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Socio-Economic Rights and Refugee Status:Deepening the Dialogue Between Human Rights and Refugee Law

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RECENT BOOKS ON INTERNATIONAL LAW

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REVIEW ESSAYS

RECENT SCHOLARSHIP ON NGOS

NGOs in International Law: Efficiency in Flexibility? Edited by Pierre-Marie Dupuy and Luisa Vierucci. Cheltenham, UK; Northampton, MA: Edward Elgar, 2008. Pp. vii, 281. Index. $140, £75.

Global Stakeholder Democracy: Power and Representation Beyond Liberal States. By Terry Macdonald. Oxford, New York: Oxford University Press, 2008. Pp. x, 237. Index. $90, £45.

NGO Involvement in International Organizations: A Legal Analysis. By Sergey Ripinsky and Peter van den Bossche. London: British Institute of International and Comparative Law, 2007. Pp. xv, 362. £65, paper.

Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit? Edited by Jens Steffek, Claudia Kissling, and Patrizia Nanz. Basingstroke, Eng.: Palgrave Macmillan, 2008. Pp. xvii, 244. Index. $80.00, £55.

NGO Involvement in International Governance and Policy: Sources of Legitimacy. Edited by Anton Vedder. Leiden: Martinus Nijhoff, 2007. Pp. xi, 234. Index. $119, €84.00.

A dozen years ago, I advanced the hypothesis that the degree of involvement and impact of nongovernmental organizations (NGOs) in international lawmaking exhibits a pattern of cyclicality, with surges and ebbs of influence.[1] Looking back at the decade of the 2000s, particularly during the financial crisis, one might detect an ebbing of the NGO role and the claims for its significance as compared to the 1990s. No example comes to mind in recent years of a hugely successful NGO international campaign or a new technique of NGO persuasion.

If NGO innovation and activism has slowed, the same is not true of scholarship about nonstate actors, and especially NGOs. In the past couple of years, several important studies have been published on aspects of the topic of international law/governance and NGOs. In this review, I take note of five new books, including three edited volumes. One book styles itself as theoretical, whereas the others have mixed methodologies, including some fruitful empirical work.

Several questions preoccupy contemporary scholars on NGOs: First, has international law been updated to accommodate a new legal status for NGOs, giving them international legal personality? Second, are international organizations (IOs) rendered more legitimate by extending a consultative role to NGOs? Or, in other words, can NGOs make amends for the so-called democratic deficit of IOs? Third, how can NGOs be made accountable for the tasks that they perform, and to whom is such accountability owed? Fourth, in particular cases, how has the NGO role changed outcomes with respect to treaty content, implementation, or enforcement? One or more of these questions receives attention in each of the new books reviewed here.[2]

Edited by Pierre-Marie Dupuy and Luisa Vierucci, *NGOs in International Law* is a volume of

[1] Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance,* 18 MICH. J. INT'L L. 183, 268–70 (1997).

[2] This review does not cover the discussion—in several chapters in the different books—regarding the NGO role in European institutions.

essays that builds upon a workshop about NGOs held at the European University Institute in 2002. Several themes are developed in the book. In the introductory essay, Vierucci and Christine Bakker explain that there is a "recurrent dilemma haunting modern international law: on the one hand, the perceived benefits of regulating an existing and progressing practice of NGO involvement in the international legal order; and, on the other hand the perceived risks of legalizing the participation of these non-state actors in the traditional state-dominated system" (p. 7). Yet as they explore the many issues, the book's contributors find that there are serious challenges in achieving new international regulation of NGOs. The problem is that formalization is hard to achieve because of the wide variety of NGOs and the myriad ways that NGOs participate in international processes. In addition, the book shows that this informality has proven valuable to NGOs, governments, and IOs. Nevertheless, the continuing operation of NGOs in a "legal vacuum" has its own costs: the continuing uncertainty as to when and how NGOs have rights and obligations, and as to how an NGO can be held internationally accountable for its actions.

In his conclusion to the volume, Dupuy creatively explores the "difficulties that the rapid development of NGOs has created for legal scholarship" (p. 207), both with respect to legal doctrine and the "increasing and progressive widening of the gap between the declared status of NGOs and their actual power of participation" (p. 212). Noting that NGOs have "become indispensable to the efficiency of the more or less rigid structures of international organizations" (p. 205) and that "[t]here is currently an increasing awareness on the part of the international judge of the fruitful contribution that NGOs may bring to international proceedings" (p. 210), Dupuy posits that "the only way for legal scholars to apprehend the reality of the NGOs' involvement is to go beyond the rigid inter-state and voluntarist conceptions usually put forward by the positivist school of thought" (p. 214). He predicts that the largest and most involved NGOs may eventually "be granted some form of legal personality" (p. 210). Yet he also suggests that the "question of the international legal personality of NGOs might not necessarily be the right one" (p. 213) because in increasing legal certainty, NGOs would "risk losing flexibility" (*id.*). Dupuy sees the flexibility of NGO international involvement as efficient for NGOs, states, and IOs. He suggests that scholars should focus less on the legal status of NGOs and more on whether NGOs are "an effective and legitimate power to have a say on the content of international norms" (p. 215). Furthermore, he calls for NGOs to "satisfy a requirement of transparency" and to "accept the necessary minimum control over the gathering and verification of the information provided" (p. 213).

The longest essay in the book, by Emanuele Rebasti, recounts how the interaction between NGOs and IOs has deepened, with NGOs now perceived as being in "partnership" with intergovernmental organizations (IGOs), rather than being mere observers or simply in "consultative status." Indeed, he posits that "non-governmental participation is strongly emerging as a parameter of good governance for IGOs" (p. 23), and notes that attempts by states to reduce NGO participatory rights "regularly meet fierce opposition from other member states which justify the defence of NGOs' prerogatives with the need to preserve the effectiveness of intergovernmental action" (p. 67). Furthermore, he suggests that the NGO role can "strengthen the accountability of international organizations by compensating for the lack of procedural rules and review mechanisms of IGOs' action" (pp. 69–70). But this enhanced NGO role leads to a greater need for regulation "in the selection of civil society interlocutors, in the definition of the modalities of interaction and in the supervision of NGO activity" (p. 43). With regard to the latter, Rebasti sees "an emerging trend to include mechanisms of self-regulation in formal participatory schemes" (p. 64).

Olivier de Frouville contributes a fine essay exploring the phenomenon of government-oriented NGOs—which he calls "servile society" (p. 72). In contrast to civil society serving a public interest, servile society serves a state interest. Such NGOs are hardly new, but his essay documents an increasing sponsorship of such NGOs in international forums by China, Cuba, Tunisia, and other states. As de Frouville explains, servile society was

ushered in back in 1996 when the UN Economic and Social Council (ECOSOC) changed its long-time rules so as to be more open to the participation of national-level NGOs. This essay provides an overview of the practices of ECOSOC's intergovernmental committee on NGOs—practices that, he says, result "in the admission of servile NGOs and the exclusion of independent ones" (p. 82). The committee's review processes can be used to try to intimidate NGOs "considered too critical" (p. 92) of affected states by threatening to have their UN status suspended or withdrawn. Indeed, de Frouville worries that "all the reform processes that were started in recent years at the United Nations resulted in a decrease in the rights of NGOs without compensation elsewhere, such as in the level of participation" (p. 111). The author is doubtful that the committee can perform more effectively "as long as this organ remains purely intergovernmental" (pp. 113–14). Instead, he suggests that the committee should be reconstituted with independent experts or a mix of such experts and NGOs.

In her essay on international courts and tribunals, Vierucci uses a comparative approach to illustrate the many modalities of NGO involvement at both international and regional levels. With respect to the direct standing of NGOs, she points to some important recent developments but finds that the "primary avenues of NGOs for legal enforcement are still domestic tribunals" (p. 160). With respect to indirect participation by NGOs as amici curiae, she sees a potential for NGOs to "give a terrific contribution to the law" (p. 166) and envisions the possibility of a "determination of the leave to file *amicus* briefs as a matter of customary law" (p. 174). Yet she also expresses a concern that amicus briefs "may increasingly shift towards representation of either party interest or a direct legal interest of the intervener itself" (p. 164 n.32). Looking ahead, she argues that "a more formalized legal status for NGOs' participation, be it direct or indirect, in international adjudication seems unavoidable in order to address the tension between the differing interests at stake" (p. 169), particularly to protect the rights of the parties. She calls for an intervening NGO to clearly state its interest in a proceeding.

Two essays in the book address the NGO role in international environmental lawmaking. Attila Tanzi surveys the variety of practices of NGO involvement and finds that much of that involvement is ad hoc. He concludes that both states and NGOs "seem to have, for opposite reasons, a strong interest in avoiding the formalization of a regulatory framework for public participation" (p. 151). Cesare Pitea examines the participation by NGOs in noncompliance procedures such as in the Aarhus Convention and the Montreal Protocol on Ozone. He finds that while NGO involvement has led to "furthering the effectiveness of the compliance review action," governments have not wanted to allow NGOs to initiate noncompliance procedures as that "may undermine the non-confrontational functioning of those procedures and bear negatively on their efficiency" (p. 199).

