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CONSCIENCE AND INTEREST: LAW, RIGHTS, AND POLITICS IN THE STRUGGLE TO CONFRONT CLIMATE CHANGE AND THE NEW POVERTY

Paul L. Joffe

I. INTRODUCTION

Herbert Hoover administered the American program providing food and other assistance to Europe in the wake of the First World War. From this experience, he said that “[i]t is impossible to discuss the peace of the world until adequate measures have been taken to alleviate the fear of hunger.”

Americans have long viewed international relief as a matter of national interest as well as a matter of conscience. This issue is transformed, however, by the anticipated, devastating, worldwide impacts of global warming. In part, the security and humanitarian concerns that previously motivated U.S. action are simply heightened by new forces contributing to poverty, hunger, disease, and environmental destruction. Beyond that, however, there are new, compelling reasons to assist poor countries and there are new challenges that must be met in order to avoid further impoverishment and ultimately the

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1 Senior Foreign Policy Counsel, World Resources Institute, Washington, D.C.; formerly Senior Director, International Affairs, National Wildlife Federation, Washington, D.C.; J.D., Yale Law School.


collapse of sustainable development.\textsuperscript{4}

In this article, I first explain how global warming has transformed the struggle to end global poverty and to achieve sustainable development. I suggest that the new situation creates special challenges due to the heightened need for global collective action to produce global public goods, namely unpolluted air and sustainable development.

I then address how the international community determines whether global collective action should be taken and what should be done, focusing in particular on the new poverty and global warming. This includes the history and role of treaties, policy initiatives, and human rights. To illuminate the nature of these and how they are related, I look back at some examples of thinking about rights and law during the seminal period of World War II and its aftermath.

Among other things, this history shows that our modern concept of human rights was heavily influenced by the desire of the United States and its allies during World War II to define the struggle in terms of the rights and freedoms for which the allies were fighting. Americans realized it is in our own national interest to recognize the rights of others. Today, in global warming, we face a new worldwide, revolutionary threat, but also opportunities, that demand unprecedented global cooperation. Unless we take prompt action, we face devastating impacts across the globe, with the poorest nations most exposed because they are less equipped to cope. On the other hand, if we undertake a far reaching transition to a clean energy future, we can reap the benefits of new technology, new sources of jobs, new markets, a cleaner and healthier environment, and stronger sustainable development worldwide.

To meet the threat and develop the opportunities, the international community has a jumble of fragmentary institutions, bits of hard law and large amounts of soft law, rights and obligations often indistinctly defined, and many policy initiatives of uncertain impact. I argue that confronting climate change presents a crisis of inadequacy for this system analogous to the crisis for international cooperation created by

\textsuperscript{4} “Sustainable development” has been defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” \textit{UNITED NATIONS WORLD COMM. ON ENV'T AND DEV., OUR COMMON FUTURE} 43 (1987).
World War II. I urge the development of human rights law to help address the problems, but I also urge that we use treaties, policy initiatives, and human rights together to define the global public interest in confronting climate change and its impacts. The result may be a legal and policy landscape changed in some respects, but drawing on lessons of the past regarding the mobilizing force of the moral dimension of law.

Next, I look at the obstacles to collective action and the ways in which these obstacles can be overcome to achieve consensus on global warming, poverty, and sustainable development. This includes exploring how national and private interests can be adjusted to achieve the broader common good of the international community.

I argue that the effort to provide global public goods depends on a politics that creates space for the public interest. In confronting climate change, the public is discovering itself. It is discovering that, while citizens have private or group interests, they also have interests in common with everyone else. A law and politics of the public interest does not ignore narrow interests, but establishes a process to fairly accommodate both. The all-important question of how much weight to give to each and how to integrate them must take place through a democratic process. Approximating this on a global scale creates yet another great challenge.5

Finally, I discuss the role of norms and morality and how they interact with interests in the effort to achieve collaboration needed to provide public goods. Increasingly, moral claims are raised on behalf of action to confront climate change. They play an important role in the field of human rights, which are based on ethical standards. Beyond modern human rights principles, however, I note that for centuries it was thought that morality was integral to the entire legal system and I suggest how we might learn from this as we try anew to address the common concerns of the international community.

We live in a new world with important characteristics that result from the climate change that is one of the defining forces of our time. My purpose is to highlight those characteristics and suggest implications for what is needed to develop a consensus to confront climate change, roll back poverty, and chart a path

5 See Joffe, supra note 3, at 170.
to sustainable development.

II. THE NEW POVERTY -- THE THREAT TO PEOPLE AND NATURE

It is now widely understood that global warming left unchecked will undermine progress in alleviating poverty and wreak havoc in the natural world. Growing poverty and environmental destruction will exacerbate each other in a vicious circle. Scientists expect rising sea levels, increasing draught and water stress, and increasing intense weather events. The results are expected to include coastal inundation, damage to agriculture, famine, mass species extinctions, environmental refugees, the spread of disease vectors, health crises, and rising conflict.

While people will be directly harmed by such developments as increasing water shortages, many no less devastating impacts will be indirect. For example, warming ocean waters are expected to destroy coral reefs, which will contribute to the collapse of fish supplies upon which millions of people depend.

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6 The United Nations Development Programme (UNDP) states flatly that “[c]limate change is the defining human development issue of our generation.” UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008: FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD 1 (2007) [hereinafter HUMAN DEVELOPMENT REPORT 2007/2008]. The UNDP also states that dangerous climate change threatens a catastrophe that “is not a distant future scenario. It is unfolding today, slowing progress towards the Millennium Development Goals (MDGs) and deepening inequalities within and across countries. Left unattended, it will lead to human development reversals throughout the 21st Century.” Id. at 21. The UNDP further warns that “[t]he current path offers a one-way route to ecological disaster.” Id. See also CHAIR’S SUMMARY, G8 ENVIRONMENT MINISTERS MEETING, KOBE, JAPAN ¶ 28 (May 24-26, 2008) (“It is emphasized that climate change is expected to have serious impacts on biodiversity, even threatening the very basis of human survival.”).

around the world. The close relationship between people and nature can also be seen in deforestation, where poverty contributes to encroachment on forests and deforestation contributes to poverty, with climate change aggravating both.

This poverty and destruction is new in the sense that we are now aware of global warming as a major new driver. This dynamic also brings new challenges. The root cause behind this driver is the release of carbon dioxide and other greenhouse gases into the atmosphere by human activity. Thus, there is a need to undertake mitigation (reduction of emissions), shifting the energy path of industrial society away from fossil fuels toward alternatives. At the same time, it is necessary to adapt by building resilience into human communities and ecosystems, so they can minimize the worst of the damage from climate change that cannot be avoided. Scientists warn that there is an important ecosystem service that is threatened by climate change: coral reefs.

8 “During the 21st Century, warming oceans and rising acidification could destroy much of the world’s coral, with devastating social, ecological and economic consequences. . . . The collapse of coral systems would represent a catastrophic event for human development in many countries.” HUMAN DEVELOPMENT REPORT 2007/2008, supra note 6, at 104.

9 Id. at 157-61. See also MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING, 2, 12-20, 70, 103-22 (2005) (regarding the importance of ecosystem services for human well-being, the impact of global warming on deterioration of ecosystem services, and obstruction by such deterioration of progress on the MDGs).

10 Joffe, supra note 3, at 126-27.

urgent need for action because if we proceed on the emissions path of business as usual, in a few years widespread damage will be unavoidable and irreversible.12

Mitigation and adaptation may require advanced technology and sophisticated skills currently unavailable to poor countries undergoing rapid development or most exposed to damage from global warming.13 Thus, there is a need for assistance to poor

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12 Joffe, supra note 3, at 126–27; HUMAN DEVELOPMENT REPORT 2007/2008, supra note 6, at 4, 22, 63. The UNDP says that without urgent mitigation, “poverty reduction efforts will suffer and many millions of people will face catastrophic outcomes. Mass displacement due to flooding in countries like Bangladesh and mass hunger linked to drought in sub-Saharan Africa are two examples.” Id. at 64.

13 HUMAN DEVELOPMENT REPORT 2007/2008, supra note 6, at 4-15, 147-57, 186-98. Regarding various estimates in the tens of billions of dollars annually in expected developing country costs of adaptation to climate change, see MCGRAY, supra note 11, at 8. Regarding technology transfer, see FRED WELLINGTON ET AL., WORLD RESOURCE INST., SCALING UP: GLOBAL TECHNOLOGY DEPLOYMENT TO STABILIZE EMISSIONS (2008), available at http://pdf.wri.org/scalingup.pdf. For a discussion of funding sources and channels for adaptation, see MANISH BAPNA & HEATHER MCGRAY, WORLD RESOURCE INST., FINANCING ADAPTATION: OPPORTUNITIES FOR INNOVATION AND EXPERIMENTATION (2008), available at http://www.wri.org/publication/financing-adaptation; HUMPHREYS, supra note 7, at 22-23. Under legislation considered, but not passed, in the U.S. Senate, a portion of the revenue from allowances auctioned under the cap and trade system for reducing greenhouse gas emissions would have been provided for international adaptation assistance, with implementation by USAID and the option for the Secretary of State to provide up to sixty percent of the funds to an international agency under the UN Framework Convention on Climate Change (UNFCCC). S. 3036, 110th Cong. (2008); see Juliet Eilperin, Senate Leaders Pull Measure on Climate, WASH. POST, June 7, 2008, at A3.
countries from wealthy nations as has long been recognized under the international agreement on climate change.\textsuperscript{14}

The problem of deforestation provides an example of circumstances where there is a need for assistance to poor countries to help them deal with a problem that is undermining both mitigation and adaptation capacity. Since destruction of forests produces about twenty percent of the world's carbon dioxide, avoiding deforestation is a major mitigation need. Also, destruction of forests simply exposes people to greater harm from global warming and forces them to adapt, without the benefits provided by healthy forests.\textsuperscript{15} This is another example of the heightened challenges faced in avoiding the new poverty and destruction. In order to avoid deforestation, tropical forest countries need to tackle a complex set of problems that includes monitoring forest practices, clarification of land titles, law enforcement, allocation of payments for avoided deforestation, and support of livelihoods for forest dependent people.\textsuperscript{16}

These new challenges in dealing with poverty and environmental destruction also bring new reasons for wealthier countries to assist poor countries and for wider cooperation among all nations. Climate change is by its nature a global problem, and to be solved it requires participation of all nations.\textsuperscript{17} Initially, industrial countries should take the lead on mitigation of greenhouse gases, but developing countries with large emissions are beginning to take action. Many will need assistance in dealing with adaptation and deforestation problems as well as with a more rapid shift to clean technology. To address climate change, the industrialization of all developing countries must follow a cleaner path. Thus, it is in

\textsuperscript{14} UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, UNITING ON CLIMATE: A GUIDE TO THE CLIMATE CHANGE CONVENTION AND THE KYOTO PROTOCOL, 15, 19 (2007) [hereinafter UNITING ON CLIMATE CHANGE].

\textsuperscript{15} The World Bank estimates that ninety percent of the world's 1.2 billion people living in extreme poverty depend on forest resources for part of their livelihood. HUMPHREYS, supra note 7, at 32.

\textsuperscript{16} Id. at 32-33; HUMAN DEVELOPMENT REPORT 2007/2008, supra note 6, at 157-61; PESKETT ET AL., MAKING REDD WORK FOR THE POOR (2008), www.povertyenvironment.net/pep/.

\textsuperscript{17} Wheeler, supra note 7, at 67-69.
the interest of the United States to join in developing a system of
global cooperation in which wealthy nations assist developing
nations, providing incentives for them to join in the global
effort. Moreover, industrialized nations grew wealthy on
relatively cheap fossil energy that was the main cause of the
problem now threatening poor countries and wealthy countries
alike. The developed countries therefore bear a special
responsibility to lead in this effort.\textsuperscript{18}

III. POLITICS AND THE NEW POVERTY

The politics of the new poverty bears a resemblance to the
politics of the old poverty, but the underlying driver of global
warming brings with it new dimensions of scale and complexity.
A planetary atmosphere free of excessive greenhouse gases is a
public good.\textsuperscript{19} The benefits of public goods are non-excludable
and non-rival.\textsuperscript{20} No one can be excluded from benefiting nor
does one country’s enjoyment prevent another from enjoying
the benefits of unpolluted air. As with clean air generally, this
means that the solution to global warming will not come about
through market forces alone, but requires cooperative action.
Within a single country, government establishes the legal
framework to reduce air pollution. While there is no global
government, cooperative action among nations is needed to stop
global warming.\textsuperscript{21}

Within nations, observers have long noted the challenge of
adjusting private interests to enable society to produce a public
good, a dynamic that is sometimes loosely discussed as a
problem of special interests and the public interest.\textsuperscript{22} This
dynamic can be readily understood with respect to pollution.

\textsuperscript{18} See Human Development Report 2007/2008, supra note 6, at 5-6, 147-61, 184-98. For an overview of recommendations for multilateral action, see id. at 17-18.


\textsuperscript{20} Id. at 1.

\textsuperscript{21} Id. at 6, 12-21.

\textsuperscript{22} See Joffe, supra note 3, at 106-12.
Air pollution is an externality, meaning that the costs of pollution are not born by the polluting company. As the pollution spews into the atmosphere, members of the public feel the consequences, but they are deterred from taking action to correct the situation by the difficulties of collective action. Each individual would rather free-ride on the action of others -- but the cost of correcting the problem exceeds the benefit to any one citizen, so nothing is done.\textsuperscript{23}

Government can correct this problem through regulation by imposing the cost on the polluters. The cost is thus internalized and the company absorbs the cost as it does other costs, by a reduction in profit, a charge to customers in the cost of its products, or a change in its production processes to minimize or avoid the pollution and its related costs. In fact, through technological innovation, it may shift to nonpolluting methods of production. Innovation involves its own costs, although the firm, its shareholders, and its customers may all be better off once the shift takes place.

