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

When delivering international development assistance, 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 US, and the UK 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 Article 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 its application to the promotion of procedural norms, thus making it difficult to review the discretionary decisions of government policymakers, nineteenth-century advocates of international administrative law—for example, Lorenz von Stein and Karl Neumeyer—were bolder. I develop their arguments in this Article, demonstrating that in a globalized world, the impact of governments’ decisions on the welfare of those in other states requires us to recognize a cosmopolitan legal order. This legal order recognizes that each individual on the globe has a right 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 a direct effect on domestic law; limiting the ability of policymakers to make government policies that disregard 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 more consistent with the equality of all and the protection of basic human rights.

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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.1 The truth of this position has become firmly entrenched in most views of international relations. This Article aims to evaluate 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 UK, and the US have concentrated their development assistance in countries such as Iraq and Afghanistan where they presently have or have in the past had specific military engagements. 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 claims? 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 any answers to these questions?

In my view, not only is it an ineffective policy to use development assistance as a means of ensuring domestic security, but there are legal limits on a state’s ability to do so. This Article explores one form of legal accountability for states that exceed these limits: international administrative law.2 Current scholarship on international administrative law has largely focused on the accountability of formal and informal transnational administrative institutions.3 Moreover, scholars tend to advocate procedural norms of accountability and transparency rather than exploring how international administrative law can be used to restrict a sovereign state’s discretionary policy decisions or impose substantive normative limits on the exercise of this discretion.4 The current

2 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, and who, I believe, have a particular take on international administrative law, as discussed in this paper. NYU’s GAL Project is online at http://www.iilj.org/GAL/ (visited Mar 27, 2012).
3 David Dyzenhaus, Accountability and the Concept of (Global) Administrative Law **2–3 (Institute for International Law and Justice (IILJ) Working Paper, NYU School of Law 2008).
4 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, 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. Philipp Dann, Grundfragen eines Entwicklungsverwaltungsrechts, in Christoph Möllers, Andreas Vosskuhle, and Christian Walter, eds, Internationales Verwaltungsrecht: Eine Analyse anhand von Referenzgebieten, 16 Jus Internationale et Europäum 7, 47 (Mohr Siebeck 2007).
international administrative law paradigm is thus inadequate for using international human rights norms as the basis for reviewing administrative decisions that have international effects.\(^5\)

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 interrelated, 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 people in other states. The normative content of this form of regulation is provided 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 policymakers that violate them.

We can apply the concept of cosmopolitan international administrative law that I will develop to address the use of development policy to wage a “war on terror.” Such application of cosmopolitanism should enable judicial review of a policy decision of the government’s executive branch to divert resources from poverty-alleviation programs to programs that 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 and the recipient state. The success of such an application will depend on whether there are norms of international law—international human rights law or the norms of the cosmopolitan conception of international justice that underlie international law—that can be applied to limit executive discretion. This direct application of international law norms should be possible regardless of whether a state has a monist system, in which international law is directly incorporated as part of domestic law, or a dualist system, in which 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 people are bound closely together in this globalized world.\(^6\) The economic policies of Brazil, China, the EU, India, the US,

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\(^5\) 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 basis for a global administrative law based on human rights is largely absent.” Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, The Emergence of Global Administrative Law, 68 L & Contemp Prob 15, 46 (2005).
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 actions on individuals in other states. 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 states' international acts 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. On this conception, lawmakers make law and judges interpret and apply it; 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

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6 For an analysis of globalization as our experience of community with others, see generally Graham Mayeda, Pushing the Boundaries: Rethinking International Law in Light of Cosmopolitan Obligations to Developing Countries, 47 Can YB Intl L 3 (2009). For a discussion of the global nature of the social-economic-political system that affects all individuals, see generally David Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance (Stanford 1995); Andrew Linklater, The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era (South Carolina 1998).

7 On this point, see Peter Singer, One World: The Ethics of Globalization 8–9 (Yale 2002).

8 Similar ideas exist in civil law jurisdictions, although additional organizational functions are assigned to administrative law. German administrative lawyer Eberhard Schmidt-Abmann states that the purpose of administrative law is both to restrict and to enable the conduct of administration. For instance, 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. Eberhard Schmidt-Abmann, Das Allgemeine Verwaltungsrecht als Ordnungsde: Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung 239, 245 (Springer 2d ed 2004).


10 See, for example, Canada's Official Development Assistance Accountability Act, 2008 SC, ch 17 (Can); the UK's International Development Act, 2002, ch 1; and the UK's International Development (Reporting and Transparency) Act, 2006, ch 31.
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 the way domestic administrative tribunals regulate the domestic affairs of a state’s citizens,\(^\text{11}\) and there is no general administrative law court to conduct administrative review at the international level.\(^\text{12}\)

In contrast, David Dyzenhaus provides a different account. He argues that administrative law is based on 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 on the foundational human rights documents of the international legal order.\(^\text{13}\) On this view, administrative law is one of the means to ensure that “fundamental legal values condition the exercise of political power.”\(^\text{14}\) Dyzenhaus questions the idea of administrative law based on the division of powers as proposed by A.V. 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 the “constitutionalism” that exists in 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.”\(^\text{15}\) 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.”\(^\text{16}\)

We can apply the idea that fundamental norms legitimate the system of domestic administrative law at the international level in order to provide the accountability we seek for the decisions of sovereign states that affect individuals in distant parts of the globe.\(^\text{17}\) Sovereign states do not act within an international

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\(^{11}\) Some might consider bodies such as the World Trade Organization administrative tribunals with transnational effects.

