

# Legal Aspects of the Security- Development Nexus: International Administrative Law as a Check on the Use of Development Assistance in the War on Terror

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## **Abstract**

*States should not be able to place the goal of protecting their citizens from transnational terrorism above that of alleviating poverty in developing countries. And yet this is precisely what they do on a regular basis when they use their policy on international development assistance to achieve security goals, as Canada, the United States and the United Kingdom have done in Iraq and Afghanistan. This is bad development policy, it does not increase the safety of those in developed states, and it is objectionable on political and moral grounds.*

*This paper argues that international administrative law can be used to challenge the legitimacy of using development policy to achieve security aims. While many modern advocates of the international administrative law paradigm restrict the application of this paradigm to the promotion of procedural norms, thus making it difficult to review the discretionary decisions of government policy-makers, nineteenth-century advocates of international administrative law (e.g., Lorenz von Stein and Karl Neumeyer) were more bold. I develop their arguments in this paper, demonstrating that in a globalized world, the impact that the decisions of governments have on the welfare of those in other states requires us to recognize a cosmopolitan legal order. This legal order recognizes the equal right of each individual on the globe to self-actualization, which is a right to have a say in decisions that affect her. The norm of equality inherent in a cosmopolitan conception of international law can have direct effect in domestic law, limiting the ability of policy-makers to make government policies without regard to the negative effects on the poor in developing countries. The domestic courts in donor and recipient countries can be used to ensure that harmful government policies are consistent with the equality of all and the protection of basic human rights.*

## I. Introduction

### A. Development Assistance – Waging War by Other Means?

The Prussian military theorist Carl von Clausewitz once stated the realist proposition that war is the pursuit of policy by other means.<sup>1</sup> The truth of this position has become firmly entrenched in most views of international relations. This paper aims at evaluating the contrary proposition – that policy is the pursuit of war by other means. Today, the statement seems obvious when taken as a matter of fact – Canada, the United Kingdom and the United States have concentrated their development assistance in countries such as Iraq and Afghanistan where they have or had specific military engagement. Development policy is thus being used as a tool to fight transnational violence or to achieve broader security goals. But what of the moral and legal claim? Should development assistance be used to wage war? Is it acceptable to use programs to alleviate poverty for the sake of establishing the domestic security of rich states? Does international law provide us any answer to these questions?

In my view, not only is using development assistance as a means of ensuring domestic security an ineffective policy, there are legal limits on a state's ability to do so. This paper explores one form of legal accountability for states that exceed these limits – international administrative law.<sup>2</sup> Although international administrative law is making a resurgence in some quarters since its origin in nineteenth century Germany, it has largely focused on the accountability of formal and informal transnational administrative institutions.<sup>3</sup> Moreover, it tends to be restricted to the promotion of procedural norms of accountability and transparency, and it does not extend to restrictions on the discretionary policy decisions of the government of a sovereign state, nor does it impose substantive normative limits on the exercise of this discretion.<sup>4</sup> It is thus inadequate for using international human rights norms as the basis for reviewing administrative decisions that have international effects.<sup>5</sup>

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<sup>1</sup> Carl von Clausewitz, *On War*, trans. Michael Howard & Peter Paret (New Jersey: Princeton University Press, 1976) at 87.

<sup>2</sup> I use the term "international administrative law" to refer to the general view that international law has administrative law aspects. Later in the paper, I use the term "Global Administrative Law" (GAL) to refer to scholars whose views on the topic were developed through association with NYU's Global Administrative Law Project (see [www.iilj.org](http://www.iilj.org)), and who, I believe, have a particular take on international administrative law, as discussed in this paper.

<sup>3</sup> David Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law," IILJ Working Paper 2008/7, Global Administrative Law Series (2008), reprinted in *Acta Juridica* (2009) at 2-3.

<sup>4</sup> Indeed, in a very thorough survey of the international administrative law regime of international and transnational development institutions, Philipp Dann points out that while in domestic administrative law the principles of equal treatment, the protection of legitimate expectations, and proportionality are central, in the law of international development, such norms do not exist. Rather, the decisions of donor states are considered in some respects to be completely discretionary ("Grundlagen eines Entwicklungsverwaltungsrechts," in Christoph Möllers, Andreas Vosskuhle and Christian Walter (eds.), *Internationales Verwaltungsrecht*, Vol. 16 of *Jus Internationale et Europaeum* (Tübingen: Mohr Siebeck, 2007) 7-48 at 47.

<sup>5</sup> On this point, Benedict Kingsbury, Nico Krisch and Richard B. Stewart point out that "in a pluralist international society [such as exists today], in which human rights are not protected at all or only minimally protected, the social

However, in my view, this concept of international administrative law does not reflect the normative requirements of cosmopolitan justice, nor does it reflect the factual situation of an increasingly inter-related, globalized world. I argue that this limited concept of international administrative law must be expanded to encompass the regulation of the administrative decisions of one state that affect those in other states. The normative content of this form of regulation is given by the norms that underlie a cosmopolitan conception of international law, as well as by the substantive legal obligations of states that make up international human rights law. These norms are directly applicable through the domestic administrative law of states, imposing on them an obligation to review the discretionary decisions of government policy-makers that violate them.

We can apply the concept of cosmopolitan international administrative law that I will develop to address the issue of using development policy to wage a war on terror. Such application of cosmopolitanism should enable judicial review of a policy decision of the executive branch of government to divert resources from development programs intended to alleviate poverty to programs to support military intervention in developing countries where terrorist threats to the donor state exist. An application for this kind of judicial review should be possible both in the domestic courts of the donor state providing the development funding and in the recipient state in which development funds are being directed to support military intervention. The success of such an application will depend on whether there are norms of international law – international human rights law or the underlying norms of the cosmopolitan conception of international justice that underlies international law – that can be applied to limit executive discretion. This direct application of international law norms must be possible both in monist systems, in which international law is directly incorporated as part of domestic law, and in dualist systems, where international law norms must be incorporated into domestic law in order to have legal effect.

## **B. International administrative law as a check on the legitimacy of domestic policies with transnational effects**

We are coming to realize that we are bound closely together in this globalized world.<sup>6</sup> The economic policies of the European Union, China, India, Brazil, the United States and other large economies have profound effects that transcend national borders. Military intervention and international development aid likewise have a significant impact on global stability and basic human rights. These effects have led to dissatisfaction with the state as the basic unit of moral and legal personality at the international level and to calls for greater accountability for the effects of sovereign state action on individuals in other

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basis for a global administrative law based on human rights is largely absent” (“The Emergence of Global Administrative Law” (2005) 68 *Law and Contemporary Problems* 15 at 46.

<sup>6</sup> For an analysis of globalization as our experience of community with others, see Graham Mayeda, “Pushing the Boundaries: Rethinking International Law in Light of Cosmopolitan Obligations to Developing Countries” [2009] *Canadian Yearbook of International Law* 3-56. For a presentation of the global nature of the social-economic-political system that affects all individuals, see David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995); and Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Columbia: University of South Carolina Press, 1998).

states.<sup>7</sup> How can we provide this kind of accountability? Traditional approaches to international law have failed to do so. But international administrative law offers some hope. As I will argue, the application of principles of administrative law to international acts of states can respond to the increased demand for legal regulation resulting from the web of globalization in which we are all enmeshed.

It is not obvious at first why administrative law is the solution. In common law jurisdictions, administrative law operates within the division of powers and the role of administrative law is limited to the interpretation and application of legal rules enacted by lawmakers to restrict the discretion of government and administrative officials.<sup>8</sup> On this conception, lawmakers make law and judges interpret and apply it;<sup>9</sup> there are no rules that courts may draw on beyond what lawmakers provide. This paradigm is clearly of little assistance in the context of development policy because, apart from a few limited examples, no statutes exist to restrict administrative discretion in this area. The situation is worse at the international level, where there exists no single, unified international lawmaking body – only scattered ones that cover discrete areas of international law. In consequence, there is little international administrative law to restrict the exercise of discretionary decision-making power. Moreover, there are few international administrative tribunals to regulate the relations of states as domestic administrative tribunals regulate the domestic affairs of a state's citizens,<sup>10</sup> and there is no general administrative law court to conduct administrative review at the international level.<sup>11</sup>

However, another account of administrative law by David Dyzenhaus considers administrative law to be based in the fundamental norms that make up the rule of law, many of which are embodied in the written and unwritten constitutions of modern states and in the foundational human rights documents of the international legal order. On this view, administrative law is one of the means of ensuring that

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<sup>7</sup> On this point, see Peter Singer, *One World: The Ethics of Globalization* (New Haven: Yale University Press, 2002) at 8-9.

<sup>8</sup> Similar ideas exist in civil law jurisdictions, although additional organizational functions are assigned to administrative law. Eberhard Schmidt-Aßman states that the purpose of administrative law is both to restrict and to enable the conduct of administration. For instance, in Chapter 5 of *Das allgemeine Verwaltungsrecht als Ordnungsidee. Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung* (2d ed. (Berlin & Heidelberg: Springer, 2004)), he discusses in depth the development of administrative law as a method for organizing state and social activities. He thus considers administrative law as encompassing the "law of organizations" (*Organisationsrecht*), one of whose purposes is to structure the conduct of work within administration as well as its decision-making process (at 239 and 245).

<sup>9</sup> The quintessential view is that of A.V. Dicey. For a summary of Dicey's view, see Paul P. Craig, *Administrative Law*, 4th ed. (London: Sweet & Maxwell, 1999) at 4-7. For a nice encapsulation of the "formal" account of administrative law, see David Dyzenhaus, "The Deep Structure of *Roncarelli v. Duplessis*" (2004) 53 *University of New Brunswick Law Journal* 111-154 at 126-127.

<sup>10</sup> Some might consider bodies such as the World Trade Organization administrative tribunals with transnational effects.

<sup>11</sup> While there is no general administrative law court with the kind of jurisdiction of domestic administrative law courts, smaller administrative tribunals with limited scope of review exist, for instance at the World Bank, where the institution of the Inspection Panel serves as a control on the discretion of the organization's administrators (see Dann, *supra* note 4 at 36-38).

“fundamental legal values condition the exercise of political power.”<sup>12</sup> Dyzenhaus questions the idea of administrative law based on the division of powers as proposed by Dicey, in which the courts only review the exercise of political power in cases where lawmakers have delegated them that authority. Instead, he argues that “constitutionalism”, by which he means a state governed by the rule of law, “is . . . a project of achieving fundamental values or principles, so that the separation of powers is useful only to the extent that separation serves the project.”<sup>13</sup> In consequence, if we are to speak of the existence of an international administrative *law* as opposed to a system of purely *political* accountability, there must be some fundamental norms that underlie the law and that confer on it “some special legitimacy that transcends what is ordinarily conveyed by the idiom of accountability.”<sup>14</sup>

The idea that fundamental norms legitimate the system of domestic administrative law can be applied at the international level to provide the accountability we seek for the decisions of sovereign states that affect those in distant parts of the globe.<sup>15</sup> Sovereign states do not act within an international law devoid of basic norms except for those they create themselves through treaties or through state practice that is animated by an intention to be legally bound by this practice. Rather, as Dyzenhaus suggests, we can conceive of international actors as acting within a system ruled by law that acknowledges that the policies and acts of sovereign states must be compatible with the basic idea of legality, which encompasses many international human rights norms and the norms of sustainable development that elaborate this legality such as the substantive equality of all states. Dyzenhaus’ approach to international administrative law is thus one way of enforcing these fundamental norms, and it represents an effective legal framework that can be used to review decisions about development aid.

I am not arguing that international administrative law constitutes a global constitutional or fundamental law. Its role is more limited. As I conceive it here, the existence of international administrative law reflects the basic idea that a particular area of international relations (not international relations as a whole) is to be controlled by law. To put this another way, the fact that administrative decisions with transnational effects “make law-like claims on those subject to their power” means that these decisions are amenable to judicial review.<sup>16</sup> The evidence that decisions about development assistance make a claim to law-like authority is evident in the regularization of development assistance decisions through formal and informal networks of national development agencies, the participation of states in the creation of informal norms to direct government aid policy such as those contained in the *Paris Declaration on Aid Effectiveness*, and in the operation of national development agencies within the scope of domestic administrative law regimes.

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<sup>12</sup> David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27 *Queen's Law Journal* 445-509 at 451. See also David Dyzenhaus, Murray Hunt and Michael Taggart, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation” (2001) 1 *Oxford University Commonwealth Law Journal* 5 at 6.

<sup>13</sup> Dyzenhaus, “Constituting the Rule of Law” at 451.

<sup>14</sup> Dyzenhaus, “Accountability and the Concept of (Global) Administrative Law,” *supra* note 3 at 4.

<sup>15</sup> Dyzenhaus, “Accountability and the Concept of (Global) Administrative Law,” *supra* note 3.

<sup>16</sup> Dyzenhaus, “Accountability and the Concept of (Global) Administrative Law,” *supra* note 3 at 16.

It follows from the recognition of the need for law in a crowded world that one of the tasks for this law must be to control the exercise of discretion of governments who make policies – for instance, development policies – that independently, or through coordination with other governments, affect the human rights of those in other states. On this view, international administrative law requires governments to demonstrate that a policy is justified in relation to the interests of those it affects, that it was arrived at by means of a decision-making process that is transparent and intelligible, and that the decision is rational and reasonably defensible in light of the factual situation it is meant to address and the norms of international law.<sup>17</sup>

Of course, the scope of administrative law cannot be extended to completely restrain political decision-making.<sup>18</sup> However, it should require that government policy-makers who wish to use development funding and programs to promote domestic security and eradicate international terrorists provide rational and cogent reasons for doing so. These reasons must be consistent with the human rights and sustainable development norms that constitute the framework for international development work. Moreover, they must take into account the interests of those affected by the policy and provide a justification of the policy in reasons that are responsive to these interests. I will elaborate on the application of the administrative law paradigm in **Section II.B.3.**, below.

### C. The Scope of the Problem – Conflating Development and Security Policy

Over the last ten years or so, developed states have been increasingly relying on development assistance programs as a means of achieving security goals such as protecting their citizens from international terrorism.<sup>19</sup> The OECD notes that developed country spending on peace-building, security and state-building has risen tremendously since 2004, reaching USD 7.1 billion in 2008. Likewise, official development assistance devoted to security activities rose from USD 947 million in 2007 to USD 1.5 billion in 2008.<sup>20</sup> In a report on transition financing, the OECD advocates increasing coordination of humanitarian, development and security funding.<sup>21</sup>

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<sup>17</sup> On the meaning of judicial review of decisions taken by administrative decision-makers, see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 47-50.

<sup>18</sup> On this point, Dyzenhaus, Hunt and Taggart point out that the role of administrative law is not to substitute the court's view of the merits of the decision of a political decision-maker for the latter's decision. Instead, the court is to require the decision-maker to provide reasons for the exercise of the discretion" ("The Principle of Legality," *supra* note 12 at 27).