A final observation about *NGOs in International Law* is that the book lacks a good index but does contain a bibliography and some useful documents in appendices.

In *Global Stakeholder Democracy,* Terry Macdonald, a political theorist teaching at Monash University, proposes a framework (or model) for conceptualizing whether public power is exercised democratically over populations beyond the territorial boundaries of states. While noting that her model would also be applicable to states, IOs, and transnational corporations, Macdonald focuses her book on NGOs. She does so in order to respond to the debate about "the democratic dilemmas surrounding the power of NGOs in contemporary world politics" and also because NGOs provide a lens "to rethink some standard state-centric assumptions about the fundamental elements of a democratic system" (p. 6). She suggests that her model can help NGOs "build stronger democratic credentials as representatives of various stakeholder groups" (p. 15).

A key intellectual move in the book is to ask the reader to forgo the assumption that democracy needs to occur within a closed society having a unified agent of public power and a discrete community of citizens. Instead, Macdonald postulates a pluralist global liberal democratic order with "multiple agents of public power held to account

by their multiple overlapping 'stakeholder' communities" (p. 13).[3] Her definition of the exercise of "public power" is a broad one embracing any "prominent and influential role in the processes of production and maintenance of autonomy-constraining regulative norms" (p. 64). The impact of the norm on an individual generates a stake and consequently gives those stakeholders "participatory entitlements" (p. 41) to exercise democratic control. At the international level, as she explains, "nation-state representation cannot achieve legitimate social choice in global politics" (p. 14) because of inadequacies in representing diverse interests, in responding to intensity of interest, and in using rational deliberation. Macdonald, who views herself as a "realist" (p. 32), is not suggesting that the "nation-state model of global representation" be abandoned, even though she views it as "fundamentally flawed from a democratic point of view" (p. 138). Rather, she proposes a hybrid approach that "incorporates multi-stakeholder representation within more conventional structures of representation by nation-states" (p. 15). For global politics, "all individuals whose autonomy is problematically constrained by the exercise of public power" (p. 102) are to be considered members of the stakeholder community.

Macdonald devotes a chapter to demonstrating that NGOs can wield "public power" that, like all public power, needs democratic control. While conceding that many NGO activities are "private power," particularly when done at "grassroots levels," she argues that when NGOs gain "privileged access" to "authoritative institutional sites" such as IOs (p. 65), the power exercised can properly be viewed as "autonomy-constraining" and hence "public" (p. 81). That is so not only because norms developed by NGOs can be treated as authoritative, but also because such norms "can feed back into the formal international legal system" (p. 69). Besides norms, she points to the operations of NGOs—for example, in refugee camps—as evidencing "public" power.

Because individuals have multiple (rather than unitary) interests, the role of the NGO is to be a representative agent of a stakeholder community. To perform that role, NGOs "must be institutionally delegated in some way, to ensure that they will advance the particular outcome-interests that are specified by their stakeholder constituents" (p. 142). Macdonald devotes several chapters to elaborating the conception and operation of her "liberal pluralist" model to show how "unelected agents such as NGOs can possess legitimate representative agency" (p. 163) through "non-electoral mechanisms of authorization and accountability" (p. 165) to stakeholders. Specifically, the book suggests the use of methods such as transparency, stakeholder surveys, NGO codes of conduct, monitoring NGOs, and reliable disempowerment practices.

NGO Involvement in International Organizations, by Sergey Ripinsky and Peter Van den Bossche, examines the legal basis within IOs for NGO involvement. Their research project consists of a series of case studies on ten of the most vital agencies and institutions, and then weaves it all together in a concluding chapter written from a comparative perspective. For each organization examined, the authors report whatever institutional law exists providing for NGO involvement and then take note of the secondary rules on consultative status or accreditation, along with the formal and informal practices in place. The case studies look at the nature of NGOs permitted to be involved, the forms of participation actually used, the accreditation process, and practices for reviewing NGOs. The organizations studied are ECOSOC, International Labour Organization (ILO), International Monetary Fund (IMF), UN Conference on Trade and Development (UNCTAD), UN Environment Programme (UNEP), UN Development Programme, World Bank, World Health Organization (WHO), World Intellectual Property Organization (WIPO), and World Trade Organization (WTO). All ten organizations invite in NGOs for some activities; the differing practices "are

[3] Macdonald does not take note, and was undoubtedly unaware, of an important 2002 article by Bosire Maragia proposing an ontology of world politics featuring multiple sites of authority and multiple sources of legitimacy, and then applying these concepts to the question of the legitimacy of NGOs. Bosire Maragia, *Almost There: Another Way of Conceptualizing and Explaining NGOs' Quest for Legitimacy in Global Politics*, 2 NON-ST. ACTORS & INT'L L. 301 (2002).

explained by the specific characteristics of the international organizations concerned" (p. 223).

In my view, the study's most important findings are as follows. There is "no necessary or direct link between the fact that the engagement with NGOs is envisaged in the organization's constituent instrument, and the intensity of such engagement" (p. 208). Only two of the ten organizations, the IMF and the WTO, "have expressly taken a position that engagement with civil society is primarily the task of national governments" (*id.*). Official NGO advisory committees are uncommon. In the "less-NGO-friendly" organizations (such as the WTO and WIPO), the trend has been to allow NGOs to attend the rarely convened formal meetings of the supreme organ but to deny participation in organs that meet regularly. NGOs have a formal right to propose agenda items only in the ECOSOC and UNEP. In most of the accreditation processes, the NGOs being vetted are not given an opportunity to speak or to be present. Two international bodies, the ECOSOC and WHO, have established formal grounds for withdrawal and suspension of an NGO's consultative status.

The book reaches the conclusion that "international organizations would generally benefit from a further 'legalization' of NGO involvement. Providing for explicit rules on engagement with NGOs would contribute to the predictability of this engagement and prevent arbitrariness" (p. 224). Although the authors recognize NGOs as "fully-fledged actors in international governance" (p. 1), they contend that "the gap between the institutional activism of NGOs and their legal standing in terms of international rights and duties is growing" (p. 7).

This volume makes a useful contribution to the literature on NGOs in international law by focusing on the administrative law governing NGO participation. Each of the case studies is rich with interesting detail, and the authors have taken great care to document their points. The only major flaw I see is that the book lacks both an index and a bibliography. The publisher, the British Institute of International and Comparative Law, should know better.

Civil Society Participation in European and Global Governance is a product of the "Transformations of the State" project at the Collaborative Research Centre at the University of Bremen. The project's background assumption is that the democratic deficit of global governance can be ameliorated by more "deliberative democratization" (p. 2). The authors (all political scientists) posit that "organized civil society may serve as a 'transmission belt' between a global citizenry and international organizations" (p. 208). The term "civil society organizations" (CSOs) is used in the book's title and in many of the essays, although some of the authors use the term "NGO" synonymously.

The purpose of the project was to assess the capacity of particular international institutions "to bring about free, informed and inclusive deliberation—and, hence, a high level of democratic quality" (p. 210). For this purpose, the authors selected and measured four criteria: access to deliberation, transparency and access to information, responsiveness to stakeholder concerns, and inclusion of all voices. The dataset for the study comprised thirty-two institutions at the international level (for example, the IMF) or in the European Union.

With respect to access and transparency for CSOs, the authors were able to reach conclusions by using a list of twenty indicators to rate each institution; one indicator, for example, is whether CSOs have the right to put topics on the agenda of an IO. Overall, the researchers found that almost all the institutions studied held consultations with CSOs. The three exceptions were the Bank for International Settlements, the North Atlantic Treaty Organization, and the G8 Summits (although summit host governments may consult CSOs).

The authors found that responsiveness and inclusiveness were not as easily measured. For those criteria, the project performed case studies of several institutions. These studies suggest that the presence of CSOs can sometimes "expand the range of viewpoints present in international negotiations and can give a voice to the concerns of marginalized groups—such as indigenous peoples—that are not well represented in the intergovernmental process" (p. 28). The case studies

also show, however, that the responsiveness of intergovernmental decision makers to the concerns presented by CSOs "is surprisingly low even under the most favourable circumstances" (p. 213), such as extensive opportunities for NGO participation.

One of the best case studies, written by Lars Thomann, examines the ILO. He begins by conceding that because of the ILO's tripartite structure, all four of the project's criteria "are fulfilled to an extent not seen in any other international organization" (p. 76). But the theme of the chapter is that the ILO is nevertheless deficient because there is a "representational gap" (p. 82) in that only the worker and employer organizations get that treatment. Thomann does not consider those organizations to be NGOs because their goals "are largely orientated toward the interests of their members" (p. 77). In his view, "the access of NGOs to the policy-making level of the ILO—meaning the [ILO's International Labour Conference] and the supervisory mechanism—is rather limited and marginalized" (*id.*). As a result, many workers "are increasingly not represented" (p. 91) at the ILO. In another essay, Claudia Kissling and Jens Steffek also discuss the oversized role for workers and employers at the ILO, and note that "[t]hese privileged partners have vigorously forestalled the introduction of 'quadripartism' within the ILO that would result from associating more closely with CSOs" (p. 212).

