

Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development

MARTIN V. TOTARO*

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* Associate, Baker Botts LLP. J.D., 2006, University of Virginia School of Law; M.A., 2003, University of Chicago; B.A., 2002, Binghamton University. I thank Pamela Bookman, Andrew Gelfand, Andrew Guzman, Jennifer Kuo, Derek Moore, Eric Posner, John Simmons, and Brian Tamanaha for helpful comments. Any views expressed in this Article are strictly my own.

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INTRODUCTION

Broadly conceived, there are two main models of how human rights become legalized in international human rights law (IHRL). The first, which I call the narrow position, views the classification of a potential human right as a binary proposition. Either this potential right does or does not constitute a legal human right under IHRL. The second, which I call the broad position, views the classification of a potential human right as operating on a continuum. On one end of the continuum exists a norm. On the other end exists an international law. The particular norm at issue must go through a process of “crystallization” before attaining the status of a full-fledged human right with corresponding legal obligations. The key difference between the narrow and broad positions is that the latter approach does not rigidly separate international human rights norms from international human rights law, while the narrow position has tighter boundaries for what it would consider bona fide international law. IHRL scholars tend to adopt the broad position. I argue that the narrow position can be seen as one variant of legal positivism in international law that offers a superior approach to the broad position.

This Article uses the debate surrounding the right to participatory development as an illustrative case to view IHRL more generally. A primary goal is to clarify IHRL by demonstrating the need to split moral norms from legal human rights. I assert that the still-dominant paradigm in IHRL tends to conflate human rights as they exist under international law with the way proponents of this trend want them to be.¹

This Article performs two main functions. First, I hope to demonstrate how the sociopolitical process of pushing toward the legalization of a moral norm can be a vibrant, robust procedure that need not make the mistake of improperly and prematurely according legal status to a

1. One could view this Article as an attempt at what Goldsmith and Posner have labeled the “New International Law Scholarship.” See Jack Goldsmith & Eric A. Posner, Response, *The New International Law Scholarship*, 34 GA. J. INT’L & COMP. L. 463 (2006). Their article, a rejoinder to critiques published in a symposium on their book, *THE LIMITS OF INTERNATIONAL LAW* (2005), provocatively argues that followers of this new wave of international law “distinguish normative and positive claims, and state positive claims as hypotheses that can, in principle, be tested. Traditional scholars tended to confuse normative and positive claims.” *Id.* at 482. Unfortunately, as this Article shows, it is premature to refer to this conflation in the past tense—although this Article focuses on legal (rather than scientific or empirical) positivism.

norm still in the adolescent stage of rights formation under international law. To this end, I use the debate surrounding the right to participatory development to highlight a mistake in prematurely according the label of “human right” to norms that have not yet achieved this status in customary international law (CIL). Second, I show how the World Bank is slowly internalizing the participatory development norm. This internalization illustrates the sociopolitical process that a rights-claim must go through to shift from a transitional right (i.e., an international norm) to customary international law. By analyzing the descriptive and normative elements of IHRL, I aim to further bridge international law scholarship with international relations scholarship, thus providing a more accurate depiction of how new generations of potential human rights attempt to gain legal recognition.

In Part I, I develop these ideas and offer a typology of IHRL that separates moral norms from legal human rights based on one strand of legal positivism.² Legal positivism in international law takes a variety of forms. I suggest that legal positivism in international law can be broken down into at least two main types, each of which I link to a particular theory of international relations. The first type, which I label “realist-positivism,” views the scope and substance of international law in minimalist terms. This variant treats international law as epiphenomenal, with state power and state interests being the primary driver in international relations. In this sense, it tends to have a dismissive attitude toward international law as a force in its own right that derives from its connection with classical and structural realism. The second type, which I call “constructo-positivism,” stresses the importance of human rights norm-internalization among key international players, including non-state actors. Constructo-positivism presents a far richer version of positivism that allows all sorts of moral theorizing about what international law ought to be. The constructo-positivist as an explanatory matter separates moral norms from legal human rights but as a normative matter supports the process of legalization of certain norms. As a result, the constructo-positivist does not consider the crystallizing norm as part of the body of international law, unless the norm satisfies the current threshold requirements necessary to be considered part of international law. The basic point is that, unlike the realist-positivist, the constructo-

2. As will be evident throughout, this Article owes a great debt to the work of Andrew Guzman, who has challenged the conflation of norms and rules of CIL. See, e.g., Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 139 (2005) (labeling the distinction between a rule of CIL and a norm of behavior as “a problematic one throughout the literature on CIL”).

positivist is free to assert that a norm should be considered a legal human right in the future, but maintains the core positivist distinction in international law between the “is” and the “ought.”

There are at least three main benefits to the constructo-positivist approach. First, it is a more accurate description of the actual state of international law. “Making” international law is notoriously difficult. The constructo-positivist approach, by dividing the moral from the legal, recognizes the boundaries of international law creation while still allowing for advocacy of new international law based on moral arguments. Put simply, the crystallization of a human right operates as a sociopolitical process, but until this process has resulted in a treaty or customary international law, the norm should not be viewed as a legal right.³ Second, it recognizes the importance of ideal theory, which is absent from the realist-positivist perspective. Third, by not conflating the moral with the legal, constructo-positivism does not slow down the development of international law. In many instances, a nation-state will sign an aspirational human rights treaty or act without a sense of legal obligation with the understanding that the treaty or action is not legally binding. If a nation-state knows ahead of time that aspirational treaties can involuntarily transform into obligatory legal documents, then a nation-state may be less likely to sign such treaties in the future.⁴ While not binding, aspirational treaties serve symbolic value and can set the stage for future developments in international law. Likewise, a nation-state or an intergovernmental organization may be less likely to undertake supererogatory acts if these actions can be construed to create a *de facto* right on behalf of the party for whom the act is done. The constructo-positivist approach does not deter an actor from engaging in a supererogatory acts.

Part II examines the ongoing debate surrounding the right to participatory development in IHRL. I conclude that while the “right” to devel-

3. This Article focuses on the potential evolution of a moral norm toward status as a legal human right under customary international law. It does not deal with human rights defined and codified in treaties. Nor does it discuss difficulties in the enforcement of human rights treaties. For a discussion of these difficulties and a proposal for better enforcement, see Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1 (2006). This Article also purposely avoids the much larger debate surrounding *domestic* implementation of international human rights norms. See generally C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights*, 19 AM. U. INT'L L. REV. 259 (2003).

4. For a discussion of the costs associated with conflating ratification of an aspirational treaty with a legally binding treaty, see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 517 (2002).

opment has not yet attained the status of other human rights like the right to be free from genocide, we are currently in a time period of crystallization, where the right to development may be gradually moving toward widespread acceptance as a human right.

Part III analyzes the recent shift in rhetoric and practice at the World Bank. These Bank programs and projects signal increasing levels of participatory development norm-internalization. They are possibly laying the groundwork for recognition of a human right to participatory development in the future. While this creation and internalization may one day make it accurate to refer to the right to participatory development as a legal human right, that day has not yet arrived. I examine the *Voices of the Poor* project, Poverty Reduction Strategy Papers, Global Monitoring Reports, and a recent World Bank publication that contains numerous chapters on the James Wolfensohn years as President of the World Bank (1995–2005). The World Bank's shift in rhetoric and practice illustrates the sociopolitical nature of rights recognition. Advocates of the legal right to participatory development have pushed the Bank toward crystallizing the participatory development norm. Even if the crystallization process is not yet complete, it nonetheless instrumentally operates in the realm of a larger process that includes, for example, NGOs challenging the Bank on moral grounds and pressuring the Bank to lessen or close its rhetoric/reality gap. But, until the crystallization process reaches a tipping point where nation-states and intergovernmental actors view the right to participatory development as part of customary international law, scholars, practitioners, and activists should be leery in viewing individuals as having—in any meaningful legal sense—a human right to participatory development.

I. POSITIVISM AND CONSTRUCTIVISM IN INTERNATIONAL LAW

A. *A General Note on Legal Positivism in International Law*

Legal positivism in international law takes on a peculiar form when compared with Austin and Hart's respective formulations of what law is. Classical positivism demanded that a sovereign hands down the law. There was no necessary link between justice and the law's effectiveness.⁵ Because of the need for a sovereign, international law is not really law in the Austinian sense. The lack of a final arbiter in the international

5. See Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269, 272 (2001).

realm precludes a society of states from handing down international law to each other in the same manner as domestic systems.⁶

International legal theorists quickly discarded the connection between legal positivism and the need for a sovereign while still maintaining the fundamental distinction between law and morality. Even Hart's emphasis on secondary rules has not been seen as vital to international legal positivism.⁷ Rather, the primary distinction for the legal positivist in international law is between moral and legal rules. Whereas both sets of rules impose obligations on actors, the type of obligation is different in the legal realm. Moral rules do not necessarily arise out of a political process, are not enforceable on their own by political entities, and are often thought of as engendering compliance through non-political means.⁸ Legal rules in the international realm arise through treaties, custom, and general principles of international law, although the last two categories are particularly contested.⁹ In all three sources, the creation and maintenance of international law is a sociopolitical process still dominated by state actors operating in a communicative realm. While legal and moral rules, of course, overlap to a great degree, the main point here is that the moral basis for a rule is not a sufficient condition for it to become a legal rule. In this sense, the categories are analytically distinct.¹⁰

Because of the nature of international law creation, legal positivism provides a useful analytical tool to examine international law. This point can be demonstrated with a brief look at legal positivism's sources and separation theses:

Sources thesis: What is and what is not law is a matter of social

6. *Id.* at 280–81.

7. Hart's discussion of secondary rules runs into problems in international law, although at least one scholar has tried to fit these types of rules within the third, vague source of international law, "general principles." See ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 49–53 (1999); see also Anthony A. D'Amato, *The Neo-Positivist Concept of International Law*, 59 AM. J. INT'L L. 321, 322 (1965) (challenging Hart's over-reliance on rules of recognition in the international law arena and foreshadowing the current debate over sources and processes of and for public international law).

8. AREND, *supra* note 7, at 17–18.

9. See Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031.

10. The recent mainstream discussion of "soft law" in IHRL often conflates the two categories. See, e.g., Sigrun I. Skogly & Mark Gibney, *Transnational Human Rights Obligations*, 24 HUM. RTS. Q. 781, 791–93 (2002); Richard L. Williamson, Jr., *Hard Law, Soft Law, and Non-law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT'L L. 59 (2003). Arend captures the central flaw of using the phrase "soft law" when he states, "If a rule meets the criteria for law, then it should be called 'law'. If, however, the rule is not binding—as soft law has been described to be—then it should not have law anywhere in its name." AREND, *supra* note 7, at 25.

fact. Therefore, what is and what is not legally valid can be ascertained by reference to social sources rather than, for instance, moral evaluation.

Separation thesis: Law is not necessarily obligatory because it is morally valid. Legal obligation is something different from, for instance, moral obligation.¹¹

The manner in which international law is formed supports both these theses.¹² International law arises out of the social relationship among states and some non-state actors, and because of the slow—and perhaps tedious—way that international law is currently created, the gap between moral and legal obligations can be quite large.¹³ This point is especially clear when examining how customary international law forms. A state may act for a variety of reasons, one of which includes a choice to comply with what it perceives to be an international legal obligation. But a state may act out of pure self-interest. Or out of moral concern. Determining whether, as a causal matter, a state acts out of a sense of legal obligation is vital to investigating whether a norm has attained status as a customary international law.¹⁴ Focusing on the conceptual space between moral norms and legal obligations, as highlighted in the sources and separation theses, provides a basic framework to evaluate the status of potential rights under IHRL.¹⁵

11. Patrick Capps, *Methodological Legal Positivism in Law and International Law*, in LAW, MORALITY, AND LEGAL POSITIVISM 9, 9 (Kenneth Einar Himma ed., 2004).

12. Because of the anarchic nature of states and the continuing (although probably declining) dominance of the Westphalian system, the sources thesis in particular and the separation thesis have special relevance for international law—where the gulf between law and morality is so distinct.

13. One possible exception is CIL based on “instant custom.” The scope of this exception depends in large part on how much weight one accords to the practice prong of CIL. See Guzman, *supra* note 2, at 157–59.

14. The key point is that “a proper investigation of state practice would consider instances in which states refrain from taking an action because it would be in violation of international law.” *Id.* at 126. Likewise, a proper investigation would consider instances where states take an action because it is mandated by international law. While such evidence would be difficult to ascertain, these scenarios would provide evidence of a causal relationship between a sense of legal obligation and state (in)action that *opinio juris* seems to require. See *also id.* at 146 (“The central problem...[with establishing *opinio juris*] is that it is difficult to know what a state believes. We observe only actions and statements, not beliefs.”).