<sup>19</sup> For an excellent description of this integration, see Center for Human Rights and Global Justice, *A Decade Lost: Locating Gender in U.S. Counter-Terrorism* (New York: NYU School of Law, 2011) at 13.

<sup>20</sup> OECD, *Ensuring Fragile States Are Not Left Behind. Summary Report* (February 2010) at 10. Available online at: [www.oecd.org/dac/incaf](http://www.oecd.org/dac/incaf). For an overview of how OECD countries have diverted funds from poverty-alleviation to security, see Jo Beall, Thomas Goodfellow and James Putzel, "Introductory Article: On the Discourse of Terrorism, Security and Development" (2006) 18 J. Int. Dev. 51-67 at 55-58.

<sup>21</sup> OECD, *Pamphlet: Transition Financing: Building a Better Response* (OECD, 2010) at 3. Available online at [http://www.oecd-ilibrary.org/development/transition-financing\\_9789264083981-en](http://www.oecd-ilibrary.org/development/transition-financing_9789264083981-en).

While the policy shift toward integrating development and military programs is often couched in the language of policy-makers and social scientists, the motivation for this shift is often political. In his recent book, *The Savage War: The Untold Battles of Afghanistan*, respected Canadian journalist and award-winning correspondent on Afghanistan, Murray Brewster, explains how the decision of the Conservative Government in Canada to shift gears from a purely military campaign to one oriented toward development and humanitarian aid was driven in large part by opinion research undertaken by the government. Murray explains the results of that research:

Most alarming to PMO [Prime Minister's Office] strategists was that Afghanistan seemed to be a "no return issue." People who supported the deployment were solid and mostly among the Conservative base. Those who were against it were just as dogged in their view. The so-called soft supporters worried the politicians the most; the numbers told them that when these people decided to turn against the war, there was no coming back.<sup>22</sup>

Realizing the falling support for the Afghanistan campaign, a PMO staffer explained the need to shift the public perception of the war:

"One of the things that market research told us was that we were going to bleed people over time," said the staffer. "We couldn't possibly hold the support for the mission. So we had to change gears and that's when we tried to shift the communications toward humanitarian and all that sort of stuff."<sup>23</sup>

What at first might appear as a rational plan – to integrate development and security programs – is frequently a purely political move to justify continued intervention in a developing country.

There are three principle policy justifications given by donor countries for the merging of development and security policies:

- 1.) poverty alleviation programs must be delivered safely, and only military staff is trained to do so;
- 2.) poverty alleviation and the delivery of development programs is necessary in order to make residents of the developing country accept foreign intervention<sup>24</sup> and in order to ensure that the

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<sup>22</sup> Murray Brewster, *The Savage War: The Untold Battles of Afghanistan* (Mississauga, ON: John Wiley & Sons, 2011) at 86.

<sup>23</sup> Ibid.

<sup>24</sup> USAID and Department of State for Foreign Affairs, *FY 2009 Foreign Operations Performance Report and FY 2011 Performance Plan* at 278 ["The United States is working to increase the capacity, skills, and abilities of host country governments, as well as to strengthen their commitment to work with the U.S. Government to combat terrorism."] Also, the stated goal of Provincial Reconstruction Teams (PRTs) deployed in Afghanistan and Iraq by NATO and the U.S. Government is to "win hearts and minds" of local people (NATO Review, Autumn 2007, available on the web at <http://www.nato.int/docu/review/2007/issue3/english/art2.html>). See also Oxfam International, *Quick Impact, Quick Collapse: The Dangers of Militarized Aid in Afghanistan* (Oxfam International: January 26, 2010) at 1-2. Available on the web at <http://www.oxfam.org/sites/www.oxfam.org/files/quick-impact-quick-collapse-jan-2010.pdf>. For a description of the "winning hearts and minds" strategy, see Mark Bradbury & Michael Kleinman,

security that is achieved by means of this intervention outlasts the withdrawal of military personnel;

3.) poverty alleviation, to the extent that it creates stability in a fragile state, serves to protect citizens of developed and developing countries alike.<sup>25</sup>

The first justification is not at issue in this paper. Clearly, development workers should not be put at risk in the delivery of development programs in crisis zones and fragile states. However, this does not necessarily mean that the military or security personnel should control all aspects of a development program. Indeed, as the *Independent Panel on Canada's Future Role in Afghanistan* points out, it makes little sense to post development workers to crisis zones such as Afghanistan if they cannot make regular contact with the people they are intended to help.<sup>26</sup>

Of greater concern is the use of development programs for goals that differ from the traditional purpose of development assistance, which is to alleviate poverty,<sup>27</sup> or the use of programs to alleviate poverty as a means of achieving the domestic security of developed countries such as Canada, the United Kingdom and the United States. I turn now to a description of this use of development policy in the U.K., the U.S. and Canada.

A justification for using development programs to achieve these ulterior goals is found in the United Kingdom's Strategy for Counter Terrorism, which states that "[i]n fragile and failing states terrorist groups can obtain support by providing essential services which can no longer be provided by government. Terrorist groups can create a crude judicial structure where the law of the state has broken down and cannot be applied."<sup>28</sup> In consequence of this link between terrorism and the lack of essential services, the UK Government is of the view that the Department for International Development (DfID) "makes an important contribution to counter-terrorism objectives by addressing longer term factors that can allow terrorist threats to develop in fragile states. DfID programmes will help to increase the resilience of communities to violent extremism, address the drivers of radicalisation and develop the rule of law which is critical to [the UK Government's] effective counter-terrorism effort."<sup>29</sup>

In order to combat the tendency of terrorists to exploit poverty, the UK government has committed to using 30% of Official Development Assistance (ODA) in "conflict-affected" and "fragile" states such as

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Feinstein International Center, *Winning Hearts and Minds: Examining the Relationship Between Aid and Security in Kenya* (Medford, MA: Feinstein International Center, 2010) at 4. A useful description is also contained in Howell, "The Global War on Terror," *infra* note 81 at 129.

<sup>25</sup> See, for instance, USAID, Fiscal Year 2008 Annual Performance Report (US Government: 2008) at 11. Available online at [http://pdf.usaid.gov/pdf\\_docs/PDACM303.pdf](http://pdf.usaid.gov/pdf_docs/PDACM303.pdf).

<sup>26</sup> Independent Panel on Canada's Future Role in Afghanistan, *Report: Independent Panel on Canada's Future Role in Afghanistan* (Ottawa: Minister of Public Works and Government Services, 2008) at 26.

<sup>27</sup> On poverty alleviation as the goal of development policy, see section III of the United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, U.N. Doc. A/55/49 (2000). See also Jo Beall, Thomas Goodfellow and James Putzel, "Introductory Article: On the Discourse of Terrorism, Security and Development" (2006) 18 J. Int. Dev. 51-67 at 53.

<sup>28</sup> UK Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (London: Crown, 2011) at 34.

<sup>29</sup> U.K. *CONTEST*, *supra* note 28 at 72.

Pakistan, Yemen and Somalia,<sup>30</sup> which, in the government's assessment, are significant sources of international terrorists.

As well, after a recent review of its terrorism prevention strategy, *Prevent*, the United Kingdom has revised and relaunched the program. It has three objectives:

1. respond to the ideological challenge of terrorism and the threat from those who promote it;
2. prevent people from being drawn into terrorism and ensure that they are given appropriate advice and support;
3. work with sectors and institutions where there are risks of radicalisation that we need to address.<sup>31</sup>

To achieve these objectives, the *Prevent* initiative will in part rely on international development assistance. The government justifies this reliance by making the link between the achievement of development goals and the achievement of the UK's security goals:

The Department for International Development (DfID) also has a role to play. Although its main purpose is to reduce poverty, overseas development work in some areas can help to build resilience to terrorism through programmes that strengthen governance and security, create jobs, and provide basic services including education.<sup>32</sup>

Similarly, in Canada, significant amounts of ODA are being spent in areas such as Afghanistan where Canada's military is engaged. The justification for this shift in ODA is articulated in the Government's report to Parliament in 2007, in which it stated that security is a precondition to economic and social development.<sup>33</sup> Like the UK government, Canada clearly also justifies its new policy based on a perceived link between security and development.

Canada's international development agency, CIDA, reports spending CAD 344.7 in Afghanistan in fiscal year 2007-2008.<sup>34</sup> In fiscal year 2009-2010, this amount had been reduced to CAD 238 million, although this still made Afghanistan the second largest recipient of Canadian aid.<sup>35</sup> Of the CAD 4.815 billion that the government of Canada spent on Official Development Assistance (ODA) in 2009-2010, CAD 53.52

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<sup>30</sup> U.K. *CONTEST*, *supra* note 28 at 72. See also U.K., *Prevent*, *infra* note 31 at 102.

<sup>31</sup> United Kingdom, *Prevent Strategy* (London: Crown Copyright, 2011) at 7. Available on the web at [www.official-documents.gov.uk](http://www.official-documents.gov.uk).

<sup>32</sup> UK, *Prevent Strategy*, *supra* note 31 at 38.

<sup>33</sup> Government of Canada, *Canada's Mission in Afghanistan: Measuring Progress. Report to Parliament* (Ottawa: Government of Canada, February 2007) at 3 and 12-13.

<sup>34</sup> CIDA, *Canada's Statistical Report on International Assistance. Fiscal Year 2007-2008* (Ottawa: Government of Canada, 2010). Available online at <http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/eng/JUD-4128122-G4W#pre>. These figures are at odds with those in a 2008 report by the Independent Panel on Canada's Future Role in Afghanistan, which stated that between 2002 and 2008, CIDA and the Department of Foreign Affairs and Trade (DFAIT) had been spending approximately CAD 100 million per year on Afghanistan.<sup>34</sup>

<sup>35</sup> CIDA, *Development for Results 2009-2010: At the Heart of Canada's Efforts for a Better World* (Ottawa: Her Majesty the Queen in Right of Canada, 2011) at 21.

million was disbursed by the Department of National Defence.<sup>36</sup> The vast majority was spent in Canada's humanitarian effort in response to the earthquake in Haiti. But CAD 13.126 million was spent on supporting a provincial reconstruction team in Afghanistan.<sup>37</sup> In its first report to Parliament following the review of the Independent Panel, the Government of Canada emphasized the need to coordinate diplomatic, development and security operations,<sup>38</sup> thus closely linking the delivery of development aid to security.

More recently, the Canadian International Development Agency stated in its *Report on Plans and Priorities* that poverty alleviation is a means to an end; that end is the "long-term security of Canadians." The Report states,

Canada recognizes that achieving significant economic, social, democratic and environmental progress in the developing world will have a positive impact on the prosperity and long-term security of Canadians, reduce poverty for billions of people in recipient countries, and contribute to a better and safer world.<sup>39</sup>

This is a shift from the 2007 report to Parliament, noted above, in which security was considered a precondition for development. The 2011 Report makes it clear that one of the goals of development is to benefit Canadians. The Report also states that the Canadian government will be spending 21% of its 2011-2012 budget on "fragile countries and crisis-affected communities," which includes Afghanistan.<sup>40</sup>

In the United States, one can observe a similar subordination of development policy to security concerns. Indeed, USAID is very clear that one of its goals is achieving peace and security, not just for inhabitants of countries receiving aid, but for "all people". It states,

The United States promotes peace, liberty, and prosperity for all people by helping nations effectively establish the conditions and capacity for achieving peace, security and stability. To address peace and security concerns around the world, USAID, together with the Department of State, directly confronts threats to national and international security by working with other U.S. Government agencies and international partners. The five priority program areas within this goal are Counterterrorism, Stabilization Operations and Security Sector Reform, Counternarcotics, Transnational Crime, and Conflict Mitigation and Reconciliation.<sup>41</sup>

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<sup>36</sup> Ibid. at 2.

<sup>37</sup> Ibid. at 23.

<sup>38</sup> Government of Canada, *Canada's Engagement in Afghanistan: Setting a Course to 2011. Report to Parliament*. (Ottawa: Government of Canada, June 2008) at 3.

<sup>39</sup> CIDA, *Report on Plans and Priorities* (Ottawa: CIDA, 2011) at 3. See also pp. 62 and 94. Available on the web at <http://www.tbs-sct.gc.ca/rpp/2011-2012/inst/ida/ida-eng.pdf>.

<sup>40</sup> CIDA, *Report on Plans and Priorities*, *supra* note 39 at 9.

<sup>41</sup> USAID, Fiscal Year 2008 Annual Performance Report (US Government: 2008) at 10. Available online at [http://pdf.usaid.gov/pdf\\_docs/PDACM303.pdf](http://pdf.usaid.gov/pdf_docs/PDACM303.pdf).

President Obama's most recent policy on the integration of aid and security policy reduces the circle of concern further, stating that "successful development is essential to advancing our national security objectives."<sup>42</sup>

Moreover, President Obama has created a National Strategy for Counterterrorism that integrates security and development. The policy states:

U.S. CT [counter-terrorism] efforts require a multidepartmental and multinational effort that goes beyond traditional intelligence, military, and law enforcement functions. We are engaged in a broad, sustained, and integrated campaign that harnesses every tool of American power—military, civilian, and the power of our values—together with the concerted efforts of allies, partners, and multilateral institutions. These efforts must also be complemented by broader capabilities, such as diplomacy, development, strategic communications, and the power of the private sector.<sup>43</sup>

In fiscal year 2008, USAID spent USD 930 or 6.7% of its budget on achieving the goals of international peace and security, down from the USD 1.712 billion it spent the previous year. In its report for fiscal year 2009, USAID and the Department of State for Foreign Affairs had spent approximately USD 9.6 billion on its "Peace and Security" program, of which approximately USD 225 million was spent specifically on counterterrorism, USD 411 million on combating weapons of mass destruction, and approximately USD 7 billion on "stabilization operations and security sector reform".<sup>44</sup> In this last report, the US government was even more clear that development aid can increase domestic security, stating that "[i]t is a tenet of U.S. policy that the security of U.S. citizens at home and abroad is best guaranteed when countries and societies are secure, free, prosperous and at peace."<sup>45</sup>

USAID also explains that it relies on joint civilian-military operations, such as the Provincial Reconstruction Teams in Iraq, in order to create the stability necessary for future development.<sup>46</sup> Moreover, in its 2009 fiscal report, USAID and the Department of State for Foreign Affairs emphasized that the "Just and Democratic Governance" arm of their foreign aid program aims at contributing to U.S. national security – a priority placed above the achievement of the "broader development agenda."<sup>47</sup> Indeed, there is increasing evidence that the US government has come to depend on a close relationship between USAID and the Department of Defence. In its policy document from September, 2011, USAID described this integration as follows:

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<sup>42</sup> USAID, "The Development Response to Violent Extremism and Insurgency. Putting Principles into Practice (USAID, September 2011) at ii. Available online at [http://pdf.usaid.gov/pdf\\_docs/PDACS400.pdf](http://pdf.usaid.gov/pdf_docs/PDACS400.pdf).

