



Implementing the Right to Development

The Role of International Law

Stephen P. Marks, Editor



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Harvard School of Public Health
PROGRAM ON HUMAN RIGHTS IN DEVELOPMENT

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The Program on Human Rights in Development (PRHID)

The Program on Human Rights in Development (PRHID) is part of the Department of Global Health and Population at the Harvard School of Public Health. It provides support to the High-Level Task Force on the Implementation of the Right to Development and to numerous research and teaching activities linking human rights and sustainable development. With the Nobel Institute in Oslo, it was responsible for the publication *Development as a Human Right* (2006) and is coordinating several publications relating to poverty and human rights, access to affordable drugs, comparative studies on the right to health, and methodological issues in implementing the right to development. Teaching includes courses at the Harvard School of Public Health and coordination of field experiences in health and human rights, as well as courses on World Poverty and Human Rights and related topics at Harvard College.

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Foreword

Felix Kirchmeier

One of the most decried weaknesses of the international human rights system is the so-called “implementation gap.” It occurs in various forms and shapes and surfaces in the most unanticipated places. It plagues conventions, declarations, norms, guidelines, protocols, and myriad other instruments containing international human rights obligations or commitments.

Under international law, a logical response to such a gap would be to strengthen the obligation side of the standard and to raise its legal standing and enforceability. Yet, as this infamous gap affects legal standards of varying degrees of legal force, this response might not be the only or even the preferred one to reach the goal, which is to close this gap.

For human beings, whose rights are infringed through failure to protect, respect or fulfill, addressing the implementation gap is not first and foremost a legal question. What matters more than technical compliance with a legal standard are practical measures that deliver results.

In order to deliver results in an international context, however, it is necessary to work from a common starting point towards common goals with a common understanding of the key concepts. Thus, in the case of the right to development, it is paramount to pursue the politically difficult process of finding consensus around the legal form and standing of the right. Otherwise, isolated efforts to implement it without a solid legal foundation will remain unsustainable.

The Geneva Office of the Friedrich-Ebert-Stiftung has accompanied and supported the UN debate around the right to development over the last several years from a civil society perspective. On various occasions, we have observed how important it is to give voice to civil society actors, including academics from all geographical regions, without which the debate runs the risk of falling into a deadlock caused by political divergences. In our role as an organization that tries to build bridges between civil society movements and policy makers, we hope our broad outreach will help foster consensus around this difficult issue.

With the present volume, based on papers presented at an expert meeting hosted by FES in January 2008, we want to continue on this path, providing nonpartisan expertise in form of academic articles. We hope the ideas and proposals contained in the papers and comments in this book will advance thinking on possible applications of international law to the challenge of implementing the right to development.

We want to express our heartfelt thanks to the authors and editor for their outstanding work and sustained commitment to the present volume. In their contributions, the authors offer a rich variety of alternative and parallel approaches to the productive use of international law to further the right to development. If future deliberations can be better informed and focused on practical outcomes as a result, our aims in producing this publication will have been fully realized.

Preface

Arjun K. Sengupta

The discourse on the Right to Development has evolved significantly in the twenty-two years since it was proclaimed in the Declaration on the Right to Development in 1986. Initially it was described as a right that was qualitatively different from other rights reaffirmed in the human rights covenants. As international co-operation was a crucial element in the realization of any development, it was blown up as a “third-generation solidarity right,” as distinct from the first and second-generation rights, involving the primary obligation of national states. Because the developing countries were the principal sponsors of this right, it was described as a right of the developing countries, although many developed countries joined the sponsorship and the right was to be exercised and enjoyed by individuals from both the developed and developing countries, like any other recognized human rights. As the right to development was defined as involving the progressive realization of all fundamental freedoms and rights, it was regarded as an ‘aspirational’ right, which can only be aimed at but not ‘realized’, even if it is feasible to phase in the realization of different rights at different points of time consistent with the expansion of resources and technology.

The debates on all these issues are now mostly settled. After the Vienna Conference on Human Rights of 1993 and several other international conferences and summits, the right to development is now recognized as a ‘human right’ like other internationally accepted human rights. It clarifies norms and standards of behavior in different societies, providing grounds for individuals to claim their rights, which the authorities at the national and international level are obliged to fulfill. The debates in this area have now shifted towards the implementation of the right to development and mechanisms and policies to be adopted by the authorities to enable the realization of this right in a progressive manner.

The duty to implement all human right applies to all developed and developing countries, wherever individuals suffer from the lack of these rights. The right to development is a special right, in the sense that it is a composite of all, or at least the basic rights. But in all other respects, it is as much a human right, as any other civil and political, economic, social or cultural right.

There are three main considerations in any process of implementation of this right. First, this right has to be identified with some indicators that can be unequivocally defined, corresponding to the content of the right. An increased value of the indicators would imply improved realization of the right. This exercise, however, should not be confused with the exercise of defining the content of the right. It is of course essential that the content be defined and that its justification as an ethical demand of a paramount importance be understood as reflecting accepted values and norms of behavior. From this definition and justification derive obligations of the authorities to enable the fulfillment of the right. Indeed, the content of any right should be defined in such a way that it is distinct from any other right, although all rights are interdependent when it comes to fulfillment. In other words, they can be evaluated separately both as objectives and as instruments for realizing other rights. But all definitions of content and the formulation of norms must occur before identifying the indicators and measuring whether and to what extent there has been any improvement in the realization of human rights.

The fulfillment of human rights, including the right to development, also requires specific policies and programs, with corresponding resource allocation. This is necessary to establish the feasibility of the right, so that the obligations of the duty-bearers can be specified. A right always entails obligations of some agents in the society, the state-authorities or other actors, who have the power to

deliver the right or adopt policies that have a high likelihood of delivering the right. If a right is not feasible, there can be no duty or obligation of any agent to deliver the right, in which case the targeted objective cannot be a right.

For the right to development, which is a composite of different rights, this would require formulating a development programme, consisting of coordinated policies to fulfill the different rights in a phased manner. The society has to decide, through a process of consultation, which rights have to be taken first, and which later in successive phases, as a part of the development process and policies for realizing those rights, coordinated both cross-sectionally and inter-temporally. Even if a complete programme covering all the rights cannot be established immediately, there is a minimum obligation to start with policies aimed at fulfilling a limited number of rights considered essential to development, such as those relating to food, health, education or employment opportunity. Such policies must be coordinated with given resources as well as programmes to increase those resources. This focus on coordinated policy and resources differentiates the fulfillment of the right to development from the fulfillment of other specific rights, and cannot be bypassed by just concentrating on some individual rights. For instance, the right to health could be implemented on its own but, when treated as a component of the right to development, its realization must include policies to expand resources as well as institutions over time, taking into account competing claims of other rights, which must be coordinated with the right to health. Such exercise might imply a much larger claim on resources and much greater inputs from international cooperation than would be the case for the fulfillment of the right to health by itself.

Clearly, such an exercise of designing development programmes will have to be context-specific, depending upon conditions prevailing in a particular country. But, from a human rights perspective, each program must specify the obligations of the different duty-bearers that will maximize the realization of the rights in question. This is an essential step in the exercise if the right to develop-

ment is accepted as a human right. If such obligations for each duty-holder contributing to fulfilling the right to development, then it is possible to speak of binding obligations on individual agents. It is to be expected that those who consider the right to development to be like any other human right would seek to establish such binding obligations through international law.

However, as the preceding discussion shows, there are difficulties in formulating the right to development in terms of binding obligations. For example, the obligation of agent A to adopt policies X, Y, Z would have to be based on a clear demonstration that those policies do indeed fulfill the right. The obligation would be binding only to the extent that a causal link can be established between non-performance of the duty and the failure to achieve the results required by the right to development. For economic and social rights, it is always difficult to establish this link and it is even more difficult to do so for the right to development, which involves the fulfillment of the number of rights. The inter-dependence between the rights and the actions of the different duty-bearers especially in an environment of many unforeseen factors would require the identification contingent obligations. Thus it will be necessary to identify not only the policies the agent 'A' must adopt, but also how those policies should be adjusted if other agents B, C or D adopt some actions that impact on the fulfillment of the right. The obligation to adopt these policies would be contingent on the other actions being taken, and cannot be regarded as binding independent of those actions. It is, of course, in principle possible to identify such contingent obligations but to make them "binding" one has to demonstrate the effectiveness of such a procedure in fulfilling the right. That would require some case studies and other evidence adequate to persuade the society to accept them as binding obligations. Once the obligations were deemed binding, it would be necessary to work out a mechanism of enforcement, whether in the domestic legal system or under international law or through a process of peer pressure and moral suasion. These issues have to be examined in terms of accepted legal principles

and procedures – a process that may take quite some time and persistence in consensus building.

It is of course possible to say that the obligations can be fulfilled often without legal enforcement but rather basing behavior on ethical demands used in the society to gauge legitimacy of governance. But that will not obviate the need for formulating binding legal obligations, however long and arduous it may be to reach consensus. It is worth the effort to reach such a consensus in order to make the right to development a proper human right, comparable to the other internationally accepted human rights.

This book is a major attempt to move towards this objective. It brings out clearly the difficulties of the process, the problems associated with converting the ethical demands of action to legal obligations and identifying the mechanism of adopting corrective actions when the obligations are not fulfilled. The human rights community, government legal offices, academics, and the broader public interested in the law and politics of human rights will no doubt welcome this publication and the light it sheds of the potential uses of international law to further the ethical demand to realize the right to development and the acceptance of the obligations it implies by all members of the international community.

Introduction

Stephen P. Marks

This collection of papers deals with the legal issues involved in considering an international convention on the right to development. It is the outcome of a meeting jointly convened by the Program on Human Rights in Development of the Harvard School of Public Health and the Friedrich-Ebert-Stiftung Geneva Office in an effort to provide clarity regarding a highly charged issue on the human rights agenda of the international system. The Expert Meeting on legal perspectives involved in implementing the right to development was held at the Chateau de Bossey, Geneva, Switzerland, on January 4–6, 2008, and was attended by 24 experts in their personal capacity.

While positions of governments are entrenched and debates in the diplomatic setting of the General Assembly or the Human Rights Council are often acrimonious, none of the contributions to this study is premised on any political preference for or against the elaboration of a convention. The aim of each author was to provide clarity regarding the legal problems to be addressed.

The motivation for convening the meeting was to assist the process of the High Level Task Force (HLTF) in implementing Resolution 4/4 of the Human Rights Council, which requires the HLTF to execute a work plan, the final phase of which might include “consideration of an international legal standard of a binding nature.”¹ However, at the time the meeting took place, the HLTF’s mandate was limited to applying and perfecting the criteria it had elaborated for evaluating the implementation of the right to development (RTD), independently of the idea of a convention.

The eventuality of a convention should be seen in the context of the Human Rights Council decision:

- (b) *“To endorse the road map outlined in paragraphs 52 to 54 of the report of the eighth session of the Working Group on the Right to Development, which would ensure that the criteria for the periodic evaluation of global partnerships, as identified in Millennium Development Goal 8, prepared by the high-level task force and being progressively developed and refined by the Working Group, is extended to other components of Millennium Development Goal 8, by no later than 2009;*
- (c) *That the above criteria, as endorsed by the Working Group, should be used, as appropriate, in the elaboration of a comprehensive and coherent set of standards for the implementation of the right to development;*
- (d) *That, upon completion of the above phases, the Working Group will take appropriate steps for ensuring respect for and practical application of these standards, which could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement.”²*

There should be no ambiguity regarding the current status of the idea of a legally-binding instrument on the RTD. Indeed, the Open Ended Working Group (OEWG) has requested that the HLTF do four things before considering a transformation from criteria to treaty standards. The four stages are:

1. Apply the criteria to the four existing partnerships.
2. Extend the application to other areas of MDG 8.

1. Human Rights Council Resolution 4/4, adopted without a vote on March 30, 2007.

2. *Id.*

3. Expand the criteria into a “comprehensive and coherent set of standards for the implementation of the right to development.”
4. Further advance the application of these standards through steps as yet undetermined but which may take the form of guidelines and may evolve as a basis for consideration of a treaty norm, called “an international legal standard of a binding nature.”

Only if at the end of this process it is decided, “through a collaborative process of engagement,” to move toward a treaty, then the guidelines or criteria would be rewritten as treaty standards. If a group of states does not wish to engage collaboratively in this process, which is the case of the US, the EU, Japan, Australia, and Canada now, then other forms would be explored to implement para. 1(d) of Human Rights Council Resolution 4/4.

Therefore, this collection of papers anticipates the sorts of issues to be addressed when the HLTF reaches stage four. It assumes that the criteria have evolved in light of dialogue with development partners and the critique of specialist in quantitative and qualitative methods.

There are three major themes that define the parts to this publication: the RTD as a legal norm, the experience with existing treaty norms on this right, and the practical issues of using the means and methods of international treaty law to advance it.

Under the first theme, Margot Salomon, a Professor of human rights at the London School of Economics who has followed closely the progress concerning the RTD for the last decade, discussed the nature and scope of the right as a legal norm, relating it to the broader issues of international social justice, or, as she puts it so eloquently, of the potential of the RTD “to humanize the global marketplace.” She concludes by underscoring the similarity of the RTD with the internal and external dimensions of the right to self-determination.

In an insightful comparison with the experience in drafting the International Convention on the Rights of Persons with Disabilities, in which he was deeply engaged, Professor Michael Stein, Executive Director, Harvard Project on Disability, with Janet E. Lord, Research Associate at the Project,

conclude that “The efficacy of human rights instruments may in the end be more heavily determined by the extent to which any given state commits itself to the values underlying those instruments than by the character of the protection as hard, soft, or customary.”

In her chapter, Sabine von Schorlemer, Professor of International Law, European Union Law and International Relations, Technical University of Dresden, analyzes the costs and benefits of converting the Declaration on the RTD into a treaty on the subject. She concludes that “there may be good reasons not to expand treaty law further,” adding that “a treaty always risks to unduly abbreviate the process of continuing legal development,” particularly when the nature of the right is dynamic, as is the case with the RTD.

In a highly original essay, Professor Xigen Wang, Vice Dean of Wuhan University Law School and Deputy Director of Jurisprudence Branch of China Law Society, proposes to redefine the RTD as the “right to sustainable development,” for which he outlines the jurisprudential foundations. He proposes to “renovate the concept of the RTD and ensure sustainability... [with] a solid foundation in theory and practice [and] ...a basis for legislation and its implementation.” It should be added that Professor Wang is completing a major five-year research project on the RTD and the Rule of Law in the People’s Republic of China, with the approval of the State Council. Like his chapter in this book, his research project is both a contribution to legal philosophy and a proposal for legal reform. His objective is to expand the meaning of the RTD and to suggest new human rights legislation and even amendments to China’s constitutional laws, to make them more responsive to human rights needs of the people.

Concluding this section is a chapter by Upendra Baxi, Professor of Law at the University of Warwick, who was unable to attend the Expert Meeting at Chateau de Bossey but provided his thoughts in written form. He identifies eight factors that determine or condition the passage from declaration to treaty and examines the RTD in light of them. After weighing the costs and benefits of a treaty, he sees advantages in a framework RTD treaty, the drafting of which should “privilege the

voices of the suffering and rightless peoples and the communities in resistance.”

While the first theme clarified the scope of the RTD in international law, the second theme address the experience with existing treaty norms that explicitly or implicitly refer to the RTD. For this purpose, Obiora Chinedu Okafor, Associate Professor, Osgoode Hall Law School of York University, Toronto, Canada, analyzes Article 22 of the African Charter of Human and Peoples Rights, as well as relevant cases before the African Commission. The analysis warns that an eventual convention of the RTD should avoid uncritically mirroring the defects of the African Charter and the Declaration on the Right to Development. Further, he stresses the importance for any such treaty for understanding development in human development terms and recognizing the participatory development imperative, among other critical features.

In his assessment of Article 17 and Chapter VII of the revised Charter of the Organization of American States and relevant experience of OAS institutions, Dante M. Negro, Director of the Office of International Law of the OAS, points out that “While Article 17 establishes the right of the state to develop its cultural, political and economic life freely and naturally, nothing in Chapter VII of the Charter would seem to indicate that this right pertains to integral development...” which is the principal approach of the OAS to development through the Inter-American Council for Integral Development, the Executive Secretariat for Integral Development, as well as the draft Social Charter of the Americas and Plan of Action.

The third and final part of the book deals with the practical aspects of moving from the current mandate of the UN regarding the RTD, to the application of the tools of treaty law to advance this right. In my paper on “A legal perspective on the evolving criteria of the HLTF on the right to development,” after enumerating the difficulties, I present some possible formulations of treaty norms based on the current criteria of the HLTF and identify six core obligations that might be the subject of treaty negotiation.

Felix Kirchmeier, Monika Lüke, and Britt Kalla present the experiences of FES and the German Agency for Technical Cooperation (GTZ) in applying the criteria to the Kenyan-German development partnership as a pilot project. Using a matrix to evaluate this partnership, they offer specific suggestions for improving the criteria and related indicators, and recommend the development of similar evaluations of other bilateral partnerships.

Koen De Feyter, Professor of International Law and Convenor of the Law and Development Research Group at the Faculty of Law of the University of Antwerp, looks at the relation of the RTD to existing substantive treaty regimes in the fields of human rights, trade, environment, development, and labor. He proposes an innovative alternative to a convention in the form of a Multi-Stakeholder Agreement on the Right to Development, the purpose of which would be “to bring together a coalition of public and private actors who are willing to commit to the RTD by establishing best practices that demonstrate that the RTD can be implemented in a meaningful way.”

In her chapter, Beate Rudolf, Junior Professor of Public Law and Equality Law at the Free University of Berlin, Faculty of Law, and director of the research project on “Public International Law Standards for Governance in Weak and Failing States,” analyzes “the overlap and gaps between the contents of the RTD and existing treaties.” After outlining what the RTD adds to these treaties, she concludes that “the RTD can be accommodated within the present system of international law,” by altering, completing, and strengthening existing norms.

The topic of approaches to complying with paragraph 2 (d) of Human Rights Council Resolution 4/4 and the meaning of “a collaborative process of engagement” is studied in a paper by Ibrahim Salama, former Chair of the Working Group on the Right to Development. He notes that, despite the current “institutional weaknesses and substantive complexities,” the RTD can survive thanks to the “increasingly positive role” of the global partnerships for development. But in order to further develop its “institutional engineering...

we need to rediscover the RTD as a guarantor of the indivisibility of all human rights.”

Finally, Nicolaas Schrijver, Professor of International Law at Leiden, Netherlands, and member of the HLTF, presents a typology of legal techniques of international law other than a treaty that can serve the same goal, including enhancing the 1986 Declaration, developing guidelines and recommendations, concluding development compacts, and mainstreaming the Declaration into regional and interregional instruments. He concludes by proposing “to give priority to the implementation of the RTD through a process of establishing, refining, and applying guidelines as requested by the Human Rights Council and currently undertaken by the High-level Task Force rather than hastily embarking on a treaty-making process.”

Where do we go from here?

Clearly, the exploration of whether and how to move the RTD from declaration to treaty will require more study. The bibliography included at the end provides a starting point for sorting out the vast amount of legally relevant official and scholarly material covering general legal theory and issues of implementation at the national, regional and global levels. This publication has to be placed in the context of the mandate that OEWG has given to the HLTF to develop a method for critically scrutinizing significant features of the international economic relations in the hope that this process will influence the practice of the components of global partnerships toward greater compliance with the RTD. There seems to be political consensus on the value of this approach. The consensus breaks down, however, when reference is made to a “treaty,” “convention,” or “international legal standard of a binding nature.” In order to break out of the political stalemate, it is useful to

examine the opposing views and what this publication might contribute to reconciling them.

Support for a treaty comes primarily from the members of the Non-Aligned Movement (NAM), which met at the summit level of the heads of state and government, in Kuala Lumpur, Malaysia in February 2003, and in Havana in September 2006. At the latter session, the heads of state and government of the NAM countries urged “the UN human rights machinery to ensure the operationalization of the RTD as a priority, including through the elaboration of a Convention on the Right to Development by the relevant machinery, taking into account the recommendations of relevant initiatives.”³

During the fourth session of the Council, NAM’s position was entered into the record as follows:

33. NAM declared for the record that a majority of states was in favor of an international legally binding instrument on the right to development and that it should be reflected explicitly in the conclusions and recommendations of the Working Group.⁴

Similarly, the resolution presented on behalf of NAM by Cuba in the Third committee of the General Assembly in December 18, 2007, contained the following language:

- “8. *Emphasizes the importance that, upon completion of the above phases, the Working Group take appropriate steps for ensuring respect for and practical application of these standards, which could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement;*
- 9. *Stresses the importance of the core principles contained in the conclusions of the Working Group at its third session,⁵ congruent with the purpose of international human rights instruments, such as*

3 Final Document, 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement, Havana, Cuba, 11th to 16th of September, 2006, NAM 2006/Doc.1/Rev.3, Havana, Cuba, 16 September 2006, para. 235.10.

