurality of actors combine in intricate intermingling processes to produce varied outcomes.

The intermingle phenomenon poses obstruction to accountability by making actors invisible and wrongfulness indiscernible in entangled processes. What this obstructive dimension implies is that when assessing levels of actors' responsibility for distributive injustices (poverty and inequality) in an interactional account, one cannot quite accurately specify the offending action, discern their relevant causes or identify a (single or joint) responsible and most culpable actor/s to hold accountable for the wrongful acts *ex-post*. This is due to the multicausality of factors, the implication of several rules, policies, and processes, and the multidimensionality of distributional outcomes in structural processes. It is this intermingling that effectively defies the normative precepts of ascertaining responsibility. That is to say, the intermingle effect renders wrongful conduct indeterminate, the identity of responsible actors unknowable, the chain of causation indiscernible, and wrongful conduct unattributable to actors, whether jointly or severally.⁶⁶

In international law, the discussion by the ILC of the main legal precepts of responsibility ascertainment lacks a deep appreciation of, and does not pay significant attention to, the intermingle effect. The law of responsibility is basically interactional, obsessed with wrongful conduct or omission, to the point that it neglects to account for the "engendered deprivations." In the section that follows, I discuss this issue.

4.2.2 Attribution of Wrongful Conduct

Under Article 4 of DARIO, internationally wrongful conduct is constituted by two elements: an act or omission that: (a) is attributable to an international organization under international law; and

⁶⁵ The rule on wrongfulness is predicated on two erroneous assumptions: identifiability of actors, and discernibility of effects or outcomes of decisions, which may not only be indeterminable but also impossible in the contemporary global economic context.

⁶⁶ See for example Salomon, *Global Responsibility for Human Rights supra* note 11 at 186. This is an analogization taken directly from Pogge, *Freedom from Poverty as a Human Right, supra* note 6 at 17.

(b) constitutes a breach of international obligation binding on the organization. The first element requires that for wrongful conduct to be attributable, it must be an act or omission on the part of an identifiable international institution.⁶⁷ The second element of the rule of attribution is that the wrongful conduct or omission leads to a breach of an international obligation. Put differently, this rule of attribution requires that some acts or omissions be regarded as wrongful conduct constituting a breach of international norms and standards (primary rules). Such acts ought to have been performed by the international organization when they aid or assist (Article 14) or direct and control (article 15) another international organization or a state in committing the wrongful act. The requirement that an international organization assist, aid, direct, or control another institution in the commission of the act is paramount for that act to be attributed to the international organization. As some international jurisprudence holds, the position seems to be that for an IFI to be said to be in control, there must be established some “ultimate authority and control”⁶⁸ in such affairs. In most cases however, the legal test of ultimate authority and control is always not the case, as what it means to control, direct, aid, or assist is not clear-cut in international economic relationships. I demonstrate this claim below.

4.2.3 The Criteria of Control, Direct, Aid, or Assist

I want to emphasize that distributive injustices defy the linear assumptions of DARIO’s conceptualization of what it means to control, direct, aid, or assist. In the multilateral context, the implementation of policies by states do not often give rise to clear-cut cases in which a party’s conduct leads to some identifiable consequence that can be regarded as a breach attributable to identifiable international organizations or their agents. International institutions’ policies often have indirect impact on outcomes within states. In international economic and financial policymaking, I want to emphasize, there are rarely clear-cut and totally direct cases of actions or conduct on the part of organs or agents of international organizations controlling, directing, aiding, or assisting a state in the commission of wrongful conduct. What one would find are policy controls

⁶⁷ DARIO Article 3. This was decided by the ICJ in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* ICJ Reports 1999 at 88-89 para 66.

⁶⁸ This was decided in the European Court of Human Rights in *Behrami and Behrami v France and Saramati v France, Germany and Norway*, Decision (Grand Chamber) of 2 May 2007 on the admissibility of applications No. 71412/01 AND No. 78166/01 para 133.

or subordination resulting from the intermingling of national and international rules, policies, and institutions.

The challenge above attends to Article 6 of DARIO, which stipulates that it is conduct of an agent or organ of an international organization in the performance of their functions that is considered an act attributable to the international organization. In the expectation that an international organization can control the state or another entity, DARIO defines organs of international organizations as officials and other persons who act on behalf of international organizations on the basis of functions that those organizations have conferred.⁶⁹ The definition of an agent of an international organization in Article 6 has been construed as wide enough to include any person “charged by an organization with carrying out, or helping carry out, one of its functions—in short any person through whom it acts.”⁷⁰ The interpretation that the ILC has adopted in its commentary places so much premium on control. It proposes that “Should persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2.”⁷¹

According to Articles 14 and 15 of DARIO, to attribute responsibility to an international organization because of its acts or those of its agents or organs, it must direct or control or aid or assist a state “with knowledge of the circumstances of the internationally wrongful acts” and with knowledge that “the act would be internationally wrongful if committed by that organization.” What is problematic is that one would be at great difficulty to find a situation where a state is at the disposal of an international organization or where organs or agents of an international organization are charged with policy implementation in the borrowing state. Typically, in international economic and financial governance, direction or control or aid or assistance does not take place in an interactional and linear fashion as conceived by the ILC. Control and direction take subtle, but nevertheless recognizable forms, often in the fashion of knowledge technologies or overt policy rationalities.⁷² A clear demonstration of this claim is suggested by the observation

⁶⁹ DARIO para 3 commentary to Article 6.

⁷⁰ *Reparations for Injuries Suffered in the Services of the United Nations*, Advisory Opinion, ICJ Reports 1949 at 177.

⁷¹ DARIO commentary 11 to Article 6.

⁷² See this discussion by Obiora C Okafor, “Re-Conceiving ‘Third World’ Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism” (2000) 6 Buffalo Hum Rts L Rev 1.

that developing states' policy autonomies have shriveled and that weaker states cannot any longer be said to be *in control* of allocating social and economic goods to their own peoples.

The interpretation that the ILC adopts is fraught with conceptual ambiguity. It does not address whether states' implementation of program conditionalities under the surveillance of the IMF, which often shapes (and even defeats) the redistributionist work of developing countries, constitutes direction or control in noncompliance with international obligations. One can see the way international law's basic precepts neglect the nature of control in complex international economic relationships. In these arrangements, the circumstances that may constitute a wrongful act are unknowable and there are no discernible acts that can be cited as internationally wrongful. This kind of conceptual ambiguity is also apparent in the statement of the CESCR, which assumes that states can assert themselves in their lending relations with IFIs so that programme conditionalities do not force them to derogate from their duty to protect rights.⁷³ Van Genugten had criticized a similar position as being "vague and far from ... outcome oriented."⁷⁴

In the ILC's scheme, there are also situations in which the state can control the international organization in the commission of a wrongful act. In fact, the express reference to the state as a potential controller of international organizations appears in Article 61. This provision stipulates that "[a state] member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation." De Schutter appreciates this likely situation as applying to circumstances where a state "seeks to avoid compliance with an international obligation by transferring powers to an international organization and allowing it to take measures that run counter to such international obligations."⁷⁵

⁷³ Statement by the Committee on Economic, Social and Cultural Rights, "*Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights*" E/C.12/2016/1 22 July 2016 para 4:

The State party that is seeking financial assistance should be aware that any conditions attached to a loan that would imply an obligation on the State to adopt retrogressive measures in the area of economic, social and cultural rights that are unjustifiable would be a violation of the Covenant. The borrowing State should therefore ensure that such conditions do not unreasonably reduce its ability to respect, protect and fulfil the Covenant rights.

⁷⁴ Willem Van Genugten, *The World Bank Group, the IMF and Human Rights: A Contextualized Way Forward* (Cambridge; Antwerp; Portland: Intersentia Publishers, 2015) at 29 [van Genugten, *A Contextualized Way Forward*].

⁷⁵ De Schutter, "A Fresh Start Towards Accountability", *supra* note 32 at 10.

This interpretation seems to implicitly address the possibility of the state circumventing its responsibility for binding decisions made by the international organization where the state has caused the international organization to commit an internationally wrongful act in matters for which the international organization has competence.⁷⁶ Such avoidance is known as “circumvention” by conduct of the state and includes those of abuses of powers related to or failures to comply with incumbent obligations.⁷⁷ The ILC commentary makes it clear that for the state to be responsible in this way, the international organization must have competence over the matter.⁷⁸ The second condition is that there must be “a significant link” between the impugned conduct of the state and that of the international organization.⁷⁹ The third requirement is that of intention, “of causing the organization to commit an act, if committed by the state would have constituted a breach.”⁸⁰ Article 61, according to van Genugten,⁸⁰ is intended to curtail the mischief of a sovereign state that may wish to circumvent incumbent obligations on the pretext of acting within the veil provided by the IFI.

To the contrary, however, the possibility of a weak state circumventing its responsibility by causing an international organization to commit a wrongful act is highly unlikely in international economic and financial relationships between a developing state and an IFI. I emphasize the context of international economic relations, not all other contexts. It is more likely, and therefore prone to occur, that a Global North state may direct an international organization to commit a particular act which binds the international organization concerned. The power map of control at the Executive Boards which takes the form of *a Global North > IFI > Global South* clearly illustrates this. I call this the first scenario. For example, due to its majority voting powers, the United States may block a resolution of the World Bank or IMF’s Executive Board. By omission, a veto wielding state may block a decision of the UN Security Council, thus hindering the humanitarian interventions of the UN, an omission for which the UN as an international organization may be held responsible.

But the reversal of power matrix to a second scenario of *Global South > IFI > Global North* is more unlikely. That is, a situation of control of an international organization by a weak state

⁷⁶ DARIO general commentary 6 to Art 61.

⁷⁷ *Ibid* general commentary 2 to Article 61.

⁷⁸ *Ibid* general commentary 6 to art 61.

⁷⁹ *Ibid* general commentary 7 to Article 61.

⁸⁰ van Genugten, *A Contextualized Way Forward*, *supra* note 74 at 28.

would seldom arise in the context of development policy financing or stabilization lending agreements. A necessary qualification must be made here. I am referring to control or direction of an international organization by a weak or developing state in the context of development financing. More likely than not, we always find that IFIs are in the driver's seat, paternalistically writing the terms of agreements when lending to developing states. While the first scenario of a veto-wielding state controlling an international organization because of the voting-quota asymmetries is real, the contrary is often too prevalent when it comes to developing countries.⁸¹

Even as the CESCR adopts the phraseology of the ILC for the interpretation that a state's "circumvention" of responsibility may arise in situations where the borrowing state fails to ensure that the conditions attached to loans are not retrogressive and will not lead to violations of the Covenant,⁸² we know that, in reality, this cannot be the case. I am underscoring the point that in international economic governance, the kind of circumvention contemplated by Article 61 may not be how circumvention of international obligations arise all the time, in all situations. As structural contingency of development reveals, the global policy system usurps the national policy infrastructure debilitating states' capacities to exercise their will at the international level. A good example is the structural adjustment programs designed by the IMF, but which a borrowing state cannot alter given that the Board has more say than the state. There is therefore a greater likelihood of control by IFIs in the usurpation of national policy space than the contrary. That Article 61 scenario remotely addresses such international economic reality cannot be gainsaid. We are all too familiar with the way control is shaped by the totality of the global policy system marked by deep economic and political power asymmetries.

More sophisticated problems of control in different aspects of relationships arise in Article 7 of DARIO on the requirement of "effective control," a criterion that determines the actor to whom conduct can be attributed. Article 7 provides that for there to be effective control "conduct of organs of a State or organs of an international organization placed at the disposal of another

⁸¹ See Jacob Vestergaard & Robert H Wade, "Protecting Power: How Western States Retain the Dominant Voice in the World Bank's Governance" (2013) 46 *World Development* at 154-155; Development Committee, "Enhancing Voice and Participation of Developing and Transition Countries in Decision-making at the World Bank and the IMF" (Development Committee, Washington DC, 2002, 2003) at 11-12 cited in Vestergaard & Wade *ibid* at 154.

⁸² CESCR, *supra* note 73 at para 5: "It would not be acceptable for such a State to circumvent its international obligations under the Covenant by transferring certain competencies relating to the subject matter of the Covenant to an organization, thus causing the organization to commit an act that, if committed by the State party, would be in breach of its obligations under the Covenant"

international organization shall be considered an act of that international organization.”⁸³ The legal test for establishing control seems to rely on the question of “*at the disposal of.*” But the complex issue relates to who may be said to be at the disposal of an international organization for purposes of attribution of conduct. ILC takes a catch-all position that “control” arises where an organ of a state “may be fully seconded to that organization.”⁸⁴ And this is where the blanket, one-size-fits-all approach of the international law of responsibility tremendously fails those who demand development justice. The realization of this kind of justice ordained by the Declaration on the Right to Development demands national and international conditions favourable to human-centred development, participation and social justice and equity. A good example is international lending conditionalities implemented by states through development policy programmes.

Whether the ILC’s “at the disposal” criterion is a kind of secondment that arises in most kinds of economic relationships is very much open to question. This is so especially when we look at the situations that the ILC relies on to construct the legal rule of “at the disposal of.” The ILC emphasizes that the “practice relating to peacekeeping forces is particularly significant in the present context.”⁸⁵ It is apparent that the legal rule, and its test that the ILC advocates, has antecedence in the application of armed force. It seems to have been crafted from some principle of the command-and-control kind of relationships often witnessed in situations of military and armed conflict. Keenly observed, economic or commercial kinds of relationships did not feature in the ILC’s considerations of control.

A keen reading of commentary to Article 7 illustrating the legal concept of “at the disposal of” would inevitably reveal an abstract doctrinal discussion of factual control of conduct. The situations discussed by the ILC are those of physical actions, such as armed conflict or peacekeeping missions, in which military agents of the state may be placed at the disposal of an international organization and vice versa.⁸⁶ I invite the reader to examine the cases under review in the commentaries to articles 7 and 61 of DARIO. One would notice that the ILC’s homogenizing

⁸³ Compare with Article 8 of ARSIWA: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct.”

⁸⁴ DARIO, general commentary 1 to Article 7.

⁸⁵ DARIO, general commentary 7 to Article 7.

⁸⁶ See e.g. Matteo Tondini, “‘The Italian Job’: How to Make International Organizations Compliant with Human Rights and Accountable for their Violation by Targeting Member States” in Jan Wouters *et al*, eds, *Accountability for Human Rights Violations by International Organization* (Antwerp; Portland: Intersentia, 2010) at 180-190.

emphasis and criteria of “who has effective control over the conduct in question”⁸⁷ was derived from the *Nicaragua* case.⁸⁸ This case involved physical combat in armed conflict where the United States were alleged to have supported military and paramilitary activities in and against Nicaragua in violation of international obligations.

As pointed out by Van Genugten, the discussion in Article 7 may not be neatly extrapolated to extraterritorial socio-economic violations sanctioned by structural relationships.⁸⁹ Essentially, the most pivotal point to be derived from this insight is that other forms of control not grasped by the descriptive legal language of the ILC do exist. Take, for instance, the IMF and Bank’s debt sustainability benchmarks, which analyze a country’s debt portfolio and propose restructuring according to methodologies and frames of reference predetermined by these twin institutions. The nature of control in issue here is that of knowledge as a technology of control, apart from its utility as a crucial element for development and economic productivity indicators.⁹⁰ Knowledge is a form of manipulative control; it is neither a coercive kind of control nor that of aid, assistance, or direction stipulated in Articles 14, 15, and 16.

A good example is that a borrowing country will qualify for debt relief, restructuring, or further international borrowing from private, bilateral, or development institutions only if its policy documents meet the prescribed benchmarks of the Bank and IMF. Mark you, these benchmarks are often detached and do not “capture real situations” of developing countries.⁹¹ This kind of indirect control, whereby IFIs stand at some distance from visibility in policy mainstreaming—as well as discussion of which actor is at whose disposal—is missing in the ILC’s debate on control. As a form of control, governance through knowledge is distinct from the command-and-control kind that has crystallized as a legal test in the international law of responsibility. The *Nicaragua* rule of “effective control” is inapplicable to all these contexts.

⁸⁷ DARIO, general commentary 8 to article 7.

⁸⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)*, Merits Judgment, ICJ Reports 1986[*Nicaragua* case]. The *ratio decidendi* in this case has been followed in *Bosnia v Serbia* (2007) ICJ Reports and *Jaloud v Netherlands*, *supra* note 3.

⁸⁹ Willem Van Genugten, “The World Bank Group, the IMF and Human Rights: About Direct Obligations and Attribution of Unlawful Conduct” in Wouter Vandenhoele ed, *Challenging Territoriality in Human Rights: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge, 2015) at 64 [van Genugten, “About Direct Obligations and Attribution of Unlawful Conduct”].

⁹⁰ Peter Weingart, “Knowledge and Inequality” in Goran Therborn, *Inequalities of the World: New Theoretical Frameworks, Multiple Empirical Approaches* (London, New York: Verso, 2006) at 164-165.

⁹¹ Ngozi Okonjo-Iweala, “Nigeria’s Fight for Debt Relief: Tracing the Path” in Lael Brainard & Derek Chollet eds, *Global Development 2.0: Can Philanthropists, The Public, and the Poor Make Poverty History* (Washington D.C: Brookings Institution Press) at 110 [Okonjo-Iweala, “Nigeria’s Fight for Debt Relief”].

Okonjo-Iweala, the then Nigerian Finance Minister documents a good example of how Nigeria was in 2004 drawn into a subtle yet manipulative control dynamic by the entrenched global policy system. This case witnessed a clash of values between the Paris Club, the Bank, and the IMF, on the one hand, and Nigerian technocrats, on the other, during debt cancellation negotiations. The issue was what policy commitments were necessary to meet the Millennium Development Goals, which Nigeria was keen on implementing while honouring the debt service agreements spelt out in the Debt Sustainability Analysis (DSA) frameworks of the Bank and IMF. The World Bank relied on one of its standard policy instrument, the Bank-Fund Low Income DSA to illustrate the preconceived view that high spending on MDGs would lead to a “sizeable insolvency problem” that even debt cancellation would not alleviate.⁹² Even though Nigeria would later end up with a 60% debt relief package from the Paris Club on June 29, 2005, attributable to a number of factors, including intense lobbying by social movements, the fact that the agreement was subject to a number of standard terms to be negotiated by the IMF Board meant that Nigeria was not in full control of the process of formulation or the subsequent development of policy programmes that it would implement.⁹³ Control lay somewhere in between the knowledge asymmetries (between Nigeria and Bretton Woods Institutions). It also lay in the debt restructuring instruments (DSA) wielded by the hegemonic development partners, whose consent and endorsement was key to Nigeria’s economic rejuvenation.⁹⁴

The Nigeria’s fight for debt relief and Greece economic catastrophe amid encounters with development agencies tell a much different story of control in development policy practice, a story that departs from all the discussions by the ILC. The fact that standard policies always espouse the neoclassical creed of the market and a fetishized way of understanding Third World economies means that there is, indeed, a different form of control that international law of responsibility for wrongfulness ought to account for. This scenario of restricted policy space reeks of a hegemonic praxis, of a dictated state retreat in the economy (reverse dirigisme). It is always unnoticeable that distributive outcomes are themselves strongly conditioned and structured by external and intrusive

⁹² *Ibid* at 111.

⁹³ *Ibid* at 117-118.

⁹⁴ The Bank, for example, relies on what it calls Donor Aid Coordination, through which it acts as the mediator and convener of deliberations bringing together donor governments, aid agencies, foundations, and private development banks for purposes ranging from “simple information sharing and brainstorming, to co-financing a particular project, to joint strategic programming in a country or region.” See World Bank: “Product and Services” online: <<http://www.worldbank.org/en/projects-operations/products-and-services#3>>.

forms of control that situate states in institutional and material conditions of malleability. Such malleability renders them incapable of exercising their own autonomy or control in policy mainstreaming. This is one way the global policy system wrests control and autonomy out of the hands of Third World peoples.⁹⁵ This scenario suggests that the kind of control we are talking about is not “effective control” or “exclusive command.”⁹⁶ And yet international law’s conceptions and assumptions make no mention of such subtle control.

Sande Lie’s ethnographic study of Uganda’s development policy practice and interaction with the World Bank is another work that reveals subtle and manipulative control in development. He argues that recipient states are seen to be in control, but in a real sense they are often not in control. They are amenable to accountability to the donors because:

the donor may have renounced their dominant position, but they retain control, albeit indirectly, by: instigating the processes and objectives, framing and thereby limiting the degree of freedom and room for manoeuvre by upholding their means to sanction deviant or non-discursive practice; and administering and monitoring the partnership arrangement.⁹⁷

Sande Lie uncovers for international lawyers the façade of freedom in control that attends to global partnerships and development cooperation. He argues that aid conditionality is a “more tacit and indirect form that allows for continued donor control over the developmental process.”⁹⁸ He notes that this mode of control stirs a large degree of problem. It comes across as an “individualizing-cum-totalizing” hold whereby donors, although they “give up control, they also retain it through other means.”⁹⁹

The façade of freedom in control is a reminder that the ILC’s criterion of “factual control” is conceptually limited, or it at least not in grips with certain facets of economic injustice. As a matter of fact, indirect and invisible control through knowledge technologies as a form of governance from a distance is the norm in the contemporary neoliberal world order. Knowledge

⁹⁵ United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013) at 55; Obiora Chinedu Okafor, “Re-Conceiving “Third World” Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism” (2000) 6 *Buff Hum Rts L Rev* 1 at 14.

⁹⁶ This criterion was developed by the United Nations Secretary General in reference to combat related activities A/51/389 at 6.

⁹⁷ John Harald Sande Lie, *Developmentality: An Ethnography of the World Bank-Uganda Partnership* (Bergham Books, 2015) at 30.

⁹⁸ *Ibid* at 31.

⁹⁹ *Ibid*.

technologies have come to reflect a broader paradigm of IFIs' construction of hegemony that is rooted in the Bank's and the IMF's perceived prudential terms and policies. These policies and instruments exert a different kind of control of the state.¹⁰⁰ Development scholarship excavates this subtle and invisible form of control that still resides outside the cognitive senses of international lawyers, perhaps due to disciplinary blind spots. They inform us that the kinds of control in the international development realm are subtle and interwoven into the fabric of economic relations.

I am belabouring the simple point that in structural arrangements, economic policy programs written in agreements engender structural violations. Because of the structural nature of the violations, the situation of deprivation is not always so clear-cut as to directly point at a chain of causation or a party in control of the policy apparatuses. Certainly, one would not plausibly differentiate actors in "effective control" in the manner contemplated by Article 7. In structural relationships, causalities are multiple (multicausality). Outcomes (largely distributive) also tend to be multidimensional. The effect is that a catch all standard of control with in-built criteria constructed by clear-cut cases may not fully capture these dynamics. The justification for this claim lies in what Pogge calls the "many cooperating causes" that influence one another, making it harder for actors to predict and avoid the effects of their conduct.¹⁰¹ This phenomenon clouds all genuine efforts aimed at assigning responsibility. As Marion concluded, one cannot possibly "trace how each person's actions produce specific effects on others because there are too many mediating actions and events."¹⁰²

I am therefore suggesting that the legal rules of DARIO on control, direction, aid, assistance, and attribution may not get traction outside of military or peacekeeping situations, that is, in situations that lack command structures. In these cases, agents of the state or the international organization may not physically/factually be placed *at the disposal of* the other. The form of control, direction, aid, or assistance in international economic governance is that of indirect control, where the real influential actors stay at a distance from policy administration or

¹⁰⁰ See for example David Moore, "The World Bank and the Gramsci Effect: Towards a Transnational State and Global Hegemony" in David Moore ed, *The World Bank: Development, Poverty, Hegemony* (Durban: University of KwaZulu Natal Press, 2007).

¹⁰¹ Pogge, *Freedom from Poverty as a Human Right*, *supra* note 6 16.

¹⁰² Iris Marion Young, "Responsibility and Global Justice: A Social Connection Model", (2006) 23:1 *Social Phil and Pol* 102 at 106.

implementation. By this distancing, IFIs are invisible and invisibilized from accountability. What enables IFIs to stay in the shadows of policy implementation are newly minted idioms and jargons in use in development such as conditionalities, PRSPs, PRGFS, operational policies and directives, surveillance and so forth. Therefore, to look at the responsibility for poverty and inequality in actions and conduct of actors, within the parameters of DARIO, is to rely on irrelevant analogues.

4.2.4 The Criteria of Causation and Shared Responsibility

The other puzzle is that of tracing chains of causation of harms in the complex interface of a plurality of actions. I want to emphasize, yet again, that the challenge to the application of general precepts of causation also arises in the context of the structural dynamics of violations. Structural violations have no clear or direct links of causation to specific actors. This is because the outcomes/effects involved are “engendered deprivations” and not harms “established by conduct.”¹⁰³ Whereas conduct can lead to discernible outcomes, engendered harms are multidimensional effects of policy decisions of many actors made jointly with others and often implemented within the ambit of competing legal regimes. Not a single agent can be cited as responsible for the outcomes produced by an institutional system of multiple causalities. The networked institutional system brings about an indiscernibility crisis in attempts to trace causal explanations of events and differentiate responsible actors for aggregated actions. This crisis results from the multicausality and multidimensionality of harms, or what is referred to elsewhere as “the paradox of many hands.”¹⁰⁴

There is therefore a need to appreciate the context of violations and the nature of a right in question. The need for a sensitivity to context specificity and exclusivity is captured in Pogge’s argument that in the integrated global economic order where many actions intermesh and various actors mediate, it is implausible to discern what actions have caused what effects, or what exactly those effects are:

This is unknowable because, as they reverberate around the globe, the effects of my economic decisions intermingle with the effects of billions of decisions made by others, and it is impossible to try to disentangle, even *ex post*, the impact of my decision from this vast traffic by trying to figure out how things would have gone had I acted differently.... This pervasive feature of modern

¹⁰³ Pogge, *World Poverty and Human Rights*, *supra* note 16 at 179.

¹⁰⁴ Salomon, *Global Responsibility for Human Rights*, *supra* note 11.

economic systems shifts attention from the responsibilities of individual agents to that of other causal factors affording sufficient visibility.¹⁰⁵

The indiscernibility and unknowability crisis that Pogge talks of strikes at the heart of the interpretation of ARSIWA and DARIO's precept of causation.¹⁰⁶ Causation is a key ingredient of the determination of whether responsibility is individual, joint, several or shared or "separate but shared." According to ARSIWA, in cases "where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."¹⁰⁷ Article 48 of DARIO replicates this ambiguous formulation of separate but shared responsibility for joint conduct with a state or another international organization. These provisions envisage a situation in which the attribution of primary responsibility for joint conduct of an international organization and a state would be to the state or the international organization concerned. In the case of ARSIWA, wrongfulness would be attributable to the state or the international organization, consistent with the individualized notion of state responsibility. Some scholars have argued that this rule is predicated on the idea that it is the state whose responsibility is engaged, regardless of the fact that other actors are responsible for the same act.¹⁰⁸ This approach of separate but shared responsibility still seems so mechanical that it would be so unsatisfactory in fixing the often-missing causal nexus between wrongful conduct and an outcome of violations in assessing an international organization's international responsibility in connection with the joint act of a state. Could this signal a failure of causation?

Indeed, some have even argued that in talking about shared responsibility for joint conduct, we are talking about the failure of causation. D'Aspremont takes the position that it is precisely because of the failure of causation that we cannot answer the question of whether the attribution of wrongfulness is for shared, overlapping, or joint responsibility for the damage suffered.¹⁰⁹ He emphasizes that absent any theory of shared responsibility, the paralysis of causation will

¹⁰⁵ Pogge, *Freedom from Poverty as a Human Right*, *supra* note 6 at 17.

¹⁰⁶ For responsibility and the duty to make reparations to arise there is a requirement of causal nexus between the harm suffered and facts constituting a breach. See, *Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs. Judgment of November 25, 2015* para 270.

¹⁰⁷ Article 47 ARSIWA.

¹⁰⁸ See Andre Nollkaemper and Dov Jacobs, "Shared Responsibility in International Law: A Conceptual Framework" (2013) 34 *Mich J of Intl L* 359; Mark Gibney, "Litigating Transnational Human Rights Obligations" in Wouter Vandenhoele ed, *Challenging Territoriality in Human Rights: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (London & New York: Routledge 2015) at 97.

¹⁰⁹ Jean d'Aspremont, "The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility" (2012) 9 *Intl Org L Rev* 1 at 8 [d'Aspremont, "Magnifying the Fissures"].

continually point more in the direction of the indistinguishability of responsibility than the impossibility of shared responsibility. While Article 48 of DARIO stipulates the attribution of primary responsibility for joint conduct of an international organization and a state to the state and the international organization concerned, it does not address the crucial question of the indistinguishability of responsibility. The lacuna is that of the inability to devise a tool for distinguishing the extent of responsibility of respective actors in circumstances of joint conduct or multiple and indistinguishable causation. It is this lacuna that inevitably leads to the default position of shared responsibility.

The fact that there are no definite legal standards or tests for distinguishing responsibility in international economic relationships may avail a possibility for actors to insulate themselves by covering their conduct in others' actions.¹¹⁰ This may portend the undesirable outcome that some perpetrators, who may be the most influential actors and to whom causation covertly point, are excused from accountability. Indeed, this is typical in international financing agreements. In such cases, even though the terms are at the behest of IFIs, they are masked from visibility because they have no remit in policy implementation and therefore cannot share any responsibility with domestic organs. This shortcoming of the shared responsibility principle (in the face of the failure of causation) shows how international law discourse rationalizes a disconnection from accountability when it comes to IFIs' responsibility for harms.

Indeed, as one commentator argues, shared responsibility that points at failure of causation is more of an exception than a general rule in international law. Vandenhole argues that ARSIWA inclines strongly toward independent and direct accountability of the state, in accord with international law tradition.¹¹¹ Accordingly, therefore, he argues, precepts of separate but shared responsibility that DARIO replicates in article 48 are arguably alien to the international law language of responsibility. He argues that "an incremental development of a legal regime of shared responsibility ... is unlikely to happen" because the law of state responsibility treats this as a limited exception to the general rule. In his view, the general rule, which is the convention in international law, is that of direct, distinct, and individual responsibility of the state. Thus, for Vandenhole, DARIO makes this reintroduction of shared responsibility, if only to disturb the

¹¹⁰ van Genugten, *A Contextualized Way Forward*, *supra* note 74 at 35.

¹¹¹ Vandenhole, "Obligations and Responsibility", *supra* note 4 at 131.

settled principle, making the exception the rule “at the price of disrupting the homogeneity of international responsibility law.”¹¹²

If the exception is being made the general rule when dealing with a complex problem of indistinguishability of responsibility, then Article 48 either suffers from an anomaly in its calibration or serves some motive. Even if speculative, we can clearly decipher international law’s rebuttal of direct responsibility of international organizations through such idioms as shared responsibility, when actually that principle is an exception to the norm. As argued by d’Aspremont, the situation of shared responsibility contemplated by DARIO actually implies a functional defect of the principle of causation as the foundational principle of the law of responsibility.¹¹³ The defect is a deliberate one, of making the exception be the general rule.

No matter how one may reframe the issue, the undeniable fact has been made without exaggeration. The point is that such a defect supposes that joint wrongful conduct and its outcome cannot be discerned and responsibility cannot be allocated when actors cannot be differentiated. Such indiscernibility shows that international law cannot cure the accountability obstructive dimensions of networked structures. International law does not provide adequate formula for distinguishing and sharing responsibility commensurate to an actor’s contribution to the harm. This anomaly arises from the technical formulation of the doctrine of causation in a way that cannot articulate a method for differentiating actors or rendering them visible for responsibility allocation. The same logic applies to the apportionment of blameworthiness in a manner commensurate with influence or degree of control. DARIO perfects this penumbra in the law, making IFIs invisible and invisibilized when their responsibility is sought to be allocated.

This dynamic of the failure of causation in collective decisions is the case when dealing with weak states or those whose autonomies are more often constrained by the hegemonic international development policy praxis. This is the reason some have sounded caution that shared responsibility should not always be invoked so readily, since, as experience shows, there may well be exceptional situations where either of the actors to whom responsibility is apportioned had no “individual agency or power to prevent the wrongful conduct.”¹¹⁴ This sympathetic outcry casts its lot mainly with the state, especially a weak one. A weak state, especially in the Third World,

¹¹² *Ibid.*

¹¹³ d’Aspremont “Magnifying the Fissures”, *supra* note 109 at 8.

