

Global governance: old and new challenges

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I. Introduction

The current world economic crisis has highlighted a profound challenge to conventional thinking on and approaches to human rights, especially the right to development. Human rights, primarily economic and social rights, are based on a theory of constant expansion of the economic pie for all, and the right to development is explicitly predicated on the idea of the nation State leading the ever-increasing process of economic and social well-being of its citizens through international cooperation and solidarity. These assumptions have never been more under challenge than now: perpetual world economic expansion is under threat; the real wealth of the world—not just the economic wealth—may be shrinking rather than expanding; economic and social well-being are more and more undermined for the most vulnerable populations of the world; the role of the nation State is more and more contested as a vehicle for development; and the international community is more divided than ever. The challenge of who is accountable for these worsening outcomes and who will be responsible for ensuring a different and more sustainable future are central questions of governance and, for the purposes of this chapter, of global governance. The right to development could provide a framework for tackling these questions if it is reoriented to include dimensions of limits imposed by social, environmental and politi-

cal factors.¹ Indeed, it was realized from the beginning of the articulation of the right to development in the 1980s that its achievement hinged on deep-rooted transformations in the authorities, institutions and processes of decision-making at multiple levels within which nation States pursued their development goals. These levels were not only national and international but also sub-State and within social systems in constant interaction—in other words, a transformation of global governance rather than simply international governance. It is in this sense that I use the term “global governance” instead of seeing “global” as the arena beyond/outside the State and “governance” as a one-dimensional exercise of authority rather than an interactive one among layers of decision-making. In this chapter, I analyse the older, inherited challenges of global governance to the realization of right to development and emerging new challenges, which have become apparent.

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¹ The idea that the right to development needs to be rethought without being abandoned is something I have expressed in many ways before. See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003), pp. 219-230. The idea that development and the right to development have natural and ethically imposed limits, for environmental, social and political reasons, is inspired by many, including Ivan Illich, *Tools for Conviviality* (Marion Boyars, 1973), who elaborated the thesis of limits with respect to modern industrial society. On more of this, see below, section IV.D.

II. The right to development and global governance: some preliminary considerations

A. The relationship between development, globalization and human rights

Human rights have been brought to bear on globalization in recent years insofar as decisions made at the meta-State levels—in international organizations, foreign Governments and private networks—affect the fundamental human rights of ordinary people around the world, who have little say in making those decisions. A traditional understanding of human rights as the rights of citizens of a single State to whom that State owes corresponding obligations became increasingly untenable as the model of accountability and justice in a world in which the source of violations and the remedy for them appeared to arise beyond the traditional regulatory competence of such States. A usual call by human rights policy advocates has relied on the idea that globalization can be tamed by human rights, by more participation in the processes of decision-making²—usually in the form of civil society—or by developing new norms that impose obligations, which include extraterritorial obligations on States for the conduct of non-State actors.³ The idea is that there is nothing basically wrong with globalization except that the weak and the vulnerable get little of its benefits and most of its burdens. The idea is that if we can tweak, change, humanize globalization, we can then have it all. Many influential writers such as Joseph Stiglitz articulate this view, which I shall call the dominant view.⁴

It is fair to say that this assumption is not universally accepted. Many scholars and practitioners believe that, in the light of our experience with development and globalization, human rights violations are often essential for the production and reproduction of wealth and productivity in the economic sense. In this view, the violation of human rights is often part and parcel of what we call successful development or globalization. Such a view maintains that in fact it is not the denial of development or the exclusion from globalization that causes human rights violations and economic and social deprivation in general, but that

the misery of the poor is in fact a “planned misery”, as Susan Marks has called it.⁵

The two above radically opposing views on the nature of globalization and its relationship to human rights have a fundamental impact on how we think about global governance. If we start from the premise that globalization is essentially benign in its impact on the weak and subalterns, and the problem is one of lack of adequate insertion of the poor into global markets, circuits of capital and culture, the reform of global governance yields one set of proposals.⁶ Those may include the further democratization of international organizations by increasing the voice of developing countries in their governance, increasing the participation of civil society in global governance and imposing and enforcing obligations against private entities and so on.

However, if we start from the premise that globalization is a problematic project because it has a structural bias against the weak and the poor and the vulnerable which is hard to separate from its logic of production, consumption and distribution, one must then address a different set of reform proposals regarding global governance. Such reforms may be more far-reaching and fundamental than any which are currently on the global agenda. They might include fundamental changes to the way markets, finance and governance are organized at multiple levels and call for sharp augmentation of the capacity for solidarity, collective action and self-governance. There is nothing inherent in the right to development that makes us choose one view over the other, but the politics of that right, and of other human rights, especially the struggle for economic and social rights, may yet determine such a choice.