As firms anticipate public efforts to address pollution, they respond in different ways. Some may lobby to prevent regulation so they can continue placing the cost burden on the public (cost free to themselves), or they may lobby to structure the regulation in a way that makes it easiest for them to place the burden on customers rather than shareholders. In these efforts, the firms often have an advantage because consumers are generally not well organized.\textsuperscript{24} Other firms support efforts to address pollution and position themselves to take advantage of new opportunities created by the new industrial and regulatory landscape.\textsuperscript{25}

Often, various segments of industry, regions of the country, and even differently-situated consumers are affected in different ways, and the politics, rather than being a binary conflict between business and consumers, becomes multifaceted. Moreover, in the case of global warming, there are large issues relating to short and long term impacts. The impacts of global warming are already having harmful effects on some people, and

\textsuperscript{23} Barrett, Why Cooperate?, supra note 19, at 7, 13.


\textsuperscript{25} See Joffe, supra note 3, at 160-61.
if left unchecked, global warming will have a devastating impact worldwide.\textsuperscript{26} However, in the short run, changing from fossil fuels to clean energy may have mixed results, increasing some costs while others are reduced through, for example, shifting to more efficient production or equipment. Opponents of change may appeal for public support by emphasizing only one aspect. These arguments may be especially effective if people are uninformed about the long term consequences of inaction.\textsuperscript{27} Despite these challenges, support for action is on the rise in the United States.\textsuperscript{28}

All the ordinary problems of dealing with pollution are more severe in the case of climate change because it is a global problem. There is no world government comparable to a national government to implement regulation. Attempts to do so are undertaken through negotiation of international agreements. Nations may hold back from joining in these agreements, and those that wish to take action lack the means available to a national government at home to gain participation and compliance. Moreover, special circumstances in developing countries may make it less likely that they will join in cooperation to confront climate change. Yet, without action by both developed and some of the large and rapidly growing developing countries, such as India and China, the world cannot avoid catastrophic climate change.\textsuperscript{29}

\textsuperscript{26} \textit{Human Development Report 2007/2008}, supra note 6, at 1, 21; see Juliet Eilperin, \textit{Warming Called Threat to Global Economy}, \textit{Wash. Post}, Oct. 31, 2006, at A18 (reporting on the finding of a British government study that climate change could result in costs of 5 to 20 percent of GDP, on the order of the Great Depression).


\textsuperscript{28} See Joffe, supra note 3, at 159-64.

There are various reasons why developing countries may resist taking action to address global warming. As in industrialized nations, some firms may oppose action. Even more than in industrialized countries, citizens may have difficulty overcoming this resistance due to the weakness of democratic institutions. Moreover, even if officials wish to take action, they may be at a disadvantage in dealing with multinational companies.

Additionally, representatives of developing countries have often argued that industrialized countries bear responsibility for most of the global warming pollution in the atmosphere and therefore must bear the burden of initial action. The 1992 UN Framework Convention on Climate Change recognized this by imposing greater responsibility for mitigation action on developed countries. Also, the developed countries pledged to assist developing countries with technology transfer to deploy clean energy and assistance for adaptation to climate change. However, little has been done to either mitigate greenhouse gas emissions or provide assistance to developing countries.

In recent months, however, there have been signs of change on the policy front. In the United States, which under the Bush administration was long an opponent of action to deal with global warming, Congress has begun considering global warming legislation. President Bush’s successor has pledged to take action. In the international negotiations for a new treaty to carry out the UN Framework Convention on Climate Change (UNFCCC), developing countries seek assistance to enable them to avoid or adapt to damaging climate impacts and have said they would take concrete steps to reduce emissions if the developed countries will provide technology and other

30 See Joffe, supra note 3, at 155, 168.

31 UNITING ON CLIMATE CHANGE, supra note 14, at 15, 19, 21; see HUMPHREYS, supra note 7, at 62-64 (regarding the weakness of these provisions).

32 See Joffe, supra note 3, at 129-30.

33 Id.

As with most treaties, the negotiation is an effort to find a formula that makes all parties winners, both in reducing the likelihood of damage from global warming and in reaping the benefits of a new, clean energy future. Everyone benefits if the treaty can provide the global public good of mitigating emissions and reducing global warming and its impacts. Poor countries can benefit from assistance in avoiding the damage caused primarily by pollution from industrialized countries. All can benefit from new technology and opportunities for new markets and jobs.

A key feature of the system envisioned for reducing emissions is the creation of carbon markets and carbon trading within and between countries. Under this approach, emission allowances are provided or auctioned to polluting companies in decreasing amounts, creating an incentive for companies to shift to more efficient production or cleaner, less polluting fuels. As a result, the most efficient means of emissions reduction is achieved through a market mechanism.

There is a great deal of discussion regarding how this approach might be designed to be mutually beneficial to both developed and developing countries. Developing countries or

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36 HUMAN DEVELOPMENT REPORT 2007/2008, supra note 6, at 125-32.
their firms that make certain emissions reductions, including possibly reduction in emissions from deforestation, might be provided credits that they could trade in the international carbon markets. Firms in developed countries might benefit by meeting a portion of their own obligations to reduce emissions by purchasing relatively inexpensive credits from developing countries. Various important issues remain to be decided. For example, developing countries argue that they should be able to earn credit for reductions that are less ambitious than those of developed countries. This may be a good way to provide an incentive for fast-growing developing countries to begin cutting emissions. At the same time, there are the questions of how to ensure that when firms from developed countries buy such credits to meet their obligations, the credits represent a genuine reduction in emissions.\(^{37}\)

For present purposes, the point to emphasize is that fairness in the structuring of the global response to climate change is not only a matter of developed countries providing financial assistance to developing countries and the terms under which that takes place. It is also a matter of the terms under which countries will reduce emissions, including the potential linkage among countries through carbon markets, as well as such issues as the terms for transfer of clean technology from developed to developing countries.

The international community has reached a turning point where it must move from vague rhetoric and promises to action that will change the trajectory of emissions from a rising curve to one that is falling. Scientists say that to avoid dangerous consequences, global emissions must peak within a few years and substantial reductions must be achieved by 2020.\(^{38}\)

\(^{37}\) Id. at 153-61.

\(^{38}\) With a temperature increase over two degrees centigrade above pre-industrial levels, the risk of “large- scale human development setbacks and irreversible ecological catastrophes will increase sharply.” Id. at 7. It is estimated that to avoid this “will require rich nations to cut emissions by at least 80 percent, with cuts of 30 percent by 2020. Emissions from developing countries would peak around 2020, with cuts of 20 percent by 2050.” Id. Yet, these estimates may be optimistic. See Juliet Eilperin, Faster Climate Change Feared: New Report Points to Accelerated Melting, Longer Drought, WASH. POST, Dec. 25, 2008, at A2; Kari Lydersen, Scientists: Pace of Climate Change Exceeds Estimates, WASH. POST, Feb. 15, 2009, at A3.
IV. GLOBAL DEALS AND HUMAN RIGHTS --
ESTABLISHING THE GROUND RULES FOR
COOPERATION.

The necessary elements of an international treaty and
domestic legislation to accomplish these objectives and avert
dangerous climate change are generally understood. Industrialized
countries must commit to strong action to reduce emissions, assist developing countries, and enact implementing
legislation. Steps by developing countries to reduce emissions
are also needed, although the size and timing of these steps are
currently the subject of debate.

In the United States, Congress is considering legislation to
cap emissions by requiring allowances for each unit of
emissions. Since the number of allowances is reduced over
time, companies have an incentive to shift to nonpolluting fuels.
Under the principal proposals, a substantial portion of the
allowances is auctioned to industry and the revenue generated is
invested in new technology, worker training, environmental
protection, and assistance to developing countries. However,
the fate of these bills is uncertain. Even if U.S. legislation is
enacted, it remains to be seen whether it will include substantial
assistance to developing countries. It remains to be seen whether the United States will do its part to confront the new
poverty.

Over the years, the U.S. has provided assistance to poor
countries for economic and social needs, including small
amounts of funding for environmental protection. Support for
such assistance has arisen from a variety of motives ranging
from competition with the Soviet Union during the Cold War to
the needs of diplomacy and humanitarian goals of various
stakeholders.

There are powerful new reasons to provide assistance to
address the new poverty resulting from global warming, but the

39 Posting of Jim Tankersley to L.A. Times Greenspace Blog,
(Feb. 3, 2009, 11:24 PST). Regarding legislation in the 110th Congress, see
supra note 13 and infra note 183.

40 CAROL LANCASTER, GEORGE BUSH’S FOREIGN AID: TRANSFORMATION OR
needed increase in effort is very large. First and foremost, poor countries that are least responsible and least able to cope with climate change will be the ones most devastated by it. Wealthy countries that benefited from cheap fossil fuels and that largely created the warming trend must take leading responsibility for mitigating it -- aided in due course by rapidly developing countries now contributing to the problem. This creates both a moral imperative and practical grounds for action. To maintain their own legitimacy in the international arena, it is in the interest of developed countries to demonstrate leadership in meeting the challenge of global warming.

Second, assistance is necessary to cement the global deal to reduce emissions to avoid dangerous climate change. As previously stated, to avoid disaster, all countries must eventually reduce emissions. An effective climate regime must contain the incentives needed to address emissions accompanying rapid growth in China, India, and other major emitting developing countries, as well as the forest destruction in Brazil, Indonesia, and other tropical forest countries. Even developing countries which are not currently major emitters must take a clean energy path or current problems will simply recur.

Third, there is an emerging consensus in the national security community that global warming is a threat multiplier with the potential for destabilizing countries, creating failed states, and contributing to conflict. Assistance in reducing the impacts of global warming will be an important element of national security strategy in the coming decades. Fourth, assistance in reducing poverty and aiding development can be in the economic interest of developed countries, since prosperity of others can redound to our own benefit by boosting international trade and investment. Additionally, assistance to developing countries in shifting to cleaner technology can open up new opportunities for our own

41 With respect to cost estimates, see supra note 13.

42 See Joffe, supra note 3, at 162.

exports and boost employment in those sectors.\textsuperscript{44}

The question remains whether these reasons will be enough to achieve the needed results in reducing greenhouse gas emissions and addressing the new poverty. I have previously argued that achieving these results would require new cooperative institutions cooperating across borders and issues, a renewed appreciation of the need to address public interests and provide global public goods, and a transformation of the economic and social conditions needed to support consensus.\textsuperscript{45}

Here, I look at how the international community establishes expectations regarding what public goods require cooperative action and what action should be taken by national governments, intergovernmental organizations, and others. In particular, I focus on how expectations are created about steps that should be taken to address global warming and the new poverty, a critical element of the global deal on climate change. I also discuss the obstacles that often frustrate the expectations about action and what can be done to overcome these obstacles.

I have already mentioned the need for an international treaty with commitments on emissions reductions and assistance to developing countries. Apart from efforts to address global warming, the international community has taken some steps to alleviate poverty, improve economic conditions, and promote sustainable development. Here, I address two streams of action: implementation of human rights and multilateral commitments culminating in the Millennium Development Goals (MDGs). I ask whether these efforts, along with the emerging climate treaty, can deal with both global warming and the new poverty, and chart a path to sustainable development. While the record does not lack some accomplishments, I argue that the existing system is inadequate and faces a crisis.

On December 10, 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights, which contains commitments to political, civil,
social, and economic rights. Economic rights include the right to an adequate standard of living. The Declaration is not self-enforcing, but rather states that it provides a “common standard of achievement . . .” for all to “promote respect for these rights and freedoms and by progressive measures, national and international . . .” to achieve their observance. Economic, social and cultural rights are to be achieved “through national effort and international co-operation and in accordance with the organization and resources of each State . . .” but the Declaration also provides that everyone is entitled to a social and international order in which the specified rights can be realized.

Sometimes it is assumed that human rights are not understood in many nations. The record, however, shows that while there were differences regarding the philosophical bases for rights and different priorities, there was widespread agreement among diverse cultures and nations on the content of the Universal Declaration. Also, contrary to some suggestions, there was not much doubt that the declaration would include economic and social rights, which were contained in the existing constitutions of some countries.

The record of implementation of the declaration and the subsequent separate covenants on political rights and on economic rights is mixed. Persistent efforts have been made,


47 Id. at art. 25.

48 Id. at prmbl.

49 Id. at art. 22.

50 Id. at art. 28.


52 Id. at 42, 58. The Universal Declaration was followed by two more specific covenants on political rights and economic, social, and cultural rights. See TOM CAMPBELL, RIGHTS: A CRITICAL INTRODUCTION 104 (2006).

but progress has been difficult. In 1986, the UN General Assembly also adopted the Declaration on the Right to Development (DRD).\(^{54}\) Attempts to carry out this declaration polarized along developed-developing country lines, although more recently there are signs that the DRD has played a constructive role in discussions among officials of international development agencies.\(^{55}\) In the wake of the end of the Cold War, the World Conference on Human Rights convened in Austria in 1993 to revitalize the human rights regime and issued the Vienna Declaration and Programme of Action, which reaffirmed the DRD.\(^ {56}\) Meanwhile, steps have been taken toward a rights-based approach to environmental issues, especially in viewing environmental protection as a precondition for human rights, such as the right to health.\(^ {57}\) However, as noted below,


\(^{55}\) HUMPHREYS, supra note 7, at 74-75. Wealthy countries disliked the DRD’s call for assistance to developing countries, tending to emphasize the need for good governance and anti-corruption efforts, while developing countries focused on the need to create a supportive international economic environment. Id.; see also Anne Orford, Globalization and the Right to Development, in ACAD. OF EUROPEAN LAW, EUROPEAN UNIV. INST., PEOPLES’ RIGHTS 132-35 (Philip Alston ed., 2001) [hereinafter PEOPLES’ RIGHTS]; Isabella Bunn, The Right to Development: Implications for International Economic Law, 15 AM. U. INT’L L. REV. 1425, 1467 (2000).

\(^{56}\) Orford, supra note 55, at 132.