\(^{12}\) 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, Grundfragen eines Entwicklungverwaltungsrechts at 36–38 (cited in note 4).


\(^{15}\) Dyzenhaus, 27 Queen’s L J at 451 (cited in note 13).

\(^{16}\) Dyzenhaus, Accountability and the Concept of (Global) Administrative Law at 4 (cited in note 3).

\(^{17}\) Dyzenhaus, Hunt, and Taggart, 1 Oxford U Commw L J at 34 (cited in note 14).
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's 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) must 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. The evidence that decisions about development assistance make a claim to law-like authority can be seen 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.

It follows from recognizing 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 that 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 both the factual situation it is meant to address and the norms of international law.

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18 Dyzenhaus, Accountability and the Concept of (Global) Administrative Law at *16 (cited in note 3).
20 On the elements of judicial review of decisions taken by administrative decision-makers, see Dunsmuir v New Brunswick [2008] 1 SCR 190, ¶¶ 47–50 (Can).
Of course, the scope of administrative law cannot be extended to completely restrain political decision-making.\textsuperscript{21} However, it should require that government policymakers who wish to use development funding and programs to promote domestic security and eradicate international terrorism 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 for the policy that responds to these interests.\textsuperscript{22}

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

Over the last ten years or so, developed states have increasingly relied on development assistance programs as a means of achieving security goals, such as protecting their citizens from international terrorism.\textsuperscript{23} The Organisation for Economic Co-operation and Development (OECD) notes that developed country spending on peace-building, security, and state-building has risen tremendously since 2004, reaching US$ 7.1 billion in 2008. Likewise, official development assistance devoted to security activities rose from US$ 947 million in 2007 to US$ 1.5 billion in 2008.\textsuperscript{24} In a report on transition financing, the OECD advocates increasing coordination of humanitarian, development, and security funding.\textsuperscript{25}

While the policy shift toward integrating development and military programs is often couched in the language of policymakers 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

\textsuperscript{21} 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. Dyzenhaus, Hunt, and Taggart, 1 Oxford U Commw L J at 27 (cited in note 14).

\textsuperscript{22} I will elaborate on the application of the administrative law paradigm in Section II.B.3.

\textsuperscript{23} 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 13 (NYU School of Law 2011).


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. Brewster 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 politicos the most; the numbers told them that when these people decided to turn against the war, there was no coming back.  

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.... 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.

What at first might appear 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 principal policy justifications given by donor countries for merging development and security policies. First, poverty alleviation programs must be delivered safely, and only military staff are trained to do so. Second, poverty alleviation and the delivery of development programs is necessary in order both to make residents of the developing country accept foreign intervention and to ensure that the security that is achieved by means of this...
intervention outlasts the withdrawal of military personnel. Third, poverty alleviation, to the extent that it creates stability in a fragile state, serves to protect citizens of developed and developing countries alike.

The first justification is not at issue in this Article. 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 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.


The work of these development experts helps make future military action less necessary. It is much cheaper to pay for development up front than to pay for war over the long term. But in Afghanistan and elsewhere, U.S. troops are helping to provide the security that allows development to take root.


31 See, for example, USAID and State Dept, Fiscal Year 2008 Annual Performance Report 11 (USAID 2009).


33 On poverty alleviation as the goal of development policy, see section III of the UN Millennium Declaration, General Assembly Res No 55/2, UN Doc A/55/49 (2000). See also Beall, Goodfellow, and Putzel, 18 J Ind Dev at 53 (cited in note 24).
achieving the domestic security of developed countries such as Canada, the UK, and the US. I turn now to a description of this use of development policy in these countries.

A justification for using development programs to achieve these ulterior goals is found in the UK’s *Strategy for Countering 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.” In consequence of this link between terrorism and the lack of essential services, the UK Government explained the Department for International Development’s (DFID) approach:

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.

In order to combat the tendency of terrorists to exploit poverty, the UK government has committed to using 30 percent of its Official Development Assistance (ODA) in “conflict-affected” and “fragile” states such as Pakistan, Somalia, and Yemen, which, in the government’s assessment, are significant sources of international terrorists. Furthermore, after a recent review of its terrorism prevention strategy, *Prevent*, the UK has revised and relaunched the program. It has three objectives: first, to “respond to the ideological challenge of terrorism and the threat . . . from those who promote it”; second, to “prevent people from being drawn into terrorism and ensure that they are given appropriate advice and support”; and third, to “work with sectors and institutions where there are risks of radicalisation which [the UK] need[s] to address.”

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 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

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35 Id at 71.


programmes that strengthen governance and security, create jobs, and provide basic services including education.\footnote{38}

Similarly, Canada spends significant amounts of ODA 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.\footnote{39} Like the UK government, Canada clearly also justifies its new policy based on a perceived link between security and development.

The Canadian International Development Agency (CIDA) reports spending CAD\$ 344.7 million in Afghanistan in fiscal year 2007–08.\footnote{40} In fiscal year 2009–10, this amount had been reduced to CAD\$ 238 million, although this still made Afghanistan the second-largest recipient of CIDA aid.\footnote{41} Of the CAD\$ 4.815 billion that the government of Canada spent on ODA in 2009–10, CAD\$ 53.52 million was disbursed by the Department of National Defence.\footnote{42} The vast majority was spent on 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.\footnote{43} 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,\footnote{44} thus closely linking the delivery of development aid to security.