All of the case studies are well done. Charlotte Dany examines the UN World Summit of the Information Society (held in 2003), which provided for active CSO participation. Steffek and Ulrike Ehling examine the WTO and conclude that "[o]pportunities for civil society to influence the deliberation process directly at the WTO are quite scarce. Remarkably little has changed since the [General Agreement on Tariffs and Trade] became operational in 1948" (p. 110). Peter Meyer compares the North Atlantic Treaty Association to the Organization for Cooperation and Security in Europe and finds more opportunities for CSOs in the OSCE, possibly because it is a leaner organization than NATO.

In my view, the most valuable chapter in the volume is written by Claudia Kissling, who examines the evolution of the legal status of NGOs in the international order. Her thesis is that providing "legal standing" (p. 32) to NGOs and interparliamentary assemblies will help to overcome the legitimacy deficit in IOs. In other words, Kissling seeks to show how the rights and duties of NGOs have "legitimizing capabilities" (p. 33). These rights and duties are not located in customary international law, she says, but rather are delineated within specific IOs.

To examine multiple organizations using a common framework, Kissling devises a comprehensive matrix to describe the degree of an NGO's legal status. On an ascending scale, the status varies from "no status" to "subject" to "person," and then to the "comprehensive legal status" (p. 37). For an NGO to be a subject, it has to enjoy rights or duties. For example, there could be a right to speak and a duty to fulfill certain accreditation conditions. Kissling distinguishes a "person" from a "subject" in that the NGO "person" can lodge a complaint against an IO or state to enforce the NGO's rights. Analogously, the NGO person is accountable for its duties. She also considers whether the NGO's status is granted in treaty (primary) law or in secondary law. Kissling summarizes her findings in a table presenting a broad range of IOs divided into groups, including environment, development, human rights, economic and financial affairs, and security. For each organization, she reports the degree of NGO status and the year that such status was obtained, both in primary and secondary law. Only the ILO grants comprehensive legal status—and did so in 1919.

The construction of this matrix is an impressive achievement. The terms "person" and "subject" are not ideal, but the categories that Kissling employs are especially useful in showing the trends for how governments and IOs accord status to NGOs. In my view, Kissling is right to see the rights and duties of NGOs as indicia of the status of NGOs in international law. One hopes that scholars will invest time in understanding her matrix in order to refine her analysis.

The last book to be reviewed emerges from a multiyear research project at Tilburg University and the University of Maastricht. The product is a volume of essays examining the "legitimacy" of

NGOs in international governance. The rationale for the exercise is that "[a]s the activities of NGOs have ever further-reaching consequences, their ability to demonstrate the legitimacy of their activities becomes more important" (p. 7). The aim of the project is to develop a workable concept of legitimacy. The volume, *NGO Involvement in International Governance and Policy: Sources of Legitimacy,* consists of seven essays by members of the research team, all edited by Anton Vedder. A leadoff essay by Vivien Collingwood and Louis Logister reports on the perceptions of NGO legitimacy by NGO officials and other stakeholders, and is nicely written.

The volume attempts to deconstruct the concept of NGO legitimacy. Several of the authors employ a three-part concept of legitimacy that looks at moral, social, and regulatory aspects. Moral legitimacy is whether the NGO's value and norms are acceptable in principle for all, and whether the NGO is effective at promoting those norms. Social legitimacy is whether there is consent or representation of those involved or affected. Regulatory legitimacy is whether the NGO's involvement conforms to applicable international rules. The essay by Anke van Gorp presents the result of his study examining the Web sites of selected NGOs, with the specific goal of determining how much information is provided for all three aspects. Among the findings is that "there are no Internet-only NGOs" (p. 103) and that some NGOs, such Greenpeace and Global Witness, do not seek to represent anyone.

The essay by Peter Van den Bossche examines regulatory legitimacy in the law of IOs. He sets out to consider whether the actual NGO involvement in major IOs matches the rules of each organization prescribing NGO involvement. With regard to allowing NGOs to be involved in the organization's activities, Van den Bossche finds that the IMF and the World Bank do so without any explicit legal basis and that the ECOSOC, UNCTAD, and UNEP engage with NGOs in ways that go further than technically allowed by the relevant rules. With respect to practices on accreditation, he finds that UNCTAD has not implemented its own substantive rules.

The essay by Menno Kamminga looks at various systems for regulating the status of NGOs at both the national level and international levels. For example, Kamminga reviews self-regulation by NGOs and suggests that such codes are feasible for NGOs that are focused on particular issues. Another interesting finding concerns NGO coalitions, which can indirectly serve a mutually validating purpose. The essay's overall conclusion is that "states are not at all the best judge of the legitimacy of NGOs" (p. 193).

The essay by Anton Vedder takes the debate about NGO legitimacy to a higher level by suggesting that the focus should really be on possible *illegitimacy.* In particular, he argues that "it does not seem to make much sense to talk about NGOs qualifying as legitimate, or about some NGOs being more legitimate than others. It seems more appropriate to establish whether, and if so, in what ways the legitimacy of a specific NGO may be doubted" (p. 208).

Overall, this book makes a useful contribution to our understanding of NGO legitimacy, though it is limited by its reliance on scholarship only from the past twenty years. The bibliography does not contain any book or article about NGOs written earlier than 1989. One wonders why a group of scholars would insulate themselves in that way, particularly when located so closely to great research libraries.

Although none of the books makes strong claims that IO legitimacy is enhanced by NGO participation, the books do suggest that such participation provides value added to IOs. As noted above, Rebasti finds that NGOs can strengthen the accountability of IOs, and the *Civil Society Participation* collection contends that NGOs improve deliberation in IOs. In arguing that NGOs can provide democratic representation at the international level, Macdonald is implicitly suggesting that the state-centric conception of IOs is not as democratic as it could be.

In a recent book review about NGO accountability in this *Journal,* Kenneth Anderson argues against the idea that NGOs play "a legitimating role in global governance."[4] I agree with Anderson

[4] Kenneth Anderson, *What NGO Accountability Means—And Does Not Mean,* 103 AJIL 170, 176 (2009)

to the extent that he is saying that NGOs are not necessarily legitimacy enhancing and that IOs are not necessarily deficient in legitimacy. But I do think that at its best, NGO participation has helped to ameliorate some of the worst pathologies of IOs, such as a lack of transparency and lack of efforts to reconcile IOs' functional missions with those of parallel organizations. For example, I believe it was the NGOs that instigated the pressure that led the WTO to be more sensitized to the impact of trade on the environment and human rights.

While all five books under review take a pro-NGO approach, Macdonald's book is different. Whereas the other four books can be characterized as mainstream, she offers a paradigm-shifting model in which NGOs are viewed as *representatives* of stakeholders. Because NGOs are not elected, she recommends establishment of non-electoral mechanisms of democratic authorization and accountability. Before reading Macdonald, I had shared Anderson's view that the "glory of civil society institutions ought to be that they are *not* representative, and, because they are not, are free to argue and shout their visions of social justice, seek to persuade, and offer alternatives that representative institutions cannot."[5] Of course, Anderson qualifies this point by agreeing that NGOs "still need to be accountable . . . in the transparency sense, so that others can judge them and their programs."[6] But the accountability he seeks is not for the purpose of improving the representativeness of NGOs; both authors are employing the term "accountability" but are using it somewhat different ways. It will be interesting to see how Anderson (who has written thoughtfully about NGOs from a more skeptical position than the books reviewed here) responds to Macdonald's ambitious framework. Reading Macdonald's book made me reconsider the question of whether one should conceptualize NGOs not only as being lobbyists or norm entrepreneurs, but also as carrying out representative functions in a democratic global system. The NGO debate has become more complex.

(reviewing NGO ACCOUNTABILITY: POLITICS, PRINCIPLES & INNOVATIONS (Lisa Jordan & Peter van Tuijl eds., 2006)).

[5] *Id.* at 177.

[6] *Id.*

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SOCIOECONOMIC RIGHTS AND REFUGEE STATUS: DEEPENING THE DIALOGUE BETWEEN HUMAN RIGHTS AND REFUGEE LAW

International Refugee Law and Socio-economic Rights: Refuge from Deprivation. By Michelle Foster. Cambridge, New York: Cambridge University Press, 2007. Pp. xlvii, 387. Index. $120.

Over the past two decades, international human rights law has provided an increasingly useful framework for interpreting key criteria of the definition of a refugee.[1] According to the 1951 Convention Relating to the Status of Refugees (Refugee Convention), a refugee is one who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."[2] A human rights–based approach to analyzing this definition helps to ensure the application of a universal and objective standard, thereby increasing consistency and uniformity in decision making by state parties regarding who qualifies for international protection. The concept of persecution is now widely understood as a "sustained or systemic

[1] Deborah E. Anker, *Refugee Law, Gender and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 136 (2002); *see also* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS (1991); JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW 29–33 (2007) (examining the human rights foundations of the Refugee Convention, *infra* note 2, and discussing it a specialist human rights treaty).

