

UNIVERSITY OF WESTMINSTER



Freda Murray-Bruce

Email address: Freda_m_bruce@hotmail.com

Should any body be poor: An Analysis of the Duties and Obligations of the International Legal Community to the Eradication of Poverty and Growth of Sustainable Development in light of the *Jus Cogens* nature of the Declaration of The Right to Development.

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ABSTRACT

This paper examines the copious problem of world poverty affecting half of the world's population in the South and assesses the international legal obligations of the international legal community, *viz.*, developed states, transnational corporations and the international financial institutions of the IMF, World Bank and WTO to the eradication of poverty and the growth of sustainable development, in view of the inviolability and peremptory nature of the Charter of the UN, and the international human rights provisions arising therefrom. To this extent, we examine the 1986 General Assembly Declaration on the Right to Development, along with the other International Bill of Human Rights, arguing that its normative and prescriptive value derived from the UN Charter, espouses a legal obligation to the international society to ensure each person has a right to the eradication of poverty and sustainable development by equitable national and international efforts.

We then address the history of developing States as proof of inequitable and unjust developed States practices, and furthermore, using the examples of the actions by developed States, transnational corporations and the trade and financial laws of the international financial institutions, we argue that they violate the *jus cogens* of the Right to Development.

In conclusion, we advocate the cancellation of debilitating third world debts, while espousing Good Governance at the National and International arenas as essential to true and equitable state growth, and ultimately, the focus of the Right to Development; the right to a good standard of living for all peoples.

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“...All people share a desire to live free from the horrors of violence, famine, disease, torture and discrimination. Human rights are foreign to no culture and intrinsic to all nations. They belong not to a chosen few, but to all people...¹” .

¹ Statement by Mr. Kofi Annan, Secretary-General of the United Nations to the opening of the 54th session of the Commission on Human Rights. Available at SG/SM/98/53. <http://www.unhchr.ch/hurricane/hurricane.nsf/0/697EEE5FBF0188CDC125662E00352F56?opendocument>

INTRODUCTION

“Development requires not only corrections to the internal causes of poverty in the retarded nations, but also a full revision of all economic relations with the advanced world²”

International Law is being used as an instrument of control in the world economics by Capitalist states. The result has become global poverty.

Capitalist accumulation through dispossession³ has always involved transfer of wealth from the developing to the developed world.⁴ In the face of world poverty, weak efforts like the Truman's 'Fair Deal'⁵ were offered. In the modern world, fair trade in agriculture was to be the measure of true intent of equity. But neither the World Bank, the International Monetary Fund (IMF), the World Trade Organisation (WTO), nor States have shown the convergence of equitable policy strategies. Instead, globalized compulsory liberalisation of trade gave undue access into fragile domestic economies of natural resources, and the world currency control policies developed by the US in making the US dollar the world currency and the accompanying interest rate hike in the 70s, built the US as the world's greatest hegemony, while plunging most developing states into poverty. Hutton warns, “The international financial system has been shaped to extend US financial and political power, not to promote the world public good.⁶” International Economic Law (IEL) is premised upon devaluing nation-state control in favour of globalized trade. But a political world devoid of one vote one voice has meant globalized trade without the profits. The application of this Anglo-American Capitalist view spelt the death of the Great Russian Empire economic by weakening the state run goals. In this regard, third world states founded on rhetoric of nationalism, find their search for political and economic independence branded by North nihilism as backward and destructive and are forced into a one-way free trade. The interest rate hikes swept cash strapped states

² Figueres, Jose. (1968). “Some Economic Foundations of Human Rights”, In: Basic Documents on Human Rights, edited by Brownlie, I & Goodwin-Gill, G. 2002. Oxford University Press: Oxford, New York. p. 832.

³ Carty, A. Marxism and International Law: Perspectives for the American (Twenty-First) Century? 2004. *Leiden Journal of International Law* (2004), p. 10.

⁴ This accumulation includes the Dutch plunder of Spanish Indies gold, the British exploitation of the Indian empire, not to forget Africa.

⁵ The Fair Deal was the name given to Harry Truman's domestic program. Building on Roosevelt's New Deal, Truman believed that the federal government should guarantee economic opportunity and social stability, and he struggled to achieve those ends in the face of fierce political opposition from conservative legislators determined to reduce the role of government. Available from < <http://countrystudies.us/united-states/history-115.htm> >.

countries like Mexico into debt-equity swaps, and most of Africa into compulsory Structural Adjustment Programs (SAPs) of cash crop mono production for export to service debts, while domestic institutions of health and education crumbled - *mutatis mutandis*. It appears utopian to say much has changed.

But the intensification in economic discrepancies between Less Developed States (LDCs) and More Economically Developed States (MEDCs) finds expression in the international economic policies of the international legal community and lack of good governance at the national and international levels. While the gap of inequality finds expression in acts of global terrorisms and other crimes, the root cause of poverty remains unaddressed. More than 70% of the world's population live in poverty. True, as Jesus said, the poor we will always have with us, but the endemic of poverty points to irreprehensible global policies and geopolitics. While it is clear bad governance in LDCs play a substantial role, advocating good governance without trade, are simply pious words to detract from failing world politics.

In the midst of law as an economic and political Capitalists' tool, stands the loss of dignity of man. Poverty strips dignity and apart from its many international crimes as outlets, it also leads to death. In view of the plethora therefore of international treaties and covenants pledging the extermination of poverty, I therefore ask, "Should anybody be poor?"

Using the international legal framework of the UN Declaration of the Right to Development (DRD), I will analyse the historical context of LDCs, the role of MEDCs' to the growth of poverty, the actions of Transnational Corporations (TNCs) in their constant violation of fundamental human rights, the impact of trade and finance laws evinced by the International Financial Institutions (IFIs) of the IMF, World Bank and WTO on the growth of poverty, the illegality of protectionism in trade-agriculture, and Trade-Related Intellectual Property laws (TRIPs), and will argue that using the DRD, each person in the world has a legal right to life and all it entails, including sustainable development as a *jus cogens* - a fundamental human right in international law from which there exists no derogation, creating obligations and duties on the whole international legal community. While advocating debt cancellation, I will also critically examine

⁶ See Carty, above [no. 2], p. 11. Anthony Giddens portrays US's influence in shaping the world order under Wilson and Roosevelt as representing the imposition of US trade and power doctrines on the world.

the good governance debate and the essential national changes, which must occur to ensure debt cancellation improves lives.

I will conclude by reiterating the right to development as a right not of a few, but of all, and challenging that the bipolarity in development between MEDCs and LDCs can be changed with changes by the will of all states, in trade laws, good governance and development aid; by their actions towards TNCs and in IFIs. Additionally, I will reiterate the need for UN control to cut the uncultivated geopolitical reach of MEDCs, to remove the scourge of poverty and fulfil the *jus cogens* of the Right to Development.

HISTORICAL ANALYSIS OF LDCs

30,000 children die each day due to poverty. That is about 210,000 children each week or just under 11 million children each year.⁷

This is due to underdevelopment.

Underdevelopment in LDCs is the by-product of development in Western States caused by destruction of the natural balance in place before colonialism as the common denominator of poverty stricken States is the rule of colonisation – otherwise called forced suppression. These former colonies still exhibit anaemic economies, illiteracy, have non-existent institutional and societal infrastructures⁸, economic reliance on cash crop mono production for export, with high import of subsistence foods, rampant corruption, dictatorships and lawlessness. Above all, they languish in individual poverty.

However, most of these States before colonisation were advanced societies; Ethiopia was one of the greatest empires in history. Mexico had pure lands, rolling hills and clear waters.⁹ The Great Mali Empire encompassed most of West Africa up to the Atlantic Ocean. The Mogul and Ottoman Empire was comparable in their day to any Northern hegemony. These now failing States are the by-product of colonial trade and its repercussions. Therefore, understanding the failing States means examining the trade and development policies of the colonisers in LDCs.

Colonization and LDC Trade

Colonization was a business, with LDCs as farms cultivated for mono crop production and not for sustainable development. To this end, sugar plantations were created in the Caribbean with the 9 million slaves from Africa, mono crop cultivation occurred in the Ceylon, Java and Cuba Islands produced cocoa, coffee, tea, rubber, sugar, cotton and coffee for export to America. From America, the colonisers imported subsistence food. In plantation societies like the West Indies, colonial masters banned local subsistence farming but in settler societies like Tanzania this was permitted, which helped develop local manufacturing and local internal development.¹⁰ In India, the coloniser systematically deforested India for the

⁷ Progress of Nations 2000. UNICEF, 2000. Available from < <http://www.unicef.org/pon00/immu1.htm> >

⁸ The health systems are barbaric with high fatality rate of diseases commonly cured in MEDCs.

⁹ Redclift, Michael. 1987. Sustainable development. Exploring contradictions. Methuen & Co. Ltd: London, New York. p. 109. In Mexico which now oozes human waste from sewage outlets⁹, before colonialism it was recorded that "we saw the fresh water which came from Chapultepec to supply the city.... water could flow in and out from one part of the lake to another."

¹⁰ However, the side effects of these settler societies were the conflicts between the natives and the whites like the Mau Mau in Kenya, or counter insurgency like in South Africa or worse still, like in Australia, where they pushed back the natives further into the bush and into starvation.

export trade in shipbuilding, as in Kenya where the colonisers took the best lands, deforested the rest, with 2/3rd of their lands now arid or semi arid¹¹. But Sub Saharan States were the worse hit and at independence, had 5 characteristic weaknesses; *distorted trade structure, a desperate extensive agriculture with low fertility land, limited industrial base, very low levels of human resource developed and almost no public infrastructure.*¹²

The Sub Saharan experience

Distorted trade structures inherited from colonialism meant dependence on exported mono production cash crops with export price fluctuations leading to flight of cash. Also, the extensive farmlands good for plantations were bad for subsistence farming and with the poor agricultural technology, population growth and underproduction produced famines. Education and development had been suppressed, affecting development in all institutions of society and government. To this end, in 1960 when most LDCs gained independence, there were only 1200 local graduates in the whole Sub Sahara region and 1 doctor in Burkina Faso per 100,000 people.¹³ Educational shortage meant reliance on expatriates with huge salaries LDCs could ill afford. Additionally, at independence, the only inherited infrastructures were the railway systems the colonisers had created for their export trade. Transport, communication, water, environmental, power and trading systems had regressed during colonialism. By independence, with the Industrial Revolution having already occurred, these infrastructures were now archaic. After nearly a centennial of forced rule, most LDCs were physically and economically bankrupt.

African States have since adopted different developmental approaches,¹⁴ but have always emphasized capital accumulation over human development.¹⁵ While this industrial pursuit has been lauded by MEDCs, by relegating agriculture the main export of most LDCs to a secondary position, the resulting trade barriers of agricultural subsidies and protectionism in trade have spelt the proverbial nail in the coffin for the continent and most LDCs.

¹¹ The problems caused by deforestation brought about the women-led Chipko and Green Belt movements in India and Kenya at independence to stop deforestation.

¹² Cornia, A. Giovanni. "Adjustment and Africa in the 1980s", In From the Debt Crisis to Sustainable Development, edited by Vaggi, Gianni. 1993. Macmillan Press Ltd: Hampshire, London. p. 160.

¹³ See Cornia, above [no. 10], p. 169.

¹⁴ Malawi and Kenya developed capitalism, Tanzania adopted African socialism, while Guinea and Ethiopia chose state controlled development.

¹⁵ See Cornia, above [no. 10], p. 170.

Now, LDCs with the support of the Declaration of the Right to Development and sustainable development seek to restore the economic, environmental, political and social stabilities they once enjoyed.

DECLARATION ON THE RIGHT TO DEVELOPMENT AS A *JUS COGENS*

“Today, across the world, 1.3 billion people live on less than one dollar a day; 3 billion live on under two dollars a day; 1.3 billion have no access to clean water; 3 billion have no access to sanitation; 2 billion have no access to electricity” .¹⁶

¹⁶ James Wolfenson, “The Other Crisis”, World Bank, October 1998, quoted from The Reality of Aid 2000, 2000. Earthscan Publications. p.10.

RIGHT TO DEVELOPMENT AS A HUMAN RIGHT

The Right to Development is a fundamental part of international law and the International Bill of Human Rights¹⁷. By virtue of its normative consensus seen by the voting patterns in its adoption¹⁸ – The Independent Expert Arjun Sengupta summarised,

“Intent to declare law, whether customary, general principles or instant, spontaneous or new law, and the resolution is adopted by a unanimous or nearly unanimous vote or by genuine consensus, there is a presumption that the rules and principles embodied in the declaration are law.¹⁹”

This Right is derived from the non derogability of the UN Charter. This is confirmed in Article 53 of the Vienna Convention on the Laws of Treaties which states, “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” With the DRD’s purposes and objectives enshrined in the UN Charter – a peremptory norm of international law, a *jus cogens* from which there is no derogation, the Right to Development automatically espouses normative value and imposes legal and non derogable obligations on its duty holders.

An Analysis of *jus cogens*

A *Jus cogens* is first of all, as Cherif Bassiouni says:

“The compelling law. And as such a *jus cogens* norm holds the highest hierarchical position amongst all other norms and principles. As a consequence of that standing, *jus cogens* norms are deemed to be peremptory and non derogable.²⁰ “

In looking at an example at the legality of the NATO invasion in Yugoslavia, while their aims and purpose were noble and legal in line with Article 5 of the NATO agreement,²¹ Articles 2(4) and 51 of the UN Charter on non interference in domestic affairs of a state, and the right of the UN through the Security Council to order an attack as an international UN effort against a state, ensured primacy over the

¹⁷ This includes the UDHR, ICCPR and ICESCR.

¹⁸ The voting pattern for a law is also declarative of its normative value and force. When the DRD was adopted in 1986, there was only 1 vote cast against it. The only dissenting vote to the Right to Development was the United States due to its refute of the indivisibility of the economic, social, cultural, civil and political rights. Japan, the UK and Germany made statements rejecting its substance.

¹⁹ Salomon, Margot E and Sengupta, Arjun. The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples. p. 27. Available from < http://www.minorityrights.org/Dev/mrg_dev_title8_ip3/mrg_dev_title8_ip3.htm > [Accessed May 2005].

²⁰ Bassiouni, Cherif, M. Internatinoal Crimes: Jus Cogens and Obligations Erga Omnes. p. 2. Available from <<http://www.law.duke.edu/journals/lcp/articles/lcp59dFall1996p63.htm> >. Accessed June 2005].

²¹The North Atlantic Treaty. Available from < <http://www.nato.int/docu/basicxt/treaty.htm> > [Accessed July 2005].

NATO attack and rendered it illegal.²² The UN Charter therefore, has peremptory norms. These inherent *jus cogens* rights actually superseding the UN Charter, as an inherent human right, have fuelled most history's revolutions, *viz.*, English, American, French, Mexican and Chinese revolutions. In conceptualizing these rights, the American Declaration of Independence holds:

“*All men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness... whenever any ... government becomes destructive of these ends; it is the right of the people to ...abolish it*” (my emphasis).