More recently, CIDA 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.\textsuperscript{45}

This is a shift from the 2007 report to Parliament, noted above, in which security was considered a pre-condition 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 percent of its 2011–12 budget on “fragile countries and crisis-affected communities,” which include Afghanistan.\textsuperscript{46}

In the US, 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.\textsuperscript{47}

President Barack Obama’s most recent policy on the integration of aid and security policy draws an even closer connection between these two concerns, stating that “successful development is essential to advancing our national security objectives.”\textsuperscript{48}

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.\textsuperscript{49}

In fiscal year 2008, USAID spent US$ 930 million, or 6.7 percent, of its budget on achieving the goals of international peace and security, down from the


\textsuperscript{46} Id at 9.

\textsuperscript{47} USAID and State Dept, Fiscal Year 2008 Annual Performance Report at 10 (cited in note 31).

\textsuperscript{48} USAID, The Development Response to Violent Extremism and Insurgency: Putting Principles into Practice ii (USAID 2011).

\textsuperscript{49} White House, National Strategy for Counterterrorism 2 (US Government 2011).
US$ 1.712 billion it spent the previous year. In its report for fiscal year 2009, USAID and the Department of State had spent approximately US$ 9.6 billion on its “Peace and Security” program, of which approximately US$ 225 million was spent specifically on counterterrorism, US$ 411 million on combating weapons of mass destruction, and approximately US$ 7 billion on “stabilization operations and security sector reform.” 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.”

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. Moreover, in its 2009 fiscal report, USAID and the Department of State emphasized that the “Just and Democratic Governance” arm of their foreign aid program aims at contributing to US national security—a priority placed above the achievement of the “broader development agenda.” Indeed, there is increasing evidence that the US government has come to depend on a close relationship between USAID and the Department of Defense. In its policy document from September 2011, USAID described this integration as follows:

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.

All three governments—those of Canada, the UK, and the US—have gradually integrated their development assistance programs into their security programs, thus consolidating what is frequently called the “3D” policy: the use of development, defense, and diplomacy in order to combat national security threats. The question is, is this a bad policy?

51 Id at 276.
52 USAID and State Dept, Fiscal Year 2008 Annual Performance Report at 12 (cited in note 31). See also id at 57–58.
54 USAID, The Development Response to Violent Extremism and Insurgency at 7 (cited in note 48).
D. Why Is the 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. First, can such an alignment lead to successful development? And second, 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. Among the key elements of the Paris Declaration are “ownership” and “alignment.” By promoting “ownership,” the Declaration advocates that “[p]artner countries exercise effective leadership over their development policies, [sic] and strategies and co-ordinate development actions.” The principle of “alignment” requires that “[d]onors base their overall support on partner countries’ national development strategies, institutions and procedures.” 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 is uneven among partners and donors.” The report goes on to say that recipients of development assistance have insufficient power to direct how this assistance is used. 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:

55 Paris Declaration on Aid Effectiveness (cited in note 19).
56 Id at 3.
57 Id at 4.
59 Id at 40.
Many 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.

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 often interfere 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—that is, on building the capacity of the state to respond to the needs of its citizens—rather than on integrating 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. In their view, a successful policy requires “the alignment of internal and external stakeholders to the goals of a sovereign state through the joint formulation, calibration of, and adherence to the rules of the game.”

Social Development Direct suggests that international development aid can

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63 Ashraf Ghani and Clare Lockhart, *The Right and Wrong Fix: Afghan Lessons for Zimbabwe* (openDemocracy 2008), online at <http://www.opendemocracy.net/article/the-right-and-wrong-fix-afghan-lessons-for-zimbabwe> (visited Mar 30, 2012). 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. Id.


65 Social Development Direct (SDDirect) is an international organization specializing in “social development consultancy and research services.” For more information on their work, see <http://www.sddirect.org.uk/> (visited Apr 1, 2012).
contribute to this process by helping to alleviate inequalities between groups within the fragile state and facilitating a more equitable distribution of resources across different groups.66

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 asserts, “[N]ational 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.”67 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.68

Not only does military intervention have a direct negative effect on 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 among groups within a state is one of the major contributors to instability.69 Where these inequalities manifest themselves in differential access to political institutions, excluded groups may choose violence to compensate for the inability to use political fora to rectify the imbalance.70 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 by certain groups to peaceful means of resolving disputes.

Some argue that security is a necessary precondition to economic growth.71 Stewart also dispels this view. Her research indicates that the pursuit of security and economic growth are not necessarily complementary goals if the benefits of

70 Stewart, Development and Security at *15–16 (cited in note 67).
71 Beall, Goodfellow, and Putzel, 18 J Intl Dev at 51–52 (cited in note 24) (citing development policies of Canada and Denmark). See also generally Michael J. Trebilcock and Ronald J. Daniels, Rule of Law Reform and Development: Charting the Fragile Path of Progress (Edward Elgar 2008).
72 Here, I mean the security in the country receiving aid. “Security” refers to a broader range of interventions than military activity.
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.” While it might be possible to promote both security and development by ensuring the equal distribution of the benefits of development, 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.

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 to pursue 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.  

In short, the short-term focus that military involvement lends to the delivery of development assistance can have a negative impact on development, thus mitigating 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 intended. Roland Paris of the University of Ottawa submitted an access to information request to the Canadian government and discovered that by 2009, support for the Taliban among Afghans was at an all-time high despite ongoing military action and development projects to benefit Afghan

73 Stewart, Development and Security at *19 (cited in note 67).
74 See notes 69–70 and accompanying text.
75 Beall, Goodfellow, and Putzel, 18 J Intl Dev at 63 (cited in note 24).
76 Brewster, The Savage War at 243 (cited in note 26).
citizens. Murray Brewster notes how the Canadian government has failed in this regard in Afghanistan. He writes,

... 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 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.  