\(^{57}\) Dinah Shelton, Human Rights, Health & Environmental Protection: Linkages in Law & Practice 3-4 (World Health Org. Background Paper 2002), http://www.who.int/hhr/information/Human_ Rights_Health_and_Environmental_Protection.pdf; DAVID WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS LAW 189-94 (2007). For analysis suggesting support remains weak for environment as a human right, see Philip Alston, Peoples’ Rights: Their Rise and Fall, in PEOPLES’ RIGHTS 281-83 (Philip Alston ed., 2001). A recent UN report on climate change and human rights states that, while climate change has negative effects on realization of human rights, it is difficult (due to complex causation issues, among other reasons) to conclude that climate impacts constitute human rights violations. Nevertheless, the report states that various, clearly protected rights will be affected and human rights obligations therefore protect affected individuals. Office of the U.N. High Commissioner for Human Rights, Report on the Relationship Between Climate Change and
the results contain serious shortcomings in addressing the impacts of climate change.58

Parallel to the evolution of the human rights regime, steps were taken by the international community for cooperation on international economic development. This began in the same period as the proclamation of the Universal Declaration on Human Rights, with the creation of the Bretton Woods Institutions -- the agreements on finance and the World Bank, and, soon after, on tariffs and trade. With time, however, many in less developed countries came to view the Bretton Woods Institutions as skewed in favor of wealthy countries. In 1974, the UN General Assembly approved the Declaration on the

Human Rights, 23, 24, 29-30, passim, A/HRC/10/61 (Jan. 15, 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.61AEV.pdf [hereinafter High Commissioner’s Report]; see also infra notes 71 and 165. The Office of the High Commissioner requested comment relating to the study be submitted by September 30, 2008. A statement submitted by a group of Dutch jurists noted a trend from an approach of linking human rights to environmental disruptions towards a clean environment as a separate human right and urged the Human Rights Council to advocate for codification of such a right in international law. INT’L COMM. OF JURISTS, 2008 OHCHR STUDY: CLIMATE CHANGE AND HUMAN RIGHTS, STAKEHOLDER INPUT BY NJCM: DUTCH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS 8, 16 (2008), http://www2.ohchr.org/english/issues/climatechange/docs/submissions/International_Co... climateChange_HR.pdf. An undated and unsigned U.S. submission took a contrary position, arguing to the OHCHR that there is no right to a safe environment, that a human rights approach to climate change is unlikely to be effective, and that climate change is better addressed through traditional treaties and other means of international cooperation. UNITED STATES, OBSERVATIONS BY THE UNITED STATES OF AMERICA ON THE RELATIONSHIP BETWEEN CLIMATE AND HUMAN RIGHTS 1, 7, http://www2.ohchr.org/english/issues/climatechange/docs/submissions/USA.pdf. Since submissions were due in September of 2008, this is evidently a statement filed by the Bush administration. For a complete list of submissions to the OHCHR, see the Office of High Commissioner of Human Rights Submissions and Reference Document Page, http://www2.ohchr.org/english/issues/climatechange/submissions.htm (last visited Feb. 24, 2009). For further discussion of the Report of the Office of the High Commissioner and its conclusion that human rights principles should inform action to address climate change, see infra note 165.

58 See infra text at note 72.
Establishment of a New International Economic Order,\textsuperscript{59} denouncing neocolonialism and calling for just pricing of commodities and preferential and non-reciprocal treatment for developing countries where feasible. This declaration was controversial and was largely ignored by developed countries.\textsuperscript{60} Instead, steps were taken to strengthen the Bretton Woods Institutions, such as the creation of the World Trade Organization in 1994. While free trade advocates said that all nations would benefit from continued trade liberalization, dissatisfaction by many developing countries continued to dog efforts at further trade liberalization.\textsuperscript{61}

Meanwhile, beginning with the Stockholm conference in 1972 and then the conferences at Rio in 1992 and Johannesburg in 2002, efforts were made to establish international cooperation on environmental problems. It was recognized, however, that environmental and development issues are intertwined. Increasingly it has been acknowledged that the problem should not be defined as one or the other, but as a combination -- the challenge of achieving sustainable development. Nevertheless, these conferences were often fraught with disagreement between less developed and wealthy countries about priorities and about allocation of responsibility for funding of action. Moreover, analysis showed that despite some measures implemented to protect the environment, economic forces are overwhelming progress and environmental degradation is proceeding apace.\textsuperscript{62}

In the year 2000, the UN General Assembly approved the Millennium Declaration, establishing a commitment by most countries to the MDGs to reduce poverty, improve health and education, and promote sustainable development. The goals included timetables and measurable targets, with most of the


\textsuperscript{60} Bunn, \textit{supra} note 55, at 1431; \textit{Kennedy, supra} note 53, at 128-31.

\textsuperscript{61} \textit{Kennedy, supra} note 53, at 140-42.

goals to be reached by 2015. The MDGs became a guide not only for individual nations, but for international development agencies.\(^{63}\)

Although progress has been slow, by the time the UN launched the MDGs, the two streams of action -- on human rights and on development -- were beginning to converge. In the wake of the 1993 Vienna Conference, the human rights approach of the right to development was recognized in some development initiatives. Noteworthy are the reports of the United Nations Development Programme, which advanced this theme.\(^{64}\)

To complete the story, it should be noted that the 1992 Rio conference gave rise to the UNFCCC. Endeavoring to put more teeth into climate action, the parties to the Convention drafted the Kyoto Protocol in 1997 and it went into force in 2005. Over 180 countries are parties to the Kyoto agreement, but the United States refused to ratify it.\(^{65}\)

As mentioned earlier, the negotiations for an agreement to succeed the 1997 Kyoto agreement are now underway. Estimates regarding the need for assistance to developing countries to deal with climate change are very large. The negotiations recognize the responsibility of developed countries to provide funding, but the amount to be contributed by developed countries as well as the means to do so remain open questions. Likewise, the negotiations recognize the responsibility of developed countries to lead in reducing emissions, but the timing and extent of efforts by countries remain unresolved.\(^{66}\) Various criteria have been suggested for

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\(^{63}\) See Joffe, supra note 3, at 132.

\(^{64}\) See, e.g., UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2000 ch. 1 (2000) [hereinafter HUMAN DEVELOPMENT REPORT 2000] (addressing human rights and human development). Philip Alston argues that collective, peoples’ rights remain weak. In discussing the Declaration on the Right to Development, he says this weakness is a result of opposition by governments and mistakes by proponents. This, he says, is regrettable because growing global inequality requires clarification of the rights and support for their acceptance. PEOPLES’ RIGHTS, supra note 57, at 288-93.

\(^{65}\) Joffe, supra note 3, at 129-30.

\(^{66}\) See supra note 35. For the reductions required to avoid dangerous climate change, see supra, note 38.
determining these questions, including extent of responsibility for the problem, ability to pay, capacity to act, and others.67

It may be that the outcome of the negotiations will be determined by these kinds of considerations as well as the balance of diplomatic clout that usually comes into play.

Here we address whether and how the norms and goals established by the international community outside the context of the climate negotiations might also be relevant to those negotiations.

The Declaration on the Right to Development states that development aims at the constant improvement of the well-being of all people. It states that sustained action is needed to promote more rapid development and that, as a complement to the efforts of developing countries themselves, international cooperation is essential to providing those countries “appropriate means and facilities to foster their comprehensive development.”68 In addition, the MDGs provide specific targets and timetables for reduction of poverty and for sustainability. At the same time, analysts say that damage from climate change can be expected to undermine achievement of the MDGs.69

In broad terms then, both human rights norms and goals established through cooperation on development add force to the direction taken in climate negotiations. There are significant differences among these approaches, but they are also complementary in certain ways. For example, the human rights approach tends to be adversarial, while the climate negotiations rest on consensus building. Generally, the human rights approach rests on moral claims of particular individuals or groups, while the economic approach to development looks to instrumental rationales. Human rights instruments often involve compensation for past misconduct. Development initiatives, such as the MDGs, seek accountability through transparency and perhaps public oversight and political and

67 Joffe, supra note 3, at 137 n.184.


69 Joffe, supra note 3, at 137 n.184.
The question remains, however, to what extent do the norms and principles that have evolved in human rights law and development policy address the demands placed on this system by global warming? The answer is that the system is flawed and faces a crisis due to its inability to deal with this unprecedented threat.

Global warming is already undermining human rights, including rights to health, food, water, and property and rights related to migration and conflict, among others. However, a plethora of obstacles exists to addressing climate change.

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70 See Henry J. Steiner, Social Rights and Economic Development: Converging Discourses?, 4 BUFF. HUM. RTS. L. REV. 25 (1998); HUMAN DEVELOPMENT REPORT 2000, supra note 64. The report contains extensive discussion of the relationship between human rights and development policy. As noted in the acknowledgements, chapter 1 of the report, authored by Amartya Sen, provides the conceptual framework. Regarding Sen’s views, see also infra, notes 136 and 142. For the view that most of the MDGs have the force of customary international law, see OFFICE OF THE UNITED NATIONS HIGH COMM. FOR HUMAN RIGHTS, FREQUENTLY ASKED QUESTIONS ON A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT COOPERATION 8 n.10 (2006).

through human rights law. The economic rights affected have weak remedies. The responsibility of countries beyond the borders of those affected is difficult to achieve under human rights law. Tracing causation between specific actors and victims is likely to be hard, as is dealing with injuries anticipated in the future. Finding a forum in which to litigate may be difficult.\textsuperscript{72} Commentators and advocates are urging that human rights law be reformed to deal with climate change, but also that human rights principles be applied to the problem in new ways. Rather than wait for change in the law, they are urging that human rights principles be used to guide policy making in international negotiations and in national policies.\textsuperscript{73}

This shifts our attention to how human rights might work with other policies. In sum, various tools have evolved in work on international development, human rights, and climate change. The record so far suggests that none of these approaches may be adequate alone. There may, however, be room for them to work together to complement each other. We turn next to how this might be so. We seek to understand better how politics, development policy, and human rights interact by looking at some experiences from the past. The purpose is to better understand what challenges and opportunities may be in store for the international community in working to establish norms to address the new poverty and climate change and to take action in accord with these norms. How do international law, human rights, and development policy interact with the politics of contending interests and nations? How can the international community use law, rights, and public policy to achieve its common interests?

\textsuperscript{72} HUMPHREYS, \textit{supra} note 7, at 3-4; KATE RAWORTH ET AL., OXFAM INT’L, \textit{CLIMATE WRONGS AND HUMAN RIGHTS: PUTTING PEOPLE AT THE HEART OF CLIMATE-CHANGE POLICY} 10 (2008), http://www.oxfam.org/files/bp117-climate-wrongs-and-human-rights-0809.pdf. The commentators also point out that where justice language has found its way into the climate change negotiations, it serves a mainly rhetorical function, rather than focusing on specific human rights violations or remedies. HUMPHREYS, \textit{supra} note 7, at 10-11.

\textsuperscript{73} HUMPHREYS, \textit{supra} note 7, at 10, 80. The inadequacy of human rights law is matched by the weakness in development policy implementation. \textit{See, e.g.}, HUMAN DEVELOPMENT REPORT 2007/2008, \textit{supra} note 6, at 186-92.
V. RIGHTS AND RIGHT -- A NEW LOOK AT THE ROLES AND MEANING OF RIGHTS, LAW, TREATIES, AND POLICY IN GLOBAL GOVERNANCE

As discussed earlier, reduction of greenhouse gases is a public good in the strict sense of that term as used by economists. Causing this reduction to take place is one of the greatest collective action problems ever faced by humanity. Since the problem is truly global, the normal use of government to address air pollution problems is not available in the way it is in a single nation. There is no comparable global government. Instead, nations are struggling to achieve a comparable result by crafting international agreements for cooperation. Previous attempts have been found weak, lacking in ambitious targets and effective enforcement mechanisms. Efforts, however, are under way to develop a stronger agreement.

The essence of the collective action problem is similar to the so-called prisoners' dilemma: in the absence of some facilitating understanding, each party may rationally decline to take action, even though the result will be adverse. The parties can only maximize their gains and avoid harm by cooperation, which typically involves communication and sanctions for failure to cooperate. In the case of global warming, the collective action problem is made even more difficult by the fact that equity -- based on previous contribution to the problem and current capacity to act -- calls for action by parties of different magnitude and speed. The complex equations and policies involved in figuring out who has a duty to do what makes it even more difficult for each party to feel assured that if it acts others will meet their obligations as well.

The multilateral institutions used to address global collective action problems are far weaker than those of a national government dealing with a local or national pollution problem. One problem is that individual nations may not feel assured that they will realize the promised gains of cooperation. A further problem is that powerful interests may try to prevent nations from achieving what is in their own best interests -- in short, that special interests may prevail over the public interest of individual nations and of the larger international community.

74 See Joffe, supra note 3, at 153-54.
Moreover, the fragmentation and weakness of international institutions enables special interests to play countries off against each other. For example, fearful that other countries may gain a competitive advantage by not regulating pollution, each country may hold back so that no one acts. This only assures catastrophic consequences for all.

Diplomats and statesmen facing these challenges have certain tools to try to deal with the problems just described. These include, for example, side payments and package deals. They can try to minimize the impact of change by providing that affected interests are not adversely impacted or at least are given time to transition to new circumstances.

With respect to the struggle to confront global warming and the new poverty, the present questions are: what is added to the diplomatic tools by principles emerging from the climate negotiations, such as the principle of common, but differentiated responsibility? What is added by the objectives of development policy such as the MDGs? What is added by human rights and a rights-based approach? What do all of these add and how do they work with international agreements and the interaction of nations and interests? Are the principles, goals, and rights merely wishful thinking, or do they provide traction to get the results needed to deal with the planetary emergency and the new poverty?

