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I am delighted to offer a few remarks at the beginning of the *Cornell International Law Journal* 2006 Symposium, *Global Justice: Poverty, Human Rights, and Responsibilities*. We cannot exaggerate the importance of this topic as we struggle with the effects of poverty, disease, and hunger on the world scene. Thomas Nagel recently observed the following in this regard:

> We do not live in a just world. This may be the least controversial claim one could make in political theory. But it is much less clear what, if anything, justice on a world scale might mean or what the hope for justice should lead us to want in the domain of international or global institutions, and in the policies of states that are in a position to affect the world order."[1]

Nagel notes that the nation-state is the primary locus of political legitimacy and the pursuit of justice, and it is one of the advantages of domestic political theory that nation states actually exist.[2] He argues that "when we are presented with the need for collective action on a global scale, it is very unclear what, if anything, could play a comparable role."[3] Questions relating to progress in world governance include: (1) what do we need from international organizations and states for the purpose of reducing the global disparity among nations and citizens of the world, and within developing countries themselves; (2) what theoretical orientation appropriately allows us to deal with world inequality; and (3) what sort of global institutions are necessary to address global inequality and poverty?

On a global scale, justice demands more from current international organizations than they are currently able to offer. Although the rule of state sovereignty does not impose the same degree of constraint on all organizations (e.g., the Security Council), the governance of international organizations is generally assumed to be limited by the organizations' benefactors.[4] This is primarily due to the fact that international institutions are established on the basis of mutual agreement among self-interested parties. Doctrines such as state sovereignty and sovereign immunity from legal process in foreign jurisdictions constrain the enforcement capability of these international organizations. Such organizations are empow-

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1. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 113 (2005).
2. *See id.*
3. *Id.* at 113-14.
4. *See id.* at 132-33.

ered to act only on behalf of those states and agencies responsible for their existence and which are signatories to the various instruments that establish them. Even when these international organizations do act upon member states, the latter are often found to be the "middle men", who are uncomfortably wedged between the respective international organization and the citizens of the respective nation state.

Another issue of global concern is how to handle nonstate actors. Without adequate authority over non-participants and members alike, institutions of justice cannot responsibly respond to the global community. To achieve justice on a more expansive scale, international organizations need adequate financial support and delegated authority. Without it, these organizations will continue to be handicapped in their ability to exercise coercive enforcement against offending states and individuals. Also, the organizations' ineffectiveness will continue to disappoint and dishearten members from the weaker and more impoverished constituencies in the global community.

Issues hotly debated within the international community relating to the enforcement of justice within the global community include the following: (1) whether we should equip and empower new global institutions; (2) if so, what sorts of international institutions they should be; and (3) what sorts of coercive powers these institutions should possess?

At the root of the issue of global justice is the question of the theoretical underpinnings upon which such a pursuit should be based. To some, a theory of global justice should specify not only obligations owed by certain segments of societies to others but also the basis for those obligations. Justice, as an evaluative standard, may be applied across various dimensions, including economics, social welfare, and government. Conceptions of justice can involve rules regarding when the use of force is acceptable, the rules governing the conduct of warfare, and the rules to promote principles of human dignity. Human rights instruments, including the Universal Declaration of Human Rights (UDHR),[5] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[6] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[7] the International Covenant on Civil and Political Rights (ICCPR),[8] and various regional instruments such as the American Convention on Human Rights (ACHR),[9] the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[10] and the African Charter of Human and People's Rights (ACHPR),[11] exemplify shared convictions regarding the international applicability of certain standards of justice.

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5. U.N. Doc.A/810 (Dec. 10, 1948).
6. G.A. Res. 2200A (XXI), U.N. Doc. A/34/46 (Dec. 18, 1966).
7. G.A. Res. 34/180, at 193, U.N. Doc. A/34/46 (Dec. 18, 1979).
8. G.A. Res. 2200A (XXI), at 52, U.N. Doc. A/6316 (Dec. 16, 1966).
9. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.
10. Nov. 4, 1950, 213 U.N.T.S. 222.
11. Organization of African Unity, African Charter of Human and Peoples' Rights, June 27, 1981, O.A.U. Doc./CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (1982).