<sup>43</sup> White House, *National Strategy for Counterterrorism 2* (2011). Available on the web at [http://www.whitehouse.gov/sites/default/files/counterterrorism\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf).

<sup>44</sup> USAID and Department of State for Foreign Affairs, *FY 2009 Foreign Operations Performance Report and FY 2011 Performance Plan* at 275.

<sup>45</sup> *FY 2009 Performance Report*, *supra* 44 at 276.

<sup>46</sup> USAID, *Fiscal Year 2008 Annual Performance Report (US Government: 2008)* at 12. Available online at [http://pdf.usaid.gov/pdf\\_docs/PDACM303.pdf](http://pdf.usaid.gov/pdf_docs/PDACM303.pdf). See also USAID, "Rebuilding Iraq and Afghanistan" (US Government: 2008). Available online at [http://www.usaid.gov/policy/budget/apr08/apr08\\_iqaf.pdf](http://www.usaid.gov/policy/budget/apr08/apr08_iqaf.pdf).

<sup>47</sup> *FY 2009 Performance Report*, *supra* 44 at 289.

USAID Missions have developed close relationships with DOD country-level counterparts to jointly plan and coordinate. In Afghanistan, joint interventions have been effective when USAID is involved in pre-operation planning for quick mobilization of development resources alongside military operations. In many cases, coordinating while identifying distinct roles that maximize interagency comparative advantages is key. Moreover, as USAID builds up its learning capacity, our interagency partners will be significant resources for lessons learned, which can continue to inform effective integration, coordination and/or differentiation.<sup>48</sup>

All three governments – that of Canada, the United Kingdom and the United States of America – have gradually integrated their development assistance programs into their security programs, thus consolidating what is frequently called the “3D” policy – the use of development, defence and diplomacy in order to combat national security threats. The question is, is this a bad policy?

## **D. Why is conflation of security and development policy a bad idea?**

### **1. Pragmatic Concerns—An Ineffective Policy**

Two main pragmatic concerns arise in regard to the alignment of development and security policies: 1.) Can such an alignment lead to successful development? and 2.) Will it result in greater security for donor countries? I will address each in turn.

#### **a) Alignment of development and security undermines the achievement of development goals**

The alignment of development and security policies goes against the best practices of development, for instance, as set out in the *Paris Declaration on Aid Effectiveness*. Two key elements of the *Paris Declaration* approach are “ownership”, which advocates that “[p]artner countries exercise effective leadership over their development policies, [sic] and strategies and co-ordinate development actions,” and “alignment,” which prescribes that “[d]onors base their overall support on partner countries’ national development strategies, institutions and procedures.”<sup>49</sup> Few countries receiving aid would identify the security of those in the donor country as a primary goal of their domestic development policy. Tying development assistance to security interests thus inherently conflicts with the principles of “ownership” and “alignment.”

This conflict is borne out in recent reports following the *Paris Declaration*. In *Aid Effectiveness: A Progress Report on Implementing the Paris Declaration*, a document produced after a forum on aid effectiveness in Accra, Ghana in 2008, participating states recognized somewhat euphemistically that “some progress is being made towards fulfilling the Paris Declaration commitments on ownership, but it

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<sup>48</sup> USAID, “The Development Response to Violent Extremism and Insurgency,” *supra* note 42 at 7.

<sup>49</sup> Paris Declaration on Aid Effectiveness, available online at: <http://www.oecd.org/dataoecd/30/63/43911948.pdf> at paras. 14-16.

is uneven among partners and donors. . . .”<sup>50</sup> The report goes on to say that insufficient power is placed in the hands of recipients of development assistance to direct how this assistance is used.<sup>51</sup> To take a particular case, the Afghanistan Compact represents an attempt to align developed country aid and intervention in Afghanistan with local needs and priorities. However, there is as yet no formal evaluation of its effectiveness in this regard. As the report on aid effectiveness points out

[m]any of the problems at the implementation level can be explained by a series of tensions, dilemmas and trade-offs: there are trade-offs between the Paris Declaration principles of ownership, alignment and harmonisation and the urgent need for bilateral donors to demonstrate ‘quick wins’ in supporting peace and recovery needs. . . . There are trade-offs between high risk interventions (*e.g.* budget support) which, in certain circumstances, could yield significant impact, and lower-risk interventions, which satisfy fiduciary concerns, but which may bypass the state or damage local institution building. . . .<sup>52</sup>

In short, current development practices in fragile states are in conflict with overall best practices from a development perspective. Reading between the lines of the report, it appears that security concerns are often interfering with the alignment of development programs with recipient country priorities, and that in consequence, these programs are “owned” by developed country donors rather than by developing country recipients.

Beyond soft law documents, recent social science research indicates that to be effective, development work should focus on development – i.e., on building the capacity of the state to respond to the needs of its citizens<sup>53</sup>— rather than integrate development and military policies. For instance, Ashraf Ghani and Clare Lockhart of the Institute for State Effectiveness argue that state intervention in Afghanistan has in fact increased instability and damaged the ability of the Afghan government to create stable economic, social and political development.<sup>54</sup> In their view, a successful policy requires “the alignment of internal and external stakeholders to the goals of the sovereign state through joint formulation, calibration of, and adherence to the rules of the game.”<sup>55</sup> Social Development Direct suggests that international development aid can contribute to this process by helping to alleviate inequalities between groups

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<sup>50</sup>OECD Working Party on Aid Effectiveness, *Aid Effectiveness: A Progress Report on Implementing the Paris Declaration* (OECD: 2008) at 40. Available online at [www.oecd.org](http://www.oecd.org).

<sup>51</sup> *Aid Effectiveness*, *supra* note 50 at 40.

<sup>52</sup> *Aid Effectiveness*, *supra* note 50 at 136.

<sup>53</sup> Social Development Direct, *Scoping a long-term research programme on conflict, state fragility and social cohesion. Annex C: Literature Review* (December 2008) at 14. See also C. Bickerton et al., *Politics without Sovereignty: A Critique of Contemporary International Relations* (Taylor and Francis, 2001).

<sup>54</sup> Ashraf Ghani and Clare Lockhart, *The Right and Wrong Fix: Afghan Lesson for Zimbabwe* (Democracy News Analysis, 2008). Available online at [www.opendemocracy.net](http://www.opendemocracy.net). Ghani and Lockhart identify a double crisis of legitimacy – development programs in Afghanistan are not directed by local needs and priorities, and local government lacks the capacity to hold those delivering aid accountable for redundant projects and discontinued projects that had created expectations of continuing service (at p. 3).

<sup>55</sup> Ashraf Ghani and Clare Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (Oxford: Oxford University Press, 2008).

within the fragile state and facilitating a more equitable distribution of resources across different groups.<sup>56</sup>

Not only does military involvement disrupt development work – it is itself a source of insecurity. Political science research demonstrates that insecurity caused by foreign military intervention is a significant cause of poverty. As Frances Stewart demonstrates, “national insecurity (invasion from outside, or a high risk of it) can be an important source of such individual or community insecurity, as the current Iraq situation demonstrates.”<sup>57</sup> Such conflict destroys all forms of capital, increases the share of government expenditure devoted to the military, decreases overall government revenue and negatively affects economic growth and the provision of government services.<sup>58</sup> Military intervention and poverty alleviation are inherently at odds with each other.

Not only does military intervention directly affect poverty, but it can also exacerbate the unequal distribution of political, social and economic resources within a state. This unequal distribution of the benefits of poverty alleviation can be a further source of insecurity. Stewart demonstrates that inequalities between groups within a state is one of the major contributors to instability.<sup>59</sup> Where these inequalities manifest themselves in a differential access to political institutions, excluded groups may choose violence to compensate for the inability to use political fora to rectify them.<sup>60</sup> Foreign intervention that targets particular groups within a developing country’s population – for instance, groups implicated in the incidences of international terrorism – will inevitably increase these “horizontal” inequalities and bar access for certain groups to peaceful means of resolving disputes.

Some argue that security is a necessary precondition to economic growth. Stewart also dispels this view. Her research indicates that the pursuit of security<sup>61</sup> and economic growth are not necessarily complementary goals if the benefits of economic growth are not equally distributed. She states that the “virtuous cycle [between security and development] can . . . readily be broken because it is easy to have relatively high levels of security without necessarily experiencing economic growth, or to have high levels of security and economic growth, but not inclusive growth. . . .”<sup>62</sup> While it might be possible to promote both security and development by ensuring the equal distribution of the benefits of development, as I explained above, the fragmentation of society that results from foreign military intervention, like the fragmentation that results from domestic wars, makes it difficult if not impossible to address the horizontal inequalities that lead to conflict and violent extremism.

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<sup>56</sup> Social Development Direct, *Scoping a long-term research programme*, supra note 53 at 14.

<sup>57</sup> Frances Stewart, “Development and Security,” Centre for Research on Inequality, Human Security and Ethnicity (CRISE) Working Paper 3 (Oxford: Queen Elizabeth House, 2004) at 3. See also her more recent paper, “Horizontal Inequalities in Kenya and the Political Disturbances of 2008: Some Implications for Aid Policy (2010) 10:1 *Conflict, Security & Development* 133-159.

<sup>58</sup> Frances, “Development and Security” at 5.

<sup>59</sup> Frances, “Development and Security” at 15 and 16. For a recent review of the various studies on horizontal inequality, see Graham K. Brown & Anim Langer, “Horizontal Inequalities and Conflict: A Critical Review and Research Agenda” (2010) 10:1 *Conflict, Security & Development* 27-55.

<sup>60</sup> Frances, “Development and Security” at 15 and 16.

<sup>61</sup> Here, I mean the security in the country receiving aid. “Security” refers to a broader range of interventions than military activity.

<sup>62</sup> Frances, “Development and Security” at 19.

Finally, prioritizing security over development can lead to short-sighted development policy. Jo Beall, Thomas Goodfellow and James Putzel point out that a prioritization of security in development policy can create an incentive for pursuing visible goals with short-term returns at the expense of projects that contribute to long-term development and, ultimately, security. They state,

A bridge in Baghdad . . . is both more visible and more ‘relevant’ to enhancing global security in the current climate than inoculations in Mozambique. Overall the swing is towards security as a priority over development in the conventional sense, and the ironic danger here is that failure to achieve significant longterm development can end up undermining security anyway.<sup>63</sup>

In short, the short-term focus that military involvement lends to the delivery of development assistance can have a negative impact on development, thus militating against combining development and security policies that involve military intervention.

***b) The alignment of security and development policies does not increase the security of donor countries***

Part of the justification for unifying development and security policy is that successful development projects will promote acceptance of foreign military intervention in the host state. The continuation of intervention that this acceptance makes possible will ultimately contribute to the national security of the interveners. However, data have shown that the combination of military and development policy has not won over the “hearts and minds” of Afghans as it was intended to do. Roland Paris, University Research Chair in International Security and Governance at the University of Ottawa, submitted an access to information request to the Canadian government and discovered that by 2009, support for the Taliban was at an all time high<sup>64</sup> despite ongoing military action and the carrying out of development projects to benefit Afghan citizens. Without designing development programs to meet the development concerns of local communities, few hearts can be won. Murray Brewster notes how the Canadian government has failed in this regard in Afghanistan. He writes that

. . . almost everything we [Canadians] were doing for them [the Afghans] was tailored to our tastes. In surveys stretching back to 2007, Afghans clearly listed their biggest concerns as unemployment, an absence of stable electricity and high prices.

“One half of Kandaharis view unemployment and electricity as the greatest challenges in their community,” said the survey.

Yet what did we give them? Schools, polio vaccinations and the restoration of agriculture through the Dahla dam project. Coincidentally, education and health care are two gifts that Canadians hold close to their own hearts. The issues were easily understandable by people back home and, most importantly, politically

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<sup>63</sup> Beall et al., “Discourse of Terrorism, Security and Development,” *supra* note 27 at 63.

<sup>64</sup> Brewster, *The Savage War*, *supra* note 22 at 243.

sellable to a public that had already turned away from the war in droves. Our solutions to the Afghan problem were elegant, thoughtful and well-crafted, but so ill-timed for a society in survival mode that it made you want to weep.<sup>65</sup>

Ill-timed and ill-targeted, Canada's prioritization of development projects that suit its own needs neither increases the security of Afghans nor that of Canadians. Development that does not meet the needs of a community ultimately threatens support for foreign intervention.

Development research demonstrates that the unequal distribution of global resources is a significant cause of unrest. Until these inequalities are addressed, military intervention, even when combined with development aid, will remain ineffective in achieving global security. Redressing these inequalities does not require military intervention in developing countries. Instead, the solution lies in part in developed countries reviewing and revising their domestic policies that promote instability. For instance, environmental policies that exacerbate or neglect climate change may cause situations such as drought and famine in poor countries that are beyond their ability to manage,<sup>66</sup> hence resulting in violence. Likewise, inequalities between states – for instance, in the distribution of natural or financial resources – can foment unrest in poor states.<sup>67</sup> Increasingly, developed countries are shifting their international development funding to states that they consider pose security risks to them or are potential allies in the war on terror.<sup>68</sup> For instance, under the government of Prime Minister Stephen Harper, the Canadian International Development Agency (CIDA) has cancelled many of its aid programs in order to focus on 20 countries alone. This is a reduction from the 126 countries listed in the 2007-2008 Statistical Report on International Assistance.<sup>69</sup> In the face of the pervasiveness of poverty, this concentration, with a particular focus on countries that pose security risks, will exacerbate rather than alleviate the unjust and unequal distribution of financial resources that can cause conflict.

Despite the evidence that economic growth and poverty alleviation are not necessarily correlated with the establishment of security, some still ask whether security is not an essential good in itself that developed countries have an obligation to promote in the countries they support through development aid. However, accepting this view does not provide support for donor countries defining the security goals of developing countries and setting up systems for achieving them. Rather, it suggests a focus on the security needs of the recipient state, rather than the subordination of that state's needs to those of the donor. Some research suggests that the security goals of communities and states can be better

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<sup>65</sup> Ibid. at 248.

<sup>66</sup> Social Development Direct, *Scoping a long-term research programme*, *supra* note 53 at 13. See also Oxfam, *Climate Wrongs and Human Rights: Putting People at the Heart of Climate Change Policy* (Oxford: Oxfam, 2008) and D. Smith and J. Vivekananda, *Climate of Conflict: The Links between Climate Change, Peace and War* (London: International Alert, 2007).

<sup>67</sup> Social Development Direct, *Scoping a long-term research programme*, *supra* note 53 at 14. See also Frances Stewart "Global Aspects of Horizontal Inequalities: Inequalities Experienced by Muslims Worldwide (Oxford: CRISE, draft). See also Stewart, *supra* note 57 at 23.