15. I concede Andrew Guzman’s point that “[i]t is inevitable...that the line between norms and CIL will often be difficult to identify.” *Id.* at 139. Guzman makes a similar point in his recent book. See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 9 (2008) (labeling the differences between formal treaties, soft law, CIL, and international norms “a matter of degree rather than of kind”). Because of the rigorous requirements for a norm attaining CIL status, it seems to me that the default position should be that a norm is not CIL. Guzman differentiates the two categories in terms of compliance costs. See Guzman, *supra*

B. Two Types of Legal Positivism in International Law

International legal positivism has had a multitude of variants since the turn of the twentieth century, but each variant contains the core distinction between moral and legal obligations. I will discuss two possible variants that focus on the relationship between international law and international relations.

The first variant expressly or implicitly links legal positivism with realism. Early international legal positivists had normative reasons for maintaining the distinction between law and morality. Lassa Oppenheim, for example, asserted that a state-centric view of international politics that lauded balance of power politics provided conditions where international law could develop and promote peace and justice.¹⁶ The emphasis on balance of power politics linked this view of legal positivism with a realist conception of international relations, and became a popular view among international lawyers. By the turn of the twentieth century, the majority of international lawyers counted themselves as positivists.¹⁷ Moreover, Oppenheim's work was influential among such international relations classical realists like E.H. Carr and Hans Morgenthau.¹⁸ Both camps viewed the study of the field as a science, with a careful investigator being able to determine what is or is not international law based on an analysis of the relevant international legal sources without imputing any moral judgments about what the law ought to be.¹⁹

note 2, at 139 (“Once the norm becomes a legal rule, states have a heightened expectation of compliance. With this heightened expectation of compliance comes an increase in reputation sanctions in the event of a violation.”); *id.* at 157.

16. See Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 402–03 (2002).

17. Hall, *supra* note 5, at 271.

18. See Kingsbury, *supra* note 16, at 435. Kingsbury also notes the influence of Oppenheim on the modern English School of international relations, which would later go on to impact constructivists across the Atlantic. See *id.* at 436.

19. See generally Alejandro Lorite Escorihuela, *Alf Ross: Towards a Realist Critique and Reconstruction of International Law*, 14 EUR. J. INT'L L. 703, 744–45 (2003).

There is no necessary link between positivism and realism.²⁰ The main tenets of structural realism can be stated succinctly.²¹ For structural realists, the primary unit of analysis in international relations is a rational and unitary state, with a focus on the power of the state in relationship to other states in an anarchic international system.²² From these assumptions, we can see both the overlap between structural realism and one strong form of legal positivism and, similarly, realism's aversion to international law. With respect to structural realism's relationship with international law, some famous realists dismiss the concept altogether.²³ Legal positivism has a narrower conception of what constitutes international law than the mainstream position in IHRL. Similarly, realism tends to dismiss international law more than its two rival international relations theories (liberal institutionalism and constructivism).²⁴

The second variant, offered here, links legal positivism with constructivism. Constructivist theory in international relations exploded onto the scene in 1992 with Alexander Wendt's *Anarchy Is what States Make of It: The Social Construction of Power Politics*.²⁵ The next dec-

20. When contemporary international relations theorists refer to "realism" they are usually referring to structural realism. Classical realism, dominant for much of the early part of the Cold War, viewed state preferences as determined by narrowly defined state interests that relate to power allocations in the international system. Structural realists (or neorealists) still focus on power, but they apply more complicated rational choice models like game theory to their analysis of why states make decisions. Differences between classical and structural realism are not particularly relevant for the discussion of realist-positivism because of both theories' almost identical stances toward international law.

21. The most basic divide within structural realism is between offensive and defensive realism, embodied by the work of John Mearsheimer and Kenneth Waltz, respectively. Where Mearsheimer views great powers as constantly trying to maximize power in pursuit of hegemonic status (subject to feasibility constraints), Waltz assumes that great powers attempt to preserve their status within the international system and will only attempt to power grab when the risks are low. For representative works, see JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

22. See MEARSHEIMER, *supra* note 21, at 30–32.

23. It is important to recognize that realism is not necessarily mutually exclusive with a belief in the legitimacy or effectiveness of international law. Stephen Krasner, who is one of the foremost proponents of realism, views international law as consequential, because the creation and maintenance of international legal rules work to "create self-enforcing equilibria." See Stephen D. Krasner, *Realist Views of International Law*, 96 AM. SOC'Y INT'L L. PROC. 260, 265 (2002). For the most part, though, Richard Falk is probably correct in stating that "[r]ealism, in its many varieties, has little or no room for international law in either analysis or prescription." Richard Falk, *Re-framing the Legal Agenda of World Order in the Course of a Turbulent Century*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 451, 454 (1999).

24. "Dismiss" may be analytically imprecise. Classical realism, by focusing on state power and state interest, may act consistently with with IHRL when it serves those two purposes but would contest the *independent* causal force of IHRL on how power and interests are defined.

25. 46 INT'L ORG. 391 (1992).

ade saw the exponential growth of constructivist scholarship, with many of the pieces trying to discuss and categorize variations of the theory and explaining other areas of international relations.

In the field of international relations, the concept of norm-internalization—which forms a major component of constructivist theory—has in the past fifteen years gained acceptance in some quarters as an alternative theoretical framework to realism and liberal institutionalism. Most norm-internalization approaches highlight the importance of non-state actors in this process.²⁶ As used here in the narrow sense, constructivism refers to the process by which states and other major international actors “internalize norms and act in accordance with them because they understand them to be correct or appropriate.”²⁷ Further, “transnational actors and their interests are not fully formed or unchanging,” so that “they are constituted or ‘constructed’ by and through interaction with one another.”²⁸ In other words, constructivism recognizes that norms and the international institutions that incorporate these norms “acquire a sort of life of their own” that can potentially alter other international actors’ interests.²⁹

One norm internalization approach emphasizes the importance of transnational advocacy networks.³⁰ Keck and Sikkink define a transna-

26. See ROBERT O'BRIEN ET AL., *CONTESTING GLOBAL GOVERNANCE: MULTILATERAL ECONOMIC INSTITUTIONS AND GLOBAL SOCIAL MOVEMENTS* 12 (2000).

27. Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 481 (2005).

28. *Id.*

29. GUZMAN, *supra* note 15, at 19.

30. Other terminology used to describe global social movements include: global society, global civil society, international society, world civic politics, transnational relations, NGO-based accounts, transnational social movement organizations, and global social change organizations. See O'BRIEN ET AL., *supra* note 26, at 12. As I aim to show, the transnational advocacy network approach best describes the interaction between international human rights actors and other advocacy groups seeking to challenge World Bank practices. These other terms should not be seen as inapplicable to the discussion that follows, but transnational advocacy network theory has the benefit of being slightly more defined than some of these other terms. Further, while the theorization surrounding transnational advocacy networks originated in international relations, some international law commentators use similar models to discuss legal norm-internalization. For example, there is a great deal of overlap between discussions of transnational advocacy networks and Dean Harold Koh's transnational legal process theory. Both stress the importance of norm-internalization as an affirmative mechanism used by Actor A to change the preferences of Actor B. For Koh, “[t]ransnational legal process is a process whereby public and private actors, including nation states, corporations, international organizations, non-governmental organizations, and individuals, interact in a variety of fora to interpret, enforce, and ultimately internalize, rules of international law.” Harold Hongju Koh, *Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 339 (2004); see also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645–59 (1997) (book review); Harold Hongju Koh,

tional advocacy network to include “those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.”³¹ A transnational network attempts to both build and sustain structures to implement their issues, because its agents “not only participate in new areas of politics but also shape them.”³² A constructo-positivist would respect and even support a transnational advocacy network’s attempt to push state and intergovernmental actors toward recognizing norms as legal human rights, but would hesitate to conflate the two categories.³³

A positivist approach to international law grounded in constructivism can be analogized to the following situation. Near the outset of *Stalag 17*, William Holden’s character, Sefton, bets his fellow POWs that two prisoners who were trying to escape would get caught by the Germans running the camp.³⁴ The two potential escapees are shot during the attempt, and Sefton wins several packs of cigarettes. Sefton is not making any normative statement about whether the two POWs *should* have been able to escape. Rather, he placed his wager based upon his perception of the situation as it *actually existed*. Further, Sefton as a constructo-positivist might even plan future escapes by other inmates—or at least recognize the validity of other inmates making such plans.

What separates the constructo-positivist from the realist-positivist is that the constructo-positivist has no steadfast allegiance to an international system based on balance of power politics with the corresponding weak notion of the independent causal function that international law can serve. The constructo-positivist views what constitutes international law as binary—either a norm does or does not fall under the international law umbrella. At the same time, the constructo-positivist recognizes that both the constitutive and regulative rules of how international law is produced can change, but until this change occurs the crystalliz-

Transnational Legal Process, 75 NEB. L. REV. 181 (1996). Koh, however, focuses more on vertical integration within a state’s domestic legal system than the internal structure of an international financial institution. See Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1406 (1998). He does note the various types of non-legal internalization. *Id.* at 1413 (defining social and political internalization).

31. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 2 (1998).

32. *Id.* at 4.

33. Keck and Sikkink might dispute this stark separation between norms and international law. See, e.g., Kathryn Sikkink, *A Typology of Relations Between Social Movements and International Institutions*, 97 AM. SOC’Y INT’L L. PROC. 301, 302–03 (2003) (using international norms and international law almost interchangeably).

34. *STALAG 17* (Paramount Pictures 1953).

ing norm should not be considered part of international law until the norm satisfies the current threshold requirements to gain status as international law.³⁵

This more nuanced view of positivism in international law has not yet been accepted among most international legal commentators.³⁶ Allen Buchanan makes the point that “[b]ecause positivism is a view about what the law is, not about what it should be, it is entirely neutral as to whether moral reasoning can determine how the law ought to be.”³⁷ This statement encapsulates the difference between constructo-positivists and realist-positivists. Simply stated, one can distinguish between what is and is not international law and still engage in theorizing about what international law should be. Further, as I argue, the constructo-positivist can be in favor of expanding international law to recognize more moral norms. This difference saves constructo-positivism from Buchanan’s observation that “legal positivists make a fundamental mistake when they move from arguments against naturalism (as a position on what the law is) to the conclusion that moral theories of international law ought to be rejected.”³⁸ While the realist-positivist might make this mistake,³⁹ the constructo-positivist would not. The con-

35. By “constitutive rules” I mean the rules that govern how international law is actually created, while regulative rules refer to how international law operates once the constitutive rules are already in place. In international law, constitutive rules are meta-rules while regulative rules have a smaller focus. For a discussion of constitutive and regulative rules in constructivism, see John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT’L ORG. 855, 871–74 (1998). Arend goes so far as to recognize the possibility of different future scenarios where the Westphalian system will not be as dominant as it has been in the past. See AREND, *supra* note 7, at 165–84. He views the state-centric system as hanging in the balance, a view which a structural realist would reject out of hand. As a constructivist, though, Arend does not deny the possibility for systemic change to the constitutive rules of international law and politics. This move allows him to reject a static view of international law, so that moral rules that do not currently have the status of international legal rules could assume this status in the future, with effective advocacy by a variety of entities, including non-state actors.

36. *But cf.* Guzman, *supra* note 2. Andrew Guzman has argued at length on the need to recognize the importance of norms from a rational choice (rather than constructivist) perspective. Guzman, for example, defines *opinio juris* as “the beliefs of states that interact with a potential violator. To the extent that these states believe there exists a legal obligation, the potential violator faces a rule of CIL.” *Id.* at 146. This definition, which occurs as part of a larger project of defining customary international law from a rational choice perspective, recognizes the social and malleable nature of *opinio juris* as seen from the perspective of the community of states.

37. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 13 (2004).

38. *Id.*

39. George Kennan implicitly adopted this position in a famous article published in *Foreign Affairs* during the mid-1980s. See George F. Kennan, *Morality and Foreign Policy*, 64 FOREIGN AFF., Winter 1985/1986, at 205, 206–08. While written under the shadow of the Cold War, Kennan’s argument focuses on statecraft more generally.

structo-positivist approach to international law allows for all sorts of moral theorizing about what a legal rule should be, and thus provides a more robust view of IHRL.⁴⁰

The constructo-positivist framework provides a fresh look at the relationship between international human rights norms and legal human rights. These norms, grounded in a moral claim that a right should be viewed as binding in an international legal sense, do not attain this legal status simply because advocates push for such recognition. Rather, advocates of a particular right-claim must demonstrate that this right has become part of international law through accepted legalization conduits like treaties or customary international law. This article focuses on the latter conduit. With respect to customary international law, a right-claim becomes part of international law when enough states (or, possibly, intergovernmental organizations) abide by the dictates of this right-claim out of a sense of legal obligation. The next Part examines one norm—that is possibly moving toward customary international legal status—to show the difference between the “is” and the “ought” in IHRL.

