

Chapter 2

Linking Law and Economics

Translating Economic and Social Human Rights Norms into Public Policy

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Central to the successful translation of economic and social human rights norms into public policy is the clear articulation of the nexus between law and economics. Scholars have inadequately elaborated the critical links between international political economy and international human rights law. This chapter begins to fill this gap by exploring the ways in which the integration of legal and economic approaches can help states more fully articulate avenues to meet their duties to respect, protect, and fulfill economic and social human rights.

After clarifying the basic definitions of central concepts, including economic and social human rights, global public goods, and common resources, I explore two concrete economic and social human rights claims, a right to health and a right to a healthy environment. My central argument is that the linkage of the *economic* concepts of global public goods and common resources to the *legal* obligations of states under human rights law helps states formulate effective policies to actualize these rights. On the one hand, the economic classifications of global public goods and common resources provide clear economic justification for government intervention in the market to ensure their adequate provision. On the other hand, the legal duty of states under economic and human rights law provides clear legal justification for government action to protect the vulnerable.

Pieces of this chapter on defining economic and social human rights, global public goods, and the economic justifications for state intervention are taken directly from parts of my book *The Global New Deal: Economic and Social Human Rights in World Politics* (2nd ed., Lanham, MD: Rowman & Littlefield, 2010), chapters 2 and 3, 27–123. Diana Fuguitt, professor of economics at Eckerd College, is the coauthor of chapter 2 of *The Global New Deal*. I am grateful to Rowman & Littlefield Publishers for permission to draw on this previously published work.

For example, the UN Committee on Economic, Social and Cultural Rights (CESCR) has clarified a minimum core obligation of states to meet their legal duties regarding the “right to health” of their citizens (CESCR 2000). Yet, the actual policies that states should adopt to meet these legal obligations remain vague. The law does not clarify the public policies that give states the best means to provide for equal access to adequate and affordable health care. Here lies the link to economics. The economic categories of global public goods and common resources provide a framework useful to states in the development of effective public policy to safeguard the right to health. In pursuing this direction, Barrett (2007, 20) articulates a “simple taxonomy of global public goods” which outlines a framework to more fully articulate state policy in relation to the fulfillment of these goods. Barrett’s proposal is utilized below in relation to the development of global and national public policy to provide for health care as a public good.

The linkage between law and economics is also critical in regard to the right to a healthy environment. As outlined below, a convincing legal case can be made to justify strong state action to protect the environment. Yet it is only by combining this legal argument with the economic understanding of the environment as a common resource and a global public good that effective public policy making in this area emerges. In regard to the right to a healthy environment, I explore the work of Elinor Ostrom, 2009 Nobel laureate in economics. Ostrom (1990) has compiled substantial evidence of institutional and community arrangements that effectively manage common resources and avoid the “tragedy of the commons.” Her work offers lessons to guide international common resource management. Her ideas are applied below to the development of public policy to protect common resources and respect the right to a healthy environment.

In the introduction to this volume, Haglund and Stryker describe a “process whereby norms are iteratively adopted and embodied in new forms that, under certain conditions, lead to social transformation.” After suggesting three “analytic moments” (belief formation, action formation, and transformational mechanisms), Haglund and Stryker propose a sequence of mechanisms, actors, and pathways (MAPs) central to the process of human rights realization. The alternative framing of human rights as global public goods described in this chapter reflects Haglund and Stryker’s depiction of the central processes of social transformation.

Consider, for example, Haglund and Stryker’s three analytic moments in relation to the human rights discussed in this chapter: the right to health and the right to a healthy environment. Both rights are clearly articulated in international human rights law, and thus belief formation is well advanced. However, action formation is stymied by differences in perceived solutions (the states-versus-markets debate) and weak accountability mechanisms. As a result, even when these human rights norms are adopted, the protection and provision of the rights remain

weak. I therefore argue in this chapter that the transformational mechanisms to realize these human rights depend upon an alternative framing of economic, social, and environmental rights as global public goods, which by definition are not achievable through market mechanisms alone. This reframing opens up political space for the articulation of public policy, new mechanisms of enforcement, and subsequently more favorable human rights outcomes. The mechanisms, actors and pathways central to this transformative approach are explicated in detail throughout this chapter.

Defining Economic and Social Human Rights

Economic and social human rights are fully defined and codified in international law. Economic rights include the right to property, the right to work, and the right to social security. Social rights include those rights necessary for an adequate standard of living, including rights to food, health, shelter, and education. This body of international law holds the state responsible to respect, protect, and fulfill these international economic and social human rights. A state violates this law if it fails to satisfy a core obligation to ensure the satisfaction of a minimum essential level of these rights.¹

International human rights law gives states flexibility regarding how they are to go about fulfilling these legal obligations, but steps must be taken within a reasonably short time after the covenant's entry into force to meet the recognized duties. The CESCR (1990) attempts to establish a "minimum core obligation" that each state must achieve.

Yet, the policies that states should implement to guarantee these rights (including essential primary health care, basic shelter, and basic education) are often controversial, and consequently unclear. These rights claims often lead to a contentious debate over the proper relationship between the state and the market. Some economists and politicians seek market-based solutions with minimal state intervention; others argue for state intervention in the face of the market's failure to provide these goods; while still others want these economic goods taken out of the market altogether, with the state providing guarantees for their provision.

To address these issues it is necessary to link the legal economic and social human rights claims to the field of economics and the economic categories of "global public goods" and "common resources."

Defining Global Public Goods and Common Resources

Samuelson (1954, 387) defines a public good as a product "which all enjoy in common in the sense that each individual's consumption of that good leads to no subtraction from any other individual's consumption of that good."² A clean and healthy environment is a pure public good. Individual enjoyment of the environment does not distract from the pleasure of others in clean air and water. Yet, as the

environmental crisis so tragically illustrates, public goods are often neglected and suffer from underprovision.

