

FROM SUBSTANCE TO ABSENCE:  
 ARGUMENTATIVE STRATEGIES IN THE  
 IMPLEMENTATION OF THE HUMAN RIGHTS-  
 BASED APPROACHES TO DEVELOPMENT

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*As a matter of official policy, all U.N. agencies and many donor states adhere to the human rights-based approaches to development. At the same time, it is widely acknowledged that the approaches have little concrete impact on development policy-making and programming. Existing scholarship attributes the failure to implement these approaches to external causes, such as the lack of funding and political will. This Article, in contrast, focuses on the conceptual limitations of these approaches. This Article demonstrates that development practitioners encounter three different versions of the human rights-based approaches in policy documents advocating these approaches. First, arguments about the human rights-based approaches typically start with international human rights instruments. These instruments lend an aura of legitimacy to the approaches. Second, when international law proves insufficient for development policy-making and programming, advocacy documents turn to non-legal definitions of human rights in support of the approaches. Third, when these definitions also fail to provide a self-standing development policy framework for human rights-based development policies, advocacy documents are satisfied with promoting human rights as substantively empty conceptual shells, which can be deployed for a variety of social justice causes. The interplay between these versions of the human rights-based approaches has produced convoluted and anomalous policy frameworks, which are unconvincing for many development practitioners.*

## I. INTRODUCTION

To all appearances, much of the international development community—international development organizations, Western donor states, and development practitioners—have reached a consensus on the “human rights-based approaches to development” (HRBAs). These approaches take human rights as the basis of international development policies and programmes. According to the promoters of the HRBAs, human rights are both intrinsically valuable development goals and instrumental for achieving these goals. To be sure, scholarship and policy documents on the approaches recognize that there are obstacles to mainstreaming human rights in development cooperation. Nevertheless, many of these texts seem to assume that donor states, international organizations, and non-governmental organizations, (NGOs), as well as individual development practitioners, will eventually come to appreciate the mutually re-enforcing relationships between human rights and development.<sup>1</sup>

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1. For seminal policy documents advocating these approaches, see HUM. RTS. COUNCIL AUSTL., *THE RIGHTS WAY TO DEVELOPMENT: A HUMAN RIGHTS APPROACH TO DEVELOPMENT ASSISTANCE: POLICY AND PRACTICE*

There are, however, cracks in this optimistic progress story. First, it is sometimes recognized that grassroots level development practitioners do not, in fact, endorse the core claim of the HRBAs, according to which development policies and programming should be based explicitly on human rights.<sup>2</sup> These development practitioners do not necessarily object to the political ideology of human rights. Instead, they are skeptical about the use of the HRBAs in the day-to-day practice of development cooperation.<sup>3</sup> Second, recent changes in the political and institutional framework of international development cooperation cast doubt on the future direction of human rights mainstreaming in development cooperation. In particular, the rise of China as a development policy-maker provides a counter-narrative to the progress story about the ever-deepening relationship between human rights and development policies and programmes.<sup>4</sup> Examples of China's influ-

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(1995); Office U.N. High Comm'r Hum. Rts., *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, U.N. Doc. HR/PUB/06/8 (2006); U.N. DEV. PROGRAMME [UNDP], *HUMAN DEVELOPMENT REPORT 2000: HUMAN RIGHTS AND HUMAN DEVELOPMENT* (2000); WORLD BANK, *DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK* (1998). For seminal scholarly texts on these approaches, see HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT (Philip Alston & Mary Robinson eds., 2005); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* (2d ed. 2008); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); PETER UVIN, *HUMAN RIGHTS AND DEVELOPMENT* (2004); 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 (2005); Mac Darrow & Amparo Tomas, *Power, Capture and Conflict: A Call for Human Rights Accountability in Development Cooperation*, 27 HUM. RTS. Q. 471 (2005); Hans-Otto Sano, *Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development*, 22 HUM. RTS. Q. 734 (2000). For critical assessments of the international human rights movement in development cooperation, see DAVID KENNEDY, *THE DARK SIDE OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004); Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMANITY 47 (2010). See also my text, SAMULI SEPPÄNEN, *POSSIBILITIES AND CHALLENGES OF THE HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT* (2005).

2. See UVIN, *supra* note 1, at 47; Alston, *supra* note 1, at 825; Patrick Twomey, *Human Rights-Based Approaches to Development: Towards Accountability*, in *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ACTION* 45 (Mashood Baderin & Robert McCorquodale eds., 2007).

3. See *infra* notes 61–62 and accompanying text.

4. See JOSHUA KURLANTZICK, *CHARM OFFENSIVE: HOW CHINA'S SOFT POWER IS TRANSFORMING THE WORLD* 215–16 (2007) (arguing that the Chi-

ence can be found in the policies of the newly established Asian Infrastructure Investment Bank (AIIB), created by China as an Asian counterforce to existing development organizations.<sup>5</sup> Human rights advocates have noted the bank's lack of a human rights focus.<sup>6</sup>

In face of such pressures on human rights mainstreaming, it seems both justified and helpful to take a hard look at human rights advocacy in international development cooperation (although, understandably, some advocates of the HRBAs might prefer to forgo this task). The majority of existing scholarship explains the challenges of human rights mainstreaming in international development cooperation on the basis of factors that are mostly external to the HRBAs. These factors include the lack of funding,<sup>7</sup> the lack of information about the benefits of the approaches,<sup>8</sup> the lack of political will,<sup>9</sup> and po-

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nese model of "controlled development," which China sells to governments with "little respect for human rights . . . is the most dangerous part of China's soft power"); James Thuo Gathii, *Beyond China's Human Rights Exceptionalism in Africa: Leveraging Science, Technology and Engineering for Long-Term Growth*, 51 COLUM. J. TRANSNAT'L L. 664, 676 (2013) (arguing that "de-coupling of Chinese investment in Africa from human rights concerns enables African governments to disregard human rights in a way that reliance solely on Western investment would not permit").

5. Jane Perlez, *China Creates a World Bank of Its Own, and the U.S. Balks*, N.Y. TIMES (Dec. 4, 2015), [http://www.nytimes.com/2015/12/05/business/international/china-creates-an-asian-bank-as-the-us-stands-aloof.html?\\_r=0](http://www.nytimes.com/2015/12/05/business/international/china-creates-an-asian-bank-as-the-us-stands-aloof.html?_r=0).

6. Office U.N. High Comm'r Hum. Rts., Letter from Independent Experts and Special Rapporteurs (Oct. 26, 2015), [http://www.ohchr.org/Documents/Issues/IEDebt/261015\\_Letter\\_AIIB.pdf](http://www.ohchr.org/Documents/Issues/IEDebt/261015_Letter_AIIB.pdf); Amnesty Int'l, *Submission to the Asian Infrastructure Investment Bank (AIIB) Environmental and Social Framework Consultation (ESF)* (Oct. 2015), <https://www.amnesty.org/en/documents/ior10/2736/2015/en/>.

7. U.N. CHILDREN'S FUND [UNICEF], 1 GLOBAL EVALUATION OF THE APPLICATION OF THE HUMAN RIGHTS-BASED APPROACH TO UNICEF PROGRAMMING: FINAL REPORT 48 (2012).

8. U.N. POP. FUND [UNFPA] & HARV. SCH. PUB. HEALTH, A HUMAN RIGHTS-BASED APPROACH TO PROGRAMMING: PRACTICAL INFORMATION AND TRAINING MATERIALS (2010) [hereinafter UNFPA Manual]; World Health Org. [WHO], *The Right to Health: Factsheet 31*, at 85–86 (2008), [http://www.who.int/entity/hhr/activities/Right\\_to\\_Health\\_factsheet31.pdf?ua=1](http://www.who.int/entity/hhr/activities/Right_to_Health_factsheet31.pdf?ua=1).

9. Philip Alston & Mary Robinson, *The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours*, in HUMAN RIGHTS AND DEVELOPMENT, *supra* note 1, at 4; HISAYO KATSUI ET. AL., REDUCING INEQUALITIES: A HUMAN RIGHTS-BASED APPROACH IN FINLAND'S DEVELOPMENT COOPERATION WITH SPECIAL FOCUS ON GENDER AND DISABILITY: A CASE STUDY ON ETHIOPIA AND KENYA 31 (2014).

tentially the influence of China on global and regional development policies.<sup>10</sup> In contrast, this Article seeks to demonstrate that the HRBAs, as they are presently promoted in international development agencies, appear unpersuasive and irrelevant for many development practitioners. This problem is conceptual rather than practical, and it cannot be easily remedied with more funding, better information campaigns, or broader political consensus.

While the aims of this Article can be seen as ultimately practical, its central argument and method are theoretical. This Article seeks to demonstrate that HRBAs take different forms for different rhetorical purposes. To this end, this Article develops a taxonomy of these approaches.<sup>11</sup> First, the predominant approach to human rights mainstreaming in development organizations bases development policies explicitly on international human rights law. This “legalistic” model of the HRBAs presents itself as a universally valid development approach that must be implemented in “all development cooperation and programming in all sectors and in all phases of the programming process.”<sup>12</sup> Second, another version of the HRBAs builds on political and ethical conceptions of human rights. This version may be as universalist as the legalistic model,<sup>13</sup> but it is often promoted in relativist and contextual terms. The latter relativist and contextual version of the HRBAs views the respect for human rights as a beneficial development policy rather than as a universally applicable legal

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10. See Gathii, *supra* note 4, at 676; KURLANTZICK *supra* note 4, at 215–16.

11. For other taxonomies, see Stephen P. Marks, *The Human Rights Framework for Development: Seven Approaches*, in REFLECTIONS ON THE RIGHT TO DEVELOPMENT 23 (Basu Mushumi et al. eds., 2005). Marks characterizes the human rights-based approach as a legalistic approach and associates the moral conceptions of human rights with the “capabilities approach” and the “social justice approach.” See also UVIN, *supra* note 1, at 35 (providing a taxonomy of six approaches through which the development community relates to human rights).

12. See U.N. Dev. Group, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the U.N. Agencies*, in Report of the Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of U.N. Reform 1 (2003) [hereinafter *Common Understanding*], [https://undg.org/wp-content/uploads/2015/05/6959-The\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development\\_Cooperation\\_Towards\\_a\\_Common\\_Understanding\\_among\\_UN1.pdf](https://undg.org/wp-content/uploads/2015/05/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN1.pdf).

13. See POGGE, *supra* note 1.

or ethical obligation.<sup>14</sup> The legalistic model and the political and ethical version of the HRBAs can be distinguished from a third form of HRBAs, which is most apparent in the advocacy strategies deployed by human rights activists. The third version of the HRBAs views human rights as placeholders for unarticulated contextual concerns—that is, various grassroots level social justice issues—without attempting to derive normative guidance from international human rights law or any other pre-existing political or ethical development policy framework. This approach can be called “reconstructive,” since it does not seek to impose itself as the top-down operationalization of pre-given human rights instruments or policies. Instead, it attempts to foster a critical and creative grassroots practice.<sup>15</sup>

While it is important to understand the differences between these variations of the HRBAs, it is also important to understand the interplay between them. This Article demonstrates that development practitioners encounter all of the above-described versions of the HRBAs in policy documents advocating the approaches. Arguments about HRBAs typically start with international human rights instruments. These instruments lend an aura of legitimacy to the approaches. However, when international law proves insufficient for advocacy purposes—which it often does—advocacy documents turn to non-legal definitions of human rights in support of the HRBAs. When these definitions fail to provide a self-standing development policy framework for human rights-based development policies and programmes, advocacy documents are

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14. See WILLIAM EASTERLY, *THE TYRANNY OF EXPERTS: ECONOMISTS, DICTATORS, AND THE FORGOTTEN RIGHTS OF THE POOR* (2013); SEN, *supra* note 1.

15. There is no single name for what is here called the “reconstructive approach.” Mark Goodale describes a “discursive approach” to human rights, which is closely analogous to the reconstructive approach discussed in this Article, in Mark Goodale, *Introduction: Locating Rights, Envisioning Law between the Global and the Local*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 8 (Mark Goodale & Sally Engle Merry eds., 2007). Lucie White and Jeremy Perelman use the name “creative practice” for a similar approach in Lucie White & Jeremy Perelman, *Essay: Can Human Rights Practice Be a Critical Project? A View From The Ground*, 44 *LOY. L.A. L. REV.* 157 (2010). Elsewhere, Jeremy Perelman has discussed an analogous approach to human rights advocacy under the rubric “‘critical/pragmatic’ human rights advocacy.” Jeremy Perelman, *Transnational Human Rights Advocacy, Clinical Collaborations, and the Political Economies of Accountability: Mapping the Middle*, 16 *YALE HUM. RTS. & DEV. L.J.* 89, 105 (2013).

satisfied with promoting human rights as substantively empty conceptual shells, which can be deployed for a variety of social justice causes. The interplay between the different versions of the HRBAs may be advantageous for the advocacy of specific development objectives, but the dynamics between them have also produced convoluted and anomalous policy frameworks, which are unconvincing for many development practitioners.

Scaling back the rhetoric about the human rights-based approach might increase the policy relevance of the approaches. Instead of attempting to “base” development policies and programmes on human rights, various human rights claims could simply be promoted as additional perspectives to decision making process. From this perspective, there would be no need to insist that development policy-making and programming should be founded on human rights. Nor would it be necessary to conflate human rights claims with all desirable development outcomes and processes. Instead of using human rights language opportunistically, human rights advocacy could also be much more open about the limitations of human rights in development policy-making and programming. In particular, advocates could refrain from playing down the contestable and dubious legal nature of many human rights claims.

Of course, it would be difficult to convince advocates of the HRBAs to appoint human rights such a humble role in development cooperation. The impression of legal normativity accounts for much of the appeal of the HRBAs. This is especially true of international development organizations, which must justify their development policies in the international arena. It is equally difficult to erase political and ethical conceptions of human rights from the HRBAs. Nobody advocates turning development cooperation into legal reasoning and law enforcement. In fact, the “flexibility” of the approaches is their main selling point.<sup>16</sup> In this sense, the conceptual fuzziness of the HRBAs is integral to these approaches and something that cannot be remedied easily. This conclusion is admittedly critical and pessimistic about the future prospects of the HRBAs in international development cooperation.<sup>17</sup>

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16. UNFPA Manual, *supra* note 8, at 131.