¹¹⁴ See for example Tom Dannenbaum, “Dual Attribution in the Context of Military Operations” (2015) 12 Intl Org L Rev 401 at 414.

may not always be in a position to get its way when dealing with a powerful international organization. The ultimate point raised by this consciousness is that one should not blame the victim or assign to it shared responsibility for the acts of the predators. Assuring as it is, its flipside is that differentiation of the responsibility of international organizations for wrongful conduct in multilateral contexts would still remain unsettled.¹¹⁵ It is the reason why new legal criteria such as “complicity” and “influence” are being proposed to augment or even correct the blind spots and penumbras of DARIO’s shared responsibility rule.¹¹⁶ Sadly, these two principles have not been embraced even in the judicial decisions examining non-economic relationships.

Sympathies with a weak state aside, there would be many cases of victimization of helpless non-complicit states. As interestingly, many of them continue to be called upon to bear responsibility for breaches that occur when they innocently implement agreements that they are externally bound by and that they cannot extricate themselves from as a matter of discretion. A good example of the case of demonizing the victim (the state) for the wrongful acts of the predator (IFIs) can be cited from the European contexts. Take, for instance, the *Greek Troika* case, where the IMF, the European Central Bank, and the European Commission were all absolved of responsibility, and therefore avoided accountability for, socio-economic harms of the imposed austerity measures. In the case of transnational corporations’ breaches, a good example is the *Ogoni* case. Another case depicting the classic victim-blaming character of international law is the *Kadi* case, where the EU Court of Justice held the EU responsible for implementing the UN anti-terrorism resolutions that were at odds with the EU normative system.¹¹⁷ In a similar case, that of *Nada*, Switzerland was held to have violated the European Convention on Human Rights for implementing UN sanctions that were binding upon it as a matter of law and not choice.¹¹⁸

Clearly, the victim blaming psyche is the golden thread running throughout the fabric of international law. This comes in the guise of shared responsibility for joint conduct. But more often than not, the state is always the actor that is held responsible. Such statism is the marker with which the international law of responsibility is etched. Its ultimate incarnation is in the *Valequez*

¹¹⁵ In fact, the entire debate by Vandenhole, “Obligations and Responsibilities”, *supra* note 4 from 131-134 highlights how to surmount this quandary of responsibility disconnection.

¹¹⁶ *Ibid.*

¹¹⁷ *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, 3 September 2008, European Court of Justice, Joined cases C-402/05 P and C-415/05, [2008] ECR I-6351.

¹¹⁸ *Nada v Switzerland*, 12 December 2012, European Court of Human Rights, App. No. 10593/08.

v Honduras due diligence jurisprudence that valorizes “the state duty to protect” as the general rule informing accountability in international law.¹¹⁹

It can be suggested that there are fundamental “failures” of a causality approach because it does not take into account structural contexts. The causality approach will always not account for the intermingle effect phenomenon. The reason is because the international law of responsibility is linear and takes a one-size-fits-all approach that neglects the existence of special circumstances in development-related matters. The special roles of IFIs, for instance, is one of the special considerations that should have prevented the transposition of ARSIWA principles into the law of responsibility of international organizations.¹²⁰

Some international lawyers, however, are inclined to maintain an unwavering faith in the causality approach. They argue for a case-by-case approach on the (mistaken) belief that “it is all about establishing sufficient factual links between the decision and the (negative) outcomes, to be done by independent third parties ... leading to justifiable and reasonable outcomes.”¹²¹ This “case-by-case approach,”¹²² based on the “reasonableness”¹²³ standard, has its devoted exponents out there. But its antagonists are quick to think that it does not convey a clear principle for delineating the direct and distinct accountability of actors. Antagonists such as Skogly are already questioning its soundness, suggesting that there are penumbras and blind spots in the regime of responsibility as it is currently configured.¹²⁴ They are already pointing out that the inability of the international law of responsibility to decipher direct causation, delineate conduct, and apportion responsibility to distinguishable actors in multilateral state institutions for the purpose of apportioning liability may not be neatly resolved by linear standards of attribution of wrongfulness in the traditional fashion.

¹¹⁹ The obligation of the state to protect human rights implies the responsibility of the state to regulate conduct of third parties and prevent rights violations. See Victor Dankwa, Cees Flinterman & Scott Leckie, “Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” (1998) 20 Hum Rts Q 705 at 714.

¹²⁰ Pellet, *supra* note 32 at 7.

¹²¹ van Genugten, “About Direct Obligations and Attribution of Unlawful Conduct”, *supra* note 89 at 65.

¹²² van Genugten, *A Contextualized Way Forward*, *supra* note 74 at 32.

¹²³ Cedric Ryngaert, “Jurisdiction: Towards a Reasonableness Test” in Michael Langford, Wouter Vandenhole, Martin Scheinin & Willem van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) at 198.

¹²⁴ Sirgun I Skogly, “Causality and Extraterritorial Human Rights Obligations” in Michael Langford, Wouter Vandenhole, Martin Scheinin & Willem van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) at 251 [Skogly, “Causality and Extraterritorial Obligations”].

Skogly sounded an alarm over resorting to “a causality approach” to extraterritorial human rights violations that occur through multilateral institutions.¹²⁵ She elucidates that in “multilateral setting, the direct causal effect between acts/omissions and human rights violations may be difficult to establish.”¹²⁶ Skogly drew on insights that, as yet, there is no legal tool in international law for determining a linkage between a wrongful act and an actor, or what she refers simply as “the determination of which acts and omissions actually led to” impugned outcomes.¹²⁷ Skogly would not stop there, though. Her reflections on this issue leave no doubt that the legal test for assessing factual or legal causation with respect to the responsibility of one state or international organization for rights violations in another state, however one may look at it, are not yet settled. In fact, they are obscured by pure legal questions such as “remoteness,” “foreseeability,” or “proximity.”¹²⁸ Skogly underscores that these legal questions pose a quandary for distinguishing actors, discerning causation, and allocating direct responsibility for wrongful conduct. She underscores the fact of the intermingle effect in the law of international responsibility.

Establishing control for purposes of ascertaining chains of causation or retaining some powers in the cycle of policy implementation defies even the robust attempts to broach ideas about “contextual assessment of the factual circumstances” or consequences.¹²⁹ Both causation and foreseeability of harms are difficult to discern where the issues complained of are distributive outcomes of a global policy system. The real problem, which none other than the ILC acknowledges, is really whether such a situation in which multiple actors are responsible, and both national and international policies are entangled, may be addressed by the technical reliance on a causality approach:

Strict liability may alleviate the burden that victims may otherwise have, but it does not eliminate the difficulties involved in establishing the necessary causal connection of the damage to the the sources of the activity. Courts in different jurisdictions have applied the principles and notions of proximate cause, adequate causation, foreseeability and remoteness of the damage. This is a highly discretionary and unpredictable branch of law. Different jurisdictions have applied these concepts

¹²⁵ *Ibid.*

¹²⁶ *Ibid* at 235.

¹²⁷ *Ibid.*

¹²⁸ *Ibid* at 237-240.

¹²⁹ Martin Scheinin, “Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights” in Michael Langford, Wouter Vandenhoe, Martin Scheinin and Willem van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (New York: Cambridge University Press, 2013).

with different results. It may be mentioned that the test of proximity seems to have been gradually eased in modern tort law. Developments have moved from strict *conditio sine qua non* theory over the foreseeability (‘adequacy’) test to a less stringent causation test requiring only the “reasonable imputation” of damage.¹³⁰

That even the ILC recognizes the causality criterion as “an unpredictable branch of law,” and that various jurisdictions have often not uniformly applied the standard, should in itself be a warning shot that the operationalization of this principle is bound to be fraught with practical challenges when claims of development justice are raised. It would be so problematic for those who will go the route of enforcing the RTD to rely on the current law of international responsibility. The RTD is a new norm that introduces the new perspective that structures, rules, and processes are equally to blame as actors and should be interrogated in accountability relationships. This is problematic because DARIO deals only with wrongful conduct. DARIO is not concerned with the effects or damage produced by conduct or policies or whether those rules and policies in themselves constitute wrongfulness.¹³¹ The fact that DARIO emphasizes only conduct and not effects is problematic. It raises the question of how one can assign responsibility for conduct only when the causal background of the acts are just as relevant for the attribution of conduct, the assessment of responsibility of actors and the liability for the damages or injuries incurred?

4.2.5 Summary Remarks

At this juncture, there are sufficient grounds to surmise that the DARIO regime is so minimalist and restrictive and thus inadequately configured to be the legal basis for direct and distinct accountability of institutions in development cooperation.

From a TWAIL perspective, the ILC’s conversations on DARIO are characteristic of the very linear nature of international law, a law that fails to bring into purview major historical happenings, particularly those of the Third World, in the narration and re-narration of the development of international law.¹³² DARIO for example was purposively designed as an analogue

¹³⁰ See International Law Commission, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, with commentaries*, adopted at the fifty-eighth session of the International Law Commission in 2006 and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10). See commentary 16 to principle 4.

¹³¹ J d’Aspremont, “Magnifying the Fissures”, *supra* note 109 at 6.

¹³² I rely on Gathii whose critique of Western international law is based on the view that TWAIL provides “a historically aware methodology” for critiquing international law norms and institutions. James Thuo Gathii, “TWAIL:

of state responsibility. During its codification, Ian Brownlie noted that “[l]ooking at the topic against the background of the Commission’s work on State responsibility, it was clear that, while one must guard against the use of facile analogues, past work on other topics should not be ignored.”¹³³ The fact that DARIO deals with complex international organization and still replicated state responsibility norms implies that it relies on irrelevant and facile analogues. It is this reliance on facile and irrelevant analogues that makes international law incomplete. As Moldner explains, the principal reason for ILC’s codification of precepts constituting DARIO was to give effect to the customary law principle that responsibility follows the breach of an international norm.¹³⁴ The motivation to give life to a widely accepted principle seems to have been behind the ILC’s decision to formulate principles governing the responsibility of international organizations.¹³⁵ ILC thus seems to have been driven by keeping fidelity to customary international law developed in the context of state responsibility.¹³⁶ The dominant discourse of customary law, as Chimni explains, tends to take an ethnocentric view of reality, reflecting values and thought processes forged within Western worldviews.¹³⁷ The yet unexplained side of this bounded perception is accountability avoidance and disconnections. This is exemplified in the IFIs circumspection toward obligations and the direct allocation of responsibility for wrongful development processes, rules, policies and outcomes. While IFIs proliferate economic standards for the implementation of development that have proven to be detrimental to the very people they are intended to help, there has not been any propensity to redesign principles of law to address this anomaly. As the chasm between

A Brief History of its Origins, its Decentralized Network and a Tentative Bibliography’ (2011) 3:1 Trd, L & Dev at 34.

¹³³ A/CN.4/SR.2803, at 88, para. 21 cited in Allan Pellet, “International Organizations are Definitely Not States: Cursory Remarks on the ILC Articles on the Responsibility of International Organizations” in Maurizio Ragazzi eds, *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden, Boston: Martinus Nijhoff Publishers, 2013) at 41.

¹³⁴ Moldner, *supra* note 26 at 286.

¹³⁵ *Ibid* 287.

¹³⁶ Pellet, *supra* note 133 at 43 cites Italian scholar, Giorgio Gaja who had endorsed the state responsibility as the baseline to be followed in formulating DARIO.

Giorgio Gaja, “First Report on Responsibility of International Organizations” (A/CN.4/532), 6–7, paragraph 11:

It would be unreasonable for the Commission to take a different approach on issues relating to international organizations that are parallel to those concerning States, unless there are specific reasons for doing so. This is not meant to state a presumption that the issues are to be regarded as similar and would lead to analogous solutions. The intention only is to suggest that, should the study concerning particular issues relating to international organizations produce results that do not differ from those reached by the Commission in its analysis of State responsibility, the model of the draft articles on State responsibility should be followed both in the general outline and in the wording of the new text.

¹³⁷ B. S. Chimni, “Customary International Law: A Third World Perspective” (2018) 112:1 Am J Intl Law 1 at 12.

international law and Third World realities continue, we continue to witness the “cruel logics of social exclusion and abiding communities of misfortune.”¹³⁸

This chapter has critiqued the basic precepts of DARIO in order to highlight the evolution of the rules of international law that often do not take account of Third World situations.¹³⁹ DARIO’s doctrines depict the deployment of versions of law and history that completely ignore non-Western experiences in its characteristic marginalization of the rest.¹⁴⁰ And yet, with the glaring ambiguities and silences, the universalization of DARIO has been articulated as if its precepts were hewn out of common practices of all peoples of the world, even when the contrary is indeed true.

The fact that DARIO precepts were not honed on the basis of common practices of all societies is manifested in the dominant feature that the law of responsibility of international organizations has been forged from the law of state responsibility, itself reflecting customary state practices. On this account, DARIO as the progeny of the law of state responsibility remains handicapped by the “limited availability of pertinent practice.”¹⁴¹ I may add that there is an absence of practice in a wide range of areas and aspects, such as human rights and international economic relationships. Accordingly, such oversights in the evolution and rigid conceptualization of precepts calls into question whether DARIO principles may provide a workable framework for the allocation of direct responsibility for structural violations inherent in the global policy system.

It is therefore plausible to surmise that the law of international responsibility, “a corollary of international law,”¹⁴² has been neither integral nor adequate to a proper understanding of the way accountability for development injustices ought to be recalibrated and reformulated. Perhaps the reason lies nowhere else than in the reflections that law cannot address that which has not been put within reach of its cognitive grasp. As Weeramantry notes, “law is not an omnipotent instrument, law can only control matters that lie within the reach of its formalized principles and prohibitions, and of its ability to oversee and punish.”¹⁴³ Questions of how the intermingle effect

¹³⁸ Upendra Baxi, *The Future of Human Rights* (New Delhi: Oxford University Press, 2006) at 309.

¹³⁹ Obiora Chinedu Okafor & Uchechukwu Ngwaba, “The International Criminal Court as a ‘Transitional Justice’ Mechanism in Africa: Some Critical Reflections” (2015) 9 Intl J of Transl Justice 90 at 91; Gathii, *supra* note 132 at 34.

¹⁴⁰ Okafor, “Newness”, *supra* note 5 at 178; Okafor, “Theory or Method”, *supra* note 5 at 377; Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, UK; New York: Cambridge University Press, 2007) at 14.

¹⁴¹ DARIO general commentary para 5.

¹⁴² Pellet, *supra* note 32 at 3.

¹⁴³ Louis Henkin & Christopher G Weeramantry, *Keynote Addresses* (1999) 25 Brook J Intl L 17 at 35.

obstructs accountability and ensures an accountability disconnection for IFIs have not been adequately explored in the theory and practice of the law of international responsibility.

5. CONCLUSION

The conclusion of this chapter is that international law legitimizes and operationalizes circumspection toward direct and distinct obligations, responsibility, and accountability of IFIs. It follows, accordingly, that the international law of responsibility is ill-formulated and conceptually flawed to ordain direct and distinct accountability of IFIs for development injustices. Secondly, international law of responsibility is fraught with profound and deliberate disconnections and avoidance of accountability, most acutely in relation to IFIs. Thirdly, and regarding the disconnections, the indictment goes to the very root of the premises of the international law of responsibility, which is so linear that it omits a distributive understanding of violations in development practices. In effect, these imperfections lend credence to the suspicion that the universalization of the debate on DARIO as the normative framework of the legal accountability of IFIs is a facile discourse of accountability. This discourse serves to mask deeply rooted responsibility avoidance and evasions. Said differently, international law rationalizes and legitimizes the accountability disconnections, obstruction, and obliteration insofar as hegemonic international institutions are the objects of legitimate censure and indignation from the Third World. As a result, it is doubtful whether the international law of responsibility, a derivative of Western thinking, can be counted upon, unproblematically, to secure development justice. Can the international law of responsibility secure a world free of poverty and reduce inequality through its mechanics and precepts of accountability? As this chapter demonstrates, DARIO's normative potential to achieve this objective is very doubtful. I proceed in the next chapter to explain why these regimes are unsuited and ill-adapted to the task of securing development justice. It is in the next chapter that I substantiate the legitimate concerns that international law produces and reproduces accountability regimes that cannot guarantee the protection of Third World peoples against the vagaries of neoliberal development policies.

CHAPTER SIX

FIRMING UP THE BACKBONE OF THE RIGHT TO DEVELOPMENT REGIME-IN AID OF DEVELOPMENT JUSTICE

1. INTRODUCTION

To provide a needed background to this chapter, the claims made in chapters 3, 4, and 5 warrant a brief rehash. The principal argument in these chapters was that contemporary international accountability practices in the development realm are, as currently conceived, inadequate for the task of delivering development justice. I maintained that international law and its praxis legitimizes the avoidance of, a disconnection from, and the obstruction of, the direct and distinct accountability of international financial institutions (IFIs) for their interventions in the global economy and the development realm. In addition, the point was made that internal accountability praxis of the relevant international institutions is mired in an unsatisfactory conception of accountability as the redress of harms resulting from their non-compliance with operational procedures and directives. This retention of the traditional idea and regime of legal accountability for such bodies, I argued, is the normative shortcoming that renders the relevant regimes woefully inadequate in constraining the global policy system as a structural impediment to rights-based development.

This chapter investigates ways through which we can strengthen the implementation of the RTD through an efficacious accountability praxis. Firming up the backbone of the RTD framework, I maintain, must entail focused attention to the crucial question of the accountability of the most influential and unregulated IFIs engaged in global development practices.

One of the key theses advanced in this dissertation is developed in this last main chapter of the work. Two main claims are pursued in this chapter. The first central contention, which builds on the discussion from the previous chapters, is that the suitability and adaptability of the fundamental premises of existing human rights accountability regimes are shaky and questionable for the protection of the peoples of the Global South against global development injustices. I then argue that to thus realize development justice for deserving recipients through the functionality of accountability, the practice must (i) be contextually-aware, and (ii) account for the specific character of the right in issue. An effective accountability mechanism, I argue, ought to take account these two factors. It is through building upon this premise that I develop the notion of *participation from below* as the basis for accountability in international law—not as the remedy to

the severe limitations of international legal accountability, but as a pragmatic approach that can appreciably supplement existing but ineffectual accountability regimes.

Throughout this chapter, I conduct a critique of the dominant concepts, doctrines, and practices of accountability by remaining fidel to TWAIL techniques of centering the experiences of the Third World into the analysis of international law, disavowing “glib universalism,”¹ and positing a counter-hegemonic critique of the dominant approaches of international law,² including challenging the subordinating character of international financial and economic governance.³

This chapter is divided into four sections. In the next section, I tease out the supporting arguments for the main thesis that accountability praxis ought to (i) be contextually aware and (ii) take into account the particularities of the right in question. Substantively, to theoretically and factually ground this claim, I draw from the academic work that has retold and analyzed the difficulties experienced by subalterns in the enforcement of socio-economic rights across Third World jurisdictions such as Kenya, South Africa, and Colombia.⁴ In principle, contextual awareness entails that accountability practice ought to appreciate the context, nature, and causes of rights violation (e.g. whether interactional or institutional), while right specificity requires that accountability for actualizing development justice must be sufficiently sensitive to the nature and peculiarities of the undergirding norm (or the specific right in question). In section three, I rely on these two factors as the basis for my scepticism toward an unquestioning embrace of the standardized precepts of the international legal accountability that have grown out of the dominant Liberal thinking and anti-sovereignty posturing tendencies of the Westphalian international legal

¹ Obiora Chinedu Okafor, “Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?” (2008) 10 Intl Comm L Rev 371 [Okafor, “Theory or Method”]; Obiora Chinedu Okafor, “Newness, Imperialism, International Legal Reform in Our Time: A Twail Perspective” (2005) 43(1&2) Osgoode Hall Law Journal 171 [Okafor, “Newness”].

² James Thuo Gathii, “Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy” (2000) 98:6 Mich L Rev at 1997.

³ Okafor, “Newness”, *supra* note 1 at 171, 176.

⁴ These three countries have been selected not only for their posture as Third World countries but also as good case studies from two continents where there is an emerging trend of advanced and progressive social rights jurisprudence that seek social transformation of societies, in quite some similar way that the RTD norm seeks. This jurisprudence may offer some lessons to those who seek to enforce an accountability praxis for the RTD norm. Any such lesson is based on the fact that there are some commonalities between the RTD and socio-economic rights. Some of the factors in common are that they are both of non-Western genealogy, they both seek to deepen social justice agenda in development and are concerned with distributive justice in the Global South. Both socio-economic rights and the RTD claims bring about a structural understanding of violations.

order.⁵ I offer an explanation of how the distinctive traits of the RTD norm and the structural contingency dynamic discloses the functional and conceptual limitations of the contemporary accountability praxis of the IFIs global development institutions' accountability praxis.

In section four, I proceed to develop the answerability prong of accountability by proposing *participation as accountability from below* as the basis for firming up the backbone of the RTD regime. The Declaration on the RTD embeds participation as a core attribute of a rights-based and people-centric development practice. Accordingly, I argue that the RTD's greatest contribution to the international law of development, or its feature that can be optimally harnessed, is its embedment of participation as accountability from below. Participation is an important aspect of the answerability dimension of accountability. To strengthen answerability as accountability, I draw upon a diversity of literature, from social movements and post-development scholarship, to propose a theoretically and empirically grounded idea of participatory accountability from below, a pragmatic alternative to "Western-derived" institutional models of accountability. This is the interdisciplinary turn of this dissertation's recommendations.

2. TWO DETERMINING FACTORS OF THE EFFICACY OF ACCOUNTABILITY PRAXIS: THE CONTEXT OF VIOLATIONS AND THE NATURE OF THE RIGHT

The main point of this sub-section is that the properties of the RTD should shape the conceptualization of a normative accountability framework for the effective governance of IFIs. In relation to this point, the foremost issue to emphasize is that there are indeed qualitative distinctions of character as between rights. Variations of character immanent or assigned to each right is an essential fact indispensable to, and influences the outcomes of, all the practices of accountability or implementation.⁶ For instance, in the sphere of international legal accountability, it has been suggested that "remedial discretion must be grounded in the overriding principle of

⁵ By liberal international law, I draw from Orford, who defines it as a law with its appeal to "constraining sovereign power, representing universal values and governing relations between sovereign states." See Anne Orford ed, *International Law and Its Others* (Cambridge: Cambridge University Press, 2006) at i.

⁶ See for example Olivier De Schutter, *Economic, Social and Cultural Rights as Human Rights* (Cheltenham; Northampton: Edward Elgar Publishing; 2013) at xv.

effective remedy, and the unique character of human rights legislation, its broad purposes, distinct provisions and administrative machinery.”⁷

The above point captures the idea that for efficacious accountability outcomes, remedial measures must be contextualized, accounting satisfactorily for the “broad purposes” of the right as encapsulated in the legislative instrument, as well as the administrative machinery for its implementation. The underlying point is simple, but not reductionist: the accountability of actors must be contextual, sensitive to the particularity and peculiarities of every given right or its genre, as well as attentive to the causes of violations. To lend credence to this claim, I point at the lived experiences of Third World peoples in countries such as Kenya, Colombia, and South Africa. In these countries, the judicialization of socio-economic claims has confronted judges with unprecedented practical difficulties and enforcement pitfalls. These experiences are relevant and offer insights for rethinking and reformulating the contemporary accountability praxis to make them suitable and adaptable to the securement of distributive justice in the national and international order. Both socio-economic rights and the RTD share this aspiration for distributive justice, an aspect of development justice that emphasizes the structural nature of violations and insists on fashioning specific remedies that can vindicate specific rights only.

The challenges judiciaries have faced in enforcing socio-economic rights are due largely to the nature of obligations imposed by these rights as well as the contexts of their violations. For this reason, both the litigation and judicial enforcement of socio-economic rights continue to be a work in progress.⁸ The difficulties judiciaries confront in crafting appropriate remedies that can be complied with to vindicate those infringements are both practical and conceptual.

In the first place, conceptual difficulties range from questions of the polycentric nature of socio-economic claims or the classical dilemma of functional competence of the judiciary.⁹ There is also the legitimacy and democratic deficit concerns actuated by the notion that judges are not elected and ought not reallocate public goods.¹⁰ On the other hand, practical difficulties are those

⁷ Gwen Brodsky, Shelagh Day & Frances Kelly, “The Authority of Human Rights Tribunals to Grant Systemic Remedies” (2017) 6:1 Can J of Hum Rts 1 at 3 & 17-18.

⁸ See for example, Malcom Langford, Cesar Rodríguez-Garavito & Julieta Rossi eds, *Social Rights Judgments and the Politics of Compliance* (Cambridge: Cambridge University Press, 2017).

⁹ Christopher Mbazira, “Confronting the Problem of Polycentricity in Enforcing the Socioeconomic Rights in the South African Constitution” (2008) 28:1 SA Public Law 30; Kent Roach, “Polycentricity and Queue Jumping in Public Law Remedies: A Two-track Response” (2016) 66:1 UTLLJ 3; David Landau, “The Reality of Social Rights Enforcement” (2012) 53:1 Harv Intl L J 190 at 192.

¹⁰ See Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (Pretoria: Pretoria University Law Press, 2009) [Mbazira, *Corrective or Distributive Justice*].

of fashioning appropriate (structural) remedies that can vindicate the structural nature of infringements that too often attend to welfare-based entitlements.¹¹ These problems are so deeply entrenched that today we witness the slow, sparing and patchy, though progressive, change to novel mechanisms of enforcement in the Global South.¹² Such visible forms of progressive change are legion: they include judicial activism and creativity in the furtherance of the social transformation potential of law. Examples include such methods as dialogic judicialism (Kenya and Colombia).¹³ Other creative measures such as deferential standards¹⁴ or structural interdicts have been in use in South Africa.¹⁵ In Canada, judicialization of welfare-based claims has seen courts resorting to such measures as the suspended declarations of invalidity where courts have deemed it necessary to give the government time to reform a legislative infrastructure on which public goods are dispensed.¹⁶ It seems that fashioning creative and progressive remedial accountability measures of these kinds often take cognisance of complex nature of the rights, and

¹¹ See for example, Kent Roach, “The Challenges of Crafting Remedies for Violations of Socio-economic Rights” in Malcom Langford ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 46; Eric C Christiansen “Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson From South Africa” (2008)13:2 *UCLA J of Intl L & Foreign Aff* 369; Mark Tushnet, *Weak Courts, Strong Rights* (Princeton: Princeton University Press, 2008) 242-244, 254.

¹² Ce’sar Rodrí’guez-Garavito, “Beyond Enforcement: Assessing and Enhancing Judicial Impact” in Ce’sar Rodrí’guez-Garavito & Diana Rodrí’guez -Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socio-economic Rights in the Global South* (Cambridge: Cambridge University Press, 2015) at 76.

¹³ Dialogic judicialism is the process by which courts point out the violations but leave it to the government to devise policy measures that are then adopted as remedies for redressing the infringements. The court then monitors the implementation of those proposed remedies or policy measures through the involvement of civil society and other interested groups. Dialogic judicialism seeks to replace a monologic judicial enforcement, by which courts would traditionally issue orders and injunctions with the expectation of unqualified obedience. Some of the literature are: Maxwell Miyawa, “Dialogic Landscape in Kenya: An Emerging Trend in Socioeconomic Rights Enforcement” (2015) 11:1 *LSK L J*; Landau, “The Reality of Social Rights Enforcement”, *supra* note 9 at 190; Rodrí’guez-Garavito & D Rodrí’guez-Franco, *Radical Deprivation on Trial*, *ibid* chapter 8; Rosalind Dixon, “Creating Dialogue About Socio-economic Rights: Strong-form versus Weak-form Judicial Review Revisited” (2007) 5 *Intl J of Const L* 391.

¹⁴ David Landau, “South African Social Rights Jurisprudence and the Global Canon: A Revisionist View” in Rosalind Dixon & Theunix Roux eds, *Constitutional Triumphs, Constitutional Disappointments A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge: Cambridge University Press, 2018) at 412.

¹⁵ Mitra Ebadolahi, “Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa” (2008) 83 *NYU L Rev* 1565.

¹⁶ *Schachter v Canada* [1992] 2 SCR 679; *Tanudjaja v Attorney General* (Canada), [2013] ONSC 1878 and *Tanudjaja v. Canada (Attorney General)*, [2014] ONCA 852. Other cases that may be relevant because they demonstrate positive obligations of the government to provide for social welfare rights are: *Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429 and *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791. In these cases, apart from giving time to reform the infringing legislation, courts have resorted to such measures as “reporting requirements, timetables, monitoring, benchmarks, and designated participatory mechanisms,” and retention of jurisdiction to make further supervisory orders. See Bruce Porter, “Canada: Systemic Claims and Remedial Diversity” in Malcom Langford, Ce’sar Rodrí’guez-Garavito & Julieta Rossi eds, *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge: Cambridge University Press, 2017) at 208.

longstanding structural issues that underlie their violations. The context of violations underscores whether the infringements are structural or interactional, while the nature of the right would dictate the appropriate vindications their violations demand.

While the normative potential of these novel measures is without question and their premises solid, they point to incompleteness, if not anomalies, in the traditional configurations of remedial accountability. Essentially, they flag the defects in the devices that the sanction or remedial typology of accountability deploys. The defects appear in the practicability challenges or what Landau calls the “legitimacy and capacity strains.”¹⁷ It is the legitimacy and capacity strains that stretch courts to be innovative. Thus, they expose the various challenges for fashioning appropriate remedies to vindicate socio-economic rights violations.¹⁸ Besides, by their novelty, these novel remedies emphasize a distributive philosophy of justice. Unlike the backwards-looking received remedial tradition for vindicating ordinary rights, distributive justice is forward-looking. It is focused on vindicating structural violations that traditional corrective remedial sanctions for civil and political rights cannot attain.¹⁹

Because these novel measures depart significantly from the (traditional) coercive, individualistic, monologic, and backwards-looking remedies for civil and political rights violations, and given that they are designed specifically for vindicating the derogation from welfare rights, they attest to the claim that the normative character of a right ought to inform its implementation, enforcement, and remediation. By extension, to the extent that they are aware of the structural causes of violations (unlike the remedial tradition which only relieves infringements resulting from conduct), they emphasize that accountability of actors for the non-attainment of rights needs to be contextually aware.

¹⁷ Landau, “The Reality of Social Rights Enforcement”, *supra* note 9 at 192.

¹⁸ Roach, “The Challenges for Crafting Remedies”, *supra* note 10.

¹⁹ The tradition of international law to deliver corrective justice as opposed to distributive justice was emphasized by Hugo Grotius. Charlesworth notes “international courts and tribunals have followed the approach of Hugo Grotius set out in *De jur e belli ac pacis* in 1625 that international law should deliver (using Aristotelian terms) corrective justice, or the reinstatement of the position of the parties before the disputed transaction, as opposed to distributive justice, which would entail attention to broader in-equalities between the parties.” Hillary Charlesworth, “International Law and International Justice” in Chris Brown & Robin Eckersley eds, *The Oxford Handbook of International Political Theory* (Oxford: Oxford University Press, 2018) 1 at 6. See also Mbazira, *Corrective or Distributive Justice*, *supra* note 9 at 103-121; César Rodríguez-Garavito, “Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America” (2011) 89 *Texas L Rev* 1669 at 1671; Kent Roach, “The Challenges of Crafting Remedies”, *supra* note 11 at 46.

And yet, there is no deep appreciation in the conventional accountability praxis that the remedial difficulties are rooted in the kind of design of the existing models. In international thought and practice of accountability, there is as yet no full awareness of the limitations of traditional remedial measures from a distributive justice perspective. Human rights practices of accountability are sanction-heavy, remedial, redressive, monologic, and interactional.²⁰ At least not within the mainstream international legal thought has the insight about structural violations and the imperative of distributive justice permeated the discourse on IFIs accountability deficit. The conventional implementation agenda, even in the context of the SDGs policy schema, does not quite keenly reflect this thinking about distributive justice that demands an institutional approach to accountability. An institutional approach would not only look to constrain conduct and remedy outcomes of violations, but it would go further to question the compatibility of the rules, policies, and processes of development with fundamental values. The RTD as a claim to a particular national and international order emphasizes this notion while questioning the inherent assumptions and rationales of the *ex-post* remedial accountability. It introduces the new insight that conceptions of accountability should not be tailored to merely focus on outcomes of breach, they must also examine and question the rules, processes, and structures that produce these very conditions.²¹ This is the notion of distributive justice.

The idea of distributive justice has brought with it a new line of thinking: the unworkability of extant regimes in the enforcement of rights of a subsistence ethic is due to the fact that their violations tend to be structural, implicating various governmental bureaucracies and their policies and programmes. Such awareness brings forth a deep sense that socio-economic rights enforceability challenges relate to their normative and distinctive character. This is comprised of the nature of obligations they impose and the form of justice they demand. Aware of the very distinctive nature of rights and the vast accountability challenges posed, some scholars have been inclined to call for “broad-based perspectives” and a “new methodological orientation” in the enforcement of socio-economic rights.²² Thus, it can be argued that socio-economic rights

²⁰ See for example, Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2005) at 7-8.