To begin to answer these questions, we look at some of the thinking about goals and rights that crystallized in the wake of another planetary emergency: the worldwide destruction and suffering left in the wake of the two world wars of the last century. Instead of anticipating a disaster ahead of us, we can look back at a disaster that previously occurred and consider what people thought about principles, goals, and rights and their relevance to real world results. I suggest that principles, goals, and rights have emerged as the international community's attempt to define an international public interest to guide decisions and mobilize support to achieve results.

There are public interests, and then there is the public interest. These are not terms with clear, agreed-upon definitions. I suggest, however, that “public interests” should include society’s interest in the provision of public goods, which is a well defined term in economics. Such public goods include unpolluted air. On the other hand, “the public interest” is a looser term, meaning the common good of the community, and
this often includes the desirability of various public goods.\textsuperscript{75} Such statements as the Universal Declaration of Human Rights are, it has been suggested, an outline of the common good or at least a key component of the common good along with other public policies.\textsuperscript{76}

In nations, governments undertake to carry out the common good. There is no world government, but nations and other actors collaborate to achieve common objectives. This process is often called global governance, meaning cooperative global efforts undertaken not through a state, but through various networks, multilateral institutions, and other mechanisms.\textsuperscript{77} Accordingly, multilateral goals and international human rights may be thought of as guidance established for global governance. Efforts to establish such guidance to confront climate change are in their infancy, but there is a somewhat longer record on other matters. As we have seen, some of these other matters, including social and economic rights, are pertinent to dealing with climate change.

The preamble of the Universal Declaration of Human Rights states that recognition of rights is the foundation of justice and peace and the highest aspiration of people is “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want . . . .”\textsuperscript{78}

Eleanor Roosevelt chaired the committee that drafted the Declaration. The language in the preamble echoes her late husband’s statement that in coming to the aid of the democracies in World War II, America looked forward to a world founded upon four essential human freedoms: freedom of speech, freedom of religion, freedom from want, and freedom

\textsuperscript{75} Id. at 112-14.

\textsuperscript{76} J.M. Kelly, A SHORT HISTORY OF WESTERN LEGAL THOUGHT 427 (1992) (citing John Finnis, NATURAL LAW AND NATURAL RIGHTS 225 (1980)). Another commentator states that in addition to imposing legal requirements, human rights “provide something approximating an international value system . . . .” Humphreys, supra note 7, at 20.

\textsuperscript{77} See Joffe, supra note 3, at 139-51.

from fear.\textsuperscript{79}

Throughout the depression in the pre-war years, President Roosevelt developed the idea that modern circumstances required new economic and social rights to supplement the older political and civil rights.\textsuperscript{80} FDR himself dictated the key passage of the four freedoms speech. An account by his speechwriter, Samuel Rosenman, sheds interesting light on the President's thinking. FDR had in his speech file a report of proposals by English religious groups on eliminating international fear, mistrust, and hatred by abolishing extreme disparities of wealth and a report that the English press was debating “the need for an 'economic bill of rights,' to defeat Hitlerism in the world forever by establishing 'minimum standards of housing, food, education, and medical care,' along with free speech, free press, and free worship.”\textsuperscript{81}

After the President dictated the passage on the four freedoms, saying that each must be achieved “everywhere in the world,” Harry Hopkins, one of his aids, questioned whether Americans would be interested in people in places far away like Java. Roosevelt responded, “I'm afraid they'll have to be some day, Harry. The world is getting so small that even the people in Java are getting to be our neighbors now.”\textsuperscript{82}

Later in the war, FDR elaborated on the four freedoms and proposed what he called a Second Bill of Rights for America, including such rights as the right to a job, to earn enough to provide for basics, the right of businesses to be free of monopolies, the right to a decent home and adequate health care and education, and the right to economic protection for the elderly, the sick, and the unemployed.\textsuperscript{83}

Roosevelt linked these economic rights to peace and freedom. He said, “essential to peace is a decent standard of


\textsuperscript{80} Id. at 68.

\textsuperscript{81} Id. at 83.

\textsuperscript{82} Id.

\textsuperscript{83} Id. at 243.
living for all” in all countries. “Freedom from fear is eternally linked with freedom from want.” Saying that “true individual freedom cannot exist without economic security and independence,” he quoted an English case that said “necessitous men are not . . . free men.” “People who are hungry and out of a job,” Roosevelt said, “are the stuff of which dictatorships are made.” Driving home his point, Roosevelt said that in discussions among the allies, “[t]he one supreme objective for the future” was security, meaning not only safety from attack, but “also economic security, social security, moral security -- in a family of Nations.” Finally, FDR answered the argument that if other countries were encouraged to increase their standard of living, ours would have to fall. On the contrary, he said, rising living standards in one country increase purchasing power which “encourages a better standard of living in neighboring countries with whom it trades.”

Roosevelt did not intend for his Second Bill of Rights to be added to the United States Constitution as amendments. Professor Sunstein says FDR thought his proposals should be considered not Constitutional rights, but “constitutive commitments.” He called on Congress to take the necessary action to translate his proposals into law.

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84 Id. at 237.


86 Id. at 242.

87 Id. (quoting Vernon v. Bethell, 2 Eden 110, 113 (1762) (Eng.) (“[N]ecessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.”)).

88 Id.

89 Id. at 236.

90 Id. at 237. For discussion of the social and political history, providing context for Roosevelt’s four freedoms and Second Bill of Rights, see ERIC FONER, THE STORY OF AMERICAN FREEDOM 195-236 (1998).

91 Sunstein, supra, note 79 at 99.

92 Id. at 180, 243.
immediately, although some of the issues he raised were addressed in part in the ensuing years. Sunstein suggests that, on the whole, these efforts were weak and that much remains to be done to make the Second Bill of Rights a reality.\footnote{Id. at 233-34.}

In making his proposal, Roosevelt appealed both to American values and interests, arguing that economic security was necessary for the spread of freedom and also to peace that would provide the foundation for freedom from fear. As we have seen, there was some bipartisan recognition of this point, for it was Herbert Hoover who said after the First World War that “[i]t is impossible to discuss the peace of the world until adequate measures have been taken to alleviate the fear of hunger.”\footnote{LAUREN, supra note 2.} Here we see the germ of the idea that it would be in America's own interest if people in other countries have certain rights.

Roosevelt’s proposal for a Second Bill of Rights was part of a broad array of policies designed to establish international stability. The Second Bill was an important source for human rights initiatives, but in the immediate post war era the Universal Declaration of Human Rights was only one initiative in a flurry of declarations, agreements, and institution building, from the creation of the United Nations, to the launch of the Bretton Woods Institutions dealing with international trade, finance, and development. While negotiations at Bretton Woods involved horse trading over commercial interests, they also reflected a belief that the new multilateral structure was needed to establish an economic order that would advance human well-being, stability, and peace.\footnote{ELIZABETH BORGWARDT, A NEW DEAL FOR THE WORLD: AMERICA’S VISION FOR HUMAN RIGHTS 93, 128, 133-34 (2005).}

Professor Elizabeth Borgwardt argues that the modern concept of human rights emerged during World War II and in the initiatives just described to establish peace and prosperity. Under Roosevelt’s leadership, the allies offered human rights as the defining difference between free and totalitarian societies.\footnote{Id. at 53.} By making human rights part of American war aims, the
national interest was redefined. This effort incorporated what were understood as the lessons of the New Deal, including the link between individual security and world stability and the responsibility of government to help individuals achieve security. Moreover, economic security was understood to require not only fair distribution of goods but also of other opportunities for development of the human personality. The appreciation of the importance of economic rights underlay the effort to establish the UN and the Bretton Woods Institutions as the foundation of a just and legitimate international order that would serve American interests by serving the interests of the people of the world.

The World War II era and its aftermath provide still-relevant lessons in the application of rights and law in addressing global problems because, like today, nations faced huge challenges which could not be confronted without cooperation. It may help provide perspective on the meaning of this outburst of international law making to consider a contemporary understanding of the relationship among law, rights, and

97 Id. at 292.

98 Id. at 78.

99 Id. at 134. Professor Borgwardt cites the writing of Charles Merriam, political scientist and New Dealer, as the source for defining economic security in terms of opportunity for development of human personality. This theme is also found in the writing of Ernest Barker and Amartya Sen, discussed infra text at note 103 and infra text at note 142. It is noteworthy that Merriam’s earlier writings about American political theory focused on other issues such as federalism, constitutionalism, parties, democracy, and the role of government, suggesting that his interest in economic rights and human rights may have emerged during the New Deal and under the pressures of World War II. See C. Edward Merriam, A History of American Political Theories (1910); Charles Edward Merriam, American Political Ideas: Studies in the Development of American Political Thought 1865-1917 (1920).

100 See Borgwardt, supra note 95, at 133-40. Regarding the subsequent history, difficulties, and suggested reform of the Bretton Woods institutions, see Id., at 252-61 and Ethan B. Kapstein, A Global Third Way: Social Justice and the World Economy, WORLD POLY, Winter 1998-1999, at 23. Kapstein argues that globalization undermined the mutuality in the original Bretton Woods deal. He proposes new means to finance national safety net programs and to monitor and promote progress on development. His suggestions anticipate to a degree the MDGs, although the latter have not yet achieved the kind of systematic impact he proposed.
governance. For this purpose, we turn to the work of a scholar of political thought who wrote about these issues in the domestic context of individual nations, based on a long life and career of study focusing especially on classical antiquity and the development of law and institutions of parliamentary democracy in England and continental Europe.

Ernest Barker (1874-1960) attended Oxford on a scholarship and later taught history there for two decades. He served as Principal of King’s College from 1920 to 1927 and the next year became the first occupant of the Cambridge Chair in Political Science, a position he held for eleven years, after which he retired but continued to write. His career and writings covered both of the World Wars, the rise and fall of dictatorships, great changes in British government and society, and failures and successes in international affairs and attempts at international cooperation.

Although Barker’s views evolved and fit no stereotype, his constant commitments were to parliamentary democracy and the rule of law and to the dignity of individual personality -- avoiding extremes of either laissez faire or collectivism. For present purposes, it is his explanation of the relationship between rights and the rule of law that is most interesting. It is interesting because it sheds light on different American perspectives on this relationship and because of the implications of these different perspectives for international law and global governance. It is also interesting because, although prominent in his day, Barker’s work has been long neglected. The renewed relevance of his view of rights and law says something about what happened after his death and what is happening now.

The discussion here on Barker’s view of rights, law, and politics is largely based on his book, Principles of Social and


102 Id. at 2, 10.

103 Id. at 205-206.

104 Id. at 198.
Political Theory, which was published in 1951. The book was based on lectures in a course he taught at Cambridge during the last years of his tenure there, ending in 1939.

Barker said that the legal system of a country is a system of rights. Instead of viewing rights as a few matters carved out for special protection, he viewed the entire legal framework as a structure of rights. He reasoned that a State is a legal association that exists through law. The ultimate purpose of the State is the “development of the capacities of personality in its members . . . .” The law is right and has “the quality of rightness or justice . . . .” to the extent it secures conditions to achieve this purpose. Of course, the law may be imperfect and fall short of Right when measured against “‘natural’ or ‘human’ rights.” The right of an individual is their capacity, in the sense of their status or power of action. Rights are “the embodiment in particular persons, of the general system of Right or Justice on which the State and its law are based.” Law is based, however imperfectly, on the idea of Right. Any person’s right is a share of “the general system of Right or Justice . . . .” and the sum of one’s rights is their position and

105 Ernest Barker, Principles of Social and Political Theory (1951). We do not suggest Barker believed the ideas developed in this book, which has a domestic focus, could be mechanically applied to international relations. However, his ideas regarding rights and law provide insights relevant in the global context, perhaps even more so today than when he wrote. Moreover, Barker did believe that certain underlying principles -- the rights of mankind and the rule of law -- have universal validity. Stapleton, supra note 101, at 195-96.

106 Barker, supra note 105, at v.

107 Id. at 89, 227.

108 Id. at 136. See also supra note 99 and infra text at notes 141 and 142.

109 Id.

110 Id. at 137 n.1.

111 Barker, supra note 105, at 137.

112 Id.

113 Id.
entire share in the system of Right.\textsuperscript{114}

In this view, law and rights are two aspects of the same thing. A system of rights (along with duties owed others so they may also have rights) looked at objectively, as something confronting the individual, is seen as law. However, when viewed subjectively, from the viewpoint of the individual, the same principles appear as rights.\textsuperscript{115} Thus, in enforcing laws, government is also securing rights, and accordingly, “the function of government is the service of rights.”\textsuperscript{116}

Barker goes on to say that “justice” is the “right ordering of human relations in, and by” the State.\textsuperscript{117} It is a principle of distribution which determines the share and weight of the principles of liberty, equality, and cooperation, each of which is itself a value or principle for determining the distribution of rights.\textsuperscript{118} Justice is a value which reconciles and synthesizes the claims of the other values.\textsuperscript{119} The idea of justice has its source in ethics and the foundation of ethics is the worth of individual personality.\textsuperscript{120} The ultimate goal of national society is to foster “the highest possible development of all the capacities of personality in all of its members . . . .”\textsuperscript{121} This result is the right ordering of society and therefore justice.\textsuperscript{122}

Barker said that justice is not something discovered by the solitary jurist but, rather, by all members of the community thinking together over time about the right order of their relationships.\textsuperscript{123} Thus, a conception of justice is the result of a

\textsuperscript{114} Id.
\textsuperscript{115} Id. at 227.
\textsuperscript{116} Id.
\textsuperscript{117} BARKER, supra note 105, at 167.
\textsuperscript{118} Id. at 136, 167.
\textsuperscript{119} Id. at 102.
\textsuperscript{120} Id. at 123.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} BARKER, supra note 105, at 197.
long term process of social thought that gives rise to common convictions.\textsuperscript{124} Government translates the results of social thought into law in a process that declares and enforces the common convictions about justice.\textsuperscript{125} Law, which falls short of the common conviction about justice resulting from social thought, may be legally valid and impose legal obligation, but it lacks moral value.\textsuperscript{126}

Barker did not assert that he had invented this theory. On the contrary, he said that the idea of justice developed over the centuries through a process of thought that made it “a common inheritance.”\textsuperscript{127} He traced the roots of this common inheritance to, among other sources, the teachings of Aristotle and the principles of Roman law.\textsuperscript{128}

Finally, Barker asserted that the evolution of society gives rise to new rights.\textsuperscript{129} Since the function of government is the service of rights, the growing pains of rights give rise to new functions of government. New rights, however, first pass through a nascent phase in which they are part of social thought. They become full-fledged legal rights only as they become part of “the common conviction of the political community” and are “formally endorsed by the organs of that community” or are widely recognized as customary law.\textsuperscript{130}

Barker’s thinking provides perspective on Franklin Roosevelt’s attempt to promote a Second Bill of Rights. FDR believed that the rights in his Second Bill had already become the “conviction of the community,” and that it only remained for them to be endorsed by the organs of that community. It will also be recalled that he believed that the Four Freedoms, which provided the framework for the Second Bill of Rights, should

\textsuperscript{124} Id. at 198.