To set up a business, an entrepreneur depends on critical factors such as a peaceful society, clean air, clean water, and so on. A businessperson's ability to produce "private goods" or services to sell in the market depends on these other "public goods" being provided. The benefits of these public goods are clearly not limited to a single producer or buyer; once they are provided for a single individual, many others can enjoy the benefits without payment. Market mechanisms have historically failed to provide these types of goods.

There are two qualities of public goods and services that are recognized as limiting financial incentives and contributing to market failure: nonrivalry in consumption and nonexcludability. Nonrivalry in consumption refers to those goods that any number of consumers may enjoy without detracting from the enjoyment of others (Samuelson 1958, 335).³

Nonexcludability and nonrivalrous consumption mean that there are insufficient market incentives to provide allocatively efficient quantities of public goods like peace or clean air. Why? Because nonexcludability results in what is called the "free-rider problem." A free rider is someone who benefits from a good without paying to support the good's production. It is not possible to charge the occupants of one household for the clean air they breathe if their neighbors breathe it for free.

The pure public good characterized by nonrivalry and nonexcludability is one polar case. And at the other end of the spectrum are pure private goods that are both rivalrous and exclusionary. In between these pure polar ends is a wide continuum for what Samuelson (1958, 335) identifies as the "mixed case [that] has elements of both in it." Indeed, there are a relatively small number of pure public goods. Many more goods combine a mixture of public and private good characteristics.

In addition, common resources are defined as resources characterized by nonexcludability (that is, it is prohibitively expensive if not impossible to exclude others from access to the resource) yet rivalry (one person's use of the resource detracts from the quantity or quality available to others; Ostrom et al. 1999, 278–82). For example, fishing on the high seas outside territorial limits is characterized by open access, but catching a fish is rivalrous, reducing the stock available to others—and, as rapidly declining fish populations suggest, not only for current but also future generations of fishers.⁴

As the discussion so far suggests, a range of goods classifications (i.e., pure public goods, mixed goods, common resources) entail some degree of nonrivalry and/or nonexcludability. Goods fitting these categories either are entirely public or have elements of public characteristics. But what makes any of these goods with public characteristics *global* is their universal dimensions and the global reach of their positive or negative externalities. In our interdependent world, many public

goods have these universal and global aspects and thus can no longer be seen as only national in character. Kaul, Grunberg, and Stern (1999, 509–510) define a global public good as “a public good with benefits that are strongly universal in terms of countries (covering more than one group of countries), people (accruing to several, preferably all, population groups) and generations (extending to both current and future generations, or at least meeting the needs of current generations without foreclosing development options for future generations).”

Economic and Social Human Rights as Global Public Goods

In many cases, the fulfillment of economic and social human rights at the national level depends on the protection and promotion of global public goods internationally. There is a class of goods and services to which all people in all countries can make human rights claims, including basic education; a healthy environment; food and water; primary health care and sanitation; and housing. If our concern is avoiding destitution and achieving equality based on the freedom to achieve and the capability to function (as developed by Amartya Sen), access to these goods should be guaranteed by state and international actors (Sen 1992, 4–5, 39). This category of economic and social human rights thus deserves special attention in public policy making (Dasgupta 1993, 149).

It is useful to classify these fundamental economic and social human needs as global public goods, because aspects of these goods are nonexcludable and/or nonrivalrous. This classification provides a clear economic justification for government intervention in the market to ensure their provision. The satisfaction of these public goods makes life possible. The needs these public goods fulfill are universal to all humanity. Economic and social human rights are in essence claims for the fulfillment of these human needs, which are global public goods.

It is true that there is a difference in excludability between, for example, health care and clean air. It is impossible to withhold clean air from the rich and the poor alike. Health care, on the other hand, can be provided only to those with money. But there are more similarities than differences between these goods in their many public good characteristics. They are essential for the well-being of the individual, the stability of society, and the efficient functioning of the economy overall. Their consumption generates social (global) benefits far greater than the private benefits to the individual consumer. Classifying these basic human needs (basic education; a healthy environment; food and water; primary health care and sanitation; and housing) as global public goods clarifies their central importance.

While economic and social human rights claims have been clearly articulated in international law, the economic justification for government intervention to promote and protect these public goods too often remains obscure. A discussion of the public goods component to the human right to health and the human right to a healthy environment will hopefully help clarify these issues.

HUMAN RIGHT TO HEALTH: THE LINK BETWEEN NATIONAL PUBLIC GOODS AND GLOBAL PUBLIC GOODS

The public in the United States is engaged in a wide-ranging and spirited debate on the obligations of the state in regard to the health of its citizens. There are conflicting views, for example, on whether a “human right” to health care exists. Even those who are in favor of such a right often have difficulty clarifying the ways in which the state must act to respect, protect, and fulfill an individual’s right to health. Central to this conceptual fog is a polarization of views on the proper relationship between the state and the market in the efficient provision of health services. At one pole, individuals argue for “privatization” and minimal state interference in a market-incentive-based health system. Those at the opposite pole seek a “single payer” framework, with the federal government guaranteeing access to health care for all citizens. As these positions have rigidified, effective progress has stalled.

It is unfortunate that the work of the United Nations agencies and human rights treaty bodies on human rights implementation has not been utilized in the U.S. national dialogue on health care. For example, through its “general comments,” the CESCR has clarified state obligations regarding a human right to health that flow from existing human rights law. Not only has this human rights framework been ignored in the U.S. debate on health care; the global dimensions to effective U.S. health protection and health care have also not been a part of the national debate.

This section reviews:

- the legal claims in human rights law to primary health care and sanitation
- the economic justification of health as a global public good requiring government intervention
- the symbiotic relationship between national public goods and global public goods, clarifying directions for effective health public policy.