<sup>68</sup> Beall et al., *supra* note 27 at 55.

<sup>69</sup> CIDA, *Statistical Report*, *supra* note 34 at 25-28. For an account of the implications of aligning development aid with security for Colombia, see Gutiérrez Sanín, "Internal Conflict, Terrorism and Politics in Colombia" (2006) 18 J. Int. Dev. 137-150.

achieved by shifting from state-centered approaches to security to citizen- and human-centred approaches.<sup>70</sup> Those living in fragile or insecure states often lose faith in the government's ability to provide for security. But a turn to commercial, informal and community forms of security provision can also be problematic, leading to questions about the accountability of these forms of provision and the interests that animate them.<sup>71</sup> In their article, Alexandra Abello Colak and Jenny Pearce advocate for the public provision of security, but "from below". By departing from a state-based system, they mean that security ought not necessarily be about the survival of the state.<sup>72</sup> Their approach involves "taking security out from the secrecy and closeness associated with intelligence, military and defence circles," and it encourages a focus on "the protection and welfare of individuals as the primary concern. . . ."<sup>73</sup> States and public institutions would still be responsible for providing security, but security would be expanded to include more holistic concepts of welfare,<sup>74</sup> it would not necessarily involve an authoritarian deployment of force,<sup>75</sup> and the goals of the security enforcement program would be informed by local communities' needs, rather than by the eradication of rivals to the state or to those wielding political power.<sup>76</sup> Colak and Pearce recommend that "security from below" approaches should involve three components:

1. They should be informed by universal as well as local values and be respectful of human rights;
2. They should be agreed to by community actors and be responsive to local needs;
3. They should not create more fear or insecurity among populations.<sup>77</sup>

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<sup>70</sup> Alexandra Abello Colak and Jenny Pearce, "'Security from Below' in Contexts of Chronic Violence" (2009) 40:2 IDS Bulletin 11-19. On the perspective of "human security" approaches, see Tara McCormack, "Human Security and the Separation of Security and Development" (2011) 11:2 *Conflict, Security & Development* 235-260 at 235-236, 240; and Roland Paris, "Human Security: paradigm Shift or Hot Air?" (2001) 26:2 *International Security* 87-102 at 87; 89-92. Note that the approach of Colak and Pearce differs from a traditional human security model because it still sees a role for government in securing human welfare.

<sup>71</sup> Colak and Pearce, *supra* note 70 at 14 and 15-16. Colak and Pearce point out that these "parallel" forms of providing security may often be associated with illegal or uncontrolled informal forms of economic activity, thus deemphasizing the interests of the community they protect and putting greater emphasis on the economic interests of the parallel providers.

<sup>72</sup> Colak and Pearce, *supra* note 70 at 12-13.

<sup>73</sup> Colak and Pearce, *supra* note 70 at 13. A similar idea is expressed in earlier DfID documents, which state, "Promoting the security of the poor is, however, not the same thing as promoting the security of states. It is possible to increase state security, for example through stronger border controls, without improving the security of poor people who live within them. Indeed, security measures by the state can be implemented in ways that increase poor people's insecurity" ("Fighting Poverty to Build a Safer World: A Strategy for Security and Development" (London: Department for International Development: 2005) at 5).

<sup>74</sup> Colak and Pearce, *supra* note 70 at 13.

<sup>75</sup> Colak and Pearce, *supra* note 70 at 13.

<sup>76</sup> Colak and Pearce, *supra* note 70 at 14.

<sup>77</sup> Colak and Pearce, *supra* note 70 at 18.

While these elements are more aspirational than practical, one can see that this approach is compatible with the best practices currently advocated in the development community, which emphasize ownership of development initiatives by local beneficiaries and alignment of development goals with local needs. On this model, security would be provided by the state, but it could not be focused on state interests alone, and it should incorporate all aspects of human security, from physical safety to meeting the basic elements of human welfare such as food security, access to water and shelter, and so on.

*c) The alignment of security and development policy indirectly affects remittances, migration and charitable donations to alleviate poverty in countries with large Muslim populations*

The integration of development and security policy can have a negative effect on development in other more subtle ways. For instance, the war on terror, which is overwhelmingly identified with a war against Islam, has restricted the flow of migration and monetary remittance between developed countries and developing countries with a large Muslim population. Migration policies have a tremendous impact on the distribution of global wealth. As John Page indicates,

Today international migration is one of the most important influences on economic relations between developed and developing countries. It has great potential for reducing poverty but, unlike trade and capital flows, it is shaped more by the security policies of individual labour-importing countries than by international regulations.<sup>78</sup>

Some studies also indicate that remittance of income from those in developed countries to those in developing countries have a significant impact on poverty:

[Recent cross-country econometric work] also shows that international remittances—defined as the share of officially recorded remittances in a country's GDP—have a negative, statistically significant effect on the incidence and severity of poverty as measured by the numbers of people living below a poverty line, the poverty gap, and the squared poverty gap (Adams and Page, 2003).<sup>79</sup>

Counter-terrorism policies in Northern developed states have shaped the flow of labour and immigration between these countries and those with a large Islamic population. As migration of those with an Islamic identity has slowed and developed states impose greater controls on the flow of capital between them and Islam-identified developing countries, there is a reduction in “both the volume and the development impact of funds returning to migrants’ countries of origin.”<sup>80</sup> This is a political consequence of linking security and development policy because it changes the identity politics of development by mapping Islamic identity onto efforts to alleviate poverty – poverty alleviation becomes

<sup>78</sup> John Page, “Three Issues in Security and Development” (2004) 4:3 *Conflict, Security and Development* 299-308 at 303.

<sup>79</sup> Ibid. at 305. The econometric study referenced is Richard H. Adams, Jr. & John Page, “International Migration, Remittances, and Poverty in Developing Countries,” *Policy Research Working Paper*, No. 3179 (December) (Washington, DC: World Bank, 2003).

<sup>80</sup> J. Page, “Three Issues in Security and Development,” *ibid.* at 305.

in part dependent on whether you are Muslim because the war on terror is identified as a war on Islamic violent extremism.

Finally, Jude Howell points out that the alignment of security and development policy is a consequence of the changing political significance of civil society as a result of the declaration of the “war on terror”.<sup>81</sup> Where previously civil society had a benign meaning<sup>82</sup> -- it was the patient on whom development agents acted – since the declaration of the war on terror in 2001, civil society has come to be seen as potential hotbed of dissent and insecurity. In turn, the discourse of “good governance”, developed in the 1990s to create the conditions of market liberalization has also transformed into a tool for ensuring control of this potential threat. As Howell explains,

Though the new wars of the 1990s had laid the seeds for a convergence of security interests with development, the launch of the global war on terror in 2001 generalised this trend beyond the narrow confines of postconflict states to all aid-recipient countries. In this changed context the goals of ‘good governance’ and related ideas of civil society, human rights, participation and the rule of law that came to prominence in the 1990s take on a new meaning. In the 1990s they reflected the ideological victory of liberal democracy and free markets over communism and an agenda that positioned the domestic state as a key element in the pervasiveness of poverty. At the turn of the millennium they become subsumed under a much broader strategic canopy that is concerned with maintaining global stability and preserving Western economic power. In this context civil society has become a more suspect arena, one that may potentially harbour enemies of Western interests and values as well as allies in the dual fight against poverty and terror.<sup>83</sup>

The characterization of civil society as a potential threat has had many consequences, many of which are felt not only in developing countries but in developed countries, where debates about the public display of religious paraphernalia such as head scarves and the kirpan demonstrate the increasing alignment of political issues in domestic civil society with international ones. Of more direct relevance to development and poverty alleviation is the increased scrutiny to which charitable organisations, foundations and non-profit organisations are submitted in donor countries.<sup>84</sup> As Howell points out,

The specific targeting of Muslim organisations not only creates an unhealthy construction of Islam as enjoying a special affinity with terrorism, a view that defies all history of terrorism, but also identifies Muslim population as a ‘dangerous other’ that unless observed and disciplined risks behaving in uncivil and violent ways. Apart from the alienating effects of such a discourse, it also undermines the basic

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<sup>81</sup> Jude Howell, “The Global War on Terror, Development and Civil Society” (2006) 18:1 *J. Int. Dev.* 121-135.

<sup>82</sup> *Ibid.* at 128.

<sup>83</sup> *Ibid.* at 126.

<sup>84</sup> *Ibid.* at 127.

rights of Muslims to associate and organise, as such action immediately draws suspicion.<sup>85</sup>

Also, government aid agencies have begun scrutinizing their civil society partners in developing countries.<sup>86</sup> This can seriously undermine the ability of these agencies to connect with community groups in a positive way due to their perceived alignment with a foreign military,<sup>87</sup> and it also impedes the alignment of development policy with local needs and priorities. Moreover, it places the staff of civil society groups at risk of kidnapping or violence.<sup>88</sup> In conclusion, Howell points out that “[w]hen governments portray essentially political problems as cultural, social or economic, this reduces the discursive resources available to groups seeking just political outcomes.”<sup>89</sup>

## 2. *Political Concerns*

I will address three political concerns. First, scholars have noted the continuity of Cold War discourse with that of the new development-security discourse. There are real consequences to this continuity that work to the detriment of developing countries. Second, the merging of security and development policy is often justified by the need to achieve “efficiencies” within the bureaucratic structures of government. The search for efficiencies uses a bureaucratic norm – efficiency – to disguise the political issues that arise from the integration of development and security policy. Third, I briefly address the capture of development discourse by political interests antithetical to development.

First, from the point of view of discourse analysis, the discourse linking sustainable development and security is a repetition of the discourse of the Cold War. Beall et al. make this point

Through much of the 1950s and 1960s mainstream ‘development work’, as propagated by the United States, took place largely within a security paradigm. It took a long fight, via the movements for decolonisation in Africa, the movement against the Vietnam War and the establishment of the United Nations agencies, to achieve a separation of development assistance from foreign policy concerns driven by security objectives and the trading interests of the wealthy countries.<sup>90</sup>

The legitimacy of development work since the 1960s has in large part rested on the separation of the goals of poverty alleviation and the security of developed countries, disconnecting development from Cold War conflicts and recognizing the independence of former colonies from control by metropolises and the axes of the Cold War.<sup>91</sup> However, the integration (or re-integration) of development and security policies has the effect of re-politicizing poverty alleviation – i.e., of treating poverty alleviation as a

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid. at 128.

<sup>87</sup> Ibid. at 129 and 131.

<sup>88</sup> Ibid. at 130.

<sup>89</sup> Ibid. at 132. Howell cites Nick Megoran, “Preventing Conflict by Building Civil Society: Post-Development Theory and a Central Asian-UK Policy Success Story” (2005) 24:1 *Central Asian Survey* 83-96 at 93.

<sup>90</sup> Beall et al., *On the Discourse of Terrorism, Security and Development*, *supra* note 27 at 52-53.

<sup>91</sup> Beall et al., *On the Discourse of Terrorism, Security and Development*, *supra* note 27 at 53.

means for securing the North against the threat of terrorism. Poverty alleviation thus becomes once again a justification for metropolitan intervention and control in developing countries.

The parallel between Cold War discourse and the discourse of security and development has had the effect of legitimizing a new basis for intervention by developed states in developing countries. Previously, the fight against communism was considered a justification for American and European intervention in former colonial states. As Mark Duffield has argued, the emerging development-security discourse provides a new justification for this intervention – the necessity of stabilizing states that are “at risk.” Development policy and direct military intervention are the two means for powerful states to infiltrate the less powerful. Duffield argues that “[i]n privileging states to prioritize the security of people, human security displays its credentials as a biopolitical technology.”<sup>92</sup> He goes on to explain how the current nexus of security and development has shifted the justification of the intervention of rich states in poor states:

Human security is but one indication that the state has once again reclaimed the centre ground of development policy. This time, however, it is not a modernizing or industrializing state concerned with reducing the wealth gap between the developed and underdeveloped worlds, it is a post-interventionary human security state tasked with containing population and reducing global circulation of non-insured peoples through promoting the development technologies of self-reliance.<sup>93</sup>

. . .

As a liberal technology of security, human security distinguishes between effective and ineffective states in order to assert an interventionist responsibility to protect.<sup>94</sup>

Duffield devotes a chapter to discussing how ineffective states had previously been neglected during the 1990s, but through the new “biopolitical technology” of the failed-state/insecurity nexus,<sup>95</sup> have been the target of renewed interest among policy-makers.<sup>96</sup>

A discourse that runs parallel to the integration of security and development policy is the concern for institutional coherence. This is expressed as a need to coordinate the programs of various branches of a state’s government – the military, the foreign aid service, foreign affairs, the military, trade and industry, etc. – acting in the same state. Behind the language of efficiency gains that is to be secured by such cooperation is an intermixture of the varying political goals of these departments, which are often at cross-purposes. For instance, increasing a developing country’s capacity to provide security may require

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<sup>92</sup> Mark Duffield, *Development, Security and Unending War: Governing the World of Peoples* (London: Polity, 2007) at 111.

<sup>93</sup> *Ibid.* at 123.

<sup>94</sup> *Ibid.*

<sup>95</sup> This form of technology actually involves multiple technologies, which Duffield identifies as “humanitarian intervention, sustainable development, human security, [and] coherence” (*Ibid.* at 159).

<sup>96</sup> *Ibid.* at 127. See also Chapter 7.

greater state intervention in civil society. In contrast, foreign trade and investment initiatives may advocate less state involvement and a greater role for private ordering, for example through the liberalization of the market for goods, services and finance. The common sense notion of achieving efficiency through coordination of various department activities in a developing country thus hides behind it a host of political issues – i.e., issues about the meaning and role of state intervention, the level of acceptable foreign intervention in the developing country, and so on.

In addition to a discourse analysis, political concerns also arise from the increased possibility of capture of development programs by the domestic political players of donor nations when the ideals of neutrality and impartiality of development assistance are displaced by the partiality of the high politics of military policy. This capture and the manner in which it undermines effective delivery of development programs is well-documented by the journalist Murray Brewster. One example is the Canadian government's decision to promote "signature" development projects in Kandahar as a means of selling the Canadian public on an extension of Canada's military involvement in Afghanistan. In 2007, John Manley, a former cabinet minister in the Liberal government of Jean Chrétien from 1998 to 2003, was appointed to lead the Independent Panel on Canada's Future Role in Afghanistan. The Panel's 2008 report recommended highly visible development projects that would satisfy Canadians that Canada's presence in Afghanistan was worthwhile.<sup>97</sup> Brewster explains the shock within the development community at the announcement that the government would implement such projects:

The offbeat idea of putting a dedicated political stamp on Kandahar reconstructions projects, for example, caused people in the development community to light their hair on fire. So-called signature projects, the idea of taking domestic credit for something as fundamentally altruistic as rebuilding a shattered country, was an offence to their sensibilities. The thought that the public needed to see something—anything—to justify the enormous expenditure of blood and treasure was so outside their realm of comprehension that it might as well have come from another planet.<sup>98</sup>

Brewster goes on to document critiques of the Panel's proposal by Canadian development officials, who argued that this kind of capture of development projects to obtain political support for military involvement is evidence of the kind of paternalistic bias that the development community has sought to supplant with ownership of development projects by communities in the recipient state. Brewster quotes Graham Lowe, the former head of the UN Habitat program in Afghanistan:

"We go into development thinking we have all the answers," he said. Lowe had spent the better part of two years in Afghanistan. "There is expertise in how to get things done and that expertise comes from the locals. If you're smart, you tap into it."<sup>99</sup>

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<sup>97</sup> Brewster, *supra* note 22 at 195.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* at 196.