17. In this sense my conclusion differs from certain previous assessments of the human rights-based approaches. See Alston, *supra* note 1, at 807,

This Article is organized as follows. Part II describes the institutional challenges of human rights mainstreaming in international development cooperation. Parts III-V examine the three versions of the HRBAs and their specific problems. Part VI describes the interplay between the three different versions of the HRBAs, pointing out that the three versions end up undermining one another and the basic premise of the approaches. Finally, Part VII contrasts the three versions of the HRBAs with a humbler vision about human rights in development policy-making and programming.

## II. POLICY PROMISES AND INSTITUTIONAL CHALLENGES

Human rights-based approaches to development emerged in the 1990s as a response to utilitarian development policies of the time. These development policies perceived human rights as values that could be sacrificed at “lower” stages of development in order to obtain more pressing development goals.<sup>18</sup> In contrast to these earlier development policies, the HRBAs view rights as both means and ends in themselves. The proponents of the approaches argue that a society that ignores human rights is not a worthy goal, even if such a society could be considered developed by certain economic and social standards. Human rights are, according to this view, intrinsically valuable development goals in their own right. From an instrumentalist perspective respect for human rights contributes positively to the achievement of development objectives. Improving the right to education, for instance, leads to better public health and economic outcomes. Rights also impose limits on potentially draconian development policies. To seek development at the expense of individual rights is to risk policy

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826–27 (acknowledging the problems with the prioritization of development objectives under the human rights-based approaches but concluding that human rights advocates should “tailor their prescriptions more carefully to address particular situations”); Darrow & Tomas, *supra* note 1, at 519, 537 (calling for “conceptual rigor” for human rights-based approaches, while arguing that “[t]he meaning of human rights principles should . . . be based as far as possible on objectively agreed and verifiable standards of outcome and behavior”).

18. For this older view, see WALT WHITMAN ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NONCOMMUNIST MANIFESTO* (3d ed., 1990).



failure, since no technocrat can fathom the complexities of economic and social development.<sup>19</sup>

As a matter of official policy, the HRBAs enjoy the unconditional support of the U.N. system. A “Common Understanding” between U.N. agencies declares that “[a]ll programmes of development co-operation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.”<sup>20</sup> During the past two decades, there have been several attempts to mainstream the HRBAs in U.N. agencies. These attempts have produced a number of “tools,” “manuals,” and “factsheets” to promote the approaches.<sup>21</sup> Western donor states, such as Canada,<sup>22</sup> Denmark,<sup>23</sup> Finland,<sup>24</sup> Norway,<sup>25</sup> Sweden,<sup>26</sup> the United King-

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19. See EASTERLY, *supra* note 14, at 328 (2013); AMARTYA SEN, THE IDEA OF JUSTICE 342-345, 379-85 (2009); Daniel Kaufmann, *Human Rights and Governance: The Empirical Challenge*, in HUMAN RIGHTS AND DEVELOPMENT, *supra* note 1, at 382.

20. *Common Understanding*, *supra* note 12, at 1. The Common Understanding was a result of a U.N. Programme for Reform launched in 1997, which aimed at mainstreaming human rights into the activities of U.N. agencies. See U.N. Children’s Fund [UNICEF], A Human Rights-Based Approach to Education for All: A Framework for the Realization of Children’s Right to Education and Rights within Education, at 9 (2007), [http://www.unicef.org/publications/files/A\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Education\\_for\\_All.pdf](http://www.unicef.org/publications/files/A_Human_Rights_Based_Approach_to_Education_for_All.pdf).

21. See, e.g., FOOD & AGRIC. ORG., METHODOLOGICAL TOOLBOX ON THE RIGHT TO FOOD (2009), <http://www.fao.org/righttofood/knowledge-centre/rtf-methodological-toolbox/en/>; INT’L BUS. LEADERS FORUM & INT’L FIN. CORP., GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT (2010), <https://www.unglobalcompact.org/library/25>; Office U.N. High Comm’r Hum. Rts., *supra* note 1; U.N. CHILDREN’S FUND, *supra* note 20; UNFPA Manual, *supra* note 8; WORLD HEALTH ORG., *supra* note 8.

22. CANADIAN INT’L DEV. AGENCY, GOVERNMENT OF CANADA POLICY FOR CIDA ON HUMAN RIGHTS, DEMOCRATIZATION AND GOOD GOVERNANCE (1996), <http://publications.gc.ca/site/eng/59327/publication.html>. The document does not, however, adopt HRBAs as an overarching policy framework for CIDA.

23. MINISTRY FOREIGN AFF. DEN., A HUMAN RIGHTS BASED APPROACH TO DENMARK’S DEVELOPMENT COOPERATION: GUIDANCE AND INSPIRATION FOR POLICY DIALOGUE AND PROGRAMMING (2013).

24. MINISTRY FOREIGN AFF. FIN., HUMAN RIGHTS BASED APPROACH IN FINLAND’S DEVELOPMENT COOPERATION (2015).

25. NORWEGIAN MINISTRY FOREIGN AFF., OPPORTUNITIES FOR ALL: HUMAN RIGHTS IN NORWAY’S FOREIGN POLICY AND DEVELOPMENT COOPERATION (2014).

dom,<sup>27</sup> and now also the United States,<sup>28</sup> have adopted their own policy documents and tools on the HRBAs or human rights mainstreaming, as have many NGOs.<sup>29</sup>

Despite such efforts, it is commonly acknowledged that human rights presently have little concrete impact on development policies and programmes within and outside the U.N. system. Philip Alston and Mary Robinson acknowledge that “there is a very long way to go before [the human rights-based] approaches become the norm.”<sup>30</sup> One advocate of the approaches points out that “significant steps remain if HRBAs are to be transplanted from policy statements and made operational in a coherent fashion.”<sup>31</sup> Another advocate notes that the “success [of HRBAs] is far from assured, or necessarily deserved.”<sup>32</sup> An advocate of health-related human rights reports that “human rights remain at the periphery of national and global health governance.”<sup>33</sup>

Studies conducted on the implementation of the HRBAs in development organizations confirm these anecdotal assessments. In the U.N. system, there is a “disconnect between U.N. development and human rights actors,” which betrays “a fun-

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26. MINISTRY FOREIGN AFF. SWED., CHANGE FOR FREEDOM, POLICY FOR DEMOCRATIC DEVELOPMENT AND HUMAN RIGHTS IN SWEDISH DEVELOPMENT COOPERATION (2010).

27. DEP'T INT'L DEV. [DFID], ELIMINATING WORLD POVERTY: MAKING GOVERNANCE WORK FOR THE POOR, WHITE PAPER ON INTERNATIONAL DEVELOPMENT (2006). In subsequent policy statements, DFID has moved away from the human rights focus. See DFID, DFID'S APPROACH TO VALUE FOR MONEY (VFM) (2011).

28. U.S. AGENCY INT'L DEV., USAID STRATEGY ON DEMOCRACY HUMAN RIGHTS AND GOVERNANCE (2013), <https://www.usaid.gov/democracy-human-rights-and-governance-strategy>.

29. Shannon Kindornay et al., *Rights-Based Approaches to Development: Implications for NGOs*, 34 HUM. RTS. Q. 472 (2012).

30. Philip Alston & Mary Robinson, *The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours*, in HUMAN RIGHTS AND DEVELOPMENT, *supra* note 1, at 3. See also Alston, *supra* note 1, at 761 (noting the separation of the human rights and Millennium Development Goals agendas).

31. Twomey, *supra* note 2, at 45.

32. Paul Gready, *Rights-based Approaches to Development: What is the Value-added?*, 18 DEV. PRAC. 735, 737 (2008).

33. Helena Nygren-Krug, *The Right to Health: From Concept to Practice*, in ADVANCING THE HUMAN RIGHT TO HEALTH 39 (Jose M. Zuniga et al. eds., 2013).

damentally different understanding of how to relate to governments in order to [affect] change.”<sup>34</sup> An evaluation of the country-level implementation of the rights-based approaches at UNICEF found mixed results from “good” and “satisfactory” to “weak.”<sup>35</sup> The CIDA (which, it should be noted, regards human rights as a governance theme) reports that a “culture that nurtures organizational silos, along with a climate of frustration related to effectiveness and utility of [the CIDA’s] administration support system . . . has seriously impeded the effective and efficient management of the Policy [on Human Rights, Democratization and Good Governance].”<sup>36</sup> In the Finnish Foreign Ministry, the HRBAs have “not been largely operationalized in the practice of the [Ministry], though pertinent efforts have been observed especially at the policy level.”<sup>37</sup>

NGOs have reportedly had better success in the implementation of the approaches than international and governmental organizations.<sup>38</sup> Nonetheless, the marginalization of rights in development policy-making and programming has been noted on a systemic level. Peter Uvin notes the “[surprising] amount of skepticism, if not outright hostility . . . that still prevails in much of the development community toward

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34. Wouter Vandenhoe, *Overcoming the Protection-Promotion Dichotomy: Human Rights-based Approaches to Development and Organizational Change within the U.N. at Country Level*, in HUMAN RIGHTS AND DEVELOPMENT IN THE NEW MILLENNIUM: TOWARDS A THEORY OF CHANGE 125 (Paul Greedy & Wouter Vandenhoe eds., 2014).

35. U.N. CHILDREN’S FUND, *supra* note 7, at iv. For a critical analysis of the study, see Wouter Vandenhoe & Paul Greedy, *Failures and Successes of Human Rights-Based Approaches to Development: Towards a Change Perspective*, 32 NORDIC J. HUM. RTS. 291, 302–03 (2014). For an extensive study of the implementation of the human rights-based approach at UNICEF, see JOEL E. OESTREICH, POWER AND PRINCIPLE: HUMAN RIGHTS PROGRAMMING IN INTERNATIONAL ORGANIZATIONS 36–64 (2007).

36. CAN. INT’L DEV. AGENCY, REVIEW OF GOVERNANCE PROGRAMMING IN CIDA: SYNTHESIS REVIEW vi, 12 (2008).

37. KATSUI ET AL., *supra* note 9, at 5.

38. A review of the implementation of the rights-based approach within ActionAid International found that the organization “has made substantial progress in implementing the ambitious goals of the [approach].” At the same time, the “actual impacts [of the organization in applying the approach] have often been less [than] its hopes.” ACTIONAID INT’L, TAKING STOCK REVIEW 3: SYNTHESIS REPORT 27 (2010), [www.actionaid.org/sites/files/actionaid/tsr3\\_synthesis\\_report\\_final.pdf](http://www.actionaid.org/sites/files/actionaid/tsr3_synthesis_report_final.pdf).

human rights.”<sup>39</sup> William Easterly, a proponent of a market-led rights-based approach to development, describes the contemporary development model as the “Tyranny of Experts,” in which rights of the poor are willfully neglected by international organizations.<sup>40</sup>

A number of policy documents note the difficulties in implementing the HRBAs. These texts cite the lack of knowledge and understanding of the approaches as important reasons for the failure to mainstream the approaches.<sup>41</sup> These texts also point out that a lack of “political will” hampers the implementation of the approaches. On the one hand, the lack of political will is reportedly due to the divisive nature of human rights language. According to James D. Wolfensohn, the former president of the World Bank, some shareholders of the Bank find “the very mention of the words human rights . . . inflammatory.”<sup>42</sup> On the other hand, the lack of political will is said to be due to the unwillingness of development experts to “engage in debates about international legal obligations.”<sup>43</sup> There are also organizational reasons for the lackluster implementation of the HRBAs. In addition to the organizational silos and lack of administrative support mentioned in the CIDA report, the lack of policy coherence and accountability mechanisms hampers human rights mainstreaming in the CIDA and other development agencies.<sup>44</sup> Ironically, even the democratic oversight of development agencies reportedly hampers the implementation of the HRBAs. The above-mentioned report on the Finnish Foreign Ministry explains that “when Ministers change, some practices and policies change along with them.”<sup>45</sup> The report argues that “[c]lear mechanisms need to be put in place to ensure the application of the HRBA regardless of turnover of Ministers and staff members.”<sup>46</sup>

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39. UVIN, *supra* note 1, at 47.

40. EASTERLY, *supra* note 14, at 338.

41. KATSUI ET AL., *supra* note 9, at 32.

42. Wolfensohn, *Some Reflections on Human Rights and Development*, in HUMAN RIGHTS AND DEVELOPMENT, *supra* note 1, at 21.

43. Alston & Robinson, *supra* note 30, at 2.

44. CAN. INT’L DEV. AGENCY, *supra* note 36, at vi, 9. For a general observation on this point, see Twomey, *supra* note 2, at 58 (noting that the implementation of the human rights-based approach “remains fragmented”).

45. KATSUI ET AL., *supra* note 9, at 31.

46. *Id.* at 32.

Some development agencies and practitioners admit that the HRBAs themselves may initially appear difficult, unclear, and complicated. The UNFPA Manual on the HRBAs, for instance, explains that there are certain “myths” about the approach within the UNFPA.<sup>47</sup> One “very common myth,” according to the manual, is the assumption that “[a] HRBA is too difficult.”<sup>48</sup> The UNFPA Manual concedes the point that the approaches are challenging—“[a]ll programming methods have their own challenges”—but insists that “the challenges posed by the systematic attention to human rights principles required of a HRBA are likely to be far fewer than the difficulties faced in the long term as a result of not adopting a HRBA.”<sup>49</sup> Also, the above-mentioned UNICEF evaluation found that “few staff members at the implementation level feel competent enough to lead on [the HRBA], to apply the approach and to bring their experience to bear on it.”<sup>50</sup> Only four percent of the surveyed implementation-level UNICEF staff thought they were competent to “apply” the approaches and “bring experience to bear.”<sup>51</sup> Anecdotally and informally, many advocates of the HRBAs attest to the confusion of their audiences.<sup>52</sup>

### III. A LEGAL BASIS FOR DEVELOPMENT POLICIES?

The acknowledgement that the HRBAs are analytically confusing may seem surprising, given that the premise of the

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47. UNFPA Manual, *supra* note 8, at 85.