[2] Convention Relating to the Status of Refugees, Art. 1A(2), July 28, 1951, 189 UNTS 150 *amended by* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 UST 6223, 606 UNTS 267 [hereinafter Refugee Convention].

violation of basic human rights demonstrative of a failure of state protection."[3]

While refugee law differs from human rights law in that it aims to provide surrogate state protection for certain individuals, rather than to monitor abuse and hold a state of origin accountable, the two regimes have increasingly converged and contributed to each other's growth. One of the best examples of this phenomenon is the evolution in our understanding of "gender based" persecution—such as rape, female genital cutting, and family violence—which not only drew on prevailing human rights norms but also helped shape them.[4] Economic and social rights, such as the rights to food, health, housing, education, and employment, highlight another area in which human rights law and refugee law have the opportunity to help each other grow by exposing internal conflicts and pushing forward particular contextualized claims. In the same way that female genital cutting represents a controversial and divisive issue within human rights circles, these circles continue to debate the status and content of economic and social rights. While scholars initially described economic and social rights as "second generation" rights that require expenditure of resources, compared to superior "first generation" civil and political rights that simply imposed negative duties on states, our understanding of economic and social rights has rapidly changed. Addressing economic and social rights in the context of adjudicating asylum claims will require sharpening our understanding of the relevant human rights standards, as well as deepening our analysis of the refugee definition.

Michelle Foster's book, *International Refugee Law and Socio-economic Rights: Refuge from Deprivation,* comes at a time of growing synergy between refugee law and human rights law and provides a comprehensive and cohesive analysis to the critical question of how states should respond to refugee claims based on socioeconomic deprivation. Foster, senior lecturer and director of the International Refugee Law Research Programme at the University of Melbourne, utilizes international human rights principles to analyze socioeconomic harm in the context of refugee law, drawing on traditional methods of treaty interpretation. She persuasively argues that many claims based on socioeconomic harm properly fall within the scope of the Refugee Convention. Contrary to what some critics have suggested, Foster does not make any radical arguments to expand protection.[5] She simply contends that the Convention "is capable of accommodating a more complex and nuanced analysis" that recognizes many types of refugee and asylum claims with an "economic element" (p. 1). By linking the refugee definition to developments in our understanding of economic and social rights under international human rights law, Foster's book pushes forward a debate about the deeply entrenched but overly simplistic dichotomy between "economic migrants" and "political refugees" that has thus far been "drastically underdeveloped" and is not comprehensible under the Refugee Convention itself (p. 4).[6] Since this dichotomy has developed largely in response to political concerns and psychological fears, rather than in response to sound legal analysis of the Refugee Convention, Foster's detailed examination of the legal issues represents a critical and original contribution.

[3] HATHAWAY, *supra* note 1, at 104–05 (providing pioneering analysis of persecution).

[4] *See* Anker, *supra* note 1, at 138.

[5] *See, e.g.*, Zachary A. Lomo, Book Review, 21 J. REFUGEE STUD. 401, 403 (2008) (reviewing MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIOECONOMIC RIGHTS: REFUGE FROM DEPRIVATION (2007)) (misleadingly stating that Foster attempts "to convert economic deprivation . . . into a new independent reason for eligibility"); Rebecca Heller, Book Review, 33 YALE J. INT'L L. 516, 517 (2008) (reviewing MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIOECONOMIC RIGHTS: REFUGE FROM DEPRIVATION (2007)) (mischaracterizing Foster's analysis as advocating "systematic relaxation" of the requirements of the Refugee Convention).

[6] *See, e.g.*, GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE UNDER INTERNATIONAL LAW 15 (3d ed. 2007) (noting that "'economic refugees'—the term has long been disfavoured . . . are not included" in the concept of a refugee); *see also* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 233 (3d ed. 1999) ("Although the refugee definition does not embrace voluntary economic migrants, a person who has left his country for both political and economic reasons should not be barred from asylum. . . .").

Foster structures her book around the key elements of the refugee definition.[7] While she places the most emphasis on clarifying the concept of persecution in the context of economic and social rights, she also addresses the requirement of a causal connection between the feared persecution and at least one of the five protected grounds (race, religion, nationality, membership of a particular social group, and political opinion), as well as the meaning of the grounds themselves, especially the "particular social group" ground. To illustrate and establish her arguments, Foster draws on various levels of decision-making from five common law jurisdictions (Australia, Canada, New Zealand, the United Kingdom, and the United States).

The first part of Foster's book explores the human rights approach to interpreting the Refugee Convention, generally considered the "dominant" view.[8] While Foster recognizes and discusses inconsistencies between and within jurisdictions, she stresses the need for both a coherent framework and an objective standard toward ensuring consistency in interpreting an international treaty. She persuasively argues that international human rights law should provide this framework based on the language, context, and purpose of this Convention as well as the axiom that international obligations must be interpreted by reference to the broader framework of international law.[9]

These arguments build on the work of James C. Hathaway, who has argued that the Refugee Convention and its Protocol are "part and parcel of international human rights law"[10] and, more specifically, "a remedial or palliative branch of human rights law . . . [as well as] a system for the surrogate or substitute protection of human rights."[11] In his 1991 book, *The Law of Refugee Status*, Hathaway explained that the International Bill of Rights (IBR), comprised of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), is "essential to an understanding of the minimum duty owed by a state to its nationals," given "the soundness of its standards, its regular invocation by states, and its role as the progenitor for the many more specific human rights accords."[12] In light of significant developments in human rights law, Hathaway subsequently acknowledged that one could interpret "being persecuted" by reference to a wider set of international human rights instruments, although he still cautioned against rushing to embrace "every new human rights idea that comes along."[13] Hathaway reasoned that "a commitment to legal positivism requires first, that we focus on

[7] *See* Refugee Convention, *supra* note 2, and accompanying text. This is the standard method of analysis. *See generally* HATHAWAY, *supra* note 1; GOODWIN-GILL & MCADAM, *supra* note 6.

[8] *See, e.g.*, UNHCR Division of International Protection, *Gender-Related Persecution: An Analysis of Recent Trends*, 9 INT'L J. REFUGEE L. (SPECIAL ISSUE) 79, 82–83 (1997); MARK SYMES, CASELAW ON THE REFUGEE CONVENTION: THE UNITED KINGDOM'S INTERPRETATION IN THE LIGHT OF THE INTERNATIONAL AUTHORITIES 70 (2000) ("The dominant trend of the authorities is to accept the human rights approach."); Dirk Vanheule, *A Comparison of the Judicial Interpretations of the Notion of Refugee, in* EUROPE AND REFUGEES: A CHALLENGE? 91–106 (Jean-Yves Carlier & Dirk Vanheule eds., 1997) (studying the judicial interpretation of the refugee definition in 5000 cases from 13 European countries, Canada, and the United States, and finding that "the only essential criterion applied, either expressly or implicitly, by the courts appears to be the disproportional or discriminatory violation of basic human rights for one of the reasons mentioned in the Geneva Convention"); Anker, *supra* note 1, at 135; HATHAWAY, *supra* note 1, at 106; GOODWIN-GILL & MCADAM, *supra* note 6, at 285–384. For criticisms of the human rights approach, see, e.g., Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 782 (1998); NIRAJ NATHWANI, RETHINKING REFUGEE LAW 21, 76–77 (2003); Daniel Wilsher, *Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability*, 15 INT'L J. REFUGEE L. 68, 98 (2003).

[9] *See* Vienna Convention on the Law of Treaties, Art. 31(3)(c), *opened for signature* May 23, 1969, 1155 UNTS 331 (requiring interpretation to take into account "any relevant rules of international law applicable in the relations between the parties").

[10] JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 4 (2005).

[11] *Id.* at 5.

[12] HATHAWAY, *supra* note 1, at 106.

[13] *See, e.g.*, James C. Hathaway, *The Relationship Between Human Rights and Refugee Law: What Refugee Judges Can Contribute, in* THE REALITIES OF REFUGEE DETERMINATION ON THE EVE OF A NEW MILLENNIUM: THE ROLE OF THE JUDICIARY 80, 86 (1999).

legal standards—primarily treaties—not on so-called 'soft law' which simply doesn't yet bespeak a sufficient normative consensus."[14] While "evolving standards" could serve "as a means to contextualize and elaborate the substantive content of genuine legal standards," they should not "be treated as authoritative in and of themselves."[15] Hathaway further argued that only treaties ratified by a "respectable super-majority," with "support in all major geo-political groupings," carried sufficient legal authority to be used to interpret the Refugee Convention.[16] As Foster notes, Hathaway found that the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC) all satisfied this test (p. 64). Hathaway's analysis advocated relying on "core norms" of international human rights law to define forms of serious harm that rise to the level of persecution.[17]

Foster, like Hathaway, believes that "refugee status adjudication should properly take into account *evolving* developments in human rights law" (p. 63, emphasis added), noting that "the specific conventions do make significant contributions to a more complex understanding of equality, which go considerably beyond the IBR" (p. 65). While she too remains cautious about relying on regional standards and treaties that have not yet attained the requisite level of support, she explores situations where "soft law" may play a role in assisting in treaty interpretation, such as a case involving someone with a mental or physical disability.[18] Foster also carefully analyzes and seriously considers possible objections to the human rights approach, such as the argument that it is both over- and under-inclusive and that it is not appropriate to hold states accountable to obligations set forth in treaties to which they are not parties (pp. 75–86).