\textsuperscript{125} Id. at 197-202.

\textsuperscript{126} Id. at 216.

\textsuperscript{127} Id. at 167.

\textsuperscript{128} Id. at 168-69.

\textsuperscript{129} BARKER, supra note 105, at 244.

\textsuperscript{130} Id. at 173-74, 229.
prevail worldwide. Moreover, the Universal Declaration of Human Rights took up the project of making that aspiration a reality.

Roosevelt’s initiative differed from the original Bill of Rights in several ways that show an interesting affinity with Barker’s conception of rights. In Barker’s description, the entire system of law is a system of rights, so legal claims do not have to be carved into a constitution or set apart from other laws in order to be rights. Of necessity, Roosevelt adopted a similar view, since probably he did not wish to face the difficulties of amending the constitution or the risk of relying on amendments to be validated through court enforcement. Also, in accordance with Barker, rights for FDR are fulfilled not only by judicial remedies, but by programs undertaken by all the organs of government.

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131 SUNSTEIN, supra note 79, at 81, 180.

132 To put this in perspective, it is worth remembering that at the time of the American founding, James Madison and others argued that a bill of rights might be problematic in implying that no rights exist except those enumerated. Madison eventually acquiesced. In a characteristic exchange of letters, Thomas Jefferson and Madison emphasized different points in favor of a bill of rights. Jefferson said that a bill of rights “is what the people are entitled to against every government on earth . . . and what no just government should refuse or rest on inference.” JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 77 (1990). Madison remained skeptical. He thought a bill of rights might, on rare occasion, provide “good ground for an appeal to the sense of the community” against government abuse, but also said it might help teach the people to curb “the impulses of interest and passion.” Id. at 77, 129. Of course, Madison was later a principal draftsman of the constitutional amendments that became known as the Bill of Rights, including the Ninth Amendment, which states that enumeration of some rights does not deny others. Also, with Jefferson, he invoked the bill of rights in challenging the Alien and Sedition Acts of the Adams administration. Id. at 81-84, 126-30.

133 Sunstein, supra, note 79 at 180.

134 Id. at 52-53, 143. See Michael J. Dennis & David P. Stewart, Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?, 98 Am. J. Int’L L. 462 (2004). While the author of the present article differs from Dennis and Stewart on the value of a complaints mechanism for economic, social, and cultural rights, they make clear that such rights are no less obligatory or binding in the absence of such a mechanism. Id. at 466 n.25, 514.
Nevertheless, the difference from the approach to rights under U.S. constitutional law should not be overstated. The broad terms of such provisions as those relating to due process and equal protection are flexible and cover a wide range of circumstances. They too may be carried out through programs administered by the executive branch, as well as through court orders. Moreover, Barker’s approach to rights converges with American tradition, in one other important respect. Barker spoke of rights emerging from a process of social thought before they achieve enforceable status. The principles of the Declaration of Independence are not enforceable as such, in court. Nevertheless, Abraham Lincoln referred to the equality principle in the Declaration as a goal, and he relied on it in his arguments against slavery. Likewise, the American government explained its understanding of the principles of the Universal Declaration of Human Rights as similar to Lincoln’s understanding of the role of the Declaration of Independence. That is, the United States suggested that the principles of the Universal Declaration, while not enforceable themselves, would act as a magnet, drawing nations toward actual implementation of those principles.

These insights from the World War II era help us look beyond the sharp distinctions among different approaches to achieving public objectives. We seek to call attention to the relationship of treaties, development programs, and human rights in addressing the new poverty and global warming. While we usually associate different characteristics with these

135 GLENDON, supra note 51, at 236.

136 Id. See Amartya Sen, The Power of a Declaration: Making Human Rights Real, THE NEW REPUBLIC, Feb. 4, 2009, at 30-32. Sen highlights what he calls the distinctive contributions of the Universal Declaration. Id. He says these include its emphasis on human rights as ethically based, “pre-legal” claims that can motivate new legislation. Id. He also states that as non legal principles, human rights are advanced not only by legislation but by societal discussion. Id. Moreover, social rights show how human rights are not limited by retrospective notions of what is feasible. Sen’s perspective has affinities with Barker’s idea that legal rights emerge from societal discussion and FDR’s idea that his Second Bill of Rights was not itself an instrument for judicial enforcement but a set of principles to create momentum for legislation. At the same time, in keeping with Barker’s thesis, the principles Sen sees as ethically based and pre-legal may crystallize into law, as some portions of the Universal Declaration have become part of customary international law. See GLENDON, supra note 51, at 178.
methods, it is useful to recognize the similarities as well and also the ways in which they can work together to achieve results. Another way to say this is that the usual distinctions between law and policy-making and between judicial and other means of implementation inhibit our ability to see how they are part of one process through which society seeks to define and achieve the public interest.

Also, Barker’s explanation of the process through which social thought becomes the conviction of the community embodied in law might help us understand where we are in the definition of the global public interest regarding the new poverty and global warming. The uncertain support for the right to development and for environmental rights, and the shortcomings in application of a human rights approach present difficulties. On the other hand, the force of necessity in confronting global warming will create great pressure to develop community consensus in a way that may be similar to the pressure that gave birth to modern human rights as a defining issue for the allies in World War II.  

Finally, Barker’s stress on the role of law as closely related to politics, and subject to appraisal in light of moral standards has important continuing relevance. While there are advantages to singling out certain principles as fundamental and requiring special deference, there is also value in the view that the entire system of law should be tested by standards of justice. Even if a decision-maker finds no established human rights violation in novel situations or situations with the competing claims that may arise due to economic or social deprivations, community values should help guide policy choices and legal interpretation.

137 For a discussion of national statutory bills of rights as precursors for constitutional provisions and interaction of such statutory rights with other mechanisms and institutions, see Mac Darrow & Philip Alston, Bills of Rights in Comparative Perspective, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVE 483-84 (Philip Alston ed., 1999).

138 In 1946, advocating for creation of an international bill of rights, Charles Merriam said that the economic and social deprivations suffered around the world “are wrongs of our day, which will not in the long run be denied a remedy in the common judgment of mankind.” SUNSTEIN, supra note 79, at 64. For the suggestion that the international law of development is largely “soft law”, and debate about whether this is problematic or potentially fruitful, see Peter Slinn, Differing Approaches to the Relationship Between International Law and the
standards was an articulation of a long tradition in Anglo-American social thought. In some ways he might be viewed as one of the last of a very long line.\textsuperscript{139} As his intellectual biographer suggests, Barker and his approach, though once prominent, were neglected after his death and largely swept aside by new fashions in political science, such as behaviorism.\textsuperscript{140}

The legacy of Barker’s approach in the decades after his death is ambiguous. On the one hand, very similar insights reemerged in other fields, including the multidisciplinary approach of the New Haven School of international law. In this approach, law is viewed as a process of authoritative and controlling decisions reflecting community perspectives, subject to appraisal in light of steps seen as necessary to achieve a world order based on human dignity.\textsuperscript{141} Also, Barker’s assertion that


\textsuperscript{139} \textit{See Ernest Barker, Political Thought in England: 1848 to 1914}, at 161-83 (2nd ed., reset with revs. 1947).

\textsuperscript{140} \textit{Stapleton, supra} note 101, at 198-99.

\textsuperscript{141} W. Michael Reisman et al., \textit{The New Haven School: A Brief Introduction}, 32 Yale J. Int’l L. 575, 576 (2007); Siegfried Wiessner & Andrew R. Willard, \textit{Policy Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity}, 93 Am. J. Int’l L. 316, 319 (1999). Myers McDougal, one of the architects of the New Haven School, commented that the values of human dignity are traditional values but the key point is to understand how to elaborate an approach to guide specific choices. Myres S. McDougal & Gertrude C. K. Leighton, \textit{The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action, in Studies in World Public Order} 335 (Myres S. McDougal ed., 1960). Notably, McDougal, like Barker, was trained in the classics and later, at Oxford, where Barker studied and taught for many years, McDougal was trained in legal history. Reisman, \textit{supra} at 575. Regarding Barker’s view of law as closely related to politics and the related New Haven School view of law as a process of decision, and for discussion of the history of shifting and recurring themes in the social sciences, emphasizing different analytical factors, such as decision, policy, law, and institutions, see \textit{Carl J. Friedrich, Man and His Government: An Empirical Theory of Politics} 70-71 (1963).
the goal of ethics is to promote the worth of individual personality and the capabilities of personality of all members of society finds resonance in Amartya Sen’s explication of development as freedom. Sen defines freedom in terms of development of human capabilities. Like Barker, Sen finds that important aspects of these ethical themes are part of traditions that can be traced to Aristotle.142

At the same time, however, approaches to international politics took a turn toward a narrow realpolitik, and an argument ensued about whether something such as a world order based on law and human dignity could ever emerge or whether power politics would always prevail. Lost in the polemics was the post-World War II insight that, in the modern era, a conception of human rights based on security and justice is integral to international stability and American national interest. Only more recently is it coming to be recognized that world order is likely to be provided both by a balancing of power and by international norms and institutions.143 A cardinal error of the “realism” of the past several decades has not been the assumption that force would sometimes be needed. It is the failure to recognize the growing number of situations in which multilateral cooperation would be required and in which force could not serve as a substitute and could even be counterproductive. As suggested previously, it would serve clarity to adopt a new realism that recognizes this reality.144

VI. TREATIES, RIGHTS, AND POLICIES -- INSTRUMENTS IN THE STRUGGLE TO CONFRONT GLOBAL WARMING AND THE NEW POVERTY

We have already discussed the difficulty of achieving cooperation and collective action on global public goods. Weak,

142 AMARTYA SEN, DEVELOPMENT AS FREEDOM, 14, 24, 36, 75, 289 (1999). See HUMAN DEVELOPMENT REPORT 2007/2008, supra note 6, at 28-29, 60 (regarding the application of Sen’s approach in the context of climate change).

143 JOSEPH S. NYE, JR., UNDERSTANDING INTERNATIONAL CONFLICTS: AN INTRODUCTION TO THEORY AND HISTORY, 281 (6th ed. 2007); Joffe, supra note 3, at 95-100.

144 Joffe, supra note 3, at 96-97, n.19.
fragmented institutions face the centrifugal force of divergent national and private interests. In confronting global warming, the magnitude and complexity of the problem mobilizes powerful interests opposing action. Here, we briefly summarize how rights, policies, and treaties counter the entropy (tendency to disorder) of the international system.

International human rights reflects a community view about the treatment of individuals and people. Although various types of rights were recognized before the Universal Declaration, the declaration was the beginning of codification. Under later conventions, nations undertook to implement specific rights, which was usually accomplished through national laws enforced by national courts. For certain purposes, multilateral institutions were also established to carry out implementation.

Thus, the human rights regime began to overcome entropy by borrowing heavily on the power of states. An important change took place, however. As Dean Harold Koh has pointed out, a new transnational process emerged in which interests and parties organized and operated across borders and through all levels of governance, from the global to the local. Moreover, the human rights regime is based on ethical standards and it thus mobilized support based on appeals to conscience.

Voluntary policies and programs have been created to foster development, undertake poverty alleviation, and promote clean energy. Falling short of enforceable agreements, these do not amount to treaties and have resulted in only modest progress. They are undertaken because modest, voluntary action is in the interest of the parties. Publicized goals and milestones create at least some minimal rationality in achieving the modest goals announced and may even generate some support, or even pressure, to act.

More ambitious is the treaty that attempts enforceable mutual obligations. The concept of enforcement of international agreements is elusive because parties may agree that the treaty

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145 See supra pp. 294-95. Regarding collective or group rights, see generally PEOPLES’ RIGHTS, supra note 57.

146 WEISSBRODT, supra note 57.

147 See Joffe, supra note 3, at 102.
is “binding”, yet fail to comply and face sanctions that are insufficient to achieve compliance. To be effective, the situation must be one in which the parties have positive or negative incentives to comply. When assessing whether to comply with a treaty designed to achieve collective action to produce a public good, the parties compare the benefits of inaction to those of action. The treaty must change the incentives faced by the parties from what they would be in the absence of the treaty. To do this, it must aggregate the benefits of cooperation, redistribute them in such a way that the parties want the agreement to succeed, and create incentives for compliance. Depending on the circumstances this may be a more or less difficult task.

All of these methods of defining and achieving the public interest or global common good may be brought together to maximize the effectiveness of the undertaking. The opposing forces of entropy are powerful since nations or strong private interests may judge that they can do better by resisting cooperation, even though most people will be harmed.