The signature projects evidently did not correspond to local needs. Indeed, a former civil servant in Canada's development agency that ran its programs in Afghanistan pointed out

“Canada as a troop-contributing country should never had focused its aid predominantly in the province that houses its [provincial reconstruction team]. . . . Such a strategy is vulnerable to criticism that aid is politicized and militarized.”<sup>100</sup>

The integration of development and security can make development policy prone to capture by political interests that can undermine development goals.

### 3. *Philosophical Concerns*

Leaving political discourse aside, the reasoning that justifies using development policy as a tool for achieving the security of developed countries is crassly consequentialist. It presupposes that the achievement of military goals – many of which involve casualties to developed country forces and to civilians in developing countries – is justified because of the ultimate goal of protecting human rights once the military ends are achieved. Another way of understanding this reasoning is that the human rights secured by poverty alleviation are not important solely in themselves; rather, they are important as a means to achieving the security of developed countries.

Consequentialist reasoning is not objectionable to all. However, the particular consequentialism involved in justifying the use of development policy to achieve the security of developed countries is objectionable because it uses what utilitarian philosopher Peter Singer calls a ‘partial’ morality – i.e., a morality that is partial to those who are part of our group, be it family, neighbourhood, region or state.<sup>101</sup> It is a partial morality, because it subordinates the interests of civilians killed by developed country militaries abroad and civilians suffering from the ills associated with poverty to the protection of the citizens of rich states. Although considered an extremist in terms of the extent of the obligations he thinks we owe to others, Singer articulates an argument whose justice many recognize: we have an obligation to help all humans regardless of their kinship to us and regardless of the physical distance that separates us.<sup>102</sup> When used to evaluate the conflation of security and development policy, Singer's view leads to the conclusion that we cannot prioritize the security of our co-nationals over the well-being of those in developing countries. Indeed, it follows from his argument that we are required to reduce the costly precautions we take against the relatively improbable harms of international terrorism in the face of the more widespread harm of poverty and the damage caused by the security measures developed countries currently promote to secure themselves against international terrorism.

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<sup>100</sup> Ibid.

<sup>101</sup> Peter Singer, “Outsiders: our obligations to those beyond our borders” in Deen K. Chatterjee (ed.), *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge: Cambridge University Press, 2004) 11-32.

<sup>102</sup> See his seminal article, “Famine, Affluence and Morality” (1972) 26 *Philosophy & Public Affairs* 189-209. In this article, Singer argues that we must continue to give to others more in need until the point of marginal utility is reached – i.e., the point where giving one more thing to another creates more unhappiness than the happiness the receiving creates. The practical consequences of this rule is that most of us in developed countries would have to give up most of what we have to those who currently have nothing.

To depart from a utilitarian perspective and adopt a natural law approach, the policy of combining security and development policy is a partial morality because it sees the securing of the human rights of those in developing countries, not as an end in itself, but as a means of achieving the rights of others. It is not normally permissible to say that we work to alleviate poverty in New York City in order to ensure that the rich are safer. Poverty is alleviated because of the suffering it causes to the poor. Likewise, we cannot treat the global poor as the means to achieving the well-being of the global rich. Similar sentiments are expressed in *PRT 3 Policy Note 3* issued by the International Security Assistance Force, the NATO-led security force in Afghanistan, which specifically states that humanitarian assistance “must not be used for the purpose of political gain, relationship building or ‘winning hearts and minds’ ...and must uphold the humanitarian principles of humanity, impartiality and neutrality.”<sup>103</sup> Such condemnation of consequentialist views can be legitimately carried over from the delivery of humanitarian aid to the delivery of development aid.

Thomas Pogge adds to the picture of responsibility for international policy the fact that some – if not all – international poverty is caused by the acts of rich developed countries. He demonstrates that although we might not have the positive duty Singer imposes on us to alleviate poverty in poor countries, we at least have a duty to stop continuing or deepening the harm that the policies of rich countries and the international institutions they dominate cause.<sup>104</sup> The financial crises over the past three years from 2008 to 2011 bear out Pogge’s assessment that rich countries directly harm economies world-wide, thereby increasing poverty. As David Miller points out, when poverty is at least partly the result of actions of developed countries – for instance, the result of military occupation, as in Iraq and Afghanistan – those developed countries have a responsibility to alleviate that poverty independent of the benefit that doing so might bring them.<sup>105</sup> In Miller’s view, this responsibility holds even if part (even a large part) of the responsibility for poverty is that of the government of the developing country state.

#### **4. Summarizing the negative effects of integrating development and security**

To conclude this section, from a pragmatic point of view, the integration of security and development policy in a way that subordinates development to the security of the donor country is likely to be largely ineffective in achieving development or security goals. Not only does such integration violate the best practices of development, which require that developing countries set the goals and priorities for development and participate fully in the delivery of these programs, it also overlooks the underlying causes of violent extremism. This extremism is exacerbated by foreign military intervention, especially when it targets groups within a developing country who, as a result of this targeting, will be marginalized and denied access to political voice. Moreover, allowing the military to be heavily involved in delivering aid or establishing aid priorities undermines the trust on which this aid is supposed to be based.

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<sup>103</sup> ISAF, *PRT Executive Steering Committee Policy Note Number 3: “PRT Coordination and Intervention in Humanitarian Assistance* (endorsed on 22 February 2007 and updated on 29 January 2009) at para. 4.

<sup>104</sup> Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002) at 197-199.

<sup>105</sup> David Miller, “National Responsibility and International Justice” in Chatterjee, *The Ethics of Assistance*, *supra* note 101 123-143.

From a political point of view, the intertwining of development and security policy has various political consequences – i.e., consequences for the distribution of political power. It repeats the dynamic of the Cold War, in which developing countries were dominated by powers seeking to establish international supremacy. The discussion around efficient delivery through coordination of various departments introduces the tensions between government intervention and non-intervention, public and private. Identified with Islam, the war on terror has resulted in greater marginalization of populations and racial identities associated with Islam, both in rich countries and internationally. It also politicizes civil society, making civil society groups and private actors subject of surveillance by states wary of their potential involvement in terrorism.

Finally, from a moral standpoint, the subordination of development policy to security concerns is justified based on an unacceptable partial consequentialism: Countries are entitled to abuse the right to self-actualization of the poor in developing countries in order to achieve greater security for their citizens at home. Moreover, it violates the high value placed on human rights by natural law theorists.

### *5. Alternatives to aligning security and development policy – citizen- and human-centered approaches to development and security*

International documents such as the *Paris Declaration on Aid Effectiveness* and current political science research indicate that integration of security and development policies violates the best practices of development work and contradicts recent research on the causes of conflict and instability in developing countries. Military conflict – especially foreign military intervention – contributes to existing instability by destroying the economic and social structures of a society. Moreover, such intervention frequently exacerbates the unequal distribution of political, social and economic resources in a state. This horizontal inequality is frequently a source of conflict.

But alternatives to these ineffective policies exist.

Some researchers and advocates are recommending a shift from state-centered security to citizen- and human-centered notions of security. These concepts would recognize security as a community-based concept. Alexandra Abello Colak and Jennifer Pearce call this approach “security from below” and describe it as follows:

‘security from below’ is about encouraging people to think about their security as they do about their food, livelihood and human rights; it is of equal importance.<sup>106</sup>

To prevent this community-based approach to security from degenerating into warlordism, Colak and Pearce are clear that the state must be involved in providing for basic security needs:

Security provision must be provided by public institutions, but it needs to be founded on agreed norms and shared values. It also has to respond to contextualised needs in ways that are legitimate and respectful of human rights.<sup>107</sup>

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<sup>106</sup> Colak and Pearce, “Security From Below,” *supra* note 70 at 12.

While domestic governments will necessarily be involved in the realization of community goals, this involvement should not give priority to the security goals of developed countries. To be effective, bottom-up security measures must be developed locally.

What is the role of the military in providing security on the ground? Mary Kaldor, an advocate of human-security initiatives, suggests that the goal of military intervention must shift from achieving the security goals of the countries that are supporting military intervention to protecting local citizens. She states that when one adopts a human-security approach, the “primary goal [of the military] is protecting citizens rather than defeating an adversary.”<sup>108</sup>

However, there is a danger in Kaldor’s approach. I have already discussed Duffield’s analysis of the dangers of justifying state intervention in developing countries on the basis of providing human security. He demonstrates how the desire to regularize, organize and coordinate the provision of development aid through NGOs and civil society groups has hampered the ability of these groups to help local communities. He documents a “repressive climate” that has “had a negative impact on those NGOs working to empower civil society groups to claim rights and express legitimate political concerns.”<sup>109</sup> He goes on to argue that

[a]n important consequence of governmentalization is that, from the perspective of their prospective hosts and beneficiaries, NGOs are now indistinguishable from the occupying forces with which they have often arrived or on which they rely for protection.<sup>110</sup>

Given this analysis, the implementation of human- and community-centred approaches to development must undo the close relationship between the military and development agencies. Otherwise, a focus on community goals and the security of the individual will be tainted by the spectre that development programs are a means of achieving the geo-political goals of developed states.<sup>111</sup> Kaldor’s view that the military can play an important role in protecting the citizens of developing countries must be premised on the possibility of separating the traditional military goals of protecting the home state from the goals of promoting the security of those in the developing state. Duffield’s critique seems to indicate that such a separation is at best difficult to achieve, or at worst, completely unachievable.

Finally, many critics of the increasing link between development and security remind us that poverty is not in itself a cause of terrorism. The unequal distribution of resources both within a state and between developed and developing states are the principal source of global insecurity. If developed countries were serious about increasing security and stability in developing countries, they would examine how their domestic policies and the priority they give these policies over the policy goals of citizens in the developing world contribute to the unequal distribution of global resources. Development assistance

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<sup>107</sup> Ibid.

<sup>108</sup> Mary Kaldor, *Human Security: Reflections on Globalization and Intervention* (London: Polity, 2007) at 186.

<sup>109</sup> Duffield, *Development, Security and Unending War*, *supra* note 92 at 130.

<sup>110</sup> Ibid. at 131.

<sup>111</sup> For a discussion of this, see Duffield, *ibid.* at 130.

must be directed to redress inequalities. Assistance that is not targeted in this way or assistance directed at developed country priorities will remain ineffective.

## II. Global Administrative Law: The Solution?

Is it possible to bring decisions to conflate security and development policies within the rubric of international administrative law? To answer this question, it is first necessary to identify the nature of the government decision we seek to challenge. Are we challenging

- 1.) the use of discretion given to states under international law to use force in self-defence or to intervene in other states to protect international human rights?
- 2.) a policy decision of the executive to prioritize security over poverty alleviation?
- 3.) a decision of the executive that implements legitimate development policy?
- 4.) governance creep – the gradual encroachment of one area of governance (military/security) on another?

Let us presume that the phenomenon we are challenging is a policy decision to prioritize security over poverty resulting in governance creep – the infiltration of security goals and procedures into decision-making around international development assistance. Is this an issue that can be addressed by international administrative law? That is the question I seek to answer in this part of the paper.

### A. The search for a normative basis for international administrative law review

In common law jurisdictions, administrative law is traditionally said to function primarily within the framework of the separation of powers.<sup>112</sup> In consequence, a purely discretionary decision that is not taken under the authority of a statute is not reviewable.<sup>113</sup> To allow such review would be to grant the judiciary too much power over the executive. According to this view, government decisions about the allocation of public resources or the exercise of prerogatives are not reviewable unless they amount to policies that are abuses of power or that involve a power that goes beyond the statutory authority of the decision-making body. Therefore, in order to bring the policy decision to conflate military and development spending under the purview of administrative law, one has to presume that there is a domestic law that confers the discretion and hence creates boundaries for its exercise. This domestic law may or may not be informed by international norms that apply within the state and that form the

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<sup>112</sup> The situation is different in some civil law countries. For instance, in France, the traditional view was that the power of the executive was limited to implementing the decisions of the legislative branch (Denis Baranger, “Executive Power in France,” in Paul Craig and Adam Tomkins (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford: Oxford University Press, 2006) 217-242 at 220. Baranger traces this view back to the way in which Montesquieu used the term “executive” to refer to the “power to administrate things” (la “puissance exécutrice des choses”) (ibid.)).

<sup>113</sup> On this point in the context of Canadian administrative law, see Sara Blake, *Administrative Law in Canada*, 3d ed. (Markham, ON: Butterworths, 2001) at 194-195.

legal framework within which a state exercises its powers.<sup>114</sup> Traditionally, these international legal norms had to be implemented by legislation. But more recently, they have been given effect even where international treaties and conventions have not been directly implemented as long as the international norms are useful in interpreting domestic law. Canadian law is an example of this trend.<sup>115</sup> In the absence of such domestic laws, one might argue that the discretion to make foreign policy cannot be reviewed based on principles of administrative law.

However, alternatives exist to the traditional account. For instance, one could argue that there is a body of international law that is analogous to the framework provided by domestic constitution and statutes, and that this framework is effective in national law and limits the exercise of the legislative discretion of states. This is the argument of David Schneiderman, who documents the emergence of global constitutionalism – i.e., the emergence of bodies of law that are quasi-constitutional, since they fetter the ability of sovereign states to exercise their decision-making power.<sup>116</sup> An example of such a global constitutional framework is international investment law. According to Scheiderman, the network of international investment agreements limits the regulatory freedom of governments, restricting their ability to legislate in ways that violate the rights of foreign investors protected under these agreements.<sup>117</sup> Applied to anti-terrorism regimes, one could argue that the body of law emerging in the area of international security is an example of the phenomenon of global constitutionalism, and that the “constitutional” regime that this law represents is the normative framework within which individual states must act. However, the constitutional model is likely inapplicable to international security, as the regime of law that governs it lacks many of the key institutional factors that characterize the international investment regime, the most significant of which is that, unlike international investment, there are no treaties – bilateral or regional – that directly restrict a government’s ability to pursue its security by means of development policy. The limited set of norms that deal with armed conflict and foreign intervention are not a comprehensive set of constitutional norms that significantly limit the normal process of government regulation of domestic activity.