4 Report of the Working Group on the Right to Development on its eighth session (Geneva, 26 February – 2 March 2007), UN Doc. A/HRC/4/47, 14 March 2007, p. 9.

5 E/CN.4/2002/28/Rev.1, sect. VIII.A.

equality, non-discrimination, accountability, participation and international cooperation, as critical to mainstreaming the right to development at the national and international levels, and underlines the importance of the principles of equity and transparency;

- 10. Also stresses that it is important that the high-level task force and the Working Group, in the discharge of their mandates, take into account the need:
- ...
- (c) To strive for greater acceptance, operationalization and realization of the right to development at the international level, while urging all states to undertake at the national level the necessary policy formulation and to institute the measures required for the implementation of the right to development as a fundamental human right, and also urging all States to expand and deepen mutually beneficial cooperation in ensuring development and eliminating obstacles to development in the context of promoting effective international cooperation for the realization of the right to development, bearing in mind that lasting progress towards the implementation of the right to development requires effective development policies at the national level as well as equitable economic relations and a favourable economic environment at the international level;
- (d) To consider ways and means to continue to ensure the operationalization of the right to development as a priority, including through further consideration of the elaboration of a convention on the right to development.“

After consensus was reached at the level of the Working Group in March 2007 over the language reproduced in paragraph 8 of the General Assembly resolution, the Cuban delegate insisted on making a statement on behalf of NAM as follows: “The Non-Aligned Movement interprets the phrase ‘international legal standard of a binding nature,’ contained in paragraph 52 of the conclusions and recommendations, to mean ‘internationally legal-

ly binding convention.’”⁶ This statement provoked Canada,⁷ the European Union,⁸ and Australia⁹ to express their opposition to the elaboration of a convention. Similarly, the insistence on paragraph 10 in the General Assembly resolution resulted in 53 negative votes on December 18, 2007.

Both results could have been avoided if the consensus language agreed upon in Geneva had been maintained. NAM had probably already achieved the maximum it could have hoped for with a reference to “an international legal standard of a binding nature.” It is unfortunate that the group mandated at the summit level to urge the UN to consider a convention has been unable to create “a collaborative process of engagement” (in the words of the resolution) to advance its objective. In fact, the insistence on paragraph 10 (d) (“consideration of the elaboration of a convention”) could have as a direct consequence a serious weakening of the ability of the HLTF to contribute to 10 (c) (“promoting effective international cooperation for the realization of the right to development”) since the 53 states that voted against the resolution on December 18, 2007 include all the OECD and EC members with whom cooperation is essential.

It is, therefore, a premise of this publication that the promotion of the RTD is served by removing this unnecessary politicization from the study of the legal issues involved in considering a convention on the RTD. It is more useful to consider whether and to what extent the means and methods of international law could be applied in a variety of ways, including an eventual treaty standard if and when the political climate is more conducive to such an undertaking.

This publication has taken that path. There is no doubt that the participants share a concern about – and indeed a commitment to – the realization of a “just international and social order” to which all are entitled under Article 28 of the Universal Declaration of Human Rights. All of them

⁶ Report of the Working Group on the Right to Development on its eighth session (Geneva, 26 February – 2 March 2007), UN Doc. A/HRC/4/47, March 14, 2007, Annex III, para. 60.

⁷ Id., para. 61-62.

⁸ Id., para. 63.

⁹ Id., para. 64.

agree that international law must be part of the solution to the unfairness of the global political economy, rather than part of the problem of entrenched and legally protected interests of the wealthiest countries and multinational enterprises. Thus, as the joint statement at the conclusion of this publication shows, the experts who took part in the meeting believe that the political divide on this issue “can and must be bridged.” They also considered that, however desirable an eventual treaty might be, it would be “preferable to give

priority to the implementation of the right to development through a process of establishing, refining and applying guidelines as requested by the Human Rights Council,” which does not exclude, at the appropriate time, moving “to a new form of legal instrument.” The clear objective, in the last analysis, is “to move from political aspirations to practical applications” and thereby contribute to the task of making the right to development, in the words of the 2000 Millennium Declaration, “a reality for everyone.”

Part I: THE RIGHT TO DEVELOPMENT AS A LEGAL NORM

Chapter 1: Legal Cosmopolitanism and the Normative Contribution of the Right to Development*

Margot E. Salomon**

This paper is concerned with the legal responsibilities of states for the violation of socio-economic rights globally. In particular, it considers the normative function of the right to development in offering a legal framework with the potential to humanize the global marketplace. It provides that the right to development has an important juridical contribution to make given the defining features of the international economic order, with the most salient element of this right found in its potential challenge to existing political and economic global arrangements. In this era of globalization that seeks to provide for an international environment conducive to the further accumulation of wealth by the wealthy through the expansive tendencies of

global capital, the right to development demands international cooperation under law for the creation of a structural environment favorable to the realization of basic human rights, for everyone. It is what Georges Abi-Saab in his commentary on this paper referred to as an “enabling right.”

Like the collective right of self-determination that preceded it, the right to development has both external and internal dimensions. The external dimension addresses disparities of the international political economy which evidence massive global inequities,¹ and the consequent post cold war growth in social and material inequality between states.² This aspect of the right engages the responsibilities of states internationally when act-

* This note is based on a paper presented at the Expert Meeting on Legal Perspectives involved in Implementing the Right to Development (Geneva, January 4-6, 2008) organised by the Program on Human Rights in Development of the Harvard School of Public Health and the Friedrich-Ebert-Stiftung. I take this opportunity to thank the participants for their valuable insights on this subject, in particular my discussant, Georges Abi-Saab. This submission draws on M.E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, 2007).

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1 “One predetermined circumstance that most powerfully determines a person’s opportunities for leading a healthy and productive life is his or her country of birth. Global inequities are massive. ... G]lobal markets are far from equitable, and the rules governing their functioning have a disproportionately negative effect on developing countries.” *World Bank, World Development Report 2006: Equity and Development* (World Bank/Oxford University Press, 2006), p. 16.

2 “For most of the world’s poorest countries, the past decade has continued a disheartening trend: not only have they failed to reduce poverty, but they are falling further behind rich countries. Measured at the extremes, the gap between the average citizen in the richest and poorest countries is wide and getting wider. In 1990, the average American was 38 times richer than the average Tanzanian. Today, the average American is 61 times richer. ... [But] [p]art of the problem with the debate over global inequality is that it misses an important point. Income inequality is exceptionally high however it is measured and regardless of whether it is rising or falling.” UNDP, *Human Development Report 2005: International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (Oxford University Press, 2005), pp. 36-37.

Inequality has risen within states as well, an aspect addressed, in part, by the internal dimension of the right to development. The UNDP provides that: “[T]here has been a clear trend over the past two decades towards rising inequality within countries. Of the 73 countries for which data are available, 53 (with more than 80% of the world’s population) have seen inequality rise, while only 9 (with 4% of the population) have seen it narrow. This holds true in both high and low growth situations (such as China in the first case and Bolivia in the second) and across all regions.” *Ibid.*, at 55.

ing individually or collectively. The internal dimension of the right to development focuses on the duties of each state to ensure domestic policies that seek to contribute to the realization of the fundamental human rights of all its subjects. These two dimensions are to a great degree interrelated. As reflected in the 1986 United Nations Declaration on the Right Development (DRD)³ states have both “the right and the duty to formulate appropriate national development policies,” the “right” being exercisable against the international community.⁴ Another particularity is that the Declaration is characterized by a “responsibilities approach;” its articles focus on delineating duties rather than detailing rights. This element reinforces the appreciation that the right to development is less about establishing a new substantive right, and more about framing a system of duties that might give better effect to existing rights.

A brief sketch of the legal foundations of the international (i.e. external) obligations of states

regarding inter alia the right to an adequate standard of living, the rights to food, health and education in developing countries reminds us that the external responsibilities of states have always been a core element in human rights treaties that address socio-economic rights.⁵ The United Nations (UN) Charter’s emphasis on social justice and human rights linked those elements to a stable international order.⁶ The realization of these common goals was recognized as requiring cooperation among states, and it is this tenet that constitutes the essence of this foundational treaty. Subsequent legal sources addressing international cooperation can be found in the Universal Declaration of Human Rights (UDHR),⁷ notably at Articles 22 and 28. Article 22 recognizes that “social security” – a right receiving increased attention as a response to market failures – requires “national effort and international co-operation.”⁸ Article 28 establishes the entitlement of all to a just social and international order in which human rights can be realized.

3 DRD, GA res A/RES/41/128, December 4, 1986, annex 41 UN GAOR Supplement. (no 53) 186, UN Doc A/RES/41/53 (1986).

4 DRD, art 2(3). “Appropriate” development policies, as per article 2(3), are those “that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.” And see, A. Orford, “Globalization and the Right to Development,” in P. Alston (ed.), *Peoples’ Rights* (Oxford University Press, 2001) p. 127, at 137.

5 The broad categories of “developing” and “developed” countries are used here as shorthand to denote the affluent and poor parts of the world respectively, just as the WTO Deputy Director-General recently offered a long list of imbalances that would need to be corrected if the multilateral trading system were to be fair to developing countries, while recognising the range of cleavages and alliances within those two broad categories. V Sendanyoye-Rugwabiza, “Is the Doha Development Round a Development Round?,” (London School of Economics, March 31, 2006).

6 Charter of the United Nations (1945), entered into force October 24, 1945, 59 Stat. 1031, TS 993, 3 Bevans 1193.

7 Universal Declaration of Human Rights, General Assembly res. 217A (III), 10 Dec. 1948, UN GAOR, 3rd Session Resolutions, pt. 1 at 71, UN Doc A/810 (1948).

8 “The momentum of international agencies, transnational corporations and the global market compels modernisation and a realistic extension of social security, including social insurance.” See, P Townsend, *The Right to Social Security and National Development: Lessons from OECD Experience for Low-Income Countries*, Discussion Paper 18 (Geneva, International Labour Organization, 2007) 2; “[Thus] access [to programmes that help individuals make employment transitions, and solid safety nets and assured access to basic services such as education and healthcare] must not vary with the ebb and flow of economic activity and personal circumstances. To have an open economy we may need a more protective one than we have had in the recent past.” D. Leipziger and M. Spence, “Globalisation’s Losers Need Support,” *Financial Times* (May 15, 2007). (Leipziger is a vice-president at the World Bank)

Note also Article 25 UDHR: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” And, CESCR, General Comment No. 19 on The Right to Social Security (Article 9), (39th session, 2007) UN Doc. E/C.12/GC/19.

Para 57: “With regard to the conclusion and implementation of international and regional agreements, States Parties should take steps to ensure that these instruments do not adversely impact upon the right to social security. Agreements concerning trade liberalization should not restrict the capacity of a State Party to ensure the full realization of the right to social security.”

Para 58: “States Parties should ensure that their actions as members of international organizations take due account of the right to social security. Accordingly, States Parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to social security is taken into account in their lending policies, credit agreements and other international measures. States Parties should ensure that the policies and practices of international and regional financial institutions, in particular those concerning their role in structural adjustment and in the design and implementation of social security systems, promote and do not interfere with the right to social security.”

Para 61: “The Committee also wishes to emphasize that it is particularly incumbent on States Parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical, to enable developing countries to fulfil their core obligations.”

Para 82: “[I]nternational organizations concerned with trade such as the World Trade Organization, should cooperate effectively with States Parties, building on their respective expertise, in relation to the implementation of the right to social security.”

The Declaration on the Right to Development makes a vital contribution in this area with duties of international cooperation informing its logic and shaping its structure: Article 3(1) provides that states have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development; Article 3(3) refers to the duty of all states to cooperate with each other in ensuring development and eliminating obstacles to development. This is followed by Article 4(1) which refers to the duty of all states to take steps individually and collectively to formulate international development policies in order to facilitate the full realization of the right to development. In Article 4(2) the DRD unambiguously accepts that effective international cooperation is essential “[a]s a *complement* to the efforts of developing countries [and] in providing these countries with appropriate means and facilities to foster their comprehensive development.”⁹ Article 6(1) of the Declaration calls upon states to cooperate in promoting, encouraging, and strengthening universal respect for human rights and fundamental freedoms for all. Under Article 10, states acting nationally and internationally are enjoined to take “steps to ensure the full exercise and progressive enhancement of the right through the formulation, adoption and implementation of policy, legislative and other measures.” As Ian Brownlie concluded in the years following the Declaration’s adoption: “the right constitutes a general affirmation of a need for a programme of international economic justice.”¹⁰

In binding human rights treaties, we find obligations of “international assistance and cooperation” at Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are reaffirmed in the context of the right to an adequate standard of living (Article 11(1))¹¹ and “the fundamental right of everyone to be free from hunger” (Article 11(2)). References to obligations of international cooperation for economic, social and cultural rights appear throughout the Convention on the Rights of the Child (CRC), which explicitly includes the requirement that “particular account shall be taken of the needs of developing countries.”¹² International cooperation has found its most recent endorsement via the adoption of the Convention on the Rights of Persons with Disabilities, which, notably, anticipates ratification by regional organizations with the European Community having already signed.¹³

These articulations provide that the dominant members of the international community of states, or, in the words of the Committee on Economic, Social and Cultural Rights (CESCR), “all those in a position to assist,”¹⁴ have not only a role but also a responsibility in contributing to the immediate realization of the minimum essential level of socio-economic rights globally.¹⁵

The significance and interpretation of this responsibility is today informed by three central factors: 1) the impact on human rights derived of powerful actors *external* to the developing state advancing rules governing world markets that are widely criticized for being inequitable¹⁶ 2) the

9 Emphasis added.

10 I. Brownlie, “The Human Right to Development,” Commonwealth Secretariat (1989), p. 1, at 8.

11 The qualification provided in this article – that international cooperation depends on “free consent” – should be weighed against what today constitutes “maximum available resources” and repeated international commitments to address world hunger and to lift people out of abject poverty. Moreover, in a world witness to mass starvation and to a systemic global wealth divide the notion that attending to world poverty should rest on “free consent” lacks any legitimacy.

12 International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), December 16, 1966, entered into force on January 3, 1976; Convention on the Rights of the Child, GA res. 44/25 of November 20, 1989, entered into force on September 2, 1990.

13 Convention on the Rights of Persons with Disabilities and Optional Protocol, GA res. A/RES/61/106 adopted December 13, 2006, entered into force on May 3, 2008.

14 CESCR, *Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights* (25th session, 2001) UN Doc E/C12/2001/10, para 16.

15 While all countries, including poor and middle-income countries, have human rights obligations both domestically and internationally, certain responsibilities in the alleviation of world poverty – the cornerstone of the right to development – apply exclusively to developed countries and constitute an “essential complement” to domestic efforts at fulfilling socio-economic rights.

16 The World Bank notes: “The rules that govern markets for labour, goods, ideas, capital, and the use of natural resources need to become more equitable. ... Changes will require, above all, greater accountability at the global level, with greater representation of poor people’s interests in rule-setting bodies.” World Bank, *World Development Report 2006*, *supra* n. 1, at 223.

pervasive influence of international economic organizations that continue to espouse neoliberalism (or its more recent variant),¹⁷ and 3) the corresponding reduction in domestic autonomy that limits the ability of states – particularly poor and less influential states – to decide independently their own economic and social policies.¹⁸

Paramount among the legal questions that vex the meaningful application of an obligation of international cooperation for the realization of economic, social and cultural rights is the interplay between the domestic and external nature of obligations.¹⁹ Despite the repeated codification of human rights obligations of “international cooperation” (international assistance and cooperation), and regardless of the fact that the realization of economic, social, and cultural rights are envisaged as giving rise to responsibilities for states other than the rights-holder’s own, there remains a sense that these external obligations challenge the classical assumption of international human rights law which is rooted in the protection of individuals against abuse by *their* own state, as opposed to enhance its object and purpose.

At the heart of this classical model lies the legal premise that the primary obligation for the realization of human rights, including economic, social and cultural rights, belongs to the developing state acting in its domestic capacity. The DRD (a document which is the result, of course, of political compromise) is consistent with human rights instruments in this regard. As per preambular paragraph 15, the primary responsibility for creating conditions favorable to the development of peoples and individuals lies with the state acting domestically. With regard to obligations to “respect” and “protect” human rights, there is little controversy in suggesting that the domestic state and the external states are simultaneously and to the same extent bound to refrain from violating socio-economic rights (respect) and to ensure protection against violations by third parties over which they exercise authority (e.g. transnational corporations, international financial institutions). The controversy (both legal and political) arises when we speak of the positive obligations of external states to “fulfill” (“to cooperate” in fulfilling) socio-economic rights elsewhere.²⁰ In this case, the international (external) obligations are largely understood as secondary obligations, that is, they become relevant when the developing state (the primary duty-

17 “The ideologically hegemonic position has been the neoliberal agenda (widely called the Washington Consensus). It calls for trade and financial liberalization, privatization, deregulation, openness to foreign direct investment, a competitive exchange rate, fiscal discipline, lower taxes, and smaller government.” (Footnote omitted). WK Tabb, *Economic Governance in the Age of Globalization* (Columbia University Press, 2004), p. 3. The admission that the welfare benefits of globalisation were ‘oversold’ (see for example, P Krugman, “Globalisation and Welfare,” London School of Economics, June 14, 2007) lead to “post-Washington Consensus” policies which have been described as “maintain[ing] a neoliberal approach to globalization, pursuing privatization, liberalization and deregulation – although with some attention to institutional contexts and social consequences.” UN Research Institute for Social Development (UNRISD), “The Sources of Neoliberal Globalization,” *Report of UNRISD Seminar on Improving Knowledge on Social Development in International Organizations II* (2002), p. 4.

18 See further, M. E. Salomon, “International Economic Governance and Human Rights Accountability,” in M. E. Salomon, A. Tostensen, and W. Vandenhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, 2007), p. 153; H Stokke, “What is Left of State Responsibility?: Turning State Obligations into State Responsibility in the Field of Economic, Social and Cultural Rights,” in M. Scheinin and M. Suksi (eds.), *Human Rights in Development, Yearbook 2002* (Martinus Nijhoff Publishers and Nordic Human Rights Publications, 2005), p. 37. See also the recent statement by the UN Special Rapporteur on the Right to Food: “We need to move towards a regime of international trade in agriculture products which facilitates, rather than impedes, the choices made at the national level about how to achieve food sovereignty, and which allows an adequate mix of national capacity for food production and openness to trade. We require a regime allowing appropriate flexibilities, and we need to put an end to trade-distorting policies.” O De Schutter, *Statement of the Special Rapporteur on the Right to Food*, Special Session of the Human Rights Council on the Impact of the Global Food Crisis on the Right to Food (May 22, 2008).

19 Political questions centre on concerns by Northern states that developing states will understand themselves to be relieved of their domestic obligations if too great a focus is placed on the international dimensions, and that any commitment to international cooperation is tantamount to a commitment to increased aid. See, M. E. Salomon, A. Tostensen, and W. Vandenhole, “Human Rights, Development and New Duty-Bearers,” in M. E. Salomon, A. Tostensen and W. Vandenhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, 2007) p. 3; M. E. Salomon, “Towards a Just Institutional Order: A Commentary on the First Session of the UN Task Force on the Right to Development,” *Netherlands Quarterly of Human Rights* 23/3 (2005), p. 409, at 424.

20 This tripartite model delineating three types of obligations is now regularly applied by CESCR in its consideration of state obligations under ICESCR.

bearer) is unable to fulfill the rights on its own²¹ with the use of its “maximum available resources,”²² as treaties dealing with this matter require.²³

In considering the normative content of the right to development this briefing note challenges the assumption that the contemporary obligations of external states to “fulfill” socio-economic rights abroad are necessarily of a secondary nature. The gross inequality that characterizes world poverty today, the power differential that accompanies it, and the reality of global economic interdependence, serve to erode the legitimacy of this model that attributes secondary as opposed to shared responsibility to a developed state to fulfill the basic rights, for example, to food, water, and health of people elsewhere.