Ill-timed and ill-targeted, Canada’s prioritization of development projects that suit its own needs increases neither 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, hence resulting in violence. Likewise, inequalities between states—for instance, in the distribution of natural or financial resources—can foment unrest in poor states. Increasingly,
developed countries are shifting their international development funding to states that they believe pose security risks to them or that are potential allies in the "war on terror." For instance, under the government of Prime Minister Stephen Harper, CIDA has cancelled many of its aid programs in order to focus on twenty countries alone. This is a reduction from the 126 countries listed in the 2007–08 *Statistical Report on International Assistance.* 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 achieved by shifting from state-centered approaches to security to citizen- and human-centered approaches. 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. 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

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84 Colak and Pearce, 40:2 IDS Bulletin at 14–16 (cited in note 83). 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.
not necessarily be about the survival of the state.\textsuperscript{85} 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.”\textsuperscript{86} States and public institutions would still be responsible for providing security, but security would be expanded to include more holistic concepts of welfare.\textsuperscript{87} It would not necessarily involve an authoritarian deployment of force,\textsuperscript{88} 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.\textsuperscript{89} Colak and Pearce recommend that “security from below” approaches should involve three components: first, they should be informed by universal as well as local values and be respectful of human rights; second, they should be agreed to by community actors and be responsive to local needs; and third, they should not create more fear or insecurity among populations.\textsuperscript{90}

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.\textsuperscript{91} On this model, security would be provided by the state—but it would not be focused on state interests alone—and it would 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,\textsuperscript{92}

\begin{footnotesize}
\item[85] Id at 12–13.
\item[86] Id at 13. A similar idea is expressed in earlier Department for International Development (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.” DFID, Fighting Poverty to Build a Safer World: A Strategy for Security and Development *5 (DFID 2005), online at http://webarchive.nationalarchives.gov.uk/+/http://www.dfid.gov.uk/pubs/files/securityforall.pdf (visited Mar 30, 2012).
\item[87] Colak and Pearce, 40:2 IDS Bulletin at 13 (cited in note 83).
\item[88] Id.
\item[89] Id at 14.
\item[90] Id at 18.
\item[91] See notes 56 ad 57 and accompanying text.
\item[92] Beall, Goodfellow, and Putzel, 18 J Intl Dev at 53 (cited in note 24).
\end{footnotesize}
has restricted the flow of migration and monetary remittances between
developed countries and developing countries with large Muslim populations.
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.\textsuperscript{93}

Some studies also indicate that remittance of income from those in
developed countries to those in developing countries has 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.\textsuperscript{94}

Counter-terrorism policies in Northern developed states have shaped the flow of
labor and migration 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."\textsuperscript{95} 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; when the "war on terror" is
identified as a war on Islamic extremism, this reduces access of states with large
Muslim populations to the resources needed to reduce poverty.

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."\textsuperscript{96} Where
previously civil society had a benign meaning\textsuperscript{97}—it was the patient on whom
development agents acted—since the declaration of the "war on terror" in 2001,

\textsuperscript{94} Id at 305, citing the econometric study by Richard H. Adams, Jr. and John Page, International
Migration, Remittances and Poverty in Developing Countries (World Bank Policy Research Working Paper
No 3179, Dec 2003), online at http://www-wds.worldbank.org/external/default/
WDSContentServer/IW3P/IB/2004/01/21/000160016_20040121175547/Rendered/PDF/wps
\textsuperscript{95} Page, 4:3 Conflict, Sec & Dev at 305 (cited in note 93).
\textsuperscript{96} Howell, 18 J Intl Dev at 126 (cited in note 29).
\textsuperscript{97} Id at 128.
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.

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 organizations, foundations, and non-profit organizations are submitted in donor countries. 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 [the] 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 rights of Muslims to associate and organise, as such action immediately draws suspicion.

Also, government aid agencies have begun scrutinizing their civil society partners in developing countries. 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, and it also impedes the alignment

98 Id at 126.
99 Id at 127.
100 Howell, 18 J Intl Dev at 127 (cited in note 29).
101 Id at 128.
102 Id at 129, 131.
of development policy with local needs and priorities. Moreover, it places the staff of civil society groups at risk of kidnapping or violence. 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.”

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 and her coauthors 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. 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 metropoles and the axes of the Cold War. However, the integration (or re-integration) of development and security policies has the effect of re-politicizing poverty alleviation, that is, of treating poverty alleviation as a means for securing the North against the threat of terrorism. Poverty alleviation thus becomes once

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103 Id at 130.
106 Id at 53.
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.” 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.

As a liberal technology of security, human security distinguishes between effective and ineffective states in order to assert an interventionist responsibility to protect. 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 have been the target of renewed interest among policy-makers.

Political concerns are not limited to the continuity between the discourse of the Cold War and the discourse of security and development. The new mania for efficiency and policy coherence among development agencies that is often used to justify the integration of security and development policy hides the political nature of this integration behind a veneer of bureaucratic logic.

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108 Id at 123.

109 This form of technology actually involves multiple technologies, which Duffield identifies as “humanitarian intervention, sustainable development, human security, [and] coherence.” Id at 159.