²¹ Patrick Twomey, “Human Rights-Based Approaches to Development: Towards Accountability” in Mashood A Baderin and Robert McCorquodale eds, *Economic, Social, and Cultural Rights in Action* (Oxford: Oxford University Press, 2007) at 54; UNDP, *Development Effectiveness—Spotlight On Performance: Why Some Countries Do Better Than Others* (United Nations Development Programme, 2003) at 7.

²² Miyawa, “Dialogic Landscape”, *supra* note 13 at 88.

enforcement has been shaped and informed by the nature of obligations entailed (right-specificity), the form of justice sought to be achieved, and the appropriateness of remedies suitable to the vindication of the violations (contextual awareness).²³

I draw upon the foregoing debate for the explanation that the normative character of a right should determine the method of its implementation, inform the modality of sanctioning non-attainment, as well as shape subsequent remedial measures. This imperative is compelling. Even if it means stepping out of the circumscribed bounds of international legal accountability or coming up with some remedial innovative tools, as was stated in the South African case of *Fose v Minister of Safety and Security*, one should be prepared to break the new ground.²⁴ Even if such new ground does not lie in the conceptually bounded doctrines of law, one should be prepared to blaze the trail.

Such preparedness to aggressively innovate must be met by a readiness to embrace new modes and notions unknown to the traditional accountability methods. This questioning of orthodoxy is what the story of socio-economic rights enforcement thus far contributes to rethinking IFIs' accountability for development injustices. Innovative remedies such as structural interdict and dialogic judicialism bring forth a structural approach to remedy in the legal jurisprudence, enforcing the idea of context-awareness and right-specificity.²⁵ It follows that the suitability of a model of accountability should focus on factors specific or germane to the right at issue, such as the obligations entailed by the right. It must appreciate the causes and context of violations, be attentive to whether the violations are institutionally sanctioned or interactional in nature.

As some litigation against the World Bank has revealed, some causal factors in the derogation of rights obligations are structural in nature. By their nature, structural violations indict various institutions and implicate different rules, policies, and several processes for such failures. Other violations may be interactional, involving decipherable sanctionable conduct and traceable causal chains directly linkable to actors. The former is the perspective brought about by development justice perspective. The latter typifies human rights accountability, which seeks corrective/retributive justice. The distinctions between the interactional and institutional

²³ *Ibid.*

²⁴ This was the dictum in *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6.

²⁵ Landau, "The Reality of Social Rights Enforcement", *supra* note 10 at 192.

sensibilities lies in two important legal concepts of *droits-attribut* (freedom from) and *droits-creance* (right to).²⁶

A good example of interactional violations is that of the recent US Supreme Court decision in *Jam et al v International Finance Corporation*.²⁷ In this matter, a host of complaints were levelled by farmers and fishermen in rural India that the coal-fired power plant financed by the International Finance Corporation (IFC) had caused environmental degradation and health hazards to the local people in Gujarat, India. IFC, an arm of the World Bank that finances private projects ventured into funding this project. In 2015, a group of farmers and fishermen sued the IFC before a Washington federal District Court. They alleged that the project caused wanton destruction of the habitat, marine life and respiratory injuries to communities living nearby. They argued that these adverse effects could have been prevented by the IFC before the plant was built. These substantive issues were not determined since the court dismissed the suit on a technical ground that the suit was barred by the rule that IFC enjoyed absolute immunity from lawsuits. The matter went all the way to the US Supreme Court which ordered that the matter be remanded to the District Court which had jurisdiction on the matter. What is most important for our purposes here is that such violations as complained of here are relatively easy to discern and remedy for the reason that tracing the chain of causation of the outcome of violations can easily be linked to the *conduct* of an entity alleged to have committed the harm. This interactional approach predominantly focuses on the conduct of an actor, its immediate causes, and manifestations of harms or violations.²⁸

On the other hand, as I already discussed, questions of causation and attribution get muddled when structural violations are at issue. This was the case in the *Lesotho-Highland* case, where multiple rules and policies, not *conduct*, were implicated in the “engenderment” of consequential harms. The institutional approach that development justice seems to require takes cognisance of the immediate causes, their structural context, and their long-term effects. That is, there is an imperative to appreciate how rules of the game conflict with other applicable standards in ways that engender and perpetuate violations, both in the immediate and long term. By focusing on the long-term effects, one looks at how multiple policy systems (national and supranational)

²⁶ Stephen Marks, “The Human Rights Framework of Development: Seven Approaches” in Arjun Sengupta, Archana Negi & Moushumi Basu eds, *Reflections on the Right to Development* (New Delhi; Thousand Oaks: Sage Publications, 2005) at 25 [Marks, “The Human Rights Framework of Development”].

²⁷ (2019) 586 U. S.

²⁸ See for example Britha Mikkelsen, *Methods for Development Work and Research: A New Guide for Practitioners* (New Delhi: Sage Publications, 2005) at 205.

entangle and interact to produce unforeseeable and unpredictable outcomes such that not a single agent can be said to have occasioned the violations. A good example is poverty as a manifestation of the violation of many aspects of socio-economic rights. By its very nature, poverty is a structural and multidimensional phenomenon.²⁹ Many factors, rules, policies, actions, and omissions intermingle, over a long period of time, to produce diverse outcomes that manifest in forms of the deprivation of human capabilities and the ability to live the life of one's choice. Not a single isolated conduct can be attributed as the cause of poverty.

Conventional human rights critiques of IFIs' accountability deficit need to sufficiently apprehend these intriguing complexes. They ought to bring into purview the structural and distributive understanding of violations and harms. It is imperative that they appreciate conceptual and normative distinctions of character between universal rights as necessitating a different approach to accountability.³⁰ The RTD enforces this consciousness. Nothing makes this imperative more than the judicial experiences of enforcement of socio-economic rights. These cases point out that praxis (theories, doctrines, or practice) of accountability that ignore the distinctive character of norms, and fail to contextualize their violations, remain severely incomplete, limited, and limiting.

The lack of the appreciation of normative character distinctions and contexts of violations is so apparent in the standardized and general (state-based and state-centred) accountability regimes operational in most domestic legal systems and international law. It is apparent in the catch-all DARIO doctrines propounded as applicable to all international organizations. Some regimes of accountability that deploy standardized state reporting and monitoring mechanisms to police state compliance with rights obligations also suffer from this architectural anomaly that omits the distributive and structural understanding of harms. Apart from the fact that these procedures are not vested with enforceability mandates, their nomenclature as "monitoring" processes serve a very unsatisfactory purpose when it comes to structural violations.³¹ The regional

²⁹ For the view that poverty is a multidimensional phenomenon that affects the realization of the RTD, see Carol Chi Ngang & Serges Djoyou Kamga, "Poverty Eradication Through Global Partnerships and the Question of the Right to Development Under International Law" (2017) 47:3 *Africa Insight* at 44.

³⁰ In making this assertion, I am not about to resurrect the fallacies inherent in the positive-negative rights dichotomization that Shue spent so much energy discussing. Henry Shue, *Basic Rights, Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1996) at 51.

³¹ For the view that the human rights field is fraught with inefficacy of compliance, see Oona Hathaway, "Do Human Rights Treaties Make a Difference?" (2002) *Yale L J* at 1938. Makau Mutua, *Human Rights Standards: Hegemony, Law and Politics* (Albany: State University of New York Press, 2016) at 76 laments the "normatively weak" options that states rely on as enforcement mechanisms. Koffi Quashigah, "The African Charter on Human and People's Rights:

human rights systems, which mimic the reporting mechanisms of the major international treaties, also suffer from an interactional deficiency. On the other hand, in domestic contexts and some regional human rights bodies, (most) accountability always enlists the jurisdiction of courts and tribunals that seek to remedy violations of any right suffered. In almost all of these institutional formalities and designs, apart from the procedural dichotomization of civil or political from socio-economic rights, there is no appreciation of the distinct peculiarity of different rights as the reason for rethinking the architecture or suitability of such sanction-heavy accountability regimes.

Standardization and replication of such limited accountability regimes seem to be the norm across most human rights systems. Implicitly, they seem to be justified on the flawed assumption that universal accountability doctrines and models apply to all rights and all actors uniformly. They pay no regard to the variations of character that underlie the different generations or categories of rights. In international legal thought as well, I note that in the assessment of the suitability of conventional regimes of accountability to non-state actors, little effort has been spent to grapple with the imperative of the normative nature of rights and context of violations (whether structural or otherwise). This question is different from a holistic approach to human rights; it does not invoke the old ideological polarities of neatly distinguishing civil and political rights from socio-economic rights on the basis of the nature of obligations entailed or immediacy or progressivity of their realization. Pitfalls in socio-economic rights enforcement, which has pushed judiciaries to be innovative, and even activist, severely challenge this kind of orthodoxy.

I am not, however, by these propositions suggesting the oversimplification, if not trivialization, of the holistic approaches to human rights that emphasize the indivisibility, universalism, interdependence, interrelatedness and the mutually reinforcing nature of all categories of rights.³² Far from it, I note that mainstream human rights law debates seem largely informed by normative theories imagining how the world should be and not how the world really is. The limitation of law in this aspect is what Koskeniemi calls “a utopian, context-breaking aspect” of international law and legal thought.³³ He concedes that law cannot at all times be a reflection of social and historical facts, but may slightly deviate from them, reflecting a utopia and

Towards a More Effective Reporting” (2002) 2 African Hum Rts L J at 261; Claude E Welch, *Protecting Human Rights in Africa: Roles and Strategies of Non-governmental Organizations* (Philadelphia: University of Pennsylvania Press, 1995) at 58.

³² For this view, see for example, Marks, “The Human Rights Framework of Development”, *supra* note 26 at 24.

³³ Martti Koskeniemi, “Histories of International Law: Significance and Problems for A Critical View” (2013) Temple Intl L & Comp L J 215 at 216.

a distance from context. This is what Koskenniemi defines as international law's development on "familiar," "fragile and contested assumptions."³⁴ See, for example, that despite our solid knowledge of the defects of the due diligence rule (developed in the old *Velásquez Rodríguez versus Honduras* jurisprudence) as the appropriate standard for indirect accountability in multilateral decision-making, we still seem not to question its generalizability, suitability, and adaptability to the contemporary realities of structural kinds of violations.³⁵ The due diligence certainly reflects a utopia and distance from contextual realities of our world today.

The debates in chapters 3, 4, and 5 are clear evidence that our imaginations of accountability in the development sphere (and even more generally) need to confront the world as it is, not as it is imagined. I make the case that human rights accountability regimes should not be unthinkingly standardized without being tailored to comport with character variation (read the composite nature and normative hybridity of the RTD) of different rights. They must also account adequately for the different nature of violations. This way, we will formulate models that can confront the spectre of development injustices rooted in the unfair and inequitable international system. Conventional accountability regimes should not miss this crucial insight, otherwise their underpinning logic would remain suspect and incredible.

It is apposite to recall the RTD's normative and distinctive character. As I argued in chapter 2, this right is radically different from other rights in substance, persona, vision, and the obligations it imposes. There, I projected the RTD as a counter-hegemonic right, its most compelling normative trait and distinctive feature in international law and development discourse. I elaborated that by this normative trait, in many ways, the RTD presents "alternative visions" and other "valid ways" that challenge the fundamental premises of the liberal understanding of rights as well as the basic conceptions of development. In chapter 3, I demonstrated that the RTD, as the guiding value for the SDGs, envisages a different vision of justice, a development justice that consists of the push against poverty and material inequality as well as the vision of eliminating structural barriers to development. This kind of justice is unknown to conventional human rights practices of accountability.

³⁴ *Ibid* at 217.

³⁵ For a discussion of the due diligence rule, see Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007) at 186 [Salomon, *Global Responsibility for Human Rights*].

It is the central claim of this dissertation that the character distinctiveness and context of violations must bear upon the critique and assessment of the suitability and adaptability of standardized accountability models. It must also be taken into questioning the Western-derived rules and institutions of accountability. I contend that the RTD's oppositional and alternative understanding of human rights doctrines (particularly its introduction of the structural contingency dynamic), if brought to bear on our analysis of praxes of accountability, exposes their unsuitability and ill-adaptability to the vindication of collective claims for development justice. I pursue this claim in the section below.

3. THE UNSUITABILITY AND ILL-ADAPTABILITY OF CONTEMPORARY ACCOUNTABILITY REGIMES TO THE REALIZATION OF DEVELOPMENT JUSTICE

Let me first point out two eminent scholars' misgivings about Western-derived doctrines of law. Santos and Rodríguez-Garavito make the observation that:

[H]uman rights institutions and doctrines, with their Western roots and liberal bent, have oftentimes been blind to non-Western conceptions of human dignity and collective rights that hold out the prospect for an expanded, cosmopolitan conception of rights.³⁶

The above quote on the conceptual blindness and rigidity of human rights cultures (law, institutions, and praxes) is the premise for my claim that the existing regimes of accountability are *unsuitable* and *ill-adapted* to realizing development justice. Such thinking highlights the predominant Western and liberal bent of human rights law and its characteristic neglect of other (if alternative) conceptions of justice. In the sections that follow, I demonstrate this discrepancy by showing how contemporary accountability frameworks fail to take into account the structural contingency dynamic (which emphasizes the need to take account of the context of violations) and the distinctive normativity of the RTD. The reasons as to why the existing international regimes miss these two crucial dynamics are elaborated below.

The first is international law's obsession with the juridical facets of international reality and a characteristic neglect of structural injustice. Human rights practices have traditionally been conducted on the highly restrictive, generalized maxims, and unchallenged assumptions of

³⁶ Boaventura de Sousa Santos and César A. Rodríguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge; New York: Cambridge University Press, 2005) at 13-14.

universalism, interdependence, interrelatedness, indivisibility and mutuality of rights.³⁷ These set of unchallenged assumptions show an obsession of international law with the juridical facets of international reality. It is an obsession that is accompanied by a characteristic neglect of the structural injustices of the international political economy. As An Naim, for example, has decried this level of generalization and universalization as unable to supply “an authoritative list of what these rights are or specify the precise content of any right in particular.”³⁸ Alston agrees that there are new rights, and their conceptions and pedigree challenge conventional understandings of the universal human rights paradigm as we know it today.³⁹

Such standardized frames and single lens approaches assume that if IFIs’ contestation of the normativity of the assignment of rights of rights obligations to them (the responsibility dimension of accountability) is overcome, IFIs would then be amenable to enforceability within the extant accountability regimes. Yet, such wisdom may not be that conventional when looking at some *sui generis* rights norms which seek a cosmopolitan conception of reality and ordain a model of development that aims to secure human well-being as its paramount objective. Such rights that have operational links to development practices—and that are born outside the Liberal tradition of focusing on constraining state sovereignty and that are not exclusively concerned with the welfarist ethic of the provision of the minimum needs of life—demand a different approach to accountability. They demand a different approach because they espouse a different vision of justice in the global policy system.

The point to be emphasized is that conventional human rights approaches have made few or no attempts to question the suitability or even adaptability of extant regimes in the protection and vindication of rights that are *sui generis* and of non-Western pedigree. The Western-derived regimes of accountability, as we have seen so far, tend to be so abstract and legalistic, neglecting the structural injustice of the international system. This has been witnessed in the beleaguered judicialization of socio-economic rights claims as well as in international efforts to formulate

³⁷ Mark Goodale, “The Myth of Universality: The UNESCO ‘Philosophers’ Committee’ and the Making of Human Rights” (2018) 43:3 Law & Soc Inq 596.

³⁸ See Abdullahi Ahmed An-Naim, *Human Rights Under African Constitutions* (Philadelphia: University of Pennsylvania Press, 2003) at 3.

³⁹ He gives a list of such rights as the right to development, right to self-determination, environmental rights, and indigenous communities’ rights. Philip Alston ed, *People’s Rights* (New York: Oxford University Press, 2001) [Alston, *People’s Rights*].

measures for their progressive realization.⁴⁰ It has also been revealed by the RTD discourse, particularly its introduction of the structural nature of violations and harms that are too often rooted in the global policy system. This view is almost always omitted by human rights narratives of justice and accountability.

The second factor explaining the unsuitability and ill-adaptability of existing regimes to the realization of development justice is the questionable minimalist conception of accountability in terms of power relations. In the dominant human rights cultures, accountability relationships are predominantly conceived according to the classical liberal tradition that tends to define it so minimally in terms of power relations.⁴¹ In other words, the broad consensus in human rights theory and practice largely reflect a power-based conception of justice. Based on this classical minimalist understanding, accounts of justice tend to view accountability function as a constraint on excesses of power or authority that is exercised as an *ex-post* remedial measure against breach of obligations.⁴² The “remedial” tradition has come to define most accountability approaches in law. It is what defines the inspection model of the Bank. It is the marker of international legal accountability that relies on the law of international responsibility to discern and attribute wrongfulness. Even in the political parlance, where accountability may be conceived in terms of answerability, whereby public authorities explain and justify their decisions *ex-ante*, there is still a retention of the power-centric and breach-focused approach to accountability.⁴³

In international law, accountability is rigidly tied to the concept of “responsibility-for-wrongfulness” and is thus confined to situations in which an international organization’s conduct

⁴⁰ One of the issues that highlights the institutional unsuitability of the enforcement dimension of accountability, particularly in the realm of socio-economic rights, is the question of compliance. See Rodríguez-Garavito & D Rodríguez-Franco, *Radical Deprivation on Trial*, *supra* note 12.

⁴¹ For this view of accountability as “a relationship of power,” see Anne Marie Goetz & Rob Jenkins, *Reinventing Accountability: Making Democracy Work for Human Development* (New York: Palgrave Macmillan; 2005) at 8 [Goetz and Jenkins, *Reinventing Accountability*]; Staffan I Lindberg, “Mapping Accountability: Core Concept and Subtypes” (2013) 79:2 *Intl Rev Admin Sci* 202 at 207.

⁴² International Law Association, *Report of the Seventy-first Conference, Berlin 2004: Accountability of International Organizations* (London: International Law Association, 2004) (arguing that “accountability is linked to the authority and power of an” international organization and that “power entails accountability, that is, the duty to account for its exercise” at 168) [ILA Report].

⁴³ UNDP, *Fostering Social Accountability: From Principle to Practice, a Guidance Note* (Oslo: Phoenix Design Aid A/S, Denmark; 2010) at 8; Peter Newell & Shaula Bellour, *Mapping Accountability: Origins, Context and Implications for Development* (Brighton: Institute of Development Studies, 2002) at 2; Ruth W Grant and Robert O Keohane, “Accountability and Abuses of Power in World Politics” (2005) 99:1 *Am Pol Sci Rev* at 29.

or omission constitutes a breach of an international standard.⁴⁴ The problem lies in the definition of “responsibility,” which holds a key place in the theory and practice of international law. Even though the concept of responsibility lends itself to multiple definitions and senses, it basically revolves around “attributing consequences and their control” and “effective sanctioning powers.”⁴⁵ A responsibility approach, as I demonstrated, does not adequately account for the institutionally embedded violations that intermingle with national factors.

In theory, we see this power-centric approach in how De Schutter defines accountability as the process of seeking remedies before national or international tribunals for violations suffered (due to excesses of power).⁴⁶ Khalfan defines accountability restrictively in terms of the legal or political bodies that can entertain complaints and offer remedies, monitor, enforce, and reward state compliance with human rights obligations or rebuke noncompliance.⁴⁷ According to this minimalist view, which explicitly venerates the *ex-post* approach, the ends of accountability is served by those processes that impose legally binding decisions or other political forces capable of influencing actors’ behaviour.

These limited conceptions permeate the actual practice of accountability. Falling into such machineries of questioning the compliance with powers and obligations (conformity to assigned duties) are the periodic human rights reporting procedures within the United Nations and other treaty bodies. Also included are the individual complaints procedures, inter-state complaints mechanisms, universal periodic reviews, and international tribunals and judicial institutions. The United Nation’s Guidelines on “adequate, effective and prompt reparation for harm suffered” as the legal test for accountability is not so far from the minimalist frames of responsibility-for-wrongfulness.⁴⁸ In the realm of development practice, the mutual accountability practice is

⁴⁴ Ige F Dekker, “Accountability of International Organizations: An Evolving Legal Concept?” in Jan Wouters, Eva Brems, Stefaan Smis & Pierre Schmitt, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010) at 21.

⁴⁵ Volker Roeben, “Responsibility in International Law” (2012) Max Plank Yrbk of UN Law 99 at 106.

⁴⁶ Olivier De Schutter, “Human Rights and the Rise of Organizations: The Logic of Sliding Scales in the Law of International Responsibility” in Jan Wouters *et al*, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010) at 56.

⁴⁷ Ashfaq Khalfan, “Accountability Mechanisms” in Michael Langford, Wouter Vandenhole, Martin Scheinin & Willem van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) at 391.

⁴⁸ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, General Assembly Resolution 60/147, annex article I.2 (b) and VII.

defined, significantly, by the power-based approach.⁴⁹ Mutual accountability emphasizes the horizontal relationships and accountability of partners to each other. This is a limited conception emphasizing bounds of authority in mutual relationship between actors. One of its weakness is that it omits from purview an engagement with structural issues. Its silence on the direct and distinct accountability of international institutions as actors in development cooperation severely indicts its suitability to securing development justice, which requires a minimum of answerability of institutions.

The practice of international law of responsibility fixated on the responsibility for wrongful conduct (or excesses of power) omits the productive forms of power. DARIO does not contemplate that contravening rules constitute conduct, therefore economic policies that are inconsistent with human-centred development hardly figure into the determination of responsibility for wrongfulness. Such rules may include macro-structural reform measures, aggressive debt sustainability policies, pro-capital foreign direct investment, and liberalization rules that contravene universal values of domestic public policies. For this neglect of the productive forms of power, the law of responsibility cannot offer effective vindication of development injustices that inhere in the rules and policies of the allocation and provision of global public goods. The law of responsibility seems to delegitimize what Salomon has termed the juridical reimagination of the utility and scope of human rights in the global justice project.⁵⁰ This runs counter to the RTD's basic conception of power and conduct as constituted by, and existing within and without, state structure, as well as in the policies and the rules that development institutions paternalistically recommend to developing states.⁵¹

The standardization and generalizability of power-based accountability mechanisms of these kinds predominantly look to constrain or remedy excesses of power which manifest in violations or failure to fulfil obligations. Often, the *ex-post* approach is obsessively fixated on

⁴⁹ See for example, Liesbet Steer, Cecilie Wathne, Ruth Driscoll, "Mutual Accountability at the Country Level – A Concept and Emerging Good Practice Paper" (2008) Overseas Development Institute (ODI); James Droop, Paul Isenman & Baki Mlalazi, "Paris Declaration on Aid Effectiveness: Study of Existing Mechanisms to Promote Mutual Accountability Between Donors and Partner Countries at the International Level" (2008) Oxford Policy Management; Capacity Development Group Bureau for Development Policy, "Mutual Accountability Mechanisms: Accountability, Voice and Responsiveness" (United Nations Development Programme, 2006).

⁵⁰ Margot E Salomon, "From NIEO to Now and the Unfinishable Story of Economic Justice" (2013) 62 ICLQ 31 at 52.

⁵¹ The *Greece Troika* case (discussed in the previous chapter) is a good example of the Commission refusing to look at the structural measures of the IMF, European Central Bank, and the European Commission which measures were responsible for worsening the social conditions brought about by the economic catastrophe.

constraining conduct. They omit to engage with structural issues at the root of such wrongful conduct. These kinds of minimalist and restrictive approaches also overlook the fact that the exercise of power or omission potentially leads to violations and calls for the enforcement of sanctions. The resort to sanctioning excesses of power neglects the fact that even rules, processes, structures, and policies that contravene other countervailing values constitute violations.

The third limitation of existing mechanisms, which render them ill-suited and ill-adapted to the kind of justice required by the RTD norm, is due to the universalization of statist and counter-statist precepts of law. The universalization and generalization of these principles is not unquestionable. However justified, such attempts at universalization emphasize the characteristic nature of the state-dominated view of international law, which tends to produce predominant counter-statist doctrines of accountability.⁵² Take for example the emergence of DARIO and its replication of several key precepts of the law of state responsibility notwithstanding their provenance in state practice and irrelevance to the complexes of international economic relations. The other example is the SDGs accountability praxis that mimics traditional state reporting and monitoring mechanisms that are designed for the *ex-post* interrogation of failure to fulfil obligations as a dysfunction of power. The state-centric practice of accountability looks away from the structural and even historical causes of poverty and inequality. Nowhere else is this restrictiveness and minimalism so perfectly exemplified than in the international legal accountability, which predominantly remains the law of state responsibility. For the most part, it is ARSIWA that has been in usage, and whose principles inform those substantive provisions of DARIO.

The predominance of the limited, rigid, and linear state-centric view of accountability poses its own challenges. Because the law of the responsibility of international organizations was for a long time undeveloped, the law of state responsibility has been dominant in judicial practice and jurisprudence.⁵³ The state-centric approach, in the view of Ryngaert, proceeds from the broad premise that “states are, in principle, not responsible for acts done by private or non-state actors ... [and that only] acts of state organs can engage the responsibility of the state, even if the act has

⁵² See, for example, Koskeniemi who makes a distinction between international law as an apology for state power or as a utopia constraining power. Martti Koskeniemi, “The Legacy of the Early Nineteenth Century” in David Armstrong *et al* eds, *Routledge Handbook of International Law* (Abingdon: Routledge, 2008) at 145.

⁵³ Salomon, *Global Responsibility for Human Rights*, *supra* note 35 at 180-186.

been done ultra vires.”⁵⁴ So far, however, the notion of the non-attribution of private conduct shows a systematization of the principle in the reverse sense. In human rights accountability practice, the responsibility-for-wrongfulness approach implies only one thing: that wrongful conduct potentially has a direct causal relationship to an identifiable actor, more often the state. Save for limited exceptions contemplated by ARSIWA,⁵⁵ even where a direct causal relationship is not decipherable so as to render wrongfulness easily attributable to the state because the impugned conduct is that of a private actor or a different entity, the (received) technical understanding of “the state duty to protect” invariably applies.⁵⁶ Hence, derivative responsibility and liability will be imputed to the state for breach of one of its duties, often the duty to protect.⁵⁷ This logic is rooted in the due diligence rule, established in the Inter-American Court of Human Rights in *Velásquez Rodríguez versus Honduras*.⁵⁸

The due diligence jurisprudence is the settled legal principle in human rights law of accountability. It has been followed in the *Ogoni* case, where the African Commission took the view that rights “generate at least four levels of duties” for the state, which include the duty to

⁵⁴Cedric Ryngaert, “State Responsibility and Non-State Actors” in Math Noortmann, August Reinisch & Cedric Ryngaert, eds, *Non-State Actors in International Law* (Oxford; Portland: Hart Publishing, 2015) at 163.

⁵⁵ There exceptions to the general rule where private wrongful conduct may be attributed to the state: ARSIWA’s Article 5 (actors or agents exercise expressly authorized governmental functions/powers of the state); Article 8 (where conduct of private parties are carried out on “clear instructions or with direction” of the state or its organs); Article 9 (where groups or other elements act in the vacuum or collapse of official governmental authority to exercise state power); Article 10 (where circumstances of insurrection or forms of subversive activities enable groups or other elements to exercise authority); and Article 11 (where the state adopts or ratifies private conduct as its own, either expressly or through its conduct).

⁵⁶ *Z and Others v United Kingdom* (App no. 29392/95) ECHR Reports 2001-V, para 72-73 where a failure of health authorities to avoid ill-treatment and abandonment of some children saw the Court stating that the state is bound by a “positive obligation, under Article 3 of the Convention, to provide ... adequate protection against inhuman and degrading treatment” and that the state ought to have taken “reasonable steps to prevent ill-treatment of which the authorities had or ought to have knowledge”. See also *Edwards v United Kingdom* (App No 46477/99) ECHR Reports 2002-II para 54. See further Human Rights Committee, General Comment 31 “The Nature of the General Legal Obligation: Imposed on States Parties to the Covenant” 29 March 2004, CCPR/C/21/Rev.1/Add.13.

⁵⁷ The obligation of the state to protect human rights implies the responsibility of the state to regulate conduct of third parties so as to constrain them from violating rights of persons. Twomey, *supra* note 21 at 47; Victor Dankwa, Cees Flinterman & Scott Leckie, “Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” (1998) 20 Hum Rts Q 705 at 714. CCPR General Comment, *ibid* para 8 that “that positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of the Covenant rights by its agents, but also against acts committed by private persons or entities”. The Committee expressed further that such circumstances may be “as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”

⁵⁸ (1988) Inter-Am Ct HR (Ser C) No 4, *Annual Report of the Inter-American Court of Human Rights: 1988*, OAS/Ser.L/V/III.19 doc. 13 (1988) 71.

restrain conduct of third parties.⁵⁹ The notion that the state bears human rights obligations was approved in *SERAP v Nigeria*⁶⁰ where the Economic Community of West Africa States Court of Justice (the Court) first declined to exercise jurisdiction against Shell Nigeria, a transnational corporation operating in the Niger Delta and accused of environmental degradation in the area, on grounds that Shell Nigeria was not a party to the ECOWAS treaty therefore not subject to its jurisdiction. The Court however found that the Nigerian government was responsible for the violations because of its failure to effectively regulate transnational corporations. The Court took a state-centric reading and ordered the Nigerian government to remedy the situation by taking all necessary measures to protect the environment and any future harms.⁶¹

Applied to the human rights accountability context, the due diligence rule presupposes a derivative accountability of states for wrongful conduct or violations by third parties. It emphasizes a principle of accountability that the state is (indirectly) responsible for violations of third parties on account of its negligence or failure to prevent harms or protect individuals within its jurisdiction. Sadly, this received principle restates and re-enacts the original dilemma rather than resolve it. Not oddly enough, this theory of state-centred accountability praxis that the liberal conception of rights has enacted has been shown to be so severely bounded that it is therefore unworkable in grasping the structural contingency dynamic.⁶²

The contention that statist accountability doctrines are conceptually defective is illuminated more clearly by the RTD's counter-hegemonic view of the world, which exposes how the global policy system institutionally sanctions subtle violations outside the province of the state. Flowing from the institutional cosmopolitan vision of constraining and bringing into its regulative

⁵⁹ *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, African Commission on Human and People's Rights, Communication No. 155/1996 para 44 [*Ogoni case*] online: <http://www1.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/Cases/SERAC1.pdf>.

⁶⁰ *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v President, Federal Republic of Nigeria* ECW/CCJ/APP/08/09 Ruling of 10th December 2010 [*SERAP v Nigeria*]

⁶¹ *Ibid* at para 121.

⁶² Accountability deficit is highlighted by "a disregard for the human rights implications of structural adjustment policies and a series of unresolved issues on the attribution of international legal responsibility for the harms incurred." For this view, see Margot E Salomon, "Of Austerity, Human Rights and International Institutions" (2015) 21:4 *European L J* 521 at 535. See also Obiora Chinedu Okafor, "A Regional Perspective: Article 22 of the African Charter on Human and Peoples' Rights" in United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013) at 380. He discusses the weaknesses of the state responsibility praxis in relation to transnational corporations and not international organizations. He also does not examine the structural contingency dynamic, but the arguments deployed there are applicable nonetheless, showing that the state-centric accountability praxis ignores power dynamics and the syndrome of state subordination.

order the entire international community, there is a new imperative that the state cannot deliver rights on its own, even if it had the full capacity.⁶³ This progressive view emphasizes the structural contingency of development, acknowledging that actions of others are also key to the realization of rights.⁶⁴ This distributive view affirms that contemporary approaches that over-glorify the place of the state in human rights theories of justice offer an inadequate explanation of the endurance of global injustices.⁶⁵

The fact that human rights causes tend to locate responsibility and accountability in the state and not in global factors and institutions is yet another factor in their unsuitability to the realization of development justice. Human rights accountability praxes omit the crucial dynamic of the inherence of development injustices in global forces. Instead, human rights praxes of accountability look to constrain conduct and their outcomes. Therefore, to suggest that international law has not adequately grasped or grappled with the structural view of the phenomenon of development justice is not a radical conclusion. It is to bring into purview how the minimalist and restrictive statist reformulation of doctrine conceals development injustices. It is to demonstrate the way international law continues to proliferate like precepts of law such as extraterritoriality, due diligence, and derivative accountability that retain the statist traits.