Diplomats and statesmen facing this challenge have a box of tools to try to deal with the entropy problem. These include side payments and package deals. They can try to minimize

148 SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 33 (2003)[hereinafter BARRETT, ENVIRONMENT]. In this indispensable book, Professor Barrett explains the collective action problem in production of public goods through a card game in which each person in a group gets a red card and a black card. Id. at 3. Each person gets $5 if they keep the red card plus $1 for every red card anyone hands in. Id. Each person is asked to hand in one card and to try to maximize their payoff. Id. The person who hands in a red card provides a public good because every other person benefits and no one can be excluded from the benefit. When playing with twenty people, if all the red cards are handed in, everyone gets $20. If none are handed in, each person only gets $5. All would do better if all handed in their cards, but most people calculate that they will do better by holding back than by providing the public good because they do not know what others will do. Id. at 4. If only a few hand in their red cards, each of them will get that number of dollars but those who hold back will get that number plus $5 for the card they kept. When this game is played and the option is provided to vote for a rule that anyone keeping their red card will have it confiscated, people invariably vote for the rule. Id. at 5. This shows how government can solve the collective action problem, but such government does not exist internationally. The problem for treaties lies in creating the circumstances described above in the text in order to get all nations to hand in their red cards pursuant to arrangements that are voluntary and self-enforcing.
opposition by providing that affected interests are not adversely impacted, or are at least given time to transition to new circumstances. They can stimulate countervailing power by promoting interests more in tune with the public interest sought. Similarly, they can try to open the process to wider citizen input, encouraging a broader perspective. In some countries, this may require new initiatives to afford basic opportunities for participation. Especially in poor countries, it will require initiatives that ensure that deployment of clean energy and economic development are integrated so that people are not forced to choose between those goals. Some of these tools were used in crafting the Montreal Protocol to deal with ozone depleting chemicals, but the global warming challenge is decidedly more difficult.\textsuperscript{149}

As we consider how rights, policies, and treaties counter the entropy of the international system, it is important to understand that the global warming problem is not one kind of collective action problem, but several. It is not only a problem of producing the public good of unpolluted air, but also the public good of adaptation, which itself is a multifaceted public goods problem. The knowledge needed to develop new clean energy technology and common standards to facilitate diffusion of the technology are also public goods.\textsuperscript{150}

Technologies and knowledge for clean energy and adaptation may be provided as global public goods, but individual nations need to provide the domestic public good of effective delivery to ensure full and wide distribution. This requires effective domestic institutions. Weak domestic institutions may

\textsuperscript{149} Barrett compares the Montreal Protocol and the Kyoto Protocol and discusses the reasons for the success of the former and difficulties with the latter. \textit{Id.} at 389. In a subsequent, important book, Professor Barrett notes the effect on this comparison of the costs and benefits of action and he discusses new analysis suggesting the threat may have previously been underestimated. \textsc{Barrett, Why Cooperate?}, \textit{supra} note 19, at 94-101. He also suggests that some public goods, including adaptation by poor countries to damage from climate change, depend largely on provision of national public goods. While such adaptation may be a global public good, poor countries may lack the capacity to act and large countries, since they may not benefit enough, may lack the motivation apart from compassion. \textit{Id.} at 189. We return to these considerations below.

\textsuperscript{150} \textsc{Barrett, Why Cooperate?}, \textit{supra} note 19, at 7.
undermine the global effort to confront climate change and therefore all nations have an interest in the effectiveness of national governments, making this also a global public good.\textsuperscript{151} Effectiveness of national governments is disrupted by conflict so that prevention of conflict is yet another related public good. Conflict prevention may be, to a significant degree, a regional public good, since the country’s neighbors may be the ones most likely to benefit from peace.\textsuperscript{152} Professor Barrett summarizes the situation by saying that free riding by rich countries and failed governance by the poor are the great obstacles to progress on adaptation that must be overcome.\textsuperscript{153}

We can now see more clearly how the various tools discussed earlier can come together to define and achieve the public interest. Whether through the multilateral goals of development cooperation, through human rights instruments and initiatives, or through treaties, the players must be induced to hand in their red cards.\textsuperscript{154} Whatever the instrument or policy, incentives and sanctions must be structured so that nations change their conduct.\textsuperscript{155}

Initiatives like the MDGs provide relatively weak inducements, but it is unlikely they would have been created if there was not some interest in pursuing them. For wealthy countries, endorsement of development goals may be motivated by the same kinds of reasons that exist for support of foreign assistance. However, the more systematic and transparent the process, the more the donor countries are subject to embarrassment and pressure if they fail to comply, including pressure through their own domestic political process.\textsuperscript{156}

Normally, we might think of human rights instruments and initiatives as having more teeth than development goals. As stated earlier, however, human rights has major shortcomings

\textsuperscript{151} Id. at 11-12.

\textsuperscript{152} Id. at 169.

\textsuperscript{153} Id. at 188.

\textsuperscript{154} Barrett, Environment, supra note 148, at 3-5.

\textsuperscript{155} Barrett, Why Cooperate?, supra note 19, at 21.

\textsuperscript{156} Id. at 123; Joffe, supra note 3, at 132-33. See also supra p. 290-91 and note 70.
when it comes to grappling with global warming, and it has been suggested that instead of waiting for reform of existing law, human rights principles should be applied in climate negotiations and to other policies. The authors of a study by Oxfam International assert that this would ground policy in widely shared norms, focus on the most vulnerable people, help identify those responsible, highlight injustice, and provide a moral impetus for action. The norms include fulfilling rights

\[157\textsuperscript{RAWORTH, supra note 72, at 8.}\]

\[158\textsuperscript{Id. As stated earlier, supra note 71, policies to address climate change as well as climate impacts themselves can implicate human rights. In the negotiations for a new climate treaty, the design and potential impact of policies to prevent deforestation prompted a controversy at the December 2009 conference in Poland when the United States, Canada, Australia, and New Zealand successfully opposed language in a committee report “noting the rights and importance of engaging indigenous peoples and other local communities.” David Adam, Indigenous Rights Row Threatens Rainforest Protection Plan, \textit{GUARDIAN}, Dec. 9, 2008. The exact reasons for this action are unclear but previous UN debates regarding rights of indigenous peoples included controversy surrounding issues of self determination and land rights, among other issues. See UNAdopts Declaration on Rights for Indigenous People Worldwide, \textit{INT’L HERALD TRIBUNE}, Sept. 13, 2007, available at http://www.iht.com/bin/print.php?id=7501482; Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, September 13, 2007, USUN Press Release No. 204(07) (Sept. 13, 2007), available at http://www.treatycouncil.org/PDFs/US_DRIP.pdf. Those objecting to the committee action seek the right of indigenous peoples to participate in decisions affecting them and to decide whether or not to accept proposed forest preservation policies. While the phrase was dropped from the December report, those opposing the language said they support participation rights but evidently had concerns about other aspects of the language, and the issue remains on the committee’s agenda for further consideration. See Indigenous People Outraged at Removal of Rights in REDD Outcome, \textit{TWN Poznan News Update} 12 (Third World Network), Dec. 11, 2008, http://www.twnside.org.sg/climate.news.poznan.htm; Posting of Luke Bailey to Rights, Forests, and Climate Change, http://rightsandclimate.org/2008/12/17/post-poznan-what-place-for-rights-in-redd/ (Dec. 17, 2008). The controversy regarding deforestation and indigenous rights illustrates the theme of the commentators noted in the text above, that even if there are potential uncertainties about a traditional human rights case, human rights principles should inform policy. Regardless of the generalized questions raised previously in UN debates regarding the non-binding Declaration on the Rights of Indigenous Peoples, the principles of the resolution are relevant to the climate negotiations and the climate negotiators should adopt fair avoided deforestation policies that protect the rights of indigenous people and local communities. See High Commissioner’s Report, \textit{supra} note 57 at 18, 23. See also \textit{supra} note 16. Additionally, this example shows that it is not only true that a policy of
(through legislative, administrative, judicial, and budgetary means), guaranteeing minimums (e.g. for food, water, shelter, and health), focusing on the vulnerable, ensuring participation and accountability, and cooperating internationally.\textsuperscript{159}

Another study highlights as a potentially key analytical tool, a proposal for establishment of human rights thresholds that specify minimum acceptable levels of protection, with a focus on specifics, such as who has been injured and how, and what relief is appropriate.\textsuperscript{160} The study also notes that experience with the right to development suggests that the climate change problem may warrant a shift in the emphasis from assigning liability to requiring due diligence and accountability and measuring effective cooperation.\textsuperscript{161} More broadly, this suggests the sustainable development can advance human rights by improving economic and social conditions, but also that implementation of human rights can advance sustainable development, since protection of forests will benefit from improvement of the wellbeing of local communities resulting from human rights protections.

\textsuperscript{159} Id. at 10-11, 17. (including UN authorities cited therein). Another line of authority for compensating those damaged by climate impacts is found in the rule of state responsibility for harm under customary international law. For discussion of this approach, the legal difficulties in achieving recovery, and the suggestion that a resolution should be achieved through negotiation of a multilateral agreement see Roda Verheyen & Peter Roderick, World Wildlife Fund – United Kingdom, Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage (2008). See also Christina Voigt, State Responsibility for Climate Change Damages, 77 Nordic J. Int’l. L. 1 (2008).

\textsuperscript{160} Humphreys, supra note 7, at 17-21. In addition to protection of individuals from damage, principles of justice are relevant in climate policy in the overall design of multilateral commitments. Under Article 3 of the UNFCCC, parties are called on to follow principles of equity and common but differentiated responsibilities. To fulfill these principles, various criteria for design of the treaty have been suggested. It is possible to connect these equitable themes to established human rights such as the right to sustenance or development, but the stakes extend beyond these specific points. Accordingly, this issue presents an important example of territory beyond traditional human rights law where there is a need to translate a general impulse for fairness into specific criteria. For discussion of these issues, see Humphreys, supra note 7, at 9-11, 59-64. See also supra p. 289-90.

\textsuperscript{161} Id. at 76. The issue of accountability includes accountability of various parties. People in donor countries sometimes object to foreign aid with generalized complaints about lack of accountability. However, ensuring that aid is properly channeled is also a concern of the intended beneficiaries. See, e.g.,
possibility of greater convergence between the instrumental approach of development policy and the normative approach of human rights.

In this vein, Henry Steiner says that in implementing economic and social rights, there has been growing recognition of their interconnection and of the planning and institution building that is involved in implementation.\(^{162}\) Steiner says there is opportunity to combine both rights and development discourses. Rights discourse serves “as a mobilizing force that speaks to basic aspects of human dignity . . .” rather than “asserting a want or interest . . . .”\(^{163}\) Development policy speaks in “consequentialist” terms. Realization of the right does not necessarily derive exclusively from the nature of the right, but depends on context and circumstances.\(^{164}\)

This may not seem so novel if we consider the parallel of a civil rights claim of discrimination and the relief for the violation, which often must be drawn while taking into account context and consequences. However, the point is helpful in thinking about the application of human rights principles to climate policy. Using the idea of human rights thresholds, mentioned above, one can identify priorities for action and even some aspects of the remedy, but the details of implementation may look more to instrumental issues. This becomes even more evident when we consider that the means of realizing an economic or social right may require connections across more than one policy area. Considering the far reaching significance for development of the issues involved in climate negotiations, the effort to make these connections is in its infancy. Little has been done to begin to evaluate and revise, in light of climate

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\(^{162}\) Steiner, supra note 70, at 29-30.

\(^{163}\) Id. at 34.

\(^{164}\) Id. at 34, 40-42.
change, development policies such as bilateral foreign aid, the MDGs, or broader international economic policy for sustainable development.¹⁶⁵

We have suggested that human rights principles can provide guidance in the policy process and also how development policy can help with their implementation. It also may be that incorporation in the climate change treaty of the norms and standards developed in the context of development policy and human rights will provide for greater action than under previous policy initiatives. This might be so because assistance for adaptation and other purposes would become part of a package of mutual commitments. Parties would agree to take action of various kinds, with varying degrees of ambition, on reduction of emissions, and assistance would be provided to address adaptation and deforestation, and to promote clean energy. In the near term, most developing countries receiving assistance

¹⁶⁵ See, e.g., HUMAN DEVELOPMENT REPORT 2007/2008, supra note 6, at 186-92 (evaluating the current state of adaptation financing as “too little, too late, too fragmented”). For a discussion of the controversy regarding the adaptation financing role of the World Bank and various developed country funding mechanisms, see RAWORTH, supra note 72, at 21-22. The recent UN report on climate and human rights sounds many of the themes noted above in the text. While suggesting it may be difficult to find that climate impacts constitute a human rights violation, the report finds negative impacts on human rights (such as the right to life, to health, and others) and it finds human rights protection for those affected. The report asserts that despite the burden on resources, human rights principles oblige nations to progressively seek to realize economic, social, and cultural rights, and human rights principles should inform and strengthen policymaking. For example, the human rights approach highlights equality, participation, access to basic levels of services, and accountability. Also, the report notes the cooperation essential to addressing climate change is reinforced by the human rights emphasis on international cooperation to realize human rights, including, for example, provision of assistance and the prevention of third parties, such as corporations, from interfering with human rights. The report notes that while human rights litigation is not well suited to anticipating future risks and thus differs from the precautionary principle familiar in environmental policy, human rights does include an allied goal of avoiding delay. Human Rights Council, Report on the Relationship Between Climate Change and Human Rights, 23-30, A/HRC/10/61 (Jan. 15, 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.61AEV.pdf. See id. at 27 n.117 (containing particularly relevant sources regarding incorporation of human rights principles into policy measures relating to development and poverty reduction). Regarding the report, see also supra notes 57 and 71.
would have minimal emissions mitigation commitments. However, there might be some mitigation actions taken by such countries, especially rapidly developing ones. Of course, strengthening compliance with assistance commitments would depend on the parties’ motivation to achieve the goals of the treaty and the strength of the compliance mechanisms. But with increasing estimates of the severity of impacts of inaction, the likelihood of compliance may also increase.\(^{166}\)

In sum, both law and policy are in crisis due to their shortcomings and weakness in the face of climate change. Under the pressure to respond, development policy, human rights, and climate change treaty law, while historically distinct, may converge to help define the global common good or public interest with respect to addressing climate change and ensuring multilateral action. The resulting landscape may differ in some ways from the one with which we are familiar, but it might also draw on past experience. For example, without time to overcome the technical weaknesses in human rights law, human rights principles may emerge to provide guidance in the way Roosevelt envisioned for the Four Freedoms and his Second Bill of Rights. Also, we should consider human rights, development policy, and treaty law holistically as part of one system of law and policy rather than solely as separate instruments. To use Barker’s phrase, they form an emerging system of Right.\(^{167}\) While working to perfect human rights law, we should not overlook the importance of the moral dimension of the larger legal system, which can also serve as a “mobilizing force that speaks to basic aspects of human dignity . . . .”\(^{168}\) Even where

\(^{166}\) See Barrett, Why Cooperate?, supra note 19, at 5, 94-99. Regarding the difficulties of designing effective enforcement of a climate treaty, see Barrett, Environment, supra note 148, at 383-98; Barrett, Why Cooperate?, supra note 19, at 100-02, 149-65. Regarding the weakness of adaptation assistance under the UNFCCC to date, see Humphreys, supra note 7, at 62-64. However, it seems unlikely that a new treaty will be concluded unless it goes beyond the vague and essentially voluntary assistance commitments in the UNFCCC. See, e.g., United Nations Framework Convention on Climate Change, art. 4.4, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 170. Regarding the relationship of principles of justice in the design of the treaty to human rights principles and development policy, see also supra, note 160.