Another option is to determine whether some fundamental norms of international law such as international human rights norms can be used effectively to set limits on a state’s anti-terrorism policy. If a donor country has signed and ratified relevant international human rights treaties, then it could be subject to the system for monitoring and enforcing these treaties. This engages the system for applying and enforcing international human rights. I will not describe the whole international human rights system for the enforcement of treaty-protected rights. However, three main mechanisms would apply. One is the employment of the system of state reporting, with its attendant observations and

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<sup>114</sup> In “dualist” systems such as exist in Canada and the United States, international treaties and conventions are not part of domestic law unless they have been implemented through legislation. For the Canadian position, see *Francis v. The Queen*, [1956] S.C.R. 618 at 621; and *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at 172-73.

<sup>115</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-71.

<sup>116</sup> David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge: Cambridge University Press, 2008).

<sup>117</sup> On the accuracy and inaccuracy of this characterization of the current international investment law regime, see José E. Alvarez, *The Public International Law Regime Governing International Investment* (The Hague: AIL-Pocket, 2011) at 446-457.

recommendations by the United Nations Human Rights Council.<sup>118</sup> Second is the system for individual or inter-state complaints and attendant inquiry procedure. Finally, there is the possibility that the U.N. Human Rights Commission could appoint an international rapporteur for development, security and human rights. This rapporteur would investigate the compliance of international development and security law and practices with international human rights norms.

However, as scholars studying the intersection of human rights and development have pointed out, our international human rights regime places more emphasis on civil and political rights than on the economic and social rights that are more directly at issue in development.<sup>119</sup> Moreover, the development community has only recently begun to use the language of human rights, which it has largely ignored up until now.<sup>120</sup> Also, there is as yet no particularly effective method for enforcing international human rights norms. For these reasons, the traditional human rights institutions may not be effective for policing the separation between development and security that I have proposed.

The final option is to see over-arching norms of international law as emerging from non-traditional sources – i.e., not just state practice and *opinio juris*. I argued in my paper on cosmopolitanism in international law that a phenomenological approach to international law would understand international norms as emerging from the increasing experience of the inter-relationship between states and individuals – in short, from the increasingly cosmopolitan nature of international relations and the increasing access we as individuals have to publicly available information about the suffering of others.<sup>121</sup> These norms, far from being a constitutional framework imposed on domestic law, would instead be the normative framework within which domestic legal regimes exist and from which they derive part of their legitimacy. I explore this latter option in the following sections, first by describing the cosmopolitan norms that underlie our experience of international community, and second, by demonstrating how these norms can have direct effect in domestic law through the rule of law enforced by domestic administrative law regimes. The interplay of cosmopolitan norms and a domestic administrative law regime could be characterized as a form of international administrative law.

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<sup>118</sup> On this option, see Brigitte L. Hamm, “A Human Rights Approach to Development” (2001) 23:4 Human Rights Quarterly 1005-31 at 1016; and André Frankovits and Patrick Earle, “Working Together: The Human Rights Based Approach to Development Cooperation. Human Rights Council of Australia Stockholm Workshop (Stockholm: October 16-19, 2000) at 13. For an assessment of the “violations” approach, see Peter Uvin, *Human Rights and Development* (Bloomfield, CT: Kumarian Press, 2004) at 146-153.

<sup>119</sup> Philip Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals” (2005) 27 Human Rights Quarterly 755-829 at 760-761; Uvin, *Human Rights and Development* *ibid.* at 47.

<sup>120</sup> Alston, “Ships Passing in the Night,” *supra* note 119 at 760.

<sup>121</sup> Mayeda, “Pushing the Boundaries,” *supra* note 6.

## B. The Phenomenon of International Law as a Source of Cosmopolitan Norms

### 1. *We do not need an international government to enforce international administrative law*

Many political philosophers who advocate cosmopolitanism as the normative basis of international law maintain that it requires the creation of international institutions that essentially constitute a world government. Andrew Linklater has argued that we should favour increasingly inclusive levels institutions such as the European Union that will gradually encompass a greater portion of the world's people.<sup>122</sup> David Held advocates the creation of a Global Parliament, a global legal system involving both criminal and civil law, and a system of global accountability for economic agencies.<sup>123</sup> However, other philosophers throughout the ages have pointed out the impossibility of achieving the sorts of institutions Held and Linklater envision, among them, Immanuel Kant and John Rawls.

In *Perpetual Peace*, Immanuel Kant argues on the one hand that a cosmopolitan approach to international law – i.e., one that recognizes the equality of every human being and derives the norms of international law from this fact – is a requirement of reason.<sup>124</sup> However, he also acknowledges that the international government that the actualization of such a requirement of reason entails is neither possible nor desirable.<sup>125</sup> Instead, he recommends the creation of a peaceful federation of states<sup>126</sup> with

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<sup>122</sup> Andrew Linklater, "Citizenship and Sovereignty in the Post-Westphalian State" (1996) 2:1 *European Journal of International Relations* 77-103 at 95-99; Andrew Linklater, *The Transformation of Political Community*, *supra* note 6 at 7-8, 44-5, 193-204); see also Matthias Kumm, "On the Place and Limits of Constitutional Pluralism," in Matej Avbelj and Ján Komárek (eds.), *Constitutional Pluralism in Europe and Beyond* (Oxford: Hart Publishing, 2011/2012), forthcoming.

<sup>123</sup> Held, *Democracy and the Global Order*, *supra* note 6 at 279. For a good review of Linklater and Held's views, see Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005) at 157.

<sup>124</sup> Kant's reasoning is that the concept of right requires the establishment of a peaceful means of resolving disputes. In his view, the right to wage war is incompatible with the defence of universal human right, and so a federation of states is necessary in order to provide a peaceful mechanism for resolving disputes between states or between nationals of two different states (Immanuel Kant, "Perpetual Peace: A Philosophical Sketch," in H.S. Reiss (ed.), *Kant: Political Writings*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 1991) at 104-105; see also 107-108, 112 and 122).

<sup>125</sup> For Kant, an international state (i.e., a supra-national state) is contradictory. However, he is not especially clear about the reason for this belief. He seems to argue that, having already formed states, which involves the subjection of the people to a legislator, the same people cannot in turn subject themselves to a higher legislative power, as this would entail the dissolution of the national state in favour of the international "state", and therefore, a violation of the national state's sovereignty (*ibid.* at 102). From a practical point of view, Kant recognizes that we have not yet reached the point where it is politically feasible to create such an international state (*ibid.* at 105). Moreover, cultural and linguistic differences suggest that a single international state is impossible, as unifying people with such differences is impractical and against human nature (*ibid.* at 114), although these differences will tend to abate over time (*ibid.* at 114). Moreover, the larger and more impersonal the government, the more unable it becomes to control its subjects (*ibid.* at 114).

<sup>126</sup> *Ibid.* at 102, 104-105 and 127.

very limited capacity to promote peace and to enforce the right of hospitality – the right of any person to be received without hostility by another state.<sup>127</sup>

John Rawls, in his *The Law of Peoples*, also rejects an extension of liberal principles to the international level on the basis that an international legal institution that could create and enforce international legal norms either does not currently exist or cannot exist.<sup>128</sup>

In my view, however, the objections of Kant and Rawls to an international state does not preclude the existence of cosmopolitan obligations that we owe as individuals to individuals in other states and that we must actualize through *the existing political and legal institution of the state*, nor does it preclude the use of national legal systems to enforce these obligations.

Are states free to reject cosmopolitanism as the normative basis of international law? On a political level, there is no doubt that they are. But is this normatively justifiable? In Kant's view, reason dictates cosmopolitanism as the normative foundation of international law.<sup>129</sup> Elsewhere, I have provided a phenomenological argument that cosmopolitanism is a requirement of international justice.<sup>130</sup> By "phenomenological," I mean that one's experience of community with others requires one to promote cosmopolitanism as the normative foundation of international law. On this view, the phenomenon of globalization – the fact of our experience of community with others, including those in far distant places – dictates that we adopt norms that reflect this community and acknowledge our responsibilities to those who live in different states than our own. While the obligations to strangers are different than those that we owe to our family members and those with whom we have close emotional ties, in all cases, we cannot ignore the poverty that we witness or our part in causing it. However, for those that reject a phenomenological form of argumentation, there is a rational theoretical justification for cosmopolitanism. As Dyzenhaus has argued, it is part of the internal morality of law that those whose lives are affected by law are given a justification for the effects that does not resort merely to an assertion of authority.<sup>131</sup> The pre-condition of such a view is the equality of those subject to the law, a basic norm underlying cosmopolitanism.<sup>132</sup>

John Rawls has argued that it follows from a liberal's respect for pluralism – i.e., a respect for different views of what constitutes equality, including views that subordinate women, religious minorities, etc. – that a liberal state should tolerate illiberal states within certain limits. Thus, liberal egalitarianism does not necessarily require a cosmopolitan conception of justice. However, as Thomas Pogge and Kok-Chor

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<sup>127</sup> Ibid. at 105-108.

<sup>128</sup> For a discussion of Rawls on this point, see Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004), at 80. For an interesting critique of Rawls' *The Law of Peoples*, see Pogge, *supra* note 104 at 104-108.

<sup>129</sup> Immanuel Kant, "Perpetual Peace," *supra* note 125.

<sup>130</sup> Mayeda, "Pushing the Boundaries," *supra* note 6.

<sup>131</sup> Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law," *supra* note 3 at 18.

<sup>132</sup> As Kok-Chor Tan points out, "the ideal of impartiality is . . . central to the concept of justice, and any plausible conception of justice must express this ideal in some appropriate way." What this means is that a standard of international justice cannot demonstrate partiality to any particular nationality or national interests. Such partiality would not be just (Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004) at 190).

Tan have demonstrated, Rawls was wrong on this point. States that do not promote equality in their domestic law may nonetheless support equality *among* states, with the result that the meaning of a just distribution of the world's resources entails an equal distribution of them.<sup>133</sup> Indeed, what illiberal state would submit to subordination in the international legal order in order to justify its illiberal domestic regime? It follows from an illiberal state's support for a principle of equality among states that we are not justified in prioritizing the eradication of poverty in the United States, Canada or the United Kingdom over eradicating it worldwide, as this would violate equality at the international level. Moreover, Tan has argued that the toleration of illiberal states contradicts the basic principles of Rawlsian liberalism by subordinating equality to toleration. If Rawls accepts that we should tolerate illiberal concepts of egalitarianism within an illiberal state, there is no reason why a reasonable person within a liberal state should not likewise reject equality.<sup>134</sup> If a reasonable liberal would tolerate illiberalism at the international level, there is no reason why it should not be tolerated domestically. Thus, Rawls' law of peoples undermines the whole normative foundation of *A Theory of Justice*.

As can be seen, there are both rationalist (Kant) and phenomenological (Mayeda) arguments as to why cosmopolitanism is necessary. Moreover, *contra* Rawls, political liberals must also advocate cosmopolitanism or risk contradiction of their advocacy of domestic liberalism.

In what follows, I explain what cosmopolitan norms apply to the use of development policy to fight international terrorism, and I provide a short explanation of the origin of these norms. I then explain how administrative law principles apply to recognize and enforce them.

## 2. *The applicable cosmopolitan norms: the right to self-actualization*

Cosmopolitanism presupposes the equality of all individuals. Some see this as a consequence of the use of reason. Immanuel Kant is the prime example of this view. However, alternative accounts of the philosophical basis of cosmopolitanism exist. For instance, using the ethical and political philosophy of Emmanuel Levinas, I have argued that this equality is in fact something we experience when we come face to face with the need of others; therefore, equality need not presuppose human rationality or even the power to reason. It follows from any account of equality as a fundamental norm of international law that it is imperative that law secure the preconditions for exercising our equality. As Amartya Sen has ably demonstrated, the alleviation of poverty – the goal of international development assistance – fulfils this imperative by securing the conditions for the freedom of each individual to exercise his or her equality.<sup>135</sup>

What are some of the subsidiary norms that are derived from equality and that are instantiated in the provision of development assistance? In *Justice Beyond Borders*, Simon Caney identifies one of the

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<sup>133</sup> Kok-Chor Tan, *Toleration, Diversity, and Global Justice* (University Park, Pennsylvania: Pen State Press, 2000) at 169. Thomas Pogge, "An Egalitarian Law of Peoples," (1994) 23:3 *Philosophy and Public Affairs* 195-224 at 218.

<sup>134</sup> Tan, *Toleration, Diversity, and Global Justice*, *ibid.* at 171-175.

<sup>135</sup> As Sen explains, "[d]evelopment requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states" (*Development as Freedom* (New York: Anchor, 1999) at 3). Implicit in this articulation of the goal of development as the expansion of agency is the equal value of every agent.

principal aspects of cosmopolitanism's recognition of the equality of all individuals, namely, that "persons have a democratic right to be able to affect those aspects of the social-economic-political system in which they live that impact on *their ability to exercise their rights*."<sup>136</sup> This is essentially a norm of "self-actualization". Caney argues that it follows from this claim that we must create international institutions to protect and enforce this democratic right that is the manifestation of our equality with others.<sup>137</sup> Be that as it may, the norm of self-actualization must at least encompass what Arjun Sengupta considers the fundamental basis of the right to development, namely, that the provision of development assistance must be "participatory, accountable, and transparent with equity in decision-making and sharing of the fruits or outcome of the process."<sup>138</sup> These norms are likewise incorporated in the *Paris Declaration on Aid Effectiveness* that I discussed earlier. Indeed, the requirement that development assistance be "owned" by the recipients and "aligned" with their interests is essentially a re-statement of Sengupta's point and flows from the requirement of the recognition of the equality of all human beings.

The norm of self-actualization is a relatively minimalist requirement, but it can do a significant amount of work when it comes to restraining the promotion of development programs that subordinate the needs of developing countries to the security interests of developed ones. And while such a norm of equality, elaborated as a requirement of participation, accountability and transparency in the delivery of development assistance, does not preclude dual goals for development – i.e., the pursuit of the security interests of developed countries and the alleviation of poverty sought by developing countries – it is sufficiently robust to limit the subordination of development to security. The development goals of the recipient country must be given at least equal priority, and they cannot merely be the side-effect of pursuing security goals. Moreover, the requirement of equality is violated if individuals in a developing country are used as a means of securing the interests of those in the developed world.

How can this foundational norm of a cosmopolitan international legal order – equality – be used to limit the discretion of donor governments to pursue security through development policy? Through the observation that securing this fundamental norm, articulated as the right to self-actualization and the demand for transparency, accountability and participation, is likewise the goal of administrative law. Indeed, as Benedict Kingsbury, Nico Krisch and Richard B. Stewart point out, these procedural norms form the background of global administrative law.<sup>139</sup> Although these norms may not completely prevent

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<sup>136</sup> Caney, *Justice Beyond Borders*, *supra* note 123 at 158.