It is imperative to bear this structural dimension in mind as we approach global governance from the perspective of the right to development.

B. The shift from government to governance

The second issue that we must consider regarding global governance is the meaning of the term “governance”. Implied in it is a rejection of the term “govern-

² See “Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalization: report of the High Commissioner” (E/CN.4/2005/41).

³ See the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights of 28 September 2011, available from www.maastrichtuniversity.nl, and the expert commentary of 29 February 2012, available at <http://209.240.139.114/wp-content/uploads/2012/03/maastricht-principles-commentary.pdf>.

⁴ See Joseph Stiglitz, *Making Globalization Work* (W.W. Norton, 2006).

⁵ See Susan Marks, “Human rights and root causes”, *The Modern Law Review*, vol. 74, Issue 1 (January 2011), pp. 57-78. There is a long line of thinking and writing that echoes this across several disciplines, most recently captured through the post-development critique.

⁶ An example of this, which concludes by advocating reform of international governance, is Paul Collier, *The Bottom billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford University Press, 2007).

ment" as the appropriate frame. Indeed, a shift from "government" to "governance" has been one of the signal shifts of the post-cold war consolidation of neo-liberal democracy on a global scale.⁷ This shift, which occurred in the literature on international relations, is distinct from but related to the shift to the language of "governance" in new governance theory⁸ as well as to "good governance" in the development field.⁹ The common ground between the first two senses of the term "governance" is that a government-centred regulatory approach to effectiveness and legitimacy of functioning social and economic systems is no longer adequate. This is due to many reasons, including the rise of non-State actors, networks among them, their ability to act in situations where conventional State-based action seemed to be lacking, as well as the absence of supranational systems of order. But at a deep normative level, the "governance" focus was too often parasitic on the "good governance" agenda, which articulated an ideal vision of what the limits of State action ought to be.¹⁰ It was postulated that such an approach must emphasize deregulation, privatization, public-private partnerships, decentralization, democratization (often procedural), human rights (often thin versions) and transparency. The problems of this ideal vision have, during the last two decades, become apparent, and in many respects, it has been abandoned in practice. This is not the place to discuss these problems at length, but it can be noted that the "good governance" agenda served to undermine the development potential of robust State action, while disciplining the populations using a highly limited and hypocritical deployment of human rights and democracy.¹¹ Robust State action is now, once again, recog-

nized as central to development success¹² while the need to ensure the accountability of States through human rights and democracy is also well recognized. Where one or the other is missing, it has produced undesirable, and often violent, social consequences. The recent rise of global protests and instability is a consequence.

An approach to global governance must begin by clarifying what one means by governance and, in particular, whether it is related to "good governance" with its anti-third world government ideology. A global governance agenda is doomed to fail if grounded in the idea of disciplining States and celebrating private actors while failing to recognize the centrality of States for positive economic and social outcomes, or if it celebrates a narrow understanding of development while sacrificing accountability of State and private actors. Rather, the challenge we face is the need for a global governance agenda that reinstates accountable and embedded statehood as part of the solution, while committing itself to deep democratic structural transformation of such States, private networks and supranational systems of order, and the creation and strengthening of norms and structures to hold States and other actors accountable to their commitments.

C. Where/what is "global" in global governance?

The third issue that needs to be clarified in advance is the meaning of the word "global" in global governance. Where is "global" located? What is its spatial, geographical domain and how does that relate to other spatial boundaries that we use in political discourse such as that of the nation, village, city or home? This question is central to understanding the ambit and the reach of the global governance reform that one must propose to bring about an improvement in the right to development. If one assumes that "global" is whatever is outside or beyond the reach of all nation States, such as the regulation of the Antarctic, the high seas or outer space, governance of such domains is properly the subject of transnational efforts beyond the State. However, there is no self-evident reason—if there ever was one—why this should be the case at the current world juncture.

⁷ See James N. Rosenau and Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics* (Cambridge University Press, 1992).

⁸ The literature is vast. See, for example, Bob Jessop, "The rise of governance and the risks of failure: the case of economic development", *International Social Science Journal*, vol. 50, Issue 155 (March 1998), pp. 29-45; and Orly Lobel, "The renew deal: the fall of regulation and the rise of governance in contemporary legal thought", *Minnesota Law Review*, vol. 89 (November 2004).