\(^{167}\) See supra p. 301-02.

\(^{168}\) Steiner, supra note 70, at 34. See also supra notes 158 and 160.
technically there may not be a human rights case or a tribunal to adjudicate one, law and policy should follow principles of equity and justice. In the next section, we look even further beyond law to the relationship of law with politics in achieving the common good in confronting climate change.

VII. LAW AND POLITICS, CONSCIENCE AND INTEREST, IN ACHIEVING THE COMMON GOOD

In what we have just said, we have focused on different legal instruments. Here, we view law in the broader context of decision making and the political process.

During the era of institution building after World War II, international relations scholar Inis Claude, Jr. suggested that in envisioning global governance, it was a mistake to focus on national government as a monopoly of power, enforcing law.\textsuperscript{169} Rather, he argued that government is a focal point for a political process to resolve conflict.\textsuperscript{170} He said the emphasis on world law ignores politics and the need to deal with groups.\textsuperscript{171} Collective security, which experience showed was an elusive goal, required individual nations to identify their interest with world order.\textsuperscript{172} An institution like the UN could not will collective security into existence, but it might facilitate a balance of power and help move the world toward a higher level of order based on political accommodation.\textsuperscript{173}

Claude's insight is important, but it does not go far enough. Claude argues that law and politics are distinct and he suggests the latter is in some sense more important. What he overlooks, however, is how the two are related and how they interact, an understanding of which is essential to dealing with global challenges.

International law may be seen as a process of authoritative

\textsuperscript{169} INIS L. CLAUDE, JR., POWER AND INTERNATIONAL RELATIONS 270 (1962).
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 260-69.
\textsuperscript{172} Id. at 146.
\textsuperscript{173} Id. at 284. On this theme, see also Joffe, supra note 3, at 119-24.
and controlling decisions reflecting community perspectives. Consequently, law creates valid expectations about action as either permissible, prohibited, or mandated in a certain manner. Law may be declared by authoritative decision makers, but often law emerges from politics as participants seek criteria for decisions beyond, or at least in addition to, power. This may be done because agreement on an orderly and fair approach is the only way they can achieve their common goals and reap the benefits of cooperation.

In saying that the illusive public good of collective security can be achieved only when individual nations identify their own interest with broader world order, Claude provided an insight that applies to treaty law as well as to the politics of world order. As we have seen, parties to a treaty attempt to achieve a common good by structuring incentives so that the interest of each individual party leads it to act in accordance with the common good. With respect to global warming, the parties seek to limit greenhouse gas emissions and also to assist developing countries in adapting to climate change. The treaty can be viewed as an attempt to define the principles of the public interest or common good on these matters. However, it does not do so in a vacuum. The international community has also established goals for reducing poverty and promoting sustainable development. Human rights principles also address poverty and human well being, and advocates are asserting that they impose certain minimum requirements on a treaty. It might be said that human rights principles contribute to defining an international common good and that attempts are being made to define the common good with respect to climate change in a way that more closely reflects human rights principles.

Those who seek to address the new poverty through reciprocal commitments embodied in a treaty or through

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174 Reisman, supra note 141, at 579-80.

175 In fact, a similar idea was expressed in a domestic context in the Progressive Era aphorism of President Theodore Roosevelt, who said, “I believe in corporations. . . . They are indispensable instruments of our modern civilization; but I believe that they should be so supervised and so regulated that they shall act for the interest of the community as a whole.” ALAN BRINKLEY ET AL., NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION 99 (1997).
appeals to established human rights principles face formidable obstacles. The anticipated need is very large, the interests competing for attention are strong, and sentiment in wealthy countries regarding assistance to developing countries is mixed.

To address these problems, it is helpful to consider experience with domestic interest group politics. Important international struggles are no longer limited to territorial conflicts. To address global warming, countries must reach agreement on conduct both within and across borders.176 Thus, there is relevance in the domestic experience. In his classic work on the dilemmas of pluralism, Robert Dahl suggested that pluralism is desirable and necessary for democracy, but the development of large autonomous interests often undermines achievement of the common good.177 To counter this, he urged promotion of greater equality, more integrative institutions, and greater civic consciousness. Civic consciousness does not demand agreement on everything, but requires at least accord on how to go about promoting convergence of interests and resolving conflicts. One aspect of promoting convergence of interests would be reduction of inequalities. Dahl observed that “[c]onflicting interests make political life necessary; but complementary interests make it possible.”178

Much of this is instructive with respect to the dilemmas presented by the struggle for global public goods. As previously discussed, there is a need to overcome the social and economic differences that block international consensus on climate change and to develop cooperative institutions to address cross-border problems.179 Dahl’s point about civic consciousness also underscores that understanding the necessity of cooperation180 is not a luxury, but essential if the threat of dangerous global warming is to be avoided.

Despite the many obstacles to action on global warming,

176 See Joffe, supra note 3, at 102.


178 Id. at 188.


180 See id. at 106-18, 164-65.
there are opportunities to build civic consciousness both within and among nations. There are strong grounds based on interest and conscience for taking the necessary action to address the new poverty. These include the self interest of industrialized countries in achieving an agreement that will avoid catastrophic climate change and the national security interest in preventing the instability expected from runaway climate change. Perhaps even more fundamentally, the United States has an interest in leading a world order based on justice. Professor John Ikenberry argues that, in order to succeed, Americans must understand the logic of our own strength in approaching international affairs.\footnote{John Ikenberry, Liberal International Theory in the Wake of 911 and American Unipolarity 21 (Jan. 22, 2006) (unpublished paper presented at NUPI seminar, Oslo, Norway), available at http://www.princeton.edu/~gji3/Microsoft_Word_-_Ikenberry-Liberal-International-Theory-in-the-Wake-of-911-and-American-unipolarity-Oslo-word%20doc.pdf.} This approach, he says, is not one based on a traditional balance of power, but one based on bargains, cooperation, and U.S. leadership in providing public goods and supporting a rules-based system. However, Ikenberry believes the U.S. has been failing to provide this leadership.\footnote{Id.}

With respect to the multitude of stakeholder interests, both domestic and international, creative statecraft can promote the convergence of interests needed, as Dahl reminds us, to promote consensus. The revenues from the auction of pollution permits in wealthy countries can be apportioned to provide international aid, promote clean technology development, and ease the domestic transition. Climate negotiations should pursue strong near-term emissions reductions by wealthy countries and technology and other assistance, as well as the possibility of carbon trading for developing countries, so they can begin more modest but growing emissions reductions.

Domestically, support may be gained by ensuring a fair allocation of revenues raised in reducing emissions and designing emissions reduction measures as part of a larger program of economic revitalization based on investment in green technology and jobs.\footnote{See GEREffi ET AL., supra note 44; William Antholis & Strobe Talbott, Brookings Inst., Tackling Trade and Climate Change: Leadership on the Home Front of Foreign Policy 15-16 (2007); see also Climate Security} Citizens have both particularized

interests and a stake in achieving broader public goods. One might say that the public interest consists in figuring out how to fairly accommodate both. If governments refuse to provide public goods, everyone may devote themselves to fighting for their parochial interests, and important public goods will not exist.\textsuperscript{184} Narrower interests may deserve recognition but difficulty arises if they seek to veto effective action to provide the public goods.

The critical question of how much weight to give to different interests and how to integrate them must take place through a democratic process where broader interests are recognized. The challenge is to devise a strategy that enables the public to see its own interests or, as John Dewey said, to discover itself.\textsuperscript{185} Among other things, this means devising a program that is ambitious enough to ensure both provision of the broader public good and fair accommodation of particular interests.\textsuperscript{186} In this


\textsuperscript{185} John Dewey, \textit{The Public and Its Problems} 126, 222 (Ohio Univ. Press 1980) (1927); see also Joffe, supra note 3, at 167-70.

\textsuperscript{186} A recent analysis considers the application of rationality about the public interest on the one hand and bargaining to safeguard a plurality of interests on the other in the making of constitutions. Nathan J. Brown, \textit{Reason, Interest, Rationality, and Passion in Constitution Drafting}, 6 Persp. Pol. 675 (2008). To the degree this analysis implies a dichotomy between action to provide public goods and bargaining about private interests and suggests a preference for the latter, my approach differs. I argue that the public interest requires
way, citizens can see more clearly how they can benefit from action to provide public goods. In the case of global warming legislation, this means realizing the benefits of clean energy investments and ensuring fairness in the transition to a cleaner economy.\textsuperscript{187} For instrumental and moral reasons, it also means including assistance to developing countries for clean technology, avoided deforestation, and the full range of adaptation needs, including protection of people and nature based on recognition of their strong interdependence.\textsuperscript{188} This is necessary because the global public good cannot be provided without a global agreement, and can also be justified on the grounds of U.S. responsibility and for reasons of conscience discussed below.

As public officials work to reconcile various interests, it must be remembered that they are working within the constraints imposed by nature. The magnitude of greenhouse gas reductions required to avoid dangerous climate change is determined by science, not by bargaining. Given consensus that the costs of dangerous climate change are unacceptable, whatever accommodation may be reached regarding various interests, the veto of the necessary action by special interests cannot continue. Since our political system gives weight to those who are organized, to strike a fair balance in achieving the public interest, it is also necessary to ensure that the broad community is well represented in the decision-making.\textsuperscript{189}

accommodation, often of course, through bargaining, of both the interests of citizens in provision of public goods and in attainment of narrower interests.

\textsuperscript{187} See supra p. 321 and note 183. As we have previously noted, achieving unpolluted air is a public good. Some of the other objectives of climate legislation, such as promoting jobs through investment in clean technology, may also involve public goods in the technical, economics sense. Thus, when we say that the public interest involves accommodating broader and narrower interests, it should be remembered that to some extent this may mean attaining different public goods simultaneously.

\textsuperscript{188} See supra notes 6, 9. For discussion of both the moral and instrumental grounds for action, see \textit{HUMAN DEVELOPMENT REPORT 2007/2008}, supra note 6, at 58-65.

\textsuperscript{189} See supra pp. 277-78; Joffe, supra note 3, at 107-109, 170; see also, \textsc{James A. Morone}, \textit{The Democratic Wish: Popular Participation and the Limits of American Government} 29, 330-37 (1990) (arguing that American history records periodic phases of reforming activism but these efforts typically
Conscience or moral commitment, as well as interest, motivates action. Moreover, conscience adds an important element in helping to build civic consciousness and to specify the content of the public interest. Powerful support for the action needed to address climate change and the new poverty may come from several sources. These include human rights principles, as well as many different traditional perspectives. There is strengthening support among faith-based movements for assistance to improve the human condition abroad and help poor countries cope with climate change impacts. One foreign aid expert finds in this a potential major shift in the politics of foreign aid which could provide unprecedented support for assistance. Additionally, it is important to recognize the way in which morality counsels support and protection for the natural world, both as an element of human well-being and as a value in its own right. Whether in the traditional language of creation care and Albert Schweitzer’s “reverence for life”, or in the language of contemporary conservation and environmentalism, this dimension has mobilized a worldwide constituency. The difficulty is that the obstacles to action are fall short because American political culture lacks a tradition supporting institutionalization of reform.


192 Press Release, Urgent Call to Action: Scientists and Evangelicals United to Protect Creation (Jan. 17, 2007), http://www.creationcareforpastors.com/PDF_files/creationcarestatement.pdf; Edward O. Wilson, The Creation: An Appeal to Save Life on Earth (2006); Creation Care, http://www.creationcare.org/magazine/ (last visited Feb. 23, 2009). Regarding the common ground among the world’s religions on stewardship and protecting the natural world, see Human Development Report 2007/2008, supra note 6, at 61. The great conservationist, Aldo Leopold, called for creation of a new ethic that would judge action by whether it tends to preserve the biotic community. Writing in 1949, he complained that conservation was judged by self-interest the way social ethics had been a century before. Without using the language of public goods, he nevertheless noted that obligations beyond self-interest are assumed for things like improvement of schools but not for nature. He
based on immediate interests asserted by powerful organizations. The interests in favor of action, though monumental, are diffuse and may seem less immediate.\textsuperscript{193}

The theologian and mid-twentieth century exponent of foreign policy realism, Reinhold Niebuhr, said that the essence of statecraft is locating “the point of concurrence between the parochial and the general interest, between the national and the international common good.”\textsuperscript{194} Professor Andrew Bacevich says that Niebuhr “understood that a nation satisfies its interests more easily when those interests are compatible with the interests of others.”\textsuperscript{195}

In 1932, Niebuhr wrote pessimistically that for all countries, “the desire to gain an immediate selfish advantage always imperils their ultimate interests. If they recognise this fact, they usually recognise it too late.”\textsuperscript{196} In 1949, with the devastation of the Second World War fresh in mind, Niebuhr commented further on the tension between a nation’s perceived self-interest and larger claims. He said it was justified to place moral blame on nations for excessive self-interest. Even enlightened self-interest would not be enough to prompt commitment to collective security. Whether a nation meets the claims of such a wider good, beyond the nation’s own interests, “represents a

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  \textsuperscript{193} See The Politics of Regulation, supra note 24, at 367-69.
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  \textsuperscript{195} Id. at 175.
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  \textsuperscript{196} Reinhold Niebuhr, Moral Man and Immoral Society 83 (1932), discussed in Bacevich, supra note 194, at 182.
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spiritual issue beyond the mere calculations of prudence.”