Human Rights as evidence of the Laws of Nations is also promoted in the preamble of the Universal Declaration of Human Rights (UDHR) which states, “it is essential if man is not to be compelled to have recourse as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

Certain international crimes are *jus cogens*. The threshold question is whether such a status places an international obligation upon states; *erga omnes*. These *jus cogens* crimes include aggression, genocide, Crimes against Humanity, war crimes, piracy, slavery, and torture. Indeed, President Pinochet was guilty of torture, even his *ratione materiae* not providing him immunity. In understanding *jus cogens* crimes, the *Barcelona Traction* case defined this as crimes affecting the whole international community. The acts of Genocide as codified in the Genocide Convention article 2 and in Article 6 of the International Criminal Court (ICC) include conditions resulting in death. The salient feature in most *jus cogens* lies in the deprivation of life or of a quality of life and the sources of law to determine *jus cogens* are the primary and secondary sources in order of *opinio juris*, treaty law, ratifications, and *ad hoc* and other international tribunal rulings.²³ The international abhorrence of poverty and the treaty laws and *opinio juris* are indicative of the crime's normative value.

The Beginnings and contents of the Declaration of the Right to Development

²² Later, the much politicised Security Council Resolution 1203 afforded it legality.

²³ This can also be seen from Article 38(1) of the International Court of Justice Statute which states “. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”

The Right to Development was first advanced in 1972 by the Senegalese Jurist Keba M' baye, and has since being the focus of a largely theoretical debate between the North and the South. With this saga came an introduction of complexities, contextualities and subtlety to the previous normative functions of human rights. Birth through intensive deliberation it sought to integrate all five human rights - civil, political, economic, social and civil incorporated in the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenants for Economic, Social and Cultural Rights (ICESCR), separated during the cold war, including the other International Bills of Human Rights. However, by its affirmation of development as a right, it invoked all the negative associations with social and economic rights, which had been seen by the West as vague, indeterminate and unenforceable, making DRD' s justifiability and legitimacy challenged.

It was first recognised by the UN Commission on Human Rights as a Human Right in 1977, and subsequently in 1981 through the establishment of a working group of Government Experts on the Right to Development and became official in the Declaration on the Right to Development adopted by General Assembly (GA) resolution 41/128. This right was further affirmed in the 1993 Vienna Conference on Human Rights as a universal and inalienable right and an integral part of fundamental human rights. Additionally, its normative value was reaffirmed in the open-ended Working Group and the Independent Expert Arjun Sengupta,²⁴ and the role of the High Commissioner for Human Rights.²⁵

The DRD' s salient feature lays in its declaration that Sustainable Development²⁶ and improvement of the social, economic and political wellbeing for all is a *jus cogens*, with international actors such as the IFIs, TNCs, and MEDC States as duty bearers with obligations for its achievement. The objectives of the DRD is summarized in Article 1, which affirms this as:

“An inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be full realized” .

In summary, Article 1 shows this as a Human Right, and being inalienable, it cannot be bargained away. It also highlights the

²⁴ Formulated by the 1998/269 Economic and Social council decision.

²⁵ Created by GA resolution A/RES/48/141.

²⁶ The Brundtland Report defines Sustainable Development as, development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. Quoted from Lowenfeld, Andreas. 2002. International Economic Law. Oxford University Press: Oxford, New York. p. 304.

interconnectedness of all the Rights as one with *all peoples* having an obligation for its accomplishment. The three main duty bearers however are the individual (article 2(2)), the Nation-State (art 3(1)), and the International Community (art 3(3)). Additionally, this Right has four main propositions – the Right to Development as a Human Right, the Right to Development as a process of development in which all fundamental human rights can be fulfilled, equity and justice being central to the development process, and the obligations of the roles of the 3 groups of people listed above.²⁷

The other listed Rights include the Right to an international environment where the Right can be achieved, equal participation in developmental and environmental planning and in the shaping of policies affecting all levels of society, right to share in the benefit of scientific progress, to adequate housing, water, food and standard of living, wages that contribute to an adequate standard of living, right to technology, highest attainable standard of health, the right to peace and to determine freely their political status, to pursue their economic, social and cultural development and complete sovereignty over their national resources.

The role of the Right to Development to the eradication of poverty cannot be overemphasized. Although economic development plays a role in the DRD, it is not the central focus. The preamble of the DRD 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 benefits resulting therefrom.”²⁸

To this end, all individuals are right holders as subjects, not objects of development.

Proving the *jus cogens* of the Right to Development

In proving the *jus cogens* of the Right to Development, although not explicitly mentioned in the UN Charter, or the other International Bill of Human Rights *viz.*, UDHR, ICCPR and ICESCR, documents which came became its inception, the full interpretation of the Right to Development as a Human Right, and a *jus cogens* must be interpreted alongside these documents, with its principles firmly enshrined in

²⁷ Sengupta, Arjun. The Right to Development as a Human Right. Available from < www.hsph.harvard.edu/fxbcenter/FXBC_WP7--Sengupta.pdf > [Accessed June 2005].

²⁸ Declaration of the Right to Development; preambular, para. 2.

their provisions. A principle of the UN Charter as a *jus cogens* law is "to promote social progress and better standards of life."²⁹ To this end, UN member states are *inter alia* to:

*"Achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"*³⁰ (my emphasis).

This UN mandated requirement of international cooperation in resolving international economic, social, cultural and humanitarian problems is the bedrock of DRD as evinced in Article 4(1&2) where it requires States to cooperate *collectively* to realize the full rights of social, economic and political development stated in Article 1. Article 55³¹ of the Charter demands that Member States of the UN shall *promote* higher standards of living, *conditions of economic and social progress and development and international economic and social solutions* so that all human rights are protected. To add to the imperative tone, in Article 56³² all Member States *pledge*, to take joint and separate action in cooperation with the organization to achieve the purposes set forth in article 55. By these two *jus cogens* UN provisions, restated in the DRD, states have a legal duty in cooperating to achieve development. Brownlie states,

"The United Nations Charter in Chapters IX and X recognizes the urgent need to deal with economic and social problems and *certain of its provisions create binding obligations for governments to maintain human rights*. There is probably also a *collective duty of member states* to take *responsible action* to create reasonable *living standards* both for their own peoples and for *those of other states*³³" (my emphasis).

Additionally, the mandatory tone in Article 1 of the DRD shows its bold declaration of an already existing law. A law's ability to declare existing laws generally accepted by the international community gives it its normative value. To this end, the UN and UHDR purposes of achieving international cooperation for the realization of human rights for all are cited in preambles paragraphs 1 and 3 of the DRD. Its normative value is also reinforced by annual GA

²⁹ UN Charter. Preamble, para 4.

³⁰ UN Charter. Art 1(3).

³¹ UN Charter. Article 55 states, "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".

³² UN Charter. Article 56 states; "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

³³ See Salomon and Sengupta, above [no. 16], p. 32.

resolutions, the establishment by the UN, of a Working Group on the Right to Development, the appointing of the UN Commissioner for Human Rights with responsibility for the promotion and realization of the right to development.³⁴ Others include the 1993 Vienna World Conference on Human Rights,³⁵ the 1995 World Summit for Social Development, the 2000 Millennium Summit, and the 2001 World Conference on Racism and the 2002 World Summit on Sustainable Development.

By the above, I have clearly argued the *jus cogens* of the Right to Development.

DRD and the international Legal Obligations of IFIs

On the surface, IFIs like the IMF, World Bank and WTO being not States are not bound by the DRD. However, having international legal personalities are duty bound to obey customary international law, including peremptory norms of *jus cogens* and general principles of law. The *Reparations for Injuries* case³⁶ stated that an international organization is a subject of international law and capable of possessing international rights and duties. Additionally, the World Bank and IMF as specialized agencies of the UN having entered into a relationship with the UN as evinced in Articles 57 and 63 of the UN Charter, have an obligation to complement the actions of the UN, as agencies with the UN, sharing the same overall objectives. Although the West so far has viewed these economic and social rights as pious wishes, these cornerstone components of DRD, which are the right to life, health and Sustainable Development, must be achieved in an open international community.

The right to health is a right to life, and requires benefits of technological advancement, equitable wages and fair trade. Actions by IFIs and TNCs therefore hinder or aid this *jus cogens*. Concerning the right to life, the General Commentary of the UN HR Commission on the ICCPR stated,

“Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant

³⁴ See Art 4 (c) on the role of the Commissioner of Human Rights, which states, “And to this purpose, advocate support from relevant bodies of the UN systems”. These specialized agencies which were created by Article 57 of the UN Charter include the IMF, World Bank and other IFIs.

³⁵ Please see part 1, para 10, part II, para 72 on the Vienna Human Rights Conference.

³⁶ Available from < www.icj-cij.org/icjwww/idecisions/ismmaries/iisunsummary490411.htm > .

mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”³⁷

This clearly implies that the right to life isn't only freedom from death, but a right to a good life, with good health and Sustainable Development.

The Commentary goes on, “this right to life is the supreme right from which no derogation is permitted”³⁸, taking its non-derogation quality, a *jus cogens* from Article 53 of the Law of Treaties and finally, this mandated quality of life is broadened in Article 25 of the UDHR. To this regard, Article 6(1) of the ICCPR, states, “this life shall be protected by law and none shall be arbitrarily deprived of his life.” This includes TRIP laws. Article 7(1)(b) of the International Criminal Court lists Extermination as a Crime against Humanity, clarified in Article 7(2)(b), “Extermination includes the intentional affliction of conditions of life *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”. By virtue of the fact that Crimes against Humanity are *jus cogens* and by intentional deprivation of adequate medicine calculated to bring about death, TRIP laws are crimes against humanity and violate the *jus cogens* of life stated in the DRD.

Article 12 of the ICESCR recognises specifically, the right to health as, “the right of *everyone* to the enjoyment of the highest attainable standard of physical and mental health” (my emphasis). The use of the word *everyone* imposes strict liability on the international community as a duty towards their citizens, but also towards every man, woman and child in the world. To this end, the UDHR states, “Everyone has a right to standard of living adequate for the health and wellbeing of himself and of his family...³⁹.”

By their membership in the World Health Organisation (WHO) Member States submit themselves to uphold this *jus cogens* document by pledging,

“The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being” and that “the health of all peoples is fundamental to the attainment of peace and security, and is dependent upon the fullest cooperation of individuals and States.”⁴⁰

³⁷ Office of the High Commissioner for Human Rights. General Comment No. 6 . The Right to Life. Art 6. (30/04/82). CCPR General Comment No. 6. Available from < [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument) > [Accessed July 2005].

³⁸ As above. General Comment No. 1.

³⁹ Universal Declaration of Human Rights, Art 25(1).

⁴⁰ Preamble of the WHO. Available from < <http://www.who.int/about/en/> >.

Fundamentally, Article 1 of the WHO is a restatement of its objective, which is the “attainment by all peoples of the highest possible level of health...”, by the *fullest cooperation of ...States*. Furthermore, Judge Weeramantry in the *Advisory Opinion of the Legality of the Use by a State of Nuclear Weapon in Armed Conflict*, stated,

“It will be noted here that the recognition by States of the right to health is... the right of everyone and not merely of their own subjects. Subsequently each state is under an obligation to respect the right to health of all members of the international community.⁴¹ “

The World Food Summit 1996 Declaration also refers to Article 56 of the UN Charter, in its reaffirmation of international obligations in achieving “full realization of the right to adequate food.”⁴²

The DRD also prescribes social justice by requiring national development policies for the constant wellbeing of all peoples, and all actions for ensuring the Right to Development by *inter alia*, equality in provision of basic infrastructures for all its people.⁴³

DRD and the international Legal Obligations of States

The concept of equity goes beyond the boundaries of Nation-State and requires equitable trade opportunities and a favourable international community where LDCs can share in the decision-making and profits of progress. Indeed, the results of the Global Consultation stated that “the concentration of economic and political power in the most industrialized countries is an obstacle to development and is perpetuated by the non democratic decision making process of the international economic, financial and trade institution.⁴⁴” It is obvious that these implanted structural inequalities in international relations between states are a barrier to development. To this end, the DRD prescribes international favourable conditions for its realization, it also asserts the duty of *all* States to *actively* formulate international developmental policies, and reiterates international cooperation as essential to complementing national efforts by providing developmental aid,⁴⁵ in line with the UN Charter on resolving international economic and other problems, and in view of Article 2(1) of the ICESCR, where each State “*undertakes* to take steps...to achieving progressively the full realization of the rights... by all appropriate

⁴¹ Dissenting Opinion of Judge Weeramantry (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *ICJ Reports (1996) 66 at 144*).

⁴² See Salomon and Sengupta, above [no. 16], p.33.

⁴³ See Articles 2 and 8 of the DRD.

⁴⁴ Barsh, Russel, Lawrence. The Right to Development as a Human Right: Results of the Global Consultation. *Human rights quarterly*; vol. 13, no. 3. Available from < sim.law.uu.nl/SIM/Library/books.nsf/ 0/911b2079c74765a2c12566400036988c?OpenDocument > [Accessed June 2005].

⁴⁵ See Arts 3(1), 4(1) and 4(4) of the DRD.

means...” (my emphasis) – The mandatory use of *undertakes*, providing an authoritative impetus. Finally the UDHR reasserts the importance of “*national effort and international cooperation, as everyone as a member of society is entitled to realization ... through... national effort and international cooperation... of economic, social and cultural rights indispensable for his dignity and the free development*⁴⁶” (my emphasis). Some of the duties of the international community include eliminating developmental obstacles,⁴⁷ non-interference,⁴⁸ the maintenance of peace and security⁴⁹ and the promotion of developmental policies⁵⁰ in keeping with their affirmation in the preamble of the UDHR to promote social progress and better standards of living.

Furthermore, Article 1 of the Vienna 1993 Convention states

“... The solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in *accordance with the Charter of the United Nations*, other instruments relating to human rights, and international law...” (my emphasis).

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, states,

“...Stressing that *all members* of the international community shall *fulfil* jointly and separately their *solemn obligation to promote ... human rights and fundamental freedoms for all with distinction...*” (My emphasis).

Additionally Article 18(2) and (3) recognizes the responsibility of international associations to “create an international order where the UDHR rights (*which are also DRD rights*) can be fully realized⁵¹” (My emphasis).

The Copenhagen Declaration recognized the commitment of States to enhancing social development and creating SAP programs that include social developmental goals.⁵² The Cairo Programme of Action stated that the lack of development should not be invoked to justify an abridgement of internationally recognized human rights.⁵³ The Beijing Declaration said economic and social development and environmental protection mutually reinforce sustainable development.⁵⁴

⁴⁶ UDHR, Art 22.

⁴⁷ Art 3 of the DRD.

⁴⁸ Art 5 of the DRD.