⁹ See, for example, World Bank, "Political institutions and governance" in *World Development Report 2002: Building Institutions for Markets* (Washington, D.C., 2002); International Monetary Fund, *Good Governance: The IMF's Role* (Washington, D.C., 1997); World Bank, *Governance: The World Bank's Experience* (Washington, D.C., 1994); United Nations Development Programme, "Reconceptualising Governance", discussion paper 2 (January 1997); Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobaton, "Governance matters: from measurement to action", *Finance & Development*, vol. 37, No. 2 (June 2000); Merilee Grindle, "Good enough governance revisited", *Development Policy Review*, vol. 25, No. 5 (2007), pp. 533-574.

¹⁰ This is not often recognized. For an attempt to recognize the distinct deployment of the term "governance" but which nevertheless does not make this link, see Thomas G. Weiss, "Governance, good governance and global governance: conceptual and actual challenges", *Third World Quarterly*, vol. 21, No. 5 (2000), pp. 795-814.

¹¹ See James Gathii, "Good governance as a counter-insurgency agenda to oppositional and transformative social projects in international law", *Buffalo Human Rights Law Review*, vol. 5 (1999).

¹² The heterodox literature that has developed this point is by now vast, starting with Gerschenkron and extending through Amsden, Chang and Rodrik. See A. Gerschenkron, *Economic Backwardness in Historical Perspective: A Book of Essays* (Belknap Press, 1962); Alice Amsden, *The Rise of the "Rest": Challenges to the West from Late-Industrializing Economies* (Oxford University Press, 2003); H. Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press, 2002); Dani Rodrik, "Why do more open economies have bigger Governments?", *Journal of Political Economy*, vol. 106, No. 5 (October 1998).

I have argued for many years that there is a need to move beyond a physical geographical understanding of international order to a cultural geography that takes community and culture more seriously as grounds of resistance, resilience and rebuilding.¹³ In many domains of development practice, it is evident that the global influences the local, and local can often be understood only as the interplay of many forces that include the global.¹⁴ To take one example, regulation of land use in Mexico by local communities might be governed by normative and institutional systems of law that stretch from the local to the national and international—Mexican and the North American Free Trade Agreement (NAFTA)—such that it is impossible to say where a “site” of production of the “global” might be.¹⁵ It is everywhere, from the actual site of the land and community to the NAFTA tribunals, which may hear the case in Canada. To “govern” such a “global” phenomenon, one needs change at all those levels in order to protect the human rights of Mexicans affected by such land use. Without such a comprehensive understanding of the term “global”, there is a perennial danger that we are like the proverbial blind men groping in the dark around an elephant.

III. The right to development and global governance: challenges at the origin

The key demands of developing countries when the right to development was adopted in 1986 focused on the international barriers to development, although the right to development itself attempted to alter the meaning and process of development in profound ways to position the “human person” as the central subject of the development process. Among the international barriers identified were the lack of democracy at the international level and the resulting concentration of economic and political power of the North, the rigged

rules of the system which worked against developing countries, the precarious condition of self-determination in developing countries and the lack of effective sovereignty over natural resources due to aggressive interventionist policies of powerful countries, and the prevalence of structural conditions that prevented the State in the developing world from performing a more robust function in economic policy formulation, coordination and implementation due to the prevailing neoliberal economic orthodoxy in the 1980s. As a legal claim, the right to development attempted to reassert the primacy of national sovereignty in economic policymaking while claiming that the right imposed international obligations on richer countries and on the international system for a more redistributive world order which was also a more level playing field in economic terms. It is fair to say that the original demands of developing countries relating to the right to development were more focused on changes in the international order than on changes within States to achieve rights-based development outcomes, as this has come to be understood in more recent years. The latter meaning, which has attempted to resurrect the more radical interpretation of the right to development as the right of individuals, although with imperfect corresponding obligations, has animated the work of United Nations experts and academics¹⁶ and given substance by the actual struggles of social movements and activists on the ground against the costs of development. But in assessing the meaning of the right to development and its implications historically, one must consider the original challenges as envisaged by its leading proponents. They had more to do with international barriers.

In reflecting upon the 25 years since then, one must render a verdict that the record of achievement of the original demands of the right to development with respect to international barriers has been a mixed bag. In fact, the developing countries have succeeded in resurrecting the idea of the strong State in economic policy formation and implementation, which is undergirded by a strong sense of national sovereignty.¹⁷ There is even a sense that industrial

¹³ Balakrishnan Rajagopal, “Locating the third world in cultural geography”, *Third World Legal Studies*, vol. 15 (1998-1999).

¹⁴ There is a long line of work that posits and defends such a meaning of the term “global”, from Saskia Sassen to Arjun Appadurai. See, for example, Saskia Sassen, “The State and the global city: notes toward a conception of place-based governance”, in Saskia Sassen, *Globalization and its Discontents* (The New Press, 1998); and Arjun Appadurai, “Deep democracy: urban governmentality and the horizon of politics”, *Environment and Urbanization*, vol. 13, No. 2 (October 2001), pp. 23-43. See also Arif Dirlik, “Globalism and the politics of place”, *Development*, vol. 41, No. 2 (June 1998).