110 Id at 127. See also Id at Ch 7.

Behind the language of efficiency gains that are 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 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 commonsense notion of achieving efficiency through coordination of various departments’ activities in a developing country thus hides behind it a host of political issues, that is, issues about the meaning and role of state intervention, the level of acceptable foreign intervention in the developing country, and so on.

Finally, in addition to a discourse analysis, political concerns also arise from the increased possibility of “capture”\(^\text{112}\) 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.\(^\text{113}\) 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

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\(^{112}\) In institutional economics, the notion of regulatory “capture” refers to the fact that public officials will be influenced by rent-seekers (lobbyists) who advocate for their own private interests. This “capture” can sometimes distort the resulting policy in favor of private interests and away from public interests. The concept was first introduced by George J. Stigler in *The Theory of Economic Regulation*, 2:1 Bell J Econ & Mgmt Sci 3 (1971).

\(^{113}\) Brewster, *The Savage War* at 195 (cited in note 26).
enormous expenditure of blood and treasure was so outside their realm of comprehension that it might as well have come from another planet.¹⁴ 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 . . . [But t]here is expertise in how to get things done and that expertise comes from the locals. If you’re smart, you tap into it.”¹¹⁵

The signature projects evidently did not correspond to local needs. Indeed, a former civil servant in Canada’s development agency who ran its programs in Afghanistan pointed out that “Canada as a troop-contributing country should never have 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.”¹¹⁶ 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—a morality that is partial to those who are part of our group, be it family, neighborhood, region, or state.¹¹⁷ It is a partial morality because it subordinates the interests of civilians

¹¹⁴ Id.
¹¹⁵ Id at 196.
¹¹⁶ Id.
¹¹⁷ Peter Singer, Outsiders: Our Obligations to Those Beyond Our Borders, in Deen K. Chatterjee, ed, The Ethics of Assistance: Morality and the Distant Needy 11 (Cambridge 2004). Singer argues that partiality is only acceptable if it can be “justified from an impartial perspective.” Id at 14.
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.\textsuperscript{118} 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.

To depart from a utilitarian perspective and adopt a natural law approach, combining security and development policy is based on a partial morality because it justifies seeing the protection 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 acceptable 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 \textit{PRT Coordination and Intervention in Humanitarian Assistance},\textsuperscript{119} a policy note 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."\textsuperscript{120} Such condemnation of consequentialist views can be legitimately carried over from the delivery of humanitarian aid to the delivery of development aid, as both types of aid aim to redress threats to human security.

\textsuperscript{118} See Peter Singer's seminal article, \textit{Famine, Affluence, and Morality}, 1:3 Philosophy \& Pub Aff 229 (1972). In this article, Singer argues that we must continue to give to others more in need until the point of marginal utility is reached, in other words, the point where giving one more thing to another creates more unhappiness than the happiness the receiving creates. The practical consequence 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.


\textsuperscript{120} Id at ¶ 4.
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.\textsuperscript{121} 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.\textsuperscript{122} The financial crises over the past three years from 2008 to 2011 bear out Pogge's assessment that rich countries directly harm economies worldwide, 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.\textsuperscript{123} 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.\textsuperscript{124}

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.

From a political point of view, the intertwining of development and security policy has 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

\textsuperscript{121} Thomas Pogge, \textit{World Poverty and Human Rights} 14–20 (Polity 2002).
\textsuperscript{122} Id at 197–99.
\textsuperscript{124} Id at 136–38.
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 to surveillance by states that suspect their potential involvement in terrorism.

Finally, from a moral standpoint, the subordination of development policy to security concerns is justified by 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.

E. 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 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. Colak and Pearce call this approach “security from below” and describe it as follows: “‘[S]ecurity 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.”125 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, stating, “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.”126 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.

126 Id.
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.”

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.” 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.”

Given this analysis, the implementation of human- and community-centered 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 haunted by the specter that development programs are primarily a means of achieving the geo-political goals of developed states. 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

128 Id at 186.
129 Duffield, Development, Security and Unending War at 130 (cited in note 107).
130 Id at 131.
131 For a discussion of this, see id at 130.
contribute to the unequal distribution of global resources. Development assistance 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 the use of states’ discretion under international law to use force in self-defense or to intervene in other states to protect international human rights? A policy decision of the executive to prioritize security over poverty alleviation? A decision of the executive that implements legitimate development policy? Or are we challenging 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 alleviation, 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 Article.

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.\textsuperscript{132} In consequence, a purely discretionary decision that is not made under the authority of a statute is not reviewable.\textsuperscript{133} 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

\begin{footnotesize}
  \begin{enumerate}
    \item 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. See, for example, Denis Baranger, \textit{Executive Power in France}, in Paul Craig and Adam Tomkins, eds, \textit{The Executive and Public Law: Power and Accountability in Comparative Perspective} 217, 220 (Oxford 2006). Baranger traces this view back to the way in which Montesquieu used the term “executive” to refer to the “power to administrate things” (“puissance exécutive des choses”). Id.
    
    \item On this point in the context of Canadian administrative law, see Sara Blake, \textit{Administrative Law in Canada} 194–95 (Butterworths 3d ed 2001).
  \end{enumerate}
\end{footnotesize}
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 legal framework within which a state exercises its powers.134 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.135 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 of the scope of administrative law. For instance, one could argue that there is a body of international law that is analogous to the framework provided by domestic constitutions 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, that is, the emergence of bodies of law that are quasi-constitutional, since they fetter the ability of sovereign states to exercise their decision-making power.136 An example of such a global constitutional framework is international investment law. According to Schneiderman, 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.137 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

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134 In “dualist” systems such as exist in Canada and the US, 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] SCR 618, 621 (Can); Capital Cities Communications Inc v Canadian Radio-Television Commission [1978] 2 SCR 141, 172–73 (Can).