<sup>137</sup> Caney, *Justice Beyond Borders*, *supra* note 123 at 159 and 182. Caney is of the view that these international institutions must reflect three values: the protection of civil and political human rights and the promotion cosmopolitan distributive principles; the protection of people's ability to affirm their cultural and national commitments; and the accountability of institutions and agents where the actions of the latter affect the exercise of people's rights (*ibid.*).

<sup>138</sup> Arjun Sengupta, *Right to Development*. Note by the Secretary-General for the 55<sup>th</sup> session, A/55/306 ( New York: United Nations, August 2000) at 21-22. For an elaboration on this statement, see Uvin, *Human Rights and Development*, *supra* note 119 at 138. De Burca also points to the importance of "the *fullest possible participation and representation of those affected*" in decisions of transnational bodies ("Developing Democracy Beyond the State" (2008) 46 *Columbia Journal of Transnational Law* 101 at 107).

<sup>139</sup> Benedict Kingsbury, Nico Krisch and Richard B. Stewart, "The Emergence of Global Administrative Law" (2005) 68:15 *Law and Contemporary Problems* 15-61 at 37-41.

the integration of security and development policy, to the degree that norms of participation, accountability and transparency are largely absent in the security policy of states, the requirement that development programs conform to them is an effective normative basis for limiting such integration.

In the next section, I discuss how the norm of self-actualization that derives from the fundamental norm of equality that underlies a cosmopolitan legal order can be implemented through global administrative law. I argue that it follows from my adoption of David Dyzenhaus's conception of administrative law that the legitimacy of administrative law review does not depend on the existence of a statute setting out the norms against which government funding decisions about development assistance will be evaluated; i.e., administrative law does not function purely within the division of powers, and consequently, administrative law review is not dependent on the legislative branch granting tribunals the power to review a statutorily conferred administrative discretion.<sup>140</sup> Instead, as Dyzenhaus argues, certain human rights norms themselves provide the normative basis for administrative law review, and they can be directly applied in such a review without being incorporated into domestic law by the enactment of a statute. Indeed, the basic norm that underlies rights-based cosmopolitanism – the norm of self-actualization – is precisely the kind of norm that can be directly applied in administrative law review of government decision-making relating to development assistance. I turn now to the justification of this “globalist” interpretation of administrative law.

### 3. *Applying the foundational norms of cosmopolitanism in domestic courts*

My contention that there is recourse for decisions of sovereign governments relating to development assistance suggests an international dimension to administrative law. International administrative law has a long history in Europe, where it goes back to the work of Lorenz von Stein in the late nineteenth century and Karl Neumeyer in the first few decades of the twentieth. The international administrative law paradigm has found renewed vigour in modern legal circles such as Global Administrative Law (GAL). As Benedict Kingsbury explains, a “global administrative space” has emerged that challenges the traditional characterization of international law as the law governing interactions between sovereign governments.<sup>141</sup> While international law has historically separated the domestic and the international, the internal and the external, the new global administrative law paradigm sees continuity between the two.<sup>142</sup> This space is occupied by “transnational private regulators, hybrid bodies such as public-private partnerships involving states or inter-state organizations, national public regulators whose actions have

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<sup>140</sup> For the contrary view in UK law, see *R. v. Secretary of State for the Environment, ex parte Holding and Barnes*, *R. v. Secretary of State for the Environment, ex parte Alconbury* and *R. v. Secretary of State for the Environment, ex parte Legal and General Assurance*, [2003] 2 AC 295, where the law lords emphasize the importance of complex political decisions affecting diverse constituencies being matters that are best left to the executive rather than the judiciary. For a good interpretation of this case, see Adam Tomkins, “The Struggle to Delimit Executive Power in Britain,” in Craig and Tomkins, *The Executive and Public Law*, *supra* note 112 16-51 at 27-30.

<sup>141</sup> Benedict Kingsbury, “The Concept of ‘Law’ in Global Administrative Law” IILJ Working Paper 2009/1 (Global Administrative Law Series) at 2. Available online at [www.iilj.org](http://www.iilj.org); Nico Krisch and Benedict Kingsbury, “Introduction: Global Governance and Global Administrative Law in the International Legal Order” (2006) 17:1 EJIL 1-13, at 1 and 10-11; and Benedict Kingsbury, Nico Krisch and Richard B. Stewart, “The Emergence of Global Administrative Law” (2005) 68:15 *Law and Contemporary Problems* 15-61 at 18.

<sup>142</sup> Krisch and Kingsbury, “Introduction,” *supra* note 141 at 11.

external effects but may be controlled by the central executive authority, informal inter-states bodies with no treaty basis (including ‘coalitions of the willing’), and the formal interstate institutions (such as those of the United Nations) affecting third parties through administrative-type actions.”<sup>143</sup> According to this paradigm, national courts can be called upon to police domestic institutions that are involved in administering a decentralized system of global governance. The system of international development assistance could be considered just such a system. The network of national aid agencies, of which USAID, CIDA and DfID – the agencies considered in this paper – are just a few, basically administer our main system for alleviating poverty in other countries. They clearly have the transnational and global impact that would bring them under the global administrative law paradigm that its advocates envision.<sup>144</sup>

However, is bringing domestic institutions involved in a decentralized system of global governance within the purview of international administrative law sufficient to reach the discretionary decisions of policy-makers to integrate development and security policy? It appears not. The main advocates of GAL consider international administrative law to be primarily concerned with the decisions of intergovernmental organizations and more formal transnational networks of national regulatory officials.<sup>145</sup> The decisions of sovereign governments that affect those in other states do not generally fall within the paradigm, although Kingsbury, Krisch and Stewart acknowledge that “regulatory decisions by a domestic authority [that] adversely affect other states, designated categories of individuals, or organizations” could be challenged if they are “contrary to that government’s obligations under an international regime to which it is party.”<sup>146</sup> There is thus some room here for review of policy decisions that are contrary to a state’s international legal obligations. However, to date, the kind of administrative action that GAL scholars consider to be capable of being reviewed is generally confined to the decisions of regulators and administrative tribunals involved in “rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management.”<sup>147</sup> Discretionary policy decisions do not fall within this category of “administrative action.”<sup>148</sup>

However, in my view, administrative law should extend to certain discretionary policy decisions of government.<sup>149</sup> Kingsbury indicates that GAL should apply to decisions coordinated among various states’

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<sup>143</sup> Kingsbury, *supra* note 141 at 2.

<sup>144</sup> For a good description of the transnational nature of international development and its administrative law aspects, see Dann, “Grundfragen eines Entwicklungsverwaltungsrechts,” *supra* note 4.

<sup>145</sup> Benedict Kingsbury, Nico Krisch and Richard B. Stewart, “The Emergence of Global Administrative Law” (2005) 68:15 *Law and Contemporary Problems* 15-61 at 16, 20, 25.

<sup>146</sup> Kingsbury, Krisch and Stewart, “The Emergence of Global Administrative Law,” *supra* note 145 at 16.

<sup>147</sup> Kingsbury, Krisch and Stewart, “The Emergence of Global Administrative Law,” *supra* note 145 at 17.

<sup>148</sup> The kind of review I am suggesting also does not figure in Kingsbury’s summary of the forms of review possible under global administrative law (see Kingsbury, “The Concept of ‘Law’ in Global Administrative Law”, *supra* note 141 at 23-30).

<sup>149</sup> To be clear, I do not mean that the policy itself can be reviewed – only specific instances or applications of the policy. On this point, see Tomkins, “The Struggle to Delimit Executive Power in Britain,” *supra* note 140 at 47 [“[I]t is important to remember the particularity of judicial review as a mechanism of executive accountability. The courts can never (and nor should they be able to) review government policy as such” (at 47)].

governments.<sup>150</sup> Development policy, with or without security implications, has precisely the kind of transnational or global impact necessary to take it outside of the sole purview of the discretionary decision-making power of national governments.<sup>151</sup> Moreover, there are international legal norms that can be applied to review these decisions. These include norms that traditionally form part of the administrative law toolbox such as participation, accountability and transparency, as well as basic human rights norms such as the norm of self-actualization that forms the basis of development policy, which aims at expanding the ability of individuals to lead the kinds of lives they wish to live by alleviating the poverty that stands in the way of their doing so.

As I explained earlier in this paper, David Dyzenhaus has argued that substantive (as opposed to merely procedural) norms must underlie the rule of law, of which administrative law is one of the chief enforcement branches.<sup>152</sup> For Dyzenhaus, these minimal substantive norms form part of the normative framework that undergirds the relations between states – for instance, the protection of basic human rights. While other scholars admit that human rights norms form part of the normative framework of GAL, they tend to see these as applying only to restrict the actions of administrative and regulatory decision-makers rather than policy-makers.<sup>153</sup> However, even if one is to deny the direct application of human rights norms in domestic administrative law review, the traditional norms of administrative law also serve to protect “the rights of individuals and other civil society actors,”<sup>154</sup> thus conferring on these actors a right to challenge discretionary decisions of the executive that have a direct impact on them.<sup>155</sup> At a minimum, then, individuals should have a right to participate in the making of decisions that directly affect them and their ability to pursue their goals and projects that they have good reason to pursue.<sup>156</sup> It follows from this that they should have the ability to challenge the conflation of development and security policy to the degree that it impedes their capacity for self-actualization.

However, there may not be a need to resort to the norms underlying the international rule of law. For some European administrative law experts, administrative law extends beyond the conferring of executive discretion on administrators and administrative bodies by legislators. For them, even the administrative framework within which the decisions of government and of inter-governmental organizations are implemented can itself have the characteristics of law. On this view, the norm of self-actualization contained in development concepts such as the recipient’s “ownership” of development

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<sup>150</sup> Kingsbury, “The Concept of ‘Law’ in Global Administrative Law”, *supra* note 141 at 2. He says that the global administrative space includes “informal inter-state bodies with no treaty basis.”

<sup>151</sup> See generally Dann, “Grundfragen eines Entwicklungsverwaltungsrechts,” *supra* note 4.

<sup>152</sup> Many scholars of administrative law are of the view that administrative law is in fact the principal means of limiting executive power (Paul Craig and Adam Tomkins, “Introduction” in Craig and Tomkins, *The Executive and Public Law*, *supra* note 112, 1-15 at 11).

<sup>153</sup> See, for instance, Kingsbury, Krisch and Stewart, *supra* note 145 at 29.

<sup>154</sup> Kingsbury, Krisch and Stewart, *supra* note 145 at 43.

<sup>155</sup> Kingsbury, Krisch and Stewart limit the kind of review available to an individual directly affected by administrative action to a review based on due process rights (Kingsbury, Krisch and Stewart, *supra* note 145 at 46).

<sup>156</sup> Kingsbury, Krisch and Stewart admit the possibility of review of administrative decisions that deny a right to participate. However, they doubt whether this possibility would achieve wide international support given the ongoing challenges to democratic principles in some countries. Also, they limit the application of democratic principles to the making of *administrative decisions*, and do not discuss the making of discretionary decisions by the executive (*supra* note 145 at 48-49).

aid programs may go beyond being simply good development policy. Instead, it may have a legal character, thus obviating the need to resort to deriving self-actualization as a foundational norm of a cosmopolitan conception of international law. For instance, Philip Dann has argued that documents such as the *Paris Declaration* are not merely hortatory – they have legal characteristics. The administrative guidelines and the policy plans developed by international organizations that deliver aid such as the World Bank and the UNDP are forms of administrative law that are well-known in domestic administrative law regimes.<sup>157</sup> Parts of both the *Paris Declaration* and the *Millennium Development Goals* contain quantified goals for development cooperation. Among these goals is a commitment to increase the ownership of recipient countries over development projects.<sup>158</sup> The coercive nature of the policy goals contained in these documents indicates their legal character.<sup>159</sup> Indeed, Dann examines the enforcement mechanisms that can be used to obtain compliance with the policy goals, stating that the legal department of the World Bank constitutes a form of administrative regulator that can obtain compliance with the policy documents produced by the international development regime. Part of the enforcement mechanism relies on interpretations of the legal nature of obligations undertaken by states. But part also rests on the power of these legal officers to approve the international legal contracts by means of which official development assistance is distributed to recipient states.<sup>160</sup>

Regardless of its source as a fundamental norm of international law or as a norm of the administrative law of development cooperation, the norm of self-actualization should be able to be enforced in two ways: 1.) through administrative review of discretionary government decisions affecting international human rights in the domestic courts of countries providing development assistance; 2.) through administrative review of the regulatory actions of countries providing development assistance in the domestic courts of the state receiving this assistance.<sup>161</sup> I leave aside for the moment the difficulties of standing and *forum non conveniens* that might pose a barrier to such forms of review.

The argument that a discretionary government decision in regard to security and development policy should be subject to administrative law review by a domestic court is consistent with the views of early advocates of international administrative law. Lorenz von Stein, often considered the founder of international administrative law, explains that this form of law deals with elements of domestic law that affect the administration of law in other states. He explains that international law is the manifestation of the communal life of individuals that transcends national boundaries.<sup>162</sup> It is precisely through the attempts of individual states to differentiate themselves from others that international law arises, and yet this process of differentiation – an expression of state sovereignty – is likewise an expression or

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<sup>157</sup> Dann, “Grundfragen eines Entwicklungsverwaltungsrechts,” *supra* note 4 at 33 and 36.

<sup>158</sup> *Ibid.* at 35.

<sup>159</sup> *Ibid.* at 36.

<sup>160</sup> *Ibid.* at 37-38.

<sup>161</sup> On the challenges of using domestic courts in this way, see , Kingsbury, Krisch and Stewart, *supra* note 145 at 30-31 and 50.

<sup>162</sup> Lorenz von Stein, “Einige Bemerkungen über das internationale Verwaltungsrecht“ (1882) 6 *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich* (Leipzig: Duncker & Humblot, 1882) 1-48 at 26-29. For an explanation of Stein’s notion that the life of the individual is in part realized through participating in the shared life of the international community, see Christian Tietje, *Internationalisiertes Verwaltungshandeln* (Berlin: Duncker & Humblot, 2001) at 58-60.

crystallization of a communal international life.<sup>163</sup> From this early recognition of what we today call “globalization”, Stein demonstrates that it follows that there must be a body of international administrative law that encompasses the aspects of a state’s domestic law that responds to the legal decisions of other states. He says,

The violence which the nature and degree of the intercourse between European states exercises on each of them individually, often without the states having taken account of it, gives rise to an international element in their own [domestic] legal order. And it is precisely within domestic administration that, without a [specific] agreement [between states], there arises that which we call, in its narrower sense, international administrative law – the taking up in domestic administrative law of regulations relating to international relations that are then incorporated into the state’s own administrative law.<sup>164</sup>

In recognizing the porosity of domestic legal regimes, Stein accepts that international law, which is the manifestation of the relations between states, has direct legal effect in domestic legal regimes.<sup>165</sup> It is only one step further to recognize that we are not dealing with a one way street. To the extent that international administrative law arises from the domestic legal responses to interactions between one state and another, it must also give rise to mechanisms for checking domestic policies and administrative decisions that affect those in other states. Otherwise, these purely domestic decisions would not contribute to the elaboration of an international communal life, but rather, would constantly detract from them. In concrete terms, development policies that affect not only those in other states but the stability of the global community must be able to be monitored through domestic administrative law.