The figures are important to this claim. Six million children in developing countries die annually from malnutrition;²⁴ a person from a developing country dies of starvation every 3.6 seconds, the large majority of whom are children under the age of five;²⁵ women living in sub-Saharan Africa have a one in 16 chance of dying in

pregnancy.²⁶ What these appalling figures fail to disclose on their own is that these maternal deaths are 100 times more likely to occur in sub-Saharan Africa than in high income countries;²⁷ only 10% of the world’s health resources service the needs of 90% of the global population;²⁸ while there is enough food to feed everyone on the planet, one in three (640 million) children in developing countries are malnourished;²⁹ 44% of the world’s population lives below a World Bank poverty line of US\$2 a day yet consumes only 1.3% of the global product.³⁰

The structural approach to human rights

Disparities in income between nations have grown at a pace faster than ever before in recent history.³¹ In its 2006 World Development Report, the World Bank concluded that unequal opportunities are “truly staggering on a global scale.”³² These discrepancies in wealth and power reflect a human rights problem far beyond that which can be systemati-

21 Here I limit my reference to states that are unable to alleviate poverty, working from an assumption that if the global economic environment better facilitated poverty alleviation, most states would avail themselves of that opportunity. In any event, whether a state is “unable” versus “unwilling” does not impact on the determination of external responsibility. As Wenar notes, “the difference [between whether the primary responsibility-holder is unable or unwilling] concerns only the appropriateness of blaming or punishing the person with the responsibility. We blame and punish those unwilling to discharge their responsibilities; we excuse those who are unable. Yet the appropriateness of blame and punishment makes no difference to the assignment of secondary responsibility... You are just as responsible for rescuing the drowning child whether the man on the park bench is callous, or whether he is rather disabled.” L. Wenar, “Responsibility and Severe Poverty,” in T. W. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press/UNESCO, 2007), p. 255, at 265.

22 An essential issue to consider is what constitutes international “maximum available resources” and the moral, and legal, implications of failing to meet the standard. Maximum available resources at the international level are equated with the globally endorsed 0.7 per cent GNI in official development assistance. If rich countries were to honour that pledge severe poverty would be eradicated. Since giving up this modest degree of wealth among high-income countries that already have roughly 81 per cent of the global product is not in conflict with anything of comparable value, the failure to do so becomes impossible to defend. Moreover, this argument does away with any justification that under these conditions states owe a greater duty of care to their own compatriots, since relieving world poverty would require no sacrifice even remotely comparable. On morality and sacrifice see the influential essay, P. Singer, “Famine, Affluence and Morality,” 1 *Philosophy and Public Affairs* 3 (1972), p. 229.

23 ICESCR art 2(1): ‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

24 UN Millennium Project, *Fast Facts: Faces of Poverty*, (2005).

25 Ibid.

26 Ibid.

27 UNDP, *Human Development Report 2003: Millennium Development Goals: A Compact Among Nations to End Human Poverty* (Oxford University Press, 2003), p. 8.

28 “An aspirin for Juelly is no longer good enough,” *Financial Times*, (January 25, 2005). See further, P. Hunt, *Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health: Mission to Uganda*, UN Doc E/CN.4/2006/48/Add2, para 63.

29 WHO, *Removing Obstacles to Healthy Development, World Health Organization Report on Infectious Diseases*, (WHO, 1999).

30 High-income countries, with far less people (955 million citizens), together consume 81 per cent of the global product. T. W. Pogge, “World Poverty and Human Rights” *Ethics and International Affairs* 19/1(2005), p. 1, at 1. Pogge draws his figures from the World Bank, *World Development Report 2003*.

31 M. B. Steger, *Globalization: A Very Short Introduction* (Oxford University Press, 2003), p. 104.

32 World Bank, *World Development Report 2006*, *supra* n. 1, at 6

cally remedied even by a good faith commitment of a poor state to fulfilling obligations at the domestic level, or by narrowly-framed extraterritorial obligations of states:³³ “Obligations of international cooperation for socio-economic rights require something over and beyond obligations derived from the ‘extraterritorial’ reach of a human rights convention; they call for *proactive* steps through international cooperation in securing these rights globally, rather than obligations attached reactively, that is, based on the impact of a state’s activities on the people in foreign countries.”³⁴

The continued occurrence of world poverty cannot be disassociated from the global structural environment that produces and perpetuates it, and from the political economy that sustains it and provides some with a disproportionate opportunity for access to wealth.³⁵ A “structural approach” to the scope of obligations proposes that the skewed international economic environment, understood in terms of lack of influence in international trade and finance for the poorest members, and the liberalization and integration of world markets that favor the powerful and affluent, by definition undermines the ability of less commanding states to give effect to human rights. This automatically triggers a complementary or shared responsibility among external states rather than a mere secondary obligation. Given the consensus on the growth of inter-state inequality and the growing gap between

rich and poor, the burden of proof should not fall on a developing state to show that it is unable to meet the basic rights of its people before the responsibility of the international community is engaged. Rather, the current state of world poverty with its substantive and systemic inequality requires that the burden of proof is reversed: it should be for developed states to demonstrate *prima facie* that their policies and decision – whether taken individually or collectively – are not hurting the world’s poor.³⁶

The moral cosmopolitanism of political theorists is instructive here. It is concerned with the bases, nature and scope of our duties to foreigners who are starving or otherwise deprived of necessities.³⁷ In essence, it appraises the duty to ensure basic human rights and justice globally.³⁸ Like other theories based on contemporary conditions of interdependence, a (strong) account of political cosmopolitanism is informed by the terms of economic globalization whereby we rely on the same global environment for the satisfaction of our needs and thus those suffering from poverty under this global scheme have a claim against it, that is, against those who direct it.

For the purposes of this inquiry, we recognize an international legal framework that provides a normative basis for substantiating this argument; a framework that is strengthened when applied in the context of economic globalization. Of course, it remains to be seen whether its legal (or political)

33 This is not to suggest that developing states are relieved of taking steps to realise progressively economic, social and cultural rights, nor does it ignore the fact that domestic factors in developing countries play an important role in the increase or reduction of their poverty. Effective domestic policies, however, do not alter the fact that the international order is implicated in their success or failure. To drive home the point: “Even if country-specific factors fully explain the observed variations in the economic performance of developing countries, global factors may still play a major role in explaining why they did not on the whole do much better or much worse than they did in fact.” T. W. Pogge, “The First UN Millennium Development Goal: A Cause for Celebration?” *Journal of Human Development* 5/3 (2004), p. 377, at 391.

34 M. E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, 2007), p. 6.

35 Salomon, Tostensen and Vandenhole, ‘Human Rights, Development and New Duty-Bearers’ *supra* n. 20, at 10-11.

36 *Mutatis mutandis*, see W. Vandenhole, “EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights,” in M. E. Salomon, A. Tostensen, and W. Vandenhole (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, 2007), p. 85, at 90. For an elaboration of the position that the first obligation is for the relevant states to cooperate in remedying the violation of existing minimum essential socio-economic rights globally, with the subsequent obligation being to prevent their further deterioration, see, M. E. Salomon, “International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice,” in B. A. Andreassen, and S. P. Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard School of Public Health – Harvard University Press, 2006) p. 96, at 115 *et seq* and Salomon, *Global Responsibility for Human Rights*, *supra* n. 35, at 189 *et seq*.

37 See the helpful overview of cosmopolitanism, which derives from the Greek word *kosmopolitês* (‘citizen of the world’), provided at <http://plato.stanford.edu/entries/cosmopolitanism/#2>.

38 *Ibid.* See, C. Beitz, *Political Theory and International Relations* (Princeton University Press, 1979); and T. W. Pogge (ed.) *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press/UNESCO, 2007).

force will be sufficiently robust to pose a challenge to the dominant forces and preferences that steer economic globalization, as exemplified by the (other inter-state) domain of trade liberalization.³⁹

The structural approach to human rights: A contribution of the right to development

Consistent with the ICESCR which preceded it, and followed by the entry into force of the Convention on the Rights of the Child a few years later, the DRD likewise entrenches the notion that states are duty-bearers not only at the national level, but at the international level as well. However the Declaration takes the scope of duties a step further in seeking to provide a juridical framework for oft-repeated claims against the public international order, for the failure of our international economic arrangements to allow for an environment conducive to human-centered development for all.

Given the very structure of our current global order claims regarding violations of basic socio-economic rights can be understood as against not only (specific) states when acting individually or collectively on the international plane, but also as against the global institutional order as a whole, over which the wealthy and powerful states exercise effective control.⁴⁰ The DRD is an important docu-

ment for this new approach and the way in which we understand and address contemporary obligations, not merely of world poverty and underdevelopment,⁴¹ but crucially, of “acquisition and affluence at the other extreme of the population experience, and the mechanics or agents of the entire distribution.”⁴²

The DRD emerged in large part as a response to the call by developing countries for an international order in which effective international cooperation would reduce the perceived unfairness of the prevailing economic scheme. Reaffirming commitments to international cooperation for human rights and a rights-based international order, the Declaration gave legal expression to the notion that the ability of states to develop, and to fulfill their human rights obligations, are constrained by the structural arrangements and actions of the (powerful members) of international community. The DRD places the claims of developing countries suffering from underdevelopment at the centre of the global political economy, where their calls for a structural environment conducive to the fulfillment of human rights might be heeded. As such, the Declaration demands not merely cooperation for the achievement of human rights central to the alleviation of poverty, but also changes to the system of structural disadvantage that characterizes the current international order.

39 “Agriculture negotiations are the ‘engine’ and central issue of the WTO Doha Development Agenda. The G-33, representing as many as 44 developing Members, is committed and persistent with its strategic objectives to ensure that the critical issues of food security, rural livelihood and rural development become an integral part of the agriculture negotiations. The Group solemnly believes that addressing the problem of food and livelihood security as well as rural development constitutes a concrete expression of developing countries ‘right to development’.” G-33 *Press Statement*, Geneva, October 11, 2005, para 1.

40 This brief paper cannot address the many issues to which these points give rise, including notably the bases for disaggregating global responsibility pertaining to collective state conduct, for violations of socio-economic rights (ie determining “perfect” obligations). Elsewhere I have addressed this issue: “While all states are to cooperate in order to contribute to the common objective of eradicating world poverty, the responsibility of a state for the creation of a just institutional economic order should be in accordance largely with its weight and capacity in the world economy. The content of this principle of common but differentiated responsibilities in the context of international cooperation for human rights provides the basis for four indicators that may assist in determining responsibility for world poverty. First, responsibility may be determined as a result of the contribution that a state has made to the emergence of the problem; second, as a result of the relative power it wields at the international level that is manifested as influence over the direction of finance, trade, and development (effective control); third, responsibility may be determined based on whether the given state is in a position to assist; and fourth, responsibility can be determined on the basis of those states that benefit most from the existing distribution of global wealth and resources.” (Footnotes omitted). Salomon, *Global Responsibility for Human Rights*, supra n. 35, at Ch 5: Attributing Global Legal Responsibility, p. 193.

41 This added-value of the right to development was recognised even prior to the adoption of the Declaration. In a seminal 1979 article Abi-Saab wrote: “[T]he responsibility for the inability of a State to exercise its right to development is not so much that of any one State as that of the international economic system as a whole.” G. Abi-Saab, “The Legal Formulation of the Right to Development,” in R-J Dupuy (ed.), *The Right to Development at the International Level* (Sijthoff & Noordhoff, 1980), p. 159, at 170.

42 P. Townsend and D. Gordon, “The Human Condition is Structurally Unequal,” in P. Townsend and D. Gordon (eds.), *World Poverty: New Policies to Defeat an Old Enemy* (The Policy Press, 2002), p. xi, at xv.

The DRD places people and their human rights at the centre of the processes and outcomes of national and international economic and development strategies. The way in which duties are framed in the Declaration is to require, on the one hand, that attention be focused nationally in order to provide a domestic environment in which equitable and sustainable poverty-reduction and development can be realized (participation, persons as beneficiaries of the right, interdependence of rights, equality of opportunity for all with a focus on an active role for women in development processes).⁴³ As is clear, the Declaration has a contribution to make in conditioning domestic policy.⁴⁴ But, on the other hand, central to its logic is the need for international cooperation in order to ensure that the external environment is supportive of this human-centered development process. Critically, responsibilities are understood also to devolve upon states acting at the international level, and, as per preambular paragraph 16 and Article 2(3) of the Declaration, developing states enjoy the prerogative to invoke this right as against the public international order on behalf of their people.⁴⁵ That every single state does not formally recognize socio-economic rights, or the right to development, does not detract from the fact that the international community of states as a whole has shown

itself to be committed to their advancement.⁴⁶ The right to development today forms an integral part of the canon of human rights and is supported through the UN human rights machinery.

As the DRD and its preparatory work reflect, the right to development typifies a cosmopolitan ethos that reveal its most distinctive and vital component: it is preoccupied, not with a state's duties to its own nationals, but with its duties to people in far off places.⁴⁷ The duties of international cooperation for addressing poverty and underdevelopment that form its core, distinct from the classical human rights model, are thus inter-state duties with the beneficiaries being the poor of developing countries. Far from being unprecedented under international law, this horizontal aspect of human rights protection has a rich pedigree.⁴⁸ The Global Partnership for Development, envisioned under Millennium Development Goal 8, reflects its current expression.

Lessons from the self-determination model

As remarked earlier, notable parallels can be drawn between the collective right of self-determination and the right to development, beginning with the fact that both are understood as having external

43 DRD arts 1(1), 2(1), 2(3), 6(2), 8(1). Poverty reduction, good governance and sustainability are today part of evolutive interpretation of the Declaration.

44 See, Salomon, *Global Responsibility for Human Rights*, *supra* n. 35, at 121 et seq.; S. P. Marks, "Misconceptions about the Right to Development," Special Report, Human Rights and Development, D. Freestone and J. K. Ingram (guest eds.), *Development Outreach* 8 (The World Bank Institute, October 2006), p. 9.

45 DRD, preambular para 16: "Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations; art 2(3): "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."

46 "The general support of the international community [to a principle of international law] does not of course mean that each and every member of the community of nations has given its express and specific support to the principle. . . ." *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v Slovakia) Judge Weeramantry (sep op) ICJ Rep (1997), p. 88, at 95.

47 As noted by the Working Group of Governmental Experts drafting the Declaration: "The right to development implies that states and the international community as a whole should aim at the creation of local and national conditions whereby everyone may enjoy the rights set forth in the Universal Declaration of Human Rights and the International Covenants on Human Rights," *Report of the Working Group of Governmental Experts on the Right to Development* (4th session, December 9, 1982) UN Doc E/CN.4/1983/11 annex IV, Compilation of Proposals Made by the Experts, Pt I, Section II, art 6; see similarly, art 7. See further, Salomon, *Global Responsibility for Human Rights*, *supra* n. 35, at 53.

48 "When certain states assert that the right to development is a right of states, their argument can only be understood as another way of remarking on their role as a vehicle in the realization of the human right to development. Although a state may need to claim the right to development from the international community before it can be realized by the people to whom it is owed, this does not make the right to development a right of states. It simply reflects the role of the state in an inter-state system." Salomon, *Global Responsibility for Human Rights*, *supra* n. 35, at 116. As Crawford explains, the government may be the agent through which the right can be vindicated; however, it will be acting in a secondary capacity, rather than as the holder of the right." J. Crawford, "Some Conclusions," in J. Crawford (ed.), *The Rights of Peoples* (Clarendon Press, 1988), p.159, at 167. "The state becomes the plenipotentiary or international dimension of peoples..." L. A. Obiora, "Beyond the Rhetoric of a Right to Development," *Law & Policy* 18/ 3-4 (1996) in M. wa Mutua, L.A. Obiora, and R. J. Krotoszynski Jr. (eds.), Special Issue on the Right to Development, 366, at 369.

and internal dimensions. The principle of self-determination, as provided for in the UN Charter had its status elevated to that of a right in the two human rights Covenants only once “the agitation in the context of decolonization raised both the stakes and the normative aspirations of the proponents.”⁴⁹ A similar trajectory can be traced with regard to the right to development which began to take shape as a result of this most recent wave of economic globalization and the remonstrations by developing states against its particular forms of subjugation. Like self-determination, the external aspect of the right to development demands liberation from power and control located outside of the developing state.⁵⁰ The locus of power today is found among a select minority of states, including via their influence over international financial institutions, within international trade, and by transnational corporations headquartered in industrialized countries. Collectively they constitute what one commentator defines as “active networks of global patronage and power.”⁵¹

In view of the importance of the right of self-determination it has obtained a status in international law whereby every state is held to have a legal interest in its protection. In the East Timor case, the International Court of Justice recognized the ‘irreproachable’ erga omnes character (providing an obligation owed towards all) of the principle of self-determination of peoples as evolved from the UN Charter.⁵² It stated likewise in its 2004 advisory opinion on the *Construction of a Wall in the Occupied Palestinian Territory*,⁵³ a position consistent with its view on the principle taken in previous cases.⁵⁴

While there exist a few remaining examples of external self-determination (due to ongoing foreign occupation and the perpetration of gross violations of human rights providing the legitimating conditions for secession), this dimension of self-determination was for the most part addressed by decolonization. Today, much of the attention focuses on its internal application – the right to democratic governance of the people or constituent groups within the state in relations with their own government. The right to political self-determination was the meta-right of the twentieth century in which the responsibility of the international community in giving it effect was clearly recognized. The right to “self-determined development” is the meta-right of the twenty-first century, advocating nothing short of a place that allows for the functional equality of representative developing states on the international stage. Like the *jus cogens* principle of self-determination the right to development is defined by a prominent external dimension, with its legal parameters taking shape in this period of indefensible world poverty.

Conclusion

All aspects of contemporary life are influenced by the world beyond our borders and international human rights law is no exception. This truism invites a shift in mindset and demands that we inquire into the responsibilities, not merely of a developing state to its own people, as important as that is, but of the international community of states. The structures that determine access to

49 P. Alston, “Peoples’ Rights: Their Rise and Fall,” in P. Alston (ed.), *Peoples’ Rights* (Oxford University Press, 2001), p.259, at 261.

50 The DRD also emphasizes the integrated nature of these two rights, both of which have their roots in struggles for liberation from external power and control. Article 1(2) of the Declaration holds that the right to development “implies the full realization of the right of peoples to self-determination.”

51 U. Baxi, *Human Rights in a Posthuman World* (Oxford University Press, 2007) Ch. 4 The Development of the Right to Development, p. 124, at 153.

52 *Case Concerning East Timor* (Judgment) (Portugal v Australia) ICJ Rep (1995) 90, at para 29.

53 “The Court would observe that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature “the concern of all States” and, “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection.” “ (*Barcelona Traction*, 32, at para 33). The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Adv. Op. (2004) 136, at paras 155–156.

54 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)* Adv Op, ICJ Rep (1971) 16, at paras 52–53; *Western Sahara*, ICJ Adv Op (1975) 12, at paras 54–59.

wealth and opportunity force us to question the circumstances under which various states might legitimately – and legally – constitute duty-bearers and what the scope of those duties might be. As we seek a meaningful application of the human rights norms articulated to shield those in need against the excesses of globalization, we are confronted with both the significance of these standards, and the need for their evolutionary interpretation and improved enforcement.

The ideas of equity that animate the right to development are heretical to those with power and advantage since it proposes – in the language of international human rights – modifications to the very system that provides for their dominance. Yet, like the right of self-determination, the right to development while at times contentious and somewhat unconventional in its approach to human rights might in our present climate be recognized as a right without which a range of other rights cannot be enjoyed.

Chapter 2: The Normative Value of a Treaty as Opposed to a Declaration: Reflections from the Convention on the Rights of Persons with Disabilities

Michael Ashley Stein* & Janet E. Lord**

Introduction

When the General Assembly adopted the United Nations Convention on the Rights of Persons with Disabilities (CRPD) by consensus on December 13, 2006,¹ it culminated a 20-some year process that transformed disability-based protections from resolutions and declarations into core human rights obligations.² With consideration currently being given to a convention to formalize the Right to Development (RTD), this chapter offers a few thoughts regarding the normative value of a treaty from the perspective of two participants in the drafting of the CRPD.³

Our reflections address the progression from soft laws to treaty obligations, the necessity of building the content of existing rights over time, the opportunity that a convention provides for establishing national benchmarks for implemen-

tation, and the role that non-State actors can play as normative change agents. We conclude with a few words on the transcendent value of a State's commitment to human rights norms regardless of whether they are embedded in soft instruments or legally binding treaties.