137 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 446–57 (Hague Academy of Int’l Law 2011).
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 recommendations by the UN Human Rights Council. Second is the system for individual or inter-state complaints and its attendant inquiry procedure. Finally, there is the possibility that the UN Human Rights Council could appoint an international rapporteur for development, security, and human rights. This rapporteur would investigate whether international development and security law and practices comply 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. Moreover, the development community has only recently begun to use the language of human rights, which it has largely ignored up until now. 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


140 For an overview of the international human rights system, see generally Manfred Nowak, Introduction to the International Human Rights Regime (Martinus Nijhoff 2003).


142 Alston, 27:3 Hum Rts Q at 760 (cited in note 141).
for policing the separation between development and security that I have proposed.

The final option is to see overarching norms of international law as emerging from non-traditional sources, not just from 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. 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.

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 favor increasingly inclusive levels of institutions such as the EU that will gradually encompass a greater portion of the world’s people. 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.

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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*, Kant argues on the one hand that a cosmopolitan approach to international law—one that recognizes the equality of every human being and derives the norms of international law from this fact—is a requirement of reason.\(^{146}\) However, he also acknowledges that the international government that the actualization of such a requirement of reason entails is neither possible nor desirable.\(^{147}\) Instead, he recommends the creation of a peaceful federation of states\(^{148}\) with very limited capacity to promote peace and to enforce the right of hospitality, which is the right of any person to be received without hostility by another state.\(^{149}\)

John Rawls, in *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 does not currently exist and cannot exist.\(^{150}\)

In my view, however, the objections of Kant and Rawls to an international state do 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

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\(^{146}\) 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 defense of universal human rights, 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* 93, 104–05 (Cambridge 2d ed 1991) (H.B. Nisbet, trans). See also id at 107–08, 112, 122.

\(^{147}\) For Kant, an international state (in other words, 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 favor of the international “state,” and, therefore, be a violation of the national state’s sovereignty. Id 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. Id at 105. Moreover, cultural and linguistic differences suggest that a single international state is impossible, as uniting people with such differences is impractical and against human nature, although these differences will tend to abate over time. Id at 114. Moreover, the larger and more impersonal the government, the more unable it becomes to control its subjects. Id.

\(^{148}\) Id at 102, 104–05 and 127.

\(^{149}\) Id at 105–08.

normatively justifiable? In Kant’s view, reason dictates cosmopolitanism as the normative foundation of international law.\textsuperscript{151} Elsewhere, I have provided a phenomenological argument that cosmopolitanism is a requirement of international justice.\textsuperscript{152} 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 who reject a phenomenological argument, 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 a law should be given a justification for the effects that does not resort merely to an assertion of authority.\textsuperscript{153} The pre-condition of such a view is the equality of those subject to the law, a basic norm underlying cosmopolitanism.\textsuperscript{154}

John Rawls has argued that it follows from a liberal’s respect for pluralism—that is, 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.\textsuperscript{155} Thus, liberal egalitarianism does not necessarily require a cosmopolitan conception of justice. However, as Pogge and Kok-Chor 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.\textsuperscript{156} 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

\begin{thebibliography}{99}
\bibitem{151} Kant, \textit{Perpetual Peace} at 105 (cited in note 146).
\bibitem{152} Mayeda, 47 Can YB Intl L at 53 (cited in note 143).
\bibitem{153} Dyzenhaus, \textit{Accountability and the Concept of (Global) Administrative Law} at *18 (cited in note 3).
\bibitem{154} As Tan points out, “[T]he ideal of impartiality is . . . central to the concept of justice, and any plausible conception of justice must express this ideal in some appropriate way.” This means 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, \textit{Justice Without Borders} at 190 (cited in note 150).
\end{thebibliography}
illiberal state’s support for a principle of equality among states that we are not justified in prioritizing the eradication of poverty in Canada, the UK, or the US 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.\footnote{Tan, \textit{Toleration, Diversity and Global Justice} at 171–75 (cited in note 156).}

If a reasonable liberal would tolerate illiberalism at the international level, there is no reason why it should not be tolerated domestically. Thus, Rawls’s law of peoples undermines the whole normative foundation of \textit{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 in their advocacy of domestic liberalism.

In what follows, I explain which 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 norm: the right to self-actualization.

Cosmopolitanism presupposes the equality of all individuals. Some see this as a consequence of the use of reason. Kant is the prime example of this view.\footnote{Kant, \textit{Perpetual Peace} at 108–14 (cited in note 146).} 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.\footnote{Mayeda, 47 Can YB Ind L at 10, 14–15 (cited in note 143). For Levinas’s view, see his analysis of how we are “accused” by the gaze of the other and hence required to take responsibility. Emmanuel Levinas, \textit{Otherwise Than Being or Beyond Essence} 124 (Martinus Nijhoff 1981) (Alphonso Lingis, trans). For my interpretation of Levinas, see Graham Mayeda, \textit{Who Do You Think You Are? When Should the Law Let You Be Who You Want to Be?}, in Laurie J. Shrage, ed, \textit{You’ve Changed}: Sex Reassignment and Personal Identity 194, 202–03 (Oxford 2009).}

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—fulfills this imperative by securing the conditions for the freedom of each individual to exercise his or her equality.\footnote{As Sen explains, “Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of indictment, personal humiliation, and so on.” Sen, \textit{Inequality Reconsidered} 147 (1976).}

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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 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.”\(^{161}\) 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.\(^{162}\) 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.”\(^{163}\) These norms are likewise incorporated in the Paris Declaration on Aid Effectiveness.\(^{164}\) Indeed, the requirement that development assistance be “owned” by the recipients and “aligned” with their interests is essentially a restatement 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 development programs that subordinate the needs of developing countries to the security interests of developed ones. Self-actualization requires that those affected by a decision of a donor state participate in the decision. It also requires that donors be accountable to recipients for their policies and transparent in their formulation and implementation of them. As I will show, while they do not preclude combining development and security goals in a government policy, the normative content of self-actualization forbids the subordination of

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\(^{162}\) Id at 159, 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 of 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. Id.