In addition to achieving an undisputed measure of international recognition and respect, such standards have, in the past half-century, become quite popular among nation states. Contradictorily, gross inequality among the peoples of the world continues unabated. Clearly, merely passing conventions, protocols and covenants relating to basic rights and international criminal accountability is alone inadequate to transform these standards into a reality. To make the statements a reality requires expansion and empowerment of the underlying mechanisms of enforcement. For example, the socio-economic rights of the poor to adequate living standards belong to the same species of human rights as freedom of religious belief, speech, and association. Thus, socio-economic rights should belong to the family of enforceable fundamental rights. But, without implementing a broader standard and enforcement mechanism of human justice, the gruesome results of inequality will remain a blight on the global human record, and we can expect the situation to worsen.

Regardless of the theoretical view one adopts in applying standards of justice to the dire situations of poverty worldwide, the world is in a disastrous state from a humanitarian perspective. Over one billion people currently lack access to healthcare, and each year approximately eleven billion children under the age of five die from malnutrition and from mostly preventable diseases.[12] In 2002, for example, almost eleven million people died of infectious diseases alone—far more that the number of those killed in natural or manmade catastrophes such as war.[13] Humanitarian disasters, like that taking place in Darfur, rage on and continue to inflict intolerable suffering.

The demands of justice require more than humanitarian assistance to those desperately in need. From a justice-oriented perspective, the issue is how we should respond to world inequality. Further, how does this concern differ from a purely humanitarian perspective? Finally, how can we ensure that the world is organized in such a way that poverty—or at least extreme poverty—is eradicated?

A popular approach among global humanitarians involves appealing to human rights to justify global responsibility for assisting the poor. Because the poor do not possess the means necessary to meet basic human needs, it is considered a moral duty for the nation states and supranational institutions to help these people achieve and acquire fundamental rights and necessities. The importance of meeting these indispensable needs is noted by Thomas Pogge:

> Other, more elementary basic goods are important for both the ethical and the personal value of human life. Among these are physical integrity, subsistence supplies (of food and drink, clothing, shelter, and basic health care),

12. *See* WORLD HEALTH ORGANIZATION, WORLD HEALTH ORGANIZATION REPORT ON INFECTIOUS DISEASES: REMOVING OBSTACLES TO HEALTHY DEVELOPMENT (1999) *available at* http://www.who.int/infectious-disease-report/index-rpt99.html.

13. WORLD HEALTH ORGANIZATION, WORLD HEALTH ORGANIZATION FACT SHEET, NO. 104, rev. Mar. 2006, *available at* h ttp://www.who.int/mediacentre/factsheets/fs104/en/

> freedom of movement and action, as well as basic education and economic participation. All of these basic goods should be recognized as the objects of human rights- but only up to certain quantitative, qualitative, and probabilistic limits: what human beings truly need is secure access to a minimally adequate share of all of these goods.[14]

For materially burdened nations, however, the concern for human rights has proven to be an inadequate basis by which to achieve global justice and to eradicate poverty. When confronted with the challenges endemic to famine, poverty, and disease, numerous theories of justice simply fall short, particularly when it comes to redistribution implications. In this regard, I wish briefly to discuss four rights-centered theories that have purported to address the need for redistributing the world's assets: rights-consequentialism, rights to welfare, John Rawls's theory of justice, and claim-rights theory.

The fundamental principle underlying the rights-consequentialism theory is to maximize rights fulfillment. This notion of maximizing consequentialism allows governments to distribute justice based on utilitarian grounds. The underlying logic allows for otherwise inviolable rights to be trumped if done in the interest of the greater good. That is to say, in the context of basic rights, the morally right action is the one with the best overall consequences.