At this juncture, it is plausible to say that international law adopts a narrow and restrictive view of the accountability of actors for development injustice. It does not seek the direct and distinct accountability of IFIs as development actors. In its conservative and minimalist element, it formalizes and legitimizes their insulation, immunity, and disconnection from accountability.⁶⁶ On this account alone, international law is implicated in, and is the explanation for, the obliteration

⁶³ See for example EM Hafner-Burton & K Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises" (2005) 110:5 Am J Soc 1373.

⁶⁴ I contend that the disruptions contingent upon the interventions of these institutions impels a new logic that when looking at global structural imbalances and inequality through human rights lenses, the monoculture of liberalism should not be the only ideological prism through which we can understand human rights usefulness as the foundation for rights-based global economic justice.

⁶⁵ Arjun Sengupta, "Poverty Eradication and Human Rights" in Thomas Pogge, *Freedom from Poverty as a Human Right: Who Owes what to the Poor* (UNESCO; Oxford; New York: Oxford University Press, 2007) at 328-329. See also, but in a different conceptualization of rights as relationships, Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) chapter 6. She proposes the idea of rights as relationships and not boundaries of power. She reimagines rights as relationships based on the "autonomy of self" in a departure from the liberal theory of rights as boundaries and restraints against power. By this non-liberal view, rights and law, even if in the strict liberal sense, come to embody the prime purpose of protecting the "autonomous self," in transactional relationships, on the understanding that individuals need protection from harm emanating from others, including the state.

⁶⁶ Chapters 3, 4, and 5.

and distortion of accountability relationships in development. As experience with the Bank's inspection panel shows, in certain cases, international law brazenly sanctions international institutions' obstruction of accountability.⁶⁷ In other words, international law cannot draw a nexus between the global struggle for a more equitable and just world and human rights causes.

The overarching explanation is that international law praxis of accountability misses the structural and distributive understanding of violations, something that the RTD accountability praxis insists on and emphasizes the most. To come to a clear grasp of the limitation of international law in this way, we must draw bright lines between this minimalist and restrictive state-centric international law and the institutional cosmopolitan conception of justice. Institutional cosmopolitan conceptions of justice are cognisant of the causes of poverty and inequality embedded in the global structural order. The creed of institutional cosmopolitanism in this context is its non-hesitation to call for the recognition of human rights normativity beyond the state.⁶⁸ Institutional cosmopolitanism trains its eyes on other social agents that are more determinative and more manipulative of policy systems that are implicated in the "engenderment" of injustices that harm human flourishing.

Lamentably, however, despite this institutional cosmopolitan awakening, human rights practices have not quite sufficiently appreciated the maximalist ethos of emphasizing the deterministic global factors and causalities over national causalities. So far, proponents of the need to hold inter-state institutions accountable for human rights wrongs committed in third-party territories have gone ahead to recalibrate the statist view of human rights by resorting to the extraterritorialization of human rights understandings. But by overlooking the imperative of structural contingency, they have ended up reconceiving the extraterritoriality question from within the statist contours. By this neglect they maintain a conception of the extraterritoriality principle as underpinning state obligations toward individuals in third countries. Thus, they limit their extraterritorial reading of the law to how "conduct of states may affect the human rights of individuals located outside their national territories" and examine the accountability of states for the harms of their policies or conduct.⁶⁹ Consequently, such new concepts remain beholden to little

⁶⁷ Chapter 4, section 4.2.1.

⁶⁸ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reform*, 2nd ed (Cambridge: Polity Press, 2008) 73, 174.

⁶⁹ Joana Abrisketa and María Nagore Casas, "Extraterritorial Application of Human Rights Treaties" in Oxford Bibliographies

more than the mundane and the old. This conceptual limitation causes the growing interest in the extraterritoriality principle to ring hollow; it is unable to champion pro-poor causes and advocate the direct and distinct accountability of international organizations.

The ineffectiveness of most of these doctrines is rooted in the fundamental flaws of what is now known as “derivative accountability.” Derivative accountability supposes that international institutions are indirectly accountable through their constituent states. According to Salomon, since there is a difficulty of disaggregating the conduct of a single actor from the collective decisions of states, there is need to restrict direct accountability to the state.⁷⁰ The justification for this approach is that in integrated and interdependent global economic relationships where the conduct of states are enmeshed when acting at the level of international organizations, there are “imperfect duties” addressed to states when acting multilaterally. Therefore it would be uncertain to disaggregate duties and attribute wrongful conduct to a specific state actor in the conventional sense of state responsibility.⁷¹ According to Salomon, the due diligence principle laid down in *Velásquez v Honduras* may come in handy to offer a technique for neutralizing the imperfect obligations dilemma. She proposes that the due diligence principle that imposes a duty on a state not to act negligently (at the multilateral level) by foreseeing and avoiding probable harms that their conduct may occasion to people living within its territory, should be applicable in the context of IFIs’ decision-making. The use of this technique, Salomon argues, has the effect of making “imperfect obligations” of the international community perfect.

Stripped to its bare essentials, this thinking skirts around the question of the direct and distinct accountability of IFIs.⁷² Its practice has failed to institute a direct normative regime of

online: <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0136.xml>>.

In the context of the RTD, see Salomon, *Global Resp for Human Rights*, *supra* note 35 at 180-186 propounding the due diligence rule that advocates derivative accountability. Even in the very titles of their work, a conception of global justice seems to take on a hard statist approach. See, for example Michael Langford, Wouter Vandenhoe, Martin Scheinin & Willem van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (New York: Cambridge University Press, 2013); Sirgun I Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Antwerp: Intersentia, 2006) at 5; Mark Gibney and Sirgun I Skogly, eds *Universal Human Rights and Extraterritorial Obligations* (Philadelphia: University of Pennsylvania Press, 2010);

⁷⁰ Salomon, *Global Responsibility for Human Rights* *supra* note 35 at 180.

⁷¹ *Ibid* at 186.

⁷² Salomon’s perceptions resuscitate a classical liberal approach that fetishizes sovereignty in international law. Her proposition, though novel, seems to be in support of the indirect or derivative accountability of international institutions through states under the due diligence mechanism. But the institutional cosmopolitan worldview severely disputes this.

accountability of international economic institutions. Its flaw is in the disinclination to locate causalities for national harms in global factors. The point is not that critical international law scholarship completely lacks the structural view of the phenomenon. Rather, mainstream legal scholarship has tended to pursue a bounded perception of these issues. On this bias, they fail to characterize structural violations as development justice questions to be invoked as human rights causes. Even black letter international law scholarship has questioned the wisdom of such classical liberal approaches to global justice. They argue, albeit in a limited legalistic way, that, by ignoring the autonomy, personality, and “distinct will” of international organizations constituted by states, international lawyers treat the structural contingency dynamic with circumspection.⁷³ They go further to question the liberal worldviews that overlook the basic insight that “if international organizations would not be independent actors, there would be no need for them to be accountable.”⁷⁴ They therefore recognize the “pervasive policy influence” of the Bank and IMF in the poor borrowing countries. This is what Darrow has called the “generally superior bargaining position and policy leverage enjoyed by the Bank and the Fund vis-à-vis the lowest per capita GDP client countries.”⁷⁵

I note that even as contemporary thought tends to be more progressive in acknowledging the limitations of the dominant statist understandings of accountability praxis, they do not sufficiently appreciate a structural understanding of human rights violations.⁷⁶ They leave

⁷³ On the issue of who may incur liability for voting conduct of members constituting an international organization, see Ana Sofia Barros & Cedric Ryngaert, “The Position of Member States in (Autonomous) Institutional Decision-Making” (2014) 11 Intl Org L Rev 58-82.

⁷⁴ Niels M Blokker “International Organizations as Independent Actors: Sweet Memory or Functionally Necessary?” in Jan Wouters *et al* eds, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010) at 37; Ramses A Wessel, “International Governmental Organizations as Non-state Actors” in Math Noortmann, August Reinisch & Cedric Ryngaert, eds, *Non-State Actors in International Law* (Oxford and Portland: Hart Publishing Ltd, 2015) at 200.

⁷⁵ Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford; Portland: Hart Publishing, 2003) at 56-61.

⁷⁶ See for example Lilian Chenwi & Tekele Soboka, *Extraterritorial Human Rights Obligations from An African Perspective* (Cambridge: Intersentia, 2018). First, they acknowledge the sovereigntist inclination of human rights, by which human rights law has developed a system of accountability predominantly focused on the state and its agents. While acknowledging that violations of human rights in one country may be linked to extraterritorial state and non-state actors, the statist bias of the accountability debate retains eminence. This is evident in the argument that “[increased] globalisation has thus given rise to the question whether the human rights obligations of states extend to persons outside of the sovereign territory of these states—that is, whether human rights obligations of states apply extraterritorially”. In the discussion of the impact of globalization, there is no mention of the determinative role of global institutions as to warrant a case for direct accountability for development injustices. What is highly favoured as the imperative is the “linking the human rights duties of a foreign state and the human rights of people of third states through extraterritorial (diagonal) human rights obligations.”

uninterrogated the suitability to some rights and adaptability to different contexts of the universal accountability mechanisms. They glide over the complex that Pahuja refers to as “structural homology.” This dynamic presupposes that international law authorizes mandate expansion for Bretton Woods Institutions as it legitimizes the avoidance of their accountability, all the while locating causality and responsibility in the agency of poor and developing countries.⁷⁷

Traditional international law thought seems not to disturb the safety from accountability enjoyed by IFIs, as facilitated by expedient doctrines and rationales (for example collective state decisions, or the compulsion to cooperate in the provision of global public goods, due diligence, and so forth). The limitations of international law thought and practice in this regard are not without historical precedence.⁷⁸ Historically, the human rights framing of justice focused only on conduct and outcomes of violations. By focusing on conduct and outcomes, we ended up with a regime so rigidly fixated on redress of harms. A focus on outcomes of harms omits a crucial understanding of how economic policies and processes, the prevailing economic models and idiosyncrasies of global development institutions are implicated in the “engenderment” of development injustices (for example inequality, poverty, structural discrimination, state subordination, inequitable development practices).⁷⁹

It is the rights-centric focus on conduct and outcomes that made it impossible to assess the unjust institutional system and recognize the institutional context of violations. One good example of the limitation of international lawyers in grasping a structural understanding of violations was the 1992 Wapenhas Report into the conduct of the World Bank.⁸⁰ Other examples are found in the

⁷⁷ Sundhya Pahuja, “Global Poverty and the Politics of Good Intentions” in Ruth Buchanan and Peer Zumbansen eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford; Portland: Hart Publishing, 2014) at 37-38.

⁷⁸ The sensitivity to the determining and manipulative effects of external distortions remained outside the cognitive grasp of human rights activism and scholarship from the late 1980s to the 1990s, when castigation of these institutions was at its peak in calling for the accountability of international financial institutions. For far too long, and despite the fact that the RTD movement had offered a structural conception of poverty and inequality from as early as the 1960s, the conventional human rights critique never took seriously the distributive view of development injustices. During this period, human rights activism pitted against global development institutions were too focused on human rights violations caused by the Bank’s projects. Their end-product, the Inspection Panels, putatively the internal independent institutions of accountability, neglected a crucial understanding of structural violations of the global policy system. That is, the excessive reliance on bland human rights frames was too narrow in scope.

⁷⁹ These are what I call the political economy questions.

⁸⁰ *Effective Implementation: Key to Development Impact, Portfolio Management Task Force September 22, 1992* at 6. Popularly known as Wapenhas Report, noted the determinative force of external factors over domestic factors in shaping the outcomes and directions of development. However, even after the Bank acknowledged that the external environment is a determinative factor conditioning national outcomes, the Inspection Panel that was created never came to take account of this reality.

civil society oppositional campaigns against the World Bank dam and canal projects in India that focused on the “violence” of development without paying keen attention to how such violence is produced by the global policy system.⁸¹ Other current examples of the interactional approach are the state-centric accountability mechanisms of SDGs, which look away from the causes of violations rooted in the global policy system.

Thus, we ended up with a severely limited development accountability praxis because of our fixation on interactional approaches to violations.⁸² The lack of clear thought on the institutional contexts of violations render contemporary models so weak that they cannot confront the radical deprivation of the global policy system. For good measure, however, we must give credit where it is due. For instance, the Inspection Panels have been replicated by multilateral development banks where they serve, at minimum, as the guarantors of internal accountability. Even if unsatisfactory, they address peoples’ claims opposing the social and environmental harms of development within their communities.

Perhaps the answer for such standardization and generalization would be that universal approaches couched as emancipatory projects are not always pro-South or even as pro-poor as they claim.⁸³ Perhaps, as Koskeniemi fears, the discourse about universalism is too often about the hegemonic spread of particular ideas and ideals capable of “deradicalizing” the others.⁸⁴ It is for this reason that most international law norms and regulative orders are ill-adapted to divergent contexts and non-Western experiences.⁸⁵ We are therefore justified to decry the way in which development and international law fail to develop a cosmopolitan and non-Western outlook on human rights causes of justice.⁸⁶ The human rights corpus, a product of Western positivization of

⁸¹ Balakrishnan Rajagopal, “Limits of Law in Counter-hegemonic Globalization: the Indian Supreme Court and the Narmada Valley Struggle” in Boaventura de Sousa Santos and César A. Rodríguez-Garavito eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge; New York: Cambridge University Press, 2005) [Rajagopal, “Limits of Law”].

⁸² See for example, Naude Andria Fourie, “The World Bank Inspection Panel’s Normative Potential: A Critical Assessment, and a Restatement” (2012) 59:2 *Neth Int L Rev* 199–234.

⁸³ See Balakrishnan Rajagopal, “Pro-human Rights but Anti-poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective” (2007) 8 *Hum Rts Rev* 157 at 158. See also Obiora Chinedu Okafor, “Attainments, Eclipses and Disciplinary Renewal in International Human Rights Law: A Critical Overview” in David Armstrong ed, *Routledge Handbook of International Law* 1st edn (Abingdon: Routledge, 2009) at 303. For a contrary view see Obiora Chinedu Okafor and Basil E Ugochukwu, “Have the Norms and Jurisprudence of the African Human Rights System Been Pro-Poor?” (2011) 11:2 *Afr Hum Rts L J* 396.

⁸⁴ Marti Koskeniemi, “Rights, History, Critique” in Adam Etinson ed, *Human Rights: Moral or Political?* (Oxford: Oxford University Press, 2018) at 42 [Koskeniemi, “Rights, History, Critique”].

⁸⁵ Santos & Rodríguez-Garavito, *Law and Globalization from Below*, *supra* note 36.

⁸⁶ Thomas Pogge, “Severe Poverty as a Human Rights Violation” in Thomas Pogge, *Freedom from Poverty as a Human Right: Who Owes what to the Poor* (UNESCO; Oxford; New York: Oxford University Press, 2007) at 23.

morality, are undeniably too-narrow constructs. Too often, they are so narrow that they cannot adequately capture the fact that some genre of norms, together with the understanding of justice that they espouse, seem to have been forged outside the demarcations of the positive theory of rights.⁸⁷

Intriguingly, international law has a peculiar tendency to make proclamations of universality for doctrines that are brokered without, or even in total disregard of, divergent contexts and experiences of different (especially Third World) peoples, nationalities, and identities.⁸⁸ To appreciate this disregard one has to understand the implication of international law in the emergence of what Pahuja calls new categories and domains. Pahuja posits that international law produces and defines categories; it “produces its own subjects” and domains, determines their “discursive constitution,” and “also makes a claim to universality for them.”⁸⁹ This, inarguably, is how one must appreciate the seeming universalist content and character of modern public international law doctrines, with their classical antecedents, which reflect Eurocentric, absolutist, and monocultural conceptions of the universe.⁹⁰ Effectively, this monoculturalism cements a universality dominated by European socio-economic, cultural, and political biases, values, and self-images.⁹¹

The fact that international law doctrines and the superstructure of post-modern institutions of development are not fashioned to reflect the diversity of people or complexities underlying their divergent values systems points to the incompleteness of international law. Thus, because some international doctrines cannot lay claim to the universality necessary for their legitimacy, however normative their justifications, they constitute a flawed normativity and universality. It is this

⁸⁷ Compare for example with Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2018) at 54 that social rights had the potential to reframe and give new significance to the language of one generation a new meaning. For example, social rights translate “the social justice proposed outside liberalism by full-blown collectivists into matters of personal entitlement” [Moyn, *Not Enough*].

⁸⁸ Okafor, “Newness”, *supra* note 1.

⁸⁹ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge; New York: Cambridge University Press, 2011) at 26-27.

⁹⁰ B. S. Chimni, “Customary International Law: A Third World Perspective” (2018) 112:1 *Am J of Intl Law* 1 at 12. See generally B.S. Chimni, “Anti-Imperialism” in Luis Eslava, Michael Fakhri & Vasuki Nesiya eds, *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press, 2017).

⁹¹ Luis Eslava & Sundhya Pahuja, “Beyond the (Post)Colonial: TWAAIL and the Everyday Life of International Law” (2012) 45:2 *Verfassung und Recht in Übersee/ Law & Politics in Africa, Asia and Latin America* 195 at 196; Elizabeth Beyerly, *Eurocentric International Law: Contemporary Doctrinal Perspectives* (New York: William S Hein & Co Inc., 1998) at 10.

deformity that supplies their discrepancy with the task of delivering accountability for development injustices.

What is indictable about the incompleteness of international norms, as Koskeniemi has come to enlighten us, is that international law is often marked by a tendency to proliferate a catch-all language “with contextual vocabularies that are as messy as the world they propose to organize.”⁹² Characteristically, this messiness and incompleteness is a defining feature of how international law precepts arise and evolve. It would, in this context, be unsurprising that international law suffers a conceptual incapacity to bring about the direct and distinct accountability of global development actors.⁹³ Put differently, by such utopianism or incompleteness, international law has fallen far short of indicating the causal relationship between culpable development institutions and their failure to guarantee human flourishing. Because of such blind spots, international law has hitherto failed to secure economic justice or guarantee minimum conditions of wellbeing for those facing the “cruel logics of marginalization and social exclusion”. Permissibly, one can surmise that it is the conservatism, monoculturalism, incompleteness, and anachronism of international law that abets the accountability disconnections, obstructions, and avoidance. This has therefore facilitated all the difficulties in the quest for the direct and distinct accountability of international institutions.

If international law was to forge a non-Western outlook on accountability in securing development justice, some principles and regimes would benefit from an opportunity to be rethought to shed the statist biases with which they are written. Their diversification into egalitarian and cosmopolitan projects such as development justice (which the RTD enunciates) would be made possible. This would create a better chance of confronting the hegemonization of development and its corresponding eclipses and displacements of the accountability of international institutions.⁹⁴ To achieve this objective, accountability regimes must be made to

⁹² Koskeniemi, “Rights, History, Critique”, *supra* note 84 at 42. See also Makau Mutua, “The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa” (1996) 17:3 *Mich J Intl L* at 608.

⁹³ See, for example Sirgun I Skogly, “Causality and Extraterritorial Human Rights Obligations” in Michael Langford, Wouter Vandenhoe, Martin Scheinin & Willem van Genugten eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) at 251

[Skogly, “Causality and Extraterritorial Obligations”].

⁹⁴ I argue, in line with key tools of TWAIL, the need to be more “skeptical of unjustified universality claims since such claims tend to elide or mask an underlying politics of domination.” See Obiora Chinedu Okafor, “Marxian Embraces (and de-couplings) in Upendra Baxi’s Human Rights Scholarship: A Case Study” in Susan Marks ed,

appreciate the context of violations and the nature of the right at issue. Hence, such new approaches will take into account that a right such as the RTD, as the right to a national and international order, can be violated by structures (imbalanced economic arrangements), processes (non-participatory and undemocratic procedures), and rules (conditionalities or standardized norms and practices that offend universal commitments).

I contend that the universalization of international regimes of accountability potentially comes with the inherent limitation of omitting the crucial insight of context awareness and the normative and distinctive nature of some norms. Existing accountability mechanisms seem to be conceived on a flawed thinking that overlooks the relative distinctions of character or genres of rights. Their conceptions also sidestep the contexts of violations or the types of justice that the vindication of certain rights demand. It seems to me that these homogenizing perceptions not only downplay the normative distinctiveness of rights but see it as irrelevant to the assessment of the suitability and adaptability of machineries of accountability. These limited conceptions of accountability result in standard analytical attentions and unsatisfactory treatments of different contexts of rights violations. They seem oblivious of new rights for which vindication cannot just be guaranteed by *ex-post* constraints on power, fashioning of remedies, or correction of behaviour (as in the case of the IMF Independent Evaluation Office). They do not appreciate that some rights require more elaborate mechanisms that can honour the objects of such a right.⁹⁵

It is also remarkable that the RTD's characteristic nature of focusing on and helping to reveal the structural nature of violations as injustices sanctioned by the global institutional order questions the suitability of contemporary regimes of accountability. It disturbs the logic of those mostly interactional mechanisms. The RTD discourse serves to uncover the ill-adaptability of these regimes to the materialization of development justice. As stated, a development justice perspective offers a structural and distributive approach to human rights violations. This is something that is still new for human rights conceptions of accountability and far beyond the circumscribed capacity of conventional understandings of human rights theory.

In this connection, I have been able to show, without being reductionist or falling into the folly of generalizability, how a deployment of the RTD perspective uncovers the inability of

International Law on the Left: Re-examining Marxist Legacies (Cambridge: Cambridge University Press, 2008) at 257.

⁹⁵ Alston, *People's Rights*, *supra* note 39.

conventional human rights accountability praxis to recognize and respond to the root causes of vulnerability embedded within undemocratic and inequitable institutional arrangements. Thanks to its epistemologies (of emphasizing context-awareness and its distinctive nature), the RTD has veritably exposed the cognitive limitations of conventional human rights practices of accountability that do not question violations underpinned by the contemporary economic organization.

On the whole, the main thrust of this dissertation thus far is that norms, institutions, and rules of accountability premised on liberal rights theory, and those theories that they produce and reproduce, are inadequate to the protection of people in the Global South against violations causally linked to the development interventions of the World Bank and the IMF. This follows from eminent critiques that human rights regulative orders are “naïve legalism.”⁹⁶ As argued in this dissertation, contemporary regimes of accountability fail to understand the determinative role of global factors and their intermingling with national factors to produce harmful outcomes. They deploy an interactional account of institutionally embedded injustices, viewing them as wrongfulness or human rights violations without rendering a proper account as to their rootedness in the global policy system.⁹⁷ The same can be said of the Bank’s Inspection Panels and sustainable development accountability praxis, which epitomize the interactional nature of contemporary accountability.

What way forward, therefore, does this dissertation propose in the face of these severe limitations, utopianism, anachronism, and the incompleteness of the existing accountability mechanisms? I propose recourse to the answerability dimension of accountability.

⁹⁶ Geoff Dancy & Christopher J Fariss, “Rescuing Human Rights Law from International Legalism and its Critics” (2017) 39 Hum Rts Q 1.

⁹⁷ Andreas Follesdal & Thomas Pogge, *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions* (Netherlands: Springer, 2005) at 2-3.

4. NEW FRONTIERS FOR THE ANSWERABILITY DIMENSION OF ACCOUNTABILITY

4.1 Going Beyond Linear International Legal Conventions and Frameworks

In this section, inspired by TWAIL's counter-hegemonic thinking and writing on international law, I help advance the notion of "subaltern cosmopolitan legality." I make the case for exploring alternatives not founded on the formal, limited, and limiting norms and practices of the international law of accountability. I imagine an international practice from a cosmopolitan perspective that insists on accountability from below. This is a departure from the exceedingly bounded perception of accountability as "responsibility-for-wrongfulness" or as sanction/remedy of outcomes of harms.

I also admit that there is no common ground on which a universal system of accountability can be conceived to respond to such complex societal problems like development injustice, neither can we all agree on the normative purposes and common underpinning values of accountability.⁹⁸ Rather than seek a universal and standard approach, I ask what kind or quality of accountability mechanism can be suitable to different settings, one that recognizes Third World agency and resistance in international law.⁹⁹ Accordingly, I address how human rights and development can suitably and adaptably respond to international law's legitimization of the avoidance and obstruction of, and disconnection from, accountability by IFIs. I am therefore not about to suggest a monolithic model as the only viable option to or way out of the constructed legal conundrum. Rather, I focus on what has been tested in different arenas, in diverse contexts, through various strategies, by various social agents and movements.

Two rationales inform this conclusion. First, resolving complex global problems demands no less than pragmatic solutions that go beyond simplistic adherence to legal conventions. Even though law is an important device for both social engineering as well as providing spaces for resistance, it can also be "a force for status quo and domination."¹⁰⁰ What is even more intriguing,

⁹⁸ Drake argues that normative purposes of accountability may include punishment, prevention, or instilling compliance in the case of sanction (in his view the vertical aspect of accountability). It may also entail maintaining harmonious working relationship in the case of mutual/horizontal accountability, changing the behaviours of institutions, or making institutions keep their promises. Accountability values, objectives, or what it ought to achieve may include legitimacy, transparency, answerability, responsibility, inclusion, and democracy. These values are synonymous with, and contribute significantly to, the purposes of accountability in different settings. Anna Drake, "Locating Accountability Conceptual and Categorical Challenges in the Literature: A Literature Review with an Annotated Bibliography" Policy Report, Entwined 2012 at 8-12.

⁹⁹ Ruth Buchanan, "Writing Resistance into International Law" 10 Intl Comm L Rev (2008) at 445, 447.

¹⁰⁰ Rajagopal, "Limits of Law" *supra* note 81 at 183.

as the International Law Association observes, forms of accountability are diverse and other interests, not “only legal interests may trigger accountability.”¹⁰¹ These other interests may include those of instilling responsiveness, inclusiveness, transparency, and political and democratic accountability.

Second, I am cognisant that the solution to development accountability deficits, dysfunctions, eclipses and displacements may lie in multiple approaches not limited to a one-size-fits-all model. A universal or workable accountability regime, no matter its legal innovativeness, cannot be reduced to a single, homogenizing framework. Rather than remain tethered to inflexible international law frameworks (which are too often minimalist, utopian, restrictive, and incomplete), my proposition here is that we should seek to reform and modify extant accountability regimes to be contextually aware and responsive to the complexity of development injustice. It is imperative that we explore what works, is workable, or has worked before.

The “what works” approach is the preferred way forward for this dissertation. The what works approach does not radically depart from what is already known. It does not challenge that which is in development policy practice. However, what works is a repudiation of state-centric models in favour of a people-centred human rights enforcement systems.¹⁰² By recognizing the potential limits of law in providing recourse to multi-variegated problems that fundamentally question the known norms, I propose that which has been tested in other disciplines of practice. I propose social movements praxis to ground alternative politics of accountability. I propose that it be transplanted to the human rights framing of development justice. By extension, it can be transplanted to the pursuit of accountability in development policy practice.

4.2 Revisiting Social Movements Praxis as Alternative Politics of Accountability

Those rationales are supported by a strong conviction I hold. I propose that to be effective, the accountability politics for the realization of development justice in the twenty-first century ought to be likened to the strategies of past historical movements and activism. I have in mind Third World mobilizations against such evils as slavery, imperialism, colonization, neo-colonization, climate change, and more recently hegemonic globalization.

¹⁰¹ ILA *Report supra* note 42 at 169.

¹⁰² I take guidance from Abdullahi Ahmed An-Na'im, “The Spirit of Laws is Not Universal: Alternatives to the Enforcement Paradigm for Human Rights” (2016) 21 *Tilburg L Rev* 255. He argues for a people-centric human rights enforcement models.

Social movements praxis presents various forms of mobilization, organization, strategies, ideology and knowledge practice. These are mechanisms that are less formalistic yet can enlarge the goals and ends of accountability beyond “responsibility-for-wrongfulness.” Social movements’ role in ensuring community participation in development and deepening human rights and democracy throughout the world, through elaborate strategies and actions, is now well documented.¹⁰³

Social movements, with their reliance on participatory methods, call for a different kind and quality of accountability—of extracting answerability of institutions toward the people affected by decisions. They thus seek to move beyond a conception of accountability as sanction of breach.¹⁰⁴ Noticeably, participatory accountability is not a reinvention of the wheel in international law. It was one of the crucial human rights pillars that was always emphasized in the RTD discourse. It was asserted as the next best thing under conditions of inequality to deliver the virtues of representation, responsiveness, inclusivity, voice, and self-determined development.¹⁰⁵

Whatever diverse roles social movements have played in development, their enduring feature reflects a cosmopolitan reimagination, for good or ill, of international law and international development structures *from below*. Social movements’ perspectives and praxes have also bolstered peoples’ participation as a counter-power to global hegemonies, fostered a subaltern counter-hegemony manifesting proactivity for clear alternatives, forwarded community counterplots to the deleterious effects of globalization, and advanced transnational movements or

¹⁰³ Leading texts are Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) [Rajagopal, *International Law from Below*]; Obiora Chinedu Okafor, *Legitimizing Social Movements: Lessons from Nigeria* (Africa World Press: 2006); Obiora Chinedu Okafor, *The African Human Rights System: Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007); Susan Dicklitch, *The Elusive Promise of NGOs in Africa: Lessons from Uganda* (Houndmills, Basingtoke; New York: Macmillan Press, 1998); Stephen N Ndegwa, *The Two Faces of Civil Society: NGOs and Politics in Africa* (Kumarian Press, 1996) (Discussing the role of NGOs in Africa’s political and democratization transformation processes); Claude E Welch Jr, *NGOs and Human Rights: Promise and Performance* (Philadelphia: University of Pennsylvania Press, 2001); Claude E Welch Jr, “Human Rights, Environment and the Ogoni: Strategies for Non-governmental Organizations” (1999) 7 Buff Env L J 251.

¹⁰⁴ Drake, *supra* note 98 at 16. Drake argues that the “participatory conception of accountability that are usually advanced in NGOs and CSOs analyses of state and IO accountability obligations” raises “a different kind of accountability—towards the people affected by decisions.” The participatory model, she argues, expands the scope of accountability to encompass democratic values of representation and legitimacy.

¹⁰⁵ *Global Consultation on the Right to Development*, E/CN.4/1990/9/Rev.1, 26 Sep 1990 para 178.

advocacy networks.¹⁰⁶ These subaltern formations further various agendas, among them those seeking to regenerate peoples' autonomy in development.¹⁰⁷

In advancing these different agendas in development practice, social movements have emerged as oppositional local formations that articulate causes and aspirations of the subalterns as they challenge global norms and institutions.¹⁰⁸ In some cases, they present a brand of grassroots, national, and transnational activism and politics.¹⁰⁹ In multiple arenas and contexts, they seek the answerability of actors, the democratization of processes, the responsiveness of institutions, and various forms and claims of global justice.¹¹⁰

Rajagopal demonstrates the national and transnational character of mobilization by grassroots forces against the Narmada Valley dam project that brought local communities, farmers, local and international NGOs, and other transnational social movements together in opposition to the World Bank, local corporations, the Indian government, and other international forces.¹¹¹ Public resistance and opposition to Narmada Valley Project has a long history which may not be fully recounted here.¹¹² From 1979, the World Bank joined to finance this project of dams construction along the Narmada valley. The project would harness the river for hydropower, supply drinking water, and irrigation.¹¹³ Thousands of dams were to be built along the river. This

¹⁰⁶Margaret E Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).

¹⁰⁷ The two-decades long resistance to the Indian Narmada Valley Project by peasants, local communities, farmers, scholars as well as NGOs led to the creation of the Bank's Inspection Panels. For other examples of social mobilization against modernist projects, see Gustavo Esteva and Mandhu Suri Prakash, *Grassroots Post-modernism: Remaking the Soil of Cultures* (London: Zed Books, 2014) [Esteva and Prakash, *Grassroots Postmodernism*]; June C Nash, *Mayan Visions: The Quest for Autonomy in an Age of Globalization* June (New York: Routledge, 2001).

¹⁰⁸ Celestine Nyamu-Musembi, "Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights", in Abdullahi Ahmed An-Na'im ed, *Cultural Transformation and Human Rights in Africa* (Zed Books Ltd, 2002); Sally Engel Merry, "Legal Transplants and Cultural Translation: Making Human Rights in the Vernacular" in Mark Goodale ed, *Human Rights: An Anthropological Reader* (Oxford, Chichester: Blackwell Publishing, 2009).

¹⁰⁹ Rajagopal, "The Limits of Law", *supra* note 81 at 185.

¹¹⁰ Michelle Williams, *The Roots of Participatory Democracy: Democratic Communists in South Africa and Kerala, India* (London: Palgrave Macmillan, 2008); Sidney Tarrow, *The New Transnational Activism* (New York: Cambridge University Press, 2005); Matthew D Stephen, "Alter-Globalism as Counter-Hegemony: Evaluating the 'postmodern Prince'" (2009) 6:4 *Globalizations* 483.