II. PARTICIPATORY DEVELOPMENT AS A LEGAL HUMAN RIGHT?

This Part addresses the “positivist” component of constructo-positivism, while Part III describes the “constructivist” component. I describe the contemporary debate over whether participatory develop-

40. One caveat should be mentioned at this point. I have intentionally oversimplified legal positivism. My brief overview of the relationship between positivism and IHRL is meant to capture Hart’s essential insight, borrowed from Bentham and Austin, regarding “the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be.” H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1958). This insight, stressing the importance of the separation thesis to public international law, avoids the much more complicated discussion of the more nuanced positions of contemporary iterations of positivism. See, e.g., Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 677-80 (1998) (providing a concise overview of the various types of legal positivism while labeling Hartian positivism as “soft” legal positivism and Austinian positivism as “hard” legal positivism”). Tamanaha describes the current state of legal positivism and the debate between inclusive legal positivism and exclusive legal positivism in unflattering terms. See Brian Z. Tamanaha, *The Contemporary Relevance of Legal Positivism*, 32 AUSTL. J. LEGAL PHIL. 1, 2 (2007) (“Legal positivist theorists have splintered into two opposing schools and are consumed in an internecine dispute over which is the better version of positivism, while they less frequently engage competing legal theories and turn their backs on real world matters.”). Tamanaha persuasively argues that, in order for legal positivism to be relevant outside legal positivist circles, it must reorient toward the separation thesis. *Id.* at 31–35. Constructo-positivism appreciates the importance of the separation thesis while concomitantly understanding the meaningful role morals can—and should—play in the development of IHRL.

ment should be classified as a human right in the legal sense, obligating major international actors like the World Bank and the United States to comply with its dictates. By doing so, I present this debate as one prominent example of the error in conflating moral norms with human rights cognizable as a part of customary international law. I argue that this contested right should not, as a descriptive matter, be viewed as a human right. The debate over framing participatory development as a right provides a window into how we should think and talk about human rights, with the ultimate goal of describing the sociopolitical process of legalization for a new generation of human rights.

A. *The Rhetoric Surrounding the Debate*

Just over a decade ago, Daniel Bradlow's much-cited article put forth the idea that International Financial Institutions (IFIs) must abide by international human rights obligations because they directly confront human rights issues in their operational activities.⁴¹ Professor Bradlow suggests that the World Bank and the International Monetary Fund (IMF) *should be* or *are* subject to what has been called "international development law." It is not clear that Bradlow is describing the legal responsibilities of IFIs as they actually exist instead of as these authors want them to be.⁴²

Bradlow argues that IFIs are "subjects of international law," which "suggests that the IFIs' operating rules and procedures should be transparent, should provide affected parties with a meaningful opportunity to participate in the design and implementation of their operations, and should hold IFI staff accountable for their actions and decisions."⁴³ Put differently, Bradlow advocates a stakeholder approach to participatory development. This stakeholder approach is based on a number of assumptions. First, as previously stated, both the Bank and the IMF are subject to international law. Second, human rights form an elemental component of international law, as evidenced by international agreements like the Copenhagen Declaration.⁴⁴ Third, "[t]he first indicator of a human-rights-promoting operation is significant stakeholder participa-

41. Daniel D. Bradlow, *Social Justice and Development: Critical Issues Facing the Bretton Woods System: The World Bank, the IMF, and Human Rights*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 47 (1996).

42. See, e.g., PETER UVIN, *HUMAN RIGHTS AND DEVELOPMENT* 122–66 (2004) (discussing a "rights-based approach to development" in terms of both aspirations and obligations, without substantively distinguishing between the two).

43. Bradlow, *supra* note 41, at 74.

44. *Id.* at 48.

tion.”⁴⁵ As a result, IFIs have an obligation to make sure that all stakeholders participate in the development process.

At first glance, the participatory development argument appears convincing—that international law must apply to certain non-state actors, that the right to development exists as a human right under international law, that the definition of such a human right can be defined in vague and aspirational terms like “stakeholder” and “participation,” and that IFIs are obligated to abide by a participatory development framework as a matter of international law. However, as discussed below, there are fundamental flaws with this approach.

B. *The Substance of the Debate*⁴⁶

The argument for the right to participatory development in international human rights law is fairly straightforward. The UN has, with various levels of ratification by its members, proclaimed a human right to development. To begin, Article 22 of the Universal Declaration of Human Rights (UDHR) states that “[e]veryone, as a member of society...is entitled to the realization...of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”⁴⁷ These “positive” rights, which require action by a second party, stand in distinction to “negative” rights of the Lockean tradition. This difference can be seen in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁸ and the International Covenant on Civil and Political Rights (ICCPR),⁴⁹ two General Assembly Resolu-

45. *Id.* at 82.

46. A comprehensive overview of the history of the right to development can be found in Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 HUM. RTS. Q. 837, 838–41 (2002); see also Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 798 (2005); Benjamin Mason Meier, *Employing Health Rights for Global Justice: The Promise of Public Health in Response to the Insalubrious Ramifications of Globalization*, 39 CORNELL INT’L L.J. 711, 749–51 (2006).

47. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); see also *id.* art. 28 (“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”).

48. G.A. Res. 2200, at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR]. The status of the ICESCR under international law is unclear, but Eleanor Kinney has argued that the ICESCR can plausibly be viewed as CIL. See Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?*, 34 IND. L. REV. 1457, 1464 (2001) (“[T]he ICESCR is arguably customary international law due to its widespread acceptance internationally. As a consequence, it may be binding on all countries regardless of ratification.”).

49. G.A. Res. 2200, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec.

tions opened for signature in 1966. The ICESCR provides some form of a right to development, with its emphasis on state obligation to provide certain economic and social rights.⁵⁰ Perhaps surprisingly, while the United States may traditionally accept the legal validity of negative rights and looks askance at positive rights, the World Bank does not make as stark a distinction. One Bank-authored document notes that human rights and development have a “fundamental two-way relationship,” so that the two concepts are interconnected even if the latter concept is based on positive rights.⁵¹

These foundational documents (the UDHR, ICESCR, and ICCPR), which collectively form what some call the International Bill of Rights, must be seen in their political contexts of both the Cold War and a large-scale debate about relations between the so-called North (developed countries) and the South (developing countries).⁵² As a general matter, where the United States supported negative rights embodied in the ICCPR, the Soviet Union recognized positive rights found in the ICESCR. During the same time period, we see two 1974 General Assembly Resolutions declaring⁵³ and purportedly establishing⁵⁴ a program of action for the New International Economic Order (NIEO). The NIEO sought to decrease the divide between the North and the South based on principles of justice, equity, and reparation for past colonial harms.⁵⁵ Needless to say, the NIEO engendered great opposition among some developed states.

With the groundwork laid through the International Bill of Rights, the UN Commission on Human Rights acknowledged a general right to development in 1977,⁵⁶ and two years later the Commission “expressly

16, 1966).

50. *See also* International Conference on Human Rights, G.A. Res. 2442, at 49, U.N. GAOR, 23rd Sess., U.N. Doc. A/RES/2442 (XXIII) (Dec. 19, 1968).

51. ANTHONY GAETA & MARINA VASILARA, *DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK 2* (1998). Because of the evolving nature of the debate, this document is already outdated but still has historical value for Bank views.

52. For a discussion of modernization versus dependency theory, see RUMU SARKAR, *DEVELOPMENT LAW AND INTERNATIONAL FINANCE* 20–28 (Rosa M. Lastra ed., 1999). The development debate has evolved significantly in the past generation. The already-classic work deconstructing assumptions underlying the process is ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (1995).

53. NIEO Declaration, G.A. Res. 3201 (S-VI), at 3, U.N. GAOR, Ad Hoc Comm., 6th Spec. Sess., 2229th plen. mtg., U.N. Doc. A/Res/3201 (S-VI) (May 1, 1974).

54. NIEO Programme of Action, G.A. Res. 3202 (S-VI), at 5, U.N. GAOR, Ad. Hoc. Comm., 6th Spec. Sess., 2229th mtg., U.N. Doc. A/Res/3202 (S-VI) (May 1, 1974).

55. *See* SARKAR, *supra* note 52, at 217–18.

56. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights Res. 4 (XXXIII), at 74, U.N. ESCOR, 62nd Sess., Supp. No. 6, U.N. Doc. E/5927 (Feb. 21, 1977).

recognized the right to development as a human right and asked the Secretary-General to study the conditions required for the effective enjoyment of the right by all peoples and individuals.”⁵⁷ Two years later the UN established a Working Group of Government Experts on the Right to Development.⁵⁸ Probably the main document setting forth a rights-based approach is the UN Declaration on the Right to Development (1986 Declaration), which only one state (the United States) voted against and eight abstained. The 1986 Declaration states that “[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁵⁹

Seven years later, 171 states unanimously approved the Vienna Declaration and Programme of Action of the World Conference on Human Rights. The Vienna Declaration affirmed “the right to development, as established in the [1986 Declaration], as a universal and inalienable right and an integral part of fundamental human rights.”⁶⁰ The United States supported this Declaration, leading one commentator to note that the issue is now “settled” that the right to development is a human right.⁶¹

The argument against the right to participatory development in IHRL demonstrates why, at the present time, this purported right has not yet achieved status as a legal human right. Too many unanswered questions exist for this supposed right to be considered part of treaty-based or customary international law.⁶² What exactly is meant by international de-

57. See Sengupta, *supra* note 46, at 839–40.

58. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights Res. 36 (XXXVII), at 237, U.N. ESCOR, 37th Sess., Supp. No. 5, U.N. Doc. E/1981/25 (March 11, 1981).

59. Declaration on the Right to Development, G.A. Res. 41/128, at 186, U.N. GAOR, 41st Sess., 97th plen. mtg., Supp. No. 53, U.N. Doc. A/41/53 (Dec. 4, 1986) [hereinafter 1986 Declaration].

60. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 10, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter Vienna Declaration].

61. Sengupta, *supra* note 46, at 841–42.

62. This problem exists not just with respect to the right to participatory development, but to all norms potentially shifting to customary international law. See Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 465 (2001) (“How much state practice is enough to create a customary human rights norm? What counts as state practice? To what extent do treaties or non-binding United Nations resolutions affect the content of customary international law? How does one determine whether nations are acting out of a sense of legal obligation? Under what circumstances is a nation a ‘persistent objector’ to a rule of customary international law and, therefore, not bound by the rule? When will non-governmental actors be liable for violating customary international law rules?”). For a discussion of the problems and prospects

velopment? What amount of participation, and by which stakeholders, would rise to a level of legality? Consultation? Consent? Is this right to international development enforceable at an individual level? What would a remedy consist of, and who would enforce it?

With respect to the definitional parameters of this right, a consensus probably has developed that the proper label should be the “right to *participatory* development.” As discussed below, even those who disagree with according development CIL status generally agree that development includes a stakeholder participation component. The need for participation arises because of the near-universal view that international development is both a means and an end, both process- and substance-based, so that the targeted populations should have a say in the process that directly affects them. At a minimum, stakeholders should have access to the process that creates development plans. As such, the right has a “multi-dimensional character.”⁶³ Arjun Sengupta, former Independent Expert on the Right to Development for the UN Commission on Human Rights, views the claimholders of this right as entitled to the “process of development,” which must be “carried out in a manner known as rights-based, in accordance with the international human rights standards, as a participatory, non-discriminatory, accountable and transparent process with equity in decisionmaking and sharing of the fruits of the process.”⁶⁴

While the United States and the World Bank would be hesitant to label international development as a human right, they do both agree that development necessarily includes participation by relevant stakeholders. The United States Agency for International Development (USAID) affirmed its commitment to participatory development over a decade ago. Former USAID Administrator J. Brian Atwood began his *Statement of*

of customary international law, see Guzman, *supra* note 2.

63. Patrick van Weerelt, *The Right to Development: From Rhetoric to a Global Strategy*, in *THE INTERNATIONAL DEBATE ON HUMAN RIGHTS AND THE RIGHT TO DEVELOPMENT* 48, 49 (Franz Nuscheler ed., 1998).

64. Sengupta, *supra* note 46, at 846. Sengupta’s use of the phrase “rights-based approach” is a potentially significant move. The recent turn toward recasting the right to development debate as a debate about rights-based approaches to development may be consistent with the constructivist approach proposed in this Article. Alston, for example, has contrasted the “abstract and often sterile discussions on the right to development” with rights-based approaches that “have been actively promoted on the ground and have sought to influence the actual practice of states and of the key international development agencies.” See Alston, *supra* note 46, at 799. Rights-based approaches may recognize that the crystallization of the right to development has not yet occurred, but still push toward greater realization of participatory norms. As Sengupta’s use of the phrase demonstrates, however, the rhetoric of “rights-based approaches” does not necessarily separate legal from moral claims.

Principles on Participatory Development with the declaration that “[t]here is nothing more basic to the development process than participation,” and also included a discussion of development in terms of means and ends.⁶⁵ Atwood defined participatory development as a process that “broadens economic, social, and political access and enables a society to keep improving the quality of life for its people.”⁶⁶ Similarly, the World Bank for several decades has spoken of development in these terms, which contrasts with the economic model of development prevalent in the 1950s and 1960s.⁶⁷ When one of the most powerful nation-states and the leading intergovernmental organization charged with promoting international development both agree with right to development advocates that “participatory development” is the proper phrase, then we can safely assume that the debate has shifted to these terms. If such a right to development exists, it seems to warrant the right-holder to participate in the process of development.