In chapter three, Foster discusses current conceptual approaches to socioeconomic deprivation and the problems with these approaches. The first major conceptual approach, which Foster refers to as "Carlier's 'Three Scales'" model, is a normative hierarchical approach that gives civil and political rights a higher priority than economic and social rights, and provides that the more fundamental the right in question, the less severe the treatment needs to be to constitute persecution.[19] Foster rejects this normative hierarchy because the distinctions between first and second generation rights have been undermined as simplistic and unsustainable. Not only is it now widely understood that all rights contain both positive and negative components and that many civil and political rights require expenditure, but also the United Nations has repeatedly reinforced the interdependence and equal importance of the two categories of rights.

The second conceptual approach, which Foster calls Hathaway's "hierarchy of obligations" model, proposes a four-tier structure to explain when a violation of core entitlements amounts to persecution.[20] Foster explains that while the

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Many scholars advocate a cautious approach to enforcing economic and social rights in general. *See, e.g.*, James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 219 (2004) (arguing that "successful promotion of economic, social, and cultural rights in the Inter-American system should be incremental, firmly grounded in established precedent, and always linked to vigorous social movements and effective advocacy strategies").

[19] *See* Jean-Yves Carlier, *General Report, in* WHO IS A REFUGEE? A COMPARATIVE CASE LAW STUDY (Jean-Yves Carlier, Dirk Vanheule, Klaus Hullman & Carlos Peña Galiano eds., 1997).

[20] Violation of the first tier, consisting of rights in the Universal Declaration of Human Rights (UDHR) that were made immediately binding in the International Covenant on Civil and Political Rights (ICCPR), *always* constitutes persecution. Violation of the second tier, consisting of rights in the UDHR that are codified in ICCPR but allow for derogation during public emergency, *generally* constitutes persecution unless derogation was strictly required, nondiscriminatory, and consistent with other aspects of international law. Violation of the third tier, consisting of rights in the UDHR that are codified in the ICESCR, constitutes persecution if the state ignores these interests despite the fiscal ability to respond, if the state discriminates, or in cases of an

United Kingdom, Canada, and New Zealand have purportedly adopted Hathaway's "hierarchy of obligations" model, many courts in these jurisdictions are actually applying a model more akin to Carlier's "normative hierarchical" approach (pp. 120–23).[21] "In other words, courts and tribunals that rely on a hierarchical model tend to equate the level of hierarchy with the extent to which the relevant right is 'fundamental' or a core entitlement, which in turn determines the extent to which a type of harm can constitute persecution" (p. 120). In actuality, Hathaway's model merely reflects the greater complexity involved in determining whether an economic and social right has been breached; it is not based on the notion that economic and social rights are normatively less important than civil and political rights. Yet courts have a tendency to apply a much higher standard to claims involving economic and social rights based on the idea that economic and social rights are of lesser value and that the level of violation necessary to establish persecution must therefore be much higher. Foster forcefully argues that courts misinterpret Hathaway's model when they find third-level violations of economic and social rights only in cases where the harm is extreme or life-threatening. Likewise, Foster contends that jurisdictions that have not formally accepted the human rights framework, such as the United States, tend to impose a higher standard for socioeconomic claims. Requiring socioeconomic harm to amount to a threat to subsistence contradicts any coherent analysis of persecution, which is generally understood as serious harm, not life-threatening conditions. Moreover, socioeconomic harm cannot be isolated and analyzed separately from physical harm because the two are inextricably intertwined (e.g., someone deprived of sufficient food, clean water, or medical care suffers physical harm).

Foster's analysis of the case law is particularly helpful in revealing the significant level of confusion and misunderstanding about socioeconomic rights. For example, adjudicators of asylum claims generally fail to realize that the notions of "progressive realization" and resource constraints do not apply where the state imposes deliberately retrogressive measures or engages in discrimination.[22] Although Hathaway's approach recognizes these types of violations as persecution, Foster contends that his approach has contributed to rigid analysis by the courts. She also questions the distinctions on which Hathaway's actual model is based, noting that the distinction between immediate and progressive duties does not line up with

extreme violation that is tantamount to deprivation of life or cruel, inhuman, and degrading treatment. Finally, violation of the fourth tier, consisting of rights in the UDHR that are not codified in either the ICCPR or the ICESCR, is not usually sufficient to constitute persecution because these rights are not subject to a binding legal obligation. *See* HATHAWAY, *supra* note 1, at 109.

[21] Foster cites numerous decisions that misinterpret Hathaway's analysis. For example, in the seminal *Gashi* decision, the UK Immigration Appeal Tribunal noted the "four distinct types of obligations in a hierarchy of relative importance," a phrase that has been repeated in numerous subsequent UK decisions. Gashi v. Sec'y of State for Home Dep't, Appeal No. HX/75677/95 (13695) (Immigr. App. Trib. 1996) (unreported), [1997] Immigr. & Nat'lity L. Rep. 96, 100; *see also* Horvath v. Sec'y of State for Home Dep't, [2001] 1 A.C. 489 , para. 48 (H.L.) (appeal taken from Eng.) ("In an attempt to classify the gravity of the breaches of the human rights, Hathaway proposed the helpful division into four categories.").

[22] The notion that retrogression violates a state's obligations under international law is not purely theoretical and has been recognized in other contexts. The Colombian Constitutional Court, for example, has long held that "all retrogression is presumptively unconstitutional and therefore subject to strict scrutiny." Alicia Ely Yamin, *Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health*, 10(2) HEALTH AND HUMAN RIGHTS J. 1, 12 & n.89 (2008) (citing C 251/97, Segunda Sala de Revisión, Constitutional Court of Colombia, 1997). Consequently, when Colombia's government sought to reduce drastically spending on the Subsidized Health Insurance Scheme, the Constitutional Court found that the cutbacks violated the law. *Id.* at 12 & n.90 (citing C 1165/2000, Segunda Sala de Revisión, Constitutional Court of Colombia, 2000; C 040/2004 Segunda Sala de Revisión, Constitutional Court of Colombia, 2004). Indeed, the court has found that the government violates the principle of progressive realization whenever it takes step that contradict the aim of achieving universal coverage, as set forth in both the Colombian Constitution and legislation. *Id.* at 12 & n.91 (citing C 130/02, Segunda Sala de Revisión, Constitutional Court of Colombia, 2002).

the distinction between civil and political rights on the one hand and economic and social rights on the other. Moreover, she argues that Hathaway's reliance on the concept of derogability is not a meaningful method of distinguishing between rights.

Foster's analysis highlights how refugee law must grapple with shifts in the normative development of socioeconomic rights. After discussing how various international bodies, especially the UN Committee on Economic, Social and Cultural Rights (Committee), have provided greater content to economic and social rights in recent years, Foster proposes using the concept of "minimum core obligations" to help define when violations of economic and social rights rise to the level of persecution. While the idea of using "core" rights is not new, Foster greatly expands on this idea, arguing that the "core obligations" approach would provide a broad framework for adjudicators, while allowing for evolution at the same time. As examples, Foster examines how the core obligations approach may help in the proper analysis of asylum claims based on violations of the right to education and the right to health.

In chapters five and six, Foster turns to other critical elements of the refugee definition: the required causal connection and the five protected grounds (race, religion, nationality, membership of a particular social group, and political opinion).[23] She discusses how the challenges involved in establishing the causal connection between the feared persecution and a protected ground are magnified in the context of claims involving economic deprivation, as adjudicators tend to invoke concepts of "economic" or "voluntary" migrants as a method of reducing complexity and automatically dismissing the claims. Foster argues that proper application of the "mixed motives" doctrine (the idea that mixed factors can explain the fear of being persecuted) and the related notion that the protected ground need only constitute part of the reason for the well-founded fear, coupled with an understanding that someone need not be "singled out" for persecution, help to overcome many of the traditional obstacles to socioeconomic claims. Moreover, after examining different approaches to understanding whether the causal connection requires an element of intention, Foster argues that the text, context, and purpose of the Refugee Convention best support an approach that focuses on the reasons that a person fears persecution, as opposed to approaches that focus on the intention of either the persecutor or the state (pp. 274–75).[24] While she recognizes that "the predominant approach in common law jurisprudence as a whole undoubtedly remains one of requiring intent" (p. 280), she identifies tentative steps by courts, as well as increasing support by the UN High Commissioner for Refugees (UNHCR) and academics, towards the predicament approach, which holds promise for encompassing claims based on socioeconomic deprivation despite inability to show individual intent.