⁴⁹ Art 7 of the DRD.

⁵⁰ Art 2(2) of the DRD.

⁵¹ “Preamble of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms”, In Basic Documents on Human Rights, 2002, edited by Brownlie, I & Goodwin-Gill, G. Oxford University Press: Oxford, New York. p. 91.

⁵² Paras 7 and 9 and Commitment 8 and 9. Including in the work of developmental banks investment lending, additional 'striving' for 0.7% of GNP official development assistance.

⁵³ Principles 3 and para 3.15.

⁵⁴ Para 36.

To this end, Sustainable Development as a *jus cogens* encompasses changes to the economic, legal, financial, trade, environmental and other patterns of global interconnectedness, the growth of sustainable development, adherence to the DRD and equitable treatment of LDCs.

DRD as an established International Legal Obligation

The obligation to fulfil the Charter, a *jus cogens*, establishes irrevocable obligations on all international legal personalities and international organisations. The obligation to *respect* human rights requires an obligation to abstain from action by a State and/or any Organisation, from any action that violates or impedes the realization of Human Rights provisions in the DRD. In view of the various pledged International Declarations, responsible international obligations as evinced in Agenda 21 **must** include addressing issues of development, sustainable resource and environmental management, poverty eradication and income generation.⁵⁵

The DRD is a process of “constant improvement⁵⁶” as restated in Article 28 of the UDHR.⁵⁷ And by its assertion of a State’s right to formulate National developmental policies, it emphasizes its inherent authority to assert the right of its people to development against other States and International Institutions of Trade, the IFIs, MEDCs and TNCs, acting as Keba M’ baye reminds, as representatives of individuals the lawful right owners.⁵⁸ Furthermore, Articles 22, 25, 27 of the UDHR on economic, cultural rights, health, and scientific development rights and Articles 1, 6, 7, 9, 11-13, 15 of the ICESCR with insistence on equitable wages, all mandate the *jus cogens* of equality and fair trade, for the complete development of man.⁵⁹

The above cited declarations and other international and regional human rights treaties,⁶⁰ state laws, NGOs and other international bodies, while not always legally binding, are declarative of customary international law, proving clearly the existence within the

⁵⁵ Agenda 21, Chapter 3, paras 4 and 7.

⁵⁶ See Art 2(3) of the DRD.

⁵⁷ This is also stated in paras 3 and 4 of the two 1966 Covenants. I quote, “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

⁵⁸ Art 2(1) shows the right holders are people and article 2(3) shows states as the duty bearers. Some scholars like Bedjaoui believe this right is a state right, although the beneficiaries are individuals.

⁵⁹ Principles 1, 4 and 5 of Rio Declaration.

⁶⁰ These include the African Charter on Human and People’s Rights which interestingly in Art 21(5) shows an effort by African states to suppress the economic exploitation practiced by international monopolies for the betterment of the quality of lives of their citizens. Additionally pledging in Art 22(2) to exercise the Right to Development. We also have the American Convention on Human Rights 1969 and the Arab Charter on Human Rights 1994.

international community of the full recognition of the Right to Development as a *jus cogens* in customary international law.

I summarize with Brownlie:

“When a resolution of the General Assembly touches on a subject matter within the United Nations Charter, it may be regarded as an authoritative interpretation of the Charter⁶¹.”

⁶¹ See Salomon and Sengupta, above [no. 16], p. 28.

EXISTING INTERNATIONAL ECONOMIC PRACTICES
INCLUDING TRADE, IFIS, TNCS AND MEDCS AND
THEIR LEGAL FRAMEWORKS VIOLATIONS OF THE
RIGHT TO DEVELOPMENT.

“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. We resolve therefore to create an environment - at the national and global levels alike - which is conducive to development and to the elimination of poverty.”⁶²

⁶² A/Res/ 55/2. Principles III (11,12) of the Millennium Declaration avowed by all the Heads of States of the UN. Available from < <http://www.un.org/millennium/declaration/ares552e.htm> >

POLICIES OF MOST ECONOMICALLY DEVELOPED COUNTRIES

Trade liberalization and globalized trade have had mixed and complex consequences for LDCs with the normative consensus in LDCs that the 'required' dismantling of trade barriers was a Capitalist's tool for world domination. The proof is evidenced in the use by MEDCs of stronger voting powers, veto rights, hegemony status, debased national policies towards LDCs, non-ratification of essential human rights treaties, self-seeking bilateral and multilateral treaties, protectionism and impenetrable trade barriers. Indeed, in spite of their obvious wealth, in the year 2000, only 5 MEDC States; Denmark, Luxembourg, the Netherlands, Norway and Sweden achieved the pledged aid target of 0.7% GNP. Additionally, most developmental and other aid comes with MEDC conditionalities of open LDC markets to allow 'dumping', and sadly, the firearms trade. Additionally, the coercion by MEDCs in achieving trade by threatening the loss of aid breeches *jus cogens*.

LDC demand for favourable trade and business laws

LDCs have always sought a way to break from under MEDC domination. The wave of expropriations in Bolivia, Brazil, Argentina, Peru, Guatemala, Dutch properties in Indonesia, the Iranian oil expropriations, the Egypt Suez Canal and Arab states nationalization of western oil companies⁶³ were cries for economic equality and development. Following these, LDCs prescribed GA Resolutions 1803, 2158 and 3171, seeking permanent sovereignty over natural resources and equitable and just bilateral treaties. Also, the Charter of Economic Rights and Duties of States (CERDS) was effort by LDCs to repudiate structural imbalances by regulating TNCs, and change bilateral treaties. These were all overwhelmingly rejected by MEDCs in spite of trade guaranteed MEDCs by the Multilateral Investment Guarantee Agency (MIGA).⁶⁴

Bilateral Investment Treaties and MEDC Trade as obstacles to development

The educational backwardness explained earlier, is the reason for attracting Foreign Direct Investments (FDI) through bilateral treaties, as a means to improve LDC technological know-how. But with treaties favouring only the MEDCs, and foreign consulting firms

⁶³ See Lowenfeld, above [no. 22], p. 405.

⁶⁴ See Lowenfeld, above [no. 22], p. 491. MIGA cover risks such as expropriation, breach of contract, war and civil unrests. Even when a business proposal is not covered by a BIT and protection, Article 23(b)(ii) show that the MIGA would still guarantee an investment if the host state guarantees MFN treatment.

charging LDCs as much as \$180,000 yearly, and more than half of the \$8 billion spent on development donations in Africa going to fees of about 80,000 expatriates working for public agencies of aid programmes within Africa,⁶⁵ LDCs still remain impoverished.

Treaties cannot generally be binding on international institutions except their constituent instruments are amended, therefore States must implement the Human Rights provisions in the International Bill of Human Rights, by equitable terms of trade in bilateral agreements, by their regulation of TNCs registered in their State and by their voting patterns in IFIs – indeed the conditionality rules in the World Bank creates poverty and death. The DRD prescribes that LDCs must have fair advantage in the decision making process in the international legal community and stop the conspicuous asymmetry in international relations in particular, economy and trade laws. For example, using LDC financial limitations, in encouraging them to accept MEDC toxic waste, although aware of their inability to cleanup, MEDCs violate the *jus cogens* of the DRD and the UN Charter provisions of international cooperation to problems of an economic and a humanitarian nature.

Jus cogens obligations on MEDCs

The 27 Principles of the Rio Declaration define the rights and responsibilities of States in their pursuit of human development. Based on the requirements of Sustainable Development, emphasis is on precautionary principles like Polluter Pays principle, as well as the Right to Development. Agenda 21 also provides governments and TNCs, guidelines on improving the social, economic, environmental and developmental conditions of the Host State. Based on the paradigm of state responsibility in the Draft Code of State Responsibility⁶⁶, I believe that under Article 9 (3) (d) which says, “a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment such as those prohibiting massive pollution of the atmosphere”, MEDCs bear state responsibility for environmental degradation in LDCs, against the developmental principles enshrined in the DRD.

The Right to Development demands international States to

“*Cooperate* with each other in ensuring development and *diminishing obstacles to development*... and fulfil these duties in such a manner

⁶⁵ See Redclift, above [no. 7], p. 57.

⁶⁶ Available from < http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm >.

as to *promote a new international economic order based on sovereign equality, interdependence and mutual interest*⁶⁷ (My emphasis).

Article 6 also requires that "*all States should cooperate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms*" (My emphasis). Additionally, Article 4 shows that all States have a duty both individually and collectively, to "*formulate international development policies to facilitate the realization of the right to development*" (my emphasis). It further urges, "effective international cooperation is essential in providing these countries like appropriate means (*trade, debt cancellation, etc.*) and facilities (*health, patent*) to foster their comprehensive development" (My emphasis).

Finally, Article 8 clearly states that all parties have a duty to ensure equal access to the benefits of development to ensure the eradication of social injustice. Evidently, depraved trading, protectionisms in trade, debilitating bilateral treaties⁶⁸, and continued neo-colonisation strangulations do not foster social justice.

Those like the singer-Prebisch or the Structuralist approach who blame LDCs for their problems point to rich States as having dynamic economies with emphasis on technological advantages while poor States have feeble investments and labour force with a downturn on production and a disincentive to diversification. On the other hand, the 'Dependency' Theorists' reassert MEDCs' deliberate use of capital allocation to control the pattern of development in LDCs. While I agree that LDCs display internal mismanagement, the self seeking actions by Nation-States as above, in their actions in the WTO, in their agricultural subsidies while fully understanding its impact on Africa where agriculture is its main export, have refuted their legal and binding obligations pursuant to the *jus cogens* of the Right to Development, by pursuing capitalism, flourishing through indigenous suppression.⁶⁹

⁶⁷ Art 3(3) of the DRD.

⁶⁸ See the *American Agricultural Products Ltd v. Republic of Sri Lanka* case. 4 ICSID Rep (1997), 30 ILM (1991).

⁶⁹ Waters, Malcolm. *Globalization*. 1995. Routledge: London, New York. p. 109.

TRANSNATIONAL CORPORATIONS

The rapid evolution of TNCs have resulted in their diversification into all industries⁷⁰ with TNCs having turnovers higher than many LDCs combined.⁷¹ Additionally, Dunning estimates that in 1988, about 20,000 TNCs had over \$1.1 trillion foreign assets and total assets of about \$4 trillion, accounted for about 30% of all combined GDP in all markets, 75% of international commodity trade and 80% of international technology.

Also, the 300 largest account for 70% of total FDI and 25% of the world's capital⁷² with 21% of the world's 100 hundred wealthiest bodies, corporations⁷³ - proof that states are no longer the driving force in international law.

While investments by TNCs is of necessary importance to the world's economy, their actions affect millions of lives, and there have been mounting criticism of their role in creating global poverty, especially in LDCs, by circumventing the rule of law, profiteering, and exploiting the corrupt legal system and Governments in the abuse of human rights through capital control, technological debasement, wage exploitations and by undercutting and destroying the local industries, ensuring the largest profit margin. However, unlike States, their actions have not being matched by accountability or responsibility. Using the Human Rights provisions in the DRD and the other International Bill of Rights, a legal precedence has been developed to determine their legal obligations.

The plethora of TNC crimes in LDCs

TNCs atrocities abound in LDCs. Their 'development' in Indonesia, led to 4 million peoples from the Java, Bali areas, displaced to the 'Outer Islands', which are unable to sustain human life.⁷⁴ In completely deforesting LDCs, the cumulative total gain for 8 LDCs

⁷⁰ Paragraph 4 of the OECD Preface states, "The rapid evolution in the structure of multinational enterprises is also reflected in their operations in the developing world, where foreign direct investment has grown rapidly. In developing countries, multinational enterprises have diversified beyond primary production and extractive industries into manufacturing, assembly, domestic market development and services".

⁷¹ Bantekas, Ilias. Corporate Social Responsibility in International Law. p. 1, *Boston University International Law Journal*, Volume 22, Number 2, Fall 2004.

⁷² See Waters, above [no. 62], p. 76.

⁷³ Read it at UN Press Briefing. Available from < <http://www.un.org/News/briefings/docs/2002/db081302.doc.htm>>.

⁷⁴ See Redcliff, above [no. 7], p. 77.

from timber export is \$100 million a year, thanks to pricing controls. The culpability of TNCs in the *Ken Sarowiwa*⁷⁵ case and the *Bhopal* disaster⁷⁶ are harrowing. In Burma, Total Oil used forced labour and has been deplored by the International Labour Organisation (ILO). Shell aided in the killing and displacement of thousands of indigenes to gain extractive farmlands. International pharmaceutical companies seeking maximum profits, even in face of disasters in Africa, refuse the duplication of cheap versions of their drugs to sustain life and cure Aids. International Telephone and Telegraph (ITT) played a major role in the 1973 *coup d'état* in Chile. 157 TNCs have been found in their complicity in the Congo atrocities by the provision of arms, perpetuation of war crimes, crimes against humanity and the exploitation of Congo natural resources by illegally mining and selling their diamonds and gold.⁷⁷ Products carrying chloro-fluoro carbons (CFCs)⁷⁸ are banned in Western States because they deplete the ozone layer causing skin cancer, yet products using them are frequently traded to LDCs. I argue that TNCs commit Crimes against Humanity as the *dolus eventualis* can be proved by showing they knew the eventual outcome of their action would lead to death – when indigenes are displaced to give land to developers, even if *actus reus* was not to destroy them but as seen in Article 30(2)(b) of International Criminal Court (ICC)⁷⁹, it is the eventual outcome. There is no reason why TNCs should not be held responsible for the inevitable loss of life caused by starvation and displacements in the pursuit of their trade goals.

Corporate Social Responsibility as a Legal Obligation

NGOs and other socially responsible groups have developed the concept of transnationals' responsibility to development in LDCs, birthing the Corporate Social Responsibility (CSR) in business conduct goals, with emphasis on TNCs obligations to its shareholders, but also to all others affected by their policies, as reaffirmed in Human Rights documents, the ILO principles, the Rio Declaration and Agenda 21 of the Copenhagen Declaration for Social Development. These emphasize

⁷⁵ Friends of the Earth. Behind the Shine – The Other Shell Report. Available from < http://www.foe.co.uk/resource/reports/behind_shine.pdf>.

⁷⁶ Bhopal Information Center. The Incidence, Response and Settlement. Available from < www.bhopal.com/ >.

⁷⁷ This deprives the people of their legal right to collectively dispose of their natural resources as enshrined in Article 1(2) of the 1966 International Covenant on Civil and Political Rights which says, 'all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence'

⁷⁸ These are used in aero sprays and refrigerators.

⁷⁹ Also read about the Malawi famine due to corruption, at www.worldpress.org/Africa/703.cfm

CSR as benefiting LDCs by creating sustainable development and ensuring right to development, but also benefiting TNCs by providing it continued acceptance by its shareholders, Consumer Rights Groups, and ensuring it a continued favourable market share, but which must be viewed not as philanthropy, but as an inherent part of company implemented goals.