Following Stein, Karl Neumeyer maintained that international administrative law (*Internationales Verwaltungsrecht*) deals with the relationship between administrative agencies (*Verwaltungen*) of two (or more) states.<sup>166</sup> In his view, the activities of one administrative agency (for instance, the Canadian International Development Agency) that reach into another country (for instance, Afghanistan) and

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<sup>163</sup> Ibid. at 29-30.

<sup>164</sup> Ibid. At 43. Bodo Richter interprets Stein as I do – three kinds of legal rules form part of international administrative law: 1.) rules created by purely international organizations; 2.) rules contained in international contracts and agreements that have administrative content; 3.) rules that promote and support the relations between private and social groups that cross state borders, regardless of whether these norms are of national or international provenance (Bodo Richter, *Völkerrecht, Außenpolitik und international Verwaltung bei Lorenz von Stein* (Hamburg: Hansischer Gildenverlag, Joachim Heitmann & Co., 1973, at 237-238). Richter mentions the work of Georg Erler, who argues that Stein’s vision also applies in the modern world (*Grundprobleme des internationalen Wirtschaftsrechts* (Göttingen: Schwartz, 1956) at 1-18).

<sup>165</sup> For a good theoretical elaboration of this point, see Tietje, *Internationalisiertes Verwaltungshandeln*, supra note 162 at 62-63.

<sup>166</sup> Karl Neumeyer, “Internationales Verwaltungsrecht. Völkerrechtliche Grundlagen.” in Karl Strupp (ed.), *Wörterbuch des Völkerrechts und der Diplomatie*, vol. 1 (Berlin & Leipzig: W. de Gruyter, 1924) 577-581.

interact with the bodies that administer development programs in that country (poverty-alleviation programs of various sorts in Afghanistan) must be subject to international law (*Völkerrecht*).<sup>167</sup>

The idea of the possibility and even the necessity of seeking boundaries for the operation of [an administrative body of one state in another state] is rooted in the reciprocal recognition of the respective societies [*Gemeinschaften*]. And when the recognition of the autonomous administrative bodies [*Verbände*] within a state is facilitated by the host [*übergeordnet*] state, it is international [administrative] law [*Völkerrecht*] that makes this possible. It follows from this that [the foreign administrative agency] has a legal obligation in international law [*Völkerrecht*] not to act illegally within the purview of the administrative responsibilities granted to it.<sup>168</sup>

In my opinion, it follows from Neumeyer's argument that the operation of an administrative body of State A in State B must conform with international law that, even if the operation consists in policy decisions that affect inhabitants of State B, these must be subordinated to the norms of international administrative law.

One might be tempted to restrict the views of Neumeyer and Stein to monist civil law systems in which international law has direct application.<sup>169</sup> However, this restricted reading is unwarranted. First, scholars have noted the erosion of monism in common law systems.<sup>170</sup> John T. Melissa A. Waters documents common law judges' increasing reliance on international human rights law as the source of and basic interpretational tool for domestic human rights law.<sup>171</sup> Second, the norms of equality and self-actualization that I have sought to have enforced through domestic courts are part of the very notion of international legality itself. While a court in a dualist state might be in some doubt as to the meaning and application of a particular provision in an international treaty, these courts cannot be in doubt about the application of norms that form the very basis of a cosmopolitan international law regime.

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<sup>167</sup> Friedrich von Martens held a similar view –the decisions of domestic administrative bodies that affect international cooperation and other states fall within the realm of international administrative law (see *Völkerrecht. Das internationale Recht der civilisirten Nationen*, Vol. 2 (Berlin: Weidmann, 1886) at 6). Tietje discusses Martens' view in *Internationalisiertes Verwaltungshandeln*, *supra* note 162 at 69.

<sup>168</sup> Karl Neumeyer, "Internationales Verwaltungsrecht," *supra* note 166 at 577.

<sup>169</sup> A typical view from a civil law perspective is contained in Art. 25 of Germany's Basic Law, which states that "The general rules of international law are part of German national law. They take precedence over domestic law and give rise to rights and duties for residents of the German state." Tietje explains that both the flexibility and openness of this article of the basic law necessarily requires the rejection of the categories of monism and dualism (*Internationalisiertes Verwaltungshandeln*, *supra* note 162 at 567-568).

<sup>170</sup> Tietje notes the artificial nature of the debate between monism and dualism, which, he says, must be understood in the particular historical-legal context in which the debate emerged (Tietje, *Internationalisiertes Verwaltungshandeln*, *supra* note 162 at 566).

<sup>171</sup> Melissa A. Waters, "Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties" (2007) 107 *Columbia Law Review* 628 at 651. In regard to treaties, see John T. Parry, "Congress, the Supremacy Clause, and the Implementation of Treaties" (2009) 32 *Fordham International Law Journal* 1209. Parry argues that although the history of the interpretation of the Supremacy Clause in the U.S. Constitution indicates a dominant view that international treaties are self-executing, he also points to the recent USSC decision, *Medellin v. Texas*, 128 S. Ct. 1346 (2008), in which the Court "came very close to establishing a presumption *against* self-execution" (at 1211).

Dualist states do not challenge the idea that they are bound to respect their international legal obligations. They may differ from monist states in the way that these legal obligations are given effect in domestic law. But to the degree that they acknowledge international law as a source of binding norms, they accept – and can give direct effect to – the norms that give meaning to the rule of international law.

Another objection to my argument that the security of the state cannot trump cosmopolitan obligations is to observe that a decision about national security is precisely the kind of decision that affects the survival of the state without which cosmopolitan obligations cannot be observed at all. At the international level, for instance, the Security Council sets out only “minimal standards for participation, reason-giving, and review” in security matters, eschewing more substantive ones.<sup>172</sup> However, as Kingsbury, Krisch and Stewart point out, such exceptions, while perhaps suitable for domestic administrative law, should be carefully considered before being applied at the global level. This is particularly the case with a review of development policy and policies relating to international terrorism. In the case of such policies, the right to life of those at risk of harm as a result of terrorism is in the balance with the right to life of those at risk of harm due to the devastating effects of poverty. Moreover, on a cosmopolitan view of international law, the survival of a state, which is merely a prudential construct for the furtherance of the equality of individuals and their pursuit of self-actualization, cannot supercede the protection of the individual, which is the basic unit of moral and legal considerability.<sup>173</sup>

One might also object that in advocating judicial review of a discretionary government policy decision with transnational effects, I do not go far enough. For instance, Gráinne De Búrca expresses dissatisfaction with judicial checks on transnational governance because she considers these checks to be an incomplete form of democratization.<sup>174</sup> In her view, “a deficiency of democracy is a core part of the problem of transnational governance and . . . despite the fundamental challenge posed by the very idea of democracy beyond the state, any serious proposal for addressing the legitimacy of transnational governance must include a robust democratic aspiration.”<sup>175</sup> De Búrca argues that a “robust democratic aspiration” requires that those affected by a decision actually participate in the decision-making process.<sup>176</sup>

This critique may be justified if we are addressing participation informal or informal non-state transnational institutions – here, there may well be a democratic deficit. However, I am addressing the accountability of discretionary decision-makers who are state officials functioning with the democratic institutions of that state. The democratic deficit De Búrca identifies does not arise in the case of the

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<sup>172</sup> Kingsbury, Krisch and Stewart, *supra* note 145 at 42. In the case of UK law, Tomkins notes that “there continue to be large slices of government that judges leave virtually untouched. Foreign affairs, diplomacy, and military matters, among others, are almost never reviewed. On the rare occasions when they are, applications for judicial review are not successful” (Tomkins, “The Struggle to Delimit Executive Power in Britain,” *supra* note 140 at 46-47. Tomkins cites *R. V. Secretary of State for the Foreign and Commonwealth Office, ex parte Rees-Mogg*, [1994] AB 552).

<sup>173</sup> On the use of the state form as a prudential means of achieving cosmopolitan justice, see Graham Mayeda, “Pushing the Boundaries,” *supra* note 6 at 37-38.

<sup>174</sup> De Búrca, *supra* note 138 at 117, 129-130.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.* at 132.

decisions of state executives operating within the parameters of state policy-making. If we are dealing with transnational organizations in the sense of non-state governing bodies, then democratization may well require direct participation by those affected, as De Búrca suggests. But if we instead focus on government policy-makers who are making state policy, then even if this policy is coordinated with other states and thus has a transnational dimension, its source of legitimacy is still arguably rooted in the democratic institutions of the state. As a result, there is no crisis of democracy. What is missing is not democracy, but rather a recognition of the equal rights of those affected by a government policy in a legitimate, democratically-made decision of state officials. It is my view that the cosmopolitan foundation of international law requires domestic policies with transnational effects to reflect cosmopolitan norms – i.e., they must be other-regarding. The issue I am addressing is how to introduce these norms into the workings of the democratic institutions of a state. The method I prefer in this regard is to see domestic administrative law as porous. In so far as the purpose of administrative law is to protect and promote the rule of law, it must enforce the elements of cosmopolitan right that secure the rule of law for all people across the world. This conception of international administrative law recognizes that the national and international levels do not only interact in international or transnational bodies. Rather, they also interact precisely because domestic administrative law must take into account cosmopolitan elements of the rule of law by recognizing the effects of domestic decisions that affect those in distant places.

Finally, it may be objected that it is not realistic to ask domestic courts to subordinate the interests of their co-nationals to those of the poor in distant states. In answer to this objection, I would re-state my argument in different terms. Essentially, I have argued that an international legal regime must of necessity be a cosmopolitan regime. It is part of the meaning of the rule of law in such a regime that the interests of all humans be given equal regard. To this extent, courts that accept that their state and domestic law operate within a framework of international law must likewise acknowledge the interests of all those affected by domestic administrative and policy decisions with extra-territorial effects. Moreover, chauvinism is going out of style, as statutes such as the *Alien Tort Claims Act*,<sup>177</sup> the U.K. *International Development Act 2002*,<sup>178</sup> and the Canadian *The Official Development Assistance Accountability Act*<sup>179</sup> demonstrate. Indeed, the increasing popularity of voluntary corporate social responsibility codes is an indication that even private actors acknowledge that their own self-interest is an inadequate guide for ethical behaviour.

#### 4. Summary of Part II

In Part II, I have argued that the GLA paradigm as currently promoted provides limited resources for justifying the review of the discretionary decision of government officials to integrate development and security policy. While there are some indications that GAL scholars acknowledge that the acts of administrative agencies that violate international law should be sanctioned, this sanction does not extend to the discretionary decisions of policy-makers. Moreover, GAL tends to limit the normative

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<sup>177</sup> 28 U.S.C. § 1350.

<sup>178</sup> 2002, c. 1.

<sup>179</sup> *Development Assistance Accountability Act*, S.C. 2008, c. 17.

content of administrative law review to procedural norms, thus making it difficult to review the content of a policy. In my view, international administrative law should have more extensive application and greater normative content.

Historically, Stein and Neumeyer recognized that international administrative law must deal with those aspects of domestic law that reflect our life as a global community. Indeed, it is the crystallization of this communal life. It follows from this broad conception of international administrative law that it must place limits on the administrative decisions of domestic policy-makers if their decisions affect the fundamental rights of those in other states.

This intrusion into the domestic law of states is justified in principle by the cosmopolitan norms that form the basis of international law. We are all equal in our humanity, and we all have a right to pursue the goals that we have reason to set and that are consistent with others' pursuit of their goals. It follows from this that the conditions for self-actualization must be secured by law. As a practical matter, this requires that individuals affected by the integration of development and security policy be consulted about this integrationist policy and the programs that purport to implement it. It requires that decisions taken by policy-makers be transparent, and that accountability mechanisms are put in place to enable those affected by the policies to seek redress for their negative effects. Part of the expectation of transparency and accountability requires that policy-makers have a rational and reasonable justification for their policy that appropriately balances competing norms. Moreover, these reasons must comply with the norms of international human rights law and be consistent with the equality of all individuals. These restrictions on policy-makers demonstrate both the procedural and substantive aspects of international administrative law properly conceived.

### **III. Conclusion**

It has long been a strategy of states to prioritize their own survival over the global good. The use of development assistance as a means of ensuring the security of the state and its citizens in the face of international terrorism is merely a modern instance of this strategy. However, from the point of view of cosmopolitan justice, such a subordination of the ends of the global poor to the ends of the rich is not only morally but also legally unjustifiable. To the degree that international law in a globalized world must necessarily pursue cosmopolitan ends, mechanisms must exist in international law for holding states accountable for their self-interested decisions that, while they might promote the interests of their own citizens, derogate from the equally valid interests of those in developing countries.

This conception of an international cosmopolitan legal order requires effective legal means for restricting decisions that occur within a "global administrative space" – a space in which states, either formally or informally, cooperatively create and implement coordinated policies that directly affect the human rights of individuals and their capacity for self-actualization. International administrative law can be such a means. The Global Administrative Law movement has traditionally overlooked the role of administrative law in reviewing discretionary policy decisions of the executive of sovereign states. However, administrative law is more than just a tool for protecting procedural fairness in the decision-

making of regulators and administrative tribunals. Rather, it is also a means for enforcing the rule of law and its associated norms. International administrative law must thus be expanded to allow for the review of discretionary government decisions that affect fundamental rights protected at the international level. These rights include the right to equality – understood as a right to an equal opportunity for self-actualization – that underlies a cosmopolitan conception of international law.

The evidence of the harm caused by the conflation of development and security is becoming more clear as social scientists study its effects. Moreover, such conflation is troubling from both a moral and a political point of view. Morally, the subordination of the interests of the poor to those of the rich is unjustifiable except based on a highly partial moral account that gives priority to our obligations to fellow citizens over obligations to those in distant places. Politically, the subsumption of development within the rubric of security reproduces forms of subordination along lines of race and religion that are unacceptable. Moreover, it shifts our perception of civil society from a positive source of self-actualization to a place of suspicion, as civil society groups, both domestically and abroad, come under increased scrutiny as potential collaborators in international terrorism. These harms justify finding a legal means of opposing government conflation of security and development policy. The review of such decisions in the national courts of both donor and recipient states in accordance with norms of cosmopolitanism and basic human rights will be a welcome remedy to the nefarious effects of current policy.