Orchestrating Under Uncertainty: The Organization of Sustainable Development at the United Nations

Philip A. Sandick

ORCHESTRATING UNDER UNCERTAINTY: THE ORGANIZATION OF SUSTAINABLE DEVELOPMENT AT THE UNITED NATIONS

PHILIP A. SANDICK[*]

> *The United Nations was created not to lead mankind to heaven, but to save humanity from hell.*[†]
> –Dag Hammarskjöld, Former United Nations Secretary-General

> *The future will see not the renovation or the construction of a glistening new international [governance] architecture but rather the continued spread of an unattractive but adaptable multilateral sprawl that delivers a partial measure of international cooperation through a welter of informal arrangements and piecemeal approaches.*[††]
> –Stewart Patrick, Director of the International Institutions and Global Governance Program at the Council on Foreign Relations,
> *The Unruled World: The Case for Good Enough Global Governance*,
> FOREIGN AFFAIRS, 58 (Jan./Feb. 2014)

INTRODUCTION

We are in a state of crisis. Humanity is now considered the "dominant driver of change to the Earth System,"[1] threatening "major destabilization of the very ecosystems that sustain human life and well-being."[2] In a major report issued March 31, 2014, by the IntergovernmentalPanel

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[†] Dag Hammarskjöld, Former Secretary-General, United Nations, Address to General Assembly (1956).
[††] Stewart Patrick, Director of the International Institutions and Global Governance Program at the Council on Foreign Relations, *The Unruled World: The Case for Good Enough Global Governance*, Foreign Affairs, 58 (Jan./Feb. 2014).
[1] Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14 ECOLOGY & SOC'Y 14(2), 32 (2009) (citations omitted).
[2] Jeffrey Sachs, *The Future of Development Goals*, *in* COMMONWEALTH MINISTERS REFERENCE BOOK 2012 53, 54 (2012), *available at* http://earth.columbia.edu/sitefiles/file/Sachs%20Writing/2012/Commonwealth_Ministers_Book_SDGs.pdfmonwealth_Ministers_Book_SDGs.pdf.

on Climate Change, the "leading international body for the assessment of climate change"[3] stated that such change is occurring, but that the Earth's systems are so complex that it simply cannot know what the risks will be.[4]

Yet some people have already noted immediate risks. The Governor of California recently drew "a direct link between climate change and both the record-setting drought that has left the state parched and the early season wildfires that broke out across California last week."[5] Similarly, the Governor of Washington explained that climate change "is not a hypothetical thing for governors on the West Coast—this is fire alarms and floods."[6] While the preeminent scientists say we cannot know what exactly the effects of climate change will be, we do know about some of the immediate effects, and they do not bode well for humankind's future harmony with nature.[7] They don't even bode well for humankind's current harmony with nature.

But proactive laws in West Coast states will not solve the West Coast's climate problems. Rather, climate change is an international problem that requires an international solution. Even with the knowledge that action is required to mitigate the effects of climate change, we cannot seem to overcome our collective action problem. Director of the Columbia University Earth Institute Jeffrey Sachs recently lamented that despite numerous declarations, pacts, treaties, commissions, conferences, and summits since the Stockholm Conference on the Human Environment in 1972, "the course of our planet has not changed."[8]

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[3] Organization, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), http://www.ipcc .ch/organization/organization.shtml (last visited Nov. 13, 2014), *archived at* http://perma .cc/5YCX-VVEP.

[4] LISA V. ALEXANDER ET AL., IPCC, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOV- ERNMENTAL PANEL ON CLIMATE CHANGE 3, 4 (2013), *available at* http://www.climatechange 2013.org/images/report/WG1AR5_ALL_FINAL.pdf.

[5] Jennifer Medina, *In California, Climate Issues Moved to Fore by Governor*, N.Y. TIMES, May 20, 2014, at A12, *available at* http://www.nytimes.com/2014/05/20/us/politics/in -california-climate-issues-moved-to-fore-by-governor.html?_r=0, *archived at* http://perma .cc/8AXP-7NSE.

[6] *Id.*

[7] *See* Justin Gillis & Kenneth Chang, *Scientists Warn of Rising Oceans From Polar Melt*, N.Y. TIMES, May 12, 2014, at A1, *available at* http://www.nytimes.com/2014/05/13/science /earth/collapse-of-parts-of-west-antarctica-ice-sheet-has-begun-scientists-say.html ("The rise of the sea is likely to continue to be relatively slow for the rest of the 21st century . . . but in the more distant future it may accelerate markedly, potentially throwing society into crisis."), *archived at* http://perma.cc/X73D-8HQJ.

[8] Jeffrey Sachs, Keynote Speech at Session Five of the Open Working Group on Sustainable Development Goals (OWG5) (Nov. 25, 2013).

Thus, the state of crisis addressed by this Article has two facets: one of nature and one of global governance. This Article focuses on the second. It seeks to answer how best to design an organization to accomplish the goal of sustainable development within the current situations of global governance and environmental crisis.

In all but the most pseudoscientific corners,[9] it is recognized that we stand at the precipice. Even the popular financial media is saturated with calls for environmental accountability,[10] but global governance mechanisms thus far have been ineffective in this regard.[11] If we cannot solve the global governance crisis, we will not solve the natural crisis. And if we do not solve the natural crisis very soon, we will hand over to the next generation a planet in irreversible decline, a planet that may not be able to sustain human life as we know it for much longer.[12] As the *Economist* put it: "A hundred years from now, looking back, the only question that will appear important about the historical moment in which we now live is the question of whether or not we did anything to arrest climate change."[13]

The state of the planet is profoundly a human rights issue. To start, every person has the right to a "social and international order" in which her rights can be fully realized.[14] And since 1986, people have the explicit right to development.[15] In 2000, the "largest gathering of world leaders to date"[16] drafted and adopted the United Nations ("UN") Millennium Declaration, which set measurable, time-bound development targets—the famous Millennium Development Goals ("MDGs")—that were largely

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[9] *See generally Climate Name Change*, DENIERS & OBSTRUCTIONISTS, http://www.climate namechange.org/#/deniers (last visited Nov. 13, 2014), *archived at* http://perma.cc/5PAK -DDUB.

[10] *See, e.g.*, *Climate Change: In the Balance*, THE ECONOMIST (Apr. 5, 2014), *available at* http://www.economist.com/node/21600080/print; Scott Cendrowski, *Who Will Fix China's Pollution Mess?*, SCOTTCENDROWSKI.COM (Apr. 28, 2014) (asserting that "business created China's problem. Now it needs to fix it."), *archived at* http://perma.cc/SHV6-73N8.

[11] MARIA IVANOVA, GLOBAL GOVERNANCE IN THE 21ST CENTURY: RETHINKING THE ENVIRON-MENTAL PILLAR 13 (2011).

[12] *See generally* Rockström, *supra* note 1.

[13] *Climate Change: Durban and Everything That Matters*, THE ECONOMIST (Dec. 12, 2011, 9:13 PM), http://www.economist.com/blogs/democracyinamerica/2011/12/climate-change, *archived at* http://perma.cc/SR9A-CAJ8.

[14] A Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/3/217 (III), at 28 (Dec. 10, 1948) [hereinafter UDHR].

[15] Declaration on the Right to Development, G.A. Res. 128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986) [hereinafter Declaration on RTD].

[16] John W. McArthur, *Own the Goals: What the Millennium Development Goals Have Accomplished*, FOREIGN AFFAIRS 152, 154 (Mar./Apr. 2013).

based upon human rights norms. Some of those include the rights to education,[17] food,[18] water, and sanitation.[19]

The MDGs sunset in 2015, and progress has been uneven. On the purely developmental side, the "proportion of people living in extreme poverty has been halved at the global level"[20] and has been reduced significantly in every region.[21] At the same time, the maternal health goals "require accelerated interventions and stronger political backing" in order to meet their targets,[22] and the targets related to women's employment and political participation are far off schedule.[23]

And then there is MDG 7, which addresses environmental sustainability. Despite the target of "revers[ing] the loss of environmental resources,"[24] deforestation and greenhouse gas emissions continue to accelerate.[25] Fish stocks remain overexploited.[26] Simply put, global development practices have been both uneven and unsustainable, and progress on climate change has gone almost nowhere.[27]

Thus, the real challenge is *sustainable* development. The successors to the MDGs will likely be called the SDGs—the Sustainable

[17] *See Millennium Development Goal 2*, UNITED NATIONS, http://www.un.org/millennium goals/ (last visited Nov. 13, 2014) [hereinafter MDG], *archived at* http://perma.cc/9UMD -CA9R; UDHR, *supra* note 14, at 26(1); International Covenant on Economic, Social and Cultural Rights, G.A. Res.2200A, U.N. Doc. A/RES/2200A (vol. 993) (Dec. 16,1966) at 13 [hereinafter ICESCR]; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (vol.1577) (Nov. 20, 1989) at 28 [hereinafter CRC].

[18] *See* MDG 1, *supra* note 17; UDHR, *supra* note 14, at art. 25; ICESCR, *supra* note 17, at art. 11.

[19] *See* MDG 7, *supra* note 17; UDHR, *supra* note 14, at art. 25; International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, U.N.T.S. 14668 [hereinafter ICCPR]; ICESCR, *supra* note 17, at 11; The Right to Water, Committee on Economic, Social, and Cultural Rights (CESCR), General Comment No 15 of 2002; UNGA, Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, U.N.T.S. vol. 1249, p. 13, art. 14(2) [hereinafter CEDAW]; CRC, *supra* note 17, at art. 24(c); *See generally* Human Rights Council Res. 7/22, Human Rights and Access to Safe Drinking Water and Sanitation (Mar. 28, 2009).

[20] UNITED NATIONS, MILLENNIUM DEVELOPMENT GOALS REPORT 2013, 4 (2013) [hereinafter 2013 MDG REPORT].

[21] UNITED NATIONS, MILLENNIUM DEVELOPMENT GOALS: 2013 PROGRESS CHART (2013) [hereinafter 2013 MDG PROGRESS CHART].

[22] 2013 MDG REPORT, *supra* note 20, at 5; 2013 MDG PROGRESS CHART, *supra* note 21.

[23] 2013 MDG PROGRESS CHART, *supra* note 21.

[24] *Official List of MDG Indicators*, MILLENNIUM DEV, GOALS INDICATORS, http://mdgs.un .org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm (last visited Nov. 13, 2014), *archived at* http://perma.cc/E2Q-H8PC.

[25] 2013 MDG REPORT, *supra* note 20, at 42–44.

[26] *Id.* at 44.

[27] *Id.* at 3.

Development Goals. The Open Working Group on Sustainable Development Goals ("OWG") is currently in the process of crafting goals, targets, and indicators[28] that countries and other actors around the world can use to galvanize a concerted effort to make development sustainable.[29] There have been thirteen OWG sessions. In this paper, sessions will be indicated by "OWG [number of session]."

How to galvanize and organize that concerted effort is the $64,000 question. A UN body called the High-Level Political Forum ("HLPF") is slated to oversee and to "promote system-wide coherence and coordination of sustainable development policies"[30] throughout the myriad sustainable development initiatives at the UN, including the SDGs. It is supposed to do that through "agenda-setting."[31] Like the SDGs, the HLPF is in its formative stages; commentators believe States will make important decisions about the HLPF's organizational design in the next six months to two years.[32] The consensus among States and stakeholders involved in the process is that organizational design features of the HLPF will be much less malleable after that.[33]

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[28] A note on the differences between these three terms. *Goals* are overarching policy outcomes, *e.g.*, "Goal 2: Achieve universal primary education." *See* MILLENNIUM DEV. GOALS INDICATORS, *supra* note 24. *Targets* are quantitative measures, *e.g.*, "Target 2.A: Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling." *See id. Indicators* specify exactly what measurements must be taken in order to make those quantitative measures accurate and precise, *e.g.*, Indicator 2.1: "Net enrollment ratio in primary education"; Indicator 2.2: "Proportion of pupils starting grade 1 who reach last grade of primary"; Indicator 2.3: "Literacy rate of 15–24 year-olds, women and men." *See id.*

[29] 2013 MDG REPORT, *supra* note 20, at 42.

[30] G.A. Res. 67/290, ¶ 7, U.N. Doc. A/RES/67/290 (Aug. 23, 2013).