Over the years however, various CSR codes have developed, but the plethora of unenforceable codes, *viz.*, Organisation for Economic Cooperation and Development (OECD) Guidelines, Caux Principles for Business, the Global Reporting Initiative, Global Sullivan Principles, Global Corporate Responsibility and UN Global Compact⁸⁰ codes, serve as a distinct disincentive.

Principle 1 of UN Global Compact says that businesses should support and *respect* the protection of internationally proclaimed human rights within their sphere of influence and while it has received corporate endorsements, its TNCs were highlighted by NGOs for poor human rights practices in LDCs. Shell by its silence complicity, is guilty of the murder of Ken Sarowiwa. Additionally, in the Chad-Cameron Pipeline Project, the incumbent equity corporation although creating the IPP (Indigenous People's Plan) as part of its financing conditions, did little else with no culpability. Unocal Corp was sued for allowing the Myanmar government rape, kill and forcibly relocate its indigenes to aid the company's gas production,⁸¹ while companies like Nike only invest in States with slave labour wages.

The Caux Principles aim to provide action and dialogue among business leaders, the Global Sullivan Principles lies in its application of soft law with no obligation on TNCs to adhere.

The most effective, the OECD Guidelines, still ineffective due to its lack of social monitoring and transnational reach, requires TNCs to respect the international law obligations⁸² of the Host State, and to facilitate in implementing the OECD Guideline. It further mandates TNCs to contribute to the LDC's economic, social and environmental progress with a view to achieving sustainable development.⁸³ Section II (3,4) of the OECD further requires TNCs to assist the local community by creating jobs and training local staff.

TNC and hazardous waste dumping in LDCs

⁸⁰ OECD Guidelines for Multinational Enterprises. 2001. Copyright Clearance Center, Customer Service: Danvers, USA. p.59.

⁸¹ See Bantekas, above [no.64], p. 14.

⁸² See OECD Guidelines, above[no. 71], Section II para 2.

⁸³ See OECD Guidelines, above [no. 71], Section II, para 1.

Section V of the Codes focuses on the environment. The UK Clean Air Act of 1956, the US Clean Water Act, the EC directives on the protection of the environment, and the Conference of the Human Environment 1972, emphasized the cost of environmental pollution cleanup in MEDCs, making it financially advantageous to outsource their toxic waste to TNCs for transportation to LDCs. By dumping toxic waste in LDCs under the guise of 'trade', aware of their economic limitations to adequate environmental recoup and the accompanying loss of lives, violates *jus cogens*. The principle *sic utere tuo ut alienum non laedas*⁸⁴, or Principle 16 of the Rio Declaration - Polluter Pays, is particularly important as LDCs are systematically despoiled through toxic trade. Principle 6 of the UN Convention on Human Environment⁸⁵ requires cooperation by all in the international arena, including TNCs to the eradication of poverty and ensuring sustainable development - Both objectives annihilated by toxic waste. In sending this trade to an LDC President like the Benin President who insists on this trade⁸⁶ for his nation's survival is clearly aware that his impoverished state cannot afford adequate environmental clean up and this will result in certain death for his citizens. This surely is a crime. And the argument that the necessary freely acquired raw materials is good for LDC trade, is unjustified by the long term repercussions - the *Khain Sea*⁸⁷ experience is an example of unwillingness by LDCs to accept toxic poisoning. The porousness of international law is showed through the Colbert brothers who in shipping poisons from the US government, and TNCs like Ford, Exxon and DuPont, to over 100 LDCs, only have as crime, the false labelling of 'surplus chemicals', in place of 'hazardous waste'. Poverty is an incentive to this trade - The *Koko toxic waste dump*⁸⁸ was sold at 18,000 drums of hazardous waste for £100 monthly. Guinea Bissau was willing to take 500,000 tons of waste from Switzerland at \$20 million, and a lesser sum from the British government, stopped only by public outcry.⁸⁹

⁸⁴ See Lowenfeld, above [no. 22], p. 298. The term means, 'use your own property so as not to injure the property of another.'

⁸⁵ This article states "The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of ill countries against pollution should be supported."

⁸⁶ Read Benin Hazardous Waste, at <http://www.american.edu/projects/mandala/TED/benin.htm>. Additionally at Nigeria Case at www.american.edu/projects/mandala/TED/nigeria.htm. Also at The World Is Dumping Toxic Waste in the African Union at www.africanfront.com/toxic-waste.php.

⁸⁷ This ship with toxic waste tried to dock and was rejected by many states, following 27 months and 4 continents till it finally arrived home to Philadelphia and would not say where its contents were.

⁸⁸ The Deadly Trade: Toxic Waste Dumping in Africa. Available from www.american.edu/projects/mandala/TED/nigeria.htm.

⁸⁹ Nigeria Waste Imports from Italy. Available from www.american.edu/projects/mandala/TED/nigeria.htm

Nigeria's Nobel Prize winner, Wole Soyinka rightfully calls this "the poisoning of the continent."⁹⁰

International Law *jus cogens* on TNCs

Corporate corruption by TNCs in LDCs has created a minority elite in LDCs, fuelled civil wars and created poverty. To this end, the US Foreign Corrupt Practices Act aims to punish TNC crimes in LDCs. Other weaker covenants like the 1997 Global Treaty against Bribery,⁹¹ the CATOC and in 2003, the UN Convention against Corruption and other regional groups⁹² have been developed but with no legal obligations, are unenforceable. This has re-established the need for soft laws like the UN Norms on the Responsibilities of Transnational Corporations, the Rio Declaration and the OECD Guidelines, and *jus cogens* laws like the ILO, UDHR and DRD to act. But not having legal personality, has affected TNCs' compulsory international obligations. However, considering their financial strength and the economic dependence of LDCs on them, allowing them wield undue advantages by imposing favourable concessions in taxation, disregarding minimum wages, self-seeking bilateral treaties, and aiding general underdevelopment in LDCs, mean that as they possess implied powers,⁹³ they also have implied responsibilities⁹⁴ to the elimination of poverty, growth of environmental regeneration and sustainable development.

Therefore the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy provides guidelines on worker rights and is declarative of customary international law.

The Rio Declaration shows Sustainable Development is substantially controlled by TNCs and Principles 5 and 27 by referring to *all states and all peoples*, ensures TNC legal culpability and participation.

Agenda 21 stresses TNCs role in implementing resource utilization, waste reduction, the environment and other sustainable developmental concerns. Furthermore, the 2002 world Summit on Sustainable Development (WSSD) noted that the *private sector* "has a duty to

⁹⁰ You can read more about this poisoning and various TNC crimes in < http://www.raceandhistory.com/cgi-bin/forum/webbbs_config.pl/read/1515 >

⁹¹ This did not prosecute private corporations.

⁹² Bantekas, Ilias. Corruption as an International Crime and Crime Against Humanity: Supplementary Criminal Justice Policies. p. 5 . These include the 2003 African Union (AU) Convention on preventing and combating corruption and 1997 Inter-American Convention against Corruption have all criminalized active and passive participation.

⁹³ Their implied powers include their culpability and non-liability in the Shell-Ogoni crisis and subsequent state sponsored murder of Civil Rights activist Ken Sarowiwa.

⁹⁴ See Bantekas, above, [no. 64], p. 4.

contribute to the evolution of equitable and sustainable communities and societies.⁹⁵”

Continuing TNC Crimes following non enforceability of soft laws

KPMG reports that 45% of Global Fortune Top companies produce environmental, social or sustainability Reports.⁹⁶ But by overriding TNC culpability in indigenous displacements, TRIP laws restricting averagely priced medications, trade laws which aid slave⁹⁷ and child labour, these Reports are simply market share propaganda and TNCs continued human right atrocities continue to have direct impact on lives in LDCs like in the *Bhopal* Case, in the *Bowoto v Chevron Texaco* case where Chevron had authorized shooting of protestors at its Parabe offshore platform in Nigeria,⁹⁸ in Shell resuming operations at a location where the government authorized shooting 60 people dead at a local uprising,⁹⁹ in India where TNC seed companies’ lured farmers who traditionally grew pulses and millets, to buy hybrid cottonseeds referred to by the seed merchants as “white gold” which was meant to make them millionaires, instead, they became paupers,¹⁰⁰ in the displacement in the Philippines, mining activities in Panama and the privatization of Sammi lands in Sweden,¹⁰¹ in the *Lubicon Lake Band v Canada* and *Lansman* cases,¹⁰² and in the Canadian gold mining TNC implicated in Tanzania in the life burial of 52 small-scale local miners by the government forces and the subsequent CAO MIGA Ombudsman cover-up.¹⁰³ Actions like the CAO cover-up of TNC crimes and the blatant universal exploitation by 157 international TNCs of the impoverished state of Congo¹⁰⁴ cannot be allowed to continue.

Clearly, viewing Transnational Crime as certain criminal behaviour, which transcends national borders, transgressing laws of several

⁹⁵ The Johannesburg Declaration on Sustainable Development, World Summit on Sustainable Development (WSSD). Agenda Item 13, 3, UN Doc. A/CONF. 199/L.6/Rev.2 (2002).

⁹⁶ See (www.wimm.nl/publicaties/KPMG2002.pdf)

⁹⁷ Thanks to the unenforceability of international trade and labour laws, China by its weak human rights law is able to uncut trade by paying its growing population less than minimum wage.

⁹⁸ Please read it further at (www.earthrights.org/chevron/index.shtml).

⁹⁹ Please read it further at (www.srimedia.com/artman/publish/printer_495.shtml).

¹⁰⁰ Poverty and Globalisation. Available from < http://news.bbc.co.uk/hi/english/static/events/reith_2000/text5.htm >.

¹⁰¹ See Salomon and Sengupta, above [no. 16], p. 20.

¹⁰² See Salomon and Sengupta, above [no. 16], p. 21. Yet, Article 23 of the Rio Declaration reaffirms the indigenous people’s right to determine and develop priorities and strategies for their development.

¹⁰³ See Bantekas, above [no. 64], p. 20.

¹⁰⁴ Lius Moreno-Ocampo, Second Assembly of States Parties to the Rome Statute of the International Criminal Court: Report of the Prosecutor of the ICC 4 (2003). Available from http://www.icc-cpi.int/library/organs/otp/030909_prosecutor_speech.pdf, led the ICC Prosecutor to declare potential criminal liability for the authors.

states or having an impact on another country,¹⁰⁵ TNCs are guilty of Transnational Crimes also.¹⁰⁶ These led the UN Commission on Human Rights in 2003 to issue Norms on the Responsibilities of Transnational Corporations and other Business Enterprise with regard to Human Rights. Article 1 summarises the overall objective that TNCs **must** promote, respect and protect all human rights laws, *including the Right to Development*.¹⁰⁷ It further requires TNCs to provide basic infrastructure to the Host State, including drinking water, health and education.¹⁰⁸ By its demand to TNCs to respect the Right to Development, the Norms highlight the DRD's normative value as a *jus cogens*.¹⁰⁹ Additionally, the UDHR as a *jus cogens*, by reasserting every *individual and organ of society's* responsibility for promoting these rights, encapsulates a legal obligation on TNCs as *organs* of society.

In summary, Ken Sarowiwa said, "we **WANTED** Shell there - we cannot drink the oil. But not at the cost we had to pay."

¹⁰⁵ This was stated by the UN in 1975 and Mueller 2001.

¹⁰⁶ Crime can also be viewed as social harm with emphasis on corporate crimes, crimes of the powerful and crime as infringing human rights as stated by Schwendinger and Schwendinger.

¹⁰⁷ Stated in Art 23 of the UN TNC Norms.

¹⁰⁸ See Art 12 of the UN TNC norms.

¹⁰⁹ The Right to Development is also stated in Art 22(2) of the 1981 African Charter.

PROTECTIONISM AND TRADE

“The 48 poorest countries account for less than 0.4% of global exports.¹¹⁰”

“At a money laundering conference in Montreal, after the keynote speaker spoke, a young man stood up and asked, ‘Tell me, what we are supposed to do? I come from the Eastern Caribbean. Europe and the United States have taken away our bananas. We have no manufacturing. After September 11, there are no more tourists. Now you are saying that we should not be licensing offshore banks and we should not be selling shell companies. But we are already starving today. How will we feed ourselves tomorrow? Please tell me, what are we supposed to do?’ The keynote speaker could only answer, ‘I don’t know.’¹¹¹”

Protectionism as a Violation of Human Rights

Since the 1980s, regional and other groups like the European Union (EU) and North Atlantic Free Trade Agreement (NAFTA) seek to remove trade barriers, while promoting protectionism against all others.¹¹² Protectionism by MEDCs weaken the economic position of LDCs, worsened by their almost overriding reliance on mono production which in a globalized market, is subject to price fluctuations, worsened still by their lack of subsistence economies. Simply put, without export trade, LDCs fail. In this regard overt or indirect protectionism by MEDCs violate their right to development and the right to life of their citizens. This egregious agricultural protectionism by MEDCs destroys economic development in LDCs whose economic mainstay is agricultural exports¹¹³ and currently this trade has more trade barriers than in the Tokyo Rounds of 1973. With the dumping and tariffs laws dictated by MEDCs and America in particular, hindering development. The exclusion of agricultural products and textiles and clothing products from the GATT is evidence of protectionism.

Existing Trade Laws as a Violation of Human Rights

Trade laws on goods, services and TRIPs are highly regulated and with regional income disparities, thanks to trade liberalisation and open markets favouring only the richer states. This is why Bedjahoui calls for genuine solidarity between nations against the “solidarity

¹¹⁰ Human Development Report 2000. p. 82, *United Nations Development Programme*. Available from <<http://hdr.undp.org/reports/global/2000/en/>>

¹¹¹ Robinson, J. 2003. The Sink. London: Constable and Robinson. p. 325.

¹¹² See Waters, above [no. 62], p. 69.

¹¹³ In Africa, agriculture takes the greatest share of the GDP with 33%, and 40% of its exports.

of profit” of richer States, as the limited wealth of the poor is being appropriated through clever means like patents.

In reviewing trade laws, TRIP protection rules mean that most scientific developments do not trickle down to LDCs. And in view of the role of technologies to the eradication of poverty, these laws act as a barrier to the Right to Development. Article 4(2) of the DRD demands as a complement to national efforts, effective international co-operation in providing means and facilities to foster *comprehensive development*. These facilities include knowledge transfer and access to scientific development in the area of medicines, agriculture and everything that *fosters comprehensive development*. The use of the word *comprehensive* specifically demands access to acquired knowledge in sustainable development.