¹¹¹ Balakrishnan Rajagopal, "Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India" (2005) 18 *Leiden J Intl L* 345 at 350. See also Obiora Chinedu Okafor, "What Should Organized Human Rights Activism in Africa Become: Contributory Insights from A Comparison of NGOs and Labour-Led Movements in Nigeria" (2010) 16 *Buff Hum Rts L Rev* at 115

¹¹² William F Fisher, *Toward Sustainable Development? Struggling Over India's Narmada River* (Armonk, New York: M. E Sharpe, 1995); Amita Baviskar, *In the Belly of the River: Tribal Conflicts over Development in the Narmada Valley* (Delhi; New York: Oxford University Press, 1995)

¹¹³ Rajagopal, *International law from Below*, *supra* note 103 at 123.

project was expected to wreak profound environmental and human costs such as displacement of thousands of people, damage to biodiversity and land degradation.¹¹⁴ These are the reasons the project attracted intense national and international resistance as it evolved. Environmental consciousness that had gathered since the 1970s among the urban and rural social classes as supported by social movements shifted attention to the Narmada Valley project.¹¹⁵ Several social movements of peasants, women, farmers, middle classes, and progressive intellectuals came together to campaign against the human and environmental harms.

Opposition to the project was led by Narmada Bachao Andolan (NBA) and Save the Narmada, an organization that brought together human rights and environmental activists, people affected by the project, academics and scientists.¹¹⁶ An international NGO Environmental Defence Fund based in Washington also supported the movements. In the end this social movements mobilization became a national and international cause triggering solidarity with other international NGOs and drawing attention of the US Congress and other legislative bodies of Western countries.¹¹⁷ In 1992, due to immense opposition nationally and globally, the World Bank constituted an independent review committee to look into the complaints. The committee found that the Bank had failed to follow its own directives and procedures. It recommended that the Bank withdraws from the project. In the end, the Bank abandoned the project, highlighting how local actions can mobilize across borders to oppose global forces, at the local levels, and from below. The location of these forces are within the domestic spheres, where they exert counter-plots to global projects at the local level. “Such success was based on local actions, well articulated for many grassroots networks which offered an active solidarity for that purpose.”¹¹⁸

In my view, RTD accountability politics stands to benefit immensely from these alternative forms of engagements, not that these are perfect revolutionary strategies but because these are pragmatic alternatives that can be termed international “institutional bypasses” to the embedded obstacles against institutional reform and change.¹¹⁹ Prado explains that an “institutional bypass

¹¹⁴ The World Commission Report on dams recognizes that conflict heightened due to the social and environmental harms posed by large dam constructions and the failure of financing institutions to conform to regulations. *The Report of the World Commission on Dams, Dams and Development: A New Framework* (London & Sterling VA: Earthscan Publications Ltd, 2000).

¹¹⁵ Rajagopal, *International Law from Below*, *supra* note 103 at 124.

¹¹⁶ *Ibid* at 125.

¹¹⁷ *Ibid* at 124.

¹¹⁸ Esteva and Prakash, *Grassroots Postmodernism*, *supra* note 107 at 34.

¹¹⁹ I borrow this terminology from Mariana Mota Prado & Steve J Hoffman, “The Promises and Perils of International Institutional Bypasses: Defining a New Concept and its Policy Implications for Global Governance” (2019) 10 *Trans*

creates new pathways around clogged or blocked institutions”... “it does not try to modify, change or reform existing institutions. Instead, it tries to create a new pathway in which efficiency and functionality will be the norm.”¹²⁰ As some form of institutional bypasses, social movements praxis captures Rajagopal’s insights that these may constitute “extra-institutional forms of mobilization” capable of influencing institutional outcomes as they “constitute important arenas of resistance that remain beyond the cognitive boundaries of international law’s sole, approved discourse” of human rights.¹²¹

This kind of subaltern politics may also secure, in the language of Okafor, “modest harvests” in other contexts of struggles.¹²² As Keck and Sikkink observe, some social movements are transnational advocacy groups that coalesce with the agenda of framing and inserting alternative ideas into policy debates.¹²³ According to Bradlow, social movements’ reliance on protests not only injects accountability into development decision-making but also broadens “the range of issues that decision-makers consider, and expand[s] the range of decision-makers who can participate in decision-making.”¹²⁴

I lean on the above insights and others for the considered view that, if we leave aside known flaws and limitations that may render social movements praxis ineffective in securing the goals for which they may be deployed, participatory accountability which they assure has some promise and potential. Participatory accountability from below can guarantee a measure of tangible results in making institutions answerable, responsive, transparent, and democratically accountable if it draws from or deploys social movements praxis and techniques of resistance or advocacy.

More critically, I see the resort to participation as an alternative form emphasizing that our understanding of emancipation and egalitarianism (pro-poor strategies) that the Declaration on the Right to Development envisions need not be tied to the totalizing conceptions of accountability

Legal Theory 275; Mariana Mota Prado & Michael J Trebilcock, *Institutional Bypasses: A Strategy to Promote Reforms for Development* (Cambridge: Cambridge University Press, 2018).

¹²⁰ Mariana Mota Prado, “Institutional Bypass: An Alternative for Development Reform” online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815442>.

¹²¹ Rajagopal, *International Law from Below*, *supra* note 103 at 225.

¹²² Obiora C Okafor, “Modest Harvests: On the Significant (But Limited) Impact of Human Rights NGOs on Legislative and Executive Behaviour in Nigeria” (2004) 48:1 *The Journal of Afr L* 23. Okafor was making reference to NGOs, which I acknowledge are not necessarily social movements. However, the point I seek to emphasize is that alternative forms of engagement can secure some sense of accountability, even if in the moderate form.

¹²³ Keck and Sikkink, *supra* note 106 at 199.

¹²⁴ Daniel D Bradlow, “The World Commission on Dams’ Contribution to the Broader Debate on Development Decision-Making” (2001) 16:16 *Ame Uni Intl L Rev* 1531 at 1535

constructed by international law or its other iterations. As I have demonstrated throughout this dissertation, absolute jural conceptions of accountability suffer from an enduring rigidity, anachronism, restrictiveness, minimalism, utopianism, and incompleteness. All too often, too much recourse to legal formalism has tended to limit our ability to grasp the potential and effectiveness of other “leftist alternatives” outside the domain of law.¹²⁵ In proposing a leftist and pragmatic approach that assumes a participatory model, I am alive to the reality that different mechanisms and processes do exist and can be invoked in holding institutions to account in ways that transcend the sanctions approach.¹²⁶

I am however not unaware that incorporating social movement praxis/principles into accountability may itself be coopted either by the states or the IFIs target of such resistance. The cooptation may happen because the resistance posed by various movements always tends to shape and are shaped by working from within the paradigms and norms set by the hegemon that is being resisted.¹²⁷ Two rebuttals to concerns of cooptation are this.¹²⁸ Social movements specifically work from outside the state and IFIs that they seek to challenge. Context therefore matters more for the failure or success of social movements activities and thinking.¹²⁹ Two, in some cases counter-hegemony is itself more about deepening alternative visions of social reality than a challenge and direct confrontation with hegemony.

4.3 Core Techniques and Sensibilities of Participatory Accountability from Below

In this venture, I take inspiration from what De Souza Santos and Cesar Rodrigue-Garavito have called the “subaltern cosmopolitan legality.”¹³⁰ I break ranks with conventional international law thinking to propose what I call *participatory accountability from below*, which goes far beyond the limited and contrived understandings of accountability in international law. I rely on the now

¹²⁵ Roberto Mangabeira Unger, *The Left Alternative* (London; Brooklyn, New York: Verso, 2009).

¹²⁶ Dekker, *supra* note 44 at 22 argues that international organizations should “account for their performance in a much broader way than only on the basis of clear violations of their obligations established under international law.” For the case that accountability mechanisms need to be pluralistic and not monolithic in networked governance systems that are fraught with “governance asymmetries,” see Thorsten Benner, Wolfgang H Reinicke & Jan Martin Witte, “Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability” (2004) 39:2 Government and Opposition 191.

¹²⁷ Rajagopal, *International Law from Below*, *supra* note 103 at 10.

¹²⁸ *Ibid.*

¹²⁹ Miles Larmer, “Social Movement Struggles in Africa” (2010) 37:125 Review of African Philosophy 251 at 252.

¹³⁰ Santos & Rodríguez-Garavito, *Law and Globalization from Below*, *supra* note 36 at 12.

familiar and tested strategies of subaltern counter-forces, particularly their use and reliance on social movements' strategies of resistance to international law and institutions.

Drawing upon social movements' theories of resistance, subaltern cosmopolitan legality has emerged as a praxis and an approach vested with several sensibilities and techniques. Its core sets of techniques that go beyond prevention, mitigation, and remedy as the traditional objectives of accountability are: (i) "social inclusion"; (ii) promoting the agency and autonomy of the people in development decision-making; (iii) mobilizing the masses in the articulation of and struggle for responsive development; (iv) creating localized terrains for counter-hegemonic engagement with global institutions; (v) seeking the dethronement of "coercive institutions" and ideational power that firm up domination; (vi) relying on law and politics to "reimagine" international institutions from below; (vii) articulating solidaristic rights discourses that transcend the individualistic-cum-liberal paradigms; (viii) and producing counter-hegemonic knowledge oppositional to, and seeking the retrenchment of, the hegemonic presentations of reality.¹³¹

As I explain later, with these techniques offered by subaltern cosmopolitanism, we can radically reimagine and enlarge the clamour for development justice, pragmatically and far beyond the bounds of legalistic models of accountability. I conceive of this as a reimagination of international practice and norms in consonance with what Baxi refers to elsewhere as the "authorial role played by the Third World in all its complexity" or as Fakhri adds "[constructing] histories of international law that resonates with peoples of the Third World so that they have a foundation to stand on to make a new future."¹³² My optimism rests on the view that participation as a form of bottom-up accountability resides in the spaces availed by well-established subaltern cosmopolitan strategies of resistance to global development institutions. These include protests, media censure, naming and shaming, transnational lobbying, mutual engagements. For, as Falk himself had earlier rendered, "[a] focus on social movements with restructuring agendas itself incorporates a political judgment on how drastic global reform can best be achieved at this stage of history."¹³³

¹³¹ These attributes of subaltern cosmopolitanism appear in Santos & Rodríguez-Garavito, *Law and Globalization from Below*, *ibid* at pages 12-18. See also William K Carroll, *Expose, Oppose, Propose: Alternative Policy Groups and Struggle for Global Justice* (London: Zed Books, 2016) at 6-16.

¹³² Upendra Baxi, "What may the "Third World" Expect from International Law" (2006) 27 Third W Q at 713; Michael Fakhri, "Introduction: Questioning TWAAIL's Agenda" (2012) 14:1 Oregon Rev Intl L 1 at 11.

¹³³ Richard Falk, "The Global Promise of Social Movements: Explorations at the Edge of Time" (1987) 12 Alternatives 173, 187.

4.4 The Legal Foundation of Participatory Accountability

Participation as a practice that enhances public accountability has a legal foundation in international law and is recognized in UDHR, ICESCR, ICCPR and CEDAW, among other instruments.¹³⁴ In fact the Human Rights Committee recognizes participation as a vital component of democratic governance.¹³⁵ Participation occupies a central and defining place in the Declaration's framework.¹³⁶ Article 1 of the Declaration is the ultimate embodiment of the cosmopolitan principle of exalting the individual's voice, contribution, and welfare in an international platform. It ordains that "every person and all peoples are entitled to participate in, contribute to, and enjoy civil, economic, social and political development in which all human rights and fundamental freedoms can be fully realized." This has been replicated in article 4 of the draft Convention on the Right to Development "which recognizes that participation in and contribution to ... comprise the foundation stones for the right to development."¹³⁷ Article 2(3) of the Declaration further reflects the institutional variant of cosmopolitanism by seeking to constrain all social agents (i.e., the state and its other formations) in the development enterprise to adhere to the injunction of people's participation in development. Article 2(3) mandates a distributive agenda for states, while acting individually and multilaterally, "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."

¹³⁴ The right to public participation or the right to participate in the conduct of public affairs is enshrined in Article 21 of the Universal Declaration of Human Rights (UDHR), Article 25 of the International Covenant on Civil and Political Rights (ICCPR), as well as in other international treaties and conventions such as the African Charter for Popular Participation in Development and Transformation, adopted at the UN, ECA International Conference on Popular Participation in the Recovery and Development Process in Africa 12-16 February 1990, Arusha, Tanzania; the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); the International Convention on the Elimination of all forms of Racial Discrimination (ICERD); and the Convention on the Rights of Persons with Disabilities (CRPD).

¹³⁵ UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7, online: <<https://www.refworld.org/docid/453883fc22.html>>; Magdalena Bexell, Jonas Tallberg and Anders Uhli, "Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors"(2010) 16:1 Global Governance 81.

¹³⁶ Siddiqur Rahman Osmani, "An Essay on Human Rights Approach to Development" in Arjun Sengupta, Archana Negi & Moushumi Basu eds, *Reflections on the Right to Development* (New Delhi; Thousand Oaks: Sage Publications, 2005) at 113.

¹³⁷ Draft Convention on the RTD with Commentaries at 7.

This participatory vision is anchored on some core values. For example, the idea of “free” introduces voluntariness or non-coercion in seeking consent, consultation or approval of the people affected by national and international development. “Active” implies representation or direct participation in decision-making, while “meaningful” suggests that people’s participation has to have real impact on decision-making.¹³⁸

As an earlier report recognized, “participation is the right through which all other rights in the Declaration on the Right to Development are exercised.”¹³⁹ Apart from the international legal instruments that require people to take part in civic matters, the African Commission on Human and People’s Rights has been trailblazer clarifying the legal scope of participation, at least in the context of the African Charter on Human and People’s Rights. The Commission upheld in the *Endorois* case that participation is a cardinal principle so significant in the development process.¹⁴⁰ This case ought to be accorded seriousness, particularly in national and multilateral contexts where states would be negotiating development pacts.

One such case which the state ought to take seriously in national development context is the *Ogiek’s* case. In 2009, the indigenous members of the Ogiek community brought before the African Court a case (the *Ogieks* case) challenging their eviction from Mau forest.¹⁴¹ The Applicant cited a number of alleged violations, including the violation of Article 22 of the African Charter on Human and People’s Rights.¹⁴² It was claimed that the eviction notice did not fully take into account the interest of the Ogiek relating to the use and enjoyment of the forest as their ancestral land and that they were not consulted in the decision to evict them from the forest.¹⁴³ In its judgment in 2017, the African Court read Article 22 of the Charter in consonance with Article 23 of the United Nations Declaration on the Right of Indigenous Peoples (UNDRIP)¹⁴⁴ to “determine and develop priorities and strategies for exercising their right to development” and “to be actively involved” in all development matters affecting them, such as health, housing, and other socio-economic programmes.¹⁴⁵ The Court therefore found in favour of the complainants a

¹³⁸ Mikkelsen, *supra* note 28 at 209.

¹³⁹ *The Report on the Global Consultation on the Right to Development*, *supra* note 105 at 46.

¹⁴⁰ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication No. 276/03, 25 November 2009.

¹⁴¹ *African Commission on Human and Peoples’ Rights versus Republic of Kenya*, Application No. 006/2012, 2017.

¹⁴² Para 10.

¹⁴³ Para 8.

¹⁴⁴ United Nations General Assembly, Declaration on the Right of Indigenous Peoples, A/RES/61/295, 13 September 2007.

¹⁴⁵ *Ogiek’s* case para 209.

violation of the right to be consulted, a violation which impacted their right to social, economic and cultural development in contravention of Article 22 of the Charter.¹⁴⁶ The right to be consulted, and to free, active and meaningful participation seems to hold significant imprimatur in both national and international development contexts.

The right to self-determined development underpinned by common Article 1 of ICESCR and ICCPR is similar in purport and tenor to Article 1 of the Declaration on the Right to Development. The notion of free, active and meaningful participation that forms the basis of self-determined development has been recognized in other jurisdictions. Giving meaning to the ICESCR and ICCPR common Article 1 right to be consulted and to participate in development, the Inter-American Court of Human Rights has determined in *Kaliña and Lokono Peoples v Suriname* that the right entails self-determined development which enshrines the right of indigenous communities to “freely pursue their economic, social and cultural development.”¹⁴⁷ The requirement of free, prior and informed consent is key to self-determined development. This requirement has been recognized by the 2000 World Commission on Dams report as necessary to enable informed participation that allows for broader public acceptance by the people affected by development project.¹⁴⁸ It should be noted that UNDRIP expressly incorporates the RTD into its provisions.¹⁴⁹

Consent, consultation and participation are rooted in the notion of autonomous governance that is so essential to indigenous communities’ control of their development and use of resources.¹⁵⁰ Autonomous governance is itself essential for securing democracy and ameliorating the subordinate status of indigenous communities in development. The tenets of consultation and consent operate to safeguard peoples’ rights that may be affected in the development process.¹⁵¹ Therefore, these cases and more, together with the express legal provisions, form the basis of the substantive elements and foundation of the right to participation as the basis of participatory

¹⁴⁶ *Ibid* para 211.

¹⁴⁷ *Kaliña and Lokono Peoples v Suriname. Merits, Reparations and Costs*. Judgment of November 25, 2015 para 122,124.

¹⁴⁸ American University International Law Review, “The Report of the World Commission on Dams-Executive Summary” (2001) 16:6 *Ame Uni Intl Law Rev* 1435 at 1447.

¹⁴⁹ Preambular paragraph 6 and Article 23.

¹⁵⁰ James Anaya, “International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State” (2004) 21:1 *Arizona J of Intl & Comp L* 13 at 51.

¹⁵¹ Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Addendum: The Situation of Indigenous Peoples in the United States of America A/HRC/21/47 para 47-53.

accountability in international law. I will discuss in the subsequent section how the core sensibilities and techniques of social movements praxis can harness the right of participation in development to achieve certain objectives of accountability that can aid the securement of development justice.

4.5 The Nexus Between Participation and the Answerability Dimension of Accountability

In this dissertation, I develop the links between the participation and answerability aspects of accountability. I understand participatory development processes as constituting the answerability element of accountability. This is supported by the legal anchorage of participation in the Declaration and the cosmopolitan vision of having all those facing marginalization and exclusion involved in self-determined development and development policymaking at the national and international levels. Participation as a core attribute of the RTD norm underscores the centrality of the answerability of institutions in the development process because it ensures “that people affected have a real say in the priorities, design, and implementation of development policies.”¹⁵²

But international law lacks theoretical rigour in sufficiently grasping the way participatory practice entails or subsumes the answerability dimension of accountability. Suffice it to say that the innovation of participatory development has not grown apace with the understanding of participation as a component of the answerability typology of accountability in international human rights law and the study of international organizations.¹⁵³ Besides, a solid conception of *participation from below as accountability in international law* has not yet percolated through the international law and development discourse of accountability.¹⁵⁴ Attempts such as Rajagopal’s construct of counter-hegemony is part of a broad discussion of social movements praxis as a form of Third World resistance in international law from below, but not accountability. Instead, he conceives mass mobilization from below as a power of resistance against hegemony.

¹⁵² Sirgun I Skogly, “The Role of International Financial Institutions in a Rights-Based Approach to the Process of Development” in Bård A Andreassen & Stephen P Marks eds, *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard School of Public Health & Francois-Xavier Bagnoud Center for Health and Human Rights, 2006) at 290.

¹⁵³ Martin V Totaro, “Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development” (2008) 48 Va J Intl L 719 at 733.

¹⁵⁴ See the conceptualization by Konrad Ginther, “Participation and Accountability: Two Aspects of the Internal and International Dimension of the Right to Development” (1992) 11 Third W L Stud at 57. Though Ginther did not describe its conceptual boundaries, he echoed development and political science thinking that participation as a right also expresses the imperative of public accountability and good governance.

We recall that in chapter 1 I noted that answerability of actors (the duty to explain, justify, and communicate decisions) can be engaged *ex-ante*, at the policymaking level, or *ex-post*, through a dialogic process between duty bearers and rights holders or stake holders.¹⁵⁵ This fledgling definition is yet to be captured by the theoretical literature on accountability in international law.

This, however, is not to suggest that participation, or its applicability, is something new for international law. The ideal of peoples' participation has long been regarded as a core component of national development process, governance, development cooperation, and even in international law.¹⁵⁶ A considerable amount of academic thinking and policy practice in the field of development indeed equates these participatory models with varying concepts of voice, empowerment, ownership, partnership, governance, involvement, and inclusion, among others.¹⁵⁷

Participation and answerability are linked in fundamental ways. As a practice, participation avails the basis on which to actualize answerability. They are linked because answerability is inherently attached to the right of access to information, freedom of expression, and the duty to explain and communicate decisions. A good deal of current literature dwell on the linkage between participation and development, but not participation as an aspect of answerability in the accountability paradigm. I must say that the reason answerability is peripheral in international law is because of its intellectual roots in political theory, with its emphasis on communication, information, and justification. It also remains unknown to positivist international law which is ever more obsessed with legal doctrine and legal formalism. As it is well known, international law distances itself from politics, including the politics of resistance habituated in the Third World. On

¹⁵⁵ For the answerability dimension of accountability, see Andreas Schedler, "Conceptualizing Accountability" in Andreas Schedler, Larry Diamond & Marc Plattner, *The Self-restraining State: Power and Accountability in New Democracies* (Boulder, Colorado: Lynne Rienner Publishers, 1999) at 14; Rob Jenkins & Anne Marie Goetz, "Accounts and Accountability: Theoretical Implications of the Right-to-Information Movement in India" (1999) 20:3 Third W Q 603 at 606.

¹⁵⁶ Mac Darrow & Amparo Tomas, "Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation" (2005) 27:2 Hum Rts Q 471.

¹⁵⁷ Anne-Marie Goetz & Rob Jenkins, *Reinventing Accountability: Making Democracy Work for Human Development* (Basingstoke: Palgrave Macmillan, 2005) chapter 2 & 8; World Bank, *World Bank Participation Sourcebook* (Washington D.C: 1996); UNDP, *Reflections on Social Accountability: Catalysing Democratic Governance to Accelerate Progress Towards Millennium Development Goals* (New York: United Nations; 2013); UNDP, *Fostering Social Accountability: From Principle to Practice, a Guidance Note* (Oslo: Phoenix Design Aid A/S, Denmark; 2010); Norwegian Agency for Development Cooperation, *A Framework for Analysing Participation in Development Report 1/2013*

online:<https://www.oecd.org/derec/norway/NORWAY_A_FrameworkforAnalysingParticipationDevelopment.pdf; Deepa Narayan, *Voices of the Poor Vol 1* (Poverty Group, PREM & World Bank, December 1999); Deepa Narayan *et al*, *Voices of the Poor: Can Anyone Hear Us* (Oxford University Press for the World Bank, 2000); Anne-Marie Goetz and John Gaventa, *IDS Working Paper 138 Bringing Citizen Voice and Client Focus into Service Delivery* (Brighton, UK: Institute of Development Studies; 2001).

this score, I agree with Beyerly that “the shortcomings of classical international law as a whole are traced to its positivism.”¹⁵⁸

It is only recently that the relevance of dialogue (information and justification) and communication as essential elements of the answerability prong of accountability are emerging in international law theories of accountability. Take, for example, Dekker, who draws from multiple disciplinary theories to elucidate the implicit linkage of answerability to participation. He views accountability as “involving the justification of an actor’s performance *vis-à-vis* others, the assessment or judgment of that performance against certain standards, and the possible imposition of consequences if the actor fails to live up to applicable standards.”¹⁵⁹ It is not only the “justification” criterion which makes participation an ideal core component of answerability (or emphasizes their overlap). As Dekker reiterates, the nexus lies in the fact that accountability has emerged as a social relationship, defined by a variety of ideals such as the right to demand information, scrutiny of decisions against predetermined standards, and the duty of justification of conduct by actors.¹⁶⁰ So far, we may cite three elements that emerge as prerequisites underlying participation as an essential component of the answerability dimension of accountability (i.e the duty of communication, information, and justification of decisions to the people affected).

4.6 Strategies for Actualizing Participation as a Form of Subaltern Cosmopolitanism Against Global Institutions

So how may we tease out the essentials of an answerability dimension of accountability that relies on the sensibilities and techniques of the ideal of participation as a form of subaltern cosmopolitan strategy against IFIs development praxis? How do we advance a Third World, cosmopolitan, subaltern perspective on accountability in international development practice? How can participation from below secure the kind of development justice envisioned by the RTD?

Encouragingly, interdisciplinary research engagements have long offered reflexive lenses critical for rethinking new frontiers for a counter-hegemonic engagement with international law, notwithstanding that such new forays may not sufficiently be justified on positivist foundations.¹⁶¹

¹⁵⁸ Beyerly, *supra* note 91 at 15.

¹⁵⁹ Dekker, *supra* note 44 at 24 quoting D M Curtin and A Nollkaemper, “Conceptualizing Accountability in International and European Law” (2005) 36 *Neth Yrbk of Intl L* at 4.

¹⁶⁰ *Ibid* at 24,33.

¹⁶¹ A case in point is the daunting amount of work suggesting the emergence of international law from below. Rajagopal, *International Law from Below*, *supra* note 103 makes two main arguments. One, that “the praxis of ...

A rich body of work reposes in social movements theories. Post-development theories have also been able to critique the hegemonizing discourses of development and international law.¹⁶² For our purposes here, the notion of participation as accountability can be integrated with social movements and post-development theories as frames of reasoning to improve our understanding of the answerability dimension of accountability that the Declaration envisions.¹⁶³ This understanding may then be applied to IFIs accountability praxis. In what ways?

Social movements praxis and post-development thinking reveal the eight core sensibilities of subaltern cosmopolitan legality that foregrounds participation in international law from below. They present these as more productive alternatives than reliance on the enforceability dimension of accountability. The core techniques (i.e., social inclusion, exalting peoples' autonomy in development decision-making, mass mobilization for struggle, the creation of localized terrains for struggle, the articulation of solidaristic rights, inscription of counter-hegemonic knowledge in the development universe, bottom-up reimagination of law and institutions, and seeking the dethronement of institutions and their ideational power)¹⁶⁴ may be instruments for use to achieve other ends of development accountability that far transcend prevention, mitigation, and remedy as some of the declared objects of accountability. The RTD's participatory ethic as an alternative, broad-based and less formalistic form of accountability (in both the political, democratic and legal senses) offers these leftist ideas.

As concerns mass mobilization for struggle, this has been demonstrated when people's social-counterpowers are exercised at the national, transnational and international level in challenging

social movements pose radical theoretical and epistemological challenges to international law ... to the extent that they articulate alternative conceptions of modernity and development that cannot be sufficiently captured by extant branches of international law, including human rights" (at 235). In his view, thinking international law through the alternative of social movements is more productive than through formalistic state-centric approaches in the traditional style of positivists and liberals (at 236).

¹⁶² While no uniform thread runs through the post-development critical edifice, their ideological approaches differ but converge on their essentializing, and admittedly, stereotypical views of development enterprise as a parochial and bankrupt Westernization projects in need of abandonment. Sally Matthews, "Post-development Theory and the Question of Alternatives: a View from Africa" (2004) 25:2 Third World Q 373; Ray Kiely, "The Last Refuge of the Noble Savage? A Critical Assessment of Post-Development Theory" (1999) 11 Eur J Dev Res 30; Wolfgang Sachs, "Introduction" in *Development Dictionary: A Guide to Knowledge as Power* 2nd ed (London: Zed Books, 2010) at xviii arguing that "development's hidden agenda was nothing else than Westernization of the world." Most important of all, post-development emphasizes alternative imaginations of the universe and an alternative struggle for "a multiplicity of voices and cultures currently threatened by the monoculture of modernity." See Esteva and Prakash, *Grassroots Postmodernism*, *supra* note 107 at 5.

¹⁶³ The overarching claim is that these theoretical insights have convincingly demonstrated how cosmopolitan and counter-hegemonic discourses have been formulated to disenchant the hegemonic international law and development.

¹⁶⁴ See Santos & Rodríguez-Garavito, *Law and Globalization From Below*, *supra* note 35 at 13-14; Carroll, *supra* note 131.

hegemonic policy paradigms and seeking to empower individuals and communities to participate in their own governance and development decision-making.¹⁶⁵ The idea of “the people,” according to Esteva and Prakash refers to those who are “autonomously organized” ... “for their own survival, flourishing and enduring; both independent from and antagonistic to the state and its formal and cooperative structures; hospitable to “the Other” and thus open to both diversity; mainly expressed in reclaimed or regenerated commons, in both urban and rural settings, and clearly concerned with the common good, both natural and social.”¹⁶⁶

There are innumerable examples of social movements praxis relying on people’s mobilization for struggle against global institutions. A good illustration of this mobilization that the clamour for development justice can learn from is the Indian Narmada Valley Dam Project, which social movements resisted, culminating in the creation of the Bank’s Inspection Panels.¹⁶⁷ The other is the Movement for the Survival of the Ogoni People (MOSOP), which “skillfully [drew] international attention through publications, lobbying at the UN forums and high-profile leadership.”¹⁶⁸ What makes these kinds of strategies relevant for global context struggles is their way of mobilization and drawing solidarity across countries that parades the plight and causes of a people in international forums. They may be applied, in incremental steps and reiterative processes, to oppose policy decisions that the World Bank or IMF may seek to enforce during lending negotiations. Special interest groups and activist forces within a country will have to repurpose their strategies of resistance to policymaking at the national level. Often policy decisions take place between the government bureaucrats and IFIs technocrats who reside in the country or those on specialized missions. It is at these levels where specialized interest groups may seek to challenge policies, from below.

The mass mobilization for struggle, for example in the case of the Narmada Valley Project that drew international attention and forged alliances with civil societies nationally and internationally showed how social movements can oppose global institutions at the national level. The fact that the World Bank instituted the inspection committee to look into complaints and later established a permanent Inspection Panel that exists to this very day shows how grassroots mobilization,

¹⁶⁵ Esteva and Prakash, *Grassroots Postmodernism*, *supra* note 107.

¹⁶⁶ *Ibid* at 13.

¹⁶⁷ See Rajagopal, “Role of Law in Counter-hegemonic Struggle” *supra* note 111, 126.

¹⁶⁸ Claude E Welch Jr., *Protecting Human Rights in Africa: Roles and Strategies of Nongovernmental Organizations* (Philadelphia: University of Pennsylvania Press, 1995) at 54.

however frail, can have far-reaching impact at the global institutional level. The fact that today there exists environmental and social impact safeguards together with indigenous communities' policies is a demonstration that resistance from below can lead to institutional changes and reforms at the global level. These mobilizations and solidarities express the everyday emancipatory power struggles and politics against formal global institutions beyond the premises availed by conventional law.¹⁶⁹

In the case of the Narmada Valley social movements, the various grassroots environmental social movements that had evolved from the 1970s offered to communities and other forces localized terrains for struggle necessary for the articulation of solidaristic rights of peasant communities who would be displaced by global projects. The fact that local people can challenge global projects by offering alternative worldviews inscribes a sense of counter-hegemonic knowledge in the development universe through a bottom-up reimagining of law, development and institutions. Seeing that the World Bank abandoned the Narmada Valley project after intense opposition endorses the participatory sensibility of seeking the dethronement of institutions and their ideational power and certainties that firm up their projects. Indeed Rajagopal sees these forms of mobilization as availing important localized pedestals for institutionalizing resistance that has not been captured within the ambit of international law such as human rights as international law's only sanctioned language of resistance.¹⁷⁰ What the RTD participatory ethic can borrow from is Rajagopal's demonstration of how interest groups, anti-poverty movements, the press, civil society, or specialized NGOs deploy these strategies that inject "extra-institutional forms of mobilization" that operate outside the realm of the state by providing legitimate causes and arenas for speaking against development institutions.¹⁷¹

This resistance to international institutions from below may happen at the national or even at the transnational level, where economic policies of development institutions are discussed.¹⁷² But to be most effective, as post-development thinking emphasizes, international institutions are best opposed at the local level, not their global incarnations, to expose their infirmities that cannot otherwise be apparent when they are openly opposed at the global levels. Local communities can

¹⁶⁹ See Rajagopal, *International Law from Below*, *supra* note 103 at 234.

¹⁷⁰ *Ibid* at 235. The main limitation of international law is its anachronism and artificiality of fetishizing the state as the institutional fulcrum of validity, a fact which thinkers have identified and are making an attempt to construct a larger picture of international law co-opting non-state actors or a "a plurality of social agents".

¹⁷¹ *Ibid* at 225, 243.