[31] *Concept Note for the Expert Group Meeting on Agenda-Setting for the High-Level Political Forum on Sustainable Development*, UNITED NATIONS CONF. ON SUSTAINABLE DEV. (Apr. 2014), http://sustainabledevelopment.un.org/content/documents/3642Concept %20note%20for%20EGM%20on%20HLPF.pdf ("Among the functions contemplated for the HLPF, the most important is that of agenda-setting. The resolution stipulates that the forum will be a dynamic platform for regular dialogue and agenda-setting to advance sustainable development. It also mandates the forum to provide political leadership, guidance and recommendations for sustainable development, follow up and review progress in the implementation of sustainable development commitments, enhance the integration of the three dimensions of sustainable development in a holistic and cross-sectoral manner at all levels and have a focused, dynamic and action-oriented agenda, ensuring the appropriate consideration of new and emerging sustainable development challenges.").

[32] *See, e.g.*, Jan Gustav Stradeanas, Presentation on Modalities of Participation in the HLPF at OWG8 (Apr. 30, 2014).

[33] Steven Bernstein, *The Role and Place of the High-Level Political Forum in Strengthening the Global Institutional Framework for Sustainable Development*, Sustainable Dev. 4

Promoting system-wide coherence of all sustainable development initiatives at the UN is a massive mandate. That is especially true in an era of "global governance in pieces,"[34] when governments—including the most powerful—"recognize the futility of negotiating comprehensive international agreements among 193 UN member states, in the full glare of the media and alongside tens of thousands of activists, interest groups, and hangers-on."[35] Since governments now disaggregate issues into manageable chunks and coordinate with specific players on specific items, the HLPF will have its work cut out for it. And not to forget, this is all occurring in a state of natural crisis.

Designing the HLPF to be nimble and flexible is a good first step, because organizational design is a key factor in organizational functionality. That is particularly true both in international organizations ("IOs") and in crisis situations. This Article draws insights from the sociology of organizations literature, the IO literature, and the organizational crisis literature. In doing so, it blends aspects of each in a novel way in order to find a novel solution to the fledgling HLPF's operational challenges.

The novel solution is that the HLPF should be "heterarchical." Heterarchies are minimal-hierarchy organizations made up of people who have different conceptions of what is valuable.[36] Put another way, heterarchies "recognize that it is legitimate to articulate alternative conceptions of what is valuable, what is worthy, what counts."[37] And since different evaluations are recognized as legitimate, the organization has a constant baseline of "resourceful dissonance" or "creative friction."[38]

Creative friction is important in crisis situations. That is so because crisis situations are those in which the future is uncertain. An "uncertain" future is one in which what is valuable for organizational success now will not necessarily be valuable for getting through the crisis or for sustaining existence after the crisis.[39] Heterarchies are best suited for crisis situations because creative friction, a source of ongoing vitality, allows

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(Sept. 2013), *available at* http://sustainabledevelopment.un.org/content/documents/2331 Bernstein%20study%20on%20HLPF.pdf.

[34] Stewart Patrick, *The Unruled World: The Case for Good Enough Global Governance*, FOREIGN AFFAIRS 1, 2 (Jan./Feb. 2014), *available at* http://www.foreignaffairs.com/articles /140343/stewart-patrick/the-unruled-world, *archived at* http://perma.cc/6GT7-GNGJ.

[35] *Id.*

[36] DAVID STARK, THE SENSE OF DISSONANCE: ACCOUNTS OF WORTH IN ECONOMIC LIFE 5–6 (2009).

[37] *Id.* at 5.

[38] *Id.* at 5–6, 18.

[39] *Id.* at 6.

an organization to more easily recognize and respond to changes in what is valuable for organizational success.[40]

Creative friction also makes heterarchies highly functional "Orchestrators."[41] "Orchestration" is a soft governance mode[42] in which "one actor (or set of actors), the Orchestrator, works through a second actor (or set of actors), the Intermediary, to govern a third actor (or set of actors), the Target."[43] If the HLPF is the sustainable development Orchestrator, the Targets are those, such as States and multinational corporations, who have the ability to directly affect sustainable development processes.[44] Intermediaries could be many different types of entities, from NGOs to business associations to other intergovernmental organizations.[45]

In a crisis, what is valuable for an Intermediary's success changes, so an Orchestrator must be able to recognize that change and continue to support the Intermediary with newly necessary resources. Heterarchies are good at recognizing change and adapting to it because creative friction increases the likelihood that someone in the organization will recognize the change and be able to adapt to it, and minimal hierarchy means that *that* person will be able to make his or her case to the rest of the organization.[46]

But organizing the HLPF as a heterarchy may not be enough to solve the sustainability problem. One reason is that the HLPF may simply not have enough power to take the sort of action that might be required to mitigate environmental degradation.[47] Another reason is that some of those involved in negotiations at the UN have vested interests in the system continuing to work as it always has. Though climate change may not be averted, at least their jobs would be secure.

International human rights bodies and mechanisms provide fertile ground for analyzing the successes and failures of previous orchestration efforts, as well as the successes and failures of the MDGs. Because

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[40] *See id.* at 5–6.

[41] *See* Kenneth W. Abbott, et al., *Orchestration: Global Governance Through Intermediaries* 3, http://www.lawschool.cornell.edu/cornell-ILIR/upload/Orchestration-for-Cornell-3-14.pdf (last visited Nov. 13, 2014).

[42] *Id.* at 4. Used here in the "soft" law sense, as opposed to the "hard" law of legally binding instruments. *See id.* at 3, 8.

[43] *Id.* at 3.

[44] *See id.* at 2–3, 5.

[45] *See id.* at 5, 14.

[46] *See* STARK, *supra* note 36, at 5–6.

[47] *World Comm. On Env't and Dev., Report of the World Commission on Environment and Development: Our Common Future*, U.N. Doc. A/42/427 (Aug. 4, 1987).

"human rights and sustainable development objectives are closely linked and mutually reinforcing,"[48] this Article garners significant support for its arguments from the human rights literature. Lessons are drawn from the OHCHR's orchestration efforts, as well as the accountability mechanisms built into human rights treaty bodies. For example, the African Commission on Human and Peoples' Rights has adjudicated the right to development within the African Charter on Human and Peoples' Rights. In addition, International Human Rights ("IHR") norms provide the lens through which policy gaps in the MDGs can be seen with clarity.

This Article has three parts. First, this introduction has identified the two central problems: there is a global environmental crisis threatening our planet and its life, and efforts to mitigate or reverse environmental decline have not worked. Part I gives a brief overview of State cooperation in general and key historical instances of sustainable development cooperation at the UN. Part II proposes an organizational structure for the HLPF based upon the heterarchy and orchestration frameworks outlined above. Part III suggests an alternative arrangement, given HLPF insufficiencies that are already apparent. Finally, the Conclusion offers recommendations.

In addition to the multiple literatures mentioned above, this Article also draws insights from fieldwork at UN Headquarters at the end of 2013 and beginning of 2014. I observed, participated, and conducted interviews during the sixth, seventh, and eighth sessions of the Open Working Group on Sustainable Development Goals ("OWG"), took part in numerous preparatory meetings, and served on multiple steering committees. Substantial access provided numerous occasions for me to observe and reflect on the UN processes that currently coexist in the sustainable development sphere.[49] Those observations and reflections provide the foundation for an original contribution to the conversation, and I am greatly indebted to those who facilitated my access and experiences.

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[48] *TST Issues Brief: Human Rights Including the Right to Development*, SUSTAINABLE DEV., http://sustainabledevelopment.un.org/content/documents/2391TST%20Human%20 Rights%20Issues%20Brief_FINAL.pdf (last visited Nov. 13, 2014).

[49] The author does not subscribe to any particular sociological perspective, such as participant observation, ethnography, or grounded theory, but rather uses a blended approach. It is beyond the scope of this project to analyze which approach would be most effective in this setting. *See generally* James Fernandez & Michael Herzfeld, *In Search of Meaningful Methods*, *in* HANDBOOK OF METHODS IN CULTURAL ANTHROPOLOGY (H. Russell Bernard, ed., 1998).

I.   STATE COOPERATION ON SUSTAINABLE DEVELOPMENT

The history of sustainable development initiatives and coopera-
tion at the UN is long and robust: it starts with the beginning of the UN
and there is no end in sight. This section describes some of the pertinent
history and draws lessons from organizational successes and failures.

A.   State Cooperation in General

States cooperate to solve transnational problems, and often create
organizations to facilitate continued cooperation.[50] Political scientists will
explain that all international cooperation occurs "under anarchy."[51] That
is, even with the existence of global governance bodies like the UN, sov-
ereignty still lies with States that cannot be coerced into action.[52] Thus, a
State's decision to establish, design, and participate in an intergovern-
mental organization, at least under anarchy, cannot be coerced.

That having been written, States regularly enter into treaties and
other international agreements that partially abrogate their sovereignty.
States also regularly cooperate in the creation of international institutions.
The growth of international institutions is accelerating as the world
becomes more and more interconnected, since more interconnectedness
means more international issues that require international solutions, and
multilateral institutions "make [international] cooperation easier."[53] One
of the main reasons cooperation is easier in an institution is that insti-
tutions lower the transaction costs of cooperation by "enabl[ing] states to
share responsibilities and burdens."[54]

In fact, States have a legal duty to cooperate on development issues.
This "duty of international cooperation"[55] arises primarily from Articles 55

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[50] This view is somewhat contested in IR literature, for example by some realists who
argue that IOs are little more than tools of powerful States to impose their will with slightly
greater legitimacy. However, whether States create organizations in order to impose their
will or in order to facilitate pure cooperation, States nonetheless often create international
organizations in order to do so. *See* Alexander Thompson, *Coercion Through IOs: The
Security Council and the Logic of Information Transmission*, 60 INT'L ORG. 1, 1–3 (2006).
[51] *See* Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy:
Strategies and Institutions*, 38 WORLD POLITICS 226, 226 (Oct. 1985).
[52] *See* UN Charter, art. 2, para. 1.
[53] Robert H. Keohane, *Hegemony and After: Knowns and Unknowns in the Debate Over
Decline*, 91 FOREIGN AFFAIRS 114, 117 (July/Aug. 2012).
[54] *Id.*
[55] *See generally* Khurshid Iqbal, *The Declaration on the Right to Development and Imple-
mentation*, 1 POL. PERSP. GRADUATE J. 1, 1 (2007) (arguing that the duty to cooperate is
"the main principle" that lends the right to development legal force); Roland Y. Rich, *The

and 56 of the UN Charter, in which "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of"[56] the following "conditions of stability and well-being:"[57]

> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
> (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[58]

Specifics of the duty to cooperate arising out of Articles 55 and 56 have been clarified in subsequent UN resolutions, including the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States,[59] the 1975 Charter of Economic Rights and Duties of States,[60] and, of course, the 1986 Declaration on the Right to Development.[61]

In addition to the duty to cooperate on development issues, many States also already have the legal duty to respect, protect, and promote many of the substantive aspects of development.[62] A variety of UN-sponsored human rights treaties address these issue, including the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the International Covenant on the Elimination of All Forms of Racial Discrimination ("CERD"), the International Covenant on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), and the Convention on the Rights of the Child ("CRC").[63]

Right to Development as an Emerging Human Right, 23 VA. J. INT'L L. 287, 291 (1983) (arguing that the duty to cooperate is "the fundamental source of the right to development"); Noel G. Villaroman, *The Right to Development: Exploring the Legal Basis of a Supernorm*, 22 FLA. J. INT'L L. 299, 319–23 (Aug. 2010).

[56] U.N. Charter, art. 56.

[57] *Id.* at art. 55.

[58] *Id.*

[59] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625, U.N. Doc. A/RES/2625 (Oct. 24, 1970).

[60] Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. Doc. A/RES/3281 (Dec. 12, 1974).

[61] Declaration on RTD, *supra* note 15.

[62] *See, e.g.*, ICCPR, *supra* note 19.

[63] ICCPR, *supra* note 19; ICESCR, *supra* note 17; Convention on the Elimination of All

Of course, not all States have signed and ratified or acceded to these treaties, and many States have reservations to various treaty provisions.[64] But even when States agree to cooperate, the agreements they sign and the institutions they create vary in effectiveness and enforcement capabilities.[65] The rest of this section details the history of sustainable development cooperation within the UN.

B.   Pre-Rio Cooperation on Sustainable Development

The Brundtland Commission's 1987 report, *Our Common Future*, is the most commonly cited source of the definition of sustainable development, but the seeds of the concept were sewn much earlier. Sustainable development was an outgrowth of economic development. The text of the 1945 UN Charter pays particular attention to economic development in Chapters IX and X.[66] The 1960s was the first United Nations Decade of Development,[67] the 1970s was the Second UN Development Decade,[68] and the 1980s was the Third UN Development Decade.[69]

It was in the Second Development Decade that sustainability— that is, the environment—entered the picture. The 1972 Stockholm Conference's outcome document contained multiple provisions emphasizing that economic development initiatives must be compatible with environmental preservation and protection.[70] From 1972 on, the environment became an important feature of any discussion at the UN about economic development.[71]

Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; CEDAW, *supra* note 19; CRC, *supra* note 17.