The Cash Crop Trade and the endemic of poverty

Specialized farming methods employed by MEDCs in LDCs meant LDCs were unable to survive in the global market without specialised farming, forcing the need for specialized cash crop mono production farming for export, and in surviving to meet the economic demands of developed states, LDCs renounced to creativity and impoverish their own values and increased their poverty. The plight of cash crop LDCs, unable to afford mechanized farming is even worse. Furthermore, the burden of debt servicing has meant inadequate healing time for the land and along with deforestation for export, has created irreversible environmental damage. But population growth demands ingenious restorative technologies to feed more people within the shortest possible healing time for the land, especially as debt servicing demands have led to insufficiency at home. Although economically dependent on its agriculture trade, it would be expected that herein lies their comparative advantage, yet Africa has become a food dependent continent by continually importing subsistence food and an imported taste once acquired, destroys demand for locally produced goods, further destroying the already limited subsistence farming.

In a bid for *any* trade, LDCs especially Africa have welcomed highly MEDC -biased bilateral treaties. Additionally, the poverty caused institutional infrastructural weaknesses and the challenges of adapting modern foreign technologies to backward infrastructures result in wide spread destruction to both. Additionally, weak governments are exploitable in equitable trade - In the Enterprise Zone in Mexico created by the US and Mexico, *maquiladoras* operate in violation of international standards of wages, with the US exploiting weak poor human right enforcements to maximum profit.

But Principle 12 of the Rio Conference requires that,

“States should cooperate to promote a *supportive* and open international economic system that would lead to *economic growth*...¹¹⁴” (My emphasis).

Legal Obligations flowing from the DRD

International law, by the *jus cogens* of human rights law and the DRD, has put the right to trade secondary to the right to life as evinced in article XX (b) of the GATT which says “*nothing* in this Agreement shall be construed to *prevent* the adoption or enforcement by any *contracting party of measures necessary to protect human, animal, or plant life or health*” (My emphasis). No profit based trade law must violate superior human rights and further to Article 2(4) of the UN Charter, States cannot act “in any other manner inconsistent with the purposes of the United Nations” (My emphasis). Also, the International Labour Organisation (ILO) in II(c) declares that international economic and financial policies and measures can *only be accepted* if they *promote* and *not hinder* the *fundamental objective* of the ILO of *eradication of poverty*, and honest and equitable pay for labour. To this end, the ILO requires its Members States pursue,

“...Policies in regard to wages and earnings, hours and other conditions calculated to ensure a just share of the fruits of progress of all and a minimum living wage to all employed ... adequate protection for the life and health of workers in all occupation, the assurance of equality of education and vocational opportunity.¹¹⁵”

The world population is estimated to reach 8 billion by 2025, most of which will be in LDCs given that population growth occurs highest in the countries with the weakest economies and infrastructures and with labour intensive agricultural technologies. Restrictive mono production export trade¹¹⁶ cannot be the solution.

The *jus cogens* rights lodged in the DRD will only be met when economic preconditions of free and unbiased trade and lack of protectionism are satisfied through concerted international cooperation.

¹¹⁴ See Lowenfeld, above [no. 22], p. 306.

¹¹⁵ Articles III (d)(g)(j), “The Declaration Concerning the Aims And Purposes of the International Labour Organization”, In: Basic Documents on Human Rights. 2002, edited by Brownlie, I & Goodwin-Gill, G. Oxford University Press: Oxford, New York. P.307.

¹¹⁶ See Redclift, above [no. 7], p. 61.

IMPEDIMENTS OF THE IMF, WORLD BANK AND WTO TO THE RIGHT TO DEVELOPMENT

The Chief Economist for the World Bank, the Harvard trained Economist, Lawrence Summers on 12 December 1991 memo-ed,

“I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that! I’ve always thought that under populated countries in Africa are vastly UNDER polluted; their air quality is probably vastly inefficiently low...¹¹⁷” (My emphasis).

No, he did not lose his job. He has since become the 27th President of Harvard University.

The Bretton Woods organizations - the IMF and World Bank were created in 1944 and the GATT/WTO in 1948 with laudable ambitions - the reconstruction and development of States by temporary balance of payment loans and the amelioration of global trade.

Although lauded by some, they have been inculcated by others for obstructing sovereignty by advocating globalized trade, with non participation spelling alienation in international trade - Yes the *Corfu Channel* Case stated that sovereignty is no longer an absolute and individual right of every state.¹¹⁸ However, the Marxist view would be as Chayes and Chayes said,

“The largest and most powerful states can sometimes get their way through sheer exertion of will, but even they cannot achieve their principal purposes - economic well-being ... without the help and cooperation of many other participants in the system.¹¹⁹”

Furthermore their lack of accountability and legitimacy aid their vilification, coupled with their structural and debt programs, creating more global economy inequalities.

The Violations of the WTO to the *jus cogens* of the DRD

In spite of its lofty preamble aims of raising standards of living and inequality in global trade, sadly, by its trade laws on agricultural subsidies, dumping, dispute resolution, subsidies and TRIPs, the WTO hinders the Right to Development.

¹¹⁷ Lawrence Summer’s speech on the brilliance of the raping and exploitation of Africa. Available from <http://www.utexas.edu/conferences/africa/ads/286.html>

¹¹⁸ *Corfu Channel Case*. ICJ 1947. Available from < <http://www.icj-cij.org/icjwww/icasas/icc/iccframe.htm> >

¹¹⁹ Chayes and Chayes. *The New Sovereignty: Compliance with International Regulatory Agreements*. 1995. Cambridge MA: Harvard University Press. p. 27.

TRIP Laws

TRIP laws have traditionally violated the right to life *jus cogens* of the DRD. Cautious changes are welcome in Paragraph 1 of the Doha Declaration on TRIPS, where WTO Ministers “recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.” Additionally pledging to promote technology transfer to LDCs and that the “Agreement…should be interpreted… to protect public health and, in particular, to promote access to medicines for all.”¹²⁰

Millions in LDCs have died due to patent protection in TRIP laws, but Article 8(1) of the TRIP states, “Members may, *in formulating* or amending their *laws* and regulations, *adopt measures* necessary to *protect public health and nutrition*” (My emphasis).

The Doha Round has created new flexibilities into TRIP laws, especially compulsory licensing and parallel importing. And in 2004, the problem of Article 31(f) of the TRIPS Agreement was resolved when States agreed upon legal changes making it easier for poorer non manufacturing LDCs to import cheaper generics made under compulsory licensing.¹²¹

While I applaud LDCs exemptions on pharmaceutical patent protection until 2016, it needs equitable trade to make the deadline. Finally, the supremacy of human rights can be seen in Doha laws on TRIPs, which requires its provisions be interpreted in line with customary international law.¹²²

WTO Dispute Settlements

At the Doha Round, members avowed, “We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding….”¹²³

WTO dispute settlements forums have traditionally been used by MEDCs to assert their pursuits.¹²⁴ Furthermore it is financially impossible for most LDCs to put forward a case, with the Determination and Panel rounds doubling the cost. Even Articles 4(10) and 12(10), which permit a Panel Member to be from an LDC in a dispute with an LDC like in the *Bananas* case, is insufficient and the Secretariat provided

¹²⁰ Declaration on TRIP Agreement and public health. Provision 7. http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

¹²¹ Please read it at < http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm >.

¹²² Declaration on TRIP Agreement and public health. Provision 5a. http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm

¹²³ Para 30 of Doha Ministerial Declaration, 14 November 2001

¹²⁴ Data from 1948-1989 listing 75% of all complaints as having been filed by the US, the EC, Canada and Australia.

counsel, opens questions of miscarriage of justice. Furthermore Article 22.2 of the Dispute Settlement prescribes economic sanctions retaliations, which are economically detrimentally if used against MEDCs, who are usually the errant States. Finally, by permitting secret *amicus briefs* and with rulings not made public as stated in Articles 10, 14 and 17.4, the WTO lacks transparency by denying access to its rulings to socially responsible groups. Finally, its lack of human rights provisions is clear in the *India Balance of Payments* ruling,¹²⁵ where the Appellate Court stated that India could address its payment deficits through macroeconomic changes that violate the DRD.

Agricultural Subsidies and Anti Dumping

The GATT was largely ineffective in disciplining agricultural trade until the Uruguay Agriculture Agreement.¹²⁶ After the Agricultural dispute spelt failure at Seattle, the positive Doha Round was welcomed until the Cancun disagreements on agricultural and other subsidies by LDCs, resulted in its failure, albeit a success for LDCs and Africa in particular.

Although MEDCs had pledged in the Doha Declaration, “we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies...”¹²⁷, in August 2003 they created a proposal which offered no reductions in their economically debilitating domestic subsidies, and continued agricultural trade barriers. This was overwhelmingly rejected by LDCs and the G-20 who demanded the above as well as Special and Differential treatment (S&D), which is also part of the Doha Declaration. Indeed, in Cancun, cotton producing States, Benin, Burkina Faso, Chad and Mali highlighted that the US is the largest subsidiser of cotton, to the tune of \$4 billion annually, which cost LDCs annually about \$250 million in direct and \$1 billion in indirect lost revenue. They sent in a proposal,¹²⁸ in which they described how cotton subsidies in MEDCs amounting to almost the value of world trade in cotton, have destroyed their economy, calling for compensation and a ban on subsidies. The Mali President, Amadou Toumani Toure explained that with the price of cotton at 35 cents a pound in 2002, the production cost being 47 cents a pound in LDCs, 73 cents a pound in the US and higher in Europe, Africa could not make a profit because, “international trade rules, as defined by the World

¹²⁵ Please read more about it at < <http://www.sice.oas.org/DISPUTE/wto/ds90/90r22.asp> >.

¹²⁶ Although it is stated in Article 20, as an ongoing process.

¹²⁷ Ministerial Declaration at the Doha Round in 2001.

¹²⁸ Now a Ministerial Conference document, WT/MIN(03)/W/2 and WT/MIN(03)/W/2/Add.1

Trade Organization, are biased by the substantial subsidies granted to European, American and Chinese cotton producers.” These subsidies were estimated, in 2001 at \$700 million in Europe, \$2.3 billion in the U.S. and \$1.2 billion in China¹²⁹ – clearly subsidy laws while violating right to food and life in LDCs, are also Capitalist tool for continuing LDC domination. Indeed, the EU subsidy on beet is higher than the price of the entire surplus sugar of the developing countries and MEDCs pay \$2 per head of cattle to its cattle growers, more than the per capita income of livestock farmers in LDCs.¹³⁰ In Geneva in August 2004, MEDCs agreed to end export subsidies, reduce agricultural subsidies and lower tariff barriers.¹³¹ It remains to be seen if this is implemented. Additionally, anti-dumping laws are used by MEDCs to restrict goods from LDCs, stating that as Article VI (1) of the WTO says, its price is below market price. The US also used this law to force Korea to open its rice markets to dumping by US agribusiness giants, Cargill and Conagra.¹³²

DRD as a *jus cogens* in the WTO

In its preamble and Article XVI:3, the WTO has as objective, a better standard of living for all, highlighting the supremacy of human rights.¹³³ The preamble states,

*“Recognizing that their relations in the field of trade and economic endeavours should be conducted with a view to raising standards of living...and expanding the production of and trade in goods and services... with the objective of sustainable development...to ensure especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development”*¹³⁴(my emphasis).

Furthermore, Article 103 prescribes the WTO implementing its laws with regard to customary international law. But the continued failure of the trade rounds highlights the continued inequality in international trade. As Kofi Annan said,

“The rhetoric of global trade is filled with promise. We are told that free trade brings opportunity for all people, not just a

¹²⁹ Please read more at < <http://www.africaaction.org/docs03/tr0306a.htm>>.

¹³⁰ Read more at < http://pd.cpim.org/2003/1012/10122003_snd.htm >.

¹³¹ Adam Smith, Prophet of Capitalism, views subsidy based protectionism as jeopardizing a state's potential wealth, but it is essential that LDCs protect their fragile and growing industries.

¹³² Cost of production of rice was \$18.66/ bushel in the US in 2001 but it was sold internationally at \$ 14.55/bushel.

¹³³ Article XVI: 3 states, “in the event of a conflict between the provisions of this Agreement and the provisions of any of the World Multilateral Trade Agreement, the provisions of this Agreement shall prevail”. This therefore gives it primacy over TRIPs or other subsidiary WTO agreements detrimental to human rights, including inter alia, Article 31(f), Article XX of the GATT, Article 2.2 and 6.1 of the TBT.

¹³⁴ Preamble of the WTO Charter. Available from <www.wto.org/english/docs_e/legal_e/04-wto.doc> .

fortunate few...And we are led to hope that the current round of trade negotiations will deliver on this promise. Sadly, the reality of the international trading system today does not match the rhetoric.¹³⁵

The Violations of the World Bank and the IMF to the *jus cogens* of the DRD

The World Bank and IMF's Articles of Agreement say that in all decisions, only economic considerations shall be relevant. To this end, the IMF's role is to promote the growth of world trade and economic conditions conducive to sustaining growth and avoidance of balance of payment deficits by short-term loans and the World Bank emphasizes programs with objectives of improvements to public enterprises. But their prescribed solutions have created global poverty. Its conditionality rule restricts a poor State's ability to borrow essential funds for its survival so that Bradlow cautioned the World Bank not to undermine its member states' international obligation to respect human rights.¹³⁶ And by providing ExxonMobil and Chevron with millions for a 600-mile pipeline from Chad to the coast of Cameroon, the irreversible environmental damage violates the DRD.

But the Bank is starting to focus on human rights. The Official Review Report shows the Bank not funding oil or mining projects without the consent of indigenous communities, barring mining companies from dumping waste in waters, and is recommending adherence to human rights as criteria for lending to extractive industries.¹³⁷ The Bank is also changing its definition of poverty from per capita income, to social exclusion and disenfranchisement.¹³⁸ But the most radical shift comes the Bank President, James Wolfensohn who promised to press the Bank's board to make loans to countries conditional upon meeting standards of human rights.¹³⁹

¹³⁵ Statement by Kofi Annan, September 10, 2003. Available from < <http://www.un.org/apps/sg/sgstats.asp?nid=491> >.

¹³⁶ Bradlow, Daniel, D. Symposium: Social Justice and Development: Critical Issues Facing the Bretton Woods System: The World Bank and Human Rights. *Transnational Law and Contemporary Problems*. 47, at 72-73 (1996).