¹⁷² Carroll, *supra* note 131 at 34.

fiercely oppose Western development interventions at the national level when they are being written into contracts between borrowing states and the financing institution. This is where social mobilization comes in. Effectively when local communities mobilize this way, at the local and national level, they end up into possibilities of opposing the global development project at the local and national levels. The local mobilization which underpins the idea of participatory accountability from below, recognizes that even if they end up in no success, such a drawn-out confrontational engagement creates an arrangement of power struggle that does not legitimize the machinery of the hegemon. If global institutions were to be opposed at the global level, we end up with the ironic outcome that it leaves intact the very “evil threatening people’s lives.”¹⁷³

This is the lesson that emerged out of the Zapatistas solidarity in opposing the Mexican government’s implementation of neoliberal policies. Esteva and Prakash have studied the Zapatistas movement of local communities in Mexico. This was an uprising of January 1 1994 organized by local communities in Chiapas against the state-led development projects that were enforcing disruptive exogenous development models.¹⁷⁴ The movement involved thousands of people issuing communiques and manifestos, through the media and other national and international platforms about their plight which gained spontaneous international attention and sympathy. This international attention enabled them to create national and international solidarity with other organizations, a fact which discouraged the government from quelling their uprising.¹⁷⁵

What we can draw from this movement is the kind of mobilization and solidarity that is relevant for consideration of the question of power asymmetries, either at the national or international levels. The attention of communities that would rise up against global projects would have to be on how to undermine global hegemonies by undermining the state institutions, policies and modes of implementation that further the agenda of the global hegemon. This can happen through activist forces that challenge trade rules such as those that limit access to anti-retroviral medicine, or those that enforce a stable financial environment, or those that favour private enterprise at the altar of human wellbeing. Note that this struggle happens at the national level, but the target is global norms and policies. Esteva and Prakash argue that mobilizations of this kind

¹⁷³ Esteva and Prakash, *Grassroots Postmodernism*, *supra* note 107 at 10, 21, 24-25,33.

¹⁷⁴ Harry Cleaver, “The Chiapas Uprising and the Future of Class Struggle in the New World Order” Riff-raff, Padua, Italy, February, 1994 excerpts available online: <https://libcom.org/library/chiapas-uprising-future-class-struggle-new-world-order-cleaver>>.

¹⁷⁵ Esteva and Prakash, *Grassroots Postmodernism*, *supra* note at 35.

may have no effect on power structures but nonetheless undermines “the dominant system” at the turfs where this can most effectively be deployed. This resonates with the proposition of subaltern internationalism from below through localized terrains for struggle that challenge international development projects at the national level.¹⁷⁶ By this approach, social movement who double up as the RTD adherents would emphatically reverse the technocratic modernization thinking, within the imperative that development is about people and their wellbeing. Well-being here implies human-centred development and not growth or production or markets or protection of intellectual property. Besides, their emphasis would not just be on the accomplishment of the ends of development but also on the process (means) of achieving development, albeit with a prerequisite that the process be equitable, just, participatory, respect all other rights and focus on promoting wellbeing of populations.¹⁷⁷

Another lesson appears in how civil societies have been able to empower and sensitize the people to be able to assert their rights and demand effective “social inclusion” at all stages of planning and implementation of development. By this tradition, if there can be open, public and transparent discussion and consultation on development policies of the Bank and IMF, we would create an environment for the exercise of the right to information, freedom of expression and speech, and possibility for communication which makes institutions responsive in decision-making.¹⁷⁸ Uvin sees this as a rights-based participatory model that adopts “a root cause” approach to “policies of exclusion and discrimination.”¹⁷⁹ A root cause approach that Uvin proposes can draw from some judicial opinions of the Inter-American Court of Human Rights, particularly on the question of consultation of indigenous communities in development. In *Kichwa Indigenous People of Sarayaku v Ecuador* the Court set out the parameters for effective participation in development.¹⁸⁰ The holding of the Court was that:

[The] obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement. In addition, the

¹⁷⁶ Ibid at 41.

¹⁷⁷ Sengupta, “Realizing the Right to Development” *supra* note 26 at 566.

¹⁷⁸ Osmani, *supra* note 136 at 114.

¹⁷⁹ Peter Uvin, *Human Rights and Development* (Bloomfield, CT: Kumarian Press, 2004) at 143.

¹⁸⁰ *Kichwa Indigenous People of Sarayaku v Ecuador, Merits and Reparations Judgment of June 27, 2012.*

people or community must be consulted in accordance with their own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval, if appropriate. The State must also ensure that the members of the people or the community are aware of the potential benefits and risks so they can decide whether to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this obligation, or engaging in consultations without observing their essential characteristics, entails the State's international responsibility.¹⁸¹

The duty imposed on the state is to ensure "active and informed" participation of the people or entire population, "within a framework of continuing communication," and to be apprised of all the "risks and benefits" so as to make informed decisions. This jurisprudence of free, prior and informed consent can be likened to a root cause approach to accountability that participation from below enforces in development. Its instrumental value is that it makes all actors and their policy contribution visible and visibilized at the initiation stages of projects or at the policymaking stage. It is an *ex-ante* approach that allows the people subject of development to probe and question the rationalities that inform policymaking and other conditionalities that are attached to development or financing projects. The *ex-ante* approach to accountability offers a viable mechanism of dealing with the intermingled effect dilemma in that it renders international actors and their policy choices visible, discernible, and determinate, at the decision-making stages, which policy choices and actions can be interrogated. This interrogation has some possibility of making development institutions responsive to the local needs and development priorities of the people.

The obligation of public participation applies as well to situations where the state bureaucrats initiate or negotiate investment project financing with the Bank, or when the IMF technocrats engage treasury mandarins in setting the structural conditionalities in a target country. The focus of participatory accountability is active, free and meaningful engagement with these institutions from below, in a communicative process that informs the subjects of development of all the risks and benefits of undertaking certain development initiatives. This duty is binding on the state nationally, bilaterally and multilaterally. In fact, Article 8 of the Draft Convention on the Right to Development imposes on the state a duty to ensure that all public authorities and institutions adhere to the obligations entailed in the Declaration while Articles 7 and 9 of the said draft convention

¹⁸¹ Para 177.

enshrine the obligations of international organizations to respect human rights and not to aid, assist, direct or control any entity in the conduct that derogates from the obligations entailed in the RTD. The fact that both the international organization and the state are enjoined to the injunction to adhere to the legal obligation of participation and to ensure conformity of other institutions with this obligation has the potential to impose a sense of social inclusion and people's voices in development. Participatory accountability from below relies on these core sensibilities and techniques.¹⁸²

With regard to economic decision-making, Rusumbi and Mbulunyi¹⁸³ have shown how Tanzanian feminist groupings have made use of political mobilization as a tool for collective action and championing the will of the people in economic policymaking. These NGOs have engaged publicly with the higher echelons of government through civil society representatives, assured strong participation of the masses in policy consultation processes, forged critical alliances with other movements nationally and across borders to channel pressure to every given level of decision-making, questioned various levels of policymaking insofar as those laws or policies would impact the people, and provoked public debate on macro-economic policies with the aim of emphasizing social justice and marginalizing economic thinking in development policies.¹⁸⁴ Rusimbi and Mbilinyi's work presents some of the core set of ideas that pro-RTD social movements can rely on to demand answerability of IFIs in macro-economic decision-making. Specialized civil society and other interest groups may ensure strong participation of the masses in policy consultation processes at the national level. The target should be macro-economic policies that the governments initiate with the advice of IFIs technocrats. At the international level, country-based movements may forge critical alliances and coalitions with other movements nationally and across borders to channel pressure to global policies to align them to considerations of equity and social justice, human well-being and participatory development processes.

¹⁸² We can also draw comparative lessons from the case of *Saramaka People v Suriname Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008*. The Court stated that the government has an obligation to "conduct an appropriate and participatory process that guarantees the right to consultation, particularly with regard to development or large-scale investment plans."

¹⁸³ Mary Rusimbi & Marjorie Mbilinyi, "Political and Legal Struggle over Resources and Democracy: Experiences with Gender Budgeting in Tanzania" in Boaventura de Sousa Santos and César Rodríguez-Garavito eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge; New York: Cambridge University Press, 2005) 283-309.

¹⁸⁴ *Ibid.*

It is apposite to note that participatory models are already in vogue in the Bank's and IMF's development and financial decision-making. The Bank and IMF have conceded to the demands and expanded spaces for civil society organizations (CSOs) consultation and participation in their engagements with developing states and other stakeholders.¹⁸⁵ Increasingly, since 1999, the Bank and IMF have made attempts to increase transparency, participation, and consultation with CSOs in their policies.¹⁸⁶ In 2003, the IMF came up with a staff guideline on consultation with CSOs, which was then revised in 2015.¹⁸⁷ The Bank has a number of policies that require wider consultation of stakeholders in policy formulation. Some of the participatory models of the Bank include the Operational Directive (OD 4.20) and Operational Policy/Bank Procedures on Indigenous Peoples (OP/BP 4.10).

Merits aside, it is not lost on us that these participatory models have been decried as ignoring power dimensions of development practice. As Kapoor shows in his work, they are a “participatory fig leaf,” “tokenistic,” “compensatory legitimation,” or “ritualistic action ... that tends to reproduce the perspectives of dominant actors.”¹⁸⁸ In much the same tone, the IMF itself incidentally notes the deficiency of its own participatory models.¹⁸⁹

I propose that in thinking about participation as accountability from below, we must think about the role that social movements can play in constructing an answerability regime in international law. Moreover, in thinking about firming up the backbone of the RTD regime as a mechanism for delivering development justice, we can go further and draw ample lessons from post-development ideology.

¹⁸⁵ Antoni Verger, D Brent Edwards Jr. & Hulya Kosar Altinyelken, “Learning from All? The World Bank, Aid Agencies and the Construction of Hegemony in Education for Development” (2014) 50:4 Comparative Education at 381.

¹⁸⁶ See the World Bank, *The World Bank Participation Sourcebook* (Washington, D.C: The World Bank, 1996)

¹⁸⁷ 2015 Staff Guidelines on IMF Staff Engagement with Civil Society Organizations” online: <https://www.imf.org/external/np/exr/consult/2015/civilsociety/pdf/CSOs_Guidelines.pdf>.

¹⁸⁸ Ilan Kapoor, “Concluding Remarks: The Power of Participation.” (2004) 6:2 Current Iss in Comp Edu 125 (argues that participatory models produce domination because they are “molded to fit bureaucratic or organizational needs” and because their objective is to “instrumentally legitimize the implementing agency” at 126); Verger et al, *supra* note 185 at 385.

¹⁸⁹ 2015 IMF Staff Guidelines, *supra* note 146 at 3:

CSOs also find engagement with IMF staff to be either too rushed or too technical, and many (59 percent) also believed that IMF staff does not effectively follow up on their engagement with CSOs and often do not take CSO viewpoints into account in shaping IMF decisions. CSOs strongly felt that they are consulted late in the IMF staff decision-making process and engagement often offered window-dressing rather than substantive input into policy strategy, analysis, and decisions.

Chief among the post-development imaginary that stands to enrich the turn to participation as a bottom up accountability is the notion that development must be culturally specific, based on the individual agencies and autonomies of the local people.¹⁹⁰ This notion is a comparator to the RTD discourse, which has in its long career disfavoured a technocratic, top-down approach and looks to peoples' active participation and contribution in all the processes of development. One area where bottom-up planning can rupture practice while investing creative energy is SDG 17.14 on policy coherence and coordination. Social movements can take the lead in championing deeper and divergent views ("a pluriverse")¹⁹¹ on national and multilateral development policies, at the national, regional, and international levels.¹⁹² The notion of pluriverse is that there are many sites of ideation "where there can be no one dominant notion of autonomy."¹⁹³ Avoiding the monolithic approaches also entails looking at social movements not only from the perspective of being, "prima facie, agents of counter-hegemony in their organized dissent to the existing order,"¹⁹⁴ but rather in the capacity that they fill the gaps of a state-centric international law. That is, they offer solutions from outside the spaces provided by the law of international organizations.¹⁹⁵ This is on account of its antecedence in the organized resistance that relies on alternative knowledges, strategies, and visions to alter the conventions, relations, and practices of domination associated with the expansion and constant refocusing of the market episteme.

The advantage of creating a pluriverse is anchored on the post-development thinking of reimagining and creating alternative worlds using local and national thought processes that depart in fundamental ways from the constructs of the Western episteme.¹⁹⁶ In fact, OECD has proposed

¹⁹⁰ Esteva and Prakash, *Grassroots Post-modernism*, *supra* note 107 at 27, 35.

¹⁹¹ *Ibid* at 36.

¹⁹² See, Women's Major Group Recommendations for Accountability, Monitoring, and Review of the Post-2015 Agenda, online:

<www.womenmajorgroup.org/wp-content/uploads/2015/05/WMGPositionPaperonAccountability.docx-2.pdf>.

observes, "Those affected by development—in particular women of all ages, girls, and people from other marginalized groups and their representative organizations—should have the primary voice in holding states and other actors accountable to development commitments. They should be involved in the design, implementation, monitoring, and evaluation of all development programs that affect them. With this in mind, people and civil society organizations should play a key role in any review mechanisms created to monitor implementation of the Post-2015 Agenda, including at national, regional, and global levels. This includes well-resourced and equipped independent civil society accountability mechanisms."

¹⁹³ Esteva and Prakash, *Grassroots Postmodernism*, *supra* note 107 at 41.

¹⁹⁴ William K Carroll and R. S. Ratner, "Social Movements and Counter-Hegemony: Lessons from the Field" (2010) 4:1 *New Proposals: Journal of Marxism and Interdisciplinary Inquiry* 7.

¹⁹⁵ Julie Fraser, "Challenging State-centricity and Legalism: Promoting the Role of Social Institutions in the Domestic Implementation of International Human Rights Law" (2019) 23:6 *The Intl J of Hum Rts* 974.

¹⁹⁶ Esteva and Prakash, *Grassroots Postmodernism*, *supra* note 107 at 25, 36.

stakeholder participation that ensures ownership, involvement, and voice as one of the key tenets of goal 17 on policy coherence.¹⁹⁷ This is also reflected in target 16.7 to “ensure responsive, inclusive, participatory and representative decision-making at all levels.” It is further envisaged in target 17.16 to “enhance the global partnership for sustainable development complemented by multi-stakeholder partnerships that mobilize and share knowledge, expertise, technologies and financial resources to support the achievement” of SDGs. It is by this root cause approach that potentially adverse and productive impacts of policies on the well-being of the people can be diagnosed and modified through an elaborate discursive exchange of ideas from the people.

How future social movements will engage with this imperative of participation and consultation in international development praxis of IFIs is a matter to be left to the core sensibilities and techniques discussed above. Conceptualizing Article 1 of the Declaration, now reproduced as Article 4 (1) of the Draft Convention on the Right to Development can draw from such sensibilities and techniques that social movements have succeeded in writing in international law.

Article 1 can be read as enshrining answerability as accountability which can draw from the kind of subaltern cosmopolitan legality and the root cause approach that social movements instill in development practice. It is important that I underscore this view. I think this is a crucial dynamic that the RTD accountability politics should advance, based on the recognition that the implementation of solidaristic rights (such as the right that demands a just and equitable international order) cannot be left to the domain of law only, but can be advanced through participatory approaches that enable people to contribute to and be consulted in the development process. The Draft Convention on the Right to Development makes participation a dominant feature of the RTD, emphasizing that the process of development is as important as the outcomes of development, for which the requirement of “active, free, and meaningful” participation is paramount. The obligations recognized by the draft convention, if it becomes law, including the duty of participation, applies to international organizations under Article 7 and 9. But even without the adoption of the draft convention as hard law, already, development praxis of international organizations are bound by human rights duties deriving from the UN Charter and other international law norms.

¹⁹⁷ OECD, *Policy Coherence for Sustainable Development 2017: Eradicating Poverty and Promoting Prosperity* (Paris: OECD Publishing, 2017) cited in Olivier De Schutter, “The International Dimensions of the Right to Development: A Fresh Start Towards Improving Accountability” A/HRC/WG.2/19/CRP.1 at 75.

If we are to revamp the robustness of RTD accountability politics, we need to inject more ideological fervour into its accountability politics. This reinvigoration must be applied to the context of the 2030 SDGs agenda, where accountability in the implementation of targets has been placed front and centre. We need to think of how to mobilize for protracted struggles, social inclusion, the presentation of alternative developmental ideas, and the reimagination of development based on authentic local ideas. Active, free and meaningful participation is helpful to such struggles. Such struggles will see people demanding information and explanation of development policies negotiated by development bureaucrats—at whatever levels where bilateral or multilateral development policymaking takes place. Like other activist forces, their purpose would be to create oppositional groups that drive the agenda for economic and social emancipation as well as to contest the excessive economic rationalism that pervades the neoliberal development agenda.

Strategies for actualizing participatory ethic in the accountability praxis of IFIs must recognize that the future practice of RTD accountability causes must shift. It must channel intense public scrutiny to such sites as the formulation of the financing agreements and policy issues that the Bank or the Fund recommend for borrowing states, with a specific attention to structural violations and the necessity of accountability at the global institutional levels. This shift must deploy the kind of social movements praxis discussed above. In other words, the RTD accountability politics must shift towards structural causes of poverty and inequalities, which, as experience shows, cannot be tackled through the mundane human rights approaches to justice. The point which must be underscored is that unlike legal notions of accountability, which are reactive, seeking to address isolated incidences of consequential harm, the conception of participatory accountability is different. It is not to be triggered by the occurrence of harms or seek to remedy infringements resulting from an actor's conduct. Where the RTD participatory sensibility would be asserted, it would be proactive and reiterative, *ex-ante*, at the policy making stage and directed to the agency of development institutions.

I propose that this can happen through national and transnational activism, advocacy and resistance, among other strategies of people's counter-power.¹⁹⁸ Through mass mobilization and

¹⁹⁸ "...transnational actors such as non-governmental advocacy groups demand to be heard in global policy-making. States and international organizations can no longer afford to bypass the concerns of transnational actors who have successfully mobilized around many global issues and have strengthened their bargaining position with significant moral, financial and knowledge resources." Benner et al, *supra* note 126 at 195.

activism, people will have to demand to be given an opportunity to participate meaningfully and to contribute their own perspectives on projects and development policy financing, including scrutinizing the conditionalities that accompany such lending agreements. However, the question of how participatory processes can be connected to decision-making processes at the bureaucratic level of the Bank and the IMF remains problematic.

For me, social movements can conduct dialogue with IFIs during decision-making processes. It does not matter that the Bank and the IMF, together with their Executive Boards are headquartered in Washington. A degree of answerability is attainable so long as their agents, representatives, and country missions and staff or the Executive Board can be made to explain and justify their policy prescriptions at the national level. In my view, in the same way local farmers, fishermen, and village dwellers rise up against international development banks, they can coalesce from below to oppose IFIs' policies at the local level when they negotiate with states and as states implement those policies. This is what we learn from the notion of "grassroots post-modernism", the idea that global forces can only be opposed in their "local incarnation" such as country missions, country representatives, seconded technocrats, development partners, development policies.¹⁹⁹ The resistance to the Narmada Valley Dam project in India that mobilized intense national and transnational social movements offers a good lesson for the future of the participatory accountability from below. While this case shows social movements struggle against development project financing, its strategies of national, transnational and international mobilization and solidarity to oppose global project can be harnessed as accountability from below in development policy financing.

Participatory accountability that relies on these strategies, as Narmada Valley Struggle illustrates, has seen social movements lobby institutions and demand their answerability by seeking information and justification of proposed projects. What is crucial is that such strategies reclaim participatory autonomy for the majorities marginalized in development policy practice; one that would see to it that voice and control reposes in the people and not in dominant institutions that usurp legitimate governance. The purpose of participation would be to provide a resurgence of the lost autonomy and preferences of the people in development. Autonomy and social inclusion are two key sensibilities of subaltern cosmopolitan legality that I have highlighted previously.

¹⁹⁹ Esteva and Prakash, *Grassroots Postmodernism*, *supra* note 107 at 35.

Given that all policy decisions of IFIs follow bureaucratic procedures that often takes place between state institutions and Bank or IMF officials, it is here that IFIs and state agencies, especially national treasuries can be made to explain and justify their policy recommendations in an open and transparent manner, in line with the core answerability edict of giving information and justifying decisions. Social movements can lobby to have them included in this negotiation process. It is through these kinds of engagements in localized terrains that people will be able to question, prospectively, the potential causes of poverty and inequality that inhere in the proposed policy system.

By deliberating and exchanging information on policy decisions, *ex ante*, people can be able to cite structural violations that pure economic approaches may not sight. This would warrant development institutions as well as state agencies to answer for, and therefore be more responsive, in their decisions at the policymaking level. This *ex-ante*, process-based approach to accountability is one sense in which to exert meaningful participation as “an effective expression of popular sovereignty in the adoption of development programmes and policies.”²⁰⁰ Participatory ethic promises this ideal of self-determined development. It also envisages the direct and distinct accountability of IFIs which may be attained through these local expressions of social counter-power that do not necessarily deploy legal techniques. As Sen emphasizes, “social and political activism is bound to have an important role, both in generating social pressure ... and in providing monitoring and scrutiny” to development institutions.²⁰¹ Answerability can be demanded by social movements’ exertion of social and political activism, as agents of the people, whenever state bureaucrats are in negotiation with the Bank’s or IMF’s technocrats. This is how local forces can deploy their autonomy to challenge global institutions and global projects in their local incarnations that may destroy their economies.

The other contribution is organizational strategies. Social movements are diverse in organizational forms, structures, and objectives and it is difficult to pin down the kind of initiatives and strategies they can formulate to provide for alternative imaginations in development, at both

²⁰⁰ Flávia Piovesan, “Active, Free and Meaningful Participation in Development” in United Nations, Office of the High Commissioner for Human Rights, ed, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (New York/Geneva: United Nations, 2013) at 105.

²⁰¹ Amartya Sen, in Bård A Andreassen & Stephen P Marks eds, *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard School of Public Health & Francois-Xavier Bagnoud Center for Health and Human Rights, 2006) at 5.

national and transnational levels. They can rely on activism, protests, advocacy, lobbying, writing letters, and so forth. Effectiveness aside, social-counter-power, in whatever form it comes, can also rely on naming and shaming institutions by external forces and can apply social pressure, to influence behaviour, and instill responsiveness of institutions. Political agitation, censure of actors for violations, or administrative procedures that do not necessarily require bindingness have always been relied upon outside the appeal of international law.²⁰²

4.7 Participation from Below as a Form of Political and Democratic Accountability

The idea that people can create spaces for “the promotion of plural participation” or other discursive sites for policy deliberation is of profound significance to the answerability typology of accountability.²⁰³ This deliberative policymaking also has a democratic quality that can enhance political legitimacy in international governance.²⁰⁴ The roles that social movements can play in this regard—asserting different interests and stake-holding—is significant for democratic accountability in the governance of the global social relations.²⁰⁵ As experts of global governance note, expanded participation enhances accountability and the democratic governance of international organizations, an objective that goes beyond the communication, information, and justification functions of answerability.²⁰⁶ Therefore, participation as a norm of action in development introduces a far more nuanced understanding that captures even the political and democratic senses of accountability, particularly the inclusion and representation aspects. It displaces the traditional understanding of accountability in international law far from responsibility and liability for wrongfulness. The International Law Association has studied the concept and concluded that accountability has different forms and levels.²⁰⁷ It may take legal, political,

²⁰² I am indebted to Peter Uvin, “From the Right to Development to the Rights-based Approach: How ‘human Rights’ Entered Development” (2007) 17:4-5 *Development in Practice* 597 at 603.

²⁰³ Taekyoon Kim, “Contradictions of Global Accountability: The World Bank, Development NGOs, and Global Social Governance” (2011) 18:2 *Journal of International and Area Studies* 23 at 27.

²⁰⁴ Patrizia Nanz and Jens Steffek, “Assessing the Democratic Quality of Deliberation in International Governance: Criteria and Research Strategies” (2005) 40 *Acta Politica* 368.

²⁰⁵ Kim, *supra* note 203; Karin Bäckstrand, “Democratizing Global Environmental Governance? Stakeholder Democracy After the World Summit on Sustainable Development” (2006) 12:4 *European J Intl Relations* 468 at 469. Cristina Lafont, “Accountability and Global Governance: Challenging the State-Centric Conception of Human Rights” (2010) 3:3 *Ethics & Politics* 193 (defines democratic accountability in terms of two key elements of inclusion and representation at 195).

²⁰⁶ Bexell *et al*, *supra* note 135 at 82;

²⁰⁷ *ILA Report*, *supra* note 42 at 168.

administrative, or financial forms.²⁰⁸ It may also have different levels, such as internal or external scrutiny, liability for tortious consequences, or responsibility for conduct or omission that does not otherwise constitute a breach of international standard.²⁰⁹

In the political and democratic senses of accountability, the UN Global Consultation report on the RTD recognized that popular participation has the further potential, under conditions of inequality and subordination, to deliver virtues of representation, responsiveness, legitimacy, inclusivity, voice, and self-determined development.²¹⁰ These are the kinds of values that most contemporary accountability mechanisms do not principally aim to achieve. These virtues are important and relevant for the RTD accountability politics, particularly when applied to challenging the blemish of the international development enterprise constituted by illegitimacy and democratic deficit in decision-making.²¹¹ Participation therefore has the transformative potential to ensure that the poor confronted with exclusion, discrimination, and marginalization as forms of development injustice are meaningfully and actively consulted in a development process. Such consultation instills a democratic quality in decision-making, through values of representation, plurality of voices, and deliberation in decision-making. This should be the case, irrespective of whether those decisions are undertaken by governmental bureaucracies or supranational institutions.²¹²

4.8 Participatory Accountability and Counter-Hegemonic Knowledges of the People

At the political level, the persistence of resistance and protest implied in participatory accountability through social movements praxis entails putting policy instruments of modernization by global institutions at the crosshairs of civil dissidence. This is one way of democratizing global policymaking, by demanding a participatory role of civil society.²¹³ This objective is unrealizable through legal accountability.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid* at 169.

²¹⁰ Global Consultation Report, *supra* note 105 para 178; Bexell *et al*, *supra* note 135.

²¹¹ "...very little empirical research has tried to assess the actual level of openness of the Bank to external ideas and, even less, to the concrete effect of external participation in the Bank's policies." Verger *et al*, *supra* note 185 at 382. See also IMF 2015 Guidelines 14 on CSOs participation, *supra* note 156: "staff is advised not to discuss sensitive information with CSOs regarding ongoing IMF program negotiations with a government, or detailed program elements that have not yet been agreed upon with government. Nor can they release market-sensitive information."

²¹² Uvin, *Human Rights and Development*, *supra* note 151 at 138.

²¹³ Piovesan at 106.

As post-development scholarship now reveals, communities have tended to view the neoliberal policy system not only as one that created daunting dehumanization and marginalization of the majority poor, but which the masses, such as the Zapatistas, are repudiating by recreating their own culturally autonomous and authentic local “post-modern” definitions and alternatives.²¹⁴ Civil dissidence entails that people can mobilize against the global project of development and the central planks that hold them together. Their target of resistance should include the IMF conditionalities for credit. Such resistance can happen, at the grassroots level, when Letters of Intent or Memorandum of Understanding containing loan conditions are being drafted. People, activists, and other groups can marshal voices to oppose terms of negotiations between the government and development institutions. This has the modest potential to render irrelevant global development institutions by what post-development thinkers call “a politics of No.”²¹⁵ This mold of politics relies on local thinking and spaces, almost akin to the participatory approach based on choice, voice, and self-determination that the RTD movement favours. It is a way of ignoring all the iterations and apparatuses of the global project that constrain peoples’ autonomy to direct their own development. Resistance and protest may have a way of making it hard for global development institutions to impose policy constraints and terms that are unpalatable and unwelcome to a wider majority of the people.

I see that the RTD accountability politics may capitalize on social movements’ active involvement in and scrutiny of negotiations and processes of development policy approvals. Consultation can bring new and creative ideas that dethrone, or in some way temper, the idiosyncratic preferences of development institutions.²¹⁶ As development thinking emphasizes, participation should be based on a “genuine exchange of ideas, or deliberation, as well as decision-making by reasoned consensus.”²¹⁷ To this end, social movements may not wholesale seek to distance themselves from, or supplant, the modernization project or its vision, but they may seek

²¹⁴ Esteva and Prakash, *Grassroots Post-modernism*, *supra* note 107 at 5.

²¹⁵ *Ibid* at 28.

²¹⁶ IMF 2015 Guidelines on CSOs participation, *supra* note 187 at 4: “Overall, systematic engagement with CSOs can help: (i) improve program design and traction of IMF policy advice by providing IMF staff with helpful insight, analysis, and knowledge of local contexts (for more tailored policies) to supplement official data and perspectives in official circles; (ii) contribute to constructive public debate on policy options that can help build mutual understanding of IMF-backed measures; (iii) assess political viability and promote country ownership and citizen oversight by engaging various stakeholders and constituencies; and (iv) enhance IMF accountability and legitimacy through a more transparent dialogue with a broader and diverse group of stakeholders.” This reflects self-improvement, transparency, and responsiveness of institutions.

²¹⁷ Verger, *supra* note 185 at 385.

its normative reorientation by instilling the harmonization of exogenous visions of development with the voices of the people through democratic and political accountability. Therefore, policy preferences will have to be questioned, and both the state and development technocrats in country missions would have to justify and explain their decisions to comport with considerations of equity or human well-being.

When seeking to direct, control, and own the development process, the imperative of local thinking as one way of rejecting the global project, or top-down developmentalism, is achieved.²¹⁸ The motivation of these local actions and thinking are to marginalize “economic thinking” and replace it with ways of seeing the world that are rooted in the cultures of ordinary members of the community.²¹⁹ A true characteristic of counter-hegemonic agency and voices is to offer alternative knowledge, “including critiques of the existing order, policy alternatives, strategies for change and wider visions of future possibilities.”²²⁰ RTD accountability politics stands to gain positive capacity from the recognition that when people present their own visions of development, they would be seeking alternative visions of the universe predicated on creative local thinking as a sign of rejecting external policy constraints. This would avail new spaces, for insistence, on endogeneity to a world predominantly governed by (the exogenous) market principles as the sole discourse of development. The post-development vision asserts that local thinking and action, as opposed to liberal economic thinking, enable local communities to rediscover “their own definition of needs” and to revamp and pursue their own “autonomous ways of living.”²²¹ This thread should run through the RTD discourse as one of the guiding values for the realization of SDGs. It would highlight the consciousness that centralized economic planning obliterates the participation of individuals and groups and obstructs their ability to determine a model and process of development that suits their needs and conditions.

4.9 Responsiveness, Transparency, and Self-improvement of Institutions

As explained above, I do understand that mechanisms of accountability are varied (e.g., “monitoring, reporting, public debate, and greater citizen participation in public service

²¹⁸ Esteva and Prakash, *Grassroots Post-modernism*, *supra* note 107 at 31.

²¹⁹ *Ibid* at 10.

²²⁰ Carroll, *supra* note 131 at 9.

²²¹ Gustavo Esteva, “Development” in Wolfgang Sachs ed, *The Development Dictionary. A Guide to Knowledge as Power* (London: Zed Books, 1992) at 21.

delivery”).²²² Mechanisms are so diverse that they cannot be tethered to legal conceptions only.²²³ They serve different objectives that can be realized through myriad processes. I recognize that the answerability model cannot be adopted in all development relationships ranging from project financing to development policy financing to negotiation of debt forgiveness or stabilization financing, however, it has a further unique potential that can be harnessed. Participatory accountability from below can stimulate the responsiveness of institutions, improve transparency of processes, and possibly enhance the self-improvement of institutions in terms of development decision-making.²²⁴ Participatory accountability from below goes beyond the traditional remedial measures by securing these outcomes.²²⁵ For me, this is how the answerability dimension of accountability can be relied upon to improve the transparency, responsiveness, effectiveness, inclusivity, and democratic legitimacy of IFIs. In essence, this is how a larger reading of Article 1 of the Declaration reintroduces political economy questions into development accountability politics.²²⁶

4.10 Potential Challenges to Participatory Accountability from Below

The impediments for this kind of social mobilization are legion including legitimacy concerns, funding constraints, and the danger of cooptation or what Sapinski and Carroll call the NGOization of social movements, a danger that “might confer upon them a ‘gatekeeping’ role that coopts movements into dominant hegemonies and marginalizes their more radical elements.”²²⁷ These concerns can be answered by the insight that Esteva and Prakash share that the documented experiences of various social movements “does not mean that success always accompanies local

²²² Darrow and Tomas, *supra* note 156 at 487-8.