[64] *See* ICCPR, *supra* note 19.

[65] *See infra* Part I.C.1.

[66] U.N. Charter, art. 55–72.

[67] RICHARD JOLLY ET AL., THE POWER OF UN IDEAS 8 (2005).

[68] *See* International Development Strategy for the Second United Nations Development Decade, G.A. Res. 2626, U.N. Doc. A/RES/2626 (Oct. 24, 1970).

[69] *See* International Development Strategy for the Third United Nations Development Decade, G.A. Res. 35/56, U.N. Doc. A/RES/35/56 (Dec. 5, 1980).

[70] United Nations Conference on the Human Environment, Stokholm, June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (1973). ("Principle 11. The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all.").

[71] *See* FELIX DODDS ET AL., FROM RIO+20 TO A NEW DEVELOPMENT AGENDA: BUILDING A BRIDGE TO A SUSTAINABLE FUTURE 5 (2014) (calling Stockholm "the precursor to the international agenda of sustainable development").

In contrast, there was little discussion of the environment prior to 1972. The 1948 Universal Declaration of Human Rights ("UDHR") only hints at environmental concerns.[72] Instead, the UDHR focuses on the rights of individuals (the inclusion of a right to development within the UDHR was discussed and scrapped during the drafting process).[73] Likewise, the International Covenant on Civil and Political Rights ("ICCPR") does not mention the environment, and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") only notes that the environment plays a role in the right to health.[74]

After the conclusion in 1982 of the ten-year review of the UN Environmental Programme—another outgrowth of the Stockholm Conference—then-UN Secretary-General ("UNSG") Javier Pérez de Cuéllar asked the Prime Minister of Norway, Gro Harlem Brundtland, to establish a World Commission on Environment and Development.[75] The UNGA formally endorsed the initiative at the end of 1983,[76] and the Brundtland Commission issued its final report in 1987.[77] That report, *Our Common Future*, defined sustainable development as "a balanced integration of social development, economic development, and environmental protection that meets the needs of the present generation without compromising the ability of future generations to meet their own needs."[78]

C.   *The Right to Development*

Before the Brundtland Commission issued its report, the right to development ("RTD") had already come into existence. First, in 1981, RTD was enshrined within the African Charter on Human and Peoples' Rights

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[72] UDHR, *supra* note 14, at art. 28 ("Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.").

[73] *See id.*

[74] *See* ICCPR, *supra* note 19; ICESCR, *supra* note 17, at art. 12(2)(b) ("The steps to be taken by the States Parties to the present Covenant to achieve the full realization of [the right to the highest attainable standard of physical and mental health] shall include those necessary for [t]he improvement of all aspects of environmental and industrial hygiene.").

[75] DODDS ET AL., *supra* note 71, at 5.

[76] Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond, G.A. Res. 38/161, U.N. Doc. 38/161 (Dec. 19, 1983).

[77] World Comm'n on Env't and Dev., Rep. of the World Comm'n on Environment and Development: Our Common Future, U.N. Doc. A/42/427 (Aug. 4, 1987) [hereinafter Our Common Future].

[78] DODDS ET AL., *supra* note 71, at 5.

("Banjul Charter").[79] Second, in 1986, the UNGA adopted its Declaration on the Right to Development ("Declaration on RTD").[80]

1. Banjul Charter Right to Development

Article 22 of the Banjul Charter establishes the collective RTD of "peoples" within all ratifying African States.[81] That article reads:

> 1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.[82]

The phrasing of RTD as a collective right by referring to "all peoples" instead of "all people" is in line with the established history of the right. That is, "after the wave of decolonization in the 1960s, the right to development [was first articulated as] a demand by developing countries against developed ones to bring to an end the perpetuation of, whether perceived or real, colonialist policies of economic domination and exploitation."[83] In other words, RTD was a direct product of what some continue to refer to as the "North-South Divide," but this paper will refer to as the Developed/Developing Divide ("D/D Divide").[84]

It is also worth noting that drafters incorporated into Article 22 the "common heritage of mankind" ("CHM") theory. While a single definition of CHM remains elusive,[85] it generally holds that certain realms fall

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[79] African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 22, *available at* http://www.achpr.org/instruments/achpr/ [hereinafter Banjul Charter], *archived at* http://perma.cc/S4QR-59PP.

[80] Declaration on RTD, *supra* note 15.

[81] Banjul Charter, *supra* note 79; *State Reporting,* AFR. COMM'N ON HUMAN AND PEOPLES' RIGHTS, http://www.achpr.org/states/ (last visited Nov. 13, 2014), *archived at* http://perma .cc/Q9BB-LPB6.

[82] Banjul Charter, *supra* note 79.

[83] Villaroman, *supra* note 55, at 300.

[84] For discussion of the term's obsolescence, see Jean-Philippe Therien, *Beyond the North–South Divide: The Two Tales of World Poverty*, 20 THIRD WORLD Q. 723–42 (1999). Those critiques notwithstanding, this paper continues to use the standard phraseology.

[85] *See, e.g.*, Jennifer Frakes, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach A*

outside of the jurisdiction of any particular sovereign state and should be held in trust for future generations.[86] Those realms are typically thought to be the Arctic, Antarctic, deep seabed, and outer space,[87] but Article 22 obviously references more accessible resources, too.[88]

The first and only time that Article 22 RTD was tested, the African Commission on Human and Peoples' Rights ("ACHPR" or "African Commission") upheld the right, found a violation, and ordered equitable and monetary relief.[89] In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, a community of 60,000 Endorois alleged that the government of Kenya forcibly removed the Endorois from three of their ancestral lands without prior consultation or adequate compensation.[90] The government did so in order to establish the Lake Hannington (later, Lake Bogoria) Game Reserve.[91] The Endorois sought restitution of their land, "with legal title and clear demarcation," as well as "compensation to the community for . . . the loss . . . of their property, development and natural resources, [and] . . . freedom to practice their religion,"[92] since the latter was linked to their particular ancestral land.

The Article 22 violation alleged and confirmed was that Kenya, by virtue of removing the Endorois, had failed "to adequately involve the Endorois in the development process and . . . to ensure the continued improvement of the Endorois community's well-being."[93] The "set of choices and capabilities open to" the Endorois shrank after their eviction, and their cattle died in large numbers after the Endorois were refused "access to the Lake, the salt licks and their usual pasture."[94]

The Endorois argued that the "realisation of the right to development . . . requires the improvement and increase in capacities and

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Compromise?, 21 WIS. INT'L L.J. 409, 409 (2003) ("The common heritage of mankind principle ("common heritage principle") is not clearly defined.").

[86] *Id.* at 413.

[87] *See* Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 28 STAN. ENVTL. L.J. 109, 110 (Feb. 2009).

[88] Banjul Charter, *supra* note 79.

[89] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Afr. Comm'n on Hum. & Peoples' Rts., Communication No. 276/2003 (Feb. 2, 2010) [hereinafter *Endorois v. Kenya*].

[90] *Id.* at ¶¶ 2–3.

[91] *Id.* at ¶ 177.

[92] *Id.* at ¶ 22.

[93] *Id.* at ¶ 125.

[94] *Id.* at ¶ 126.

choices" available to a people.[95] As such, they should have increased control over the use of their natural resources—as opposed to having them taken away without consultation or compensation and turned into a game reserve.[96]

The ACHPR agreed. It held that the Article 22 RTD:

> is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.[97]

Thus, because Kenya did not create a process by which the development of the game reserve "increased the capabilities of the Endorois," but actively decreased their capabilities, *inter alia*, to decide where to live, Kenya violated the Endorois's Article 22 RTD.[98]

The ACHPR noted other duties that may be triggered by RTD. First, a government must consult with indigenous peoples "especially when dealing with sensitive issues as land."[99] Failing to adequately consult could well lead to a failure to give the people their due influence in the process by which they are developed.[100] Greater evidence may be required to demonstrate adequacy where the indigenous peoples are in an "unequal bargaining position," such as being illiterate and/or possessing a different understanding of property use and ownership.[101] In those situations, the State must conduct the consultation in such a way that allows the indigenous peoples to be fully informed and to participate meaningfully.[102] Kenya lost on all of these grounds.

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[95] *Endorois v. Kenya*, at ¶ 126.
[96] *Id.*
[97] *Id.* at ¶ 277.
[98] *Id.* at ¶ 279.
[99] *Id.* at ¶ 281.
[100] *Id.*
[101] *Endorois v. Kenya*, at ¶ 282.
[102] *Id.*

Though a violation of RTD was found and Kenya was ordered to return land to the Endorois and pay them due compensation for their suffering, implementation of the decision has not been forthcoming. Two years after the African Commission's 2010 ruling, the Kenyan government was still "drag[ging] its feet" to implement the order.[103] Four years later, in February 2014, the Kenyan government actively contravened the ACHPR's decision by parceling out Endorois land to non-Endorois.[104]

Kenya was able to take or fail to take action because the Banjul Charter's "enforcement powers are limited to only making recommendations to the Assembly of Heads of States and Government."[105] While some African States demonstrated their desire for a more robust enforcement mechanism from the very signing of the Charter,[106] no such mechanism was included. As a result, "all Heads of State of the OAU [would] together tackle the problems of administering or enforcing the Charter."[107]

Endorois v. Kenya is a good demonstration of how anarchy affects cooperation. Kenya signed and ratified the Banjul Charter, but when it did not want to abide by a verdict against it, it simply ignored the ACHPR's decision.[108] Other States who shared responsibility for enforcing Charter obligations did not take adverse action against Kenya, for whatever reason. Perhaps because many of those other States, like Kenya, are also in violation of the Banjul Charter Article 62 requirement that they

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[103] *Two Years on from African Commission's Ruling, Kenya Continues to Drag its Feet in Recognizing Indigenous Peoples' Ownership of Wildlife Park, MRG Urges Government to Act*, MINORITY RIGHTS GROUP INT'L (Feb. 1, 2012), http://www.minorityrights.org/11191 /press-releases/two-years-on-from-african-commissions-ruling-kenya-continues-to-drag -its-feet-in-recognising-indigenous-peoples-ownership-of-wildlife-park-mrg-urges -government-to-act.html [hereinafter *Two Years*], *archived at* http://perma.cc/6HE7-AL53.
[104] *Rights Group Urges Kenyan Government to Stop Parcelling Endorois Community Land Without Consultation*, MINORITY RIGHTS GROUP INT'L (Feb. 20, 2014), http://www .minorityrights.org/12258/press-releases/rights-group-urges-kenyan-government-to-stop -parcelling-endorois-community-land-without-consultation.html, *archived at* http://perma .cc/FW2Z-ZLTH.
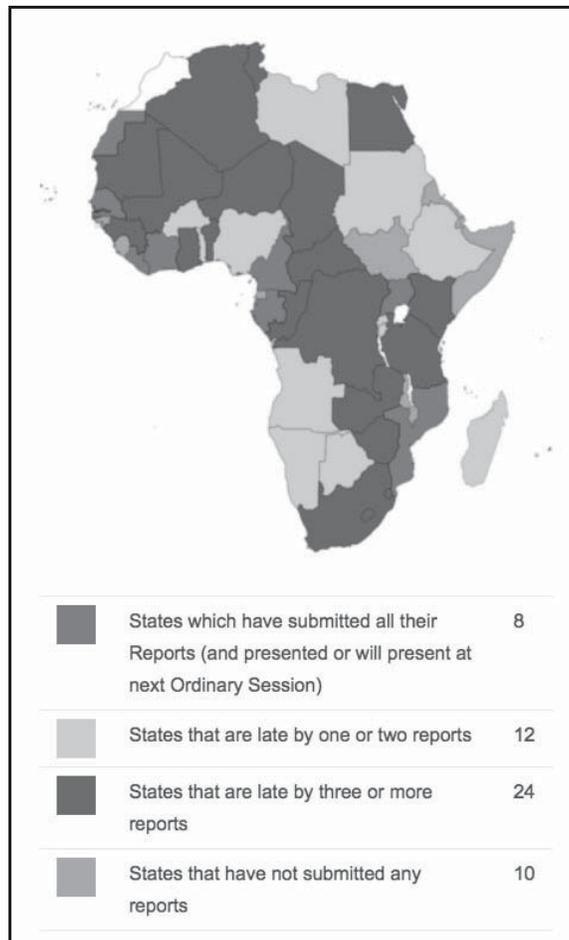[105] *Circle of Rights: Module 28: The African Commission on Human and Peoples' Rights and ESC Rights*, UNIVERSITY OF MINN. HUMAN RIGHTS RES. CTR, http://www1.umn.edu /humanrts/edumat/IHRIP/circle/modules/module28.htm (last visited Nov. 13, 2014), *archived at* http://perma.cc/9S3H-HGBZ.
[106] *See, e.g.*, Banjul Charter, *supra* note 79 ("While acceding to the African Charter on Human and Peoples' Rights it is the view of the Republic of South Africa that there should be consultation between States parties to the Charter, inter alia, to: consider possible measures to strengthen the enforcement mechanisms of the Charter.").
[107] *Id.*
[108] *Two Years*, *supra* note 103.

submit implementation reports every two years. A map of State compliance with Article 62 reporting obligations demonstrates said widespread dereliction[109]:

■	States which have submitted all their Reports (and presented or will present at next Ordinary Session)	8
■	States that are late by one or two reports	12
■	States that are late by three or more reports	24
■	States that have not submitted any reports	10

　　　　The key lesson learned from *Endorois* is that a development obligation within a regional cooperation agreement—without at least some enforcement power—does not guarantee results.