Moving from Soft Laws to Treaty Obligations

Each of the seven United Nations core human rights conventions promulgated before the turn of the century contains legal obligations that can be applied to persons with disabilities, but were not so used in practice.⁴ To illustrate, while the International Bill of Rights provides protections applicable to all people, there is no explicit mention of discrimination on the grounds of disability.⁵ Central to this difficulty is that these principal

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1 Convention on the Rights of Persons with Disabilities (CRPD), G.A. Res. 61/106 (2007) [hereinafter CRPD].

2 Notably, Italy proffered a convention draft during the 42nd session of the General Assembly in 1987. See UN Doc. A/C.3/42/SR.16, and Sweden did the same two years later at the General Assembly's 44th session. See UN Doc. A/C.3/44/SR.16.

3 For our earlier and more detailed treatments of the CRPD, see Janet E. Lord & Michael Ashley Stein, "The Committee on the Rights of Persons with Disabilities," in Philip Alston & Frédéric Mégret (eds.), *The United Nations and Human Rights: A Critical Appraisal* (2008); Michael Ashley Stein & Janet E. Lord, "Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities," in Oddný Mjöll Arnardóttir & Gerard Quinn (eds.), *The UN Convention on the Rights of Person with Disabilities: European and Scandinavian Perspectives* (2008); Michael Ashley Stein & Janet E. Lord, "The United Nations Convention on the Rights of Persons with Disabilities as a Vehicle for Social Transformation," in Comisión Nacional de los Derechos Humanos de México, Network of the Americas & Office of the United Nations High Commissioner for Human Rights (eds.), *National Monitoring Mechanisms of the Convention on the Rights of Persons with Disabilities* (2008). For a pre-consideration of the CRPD, see Janet E. Lord, *Understanding the Role of an International Convention on the Human Rights of People with Disabilities* (National Council on Disability, 2002).

4 Thus, in the decade 1994-2003, 17 disability-related complaints were asserted under the seven core United Nations instruments, but 13 were declared inadmissible by their respective monitoring committees. The decisions of the three relevant monitoring committees can be accessed through the Netherlands Institute of Human Rights web page, <http://sim.law.uu.nl/sim/Dochome.nsf>.

5 For example, the only one reference to disability appearing in the Universal Declaration of Human Rights, G.A. Res. 217A (III), UN GAOR, 3d Sess., at 71, UN Doc. A/810 (1948), art. 25 ("[E]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, ... and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.") The only distinct provision focusing exclusively on disability rights is in the Convention on the Rights of the Child, G.A. Res. 44/25, UN GAOR, 44th Sess., Supp. No. 49, p. 161, UN Doc. A/44/49 (1989), art. 23, para. 1 (States Parties must recognize the rights of children with disabilities to enjoy "full and decent" lives and participate in their communities).

human rights treaties do not address the specific barriers that persons with disabilities face in realizing their human rights, for example, the need for alternative formats to effectively secure equal access to justice.⁶

- Prior to the CRPD's adoption, the United Nations adopted resolutions and declarations referencing the rights of persons with disabilities.⁷ Especially notable among these pronouncements is the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which developed a template for domestic policy-making and international technical and economic cooperation.⁸ To facilitate these functions, the Standard Rules established a monitoring mechanism in which a Special Rapporteur reports directly to the Commission on Social Development.⁹
- Yet, despite being relatively ahead of their time, as soft human rights instruments these resolutions and declarations were not legally binding.¹⁰ In the absence of specific attention and language devoted to prohibiting the violation

of human rights for persons with disabilities in any single international human rights treaty, governments remained unaware of their legal obligations.¹¹ Further, existing human rights treaty-monitoring bodies addressed only marginally, if at all, routine human rights violations to which persons with disabilities are subjected,¹² creating a notable lacunae of jurisprudence on these protections as a matter of international human rights law.¹³

Thus, a central motivation supporting the CRPD as a specialized treaty, as opposed to promised enforcement of existing universal hard laws or the further promulgation of disability-specific soft laws, was the historic lack of enforcement and the attendant lack of expertise of monitoring bodies.¹⁴ Indeed, much of the first two negotiation sessions leading up to the CRPD's drafting focused on whether a disability-targeted treaty was either necessary or desirable. After much powerful advocacy by disabled persons and their representative organizations (DPOs),¹⁵ States were convinced of the need and benefits of a disability-specific treaty and

6 See generally Gerard Quinn, "The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework," in Theresia Degener & Yolana Koster-Dreese (eds.), *Human Rights and Disabled Persons* (1995), p. 69. As Theresia Degener has emphasized, where disability is addressed in the International Bill of Rights, "it is only in connection with social security and preventive health policy" and not as a comprehensive human rights issue. Theresia Degener, "Disabled Persons and Human Rights: The Legal Framework," in *id.*, p. 94.

7 See, e.g., World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, p. 185, UN GAOR, 37th Sess., Supp. No. 51, UN Doc. A/RES/37/52 (Dec. 3, 1982); International Year of Disabled Persons, G.A. Res. 36/77, p. 176, UN GAOR, 36th Sess., Supp. No. 77, UN Doc. A/RES/36/77 (Dec. 8, 1981); Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), p. 88, UN GAOR, Supp. No. 34, UN Doc. A/10034 (Dec. 9, 1975); Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), p. 93, UN GAOR, Supp. No. 29, UN Doc. A/8429 (Dec. 20, 1971).

8 Standard Rules on the Equalization of Opportunities for Persons With Disabilities, G.A. Res. 48/96, at 202, UN GAOR, 48th Sess, Supp. No. 49, UN Doc. A/RES/48/96 (Dec. 20, 1993).

9 See generally, United Nations Enable, The Special Rapporteur on Disability of the Commission for Social Development, <http://www.un.org/esa/socdev/enable/rapporteur.htm>.

10 We qualify the praise by noting that these instruments also continued to reflect medical and charity models of disability and were heavily burdened with paternalism. See, e.g., Declaration on the Rights of Mentally Retarded Persons, *supra* note 58, art. 1; Preamble para. 5 ("[T]he mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings," and societies should promote "their integration as far as possible in normal life.")

11 Eric Rosenthal, "International Human Rights Protections for Institutionalized People with Disabilities: An Agenda for International Action," in Marcia Rioux (ed.), *Let the World Know: A Report of a Seminar on Human Rights and Disability*, (2000), pp. 68, 70-1.

12 See Gerard Quinn & Theresia Degener, *Human Rights and Disability: The Current use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, (2002), p. 1. <http://www.nhri.net/pdf/disability.pdf>.

13 General Comment No. 5 issued by the Committee on Economic, Social and Cultural Rights is a notable exception to the general rule that treaty-monitoring bodies have not given adequate attention to how disability relates to the specific protections provided in the relevant treaties. General Comment No. 5 does provide interpretative guidelines of the application of economic, social and cultural rights to people with disabilities. ICESCR Committee, General Comment 5, *Persons with Disabilities*, Eleventh Session, UN Doc. E/1995/22 (1994). For an excellent analysis of General Comment No. 5 and how disability organizations can utilize this work and the machinery of the Committee, see Quinn & Degener *supra*, note 63, at §5.5.

14 A detailed description of the political process behind the UN's decision to go forward with a disability human rights convention is set forth in the (United States) National Council on Disability, "UN Disability Convention - Topics at a Glance: History of the Process," http://www.ncd.gov/newsroom/publications/2003/history_process.htm.

15 The inclusion of NGOs at this stage was unprecedented in the normal course of treaty development at the UN, and can be interpreted as acquiescence to NGOs' assertion of the participatory claim expressed in the mantra: "nothing about us without us."

a working group was appointed to draft articles for consideration by the entire Ad Hoc Committee.¹⁶

Advocates for formalizing the mandates of the RTD into a core treaty will face similar challenges to CRPD supporters in so far as making the case for why a specialized treaty is needed in lieu of more rigorous soft law enforcement. They would be likewise counseled as to the advantages of involving members of the targeted population – here, people living in poverty – in efforts to educate State representatives on their life circumstances and in what ways they feel a treaty forwards global awareness of their condition.¹⁷

Building on Existing Rights

A key issue in the negotiations leading up to the adoption of the CRPD involved educating States about the existing but non-enforced nature of disability rights. Put another way, many States required convincing that the CRPD would clarify existing human rights within the context of disability, rather than create new obligations.¹⁸ In response, individual disabled persons, DPOs, and States framed the majority of their positions in terms of extant human rights laws. Consequently, in a number of instances the treaty text closely aligns with language found in instantiated human rights conventions. Unlike other human rights treaties, existing soft laws were eschewed during

the negotiations as having no precedential value, and so these instruments did not serve as a template for the drafting of the CRPD.

- An additional and early consideration was whether a disability-specific human rights convention would follow a non-discrimination framework expressing civil and political rights, whether it would track economic, social and cultural rights, and/or whether it would reflect a social development approach.²⁰ Ultimately, the Ad Hoc Committee determined that a comprehensive treaty, modeled most closely after the Convention on the Rights of the Child,²¹ with some social development components reflected, would be the best vehicle through which to empower persons with disabilities. Inclusion of a development perspective was highly motivated by the fact that some eighty percent of people with disabilities live in developing countries, where they are subject to material deprivation and social exclusion.²² Trenchantly, disabled people are estimated to account for one out of every five of the world's poorest people.²³

Advocates of a convention to formalize the RTD are likely to face greater resistance than supporters of the CRPD in respect to alignment with existing human rights law because core treaties are not generally understood as explicitly acknowledging the RTD.²⁴ The support for a RTD convention would therefore seem highly contingent on the success of demonstrating clear linkages to existing human

16 The working group was composed of States, NGO's, and national human rights institutions. See Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Report of the Working Group to the Ad Hoc Committee, UN Doc. A/AC.265/2004/WG.1 (January 27, 2004), para. 1.

17 We note below the connection between disability and poverty.

18 See United Nations Department of Economic and Social Affairs, "Convention on the Rights of Persons with Disabilities: Why a Convention?," <http://www.un.org/disabilities/convention/questions.shtml#one>.

19 For a comprehensive treatment, see Janet E. Lord & Katherine N. Guernsey, *Convention Document Working Group Draft Text Commentary: A Legal Commentary on the Draft Convention Text Produced by the Working Group for the UN Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, (March 2004).

20 Such an approach encompasses poverty eradication, employment promotion, and social integration for vulnerable populations. See United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, <http://www.un.org/esa/socdev/>.

21 Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 161, U.N. Doc. A/44/49 (1989).

22 See Second Annual Report on the Implementation of USAID Disability Policy (2000), p. 2. For a sense of the varying levels of disability reported from country-to-country, see United Nations Department of Economics and Social Affairs, Statistics Division, <http://www.unstats.un.org/unsd/disability/default.asp>.

23 Ann Elwan, "Poverty and Disability: A Survey of Literature," *World Bank Social Protection Discussion Paper No. 9932* (Dec. 18, 1999), p. iv.

24 That being said, the Committee on Economic, Social, and Cultural Rights has acknowledged the RTD in its jurisprudence. See Committee on Economic Social Cultural Rights, *The nature of States parties obligations* (Art. 2, par.1):14/12/90, General Comment 3, at para. 14, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument)

rights standards. In the same vein, an enormous barrier to acceptance of the CRPD was (and remains) State concern regarding the costs of implementation. This trepidation was assuaged to some extent by the inclusion of language on progressive implementation, as well as advocacy claims that these obligations were mitigated by existing ones, including effectuation of the Millennium Development Goals.²⁵

Setting Standards for Domestic Implementation

The CRPD will also trigger national level engagement with disability law and policy among States Parties (and one might argue non-States Parties due to the impact of customary international law).²⁶ Some forty nations have systemic disability rights laws,²⁷ many of which are outdated or of questionable utility.²⁸ To illustrate, Morocco has no comprehensive disability law, and legislation dating to 1982 applies only to a limited number of rights granted to persons with visual impairments, but not to persons with other types of disabilities. The CRPD process, in which the Moroccan government played a major role, has promoted national-level planning and national-level legislative reform to remedy major gaps.²⁹ Much like Morocco, the vast

majority of States now need to develop or substantially reform their domestic legal and social policies regarding persons with disabilities.

- It also bears noting that the treaty-making process itself was socially transformative. It precipitated belief changes by providing information to societies about the rights of persons with disabilities, and in so doing, it now has enormous potential as an educational tool for altering social mores.³⁰ During the negotiation process, a linguistic shift took place from the terminology of a medical and charity model to that of social model, rights-based taxonomy among States' representatives. For instance, an early intervention made by a Nigerian delegate contrasted persons with disabilities with "normal people;"³¹ at a later session, a South African representative called on delegates to refrain from using inappropriate language when referencing persons with disabilities.³²
- Once the CRPD becomes operative, States Parties will be tasked with an affirmative duty to alter social norms regarding persons with disabilities, including the evisceration of harmful stigma and stereotypes and the promotion of positive imagery.³³ Thus, the CRPD's narrative regarding the unnecessary and amenable nature of the historical exclusion of persons with disabilities across

25 The official United Nations website for the Millennium Development Goals sets forth all eight goals, identifies key targets and benchmarks, <http://www.un.org/millenniumgoals/>. For a discussion of the MDGs and their implicit, but unstated, link to disability issues, see Janet E. Lord & Katherine N. Guernsey, *Inclusive Development and the Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, IDDC Task Group in the UN Convention, (January 2005), <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5iddc.doc>.

26 The essence of this argument is that States that do not sign international treaties nonetheless can become bound by the precepts of those instruments when they reflect a codification of customary international law or where they, over time, acquire such status. See Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," *American University Law Review*, vol. 32 (1982), pp 1, 16-7.

27 Theresia Degener & Gerard Quinn, "A Survey of International, Comparative and Regional Disability Law Reform," in Mary Lou Breslin & Sylvia Yee (eds.) *Disability Rights Law and Policy: International and National Perspectives* (2002), p.3, provides a catalogue.

28 "Unfortunately, the continuing economic inequities and social exclusion of disabled persons worldwide severely calls into doubt the efficacy of these efforts. It also begs the question of whether any country adequately protects their disabled citizens." Michael Ashley Stein & Penelope J.S. Stein, "Beyond Disability Civil Rights," *Hastings Law Journal*, vol. 58 (2007), p. 1203.

29 See Secrétariat à l'Etat Chargé de la Famille, de l'Enfance et des Personnes Handicapées, *Programme National de Réadaptation à Base Communautaire au Profit des Personnes Handicapées 2006-2008* (Rabat, Morocco, 2006).

30 For an account of the expressive law value of human rights treaties, see Alex Geisinger & Michael Ashley Stein, "A Theory of Expressive International Law," *Vanderbilt Law Review*, vol. 60 (2007), p. 77; Alex Geisinger & Michael Ashley Stein, "Rational Choice, Reputation, and Human Rights Treaties," *University of Michigan Law Review*, vol. 106 (2008). For the application of these ideas to the process by which the CRPD was negotiated, see Janet E. Lord, *Normative Landscaping: Power and Norms within Human Rights Law-Making Processes* (unpublished manuscript, on file with authors).

31 Oral Intervention to the Ad Hoc Committee by Representative from Nigeria to the Ad Hoc Committee, Disability Negotiations Daily Summary Volume 1/7 (August 6, 2002), <http://www.worldenable.net/rights/adhocmeetsumm07.htm>.

32 Oral Intervention to the Ad Hoc Committee by Representative from South Africa to the Ad Hoc Committee, *Disability Negotiations Daily Summary, Volume 1/2 (July 30, 2002)*, <http://www.worldenable.net/rights/adhocmeetsumm02.htm>.

33 See, e.g., CRPD, *supra* note 1, art. 8 (requiring States Parties "to adopt immediate, effective and appropriate measures...[t]o raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities..."). For a practical application of human rights education and awareness raising, see Janet E. Lord, et al., *Human Rights. YES!* (2007), <http://www1.umn.edu/humanrts/edumat/hreduseries/TB6/>.

societies will serve a vital function beyond the particular implementation of its substantive obligations in law and policy.³⁴

- This expressive methodology relates well to the understanding in constructivist scholarship of “deeply social” actors whose identities are shaped by institutionalized norms, values, and ideas of their social environments.³⁵ In combination, these notions comprehend the CRPD as a process through which actor identities and interests are shaped and reconstituted.³⁶ Viewed this way, the CRPD is an instrument that recasts disability as a social construction, and enunciates disability-specific protections to enable disabled persons to fully enjoy their human rights.³⁷ In this respect, the CRPD has also generated an array of tangible benefits. These include raising the general public’s awareness about the human rights of persons with disabilities; highlighting historic and continued abuses of those rights; further developing the knowledge-base of States Parties through the requirement of consultation with domestic and international DPOs and non-governmental organizations (NGOs); providing the impetus for extensive programmatic developments, including in foreign assistance schemes; and improving data collection. Ultimately, however, the efficacy of human rights instruments may in the end be more heavily determined by the extent to which any given State commits itself to the values underlying those instruments than by the character of the protection as hard, soft, or customary.
- A convention on the RTD can harvest similar normative change benefits for social constructions regarding the human rights basis of deve-

lopment assistance. However, a significant divergence between the CRPD process and that which would engage the RTD relates to existing domestic implementation. Specifically, although disability rights frameworks remain significantly sparse and underdeveloped, at the very least there is traction and precedent on which to develop best practices in the future. By contrast, similar best practices are harder to come by in the context of domestic RTD implementation. Accordingly, a future treaty-making process on behalf of the RTD would be more rigorously tasked with altering underlying social norms.

Engaging Non-State Actors as Normative Agents

The CRPD also has added value because it engages non-State actors as agents for normative social change. These entities include NGOs, the UN and its specialized agencies, and regional integration organizations.

- NGO (and in particular, DPO) participation in CRPD-related implementation and monitoring is both implicitly and explicitly woven throughout the entire fabric of the text.³⁸ It also is implicitly provided for in the monitoring process insofar as the CRPD requires States Parties to include civil society in that process at the national level,³⁹ calls on States Parties to consider consultations with DPOs when determining treaty monitoring body nominations,⁴⁰ and authorizes the monitoring body to elicit “expert advice” conducive to achieving its mandate⁴¹ and in the preparation of their reports.⁴²

34 See Michael Ashley Stein, “Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination,” *University of Pennsylvania Law Review*, vol. 153 (2004), p. 579.

35 International legal scholars, going back to Hugo Grotius, have long understood the international system as a social system. Hugo Grotius, “De Jure Belli ac Pacis: Libre Tres (1625),” in J.B. Scott, ed., *Classics of International Law* (1925).

36 On the understanding of international law as a process, see especially Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (New York: Oxford University Press, 1994).

37 See Alexander Wendt, “Constructing International Politics,” *International Security* (1995), vol. 20, p. 73, (positing that systems of shared ideas, beliefs and values work to influence social and political action within and across multilateral law-making processes); Christian Reus-Smit, “Constructivism,” in Scott Burchill, et al. (eds.), *Theories of International Relations* (2001), p. 218 (noting that “[i]nstitutionalized norms and ideas” can “condition what actors’ consider necessary and possible, both in practical and ethical terms.”)

38 See CRPD, supra note 52, art. 4 (3) (“In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.”); *id.* at art. 3(c) (“Full and effective participation and inclusion in society;”).

39 *Id.* at art. 33(3) (“Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.”).

40 *Id.* at art. 34(3).

41 *Id.* at art. 38(a).

42 *Id.* at art. 35(4).

To foment effective implementation, the CRPD committee is directed to cooperate with United Nations specialized agencies and other organs during the reporting process and Conferences of States Parties, and may be invited by the treaty monitoring body to share technical assistance and submit reports.⁴³ The CRPD also seeks to foster communications between its monitoring committee and other treaty monitoring bodies, by authorizing consultations with “other relevant bodies instituted by international human rights treaties.”⁴⁴

Finally, the CRPD expressly invites States Parties to cooperate internationally through partnerships with relevant international and regional organizations (as well as with other States).⁴⁵ This is especially notable in the realm of development aid where the CRPD requires States Parties’ assistance be disability-inclusive, because the European Union is the world’s largest donor organization.⁴⁶

Inclusion of non-State actors as agents for normative change by the CRPD marks a significant sea-change in human rights treaty process. By engaging a full range of non-governmental and civil society entities, the CRPD signals a normative value commitment to deeply retrenching global society and its interaction with persons with disabilities. Most significantly, through this inclusive dynamic the CRPD not only signals a commitment to traditional top-down human rights protection and promotion, but also facilitates horizontal norm change in which non-State actors alter social constructions. It thereby creates a framework for recursive and coherent implementation in which sundry actors can precipitate the CRPD’s expressed paradigm shift.