The fundamental problem with according the right to participatory development status as a customary international law, however, is that there are too many unknowns with respect to what constitutes this purported right. The primary unanswered question asks “What exactly is participatory development?” There is no generally agreed upon definition of the right. Arjun Sengupta goes so far as to state that “[t]he right to development. . . involves the realization of *all* the civil, political, economic, social, and cultural rights.”⁶⁸ The ICESCR speaks of signatories taking affirmative steps to realize economic, social, and cultural rights, but does not further break down the content of these steps.⁶⁹ The 1986 Declaration similarly contains a discussion of participatory development which is “internally contradictory, duplicative of other already clearly codified rights, and devoid of identifiable parties bearing clear obligations.”⁷⁰ Antonio Cassese has described the 1986 Declaration as “mis-

65. J. Brian Atwood, U.S. Agency for Int’l Dev., *Statement of Principles on Participatory Development* (1993), http://pdf.usaid.gov/pdf_docs/PNACF577.pdf.

66. *Id.* at 1.

67. See generally PUTTING PEOPLE FIRST: SOCIOLOGICAL VARIABLES IN RURAL DEVELOPMENT (Michael M. Cernea ed., 1985).

68. Sengupta, *supra* note 46, at 857 (emphasis added).

69. See ICESCR, *supra* note 48, arts. 2, 3.

70. See UVIN, *supra* note 42, at 43 (citations omitted); see also Franz Nuscheler, *The “Right to Development”: Advance or Greek Gift in the Development of Human Rights?*, in THE INTERNATIONAL DEBATE ON HUMAN RIGHTS AND THE RIGHT TO DEVELOPMENT 54, 61 (Franz Nuscheler ed., 1998) (“While the 1986 Declaration did formulate some general postulates, it nonetheless failed to specify what development means.”).

guided.”⁷¹ The 1993 Vienna Declaration proclaimed that “[a]ll human rights are universal, indivisible and interdependent and interrelated.”⁷² The UN Commission on Human Rights has attempted to provide some teeth to the right to development, but in contradistinction to aspirational statements on the topic, the World Bank’s largest shareholder voted against the resolution.⁷³

Related to this definitional debate are the differing conceptions about the relationship between the purported right to development and other human rights. Arjun Sengupta, for instance, calls for a “vector”-based approach that views human rights (including the human right to development) as “interdependent in the sense that the realization of one right, for example the right to health, depends on the level of realization of other rights, such as the right to food, or to housing, or to liberty and security of the person, or to freedom of information.”⁷⁴ Sengupta’s formulation demands Pareto optimality. “Because all human rights are inviolable and none is superior to another,” he writes, “the improvement of any one right cannot be set off against the deterioration of another.”⁷⁵ If any other right is violated in the course of improving other rights, the meta-right to development has been violated as well.⁷⁶ For Sengupta, the truth of this statement does not depend on the size of the improvement or the deterioration. In contrast, Philip Alston adopts a human rights-based approach to development.⁷⁷ Alston implicitly rejects Sengupta’s rigid formulation and represents a more pragmatic approach toward setting priorities. Alston recognizes that “[a] list of requirements that is too demanding or ignores trade-offs and dilemmas is unlikely to be taken seriously by practitioners who are operating under major re-

71. ANTONIO CASSESE, INTERNATIONAL LAW 401 (2001) (labeling the provisions in the 1986 Declaration as “loosely worded political goals, rather than legal guidelines” that “did not specify to what extent the right at issue should be conceived of as a right of individuals towards their States, or of peoples, and whether the holder of the corresponding obligations should be States *vis-à-vis* individuals or States towards one another”).

72. Vienna Declaration, *supra* note 60, ¶ 5.

73. Australia and Japan joined the United States in the vote against the Resolution. See Commission on Human Rights Res. 2003/83, U.N. Doc. E/CN.4/2003/L.11/Add.8 (Apr. 25, 2003); Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137, 140 (2004) (noting that the Resolution was adopted by a vote of 47 to 3, with 3 abstentions).

74. Sengupta, *supra* note 46, at 868.

75. *Id.* at 869.

76. *Id.*

77. Alston, *supra* note 46, at 807.

source and time constraints and are faced with competing priorities and the need to make difficult choices.”⁷⁸

Even if we could define participatory development as a general matter and decide how this right relates to other human rights, we must then ask who holds the accompanying duty to this purported right. One obvious candidate is the World Bank. The first problem with imposing the right to development on the World Bank is that the Bank is not a state, but a multilateral institution. The World Bank’s status under international law is not entirely clear, as “[i]t is not a signatory to the U.N. Charter and is technically an independent, specialized agency of the United Nations pursuant to a 1947 agreement between the two organizations.”⁷⁹ As a result, General Assembly Resolutions do not bind the Bank in the same way that they possibly bind states.⁸⁰ If binding, a strong argument can be made that the right to development applies to states only.⁸¹ Even the 1986 Declaration proclaims that states, not IFIs, have “the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.”⁸² As Arjun Sengupta, one of the foremost proponents of the right to development, acknowledges, “the primary responsibility for implementing the right to development will belong to states.”⁸³ There is little evidence to indicate, though, that states accept participatory development as obligatory as a matter of international law. The World Bank’s largest shareholder does not. The United States ratified neither the ICESCR nor the 1986 Declaration. The United States also opposed a General Assembly Resolution that contained similar content to the NIEO.⁸⁴ In any case, the most ardent proponents of the rights-based approach to development acknowledge the uncertain legal status of the

78. *Id.*

79. John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT’L L.J. 331, 359 (2000).

80. *Id.* at 360.

81. If the right to participatory development were to apply to states, the content of the right would need to avoid its misuse. Authoritarian states in the past have used the right to development to justify harsh practices that trump other human rights. Anne Orford, *Globalization and the Right to Development*, in PEOPLES’ RIGHTS 127, 132–33 (Philip Alston ed., 2001).

82. 1986 Declaration, *supra* note 59, art. 3(1). *But see* Orford, *supra* note 81, at 141–44 (arguing that the right to development embodied in the 1986 Declaration “recognizes that actors other than states can be responsible both for protecting human rights, and for human rights violations”).

83. Sengupta, *supra* note 46, at 855.

84. *See* Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), at 50, U.N. GAOR, 29th Sess., 2315th plen. mtg., Supp. No. 30, U.N. Doc. A/9631 (Dec. 12, 1974); 14 I.L.M. 251, 265 (1975) (listing the U.S. vote against the Resolution).

1986 Declaration, perhaps the central document purportedly establishing the right to development as a part of international law.⁸⁵ Alongside the definitional uncertainty of what such a right would look like, these uncertainties lead to the conclusion that the right to participatory development is not a part of treaty-made or customary international law.⁸⁶

A related problem with imposing the right to development on the World Bank is that, at the present time, remedies against IFIs like the World Bank do not yet exist in any formalized manner in international law. Of course, the lack of remedies in international law does not mean that the right at issue has not achieved legal status. However, the key difference between the right to development and other IHRL rights without remedies is that the *content* of the right to development is not at all clear.⁸⁷ Without a generally-agreed upon working definition, implementation and monitoring of this supposed right is difficult to say the least.⁸⁸ If one were to define the right to development vaguely in order to include the ability of stakeholders to engage in “collaborative decisionmaking” with “some degree of shared control,” then knowing just what this right entails becomes difficult.⁸⁹

85. See Mac Darrow & Amparo Tomas, *Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation*, 27 HUM. RTS. Q. 471, 509 n.110 (2005).

86. For arguments that the World Bank has international legal obligations, see MAC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW 124-33 (2003); Herbert V. Morais, *The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights*, 33 GEO. WASH. INT'L L. REV. 71, 72-73 (2000); Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527, 561 (2002); see also Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT'L L. & POL'Y 331 (2006).

87. See Meier, *supra* note 46, at 751 (“In attempting to protect everything, the right [to development] has protected nothing.”).

88. The non-binding nature of human rights “obligations” permits different actors to discuss the concept in various ways. See Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199, 222 (2004) (“It is important...to recognize that references to human rights within development and market reform policies are not necessarily references to human rights as they are understood by the international human rights institutions, human rights scholars, the activist community or the wider civil society.”).

89. This definition, which is similar to other definitions, comes from WORLD BANK, PARTICIPATION SOURCEBOOK 11 (1996), available at <http://www.worldbank.org/wbi/sourcebook/sbhome.htm>. While particular definitions may differ slightly, the key components of any participatory development approach include shareholder involvement in the development process. See also van Weerelt, *supra* note 63, at 49 (stating that “the right to development is a programmatic right with a multi-dimensional character”).

Further, there is a fundamental difference not adequately addressed in the literature between promoting a norm and attaching a legal obligation to abide by the dictates of that norm.⁹⁰ One argument that the right to participatory development is a legal human right is that both the World Bank and the United States embrace the rhetoric of participation and even practice participatory development in many projects. By doing so, the argument goes, participatory development has risen to the level of customary international law even though major actors have repeatedly refused to acknowledge that this right exists as a legal matter. If accepted, this argument has the potential to deter the World Bank and the United States from undertaking supererogatory acts, if doing so creates a *de facto* duty to do so in the future. On the contrary, the World Bank can sponsor projects that lead to greater participatory development without creating a *de facto* affirmative duty to aid in the development of every poor person in every poor country. The United States can vastly increase development aid without recognizing development as an international human right. This distinction can be labeled as the difference between a *duty* and an *undertaking*, and it should not be ignored when discussing U.S. or Bank perspectives on whether they recognize such a legal right.⁹¹

This discussion speaks to the relationship between international human rights *norms* and international human rights *law*. Outside the treaty context, unless a norm has attained *jus cogens* status, a norm becomes a law because of state practice and *opinio juris* under the commonly accepted definition of customary international law.⁹² An international human rights norm may be internalized such that states engage in or respect the validity of a *moral* norm (the usage or practice prong), but states might not do so out of a sense of *legal* obligation (the *opinio juris* prong). Likewise, while outside the scope of this Article, separating actions a state takes out of moral obligation (or, for that matter, pure self-interest) from actions caused by the perception of a legal obligation implicates the persistent objector doctrine. A state may not object to the

90. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 24 (2005) (stating that “there is no convincing explanation of the process by which a voluntary behavioral regularity transforms itself into a binding legal obligation”).

91. Stephen Marks overlooks this distinction when he argues that “[p]aradoxically, the United States opposes or is reluctant to recognize development as an international human right, and yet the current administration has proposed to nearly double its development spending under a program that is strikingly similar to the international [right to development] model.” Marks, *supra* note 73, at 137.

92. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2); Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031.

validity of a moral norm while simultaneously opposing the norm as a binding legal obligation.⁹³ Even if actors like the United States and the World Bank have accepted the aspirational nature of the norm and often engage in this practice, they have not done so out of a sense of legal obligation. As Stephen Marks notes, there are at least four political groupings of countries according to their positions taken in the debate over the right to development.⁹⁴ At one end of the spectrum, poor and developing countries seek to actively use the right to development as an affirmative tool, while at the other end of the spectrum a group led by the United States consistently votes against monitoring and enforcement resolutions. For example, the U.S. delegation to the UN Human Rights Commission persistently objects to the right to development as anything but “progressive and aspirational,” which in no way “require[s] correlated legal duties and obligations.”⁹⁵ In short, an actor may object to the binding legal nature of a norm without rejecting the moral legitimacy of the norm itself.

Andrew Guzman’s *Saving Customary International Law* discusses this separation between morality and legality when he offers a theory of customary international law that accounts for the influence of norms on state behavior. Applying rational choice assumptions regarding state behavior—that states “have no innate preference for complying with international law and so will only comply when doing so makes them better off”—Guzman’s reformulation focuses on incentives among states for complying with norms.⁹⁶ Guzman argues that “CIL depends only on the existence of *opinio juris*” because of the reputational sanctions that follow from violating a CIL norm.⁹⁷ Under Guzman’s proposal, the practice prong of CIL provides evidence of the *opinio juris* prong, but does not carry any independent force in deciding whether a norm has attained CIL status. Thus, “[p]ractice may be relevant inasmuch as it affects the perceptions of states regarding the existence of a legal rule

93. See Guzman, *supra* note 2, at 164–71 for a provocative critique of the persistent objector doctrine in CIL and its role in Guzman’s rational choice-based reformulation of CIL. See also GUZMAN, *supra* note 15, at 183–209. For a suggestion, contrary to the assumptions and conclusions of this Article, that the doctrine should have minimum application to non-preemptory norm-based human rights, see Holning Lau, Comment, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT’L L. 495 (2005).