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[109] *State Reporting, supra* note 81.

2.   UN Declaration on the Right to Development

The UN Declaration on RTD[110] was more robust than the African version but had no implementing mechanism and no adjudicatory mechanism. In the legal sense, it was, like other UN General Assembly Declarations, non-binding.[111] It was also, like the Banjul Charter RTD, indicative of the D/D Divide. The United States was the only UN Member State to oppose the declaration; eight others abstained.[112]

The declaration did have some normative impact, however. RTD as codified in the declaration became an integral part of future conversations about development.[113] For example, the 1993 World Conference on Human Rights reaffirmed RTD as depicted in the Declaration on RTD and established that it is "a universal and inalienable right and an integral part of fundamental human rights."[114] And, at the 2000 UN Millennium Summit, discussed in further detail below, Member States passed a Declaration that included a pledge "to making the right to development a reality for everyone and to freeing the entire human race from want."[115]

D.   1992—Rio

Three years after the Declaration on RTD and two years after the publication of *Our Common Future*, the UNGA held a Conference on Environment and Development.[116] It did so because it was, more than twenty-four years ago, "[d]eeply concerned by . . . trends that, if allowed to continue, could disrupt the global ecological balance, jeopardize the life-sustaining qualities of the Earth and lead to an ecological catastrophe."[117] Renamed "the Earth Summit," the 1992 Rio Conference ("Rio") had seven

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[110] Declaration on RTD, *supra* note 15.

[111] Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876 (Sept. 1983).

[112] Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137, 138 (2004).

[113] *Id.*

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

[115] Millennium Declaration, G.A. Res 55/2, ¶ 11, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

[116] *UN Conference on Environment and Development (1992)*, UNITED NATIONS BRIEFING PAPERS, http://www.un.org/geninfo/bp/enviro.html (last visited Nov. 13, 2014), *archived at* http://perma.cc/VSU7-9XA3.

[117] G.A. Res 22/28, U.N. Doc. A/RES/44/228 (Dec. 22, 1989).

significant outcomes: 1) the Convention on Biological Diversity;[118] 2) the Desertification Convention;[119] 3) the Forest Principles;[120] 4) the UN Framework Convention on Climate Change ("UNFCCC"); 5) the Rio Principles; 6) Agenda 21; and 7) the CSD.[121]

The Conventions on Desertification and Biodiversity,[122] the UNFCCC, and the Forest Principles have had negligible impact on their respective areas.[123] As delegates were preparing to gather in Rio de Janeiro for Rio+20 in 2012, *Nature* published a "Rio Report Card"—and gave each of the three Rio treaties an "F" on its respective main assignment.[124] As of June 2012, the "overall growth rate of carbon emissions ha[d]n't changed much since 1970,"[125] "we continue[d] to lose biodiversity at an unprecedented rate,"[126] and the Desertification Convention had "received scant attention from governments" and was "the most underinvested of all conventions."[127]

Jeffrey Sachs commented at OWG5 that the SDGs were our "last best hope for finding a way forward that turns a situation that is extremely dangerous into one that can be enormously promising."[128] He continued:

> International law has not been sufficient. Twenty years after Rio, in which three well-drafted treaties were agreed and ratified, the course of the planet has not changed. We

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[118] United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.
[119] United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, 1954 U.N.T.S. 3.
[120] United Nations Conference on Environment and Development, June 3–14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. III), Annex III (Aug. 12, 1992).
[121] *Who We Are*, UNITED NATIONS DIV. FOR SUSTAINABLE DEV. IN BRIEF, http://www.un.org /esa/desa/aboutus/dsd.html (last visited Nov. 13, 2014), *archived at* http://perma.cc/V8V6 -DR6N.
[122] *See* Jeff Tollefson & Natasha Gilbert, *Rio Report Card*, 486 NATURE 20 (June 7, 2012) (asserting that the Biodiversity Convention failed "because it did not set concrete and focused targets, . . . provided no means to measure progress towards protecting wildlife and ecosystems[,] . . . lacked a dedicated body" and was underfunded, and that the Desertification Convention failed because it "received scant attention from governments" and was "the most underinvested of all conventions.").
[123] *Id.*
[124] *Id.*
[125] *Id.* at 21.
[126] *Id.* at 22 (quotation omitted).
[127] *Id.* at 23 (quotation omitted).
[128] Sachs, *supra* note 8.

> need the public engagement, the imagination, the moral
> sentiment of our young people, the energy of youth that
> can look to these goals as a fundamental new direction.[129]

The key lesson learned from these three treaties is the international counterpart to the Banjul Charter's regional illustration: a development obligation within an international cooperation agreement—without enforcement power—does not guarantee implementation.

1.   Rio Principles

The Rio Declaration on Environment and Development also established 27 Rio Principles.[130] Among other things, the Rio Principles affirm both the centrality of human beings in the development agenda[131] and poverty eradication as the top priority;[132] note each country's complete sovereignty over its domestic natural resources;[133] and establish the economic principles of "precautionary approach"[134] and "polluter pays."[135]

The Rio Principles also included the concept of "common but differentiated responsibilities" ("CBDR").[136] CBDR is an outgrowth of CHM—"common heritage of mankind"—theory and stands for the proposition that those who made the environmental mess (the developed world) should be the ones who clean it up.[137] It is considered "a manifestation of general principles of equity in international law"[138]—and also signifies representation of the developing world's agenda in multilateral agreements. The Rio Principles and particularly CBDR continue to be considered the necessary foundational principles of any UN sustainable development agenda.[139] Going forward, CBDR in particular will be recognized

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[129] *Id.*

[130] United Nations Conference on Environment and Development, June 14, 1992, U.N. Doc. A/CONF.151/26, 31 I.L.M. 874 (1992).

[131] *Id.* at Principle 1.

[132] *Id.* at Principle 5.

[133] *Id.* at Principle 2.

[134] *Id.* at Principle 15.

[135] *Id.* at Principle 16.

[136] United Nations Conference on Environment and Development, *supra* note 130, at Principle 7.

[137] *Legal Brief: The Principle of Common But Differentiated Responsibilities: Origins and Scope*, CTR. FOR INT'L SUSTAINABLE DEV. LAW 1 (Aug. 26, 2002), http://cisdl.org/public/docs /news/brief_common.pdf.

[138] *Id.*

[139] JOHN DREXHAGE & DEBORAH MURPHY, SUSTAINABLE DEVELOPMENT: FROM BRUNDTLAND TO RIO 2012 8, 2010.

by States and stakeholders alike as perhaps the only equitable way to assign obligations to mitigate or reverse climate change and other environmental degradation.

2. Agenda 21 and Major Groups

Agenda 21 was designed to be a sustainable development agenda for the 21st Century.[140] It is voluntary and non-binding.[141] Organizationally, it is perhaps the most important development to come out of Rio because it recognized that expansive stakeholder participation would be critical to the success of development initiatives.[142] It then established a system through which to channel that participation: Major Groups ("MGs").[143]

Agenda 21 established nine[144] "programme areas," called "Major Groups," in which it sought "real social partnership in support of common efforts for sustainable development."[145] The MG structure is used by multiple ECOSOC bodies related to development. These bodies allow various levels of access and participation to MG affiliates to ensure that stakeholders are involved in relevant global development discussions. Continued use of the MG structure was reaffirmed in the Rio+20 outcome document, *The Future We Want*.[146]

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[140] *See* Promoting Sustainable Human Settlement Development, United Nations Conference on Environment and Development, Agenda 21, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.I), ¶1.3 (1992) [hereinafter Agenda 21] ("Agenda 21 addresses the pressing problems of today and also aims at preparing the world for the challenges of the next century.").

[141] *FAQ: ICLEI, the United Nations, and Agenda 21*, ICLEI—LOCAL GOV'TS FOR SUSTAINABILITY, http://www.icleiusa.org/about-iclei/faqs/faq-iclei-the-united-nations-and -agenda-21 (last visited Nov. 13, 2014), *archived at* http://perma.cc/YDD5-ZQFF.

[142] *See* Agenda 21, *supra* note 140, at ¶ 23.2.

[143] *See id.* at ¶¶ 23.1–23.2 (1992) ("Critical to the effective implementation of the objectives, policies and mechanisms agreed to by Governments in all programme areas of Agenda 21 will be the commitment and genuine involvement of all social groups. One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making.").

[144] The nine areas are Women, Children and Youth, Indigenous Peoples, Non-governmental organizations ("NGOs"), Local Authorities, Workers and Trade Unions, Business and Industry, the Scientific and Technological Community, and Farmers. *See id.* at ch. 24–32.

[145] *Id.* at ¶ 23.4.

[146] The Future We Want, G.A. Res. A/RES/66/288 ¶ 43 (July 27, 2012) ("We underscore that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development. Sustainable development requires the meaningful involvement and active participation of regional, national and subnational legislatures and judiciaries, and all major groups.") [hereinafter TFWW].

In order for an entity anywhere in the world to become affiliated with an MG, the process can be as simple as sending an email or signing up for a mailing list. In order for MG participation to be effectively channeled, Organizing Partners ("OPs") are selected to act as intermediaries between official UN processes and MG affiliates.[147] UN processes can require OPs to meet certain criteria, including expert knowledge of UN procedure,[148] but those criteria are not strictly enforced. And while the MGs are currently self-governing, MG governance is undergoing standardization in order to ensure the sufficient representation of the affiliates of all of the MGs.

According to a UNSG report on MGs, the system is largely considered a success.[149] That is so because expanded stakeholder participation spurred thousands of development initiatives around the world. And, crucially,

> [n]umerous case studies conducted over the past decade have demonstrated that when a broad range of stakeholder groups are actively involved in programme design, implementation and monitoring and are accountable to each other on decisions or activities they undertake, the results are more sustained than would otherwise be the case. Participation generates shared values, mutually reinforced commitments, and joint ownership, which, in turn, effectively breaks the traditional pattern dividing stakeholders into "recipients" and "providers".[150]

These successes notwithstanding, some logistical issues have arisen, and I can personally attest to at least two of them. First, membership requirements for the MGs are not obvious. Before applying to join any MGs, I consulted with many individuals, including one of the OPs for the NGO MG and the Major Groups Programme Coordinator at the UN Department of Economic and Social Affairs ("DESA") Division for Sustainable Development ("DSD"). No one could answer the question, "Which Major Group or Groups can my organization, the Northwestern School

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[147] *See Organizing Partners*, UNITED NATIONS SUSTAINABLE DEV. KNOWLEDGE PLATFORM, http://sustainabledevelopment.un.org/orgpartners.html (last visited Nov. 13, 2014), *archived at* http://perma.cc/D7MJ-EGLY.

[148] *Id.*

[149] *See, e.g.*, U.N. Secretary-General, *Major Groups: Report of the Secretary General*, ¶ 12, U.N. Doc. E/CN.17/2001/PC/4 (Mar. 14, 2001).

[150] *Id.* at ¶ 13.

of Law Center for International Human Rights ("CIHR") join?" Perhaps since the goal of *Agenda 21* is broad stakeholder participation, the one consistent piece of advice I received was that I was not prohibited from seeking CIHR affiliation with all relevant MGs.

So I did. That raised the second issue: the method for gaining MG affiliation is also far from clear. I contacted the OPs listed on the UN's new Sustainable Development Knowledge Platform.[151] Only one—the NGO OP—responded, and he quickly added CIHR to the NGO MG list. I then signed CIHR up for the MG on Children and Youth ("MGCY") Google-based mailing list through their website, and it was added.[152] I applied to the Women's MG through their website, but heard nothing thereafter. As described below, CIHR was able to impact the OWG process because it was affiliated with the NGO MG and the MGCY. I have since met the OP for the Women's MG, and she assured me that if she had received the request, she would have granted affiliation. But it leaves open the question of what others do when they simply request through the website and hear nothing back. Self-government has its benefits, but when a stakeholder is unable to participate because governance fails, it may be time for a centralized authority to step in.