*Legal Claim: Primary Health Care = Equal Access to Adequate and
Affordable Health Care and Sanitation*

The “right to health” is found in the International Covenant on Economic, Social and Cultural Rights (ICESCR 1996), which recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (Article 12.1). The CESCR (2000) asserts that this right hinges on availability and accessibility. Functioning public health facilities, goods and services, and programs are to be available in sufficient quantity. These include safe and potable drinking water and adequate sanitation facilities; hospitals, clinics and other health-related buildings; trained medical and professional personnel receiving domestically competitive salaries; and essential drugs. These health facilities, goods, and services have

to be accessible to everyone within the jurisdiction of the state, without discrimination. Accessibility has four overlapping dimensions: nondiscrimination, physical accessibility, economic accessibility (affordability), and information accessibility (3–4).

As can be seen, the CESCR and other legal experts have provided state and nonstate actors with a clearly defined understanding of the obligations and duties to uphold the human right to health. It is thus no longer credible to argue that the right to adequate and affordable health care is too vague to implement and enforce. The minimum core legal content of this right has been clarified by the CESCR. It is now the legal duty of states, regardless of their political and social systems, to respect, protect, and fulfill this core right for all citizens.

Yet, the economic argument remains unresolved. State leaders could still argue that a market-incentives-based system with minimal government involvement is the most efficient means to fulfill these legal duties. The “necessary steps” to implement the ICESCR would then involve “privatization” of hospitals, health insurance, and health care overall. Yet, historically, the welfare of the poor and working class has not been well served by such privatization schemes. The market fails to provide an adequate provision of health services to the population as a whole. One approach to addressing this dilemma is to link the legal/human rights arguments for a right to health to the idea of health as a global public good. Such an approach provides a clear economic justification for government intervention in the market to overcome “market failure” and assure access to adequate and affordable health care for all.

Economic Justification for Government Intervention: Health as a Global Public Good

Globalization has had a profound impact on many aspects of life, including health. The massive movements of people across borders (refugees, immigrants, international travelers), combined with new linkages in trade, have created new global health vulnerabilities and raised global health risks; and the revolution in information technology has enabled rapid dissemination and sharing of health information globally. As H1N1 (swine flu), avian flu, HIV/AIDS, ebola virus, and smallpox demonstrate, health risks emanating from one country can create threats and dangers to populations around the world (Zacher 1999, 266–67).

The human right to health contains characteristics of public goods. For example, the benefits from immunizations against contagious diseases, and the establishment of sewage systems, sanitation, and global epidemiological surveillance, are essentially nonrivalrous and nonexcludable. A person can enjoy a sanitary, disease-free environment without infringing upon another person’s enjoyment of this clean environment. Everyone can benefit from knowledge about the world’s health and awareness of foreign outbreaks of infectious diseases. Upon receiving a

health alert, individual nations can prepare their people to respond and cope with the disease. However, the provision of these goods will fall short of social efficiency without government action. For example, state involvement is necessary to coordinate and implement society-wide immunization and disease-monitoring programs (Zacher 1999, 268).

Given the global nature of the new health threats, close international cooperation and coordination are necessary to guarantee the provision of these goods for all. The effort of the World Health Organization (WHO) to eradicate smallpox exemplifies the global nature of these public goods. One nation acting alone was unable to defeat smallpox; yet the eradication of smallpox offered benefits to all countries, in the form of reduced health risks and reduced allocation of resources toward smallpox precautions, prevention, and treatment. The WHO's coordination of a worldwide system of disease control, health improvements, and immunizations is essential in our modern world. It is in the interests of all nations to help poor countries succeed in the provision of basic health care and sanitation (Mendez 1992, 63).

The Symbiotic Relationship between National and Global Public Goods

Recognizing the global dimension to public goods does not necessarily imply the need for a world government to regulate laws at the local level to assure the adequate provision of these goods. Rather, there is a need for new forms of *global governance* to emerge which incorporate national institutions into a global network of support and coordination. Global governance refers to the formal and informal development of rules and institutions among state and nonstate actors in a particular issue area, such as the protection of human health. Such health "regimes" would establish common rules, norms, and procedures which all states would follow.⁵ These governance arrangements reflect the reality of the symbiotic relationship between national and global public goods.

The differences in the global approach of the world community in the fight against the spread of polio versus that of malaria demonstrate both this symbiotic relationship and the difficulty of creating national incentives for adequate public policy to protect global public goods.

Polio. Scholars note that the polio epidemic peaked in the United States in 1952, when 57,000 cases were recorded, 21,000 people suffered permanent paralysis, and about 3,000 people died. This scale of suffering stimulated a race to develop a means to control the disease and, in only a short time, Jonas Salk discovered and tested an effective vaccine. The polio vaccine was a global public good and, in Oshinsky's words, "America's gift to the world" (2005, 215; see also Barrett 2007, 45).

Barrett (2007, 22) argues that some global public goods can be supplied by a "single best effort"; "the knowledge of how to stimulate the human immune system

to protect against polioviruses is an example.” While the polio vaccine was discovered in the United States, it was transferred for use around the world. The United States did not undertake the research to benefit other countries but to stop the epidemic raging inside its own country. Yet, the U.S. population was better protected if other nations helped eradicate the disease. The vaccine thus became available to others and became a global public good.

Yet, while the knowledge to prevent polio (e.g., the vaccine) is a global public good, whether it serves to benefit people everywhere depends upon the provision of complementary national public goods. Whether the vaccination undertaken within a nation is at a sufficient rate to eliminate polio depends upon a country’s being capable of delivering minimal basic public services. Despite the “single best effort” by the United States, the effort toward global immunization against polio can be sabotaged at the national level.