There are ways, however, in which morality and interest may reinforce each other. Niebuhr’s contemporary and fellow architect of post World War II foreign policy realism, Hans Morgenthau, argued that conscience and interest are intertwined. He thought a foreign policy based on America’s purpose was needed to engage America’s energy and was an important basis of American power because of the appeal of the American example. Thus, he criticized the Nixon administration and especially its conduct in the Vietnam War for its failure “to restore those exemplary qualities of America where throughout its history the lasting roots of its powers have lain.”

The potential relationship between conscience and interest, and a way in which conscience may influence the interest of nations in cooperation to address global warming and the new poverty, is dramatized in Harold Berman’s monumental study of the influence of religion on the evolution of the Western legal tradition. Berman’s thesis was that the legal tradition of the

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197 Reinhold Niebuhr, On Freedom, Virtue, and Faith, in FAITH AND HISTORY 97 (1949). Perhaps Niebuhr meant that collective action may sometimes not be in the enlightened self-interest of the nation, or he may also have meant that, without taking into account a spiritual dimension, nations will not perceive and will not act on their enlightened self-interest. The latter would seem more consistent with his 1932 statement and with the experience of the war.

198 Hans J. Morgenthau, Nixon and the World: Four Years of Achievement and Failure, NEW REPUBLIC, Jan. 6, 1973, at 20. In subsequent times, many have misread the founding realists to say that nations must follow their interests and ignore morality. Morgenthau explained that the challenge for statesmen was more complex. He said the error in American foreign policy was to treat national interest and moral principle as mutually exclusive. The choice, he said, is not between moralizing and national interest lacking moral dignity but “between one set of moral principles divorced from political reality, and another set of moral principles derived from political reality.” HANS J. MORGENTHAU, IN DEFENSE OF THE NATIONAL INTEREST 33 (1951); see also Joffe, supra note 3, at 89-100, 124 (discussing Dr. Brzezinski’s argument that the United States should take into account the needs of other nations and give globalization a moral theme that will create global consensus and provide continued legitimacy for U.S. leadership in a world where America will be less dominant).

West was based on an evolving belief system. The failure of that system to change in time and provide a basis for changes in the legal system led to revolution and to changes in the belief system. In due course, the old and new law became reconciled, but the process eventually repeated itself.\textsuperscript{200} A complete theory of law, Berman said, would recognize morality along with politics and history as determinants of the legal system. He said that in the Western legal tradition, there was always a belief in a source of law beyond the highest political authority, whether in divine law, natural law, or, more recently, in human rights.\textsuperscript{201}

Pressure today on previous belief systems regarding international affairs stems from the cooperation imperative which has emerged in the last sixty years. Previously, nations could gamble on achieving security through conflict rather than cooperation, but in the age of mutually assured destruction (MAD), this is no longer so.\textsuperscript{202} In the past, a nation could decide to what extent it would address a pollution problem without worrying too much about whether other nations would do the same. Now, on these and other issues, such as pandemic disease, narcotics traffic, and terrorism, failure to cooperate poses an existential threat. A belief system that resists cooperation is divorced from reality and is under pressure to change.

On the time scale of history, the emergence of the cooperation imperative in the last few decades is akin to the blink of an eye. It is not surprising that belief and law on how to address the new developments are uncertain and in flux. At the same time, the need for clarity and action is urgent, and what is needed has become evident. We need to appreciate that it is in our own interest to clarify the rights of all members of the international community in the emerging regime to confront climate change and its impacts. This includes clarifying the rights of people in developing countries to assistance to cope with, in fact to avoid, the new poverty, and to achieve sustainable development. Where distinct rights subject to

\textsuperscript{200} \textit{Berman, Law and Revolution II, supra note 199, at 373.}

\textsuperscript{201} \textit{Berman, Law and Revolution I, supra note 199, at 44, 45. See also Bruce Mazlish, The Idea of Humanity in a Global Era (2009).}

\textsuperscript{202} See Joffe, \textit{supra} note 3, at 90-91.
adjudication have not yet emerged, we need to work for them, but in the meantime, we need to work to advance principles of equity, due process, and security throughout the policy and legal process. This is the corollary of the cooperation imperative, whether this corollary is viewed as a new departure, or simply the recovery of ancient principles often neglected and no longer optional.203

Considering Morgenthau and Berman together, one might say that nations which fail to take morality into account may experience turmoil, but those that do so judiciously draw on an additional source of strength. Individuals may emphasize conscience, interest, or both together.204 It may be, however, that for a nation such as the United States, conscience and interest converge. Both separately and together, they provide grounds for the United States to lead in confronting climate change and the new poverty. The obstacles to achieving the public interest are immense. It is fortunate, therefore, that conscience is enlisted along with interest, whether because it is

203 Regarding the nineteenth century background for thinking about the public interest, Barker said political and industrial revolution had required a philosophy of social progress with greater attention to the betterment of the whole community, reviving principles of politics which Barker traced to ancient Greece. In this view, the ultimate force behind political action was understood to be a “common conviction” and a “common conscience” that empowers the agents of the community and underlies law and rights. BARKER, supra note 139, at 4-5, 28-29. Professor Beer examines the antecedents of American ideas of the public interest in the seventeenth and eighteenth century English concept of “government by discussion” through parliamentary institutions. Proponents argued that, if properly structured, such institutions could take into account private interests but achieve a public interest broader than a mere aggregation of the private interests. SAMUEL BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 96-118, 264-75 (1993). See also Ian Clark, Book Review, 6 PERSP. POL. 642-43 (2008) (reviewing ANDREW HURRELL, ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY (2007) (discussing different contemporary frameworks for understanding international relations and suggesting an approach to justice based on a search for common purposes and values similar to those in Barker’s work).

204 See MAX WEBER, Politics as a Vocation, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77-128 (H. H. Gerth & C. Wright Mills eds., 1958) (containing the classic discussion in Max Weber’s 1918 lecture at the University of Munich). Weber contrasted what he called the “ethic of ultimate ends” and the “ethic of responsibility,” but he said they are not mutually exclusive, and only in unison do they form the character of a person with the calling for politics. Id. at 120, 127.
in our interest to pursue justice or because justice, as “our common inheritance” teaches,\textsuperscript{205} is the good.

VIII. CONCLUSION

Global warming confronts the peoples of the world with one of their greatest challenges. There are solutions, but there is an urgent need for action requiring cooperation of unprecedented scale and complexity. Complexity results in part from the fact that equity calls for commitments by different nations that vary in magnitude and timing. Difficulty results in part from the need to take action to drive technological innovation into uncharted territory. Difficulty also arises because the effectiveness of many of the regulatory and industrial policy measures needed to address global warming and its impact requires improved governance, economic conditions, and technical capacity -- none of which is easily achieved. At the same time, meeting these challenges offers potentially great benefit.

A central theme of this article is that one of the largest difficulties in confronting global warming is the collective action problem involved in providing the public good of unpolluted air and cooperation to address the new poverty. I have suggested previously that the solution requires improved cross-border institutions, improvement in social and economic conditions in developing countries to facilitate consensus, and renewed understanding of the meaning of the public interest.\textsuperscript{206}

In the present article, I have suggested that the international community can develop a common understanding of the contours of the public interest on climate change and the new poverty. This understanding can be established through treaties, policy initiatives, and human rights. Through these varied means, the international community is providing guidance to itself on how to reconcile special interests of nations and private actors with the public interest in confronting global warming and the new poverty. This effort is particularly important because of the size and complexity of the problem as

\textsuperscript{205} Barker, supra note 105, at 167, 216.

\textsuperscript{206} Joffe, supra note 3, at 92–93, passim.
described above. For the parties to act with confidence, they need a common understanding of the ground rules.

I have also argued that it will help development of this common perspective if we rethink the nature of international law, human rights, and policy, and if we consider both conscience and interest as motivations for action. Human rights, as in FDR's Second Bill of Rights, can serve as a standard to inform action even when not, or at least not yet, carved into domestic law or subject to adjudication. We may be better able to see how human rights work with treaties or policy initiatives if we do not think of them as sharply distinct, but rather as aspects of an entire system of law -- or as Ernest Barker said, a system of Right. We should recapture Barker's theme, which itself was based on ancient learning, that the legal system as a whole should have ethical grounding and serve as a mobilizing force on behalf of human dignity.207

Looking to the World War II era, we see that the modern conception of human rights emerged under the pressure of war as the allies sought to define the struggle in terms of the goals of a free society. I argue that the pressures of the struggle to confront climate change are also creating a crisis of the international system with an imperative to establish new norms and institutions for cooperation to provide global public goods.

There are strong obstacles to this effort. To overcome these, we require a system of politics and law that will create space for provision of public goods. Global warming is creating a dynamic that highlights for citizens their stake in global public goods. Consensus on action to provide public goods is most likely to result from a fair accommodation of the interest of citizens with respect to public goods and their narrower interests. In confronting global warming, this requires a fair and ambitious program, able to reduce pollution, invest in clean technology for new jobs and new industries, and provide assistance to developing countries to deal with the new poverty. To succeed in this effort, our pluralist politics requires organization and mobilization of the broader public so that narrow interests do not veto action. Moreover, it requires a recovery of the understanding that emerged during World War II that progress for the world is an essential element of America's own national

207 Barker, supra note 105; Steiner, supra note 70.
interest.

It will also help us reconcile national and private interests with the public interest if we recognize both interest and conscience as motivations for action. Historically, as Harold Berman says, law has been informed by moral insight, although belief systems have experienced periodic crisis when they no longer fit the needs of the times. In the past, nations could believe that force and conflict were an alternative to cooperation and recognition of the rights of others, but this is no longer a realistic way to address the greatest threats. Today, a belief system that resists international cooperation and recognition of rights would be divorced from reality and at odds with the cooperation imperative.

Over a century ago, the German scholar, Georg Jellinek, explained why the idea of fundamental rights retained currency despite critics who characterized it as a mere dream. “[N]o theory,” he said, “no matter how abstract it may seem, which wins influence upon its time can do so entirely outside the field of historical reality.” 208 The bitter experience of war and violence made clear the reality that linked the national interest of the allied victors in World War II to the wellbeing of people everywhere. In signing the Universal Declaration, President Truman said that, “[e]xperience has shown how deeply the seeds of war are planted by economic rivalry and social injustice.” 209 Writing in a newspaper column at the moment of victory in Europe in World War II, Eleanor Roosevelt noted that President Roosevelt had always said that freedom from want and freedom from aggression go together. Fortunate nations, she said, would have to assist others if they wanted lasting peace. 210

Moreover, as we have noted, American leaders saw a need


209 GLENDON, supra note 57, at 238 (2001). In citing Truman’s statement and recalling that FDR included “freedom from want” as one of his four freedoms, Glendon observes that a basic assumption of those who created the UN and the Universal Declaration was that atrocities and conflict are often rooted in poverty and discrimination. This is why, she says, the Declaration emphasizes the relationship among freedom, social security, and peace. Id.

210 Id. at 42-43.
for cooperation beyond financial assistance. Their appreciation of the importance of economic rights inspired the effort to create a fairer international economic order. This brought to fruition the war aims stated by Roosevelt and Churchill in the Atlantic Charter of 1941. There they set forth the principles on which they based “their hopes for a better future for the world.” They included “the fullest cooperation between all nations in the economic field, with the object of securing for all improved labor standards, economic advancement, and social security.” They sought a peace, which “after the final destruction of the Nazi tyranny . . . “ would assure that everyone “in all the lands may live out their lives in freedom from fear and want.”

The reasons for cooperation and recognition of rights that emerged at the end of World War II are no less compelling today. These reasons are reinforced by new developments, including the unprecedented challenge of global warming. Global warming threatens to aggravate the old problems of instability and rivalry over scarce resources. It also creates new reasons to cooperate to avoid economic, social, and environmental devastation. Industrialization based on fossil fuels has produced great benefits for mankind, but we now know that in its present form it threatens people and nature with great troubles if we do not change course. Scientists tell us that major changes are urgently required and that these changes must also continue over many decades.

All of this is creating a crisis in the international system and its fragmented and often stalemated institutions responsible for addressing poverty and sustainable development. The forces in play heighten the cooperation imperative, a fundamental reality of our times. Nations must agree to actions that will reduce emissions, chart a clean energy path to the future, and provide assistance where needed to vulnerable countries to cope with impacts. The far reaching character of this undertaking requires integration of these steps with broader policies for sustainable development. We are only at the beginning of this entire effort. As we take the first steps, we will need to think anew.

211 BORGWARDT, supra note 95, at 303.

212 Id. at 304.

213 Id.
our most innovative thinking, however, might be based on remembering things we once understood. We need to recall what history and experience have taught us about the importance and meaning of rights and law, and the role of conscience and interest in reconciling private interests and the public interest to achieve the common good.

214 Commenting on the idea that global institution building may depend on catastrophe to highlight the urgency and feasibility of such undertakings, the historian Bruce Mazlish asks whether it will take something like a nuclear war or global climate change to prompt the reflection we need in a global epoch. BRUCE MAZLISH, THE IDEA OF HUMANITY IN A GLOBAL ERA 108 (2009). “The historian,” he adds, “can only supply resources, in this case for the project of Humanity, and decry the dangers inherent in certain paths and predilections.” Id.