¹⁵ For an example, see International Centre for Settlement of Investment Disputes (Additional Facility), case No. ARB(AF)/97/1, *MetalClad Corporation v. United Mexican States*, award of 30 August 2000 by the Arbitral Tribunal, presided over by Sir Elihu Lauterpacht. For a discussion, see Fernando Bejarano González, “Investment, sovereignty, and the environment: the Metalclad case and NAFTA’s chapter 11”, in *Confronting Globalization: Economic Integration and Popular Resistance in Mexico*, Timothy Wise, Hilda Salazar and Laura Carlsen, eds. (Bloomfield, Connecticut, Kumarian Press, 2003).

¹⁶ The late Arjun Sengupta, Philip Alston, Stephen Marks and Upendra Baxi are foremost in this regard. See, for example, the fifth report of the Independent Expert on the right to development, Arjun Sengupta (E/CN.4/2002/WG.18/6 and Add.1); 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”, *Human Rights Quarterly*, vol. 27, No. 3 (August 2005); Stephen Marks, “The human right to development: between rhetoric and reality”, *Harvard Human Rights Journal*, vol. 177 (Spring 2004); and Upendra Baxi, “Development as a human right or as political largesse? Does it make any difference?”, Founder’s Day lecture, Madras Institute of Development Studies (June 2006).

¹⁷ Even *The Economist* recognizes the rise of the State again, in the form of the “visible hand”, or State capitalism in emerging economies. See “The visible hand”, *The Economist*, 25 January 2012.

policy is now back in action as a policy tool even in Western circles. Large and medium-sized developing countries have also benefited well from the State-based systems of supranational order, especially the World Trade Organization (WTO).¹⁸ Unfair trading rules and unilateral punitive measures in trade relations persist but are increasingly challenged at WTO, while the rules-based regime has been exploited by large developing countries to increase their “policy space”. Terms of trade between developing and developed countries have changed for the better, although they tend to be dominated by exporters of fuels and mining products.¹⁹ Exporters of agricultural commodities continue to suffer from long-term negative terms of trade, thereby revealing the structural conditions under which global capitalism operates. Very little has been done to improve their conditions, including through long-advocated international mechanisms such as buffer stocks and price support, or even extending DFQR (duty-free, quota-free) market access to least developed countries (LDCs).²⁰ Similarly, while South-South trade flows have also vastly increased, they have tended to create new relations of domination, especially by large raw material-consuming countries like China.²¹ All this has undoubtedly been made possible by globalization and the resultant circulation of capital, technology, culture and manufacturing. Western domination of capital and technology has become less, even as the formal structures of international economic and political governance continue to be dominated by them. The rise of new contenders to power in the form of BRICS (Brazil, Russian Federation, India, China and South Africa), especially China, has posed new questions of power and accountability unlike those faced by the first generation of right to development champions. In particular, the very same forces that enabled medium and large developing countries to exploit globalization have also revealed serious fissures in the solidarity of developing countries, which were the original

champions of the right to development, and given rise to new challenges of global governance.

IV. New challenges of global governance for realizing the right to development

The new challenges of global governance that matter for the right to development are fourfold:

- (a) The changing character of global governance and where it is located;
- (b) The geopolitics of the right to development stemming from the rise of the “Rest”, including BRICS, and the transformation of the global development agenda due to their rise;
- (c) The reorientation of the third world—the traditional constituency of the right to development—and the emergence of a more counter-hegemonic form of the third world;
- (d) The global crisis of ends and means, most visibly seen in the global financial and economic crisis that burst forth in 2008 and which strongly suggests that the right to development can no longer rest on a conception of development that is merely rights-friendly, humane and participatory and otherwise neoclassical, but must reckon with the limits to development itself and with the implications of such an approach for human rights.

These challenges are by no means the only ones, nor are they entirely new. But they appear to have gained sharp momentum in recent years and have shown the need to rethink the right to development in new and even daring ways.

A. Changing characteristics of global governance

The nature of global governance—who governs, at what level, how and towards what end—has become a central issue with deep implications for the right to development. As mentioned previously, global governance is an ongoing project of transformation in which neither the location of regulation nor the scale of the activities encompassed is already set. Global governance is not merely what lies beyond the nation State; it is also what lies in between and below, and

¹⁸ Alvaro Santos, “Carving out policy autonomy for developing countries in the World Trade Organization: The Experience of Brazil and Mexico”, *Virginia Journal of International Law*, vol. 52, No. 3 (March 2012), pp. 551-632.