Unfortunately, this disruption has occurred. It appeared for a short time that the UN-led effort to totally eradicate polio might succeed. After Somalia was removed from the list in 2004, the number of polio-endemic countries was reduced to zero. UNICEF declared the achievement a “miraculous victory for children over conflict and devastation.” Yet, tragically, this announcement proved premature. A few months later, in Mogadishu, a 15-month-old girl was diagnosed with polio. Later, more cases were confirmed, and by March 2006, a total of 200 polio cases had been identified. Barrett notes (2007, 54–55): “Only about one in 200 persons infected with polio suffer paralysis, and so an outbreak of this magnitude implies around 40,000 infections. Even more worryingly, the disease had spread into outlying regions. An epidemic was underway.”

Somalia was not the only “weakest link” in the initiative to eradicate poliomyelitis. Somalia’s first new case of polio was traced, through genomic sequencing, to Yemen—a county, like Somalia, previously declared to be polio free. Yemen’s case was traced to Chad, and from there to Nigeria. In 2003 Nigerian politicians had suspended mass vaccinations, “claiming that polio eradication was a Western plot, intended to sterilize Muslim girls and spread HIV” (Barrett 2007, 55). This action allowed the disease to spread, putting at risk not only Nigeria but the entire global initiative to eradicate polio.

To a large degree, the poorest polio immunization coverage has occurred in “failed states.” Successful immunization campaigns depend upon many factors, with good governance (a national public good) a crucial component. A nation’s leaders need to embrace the necessity of the provision of public health systems and basic health care for all their citizens. If national leaders do not accept the responsibility to respect, protect, and fulfill human rights obligations, global efforts will fail.

Malaria. The United States today has little incentive to develop a malaria vaccine. Only a handful of deaths from malaria occur in the United States, and those

are almost always a result of people traveling abroad and failing to take anti-malarial chemoprophylaxis as recommended. The situation globally is very different. The WHO's *World Malaria Report 2010* reported that in 2009 there were 225 million cases of malaria worldwide, with 781,000 deaths from the disease in that year alone (16). Approximately 90 percent of these deaths occur among those who live in Africa, and approximately 85 percent of the deaths are in children under five years of age. The ecology of Africa—tropical atmosphere, high temperatures—creates plenty of mosquito breeding sites. The disease can be controlled (if not eliminated) in Africa through household spraying, insecticide-treated bed nets, and anti-malarial medicines. Yet, these low-cost treatments often fail to reach the poor. Sachs (2005, 196–99) argues that “no children need to die [of malaria], and none will if they have access to all of the modern tools of disease prevention and treatment! Yet malaria sets the perfect trap: it impoverishes a country, making it too expensive to prevent and treat the disease. Thus malaria continues and poverty deepens in a truly vicious circle.”

Sachs and others have called for billions of dollars to be invested toward the development of a malaria vaccine. Yet there is no incentive for the United States or the European Union to make the “single best effort” to provide this global public good, as there was with the polio vaccine. As Barrett (2007, 45) notes: “If malaria were as big a problem for the United States today as polio was in the 1950s, the U.S. would be investing much more money in malaria vaccine R&D. Similarly, if the countries most burdened by malaria responded in the same way as the United States did to polio, they would be investing much more in malaria R&D. Sadly—no, tragically—no country is responding in this way. Diseases like malaria that primarily affect poor countries are largely being neglected by science.”

While global public goods (like a malaria vaccine) are nonexcludable and non-rivalrous in consumption, this does not mean or imply that all enjoy the good in the same way. Kaul and Conceição (2006, 57) explain: “It only means that many, sometimes all, are affected by the good’s costs or benefits. But they may be affected in different ways. The vast differences and disparities that exist in the world mean that preferences for global public goods are likely to vary considerably.”

How can the incentives be created to stimulate development of a public good that would primarily benefit the poorest countries? If the big, rich countries won’t take the lead, since they remain for the most part unaffected by the dangers of malaria, how can a regime of cooperation emerge among all countries to tackle this issue?

The WHO should not be forced to beg for contributions to move forward on an agenda to eliminate or eradicate malaria.⁶ Horton notes that while the Gates Foundation has billions of dollars at its disposal, the WHO ran a deficit in 2009 for the first time in its history. The WHO remains the only intergovernmental agency with the mandate to work at a country-by-country level to address this disease. Yet, with-

out more global support, the WHO will be unable to lead, innovate, and harness the expertise necessary for malaria elimination or eradication (Horton 2011, 31).

HUMAN RIGHT TO A HEALTHY ENVIRONMENT:
GOVERNANCE SYSTEMS TO MANAGE A COMMON
RESOURCE

*Legal Claim: A Human Right to a Clean, Ecologically Sound and
Sustainable Environment*

A strong legal case can be made for a human right to a healthy environment. In “hard law” (treaties, customary law, and general principles), the right to a healthy environment is affirmed in both the African Charter on Human and Peoples’ Rights (African Charter) and the San Salvador Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol). In addition, the linkages between fundamental human rights, such as the right to life and the right to health, and a healthy environment can be drawn directly from the International Covenant on Civil and Political Rights and the ICESCR. Furthermore, individual countries have expressed concern for the protection of the environment in their national laws and constitutions.

In “soft law” (state recommendations, declarations, clarifications, directives, etc.), the international community has also endorsed a general right to a healthy environment. Since the 1972 Stockholm Conference on the Human Environment, there have been over a dozen global affirmations of this right in soft law instruments. For example, the UN’s special rapporteur on human rights and the environment, Fatma Zohra Ksentini, argues that there has been “a shift from environmental law to the right to a healthy and decent environment,” and proposes a set of Draft Principles on Human Rights and the Environment, calling on all states to “adopt administrative, legislative and other measures necessary to effectively implement the rights in this Declaration” (UN Commission on Human Rights 1994).