94. Marks, *supra* note 73, at 141–42.

95. *Id.* at 147 (quoting United States Government, Statement at the U.N. Commission on Human Rights, 59th Sess., Comment on the Working Group on the Right to Development (Feb. 10, 2003)).

96. Guzman, *supra* note 2, at 121.

97. *Id.* at 149.

(*opinio juris*),” and in this manner provides evidence of the existence of a legal obligation.⁹⁸

Guzman’s insights are central to this discussion. As Guzman suggests, and as discussed throughout this Article, “the existence of a moral imperative for states to act in a certain way says nothing about whether the states themselves believe that such actions are legally required.”⁹⁹ Guzman highlights the importance of not conflating state practice with *opinio juris*. Just like an individual, a state may act without a sense of legal obligation. I may choose to provide a \$100 micro-credit loan to an entrepreneur listed on <http://kiva.org/> out of a sense of moral rather than legal obligation. A state may choose to engage in participatory development for similar reasons.

In sum, from the positivist perspective, the right to participatory development does not yet exist in any legal sense. Importantly, this lack of official status does not mean that the participatory development right will not exist in the future or that the potential shift toward legalization has not yet begun. As I show in Part III, the World Bank has, since at least the end of the Cold War, begun to internalize participatory development norms in both theory and practice. From a constructivist-positivist perspective, this internalization process indicates how we can separate moral norms from legal human rights as a descriptive matter while still recognizing the dynamic process through which these norms may rise to the status of a legal human right. While this Part has focused on the “is,” Part III emphasizes the “ought.”

III. PARTICIPATORY DEVELOPMENT NORM-INTERNALIZATION AT THE WORLD BANK

This Part demonstrates how norm-internalization and a positivist conception of international human rights law are not mutually exclusive when we take seriously the differences between norms and legal human rights as well as the process of a norm “becoming” a legal human right. This norm-internalization provides evidence of further crystallization of the right to participatory development. While I do not mean to imply that the shift from a moral norm to a legal human right is teleological, the constructo-positivist is open to this transition. Thus, this Part examines how one such norm is possibly undergoing the shift toward attaining status as customary international law. The process of norm-

98. *Id.* at 153–54.

99. *Id.* at 156; *see also* Alston, *supra* note 46, at 771, 773.

internalization indicates growing acceptance of the virtues of participatory development and its widespread practice by major international actors like the World Bank. The next shift for participatory development norm entrepreneurs will be to attempt to push for the internalization of the legal status of the norm rather than the legitimacy of the norm itself. This Part will show that even if the norm has not yet been internalized to the point where the World Bank engages in participatory development out of a sense of legal obligation, it has been internalized as an aspirational norm.

I will examine three different World Bank programs and one collection of essays produced as a *festschrift* at the end of James Wolfensohn's tenure as Bank President from 1995 to 2005. These vignettes are organized chronologically because they illustrate increasing levels of participatory development norm-internalization at the World Bank. This change in the Bank has coincided with the institution slowly beginning to partner with members of civil society, academics, activists, and other political actors who make up the participatory development transnational advocacy network. The two final sections detail Global Monitoring Reports, which evaluate the Millennium Development Goals, and a collection of essays that discuss the extent to which Wolfensohn shifted the direction of the Bank toward a more inclusive approach. While this process may have begun as an exercise in rhetoric, I discuss circumstances that reveal that the Bank cannot keep the proverbial participatory development genie in the bottle. This Part is purposely detail-oriented, to demonstrate the complexities of the norm-internalization process as well as support for the assertion that this norm has not yet attained CIL status.

A. *Examples of Norm-Internalization*

1. *The Voices of the Poor Program*

Voices of the Poor, one of President Wolfensohn's pet projects, had two major components. First, it analyzed research that was commissioned by the Bank in the early 1990s, when over 40,000 poor people of the developing world were interviewed. Second, the *Voices of the Poor* project conducted new interviews with over 20,000 poor people from almost two dozen developing nations. The analysis of both components was presented in a three-volume series. The first two volumes, *Can Anyone Hear Us?* and *Crying Out for Change*, were both published in

2000.¹⁰⁰ Volume three, *From Many Lands*, was published two years later.¹⁰¹

Can Anyone Hear Us? examines eighty-one “Participatory Poverty Assessments” that the World Bank oversaw or conducted. A participatory poverty assessment is an umbrella phrase for various studies that incorporate quantitative and qualitative data. The benefit of this multifaceted approach, according to the Bank, is that the poor are able to give lengthy, substantive answers to open-ended questions so that the research consists of more than just brief answers to questionnaires.¹⁰² *Crying Out for Change* discusses the Bank’s new studies with 20,000 people. Like volume one, volume two also uses participatory poverty assessments. *From Many Lands* selects fourteen of the countries studied in *Crying Out for Change* and provides more detailed research.

Collectively, the results of the *Voices of the Poor* project portray the poor as multi-dimensional and poverty as context-specific. The “key message of the study” focuses on characteristics of poverty:

[I]t is about powerlessness and voicelessness; it is about violation of dignity; social isolation, widespread corruption, no recourse to justice, lack of protection from violence in the home, and hopelessness; and yet it is about resilience, resourcefulness, and solidarity. Poor people hunger most for a better future for their children.¹⁰³

The results from this study influenced the *World Development Report 2000/2001*.¹⁰⁴ Every year, the Bank produces these reports, which are intended to highlight what the institution views as necessary for improved development practices. The focus of the *World Development Report 2000/2001* is on participatory development, with specific reference to opportunity, empowerment, and security.¹⁰⁵ For the most part,

100. WORLD BANK, VOICES OF THE POOR: CAN ANYONE HEAR US? (Deepa Narayan et al. eds., 2000); WORLD BANK, VOICES OF THE POOR: CRYING OUT FOR CHANGE (Deepa Narayan et al. eds., 2000) [hereinafter CRYING OUT FOR CHANGE].

101. WORLD BANK, VOICES OF THE POOR: FROM MANY LANDS (Deepa Narayan & Patti Petesch eds., 2002).

102. See CAROLINE M. ROBB, WORLD BANK, CAN THE POOR INFLUENCE POLICY? PARTICIPATORY POVERTY ASSESSMENTS IN THE DEVELOPING WORLD xii–xiii (1999).

103. Deepa Narayan, *Voices of the Poor—A Landmark Study*, in BALANCING THE DEVELOPMENT AGENDA: THE TRANSFORMATION OF THE WORLD BANK UNDER JAMES D. WOLFENSOHN, 1995–2005, at 21, 21 (Ruth Kagia ed., 2005) [hereinafter BALANCING THE DEVELOPMENT AGENDA].

104. WORLD BANK, WORLD DEVELOPMENT REPORT 2000/2001: ATTACKING POVERTY 1–3 (2001) [hereinafter ATTACKING POVERTY].

105. Press Release, World Bank, New World Bank Report Urges Broader Approach to Re-

these words are defined with empty slogans that do not necessarily imply real change on the ground.¹⁰⁶ *Voices of the Poor* and the *World Development Report 2000/2001* represent the zenith of this type of rhetoric at the Bank.

How does the *Voices of the Poor* demonstrate participatory development norm-internalization at the World Bank? As a normative matter, the Bank through its policy statements appears to believe that participatory development offers a superior model to the strictly hierarchical technocratic approach that dominated at least until the mid-1980s. Further, a massive study like *Voices of the Poor* demands substantial resources to at least partially enact participatory methods.

Unfortunately, there are two main failings of the *Voices of the Poor* study that prevent it from translating rhetoric into practice. First, the actual methods the Bank used for the study would not pass even minimal fieldwork standards taught in an introductory anthropology fieldwork methodology course. Second, the way the Bank represents the study has been far out of proportion to the influence the study actually had.

Some of the gross shortcomings in the *Voices of the Poor*'s fieldwork methodology include: high variability across countries for fieldwork duration, extremely short fieldwork durations, fourteen hour days for researchers, and short time lines for researchers to produce reports.¹⁰⁷ These weaknesses would not be so fatal if the World Bank represented the findings of the *Voices of the Poor* as context-specific and unable to be generalized. However, nothing could be further from how the Bank, and then-President Wolfensohn, portrayed the results of the study. The official Bank press release proclaims that the study "presents detailed personal accounts from over 60,000 men and women in 60 countries."¹⁰⁸ Then-President Wolfensohn framed countless speeches about poverty around the project, and in nearly every instance generalized the results as speaking for all poor people in the developing world. The

ducing Poverty, Press Release No: 2001/042/S (Sept. 12, 2000).

106. The Press Release announcing *Attacking Poverty* defines opportunity as "[e]xpanding economic opportunity for poor people by stimulating economic growth, making markets work better for poor people, and working for their inclusion, particularly by building up their assets, such as land and education," empowerment as "[s]trengthening the ability of poor people to shape decisions that affect their lives and removing discrimination based on gender, race, ethnicity, and social status," and security as [r]educing poor people's vulnerability to sickness, economic shocks, crop failure, unemployment, natural disasters, and violence, and helping them cope when such misfortunes occur." *Id.*

107. See CRYING OUT FOR CHANGE, *supra* note 100, at 8, 16.

108. Press Release, World Bank, 'Voices of the Poor' New Study Offers Unique Human Insight into Living with Poverty, Press Release No. 2000/248/S (Mar. 14, 2000).

Voices of the Poor has been used to justify positions on, for example, the role of police in postconflict areas,¹⁰⁹ water rights,¹¹⁰ gender violence,¹¹¹ and even information technology.¹¹² The *Voices of the Poor* study, then, served to push along the World Bank's agenda by justifying it in participatory terms.

2. *Poverty Reduction Strategy Papers*

Voices of the Poor provides one example of how the World Bank cannot embrace participatory development in theory while at the same time not actually altering its development practices. This statement at first appears counter-intuitive because of all of the methodological failures of the project and the success of then-President Wolfensohn's use of *Voices of the Poor*. When seen from a dynamic perspective that views participatory development from a longer timeframe than just the late-'90s/early-00's, a picture soon emerges of this rhetoric partially spilling over into practice.

The emergence of Poverty Reduction Strategy Papers (PRSPs) as a best-practice at the Bank provides one indication that the participatory development genie's head is peeking out of the bottle. While it is too early to fully determine this genie's status in relationship to the Global Monitoring Reports discussed in Part III.A.3, there is reason to be more optimistic about Global Monitoring Reports than PRSPs. Before looking at Global Monitoring Reports in detail, I first discuss the role of PRSPs in the participatory development process, how PRSPs provide evidence of further crystallization of this norm, and how external actors interact with the PRSP process. In this sense, PRSPs represent a marked improvement of how participatory development is practiced at the Bank in comparison to the *Voices of the Poor* project.

109. James D. Wolfensohn, *Postconflict Countries and Defining New Cooperation in the Humanitarian Agenda* (Nov. 2, 1999), in VOICE FOR THE WORLD'S POOR: SELECTED SPEECHES AND WRITINGS OF WORLD BANK PRESIDENT JAMES D. WOLFENSOHN, 1995–2005, at 181, 184 (Andrew Kircher et al. eds., 2005) [hereinafter VOICE FOR THE WORLD'S POOR].

110. James D. Wolfensohn, *Ensuring Safe Water for All Through Participation, Innovation, and Inclusion* (Mar. 22, 2000), in VOICE FOR THE WORLD'S POOR, *supra* note 109, at 201, 201–02.

111. James D. Wolfensohn, *Educating a Woman Is Educating a Family* (Mar. 8, 2001), in VOICE FOR THE WORLD'S POOR, *supra* note 109, at 265, 266. (“When we look at questions of poverty, as was pointed out in the Bank's *Voices of the Poor* study in 60 countries, violence against women is a central issue, and this is something that was not previously so clear to me.”).

112. James D. Wolfensohn, *The Role of Information Technology in a Knowledge-Based Global Economy* (July 5, 2000), in VOICE FOR THE WORLD'S POOR, *supra* note 109, at 233, 233–34.

A PRSP is a document produced by a country seeking debt relief and concessional financing from the World Bank and the IMF.¹¹³ While variable in content and scope, the four basic elements of every PRSP are: “ownership” by the developing country, comprehensiveness in the *content* of the strategy paper (with an emphasis on the capabilities approach), comprehensiveness in the *process* of the strategy paper (an explicit reference to participatory development), and adoption of an outcome-based approach to participatory development.¹¹⁴ PRSPs emphasize the importance of consultation. Consultation forms one of the major planks of a participatory development approach, and the Bank has incorporated this concept in its discussions of development. This move toward consultation arises out of the Bank’s new strategic framework that stresses what it deems the “twin pillars” of “investing in and empowering people and promoting a favorable investment climate.”¹¹⁵ The twin pillar approach has its origins in the *World Development Report 2000/2001: Attacking Poverty*, which, again, is largely based on the *Voices of the Poor* study.¹¹⁶ The macroeconomic pillar falls outside the scope of this Article, but the investment/empowerment pillar embraces participation as a means and an end to development.¹¹⁷ Emblematic of this focus on investment and empowerment is the Comprehensive Development Framework, begun in 1999, which introduced PRSPs.¹¹⁸ Both the Bank and the IMF approved this approach.¹¹⁹ PRSPs can also be traced to *World Development Report 2000/2001: Attacking Poverty*.¹²⁰ To further enhance the visibility of PRSPs, the Bank publishes a free monthly e-newsletter focusing on poverty issues and documenting

113. See John Page, *Building the Country-Based Approach*, in BALANCING THE DEVELOPMENT AGENDA, *supra* note 103, at 36, 36.