- Current work on the RTD, especially by the High Level Task Force, has focused on “global partnerships” and therefore on multilateral arrangements of entities not usually signatories to human rights treaties. Advocates for a convention formalizing the RTD would therefore be well

advised to draw from the experiences of the CRPD in creating a framework in which a multitude of actors, both State and non-State, participate in implementation processes. Notably, the CRPD stands out from among the canon of human rights treaties in endeavoring to respond to the complexity of challenges raised in its operation within and across government action.⁴⁷

Conclusion

In the context of disability-based human rights, the CRPD is a welcome innovation in light of the failure of previous declarations and resolutions to bring about progressive change in law, policy and disability culture-building. A legally binding instrument represents, very often, the crystallization of a rights regime, marking both an evolved content of substantive rights and creating formal and facilitating informal structures that pull participants to compliance. A treaty also provides an opportunity for establishing national benchmarks for implementation. It likewise catalyzes, sometimes for the first time, a role for non-State actors to play as normative change agents. All the same, it remains to be seen how much additional traction the CRPD will yield in practise. Whether the normative character of a human rights instrument is necessarily determinative of its efficacy cannot be definitively answered. Nonetheless, as argued here, a pre-commitment to the values underlying the human rights protection framework laid out in a convention may presage its effectiveness as a legal tool and focal point for social transformation. Thus, in the context of a putative convention on the RTD, its advocates must determine what value such formalization will add, and whether their ultimate goal is best served by pursuing that course of action.

43 *Id.* at art. 38(a).

44 *Id.* at art. 38(b).

45 *Id.* at art. 32(1).

46 See Lord & Guernsey, *supra* note 76.

47 For example, the CRPD provides for a periodic Conference of States Parties to review implementation, in which both States Parties and non-State actors will participate as well as a more detailed framework for international cooperation than that provided in other human rights conventions. In doing so, the CRPD more closely approximates international agreements in environmental and other realms. See, e.g., United Nations Framework Convention on Climate Change, 9 May 1992, entered into force 24 March 1994, reprinted in 31 I.L.M. 849 (1992); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, 18 Sept. 1997, entered into force 1 Mar. 1999.

Chapter 3: Normative Content of a Treaty as opposed to a Declaration on the Right to Development: A Commentary

Sabine von Schorlemer*

Introduction

The topic of this Conference is the implementation of the right to development (RTD) on its way from “rhetoric to reality”¹ and, in particular, the role that international law may play in that process. Part of the discussions will relate to the question of to what extent are the mechanisms of the normative international order useful, considering the challenges of the RTD. Still, we should not forget that there are many ways to influence the international norm-creating process, both through normative rules and through non-normative or “pre-normative” rules and acts. While the two may be relevant in the political process, the distinction between them should not be blurred.²

Today, the RTD seems to be at the crossroads regarding its nature, scope, and, in particular its “normative content” – the topic of Michael Stein for this volume. His contribution, which focused on the new “Convention on the Rights of Persons with Disabilities,”³ showed us in an impressive way what the international community could gain if a process of codification successfully leading to a binding normative treaty.⁴ Amongst other benefits,

the process of drafting a treaty may conduce state parties to agree on the specific purpose of one or several “rights,” depending on the normative content of the treaty. It could clarify the scope of rights and obligations and establish binding implementation and monitoring instruments. By doing so, the conduct of states in international relations would be guided or even “limited,” i.e. alternative forms of conduct may be ruled out.

However, as *Rüdiger Wolfrum* emphasized, the international normative order is not restricted to regulatory functions: “It has also an effect concerning the formation of the international community,” i.e. the international normative order constitutes the framework in which its members may accommodate their mutual interests.⁵ The formulation and balancing of different and mutual interests is a delicate process, as can be seen in the field of the RTD, where the risk of politicization is particularly high because of the different perceptions from regional groups⁶ and other actors. The right to development, it is often said, means different things to different people. For that reason, it is essential to reflect on the next steps for implementing it carefully, both politically and legally.

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1 Stephen Marks, “The Human Right to Development: Between Rhetoric and Reality,” *Harvard Human Rights Journal*, 17 (2004), pp. 137–68.

2 Rüdiger Wolfrum, “Introduction.” in Rüdiger Wolfrum and Volker Röben (eds.), *Developments of International Law in Treaty Making* (Berlin, Heidelberg, New York: Springer 2005), pp. 1–13 (1) with reference to Prosper Weil, “Towards Relative Normativity in International Law,” *American Journal of International Law* 77 (1983), pp. 413–442 (415).

3 Convention on the Rights of Persons with Disabilities, adopted on December 13, 2006 by GA Res. 61/106 (2007); Michael Ashley Stein, “Disability Human Rights,” *California Law Review* 95 (2007), pp. 75–122; 2) Michael Ashley Stein, “A quick overview of the United Nations Convention on the Rights of Persons with Disabilities and its implications for Americans with disabilities.” *Mental and Physical Disability Law Report* 31 (2007), pp. 679–683.

4 See in particular Georges Abi-Saab, “Whither the International Community,” *European Journal of International Law* 9 (1998), pp. 248–65; Bruno Simma, Andreas Paulus, “The ‘International Community’: Facing the Challenge of Globalization,” *European Journal of International Law* 9 (1998), pp. 266–77.

5 Rüdiger Wolfrum, *supra*, note 3, at p. 2.

6 Felix Kirchmeier, “The Right to Development – Where Do We Stand? Stand of the Debate on the Right to Development,” Friedrich-Ebert-Stiftung, *Occasional Papers, Dialogue on Globalization*, No. 23, (July 2006), p. 5.

Preliminary Remark: The Relevance of “Wording” in Treaties and Declarations

In legal terms, from the point of view of public international law, the wording of the articles of a treaty does not necessarily differ much in substance from those of a declaration on the same topic. This is irrespective of the bindingness of the text in the first case and the non-bindingness in the second one.

Theoretically, it is possible to choose the same wording for both a declaration and a treaty: there may be a “preamble” and a provision on the “scope of application;” there may be an article containing legal “definitions” and/or clarifications of terminology; there may be “general principles” and provisions setting forth “rights” and “obligations” (although, again, binding in the case of a treaty and non-binding in the case of a declaration).

Several UN documents exist where simply from reading the text it is difficult to recognize the difference between a declaration and a treaty. The “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations”⁷ is such an example, but also the “Charter on Economic Rights and Duties of States.”⁸ These UN documents resemble very much a treaty, both from their structure and their wording.

What, then, makes the difference? What would be the normative content of a treaty as opposed to a declaration on the RTD?

Structural Differences between UN Treaty Law and Declarations

a) First of all, ipso facto there are some slight differences between a treaty and a declaration which are mainly incorporated in “formal” provisions (not touching upon questions of legal content).

The final clauses of a treaty – provisions on ratification, acceptance, approval or accession by Member States⁹ – would certainly be missing in a declaration. No provision concerning its entry into force would be needed in a declaration.¹⁰ And only a treaty may allow for reservations, since the rationale of reservations is to offer “exit” strategies for states because of the binding nature of the treaty. Moreover, we might find in treaties rules on denunciation¹¹ and registration,¹² equally not needed in declarations. In any case – and irrespective of the will of the parties – there will exist at least five or six formal differences between a treaty and a declaration.

Also, either a revision clause or a clause on amendments is likely to be found in a treaty.¹³ This is important for the dynamic of the treaty provisions and allows for future adjustment of a treaty, while a declaration may simply be confirmed by a resolution or followed by a new declaration at a later point.

b) Second, there may be some substantive norms where the difference between a treaty and a declaration really matters and, therefore, political decisions are necessary. These provisions are generally more controversial in the bargaining process.

7 UN Doc. A/RES/2625, October 24, 1970.

8 UN Doc. A/RES/3281 (XXIX), December 12, 1974.

9 For example: “This Convention shall be subject to ratification, acceptance, approval or accession by Member States of the United Nations in accordance with their respective constitutional procedures.”

10 For example: “This Convention shall enter into force (...) months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession (...).”

11 For example: “Any Party of the Convention may denounce a treaty. The Denunciation shall be notified by an instrument in writing deposited with (...). The Denunciation shall take effect (...) months after the receipt of the instrument of denunciation. It shall in no way affect the financial obligations of the Party denouncing.”

12 For example: “In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the secretariat of the United Nations (...).”

13 For example, an article stating that “amendments shall be adopted by a (...) majority of parties” and/or that “amendments shall be submitted to the Parties for ratification.”

For example, a treaty has to give a definition of its subject and describe its precise scope of application. With regard to the RTD, this would probably create long debates and a lengthy, if not repetitive, process on the conceptualization. Some fear that a reopening of the debates of the definition and scope of application of the RTD in the process of its codification would risk to eliminate the concept of “peoples” and to weaken its collective dimension. As *Upendra Baxi* put it: “(...) it would be surprising, even astonishing, if the right to development (RTD) languages of the right to development of ‘states’ and / ‘peoples’ would not be strained towards eventual elimination via Right to Development Treaty (RTDT)!”¹⁴

On the other hand, these drafting debates would offer the chance to include important new aspects, for instance on intergenerational equity and sustainability,¹⁵ and allow for accentuation of the ecological dimension of the RTD which has so far been largely neglected.¹⁶ In other words, fresh impetus to the old debate would become possible.

The drafting of potential financial regulations is another point. Only a treaty may contain binding provisions on whatever financial instrument, e.g. a fund, to be established.¹⁷ Whether this is an appropriate solution for a treaty on the RTD is a different question: most Northern states simply fear that a treaty would lead to

legally binding obligations to provide resources to developing countries.¹⁸ At least, as was mentioned above, it is difficult to imagine how a constructive bargaining process on these issues could take place without the risk of politicization.

- c) Third, there may be a “grey area” of provisions which are of a rather formal nature, but which do have a clear-cut legal impact. Among them is the institutional setting of a treaty, e.g. the establishment of a secretariat and/or a Conference of Parties (COP) and/or a Committee. Related to that is the existence of provisions on a monitoring system. It is more likely to find a proper reporting mechanism¹⁹ and follow-up system in a treaty, although declarations may contain a follow-up system as well. For example, the Charter of Economic Rights and Duties of States²⁰ provides in Art. 34 that “an item of the Charter of Economic Rights and Duties of States shall be included in the agenda of the General Assembly at its thirtieth session, and thereafter on the agenda of every fifth session.” Thus, a systematic and comprehensive consideration of the implementation of the Charter, covering both the progress achieved and any improvements and additions which might become necessary, was planned to be carried out.²¹ Moreover, dispute settlement provisions belong to that category, too. A treaty, in contrast to a declaration, may contain a procedure for the

14 Upendra Baxi, “Paper for the Expert Meeting on the Right to Development,” organised by Harvard School of Public Health and Friedrich-Ebert-Stiftung, “Normative Content of a Treaty as Opposed to the Declaration on the ‘Right to Development’: Marginal Observations,” (Geneva, January 4-6, 2008) p. 2, Para. 14; see also Chapter 4 on the right to development in Upendra Baxi, “Human Rights in a Posthuman World: Critical Essays” (Delhi: Oxford University Press, 2007), pp. 124-55.

15 See already the Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, July 12, 1993, Para. I. 11 which set forth: “the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations;” see also Nagendra Singh, “Right to Environment and Sustainable Development as a Principle of International Law,” *Studia Diplomatica* 42 (1988), pp. 45-61.

16 See Paul Baer, Tom Athanasion, Sivan Kartha, “The Right to Development in a Climate Constrained World: The Greenhouse Development Rights Framework,” (November 2007), www.ecoequity.org/docs/TheGDRsFramework.pdf.

17 For example a provision that “(voluntary) contributions/ gifts, bequests by States, funds raised through collection and its use to be decided by a committee/COP (...).”

18 Alan Boulder, “The UN Human Rights Council and the Right to Development,” *Policy Papers on Transnational Economic Law*, No. 22, (May 2006), p. 9 rightly pointed out that some Northern States “have softened their positions over the years” concerning the international dimension of the right to development; regarding various country positions on the right to development see Felix Kirchmeier, “The Right to Development – Where Do We Stand? Stand of the Debate on the Right to Development,” *Friedrich-Ebert-Stiftung, Occasional Papers, Dialogue on Globalization*, No. 23, (July 2006), p. 13 et seq.

19 For example, a provision that “the function of a Conference of parties / committee shall be, inter alia, to receive and examine reports of the Parties to the Convention.”

20 Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX), UN Doc (1974).

21 This provision was not implemented, however.

settlement of disputes. It could, for example, set forth that in the event of a dispute between parties of the Convention, they shall seek a solution by negotiation and/or good offices, they may request mediation by a third party and – if this fails – they may recur to conciliation or arbitration, even to the ICJ. A declaration does not need such a provision because its application and interpretation are generally not viewed as judicial questions.

Relationship to Other Treaties

The RTD is the only right that is specifically mentioned in the resolution establishing the UN Human Rights Council,²² which indicates its relevance in all discussions on human rights. Another aspect which would necessarily play a role in the process of codification is therefore the relationship of the treaty to other treaties. In contrast to a declaration, which may be seen as a simple “add-on,” a treaty on the RTD would have to clarify its relationship to existing (human rights) treaties.

Right now it is an open question to what extent a treaty on the right to development would be integral part of the core human rights instruments of the United Nations along with ICCPR; ICESCR; CAT; CEDAW; CERD; CRC, the International Convention on the Protection of the Rights of all Migrant Workers (1990), the International Convention for the Protection of all Persons from Enforced Disappearance (2007), and the Convention on the Rights of Persons with Disabilities (2007). In case the Human Rights Council’s resolution 4/4, which decided on “a programme of work that will lead to raising the right to development (...) to the same level and on a par with all other human rights and fundamental freedoms”²³ is implemented, then the necessary focus would have to be on the dimen-

sion of individual human rights. Nonetheless, as *Michael Stein* highlighted, in that case the right to development is likely to meet much of the same resistance and face many of the same challenges as the Convention on the Rights of Persons with Disabilities, mainly because of its inclusive nature with regard to civil and political as well as economic, social and cultural rights.

In case a development cooperation treaty (“compact”) would be drafted putting emphasis on good governance, preferential treatment, rights based approach and solidarity, then the collective dimension may be stronger. The challenge certainly is to apply an integral approach to human rights and development²⁴ and to clarify the relationship between a potential treaty on the RTD and other international law treaties.

The political Leverage of a Declaration

Whether a treaty differs from a declaration in the substantive part of its provisions depends to a large extent on the will of the drafters. The will of State Parties to adopt a binding instrument, such as a Treaty on the Right to Development, is crucial.

As a next step, after years of debate, State Parties may very well wish to specify the content of the RTD and clarify its scope and obligations. Still, they may do so without necessarily drafting a treaty. They could wish to clarify the scope of application and the obligations as a first step in a non-binding document, i.e. a declaration, which then may serve as a potential “model” for a treaty. Another (second) declaration, more than two decades after the adoption of the 1986 Declaration (Res. 141/128), – if this is to be envisaged – could take into consideration the most important evolution of the RTD by bearing in mind the criteria developed by the Working Group on the Right to

22 Human Rights Council, UN Doc. A/RES/60/251, (April 3, 2006), Preambular part and Para. 4.

23 Human Rights Council, Resolution 4/4, The Right to Development, adopted without a vote, 31st meeting, (March 30, 2007).

24 See OHCHR Arjun Sengupta, Report of the Independent Expert on the Right to Development, UN Doc. E/CN.4/2000/WG.18/CPR.1 (September 11, 2000); UN Doc. E/CN.4/2001/WG.18/2 (January 2, 2001); UN Doc. E/CN.4/2002/WG.18/2 (March 5, 2002); UN Doc. E/CN.4/2002/WG.18/6 (September 18, 2002); Arjun Sengupta, “The Human Right to Development,” *Oxford Development Studies*, 32 (2004), pp. 179–203.

Development and its High Level Task Force since 2004.²⁵ A declaration – as a first step – might be better suited to comprise all stakes and mutual interests than a treaty which might have a narrower focus.

Let me give an example for what may be described as a useful “step-by step approach”: On 2nd November 2001, the UNESCO Member States unanimously adopted the Universal Declaration on Cultural Diversity at the 31st session of the General Conference.²⁶ This declaration is part of the foundation of the latter “Convention on the Promotion and Protection of the Diversity of Cultural Expressions,” adopted by the UNESCO General Conference on 20th October 2005. The Declaration emphasized the interdependence of human rights and cultural diversity and raised cultural diversity to the level of the “common heritage of the mankind”²⁷, making its defense “an ethical imperative indissociable from respect for the dignity of the individual.”²⁸ The Declaration, which advocated for specific actions, has been welcomed by numerous institutions that have adopted similar declarations, such as the Organization of the Francophonie,²⁹ the Organization of Iberoamerican States for Education, Science and Culture (OEI)³⁰ and the Summit of the Americas.³¹ Hence, there has been considerable impact on the regional level.

Several provisions of the Universal Declaration on Cultural Diversity (2001) resemble the spirit and wording of the Convention which was

adopted as a second step four years later (2005).³² However, the Convention on Cultural Diversity (2005) merely concentrates on the “expressions” of cultural diversity, while the Universal Declaration (2001) has a much broader theme: It reflects “the broad concept of culture and cultural diversity, as well as the importance of culture as a crucial element in the overall development of each society.”³³ In contrast to that, the focus of the 2005 Convention on Cultural Diversity is rather narrow. As Art. 3 CCD (2005) sets forth: “This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural *expressions*” – a term defined in Art. 4 Para. 3 as “those expressions that result from the creativity of individuals, groups and societies, and that have a cultural content.” This narrow approach is related to the mandate given to the Director-General in 2003 (see below), based on a preliminary study reproduced in Appendix 1 of document 32 C/52 (option (d)).³⁴ Therefore, it is important to note that “cultural diversity,” the term used in the UNESCO Universal Declaration (2001), and the “diversity of cultural expressions,” the term used in the Convention (2005), are two concepts which have different meanings.

Despite the differences between the topic of “cultural diversity” and the “right to development” the stakes are similar and parallels may be drawn. Generally, it is to be expected that a declaration may serve as a valuable basis for a treaty project.

25 For detail see Margot E. Salomon, “Towards a Just Institutional Order: A Commentary on the first Session of the UN Task Force on the Right to Development,” *Netherlands Quarterly of Human Rights*, 23 (2005), pp. 409-38; Charlotte Daub, “Die UN-High Level Task Force zur Umsetzung des Rechts auf Entwicklung: Implikationen für den Menschenrechtsschutz und die Entwicklungszusammenarbeit,” in: Sabine von Schorlemer (ed.), *Globale Probleme und Zukunftsaufgaben der Vereinten Nationen*, (Baden-Baden: Nomos, 2006), pp. 110-28; a matrix for the application of the right to development criteria and indicators was developed by Felix Kirchmeier, Monia Lüke, Britt Kalla, “Towards the Implementation of the Right to Development. Field-Testing and Fine-Tuning the UN Criteria on the Right to Development in the Kenyan-German Partnership,” Friedrich-Ebert-Stiftung, Geneva Office, (2007), pp. 15 et seq.

26 UNESCO, *Universal Declaration on Cultural Diversity*, General Conference of UNESCO 31st session, (Paris, November 2, 2001), <http://www.unesco.org>.

27 See Art. 1 of the Declaration.

28 Koichiro Matsuura, Director-General, “The Cultural Wealth of the World is its Diversity,” Foreword, UNESCO, *Universal Declaration on Cultural Diversity*, <http://www.unesco.org>.

29 Declaration of the Ninth Summit of the Francophonie, (Beirut, October 20, 2002).

30 Declaration on Culture, Sixth Iberoamerican Conference on Culture, (Santo Domingo, October 4, 2002).

31 Plan of Action of the Third Summit of the Americas, attached to the Declaration of Quebec City, (April 22, 2001), Chapter 17.

32 For detail see Sabine von Schorlemer, “Cultural Policy Rooted in International Law: The Drafting History of the ‘UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions,’” University of Kolkata, forthcoming in 2008.

33 Nina Obuljen, “From Our Creative Diversity to the Convention on Cultural Diversity: Introduction to the Debate,” (Zagreb, Institute for International Relations, 2006), pp. 19–35.

34 See UNESCO, Preliminary Study on the Technical and Legal Aspects relating to the Desirability of a Standard-setting Instrument on Cultural Diversity, UNESCO Doc. EX/28 (March 12, 2003).

Conclusion

During the last two or three decades, international treaty law has expanded rapidly³⁵ even though the international community does not have a single norm-setting forum. Given the enormous progress in, *inter alia*, the field of human rights law, international trade law, international criminal law, and international environmental law, we have to admit the high impact of normative action, provided that there is political will.