¹³⁷ Oxfam America, World Bank Official Review Advises: Respect Human Rights, Pull Out of Coal and Oil Financing. http://www.oxfamamerica.org/newsandpublications/press_releases/archive2003/art6600.html

¹³⁸ Development and human rights- the Role of the World Bank. Available from < <http://www.worldbank.org/html/extdr/rights/hrtext.pdf>.>

¹³⁹ World Bank president urges "radical shift". Available from <http://hurryupharry.bloghouse.net/archives/2004/05/18/world_bank_president_urges_radical_shift.php>. His following words show the hindrances to DRD in the World Bank. "If I talk about a rights-based approach, I get letters [from board members] saying I have exceeded my authority because we are a financial institution. "Many countries on our board have signed the declaration of human rights but say this is not the job of a financial institution

Debt Rescheduling and Structural Adjustment Programs

The summary effect of renegotiating debts through the Heavily Indebted Poor Countries Initiative (HIPC) and, the Paris Club and others¹⁴⁰ have been more debts,¹⁴¹ increased debt payments and longer interest rate payments. But even qualifying requires strategic alliances; Pakistan received \$1.3 billion credit from the Poverty Reduction and Growth Facilities Loan partly due to its assistance on the war on terrorism in Afghanistan.¹⁴²

Following a decade of SAPs, in 1999, IMF SAPs imposed an average of 114 conditions on each sub-Saharan African government¹⁴³ – These various policies enforced reduced public spending, freezing and reduction of wages, trade liberalization, elimination of subsidies and devaluation – Following these, living standards deteriorated due to the side effects of cutbacks on social spending and maintenance of infrastructure which meant fewer exports and less money for debt repayment,¹⁴⁴ creating further asymmetries. Indeed, Stiglitz, the former World Bank chief economist, in his book wrote, “...The IMF is not particularly interested in hearing the thoughts of its ‘client countries’ on such topics as development strategy or financial austerity. All too often, the Fund’s approach to the developing countries has had the feel of a colonial ruler” .¹⁴⁵

Trying to make a change, in 1999 the IMF replaced SAPs with Poverty Reduction Growth Facility (PRGF). This is also being criticized. Its continued lack of transparency is evinced when in the Joint World Bank/IMF papers on the PRSP, it stresses poverty reduction and the broad participation of civil society, while in a separate paper for a meeting of African finance ministers in January 2000 to explain the

¹⁴⁰ Others include the Decision on Surveillance of 1977, the Extended Fund Facility of 1974, the Compensatory Financing Facility in the 1960s, the Oil Facility, the Compensatory and Contingency Financing Facility, the Supplementary Financing Facility in the mid 1980s, the Poverty Reduction Facilities, the Poverty Reduction and Growth Facility and the Toronto Terms of 1988 were just some of the menu of options LDCs had to choose from to help them refinance and renegotiate debts including longer repayment terms, low interest rates and cancellation of one third of eligible maturities.

¹⁴¹ The only initiative that permitted some form of debt cancellation was the HIPC but with the 'First Decision Point' and the 'Completion' Point taking 6 years and many requirements, an enhanced HIPC initiative was created to accelerate the debt relief and this enhanced facility allowed more LDCs to qualify for partial cancellation.

¹⁴² See Lowenfeld, above [no. 22], p. 555.

¹⁴³ Read more at <<http://www.50years.org/cms/ejn/story/159>>.

¹⁴⁴ For example, the IMF debt restructuring in Ecuador meant loss of jobs, 80% increase in cooking gas price, cutting salaries, and with its Banana production the country's only export, encountering EU import limits, these served to destroy the fragile Ecuadorian economy. In Tanzania, the IMF and World Bank policies forced it to suddenly charge hospital fees, resulting in over 1.8 million deaths of aid patients and other diseased. Charging school fees resulted in decline in education and technology.

¹⁴⁵ Stiglitz, J. 2002. Globalization and its Discontents, Penguin Books, pp 40-41.

new PRGF, the IMF demanded from all LDCs, “a more rapid privatization process” and “a faster pace of trade liberalization”.¹⁴⁶ But following the April 2000 IMF and World Bank protests in Washington and the Meltzer Report criticism, IMF has had reforms. Indeed, an internal World Bank Report concluded that the poor are better off without SAPs.¹⁴⁷ In March 2003, the IMF itself admitted in a paper that globalization may actually increase the risk of financial crisis in LDCs stating “the evidence presented in this paper suggests that financial integration should be approached cautiously, with good institutions and macroeconomic frameworks viewed as important”.¹⁴⁸

IMF's Legal Obligations to the *jus cogens* of the DRD

The IMF believes its specialized agency relationship with the UN and the non-applicability of international covenants to it makes it immune from human rights law. But this relationship means it is bound to obey general norms of international law, particularly those adopted pursuant to the UN Charter. Additionally, its State Members when interpreting trade and financial laws are bound by international law, to promote and protect development and human rights. International law is therefore binding upon all subjects of international law including international organisations. Furthermore under Article IV of the IMF, each Member State is required to “endeavour to direct *its economic and financial policies* toward the fostering of *orderly economic growth* with reasonable price stability with due regard to... circumstances” (My emphasis). Article IV Section I (I) of the IMF states that

“Recognizing that the essential purpose of the international monetary system is to provide a framework that... *sustains sound economic growth*... each member undertakes to collaborate with the Fund and other members to assure orderly exchange rates arrangements and to promote a stable system of exchange rates...” (My emphasis).

By the introduction of the term, *sustains sound economic growth*, the Fund has the obligation to oversee both the international monetary system and the compliance of each member to the stated obligations. Additionally, international law Experts insist on the primacy of human rights laws in the DRD being customary international law with international obligations, as superseding the provisions of IFIs. Detractors could argue that Article 24 of the ICESCR precludes

¹⁴⁶ Shah, Anup. Structural Adjustment — a Major Cause of Poverty Available from <<http://www.globalissues.org/TradeRelated/SAP.asp>>.

¹⁴⁷ The Effect of IMF and World Bank Programmes on Poverty. Available from <http://www.imf.org/external/pubs/ft/staffp/2000/00-00/e.pdf>

¹⁴⁸ Effects of financial globalisation on developing countries: Some empirical evidence. Available from <http://www.imf.org/external/np/res/docs/2003/031703.pdf>.

obligations on the specialized agencies. But the ICESCR does not impair, but rather enhances and explains the Charter and should any IFI provision clash with the Charter, Article 103 gives the UN Charter pre-eminence. And as Article 31 of the Vienna Law of Treaties shows, treaties shall be interpreted in line with its objectives and purposes. By signing the UN Charter with its far-reaching human rights provisions, all bodies are obligated to respect it.

Financial institutions are ephiphenominal, acting mainly as agents of States and reflect interest of the powerful States. Thucydides said long ago that the strong do what they can; the weak suffer what they must! - For these reasons, capitalist States have furthered their aims through the IFIs with trade and finance laws distinctly biased against LDCs, and have failed to contribute to development. As the Right to Development Working Group asserted, the international framework has to provide an environment that is transparent and non discriminatory with equal access to the distribution of the wealth. - This international framework is sadly lacking. If their trade laws and actions violate the DRD, the IFIs owe a duty to all peoples in LDCs for laws favouring the *jus cogens* of the Declaration of the Right to Development and Sustainable Development.

THE GOOD GOVERNANCE DEBATE – CONTENTS AND CRITICAL REFLECTIONS.

“Good Governance is perhaps the single most important factor in eradicating poverty and promoting development¹⁴⁹”

“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... Success in meeting these objectives depends, *inter alia*, on good governance within each country. It *also depends on good governance at the international level and on transparency in the financial, monetary and trading systems. We are committed to an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system*”¹⁵⁰ (My emphasis).

¹⁴⁹ Concept Paper on State of Governance in LDCs REPORT. Statement by UN Secretary General, Kofi Annan.

¹⁵⁰ A/Res/ 55/2. Principles III (13) of the Millennium Declaration avowed by all the Heads of States of the UN. Available from < <http://www.un.org/millennium/declaration/ares552e.htm> >

THE GOOD GOVERNANCE DEBATE

The World Bank's 1989 Report on Sub-Saharan Africa characterised the crisis in the region as a "crisis of governance".¹⁵¹

The term, Good Governance was first injected into the North-South dialogue by the Global Coalition for Africa in 1990. In spite of its various descriptive anagrams, its essence lies in the management of State resources including its legal, political, economic, cultural and infrastructural institutions to the benefit of its people, as essential participants in a State's success. The great debate lies in analysing the place Bad Governance plays as a causation of poverty and underdevelopment. The West accuses LDCs of being authors of their own doom by gross mismanagement of State resources for personal enrichment, with poor governance and corruption being the root causes of underdevelopment. But in analysing this debate, it is essential to note that term governance encompasses both national governance and governance at the international level.

Features of Good Governance

There are eight main features of good governance¹⁵² viz., *participatory, respects rule of law, consensus oriented, transparent, responsive, effective and efficient, equitable and inclusive.*

In a participatory government, men and women evenly participate in the state's development, with the viewpoint of all citizens of essential import. The model also requires a fair and impartial legal framework with respect for the rule of law through an incorruptible police force and an impartial jury. And in their actions, all stake members and stakeholders must operate with transparency. Business decisions must be decisive. Additionally, in view of a State's diversity, a consensus based policy process must take place to foster inclusiveness of all citizens and finally all citizens and cultural groups must possess equal opportunity for improvements.¹⁵³ Effective governance also requires maintaining infrastructures and effectively utilizing natural resources to ensure sustainable development. However, the overriding point in good governance lies in

¹⁵¹ Available from <http://www.ossrea.net/eassrr/jan89/mahmood.htm>.

¹⁵² This is as clarified by Resolution 2000/64 of the Commission on Human Rights. The Commission linked good governance to an enabling environment conducive to the enjoyment of human rights and promoting growth and sustainable human development.

¹⁵³ This has been the cause of most civil wars in LDCs. See the South Sudan repression, the Ogoni people's fight for sustainable development, the Hutu and Tutsi problems and the various cases in the *ad hoc* tribunal for Yugoslavia with the ethnic divide.

accountability – the Government, private sectors and civil society organisations must be accountable to stake holders.

With LDCs and in particular Africa uncovered as examples of Bad Governance, the Office of the UN Human Rights in coordination with the UN programme of Technical Cooperation and the UN Consultative Committee on Programme and Operational Questions created policies of good governance for LDC, including democracy, participation, environmental protection, human rights, the rule of law, public administration, transparency and accountability, and more.¹⁵⁴ To help failing states, the Commission presented practical examples within Africa of good governance from among Uganda, Tanzania, Botswana and Kenya whose visionary leadership, administrative reforms and extensive decentralization have helped their resurgence. And at the first African Governance Forum in Addis Ababa,¹⁵⁵ these countries shared.

Good Governance in LDCs

The international community has traditionally branded LDCs as bad, because of their governance, policies and poverty. It is important therefore to analyse the governance of certain LDCs classified as paradigms of good governance. In Uganda, after having inherited a civil war torn State, the Government developed programs of reform which resurrected Uganda to an African state with a 7.0% GDP,¹⁵⁶ by unswerving commitment to economic reforms and governmental changes. But in so doing, the President banished democracy by enforcing a one party State. He also incurred the wrath of the World Bank by negotiating the purchase for a new presidential jet while seeking debt relief. All the same, for its commitment to good governance, Uganda receives Danish and Canadian financial backing.

In Tanzania, with the goal of improving governance and reducing poverty, the Government created anti corruption initiatives, established sound democratisation processes, and developed the agricultural sector while enforcing regional integration. For its efforts, the ADB Director stated,

“We note with appreciation the good progress that Tanzania has made in the implementation of its programme of economic and social reforms,

¹⁵⁴ Please find the list at the Office of the United Nations High Commissioner for Human Rights. Available from <<http://www.unhchr.ch/development/governance.html>>

¹⁵⁵ Available from <<http://www.africaaction.org/docs97/eca9707.htm>>.

¹⁵⁶ Muwonge, Donna. Uganda – Is it a model of Good Governance for Africa? Available from www.open2.net/makingadifference/good_governance.html [Accessed August 2005].

which is anchored on the Poverty Reduction Strategy of the country. As a result, macroeconomic performance has improved significantly” .¹⁵⁷ It has also received financial support from Norway to implement Good Governance.

Botswana is a paradigm of good governance with only 3 past Presidents and peaceful regime changes. It is void of ethnic tensions, has sound political stability and sustained economic growth – Indeed, the UNDP Human Development Report of 1996 ranked Botswana 71st out of 178 countries. Botswana developed a framework of good infrastructures, accountability, transparent legal, fiscal and monetary framework, mixed economy with heavy reliance on the private sector – welcoming foreign investment and TNCs.¹⁵⁸

Bad Governance in LDCs

Indonesia suffered a devastating blow in December 2004 due to a Tsunami which killed over 115,000 of its people in the war -torn province of Aceh. It has been demonised for bad governance as the aid supplied by the international community fails to reach those destitute and dying. Its governmental failings can be seen from its financial crisis in 1997 and subsequent economic collapse, resulting in its military dictator, General Suharto being driven out of office and it is currently undergoing enforced IMF SAP, while fighting off repression movements in the oil rich Aceh province. Indeed, with its complicity in the *East Timor* case, its brutality is evident. Yet this stems from the brutality and bad governance it has received. Holland had ruled Indonesia with vile wickedness from the 17th century, torturing and stealing from the local people while hugely profiting from Indonesian spices, coffee and sugar. The vicious colonial subjugation and the role of America in its bloody and unstable past¹⁵⁹ highlight the role of international Bad Governance as capitalising on its weaknesses and aiding in its bad governance.

Nigeria is immensely blessed with a rich endowment of natural oils,¹⁶⁰ but its wealth has been siphoned by white elephant schemes, incongruous policies and greedy mismanagement of state wealth by the rulers. But these were accomplished with connivance by MEDCs through their banks and their TNCs.

¹⁵⁷ Available from <<http://www.afdb.org/pls/portal/url/ITEM/F5D29C2C99DE0312E030A8C0668C31A3>>

¹⁵⁸ Selolwane, Onalenna Doo Summary of Research Papers on Botswana. Available from <<http://www.ossrea.net/rw/goodgover-02.htm>>.

¹⁵⁹ In 1965 there was a crisis after the regime nationalised the oil industry, threatening the Anglo-Dutch multinational Shell, which had a monopoly on Indonesia's oil. The army, encouraged by the US, seized power. Some 700,000 people were killed. The US backed the 1975 invasion of East Timor, which saw 300,000 people killed over the next 20 years.

¹⁶⁰ Nigeria it must be remembered is the 8th largest oil producing state in the world.

The acts of Zimbabwe's President Mugabe in agrarian reforms shocked the international world as he seized farmlands from white Zimbabweans. He has also banned free press and rejected international food aid. But it was his May/June 2005 actions that attracted unprecedented international criticism when he bulldozed over 200,000 homes in urban areas, in Operation *Murambatsvina*, Shona language for *Operation Drive Out Trash*. His people call this, *Zimbabwe's Tsunami*, leaving 700,000 people jobless and a further 2.4 million people have been affected countrywide.¹⁶¹ The opposition party, the Movement for Democratic Change (MDC) allege the actions were simply to punish the urban poor for not voting for him in the elections. Indeed, his nation's economy has shrunk by 40% while he lives a palatial life.¹⁶² But his speech¹⁶³ at the 2002 World Summit on Sustainable Development, remonstrates the cohesiveness of international bad governance where law is used as a capitalist tool with international law biased towards continued LDC subjugation - This is indeed the bedrock for his own bad governance.