48. *Id.*

49. *Id.* At the same time, the organization acknowledges that “it has been difficult to measure the success of HRBAs.” *Id.* at 86.

50. U.N. CHILDREN’S FUND, *supra* note 7, at 40.

51. *Id.*

52. *See, e.g.*, Twomey, *supra* note 2, at 60 (pointing out that one of the challenges in the implementation of the human rights-based approach is the “lack of clarity regarding the core meaning of HRBA”); Nygren-Krug, *supra* note 33, at 41 (recounting her experiences in the advocacy of human rights-based approaches in global health, Nygren-Krug explains that an “obstacle, although not insurmountable,” for the implementation of the approach “was the complexity of the right to health”); *see also* ACTIONAID INT’L, *supra* note 38, at 27 (“Confusion about the differences between rights-based and community development approaches has resulted in some cases in uneasy combinations or relabeling programs without changing their substance.”); Darrow & Tomas, *supra* note 1, at 482–84 (arguing for the necessity of conceptual clarity regarding HRBAs).

approaches—the argument that the protection of human rights correlates positively with the achievement of development objectives—is relatively straightforward. Nevertheless, the perception is justified, in particular as regards to the predominant version of the HRBAs, what is here called the legalistic version. The legalistic version of the human rights-based approaches to development sets out to derive development policies from international human rights law. This is the version adopted by the U.N. agencies in the aforementioned Common Understanding. The Common Understanding defines the HRBAs, *inter alia*, as the requirement that “[h]uman rights standards contained in . . . international human rights instruments guide all development cooperation and programming.”<sup>53</sup> Also, donor States, such as Denmark, Finland, Sweden, and to a certain extent the United Kingdom and the United States, derive the basis of human rights from international human rights law.<sup>54</sup>

The legalistic version has certain obvious advantages for human rights advocacy in development policy-making and programming. Most importantly, the legalistic model adds a sense of legal duty to development policies that are advocated on its strength.<sup>55</sup> As the UNFPA Manual on the human rights-based approach explains, the human rights-based approach “moves development action from the optional realm of benevolence (or charity) into the mandatory realm of law.”<sup>56</sup> The language of rights and duties has enabled development practitioners to discuss development policies in terms of obligations of aid-receiving States and donor States.<sup>57</sup> A legalistic understanding of the approaches also allows development agencies

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53. *Common Understanding*, *supra* note 12, at 1.

54. See MINISTRY FOREIGN AFF. DEN., *supra* note 23, at 4; MINISTRY FOREIGN AFF. FIN., *supra* note 24, at 4–5; MINISTRY FOREIGN AFF. SWED., *supra* note 26, at 8. The British DFID reportedly bases its human rights conceptions on two soft law instruments, “the Universal Declaration of Human Rights and the Millennium Declaration.” DEP’T INT’L DEV., *supra* note 27, at 73. For the legal significance of these two documents, see Alston, *supra* note 1; Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287 (1996). For the position of USAID, see *infra* note 202.

55. See HUM. RTS. COUNCIL AUST., *supra* note 1, at 11–12; Sano, *supra* note 1, at 745–8.

56. UNFPA Manual, *supra* note 8, at 81.

57. HUM. RTS. COUNCIL AUST., *supra* note 1, at 12.

to skirt controversial questions about their mandates. An internal U.N. publication for the U.N. staff in Vietnam, for instance, suggests that implementing the HRBAs in Vietnam is a “duty” of the [U.N.] staff, since the “Universal Declaration of Human Rights [UDHR] is today accepted international customary law.”<sup>58</sup> Finally, the legalistic version of the HRBAs may help neutralize contentious claims about human rights. According to the UNFPA Manual, it is a mistake to assume that “[h]uman rights are western and alien to many cultures,” since “human rights are universal, and the world’s governments have ratified at least one major human rights treaty.”<sup>59</sup>

Despite these (real or perceived) advantages, the association between international law and human rights is a potential source of embarrassment for the advocates of the HRBAs. Inconvenient aspects of international human rights law include the ambiguous nature of human rights norms, the conflicts between various human rights claims, the outdated and otherwise particular nature of certain treaty provisions, the limited relevance of treaty body recommendations, the ineffectiveness of human rights enforcement mechanisms, and the objections against specific forms of human rights advocacy that may be raised under general international law. The following sections discuss these difficulties one by one.

#### A. *Ambiguous Nature of Human Rights Norms*

The ambiguous nature of human rights treaties affects all types of human rights, from economic, social and cultural rights to seemingly specific rights, such as the prohibition on torture.<sup>60</sup> Ambiguity, as such, need not be detrimental to the

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58. U.N. Viet Nam Staff, *Brief Explanation of a Human Rights-Based Approach (HRBA) from U.N. Staff in Viet Nam for U.N. Staff in Viet Nam*, in A HUMAN RIGHTS-BASED APPROACH TOOLKIT 2 (2009) [hereinafter *HRBA in Viet Nam*], [http://www.un.org.vn/en/publications/doc\\_details/115-a-human-rights-based-approach-toolkit.html](http://www.un.org.vn/en/publications/doc_details/115-a-human-rights-based-approach-toolkit.html). See also UNFPA Manual, *supra* note 8, at 12–16, 40.

59. UNFPA Manual, *supra* note 8, at 85.

60. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 119 (2002) (noting the porousness of human rights vocabulary); Jennifer Prah Ruger, *Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements*, 18 YALE J.L. & HUMAN. 273, 310-311 (2006) (discussing the ambiguity of health-related human rights); John Tobin, *Seeking to Persuade: A Constructive Approach to*

advocacy of specific development objectives. Ambiguity allows human rights advocates to deploy the legitimizing effects of human rights treaties for various causes. At the same time, ambiguous norms can only provide an ambiguous basis for development policies and programs. Development professionals looking for concrete guidance for their work have been let down by the ambiguous nature of the HRBAs. According to one observation by a group of public health professionals, “legal measures and abstract principles . . . provide scant guidance for real-world decision making around resource allocation or programme strategies.”<sup>61</sup> The same problem is acknowledged in the above-mentioned UNICEF report, which points out that “specialists . . . often fail to see the linkage between adherence to [HRBA] principles and their own evidence-based or peer-reviewed decision-making.”<sup>62</sup>

The ambiguity of international human rights treaties has caused the promoters of the HRBAs to turn their attention to a set of “human rights principles.” These principles have been loosely “derived . . . from international human rights instruments,”<sup>63</sup> but they are typically not established with direct reference to any specific human rights instrument. Policy documents on HRBAs advance various versions of these principles. The above-mentioned Common Understanding, for instance, defines human rights principles as: universality and inalienability, indivisibility, inter-dependence and inter-relatedness, non-discrimination and equality, participation and inclusion, accountability and the rule of law.<sup>64</sup> The UNFPA Manual follows the principles set out by the Common Understanding,<sup>65</sup> whereas a FAO guide on the HRBAs defines these principles

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*Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1, 1 (2010) (referring to the shifting scope of the prohibition against torture).

61. Asha George et al., *Making Rights More Relevant for Health Professionals*, 375 LANCET 1764, 1764 (2010).

62. U.N. CHILDREN’S FUND, *supra* note 7, at 82. For another example of this problem, see Hugo Tremblay, *A Clash of Paradigms in the Water Sector? Tensions and Synergies Between Integrated Water Resources Management and the Human Rights-Based Approach to Development*, 51 NAT. RESOURCES J. 307, 336 (2011) (noting that “human rights can hardly provide a stable and solid conceptual foundation for operational water resources management framework”).

63. *Common Understanding*, *supra* note 12, at 1.

64. *Id.* at 2.

65. UNFPA Manual, *supra* note 8, at 72–73.



as: participation, accountability, non-discrimination, transparency, human dignity, empowerment, and the rule of law.<sup>66</sup> UNICEF defines the principles slightly differently, as: universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, empowerment and accountability, and respect for the rule of law.<sup>67</sup>

Human rights principles allow development practitioners to circumvent some inconvenient aspects of ambiguous human rights norms while still maintaining an element of legality in the approach. Ill-defined principles turn the implementation of the HRBAs into a loosely guided process, which is distinct from a mechanical application of the law. Instead of attempting to establish the definite meaning of human rights norms through the rules of treaty interpretation,<sup>68</sup> human rights principles can be applied flexibly to concrete development problems. The UNFPA Manual, for instance, describes the human rights-based approach (in singular form) as “an extremely flexible approach that consists of asking key questions, applying key human rights principles to your processes and outcomes, and framing the project/programme . . . around the realization of human rights that governments are legally obliged to protect.”<sup>69</sup>

The combination of various human rights norms and principles does make the legalistic model “extremely flexible.”<sup>70</sup> As the UNFPA Manual states, “there is no set formula” to apply the HRBAs.<sup>71</sup> However, the flexibility of the legalistic model also means that almost all work presently carried out by development agencies can be justified in terms of promoting one human right or another.<sup>72</sup> According to the UNFPA Man-

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66. FOOD & AGRIC. ORG., GUIDE ON LEGISLATING FOR THE RIGHT TO FOOD 9 (2009), <http://www.fao.org/righttofood/knowledge-centre/rtf-methodological-toolbox/en/>. FAO calls this definition the “PANTHER framework.” *Id.* at 29. See also *infra* note 239.

67. U.N. CHILDREN’S FUND, *supra* note 20, at 10–11.

68. For rules of treaty interpretation of human rights instruments, see Tobin, *supra* note 60, at 16–25.

69. See UNFPA Manual, *supra* note 8, at 277. See also Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 11; U.N. CHILDREN’S FUND, *supra* note 20, at 18.

70. See UNFPA Manual, *supra* note 8, at 131, 277.

71. *Id.* at 131.

72. UVIN, *supra* note 1, at 50–55.

ual, for instance, the “[r]ight to the benefits of scientific progress,” established in UDHR Article 27 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 15, inspires activities such as funding “research on women’s as well as men’s health needs . . . , especially research that can benefit the most marginalized populations.”<sup>73</sup> Apart from a general preference for research benefiting the most marginalized populations, UDHR and ICESCR provisions offer little practical guidance for choosing between different development projects.

### B. *Conflicts Between Various Human Rights Claims*

The legalistic version of the HRBAs is particularly ill-suited for prioritizing development objectives. This is because human rights norms, ambiguous as they are, enable various competing rights claims about social justice questions. It does not help that the advocates of the approaches make a point of emphasizing that “[t]here is no hierarchy in human rights.”<sup>74</sup>

The difficulties with prioritization are acknowledged by some advocates of the HRBAs. UNICEF, for instance, notes that “the need to balance the claims of different rights holders and address potential tensions between the realization of different rights or between rights and responsibilities” poses challenges to the implementation of the approaches.<sup>75</sup> Again, human rights principles can alleviate some of the concerns posed by conflicting human rights claims. For instance, the UNFPA Manual notes that the fact that “all people have human rights . . . does not mean . . . that all problems of all people must be tackled at once.”<sup>76</sup> The manual explains that “a government might wish to first start off by providing services to the most excluded groups.”<sup>77</sup> This conclusion can be reached by applying the principle of non-discrimination.<sup>78</sup> However, despite providing some guidance for the resolution

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73. UNFPA Manual, *supra* note 8, at 52; International Covenant on Economic, Social and Cultural Rights art. 15, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

74. UNFPA Manual, *supra* note 8, at 458.

75. U.N. CHILDREN’S FUND, *supra* note 20, at 2. *See also* Alston, *supra* note 1, at 806.

76. UNFPA Manual, *supra* note 8, at 499.

77. *Id.*

78. *Id.* at 498.

of competing rights claims, flexible and ill-defined human rights principles also generate new, competing claims about human rights. The potential for human rights advocacy to reduce social cohesion between different groups has been noted in academic scholarship.<sup>79</sup> Some advocates of the HRBAs acknowledge that there is a common perception among development practitioners that human rights approaches encourage conflicts instead of alleviating them.<sup>80</sup>

C. *Outdated and Otherwise Particular Nature of Human Rights Treaty Provisions*

The ambiguity of human rights norms and the various contradictions between them call into question the very basis of the legalistic version of the human rights based-approaches: the assumption that international human rights law is a relatively coherent body of norms, which is able to determine the content of development policies in a meaningful way. However, even when international treaties are sufficiently clear, they may be outdated or otherwise too particular to support the contemporary aspirations of development practitioners.<sup>81</sup> For instance, UNICEF's goal to improve access to education is limited by the wording of Article 13 of the International Covenant on Economic Social and Cultural Rights. According to this article, only "[p]rimary education shall be compulsory and available free to all," whereas secondary education shall "be made generally available and accessible to all," and higher education merely "equally accessible to all."<sup>82</sup> The ICESCR in-

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79. See generally Kennedy, *supra* note 60, at 113. For the inadequacy of rights-based approaches in post-conflict situations, see Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1347, 1357 (2008) (noting that "for every attempt to engage in 'rights talk' by a development agency, a local actor such as [an NGO] or a social movement would offer an oppositional reading of rights"). In one reported incident in a Bolivian city, human rights advocates encouraged claims about the "the right to security," which resulted in increased police violence. See Daniel M. Goldstein, *Human Rights as Culprit, Human Rights as Victim: Rights and Security in the State of Exception*, in THE PRACTICE OF HUMAN RIGHTS, *supra* note 15, at 51.

80. See UNFPA Manual, *supra* note 8, at 85 (discussing a common "misconception" that the approaches overemphasize rights claims at the expense of civic responsibilities).