The lessons learned from *Agenda 21*'s implementation are threefold. First, broad stakeholder participation benefits development initiatives. Second, self-governance is sufficient only up to a point—after which a centralized authority must establish and enforce participation standards. And third, even with thousands of these more "sustained" partnerships, the state of the planet still has not changed.

3.   CSD

The final outcome of Rio to be addressed here that significantly changed the sustainable development landscape was the creation of the Commission on Sustainable Development ("CSD"). The CSD was the first UN body on sustainable development and was intended to be the

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[151] *See* UNITED NATIONS SUSTAINABLE DEV. KNOWLEDGE PLATFORM, http://sustainable development.un.org (last visited Nov. 13, 2014), *archived at* http://perma.cc/VY7R-KV33.

[152] It deserves noting—and perhaps further research—that the Major Group on Children and Youth ("MGCY") maintains an extremely active mailing list and Facebook page. Many MGCY members have long and significant conversations through the list, and they effectively organize themselves before and during each OWG in order to ensure that anyone on the list has access to someone in every meeting and that notes are distributed to the entire MGCY afterward.

"cornerstone of the United Nations intergovernmental framework for sustainable development governance."[153] It was mandated to "ensure the effective follow-up of [Rio], as well as to enhance international cooperation [in integrating] environment and development issues."[154] As such, it was the precursor to the HLPF and is the main foundation upon which the HLPF is being built.[155]

In the early years, it appeared to be performing its duties relatively well.[156] It kept sustainable development high on the global agenda[157] and engaged MGs in innovative ways. One commentator called the CSD "a veritable laboratory of new patterns of interaction [between the UN and] civil society."[158]

One of these innovative engagement methods was the "multi-stakeholder dialogues," which were introduced in 1998. In these dialogues, parliamentary procedure was suspended for two days of the CSD annual session to allow MG representatives and government delegates to speak informally.[159] Noteworthy outcomes of the dialogues were reported in the Chair's Summary of the session, and there was evidence that the dialogues had a considerable effect on decision making.[160] For example, a 2003 report prepared for the UNSG Panel of Eminent Persons on UN Relations with Civil Society reported that "80% of the international work programme on sustainable tourism development adopted by CSD in 1999 came from proposals made and discussed at the multi-stakeholder dialogue on tourism."[161]

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[153] U.N. Secretary-General, *Lessons Learned from the Commission on Sustainable Development: Rep. of the Secretary-General*, ¶ 2, U.N. Doc. A/67/757 (Feb. 26, 2013) [hereinafter *Lessons Learned*].

[154] *See* Agenda 21, *supra* note 140, at ¶ 38.11.

[155] *High Level Political Forum on Sustainable Development*, UNITED NATIONS SUSTAINABLE DEV. KNOWLEDGE PLATFORM, http://sustainabledevelopment.un.org/index.php?menu =1556 (last visited Nov. 13, 2014), *archived at* http://perma.cc/5F9M-GE9C.

[156] Programme for the Further Implementation of Agenda 21, G.A. Res. A/Res/S-19/2 (Sept. 19, 1997).

[157] *See Lessons Learned*, *supra* note 153, at ¶ 2.

[158] Emanuele Rebasti, *Beyond Consultative Status: Which Legal Framework for Enhanced Interaction Between NGOs and Intergovernmental Organizations?*, *in* NGOS IN INTERNATIONAL LAW 21, 35 (Pierre-Marie Dupuy & Luisa Vierucci eds., 2008).

[159] *See id.*

[160] *See* Michele N. Ferenz et al., MULTI-STAKEHOLDER DIALOGUES: LEARNING FROM THE UNCSD EXPERIENCE (Consensus Building Inst. Working Paper for Dep't of Econ. & Soc. Affairs, Background Paper No. 4, 2002), *available at* http://www.un.org/jsummit/html /documents/prep3_background_papers/msdhstudy2.pdf.

[161] *See Background Paper for the Secretary-General's Panel of Eminent Persons on U.N. Relations with Civil Society, UN System and Civil Society: An Inventory and Analysis of Practices,*

Notwithstanding these advances, the CSD had significant shortcomings. Guyana's Sir Shridath "Sonny" Ramphal put the CSD in the context of other UN commissions that dealt with global issues[162]: "The Brandt Commission produced Cancún, and the Brundtland Commission produced Rio. What did Rio produce? Rio produced the UN's sustainable development commission. What has that commission produced? Disappointment."[163]

That disappointment stems from the fact that the CSD, over time, lost legitimacy and effectiveness. It did so because it failed to attract ministers and high-level policymakers, particularly in the economic and social sectors.[164] They were not required to be there and they did not show up. The CSD also adopted a multi-year agenda in 2002 that was too rigid to accommodate "addressing critical contemporary challenges and new and emerging issues."[165] This development is covered in the Rio+10 section below.

In addition, the CSD failed to fully integrate the three pillars of sustainable development—economic, social, and environmental—into its work. Specifically, the economic development pillar was left almost entirely out. An independent review of the CSD attributed this failure to the fact that the CSD's "work did not include an examination of the economic system or economic drivers, such as the role of multinational corporations or trade in sustainable development."[166] Because the CSD did not investigate that sector, it could not integrate that information into a comprehensive analysis of sustainable development processes.

According to the UNSG report, the CSD inadequately monitored and reviewed the progress of agreements related to sustainable development. Unlike the African Commission's finger-pointing at States for not submitting reports, the UNSG pointed his finger at the CSD for not analyzing the reports that it received. "While 109 countries as of 2009 [had] developed sustainable development strategies,"[167] and "data on the strategies has been made available to Member states on an annual basis, the Commission has never dedicated time to a systematic review."[168] The

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U.N. NON-GOVERNMENTAL LIAISON SERV. (2003), *available at* http://www.un-ngls.org/orf/ecosoc%20HL%20Panel%20-%20Background%20paper%20by %20Secretariat.doc.
[162] *Shridath Ramphal Biography*, INT'L INSTITUTE FOR SUSTAINABLE DEV., http://www.iisd.org/about/staffbio.aspx?id=385 (last visited Nov. 13, 2014), *archived at* http://perma.cc/WU55-4T4L.
[163] THOMAS C. WEISS ET AL., UN VOICES: THE STRUGGLE FOR DEVELOPMENT AND SOCIAL JUSTICE 382 (2005).
[164] *See* Bernstein, *supra* note 33, at 4.
[165] *Lessons Learned*, *supra* note 153, at ¶ 42.
[166] Bernstein, *supra* note 33, at 5.
[167] *Id.*
[168] *Lessons Learned*, *supra* note 153, at ¶ 24.

reason why is unclear, but an obvious answer is that it was not considered within its mandate to do so.

Lastly, as if to signal the end of its life, the CSD failed to agree on any policy outcome at all. This happened not once but twice.[169] Ambassador John Ashe, as President of the UNGA, addressed the final meeting of the CSD in 2013:

> With the constantly evolving institutions and instruments in the multilateral system, as with life in general, we must expect change and do our utmost to adapt to and use those changes to develop new organs and bodies in support of the greater good. This applies to both the Commission on Environment and Development and the CSD, as well as others, but we should not mourn their loss, precisely because we can learn from their lessons and legacy.[170]

The lessons and legacy of the CSD teach us four things about the HLPF: 1) that high-level ministers and heads of state must remain involved in the HLPF; 2) that the HLPF must remain flexible enough to deal with new issues as they emerge; 3) that the HLPF must monitor all pillars of and agreements on sustainable development; and 4) that stakeholder involvement with the HLPF will likely generate new and good ideas for States to adopt. A possible fifth lesson is that it may be beneficial for some official or body to be vested with the power to make a decision when the group as a whole fails to agree.

E.   2000—Millennium Development Goals

Passing the Millennium Declaration and establishing the Millennium Development Goals ("MDGs") were watershed moments in development history. Rather than language about *cooperation*, the largest gathering of heads of state to date[171] agreed to a limited set of time-bound

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[169] DODDS ET AL., *supra* note 71, at 8 ("In 2007, for the first time in its short history, the CSD failed to agree [on] a policy outcome. In 2011 it failed again for a second and last time, since the CSD's life would come to an end after its 2011 meeting as a result of decisions made at the Rio+20 Conference.").

[170] John Ashe, President of the 68th Session of the United Nations General Assembly, Remarks at the 20th Session of the Commission on Sustainable Development (Sept. 20, 2013).

[171] McArthur, *supra* note 16, at 2.

goals with the "overarching vision of cutting the amount of extreme poverty worldwide in half by 2015."[172] The eight goals were subsequently broken down into 21 targets and 60 indicators.

John McArthur, one-time Manager and Deputy Director of the UN Millennium Project, explained the organization of the MDG implementing mechanism as follows:

> No single individual or organization is responsible for achieving the MDGs. Instead, countless public, private, and nonprofit actors—working together and independently, in developed and developing countries—have furthered the goals.[173]

In 2002, UNSG Kofi Annan and the administrator of the UN Development Project asked Jeffrey Sachs to launch the UN Millennium Project.[174] He did so, bringing together hundreds of experts from around the world in business, academia, government, and civil society.[175] Some of those same civil society leaders were encouraged "to hold their governments accountable for meeting the goals."[176] While the UN had and has no power to enforce the MDGs, a groundswell of calls for accountability from the domestic electorate was considered a good "soft" option—and perhaps a more effective one.[177]

One situation in which this strategy would be perhaps more effective is in places like the United States, where certain international cooperation complications affected the State's involvement in the MDG process. The United States was "hesitant to embrace the MDG agenda," largely because President George W. Bush considered the goals "UN-dictated aid quotas."[178] The struggle between the US and the UN over the war in Iraq introduced a further complication in the MDG process.[179]

While the Millennium Declaration recognized existing human rights legal obligations,[180] and many of the MDGs were based on human

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[172] *Id.* at 1.

[173] *Id.*

[174] *Id.* at 3.

[175] *Id.*

[176] *Id.*

[177] McArthur, *supra* note 16, at 6.

[178] *Id.*

[179] *Id.*

[180] G.A. Res. 55/2, *supra* note 115 ("We will spare no effort to promote democracy and

rights norms and obligations such as the rights to food, gender equality, health, education, water and sanitation, and housing, the MDGs themselves were relatively silent on human rights.[181] Many commentators at the OWGs considered this silence a shortcoming. However, there are very good reasons not to explicitly name human rights obligations within the declarations on the MDGs and SDGs.[182] For example, a State that is not a party to a human rights treaty likely would not want obligations contained in that treaty to be applied to it under any circumstance. Because not all States have ratified all IHR instruments, including references to specific rights and instruments likely would be a political mistake.

Nonetheless, those in the IHR realm have offered useful critiques of the MDGs. First, while the MDGs sufficiently addressed economic, social, and cultural rights, they generally "neglect[ed] civil and political rights and issues such as political participation, personal security and access to justice."[183] While some civil and political rights indicators were included in the MDGs, *e.g.*, the proportion of parliamentary seats held by women, many others were excluded.[184] The UN Commission on Legal Empowerment of the Poor also demonstrated that the failure to establish legal frameworks and effective, accountable institutions that enforce rules and procedures can be key factors in a country's failure to meet the MDGs.[185]

A second critique was the failure of the MDGs to sufficiently address inequality. For example, there are many ways to reduce maternal mortality by two-thirds. Depending on the population, it may be possible to do so by completely eliminating maternal mortality from the richest ranks of society while allowing it to remain rampant among the most vulnerable. But that strategy is not aligned with human rights standards. Rather, it is discriminatory.

A third critique relates to quality versus quantity. The MDGs are phrased in terms of access to services, *e.g.*, primary education for all. A

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strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.").

[181] Stephen P. Marks, *Prospects for Human Rights in the Post-2015 Development Agenda*, in VIENNA +20: ADVANCING THE PROTECTION OF HUMAN RIGHTS ACHIEVEMENTS, CHALLENGES, AND PERSPECTIVES 20 YEARS AFTER THE WORLD CONFERENCE, (Julia Kozma, Anna Müller-Funk, and Manfred Nowak eds., 2015).

[182] Conversation with Philip Alston, UN Headquarters, New York, New York (Dec. 9, 2013).

[183] UN DEVELOPMENT GROUP, THE GLOBAL CONSULTATION BEGINS: EMERGING VIEWS FOR A NEW DEVELOPMENT AGENDA, "A MILLION VOICES," 14 (2013).