However, there may be good reasons not to expand treaty law further. Apart from the question of the proliferation of monitoring bodies and the overlap of different treaties, in particular in the field of human rights, a treaty always risks to unduly abbreviate the process of continuing legal development. In that respect a treaty may be compared with a photograph taken at a certain moment in history: it may “fix” and respectively conserve the picture, but once that is done, flexibility (on the subject) and creativity will be reduced.

Let us not forget: by nature, the RTD is dynamic. As Ibrahim Salama put it, it is “a constantly ongoing process, a permanent work in progress (...).”³⁶ For that reason, at the moment a treaty may risk to be too rigid in order to properly take into account the future evolution of the RTD. Besides,

as we all know, “no treaty is perfect.” An ill-drafted document might do more harm than no legal instrument at all. It would be naïve to expect a treaty on the RTD to satisfy all interests. In any case, the bargaining costs will be high, potentially even to the detriment of the new consensus which became possible due to the “pragmatic” approach taken by the Working Group on the Right to Development under Chairman Ibrahim Salama and the High Level Task Force on the Implementation of the Right to Development since 2004.

Whether the drafting of a treaty will have the effect of raising consciousness and educating states about the holistic nature of rights (as did the CRPD, see *Michael Stein*), or whether it will narrow the content of the RTD and politicize it, are open questions. However, as this analysis tried to show, in the context of the RTD we will find a number of differences which do play a role and which should be considered carefully, in particular in the context of fruitful North-South cooperation. Given the multifaceted and holistic nature of the RTD the lack of conceptual clarity and the imperfection of its obligations,³⁷ the time-frame for the next steps to be taken should be extensive in order to be able to proceed gradually, at best by way of a step-by-step approach (as in the case of the Convention on the Rights of Persons with Disabilities).

35 As of August 1st, 2001, the Secretary-General was the depositary of more than 500 major multilateral instruments, 429 of which were in force (UN Doc. A/56/326, (September 6, 2001), p. 8, Para. 16.

36 Ibrahim Salama, “The Right to Development: Towards a New approach?,” Paper for this volume, (2008), p. 4.

37 For detail see Sabine von Schorlemer, “Das Recht auf Entwicklung,” *Vereinte Nationen* 5 (2008, forthcoming).

Chapter 4: On the Right to Sustainable Development: Foundation in Legal Philosophy and Legislative Proposals

Xigen Wang*

There are two problems with the right to development (RTD) in theory and practice. The first problem has to do with the separation between the RTD and the concept of sustainable development. Sustainable development is not mentioned in the Declaration on the Right to Development, adopted by UN General Assembly in 1986, although as a concept it has been accepted since the 1980's and the relationship between the RTD and sustainable development has even been discussed in the literature.¹ The second problem is that sustainable development is expressed in terms of obligations and duties of human beings towards nature rather than as a human right. Both of these problems severely limit the potential for the protection and implementation of the RTD and sustainable development. Therefore, this paper attempts (1) to link sustainable development to the RTD and to posit the right to sustainable development as one aspect of RTD from the perspective of legal philosophy, and (2) to explore the legal framework for the implementation of human rights-oriented sustainable development

The lack of the rights-based approach

The perspective and methodology that one applies to sustainable development directly affect the orientation of actions and the actual effect of those

actions. Although sustainable development has a recognized definition, debates and explanations concerning it have been incessant since the conception was articulated. Owing to different background knowledge, theoreticians and practitioners approach the concept of sustainable development from their own angles, which can be summarized as follows:

- (1) **The ecological perspective:** From this perspective, sustainable development is considered in terms of ecological sustainability. The International Association for Ecology (INTECOL) and The International Union of Biological Science (IUBS) reflect this perspective. They define sustainable development as related to the protection of the environment and the enforcement of capability of creating and renovating environmental systems.
- (2) **The sociological perspective:** According to this perspective, sustainable development is designed to improve the quality of human life while living within the carrying capacity of supporting ecosystems.²
- (3) **The economic perspective:** This perspective focuses on keeping a harmonious balance between economic growth and environment consumption. It conceives of sustainable development as the maximization of net benefits of economic development, while conserving the

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1 "The right to development was discussed as main legal basis underlying sustainable development" (Cf. Konrad Ginther, Erik Denters, and Paul J.de Waatt, *Sustainable Development and Good Governance*, (Dordrecht/ Boston/London: Martinus Nijhoff Publishers, 1995), p.10.) But, in fact, the expressions or norms taking sustainable development as a right to development have not been found in existing legal documents.

2 World Conservation Union (INCN), United Nations Environment Programme (UNEP), World Wild Fund for Nature(WWF), *Caring for the Earth-A Strategy for Sustainable Living* (Gland: Switzerland, 1991).

quality of natural resources and the service provided by them³ Therefore, “sustainable development is here defined as a pattern of social and structural economic transformations (i.e., ‘development’),”⁴ which means that the average return or benefit to every person will continuously increase over time.⁵

(4) The technological perspective: This perspective considers sustainable development as an objective directed toward finding clearer and more effective techniques in order to reduce consumption of energy and other natural resources.⁶

(5) The ethical perspective: In ethical terms, sustainable development means fairness at three levels: “intra-generation,” “inter-generation,” and between “humans and the environment.”⁷ The task here is to enhance people’s moral consciousness of environment protection, alter traditional ideologies and behaviors, and promote sustainable survival.

(6) The comprehensive perspective: The most representative formulation of a holistic approach to sustainable development is found in the UN’s official definition, building on the report of the commission chaired by Gro Harlem Brundtland, namely, development that meets the needs of the present without compromising the capability of future generations to meet their needs.⁸

All of the above perspectives have clarified the inner meanings and outer forms of sustainable development and possess undeniable rationality and correctness. But these definitions are limited and unilateral because each one represents a different perspective. In short, the common characteristic of these perspectives is that they identify sustainable development with a kind of “strategy,” “responsibility,” “duty,” or “obligation.” They at-

tribute responsibility for unsustainable development to human beings and emphasize why people should take responsibility for nature and how they should act, which ultimately makes people become the object of a legal relationship with nature as the subject. This relationship avoids the misunderstanding that results from analyzing sustainable development exclusively in terms of obligations and responsibilities, while ignoring correlative rights. Because of the lack of a rights perspective, people are not the subject of rights but the subject of responsibilities, and become the chief culprit of environmental deterioration, resource destruction, and ecological crisis. The situation is legal nonsense because it involves a right without a remedy: although there is theoretically a violation of the right to sustainable development, no alleged victim has an enforceable right against a duty-holder to ensure that all the benefits of sustainable development accrue to the people as beneficiaries of this right. Therefore, we must go beyond the traditional visions and find a new approach based on rights, as understood in existing research.

Considering sustainable development as a human right

Sustainable development is neither the privilege of animals and nature, nor just the obligation of humans. We should introduce a new idea and consider it from the angle of human rights, especially the RTD, which means we should rethink the existing development framework and reconstruct a new one: the right to sustainable development. Taking sustainable development as a human right is the radical solution to the difficulties encountered, for the following three reasons.

3 Edward B. Barbier, *Economics, Natural Resources, Scarcity and Development: Conventional and Alternative Views* (London: Earthscan Publications, 1989); also see Book reviewed by Richard F. Kosobud, *Economic development and cultural change*, vol. 39/2 (1991), pp.435-7.

4 Richard Goodland, George Ledee, “Neoclassical, Economics and Principles of Sustainable Development,” *Ecological Modeling*, vol. 38/1 (1987), p.36.

5 David Pearce, Anil Markandya, and Edward B. Barbier, *Blueprint for a Green Economy* (London: Earthscan Publications, 1989).

6 James Gustave Spath, “The Greening of Technology,” *Washington Post* (Washington DC., November 20, 1988); also see “The Greening of Technology,” *The Bridge* (Washington DC., 1989), National Academy of Engineering, Summer 1989.

7 Robert Costanza, Ralph d’Arge, and Rudolf Groot, “The Value of The World’s Ecosystem Services and Natural Capital,” *Nature*, vol.387 (1997), pp. 253–9.

8 World Commission on Environment and Development (WCED): *Our Common Future* (Oxford: Oxford University Press, 1987).

- (1) Regarding sustainable development as a human right can overcome the drawbacks mentioned above.

Treating sustainable development as a human right will help to eliminate the logical contradiction of traditional views, which confuse the subject and the object of legal relationship. From the ontological perspective, the views mentioned above consider both mankind and nature as the subject of the legal relationship since both have life and inner values. This kind of view is born of the rejection of anthropocentrism, exemplified in the work of the German philosopher Martin Heidegger, who firstly criticizes it and thinks that the human being is not the master or center but the servant of "existence." Paul W. Taylor emphasizes the equity of nature and humans.⁹ David Griffin points that the view taking human as the subject while nature as the object is wrong, as it implies ravaging ethnics and disregard of nature's life and its inner values – "produced a radically *anthropocentric ethnic*" and "*exploitative ethnic*."¹⁰ Applying this view of intersubjectivity between nature and humans into sustainable development, leads to a view of values and rights of nature. Authoritative views set the rights of other living beings on a par with human rights, which means all kinds of living beings should be respected and protected.¹¹ Not only mankind but also other biological species and the whole biological system have undeniable right to development. If we admit that mankind is the only subject of right to survival and development, most of the destructive behaviors to nature would be justified and legalized under the reason of human survival. The traditional industrial civilization derived from this view makes all kinds of evil violations of nature and leads to unsustainable development.¹² Actually, although other living beings besides humans have their own needs, benefits and values, they are still unable to become the subject of right and will always be the object.

Therefore, taking sustainable development as an obligation rather than a right is unreasonable. Science calls for treating it as a right. The view of taking sustainable development as a human right is based on the idea that mankind is advocate, supporter, judge, and implementer. Accordingly, every person not only has obligation to others, but is also himself a subject. In this view, people are always the subjects of legal relationship; nature cannot be the subject and should always be the object. The purpose of protecting nature is merely to safeguard human rights instead of nature itself. The value of nature is its usefulness to mankind as the subject. Therefore, we should emphasize the central position of mankind, not of nature, and highlight human rights, not inanimate rights.

Be that as it may, the right to sustainable development distinguishes clearly between the subject (mankind) – and the object (nature).¹³ Any natural substance besides human beings has no possibility to turn into the subject from the object, which is the most fundamental difference between the theory of right to sustainable development and the theory of obligation to sustainable development.

- (2) The theory of the right to sustainable development overcomes obstacles to implement sustainable development.

Traditional theory regarding sustainable development based on people's obligations instead of rights lacks socio-psychological support derived from functioning systems, and is impossible to be put into practice. This theory just takes sustainable development as a human obligation and ignores the inseparable relationship between right and obligation. Right and obligation are preconditions for each other. It is an indisputable common understanding in jurisprudence that there is no obligation without right. If sustainable development is just a human obligation, people will lose their

⁹ Paul W. Taylor, *Respect for Nature: A Theory of Environmental Ethics*, (Princeton: Princeton University Press, 1986).

¹⁰ David Griffin, *Spirituality and Society: Post-modern Vision*, (Albany: State University of New York Press, 1988), p. 146.

¹¹ See *supra*, note 3.

¹² Desheng Wang, *Natural Dialectics Theory*, (Beijing: Beijing Normal University Press, 1997), p. 351.

¹³ In this view, people always are the subjects, substances are impossible to be the subject and should always be the object. See Changshu Chen: *Sustainable Development in Philosophic Field* (Beijing: China Social Science Press, 2000), pp. 95–121.

psychological identity and emotional common understanding, and even detest or hate it, or at least not identify it on the inside and only be subdued by external force without inner persuasion. We could make many laws for sustainable development, which may have legal authority, but they would only create outer pressure, not an inner idea, and without the support of inner belief, the laws will be difficult to enforce.

Moreover, if sustainable development is a mere obligation without rights of the subject, once obligations are infringed, how does one determine whose right is violated and who can make a claim based on that violation? What should be done when human rights conflict with nature's rights? Is there any operable way to realize and ensure the present generations' benefits without endangering those of future generations?¹⁴ These questions can only be answered if we regard humans as the subject of rights. The right to sustainable development allows people to be the subjects, which means that when somebody violates another's right, the victim can use the legal system to claim his right from the perpetrator who has disobeyed the rules. This kind of "people – people" model is simple and reasonable compared to the "people – matter" model, so there is no need for us to put currently existing theories aside and develop a new one, which would just bring chaos of theories and lead to confusion of practical operation.

In any case, the theory of the right to sustainable development fully respects the philosophical principles of subject and object, and puts nature as the intermediary between the people and people taken as subjects. Once a person violates sustainable development between humans and the environment, that person violates the other person's rights. This connects two subjects together through mutual legal adjustment of their benefits, and furthers the protection of the natural world and sustainable development.

In my opinion, there are three interrelated components of sustainable development: comprehensive development of the human person, free development of the human person, and harmonious development of the human person. All

of these are unified into one human right – the right to sustainable development. Taking sustainable development as a human right realizes the unity of developmental intentions and measures. On the one hand, the right is the final aim of all behaviors and systems. In a legal value system, it is the highest level to pursue, and it expresses the finality of development. On the other hand, the systematizing and legalization of the right is the key to transfer a valuable idea into a valuable practice. In a society ruled by law, standardizing, affirming, protecting, and providing remedies for the RTD is the optimal path to realize sustainable development.

Foundation in legal philosophy and legitimacy

Legitimacy is analyzed, notably by Max Weber and Jürgen Habermas, at three levels: historical origination, regulation, and justness. Should sustainable development be a right recognized in law? What are its legal value and its basis in legal philosophy? Can we create a new legal concept and, if possible, how do we go about it? These questions are the major premises for the research on the right to sustainable development. A human right refers to the capacity of a subject to claim freely and equally his or her proper benefits. Jurisprudentially and logically, every right includes at least five elements: *benefit, justice, liberty, capability, and claim*.

Sustainable development has been taken as a *claim*. "The real foundation of human development is universalism of life claims," "this universalism of life claims – a powerful idea that provides the philosophical foundation for many contemporary policies – underlies the search for meeting basic human needs."¹⁵ But whether or not a claim is properly considered as a human right depends on the extent to which it includes benefit, justice, liberty, and capability. For present purposes, the character of sustainable development as a human right is more or less demonstrated, but as a whole it is still very primary and incomplete. Through a macro-analysis of core ideas and related values about sustainable development as understood in

14 Changshu Chen: *Sustainable Development in Philosophic Field*, (Beijing: China Social Science Press, 2000), pp. 6–7.

15 UNDP, *Human Development Report 1994*, (New York/ Oxford: Oxford University Press, 1994), p.13.

human rights jurisprudence, the theoretical reasoning leading to the conclusion that sustainable development is a human right goes as follows:

Firstly, *benefit* is the content of right and right is the outer form of benefit. As a new way of distributing benefits, the original intention of sustainable development is to reasonably distribute all sorts of benefits and resources to prevent destruction and depletion of all natural resources beneficial to society. In a word, the benefit is the aim and the result of development. In spite of how it is defined, sustainable development is always indispensable to meet human needs in the present and in the future and to continually improve the quality of human life.¹⁶ If we take development as a vector of an ideal social object, it will include the increase of per capita GDP, the improvement of conditions of health and nutrition, the achievement of education, the acquisition of resources, the fair distribution of income, and the enhancement of basic freedom. Over time, average advantages and benefits will also continuously increase.¹⁷ The definition proposed by Brundtland widens the space of human needs about benefits, and points out the connection of sustainable development between the needs of the present generation and those of future generations. Briefly, almost all definitions identify the key of sustainable development as residing in the distribution, use, and consumption of resources and benefits, but regrettably none of them abstracts rights from the essence of benefits NOR establishes the new view of the right to sustainable development. Even the official Brundtland definition has its drawbacks. One scholar points out that the definition's defect lies in that "It just thinks that the aim of sustainable development is 'the satisfaction of human needs,' but doesn't highlight the radical issue of 'taking human persons as the core of development,' even more it also doesn't mention the ultimate goal of

'comprehensively free development of human persons.'"¹⁸ Actually, the essential defect of the definition is that it never transfers "human needs into benefits" to "human needs into rights." In other words, what is missing from the definition is the language of a human right, the right to sustainable development.

Secondly, although not every benefit necessarily can be taken as the right, only justified and rational benefits can have the constituent elements of rights. The essence of sustainable development not only lies in its traditional principles of *justice*. but it also enriches and expands the understanding of justice. In the present analysis, this kind of justice, which I consider to be embodied in sustainable development, is defined as "dynamic Justice."¹⁹ This view of justice endows subjects with abilities to equally and properly acquire, occupy and use resources and benefits. One, dynamic justice is intra-generational justice, that is, equal justice for all members of the present generations living in different districts and nations and enjoying different levels of development. Two, dynamic justice is inter-generation justice, that is, justice between the present generation and future generations. And three, dynamic justice emphasizes the equity of humans and nature, which means people should treat nature with the same care they treat themselves.²⁰ It emphasizes the fairness of distributing limited resources equally among nations;²¹ it ensures the same opportunities for developing countries to utilize resources as developed countries have; and, through these equal opportunities, finally it realizes global justice.

All in all, the view of justice underlying sustainable development has five basic characteristics:

- a. *Collectivity*: Justice should be shared by all the people collectively not individually, which is social justice or human justice, not individual justice.

16 Robert Prescott-Allen, *How to Save the World: Strategy for World Conservation*, (London: Littlefield, Adams, 1981).

17 David Pearce, Edward B. Barbier, and Anil Markandya, *Sustainable Development and Cost Benefit Analysis*, (London: IIED, 1989).

18 Wenhua Chen, "Thoughts about Connotation of Sustainable Development," *Science Technology and Dialectics*, Vol. 4(1999).

19 See Xigen Wang, "On the Comprehensive Justice – based on the right to development," (Collected papers for the 23rd IVR conference, Cracow, Poland, August 2007).

20 See *supra*, note 8.

21 Rio Declaration on Environment and Development points out: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction." Rio Declaration on Environment and Development (RDED), UNCED report (1992).

<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

- b. *Integration*: Justice does not just emphasize resources and environmental justice, but also requires a mutually-reinforcing development among the economy, nature and society, which is the unity of economic, social, and environmental justice.
- c. *Compensation*: Justice does not just highlight equality and equalization, but also insists on the realization of social justice through affirmative action on behalf of poor populations and frail ecology.
- d. *Comparativeness*: Justice distributes resources equally through longitudinal inter-generation comparison and shares resources fairly through transverse intra-generation comparison, which rectifies traditional views of realizing justice merely from a static angle.
- e. *Globalization*: Justice transcends boundaries of nations and social systems, enlarges John Rawls' theory of justice from national to international scope, and realizes global justice. Only in this way, can justice be dynamic and sustaining. This dynamic character is the most radical particularity of the right to sustainable development.

Thirdly, sustainable development considers *free* human development as a prerequisite, and as a measuring rod for the enlargement and realization of human freedom. Freedom is an important standard to judge human rights, and the contribution of sustainable development to freedom lies in four areas:

- a. *Freedom to choose development models*. According to Amartya Sen, the development capability means a person's freedom to choose among different ways to living.²² Sustainable development is a kind of selective development. In order to maximize continuous and eternal development, different subjects, according to individually special characters of economy, society, environment, population and resources in given spaces, can make correct judgments and choices of developmental directions, speeds and models for themselves.
- b. *Freedom of the individual to benefit from nature*. Free development of a market economy is the

material measure of the realization of sustainable development, because market economy can optimize resource allocation, promote the efficient use of resources through market-based incentives, and thus promote sustainable development. But unconditional market economy will lead to the exhaustion of natural resources, serious environmental pollution, and ecological crisis. So a power-state which can control and surpass the market emerged as the times require. Rather than radically rejecting the free market, we should restrain its traditional developmental model of high-consumption, low-efficiency and environmental destruction. The advantages to be gained by orienting the modern market economy towards sustainable development include transforming the legal barycenter from individual to social or collective rights, expanding the scope of freedom, and increasing human control over nature. In the model of sustainable development, mankind became the master of liberty, while unsustainable development catabolized the people into the slave of liberty and led to "colonization of lifeworld"²³ mentioned by Habermas. Only by realizing harmonious development in all aspects of the economy, science, society, population, and resources, can we improve human abilities to recognize, utilize, and rebuild nature and finally enlarge human freedom.