81. See generally Kennedy, *supra* note 60, at 112–14.

82. ICESCR, *supra* note 73, art. 12.

roduces the goal of “progressive introduction of free education” for secondary and higher education.<sup>83</sup> Nevertheless, the priorities of the convention are reproduced in UNICEF’s policy guide on the human rights-based approach to education. The guide acknowledges that, “[w]hile human rights law affirms . . . free, compulsory primary education, obligations in respect of secondary education are less emphatic.”<sup>84</sup> The guide also acknowledges the outdated nature of this provision,<sup>85</sup> but still goes on to define the limits of its ambitions in conformity with the limited vision of the ICESCR.<sup>86</sup>

#### D. *Limited Relevance of Treaty Body Recommendations*

In addition to human rights treaties and declarations, the legalistic version of the HRBAs seeks to derive the content of development policies from the general comments and recommendations of various human rights treaty bodies.<sup>87</sup> Human rights treaty bodies, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, are tasked with monitoring the implementation of human rights treaties.<sup>88</sup>

Treaty bodies contribute to the implementation of the HRBAs in two ways. First, human rights treaty bodies adopt general comments on specific aspects of human rights treaties. These comments interpret human rights treaties by introducing new principles for the implementation of specific human rights.<sup>89</sup> The adoption of general comments has a legal basis,<sup>90</sup>

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83. *Id.*

84. See U.N. CHILDREN’S FUND, *supra* note 20, at 30.

85. *Id.* at 45, 57.

86. *Id.* at 30.

87. For references to treaty body reports as a source of human rights norms and principles see, e.g., Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 1; UNFPA Manual, *supra* note 8, at 57; U.N. CHILDREN’S FUND, *supra* note 20, at 16. The reports of Special Rapporteurs on various human rights matters have also been recommended in this context. See Alston, *supra* note 1, at 818.

88. See Office U.N. High Comm’r Hum. Rts., THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: FACT SHEET NO. 30/REV. 1 19 (2012), <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>.

89. For instance, the committee in charge of monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights, has interpreted the right to health as an entitlement to (i) available, (ii) accessible, (iii) ethically and culturally acceptable health facilities, goods

but governments stress that the comments themselves are not “binding.”<sup>91</sup> Governments have objected to specific general comments made by human rights treaty bodies.<sup>92</sup> Second, treaty bodies consider reports from State parties on the implementation of specific human rights treaties. Treaty bodies hold dialogues with the State parties and issue observations and recommendations for them on the basis of this process.<sup>93</sup> Again, the observations and recommendations that result from this process are not considered “binding.”<sup>94</sup> Nevertheless, the observations and recommendations are offered as helpful for the operationalization of the HRBAs, since they provide guidance on specific country-level activities. The UNFPA Manual, for instance, recommends “using the recommendations of international human rights mechanisms in the analysis and stra-

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and services, (iv) which must also be of good quality. *See* U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cul. Rts., Gen. Cmt. No. 14: The Right to the Highest Attainable Standard of Physical and Mental Health, at 42 para. 12, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

90. According to Rule 65 of Rules of CESCR, the committee “may prepare general comments based on the various articles and provisions of the Covenant with a view to assisting States parties in fulfilling their reporting obligations.” U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cul. Rts., Rules of Procedure of the Committee, U.N. Doc. E/C.12/1990/4/Rev.1 (Sept. 1, 1993). *See also* Peter-Tobias Stoll, *Human Rights, Treaty Bodies*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e820?rskey=znaVt9&result=2&prd=EPIL>.

91. *See, e.g.*, United States & United Kingdom, Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24, U.N. Doc. A/50/40 (Mar. 28, 1995) [hereinafter US-UK Observations] (stating that “the [Human Rights] Committee lacks the authority to render binding interpretations or judgments”), <http://www.iilj.org/wp-content/uploads/2016/08/US-and-UK-Responses-to-the-General-Comment.pdf>.

92. *Id.* (stating that “the [Human Rights] Committee lacks the authority to render binding interpretations or judgments” and arguing that the General Comment No. 24 “runs contrary to . . . international law”).

93. *See generally* Felice D. Gaer, *A Voice Not an Echo: Universal Periodic Review and the U.N. Treaty Body System*, 7 HUM. RTS. L. REV. 109 (2007); Hurst Hannum, *Reforming the Special Procedures and Mechanisms of the Commission on Human Rights*, 7 HUM. RTS. L. REV. 73 (2007); Stoll, *supra* note 90.

94. *See* CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 188 (2d ed. 2008); INT’L L. ASS’N, COMM. INT’L HUM. RTS. L. & PRAC., FINAL REPORT ON THE IMPACT OF FINDINGS OF THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES ¶¶ 15–16 (2004).

tegic response to development problems.”<sup>95</sup> As an example of the use of treaty body observations and recommendations, the OHCHR describes a U.N. assessment of development problems in the Philippines, which refers to the observations of the treaty body in charge of interpreting the Convention on the Rights of the Child.<sup>96</sup>

The non-binding legal basis of the general comments and treaty body observations and recommendations is at most a minor inconvenience for the advocates of the HRBAs. In practice, general comments are incorporated seamlessly into policy documents on the HRBAs.<sup>97</sup> In the words of the UNFPA Manual, “soft” human rights law is “generally regarded as having moral and political force and providing a guiding reference to States.”<sup>98</sup> Nevertheless, the practical nature of treaty body observations and recommendations is reduced by their time-sensitive and experimental nature.<sup>99</sup>

Treaty body observations and recommendations may also appear uninformative for development practitioners. These documents are composed based on information received from the U.N. agencies and other development practitioners. UNICEF, for instance, provides technical support for governments who are preparing reports to the treaty body review process.<sup>100</sup> UNICEF also “facilitates the civil society alternative or ‘shadow reports’” that are submitted in this process and writes “confidential reports” for treaty bodies.<sup>101</sup> Observations and recommendations coming back to UNICEF from this process have, therefore, been formulated in close cooperation with the very experts for whom they are meant to provide practical guidance.

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95. UNFPA Manual, *supra* note 8, at 16.

96. Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 25; Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (entered into force Sept. 2, 1990).

97. For instance, the CESCR’s General Comment No. 14 is included in the WHO’s advocacy material on human rights-based approaches to health without speculation about its normative value. See WORLD HEALTH ORG., *supra* note 8, at 3, 8.

98. UNFPA Manual, *supra* note 8, at 46.

99. See Michael O’Flaherty, *Towards Integration of United Nations Human Rights Treaty Body Recommendations: The Rights-Based Approach Model*, in ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ACTION, *supra* note 2, at 29.

100. See U.N. CHILDREN’S FUND, *supra* note 7, at 51.

101. *Id.*

### E. *Ineffectiveness of Human Rights Enforcement Mechanisms*

The legalistic version of the HRBAs emphasizes the accountability of “duty-bearers” (which are mostly governments) in the implementation of human rights obligations.<sup>102</sup> The UNFPA Manual explains that a “HRBA establishes duties and obligations and corresponding claims, while underscoring the importance of creating accountability mechanisms at all levels for duty-bearers to meet their obligations.”<sup>103</sup> The manual asserts that human rights accountability mechanisms will lead to “better and more sustainable human development outcomes.”<sup>104</sup> Given the strong emphasis on human rights accountability mechanisms in the advocacy for the legalistic version of the HRBAs, the relative ineffectiveness of these mechanisms is embarrassing for its advocates.

To be sure, the enforcement procedures of international human rights treaties have been strengthened in recent years. New mechanisms have been established to allow human rights treaty bodies to hear individual complaints for alleged violations,<sup>105</sup> and international tribunals have expanded remedies available for victims of human rights violations.<sup>106</sup> Nonetheless, governments consider the recommendations of human rights treaty bodies on individual human rights violations as

102. UNFPA Manual, *supra* note 8, at 25.

103. *Id.* at 15. *See also Common Understanding*, *supra* note 12; Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 7, 24–25.

104. UNFPA Manual, *supra* note 8, at 15. *See also* WORLD HEALTH ORG., *supra* note 8, at 31 (stating that “[m]echanisms of accountability are crucial for ensuring that the State obligations arising from the right to health are respected”).

105. *See, e.g.*, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, *opened for signature* Dec. 19, 2011, U.N. Doc. A/RES/66/138 (entered into force Apr. 14, 2014). As of January 2016, the protocol had 24 States Parties. United Nations Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11-d&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-d&chapter=4&clang=_en) (last visited Jan. 28, 2016). *See also* Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 10, 2008, U.N. Doc. A/RES/ 63/117 (entered into force May 5, 2013). As of January 2016, this Protocol had 21 Parties. United Nations Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3-a&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3-a&chapter=4&clang=_en) (last visited Jan. 28, 2016).

106. *See* Gerald L. Neuman, *Bi-Level Remedies for Human Rights Violations*, 55 HARV. INT’L L.J. 232 (2014); DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (2005).

“views and suggestions” rather than as binding resolutions.<sup>107</sup> The decisions of regional human rights tribunals—such as the European Court of Human Rights and the Inter-American Court of Human Rights—are formally binding, but a significant compliance problem remains in the implementation of these resolutions.<sup>108</sup>

In addition to international enforcement mechanisms, advocates of rights-based approaches emphasize the role of national courts in the enforcement of international human rights obligations.<sup>109</sup> While domestic judicial processes may suffer from fewer compliance problems than international procedures, the use of domestic courts has limits in human rights advocacy. The enforcement of social rights in domestic courts has reportedly benefitted middle- and upper-class individuals more than the poorest population groups.<sup>110</sup>

Aside from international and domestic judicial procedures, advocates of the HRBAs note that there are many non-judicial mechanisms that increase duty-bearers’ accountability for their human rights obligations. OHCHR, for instance, lists a number of strategies for “[e]nsuring accountability.”<sup>111</sup>

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107. China explains in its report to the Human Rights Council that it “values and gives full consideration to the views and suggestions expressed by the treaty bodies, and adopts and implements these to the greatest extent its domestic conditions permit.” See Hum. Rts. Council, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, at 4, U.N. Doc. A/HRC/WG.6/17/CHN/1 (Aug. 5, 2013). For compliance, see COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE 140–41 (2013).

108. Hillebrecht notes that the European Court of Human Rights has a “remarkably high” compliance rate at forty-nine percent. The Inter-American Court of Human Rights has a thirty-four percent compliance rate. HILLEBRECHT, *supra* note 107, at 11.

109. *Id.* at 3. See also U.N. CHILDREN’S FUND, *supra* note 20, at 3; WORLD HEALTH ORG., *supra* note 8, at 32–34.

110. See generally David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 190, 199–200 (2012). In New Delhi, India, rights-based activism is reportedly “constituted or framed by middle-class discourses.” Martin Webb, *Activating Citizens, Remaking Brokerage: Transparency Activism, Ethical Scenes, and the Urban Poor in Delhi*, 35 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 206, 209 (2012).

111. For references to treaty body reports as a source of human rights norms and standards see, for example, Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 24.



These strategies range from awareness-raising and alliance-building to the use of qualitative data and participatory monitoring of development programmes.<sup>112</sup> Such methods are tried and tested tools of development cooperation, but they are not particularly “legal.”<sup>113</sup>

#### F. *Objections from General International Law*

Finally, the legalistic version of the HRBAs suffers from an inconvenience that is directly related to its objective to base development policies and programmes on legal obligations. As mentioned above, the goal of the legalistic version of the HRBAs is to move “development action from the optional realm of benevolence (or charity) into the mandatory realm of law.”<sup>114</sup> International law not only contains human rights norms, but it also provides legal techniques to oppose particular arguments about a State’s human rights obligations. Of course, arguments about international law take place on the level of high diplomacy, which is far removed from the day-to-day practice of development cooperation.<sup>115</sup> Legal arguments may simply be ignored in the practical implementation of HRBAs.<sup>116</sup> Nevertheless, it is inconvenient for the advocates of the HRBAs that the principles of State sovereignty and non-intervention remain integral to international legal argumentation and that these principles may also be used to resist specific arguments about the international obligations borne by a State.<sup>117</sup>

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112. *Id.* at 24–25; WORLD HEALTH ORG., *supra* note 8, at 31–32.

113. For a non-legal explanation of these strategies, see, for example, JAMES CYPHER & JAMES DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 44, 195, 230, 378 (2009). For the observation that the issues on the HRBA agenda “have been on the [development] agenda for anywhere between ten and 30 years,” see Peter Uvin, *From the Right to Development to the Rights-Based Approach: How “Human Rights” Entered Development*, 17 *DEV. PRAC.* 597, 603 (2007).

114. UNFPA Manual, *supra* note 8, at 15.

115. See Miia Halme-Tuomisaari, *Contested Representations: Exploring China’s State Report*, 1 *J. L. ANTHROPOLOGY* 333, 351 (2013).

116. For instance, the extensive evaluation of the implementation of human rights-based approaches in UNICEF makes no mention of legal impediments. See U.N. CHILDREN’S FUND, *supra* note 7, at 15–16.

117. See generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (reissued 2006).

In human rights law, these principles culminate in the requirement that human rights obligations be based on State consent.<sup>118</sup> Consent-based arguments emerge whenever a specific argument about a State's human rights obligations is advanced on the basis of international human rights treaties. Most obviously, States that have refrained from acceding to specific human rights treaties can point out that these particular treaties do not apply to them.<sup>119</sup> A number of States have also made far-reaching reservations to international human rights treaties. Reservations are generally available under the *Reservations* opinion and the Vienna Convention on the Law of Treaties, as long as they do not frustrate or impair the object and purpose of the treaty.<sup>120</sup>

The legal effects of reservations that frustrate or impair the object and purpose of a human rights treaty are debatable.<sup>121</sup> Regardless of their legal effects, far-reaching reservations complicate the advocacy of certain human rights. The

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118. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 1951 I.C.J. 15, at 21 (May 28) (establishing the principle that a "State cannot be bound without its consent"). The Human Rights Council of Australia acknowledges the consent-based nature of international law. See HUM. RTS. COUNCIL AUSTL., *supra* note 1, at 15. Consent-based arguments remain a feature of international law, even though some scholars have argued since the 1990s that the concept of sovereignty in international law has become more restricted since the Second World War. For the alleged erosion of sovereignty, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995); Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31 (1996); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990); Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOV. & OPP. 159-90 (2004).