These soft and hard law instruments can potentially be effective in the struggle for ecological balance. International law provides a standard from which it is possible to judge the behavior not only of states but of all economic organizations and actors. This legal approach clarifies the minimal claims for environmental protection central to basic human survival. The legal case for government action to protect the environment is clear. What about the economic justification for governmental intervention in the economy to promote ecological balance?

*Economic Justification for Government Intervention:
The Environment as a Common Resource and a Global Public Good*

Many components of the environment can be considered pure public goods. Clean air, for example, is nonrivalrous and nonexcludable. An individual’s consumption

of a unit of clean air does not subtract from any other individual enjoying a similar amount of fresh, healthy air. Protecting the stratospheric ozone layer (which acts as a protective shield for the earth against harmful ultraviolet radiation) also provides a global public good. All of us enjoy, and no one can be excluded from, the benefits of this protection. Likewise, the troposphere (the lower portion of the atmosphere) is a global public good; protecting this realm from an accelerated greenhouse effect leading to global warming provides nonrivalrous and nonexcludable benefits to all. In contrast, the dramatic changes in the world's temperature and precipitation from a thermal expansion of the oceans caused by a melting of snow and ice in the polar regions would be extremely disruptive to the vast majority of the world's peoples and probably devastating to coastal cities and countries on all continents (Mendez 1992, 66–69).

Biodiversity can also be considered a public good in the sense that its conservation offers benefits that are largely nonexcludable and nonrival. The Convention on Biological Diversity (1992) defines biodiversity as “the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.” Protection and preserving biodiversity serves to maintain the information contained in the global gene pool, which, according to Perrings and Gadgil (2003), is a pure public good. In addition, biodiversity sustains the world's ecosystems, the loss of which would cause long-term damage to all people's health and food security (532–533).

Unpolluted oceans and transnational lakes, rivers, and seas have also been identified as global public goods. As with air, these bodies of water cross borders and their benefits are nonrivalrous and nonexcludable.

Common Resources. Many components of the environment can be considered common resources, characterized by nonexcludable yet rivalrous use. Over half the world's surface is outside the national borders of any one state and thus beyond national jurisdiction. Common resource areas, which include the high seas, the sea-bed, Antarctica, and outer space, have been termed the “common heritage of humankind” in international environmental law. In view of the free-rider problem, described earlier, there is a strong argument for global government regulation and intervention to protect these common resources. Open access can lead to the tragedy of the commons and overexploitation and depletion, as the example of overfishing so dramatically demonstrates.

Due to ecological interdependence, there are also common resources with the borders of sovereign nations. All of humanity may have a collective interest in actions that take place within a given country. Biodiversity preservation, for example, is of interest to all even though the resources that need protection may be located within a particular national jurisdiction. This high level of ecological interdependence

dependence led to the formation of the concept of a “common concern for humankind” in international environmental law. The preamble of the Convention on Biological Diversity (1992) affirms that “the conservation of biological diversity is a common concern of humankind,” even though, as noted by Hunter, Salzman, and Zaelke (2007, 489–90), most terrestrial biodiversity is found within sovereign states. Global regulation, again through international law, is often needed to protect and restore these common resources.

Aggregate Efforts: The Example of Overfishing

Barrett (2007, 74) asks us to “imagine a group of rowers trying to propel a boat. Their speed depends not on the weakest rower, nor on the strongest, but on the efforts of all the rowers. Some global public goods likewise depend on the total efforts of all countries. Environmental issues are typically of this type. Pollution is determined by aggregate emissions, overfishing by the fishing efforts of all countries.”

Can the international community “row” together to prevent overfishing? Unfortunately, progress in this direction has been slow. For example, nothing has come of various proposals over many years for the establishment of a World Fisheries Organization. Instead, the world community has created a diffuse and cumbersome international legal regime to govern the conservation of living marine resources. The most important legal documents in this regime are the 1982 UN Convention on the Law of the Seas (UNCLOS) and the 1995 UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks. Yet, despite this legal regime, global fish populations are in extreme danger. In 2010 the Food and Agriculture Organization (FAO) reported that 32 percent of the world’s fish stocks were estimated to be overexploited, depleted, and needing to be rebuilt. Further, since over half of the world’s fisheries were already at “maximum sustainable production,” there was no room for further expansion.

Under UNCLOS, coastal states are given a 200-nautical-mile exclusive economic zone (EEZ) for fishing. Coastal states are to ensure “through proper conservation and management measures” that the living resources in the EEZ are maintained and not threatened with over-exploitation. Yet Birnie, Boyle, and Redgwell note that this conservation aim is “offset by the need to promote ‘optimum utilization’” (2009, 715). This has led to some states’ giving more weight to economic rather than environmental considerations in the determination of the short-term national interest. One study of these issues concluded that the failures of the EEZ regime “render the conservation obligations of States largely illusory” (718).

Beyond the EEZ, UNCLOS recognizes the right of all states to engage in fishing on the high seas. There are at least 400 species found outside the 200-mile zone. New fishing technologies have greatly expanded the range of fishing operations in the high seas and put pressure on these fish stocks. There are currently no harmonized standards of conservation for these fish stocks on the high seas (720).

Barrett (2007) argues that this treaty approach to the conservation of the world's fish stocks is misguided. He notes that treaties are only binding on those countries that ratify them. (The United States, for example, has still not ratified UNCLOS.) Protecting these global public goods depends upon the full participation of all states. Thus, if nations bow out by not signing the treaty, the regime will fail. "The weakest link can make cooperation by all the other countries pointless" (72). Protecting the world's fish stocks will require fundamental institutional change. "Fisheries conservation is different. If some states limit their harvests, others have an incentive to take their place. Enforcement is essential to the supply of many weakest link global public goods" (72). If access to the world's fisheries must be restricted, how are we to do that?