\(^{164}\) See notes 55–57 and accompanying text.
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.\textsuperscript{165} Although these norms may not completely prevent 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, which is derived 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 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; that is, administrative law does not function purely within the division of powers, and consequently, administrative law review is not dependent on the legislative branch’s granting tribunals the power to review a statutorily conferred administrative discretion.\textsuperscript{166} 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 for this "globalist" interpretation of administrative law.

\textsuperscript{165} Kingsbury, Krisch, and Stewart, 68 L & Contemp Prob at 37–41 (cited in note 5).
\textsuperscript{166} For the contrary view in UK law, see Regina (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295 (UK), 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 16, 27–30 (cited in note 132).
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\(^\text{167}\) and Karl Neumeyer in the first few decades of the twentieth.\(^\text{168}\) The international administrative law paradigm has found renewed vigor in modern legal circles such as Global Administrative Law (GAL). As Kingsbury explains, a “global administrative space” has emerged that challenges the traditional characterization of international law as the law governing interactions between sovereign governments.\(^\text{169}\) 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.\(^\text{170}\) Kingsbury notes:

This global administrative space is increasingly occupied by transnational private regulators, hybrid bodies such as public-private partnerships involving states or inter-state organizations, national public regulators whose actions have external effects but may not be controlled by the central executive authority, informal inter-states bodies with no treaty basis (including ‘coalitions of the willing’), and formal interstate institutions (such as those of the United Nations) affecting third parties through administrative-type actions.\(^\text{171}\)

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 CIDA, DFID, and USAID are just a few, basically administer our main system for alleviating poverty in other countries. They clearly have the transnational and

\(^{167}\) See Lorenz von Stein, Einige Bemerkungen über das internationale Verwaltungsrecht, in Gustav Schmoller, ed, 6 Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich 1 (Duncker & Humblot 1882).


global impact that would bring them under the global administrative law paradigm that its advocates envision.\(^2\)

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 policymakers 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.\(^3\) 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."\(^4\) 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 reviewable 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."\(^5\) Discretionary policy decisions do not fall within this category of "administrative action."\(^6\)

However, in my view, administrative law should extend to certain discretionary policy decisions of government.\(^7\) Kingsbury indicates that GAL should apply to decisions coordinated among various states' governments.\(^8\) 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

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\(^{172}\) For a good description of the transnational nature of international development and its administrative law aspects, see generally Dann, *Grundfragen eines Entwicklungsverwaltungsrechts* (cited in note 4).


\(^{174}\) Id at 16.

\(^{175}\) Id at 17.

\(^{176}\) 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'* at **23–30 (cited in note 169).

\(^{177}\) To be clear, only specific instances or applications of the policy, and not the policy itself, can be reviewed. On this point, see Tomkins, *The Struggle to Delimit Executive Power in Britain* at 47 (cited in note 166) ("It 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.").

\(^{178}\) Kingsbury, *The Concept of 'Law'* at *2 (cited in note 169). He writes that the global administrative space includes "informal inter-state bodies with no treaty basis." Id.
of the discretionary decision-making power of national governments. 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 to expand 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, Dyzenhaus has argued that substantive, rather than merely procedural, norms must underlie the rule of law, of which administrative law is one of the chief enforcement branches. 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 policymakers. 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,” thus conferring on these actors a right to challenge discretionary decisions of the executive that have a direct impact on them. At a minimum, then, individuals should have a right to participate in making decisions that directly affect them and their ability to pursue their goals and projects that they have good reason to pursue. 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

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179 See generally Dann, Grundfragen eines Entwicklungsverwaltungrechts (cited in note 4).

180 See notes 13–17 and accompanying text. Many scholars of administrative law are of the view that it is in fact the principal means of limiting executive power. Paul Craig and Adam Tomkins, Introduction, in Craig and Tomkins, eds, The Executive and Public Law 1, 11 (cited in note 132).

181 See, for example, Kingsbury, Krisch, and Stewart, 68 L & Contemp Prob at 29 (cited in note 5).

182 Id at 43.

183 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. Id at 46.

184 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. Id at 48–49.
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 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, Philipp 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 UN Development Programme, are forms of administrative law that are well-known in domestic administrative law regimes. 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. The coercive nature of the policy goals contained in these documents indicates their legal character. 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.