[184] *Id.* at 149.

[185] Naresh C. Singh, *UN Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone*, 103 AM. SOC'Y INT'L L. PROCEEDINGS 147, 148 (2008).

purely quantitative measure fails to recognize or assure any particular quality of the services provided. Under existing international human rights norms, however, States who are parties to the ICESCR are obligated to ensure that public services are not just available but also of sufficient quality. The sole MDG indicator meant to address the quality of education offered merely measures the "literacy rate of 15-24 year-olds, men and women."[186] That falls far short of the ICESCR standard asserting that the "form and substance of education, including curricula and teaching methods, have to be acceptable (e.g., relevant, culturally appropriate, and of good quality)."[187]

A related and final critique concerns the teleological nature of the goals. Professor Roy S. Lee observed that it was a quite serious failure that the MDGs specify goals but do not dictate guidelines for achieving them.[188] Housing is one clear example. Craig Mokhiber, Chief of the Development & Economic & Social Issues Branch of the UN Office of the High Commissioner for Human Rights ("OHCHR"), repeatedly referred to situations in which countries reduced the number of people living in urban slums by forcefully evicting them and sending them out of their cities.[189] Because the MDG indicator is the proportion of urban population living in slums,[190] violations of the right to housing[191] and right to be free from forced evictions[192]—again, where countries have ratified the relevant treaties—was charted as a net gain in MDG terms. The successes and failures of the MDGs thus provide both positive and negative guidance for the substantive and procedural aspects of the SDGs and the HLPF.

F.   2002—Rio+10

The ten-year review of Rio was held in Johannesburg in 2002. It was at this conference, the "World Summit on Sustainable Development" or "WSSD," that Member States adopted the Johannesburg Plan of Implementation ("JPoI") in order to "reinvigorate the global commitment to

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[186] *Official List of MDG Indicators*, *supra* note 24.

[187] U.N. Econ. & Soc. Council, Comm. On Econ., Soc. & Cultural Rights, *General Comment No. 13: The Right to Education* (art. 13), ¶ 6(c), U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

[188] Conversation with Roy S. Lee, UN Headquarters, New York, New York (Feb. 6, 2014).

[189] Craig Mokhiber, Presentations at OWG6 and OWG7 (Dec. 2013 and Jan. 2014).

[190] *Official List of MDG Indicators*, *supra* note 24.

[191] UDHR, *supra* note 14, at art. 25; ICESCR, *supra* note 17, at art. 11.

[192] UDHR, *supra* note 14, at art. 25; ICESCR, *supra* note 17, at art. 11; U.N. Econ. & Soc. Council, Comm. On Econ., Soc. & Cultural Rights, *General Comment No. 7: The Right to Adequate Housing* (art. 11.1), ¶ 7, U.N. Doc. E/C.12/1999/10, Annex IV (May 14, 1997).

sustainable development."[193] The JPoI outlines the roles of the UNGA, ECOSOC, and the CSD in promoting sustainable development.[194]

Reinvigoration was thought necessary because many Member States had become dissatisfied with the CSD.[195] Generally, those states felt the CSD undertook too much negotiation on too many issues and did not include all of the relevant and necessary actors in those discussions.[196] As a result of both of these concerns, the JPoI attempted to structure the CSD's deliberations. The JPoI urged more direct and substantive involvement of international organizations, businesses, and other stakeholders—including Major Groups—in the CSD's deliberations.[197] It also recommended limiting the negotiating sessions of the CSD to every two years[198] and limiting the number of topics discussed at each session.[199] At the next meeting of the CSD, the Commission adopted a multi-year work plan in line with the JPoI's recommendations.[200]

This rigid structuring of the CSD schedule of work soon displayed its drawbacks. Topics emerged in the real world that were not on the schedule and therefore could not be raised in CSD sessions. Eventually, "[m]ost Member States, United Nations system organizations and major groups" came to recognize that the CSD was unable to address "critical contemporary challenges and new and emerging issues."[201]

As a result of the concern about having the right stakeholders in the right discussions, the JPoI suggested that the CSD increase its emphasis on promoting and facilitating partnerships across governments, international organizations, businesses, and other stakeholders.[202] These multi-stakeholder partnerships became known as "Type II Partnerships."[203]

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[193] G.A. Res. 55/199, ¶ 1, U.N. Doc. A/RES/55/199 (Dec. 20, 2000).

[194] *See generally id.*

[195] *Id.* at ¶ 1–2.

[196] *Id.*

[197] *Id.* at ¶ 19.

[198] World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26–Sept. 4, 2002, *Rep. of the World Summit on Sustainable Development*, ¶ 147(d), U.N. Doc. A/CONF.199.20.

[199] *Id.* at ¶ 147(e).

[200] *See* Comm'n on Sustainable Dev., Econ. And Soc. Council, Rep. on the 11th Sess., Jan. 27, Apr. 28–May 9, 2003, U.N. Doc. E/2003/29, E/CN.17/2003/6, 11-12, Supp. No. 9 (2003).

[201] *Lessons Learned*, *supra* note 153, at ¶ 42.

[202] *Rep. of the World Summit on Sustainable Development*, *supra* note 198, at ¶¶ 145–46.

[203] Liliana B. Andonova & Marc A. Levy, *Franchising Governance: Making Sense of the Johannesburg Type II Partnerships*, *in* YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT 2003/2004 19–31 (Olav Shram Stokke & Øystein B. Thommessen eds., 2003).

As opposed to "Type I Partnerships," consisting of treaties and other documents and agreements negotiated by States,[204] Type II Partnerships were new types of voluntary, "solution-oriented partnerships that may include non-government organizations, willing governments and other stakeholders."[205] Because the partnerships would include significant local representation, they were envisioned to be able to act more quickly and efficiently to affect local issues than top-down international governance. By the end of the WSSD, approximately 280 such partnerships had been announced.[206]

Developing countries were critical of Type II partnerships from the very beginning for two main reasons. First, they were skeptical of imbalances in power that may arise in these relationships.[207] Rather than abide by obligations under the UN Right to Development and other international instruments, the imbalances in power within each Type II partnership might create new agreements in which those States with the ability to pay get better deals.[208] Similarly, many States were concerned that the diverse nature of these multi-stakeholder partnerships would be hard to police, which may be used to deflect accountability from international institutions meant to monitor development, e.g., the UN and the Organization for Economic Cooperation and Development.[209]

The critiques of Type-II partnerships are generally considered to be accurate, but the benefits have also been realized. According to a leading authority on Type-II partnerships, "extensive reporting and monitoring mechanisms" have sprung up to address the shortcomings noted above, and the partnerships are considered to have more legitimacy than their purely

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[204] *See* Marion Wilson, *The New Frontier in Sustainable Development: World Summit on Sustainable Development Type II Partnerships*, 36 VICTORIA U. OF WELLINGTON L. REV. 389, 391 (2005).

[205] *The Johannesburg Summit Test: What Will Change?*, UNITED NATIONS: JOHANNESBURG SUMMIT 2002, (Sept. 25, 2002), http://www.johannesburgsummit.org/html/whats_new /feature_story41.html, *archived at* http://perma.cc/8RVV-74TZ.

[206] *See* Halina Ward et al., *Corporate Citizenship: Revisiting the Relationship Between Business, Good Governance, and Sustainable Development*, *in* SURVIVAL FOR A SMALL PLANET: THE SUSTAINABLE DEVELOPMENT AGENDA 351 (Tom Bigg ed., 2004) ("Over 220 were announced in advance of the summit, and 60 during the summit itself.").

[207] Jan Martin Witte & Charlotte Streck, *Progress or Peril? Networks and Partnerships in Global Environmental Governance*, in GLOBAL PUB. POL'Y INST. 1, 3–4 (Charlotte Streck et al., eds., 2003).

[208] *Id.*

[209] Thomas N. Hale & Denise L. Mauzerall, *Thinking Globally and Acting Locally: Can the Johannesburg Partnerships Coordinate Action on Sustainable Development?*, 13 J. OF ENV. & DEV. 220, 222 (Sept. 2004).

governmental counterparts.[210] So while the WSSD was bad for the CSD, it was good for ushering in a new era of public-private partnerships that have become one of the standard modes of operating for global environmental governance.[211] Of course, it is also true that these partnerships have not made enough headway on sustainability quickly enough to stave off the current crisis.

G.   2012—Rio+20

Rio+20 was the 2012 20-year follow-up to the Earth Summit. The key outcome document was titled *The Future We Want*, which represented a recommitment to and updating of the issues that arose out of all of the summits and declarations described above and many, many more.[212] Most importantly, it set in motion the OWG process to create SDGs[213] and created the High-Level Political Forum to replace the CSD.[214]

1.   Open Working Group on the Sustainable Development Goals

The OWG on SDGs was where I had my main interaction with the UN sustainable development processes. The OWG is a yearlong stocktaking exercise that was meant to feed information from all stakeholders to States.[215] At the end of the stocktaking exercise, States would then decide what areas the SDGs should encompass and what specific goals, targets, and indicators they should contain.[216]

The MG/OP system was used for the process. I was on a number of steering committees that selected individuals come from around the world to present at the OWGs, including speakers on global partnerships, global governance, rule of law, and human rights. Throughout the process, other representatives of civil society and I were able to make interventions and suggest ways in which processes could be aligned with existing standards and norms, as well as ways in which existing mechanisms might provide insight into the SDG process. The feedback loop was

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[210] Karin Bäckstrand, *Accountability of Networked Climate Governance: The Rise of Transnational Climate Partnerships*, 8:3 GLOBAL ENVTL. POL'Y 74, 78 (Aug. 2008).
[211] *Id.*
[212] TFWW, *supra* note 146, at ¶ 1.
[213] *Id.* at ¶¶ 245–51.
[214] *Id.* at ¶¶ 84–86.
[215] *Id.* at ¶ 248.
[216] *Id.* at ¶¶ 248, 250.

surprisingly strong; sometimes a suggested change in process would be implemented by the very next OWG.

The OWG process ended on July 19, 2014. The Report of the OWG was finalized and published on August 12, 2014.[217] A draft resolution adopting the OWG Report "as the basis for integrating sustainable development goals in the post-2015 development agenda" was submitted to the UNGA on September 8, 2014.[218] The SDGs, if adopted as the basis for the UN's post-2015 development agenda, would then be administered by the HLPF.

2.   HLPF

The HLPF was created by the General Assembly in *The Future We Want* and was designed explicitly to replace the CSD.[219] As such, the HLPF was mandated to build "on the strengths, experiences, resources and inclusive participation modalities" of the CSD.[220] Delegates mandated that the HLPF "shall follow up on the implementation of sustainable development,"[221] and that it "should" do so in a cost-effective manner.[222]

The Future We Want left the "format and organizational aspects" of the HLPF to be decided at a later date by an intergovernmental negotiation process under the General Assembly.[223] Those aspects were decided in UNGA Resolution 67/290 of August 2013.[224] Between 67/290 and *The Future We Want*, the HLPF is mandated to:

> •   Provide high-level political leadership and guidance for sustainable development while avoiding overlap and duplication;
> •   [Agenda-set] . . . with multiple sources of input through dialogue and stocktaking with governments, major groups, and stakeholders more broadly;

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[217] *Report of the Open Working Group of the General Assembly on Sustainable Development Goals*, U.N. Doc A/68/970 (Aug. 12, 2014).

[218] *Draft Resolution Submitted by the President of the General Assembly: Report of the Open Working Group on Sustainable Development Goals Established Pursuant to General Assembly Resolution 66/288*, U.N. Doc. A/68/L.61 (Sept. 8, 2014).

[219] *Id.* at ¶¶ 84–86.

[220] TFWW, *supra* note 146, at ¶ 84.

[221] *Id.*

[222] *Id.*

[223] *Id. at* ¶ 86.

[224] G.A. Res. 67/290, *supra* note 30.

- Implement . . . a focused, dynamic agenda that can also consider emerging challenges;
- Enhance integration and coherence of the three dimensions of sustainable development within the UN system, across global governance institutions more broadly, and at all levels of decision-making;
- While retaining the intergovernmental nature of the Forum, allow a variety of modes of participation by representatives of major groups and other relevant stakeholders;
- Follow up and review progress in the implementation of sustainable development commitments of all the major United Nations conferences and summits in the economic, social and environmental fields, as well as the respective means of implementation;
- Strengthen the science-policy interface by examining documentation, bringing together dispersed information and assessments, including in the form of a global sustainable development report.[225]

Some of the problems with the CSD were immediately remedied by 67/290. Whereas the CSD lost legitimacy because high-level political figures stopped showing up, Heads of State are required to be involved in the HLPF, at least once every four years.[226] But convening the HLPF only once per year and only requiring Heads of State to be present once every four years—for two days[227]—is not likely to remedy the CSD's inability to deal with new and emerging issues in an efficient and legitimate way. When problems arise, the HLPF cannot wait nine months to address them.