¹⁹ See United Nations Conference on Trade and Development (UNCTAD), *Development and Globalization: Facts and Figures 2008* (United Nations publication, Sales No. E.07.II.D.20, 2008), p. 10.

²⁰ Indeed, the dire situation of LDCs reveals the stagnant or negative progress made in achieving the goals of the right to development. Only three countries have “graduated” from the status since the 1980s. Most of the global poor do not live in LDCs any longer, but rather in middle-income and emerging economies like India. For an assessment and proposal, see the Istanbul Declaration of the Academic Council on the occasion of the Fourth United Nations Conference on the Least Developed Countries, Istanbul, Turkey, 9-13 May 2011, available from www.ldcintellectuals.org/EN/.

²¹ For an assessment of South-South trade, see Bailey Klinger, *Is South-South Trade a Testing Ground for Structural Transformation?*, UNCTAD, Policy Issues in International Trade and Commodities, Study Series No. 40 (UNCTAD/ITCD/TAB/43) (2009).

how all those levels relate to one another. Reform of the United Nations system or of international organizations such as WTO or the Bretton Woods institutions is a necessary but not sufficient condition of real change in global governance. The first reason why this is the case has to do with the question of who governs. The world that existed before 1986, when the right to development was adopted, was much less characterized by the fluidity of identities, the rapidity of cultural and financial flows, and the thickness of private networks of non-governmental organizations (NGOs) or private actors that characterize today's world. It was a world wherein the nation State had a much more central role in the imagination. The State was expected to govern its population internally and statist organizations like the United Nations were expected to coordinate actions towards achieving the goals of the right to development.

Now it is not clear if the State alone governs, if it ever did. Private networks, NGOs, humanitarians, business enterprises and quasi-public sovereign entities all function with much more authority and effectiveness in a range of security, economic, environmental and other domains. To analyse this transformation is not within the purview of this chapter, but it may be noted that many research projects of global governance are under way to try to comprehend the nature of the changes outlined above, such as "global administrative law", autopoiesis,²² law and regulation, global expertise, etc.²³ In each of these modes of comprehension, global governance takes place in different locations; for some it is in the expertise of professionals, for others it is in the inexorable mechanisms of domination and power, and for yet others, it is in the social and cultural domains of meaning creation.

To give one example of this complexity, the climate change regime is composed not only of States, treaties, standards and the behaviour of formal participants in the circulation of norms and institutions; it is also found in the interstices of finance in the form of climate change bonds, or in the form of NGO intervention in local land use by rural and indigenous people in regimes such as UN-REDD.²⁴ To imagine

changes to the global governance of climate from a right to development perspective, one must change all of these mechanisms and actors, their expectations, interests and values, and the way they relate to one another. The complexity of effecting change at so many levels makes the project of global governance much more difficult, from a right to development perspective, compared to the more limited apparent challenge of global governance in the 1980s. The stakes of effecting change in climate change may also differ fundamentally depending on the vantage point of those effecting change: a United Nations official, a Government bureaucrat, a village chief or a climate change expert from a university. They will raise basic questions about the ends of governing climate and for whom governance is intended.

These factors combine to introduce a powerful reality check in determining what kind of global governance reform is the right one from a right to development approach.

B. Rising powers and the transformation of the development agenda

A second challenge to global governance is introduced by the rise of the "Rest", the formerly colonized or marginalized countries which have come to achieve rapid progress in economic terms and a certain measure of political if not military power. This rise has serious implications for the geopolitics of the right to development and the meaning of the development agenda.

At one level, the rise of these Powers, especially in the form of BRICS, has resulted in the demand for changes in the governance of international organizations and has led to the rise of new groupings such as the Group of Twenty (G20), which has now supplanted the Group of Eight (G8) as the world's economic club of nations. Demands for a "second Bretton Woods" were heard after the 2008 global financial crisis, and led to a new lease of life for IMF, which had become discredited and underutilized by then. Now IMF has received replenishment of its funds and the quotas of member States have been increased. In particular, the voices of emerging economies such as Brazil, China, India and the Russian Federation have been increased through an amendment in 2008 and another (yet to enter into force) in 2010.²⁵ By contrast, reform of the World Bank, the Security Council and WTO has not seen much movement. The proponents

²² The self-regulating theory of systems, called autopoiesis, is further discussed in Anthony D'Amato, "International law as an autopoietic system", in *Developments of International Law in Treaty Making*, Rüdiger Wolfrum and Volker Röben, eds. (Springer, 2005). See also Gunther Teubner, ed., *Autopoietic Law: A New Approach to Law and Society* (European University Institute, 1987).