Finally, Foster turns to the five protected grounds. All five grounds are potentially relevant to claims based on socioeconomic deprivation, but Foster's analysis focuses on "membership of a particular social group" (pp. 292–339). After explaining the different conceptual approaches to interpreting the social-group ground, Foster explores how various socioeconomic claims—such as those based on caste, economic class, occupation, and disability—could be brought under this ground. Thus, insofar as Zachary A. Lomo criticizes Foster for "attempt[ing] to convert economic deprivation . . . into a new independent reason for eligibility for refugee status," he mischaracterizes her argument, which persuasively shows that certain claims based on socioeconomic deprivation fit within the existing criteria for establishing refugee status.[25] Moreover, in arguing that Foster "avoids placing the problem of economic deprivation in its proper perspective" by failing to consider issues such as the "vast inequalities between western countries and developing countries resulting from historical injustices" and "destructive neo-liberal

[23] *See supra* note 2 and accompanying text.

[24] *See* James C. Hathaway, *Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT'L L. 211, 215 (2002).

[25] Lomo, *supra* note 5, at 403.

economic policies,"[26] Lomo misses the point that refugee law's sole purpose is to provide surrogate protection in individual cases, not to address global injustices.

In her conclusion, Foster addresses some important policy questions. Recognizing that many adjudicators fear "opening the floodgates" and creating an "unmanageable situation" by embracing a more expansive interpretation (pp. 344–45), Foster dissipates this fear by showing that it assumes a much more expansive conclusion than the analysis justifies. All of the world's poor could not claim refugee status since they would have to satisfy each element of the refugee definition, including the persecution and nexus elements. Moreover, the "floodgates" argument falsely assumes that all who satisfy the refugee definition will leave their home countries and seek protection in another state, when, in fact, relatively few people do so. Critics such as Rebecca Heller underestimate both the rigor required to meet elements of the refugee definition and the difficulty of traveling to another state to seek protection.[27] Moreover, contrary to Lomo's suggestion,[28] Foster does not seek to "diminish or obliterate" the distinction between refugees and migrants, but to "sharpen and clarify" it. The notion that the boundary between migrants and refugees has become blurred is far from radical; as refugee scholar Guy S. Goodwin-Gill has acknowledged, "[o]nce thought to be readily distinguishable, migratory and refugee flows are now interwoven, perhaps inextricably, and are assisted by the booming business in the traffic of human beings."[29] Foster upholds the distinction between those who flee because their fundamental human rights are violated and those flee for other reasons, but she seeks to better incorporate violations of economic and social rights into the refugee determination.

Foster's detailed and insightful book comes at a time of vigorous debate around economic, social, and cultural rights. While various scholars have sought to clarify the role, meaning, and enforceability of these rights in the context of international human rights law, Foster's book makes an original contribution by expounding on socioeconomic rights violations in the context of refugee law. Her proposal to use a "core obligations" approach to analyze refugee claims deserves particular attention given the current focus on this approach.[30] The basic idea behind a "minimum core" is that identifying certain essential obligations helps to ensure that states provide people with the basic conditions under which they can live in dignity, thereby providing a "bottom line" for state responsibility. The Maastricht Guidelines, articulated in 1997, state that minimum core obligations "apply irrespective of the availability of the resources of the country concerned or any other factors and difficulties."[31] Thus, minimum core obligations are immediately enforceable and not subject to progressive realization. Nondiscrimination is considered part of the minimum core content of all rights in the ICESCR and, as Foster stresses, applies immediately to all

[26] *Id.*

[27] *See* Heller, *supra* note 5, at 517.

[28] Lomo, *supra* note 5, at 402.

[29] Guy S. Goodwin-Gill, *Migration: International Law and Human Rights, in* MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME? 160, 162 (Bimal Ghosh ed., 2000).

[30] *See, e.g.*, Audrey R. Chapman & Sage Russell, *Introduction, in* CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1 (Audrey R. Chapman & Sage Russell eds., 2002); Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

[31] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 9, 20 HUM. RTS. Q. 691, 695 (1998) [hereinafter Maastricht Guidelines]. In 1986, the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, Netherlands), and the Urban Morgan Institute of Human Rights of the University of Cincinnati convened an important meeting of twenty-nine human rights experts that produced the Limburg Principles on the Implementation of the ICESCR. *See Symposium: The Implementation of the International Covenant on Economic, Social and Cultural Rights: Introduction*, 9 HUM. RTS. Q. 121 (1987). Ten years later, in January 1997, the same institutions convened another group of human rights experts in Maastricht to elaborate guidelines to further clarify the Limburg Principles, given dramatic changes in the world order and the substantial work of the UN Committee on Economic, Social and Cultural Rights in the intervening decade.

states.[32] According to the Committee, the minimum core of the main economic, social, and cultural rights has become customary international law and is therefore binding on all states, regardless of whether they have signed or ratified treaties protecting those rights.[33]

The idea of defining core minimum obligations appeared in the human rights literature during the 1980s, gaining authority in 1991 when the Committee adopted General Comment No. 3, declaring that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of these rights is incumbent upon every State party."[34] That same year, the Committee adopted General Comment No. 4 on the right to housing, but then dropped the project of defining minimum core obligations.[35] During the past decade, the Committee has resumed the core obligations project in earnest, adopting General Comments on the rights to education, food, health, water, and work.[36] In developing the content of the minimum core, the Committee has relied largely on the reports of state parties, perhaps due to the absence of an enforceability mechanism under the ICESCR. While scholars such as Katharine G. Young have criticized an approach based on consensus, the Committee's General Comments have nevertheless "developed an authoritativeness usually reserved for advisory opinions and enjoy a significant degree of acceptance by state parties."[37]

More recently, the Committee has shifted its focus from identifying areas of consensus to creating "a template of 'core obligations'" that "rests on, but seeks to supersede, previous analytical distinctions and typologies, such as the distinction drawn between 'conduct'-based obligations and 'result'-based obligations, and the indexing of the different duties to respect, protect, and fulfill rights."[38] Audrey Chapman and Sage Russell describe the trend of expanding core obligations as a "rising floor," and question whether minimum obligations can be identified with any conviction given this context. They suggest that returning to a narrower view of minimum obligations may help.[39] Young expresses much more skepticism about the core obligations approach, criticizing it as being "far from coherent," despite "the heavy analytical arsenal."[40] She notes that the Committee keeps changing how it defines core obligations and that little overlap exists between these core obligations and the normatively prioritized principles set forth in the treaties.[41] While

[32] The Maastricht Guidelines provide that any discrimination on account of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant." Maastricht Guidelines, *supra* note 31, at para. 11.

[33] *See, e.g.*, UN Committee on Economic, Social, and Cultural Rights, Concluding Comments (Israel) (May 23, 2003), UN Doc. E/C.12/1/Add.90, para. 31 (noting that "basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law"); *see also* SIGRUN I. SKOGLY, BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION 124 (2006); MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW 124–25 (2007).

[34] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, The Nature of States Parties Obligations, UN Doc. E/1991/23, Annex III (1990) [hereinafter General Comment No. 3].

[35] CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11(1)), UN Doc. E/1992/23 (1991), Annex III.

[36] CESCR, General Comment No. 13: The Right to Education, UN Doc. E/C.12/1999/10; CESCR, General Comment No. 12: The Right to Adequate Food, UN Doc. E/C12/1999/5 (1999); CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc. E/C.12/2000/4 [hereinafter General Comment No. 14]; CESCR, General Comment No. 15: The Right to Water, UN Doc. E/C.12/2002/11 (2002); CESCR, General Comment No. 18: The Right to Work, UN Doc. E/C.12/GC/18 (2005).

[37] Young, *supra* note 30, at 143 & n.174 (citing M. MAGDALENA SEPÚLVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 42 (2003); MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 91 (1995)).

[38] *Id.* at 152 & n.224.

[39] Chapman & Russell, *supra* note 30, at 14.

[40] Young, *supra* note 30, at 154.

[41] *Id.* at 155–56. For example, Young notes that General Comment No. 3, *supra* note 34, para. 10, allowed

the Committee may be responding to the unique obligations raised by each right, Young argues that this flux fails to explain why the Committee has assigned very different core obligations to rights that raise similar distributional questions, such as the right to food and the right to water.

Although Foster's book does not address the concerns regarding the core obligations approach raised by scholars such as Young, it nevertheless helps to propel the discussion of economic and social rights by suggesting a relatively concrete way of incorporating violations of these rights into refugee status determination. Given that Foster focuses on the individualized adjudication of refugee claims, not the human rights project in general, some criticisms of the core obligations approach seem less relevant, such as arguments that this approach will weaken the goal of fully implementing economic, social, and cultural rights and that it directs attention only to the performance of developing states.[42] Furthermore, Foster's view of minimum core obligations as flexible and evolving helps to counter the fear of the floor becoming the ceiling.

Like proponents of the core obligations approach who believe that this concept will promote enforceability, Foster's main point is simply that violations of minimum obligations can serve as a benchmark for assessing when harm rises to the level of persecution. While measuring whether a state has fulfilled its minimum core obligations remains thorny and problematic, growing literature has appeared on this subject, including a newly developed index that "demonstrates the possibility of measuring obligations for progressive realization of core economic and social rights," allowing comparison across countries and providing a means to flag state underperformance.[43] The index is still missing some important elements, including a measure of discrimination and certain core rights, but it represents a useful step in the right direction.