119. For information about parties to human rights treaties, see *Multilateral Treaties Deposited with the Secretary-General*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en> (last visited Jan. 14, 2017).

120. *Reservations*, 1951 I.C.J. at 24; Vienna Convention on the Law of Treaties art. 19, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

121. The question is whether the State making such a reservation should be regarded as being a party to the treaty without the benefit of the reservation or whether the impermissible reservation casts the State out of the entire treaty. See generally Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002).

UNFPA Manual, for instance, cites two reservations to the Convention on the Elimination of All Forms of Discrimination against Women.<sup>122</sup> The first reservation (unnamed in the UNFPA Manual but actually made by the Government of Australia) states that the government is not able to “introduce maternity leave with pay.”<sup>123</sup> The second reservation (made by the Government of Bangladesh) states that the government “does not consider as binding upon itself the provisions [on eliminating discrimination against women] as they conflict with Shari’a law based on Holy Quran and Sunna.”<sup>124</sup> The UNFPA Manual does not discuss the permissibility of these two reservations under international law but instead urges its readers to contemplate whether the ratifications are against the “spirit of the treaty.”<sup>125</sup> Finally, States may oppose specific interpretations of international human rights law through consent-based arguments. Such arguments are typically attributed to non-Western countries, which oppose the universalist human rights agenda.<sup>126</sup> However, Western donor States, such as the United Kingdom and the United States, have made use of consent-based arguments against expansive interpretations of international human rights law.<sup>127</sup>

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122. See Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

123. UNFPA Manual, *supra* note 8, at 43. For Australia’s reservation, see CEDAW, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en) (last visited Feb. 15, 2017).

124. UNFPA Manual, *supra* note 8, at 43. For Bangladesh’s reservation, see CEDAW, *supra* note 123.

125. UNFPA Manual, *supra* note 8, at 43.

126. See David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 NORDIC J. INT’L L. 385, 418–19 (1996).

127. See United Kingdom, Observation by the Government of the United Kingdom on General Comment No. 24, para. 12, U.N. Doc. A/50/40 (July 21, 1995), <http://www.iilj.org/wp-content/uploads/2016/08/US-and-UK-Responses-to-the-General-Comment.pdf> (insisting that the Human Rights Committee only enjoys such powers that provided for in the International Covenant on Civil and Political Rights); US-UK Observations, *supra* note 91, at 131–34 (stating that international legal obligations are based on consent).

## IV. POLITICAL AND ETHICAL CONCEPTIONS OF HUMAN RIGHTS

A. *From Legality to Politics and Ethics*

The problems riddling the legalistic version of the HRBAs have persuaded some promoters of the approaches to perceive human rights as concepts of political thought and ethics rather than as law. While U.N. agencies commonly make use of non-legal definitions of human rights,<sup>128</sup> the political and ethical version of the HRBAs is particularly popular within academia. Amartya Sen, one of the most prominent advocates of rights-based approaches to development, argues that proclamations about human rights are “really strong ethical pronouncements as to what *should* be done.”<sup>129</sup> Sen argues that the existence of such proclamations is fundamentally different from the existence of “a legislated law in the statute book.”<sup>130</sup> As ethical claims, human rights proclamations are in the same category as utilitarian and libertarian claims about social justice, and as such, they are “eminently discussable” in the political arena.<sup>131</sup> Thomas Pogge, another prominent advocate of human rights in the developmental context, argues that we should “avoid any conceptual connection of human rights with legal rights.”<sup>132</sup> Pogge does not object to human rights being “juridified in international law,” but he does not derive their desired content from international human rights law.<sup>133</sup> Instead, Pogge views a human right as “a moral claim *on* any coercive social institutions.”<sup>134</sup> William Easterly, yet another prominent advocate of the rights-based approaches, perceives “rights” in non-legal terms as conceptions of political ideology, which took shape in the “free cities in northern Italy and

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128. See U.N. DEV. PROGRAMME, *supra* note 1, at 25; U.N. CHILDREN’S FUND, *supra* note 20, at 18; Section VI.A, *infra*.

129. SEN, *supra* note 19, at 357.

130. *Id.* Marks, *supra* note 11, distinguishes Sen’s capability approach from the human rights-based approach. In *The Idea of Justice*, however, Sen presents his theory as an element of “what is now called the human rights approach.” SEN, *supra* note 19, at 206.

131. SEN, *supra* note 19, at 360–61.

132. POGGE, *supra* note 1, at 52.

133. *Id.*

134. *Id.* For linkages between the Universal Declaration on Human Rights, see *id.* at 70–72.

spread to other parts of Europe.”<sup>135</sup> According to Easterly, these rights include “both political and economic rights . . . traditionally respected in today’s mature capitalist democracies.”<sup>136</sup>

As concepts of political thought and ethics, rights-based approaches are advocated as worthy *ideas* rather than as concepts that are binding on the strength of their legal validity. Under this approach, human rights are instrumental for realizing development objectives. According to Amartya Sen’s well-known observation, “no famine has ever occurred in a functioning democracy with regular elections.”<sup>137</sup> In Sen’s view, a democratic government has “an excellent incentive to do its best to eradicate famines,” because famines would be a “political disaster for a ruling government.”<sup>138</sup> Easterly argues that respect for individual rights correlates positively with economic and social development: “The regions with collectivist values and autocratic history are still poorer today than those with individualistic values and a more democratic history.”<sup>139</sup> In Easterly’s view, a system of political rights enables voters to vote out poorly performing governments, and economic freedoms allow those who are best informed—private individuals—to act on their own accord.<sup>140</sup>

As is the case with legal conceptions of the human rights based approaches, the proponents of political and ethical conceptions of human rights do not merely argue that rights bring about development objectives. These proponents also seek to define development objectives on the basis of rights or on the basis of the underlying freedoms that necessitate these rights. Under Amartya Sen’s “capability approach” freedoms are instrumental for ensuring “more *opportunity* to pursue our objectives—those things that we value.”<sup>141</sup> In Sen’s view, freedoms are intrinsically valuable because “we may attach importance

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135. EASTERLY, *supra* note 14, at 130. For Easterly’s support for the “rights view” to development, see *id.* at 152.

136. *Id.* at 12.

137. SEN, *supra* note 19, at 342.

138. *Id.* at 343.

139. EASTERLY, *supra* note 14, at 141.

140. *Id.* at 148–49.

141. SEN, *supra* note 19, at 228. See also SEN, *supra* note 1; Amartya Sen, *Human Rights and Capabilities*, 6 J. HUM. DEV. 151 (2005).

to the *process* of choice itself.”<sup>142</sup> Easterly believes it to be a mistake to discount the intrinsic appeal of individual freedoms to non-Western people: “Poor people (like rich people) do not like being told what to do.”<sup>143</sup> Thomas Pogge focuses on the duties of donor States and their citizens. Pogge provides moral arguments to support the proposition that “privileged citizens of affluent countries should support structural reforms . . . that would reduce harms suffered by poor people in the less developed countries.”<sup>144</sup>

### B. *Context and Comparisons*

Political and ethical versions of the HRBAs can echo the universalist ideology of international human rights law, which appoints human rights as the universal basis of development policies. Pogge, for instance, advances a “*single, universal* criterion of justice which all persons and peoples can accept as the basis for moral judgments.”<sup>145</sup> However, the political and ethical approach to human rights may also view the relationship between rights and development in contextual and relative terms. Amartya Sen’s work *The Idea of Justice* attacks the notion that human rights or any other justice consideration could have metaphysical priority over other considerations.<sup>146</sup> The precise object of Sen’s critique is so-called “transcendental institutionalism.” Sen uses this concept first and foremost to criticize John Rawls’ theory of justice (as well as Pogge’s view of universal justice),<sup>147</sup> but the concept also describes central elements of the legalistic version of the rights-based approaches to development. Sen argues that transcendental institutionalism “concentrates its attention on what it identifies as perfect justice, rather than relative comparisons of justice and injus-

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142. SEN, *supra* note 19, at 228.

143. EASTERLY, *supra* note 14, at 150.

144. POGGE, *supra* note 1, at 264.

145. *Id.* at 39 (emphasis added).

146. SEN, *supra* note 19, at 65.

147. *Id.* at 11–12 (referring to the original edition of Rawls’ *A Theory of Justice* rather than to Rawls’ later texts). See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For Sen’s critique of Pogge, see SEN, *supra* note 19, at 71. As another object of criticism, Sen discusses Thomas Nagel’s doubts about the possibility of global justice. See SEN, *supra* note 19, at 25; Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005).

tice.”<sup>148</sup> Transcendental institutionalism also “concentrates primarily on getting the institutions right, and . . . is not directly focused on the actual societies that would ultimately emerge.”<sup>149</sup> As is the case with transcendental institutionalism, the legalistic version of the HRBAs envisions a universal form of justice that “[c]annot be waived or taken away,” despite differences in the practical implementation of human rights.<sup>150</sup> In contrast to transcendental institutionalism, Sen argues that the choices between social institutions “cannot neglect the actual social realizations that may be expected to emerge from any choice of institutions.”<sup>151</sup> Anti-transcendentalism allows Sen to acknowledge that there may exist conflicts within and between human rights and other policy considerations. Sen points out that “even with agreement on the affirmation of human rights, there can still be serious debate . . . on the ways in which the attention that is owed to human rights should be best directed.”<sup>152</sup>

The “chastened” version of the human rights-based approaches to development, advocated by Sen, claims no priority over other policy considerations on the basis of legal or metaphysical grounds. Nor does it argue that human rights will always and inevitably lead to better development outcomes. Instead, this version establishes the justness of social institutions and development policies through contextual and verifiable comparisons between different ethical and political claims. “Debates about justice,” Sen points out, “cannot but be about comparisons.”<sup>153</sup> Sen advocates perceiving development policies in terms of their “comprehensive outcome,” which includes the processes through which the policies are brought about, and not merely in terms of the culmination of these outcomes.<sup>154</sup> Sen argues that this kind of comparison should be performed with reference to the ideal of an “impartial spectator,” a person who is able to achieve a fuller and fairer understanding of views about ethics and justice because she is not

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148. SEN, *supra* note 19, at 5–6.

149. *Id.* at 6.

150. UNFPA Manual, *supra* note 8, at 37.

151. SEN, *supra* note 19, at 68.

152. *Id.* at 386.

153. *Id.* at 400.

154. *Id.* at 22–23.

motivated by vested interests, traditions, and customs.<sup>155</sup> Comparative, anti-transcendentalist views have been appealing to those development scholars who are wary of universal and metaphysical justifications for the HRBAs. As William Easterly argues, it is the “relative weight of evidence,” rather than “evidence sufficiently rigorous to meet an *absolute* standard of proof,” that points to the benefits of the rights-based approaches.<sup>156</sup>

### C. *Conceptual Weaknesses*

The political and ethical version of the HRBAs (and in particular its anti-transcendentalist, “chastened” form) has certain advantages over the legalistic version for the self-consciously pragmatic and context-sensitive development practitioners. The former version does not assume, a priori, that respect for international human rights law will always lead to better development outcomes. It all depends, is the message. In contrast to the legalistic version of the HRBAs, inefficient enforcement of international human rights law is not a problem for the political and ethical human version of the HRBAs. Nor are objections from general international law a concern for this version of the HRBAs. Governments may, of course, object to political and ethical arguments about human rights through legal means. However, they would be foolish to do so in light of the “relative weight of evidence” supporting the approaches.<sup>157</sup> Under this version, the debate about the HRBAs is not a legal one but a political and ethical one.

Yet, the political and ethical version of the HRBAs suffers from certain weaknesses as far as the purposes of international development cooperation are concerned. Most obviously, the explicit rejection of the link between human rights and international law is unhelpful for international development agencies and donor States. In the politically charged context of international development cooperation, development organizations and donor States have to be careful about not exceeding

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155. *Id.* at 44–46, 124–26, 131. *But see* RAWLS, *supra* note 147, at 26–27 (criticizing the conception of the “impartial spectator”).

156. EASTERLY, *supra* note 14, at 152.

157. *Id.*



their legal mandates.<sup>158</sup> International human rights law provides the least controversial basis for international human rights advocacy. Without the support of international human rights law, political and ethical arguments about human rights may easily appear arbitrary, controversial, and too “Western.” William Easterly, for instance, suggests that Asian collectivist values “are not necessarily . . . what individuals left to themselves value . . . since a collectivist society traps its members in collectivist values.”<sup>159</sup> Easterly argues that “the ideals expressed by citizens in an authoritarian regime may reflect social norms enforced by the social group or by the state, rather than what individuals really value.”<sup>160</sup> The legalistic version of the HRBAs avoids such controversial statements by appealing to State consent as a justification for individual values (or rights). After all, all states “have ratified at least one major human rights treaty.”<sup>161</sup>

Moreover, without a legal or metaphysical basis, the chastened version of the HRBAs comes down to an appeal to a reasoned discussion about the substance and status of human rights. Sen, for instance, stresses that the “impartial spectator” ideal does not generate disinterested and uninvolved decision-makers. Instead, the ideal is meant to inspire decision-makers, who already find themselves as members of particular groups and polities.<sup>162</sup> In other words, Sen does not argue that particular views about the substance and status of human rights can be impartial; he merely calls these views to be formed in a process, which is *intended* to be impartial.<sup>163</sup> It is difficult to see how this meta-level argument could move the supporters of, say, Asian collectivist values to abandon these values.

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158. PHILIPP DANN, *THE LAW OF DEVELOPMENT COOPERATION: A COMPARATIVE ANALYSIS OF THE WORLD BANK, THE EU AND GERMANY 192–95* (2013) (detailing the tensions that arise between the World Bank’s mandate and its political goals as the institution operates).

159. EASTERLY, *supra* note 14, at 144.

160. *Id.* at 149.