114. *Id.* at 36–37.

115. Ruth Kagia, *Challenges Ahead*, in BALANCING THE DEVELOPMENT AGENDA, *supra* note 103, at 144, 144.

116. See World Bank, *Synopsis of World Development Reports*, 2 (1995–2005), http://siteresources.worldbank.org/INTWDRS/Resources/WDR_Summaries_4DC3.pdf [hereinafter *Synopsis of World Development Reports*].

117. Sir Nicholas Stern, *Two Pillars of Development*, in BALANCING THE DEVELOPMENT AGENDA, *supra* note 103, at 149, 149 (“Empowerment should not be seen only as an instrument for achieving development—it is also a central element of development itself.”).

118. François Bourguignon, *A Broader, More Integrated Approach*, in BALANCING THE DEVELOPMENT AGENDA, *supra* note 103, at 13, 13.

119. *Id.*; see also Page, *supra* note 113, at 36.

120. See *Synopsis of World Development Reports*, *supra* note 116, at 6 (“The report formed the intellectual basis for country-owned Poverty Reduction Strategy Papers (PRSPs) that were being initiated as the report was being written.”).

the status of various PRSPs around the world.¹²¹ The actual PRSPs are also available online.

These strategy papers adopt the *Voices of the Poor's* belief in the need for a movement away from universal poverty reduction strategies and toward more country-specific planning. Further, and related to the conversation the Bank is increasingly having with external actors like NGOs, the Bank has institutionalized clinics where experts of the PRSP process share their stories about successes and failures, with the hope that their experiences can help reduce common mistakes from being repeated in other countries. In April 2005, the Bank held a Civil Society Global Policy Forum on the Poverty Reduction Strategy Review, where external actors—members of the participatory development transnational advocacy network (to use Keck and Sikkink's phrase)—debated the PRSP process.¹²²

PRSPs provide the foundation for World Bank funding to developing countries, through their "Country Assistance Strategies" (CAS). A CAS "sets out the Bank's diagnosis of the country's development situation and a selective program of planned Bank Group support that is tailored to the country's needs, against the background of the government's development objectives and strategy, the Bank's ongoing portfolio, and the activities of other development partners."¹²³ In order to bring various stakeholders into the CAS process, the project leaders of a country hold workshops and roundtable discussions with members of civil society ("nongovernmental stakeholders") to create the strategy.¹²⁴

PRSPs do not entirely shift ownership to the countries, though. While a country basically controls the design of a PRSP, this plan must be submitted and approved by the World Bank Board of Governors before

121. Anyone with internet access can sign up for the newsletter. See *Newsletter Archive*, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,contentMDK:20153308~menuPK:337036~pagePK:148956~piPK:216618~theSitePK:336992,00.html>.

122. For an agenda of this meeting listing the various speakers, see World Bank, Civil Society Global Policy Forum, http://siteresources.worldbank.org/CSO/Resources/CS_Forum_Agenda_FINAL.pdf. There are many actors in the transnational advocacy network advocating for the World Bank to fully implement participatory development. A non-exhaustive list would include international and domestic NGOs, local social movements, private think tanks, and local organizations like churches or trade unions. Oxfam International, for example, supports participatory development by funding projects and pressures the Bank to do so as well. See, e.g., Oxfam International, *Making PRSPs Work: The Role of Poverty Assessments* (April 2001), available at http://www.oxfam.org/en/policy/briefingnotes/pp0104_Making_PRSP_work.

123. WORLD BANK OPERATIONAL MANUAL, PROCEDURE 2.11: COUNTRY ASSISTANCE STRATEGIES ¶ 2 (June 2005).

124. *Id.* ¶ 7.

a country can qualify for debt relief under the Highly Indebted Poor Country process.¹²⁵ The World Bank in this sense has a final say in PRSPs. Further, because the country's government basically controls which groups in society can participate, PRSPs often exclude those that the government does not view favorably.¹²⁶ The Bank is not ignorant of these criticisms. Stewart and Wang, for example, have written an article in a volume edited by Alston and Robinson that arose out of a symposium at New York University that had members of Bank management engaging with academic critics.¹²⁷ This dialogue could not have occurred two decades ago, probably would not have happened at the start of Wolfensohn's term, and characterizes the new relationship between the Bank and members of the participatory development transnational advocacy network. When compared with the *Voices of the Poor* project, this new emphasis should be seen as a step toward a more participatory approach.

3. *Global Monitoring Reports*

Global Monitoring Reports are intricately related to the UN's Millennium Development Goals (MDGs). The MDGs trace their origin to the September 2000 United Nations Millennium Summit. At the conclusion of this Summit, the General Assembly adopted the UN Millennium Declaration, which stated in a mix of broad and specific terms what would later become the MDGs. Paragraph sixteen, for example, states that the signatories are "determined to deal comprehensively and effectively with the debt problems of low and middle-income developing countries, through various national and international measures designed to make their debt sustainable in the long term."¹²⁸ Paragraph nineteen, though, seeks, by 2015, to halve the proportion of people living on less than one dollar a day, the number of people who do not have access to safe drinking water, and the number of people who suffer from hunger.¹²⁹ Other paragraphs fall somewhere in between with respect to

125. Frances Stewart & Michael Wang, *Poverty Reduction Strategy Papers Within the Human Rights Perspective*, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 447, 450 (Philip Alston & Mary Robinson eds., 2005). Stewart and Wang's article questions whether PRSPs effectively change the *substance* of decisions in the development process. This Article focuses on how the PRSPs operate with a more participatory framework in *procedural* terms.

126. *Id.* at 456–57.

127. *See id.* at v–vi.

128. United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 16, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

129. *Id.* ¶ 19.

specificity.¹³⁰ Unlike many other aspirational development statements, major actors in the development community began to further refine the Millennium Declaration so that concrete development goals eventually formed.

There are eight MDGs, all broad in scope.¹³¹ While some of these goals might sound no different than, say, the type of statements made by then-President Wolfensohn when discussing the *Voices of the Poor* project, there is one fundamental difference. These MDGs have widespread support across a variety of sectors, both governmental and non-governmental. As a result, unlike the *Voices of the Poor* project, mini-bureaucracies have developed for each of the eight goals, with specific monitoring mechanisms to chart the status of the progress of each goal. The World Bank participated in the creation of these goals and now has a major role in observing and aiding in their progress. The UN had a major summit in September 2005 to review the progress over the previous five years, and Secretary-General Annan produced a widely-circulated report that outlined his views on what has been done and, more importantly, what still needs to be done.¹³²

The key difference between the MDG model and the prior models is that the monitoring mechanisms created to evaluate the MDGs have kept MDGs at the forefront of the international development agenda.¹³³ While the United Nations also has a method to evaluate progress,¹³⁴ the World Bank, through its Global Monitoring Reports, has created a pre-

130. Paragraph twenty, for example, resolves to “promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable.” *Id.* ¶ 20.

131. See Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 28, U.N. Doc. A/59/2005 (Mar. 21, 2005) (stating that the goals are to: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria, and other diseases; ensure environmental sustainability; and develop a global partnership for development).

132. *Id.* ¶¶ 3–5.

133. Alston goes so far as to describe the MDGs as “the single most important focus of international efforts to promote human development and dramatically reduce poverty.” Alston, *supra* note 46, at 755–56.

134. The *Millennium Development Goals Report*, released by the UN, breaks down each of the eight goals and discusses them specifically. One beneficial aspect of this Report is that it was produced in conjunction with a wide variety of actors, not all of whom are located inside the UN. The World Bank, for example, helped with the Report. One negative aspect, though, is that it is less of a substantive report and more of a diagram-heavy, analysis-light document that does not engage any of the goals in any meaningful manner. The document is useful in that it contains a plethora of the relevant statistics relating to the goals. See UNITED NATIONS, THE MILLENNIUM DEVELOPMENT GOALS REPORT (2005).

cise way to quantitatively measure progress on the MDGs.¹³⁵ Even though many of these goals will not be met by 2015, the MDGs should, nonetheless, be viewed much more favorably than the type of top-down development projects dominant up through the 1980s. The MDG model of development is also preferable to the rhetoric-heavy participatory development model adopted by the World Bank in the 1990s and exemplified by the *Voices of the Poor* project and PRSPs.

Global Monitoring Reports potentially represent a major step forward for the Bank in adopting a participatory approach to development.¹³⁶ The sole purpose of these reports is to catalogue and monitor the status of the MDGs.¹³⁷ Like the PRSPs, these reports are joint efforts of the Bank and the IMF. Other international financial agencies, such as the Asian Development Bank, are also partners. Like the PRSPs and Inspection Panel reports, Global Monitoring Reports are available to the public for free.¹³⁸

These reports consist of two major components: assessment and calls for action. They list the progress or lack thereof of the international community in meeting each goal. For example, if the statistics are credible, we are told that the developing world will meet the goal to halve the number of people living on less than one dollar a day by 2015. The *Global Monitoring Report 2006* informs us that, while 27.9% of the

135. Roberto Dañino, former Senior Vice President and General Counsel of the World Bank, has succinctly stated the relationship between the MDGs, the Bank, and human rights:

All eight MDGs involve more than one human right. One concept that the Bank has taken a leading role in developing is governance. Governance itself has a strong human rights content; indeed, this is an area in which our research has found a rich set of connections in charting the work of the Bank to key international human rights provisions. Governance incorporates transparency, accountability, and a predictable legal framework.

Roberto Dañino, *The Legal Aspects of the World Bank's Work on Human Rights*, 41 INT'L L. 21, 24 (2007).

136. *But see* Alston, *supra* note 46, at 780 (noting that the *Global Monitoring Report 2004* "succeeds in either ignoring [the human rights] dimension or addressing it clandestinely").

137. The next vignette will discuss a collection of essays by current and former Bank officials. *See* BALANCING THE DEVELOPMENT AGENDA, *supra* note 103. The chapters do not go into a discussion of the Global Monitoring Reports. Many instead focus on the MDGs directly. François Bourguignon, Chief Economist and Senior Vice President at the Bank, views two basic challenges to achieving the MDGs, mirroring the position that the *Global Monitoring Report 2006* takes—the need for reform in developing nations and the need for greater commitments by the developed world with respect to aid. *See* Bourguignon, *supra* note 118, at 17. In one chapter, a Senior Vice President for the Bank's Human Development Network explicitly ties participatory development into the MDGs. *See* Jean-Louis Sarbib, *Putting People at the Center*, in BALANCING THE DEVELOPMENT AGENDA, *supra* note 103, at 18, 25.

138. For copies of the reports, see The World Bank, Data and Research: Global Monitoring Reports, <http://go.worldbank.org/947M8H2100>.

world's population fell into this category in 1990, this number fell to 21.7% by 2002 and is projected to be at 10.2% by 2015.¹³⁹ Less successfully, access to water, electricity, and telephones in South Asia have not kept up with the region's population growth.¹⁴⁰ There are hundreds if not thousands of statistics like this in the Report, and the Bank does not shy away from discussing unflattering statistics.¹⁴¹ With respect to the second component, calls for action, the Report lists six proposals. They center on strengthening national infrastructure and investment climates, providing more flexible and coordinated aid, having wealthier countries actually come through on aid promises and equitable trade agreements, shifting the Bank and IMF toward a "results management agenda" that looks at the success or failures of projects as they occur on the ground as opposed to how they are planned, improving governance monitoring mechanisms, and supporting a system of "global checks and balances" whereby wealthier countries agree to not participate or enable attempts at corruption in the developing world.¹⁴²

How, then, do the Millennium Development Goals and the *Global Monitoring Report 2006* mesh with my previous discussion of norm-internalization at the World Bank? Again, when discussing proof in the context of norm-internalization, it is nearly impossible to provide irrefutable evidence. Still, we see a clear trend by the World Bank toward the internalization of participatory development norms not only in terms of rhetoric but, with the advent of the Global Monitoring Reports, action as well. Two consistent themes in Bank rhetoric have been transparency and accountability. The *Global Monitoring Report 2006* appears to be an effort to engage both of these concepts at a substantive and verifiable level.