Foster's arguments echo those of scholars such as Craig Scott and Philip Alston, who contend that the concept of the minimum core is analytically useful and that adjudicators' failure to utilize this concept signals ideological resistance to economic, social, and cultural rights.[44] Like Foster, these commentators stress that courts have failed to draw on international documents that elucidate the concept of the minimum core. Advocates seeking to enforce the economic and social rights provisions of South Africa's 1996 Constitution have further developed arguments about the utility of the minimum obligations approach.[45] While the South African Constitutional Court has rejected a notion of a minimum core that is immediately enforceable regardless of resources, some recent decisions suggest that it may be moving closer towards recognizing core obligations.[46] Furthermore, in July 2008, the Colombian Constitutional Court issued a seminal decision calling for

an infringement of the minimum core when the State party made "every effort . . . to use all resources that are at its disposal to satisfy, as a matter of priority, those minimum obligations," whereas General Comment No. 14, *supra* note 36, para. 47, provides that "a State party cannot, under any circumstances whatsoever, justify its non-compliance with . . . core obligations . . . which are non-derogable."

[42] Young, *supra* note 30, at 114; *see also* Anker, *supra* note 1, at 153–54 ("Refugee law offers a particular structuring that confronts the human rights questions, but less contentiously than under the human rights regime's more ambitious framework. Refugee law does not seek to reform states and does not address root causes.").

[43] *See* Sakiko Fukuda-Parr, Terra Lawson-Remer & Susan Randolph, *Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment* 8 (U. Conn. Working Paper 2008-22), *available at* http://www.econ.uconn.edu/working/2008-22.pdf.

[44] *See* Craig Scott & Phillip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on* Soobramoney*'s Legacy and* Grootboom*'s Promise*, 16 S. AFR. J. HUM. RTS. 206, 213 (2000).

[45] *See, e.g.*, DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIOECONOMIC RIGHTS 178–237 (2007) (arguing that the South African Constitutional Court should embrace a minimum core obligations approach in interpreting economic and social rights); Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socioeconomic Rights: An Effective Tool in Challenging Poverty?* 6 L. DEM. & DEV. 159 (2002).

[46] *See, e.g.*, Dennis M. Davis, *Socioeconomic Rights: Do They Deliver The Goods?* 6 INT'L J. CONST. L. 687 (2008); Lisa Forman, *Justice and Justiciability: Advancing Solidarity and Justice Through South Africans' Right to Health Jurisprudence*, 27 MED. & L. 661 (2008).

modification of the entire health system, which interpreted the country's social insurance plan as defining an immediately enforceable minimum core of rights.[47] In recent years, Amnesty International has also turned its attention to social and economic rights, using the language of minimum core obligations.[48] If the concept of a minimum core can prove analytically useful in these complex situations involving general rights violations, it should also prove useful in the refugee status determination, which requires simply an individualized decision about whether someone should receive international protection based on a very particular set of facts.[49]

One important issue that scholars and activists have debated and that Foster's proposal raises is whether courts are the proper forum for defining the content of economic and social rights. Based on the South African experience, some commentators argue that judges retreat into models of adjudication based on traditional legal practice even when armed with progressive texts.[50] With respect to refugee status determination, one may question more generally whether decision makers would be overstepping the boundaries of their legitimate function, as well as their expertise, by becoming involved in identifying violations of minimum obligations. Foster briefly addresses these concerns by noting that reliance on an objective framework is less prone to error, as it increases the opportunity for judicial review, and that the risk of misunderstanding human rights provisions is reduced by interpretive guidance from the Committee. Furthermore, the risk of overstepping boundaries is much less in the context of refugee law, which has a purely palliative function: "[a] refugee decision-maker has neither the jurisdiction nor ability to make a positive finding of state responsibility vis-à-vis the state of origin" (p. 80).

Recent developments in U.S. jurisprudence highlight and reinforce many of Foster's arguments, not only by showing the general confusion that pervades cases involving economic harm but also by confirming that adjudicators tend to apply a higher standard—or to forego proper legal analysis altogether—in such cases. In 2006, the Second Circuit remanded the case of *Mirzoyan v. Gonzales* to the Board of Immigration Appeals (BIA), the highest U.S. administrative authority for immigration issues, to clarify the correct standard for assessing when economic harm amounts to persecution.[51] The court noted that the BIA had at times referenced the "deliberate imposition of substantial economic disadvantage" standard, which was introduced by the Ninth Circuit nearly forty years ago in *Kovac v. Immigration & Naturalization Service* and subsequently adopted by other circuits.[52] However, the BIA had also stated in *In re Acosta* that persecution "could consist of economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom."[53]

In 2007, the BIA issued its decision in *In re T—Z—*, which clarified that claims involving

[47] Corte Constitucional de Colombia, Sala Segunda de Revisión, Sentencia T-760 (July 31, 2008) (Magistrado Ponente: Manuel José Cepeda). The decision also provides a process for implementing the modification of the country's health system. *Id.*

[48] *See* Amnesty International, *What Are Economic, Social and Cultural Rights? at* http://www.amnesty.org/en/economic-and-social-cultural-rights/what-are-escr (visited Apr. 16, 2009).

[49] *See* Anker, *supra* note 1, at 143 ("Refugee law can also sharpen the focus of debates within the human rights discourse by grounding them in the circumstances of a real person seeking refugee law's particular, palliative solution.").

[50] *See, e.g.*, Davis, *supra* note 46, at 709.

[51] Mirzoyan v. Gonzales, 457 F.3d 217, 219–20 (2d Cir. 2006) (considering whether someone who was denied admission to a prestigious college, could not find a job in her profession, and was discharged from her job as an unskilled worker on account of her ethnicity had been subjected to persecution). The Second Circuit suggested that Mirzoyan "likely could not prevail under the standard referenced in *Acosta,* . . . but might prevail under the *Kovac* standard." *Id.* at 223.

[52] Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969); *see also* Guan Shan Liao v. U.S. Dep't of Justice, 293 F.3d 61 (2d Cir. 2002); Yong Hao Chen v. INS, 195 F.3d 198, 204 (4th Cir. 1999); Borca v. INS, 77 F.3d 210, 216 (7th Cir. 1996); Baka v. INS, 963 F.2d 1376, 1379 (10th Cir. 1992); Berdo v. INS, 432 F.2d 824, 845–46 (6th Cir. 1970).

[53] *In re* Acosta, 19 I. & N. Dec. 211, 222 (BIA 1985), *overruled on other grounds by* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

economic harm should be assessed under the standard for nonphysical forms of harm or suffering.[54] Quoting a 1978 House Report, the BIA explained that this standard requires "*the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.*"[55] According to the BIA, the second clause of the standard refers to a situation where "economic persecution may involve the deliberate deprivation of basic necessities such that life or freedom is threatened," while the first clause refers to a situation, such as "an extraordinarily severe fine or wholesale seizure of assets," that is "so severe as to amount to persecution, even though the basic necessities of life might still be attainable."[56] In embracing this definition, the BIA stressed that both the *Acosta* formulation and the House Report use the term "severe," rather than "substantial," in describing the level of harm required for persecution, indicating a higher standard than set forth in *Kovac*.[57]

The BIA further stated that the "economic difficulties must be above and beyond those generally shared by others in the country of origin and involve noticeably more than mere loss of social advantages or physical comforts," although an applicant "need not demonstrate a total deprivation of livelihood or total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution."[58] By way of example, the BIA indicated that "[a] particularly onerous fine, a large-scale confiscation of property, or a sweeping limitation of opportunities to continue to work in an established profession or business may amount to persecution even though the applicant could otherwise survive."[59]

Since the BIA issued its decision in *T—Z—*, however, some courts have continued to require economic harm to threaten life or freedom to constitute persecution. For example, in *Makatengkeng v. Gonzales*, which involved a citizen of Indonesia who could not find employment because of his albinism, the Eighth Circuit cited the standard in *T—Z—* but went on to state that "[e]xcept in a few circumstances, our court has continued to require a showing that allegations of economic hardship threaten the petitioner's life or freedom in order to rise to the level of persecution."[60] While the court noted that "[i]n the proper case, it might be appropriate for our court to revisit the standard for proving economic persecution," it concluded that "this . . . is not that case."[61] Given that Makatengkeng was able to support his family by starting his own business, the court found that his allegations "[did] not rise to the level of economic persecution under any of the standards."[62] Likewise, in *Beck v. Mukasey*, the Eighth Circuit found that a Roma couple from Hungary who had been discriminated against during their education and relegated to low-level agricultural jobs failed to demonstrate past persecution, reasoning that "private employment was available, so the economic discrimination was not sufficiently harsh to constitute a threat to life or freedom."[63]

Most recently, however, in *Ngengwe v. Mukasey*, which involved a widow from Cameroon, the Eighth Circuit seemed to embrace the standard in *T—Z—* in finding that the immigration judge had "offered no analysis, and cited no case law, on why the choice between forced marriage, death, or

[54] *In re* T—Z—, 24 I. & N. Dec. 163, 170 (BIA 2007) (citing *In re* Laipenieks, 18 I. & N. Dec. 433, 457 (BIA 1983), *rev'd on other grounds*, 750 F.2d 1427 (9th Cir. 1985)).