161. UNFPA Manual, *supra* note 8, at 85. Of course, the argument remains that there is no politically neutral and innocent way to arrange the rights and freedoms. See Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20 *Eur. J. Int’l L.* 7, 13 (2009).

162. SEN, *supra* note 19, at 131.

163. *See id.* at 385–87.

Views about desirable development outcomes and processes will also have to be communicated to development practitioners for implementation. Whenever this happens, questions about the correct interpretation of these views will inevitably emerge, just as they emerge with the legalistic version of the HRBAs. This can be seen in the popularized versions of Sen's "capability approach,"<sup>164</sup> which was adopted by UNDP in its 2000 Human Development Report.<sup>165</sup> Following Sen, the UNDP report delinks human rights from international law, arguing that human rights are "moral claims" rather than legal entitlements.<sup>166</sup> The report moves on to define desirable development outcomes in terms of seven "human freedoms." These comprise (i) freedom from discrimination; (ii) freedom from want; (iii) freedom for the realization of one's human potential; (iv) freedom from fear; (v) freedom from injustice; (vi) freedom of participation, expression and association; and (vii) freedom for decent work without exploitation.<sup>167</sup> The human freedoms are further defined in the report on the basis of international human rights law. For instance, the report discusses equality with reference to CEDAW and freedom from want with respect to the ICESCR.<sup>168</sup> These definitions suffer from the same ambiguity problems as the legalistic version of the HRBAs when they are offered as the basis of development policy-making and programming.

Another problem for the advocates of the HRBAs emerges from the fact that human rights alone, even when defined substantively, do not provide a self-standing development policy framework for the "chastened," anti-transcendentalist version of the human rights rights-based approaches. As a matter of both logic and practice, some other metric besides the HRBAs is needed in order to compare the policy outcomes of different rights-based claims and other development objectives. Unless these rights are vested with intellectually dubious "transcendental priority," this other metric can redefine and potentially trump specific rights claims. This is what Amartya

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164. *Id.* at 228.

165. U.N. DEV. PROGRAMME, *supra* note 1, at 2, 24.

166. *Id.* at 25.

167. *Id.* at 31.

168. *Id.* at 32-33.

Sen acknowledges in *The Idea of Justice*. Sen explains that “taking rights seriously” does not imply that a right “must always overwhelm every other argument in the contrary direction (based, for instance, on well-being, or a freedom not included in that right).”<sup>169</sup> In other words, “well-being” is a consideration that can outweigh right claims (albeit not “easily,” Sen notes).<sup>170</sup> Even if human rights are “included among the powerful determinants of action,” as Sen requires,<sup>171</sup> a full account of these other determinants is needed. According to this perception, human rights are not so much the basis of development policy-making and programming as one consideration among many others.

## V. THE RECONSTRUCTIVE—AND OPPORTUNIST—APPROACH TO HUMAN RIGHTS ADVOCACY

### A. *Human Rights as Entry-Points*

The two preceding parts sought to demonstrate that the legalistic and political and ethical versions of the HRBAs are destined for a supporting role in development policy-making and programming. It is possible that a development practitioner might find a pertinent statement in a treaty body report to support a particular development policy. Ostensibly, a development practitioner may also be inspired by a clause in a human rights treaty or a statement in a soft law instrument and decide to address a specific issue on that basis.<sup>172</sup> It may even be the case that a development practitioner is motivated by a scholarly text on human capabilities to reallocate resources to a new activity. But in none of these instances is development policy-making and programming “based” on the HRBAs. Instead, the approach is a tool or a consideration supplementing the decision making process. The above discussion identified two primary reasons for this. First, at times HRBAs define development policies too concretely for the practical purposes of development policy-making and programming (as a result of outdated legal provisions, for instance, or controversial conceptions of human freedoms). Second, and more com-

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169. SEN, *supra* note 19, at 360–61.

170. *Id.*

171. *Id.* (describing the scholarship of Mary Wollstonecraft and Thomas Paine).

172. For an example, see UNFPA Manual, *supra* note 8, at 178–83.

monly, HRBAs do not define development objectives concretely enough for the practical purposes of development policy-making and programming (because of vague legal provisions, for instance, or the assumption that other determinants of well-being may outweigh rights claims).

There is, however, a potential solution to these problems. Instead of attempting to derive the content of development policies from legal human rights norms or from political and ethical conceptions of human rights, it is possible to perceive human rights as substantively empty entry-points for social action. Such an approach to human rights and development views human rights as tools for a “creative” and “critical” (or, in the terminology of this Article, “reconstructive”) project.<sup>173</sup> Promoters of the reconstructive project hope that the institutional experiments inspired by creative and critical human rights practice “become beachheads for further mobilization and innovation.”<sup>174</sup> Ambiguous and conflicting human rights norms present no challenges for this project, because it merely seeks to use human rights language to “open up *political debate*” about the allocation of resources.<sup>175</sup>

The reconstructive version of the HRBAs calls for a significant change in perspective from the two versions discussed above. First, the reconstructive version does not equate human rights tools with formal monitoring and accountability mechanisms. As Jeremy Perelman has documented, human rights activists engaged with creative and critical projects use “all kinds of available tactics . . . including naming, shaming, litigating, and reporting,” as well as “coalition building, grassroots organizing, community development, policy advocacy, global networking, and media use.”<sup>176</sup> Second, the reconstructive ver-

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173. See White & Perelman, *supra* note 15, at 161–62 (featuring an example of the reconstructive approach).

174. *Id.* at 174.

175. See Jeremy Perelman & Lucie E. White, *Stones of Hope: Experience and Theory in African Economic and Social Rights Activism*, in *STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY* 150, 166 (Lucie E. White & Jeremy Perelman eds., 2011).

176. See Perelman, *supra* note 15, at 106 (footnote omitted). See also Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 *HUM. RTS. Q.* 63, 67 (2004) (arguing the most efficacious way for international human rights organizations to address ESC rights is through exposing governmental and nongovernmental conduct to a “disapproving public”).

sion of the HRBAs does not conceptualize development primarily as an expert-driven process. Whereas the advocacy of the first two versions of the HRBAs typically addresses development experts employed with international organizations and donor agencies, advocates of the reconstructive model focus their efforts on civil society organizations. To be sure, civil society organizations are featured in conventional policy guides on the human rights-based approach. However, such organizations play a much more limited role in these conventional policy guides than in the literature describing the reconstructive model. Whereas conventional policy guides encourage development experts to involve and engage with civil society organizations,<sup>177</sup> the reconstructive model views activists and civil society organizations as the primary agents of change. Consequently, the reconstructive model focuses primarily on grassroots level organizations instead of the traditional methods of human rights activism, such as the normative human rights practice of the U.N. agencies.<sup>178</sup>

Third, under the reconstructive version of the HRBAs, human rights are seen in terms of their relation to social practices rather than their intrinsic normative force. The reconstructive version does not call for more clarity and “objectively” agreed meanings for human rights principles.<sup>179</sup> Instead of basing human rights on a specific legal, political, or ethical source, the reconstructive model regards human rights as “different nodes within the power/knowledge nexus through which human rights emerges in social practice.”<sup>180</sup> Normativity itself is “understood as the means through which the idea of human rights becomes discursive, the process that renders human rights into social knowledge that shapes social action.”<sup>181</sup> Knowledge about the reconstructive model is, hence, more easily characterized as anthropological and sociological

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177. See FOOD & AGRIC. ORG., *supra* note 66, at 158; UNFPA Manual, *supra* note 8, at 42.

178. See Perelman, *supra* note 15, at 106-108.

179. For such a call, see Darrow & Tomas, *supra* note 1, at 496.

180. Goodale, *supra* note 15, at 8.

181. *Id.* See also Katharine Young & Jeremy Perelman, *Rights as Footprints: A New Metaphor for Contemporary Human Rights Practice*, 9 NW. U. J. INT'L HUM. RTS. 27, 38-39 (2010) (defining human rights as “footprints not blueprints”).

than legal or ethical.<sup>182</sup> Finally, social activists who are engaged with the reconstructive model feel no particular allegiances to the structural integrity of international human rights law. As a consequence, legal argumentation practiced by such social activists is less constrained by the doctrines of international law than the professionalized U.N.-based human rights advocacy.<sup>183</sup>

### B. *Operationalizing Opportunism*

Intellectual support for the reconstructive model can be found in a number of sources. Most obviously, the model is based on pragmatic and contextual tendencies in contemporary social thought and political theory. These tendencies deny the assumption that any pre-existing normative framework—whether legal or ethical—can serve as the universal “foundation” of justice.<sup>184</sup> Some tenets of this form of social thought are mainstream in contemporary academia and shared by the supporters of the political and ethical version of the HRBAs. As was explained above, Amartya Sen builds his critique of transcendental institutionalism on the assumption that evaluations about justice may have to be conducted on the basis of incomplete knowledge and unresolvable questions.<sup>185</sup> Sen also argues that there are many possible principles and interpretations affecting such evaluations.<sup>186</sup> But whereas Sen approaches rights and development through the positional ob-

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182. See Goodale, *supra* note 15, at 1, 11-12; Young & Perelman, *supra* note, 181, at 37. See also Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38 (2006) (arguing for an anthropological analysis of translators).

183. As mentioned, UNFPA acknowledges the “technically ‘non-binding’” nature of soft law instruments, although this is inconvenient for the agency’s goals. UNFPA Manual, *supra* note 8, at 46. See also Section III.D, *supra* (discussing the limited relevance of treaty body recommendations). Civil society organizations have fewer reasons for such acknowledgements.

184. On universalism and contextualism in political theory, see David Miller, *Two Ways to Think About Justice*, 1 POL., PHIL. & ECON. 5 (2002). In law, one manifestation of such anti-foundational contextualism is “reflexive pluralism.” Reflexive pluralism is a pragmatist approach to law, which “entails a commitment to respect and negotiate throughout the multiple legal orders and normative worlds that the activists encounter among the people with whom they work.” Perelman, *supra* note 15, at 107, 120.

185. See SEN, *supra* note 19, at 103.

186. *Id.* at 106.

jectivism of an ideal “disinterested spectator,” the intellectual defenses of the reconstructive model take a decidedly critical form. The promoters of the reconstructive model seek to describe and encourage human rights practices that “disrupt or reverse entrenched power hierarchies” rather than to convince their audiences of the justness of a certain form of social order.<sup>187</sup>

The reconstructive version of the HRBAs contests not only the conventions of the development establishment but also the dominant discourse of international human rights law. On the one hand, social activists challenge paradigmatic conceptions of international law “from below,” as Balakrishnan Rajagopal has explained.<sup>188</sup> Such challenges can ostensibly exist within the confines of international law, opening and amending the texture of international law according to a particular marginalized agenda. On the other hand, academic descriptions of creative and critical human rights practices portray social activists as being in bad faith about the “official” human rights discourse.<sup>189</sup> Under the reconstructive model, international human rights law is not self-evidently in the role of a liberator, as is the case in the legalistic model. Instead, the reconstructive model regards international law as rhetoric (as “ESCR language,” for example), which is to be strategically exploited.<sup>190</sup> In this project, the role of international human rights law depends on the “play” at hand. At times, the dominant human rights rhetoric may even be counterproductive for local social justice goals.<sup>191</sup>

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187. See White & Perelman, *supra* note 15, at 167.

188. See generally BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003) (critiquing twentieth-century international law from the perspective of third world social movements).

189. See Goodale, *supra* note 15, at 9, 13 n.10 (noting that scholars have demonstrated the usefulness of the “critical discursive approach to human rights”).

190. See Perelman, *supra* note 15, at 107.

191. See Raymond A. Atuguba, *Human Rights and the Limits of Public Interest Law: Ghana's Reaction to A Messy World Phenomenon*, 13 *UCLA J. INT'L L. & FOREIGN AFF.* 97, 120 (2008) (noting that not the rights-based approaches are not an “‘in thing’ for communities in Ghana today”); Goldstein, *supra* note 79, at 63 (stating that in Bolivia “human rights . . . is regarded by many as a foreign imposition that reduces national sovereignty and illegitimately shapes local realities”).

The reconstructive version of the HRBAs is not meant to be “operationalized” in international development cooperation in the same way as the legalistic and the political and ethical versions are intended to be. As a critical practice, the reconstructive version does not purport to provide a basis for development policy-making and programming. Instead, the reconstructive version describes tactics through which development practitioners may use the good will attached to human rights norms for their specific ends. This strategy builds on an opportunistic attitude towards the official, legalistic human rights discourse. Under the reconstructive version, the usefulness of human rights and HRBAs is not due to the substantive content conferred to these approaches within the official human rights discourse. Nonetheless—and this is why the approach is arguably cynical—the advocates of the reconstructive version still find reasons to support the illusions of the official human rights discourse.

The opportunistic attitude to human rights instruments may seem marginal, but evidence of it can be seen on the highest levels of human rights advocacy. UNDP’s aforementioned Human Development Report, for instance, both dismisses “legal or quasi-legal” definitions of human rights<sup>192</sup> and “readily” concedes “the rhetorical and agitprop merits of the language of human rights.”<sup>193</sup> Also the OHCHR urges development practitioners to use human rights language strategically: “The language of human rights can be powerful in both positive and negative ways.” The document notes that “[i]n some contexts it can ‘shut you down’ while in others it can serve your cause.”<sup>194</sup>

## VI. THE INTERPLAY BETWEEN THE THREE VERSIONS

To summarize the above discussion, it is possible to distinguish between three different versions of the HRBAs: (i) the legalistic version, which purports to establish a legal basis for

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192. U.N. DEV. PROGRAMME, *supra* note 1, at 25.

193. *Id.* at 24.

194. Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 18. The OHCHR’s approach could be conceptualized as “strategic legalism.” See generally BRONWYN LEEBAW, JUDGING STATE-SPONSORED VIOLENCE, IMAGINING POLITICAL CHANGE 44 (2011) (providing background information on strategic legalism).



development policies and programming in international human rights law;<sup>195</sup> (ii) the political and ethical version, which typically advocates the human rights-based approach as an empirically verifiable, worthy idea;<sup>196</sup> and (iii) the reconstructive version, which conceptualizes human rights as “language”<sup>197</sup> or “rhetoric”<sup>198</sup> that may or may not be useful for the advocacy of concrete social justice goals. Some scholarly texts maintain a neat distinction between the different versions of the HRBAs,<sup>199</sup> but as already suggested, development practitioners encounter all of these versions in policy documents advocating the approaches. This part makes a further point. It is not simply the case that the different versions of the HRBAs complement one another. Instead, the different versions interact so as to undermine one another and the general premise of the HRBAs.<sup>200</sup> The following section describes this effect through examples from key policy documents on the HRBAs.

#### A. *Between Legal Normativity and Ethics*

The legalistic version of the HRBAs, adopted by the U.N. agencies in their Common Understanding<sup>201</sup> is reproduced in most policy documents advocating the approaches.<sup>202</sup> While

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195. *Common Understanding*, *supra* note 12.

196. SEN, *supra* note 19, at 360–61. For a non-scholarly text maintaining the distinction, see U.N. DEV. PROGRAMME, *supra* note 1, at 25 (stating that legal rights should not be confused with moral rights and defining human rights as moral claims).

197. Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 18 (urging HRBA advocates to use language strategically).

198. U.N. DEV. PROGRAMME, *supra* note 1, at 24.

199. See, e.g., SEN, *supra* note 19, at 357–8 (stating that human rights are strong ethical pronouncements rather than already established legal rights).

200. This is a critical observation and contrary to the mainstream understanding of the human rights-based approaches. See, e.g., Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 17 (presenting the human rights-based approaches as a “holistic view,” which “lifts sectoral ‘blinkers’ and facilitates an integrated response to multifaceted development problems”); UNFPA Manual, *supra* note 8, at 277 (commending the flexibility of the human rights-based approaches).

201. *Common Understanding*, *supra* note 12.

202. For U.N. agencies, see Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 1 (defining human rights as “universal legal guarantees”); UNFPA Manual, *supra* note 8, at 15 (advocating for development action to be moved into “the mandatory realm of law”); U.N. CHILDREN’S FUND, *supra* note 20, at

international law provides the least controversial basis for human rights advocacy, the explicit connection between human rights and international law generates a number of re-occurring anomalies, which were discussed in Section III above. As one may expect, explicit rejections of the legalistic version of the HRBAs are rare in policy documents promoting the approaches. UNDP's Human Development Reports provide a significant exception to this general pattern. The 2000 Human Development Report makes it clear that "legal rights should not be confused with human rights" because they are insufficient "for the fulfilment of human rights."<sup>203</sup> In addition, the 2011 Human Development Report states explicitly that "human rights are not equivalent to legal rights."<sup>204</sup> Other recent Human Development Reports have been noncommittal about the legalistic version of the HRBAs without rejecting it explicitly.<sup>205</sup>

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9–10 (describing the international integration of the Common Understanding); WORLD HEALTH ORG., *supra* note 8, at 29 (stating that the WHO seeks to "advance the right to health in international law and international development processes"). For donor countries, see MINISTRY FOREIGN AFF. DEN., *supra* note 23, at 4; MINISTRY FOREIGN AFF., FIN., *supra* note 24, at 4–5; MINISTRY FOREIGN AFF., SWED., *supra* note 26, at 8. USAID states that the organization is committed to protecting and promoting "universally recognized human rights," but, in terms of international criminal law, it defines its development objectives on the basis of "American values." U.S. AGENCY INT'L DEV., *supra* note 28, at 21.

203. U.N. DEV. PROGRAMME, *supra* note 1, at 25.

204. U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2011, SUSTAINABILITY AND EQUITY: A BETTER FUTURE FOR ALL 86 (2011).

205. The most recent global Human Development Report, which focuses on work and human development, recognizes the ratification and implementation of international conventions on workers' rights as a strategy for ensuring workers' well-being. Nevertheless, the report refrains from defining "human rights" as legal rights. See U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2015: WORK FOR HUMAN DEVELOPMENT 160–61 (2015) (explaining the importance of using legislation and regulation to protect the rights and benefits of workers in order to strengthen the positive links between work and human development), <http://hdr.undp.org/en/global-reports> (last visited Jan. 15, 2017). Additionally, the 2014 Human Development Report keeps a certain distance from the legalistic version of the approaches, noting that "[a]spirationally" human rights "have been . . . recognized in the Universal Declaration of Human Rights." U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2014, SUSTAINING HUMAN PROGRESS: REDUCING VULNERABILITIES AND BUILDING RESILIENCE 86 (2014), <http://hdr.undp.org/en/global-reports> (last visited Jan. 15, 2017). UNDP's 2013 Human Development Report, which focuses on the global south, criticizes

Although policy documents seldom reject the legalistic version of the HRBAs explicitly, they often suggest that the legalistic version is, nonetheless, inadequate for the purposes of development policy-making and programming. First, policy documents find it necessary to define the human rights-based approach both in terms of legal norms and as an ethical conception. OHCHR, for instance, explains that “a human rights-based approach is the right thing to do, morally or legally.”<sup>206</sup> Also the UNFPA Manual insists that a “HRBA is the right thing to do—morally, legally and ethically,”<sup>207</sup> and goes on to define human rights as “intrinsic values.”<sup>208</sup> UNICEF’s guide maintains that “[h]uman rights are not simply legal entitlements [but] standards and principles that directly affect the day-to-day relationships between individuals in their communities.”<sup>209</sup> Reliance on both legality and ethics (or morality) suggests that neither legal nor ethical definitions of human rights are alone sufficient for the implementation of the HRBAs.

Second, policy documents deploy the political and ethical version of the HRBAs to compensate for the inadequacies of international human rights law. This can be seen, for instance, in the assertion that the “technically ‘non-binding’” nature of soft law instruments is mitigated by the moral force of these

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the “international human rights regime” for its emphasis on civil and political rights. U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2013, THE RISE OF THE SOUTH: HUMAN PROGRESS IN A DIVERSE WORLD 111 (2013), <http://hdr.undp.org/en/global-reports> (last visited Jan. 15, 2017). The organization did not publish a global report in 2012. The 2010 Human Development Report refrains from criticizing the legalistic version, explaining instead that “[i]nternational conventions . . . have given legal status to normative [human rights] claims.” U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2010, THE REAL WEALTH OF NATIONS: PATHWAYS TO HUMAN DEVELOPMENT 18 (2010), <http://hdr.undp.org/en/global-reports> (last visited Jan. 15, 2017).

206. Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 16.

207. UNFPA Manual, *supra* note 8, at 206.

208. *Id.* at 25.

209. U.N. CHILDREN’S FUND, *supra* note 20, at 87. For other references to moral obligations in HRBA advocacy, see FOOD & AGRIC. ORG., *supra* note 66, at 10 (stating that non-binding human rights instruments impose moral obligations on states); U.N., *Fact Sheet on Human Rights and a Human Rights-Based Approach*, in A HUMAN RIGHTS-BASED APPROACH TOOLKIT 1 (2009), [http://www.un.org.vn/en/publications/doc\\_details/115-a-human-rights-based-approach-toolkit.html](http://www.un.org.vn/en/publications/doc_details/115-a-human-rights-based-approach-toolkit.html).

instruments.<sup>210</sup> The inadequacy of international human rights law is also reflected in the proliferation of various quasi-legal principles that guide the HRBAs. These principles seek to compensate for the ambiguity of international human rights instruments by guiding “struggles over the meanings of rights.”<sup>211</sup> In UNICEF’s view, the effectiveness of the entire HRBAs arises from the “moral and political force” of these principles.<sup>212</sup>

Third, policy documents readily acknowledge that international human rights law is sometimes impractical for the concrete realities of development cooperation. According to the OHCHR, for instance, the practical implementation of the HRBAs requires “sensitivity to culture.”<sup>213</sup> Policy documents also acknowledge the controversial nature of human rights language in the development context. The UNFPA Manual, for example, concedes that a “HRBA will entail changes that may face strong political opposition and resistance by the elite in power.”<sup>214</sup>

There are, thus, many reasons for policy documents to make the move from legal arguments to the field of politics and ethics. However, policy documents also make use of an opposite argumentative pattern, which takes the argument

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210. See UNFPA Manual, *supra* note 8, at 46, and accompanying text (discussing certain non-binding instruments that, though they are non-binding, generally provide moral and political force to States). See also U.N. CHILDREN’S FUND, *supra* note 20, at 9 (referring to global conferences that have affirmed the right to education).

211. UNFPA Manual, *supra* note 8, at 28. See also FOOD & AGRIC. ORG., *supra* note 66, at 12, 16 (distinguishing principles of “dignity, transparency, empowerment and participation” from human rights and using principles to provide “concrete recommendations for action”); Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 16 (stating that principles and standards “derived from international human rights treaties should guide all development cooperation and programming”).

212. U.N. CHILDREN’S FUND, *supra* note 20, at 18.

213. Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 5. See also UNFPA Manual, *supra* note 8, at 19 (stating that “human rights can only truly have an impact if implemented in a culturally sensitive . . . way”).

214. UNFPA Manual, *supra* note 8, at 109. See also FOOD & AGRIC. ORG., *supra* note 66, at 188 (explaining that “high-level political support is critical” to implementing policies on the right to food); Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 18 (acknowledging the negative consequences of the “language of human rights”).

from the field of politics and ethics to legality.<sup>215</sup> This is necessary when the language of politics and ethics proves inadequate for the purposes of development policy-making and programming. As was discussed above, advocates of the HRBAs sometimes acknowledge that the approaches have not been widely implemented in development programming. Some advocates also acknowledge that the human rights-based approach suffers from a “[l]ack of solid evidence to prove its effectiveness.”<sup>216</sup> The language of legal obligations provides useful arguments against these observations. Even though the approaches have not been commonly adopted and even though there is no “solid evidence” to justify their adoption, the implementation of these approaches can be seen as a legal obligation in its own right. The UNFPA Manual, for instance, states that “[h]uman rights principles *must* guide all stages of the programme.”<sup>217</sup> Also the OHCHR notes that HRBAs “are anchored in a system of rights and corresponding obligations established by international law,” pointing out that “[m]ere charity is not enough from a human rights perspective.”<sup>218</sup> Similar appeals to legal normativity abound in policy documents on the HRBAs.<sup>219</sup>

The move from ethical and political versions of HRBAs to the legalistic version can also be observed in the historical development of certain specific discourses in the development community. For instance, the early scholarship on public health and human rights of the 1990s resembled the political and ethical version of HRBAs. At this time the linkages between human rights and health were perceived in terms of comparable and verifiable ideas instead of universally valid, transcendental conceptions of justice. It was, for instance, argued that documenting human rights violations could “help uncover previously unrecognized burdens on physical, mental

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215. This analysis echoes the movement between normative and sociological argumentative patterns in international law discussed in KOSKENNIEMI, *supra* note 117, at 17. Indeed, Koskenniemi’s book has inspired the title of this article.

216. UNFPA Manual, *supra* note 8, at 85–86. See generally UVIN, *supra* note 1, at 191.

217. *Id.* at 88 (emphasis added).

218. Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 15.

219. See U.N. DEV. PROGRAMME, *supra* note 1, at 25; UNFPA Manual, *supra* note 8, at 16; *HRBA in Viet Nam*, *supra* note 58, at 2.

or social well-being,”<sup>220</sup> but “rigorous evaluation” of the linkages between promotion and protection of rights and health was needed.<sup>221</sup> At this stage, the purpose was to “add a human rights dimension” to existing public health policies rather than to “replace more traditional public health efforts with a purely human rights-based approach.”<sup>222</sup> In the 1990s, promoters of the human rights-based approaches to health also viewed international human rights law with considerable nuance and skepticism.<sup>223</sup> As the HRBAs made headway in international organizations in the 2000s, the linkages between human rights and health came to be seen in increasingly categorical and legalistic terms. The legalistic model, as expounded by the World Health Organization at the time, came to assume that human rights were able to “provide a guiding framework for development plans, policies and processes.”<sup>224</sup> The attitude towards international human rights mechanism and language changed with the move to the legalistic model. Whereas the early promoters of human rights-based approaches to health had recognized “the limits of official organizational support for the call for social transformation inherent in human rights promotion,”<sup>225</sup> in the 2000s and 2010s the promoters of the approaches described the legitimacy of human rights language in much more positive terms.<sup>226</sup> Importantly, however, the legalization of the HRBAs has not been a one-way street, as political and ethical arguments remain in the arsenal of proponents of these approaches.<sup>227</sup>

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220. Jonathan M. Mann et al., *Health and Human Rights*, 1 HEALTH & HUM. RTS. 1, 19 (1994).

221. *Id.* at 21.

222. Jonathan M. Mann & Daniel Tarantola, *Responding to HIV/AIDS: A Historical Perspective*, 2 HEALTH & HUM. RTS. 5, 8 (1998). See also Mann et al., *supra* note 220, at 20.

223. See LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC 32–33 (1997) (acknowledging that there are tensions and ambiguities within international human rights doctrines).

224. WORLD HEALTH ORG. [WHO], A HUMAN RIGHTS-BASED APPROACH TO HEALTH 1 (2009), [www.who.int/hhr/news/hrba\\_to\\_health2.pdf](http://www.who.int/hhr/news/hrba_to_health2.pdf). For a similar UN-wide statement, see *Common Understanding*, *supra* note 12, at 1.

225. Jonathan M. Mann, *AIDS and Human Rights: Where Do We Go from Here?*, 3 HEALTH & HUM. RTS. 143, 146 (1998).

226. See Daniel Tarantola & Sofia Gruskin, *Human Rights Approach to Public Health Policy*, in HEALTH AND HUMAN RIGHTS IN A CHANGING WORLD 44 (Michael Grodin et al. eds., 3d ed. 2013).