²³ For an analysis of these various approaches to global governance, see David Kennedy, "The mystery of global governance", *Ohio Northern University Law Review*, vol. 3, No. 3 (2008), pp. 842-845.

²⁴ The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, launched in 2008.

²⁵ See "The IMF's 2008 quota and voice reforms take effect", IMF press release No. 11/64, 3 March 2011.

of the right to development have advocated many of these reforms for a long time. There is a question why IMF reform has begun, however weakly,²⁶ while the reform of others stagnates. The answers lie partly in the political economy of development and globalization in today's world. The response by BRICS to these halting reforms also shows the changed conditions of development and globalization.

In short, one can attribute the limited progress on reform of international organizations to the global financial crisis and the resultant policy weakness of rich countries in macroeconomic terms. As the crisis exposed the weakness of the currency regime prevailing in the world, including the status of the United States dollar as a reserve currency, and the over-leveraged nature of private debt, the role of credit and borrowing from countries such as China became imperative as a tool to manage the crisis. The rise of sovereign wealth funds, primarily from emerging economies or economies that experienced a commodity boom, weakened the grip of Western capital over global liquidity. The reforms at IMF can be explained primarily by this weakening and the lessons learned by IMF about the value of short-term capital controls—a reversal of its orthodoxy from the 1990s during the Asian economic crisis. The reform of the other organizations does not have the immediacy and urgency that the global financial crisis provoked and the resistance of the rich countries continues unabated.

BRICS have responded to this impasse by considering alternatives to the current system of global governance. They have held five summits since 2009 (with a sixth planned for 2014); they have strengthened their economic interactions, including trade; and they have tried to coordinate policy on issues like the Islamic Republic of Iran, Libya and the Syrian Arab Republic with partial success. At their summit in China, in April 2011, the BRICS countries adopted the Sanya Declaration spelling out a different vision for international relations from the current United States-dominated world system, a vision that perhaps bears more similarity to the original vision of the Charter of the United Nations. For instance, implicitly rejecting the use of force under emerging principles of the responsibility to protect, the Sanya Declaration pronounces: "We share the principle that the use of force should be avoided. We maintain that the independence, sovereignty, unity and territorial integrity of each nation should be respected" (para. 9). At the

March 2012 meeting in New Delhi, they announced their intention to create closer financial integration, starting with the creation of a benchmark equity index derivative shared by the stock exchanges of the five BRICS nations (which would be cross-listed, so stocks could be bought in local currencies), as well as a BRICS Development Bank modelled on the Brazilian development bank BNDES and a possible competitor to the World Bank (which could extend credit guarantees in local currencies).²⁷ In the Sanya Declaration, the BRICS countries also make it clear that they will pursue diversification of world currencies, including the possibility of replacing the United States dollar as the world's reserve currency by Special Drawing Rights (SDR) or some other basket of currencies. These are significant steps towards reforming global economic governance, although they could turn out to be hegemonic as well. Importantly, the BRICS countries are pursuing reform of global governance through two tracks, one that pushes for a greater voice for them in existing institutions such as the Bretton Woods institutions, and a second track, which explores alternatives to the existing system itself.

A final note on the impact of the rise of the "Rest" on global governance: it is clear from the various BRICS declarations that they aim to offer an alternative blueprint for global governance which may not necessarily result in a right to development-friendly approach. In particular, the BRICS summit declarations barely mention human rights as an important element in the world order that they seek to establish. Instead, the emphasis is solely on sovereignty and territorial integrity based on the Charter of the United Nations. This can be contrasted with the Bandung Declaration of 1955,²⁸ the founding moment of the third world, which mention human rights as a central element in the kind of world order that those countries wished to establish. The absence of human rights in the BRICS declarations may not mean that they seek to ignore the importance of human rights, but may rather indicate their level of discomfort at the way in which the West has used recourse to rights as a toxic pretext for the use of force and other illegal interventions. The question is whether the new BRICS approach may lead to the toleration of problematic means and ends in their respective fields of development cooperation with less powerful developing countries, for example

²⁷ See the Delhi Declaration adopted by the Fourth BRICS Summit, New Delhi, 29 March 2012.

²⁸ For a discussion of the importance accorded to human rights at the 1955 Conference, contrary to the popular misconception that the third world was always anti-human rights, see Roland Burke, "The compelling dialogue of freedom: human rights at the Bandung Conference", *Human Rights Quarterly*, vol. 28, No. 4 (November 2006), pp. 947-965.

²⁶ See Ngaire Woods, "Global governance after the financial crisis: a new multilateralism or a last gasp of the Great Powers?", *Global Policy*, vol. 1, Issue 1 (January 2010).

between Africa and China or India. Most importantly, the idea that the “human person” is at the centre of the development process, a central contribution of the right to development, appears to be absent in the BRICS approach.