Clearly Sub Saharan States need Good Governance for their development by adopting changes in the public sector, updating institutional infrastructures,¹⁶⁴ downsizing bureaucracy, tightening the financial control systems and combating corruption.¹⁶⁵ And finally, they must rule for the people - Nelson Mandela suffered more than all, yet he remained President of South Africa for only one term.

The need for International Good Governance

Demanding equity, at the 2004 Annual GA meeting,¹⁶⁶ Kofi Annan condemned world rulers for shamelessly disregarding the rule of law - commenting that some States viewed themselves as above the law. This was highlighted as problems caused by the Security Council (SC) failing to reflect the current global geopolitical realities. The SC was also condemned for geopolitical rulings while ignoring human rights laws. Kofi Annan hauntingly concluded: "Throughout the world,

¹⁶¹ [News 24](http://www.news24.com/News24/Africa/Zimbabwe/0,,2-11-1662_1741736,00.html), 22 July 2005. Available from < http://www.news24.com/News24/Africa/Zimbabwe/0,,2-11-1662_1741736,00.html >

¹⁶² President Mugabe has the use of two official residences in Harare and others in Bulawayo, Gweru and Mutare. He owns a mansion in Zvimba and the Nyanga highlands and has just built another palatial mansion with 4 acres of floor space lined with Italian marble and 25 bedrooms.

¹⁶³ This can be accessed at < www.un.org/events/wssd/statements/zimbabweE.htm >

¹⁶⁴ Nigeria and Chad were named as having the worst public institutions.

¹⁶⁵ Some of these reforms include review and adjustment of compensation package for employee, merit-based recruitment and promotion while promoting the values of good governance.

¹⁶⁶ Read more at < www.un.org/News/Press/docs/2004/ga10257.doc.htm >.

the victims of violence and injustice are waiting... for us to keep our word... But ultimately, that will depend on the hold that the law has on our consciences.”

Indeed, there are an abundance of international laws promoting *jus cogens* obligations on States, TNCs and IFIs as duty bearers to the elimination of poverty and to the growth of sustainable development, by international good governance.

At the Millennium Conference, the Member States pledged to create at the national and international levels, an environment conducive to development and elimination of poverty depending *inter alia*, on good governance.¹⁶⁷

The Programme of Action adopted in Brussels by the 2001 3rd UN Conference on Least Developed Countries also emphasized the role of international good governance, stating,

“Success in meeting the objectives of development and poverty eradication depends *inter alia*, on good governance within each country. It also depends on *good governance* at the *international level* and on *transparency in the financial, monetary and trading systems*¹⁶⁸” (My emphasis).

The Copenhagen Declaration on Social Development affirmed,

“We are convinced that *democracy* and *transparent* and *accountable governance* and administration in all *sectors of society* are indispensable foundation for the realization of social and people-centred sustainable development¹⁶⁹” (My emphasis).

Sadly notwithstanding the compulsory tone of these various Declarations that espouse the current millennium goals, these goals¹⁷⁰ have not being met as the international community continues to be narcissistic.

Quite clearly, the DRD requires LDCs take the lead on their national development, “...with a view to achieving progressively the full realization of the rights recognized... by all appropriate means¹⁷¹” and by formulating “... appropriate national development policies that aim at the *constant improvement* of the well-being of the entire population and of all

¹⁶⁷ It additionally notes the values of Freedom, equality whereby no individual must be denied the opportunity for development (1)(6)(b), Solidarity emphasizing the obligation of the richest to help the poorest, tolerance, respect for the principles of sustainable development, shared responsibility in managing international development. Available from < <http://www.un.org/millennium/declaration/ares552e.htm> >.

¹⁶⁸ The Third United Nations Conference on the Least Developed Countries. 14-20 May 2001: A/CONF: 19/11 8th June 2001.

¹⁶⁹ Principle 4, “The Copenhagen Declaration on Social Development, 1995”, In: Basic Documents on Human Rights, 2002, edited by Brownlie, I & Goodwin-Gill, G. Oxford University Press: Oxford, New York. P. 869.

¹⁷⁰ Millennium goals include eradicate extreme hunger and poverty, achieve universal primary education, reduce child mortality, improve maternal health, combat HIV/Aids, malaria and other diseases, ensure environmental sustainability and develop a global partnership for development. Available from < <http://www.un.org/millenniumgoals/> > [Accessed August 2005].

¹⁷¹ Art 2 of the ICESCR.

individuals”¹⁷² (My emphasis), while taking all steps to realize the Right to Development and ensure *inter alia*, equality of opportunity for access to basic resources of life and income.¹⁷³

However, in keeping with the *jus cogens* of international responsibility, the DRD demands international cooperation to *ensure development* for the promotion of a new international economic order of sovereign equality, interdependence and cooperation amongst states¹⁷⁴ and stresses that ...” as a *complement* to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development¹⁷⁵” (My emphasis).

Finally in Article 10, it obliges the international community to take steps in ensuring full exercise and progressive enhancement of the right to development, by “formulation, adoption and implementation of policy... and other measures... at the...international levels.”

The Good Governance Debate

The indices on the Transparency website lists out of 146 states, Botswana at 30, Tanzania at 93, Uganda at 103, Kenya at 130, Zimbabwe at 117, Indonesia at 135, and at 144, Nigeria at the bottom of the pile.¹⁷⁶ This clearly indicates that Good Governance makes a difference. But following Blair’s Commission for Africa¹⁷⁷ in which he blamed Bad Governance by greedy African leaders for the plight of Africa, this debate erupted. This 400 page Report criticized despotic African leaders who senselessly plunge their States into unnecessary wars, creating famine and a mass exodus of refugees. It stipulated the need for increased aid, debt elimination, lifting of trade barriers, and stamping out corruption. But its strength even with critics, lies in its willingness to accept the need for national and international Good Governance.

The reaction by LDCs point to the lack of legal standards on good governance; who determines when good and bad governance have occurred? – Indeed, South Africa’s reign of apartheid was accepted for decades with international silent complicity and most would view its actions as bad governance. Additionally, debilitating trade laws evidence

¹⁷² Art 2(3) of the DRD.

¹⁷³ Art 8 of the DRD.

¹⁷⁴ Art 3(3) of the DRD.

¹⁷⁵ Art 4 of the DRD.

¹⁷⁶ Indices from Transparency.org. Available from < <http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004>>

¹⁷⁷ Read more at < www.commissionforafrica.org/>.

international bad governance yet is not decried as such by the rule setters. Also, to what extent is democracy required to achieve good governance? Capitalist States demand democracy as part of good governance. Yet Cuba has survived financially without democracy. Most immensely rich Arab States have never practised democracy. The criticism would be that a democratic State is an easier target for globalized international trade where Capitalist can penetrate markets of democratic States through dumping while maintaining their own trade barriers. Indeed, by determining what good governance means, MEDCs force on other States, their own laws and desires, while failing to meet the standards they demand of others – Indeed, while deploring corrupt LDC leaders for siphoning State wealth, this money laundering is only possible by assistance and greed in MEDC Banks. Financing of white elephants schemes is through IFIs, and bribery to gain contracts they are ill equipped to fulfil is by TNCs. Their self-seeking participation has fuelled bad governance in LDCs. It seems that the promotion of Good Governance detracts from the real problem of biased trade and business laws favouring MEDCs. By highlighting LDCs as suffering because of national bad governance, the international community refute their legal obligations of good governance also. Additionally, a ‘one size fits all’ rule of good governance will not work, as LDCs must have regionalised good governance, taking into consideration their level of development. It is further worrisome that laws on conditionalities, developmental aid, and trade might be premised upon this non-legal standard good governance, further escalating the plight of suffering of the poor in LDCs.

After all, it is people that lie at the heart of the suffering – Basic sanitation has killed more children in the past decade than all the military conflicts since the end of the Second World War, and in 2003, \$965 billion was spent on military expenditure; 17 times the amount devoted worldwide to official development assistance and more than the sum of the foreign debt of 64 countries with the lowest GDP.¹⁷⁸ We **must** have international commitment to those silenced by inequity, hunger and hopelessness, by creating true global Good Governance and obey the Hammurabi’s 3,000 year old code¹⁷⁹ espousing legal protection for the poor; so the strong do not oppress the weak.

Therefore, while I deplore the 241 SAPs forced on LDCs between 1980 and 1989, which destroyed their economies as evidence of

¹⁷⁸ Read more at < www.un.org/News/Press/docs/2004/ga10257.doc.htm >.

¹⁷⁹ To learn more, please go to Wikipedia, ‘Code of Hammurabi’. Available from < http://en.wikipedia.org/wiki/Code_of_Hammurabi >

international bad governance,¹⁸⁰ LDCs must **commit** themselves to Sustainable Development and sound economic policies— like Cameroon did during the oil boom, in saving its excess capital.¹⁸¹ To this end, they must promote the rule of law, taking advantage of any regional help in combating state crime, and empower leaders who are committed to true democracy and equality so they can provide for their citizens, an equitable life. This is achieved *inter alia* by creating sound economic policies, sponsoring nascent industries, promoting domestic skills and innovative industries, making sound monetary and financial policies, controlling the powers of TNCs within their borders, sustainable development and subsistence farming – Indeed, both Ghandi and Mao emphasized the need to take industry to the rural population.¹⁸²

While it is *not* the only thing, it is a start. LDCs must implement these alongside mandatory good governance on transparency and trade and finance laws on the part of the International Community. Nothing else, in view of the lives lost to whom the international organisation owe their allegiance, will do.

¹⁸⁰ See Cornia, above [no. 10], p. 181.

¹⁸¹ See Cornia, above [no. 10], p. 178.

¹⁸² See Amit, above [no. 99], p. 14.

DEBT CANCELLATION AND CONCLUSION

Poverty | 2.5

2.5a

Regional poverty estimates

People living on less than \$1 a day (millions)

Region	1981	1984	1987	1990	1993	1995	1999	2001
East Asia & Pacific	796	562	426	472	415	287	282	271
China	634	425	308	375	334	212	223	212
Europe & Central Asia	3	2	2	2	17	20	30	17
Latin America & Caribbean	36	46	45	49	52	52	54	50
Middle East & North Africa	9	8	7	6	4	5	8	7
South Asia	475	460	473	462	476	461	429	431
Sub-Saharan Africa	164	198	219	227	242	271	294	313
Total	1,482	1,277	1,171	1,218	1,208	1,097	1,096	1,089
Excluding China	848	852	863	844	873	886	873	877

Share of people living on less than \$1 a day (%)

Region	1981	1984	1987	1990	1993	1995	1999	2001
East Asia & Pacific	57.7	38.9	28.0	29.6	24.9	16.6	15.7	14.9
China	63.8	41.0	28.5	33.0	28.4	17.4	17.8	16.6
Europe & Central Asia	0.7	0.5	0.4	0.5	3.7	4.3	6.3	3.6
Latin America & Caribbean	9.7	11.8	10.9	11.3	11.3	10.7	10.5	9.5
Middle East & North Africa	5.1	3.8	3.2	2.3	1.6	2.0	2.6	2.4
South Asia	51.5	46.8	45.0	41.3	40.1	36.6	32.2	31.3
Sub-Saharan Africa	41.6	46.3	46.8	44.6	44.0	45.6	45.7	46.4
Total	40.4	32.8	28.4	27.9	26.3	22.8	21.8	21.1
Excluding China	31.7	29.8	28.4	26.1	25.6	24.6	23.1	22.5

People living on less than \$2 a day (millions)

Region	1981	1984	1987	1990	1993	1995	1999	2001
East Asia & Pacific	1,170	1,109	1,028	1,116	1,079	922	900	864
China	876	814	731	825	803	650	627	594
Europe & Central Asia	20	18	15	23	81	98	113	93
Latin America & Caribbean	99	119	115	125	136	117	127	128
Middle East & North Africa	52	50	53	51	52	61	70	70
South Asia	821	859	911	958	1,005	1,029	1,039	1,064
Sub-Saharan Africa	288	326	355	382	410	447	489	516
Total	2,450	2,480	2,478	2,654	2,764	2,674	2,739	2,735
Excluding China	1,574	1,666	1,747	1,829	1,961	2,024	2,111	2,142

Share of people living on less than \$2 a day (%)

Region	1981	1984	1987	1990	1993	1995	1999	2001
East Asia & Pacific	84.8	76.6	67.7	69.9	64.8	53.3	50.3	47.4
China	88.1	78.5	67.4	72.6	68.1	53.4	50.1	46.7
Europe & Central Asia	4.7	4.1	3.3	4.9	17.2	20.7	23.8	19.7
Latin America & Caribbean	26.9	30.4	27.8	28.4	29.5	24.1	25.1	24.5
Middle East & North Africa	28.9	25.2	24.2	21.4	20.2	22.3	24.3	23.2
South Asia	89.1	87.2	86.7	85.5	84.5	81.7	78.1	77.2
Sub-Saharan Africa	73.3	76.1	76.1	75.0	74.6	75.1	76.1	76.6
Total	66.7	63.7	60.1	60.8	60.2	55.5	54.4	52.9
Excluding China	58.8	58.4	57.5	56.6	57.4	56.3	55.8	54.9

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¹⁸³ World Bank Indices National Poverty Line. Available from http://www.worldbank.org/data/wdi2005/pdfs/Table2_5.pdf

CASE FOR CANCELLATION OF LDC DEBTS

Today, much of Sub-Saharan Africa is starving, while interest on external debts is being repaid.

In the year 1800, the rich:poor ratio was 2:1. In 1945, it was 20:1 and by 1975, 40:1. While the average American GDP ¹⁸⁴ per capita is \$6500, in most LDCs, it is less than \$100.¹⁸⁵ The great divergence in performance between the North and the South can be summed up as a direct result of tight monetary policies by MEDCs and financial institutions following the second oil shock of 1980, the recession of the early 80s, the interest rates hike, global terms of trade policies, decrease in aid flows to LDCs and more recently, to bad governance.

Recession as a causation of LDC debts

Believing the oil prices shock in 1973/74 were temporary, states increased borrowing to cover the recession. Following the 1979/80 oil shock, the IFIs increased the interest rates and reduced available credit, leading to flight of capital for debt repayments, and coupled with the decline in raw materials export price, LDCs borrowed more to maintain their debt interests, and these debt-rescheduling served to increase the loan period whilst never repaying the principal. The World Bank and IMF led solutions were a myriad of poorly thought out Structural Adjustment Programs (SAPs), which completely annihilated the still flagging LDC economies, by emphasizing compulsory privatization, trade liberalization and stopping subsidies, which resulted in less national spend on education and health, increasing inflation and interest rates, requiring LDCs to pay even more to maintain their interest payments as well as creating poverty.

Depraved conditionalised developmental aids

While some would say LDCs can make changes with developmental aid, it is noteworthy to realise they are given in view of strategic alliances – Egypt, Israel and Turkey receive 4/5 of all American aid.