227. See OESTREICH, *supra* note 35, at 161.

## B. *From Substance to Absence*

In conclusion, key policy documents advocating the HRBAs move easily between the mandatory realm of law and the realm of ethical and political human rights conceptions. These policy documents deploy ethical arguments when human rights law fails to deliver a desirable legal effect, and they refer to legal arguments when ethical conceptions of human rights fail to provide a sufficiently persuasive development policy framework. This argumentative strategy may be rhetorically effective in particular contexts, but it also has negative consequences for the advocacy of HRBAs in international development cooperation. The ever-shifting normative basis for the HRBAs has undermined the view that international human rights instruments are able to “guide all development cooperation and programming in all sectors and in all phases of the programming process,” as promised by the Common Understanding.<sup>228</sup> The oscillation between different definitions of human rights has also given rise to a dizzying conceptual framework in which legal and quasi-legal concepts intermingle with ethical propositions and claims about empirical causality between human rights and various development objectives.<sup>229</sup>

This conceptual clutter has resulted in considerable vagueness about the relationships between human rights “norms,” “rules,” “standards,” and “principles.” In conventional legal terminology, “principles” guide the application of law,<sup>230</sup> and “standards” are “norms,” which allow more discretion to those applying the standards than “rules.”<sup>231</sup> Following this conventional usage, policy documents on the HRBAs could describe “human rights principles” as non-legal or partly legal principles that guide the application of the “rules and standards” of human rights law. No such clarity can be found

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228. *Common Understanding*, *supra* note 12.

229. For the lack of conceptual clarity rights-based approaches in public health, see Sofia Gruskin, Dina Bogecho & Laura Ferguson, “Rights-Based Approaches” to Health Policies and Programs: Articulations, Ambiguities, and Assessment, 31 J. PUB. HEALTH POL’Y 129, 137–38 (2010).

230. RONALD DWORKIN, LAW’S EMPIRE 19 (1998).

231. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 188–90 (2009).

in policy documents that seek to operationalize the HRBAs.<sup>232</sup> In these documents, the term “norm” sometimes refers to all human rights norms, including specific rights enshrined in human rights treaties, as well as to “standards” (and sometimes also to “principles”) set out in other human rights instruments, and sometimes even to the more limited rule-like quality of specific rights, which are distinct from “standards” and “principles.”<sup>233</sup> “Standards” are sometimes synonymous with international human rights law;<sup>234</sup> and sometimes they coexist in international human rights law together with “norms” or

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232. In contrast, the short and declaratory Common Understanding refers consistently to “[h]uman rights standards contained in, and principles derived from” international human rights instruments. See *Common Understanding*, *supra* note 12.

233. Taken at face value, the conceptual framework of OHCHR’s guide on the HRBAs is vague and partly inconsistent. While the guide refers to “international human rights norms” as a general term for all international human rights law, it also distinguishes between “legal norms and standards” and between “human rights standards and principles.” Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 18, 25. The same guide refers to the term “standard” as a concept that is “reflected in the international treaties” and it defines human rights principles as, inter alia, “participation, non-discrimination and accountability.” *Id.* at 23. At the same time, the document conflates “[h]uman rights standards” with the principles of indivisibility, progressive realization of human rights, transparency and participation, and “the principle of non-retrogression of rights.” *Id.* at 11–12 (emphasis omitted). Other guidelines are equally vague about the relationship between human rights principles, standards and norms. See FOOD & AGRIC. ORG., *supra* note 66, at 1 (referring to “human rights principles” as a synonym for international human rights law); *id.* at 5 (using the phrase “norms of international law” to refer to international human rights law); *id.* at 187 (distinguishing between “right to food standards” and “human rights principles”); *id.* at 81 (referring to non-discrimination as a “principle”); *id.* at 214 (referring to non-discrimination in the context of “human rights standards”); U.N. CHILDREN’S FUND, *supra* note 20, at 10 (distinguishing between “norms, standards and principles of international human rights”); *id.* at 115 (distinguishing between “legal norms and standards”); UNFPA Manual, *supra* note 8, at 114 (distinguishing between “norms and standards set out in international human rights law”); *id.* at 129 (referring to “human rights norms” as a synonym for international human rights law).

234. Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 15 (stating that a HRBA “is a conceptual framework for the process of human development that is normatively based on international human rights standards”); *id.* at 25 (urging rights-bearers to ensure “that national laws are harmonized with international human rights treaty standards”); UNFPA Manual, *supra* note 8, at 14 (stating that a HRBA is “normatively based on international human rights standards”); U.N. CHILDREN’S FUND, *supra* note 20, at 18–19 (stating that a



“principles.”<sup>235</sup> “Principles” may “inform” the HRBAs—and thereby guide the application of human rights “standards”<sup>236</sup>—or they may coexist with “norms” and “standards,” and give rise to yet another “standard of achievement for all women, men and children and all nations.”<sup>237</sup> They may also be used synonymously with all human rights law.<sup>238</sup> A single policy guide on the HRBAs may provide different definitions of human rights “principles.”<sup>239</sup> “Rights” may be conflated with “principles,”<sup>240</sup> or with “standards,”<sup>241</sup> or they may be kept distinct from these concepts.<sup>242</sup>

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“rights-based approach to education” necessitates that “[a]ll programme activities are explicitly linked to human rights standards”).

235. Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 18 (referring to “international human rights standards and principles”); UNFPA Manual, *supra* note 8, at 30 (referring to “human rights standards and principles”); U.N. CHILDREN’S FUND, *supra* note 20, at 10 (referring to “norms, standards and principles of international human rights”); *id.* at 87 (describing “human rights” as “standards and principles”).

236. U.N. CHILDREN’S FUND, *supra* note 20, at 10. *See also* UNFPA Manual, *supra* note 8, at 16.

237. UNFPA Manual, *supra* note 8, at 15. *See also* U.N. CHILDREN’S FUND, *supra* note 20, at 10 (discussing the integration of “norms, standards and principles of international human rights into the entire process of development programming”).

238. FOOD & AGRIC. ORG., *supra* note 66, at 1. *See also* U.N. CHILDREN’S FUND, *supra* note 20, at 52.

239. In addition to its own PANTHER framework discussed in *supra* note 66 and the accompanying text, FAO defines human rights principles as “dignity, transparency, empowerment and participation.” *See* FOOD & AGRIC. ORG., *supra* note 66, at 16.

240. U.N. CHILDREN’S FUND, *supra* note 20, at 61 (referring to the “the right of every child to access to quality education” as a “principle”).

241. *See* FOOD & AGRIC. ORG., *supra* note 66, at 85 (stating that the content of the right to adequate food must “correspond to relevant international standards”); Office U.N. High Comm’r Hum. Rts., *supra* note 1, at 10 (stating that human rights “provide a set of performance standards”); UNFPA Manual, *supra* note 8, at 30 (emphasizing that “human rights” violations should be based on “international human rights standards” over long-standing traditions or cultural customs).

242. FOOD & AGRIC. ORG., *supra* note 66, at 16 (distinguishing between “human rights and principles” and defining principles as “dignity, transparency, empowerment and participation”); UNFPA Manual, *supra* note 8, at 70 (explaining that an HRBA “entails consciously and systematically paying attention to human rights and rights principles”); WORLD HEALTH ORG., *supra* note 8, at 29 (stating that an HRBA should “realize human rights and be guided by human rights principles and standards”).

The conceptual fuzziness suggests that it is neither the legalistic nor the political and ethical version of the HRBAs that accounts for the various uses of these approaches. Instead, the uses of human rights arguments in development cooperation are informed by an opportunistic attitude toward human rights language. Ultimately, human rights operate as decorative, substantively empty entry-points for arguments about development policies and programmes. Conceptual fuzziness does not matter for this project, since arguments about the HRBAs are effectively about contextual social justice claims that have been established in alternative normative frameworks. From this perspective, criticism against the conceptual framework of the HRBAs may even appear as a red herring, which draws attention away from various grassroots level social justice issues. Such criticism also risks stripping away the artifice of law and ethics, which the opportunistic advocates of the approaches find useful.

The opportunistic attitude to human rights language in international development organizations has been noted in scholarship,<sup>243</sup> and, as was demonstrated above, there is evidence of it in policy documents on the HRBAs.<sup>244</sup> As a final example of this attitude, it may be helpful to note how the UNFPA Manual addresses the criticism that a human rights-based approach “overemphasizes rights and neglects the concept of responsibilities.”<sup>245</sup> The UNFPA Manual acknowledges that such a “myth and misconception” exists,<sup>246</sup> and notes against this view that rights “come with corresponding duties and responsibilities.”<sup>247</sup> What the Manual does not mention in this context is that the duties and responsibilities relating to human rights are borne by the State and various non-State ac-

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243. See generally Andrea Cornwall & Celestine Nyamu-Musembi, *Putting the ‘Rights-Based’ Approach to Development into Perspective*, 25 *THIRD WORLD Q.* 1415, 1433 (2004) (concluding that international development agencies “use the language of rights-based approach to development largely to invoke the discursive power of the concept of right”); Koskenniemi, *supra* note 1, at 47 (interpreting human rights mainstreaming as a “project for seizing institutional power that is profoundly ambiguous in its effects”); OESTREICH, *supra* note 35, at 146 (noting that WHO staff describes rights-based programming in the organization as “opportunistic”).

244. See *supra* notes 192–95 and accompanying text.

245. See UNFPA Manual, *supra* note 8, at 85.

246. *Id.*

247. *Id.*

tors—not by individuals, whose rights claims are a concern for the critics of the HRBAs.<sup>248</sup>

Again, it may be sensible for the advocates of particular social justice causes to view human rights language strategically. Human rights language has the potential to alienate development practitioners and partners, and to complicate development programmes that are advocated through it.<sup>249</sup> Using this language must clearly be a strategic choice and not a goal in its own right. At the same time, the opportunistic approach to human rights language has rendered conceptual consistency a secondary concern for the advocates of HRBAs. The advocates of the approaches have become accustomed to overstating the possibilities of international human rights law and the HRBAs on the whole. It has been easy for them to forgo the complexities of international law and to advance empirically unfounded propositions about the links between human rights and development objectives. This attitude may have secured tactical victories, but it has also made the HRBAs a hard sell in international development organizations. Indeed, in spite of two decades of advocacy at the highest levels of the development community, the implementation of the HRBAs still rests on the shoulders of a small group of “true believers.”<sup>250</sup>

## VII. CONCLUSION

The above analysis suggests that the problems with the HRBAs cannot be resolved by providing yet more definitions for the various elements of the approaches. Such definitions would only add an additional layer of conceptual clutter to the already complicated policy frameworks. Moreover, it does not seem likely that the approaches can be fixed by turning them into an even more “flexible” policy framework. As discussed above, the fuzzy logic of the approaches has made them so flexible that the approaches can justify virtually any development policy or program presently implemented by U.N. agencies.

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248. *Id.* at 25. It should be noted that the Manual explicitly rejects the strategic use of human rights language for “politically useful” purposes. *Id.* at 85.

249. Alston, *supra* note 30, at 2; UVIN, *supra* note 1, at 47.

250. See OESTREICH, *supra* note 35, at 146, 152, 177.

These problems can be highlighted by comparing the present rhetoric about the HRBAs to a humbler way to discuss the relationship between human rights and development. A humbler version of the HRBAs would discard the assumption that human rights are able to guide development policy-making and programming in a meaningful way. Indeed, it would abandon the term “human rights-based approaches to development” altogether, since it would recognize that development policies and programs cannot be “based” on human rights. It would stress that the implementation of the HRBAs (or, more accurately, “human rights perspectives”) requires not only good will towards human rights language but also a pre-existing development policy framework, which provides a basis for choosing between different policy options. Furthermore, a humbler version of the HRBAs would acknowledge that human rights do not lead to greater policy coherence and normative clarity. For better or for worse, human rights in their various manifestations are extremely malleable and ambiguous concepts. A humbler version of the approaches would also acknowledge that there exist various conflicting rights claims about a given development issue, and it would not attempt to provide rights-based solutions for these conflicts. Finally, a humbler version of the approaches would make it clear there is no evidence that a human rights-based approach will lead to better and more sustainable development outcomes, nor will there probably ever be, given the vagueness of the approaches.

A humbler version of the approaches could, however, stand its ground by making a few modest and simple claims. In some instances, certain definitions of human rights may coincide with certain conceptions of desirable development outcomes and processes. In other instances, certain definitions of human rights may conflict with conceptions of desirable development outcomes and processes. In both of these instances, a development practitioner or a social activist may find it worth adding a human rights perspective to development policy-making and programming. This perspective would not attempt to conflate development outcomes and processes with human rights. Instead, it would seek to understand various human rights objections against existing articulations of desirable development outcomes and processes. At the end of this process, the development practitioner would be able to consider various normative claims about desirable development outcomes

and processes, some of which would be made on the strength of human rights language and some of which would not. This analysis would not give human rights claims transcendental priority over other welfare claims. Nor would this analysis be marketed as a necessary element of development policy-making and programming. Applying the human rights perspective to development would depend on a variety of contextual factors, which include budget concerns, the availability of human resources, the risk of diverting attention to potentially inconsequential debates about human rights, as well as the receptiveness of relevant stakeholders to human rights analysis. Policy documents advocating this perspective would spell out all of the above and provide plenty of examples of overambitious and legally and ethically dubious human rights claims.

The modest human rights-perspective to development described above is a realistic description of the actual possibilities of human rights mainstreaming in development policy-making and programming. This perspective will probably appear more plausible to development practitioners than the conceptual jumble promoted in existing policy guides on the approaches. As was seen above, many elements of this perspective are already present in key policy documents advocating the approaches—together with much more bombastic claims about HRBAs, which presently cancel out the humble human rights perspective. Nevertheless, the chance of the human rights community adopting the humble human rights perspective is slim. The perceived legitimacy of human rights language depends on grand universalist statements, which appoint human rights as the highest normative framework in all development policy-making and programming. If this high ground is not found in law, it is looked for in ethics, and *vice versa*. It is understandably difficult (but not impossible) for the advocates of the approaches to give up this argumentative strategy.