C. The reorientation of the third world and the emergence of a counter-hegemonic global South

I have detailed elsewhere the ways in which the category “third world” is no longer just a collection of States united by ideology, economic development and a shared sense of historic wrongs, but is instead a fragmented idea with a hegemonic and a counter-hegemonic frame.²⁹ Indeed, the transition from “third world” to “global South” is indicative of this fragmentation and reorientation. It is by now the case that the third world is a collection of social movements and collective mobilizations of workers, peasants, farmers, urban poor, women, indigenous peoples and many others who do not benefit from the insertion of the “third world” into the “global economy” or who share costs and benefits disproportionately. While many of these movements are embedded in or intertwined with States and statist structures such as the United Nations, States and statist structures have themselves become an arena of contestation between hegemonic and counter-hegemonic social forces.

The rise of counter-hegemonic and hegemonic forces in the third world poses serious challenges of global governance for the right to development, but also an opportunity to reinvent itself. The challenges posed by global social movements to global governance are indicated by the motto of the World Social Forum: “Another world is possible”.³⁰ In this approach, social movements seek to be both modern and different, and not caught up in the binary of modernity versus tradition. The challenge that they pose is one of epistemology and ethics as they seek to problematize the superiority of expert knowledge, the over-reliance on professionalism, the over-bureaucratization of social life, the pervasiveness of power and its tendency to corrupt, and the possibilities inherent in collective action and solidarity. Many of these challenges are, as noted above,³¹ the ones identified

by current analysts of global governance as key to the understanding of today’s world and of the possible ways to govern it better. From a right to development perspective, these challenges reveal the limits of its current framing but also show ways in which it can be made more relevant to the counter-hegemonic global South. It is no secret that the right to development framing has not had a significant impact as a tool of struggle or activism in the human rights field, but has rather remained esoteric at the level of geopolitics of nation States. This can be contrasted to the way other human rights, including economic and social rights, are deployed in struggles around the world. It is partly this failure to “connect” with the real politics of human rights that has kept the right to development weak. The radical potential in it can be better unleashed if it links creatively with the politics of the counter-hegemonic South.

The work by Arjun Sengupta, the former Independent Expert on the right to development, on the measurement of poverty in India in the unorganized sector is one example of how expert knowledge can be deployed in counter-hegemonic ways to help those who need the right to development most.³² The right to development must expand its domain to include active political engagement on a range of issues that have multiple dimensions—economic, security, livelihood, sustainability and accountability—as it serves as a *Grundnorm* of the human rights regime to legitimate the voices of the most marginalized.

D. Limits to development and their implications for the right to development

The most difficult challenge for the right to development from the perspective of global governance is the one posed by the crisis of development and the models of human rights—especially economic and social rights—now revealed most clearly in the form of the global economic crisis that burst forth in 2008. The debate over the right to development in the 1980s was characterized by the double sense that developing countries were deprived of the fruits of modern technology and economic and social progress due to unjustified and oppressive policies of the rich countries, and that development was unfair in process and outcome to the rights of individuals and communities within States. Ergo, the reasoning went, development

²⁹ See Balakrishnan Rajagopal, “Counter-hegemonic international law: rethinking human rights and development as a third world strategy”, *Third World Quarterly*, vol. 27, No. 5 (2006), pp. 767-783; see also Rajagopal, *International Law from Below* (see footnote 1).

³⁰ See Jai Sen and Mayuri Saini, eds., *Are Other Worlds Possible?: Talking New Politics* (Zubaan, 2005); Jai Sen and Peter Waterman, eds., *World Social Forum: Challenging Empires*, 2nd ed. (Black Rose Books, 2007); Boaventura de Sousa Santos, *The Rise of the Global Left: The World Social Forum and Beyond* (Zed Books, 2006).

³¹ See footnote 23 above and the accompanying text.

³² See *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector* published by the Indian National Commission for Enterprises in the Unorganised Sector, of which Arjun Sengupta was Chair, in 2007. The report found that 77 per cent of India’s population lives on less than Rs. 20 per day, deeply contradicting more rosy Indian Government and World Bank estimates.

should be expanded, countries should grow economically and the standard of living for everyone must rise to catch up with the best of the West. This catching-up rationale had, however, an insidious and self-defeating logic to it. So long as the planet can sustain economic growth, endless growth is indeed possible. But that assumes that the real costs of economic development and globalization, in human and environmental terms, are fully accounted for, assessed when they go too far, and mitigated before crisis becomes catastrophe. The barriers to such honest accounting and response are well known by now: the myopia of expertise and specialization, the narrow professionalism of the ruling class, the lack of ethical regard for the values of human solidarity, and self-serving exploitation of the weak and of the planet's resources. Under these circumstances, it is hard to see how the right to development can rely on a notion of ever-expanding development, material progress and standard of living. Instead, it is necessary to think of an approach to the right to development wherein "development" is within the limits, both natural and ethical, of the industrial and globalizing model, unlike the limitless model dominant today and in the past.