The rights-consequentialism theory has inherent problems. For example, the assortment of goods considered necessary for a minimum standard of living offers a unique and often insurmountable challenge for poor nations. A uniform bundle of goods that meets the basic economic rights of those in one nation may not accommodate another peoples' basic rights to survival and subsistence. Consider, for example, the needs of pregnant or disabled persons.[15] Another example involves the right to basic capabilities—the right to do, or to be, certain things throughout the course of one's life.[16] In addition, there is a difference between having the *capability* to deliver certain basic rights and actually *possessing* those rights. There are instances in which preferences have been shaped along cultural lines in ways that preclude certain groups within a population from achieving minimal decency. Because disadvantaged people may not know better, they can grow complacent and accept a substandard way of life. Thus, the rights-consequentialism theory and its variations fail to accommodate the concerns unique to distributing justice within poor countries.

The second theory of rights I wish to discuss is the right to welfare approach. This notion of rights involves the maximization of welfare for a given population. This view, however, also does not meet the requirements for a plausible distribution of justice. The basic problem here is that instead of dictating a standard commitment to human rights, the right to welfare approach seeks to dispense an arbitrary standard across a given

14. Dale Dorsey, *Global Justice and the Limits of Human Rights*, 55 PHIL. Q. 562, 562 (2005).
15. *Id.* at 572.
16. *Id.* at 573.

population. Maximizing a substandard notion of decency accomplishes nothing.

The third theory relates to John Rawls's theory of justice. This rights-based perspective also does not embrace the non-discriminatory interest in assuring justice in poor countries. For example, Dale Dorsey argues that the "difference" principle of the Rawlsian model of justice "might have the effect of reducing the available resources of those who are able to avoid starvation to the level at which starvation sets in, greatly increasing the length and impact of the famine."[17] In the context of destitute nations, Dorsey argues that the priority of distributive justice should be that of alleviating deprivation and morbidity for as many as possible in spite of severely limited resources. Global or domestic justice in this sense involves the unwavering obligation to fulfill the most basic human needs: subsistence for all peoples.

Claim-rights, the fourth rights-based view, applies the inalienability of rights to basic needs, such as subsistence. This theory not only makes Rawls's "difference" principle impossible to achieve, it also fails to reconcile the need for basic subsistence with the severe resource scarcity characteristic of materially burdened nations. It de-legitimizes any act by the government that either violates a claim-right or neglects to fulfill one, even if such an act is in the interest of promoting the greatest possible level of subsistence. Overall, the state of affairs within poor countries requires that global obligations be built on something more than the bedrock of human rights. This is not to say that human rights do not have a place in the discourse of the distributional aspects of global justice. They do indeed. There is a recognition, however, that the human rights argument, by itself, has proven to be an inadequate basis on which to implement the fundamental economic right to survival, of which the world's most desperate citizens are in dire need.

Martha Nussbaum reminds us of the advantages of a rights approach: (1) people have justified and urgent claims to certain types of treatment regardless of what the world around them has done about it; and (2) 'rights' talk is rhetorically powerful.[18] Nussbaum is correct in that inalienable rights, as noted in her first claim, require no further justification. Her second point, however, warrants closer inspection. Human rights language is entrenched in any discourse relating to global justice. In addition, such language appeals to the sensibilities of concerned citizens of the world and, therefore, possesses rhetorical appeal. But, at the end of the day, global justice should first and foremost ensure subsistence and survival for as many as possible, despite the resource scarcity endemic in the poorer nations of the world.

The rhetorical power of human rights language in the context of public health, however, is two-sided. To properly examine this claim, it is first

17. *Id.* at 565.

18. *See generally* Martha Nussbaum, *Beyond The Social Contract: Toward Social Justice*, *in* 24 THE TANNER LECTURES IN HUMAN VALUES (Grethe B. Peterson ed., 2002).

necessary to understand the role of public health within the sphere of human rights. Those who assert a fundamental right to adequate health care emphasize the importance of both individual and collective rights.[19] For such advocates the concept of public health as a right goes beyond just the protection of human rights, demanding government responsibility for providing adequate health care.[20] The obligation of the government to ensure proper health care, according to these proponents, finds its justification within Article 25 of the Universal Declaration of Human Rights. This article states that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