Indications of transparency occur throughout the Report. As previously stated, the Bank has included numerous statistics that paint the progress of the MDGs in a mixed light. A brief comparison to the way the World Bank packaged the *Voices of the Poor* project to the public provides evidence of the extent of norm-internalization. Whereas the Bank discussed *Voices of the Poor* with universal acclaim,¹⁴³ even the opening lines of the World Bank's press release announcing the *Global*

139. WORLD BANK, GLOBAL MONITORING REPORT 2006, at 21–22 (2006) [hereinafter GLOBAL MONITORING REPORT 2006].

140. *Id.* at 35.

141. *But see id.* at 46–55 (discussing statistics on "countries making MDG progress").

142. *Id.* at xvii–xx.

143. *See supra* Part III.A.1 and accompanying text.

Monitoring Report 2006 takes a cautiously optimistic approach.¹⁴⁴ Aside from the actual content of the Report and press releases surrounding its release, the Bank is currently in the process of holding press conferences to announce the purposes and findings of the Report.¹⁴⁵ At various points in the Report, its authors seem to undermine some of the longstanding and, some might say, dogmatic positions of the World Bank.¹⁴⁶ The Report addresses how privatization of the utility industry has a detrimental effect in poor and rural areas.¹⁴⁷ It also goes so far as to suggest that the “rising tides raises all ships” mantra that underlies much of its liberalization platform overlooks how, even when developing world wealth in the aggregate might be increasing, the very poorest of the developing world may not benefit from increased liberalization.¹⁴⁸ Later in the Report, the authors discuss how the spread of global markets does not necessarily benefit all parts of the developing world. In a statement that would have been unheard of in a Bank-produced document not too long ago, the Report asserts that “[g]lobal markets can be the source of virulent, corrosive corruption” if the richer nations of the world do not implement an effective system of checks and balances on their own behavior.¹⁴⁹

144. Press Release, World Bank, Progress on Millennium Development Goals Suggests Global Effort Working, Says World Bank-IMF Report, Press Release No: 2006/357/DEC (Apr. 20, 2006) (“Evidence of reduced child deaths in nine out of 10 developing countries surveyed, rapid gains in primary school enrolment, and reduced HIV/AIDS infection rates in several countries suggest that strong economic growth, backed by improved policies in developing countries and increased aid, is delivering results in some countries.”).

145. The lead author of the *Global Monitoring Report 2006*, Mark Sundberg, made this comment about MDG progress at a press conference announcing the release:

Africa and South Asia are off track in all of these dimensions. Gains in child mortality have been particularly slow. Over 10 million children continue to die each year from causes that are readily preventable and readily treatable. Only one-fourth of countries are on track to meet the nutrition targets, and several countries in Africa are actually slipping backwards.

World Bank, Transcript of Global Monitoring Report: Press Conference – IMF/World Bank Spring Meetings 2006, <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTPROGRAMS/EXTTRADERESEARCH/0,,contentMDK:20896633~menuPK:162691~pagePK:210083~piPK:152538~theSitePK:544849,00.html>.

146. See GLOBAL MONITORING REPORT 2006, *supra* note 139, at xi (stating that “many countries are off track to meet the human development MDGs” and that “[f]or every success story...there are disturbing examples of increased poverty in much of Sub-Saharan Africa, and among large groups of people in many other parts of the world”).

147. See *id.* at 40.

148. The Report does not actually use the “raises all ships” quote.

149. *Id.* at 122. I do not wish to make it seem as if *Global Monitoring Report 2006* was written by an institution that does not believe in the power of the market. Overall, the Report is in favor of liberalization, but with a strong ethical component that takes into account the conse-

The second theme that can be gleaned from the *Global Monitoring Report 2006* focuses on accountability. This term has become one of those potentially meaningless words bandied about by development experts who use the concept as a way to avoid a truly participatory approach. In the past, “accountability” has been used as a sort of code word whose meaning refers to accountability only among the leaders of the developing world rather than members of IFIs and national leaders of the “developed” world. With the Report, we see a more balanced approach. While much of the Report is devoted to addressing accountability amongst the developing country elites,¹⁵⁰ one innovation that indicates a deep level of norm-internalization at the Bank is the emphasis on the need for reform among the developed world.

This broadening of the definition of accountability can be seen throughout the Report, but especially in chapters three and seven. Chapter Three, “Delivering on Commitments for Aid, Debt Relief, and Trade,” addresses, among other topics, how aid has increased in the past decade but still lags well behind the .7% of national income target.¹⁵¹ Chapter Seven, “Strengthening Global Checks and Balances,” stresses how the developed nations should abide by international law when dealing with the developing world. This chapter argues that accountability works in both directions, so that if the developed world does not abide by the dictates of, for example, the OECD’s anti-bribery convention or various money laundering agreements, then developed nations contribute to both poor governance and increased inequality in the developing world.¹⁵²

These Global Monitoring Reports demonstrate the interaction between the World Bank and those who wish to elevate participatory development to a best practice at the Bank in both rhetoric and practice. The Bank has partnered with several NGOs in its Global Monitoring project. One partner is the Center for Global Development, which was founded only seven years ago as a non-profit whose goal is to reduce poverty.¹⁵³ The Bank now routinely meets with members of the participatory development transnational advocacy network like the Center for Global Development, and Global Monitoring Reports illustrate one instance where the Bank is even bringing in people at the policymaking

quences—unintended or otherwise—that arise from the spread of global markets.

150. Chapter Five, for example, is devoted to “monitoring developing-country governance.” See *id.* at 123–38.

151. *Id.* at 76–77.

152. See *id.* at 177–81.

153. See Center for Global Development, <http://www.cgdev.org/>.

level. Even if one questions the level of influence of these groups as a causal matter, we can see clear progress in how the Bank not only talks but also acts with respect to participatory development.

The *Global Monitoring Report 2006* in numerous places discusses the concept of “quality of aid,” which simply “refers to the form and modalities of aid that make it more effective as a resource for advancing development objectives.”¹⁵⁴ In discussing the various ways to measure the quality of aid, the Report mentions the Center for Global Development’s Commitment to Development Index.¹⁵⁵ Aside from this particular citation in the actual Report, the Center for Global Development also participates in planning sessions that decide upon the content of the reports. Other organizations, like the Development Gateway and the Global Development Network, also participate.¹⁵⁶

One reasonable critique of the Millennium Development Goals is that they discuss accountability so broadly that a free-rider problem emerges. One could imagine a G-8 leader asking, “Why does my country need to increase its development assistance to .7% of its national income if the other countries do not do so? It might be better to allow others to do so, because I’ll still reap most of the benefit even if I do not participate.” There are at least two problems with this view, and they both relate back to the type of work the World Bank is doing to aid in the implementation of the MDGs. First, accountability mechanisms like the Global Monitoring Reports are surprisingly specific about developed countries who are not pulling their weight. I say “surprisingly” because many of the countries implicitly or explicitly targeted by these Reports are major shareholders at the Bank.¹⁵⁷ Second, because of the publicity of the MDGs and support mechanisms like the Global Monitoring Reports and various UN programs, there is (or perhaps, more accurately, “should be”) an element of global shame associated with not fulfilling self-created duties as memorialized in the UN Millennium Declaration and the MDGs.

154. See, e.g., GLOBAL MONITORING REPORT 2006, *supra* note 139, at 84 Box 3.2.

155. *Id.*

156. The Development Gateway, which has worked intimately with the World Bank since it began, now has over 130,000 members. Mohamed Muhsin, *Transforming the Bank with IT*, in BALANCING THE DEVELOPMENT AGENDA, *supra* note 103, at 135, 140.

157. The Report outlines the major findings of the Volcker report on the UN-Iraq Oil-for-Food scandal, and states that “[t]he list of countries with companies implicated in the kickback scheme includes most signatories of the OECD convention, which criminalized bribery of foreign officials.” GLOBAL MONITORING REPORT 2006, *supra* note 139, at 179 Box 7.1.

A second reasonable critique of the MDGs is that goals are good to have, and monitoring mechanisms are fine, but if the World Bank and its shareholders do not vastly increase their overseas development assistance, then the global poor will still get poorer and global inequality will increase. Here I would suggest that we analytically separate the Bank's governing body from the bureaucrats who work there on a day-to-day basis. The Global Monitoring Reports illustrate that possible tension exists between the two groups. On one hand, many of the Bank's largest shareholders are perceived to be rather stingy with overseas aid. This critical evaluation of the Bank is valuable in that it highlights current problems in the international development arena. On the other hand, though, there is reason to believe that Bank bureaucrats do not share fully overlapping preferences with the Bank's major shareholders. These reports do not hesitate from openly seeking a strong monitoring mechanism of nations that commit to aid levels but then fail to follow through.¹⁵⁸ Additionally, these reports adopt a more participatory approach in two senses. Not only do a wide variety of non-state actors aid in producing the reports, but the content of these reports reveals a strong preference for participatory development. At an absolute minimum, both the Millennium Development Goals and the Global Monitoring Reports provide evidence of a crystallization of the human right to participatory development that is well beyond what we saw in, for example, the *Voices of the Poor* project.

No one is arguing that the MDGs are a panacea to world poverty and global inequality. However, it would not be fair to state that these goals are meaningless. While they may have begun as aspirational, hard-to-implement statements back in 2000 at the UN Millennium Summit, since their adoption we have seen an explosion of actors and ideas that surround the MDGs. The door has been opened for members of the participatory development transnational advocacy network to enter, and they have done so. With these actors working on the MDGs and helping to produce documents like the Global Monitoring Reports, the World Bank has set itself up for the perhaps unintended consequence of decreasing the gap between its participatory rhetoric and practices.

158. *Id.* at 78–79.

4. *Balancing the Development Agenda: The Inevitable Bureaucratization of Rhetoric*

The year 2005 marked the end of James Wolfensohn's decade-long tenure as World Bank president. As the first and second vignettes showed, Wolfensohn was a master rhetorician who traveled all over the world preaching the values of participatory development. He took hundreds of official trips to all corners of the globe, pushing the Bank's agenda.¹⁵⁹ The World Bank celebrated these ten years with a *festschrift* called *Balancing the Development Agenda: The Transformation of the World Bank Under James Wolfensohn, 1995–2005*.¹⁶⁰ The book is a collection of essays by current and former Bank management on all of the reforms made during Wolfensohn's tenure. It is a significant piece of Bank-produced evidence showing just how much the norms of participatory development have taken root at the World Bank.

The chapters in this book illustrate what may be called “the inevitable bureaucratization of rhetoric.” Because the Bank has now been focusing on participation for almost two decades, it has some surprisingly elaborate “participatory talk” that puts pressure on itself to actually practice what it preaches. In 1985, the World Bank discussed in broad terms the virtue of participation. Ten years later, we saw a shift toward more specific rhetoric about what participation really means. In 2005, we see not only more complicated rhetoric, but also more structures built around this rhetoric. PRSPs and, especially, Global Monitoring Reports are but two of many examples that can be included here. An institution as large as the Bank cannot simply repeat the same vacuous phrases about participatory development ad infinitum. As the rhetoric itself develops, there will be a tendency by any bureaucracy to enact some sort of accountability structure to match the rhetoric.

A close reading of *Balancing the Development Agenda* reveals that the World Bank is beginning to put content behind potentially airy par-

159. Ruth Kagia, *Overview*, in *BALANCING THE DEVELOPMENT AGENDA*, *supra* note 103, at 2, 5 (“During his tenure Wolfensohn undertook more than 300 official trips to all regions of the world. On every trip he reiterated the need for faster and more comprehensive action on poverty reduction.”). Ruth Kagia, the Director of Education in the Bank's Human Development Network, states that Wolfensohn framed his speeches during these trips around four core themes: “one world” (trying to emphasize that actions in the developing world have direct implications on the developed world), “global inequality, social justice” (noting the correlation between poverty and social justice on one hand and violence and peace on the other), “hope” (an implicit reference to the human capabilities approach to development), and “the future” (recognizing the need for good development practices because of the increasing world population and the decreasing median age of developing country's populations). *Id.* at 5–6.

160. *See* *BALANCING THE DEVELOPMENT AGENDA*, *supra* note 103.

ticipatory rhetoric like sustainability and empowerment. A major indicator of an actual commitment to these concepts is the level of funding given to programs that embrace participation. Funds provided to development projects that are “community-driven” increased in one five year period (1996–2001) from \$500 million to \$2.3 billion.¹⁶¹ Funding for these programs has hovered since the 2001 level.¹⁶² While \$2.3 billion is small when compared to the overall amount of Bank lending, an almost five-fold increase represents a significant achievement. Similarly, “rule of law” can be an empty promise when not backed by adequate funding and institution-building. Since 2000, the Bank has sponsored large-scale rule of law conferences in Washington, D.C. and abroad, and it has also vastly increased the number of programs geared toward judicial reform.¹⁶³ *Balancing the Development Agenda* addresses environmental issues as well. While Wolfensohn continuously mentioned the importance of the environment in speeches,¹⁶⁴ the Bank has begun to bureaucratize environmental concerns through funded structures and official policies that, at least partially, alter the way the Bank carries out its development practices. The World Bank’s Operational Policy on Environmental Assessment provides a list of ten policies that mandate, for example, environmental assessments of proposed projects.¹⁶⁵

The shift in these programs is rooted in the World Bank’s apparent commitment to consultation and participation. Consultation and participation, according to James Wolfensohn, occur more easily with a Bank structure that is decentralized.¹⁶⁶ Decentralization refers to shifting authority to make decisions toward the client by emphasizing three prongs of this business model: a matrix structure aimed at increasing the Bank’s global knowledge with subsequent application to the client country, a focus on country rather than merely project results, and technical excellence and innovation among Bank managers.¹⁶⁷ At first glance, this model might be criticized as vague or as more mere words.