Governance Systems to Manage Common Resources. As previously noted, common resources are defined as resources characterized by nonexcludability (that is, it is prohibitively expensive if not impossible to exclude others from access to the resources), yet rivalry (one person's use of the resource detracts from the quantity or quality available to others; Ostrom et al. 1999, 278–82).

Hardin's (1968) treatise on "The Tragedy of the Commons" demonstrates the problem for common resources. He considered the example of "a pasture open to all." As Hardin described, under open access each rational herdsman will see it as in his interest to graze as many cattle as possible on the pasture, given the increased private return he will receive from each additional well-fed cow, while not taking into account the full social costs incurred by all the herdsmen (from the environmental destruction rendered by his cattle's consumption in the overgrazed pasture). Hardin wrote, "this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons." Extending this analogy to an international regional common resource, Mendez (1992, 55) notes, "this is essentially the tragedy of the Sahel, where the overgrazing of rangelands had contributed to the desertification of the region."

Likewise, the global "commons"—the oceans, air, and outer space—are used without regard to the full social costs imposed. No one is excluded from utilizing these natural resources. Although regulatory progress has been made in international environmental law, the global commons remains threatened and endangered. The right to a healthy environment is jeopardized.

Ostrom (1990), Bromley (1992), and others (see e.g. Dietz, Ostrom, and Stern 2003) have compiled substantial evidence of alternative institutional arrangements and governance systems that can effectively manage the use of a common resource and successfully avoid a tragedy of the commons. These experiences offer lessons

that can guide international common resource management. With careful thought and international cooperation, proper and effective management of the global commons is feasible. What is needed is the international political commitment and action to implement effective systems.

Ostrom and her colleagues (1999) challenge Hardin's stark conclusions as unduly pessimistic and disempowering. Individuals are not "trapped in a situation they cannot change," these scholars believe. "Although tragedies have undoubtedly occurred, it is also obvious that for thousands of years people have self-organized to manage common-pool resources, and users often do devise long-term, sustainable institutions for governing these resources."

Ostrom's scholarship demonstrates through empirical studies that more solutions exist for the sustainable use of common resources than Hardin proposed. Ostrom and her colleagues conclude:

The prediction that resource users are led inevitably to destroy CPRs [common-pool resources] is based on a model that assumes all individuals are selfish, norm-free, and maximizers of short-run results. This model explains why market institutions facilitate an efficient allocation of private goods and services. . . . However, predictions based on this model are not supported in field research or in laboratory experiments in which individuals face a public good or a CPR problem and are able to communicate, sanction one another, or make new rules. Humans adopt a narrow, self-interested perspective in many settings, but can also use reciprocity to overcome social dilemmas.

In just one of her many examples, Ostrom points to the farmer-managed irrigation systems of Nepal, where strong, locally crafted norms and rules emerged to protect the water and land. Farmers saw the value in respecting this local regime. Government efforts to replace these farmer-constructed systems reduced rather than improved performance, because the government did not respect the evolved normative framework. National governments can thus help or hinder this process.

Ostrom's research documents how individuals in all walks of life and all parts of the world have organized themselves to create and enforce rules that protect natural resources and common resources. Yet, her research "also confirms that the temptation to free ride on the provision of collective benefits is a universal problem. In all known self-organized resource governance regimes that have survived for multiple generations, participants invest resources in monitoring and sanctioning the actions of each other so as to reduce the probability of free riding" (Ostrom 2000, 138).

Dietz, Ostrom and Stern (2003) identify the conditions in Nepal and elsewhere that were most likely to stimulate successful self-organized processes for the sustainable use of common resources. Key elements to such successful governance

systems included: (a) accurate and up-to-date information; (b) methods for conflict resolution; (c) inducements for rule compliance; and (d) mechanisms for adaptation and change.

These lessons in successful local governance of the commons can be applied at the global level. Our modern environmental challenges are intrinsically global and require governance and cooperation from global to local levels. The trick is in applying these local lessons to the challenges of the global commons to effectively manage biodiversity, climate change, and so on. How do global actions enhance (rather than frustrate) individual efforts to protect the global commons? What types of sanctions and monitoring are most effective globally in lowering the high probability of free-riding?

Strengthening the United Nations Environment Programme. Just as a strengthened WHO is needed to lead the efforts to combat malaria and polio, so is a strengthened UN Environment Programme (UNEP) necessary for the development of global governance to protect the global commons. Global coordination and intervention are needed to respect, protect, and fulfill the human rights to both health and a healthy environment. Lessons from the successful local efforts to protect common resources can be incorporated into the functioning of a revitalized UNEP. UNEP could serve as a body that creates incentive systems for global cooperation to protect the global commons by working with local actors to develop a framework for local monitoring and local enforcement.

A strengthened UNEP could help facilitate this level of global cooperation to protect the biosphere, oceans, and all common environmental resources. It is often noted that effective enforcement of environmental law is difficult. There is no central authority to administer and execute either criminal sanctions and fines, or disincentives and incentives. An enhanced UNEP could be a critical step toward improving the effectiveness of international environmental standards and regulations. States have voluntarily signed significant global legislation to protect the environment. Their ratification indicates that they see the enforcement of these treaties as in their individual national interest and thus should support strengthening the UNEP to achieve these goals.

The elements Dietz, Ostrom, and Stern identify for successful governance of common resources (accurate information; methods for dealing with conflict; inducing rule compliance; and preparing for change) can perhaps serve as the basic organizational principles around which to structure planning at UNEP. Many existing international organizations, including the International Labour Organization, the Office of the High Commissioner for Refugees, and the WHO, have successfully incorporated some of these guidelines into their work. In particular, these organizations have been helpful in the establishment of regimes of cooperation regarding the sharing of accurate information and providing infrastructure

and assistance to less developed countries. These successful approaches can also inform the work and approach of UNEP.