²²³ Benner *et al*, *supra* note 126.

²²⁴ Verger *et al*, *supra* note 185 at 384 “...such participation can contribute, on the one hand, to the effectiveness of their actions and, on the other, to the enforcement of rules and norms”. See also United Nations Environmental Programme, *Options paper for the involvement of civil society organizations in an intergovernmental platform on biodiversity and ecosystem* 21 March 2012 UNEP/IPBES.MI/2/INF/6services; Johannah Bernstein “Assessing the Value of Civil Society Involvement in IPBES Governance” IUCN briefing paper, 20 May 2010.

²²⁵ See generally Shelton, *supra* note 20.

²²⁶ Some of the political economy questions include subjugation, discrimination, inequality, inequities, non-participation, democratic deficit and paternalism of the international economic order.

²²⁷ William K Carroll & J P Sapinski, “The Challenge of NGOization” in William K Carroll, *Expose, Oppose, Propose: Alternative Policy Groups and Struggle for Global Justice* (London: Zed Books, 2016) at 121-123. See also Obiora Chinedu Okafor, *Legitimizing Social Human Rights NGOs: Lessons from Nigeria* (Africa World Press: 2006) at 225.

struggles or that global forces are being dissolved by these initiatives. In many cases the results are ambiguous.”²²⁸

For one, the problematic issue is the ways by which self-determination and peoples’ wishes in development would be invoked and operationalized in multiple development arenas where aid, debt relief, or financing programmes for poverty eradication or stabilization financing are debated between states and development agencies. On this score, Mutua has lamented the marginal presence of the RTD in international activist politics. He complains of the neglect of international redistributive justice concerns that socio-economic rights speak to.²²⁹ The human rights NGOs and states of the South, he explains, have always lacked the resources, intellectual clout, and skilled participation to challenge the market principles and other liberal economic thoughts advocated by the North.²³⁰

Nye Jr. offers a counter-insight to Mutua’s marginality dilemma, highlighting the prominent role of NGOs, interest groups, and the media in enabling social dialogue of policies:

In addition to voting, people in democracies debate issues using a variety of means, from letters to polls to protests. Interest groups and a free press play important roles in creating transparency in domestic democratic politics and can do so at the international level as well. NGOs are self-selected, not democratically elected, but they too can play a positive role in increasing transparency. They deserve a voice, but not a vote. For them to fill this role, they need information from and dialogue with international institutions.²³¹

Nye’s thoughts are key guidelines on how we may rethink firming up the backbone of the RTD norm through alternatives to a totalizing order. His point seems to be that while peoples’ direct participation in the making of economic policies is a rare occurrence at the supranational level, there is a possibility for this to gain salience in economic governance through alternative approaches promised by dialogic engagements.

Where participatory processes would appear weak either due to legal or institutional impediments, ways can be found for anchoring and securing participatory processes through constitutional, legislative, or institutional amendments and reform to ensure peoples’ voice in

²²⁸ Esteva and Prakash, *Grassroots Postmodernism*, *supra* note 107 at 33.

²²⁹ Makau Mutua ed, *Human Rights NGOs in East Africa* (Philadelphia: University of Pennsylvania Press) at 23.

²³⁰ Makau Mutua, *Human Rights Standards: Hegemony, Law and Politics* (Albany: State University of New York Press, 2016) at 69.

²³¹ Joseph S Jr Nye, “Globalization’s Democratic Deficit - How to Make International Institutions More Accountable” (2001) 80 *Foreign Aff* at 5.

economic governance. In Kenya, for example, the constitutional sanction of public participation as a national value and principle of governance has made participation a prerequisite in all public decision-making, including at subnational, legislative, and executive levels.²³² Overall, the scope of such participation should be wide enough, to include public matters in the realm of economic governance, borrowing plans, budgetary financing, and other commitments governments forge with international financial and donor institutions.²³³ In all these cases the standard of evaluation must be universal human rights, of which the RTD avails a most appropriate yardstick.

5. CONCLUSION

To sum up, I have advanced a critical evaluation of the Western-derived regimes, invariably predicated on, and constructed by, international law's liberal traditions of constraining sovereignty and of defining accountability restrictively as remedy of wrongfulness/violations. I have brought into critical perspective the internal accountability of development institutions and the review, follow-up and monitoring procedures of the 2030 Sustainable Development Agenda. I also critically examined internal institutional accountability rules as well as international doctrines of accountability from the RTD perspective. I questioned their adaptability for materializing development justice, one of the humanitarian projects into which international law has been diversified. I probed whether extant regimes of accountability can be harnessed to confront contemporary challenges of development injustices. I interrogated whether they need recalibration in the face of endemic development injustices, or whether they should be abandoned altogether or augmented by alternative approaches outside the domain of international law. I argued for a deeper and nuanced understanding of principles and norms of legal accountability of international financial institutions beyond interactional violations. I argued that conceptually bounded doctrines and practices of accountability that liberal international law has so far produced and reproduced are so woefully inadequate and ill-adapted to securing development justice for the Global South.

²³² Article 1 (2) of the Constitution of Kenya 2010 provides that all sovereign power belongs to the people of Kenya which the people may exercise directly or through their elected representatives. Article 10 (2) a, b and c enshrines national values and principles of governance to include; democracy, participation; inclusiveness; good governance, integrity, transparency, and accountability. Other provisions on public participation are Articles 35 on access to public information; 174(d) on community right to manage their own affairs; 201(a) on accountability and participation in public financial matters;

²³³ Rusimbi & Mbilinyi, *supra* note 183.

Contemporary regimes of accountability are not able to confront some realities that undercut their underpinning logic.

It is for this reason that I resort to the core element of the RTD to “participate in, and contribute to, development” as a potent tool that can be relied upon by the people to clamour for development justice. Participation avoids the consequential (*ex-post*) approach to violations. It insists on vindication (*ex-ante*) at the primary stages of making the rules and policies that would potentially engender and perpetuate those violations. It is contextually aware and draws from the RTD key tenets. I conclude by making the justifications for participatory accountability from below from an institutional cosmopolitan perspective. This theory focuses on the assignment of human rights responsibilities within the institutional order for actions that render others more vulnerable to domination and coercion. Participation as a bottom-up accountability, as ineffective and inefficacious as it may be, has the potential and promise to augment and supplement, as may be appropriate, though not necessarily in every given situation, legal and other approaches to accountability. Admittedly therefore, participatory accountability from below is part of a whole gamut of measures by social movements that seek to effect, implement, maintain, and regain systemic change in the global institutional order. It is not new or radical. This dissertation endorses what has been tested in different arenas, in diverse contexts, through various strategies, by various social agents and movements. In making this admission, I am conscious that there is no common ground on which a universal system of accountability can be conceived to respond to such complex societal problems like development injustice, neither can we all agree on a monolithic method of emancipatory resistance to the global policy system. Rather than seek a homogenizing approach, I advocate an accountability mechanism that recognizes Third World agency and resistance in international law, one that is founded on a root cause approach to structural injustices of the global policy system. Through this Third World politics of resistance, we can suitably and adaptably respond to international law’s rationalization and legitimization of the IFIs’ accountability avoidance, obstruction and disconnection. This is how I propose that we rely on bottom-up agency of the people to write resistance in international law and make it recognize Third World emancipatory claims for development justice.

CHAPTER SEVEN

THE CONCLUSION AND FINAL REFLECTIONS

In this dissertation, I set out to examine how international financial institutions' (IFIs) interventions in the global economy and the development realm can effectively be constrained by accountability. Accountability is one of the paramount human rights standards that can be deployed to realize development justice. Enhancing accountability in global development practices emerged as the most crucial objective in the implementation of the United Nations 2030 Sustainable Development Agenda.¹ But so far no *detailed* theoretical or policy debate has examined how development justice can be realized through an international mechanism that recognizes the persistence of structural injustice which demands the imperative of direct and distinct accountability of IFIs in development practices. Blandly accepted from its inception, the SDG framework for the accountability of actors, including private actors involved in the sphere of development, has been touted as a fundamental principle guiding the implementation of the goals.² And yet, so far, this policy commitment to deepen accountability has only been accompanied by a rhetorical debate, and seemingly lacks any practical measures or comprehensive programme of action to guide the implementation agenda. It was therefore the principal aim of this dissertation to investigate ways through which these deficits and dysfunctions can be redressed, or at least ameliorated. It was the purpose of this dissertation to explore ways of “firming up the backbone” of the RTD regime through accountability praxis that can be deployed to protect those in the Global South against harms causally linked to IFIs' development-related interventions. Firming up the backbone of the RTD regime is central to the post-2015 conceptions and practice of a rights-based international order.³

¹ See OHCHR, “Integrating Human Rights into the Post-2015 Development Agenda Follow-up and Review: Ensuring Accountability for the SDGs” online: <<http://www.ohchr.org/Documents/Issues/MDGs/Post2015/AccountabilityAndThePost2015Agenda.pdf>> [OHCHR, “Ensuring Accountability for SDGs”];

² For the idea that accountability is a key policy action in the context of SDGs, see United Nations, *A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development* (New York: United Nations, 2013) at 22 [United Nations, *A New Global Partnership*]; Office of the High Commissioner for Human Rights & Center for Economic and Social Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (New York/Geneva: United Nations, 2013).

³ Obiora Chinedu Okafor, “African Lessons for Post-2015 Global Right to Development Conceptualization and Practice” (2015) 2 *The Trans Hum Rts Rev* 169.

1. KEY FINDINGS OF THE DISSERTATION

This dissertation deployed TWAIL and institutional cosmopolitan, two theories that are compatible with each other in their critique of the imperialist international law and its construction of unfair and unjust schemes of arrangements.⁴ I relied on these theories to examine whether the general principles of accountability born of counter-sovereignty dogmas of international law, those rooted in contemporary human rights accountability practices, and the internal processes of accountability of the Bank and the IMF are suitable and well-adapted to the securement of development justice as it is envisaged by the Declaration on the RTD. I also examined whether the existing regimes can be relied upon, or generically transplanted into contemporary development practices to achieve the objective of development justice. I conducted this inquiry by relying on the RTD as a discourse that questions the cherished beliefs and doctrines that international law produces and reproduces in development accountability practices. This inquiry has made the following findings:

One overarching finding of this dissertation is that the existing accountability regimes (which are mostly “Western-derived” in their conceptions and configuration) are ill-adapted and unsuitable for vindicating infringements of the RTD and therefore incapable of securing development justice for people in the Global South. The other general finding is that the imperative of direct and distinct accountability of IFIs has *not* been an essential part of the development of the law of international organizations.

To be clear, though international law has always evolved doctrines that do not completely ignore the imperative of accountability of IFIs, it has constructed and mobilized meanings that qualify every doctrine of law and every practical measure aimed at the direct and distinct accountability of IFIs in development. International law has therefore been instrumental in facilitating the sustenance of the structural relationships of domination, subordination, and marginalization of the Third World through obliteration and depletion of the direct and distinct accountability of IFIs. International law of development therefore lacks any emancipatory

⁴ For the argument that the true nature of international law varies across time and that the totalizing critique of international law as imperialist and Western is not an appropriate account and therefore misplaced, see George Cavallar, “Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?” (2008) 10 *Journal of the History of International Law* 181.

potential and cannot lay claim to any quality of securing development justice through holding accountable the most influential actors in global development practices.

The other key finding which formed the central argument of this dissertation has come to fundamentally alter the way we think about development accountability practice. I argued that international law and development praxis sanction and legitimize the avoidance of, disconnection from, and at times obstruction of the direct and distinct accountability of IFIs for their interventions in the global economy and the development realm. To be sure, it is instructive to note that this dissertation did not argue that international law sanctions *absolute* and complete accountability avoidance by IFIs. Rather, it argued that international law institutionalizes highly *qualified* and *inadequate* accountability mechanisms as part of the legacy of the hegemonization of development and international law's creation of subject peoples.

The accountability disconnects, dysfunctions, eclipses and disconnections in relation to IFIs' interventions reside in two sites in the international normative system. One site is the specification of human rights duties and obligations (i.e., the applicability of primary rules), and the second site is that of responsibility allocation (i.e., the legal process of the attribution of wrongful conduct to an actor).

Through critical discourse analysis, I have shown how the phenomenon of accountability avoidance, disconnection, and obstruction is discursively constructed (formulated, articulated, rationalized, and legitimized) by international law discourses (the practice of language, doctrines, and precepts of law). These discourses are then deployed (in practice) as devices for domination, subjugation, hierarchization, legitimization of power, and accountability evasions and avoidance. Indeed, there are a number of doctrines that international law has forged and relies on to perpetuate accountability dysfunctions and deficits in development to further the legacy of domination, inequality and marginalization. This legacy is to be seen in the fact that these very doctrines are part and parcel of the organized strategy to shirk accountability for those most culpable for global poverty, inequalities, and structural impediments to human-centred development. In this regard, I analyzed the way the functionings of hegemony and power are exemplified within social institutions as expressed in the constructed "meanings" of the idioms and languages of international law.

Indeed, the doctrines and idioms that facilitate accountability avoidance, disconnection, and obstruction are legion. I have described and analyzed in detail the deployment of the political

prohibition doctrine, the dominant application of state responsibility doctrine, precepts of shared responsibility, the notion of collective duties of states, the due diligence rule, the rationality of global public goods, the logic of internal institutional accountability of the Bank and IMF, the SDG language of follow-up and review, the development jargon of a human rights approach to development (HRAD), among others. I demonstrated the implicit and explicit expressions of power manifested in these idioms of law that facilitate accountability avoidance, disconnection, and obstruction in the realm of development practice. In summary, even though development accountability thought and practice is understood in diverse ways, the law remains beholden to archaic and abstract concepts and rules that do not inspire, in any degree, the transformative potential of the RTD.

2. KEY SUPPORTIVE ARGUMENTS

To make the above key findings and conclusions, I pursued in the different chapters some key supportive arguments, claims, and positions. Foremost, I have been able to demonstrate in this dissertation that international law and precepts of accountability that it has produced and reproduced in the SDGs agenda, in the intellectual debates about the HRAD, and in the doctrines of the law of international responsibility, indelibly embrace strong statist imprints. Bearing this statist imprint, these regimes of accountability do not adequately provide for the direct and distinct accountability of IFIs. I have further shown in chapter 4 that the adoption of internal institutional accountability modes such as the normatively weak Inspection Panels of the World Bank and the Independent Evaluation Office of the IMF—no matter their overarching goals and documented successes—has not dislodged the unsatisfactory conceptions of accountability as redress or prevention of breach.

The general shortcoming of all the regimes of accountability that I examined in this dissertation is that they adopt the interactional and not the institutional standard of accountability. The interactional approach to accountability ignores how development injustices are produced, perpetuated, and sustained by such global structural constraints as the rules, policies, and standardized norms of development lending, financial surveillance, technical assistance, and knowledge generation. By such limitation, the existing regimes of accountability fall far short of disaggregating and distinguishing actors for purposes of directly sanctioning their conduct or their effects.

I have established as well that despite the over-proliferation of the language of accountability in international law in the last few years, the statist orientations of contemporary accountability regimes have not quite sufficiently been interrogated. Not much interrogation has focused on whether the existing regimes are compatible with the *sui generis* rights that do not exclusively seek to constrain state sovereignty. I am referring to the RTD that speaks to development justice by bringing into view the fact that causes of poverty and inequality are pre-eminently located in the supranational realm and in the asymmetries of international development and financial governance. I notice that traditional black letter theories of accountability miss the crucial insight that because supranational institutions are very much implicated in development injustices, they ought to be directly and distinctly held accountable. Such oversight of international lawyers has left intact the very basic pillars and premises of state-focused and state-based accountability regimes.

One very good example of the replication of statist and interactional accountability paradigms is found in the SDGs accountability agenda. The SDGs have become robust global commitments anchored to the principle that human rights and development are mutually reinforcing—functioning within the same contours, serving similar objective purposes, and demanding the imperative of accountability of all actors.⁵ However, despite this transformative sensibility, in the articulation of accountability, the question of the direct and distinct accountability of IFIs—the determinants and manipulators of most global development policies—has not been accorded even a cursory mention, let alone a part in the formation of the implementation agenda. And yet, these are the most influential development actors; their interventions greatly impact the redistributionist agenda (such as the SDG 17 aim of eliminating structural obstacles to development).

Clearly, the silence on the imperative of the direct and distinct accountability of IFIs is one of the challenges to the implementation of the SDGs 1, 10, and 17. It is this very legacy that also undermines the growing practice of development as “normatively based on” and “operationally directed” to the promotion of human rights. In its design, the SDGs accountability model of follow-

⁵ United Nations, *A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development* (New York: United Nations, 2013) at 22. See also Article 3 of Draft Convention on the Right to Development, with commentaries A/HRC/WG.2/21/2/Add.1 online: <https://www.ohchr.org/Documents/Issues/Development/Session21/4_A_HRC_WG.2_21_2_Add.1_RegisteredVersion.pdf>.

up and review is decidedly statist in policy outlook, specifically in its declared objective of holding governments accountable in the implementation of the goals. The immediacy of the direct and distinct accountability of IFIs stands out as prominently undermined by the repurposing of strongly statist versions of law. Thus, in the strong push to integrate human rights into development, we have ended up with the over-proliferation of the SDGs accountability agenda where the traditional and mundane are neither interrogated nor questioned.

Whatever its merits, by its non-specification of the responsibility of private actors, this policy schema has failed to inspire the transformative rights-based development agenda implied in the SDGs agenda. Effectively, people in the Global South that have perennially faced subjugation, inequities, and other forms of radical deprivation are furnished with accountability regimes or policy discourses that can neither constrain hegemonic development models nor seek redress for inegalitarian development outcomes. This leads us to the conclusion that the human rights and development interface, in practice—even in its most counter-hegemonic sensibility, infused by the RTD norm—cannot secure the ends of development justice. By leaving intact the very basic pillars of the state-centric view of human rights justice in the international development praxis, we continue to ignore the challenge posed by the structural contingency of development. Such institutionalized weaknesses in the architecture of international development accountability praxis is deliberate. It reflects a constructed reality that is constantly rationalized and legitimized by international law's discursive practices in development.

This shortcoming, of relying on specious and normatively weak discourses of accountability extends to the inspection model of the Bank, the evaluation offices of the IMF and even the very notion of a HRAD as a discourse of accountability. The intellectual debates about these regimes, while novel, are unsatisfactory for they have not only relegated but delegitimized both the political economy questions and the redistributive agenda that the RTD discourse of accountability ought to focus on.

The point is that the human rights and development interface has enabled the intervention of human rights debates from a development perspective, but with the sad result that structural issues have taken a back seat in the accountability discourse. Lamentably, the erudition of such prolific writers as Sengupta, Bradlow, Sovacool, Faurie, Sen, Twomey, Marks, Uvin, Nyamu-Musembi, and Cornwall, among others, have only served to obscure and render incoherent, rather than clarify, the discourse of human rights accountability in the realm of development practice.

This obscuration perfectly explains how language (HRAD or inspection logic) is deployed to shape peoples' interpretations of their own behavior, circumstances or relationships with global development institutions. In this sense, the HRAD or the inspection model have been used to express certain values, which values have been normalized and routinized and now inform the way we understand human rights accountability in development, including the way such understanding has relegated to the periphery structural issues and other grave deprivations and violence of the development enterprise.

One such site of incoherence in the HRAD debate and in the notion of inspection is the uncertainty of the scope of human rights duties and performance criteria in development. In practice, the dialectic of disclaimer of human rights obligations permeates and persists even in the very international community's recognition of the close interface and mutual reinforcement of human rights and development that (the SDGs putatively embody). This conservatism has often invoked that familiar question of who the "addressees" are when human rights norms are invoked in development practices. This contestation of the normative status of rights obligations is rationalized and legitimized by idioms and meanings that international law produces and reproduces. It is hidden in such vocabularies as the political prohibition doctrine, economic rationalism, and other legal techniques of interpreting rights obligations in a state-centric fashion. Such rejection begins with the persistent disavowal of human rights obligations for the non-state actor, in both the human rights realm and development practices (development cooperation and partnerships).⁶ Indeed, IFIs continue to disavow the relevance and applicability of human rights even in the operations of their internal accountability mechanisms. They do so by ever retaining pure economic outlooks and the governing logic of accountability to "own rules, operational policies and directives." This is a rationale that conveniently allows them to maintain a safe distance from accountability when it comes to human rights violations caused by their projects, programs, and policies.

This delegitimization of primary rules (human rights obligations) through international law languages permeates even the Draft Articles on the Responsibility of International Organizations for Internationally Wrongful Acts (DARIO). DARIO is the proposed normative system of accountability built on the assumption that international organizations are regulated by international norms (primary rules), the breach of which triggers their responsibility. However, the

⁶ Chapter 3, section 4.2.1; and Chapter 4 section 3.3.

paradox is that human rights do not as yet constitute legal obligations binding on international organizations. This negates the reliability of DARIO as a suitable regime of international legal accountability.

The ambiguity and contradiction regarding the normativity of rights for IFIs has often tended to legitimize and facilitate accountability avoidance and disconnection for IFIs' interventions.⁷ We see this articulation of IFIs' safety from accountability in several instances in contemporary discourses of human rights accountability that too often emphasize state responsibility and human rights obligations tied to a conception of sovereignty in the Westphalian sense. Even when it has been recognized that IFIs ought to be held accountable, human rights law excessively bears the statist imprint.⁸ This is how we end up with adherence to the so-called "derivative accountability", a discursive construction which at the level of practice is grounded in the principle that states have a duty to protect against human rights violations.

What is alarming is that despite international law having supplied adequately convincing answers to this problem of the contestation of the normativity of rights by IFIs, there is as yet no ending of the debate on the bindingness of human rights obligations in the realm of development practice. One common response that has achieved a considerable degree of consensus relies on the normative override of the UN Charter values and obligations. As Skogly argues, international financial institutions are "legally obligated not to conduct actions contravening principles and purposes of the UN Charter, and also to respect the Charter, including the human rights provisions."⁹ This legal proposition relies on the normative override principle enshrined in Article 103 which supposes that the UN Charter obligations take precedence and supersede any contravening obligations in any other treaties that states have entered into.¹⁰ Accordingly therefore, human rights norms have been said to apply to international institutions as part of the international

⁷ Chapter 4 section 4.2.2; chapter 5 section 4.1.

⁸ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).

⁹ Sirgun I Skogly, *Human Rights Obligations of the World Bank and IMF* (London: Taylor & Francis, 2001) at 101-102.

¹⁰ Article 103, has been said to establish the hierarchical supremacy of the United Nations objectives over other obligations:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

See e.g., Obiora Chinedu Okafor, "The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North Entente" (1995) 7 *Afr J Intl & Comp L* at 872; Sanae Fujita, *The World Bank, Asian Development Bank and Human Rights* (Cheltenham, Northampton: Edward Elgar Publishing, 2013) at 11.

society bound by the Charter value system. The argument goes as follows: IFIs are organs of society bound by the fundamentals of an “international constitutional” system founded upon the UN Charter,¹¹ of which rights are the paramount values. It is argued, therefore, that IFIs have always had a responsibility to respect human rights and promote the “conditions of economic and social progress and development” enshrined in Article 55 of the UN Charter.

One such insight that has gained prominence in the context of the RTD is Okafor’s. He observed that this riddle is resolved by Article 55 of the UN Charter, which imposes obligations of “a constitutional” nature on all states, a duty to promote “higher standards of living, full employment, and conditions of economic and social progress and development.”¹² By its call on every individual and all organs of society to adhere to human rights commitments, the UDHR was taken as an authoritative interpretation giving effect to Article 55 of the UN Charter command for “a social and international order” based on universal respect and observance of human rights.¹³ It has been argued therefore that international organizations as organs of society have a duty to respect human rights,¹⁴ including the RTD which is part of the international human rights corpus.

¹¹ For a view that rights are the fundament of the international constitutional order, see, Nigel White, “The United Nations System: Conference, Contract or Constitutional Order?” (2000) 4 Singapore Journal of Intl & Comp L at 291; Erica de Wet, “The International Constitutional Order” (2006) 55 ICLQ at 57.

¹² Okafor, *supra* note 10 at 872.

¹³ Article 55 of UN Charter reads: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

See also Preamble and Article 28 of UDHR.

Scholars proposing this view are Bard Andreassen “Development and Human Rights Responsibilities of Non-State Actors” in Bård A Andreassen & Stephen P Marks eds, *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard School of Public Health & Francois-Xavier Bagnoud Center for Health and Human Rights, 2006) at 129; Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford; Portland: Hart Publishing, 2003) at 10; Mac Darrow, “World Bank and International Monetary Fund” in David Forsythe, *Encyclopaedia of Human Rights* Vol. 5 (Oxford, Oxford University Press, 2009) at 378.

¹⁴ Olivier De Schutter, “Human Rights and the Rise of Organizations: The Logic of Sliding Scales in the Law of International Responsibility” in Jan Wouters et al, *Accountability for Human Rights Violations by International Organization* eds, (Antwerp; Portland: Intersentia, 2010) at 56, 69-72. For De Schutter, this interpretation is appropriate but does not offer a convincing account of the foundation or premise of the conclusion that UDHR is legally binding. His reflections revolve around the doctrine of sources, enunciated in Article 38(1) of ICJ Statute which provides binding sources of international law such as *jus cogens* norms, treaties, custom, and general principles of international law. He offers a baseline theory upon which human rights obligations may be exerted and recognized as binding on international organizations and rejects the notion that human rights obligations of states are binding on

Similarly, the United Nations Office of the High Commissioner for Human Rights (OHCHR) has argued that “the right to development imposes duties on states and the international community, as well as on all those whose actions and/or omissions have an impact on human rights and on the environment in which these rights are to be fulfilled.”¹⁵ Others contend that international institutions are bound to respect international law, including customary law.¹⁶ In particular, the RTD terms are expressly addressed as obligations of the international community, which is comprised of states, multilateral and bilateral institutions, individuals, and non-state actors.¹⁷ The draft Declaration on the Right to Development clearly reaffirms the obligations of international organizations.¹⁸ The international community as well as natural and legal persons are therefore subjects of the RTD norms and obligations.

International law therefore has answers to the rejection of rights obligations by IFIs. Hence, it is duplicitous for the spiral of human rights obligations disavowal to continue in vogue when indeed IFIs have acknowledged the crucial roles they play in the implementation of the SDGs (a transformative rights-based development agenda). The continuance of the spiral of disavowal of

international organizations merely on account of being constituted by member states. He posits that that international organizations have their own legal personality and are thus distinct from their constitutive members, or that human rights are custom, on grounds of indeterminacy of state practice. According to him, human rights norms are binding on international organizations as a matter of general principles of international law. See also Bruno Simma and Philip Alston, “The Sources of Human Rights Law: Custom, Jus Cogens, and General Principle” (1988-1989) 12 *Aust YB Intl L* 82.

¹⁵ United Nations Office of the High Commissioner for Human Rights, *Frequently Asked Questions: Fact Sheet No. 37* (United Nations: New York and Geneva, 2016) at 3, 10, 13. According to OHCHR, article 2(2) of the Declaration that places a duty on all persons to promote development implies that “such responsibilities are shared by all relevant actors and organs of society, including the private sector and civil society.” Going by this assumption, it is contended that the Declaration creates binding obligations on all persons, both natural and legal persons and the international community comprised of states and the international institutions that they have created. The position taken by OHCHR draws from a stance that the normative bindingness of the RTD in international law has been settled given that the RTD “synthesizes” most norms that are contained in most human rights instruments and that the legal norms constituting the RTD are binding on states when acting as members of international organizations.

¹⁶ For other arguments concerning the explicit mandate of international financial institutions in relation to obligations imposed by the RTD, see Sirgun Skogly, “The Role of International Financial Institutions in a Rights-Based Approach to the Process of Development” in Bård A Andreassen & Stephen P Marks eds, *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard School of Public Health & Francois-Xavier Bagnoud Center for Health and Human Rights, 2006) at 289; Sirgun Skogly, “The Position of the World Bank and the International Monetary Fund in the Human Rights Field” in Raija Hanski & Markku Suksi eds, *An Introduction to the International Protection of Human Rights: A Textbook* 2nd rev ed (Turku/Abo: Institute for Human Rights, Abo Akademi University, 1999) (that inter-governmental organizations comprised of states have express human rights pre-commitments which cannot be abnegated by “operating through an international organization” at 244); Daniel D Bradlow, “Social Justice and Development: Critical Issues Facing the Bretton Woods System: The World Bank, the IMF, and Human Rights” (1996) 6 *Trans L & Contemp Probs* 47 at 74.

¹⁷ OHCHR, *Frequently Asked Questions supra* note 15 at 3-4; Article 2(1) of the Declaration on the RTD.

¹⁸ Draft Convention on the Right to Development, *supra* note 5 Introduction, commentary 6, Articles 7 and 9.

rights bindingness means that we are dealing with a contrived attempt to avoid and evade, at all costs, the accountability of IFIs for adverse development outcomes that imperil human flourishing.

Aside from the obligations-addressee question, accountability evasions and avoidance are constructed by the way international law conceptualizes the notion of responsibility for wrongfulness. It is the tendency of international law to differentiate the state and the international organization. It is by this differentiation that international law further entrenches a system of no direct and distinct accountability of IFIs. This is particularly so within the DARIO regime. To begin with, DARIO is itself a replication of the norms and principles of the law of state responsibility, but without a deeper interrogation of the fundamental assumptions and premises of that law and or even its applicability to international economic governance. One dynamic that complicates DARIO's approach to responsibility for wrongfulness is the notion of structural contingency of development. In the globalized system of (allegedly) collective policy action, and (admittedly) technocratic practices and parochial objectives of global bureaucracies, outcomes tend to be contingent on the structural configurations and policy instruments of that system. This is because supranational factors are more determinative, manipulative, and subordinating of national policy infrastructures. Due to this structural contingency, there is a natural propensity for causal links of harms to be indiscernible. This is mainly due to many entangling and mediating forces at the national level, where supranational factors interact with national policy infrastructures. Subsequently, the distributive consequences and spillovers of collective and multilateral decisions may not effectively be attributed to differentiated responsible actors.¹⁹ Thus, the indiscernibility of causality, the unattributability of conduct, and the unknowability of the extent of harms present a crisis for international legal accountability that relies on the international law of responsibility for ascertaining wrongfulness. This dynamic, brought about by the RTD discourse, shows that international law is yet to account for, or even articulate, the structural nature of violations rooted in the system of economic organization.

I therefore contended in chapter 5 that the fundamental premises of the state responsibility doctrine and its replica DARIO, as supported by a liberalist conception of rights, are woefully inadequate and ill-suited to the conceptualization and formulation of accountability norms for the actualization of development justice. The RTD and the vision of justice that it espouses reveals

¹⁹ Thomas Pogge, "Are We Violating the Human Rights of the World's Poor?" in David Kinley, Wojciech Sadurski & Kevin Walton eds, *Human Rights: Old Problems, New Possibilities* (Cheltenham: Edward Elgar Publishing; 2014).

that fundamental precepts of DARIO, in their current formulation, and the accountability principles that they produce and reproduce, are ineffective because they are based on a subjective view of wrongfulness. By this subjective view, DARIO has a propensity to ignore the institutionally embedded constraints of the global economy as forms of violation of the RTD. In addition, a liberal conception of rights as constraints on sovereignty, so predominant in the human rights accountability praxis, leads to an unhelpful account of the nature of rights violations of the structural/institutional kinds. It generates an unsatisfactory approach to accountability that attributes the effect of structural violations as state conduct or omission, without appreciating the causal and contributory roles of global systemic determinants (rules and policies).

The foregoing far-reaching critiques of this dissertation were achieved by the application of the RTD lens to examine the suitability and adaptability of existing accountability frameworks. First, I showed in chapter 2 that the Third World counter-ideology expressed in the notion of the RTD contests received international law traditions, including those in the realm of international development. I showed that legal and historical foundations of the RTD norm seem to have been forged outside the demarcated boundaries of the liberal theory of rights and traditional conceptions of development. I showed that international law and development have not adequately grasped the normative distinctiveness of the RTD when it comes to accountability thought and practice. In international law of development, there is as yet no deep appreciation that because the Declaration on the RTD has operational linkages with development practices by ordaining a particular model of development, the kind of development that it ordains cannot be secured by the usual accountability regimes. I demonstrated that there is therefore a need to rethink accountability when the Declaration on the RTD is sought to be mainstreamed in international law and development practice.