¹⁸⁴ Amit Bhaduri, "Orthodox Development Theories and their Application to Less developed countries", In: From the Debt Crisis to Sustainable Development. 1993, edited by Vaggi, Gianni. Macmillan Press Ltd: Hampshire, London. p. 7. GDP are the frameworks used in determining an LDC's economic and financial performance. This can be further decomposed into 3 components namely, participation ratio – ratio of active to total population, occupational structure -distribution of workers in the labour industry, and output per worker – dealing with labour productivity.

¹⁸⁵ See Waters, above [no. 62], p. 71.

Indeed, Yemen in refusing to aid American win a Security Council resolution against Iraq lost its annual \$70 million US aid. MEDCs even use food as a political tool, dumping in LDCs¹⁸⁶ rather than face anti dumping penalties. Furthermore, America even in the midst of the Bangladeshi famine, refused to provide food to Bangladesh in 1974 because its government was selling their jute to Cuba. In 1981, President Reagan put a wheat embargo on Nicaragua in a bid to destroy the Sandinista government.¹⁸⁷ These developmental aid and food surpluses are crucially important when offered without conditionalities.

Debt cancellation as a lasting solution

However, in viewing the heavily indebted States like Argentina, Brazil, Chile, The Philippines, Yugoslavia, Mexico and Nigeria,¹⁸⁸ and the total international combined indebtedness at over \$160 billion, it is clear that developmental aid and debt interest-only repayments will never clear the outstanding debts, considering fluctuating interest rates and trade restrictions. For these reasons, debt cancellation is a must. However, I do not advocate it as a continuing policy – Sustainable Development requires concrete changes to the global economic, financial and fiscals markets and laws.

I highlight the efforts of Sir Bob Geldoff, and the promise of the G8 at the recent G8 Summit in Gleneagles¹⁸⁹, to debt cancellation of 18 of the most indebted States over a 10-year period. While I understand MEDCs fear that this will lead to further debts incurred by greedy leaders, and that the cancellation would also spell a reduction in funds currently received from LDC interest payments, which the MEDCs would have to make up, I reiterate that cancellation must come with universally acceptable conditionalities of Good Governance. However, until the Capitalist domination in trade is curtailed, the cycle of debt cancellation will reoccur. As the popular John Lennon song, *Imagine* goes,

“Imagine no possession, I wonder if you can. No need for greed or hunger. A brotherhood of man. **Imagine all the people**, sharing all the world. You may say I’ m a dreamer but I’ m not the only one.”¹⁹⁰

¹⁸⁶ Furthermore, cheap dumping of goods on LDCs decrease agricultural production and in most LDCs, even the 'dumping' prices are too high for most citizens.

¹⁸⁷ See Redclift, above [no. 7], p. 63.

¹⁸⁸ Vaggi Gianni, “A Brief Debt Story”. In: From the Debt Crisis to Sustainable Development. 1993, edited by Vaggi, Gianni. Macmillan Press Ltd: Hampshire, London. p. 86.

¹⁸⁹ Read more at < www.g8.gov.uk >.

¹⁹⁰ Available from <<http://www.merseyworld.com/imagine/lyrics/imagine.htm>>.

CONCLUSION

Indeed, the discovery of natural resources in Africa brought the mistaken belief of alleviation of poverty. This has not materialized. The exponential population growth in LDCs means immediate global solutions, which require cooperation amongst states, international organisation, civil society and markets must be sought to avoid a global catastrophe. As Adam Smith wrote in 1759,

“How selfish soever man may be supposed, there are evidentially some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.¹⁹¹”

The outpours, **now legal obligations**, must include National and International Good Governance, comprehensive strategy comprising debt forgiveness, sound domestic policies and equitable international and multilateral external trade policies, environmental regeneration, technology developments by international knowledge transfer, LDC human development and effective regulation of TNCs. Long term processes like an equitable trade market, elimination of agricultural protectionist and subsidies create Sustainable Development.¹⁹²

These must be done because MEDC actions in TNCs and IFIs are crimes. Viewing the Palermo definition of Transnational Crime¹⁹³ in light of the EU Commission –Europol joint Report List of 11 crimes, 6 of which must be present to have organised crime¹⁹⁴, along with Nikos Passas’¹⁹⁵ definition of Transnational Crime as cross border misconduct that entails avoidable and unnecessary harm to society, the above are guilty of Transnational Crime, and have failed to uphold their Millennium Assembly, Monterrey Financing for Development, Johannesburg World Summit, DRD and other pledges. And as the United Nations Conference on Trade and Development (UNCTAD) lists 71 states

¹⁹¹ Vaggi, Gianni. “Conclusions: Thoughts on the Future”, In: From the Debt Crisis to Sustainable Development. 1993, edited by Vaggi, Gianni. Macmillan Press Ltd: Hampshire, London. p. 297.

¹⁹² Example is Bangladesh affected by quota restrictions, affecting its textile industry export trade and state sustenance.

¹⁹³ Article 20 states, “A structured group of three or more persons existing over a period of time and having the aim of committing one or more serious crimes or offences established in accordance with this convention in order to obtain directly or indirectly a financial or other material benefit”.

¹⁹⁴ And 4 elements which must be part of the 6 are, collaboration of more than two people; for a prolonged or indefinite period of time, suspected of the commission of serious criminal offences; determined by the pursuit of profit and/or power. The others are; each with own appointed tasks, using some form of discipline or control; operating at international level; using violence or other means suitable for intimidation; using commercial or businesslike structures; engaged in money laundering; exerting influence on politics, the media, public administration, judicial authorities or the economy.

¹⁹⁵ Passas, Nikos. Anomie and Strain: Contexts and Consequences of Merton’s Two Theories. Available from < <http://www.cas.sc.edu/socy/faculty/deflem/zanomiestrain1.pdf> >. Also in Passas, Nikos, “Globalization and Transnational Crime: effects of criminogenic asymmetries”, IN: Combating Transnational Crime: Concepts, Activities, and Responses, edited by Phil Williams, Dimitri Vlassis. Frank Cass, 2001.

and 29 companies as the largest economies,¹⁹⁶ their role in global development is an obligation. It is for this reason the Dembri text stated

“It is necessary to enhance efforts of evaluating and addressing the impact of international economic issues such as international macro-economic decision making, debt burden, international trade, market access, functioning of international financial institutions, transfer of technology, bridging of knowledge gap, impact of intellectual property regimes, fulfilment of international development commitments and migration issues on the enjoyment of human rights.¹⁹⁷”

Dr Amartya Sen says freedom is both the primary objective and the principal means of development.¹⁹⁸ Health, education, development are not aims. They are human rights themselves. The dignity of man is not respected by himself or others when he is unable to earn a decent living. By the same token, in the international field, a State is not sufficiently respected when her work and her trade with other States do not allow her fully support the needs of her citizens. Article 11 of the ICESCR states that *everyone* has the right to the continuous improvement of living conditions. Therefore, economic growth is not an option. It is imperative.¹⁹⁹

But in spite of the *jus cogens* of the Right to Development and the economic rights evinced within, these are not matched by practice, instead there have been concerted efforts to destroy it because at its heart is the Special and differential treatment (SDT) principle, which is central to a new international development law, meant to inject equity into international economic relations. Therefore, even with the DRD’s pronouncements in treaties, GA resolutions and soft laws, its normative value has been nullified. Because as Trotsky says,

“Capitalism has transferred into the field of international relations the same methods applied by it in regulating the international economic life of the nations...World competition of the capitalist forces mean the systematic subjection of the small,

¹⁹⁶ Read it at [UN Press Briefing](http://www.un.org/News/briefings/docs/2002/db081302.doc.htm). Available from < <http://www.un.org/News/briefings/docs/2002/db081302.doc.htm>>. The list, which ranks both countries and TNCs on the basis of value-added wealth, reveals that Exxon is the largest multinational with the highest assets abroad. Exxon ranks 45th in the list with \$63bn in value-added wealth and is on a par with the economies of Chile and Pakistan. General Motors is the next largest TNC, coming in just after Pakistan. Nigeria features just between DaimlerChrysler and General Electric, while Philip Morris is compared with Tunisia, Slovakia and Guatemala. Also at [UN rankings reveal muscle of corporations vis-a-vis](http://fdimagazine.com/news/fullstory.php/aid/56/UN_rankings_reveal_muscle_of_corporations_vis-a-vis.html), available from < http://fdimagazine.com/news/fullstory.php/aid/56/UN_rankings_reveal_muscle_of_corporations_vis-a-vis.html>.

¹⁹⁷ Raghavan, Chakravarthi. [UN:Moving forward on Right to Development?](http://www.twinside.org.sg/title/moving.htm) Available from < www.twinside.org.sg/title/moving.htm >. [Accessed July 2005].

¹⁹⁸ Sen, Amartya. [Development as Freedom](http://eep.com/Merchant/newsite/samples/pe/pe1701.htm). Available from < <http://eep.com/Merchant/newsite/samples/pe/pe1701.htm> >.

¹⁹⁹ And therefore a shame that the official development assistance target of 0.7% of GDP has rarely been achieved by MEDCs. Adopted in 1970 and reaffirmed in 1992 at the UNCED, was achieved in 1993 by only 4 states (Denmark, the Netherlands, Norway and Sweden).

medium sized and backward nations by the great and great capitalist powers.”²⁰⁰

Although the period following the Westphalia Wars in 1648, birth the principle of national sovereignty and *legal* equality of States, as Cassese says, “power politics...could not but favour the Great Powers. In practice, international law was modelled in such a way as to legitimise, codify, and protect their interests.”²⁰¹ This is because international law is rhetoric, standing as a political and economic tool by capitalist States and manifests policies of neo colonialism. Indeed, economic rights and the DRD are premised upon SDT, which had been taken from LDCs through various decisions in the Final Act of the Uruguay Round. Therefore, concepts like the Common Heritage of Mankind and CERDS were attempts by LDCs to change the strategic global coalition and promote their self development, but these concepts were calculatedly rejected by MEDCs who instead sought to, and have developed a network of laws to establish the legal and institutional framework favourable to their accumulation of capital - Law plays a major role in reproducing capitalist legal order, with the legal systems of capitalist societies embodying the material interests of the capitalist regime. To this end, the MEDC capitalist-developed international legal system only accepts its own prescribed sources of international law, which helps it maintain the status quo, preventing the substantive transformation of law in the favour of the South. That is the reason unanimous GA resolutions focused on restructuring international economic relations are determined by Capitalist States to be ‘soft laws’ and not law. And inherent within their accepted laws and sources of law, perceived to having been signed by equal states, is the *substantive inequality of parties* that shape the agreement, because formal equality goes hand in hand with material inequality and democratic principles with neo colonialism.

Furthermore, new laws permitting liberalisation of world capital have worked through MIGA, BITs, TRIMs and the OECD Multilateral Agreement on Investment.²⁰² Others include TRIP text, requiring from all developmentally different States, the *same* patent regime implementation, and the capitalist use of new norms; ‘democratisation’ and ‘good governance’, to confer a form of legitimacy to collaborating regimes. This far reaching MEDC

²⁰⁰ Trotsky, Leon. [The Program of Peace](#). His writings are available at www.marxists.org/archive/trotsky/works/britain/ch11.htm .

²⁰¹ Cassese, Antonio. [International Law 2001](#). Oxford:Oxford University Press. P. 11.

²⁰² Chinmi, B.S. [Marxism and International Law: A Contemporary Analysis](#). Available from www.swaraj.org/multiversity/chimni_law.htm.

capitalist manipulation is seen through US policies, in walking out of the Nicaragua Case, terminating its acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ), or its illegality in the Gulf war where the UN was completely sidelined and the SC acting as US' s puppet, or its geopolitically-based humanitarian interventions in Haiti, Bosnia and Kosovo, or its new foreign policy giving it unlimited pre-emptive use of force powers, its rejection of the ICC or its unlawful detention of prisoners in Guantanamo Bay whom it declares fall outside the ambit of legal combatants, although deemed as lawful in the customary law Geneva Convention III. As evinced by Karl Marx in 'The German Ideology' , law is the instrument of capitalist rule and exploitation.

To this end, the UN must realize its original mandate in the social and economic fields by pursuing development at the centre of its policies and helping Member States realize their diverse developmental goals. The current Security Council structure fails to recognize the global divergence. And with America wielding undue international control, the onus lies on the UN and the Office of the Secretary General, by the creation of a viable Security Council where strategic veto rights cannot disable international laws, ensuring the subjection of America and other egoistical Nation-States who use law as an instrument of coercion, facilitating the fragmentation and oppression of the world community.

World problems also stem from dissatisfaction. Both Durkheim and Merton explain that when social expectations are out of line with realistic ability to achieve them, deviance occurs following, anomie.²⁰³ In Bougainville,²⁰⁴ following the pollution, there was an outbreak of violence - The more capitalist laws create economic poverty, the economically marginalized, disenfranchised world proletariat will become more aggressive. To ensure a safe and equitable international society with true freedoms for all, the new paradigm of Human Rights law **demands** rather than **begs** access to participation in trade and other policy decisions, including trade and TRIP laws ensuring the supremacy of human rights provisions in the process. The International Legal Community are under an **obligation** to interpret their provisions in a manner that promotes and maintains the *jus cogens* of DRD and the inviolability of fundamental human rights, because as many of the obstacles to the Right to Development are global, the solutions must of necessity be

²⁰³ Anomie is a withdrawal from societal norms and standards of behaviour weaken in the face of need, lack and frustration.

²⁰⁴ Read more at < <http://www.minesandcommunities.org/Company/rio14.htm>>.

global. To this end, the answer is as Kofi Annan said, "It is neither utopian nor impossible. ...What is missing is the will...".²⁰⁵ But Capitalists using law as rhetoric mean that the non enforceability of the given *jus cogens* DRD result in the continuance of structural global asymmetries. Until a radical equitable change is made to the configuration of the Security Council, a unipolar capitalist world would continue its domination and destruction of the poor and the weak. But while the world lies dying and human sufferings abound to heights unknown. While the poor become poorer and the destitute lose hope. While the hungry became angrier, and the rich expand in greatness. While men laugh in fullness, while others cry to God as they die in hunger. As mothers watch helplessly as their sons and daughters and husbands die of malnutrition and easily cured diseases...Let us remember, in you and I, in the will of all, lays the solution. Therefore as Ernest Hemingway says, "...never send to know for whom the bell tolls; it tolls for thee." ²⁰⁶

²⁰⁵ International Day for the Eradication of Poverty. Available from < <http://www.un.org/events/poverty2000/messages.htm> >. Clarified by Resolution 2000/64. The Commission linked good governance to an enabling environment conducive to the enjoyment of human rights and promoting growth and sustainable human development.

²⁰⁶ Hemingway's novel, "For Whom the Bell Tolls" made these words by the John Donne poem, famous. It is available at <<http://www.incompetech.com/authors/donne/bell.html>>. The idea is essentially a cry to humanity, a complete and unabiding universal appeal for everyone on the planet to get involved in the affairs of humanity to make the world a better place. For in each death in the universe, a part of us dies.

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