CONCLUSION: FINANCING GLOBAL PUBLIC GOODS

While the suggestions presented above to strengthen the WHO and UNEP may seem ambitious, the protection and provision of global public goods ultimately depends upon such a robust global regulatory framework. A focus on strengthening international organization is essential to the success of local strategies to respect, protect, and fulfill economic and social human rights for all. As we have seen, addressing the global and local challenges in the areas of health and the environment demands concerted cross-border cooperation.

Yet, financing and establishing this global framework remains difficult. One problem is that the benefits of the protection of global public goods will differ from country to country. While all citizens in all countries will profit when these global public goods are protected, the type and amount of benefit may differ from country to country. The example of a malaria vaccine makes this point clear. While all of humanity would benefit from the elimination of this disease, such a vaccine is a much higher priority to certain poorer states in Africa as opposed to the richer states in the Northern Hemisphere. In a world of vast economic disparities, different preferences will exist over which public good has the highest priority and should be funded. Thus, gaining the cooperation of the rich countries (single best effort) and the poorer countries (weakest link) becomes central to the successful provision of global public goods. International organizations, like the WHO and UNEP, are forums through which such cooperation can be created and nurtured.

In addition, further problems exist in establishing “just” and equitable funding mechanisms for global public goods. Debates often revolve around “ability to pay” versus “beneficiary pay” principles. Some contend that the rich northern industrialized countries have a moral duty to finance these public goods, based on principles of “charity” to help those less fortunate. It is clearly complicated to determine a “just” system of financing for global public goods.

Conceição and Mendoza (2006) point to further difficulties in gaining support for the financing of global public goods. At a local level, policy makers may be able to determine the community’s willingness to pay for public goods, like a local school. But “trying to ascertain this information worldwide for a global public good, such as ensuring international financial stability or preserving climate stability is another matter.” Global preferences are “difficult to identify and difficult, if not impossible, to aggregate. In addition, people may express preferences without having full information—a particular risk for global public goods, which are often complex and hard to understand” (330).

To overcome these conundrums, Conceição and Mendoza developed a “net benefit” approach to assess “sensitive global public goods.” These scholars acknowledge the difference in net outcomes between the industrialized and developing countries in the provision of key global public goods, and believe that it is only by taking this difference into account that it becomes possible to establish successful regimes of cooperation in the areas of health and the environment. International cooperation to ensure global public goods is partially dependent upon industrialized and developing states’ perceiving that the costs and benefits of the regime are fair.

To achieve the perception of fairness on all sides, Conceição and Mendoza argue that “net benefit seems to be a more appropriate measure for determining what burden-sharing principle applies.” This “distribution-sensitive assessment methodology” leads to “a switch from an ability-to-pay to a beneficiary-pays principle in many cases of international cooperation. This switch could refine how policymakers and, more important, the general public (notably in donor countries) think about burden-sharing arrangements in international cooperation” (343). In other words, the financing of global public goods would be seen less as an act of charity and good will on the part of those who have the ability to give, and more as a good investment that yields significantly high dividends. Perhaps the financial resources for a strengthened WHO and UNEP can be found through such a “net benefit” approach.

The MAPs (mechanisms, actors, and pathways) framework utilized by Haglund and Stryker in the introduction to this volume points to the challenges in mobilizing the international community to fortify the WHO, UNEP, and other central international organizations. Unfortunately, the accountability *mechanisms* established in the WHO and UNEP, designed to protect economic and social human rights, are weak. The key *actors* determining the priorities of these international organizations are the powerful states, often acting on narrow self-interest. To achieve more balanced accountability, the *pathway* forward involves the creation of a more robust global regulatory framework governing health and the environment that privileges global public goods as economic and social human rights. As this chapter demonstrates, such an approach can help to overcome the free-rider problem, prevent the tragedy of the commons, and facilitate the realization of basic human rights claims to health care and a healthy environment.

NOTES

1. Abouharb, Cingranelli, and Filippov demonstrate in chapter 1 of this volume the importance of state ratification of the CESCRC. As documented in their research, the longer states participate in the legal CESCRC regime, the greater their level of respect for economic and social human rights.

2. Here, “good” refers to good or service.
3. For clear explanations of “nonexcludability” and “nonrivalrous consumption,” see also Mendez (1992, 53–66) and Kaul, Grunberg, and Stern (1999, 2–16).
4. For the classic analysis of a fishery as a common resource, see Gordon (1954).
5. “Regimes are principles, norms, rules, and decision-making procedures around which actor expectations converge” (Krasner 1985, 4).
6. According to Richard Horton (2011, 30), “Eradication is the permanent reduction to zero of the worldwide incidence of malaria—the parasite will disappear from the planet. Elimination is the interruption of malaria transmission so that in a given geographic area there will be no locally contracted cases.”