161. Ian Johnson, *Sustaining Development*, in *BALANCING THE DEVELOPMENT AGENDA*, *supra* note 103, at 40, 46.

162. *Id.*

163. See Roberto Daniño, *Reforming Legal and Judicial Systems*, in *BALANCING THE DEVELOPMENT AGENDA*, *supra* note 103, at 62, 63–65

164. See, e.g., James D. Wolfensohn, *Securing the 21st Century, Protecting the Planet* (Oct. 3, 2004), in *VOICE FOR THE WORLD’S POOR*, *supra* note 109, at 495.

165. See Johnson, *supra* note 161, at 40.

166. James D. Wolfensohn, *Address at a Congressional Staff Forum sponsored by the Overseas Development Council* (May 16, 1997), in *VOICE FOR THE WORLD’S POOR*, *supra* note 109, at 64, 68–69.

167. Kagia, *supra* note 159, at 7–8.

However, the decentralization of the Bank has begun to occur. As one example, the Bank notes that seventy-three percent of its country directors were based in the field in 2005, compared with none a decade earlier.¹⁶⁸ The shift in location from Washington to client countries by senior Bank officials represents a step toward, at a minimum, greater consultation.

As is clear from this Section, one of the World Bank's intended functions of *Balancing the Development Agenda* is to show just how much James Wolfensohn accomplished as Bank President. Gerard Rice, the Bank's Communications Director, tells a story about Wolfensohn that summarizes the thesis of Part III. Rice states that Wolfensohn came to the Bank at a time when various civil society groups were vehemently protesting IFIs. The "50 Years is Enough" campaign was gaining popularity, and the Bank-IMF Annual Meetings had been disrupted the year before by Greenpeace activists.¹⁶⁹ Rice labels 1994–95 as a time where the Bank was "an institution under siege."¹⁷⁰ Within a short time, Rice argues, Wolfensohn changed both the Bank's practices and how outside groups viewed the Bank. Wolfensohn crafted Bank relationships with the UN, civil society, the private sector, and parliamentarians.¹⁷¹ With regard to civil society, Rice claims that, as of 2005, seventy percent of Bank projects included civil society participation.¹⁷² Rice closes his story with a reference to how, in May of 2004, Greenpeace invited Wolfensohn to address the organization's annual meeting—and notes that "[w]hen he finished speaking, he was given a warm ovation."¹⁷³

Gerard Rice makes a point relevant to this discussion. If his story is true, then a dramatic shift has occurred in how some members of the participatory development transnational advocacy network perceive the Bank when compared to just a decade ago. Increased Bank funding for civil society partnerships provides evidence of their solidifying relationship. In the past decade, the private sector arm of the World Bank increased its level of investment in the developing world, from \$2.1 billion in 1996 to \$4.75 billion in 2004.¹⁷⁴ This investment was in part channeled through civil society partnerships.¹⁷⁵

168. *Id.* at 4.

169. Gerard Rice, *Opening Up the Bank*, in *BALANCING THE DEVELOPMENT AGENDA*, *supra* note 103, at 76, 76.

170. *Id.*

171. *Id.* at 79.

172. *Id.*

173. *Id.* at 81.

174. See Jean-Francois Rischard, *Forging New Strategic Alliances*, in *BALANCING THE*

I will close this vignette with one anecdote, provided by a Senior Vice President for the Bank's Human Development Network, that exemplifies inevitable bureaucratization. The Roma, the largest minority in Europe, have been historically discriminated against in the many countries and societies where they reside. The World Bank has targeted the Roma as a group who, with successful development practices and proper funding, can emerge from poverty. Early indicators show that the Bank's work with the Roma goes beyond general statements about participation and poverty eradication and toward action aimed at these goals. To this end, the Bank has increased funding on Roma projects and, with George Soros' Open Society Institute, held a pan-Roma conference in Budapest with prime ministers and other government officials aimed at "overcoming exclusion and expanding opportunities for Roma to contribute to economic and social development in Europe."¹⁷⁶

In sum, this Part has provided anecdotal evidence of the slow crystallization of the participatory development norm. As norm-internalization by the World Bank increases, so too has the ability of members of the participatory development transnational advocacy network to actually engage the World Bank. As we have seen in the past few years, this engagement is no longer limited to critiquing the Bank on its own terms. As members of the participatory development transnational advocacy network work with the Bank, there is a correlation with the Bank embracing participatory development norms. Empty words have begun to be replaced by funded programs and conferences. At the same time, there is little indication that the Bank undertakes these activities out of any sense of international legal obligation.

B. Constructo-Positivism and Participatory Development

At a conference arranged by Philip Alston and Mary Robinson (former UN High Commissioner for Human Rights), then-World Bank President James Wolfensohn addressed the divide between proponents of viewing participatory development as a human right and those who still take a pro-development stance but refuse to accept the view that the participatory development norm somehow suggests a corresponding legal obligation. Wolfensohn in the speech seems to be saying that the

DEVELOPMENT AGENDA, *supra* note 103, at 82, 87.

175. *Id.*

176. Sarbib, *supra* note 137, at 26; *see also* DENA RINGOLD ET AL., WORLD BANK, ROMA IN AN EXPANDING EUROPE: BREAKING THE POVERTY CYCLE (2005).

Bank recognizes the importance of human rights, but under the guise of different terms. As an explanation, he tells the audience:

I've said to Mary many times, "You know, one of the things we have to do in our institution is to try and get some things done, but to some of our shareholders the very mention of the words 'human rights' is inflammatory language. It gets into areas of politics and other areas, and they become very concerned. So we decide to just go around it, and instead we talk the language of economics and social development."¹⁷⁷

Wolfensohn views the Bank as embracing human rights, but non-legally and with different terminology. For political reasons, he frames the Bank's activities using economic and social terminology, all while pushing the human rights agenda.

But is there more to this debate than Wolfensohn acknowledges? Advocates of a right to participatory development seem to think so. Mary Robinson stresses the legitimation function served by rights language. Under this concept, the shift in development discourse from social justice principles to human rights implies a turn from the aspirational toward the obligatory.¹⁷⁸ Forming international law, though, requires more. If no actor engages in participatory development out of a sense of legal obligation, then a strong argument exists that there is no right to participatory development in customary international law. Perhaps for this reason, James Wolfensohn has semantically reframed the human right to development in non-legal terms. Then-President Wolfensohn's statement describes the fluid process between moral norms and legal human rights. Wolfensohn neither contests the benefits of participatory development nor consents to the reframing of participatory development as a legal human right. The United States adopts a similar stance.

The positions of the World Bank and the United States are consistent with the constructo-positivist theory of international human rights formation offered in Part I that stressed the importance of separating the "is" from the "ought." In Part II, I used the debate over participatory development as one example of how the separation thesis has been overlooked in IHRL. In this Part, I have examined how the World Bank has slowly internalized participatory development norms. In customary

177. James D. Wolfensohn, *Human Rights and Development: Toward Mutual Reinforcement* (Mar. 1, 2004), in *VOICE FOR THE WORLD'S POOR*, *supra* note 109, at 452, 454.

178. Mary Robinson, *What Rights Can Add to Good Development Practice*, in *HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT* 25, 38–39 (Philip Alston & Mary Robinson eds., 2005).

international law terms, even though the United States and the World Bank do not engage in participatory development out of any sense of legal obligation, the norm-internalization of the value of participatory development provides increasing evidence of state and intergovernmental practice, with non-Bank actors pressuring the Bank to change its preferences to reflect a more participatory approach. One of the next steps for the participatory development transnational activity network may be to pressure the Bank and other major actors to accept this norm as a binding legal obligation. That day has not yet arrived.

From a positivist perspective, then, we can distinguish between the general acceptance of the moral value of participatory development and participatory development as a legal human right. From a constructivist perspective, we can recognize the dynamic process between the World Bank and other actors who pressure the Bank to further entrench participatory development as its best practice. The combination of positivism and constructivism attempts to provide a descriptively accurate picture of the current state of participatory development in international law.

CONCLUSION

The argument offered here has focused on human rights through the lens of international law. As Amartya Sen stresses, there are other avenues for human rights to be realized. A purported human right that has not attained legal status may still change the behavior of potential duty-holders based on the right's ethical status.¹⁷⁹ Analytically, however, it is important to avoid incorrectly labeling a norm-based claim (for example, the right to participatory development) as a legal human right.

Separating norms from legal rights has been largely overlooked in the international human rights law literature. Sen must be correct in his belief that a right does not have to attain international legal status in order for it to be protected; a variety of mechanisms, including work by NGOs, exist to work against those who would violate this right.¹⁸⁰ My

179. Amartya Sen, *Human Rights and the Limits of Law*, 27 *CARDOZO L. REV.* 2913, 2920 (2006). Sen argues that an overemphasis on the need for legalization undercuts other effective avenues of rights realization. *See id.* ("For some rights, the ideal route may well not be legislation but something else, such as recognition or agitation, or even public discussion and education, with the hope to change the behavior of those who contribute to the violation of human rights."). Sen actually pushes his argument further and contends that legalizing a human right might be less effective in protecting the content of that right. *See id.* (discussing how defending a wife's moral right to be consulted in family decisions may be better protected through non-legal means).

180. *Id.* at 2919–21.

concern lies in the conceptual space between non-legal mechanisms to promote and protect a norm and the recognition of a right in international law. The two categories converse, in a sense, with each other, but should be analytically separated when examining the content of international law. The broad position of IHRL fails to adequately address this conceptual space.

The conflation discussed in this Article is one example of the larger discussion of the problems with defining customary international law more generally.¹⁸¹ Part of the difficulty with separating moral norms from legal human rights is that the definitional boundary of customary international law is uncertain at best.¹⁸² In other words, “[t]he greatest criticism of modern custom is that it is descriptively inaccurate because it reflects ideal, rather than actual, standards of conduct.”¹⁸³ A sub-commission of the UN’s Commission on Human Rights, for example, approved in 2003 a report that explicitly conflated international human rights norms with obligations.¹⁸⁴ This report, authored in large part by Harvard Professor John Ruggie, listed what it viewed as current corporate obligations under international law. As Carlos Vázquez has noted, however, the purported obligations in the UN report go beyond current customary international law.¹⁸⁵ This Article takes no position on *whether* the human rights norms in the UN report should be binding on corporations. Indeed, a main point of the Article is to demonstrate that the normative question should be analytically separated from the descriptive question of what actually constitutes customary international law.¹⁸⁶

181. See Guzman, *supra* note 2, at 156 (“‘Modern CIL,’ to the extent it is based on moral and normative claims rather than *opinio juris*, does not create a legal obligation.”).

182. See GOLDSMITH & POSNER, *supra* note 90, at 23–24; Guzman, *supra* note 2, at 117 (“CIL stands virtually defenseless and unable to counter critiques with much more than unsupported claims about its importance.”); *id.* at 118 (stating that “many of the criticisms of CIL are powerful because they are correct”).

183. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 769 (2001).

184. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

185. Carlos Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT’L L. 927, 928–29, 933 (2005).

186. Lest there be any doubt that the conflation of human rights legal obligations under international law with nonbinding norms resides solely in the realm of theory, the ramifications of the norm/obligation debate can be seen in the U.S. domestic system because of the Alien Tort Statute, 28 U.S.C. § 1350. One of the main problems with adjudicating Alien Tort Statute claims in U.S. courts is that, even after *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), courts necessarily have a

For the past thirty or so years in international human rights law, the participatory development norm has been slowly crystallizing to a point where many commentators view it as a human right in a legal sense. However, while this norm might be widely acknowledged as having a moral component, it should not yet be considered a legal human right because of the lack of a sense of legal obligation to practice participatory development. The constructo-positivist would have no qualms about supporting the actual process of moving from a moral norm to a legal right—so long as the line between the moral and the legal is strictly drawn. That is to say that the constructo-positivist can be involved in the sociopolitical process of pushing toward legalization of a norm without prematurely according legal status to a norm still in the adolescent stage of rights formation under international law.

difficult time distinguishing aspirational norms from binding legal obligations under CIL because CIL does not currently have a sufficient model for separating the two categories. *See* Guzman, *supra* note 2, at 120 (“As the *Sosa* case demonstrates, once CIL can be considered part of or relevant to domestic law, it must be interpreted by domestic courts. Such an interpretation is only possible if we first have an understanding of what CIL is and how it works.”).