It was my emphasis that different methodologies that defy sovereigntist understandings of accountability must be forged to support Third World claims for development justice. The RTD's espousal of peoples' solidaristic claims for socio-economic emancipation avowedly contests positivist international law conceptions of justice.²⁰ By bringing a cosmopolitan view of justice, as opposed to a statist understanding of rights, the Declaration on the RTD exposes the degree to which contemporary global economic arrangements promote or undermine human flourishing. It

²⁰ This is the gist of Chapter 2.

does so in a completely new way not captured by standardized international law norms.²¹ Its accountability politics and practice, I argued, must therefore take account of how the global policy system produces development injustices that constitute its derogation.

Second, by introducing the structural contingency dynamic into the development accountability debate, the RTD discourse shows the hegemonic character of the interventions of IFIs in international economic governance and development, and how these interventions constitute a severe challenge to their accountability. It asserts that in structural violations, not one agent is in control and therefore tracing causal chains of harms is an extremely indeterminate task. Stated differently, in structural violations, we are not dealing with isolated-cause, single-effect and isolated-outcomes. We are dealing with a complex dynamic with multiple causes, multiple processes, and multidimensional outcomes. Exposing the multicausality and multidimensionality of harms is one way in which the RTD discourse unravels the tendencies of the international system, by revealing the inadequacies and conceptual limitations of international doctrines to locate the causes of injustices against the Third World in the international system. The RTD emphasizes development justice, drawing the nexus between the global institutional order and the under-fulfilment of human rights commitments. This is something that is quite clearly not grasped within the conventional human rights accountability praxis.

Third, I argued that the crucial insight brought by the institutional cosmopolitan understanding of phenomena has not percolated through international law's discourse of accountability. It has also not permeated the 2030 Sustainable Development Agenda, where accountability remains largely state-based and state-focused. By locating causes of poverty and inequality within nation-states' agencies, these praxes of accountability remain largely interactional. Similarly, I argued that the current models of accountability, including the inspection panels or remedial processes of accountability anchored to the law of international responsibility, heavily incline toward notions of accountability as constraint on power and as redress of breach. These approaches have proven incapable of preventing or mitigating institutional constraints embedded in global economic arrangements and cannot be relied on to steer the implementation of the SDGs, particularly goal 17.

²¹ See for example Gillian Triggs, *Global Justice: A Cosmopolitan Account* (Oxford; New York: Oxford University Press, 2009) at 237.

Throughout this dissertation, a TWAIL perspective made it possible to give a richer explanation of the reality of the avoidance, disconnection, and obstruction of the accountability of IFIs in development. I demonstrated that international law re-enacts frames of reference and understandings that completely evade holding IFIs accountable in development. Simply, in the quest for development justice, the direct and distinct accountability of IFIs has not been part of the culture of integrating human rights into development to tackle structural injustice. This particular bias is sanctioned and rationalized by international law and the institutional practice of development through glib discourses that are framed as universal but whose praxis is to assure IFIs some measure of safety from accountability politics and practice.

This international development accountability anomaly is legitimized through the practice of such historically preconceived notions, legal precepts, languages, and conventions as “due diligence,” “state responsibility,” “collective responsibility,” “global public goods,” “derivative accountability,” “inspection procedures,” and “reporting, review, follow-up, and monitoring.” More crucially, this generalization and standardization of norms and precepts of law to the everyday practices of accountability often tend not to interrogate context and the nature of some rights for which they are being deployed. For example, the law of international responsibility’s capture of the way accountability is understood in international law is one clear case of the flaws of standardization and universalization of norms. Its basic shortcoming is that it fails to recognize wrongfulness beyond conduct and does not contemplate the direct and distinct accountability of global actors where responsibility cannot be disaggregated to respective actors. International law of responsibility is therefore deficient and has failed to avail an adequate frame for understanding the supranational causes of poverty and inequality.

And yet, with these fundamental defects, the law of international responsibility has attained heightening levels of universalism. It is therefore plausible to conclude that the orthodoxy of the notions, legal precepts, languages, and conventions that legitimate the contemporary international development accountability regime—like that of all other concepts and doctrines—is based on specious claims of their legalistic universality. Their rationalization and legitimization is vehement, even when they are patently ill-formulated to the challenges of the contemporary world order.²² Indubitably, the orchestrations of doctrinaire precepts of law that have come to be clothed

²² Philip Alston, “The Myopia of the Handmaidens: International Lawyers and Globalization” (1997) 3 *European JL* at 435 at 442.

with universality and acceptance in international law discourses should not at all be surprising. As Third World scholars suggest, the invocation of international rules serves, in certain cases, to foster projects and, at worst, to advance the agenda of the most powerful states who benefit from unaccountable international governance structures.²³

Lastly, in pursuing the contention about the unsuitability and ill-adaptability of contemporary regimes of accountability, I have proved a series of other related claims. Foremost, I have shown that when looking at the global structural injustices through human rights lenses, the monoculture of liberalism must, at the very least, be compensated for or altogether pluralized. Pure liberalism should not be the only ideological prism through which we understand new genres of rights such as the RTD. Moreover, human rights movements, human rights usefulness, and human rights claims for emancipatory and egalitarian projects cannot any longer be understood within totalizing liberal frames. A conception of development justice that relies on human rights theories, I have argued, must be expanded. It must be enlarged, for instance, by engaging institutional cosmopolitanism and TWAIL. These theories can re-tool the functional defects and conceptual limitations of human rights theories that inform practices of accountability. Throughout this dissertation these two lenses suggested that accountability frameworks fashioned within the strict positivist tradition may need some conceptual reengineering to redress the contemporary realities of the hegemonic international order.

3. THE CASE FOR A RETHINK AND REDESIGN OF THE EXISTING ACCOUNTABILITY MECHANISMS

The case for a fundamental rethink of existing accountability mechanisms is necessitated by the phenomenon of structural injustice prevalent in the development realm. The urgency of a rethink and redesign arises from the institutional and normative inadequacies and unsuitability of the existing regimes of accountability to the protection of the peoples of the Global South against the institutional practices and rights violations linked to development interventions of the World Bank

²³ B.S Chimni, “Legitimizing the International Rule of Law” in James Crawford & Martii Koskenniemi eds, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012) 290 (that international legal standards “codify the interests of powerful states and social classes in the international system” at 294); James Thuo Gathii, “Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy” (2000) 98 Michigan L Rev 1996; Carmen G Gonzalez, “Human Rights, Environmental Justice, and the North-South Divide” in Anna Grear and Louis J Kotze eds, *Research Handbook on Human Rights and the Environment* (Cheltenham; Northampton: Edward Elgar, 2015) 449 at 453.

and the IMF. It is also partly informed by the dynamic that international law has not formulated a mechanism for holding IFIs directly and distinctly accountable in their role in creating certain barriers to the realization of the right to development (RTD). These barriers are presented by the rules, policies, processes and institutional arrangements for the governance of international economic activities.

I therefore call upon international lawyers to fundamentally rethink the relationship between international law and development, particularly in relation to the way they forge norms that facilitate accountability deficits and dysfunctions in the realm of IFIs' interventions in the global economy. As we do, there must be an awareness that we cannot fully rely on international law, or its other iterations, as the sole discourse for the Third World emancipatory struggles against structural injustice. In other words, international law and institutions of development lack any emancipatory potential and cannot lay claim to such quality. That international law has proven helplessly incapable of eliminating structural barriers to development and other paradigms that perpetuate development injustices is without question. We see this in the logic of the provision of global public goods.²⁴ This rationality has enormously expanded the remit of IFIs, but without a corresponding dispersal of obligations or reimagining of their accountability for structural injustices. Of utmost concern is that as development injustices continue unabated, the glib discourse of accountability seems to be deliberately tailored to turn a blind eye to the violence and perversions of global development practices. Accountability is framed as outward-looking toward the state but only inward-looking toward IFI's compliance with their own rules and procedures. Unless fundamentally rethought and reconstructed, international law norms of accountability offer facile hope for the protection of the people in the Global South against the vagaries of the neoliberal development enterprise. To stem this injustice, we must therefore fundamentally rethink and redesign the institutions and norms of accountability to take account of the Third World struggle against structural injustice that underlie the idea of a RTD.

The urge and immediacy for a rethink and redesign of mechanisms of accountability is more acute in the intersecting arenas of human rights and development, particularly as envisaged by the Declaration on the RTD. It is in the context of the convergence between the two that development is constantly being reconceptualized more and more aggressively in the context of the implementation of the 2030 SDGs agenda, a policy variant that complements the Declaration of

²⁴ Chapter 4 section 3.

the RTD. Indeed, the implementation of the RTD in the context of the SDGs agenda affirms the linkage between external challenges, development policy practice, and the enjoyment of human rights.

It is to be noted, quite unsurprisingly, that the commitment to respond to national and international causes of indigence and widening inequalities has not been founded on a robust interrogation of those international norms, conventions and practices that embed accountability deficits in the global institutional order. If we are to pursue, henceforth, a genuine development justice accountability agenda we must critically reflect on and give due weight to the RTD's predominant posture as an instrument of struggle against structural injustice.

4. THOUGHTS ON THE REFORM OF THE FRAGMENTED REGIMES OF ACCOUNTABILITY

Yes, to accord the various international regimes of accountability the potential to secure development justice, their normative and institutional limitations can be reformed, as fragmented and ununiform as they are. They can be reformed so to be able to directly and distinctly hold international and multilateral development actors accountable. They can be reformed to be more effective in, and at best more adaptable to, the vindication of structural injustices of the international institutional order. I would propose not that we completely abandon the regime of international accountability, namely the law of international responsibility, internal institutional accountability or the follow-up and review processes. No! Not even when confronted with such extensive functional deficiencies. I believe we can recalibrate their fundamental precepts and assumptions, where necessary and appropriate, so that we can best suit and adapt them to the collective claims for development justice.

The suggestion that conceptual limitations and functional deficiencies of contemporary accountability regimes are susceptible to reform if they can be rethought in the international academic and policy discourse should not be taken lightly. As my discussion in chapter six of socio-economic rights enforcement shows, there is so much to be gained from the recalibration of our approaches to accountability where violations are structural in nature, demanding new and novel remedial measures to vindicate those infringements. The experiences gained from the judicialization socio-economic rights claims in countries such as Kenya, South Africa, and Colombia suggest that in seeking to enforce or implement some *sui generis* rights, we must be

aware of structural contexts of violations and the nature of the right in issue. This consciousness should permeate, loud and clear, the ongoing debates on the implementation of the RTD and the SDGs accountability policy. This key finding should permeate our understanding and practice of accountability for different genres of rights norms, but more particularly must inform the future of the RTD practice and politics of accountability in the context of the implementation of SDGs.

The task of this dissertation was to come up with new insights, nuances, aspects, and concepts that the scholars, practitioners, policy think tanks at the UN, regional and domestic levels can rely on to rethink and reform accountability of IFIs in development. I propose the following thoughts.

4.1 Thoughts on Reform of the International Law of Responsibility

My proposition for the rehabilitation of different regimes of accountability from the way international law has conceived their understandings first goes to the law of international responsibility. One way is to recalibrate the basic precepts of the law of responsibility of international organizations to recognize the structural contingency dynamic and the corresponding intermingle effect. Simply, legal reform should be cognisant of structural nature of harms attendant to the unique international economic relationships.

One precept deserving to be looked into is the definition of wrongful conduct DARIO and ARSIWA. In calling for this redefinition, I suggest that conduct or omission in breach of primary obligations should not be the only legal test of wrongfulness, but also the rules, policies, and processes that shape such outcomes/conduct or omission. There is also the need to bring into the definition of wrongfulness the effects of conduct or the consequential harm brought about by rules and policies. The reason for this suggestion is that in structural violations, breach can be produced not only by decipherable conduct but also by rules and policies that govern such conduct. This is the exemplification of an institutional approach to accountability that avoids a linear and straightforward approach of the interactional kind. Such a redefinition employs an institutional understanding of global injustices, the much-needed crucial insight when it comes to structural violations.

If DARIO's precepts are reformed in line with this proposal, this would mean that for once international law will have to treat international rules and policies in the same way as conduct, taking account of how they intermingle with national policy infrastructure, consequent to which

they are subjected to the determination of breach or wrongfulness.²⁵ This is the institutional optic which looks to multiple primary causal elements that are linked to the global institutional order.²⁶ By recognizing the implication of global rules and policies in development injustices, it will be possible to locate the causes of poverty, inequality (within and between states), and other structural barriers in the international policy system. By this recalibration of DARIO, it will be possible to attribute such multidimensional harms or engendered deprivations to responsible actors. The institutional approach of this kind takes account of the determinative, manipulative, and subordinating role of supranational actors. It has the potential to resolve the indiscernibility, indeterminacy and unknowability of actors, their contribution and wrongfulness that arise as a result of the intermingle effect.

The phenomenon of locating causal chains of harms in the global policy system and not in the agency of the state in the traditional mechanisms of international law (i.e., through such idioms as due diligence) has the potential to fundamentally alter the law of responsibility of international organizations. DARIO's precept that first comes to mind is the concept of "control". By a right-specific approach to accountability and context awareness, we will have to recognize that the RTD is a right to a particular national and international order that is favourable to just and equitable, human centred, and participatory development. By this appreciation, a general appraisal of the nature of policies and rules governing economic relationship are brought into our legal interpretation of DARIO's precept of control. It can be said that the global system exerts a kind of subtle "control" different from the command-and-control or factual control contemplated by Article 7 of DARIO. It will be possible to appreciate, for once, that the covert control in the global policy system is not discernible as direct and "effective control" in the traditional fashion of the law of responsibility. In fact, for the RTD vision, there is an insistence that global and historical forces be looked at in the determination of accountability for development injustices. By dislodging the power-based and cause-and-effect understanding of control, we are being amenable to accepting that control can take many forms. We are accepting that control can be woven into

²⁵ For the idea that the core norm of the RTD is defined in terms of rules, processes and outcomes of development, see *Report of the High-level Taskforce on the Implementation of the Right to Development on its sixth session* A/HRC/15/WG.2/TF/2/Add.2 14-22 January 2010 at 8.

²⁶ Thomas Pogge, *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (UNESCO; Oxford; New York: Oxford University Press, 2007) at 26.

the idiosyncratic policy instruments and conditions governing the provision of global public goods. This is how I propose reform of DARIO.

I am however apprehensive that even with an expanded meaning of wrongfulness and control we may not be able to achieve the kind of distributive justice that structural violations demand. The problem relates to the conceptualization of causality in the law of responsibility. The intermingle effect dilemma would not have adequately been resolved by the causality approach to structural violations. The problem is traceable to what Pogge calls the multiple entangling forces that make it impossible to trace causal chains of harms.²⁷ As I had argued, in the guise of collective action, the structure of the global policy system unifies into an integrated and complex whole. Due to this, actors become undifferentiated, actions become aggregated, causal links dissipate, and distributional outcomes—where adverse—cannot effectively be linked to any specific agent in the assignment of responsibility. Pogge’s institutionalism seems to emphasize how a development justice perspective needs to understand accountability differently. He argues that when it comes to poverty as a distributive deprivation, the interactional approach to responsibility cannot be grounded in a causal account of outcomes. Rather, it requires an account of the patterns of behaviour in relations between states and institutions, an account of the plurality of actors and the intermingling of national and global policy regimes. His point seems to be that where there are multiple interacting forces and factors, the causal approach to accountability seems inadequate and ineffective. This is because the resultant injustices cannot be addressed by *ex-post* remedial accountability approaches that are backwards-looking and fixated on breach. Pogge is acutely aware that the global policy system is structurally implicated in the causal explanation of poverty, though not in a unilinear fashion. This structural contingency calls forth a different conceptualization of justice, one that recognizes the multiple causalities woven into the entangled structural relationships across boundaries.²⁸ Pogge recognizes the limitation of an *ex-post* that cannot discern causality so as to be able to distinguish the responsibility of actors. If the causality approach is unworkable and unreliable because it adopts an *ex-post* approach, perhaps we should adopt an *ex-ante* approach that insists on accountability at the policymaking stage. An *ex-ante* approach does not feature in the basic conceptions and assumptions of international law of responsibility for wrongfulness. As I explained while propounding participation as accountability,

²⁷ *Ibid* at 16.

²⁸ See e.g. Iris Marion Young, *Responsibility for Justice* (Oxford: Oxford University Press, 2011) at 125.

an *ex-ante*, process-based accountability is what the answerability prong of accountability offers. It is what I propose as the way forward in this dissertation.

4.2 Thoughts on Reform of the Inspection Panels and the Independent Evaluation Office

At the level of internal institutional accountability praxis of the Bank and the IMF, several recommendations may be proposed. First, I propose reforming the Independent Evaluation Office of the Fund to take the model of the Inspection Panel, albeit with far reaching structural modifications and expansion of remit. Giving the Evaluation Office a new architecture and functional domains will shift its objective from changing the behaviour of the IMF to enforcing independent accountability.

Insofar as the inspection model is concerned, far-reaching changes must be made. First, there is need for reformulation of the Panel rules to instil compliance with universal rules and standards such as human rights as the fundamentals of the international society and the guiding value for the realization of sustainable development goals. As I argued before, the paramountcy of human rights obligations over other contravening international obligations flows from article 103 of the UN Charter. Second, there is need to diminish the override role of the Board to avoid cases of obstruction of accountability. Third, making the Panel recommendations binding on the Board and the Bank will be revolutionary in instilling effective compliance and ensuring meaningful accountability. Expanding the jurisdiction of the Panel to encompass effects of projects and development policy financing (taking account of the intermingle effect) would be a sure way of serving real justice to the victims who are always confronted with after-effects of projects and programmes executed at the behest of global development institutions. Development institutions will be directly and distinctly accountable for conduct related to projects or programmes as well as for those long-term effects that may occur after completion of projects.

4.3 Thoughts on Reform of the SDGs Accountability Policy

Lastly, in relation to the SDG accountability regime, there must first be a new recognition that development practices are now explicitly based on and operationally directed to the promotion of human rights and human well-being. The permeation of this integration of development and human rights (enshrined in the Declaration on the RTD) as the guiding value and legal commitment

binding on all development actors will reform the obligation avoidance and circumspection toward human rights norms by the Bank and the IMF. This will address the intractable question of whose responsibility it is to respect rights in development. Direct and distinct human rights responsibility of all development actors should be the aim of this endeavour. The legal approach to this quandary already exists in international law. Probably a robust and clear-eyed judicial pronouncement on this in municipal and international courts is warranted.

I conclude that for the SDGs policy schema of accountability to make development justice a reality for peoples of the Global South, four things are key. First, I propose that the direct and distinct accountability of all development actors in development cooperation and partnerships needs to be accorded much more sustained introspection in the mainstreaming of the human rights agenda into development practice. Second, we must rehabilitate the horizontal accountability logic from its statist orientation and expand its dialect into the sphere of non-state development actors. Third, we should focus on distinct and direct obligations, responsibilities, and accountability of state and interstate actors, at the level of development relations. This should go as far as the arenas of implementation of development policies (including financing agreements and global partnerships). Fourth, we should include clear and explicit strategies for embedding a HRAD in all programmes and policies of development agencies, with a targeted language on the RTD's focus on structural injustice and the imperative of distinct and direct accountability of all actors. Such a discourse of accountability should focus on ensuring that rules, policies, structures, and processes of development are compatible with the objectives of human wellbeing, equity and social justice and participation in development. Fifth, the regime of follow-up and review should be expansive enough to include the Bank and the IMF not only as stakeholders but as institutions who will also file reports and be susceptible to answerability for the related outcomes of development assistance and financing. There is also a need to enable robust civil society participation in the work of the High-Level Political Forum that oversees and monitors progress in the implementation of SDGs.

4.4 Embrace and Deepening of Participatory Accountability from Below

As we await these reforms, I make a bold invitation for international lawyers to be open to the potential and promise of participatory accountability from below that the RTD's participatory ethic avails. This participatory ethic can be made to improve our understanding and practice of the

answerability prong of accountability. In recommending participation as accountability, I do not intend to propose a universal and standard approach, rather I propose a quality of accountability that can be suited and adapted to different settings. The paramount reason is to ensure that we have a workable mechanism that recognizes Third World agency and resistance in international law. This is what I have called the “what works approach.” This proposed alternative approach privileges subaltern resistance against international institutions, nationally, transnationally and internationally. I argued that participatory accountability in international law from below has a great deal to offer. The features that make participatory accountability seductive as an alternative accountability and a form of international law from below is embodied in what Santos and Rodriguez-Garavito refer to as “subaltern cosmopolitan legality.”²⁹

In this dissertation, about six reasons explain why I broke ranks with international law to propose a theory of participation from below as accountability. The first paramount reason for the deviation is informed by TWAIL’s sensibility that if a viable model is to be configured or informed by international law’s precepts, it must take account of Third World experiences and involve Third World agency and resistance in protecting and promoting their own dignity, rights, and development aspirations. I heeded TWAIL’s injunction that creating universal doctrines requires a critique of dominant principles and practices from the perspectives of the “Others.”³⁰ It requires rooting new visions of legality and futures in the “historical, civilizational, development and cultural struggles” of the Third World.³¹

Second, this participatory model recognizes that accountability for materializing development justice must be contextual, taking account of the particularities of the genre of the right in question and being aware of the nature of its potential violations.

Third, this model exalts the agency, autonomy, and counter-hegemonic knowledges of the people in the development process. It vests the onus of instilling accountability in the people, not institutions or the state.

Fourth, it expands accountability beyond the legal realm of sanctions and remedy to encompass the political and democratic notions of accountability.

²⁹ Boaventura de Sousa Santos & César A Rodríguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge; New York: Cambridge University Press, 2005) at 12.

³⁰ Anne Orford ed, *International Law and Its Others* (Cambridge: Cambridge University Press, 2006).

³¹ Upendra Baxi, “What May the “Third World” Expect from International Law” (2006) 27 *Third World Q* 713 at 714.

Fifth, participation adverts a viable recourse to process-based, decisional-level (*ex-ante*) accountability as an alternative to *ex-post* models of remedial accountability.

Above all, participation as accountability has the potential to firm up the backbone of the RTD regime, its aspirational politics of accountability, and the clamour for development justice in ways that international law cannot guarantee. It promises overly politicized garbs as alternative public spaces in which people can contest the dominant practices, rules, and policies of development. Its praxis as oppositional politics seeks to alter dominant rationalities and development paradigms. It has the potential to advance the answerability of institutions and make them responsive to peoples' voices and claims for egalitarian and emancipatory development. It can deliver this potential by building potentially counter-hegemonic relations and projects in the international development realm.

We can rely on this practice to formulate and evolve a non-Western practice of accountability that distances itself from arcane anachronisms of the law of responsibility or legalistic practices tied to a remedial conception of accountability (read the Inspection Panels). I propose participatory accountability as part of going beyond legal conventions. It deviates from the flawed and fundamentally unworkable international doctrines, regimes, and institutions of accountability.

5. REFLECTIONS ON THE FUTURE OF “THE RIGHT TO DEVELOPMENT ACCOUNTABILITY” IN THE INTERNATIONAL PLANE

While this dissertation ultimately challenges us international lawyers to fundamentally reconceive the practice and politics of accountability in both international law and development, the pertinent question is, what is the way forward for the future of the RTD accountability debate? As we aim to reform the international development regime of accountability, or think them anew in the face of these fundamental flaws, what measures are the international community taking and how can they be improved considering this dissertation's findings?

I acknowledge that there is already tremendous progress, albeit slow and unsatisfactory, to enlarge accountability in development practice and to make it focus on the activities of private actors, IFIs, and other non-state actors. First and foremost in this progress is the Ruggie framework for transnational corporations on human rights matters, which saw the UN Human Rights Council

adopt certain guidelines on the “remedy” pillar of the framework.³² These developments are a sign of positive steps, though their focus on domestic legal processes and policy infrastructure of states render them inapplicable at the international level. Another latest attempt is the Intergovernmental Working Group of the United Nations Human Rights Council, which has proposed a binding treaty on human rights obligations of transnational corporations and international organizations. There is also the latest development at the UN Human Rights Council, which is about to consider the zero draft of the Convention of the Right to Development prepared by the Intergovernmental Working Group on the Right to Development.³³ The Human Rights Council has also come up with Expert Mechanism on the RTD, perhaps in keeping with the tradition of special procedures of the UN human rights systems that help in the promotion of human rights agenda.

No doubt, these measures are progressive and show a deep commitment to ensure that among other objectives, the RTD can have bite in international development practice. However, these measures have not sufficiently appreciated the dynamic of structural contingency which dictates that development injustice needs to be tackled differently through a robust accountability praxis and politics at the global level. Structural contingency dynamic infuses the perspective that we ought to design accountability regimes that can confront structural injustices inherent in the global policy system and in the model of global economic organization.

While I do not in any way advocate the repudiation of international law because of its legacy of constructing rigid and limited doctrines of accountability, I propose that the recalibration of standard doctrines and practices of accountability must tackle structural injustices of the global policy system. This is something that the bland, the conventional and the traditional approaches, as are ongoing at the Human Rights Council level, cannot accomplish. Contemporary approaches to improve accountability in the realization of development justice must take account of and reflect

³² Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance A/HRC/32/19/Add.1*; Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, *Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse* Advance Edited Version, A/HRC/32/19; United Nations, “The OHCHR Accountability and Remedy Project: Companion document to A/HRC/32/19 and A/HRC/32/19/Add.1”.

³³ OHCHR, “The Twenty-first Session of the Working Group on the Right to Development” (13-17 July 2020) online: <<https://www.ohchr.org/EN/Issues/Development/Pages/21stSession.aspx>>. The list of documents are to be found here:

upon how to devise a regime that regulates the way institutional schemes allocate structural advantage and disadvantage.

I propose that future revision of the law and practice should aim to make them comport with, and be alive to, the exigencies of structural injustice. This must particularly entail an awareness of how the global policy system facilitates IFIs' accountability avoidance, disconnection and obstruction. This proposition addresses the question of how development justice can be materialized through an international mechanism that recognizes the imperative of direct and distinct accountability of IFIs in development practices. Our thoughts must first appreciate the dynamic of the structural nature of violations otherwise we risk carrying on with the incomplete and fundamentally unworkable regimes that are in use in international law.

A consciousness of the structural context of violations recognizes that in the guise of economic interdependence, the structure of the global policy system unifies into an integrated and complex whole, actors become undifferentiated, actions become aggregated, causal links dissipate, and distributional outcomes cannot effectively be linked to any specific agent in the assignment of responsibility for wrongfulness. In these complexes, supranational actors decisively take on more determinative and manipulative roles in conditioning the national and international environment of development, including shaping outcomes that constitute a derogation from the RTD. This phenomenon makes it imperative that accountability ought to be assigned at the global level.

Second, if we are to craft an effective and efficacious accountability regime that is informed by the core principles of the Declaration on the RTD, we must appreciate the *sui generis* character of the RTD norm and the conception of justice that it envisions. By bringing into view the structural contingency of development, or the idea that global factors and actors are more implicated in the "engenderment" of harms at the domestic level, international debates must recognize that the RTD questions the fundamental assumptions of the contemporary statist and interactional accountability models prevalent in human rights and development practices. It would, for this reason, be implausible to expect that a right of non-Western genesis as the RTD can be enforced by Western-derived regimes of accountability whose fundamental assumptions are as questionable as they are ill-adapted to structural injustice.

Because of the ill-adaptability and ill-suitability of the models that are currently in use, this dissertation therefore proposes the need to forge other ways of being and doing the act of accountability. I propose the need to more deeply consider social movements perspectives in

policy debates on the conceptualization and practice of accountability as a paramount standard in the implementation of the RTD in the post-2015 development agenda. International legal thinking should expand to recognize other conceptions of accountability that have worked, or proved workable, in other realms of practice. Participatory ethic expands the roles of accountability, transcending prevention, mitigation, and remedy of harms as the approved objects of accountability in international law. In other arenas where social movements praxis has been experimented with, it infuses other objectives of accountability such as responsiveness, transparency, and self-improvement of institutions sought to account. Unlike power-based accounts of justice predominant in international law and human rights practices of accountability, participatory accountability from below focuses on actors, power, processes, rule and policymaking, and structural issues in development. Its application also comes with the political and democratic qualities and objectives of instilling inclusivity, representation, legitimacy, at least when effected *ex-ante*, at the decision-making stages.

6. CONCLUSION

This dissertation concludes that in spite of the social transformation agenda—advanced by the Declaration on the RTD (as a particular human rights framing of justice in the development realm), the development’s embrace of human rights values continues to shape discourses of accountability that: (i) neglect structural injustice of the global policy system; (ii) do not acknowledge the normative character distinctiveness of rights; (iii) do not adequately address the differentiated responsibilities of actors at the multilateral level; (iv) are effete in resolving the challenge of direct and distinct accountability of IFIs; and (v) in fact assure IFIs safety from accountability in relation to their interventions in the realm of development. This conclusion emerges from a critique of the existing regimes of accountability as heavily interactional, neglecting the imperative of institutional approach to accountability. Such accountability models that are mostly “Western-derived” in their configuration and functions, are ill-suited to aid the securement of the kind of development justice ordained by the RTD norm.

As this dissertation has illustrated, historically, the evolution of international law of accountability has deliberately neglected the imperative of the direct and distinct accountability of IFIs in the development realm. International law, either because of its statist character, or in its characteristic incompleteness and utopianism, falls far short of providing an adequate framework

for addressing this issue. Take for example the responsibility dimension of accountability, which invokes the following question: “to whom are the human rights responsibilities in development addressed?” This prong of accountability remains in a flux, even in the very conceptualization and practice of the SDGs agenda, in DARIO, and in the IFIs’ understanding of their own accountability. Ultimately, the implementation of the Declaration of the RTD as the (underpinning) normative framework for development justice and one of the instruments guiding the achievement of the SDGs still stands greatly undermined by this doctrinal position. Another way of expressing this is that even with the robust convergence and synergies of the international community around SDGs agenda, foreseeably, no much is to be gained by the polemics of accountability. Effectively, this prong of accountability being in a flux constitutes an institutional, functional and normative impediment to the realization of development justice. It severely undermines all international mechanisms that attempt to recognize the imperative of ensuring the direct and distinct accountability of IFIs in development practices. I suggest that participatory accountability from below can be relied on to develop a workable regime of accountability.

In sum, this dissertation seeks to contribute perspectives for enhancing the efficacy and effectiveness of the accountability of IFIs in international financial governance and interventions in development policymaking and practice. One key thing that the implementation of the RTD in the context of SDGs agenda will contribute to the search for an effective accountability regime in development is the praxis of participatory accountability from below in international law. This dissertation concludes that the recalibration of international law norms and redesign of policies to ensure the effective and efficacious accountability of IFIs in the implementation of sustainable development agenda must take account of the imperative of Third World agency and resistance in protecting and promoting their own dignity, rights, and development aspirations. Participatory accountability from below promises and premises this cosmopolitan ideal. Given that IFIs still reject binding human rights obligations in the realm of development practice, and since there is no international institution that can enforce sanctions against IFIs for adverse distributive outcomes of development, resort to the answerability prong of accountability is the next best thing to do. This pragmatic approach to justice in the international plane “[signals] a move away from the legal arena to the political and social as sites for justice” and shows that “ideas about justice are

negotiated in everyday contexts, through contestation and debate.”³⁴ This contestation and debate makes law “[gain] strength from being woven with other strands to form a web of regulation that can be animated by networks of actors, but by itself cannot redress injustices based on oppression and domination.”³⁵

Answerability instills process-based accountability that is essential to confronting, *ex ante*, economic policies, rules, institutions, and processes of development that have the potential to engender gross inequalities and inequities. This is how a development justice perspective appreciates the institutional context of violations, by looking at the primary causal elements that are linked to the globalized institutional framework, which it treats as questions warranting accountability. In the context of the Declaration on the RTD, the answerability typology of accountability relies on the right to participate in, and contribute to, development processes. Its great attribute is that answerability entitles people, the subjects of development, to scrutinize policy actions and to seek explanations and justification for, and information regarding such policies and rules at the decision-making level (*ex ante*). It is through participation in decision-making that people can demand, *ex ante*, fairness and equity in the rules, processes, institutional setup, and outcomes of development. Participatory accountability from below can therefore be relied upon, potentially, to achieve responsiveness, transparency and self-improvements of global development institutions. This for me is a turn to pragmatism, a shift from blind faith in the juridical facets of international justice to a pragmatic sense of resistance.

³⁴ Hillary Charlesworth, “International Law and International Justice” in Chris Brown & Robin Eekersley eds, *The Oxford Handbook of International Political Theory* (Oxford: Oxford University Press, 2018)1 at 11.

³⁵ *Ibid.*

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TREATIES AND DECLARATIONS

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