The HLPF also currently includes no enforcement mechanism.[228] It is simply not envisioned that the HLPF would ever do anything like enforce sustainable development obligations. While there were numerous calls for the inclusion of an accountability framework within the SDG declaration, virtually no proposals are being taken seriously.[229]

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[225] Bernstein, *supra* note 33, at 1 (quotations and citations omitted).

[226] G. A. Res. 67/290, *supra* note 30, at ¶ 6.

[227] *Id.*

[228] *See id.* (describing the structure of the HLPF without explicitly stating an enforcement mechanism).

[229] *See, e.g.*, *Global SDG Partnership: Joining Forces to End Extreme Poverty by 2030*,

To be fair, it is worth noting that the UN, known far and wide for its unparalleled bureaucracy, occasionally does show glimmers of agility. UN DESA, "the Secretariat entity responsible for the development pillar of the United Nations,"[230] has been very proactive about institutional learning. Since June 2013, DESA has commissioned three papers on ensuring the effectiveness of the HLPF.[231]

In the first, two scholars from the Global Policy Forum, Barbara Adams and Lou Pingeot, offer 19 specific recommendations to "make the Major Groups more inclusive and effective."[232] They comprise structural, technical, and financial improvements with the aim of improving "both the quantity and quality of the inputs that Major Groups and other stakeholders can provide" within the HLPF process.[233] Adams and Pingeot suggested better and more structured MG governance, the creation of new MGs, better funding to facilitate face-to-face interaction, better administrative support, and a host of other ideal improvements.[234] Given the successes and the failures of the CSD's multi-stakeholder dialogues, all of Adams and Pingeot's suggestions would markedly improve the organization of the MG system.

Of course, the multi-stakeholder dialogues had limits. Limits on interventions and strong leadership to enforce those limits arose as an issue in front of the OWG.[235] There is a light at the end of all microphones that indicates when a speaker's time has run out. At many OWG sessions, delegates read long statements that exhausted their allotted time by many minutes.

In the beginning of the OWGs, the OWG Co-chairs, Ambassador Korosi from Hungary and Ambassador Kamau from Kenya, were soft on those who exhausted their time.[236] Toward the end of the OWGs, the

GLOBAL DEV. INCUBATOR 1 (Feb. 19, 2014), http://www.globaldevincubator.org/wp-content/uploads/2014/04/Global-SDG-Partnership-Concept-Note.pdf.

[230] *About Us: Who We Are*, UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS, http://www.un.org/en/development/desa/what-we-do.html (last visited Nov. 13, 2014), *archived at* http://perma.cc/3SAL-MG4G.

[231] *See* BARBARA ADAMS & LOU PINGEOT, STRENGTHENING PUBLIC PARTICIPATION AT THE UNITED NATIONS FOR SUSTAINABLE DEVELOPMENT: DIALOGUE, DEBATE, DISSENT, DELIBERATION (June 2013); Bernstein, *supra* note 33.

[232] ADAMS & PINGEOT, *supra* note 231, at 42.

[233] *Id.*

[234] *See id.*

[235] *See* Faye Leone et al., *Summary of the First Session of the UN General Assembly Open Working Group on Sustainable Development Goals: 14–15 March 2013*, 32 INT'L INST. FOR SUSTAINABLE DEV. 1, 9 (2013).

[236] After one particularly long intervention, Ambassador Korosi said, "Each and every person's ideas are important, and the list of speakers is very long. If we want to hear each

Co-chairs took a firmer stance on time management. The Co-chairs interrupted the delegates by saying, "You may wish to wrap up your intervention." Delegates displayed different levels of acceptance, but the enforcement was appreciated by almost everyone—especially since the statements being read were all posted online anyway.

In the second paper on the HLPF, Steven Bernstein builds on the work of Abbott and Snidal in arguing that the HLPF's primary mode of operating should be as an Orchestrator.[237] As an Orchestrator, the HLPF's primary function would not be to enforce state compliance with SDGs, but to "provide leadership, guidance, knowledge, and political authority" to other entities "to build coherence and integration" in various spheres of political action.[238] An example already seen was when the Millennium Project encouraged and supported civil society leaders to hold their governments accountable.

In this vein, Professor Beth Simmons's study of human rights treaty obligations elucidates three ways in particular that human rights treaties have had some normative impact on domestic policies. First, from the most elite perspective, discussion of treaty ratification affects the agenda negotiated by the elite of a country because they are forced to answer the question, "Should we ratify this thing?"[239] Once they have that discussion, the elite discourse is permanently altered with virtually no popular input.[240]

Second, once a treaty has been ratified, compliance may be able to be enforced without reverting to an international mechanism at all. Depending on the structure of the domestic legal regime, enforcement proceedings may be able to be brought in domestic courts.[241] South Africa represents one type of domestication of international obligations through its constitutional mandate that, when interpreting the South African Bill of Rights, courts must look to international law and may look to foreign law.[242] As a result of this Constitutional Mandate, a South African court referred to the ICESCR in *Grootboom* even though South Africa was not

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other's ideas, we should try very hard to keep our interventions within the time limits." Div. for Sustainable Dev., Seventh Meeting, Open Working Group on Sustainable Development Goals, Eighth Session (Feb. 6, 2014), http://sustainabledevelopment.un.org/index.php?page =view&nr=872&type=12&menu=1807&template=1042&play=452, *archived at* http://perma .cc/6962-QBLK.

[237] Bernstein, *supra* note 33, at 9.

[238] *Id.*

[239] BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS, Kindle Location 503 (2009).

[240] *Id.*

[241] *Id.* at 507.

[242] S. Afr. Const., 1996.

a signatory to that treaty.[243] "Monist" or partially monist countries such as the Dominican Republic[244] represent another avenue-constitutionalizing international obligations—which allows international obligations to immediately take effect and enjoy supremacy over sub-constitutional domestic legislation.

Third, commitments to a human rights treaty can perform a legitimating function for popular groups that mobilize in support of compliance.[245] Simmons found this effect was greatest "in countries that are neither stable democracies (where most rights are already protected and the motive to mobilize is relatively low) nor stable autocracies (where the likelihood of successful mobilization is low if the rights the treaty addresses are seen in any way as challenging status quo governing arrangements)."[246] These three avenues illustrate that the HLPF need not intervene directly or have direct enforcement power in order to have some normative impact on domestic policies and legislation. But, barring some extraordinary popular uprising on climate change or some uncharacteristically celeritous domestic litigation, Simmons's normative impacts are simply not likely to avert a crisis nor solve the one that we are in.

The third paper is not yet published, but was discussed at OWG8. In it, Jan-Gustav Stradeanas, who has been involved in global development discussions since the Stockholm Conference of 1972, analyzes ambiguities in Modalities of Participation in the HLPF. He argues that there is currently significant room for negotiation of permitted modalities of stakeholder participation in the HLPF due to ambiguities in the text of UNGA Resolution 67/290. But, he asserts, decisions made by governments in the next six months to two years will likely foreclose some avenues of potential participation unless concerted advocacy convinces States that they should leave those avenues open.

II.   ORGANIZATION AND INTERNATIONAL ORGANIZATION THEORY

At heart, the HLPF is only an organization within the large and complex UN organization.[247] According to sociologists of organizations,

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[243] *S. Afr. v. Grootboom* 2000 (1) SA 46 (CC) at 24–25 para. 29–30 (S. Afr.).

[244] Dom. Rep. Const., 2010 (stating that the "rules in ratified international treaties" become "effective within the Dominican territory upon their official publication").

[245] SIMMONS, *supra* note 239, at 507.

[246] SIMMONS, *supra* note 239, at 515–17.

[247] U.N. Charter pmbl. (". . . do hereby establish an international organization to be known as the United Nations."); U.N. Charter art. 2, para. 1–6 (referring to the UN three times as "the Organization").

all organizations are fundamentally "engaged in a search for what is valuable,"[248] i.e., that which helps the organization achieve its goals. The HLPF's main goal is to help the planet meet "the needs of the present without compromising the ability of future generations to meet their own needs."[249] So, with regard to sustainable development, the HLPF is engaged in a search for that which allows present and future needs to be met.

Organizations are designed to find value.[250] But in crisis situations, what is valuable for organizational success changes. And when what is valuable for success changes, some organizations thrive while others wither. Organizational design can be the difference between the two, with some design features facilitating recognition of new forms of value better than others.

A.   *Heterarchies Excel at Recognizing Value in Crisis Situations*

In January 2011, UNSG Ban Ki-moon addressed the World Economic Forum in Davos. He spoke to those who have benefited from the world as it is and told them the world needs to change:

> We need a revolution. Revolutionary thinking. Revolutionary action.
>
> A free market revolution for global sustainability.
>
> It is easy to mouth the words "sustainable development", but to make it happen we have to be prepared to make major changes—in our lifestyles, our economic models, our social organization, and our political life.[251]

In organizational terms, revolution is based on successful innovation. And innovation is based on searching, often without knowing what

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[248] STARK, *supra* note 36, at 6.
[249] Our Common Future, *supra* note 77, ¶ 27.
[250] Some commentators argue that organizations are designed with the secondary purpose of either minimization of transaction costs or the balance power and interests. *See* RANDALL W. STONE, CONTROLLING INSTITUTIONS: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL ECONOMY xii (2011).
[251] Ban Ki-moon, United Nations Secretary-General, Remarks at the World Economic Forum Session on Redefining Sustainable Development (Jan. 28, 2011) (transcript available at http://www.un.org/sg/statements/?nid=5056).

one is searching *for*.[252] Once one finds that thing, one must be able to recognize it for what it is: a revolutionary innovation.

1.   Uncertainty Is the Essence of Crisis, and Our World Is Becoming More Uncertain by the Day

In a crisis, the future is uncertain. If one had known the solution in advance, the crisis would have been averted. And if one knew the solution right away, the crisis would already be over. But what is valuable for getting out of a crisis and what will be valuable on the other side of the crisis is unknown prior to the crisis. That is, what is valuable in those instances is uncertain.

There are multiple forms of uncertainty that affect international organizations. The three main types are uncertainty about the state of the world, other actors' preferences, and other actors' behavior.[253] The greater the overall uncertainty, the less predictable the value of an organizational resource will be.

As for the first two types of uncertainty, it was previously thought that the "environmental area is plagued by enormous uncertainty (most of it scientific) about the state of the world and much less uncertainty about [State actor] preferences."[254] But since at least December 2010, State preferences have become significantly less certain. When States undergo revolution and regime change, their preferences change. The Arab Spring brought with it a great tide of regime change that continues to this day.[255] As a result, State actor preferences are more uncertain now than they have been in decades.

Actor behavior has also become much less certain in recent years. As Jeffrey Sachs pointed out in a recent op-ed, the US, the EU, NATO,

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[252] *See* RICHARD K. LESTER & MICHAEL J. PIORE, INNOVATION: THE MISSING DIMENSION 41 (2006) ("In many industries, innovations can be identified that did not, at least initially, address a particular need or problem, or for which the problem became apparent only after the product was in use. In such cases, the product developer frequently starts out without really knowing what she is trying to create.").

[253] Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 778 (2001).

[254] *Id.*

[255] *Arab Spring*, WIKIPEDIA, http://en.wikipedia.org/w/index.php?title=Arab_Spring& oldid=626895797 (last visited Nov. 13, 2014) ("By December 2013, rulers had been forced from power in Tunisia, Egypt (twice), Libya, and Yemen; civil uprisings had erupted in Bahrain and Syria; major protests had broken out in Algeria, Iraq, Jordan, Kuwait, Morocco, and Sudan; and minor protests had occurred in Mauritania, Oman, Saudi Arabia, Djibouti, Western Sahara, and the Palestinian territories.").

and now Russia violate international law—an element of liberal peace—in what seems like a return to great power politics.[256] As a result, notwithstanding Simmons's research above, when a State signs a treaty, it is becoming less certain that the State will abide by the terms of that treaty.[257] So it is not just regime changes that have spawned uncertainty; even regimes that have not changed *per se*—and that have been relatively stable for decades—are now setting dangerous precedents with actions that disrupt the relative certainty that is essential to international legal arrangements.[258]

Meanwhile, the uncertainty about the state of the world is also increasing. Even though there is ever-greater consensus that climate change is occurring, we do not know what its effects will be. In March 2014, more than 100 governments unanimously approved a report making two assertions with "high confidence": first, that "[u]ncertainties about future vulnerability, exposure, and responses of interlinked human and natural systems are large";[259] and second, particularly relevant for the HLPF's task, that "[r]esponding to climate-related risks involves decision-making in a changing world, with continuing uncertainty about the severity and timing of climate-change impacts and with limits to the effectiveness of adaptation."[260]

From a cooperation perspective, an uncertainty's effect will vary based on its context. Uncertainty about another actor's behavior, e.g.,

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[256] Jeffrey D. Sachs, *Ukraine and the Crisis of International Law*, PROJECT SYNDICATE (Oct. 4, 2014), http://www.project-syndicate.org/commentary/jeffrey-d--sachs-sees-in -russia-s-annexation-of-crimea-the-return--with-us-complicity--of-great-power-politics (noting that the US, EU, Saudi Arabia, Turkey, NATO, and Russia, among others, have recently violated international treaty obligations, and "[w]ithout some scaffolding of law, open conflict is all too likely."), *archived at* http://perma.cc/W43A-U3FL.