The 2008 global economic crisis is only a symptom of a deeper underlying malaise. It is a crisis of development itself, not just of growth but of the broader idea that a constant improvement in living standards is possible through technology, science and rational thought, and which is realized through an increase in wealth.

The basic idea that the crisis is due to mistakes committed by a few "bad apples"—Lehman Brothers, or overleveraged banks, or spendthrift Greeks or Irish—is a mistaken understanding of the root of the problem. Rather, it has to do, borrowing from Joseph Schumpeter, with a process that I shall call "destructive creation". Schumpeter, of course, is famous for his theory of "creative destruction" to describe the process of economic innovation in capitalism which destroys old structures and creates new ones and would, he has argued, eventually lead to its demise.³³ I want to flip it over—following a more accurate Marxist reading of "creative destruction" by David Harvey³⁴ and others—that, in fact, the development process is more accurately described as destructive creation. To create anything of value, it needs to destroy what existed before; in relying on the idea of scarcity—which is at the heart of economic theory—the process of develop-

ment in fact leads to a ceaseless accumulation, consumption and destruction of resources.³⁵ Every act of creation of value in the economy now involves more destruction than creation. Following this reasoning, the current economic crisis is structural, not exceptional.

The crisis indicates that the model of economic development and globalization dominant today is based on a process of "destructive creation", which is not morally, economically or environmentally sustainable. A search for alternatives through the right to development must begin by critiquing these foundational assumptions which permeate the legal, social, political and cultural orders and which defend development and globalization. As Immanuel Wallerstein asked recently: "After development and globalization, what?"³⁶ There is broad recognition of the inherent limits of an economic model which is based on scarcity, unending accumulation and consumption instead of human well-being and happiness. There are signals coming from stressed civilizations and a stressed planet that the path we are on is unsustainable.

V. Conclusion

The right to development shattered many shibboleths in world politics, international law and human rights even as it confirmed the centrality of many others. It tried to shift the focus of development, which had remained nation State-centred in legal terms, to individuals and communities; it posited an ethic of solidarity as a soft legal obligation, giving substance to article 28 of the Universal Declaration of Human Rights,³⁷ it reinforced the centrality of participation in the development process as a key to making it better; it articulated the Gandhian idea that the purpose of development was the fulfilment of the human personality; it fulfilled the geopolitical needs of a frustrated third world coalition at the United Nations which had seen its demand for a New International Economic Order ignored by the West. Despite these impressive

³³ See Joseph Schumpeter, *Capitalism, Socialism and Democracy*, 3rd ed. (Harper, 1962).

³⁴ See David Harvey, "Neoliberalism as creative destruction", *The Annals of the American Academy of Political and Social Science*, vol. 610, No. 1 (March 2007), pp. 21-44.

³⁵ For an earlier attempt to argue along the same lines, i.e., that the idea of scarcity drives much of the legal imagination in international law and human rights and why this is unsustainable, see Balakrishnan Rajagopal, "International law and the development encounter: violence and resistance at the margins", in *Proceedings of the American Society of International Law at its 93rd (Ninety-Third) Annual Meeting Held at Washington, D.C., March 24-27, 1999*. See also Leslie Sklair, "Social movements and global capitalism", in *The Cultures of Globalization*, Fredric Jameson and Masao Miyoshi, eds. (Duke University Press, 1998), in which he has articulated a critique of what he calls the "culture-ideology of consumerism".

³⁶ Immanuel Wallerstein, "After development and globalization, what?", *Social Forces*, vol. 83, No. 3 (March 2005), pp. 1263-1278.

³⁷ Article 28 of the Universal Declaration states: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." For an articulation of the importance of this revolutionary idea in today's world for the world's most marginalized, see the Istanbul Declaration (footnote 20 above).

achievements, the right to development remained disconnected from the real politics of human rights, which arose from the struggles of social movements; it gave ideological cover to a sovereigntist approach to development, which actually ignored human rights; and, most importantly, it remained wedded to a vision of development and human rights without limits. The

global economic crisis of 2008 reveals most clearly the problems with these dimensions of the right to development, even while it highlights the need to recover the more progressive elements of the right. The stakes for global governance in achieving such a progressive vision of the right to development have never been higher.