- c. *Freedom of the individual to develop in society*. Sustainable development enhances everyone's freedom in society, including both negative and positive freedoms. The former means that everyone has the right to protect himself from continuous violations of sustainable development coming from others, and every generation's equal RTD cannot be denied by other generations. The later means that the present generation can develop only to the extent that it does not deprive future generations of the benefits of development.
- d. *Freedom of individual to self-fulfillment*. Sustainable development not only enhances the freedom of people to benefit from nature and to

22 Amartya Sen, *Commodities and Capabilities*, (North-Holland, 1985); *Development as Freedom*, (Oxford: Oxford University Press, 1999).

23 Habermas Jürgen: *The Theory of Communicative Action, Volume 2, System and Lifeworld: A Critique of Functionalist Reason*, (MA/Boston: Beacon Press, 1987), pp. 301–8.

live in society, but is also beneficial to realize the freedom of people to reach their human potential, which can enhance their ability as subjects to engage in activities, to reach a common understanding and mutual respect, and to foster self-respect, self-consideration and independence of people. In sum, sustainable development is an important measure for the realization of comprehensive and free development of people. Development is the unity of aim and measure, and sustainable development aims to realize free development of people through the best measures. Thus, everyone's free development is the condition to all people's free development, and the whole of humankind's free development is the basic value pursued by sustainable development.

Finally, sustainable development means the enhancement of human survival and development *capability*, and it is the continuous energy to keep people's "status" as people. Capability as the subjective condition in the human body must depend on the external energy supplied by natural resources and environment, which need to be protected in the framework of sustainable development. On the contrary, unsustainable development has destroyed or weakened the foundation of people's development. Of the various definition of poverty, capability poverty is all the more serious as it results in deprivation of the right to development. Furthermore, unsustainable development compromises the "*capability* of future generations to meet their needs."²⁴ Thus, sustainable development is a rational choice to intensify capability. The capability and status are necessary characteristics of human rights, and human rights embody people's capability or status. Originally, development referred to the external result of achieving human potential. Development under the capability approach goes one step further by referring to the capability of a person to exercise various combinations of functionings (doings and beings) that he or she can achieve.²⁵ Sustainable development

aims to enhance human inner mental and physical strength, as well as external understanding of ability, including sentience and ideation, and aesthetic capability. In this regard, the Rio Declaration on Environment and Development points out that "To achieve sustainable development and a higher quality of life for all people, states should reduce and eliminate unsustainable patterns of production and consumption."²⁶ In this kind of development, human beings are at the centre of concerns ("people-centered development,"²⁷) and to "expand their capabilities"²⁸ is the radical assignment. Sustainable "development must enable all individuals to enlarge their human capabilities to the fullest and to put those capabilities to the best use in all fields – economic, social, cultural and political."²⁹

Human capability can be demonstrated by a series of development indexes, which analyze developmental capability from economic, societal, environmental, and other aspects of human society.

Moreover, all people are created equal, everyone is equally provided with the status of sustainable development. Once this status is deprived or limited, people can seek legal protection and legal relief to restore their benefits. Accountability and remedies for rights deprivation are essential characteristics of sustainable development. In light of the challenges sustainable development faces from ecological crisis, environmental degradation, resources destruction, when people are suffering from violations brought by these problems, they should have the possibility to claim their rights, which includes access to due process and remedies ranging from compensation to recovery. Nowadays, the legal systems of sustainable development all over the world suffer from the same defects: They always affirm values and meanings of sustainable development through strategies, slogans or creeds, but only rarely and with difficulty build effective legal mechanisms of responsibility and punishment based on the inextricable connection between right

24 See *supra*. note 8.

25 Bård A. Andreassen and Stephen P. Marks, *Development As A Human Right* (Cambridge: Harvard University Press, 2006).

26 See *supra*. note 20.

27 James Gustave Speth, "Forward," in UNDP, *Human Development Report 1994* (New York/ Oxford: Oxford University Press, 1994), p.III.

28 See *Supra*, note 15.

29 *Id.*, p.13.

and obligation, with the consequential lack of affirmation and relief of sustainable development. Therefore, the law of sustainable development should emphasize particularly the construction of mechanisms to affirm and provide relief for rights in the future, inspire people's enthusiasm for sustainable development, and finally raise sustainable development from a romantic ideal to the realm of positive legal reality.

Conclusion

This chapter has attempted to articulate the right to sustainable development as a new kind of right, in order to renovate the concept and ensure sustainability. Accordingly, a solid foundation in theory and practice of the RTD establishes a basis for legislation and its implementation. Absence of common knowledge and understanding in legal philosophy is a major problem. Of course, no right will ever be realized if its justification for being valuable and legitimate is only through natural law instead of positivism. A practical approach to realize this right is to achieve its "positivization" into a legal norm. Therefore, some suggestions with regard to legislation about right to sustainable development are in order:

(1) *Reconstructing the concept of the right to development.* In the definition of the RTD in the 1986 Declaration,³⁰ there is no explicit reference to sustainable development. This definition contains all aspects of this right involving economic, social, cultural, and political development, but is still of inevitable historical limitations. Both idea and content of sustainable development should be absorbed into the right to development, including in the possible drafting of a Convention on the Right to Development. Thus the definition in Article 1 should be amended to add "sustainable" before

"development" and the term "nature" or "environment" should be added to the idea of "development." Only in this way, can sustainable development have legal status and become a binding norm.

(2) *Creating legal principles.* Legal principles are the basic premises in constructing legal systems.³¹ The declarations on the RTD and on sustainable development are often derided as documents without force or effect. Indeed, they are not legally binding, but they do respond to the criteria of practicability and feasibility to be regarded as legal principles. The basic principles of sustainable development are recognized as a kind of "soft law"³² waiting to become "hard law" in the future. The existing principles as soft law set a good example and proof for the potential future legislation as "hard law." If legal principles are to be mined for hard law in the drafting of a Convention on the Right to Development, we should not ignore the status and function of the sustainable development principle.

(3) *Making legal rules.* The main form of a legal norm is the formulation of specific and justiciable rules based on legal principles. Thus, we should articulate the legal relationships involved in the right to sustainable development, including the subject and object of the right, as well as its content. Then comes the logical structure consisting of rule of behavior and its legal effect. Once one's right to sustainable development is violated, legal responsibility will follow. So the rights-based approach to sustainable development needs to connect right with obligation instead of relying exclusively on obligation and responsibility. For this reason, the rights-based approach, compared with an obligation-based approach, is preferable, since its principal merit is to provide the legal basis for the implementation of the right to development.

30 Article 1 says: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." See Declaration on the Right to Development, G. A. Res. 41/128 (1986).

31 Ronald Dworkin divided the law into three forms: "principle," "rule" and "policy," principle plays the most important roles (Ronald Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1977), pp. 22–44).

32 The binding of soft law is not originated from some specific regulation in law, on the contrary, "such legitimacy can be regarded as legitimate because the enactment has been agreed upon by all those who are concerned" (Max. Rheinstein ed., *Max Weber on Law in Economy and Society*, Cambridge: Harvard University Press, 1954).

Chapter 5: Normative Content of a Treaty as Opposed to the Declaration on the Right to Development: Marginal Observations

Upendra Baxi*

Passage from a Declaration to a Treaty

Many crucial United Nations Declarations have matured into treaties; and it remains understandable that some of us may favour the passage of the Declaration on the Right to Development (RTD) to a status of a treaty, creating abiding obligations for state parties. However, the passage of Declarations into Treaty forms suggests that it stands influenced as much by chance (contingency) as by necessity (the inherent power of normativity over the Realpolitik considerations.) The history of the RTD Declaration provides a many sided-narrative of contingency. The important question is whether the RTD has developed sufficient normative power compelling its transformation into a global treaty.

This passage from the status of an international instrument named as a Declaration into a Treaty is usually determined/conditioned by various factors, among which are the following:

- [a] the normative and programmatic importance of the subject-matter of the instrument;
- [b] the state of *communio juris* around the core content of the instrument;
- [c] the specific status ascribed to a Declaration within the United Nations system;
- [d] the pertinence of the instrument measured in terms of the development of global, regional, and national social policies;
- [e] an assessment of the of the available technical, institutional, and diplomatic competence facilitating the passage; and
- [f] the costs and benefits of moving from a Declaration to a Treaty form, especially in terms of the considerations thus far outlined.

These six factors form the context of any consideration for the passage of the RTD into a Right to Development Treaty (hereafter RTDT.).

The Normativity of the RTD

Concerning the first dimension – [a] above – it remains arguable that some compelling considerations exist for contemplating this transformation. The RTD is a new genre of normative/discursive implosion. It readily relates itself to some principal developments in the field of human rights. It redefines the very notion of development in several distinct ways. The initial doctrinal and diplomatic reservations to RTD have, over time, yielded to the power of its normative content. One may even go so far as to draw a parallel between the Universal Declaration of Human Rights and the RTD: since the UDHR matured into an International Bill of Human Rights, there is no inherent reason why the RTD may not provide crucial ingredients/elements for an international Bill of Developmental Human Rights. Further, it is clear that the programmatic content of RTD has attained over the decades, a wider endorsement from the community of states than in sight at the times of its adoption.

Concerning [b] above, the state of *communio juris* around the core content of the RTD may still invite acts of contentious reading. One may maintain, on the one hand, that the core content is far too nebulous to allow this passage. On the other hand, it also remains arguable that it has already acquired accretion of meanings and significations, which make RTD “ripe” for transformation into RTDT. It needs saying that already the crucial

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normative components have impacted both in the spheres of state practice (including the adjudicatory spheres) and the evolution of the global social policy (as partly illustrated by the United Nations MDG discourse.) However, a fuller demonstration seems needed to establish the proposition that a core content of the RTD has been established via state practice as well as the opinion of eminent publicists (forming the subsidiary sources of international law, as per the Statute of the International Court of Justice.)

The Status of RTD within and outside the United Nations System

The RTD is among the most reiterated declarations within the United Nations system, second only to the Universal Declaration on Human Rights. It has also been reiterated in regional human rights instruments, and in the recent articulations of global social policy (such as the Millennium Development Goals.) Further, one needs to foreground the UN investment so far made into efforts at the development of the right to development, notably in terms of the efforts by Dr. Arjun Sengupta's important and remarkable contributions in this direction and the deft RTD deployment by the Human Rights Treaty Bodies. If, as is well recognized the reiteration of Declaration norms in the United Nations system (especially the General Assembly Resolutions) tends to convert "soft law" into "hard law" formations, the RTD surely qualifies as "ripe" for translation into RTDT.

The Technical Element

Considerations indicated by [e] above need closer examination. We need to render specifically discrete the available technical, institutional, and diplomatic competence facilitating the passage. As Fredrick von Savigny, the 19th century founder of historical jurisprudence, reminded us all, codification entails both technical and political elements. If the latter invited attention to the problems of political will-formation favourable to attempts at codification, the former stood symbolized by the

vocation of jurists, whose tasks remained formidable in terms of putting into a commonly acceptable language a vast mass of heterogeneous textual and interpretive practices. It is well worth asking whether there exists this technical expertise concerning the passage of RTD into a RTDT. Likewise, the concerns about the within-UN system institutional auspices do indeed matter, given the fact that the International Law Commission generally remains entrusted with the tasks of "progressive codification" of international law. At the same moment, the Office of the High Commissioner for Human Rights has also emerged as a specialized body addressing similar tasks for developing the human right to development. Leaving aside momentarily the within-UN "turf wars," the problem of crafting new institutional auspices for the passage invites some close deliberative attention, indeed!

Further, the issue of diplomatic competence – inviting the labours of further translation of this passage from declaration to treaty in terms of the UN member-state sponsorship and support – raises the question of whether any effort at this transformation will persuade the unwilling states towards endorsing a RTD treaty regime. Persuasion, on this register, invites consideration of incentives and disincentives for the unwilling states. In what may this "incentives package" consist? In a sense, this raises a related question factoring cost-benefit analysis.

Towards a Cost-Benefit Analysis

How may one proceed to consider the benefits and costs of translation of RTD into a Treaty? Clearly, a most attractive benefit is provided by the prospect of common consent of states to assume legally binding obligations towards human and social development. However, a pursuit of this benefit may not disregard the costs of dissensus, opening up in the process the very legitimacy of RTD conceptions and values. For the large number of states, who have already endorsed the RTD, perhaps no additional legitimacy gains may be yielded by RTDT regime; however, any treaty proposal would enhance the power of those states already ill-dis-

posed, and even opposed to RTD. This aspect obviously deserves a close examination in any contemplation of a movement towards the RTDT.

Further, the treaty form may carry the cost of arresting new directions in the development of the right to development. For example, the much talked about notion of human rights based pursuit of developmental goals and policies suggests that no aspect of governance may claim to remain human rights neutral. This is a very complex idea, which may justly resist an early codification. Further, the RTD extends responsibility to non-state but state-like actors and if the response to the UN Draft Norms on the human rights responsibilities of multinational corporations and other business entities is any guide, any RTDT type crystallization of these obligations will not merely evade mature consensus but will be opposed early as deserving a “third class funeral.”

The issue of cost-benefit analysis goes beyond that of enhancing diplomatic competence favourable to the very notion of passage from RTD to RTDT. The RTD celebrates the idea of development, which has itself been exposed to various incarnations such as alternate, or another development and “post-development” and “globalization.” This needs some elaboration.

RTD Talk in an Era of Post-Development and of Hyperglobalization

The RTD enunciation occurs in a world-historic disjuncture. If at one singular historic moment, it thrives on the ruins and debris of heroic movement towards the New International Economic Order (and the equally aborted UNESCO sponsored the New International Information and Communication Order) it also seizes a unique moment in the interregnum marking the transition towards some new forms of postdevelopment and hyperglobalization. The RTD occurs, more or less, towards the end of the Cold War and stands developed fully amidst the forms of disciplinary, regulatory and transactional onsets of contemporary economic globalization.

As is well understood all-round, contemporary economic globalization re-imagines and recasts the

entire world as an integrated market for as unimpeded as “humanly” possible the flow of factors of production. It begins to assume forms of hyperglobalization when social and cultural pluralities are seen to pose an obstacle, rather than an asset, for human and social development. It is in this sense that Pierre Bourdieu enunciates neoliberalism as a “war against pluralisms.” The post 9/11 quest for collective human security directed against the wars of terror reinforces this trend. Any movement towards RTDT ought to take seriously into account these vastly changeable global scenarios.

Likewise, the “post-development” discourse suggests a moral fatigue – a weariness and wariness – with the very Idea of Development translated into the ideologies of developmentalism. The activist critique of developmentalism has further significantly contributed to this emergence. The space thus at least partially evacuated stands now occupied by what I may here name as the processes of privatization of the development paradigm, a form in which increasingly the formerly cognized duties of North governmental development aid and assistance to the Third World societies and nations stand transferred to a variety of public-private partnerships, which in turn legislate new conceptions of “development.” In these latter, the states, multinational corporations, communities of direct foreign investors, human rights and social movement NGOs and policy experts tend to form development consortia, even at times politburos. The United Kingdom-led Africa Plan illustrates this trend towards a new model of privatization of development paradigm. So do, in related but different context, the UN Global Compact and the logics of the UN-MDG operations.

The momentous question thus posed is this: how far the translation of the RTD into RTDT may periclitate (or imperil) the originary vision and values of the RTD? Put another way, if a middle path has to be after all treaded, how may we envisage the terms of dialogue for this passage, consistent with some lofty aspirations and objectives of the RTD? Further, is the current diasporic global presence and impact of the RTD, after all, not well worth preserving in the face of the potential diminution of its rhetoric and normative force?

Towards Conceptualizing Some Key Elements of RTDT

Assuming a responsible and responsive consensus favouring RTDT, I summarily outline below some problematic elements of this transition.

First, it would be surprising, even astonishing, if the RTD languages of the right to development of “states” and “peoples” would not be strained towards eventual elimination via RTDT! We already know from the Draft Charter on Indigenous Peoples Rights the difficulties experienced in the retention of the term ‘peoples.’ Further, any possible re-articulation will surely here need to attend to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (General Assembly resolution 53/144 of March 8, 1999), which may be construed as extending to individual as well as peoples’ responsibility. As concerns the “states,” the RTDT will have to fully relate itself to the International Law Commission’s codification of the law of state responsibility. How far all this may remove us beyond the ambit and the remit of the RTD poses a serious reflexive concern.

Second, how may any contemplated RTDT further fructify the germinal enunciation of RTD Article 6[2] insistent on the elimination of “obstacles to development resulting from failure to observe civil and political rights as well as social, economic, and cultural rights”? For example, less favourable, even anti-human rights regimes may still be said to satisfy some RTD indicators (such as literacy and education, poverty-alleviation, and overall GDP growth factors as indicators of “development”) yet in the originary RTD aspiration these regimes may still remain identifiable as posing “obstacles” to social and human development.

Third, how may RTDT even venture to address what I have identified as the “five silences” of the RTD concerning the right to self-determination, “full and complete sovereignty over natural resources,” “international peace and security” as a foundational element of RTD, rededication of resources of development generated by disarmament, and the servicing of a New International Economic

Order in the full face of neoliberal hyperglobalization? Most likely, all this would be consigned to a gigantic historic dustbin in any move towards RTDT. Yet, if the RTDT project remains sensible in terms of some nascent (and yet still reascent) approaches to global justice, sufficient technical and diplomatic competence would have to be at hand to translate these elements in some fresh RTD future-serving terms and diction.

Fourth, the RTD celebrates “participation” as a supreme virtue of governance. It is clear that this virtue has been since then further crystallized both, and somewhat asymmetrically, in the UNDP and the IFI programmatic thrusts defining “good governance.” Further, both the 2003 African and the UN declaration on political corruption offer grist to the mill of a future RTDT. So do the EU and NGO means and ethos of “certification” of “free and fair” elections (of course outside the Northern shores, especially the United States!) Any attempt at formulation of RTDT will have to be based on empirically grounded understanding of these, and related endeavours, and further normatively liberated from the lean and mean patterns of the expedient and exigent governing some North-based development/aid policies and performance.

Fifth, presumably a great advantage of RTDT over the RTD may be furnished by a corresponding proposal for the formation of a UN RTD Treaty-Body. If so, its procedures and powers will make sense only when conceived in the light of the experience of actually existing UN human rights treaty-bodies. How may then a future UN-RTDT body innovatively reconfigure these, in ways that may also fecundly refract on the existing human rights treaty-bodies?

Sixth, there exist some leeway of choice, directing the imagination of RTDT towards a framework, even a law-making, “treaty” contrasted with treaty-regimes that enact an order of internationally binding obligations. While a “framework” RTDT may be thought to mark an advance over the extant regime of RTD, the issue of derogations even from this form needs to be addressed afresh in, and somewhat beyond, the terms of the Vienna Convention on the Law of Treaties. I here deist from any detailed elaboration save saying that any

contemplated RTDT may best be best thought of, at the present moment, in terms of a “framework” treaty regime. I say this because the constituencies of the RTD rights and duty bearers must themselves be opened up to further inclusive strategies, in particular specifically embracing the RTD-type obligations of: [a] international, supranational, and regional financial institutions; [b] multinational corporations and allied business entities; [c] human rights based responsibilities of state actors and instrumentalities in the “hot pursuit” of hyper-globalizing policy frameworks and conducts.

More may be said in this narrative vein. However, I here again desist save saying any reflective

choice-making at converting the regime of the RTD into RTDT ought to seriously cognize the inchoate transformative and aspirational power of the RTD against what may, after all, be gained by this passage. The RTD remains, on all available indicators hitherto, an enormous platform of human rights and social activist struggles. A well-accented Draft framework RTDT may even enhance this mission and cause. For this reason alone, may I suggest, in a concluding remark, that the any act of authorship for a future RTDT ought fully to privilege the voices of the suffering and rightless peoples and the communities in resistance?

Part II: EXPERIENCE WITH REGIONAL TREATIES CONTAINING PROVISIONS ON THE RIGHT TO DEVELOPMENT

Chapter 6:

“Righting” the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples’ Rights

Obiora Chinedu Okafor*

The issue central to each of these [developing] countries, and dominant in their posture towards the industrialized nations, is development...It is the most critical of the myriad mix of fibers that form the fabric of international relations. Unless wise policies replace the often short-sighted activities that are now all too often evident in countries both North and South, humankind faces an increasingly bleak future. The preferred policy mix, unquestionably, *must include an element of law.*

Ivan Leigh Head¹

“1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

Article 22 of the African Charter²

I. Introduction:

This paper is framed by three principal objectives. The first is to analyze (from a globally contextualized socio-legal perspective) the normative properties, strengths, and weaknesses of Article 22 of the African Charter; one of the precious few *hard law* guarantees of a right to development that currently exist in the realm of international human rights. The second major objective of the paper is to tease out and articulate what, if anything at all, can be learnt from an understanding of this region-spe-

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1 See Ivan Head, “The Contribution of International Law to Development,” *Canadian Yearbook of International Law*, vol. 25 (1987), p. 30. Emphasis added.