[257] *Id.* ("International law itself is at a crossroads. The US, Russia, the EU, and NATO cite it when it is to their advantage and disregard it when they deem it a nuisance. Again, this is not to justify Russia's unacceptable actions; rather, it is to add them to the sequence of actions contrary to international law.").

[258] *Diplomacy and Security After Crimea: The New World Order*, THE ECONOMIST (Mar. 22, 2014), http://www.economist.com/news/leaders/21599346-post-soviet-world-order-was-far -perfect-vladimir-putins-idea-replacing-it ("The reality is that Mr. Putin is a force for instability and strife. The founding act of his new order was to redraw a frontier using arguments that could be deployed to inflame territorial disputes in dozens of places around the world."), *archived at* http://perma.cc/ZS5B-YAFG.

[259] Christopher B. Field, et al., *Climate Change 2014: Impacts, Adaptation, and Vulnerability: Summary for Policymakers*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 11 (Mar. 31, 2014), https://ipcc-wg2.gov/AR5/images/uploads/IPCC_WG2AR5 _SPM_Approved.pdf.

[260] *Id.* at 9.

whether it will abide by treaty obligations, may make cooperation more difficult, while uncertainty about the state of the world may make co-operation easier.[261] For example, if no one knows how much oil is under a piece of land, negotiations about ownership of that land may be much less contentious than if everyone is certain that the land is oil-rich. From an organizational design perspective, however, greater uncertainty necessitates greater organizational adaptability. That is so because the organization will need to be effective in its mission no matter which States hold global power, no matter what agendas those States hold, and no matter what unforeseen events arise.

2.   Heterarchies Are Maximally Adaptable Because They
        Facilitate Taking on New Organizational Forms to Deal
        with New Problems

David Stark is a sociologist at Columbia University who has been studying organizations in crisis for his entire career. Most of his work focuses on business entities, but because his analysis operates at the pure organizational theory level, it is equally applicable to IOs. The thesis of his most recent book, *The Sense of Dissonance*, addresses qualities that make organizations effective in crisis situations, and is therefore quoted here at length:

> When coping with [situations of great uncertainty], where [disruptive events] can be anticipated in general but are unpredictable in their specific contours, firms must be per-petually poised to pursue innovation. To do so they build organizations that are not only capable of learning but also capable of suspending accepted knowledge and established procedures to redraw cognitive categories and reconfigure relational boundaries—both at the level of the products

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[261] Koremenos et al., *supra* note 253, at 778. An additional type of uncertainty not mentioned here is textual uncertainty, i.e., vagueness of the documents around which cooperation centers. *See* Marc Pallemaerts, *International Environmental Law from Stockholm to Rio: Back to the Future?*, 1 REV. OF EUR. COMMUNITY & INT'L ENVTL. L. 254, 261 (1992) ("It is not surprising that such a concept [as sustainable development] has received widespread support from leaders of the North and South alike, environmental and Third World movements, international bureaucrats and enlightened managers of financial and economic institutions and structures in both capitalist and socialist countries. This is explained by the artful vagueness which the new paradigm of 'sustainable development' casts upon their respective responsibilities.").

and services produced by the firm and at the level of the
working practices and production processes within the firm.
These organizations innovate in ways that allow them to
recognize, redefine, recombine, and redeploy resources for
further innovation. That is, alongside technological inno-
vation, they also engage in organizational innovation by
creating organizational forms that allow for easy reconfigu-
ration and hence minimize the costs of reorganization. Such
capacities for organizational innovation go beyond the dis-
covery of new means to carry out existing functions more
effectively and efficiently. Under conditions of radical uncer-
tainty, organizations that simply improve their *adaptive
fit* to the current environment risk sacrificing *adaptability*
in subsequent dislocations.[262]

The HLPF will be maximally adaptable if it is organized as a
heterarchy. When shifts in State power or State behavior—or a global
environmental event—occur, the HLPF must be able to "recognize, re-
define, recombine, and redeploy resources" in order to accommodate those
changes and continue to operate as an effective Orchestrator.

Due to the massive amount of environmental and political un-
certainty, the HLPF will need to be maximally adaptable in order to be
an effective Orchestrator of sustainable development governance. A proj-
ect involving Intermediaries from the business world may require dif-
ferent sorts of orchestration than a project involving Intermediaries from
the NGO world or the intergovernmental organization ("IGO") world. An
effective Orchestrator must be able to recognize new problems and de-
sign new orchestration solutions—which may mean implementing new
organizational design features.

Abbott *et al.*, the founders of the orchestration movement, assert
that governance actors like the HLPF are more likely to orchestrate when
their "organizational structure and culture encourage . . . entrepren-
eurship."[263] Heterarchies encourage entrepreneurship because they foster
creative friction between competing evaluative structures. That creative
friction results in the anticipation and recognition of new problems,[264]
and out of new problems come new solutions. Whether the HLPF has the

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[262] STARK, *supra* note 36, at 83.

[263] Abbott et al., *supra* note 41.

[264] *See, e.g.*, John Seely Brown, *Productive Friction: How Difficult Business Partnerships
Can Accelerate Innovation*, HARVARD BUS. REV. 83 (Feb. 2005).

adaptive flexibility to operate as a heterarchical Orchestrator rests in large part on the amount of authority States delegate to the HLPF.

B.   States Would Need to Delegate Significant Design Authority to the HLPF in Order to Allow it to Act Heterarchically

To reiterate: heterarchies reorganize themselves in order to suit the needs and organizational structures of specific projects. That ability to reorganize makes heterarchies effective Orchestrators, because working with different Intermediaries requires the Orchestrator to figure out how it can best fit into the existing organizational framework of the Intermediary. Thus, the greater the HLPF's authority to reorganize itself when confronted with a new orchestration problem, the greater the likelihood the HLPF will be a successful Orchestrator.

Two IO scholars, Tana Johnson and Johannes Urpelainen, recently developed a theory about how much organizational design discretion States delegate to "international bureaucrats in the design of new IGOs."[265] They contend that even though powerful States may disagree with a bureaucrat's design preferences, those States may nonetheless grant the bureaucrat substantial leeway in the organizational design of a new institution. The States do so largely because they rely on bureaucrats' expertise.

Two factors emerge as principal drivers of whether or not States delegate design authority: 1) State capability, with particular regard to uncertainty and cost of designing the institution; and 2) the salience of a particular matter, in particular, "an issue's proximity to state survival."[266] Given the uncertainty noted above, that element is likely satisfied, for no one State could have the capability and capacity to monitor global political and environmental uncertainty[267]—nor would a State want that mandate. The primary question will be whether States

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[265] Tana Johnson & Johannes Urpelainen, *International Bureaucrats and the Formation of Intergovernmental Organizations: Institutional Design Discretion Sweetens the Pot*, 68 THE REV. OF INT'L ORG. 177, 177 (2014).

[266] Tana Johnson, *Looking Beyond States: Openings for International Bureaucrats to Enter the Institutional Design Process*, 8 THE REV. OF INT'L ORG. 499, 504–06 (2013).

[267] A "[t]entative list" of platforms for the review and coordination of the proposed SDGs was released by the UN Technical Support Team. It is a 190-page long spreadsheet. *See* Tentative list of review and coordination platforms: Compilation of Inputs Submitted by the Technical Support Team (TST), *available at* http://sustainabledevelopment.un.org/content/documents/5459Tentative%20list%20of%20review%20and%20coordination%20platforms.pdf.

find the issue proximate enough to their fundamental interests that they refuse to delegate it. If they do, there is little that can be done—within the current system of transnational governance.

III.   SOME MORE EXTREME OPTIONS

But there is another option: change the system. Stewart Patrick claims that the future will not see "the renovation or the construction of a glistening new international [governance] architecture."[268] But maybe Patrick is only correct up until the widespread recognition of imminent danger. Maybe once people realize that their corner of the Earth is literally at risk of not being able to sustain life much longer, there will be some popular outcry.

At that point, there may be another option. That option is to create a body that does not orchestrate—that does not act through Intermediaries—but that takes direct decisions and can enforce those decisions with whatever power is available. The suggestion requires Chapter VII-esque authority to act on the environment.[269]

Pollution may fall under Chapter VII as it is written. The logic of Chapter VII of the UN Charter is that a global body is rightly vested with the power to take collective action against individual States that violate the sovereignty of another State by threatening peace, breaching the peace, or otherwise acting aggressively. The science behind a physical breach of the peace is simple: if State A launches a missile against State B without UN approval, there is no question that it is breaching the peace, and it is therefore susceptible to Chapter VII enforcement mechanisms to restore peace. Blue helmets may well follow.

Now, another hypothetical. If State A were to pollute the entire atmosphere surrounding a part of State B and, as a result, an environmental event occurred in that part of State B that killed thousands of people, should blue helmets not follow to stop State A from continuing to pollute? One major issue, of course, is the causality between pollution and environmental events; even the IPCC report does not go into detail

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[268] Patrick, *supra* note 34, at 58.

[269] This Article is far from the first to suggest such action. *See, e.g.*, Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 NW. J. INT'L HUM. RTS. 24, 24 (2008); Alexandra Knight, *Global Environmental Threats: Can the Security Council Protect Our Earth?*, 80 N.Y.U. L. REV. 1549 (2005); Report of the Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, ¶ 78, U.N. Doc. A/59/2005 (Mar. 21, 2005) (emphasizing that, in the twenty-first century, "environmental degradation" is a threat to international peace and security).

about how a specific polluter might be responsible for specific events. But fitting environmental damage into Chapter VII may be easier than it first appears. After Libya, however, it has been and will be extremely difficult to pass a Chapter VII resolution through the Security Council—even for those States disrupting international peace by more conventional methods.

Another option is to rethink the existing structures of transnational governance in order to accommodate these new threats to individual and international peace that simply did not exist in their current magnitude when the UN was first formed.[270] UN reform has been on the table for some time, and D/D Divides that have existed throughout development discussion for decades are still stalling meaningful action within the current structure. So now may be a good time to change the structure—while we still have a globe to govern.

CONCLUSION

The world is in a state of dual crisis. The environment is being irreparably damaged, yet global governance cannot muster the strength to stop it. Thus, the crisis is both environmental and political.

Sustainable development initiatives that have not been successful can teach us many things. A development obligation within a regional or international cooperation agreement—without more—does not guarantee implementation. CBDR is now recognized by States and stakeholders alike as the only equitable way to assign obligations to mitigate or reverse climate change and other environmental degradation. Self-governance is sufficient only up to a point. Broad stakeholder participation benefits development initiatives, but not enough to make a meaningful difference in real world results. High-level diplomats must remain involved in a mechanism that is delegated sufficient authority to be flexible and enforce its decisions.

Resolution 67/290 does not preclude the HLPF from being structured as a heterarchical Orchestrator. Structured as such, the HLPF could incorporate many of these lessons. Its orchestration could be the "more" required to drive development obligations. It could follow the principle of CBDR. It could ensure that MGs are sufficiently governed. It could allow for broad stakeholder participation, which would all but ensure creative friction between different evaluative structures. And if some form/bureau/secretariat of the HLPF met much more often than 67/290 asserts, it could remain agile and adaptable.

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[270] *See* U.N. Doc. A/59/2005, *supra* note 269, at ¶¶ 76–86.

But it lacks enforcement power. That may be a critical downfall. If the SDGs are to make a difference as quickly as scientists say they need to, broad popular support for international obligations likely will not be enough. It will require top-down enforcement, either under the current Chapter VII or in some new formation.

World War II shocked the world enough to catalyze the creation of the UN, the Security Council, and Chapter VII authority to violate a State's sovereignty. If we wait for the environmental crisis to shock us to that extent, it will be too late. Sovereignty will be of little use when there are no more people around to exercise it.