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 enforceable in two ways: first, through administrative review of discretionary government decisions affecting international human rights in the domestic courts of countries providing development assistance; and second, through administrative review of the regulatory actions of countries providing development assistance in the domestic courts of the state receiving

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185 Dann, Grundfragen eines Entwicklungsverwaltungsrechts at 33, 36 (cited in note 4).
186 UN Millennium Declaration, General Assembly Res No 55/2, UN Doc A/55/49 (cited in note 33).
187 Dann, Grundfragen eines Entwicklungsverwaltungsrechts at 35 (cited in note 4). Goal 8 of the MDGs is to “develop a global partnership for development.” See UN Millennium Declaration, General Assembly Res No 55/2, UN Doc A/55/49 (cited in note 33).
188 Dann, Grundfragen eines Entwicklungsverwaltungsrechts at 36 (cited in note 4).
189 Id at 37–38.
190 Id.
this assistance.\textsuperscript{191} 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. 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.\textsuperscript{192} 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 crystallization of a communal international life.\textsuperscript{193} 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 respond 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.\textsuperscript{194}

In recognizing the porosity of domestic legal regimes, Stein accepts that international law, which is the manifestation of the relations between states, has

\textsuperscript{191} On the challenges of using domestic courts in this way, see Kingsbury, Krisch, and Stewart, 68 L & Contemp Prob at 30–31, 50 (cited in note 5).

\textsuperscript{192} Von Stein, \textit{Einige Bemerkungen über das internationale Verwaltungsrecht} at 26–29 (cited in note 167). 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, \textit{Internationalisiertes Verwaltungshandel} 58–60 (Duncker & Humblot 2001).

\textsuperscript{193} Von Stein, \textit{Einige Bemerkungen über das internationale Verwaltungsrecht} at 29–30 (cited in note 167).

\textsuperscript{194} Id at 43. Bodo Richter interprets Stein as I do—as proposing that 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, and 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, \textit{Völkerrecht, Außenpolitik und international Verwaltung bei Lorenz von Stein} 237–38 (Heitmann 1973). Richter cites Georg Erler, who argues that Stein’s vision also applies in the modern world. Georg Erler, \textit{Grundprobleme des Internationalen Wirtschaftsrechts} 1–18 (Schwartz 1956).
direct legal effect in domestic legal regimes. 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. In his view, the activities of one administrative agency (for instance, CIDA) that reach into another country (for instance, Afghanistan) and 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). 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 (übergreifend) 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.

It follows from Neumeyer's argument that when an administrative body of State A operates in State B, its policy decisions are subject to international administrative law. This holds even if these decisions affect only inhabitants of State B.

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195 For a good theoretical elaboration of this point, see Tietje, *Internationalisiertes Verwaltungshandeln* at 62–63 (cited in note 192).
197 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. Friedrich von Martens, 2 *Völkerrecht: Das Internationale Recht der Civilisirten Nationen* 6 (Weidmann 1886). Tietje discusses von Martens's view in *Internationalisiertes Verwaltungshandeln* at 69 (cited in note 192).
One might be tempted to restrict the views of Neumeyer and Stein to monist civil law systems in which international law has direct application. However, this restricted reading is unwarranted. First, scholars have noted the erosion of dualism in common law systems. John T. Parry and Melissa A. Waters document common law judges' increasing reliance on international human rights law as the source of and basic interpretational tool for domestic human rights law. 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. 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 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. However, as Kingsbury, Krisch, and Stewart point out, such

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199 A typical expression of such monism from a civil law perspective is contained in Art 25 of Germany's Basic Law (Grundgesetz für die Bundesrepublik Deutschland), which states, “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. Tietje, Internationalsiertes Verwaltungsverhandeln at 567-68 (cited in note 192).

200 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. Id at 566.

201 Melissa A. Waters, Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties, 107 Colum L Rev 628, 651 (2007). In regard to treaties, see John T. Parry, Congress, the Supremacy Clause, and the Implementation of Treaties, 32 Fordham Int'l L J 1209 (2009). Parry argues that although the history of the interpretation of the Supremacy Clause in the US Constitution indicates a dominant view that international treaties are self-executing, he also points to the recent Supreme Court decision Medellin v Texas, 552 US 491 (2008), in which the Court “came very close to establishing a presumption against self-execution.” Parry, 107 Colum L Rev at 1211.

202 Kingsbury, Krisch, and Stewart, 68 L & Contemp Prob at 42 (cited in note 5). 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
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 supersede the protection of the individual, which is the basic unit of moral and legal consideration.203

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.204 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.”205 De Búrca argues that a “robust democratic aspiration” requires that those affected actually participate in the decision-making process.206

This critique may be justified if we are addressing participation in formal 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 decisions of state executives operating within the parameters of state policymaking. 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 policymakers 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

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203 On the use of the state form as a prudential means of achieving cosmopolitan justice, see Mayeda, 47 Can YB Intl L at 37–38 (cited in note 6).


205 Id.

206 Id at 132.
democratic institutions of the state. As a result, there is no crisis of democracy. What is missing is not democracy, but rather 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—that is, 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. Insofar 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 laws operate within a framework of international law must likewise acknowledge the interests of all those affected by domestic administrative and policy decisions with extraterritorial effects. Moreover, chauvinism is going out of style, as statutes such as the Alien Tort Claims Act,\textsuperscript{207} the UK International Development Act 2002,\textsuperscript{208} and the Canadian Official Development Assistance Accountability Act\textsuperscript{209} 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 behavior.

4. Summary of Section II.

In Section II, I have argued that the GAL paradigm as currently promoted provides limited resources for justifying the review of the discretionary decisions 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 policymakers.

\textsuperscript{207} 28 USC § 1350.
\textsuperscript{208} 2002, c 1.
\textsuperscript{209} SC 2008, c 17.
Moreover, GAL tends to limit the normative 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 policymakers 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 policymakers 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 policymakers 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 executives 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 clearer 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 subsuming 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.