[55] *Id.* at 171 (emphasis added) (citing H.R. Rep. No. 95-1452, at 5, *as reprinted in* 1978 U.S.C.C.A.N. 4700, 4704).

[56] *Id.*

[57] *Id.* at 172–73. The BIA explicitly rejected an "open-ended 'substantial economic disadvantage'" test, noting that "[a] heavy fine against a wealthy individual might be seen as a substantial economic disadvantage, even if the person remains relatively wealthy and experienced no meaningful change in life style or standard of living." *Id.* at 173 n.10.

[58] *Id.* at 173.

[59] *Id.* at 174.

[60] Makatengkeng v. Gonzales, 495 F.3d 876, 883 (8th Cir. 2007). The BIA issued its decision in *T—Z—* while Makatengkeng's petition for review was pending with the Eighth Circuit. *See id.* at 876; *T—Z—*, 24 I. & N. Dec. at 163.

[61] *Makatengkeng*, 495 F.3d at 884.

[62] *Id.*

[63] Beck v. Mukasey, 527 F.3d 737, 741 (8th Cir. 2008) (internal quotations omitted).

paying an unaffordable bride's price does not constitute persecution."[64] The court further noted that the immigration judge "did not consider Ngengwe's argument that her in-laws confiscated all her property, and threatened to take her children," which is "related to whether non-physical persecution occurred."[65] Accordingly, the court remanded the case to the BIA to determine in the first instance "whether the combination of all the actions constitutes past persecution."[66] Decisions like *Ngengwe* not only highlight the confusion about the correct standard for analyzing claims of socioeconomic persecution but also underscore Foster's argument that immigration judges tend to discount this type of harm without any real analysis.[67] Of course, immigration judges frequently make the same type of errors in cases involving physical harm, failing to consider all incidents of physical harm in the record or discounting certain forms of physical harm, such as sexual violence.

Just as the immigration judge who considered Ngengwe's case did not understand that choosing between paying an unaffordable bride price and a forced marriage or death could constitute persecution, the BIA has made similarly surprising errors in reasoning. Judge Posner, authoring the Seventh Circuit's decision in *Xiu Zhen Lin v. Mukasey*, expressed disbelief at the BIA's apparent finding that sterilization induced by the inability to pay a monetary fine would not amount to persecution.[68] Citing the language in *T—Z—* indicating that a particularly onerous fine can amount to persecution, the court remanded the case to the BIA to determine "the likely consequences if the petitioner (and her son) are returned to China . . . [including] the size of the monetary penalties they are likely to impose on the petitioner . . . [and] whether she is likely to be able to pay them . . . ."[69] Thus, even the BIA has strayed from its own standard for economic persecution.

While the Tenth Circuit has not limited economic claims to those involving a threat to life or freedom, in *Vicente-Elias v. Mukasey*, it offered its own narrow interpretation of *T—Z—*, finding that "the *Kovac* test can support asylum absent a threat to life or freedom if an alien has suffered a severe *loss* of an *existing* economic/vocational advantage."[70] *Vicente-Elias* involved two Quiche-speaking individuals of Mayan ancestry who argued that they suffered economic persecution in Guatemala, "where Spanish-speakers refuse to employ native Americans who communicate in indigenous languages."[71] Rejecting Vicente-Elias's argument that the immigration judge had applied the wrong legal standard, the court found that the judge had "clearly applied the *Acosta* test," which the court found to be "consistent with *In re T—Z—* under the circumstances . . . involving general economic disadvantage but no seizure or loss of property, assets, or professional occupation/status that would implicate the *Kovac* test."[72] Since there was no evidence that the life of Vicente-Elias or his family were "threatened by economic

[64] Ngengwe v. Mukasey, 543 F.3d 1029, 1036–37 (8th Cir. 2008).

[65] *Id.* at 1037.

[66] *Id.*

[67] *See also* Manzur v. U.S. Dep't of Homeland Sec., 494 F.3d 281, 285 (2d Cir. 2007) (concluding that the immigration judge's analysis of the petitioners' economic persecution claims was insufficient to determine if he had applied the correct legal standard and remanding the case for adjudication under the standard set forth in *T—Z—*). *Manzur* involved a widow from Bangladesh and three of her adult children, who were the immediate family members of a former high-ranking military official and a leading freedom fighter. They were placed under house arrest for a month and subjected to constant surveillance and harassment for the next twelve years, including the denial of benefits and medical care, as well as obstruction of employment opportunities. *Id.* at 284–85.

[68] Xiu Zhen Lin v. Mukasey, 532 F.3d 596, 597–98 (7th Cir. 2008).

[69] *Id.* at 599; *cf.* Jian Hui Shao v. Mukasey, 546 F.3d 138, 164 & n.25 (2d Cir. 2008) (finding that the Chinese petitioners had failed to demonstrate a well-founded fear of economic persecution based on a single statement in a 2006 Country Report indicating that women with two or more children are sometimes penalized with a fee that leaves them little practical choice but to undergo an abortion, and noting that "a system of economic rewards and moderate economic penalties" did not necessarily amount to persecution).

[70] Vicente-Elias v. Mukasey, 532 F.3d 1086, 1089 (10th Cir. 2008).

[71] *Id.* at 1088.

[72] *Id.* at 1090.

circumstances," or that they "face a potential loss of freedom through some form of confinement, enforced servitude, or the like," the court affirmed the finding of no past persecution.[73]

The court's reasoning in *Vicente-Elias* seems to stem from the fear of "opening the floodgates" that Foster describes, rather than proper legal analysis, as nothing in *T—Z—* limits "severe economic deprivation" to situations where the government takes away an existing asset or employment, rather than actions or policies preventing someone from obtaining such assets or employment in the first place. Thus, while the court purported to apply the standard in *T—Z—*, it actually parsed the standard in such a way as to require a higher threshold of harm.

So far, no circuit court has explicitly addressed whether the standard in *T—Z—* is valid, but it may well be challenged in future cases as imposing a higher standard for economic harm than generally required. In *Vicente-Elias,* the Tenth Circuit specifically noted assuming, without deciding, that the standard in *T—Z—* is valid.[74] Moreover, in *Kadri v. Mukasey*, where the First Circuit remanded pursuant to *T—Z—* a case involving a Muslim Indonesian who could not work as a doctor because of his sexual orientation, the court noted that it did not need to address whether the BIA's new standard in *T—Z—* "survives *Chevron* review."[75]

Foster's book comes at a critical time, not only because of increasing acceptance of the connection between refugee law and human rights law and significant developments in the current understanding of economic and social rights, but also because more asylum applicants are articulating the aspects of their claims involving socioeconomic deprivation. All jurisdictions, including the United States, now recognize that socioeconomic harm can rise to the level of persecution, but inconsistencies and insecurities still obstruct attempts at coherent analysis. It is hoped that Foster's meticulous research, sober reasoning, and original analysis will encourage further scholarship on these pressing issues and will lead to a more sophisticated understanding of both the refugee definition and the substantive content of economic and social rights. The proper adjudication of socioeconomic claims will likely play a vital role in challenging the lingering, dominant orthodoxy of civil and political rights, help coalesce the relationship between human rights and refugee law, and promote the development of refugee law, with some coherency, as a body of law.

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[73] *Id.* at 1091–92.

[74] *Id.* at 1089 n.3.

[75] Kadri v. Mukasey, 543 F.3d 16, 22 (1st Cir. 2008) (noting that Kadri "may be able to sustain a claim for economic persecution"). The majority of the BIA had disagreed with the immigration judge's finding that Kadri has suffered past persecution based on economic deprivation. *Id.* at 21.

BOOK REVIEWS

Confronting Global Terrorism and American Neoconservatism: The Framework of a Liberal Grand Strategy. By Tom Farer. Oxford, New York: Oxford University Press, 2008. Pp. x, 257. £50, cloth; $29.95, £16.50, paper.

It is happening again. A Democratic president is pilloried by the hawkish right for being inexperienced, soft, and blindly idealistic as regards national security and foreign policy. This reprise of our familiar political theater suggests that Barack Obama's 2008 presidential victory did not close the book on the "neocons." In fact, the political repudiation of neoconservatism at the ballot box has never been a guarantee of its decline. After all, neoconservatives made quite a lot of noise from the sidelines during the waning years of the Clinton presidency, rattling their sabers ever more loudly over Saddam Hussein's Iraq. And just as the political exile of neoconservatives in the 1990s did not signal their retreat, their ubiquity in present policy debates—and the conviction with which they press their critiques—is proof that neoconservatism is with us still. Neoconservatism's muscular and righteous vision of America's historic power