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Closing the Rights Gap

From Human Rights to Social Transformation

Edited by

LaDawn Haglund

and

Robin Stryker



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*For our parents,
Mavis Haglund
and
Alyce and Sheldon Stryker*

CONTENTS

<i>List of Figures</i>	<i>xi</i>
<i>List of Maps</i>	<i>xiii</i>
<i>List of Tables and Boxes</i>	<i>xv</i>
<i>List of Contributors</i>	<i>xvii</i>
<i>Preface</i>	<i>xxiii</i>
Introduction: Making Sense of the Multiple and Complex Pathways by which Human Rights Are Realized	1
<i>LaDawn Haglund and Robin Stryker</i>	
PART ONE: PROMISES AND CHALLENGES OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (ESCR) REALIZATION AT THE INTERNATIONAL LEVEL	
1. Do Non-Human Rights Regimes Undermine the Achievement of Economic and Social Rights?	29
<i>M. Rodwan Abouharb, David L. Cingranelli, and Mikhail Filippov</i>	
2. Linking Law and Economics: Translating Economic and Social Human Rights Norms into Public Policy	49
<i>William F. Felice</i>	
3. Advances and Ongoing Challenges in the Protection of Indigenous Peoples' Rights within the Inter-American System and the United Nations Special Procedures System	69
<i>Leonardo J. Alvarado</i>	

PART TWO: THE ROLE OF DOMESTIC LAW AND COURTS
IN ESCR REALIZATION

4. The Impact of Legal Strategies for Claiming Economic and Social Rights 87
Varun Gauri and Daniel Brinks
5. The Role of Human Rights Law in Protecting Environmental Rights in South Asia 105
Sumudu Atapattu
6. The Morality of Law: The Case against Deportation of Settled Immigrants 127
Doris Marie Provine

PART THREE: BEYOND JUDICIAL MECHANISMS AS MEANS
TO ESCR REALIZATION

7. Social Movements and the Expansion of Economic and Social Human Rights Advocacy among International NGOs 149
Paul J. Nelson
8. The Challenge of Ensuring Food Security: Global Perspectives and Evidence from India 171
Shareen Hertel and Susan Randolph
9. Achieving Rights to Land, Water, and Health in Post-Apartheid South Africa 199
Heinz Klug
10. Social Accountability in the World Bank: How Does It Overlap with Human Rights? 219
Hans-Otto Sano

PART FOUR: MEASURING ESCR REALIZATION

11. Making the Principle of Progressive Realization Operational: The SERF Index, an Index for Monitoring State Fulfillment of Economic and Social Rights Obligations 239
Sakiko Fukuda-Parr, Terra Lawson-Remer, and Susan Randolph
12. Deepening Our Understanding of Rights Realization through Disaggregation and Mapping: Integrating Census Data and Participatory GIS 265
Rimjhim Aggarwal and LaDawn Haglund

13. Studying Courts in Context: The Role of Nonjudicial Institutional and Socio-Political Realities	291
<i>Siri Gloppen</i>	
Conclusion: Emerging Possibilities for Social Transformation	319
<i>Robin Stryker and LaDawn Haglund</i>	
<i>Index</i>	355

LIST OF FIGURES

Figure 0.1	“Moments” of social transformation	4
Figure 8.1	FAO Food Price Index, 1990 to 2012	177
Figure 8.2	Recursive pathway to social transformation (right to food)	185
Figure 10.1	The evolution of social accountability	221
Figure 10.2	Long and short routes to accountability	225
Figure 10.3	Citizens and service providers: the human rights analysis	226
Figure 11.1	Accountability using the Social and Economic Rights Fulfillment (SERF) Index	240
Figure 11.2	How the SERF Index can promote social transformation	241
Figure 11.3	Achievement possibility frontier for child survival rate	248
Figure 11.4	Penalty for different scaled indicator values	251
Figure A11.1	SERF Index for core countries	263
Figure A11.2	SERF Index for high-income OECD countries	264
Figure 13.1a	The anatomy of the litigation process	293
Figure 13.1b	The anatomy of the litigation process: actors and factors	293
Figure 13.2	Litigants’ opportunity structure	294
Figure 13.3	The anatomy of the litigation process: international context	295

LIST OF MAPS

- Map 12.1 Spatial distribution of access to piped water in São Paulo 271
- Map 12.2 Spatial distribution of access to piped water in Delhi 272
- Map 12.3 Spatial distribution of access to piped water and sanitation in São Paulo 274
- Map 12.4 Spatial distribution of access to piped water and sanitation in Delhi 275
- Map 12.5 Distribution of extreme poverty and access to water and sanitation in São Paulo 276
- Map 12.6 Distribution of slum households and access to piped water in Delhi 278
- Map 12.7 Population density and access to piped water and sanitation in São Paulo 279
- Map 12.8 Population density and access to piped water in Delhi 280

LIST OF TABLES AND BOXES

- Table 1.1 Generalized Least Squares Model: IGO Membership, ICESCR Ratification, World Bank and IMF Program Lending, and Their Impact on Physical Quality of Life Index (PQLI), 1981–2007, All Developing Countries 41
- Table 7.1 NGO Sectors and Their Core Characteristics 153
- Table 7.2 International Economic, Social, and Cultural Rights (ESCR) NGOs 160
- Table 8.1 Right to Food Determinants and Measures 175
- Table 8.2 Number of Undernourished People (millions) 178
- Table 8.3 Percentage Not-Poor Relative to Feasible Rate Given Best Practices 179
- Table 8.4 Percentage with Access to Improved Water and Sanitation Relative to Feasible Rates Given Best Practices 180
- Table 8.5 Percentage of Children Not Malnourished (Height for Age) Relative to Feasible Rate Given Best Practices 181
- Table 8.6 SERF Right to Food Index by Indian State 182
- Table A8.1 National Food Distribution Programs of India 197
- Box 10.1 Explanations of Social Accountability Tools 223
- Table 10.1 Characteristics of Social Accountability Tools 223
- Table 10.2 The ARVIN Framework: A Way to Assess the Enabling Environment for Civic Engagement 228
- Table 11.1 Economic and Social Rights Indicator Sets 247
- Table A11.1 SERF Index Indicator Definitions 256

Table A11.2 Observations Defining Frontiers 260

Table A11.3 Frontier Equations, Peak Values, and Minimum Values 261

Table 13.1 Legal Mobilization for Transformation and Accountability: Processes
of Change and Forms of Impact (Intermediary and Outcome
Variables) 295

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