An example of the domestic use of the right to health as a human right to advance public health occurred in the *South African Treatment Action Campaign Case*.[21] In this case, a NGO sued the South African government because of perceived shortcomings in its response to the HIV/AIDS dilemma. The constitutional court ruled in favor of the NGO and ordered the South African government to remove the restrictions that prevented nevirapine from being made available to reduce the risk of mother-to-child transmission of HIV at public hospitals and clinics. The court ruled that section 27(1) of the South African Constitution required the government to devise and implement within its available resources a comprehensive and coordinated program to progressively realize the rights of pregnant women and their newborn children to health care services to combat mother-to-child transmission of HIV/AIDS. Specifically, the court ruled that such a program must include: (1) reasonable measures for counseling and testing pregnant women for HIV/AIDS; (2) counseling HIV/AIDS-positive pregnant women on the options available to them to reduce the risk of mother-to-child transmission of HIV/AIDS; and (3) making appropriate treatment available to pregnant women for such purposes. The court further ordered the government to do the following: (1) remove restrictions that limited the availability of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV/AIDS at public hospitals and clinics that are not research and training sites; (2) permit and facilitate the use of nevirapine to reduce the risk of mother-to-child transmission of HIV/AIDS; and (3) make nevirapine available for this purpose at hospitals and clinics when, in the judgment of the attending medical practitioner, this is medically indicated. If necessary, the program shall ensure appropriate testing and counseling at public hospitals and clinics. Finally, reasonable measures should be adapted to extend testing and counseling facilities at hospitals and clinics throughout the public health sector. In this case the rights approach

19. Peter Jacobson & Soheil Soliman, *Co-opting the Health and Human Rights Movement*, 30 J.L. MED. & ETHICS 705, 705 (2002).

20. *Id.*

21. *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

was effective, and the concerned government has begun to implement the court order.

In *Grootboom v. South Africa*[22], another case involving the right to access to housing, the petitioners were successful in court, but they did not obtain the redress sought. Namely, despite their court victory, the applicants did not get the housing they sought and desperately needed. In *Grootboom*, Mrs. Irene Grootboom and several hundred other adults and children had lived with thousands of others in unsanitary conditions, namely shacks in a squatter settlement called Wallacadene. The plaintiffs then moved to private land that had been designated by the municipality as the future site for construction of low-cost housing. They were subsequently evicted from the site and had nowhere to go. The plaintiffs were seeking shelter in temporary structures on the Wallacedene sports field when they initiated the court action, asserting the constitutional right of children to shelter. The constitutional court ruled that Section 26(2) of the Constitution required the state to devise and implement within its available resources a comprehensive and coordinated program progressively to realize the right of access to adequate housing, and that this program must include reasonable measures to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations. The court further ruled that as of the date of the launch of the application, the state housing program in the area of Cape Metropolitan Council fell short of compliance with the requirements of Section 26(2) in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area. The municipality enforced the order by bulldozing their homes."

These two South African cases teach us some lessons about the rights approach. When one looks at why the litigants in *Treatment Action* were more successful than the *Grootboom* litigants in compelling government action after their court victories, one must notice the role and importance of social movements and publicity. The *Treatment* campaign movement mobilized the public and heightened scrutiny of the government's response, helping to ensure enforcement of the orders of the court. The situation was rather different for the *Grootboom* litigants. They did not have a movement behind them to assure a comparable achievement.

At the international level, a South African case of 1998 exemplifies another success of the public health rights approach, when coupled with social movement pressure to ensure that court victories produce tangible outcomes. This was the case of the *Pharmaceutical Manufacturers Association of South Africa v. The Republic of South Africa.*[23] In this case the Pharmaceutical Association of South Africa, on behalf of forty local and international pharmaceutical manufacturing companies, sued the government of South Africa to prevent implementation of the Medicines and

22. Grootboom v The Republic of South Africa 2000 (1) SA 46 (CC) (S. Afr.).

23. *Pharmaceutical Manufacturers Association of South Africa v The Republic of South Africa*, 1998 High Court of South Africa, Case No. 4138/98 (S. Afr.).

Related Substances Control Amendment Act of 1997. This law was designed to facilitate low-cost access to AIDS drugs. These pharmaceutical manufacturers of the country with the largest population of HIV/AIDS in the world accused the government of circumventing patent protections, guaranteed by the TRIPS (Trade-Related Aspects of International Rights) intellectual property rules. The pharmaceutical companies charged that the South African government, in Section 15 of its Medicines and Related Substances Control Act, violated the South African Constitution and its obligations to the World Trade Organization under TRIPS in permitting manufacturing of medicines without the authorization of the patent owners and in allowing parallel imports of drugs. The pharmaceutical companies later dropped their lawsuit in the spring of 2001 after an avalanche of negative international publicity. Treatment Action Campaign (a South African NGO) and Doctors Without Borders led this publicity campaign.[24] In the international climate that followed, several pharmaceutical companies entered into agreements with developing countries that lowered the prices of their AIDS drugs in those countries. Here, the use of publicity, coupled with social movement activity, proved to be crucial in the quest to bring justice to the poor.

To return to the notion of human rights language as a double-edged sword in the public health and human rights movement, some contend that the rhetorical power of such discourse is questionable when collective human rights are subordinated to individual civil rights. Human rights opponents appropriate the rhetorical muscle of human rights language to counter collective rights-based public health initiatives. By engaging in civil rights dialogue, they juxtapose individual civil liberties rights and community rights.

The use of civil rights rhetoric in opposition to the tobacco control movement exemplifies such a co-optation of human rights language and concerns. After the rejection of their scientific arguments, the tobacco industry attempted to neutralize tobacco regulations by arguing that smokers had the right to exercise their personal preferences and engage in certain social behaviors.[25] They invoked the inviolability of several different rights, including the private property rights of business owners to determine how to use their property, the right to smoke, and personal right to freedom from unnecessary governmental intrusion.

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24. *See* David Barnard, *In The High Court of South Africa, Case No. 4138/98: The Global Politics of Access to Low-Cost AIDS Drugs in Poor Countries*, 12 KENNEDY INST. ETHICS J. 159 (2002). Barnard argues that the *coup de grace* came when the High Court of South Africa granted a petition by TAC for a friend of the court status and admitted into evidence affidavits prepared by TAC that threatened to lay open for public scrutiny details of drug company research and development costs for AIDS drugs relative to government investments of public funds, as well as other aspects of the manufacturers advertising and marketing policies and expenditures. The court ruled on TAC's petition on March 6, 2001. On April 17, 2001 the pharmaceutical manufacturers withdrew their lawsuit.

25. *Id.* at 160.

A similar scenario arose in the disputes over gun control. Using the individual civil right to keep and bear arms specified in the Second Amendment of the U.S. Constitution, organizations like the National Rifle Association (NRA) have successfully co-opted human rights arguments for purposes of gun control. Using individual civil rights to drive policy making, the question as to how to bridge the legislative gap between collective and individual rights rears its head and begs to be addressed.

Some argue that the answer lies in the use of social movements, publicity, and the legal system. To effectively frame human rights issues, support must first be mobilized locally because industry interest groups wield less power at the local level. By addressing the dangers particular to a community, public health advocates can align their interests with those of members of the local community. Changing public perceptions makes it easier to embed a different interpretation of human rights into the legal system. To put collective rights on par with individual ones, human rights in government must be positively perceived, understood, and interpreted. Government power too often focuses on what it cannot do, rather than on what it can and should do. Hence, when a civil right is violated, an individual may challenge the government on those grounds, but claims of entitlement bear no force.

Before global justice can achieve its necessary goals of nondiscrimination for all peoples, proponents expect that our global institutions must acquire global legitimacy. Further, because health care, for example, serves as an integral part of the basic right to survival, embedding the concept of collective human rights within legal systems and social movements is of great importance. The proper goal of distributive global justice must be to provide a standard of living at a level sufficient to meet basic subsistence standards and to ensure survival for as many people throughout the world as possible. In the end, we cannot accomplish the goals of global justice involving health care, acceptable standards of living, and social equality until we empower international institutions to bring them about.