2 See the African Charter on Human and Peoples’ Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 521 I.L.M. 58 (1982), entered into force on October 21, 1986 (hereinafter referred to as the “African Charter.” See also Article 19 of the Protocol to the African Charter on the Rights of Women, the so-called Women’s Protocol, http://www.achpr.org/english/_info/women_en.html, providing for a right of African women to “sustainable development.” In a similar vein, Article 20 of the Fourth Lome Convention did of course provide for a limited right to development, but that document is not an international human rights treaty. See the *Fourth ACP-EEC Convention of Lome*, December 15, 1989, 29 I.L.M 783 (1990).

cific provision by those who have been tasked with imagining what a possible global treaty on the RTD might look like. Entailed by these first two goals of this paper is an attempt at the “righting” of the RTD as it is articulated under Article 22; an attempt to develop ways of making the RTD “right” – not just by strengthening its capacity to function as a legal norm, but also by enhancing its capacity to contribute to “good” development praxis.

The partial “Africa-toward-the-Globe” gaze of this analysis is only fitting given the highly significant African roots of the specific version of the RTD that has become ascendant.³ This germinal African contribution to what Baxi has melliflously referred to as “the development of the right to development”⁴ is traceable in part to the historical experience of exploitation and underdevelopment that has been widely and intensely experienced by Africans, and to the conviction among not a few African legal thinkers and political leaders (reflected even in global documents) that international law must play an important role in the struggle to ameliorate those circumstances.⁵

The widespread affirmation of the RTD among African thinkers and leaders did not, however, mean that the kind of effusive enthusiasm for the recognition of a RTD that was expressed by prominent Africans such as Judge Mohammed Bedjaoui was warmly received in all circles.⁶ As Baxi has noted, positive responses to the recognition of this right, such as Judge Bedjaoui’s famous valorization of the right as “the alpha and omega of human rights,”⁷ have frequently been met by the deep skepticism of scholars like Yash Ghai who

view any attempt to recognize or protect the RTD as diversionary, and as capable of providing increasing resource and support for state manipulation and repression of civil society.⁸

In any case, ever since the conclusion of the Vienna World Conference on Human Rights, it has been clear to the discerning observer that, even on the global plane, what Baxi has referred to as the “jurispotency” of the RTD can no longer be in doubt.⁹ Part I, paragraph 10 of the *Vienna Declaration and Program of Action* (which was adopted by 171 countries, including the USA and nearly every Western state) declared quite clearly that the RTD is a universal and inalienable right and an integral part of the corpus of fundamental human rights.¹⁰ What is more, the existence of Article 22 of the African Charter is proof-positive of the transcendence of this right beyond the realm of soft international human rights law, albeit only at a regional African level. As interesting in this connection is the fact that, whatever its formal legal status, the RTD has certainly exhibited what I have long referred to elsewhere as the tripartite properties of law-generation; law-regulation; and law-(de)legitimation.¹¹

Nevertheless, the fact remains that despite the important – if admittedly limited – value that hard law norms can add to the development struggle, no global treaty exists as yet to frame and regulate, as much as is possible, the relations in this regard among the states of the North (who by and large control the means of development) and the states of the South (who by and large require the infusion of those resources). It is against this background

3 See Fatsah Ougergouz, *The African Charter on Human and Peoples’ Rights* (The Hague: Martinus Nijhoff, 2003), p.298-9. See also Akino-la Aguda, *Human Rights and the Right to Development in Africa*, Lecture Series No. 55, Nigerian Institute of International Affairs, 1989; and Joe Oloka-Onyango, “Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?” *Buffalo Human Rights Law Review* 39, vol. 6 (2000), p.59. See also the *Declaration on the Right to Development*, G.A. Res. 41/128, annex, 41 UN. GAOR Supp. (No.53) at 186, U.N. Doc. A/41/153 (1986). (Hereinafter “the Declaration”).

4 See Upendra Baxi, “The Development of the Right to Development,” in *Human Rights in a Post Human World: Critical Essays* (Delhi: Oxford University Press, 2007), p.124.

5 See Boutros Boutros-Ghali, *An Agenda for Development*, UN Doc. A/48/935 (1994), para.3. See also Chidi Odinkalu, “Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples’ Rights,” *Human Rights Quarterly*, vol. 23 (2001) p.347.

6 See Mohammed Bedjaoui, “The Right to Development” in Mommamed Bedjaoui (ed.), *International Law: Achievements and Prospects* (Dordrecht: Martinus Nijhoff and UNESCO, 1991) pp.1177 and 1182.

7 *Id.* See also U. Baxi, *supra*, note 4, p.124.

8 See Yash Ghai, *Whose Human Right to Development?*, Occasional Paper, Commonwealth Human Rights Unit, 1989.

9 *Id.*, pp.126-7.

10 See Obiora Chinedu Okafor, “The Status and Effect of the Right to Development in Contemporary International Law: Towards a South-North ‘Entente’” *African Journal of International and Comparative Law*, vol. 7 (1995), p.878.

11 *Id.*, pp.881-5.

– within this context of the existence of a normative gap – that this globally contextualized analysis of Article 22 of the African Charter (a region-specific treaty), and of the lessons for global norm-making that might be learned from its particular normative character, makes sense.

In order to accomplish its two major objectives, this paper is organized into six main sections (this introduction included). In section II, I will attempt – as much as is possible – to tease out and develop the nature of the concept of development that animates Article 22. This exercise of necessity draws from the surrounding international discourse on the concept of development. Section III is devoted to understanding the identity and nature of the rights-holders; the “peoples” upon whom the RTD has been explicitly conferred by Article 22. In section IV, I consider the question of the identity and nature of the duty-bearers; those actors on whose shoulders Article 22 has rested the weighty responsibility of ensuring that all peoples enjoy their RTD. Section V focuses on the nature of the legal obligation that these duty-bearers must bear under Article 22. For example, is this duty to be discharged immediately or is its discharge to be progressive? Section VI concludes the paper, and proposes an African Charter-informed socio-legal agenda that might help frame the character of a possible global treaty on the RTD.

II. The Concept of Development in Article 22:

Despite the fact that the character of the particular conception or model of development that is adopted (neo-liberal or social democratic) is key to the success or failure of the effort to secure the enjoyment of the RTD,¹² Article 22 and the other

documents that recognize and articulate that right are hardly clear as to the identity of their preferred development conceptions or models.¹³

However, certain conceptual guideposts are available to inform our understanding of the meaning of development. These are so relatively well established as not to require lengthy discussion in this short paper. They are that development should no longer be conceived solely in terms of *economic growth*;¹⁴ that development at its core involves the fostering of equity within and among states;¹⁵ that *gender* interests must be “mainstreamed” into the development design and practice;¹⁶ that *participatory development* is to be much favored over the top-down model;¹⁷ and that a rights-based approach is useful.¹⁸ In addition, Article 22 explicitly disaggregates its concept of development into *economic*, social and *cultural* components.

Given the above *tour d’horizon*, which identified the key corner stones that seek to demarcate and distinguish “good” from “bad” development praxis, what then might one offer as a working definition of the concept of development; as a widely accepted and proper understanding of that term? In my own view, the United Nations Development Program has correctly conceived of development in terms of “human development.” It has in turn viewed the concept of human development itself as denoting the creation of “an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests.”¹⁹ If this is what development means or ought to mean in our time, then the RTD should in turn mean the right to that kind of development; the right to the creation of the stated type of environment. To build upon Sengupta’s work, this can be viewed as encompassing three main aspects: the right to the *means*

12 See Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Oxford: Hart Publishing, 2005), pp. 263–4.

13 See Ougergouz, *supra*, note 3, p.307.

14 See Banda, *supra*, note 12, p.264; and Aguda, *supra*, note 3, p.19.

15 See for example, World Bank, *World Development Report* (New York and Washington: Oxford University Press, 2005), at 7; and Simeon Ilesanmi, “Leave No Poor Behind: Globalization and the Imperative of Socio Economic and Development Rights from an African Perspective” *Journal of Religious Ethics*, vol. 32 (2004), p.72.

16 See Nsongurua Udombana, “The Third World and The Right to Development: An Agenda for the Next Millennium” *Human Rights Quarterly*, vol. 22 (2000), p.767; and Banda, *supra*, note 16, p.265 and pp. 269–85.

17 See *An Agenda for Development*, *supra*, note 6, para. 220.

18 See Kofi Quashigah, “Human Rights and African Economic Integration” *Proceedings of the African Society of International and Comparative Law*, vol. 8 (1996), p.218. See also Andrea Cornwall and Celestine Nyamu-Musembi, “Putting the ‘Rights-Based Approach’ to Development in Perspective” *Third World Quarterly*, vol. 25 (2004), p.1415.

19 See <http://www.undp.org/humandev> (last visited December 17, 2007).

of creating that environment, the right to a *process* of creating that environment, and the right to the *benefits* that flow from the creation of such an environment.²⁰

The foregoing analysis begs the question whether this is the particular conception of development (suitably limited by the so-called development dos and don'ts) that has found expression in Article 22. The jurisprudence of the African Commission does not offer as much an insight into the character of the conception of development that animates Article 22 as one would have wished. On the one hand, in the *Bakweri Land Claims Case*, the only case I could find where the African Commission was seized with a communication that was explicitly grounded in Article 22, the complainants framed their main grievance, namely the concentration of their historic lands in non-native hands, in terms of the violation of their RTD under Article 22.²¹ As the matter did not go past the admissibility stage, the Commission did not get a chance to pronounce on this issue. On the other hand, in the so-called *Ogoni case*, a matter that was decided on the merits, despite the fact that the evidences of the case begged for such a course of action, the complainants did not explicitly allege any violation of Article 22. However, while finding that Nigeria's conduct toward the Ogoni people of the Niger Delta of Nigeria had violated Articles 16 (right to health) and 24 (right to environment) of the African Charter, the Commission declared that:

"Undoubtedly and admittedly, the government of Nigeria, through the NNPC, has the right to produce oil [Nigeria's principal developmental resource], the income from which will be used to fulfill the economic and social rights of Nigerians. But the care that should have been taken...which would have protected the rights of the victims of the violations complained of was not taken."²²

This quotation suggests a reading of the relevant provisions that subscribes to a rights-based and rights-framed model of development; one in which the goal of development activities is imagined, at least in part, as the fulfillment of the economic and social rights of a people. It also suggests that the Commission is of the view that the people of Nigeria as a whole (through their government) must have a right to the *means, process, and outcomes* of development. In another part of the decision, in which it found that Nigeria had violated Article 21 of the African Charter (the right of all peoples to freely dispose of their wealth and natural resources in their own interest), the Commission explicitly adopted the language of the complainant in chiding Nigeria's development praxis and condemning the fact that Nigeria "did not involve the Ogoni communities in the decisions that affected the *development* of Ogoniland."²³ Further down in its decision, the Commission argued that Article 21 was designed to ensure "cooperative economic development" in Africa.²⁴ This was a clear endorsement of the participatory development imperative. If the African Commission could endorse that imperative in relation to Article 21, there is no reason to suppose that it will not do the same in regard to Article 22. These holistic ways of reading the African Charter and the Commission's interpretations of that document are appropriate, since as Chidi Odinkalu has noted, one must take account of the interconnectedness and seamless-ness of the rights contained in the African Charter.²⁵ Thus, although the above insights are gleaned from reading a case in which the list of provisions that were explicitly interpreted did not include Article 22, the insights into the concept of development that was thereby gleaned are nevertheless useful as a reflection of the thinking of the African Commission on the very same kinds of concepts that also animate Article 22.

20 See Arjun Sengupta, "The Human Right to Development" *Oxford Development Studies*, vol. 32 (2004), pp.183, 192.

21 See African Commission on Human and Peoples' Rights. *Bakweri Land Claims Committee v. Cameroon*, Communication No.260/2002, *African Human Rights Law Reports* (2004), p.43.

22 See African Commission on Human and Peoples Rights. *Social and Economic Rights Action Center and another v. Nigeria*, Communication No. 155/96, http://www1.umn.edu/human_rts/africa/comcases/155-96b.html, para. 54.

23 *Id.*, para. 55.

24 *Id.*, para. 56.

25 See Odinkalu, *supra*, note 5, p.341.

Furthermore, although not an authoritative source of African Charter meaning, the view of Professor Oji Umozurike, a one-time chair and member of the African Commission and an eminent human rights scholar, is persuasive as to the conception of development that animates Article 22. After all, does not international law recognize the opinions of the most highly qualified jurists as a source of legal meaning? Umozurike seems to think that the “participatory development” and “equitable distribution” imperatives that are required by the Declaration on the Right to Development form part of the “right” conception of the developmental right. As such, it is not far-fetched to infer that Article 22 may be viewed in this way by at least some members of the African Commission. In any case, the discussion in the immediately preceding paragraph corroborates Umozurike’s views, at least with regard to the African Commission’s subscription to the participatory development imperative.

On the whole therefore, given the nature of the emergent international consensus on the “dos and don’ts” of development praxis, and the evidence canvassed above with regard to the specific case of the African Charter/Commission, it seems fairly that while much remains ambiguous as to the nature of the concept of development in Article 22, and no detailed developmental program can be deciphered from a reading of that provision, certain corner stones have been laid that reveal in very rough and very broad outline its likely characteristics. Thus, any conception of development under Article 22 must, at a minimum: frame the process and goals of development as constituted in part by the enjoyment of peace; envision the process and ends of development, in part, through a human rights optic; view the gender, ethnic and other such inequities that exist in the distribution of developmental benefits as a lack of development; imagine the people’s participation in their own development as an irreducible minimum; and

imagine the RTD as inclusive of the rights to the means, process, and outcomes of development. Perhaps any anticipated global treaty on the RTD ought to take a cue from this list.

III. Who are the Right-Holders Contemplated by Article 22?

According to Article 22, the RTD is to be claimed and enjoyed by “all peoples.” Under that provision therefore “peoples” are the relevant “right-holders.” Yet, although the term *peoples* appears as well in a number of other provisions of the African Charter, it is nowhere defined in that treaty. As Kiwanuka’s influential work on this issue has taught us, this definitional gap was the product of a deliberate and calculated attempt by the drafters of the African Charter to avoid what they saw as a difficult discussion over the precise meaning of the term.²⁶

It is little wonder then that there remains significant division, even today, as to the meaning of the extant term among the most prominent commentators on Article 22 (or similar provisions). One important scholarly debate concerns whether or not the term *peoples* includes individual citizens of a given state; whether an individual could claim a RTD under Article 22. For sure, ambiguity does exist on the international plane regarding this question.²⁷ For, the *Declaration on the Right to Development* does state that the RTD is both an individual human right and a right of peoples.²⁸ Yet, as Ougergouz has recognized, given the guarantees of economic and social rights that are now present in all the main regional and global human rights regimes, viewed strictly as an *individual right*, the RTD does not add all that much to the concept of human rights.²⁹ Although its benefits can of course be enjoyed individually, the developmental right tends to make more practical sense as a collectively-claimed right.³⁰ In any event, the ambi-

26 See Richard Kiwanuka, “The Meaning of ‘People’ in the African Charter on Human and Peoples’ Rights” *American Journal of International Law*, vol. 82 (1988), p.82.

27 See Ougergouz, *supra*, note 3, pp.299-300.

28 See Article 1. See also Ougergouz, *id.*, p.301.

29 *Id.*, p.303.

30 See Sengupta, *supra*, note 20, p.191.

guity that exists at the international level is not reproduced at the African level. Article 22 is crystal clear in its identification of “peoples” (as opposed to individuals) as the subjects/holders of the RTD that it guarantees. But this does not imply that the meaning of the concept of peoples in Article 22 is as clearly stated.

As such, there is a related and increasingly important debate as to whether or not the term *peoples* includes sub-state groups (such as so-called ethnic groups and national/regional minorities) or enures exclusively to states as the representatives of the entire populations of their countries. While there is little doubt today that sub-state groups, such as ethnic minorities, can hold rights under international law,³¹ there is less clarity as to whether these groups are among the rights-holders envisaged by Article 22. On one side of the debate is Judge Ougergouz who has concluded that “the ‘people-state’ [that is, the entire population of a state], like the ‘people-ethnic group’ are here subjects of the right to development, but to varying degrees.”³² This view is supported by Benedek’s declaration that the concept of “people” in the African Charter is broad enough to include ethnic groups and minorities,³³ and by Ankumah’s conclusion that a RTD claim’s chances of success can be strengthened if the group concerned can show that it is a minority or oppressed group which is experiencing discrimination.³⁴ On the other side of the conceptual fence sits Kiwanuka who, while conceding that the term *peoples* (as used in the African Charter) could under certain circumstances include sub-state groups,³⁵ argues nevertheless that we must “equate ‘peoples’ with the state where the right to development [under Article 22] is concerned” since in his view “an entity less than the state cannot effectively contest the right to de-

velopment in the international arena.”³⁶ Oloka-Onyango is of the view that this is the very sense in which the term was understood by African leaders at the time of the adoption of the African Charter.³⁷ Given that almost every expert would agree that the human person is the central *subject* of development,³⁸ seen in their best light, the arguments put forward by scholars like Kiwanuka ought to be viewed as suggesting that the RTD under Article 22 should be conceived of as the right of the entire population of the relevant state.³⁹ As such, Sengupta is right to suggest that when states claim that right, that claim can at best be on behalf of their entire population, and not in favor of the state qua state.⁴⁰

What is more, at a minimum, Kiwanuka’s argument that sub-state groups cannot effectively contest the RTD in the international arena incorrectly assumes that the international arena is the sole site of struggle for the realization of the RTD. It thus discounts the domestic dimension of the right – a dimension that must in fact loom large in the context of a regional treaty such as the African Charter (which does not admit of the participation of any of the rich industrialized states against which the RTD can be claimed by African states). Within the domestic arena, there is no reason why a sub-state group, as a “people,” cannot effectively contest the RTD against their own state. Have not peoples like the Ogoni of Nigeria or the Bakweri of Cameroon famously launched such claims?

In any case, this debate is now somewhat passé. In my view, the African Commission – a pre-eminent interpretive agency in the present connection – has all but settled the debate. The commission does in fact treat sub-state groups, especially ethnic groups, as subjects of peoples’ rights

31 See Kiwanuka, *supra*, note 26, p.84.

32 See Ougergouz, *supra*, note 3, p.320.

33 See W. Benedek, “Human Rights in a Multi-Cultural Perspective: The African Charter and the Human Right to Development,” cited in Ougergouz, *id.*, p.320.

34 See A. Ankumah, *The African Commission on Human and Peoples’ Rights: Practice and Procedures* (The Hague: Martius Nijhoff, 1996) at 167.

35 See Kiwanuka, *supra*, note 26, pp.88-95.

36 *Id.*, p.96.

37 See. Oloka-Onyango, *supra*, note 3, pp.59–60.

38 See Ougergouz, *supra*, note 3, p.302.

39 See Udombana, *supra*, note 16, pp.768-70.

40 See Sengupta, *supra*, note 20, p.191.

that are protected in the African Charter. In the *Bakeri Land Claims Committee case*, although the matter ended at the admissibility stage because the complainants, a minority people within Cameroon, had not first exhausted domestic remedies before approaching the African Commission, the commission did *impliedly* treat the Bakweri as a “people” under the African Charter. What is more, neither Cameroon nor the Commission raised the possible objection to the admissibility of this communication on the ground that it was not brought on behalf of “a people” within the meaning of Article 22 of the African Charter, and that it was as such “incompatible” with that treaty. Since a matter that is grounded in Article 22 can only be brought to the Commission by “peoples,” the failure to dismiss the communication on this basis is at least implied evidence that this was not a significant concern to either the opposing party (which had a huge incentive to make all plausible arguments to secure the dismissal of the communication) or the African Commission. Furthermore, in the so-called *Ogoni case*, the African Commission found that Nigeria had violated the rights of the Ogoni people under a “sister” provision, the guarantee in Article 21 that “all peoples shall freely dispose of their wealth and natural resources.”⁴¹ Clearly, the Ogoni – who are an “ethnic” minority group within Nigeria – were viewed by the Commission as a “people” within the meaning of Article 21. Logic only suggests that had the Commission not viewed the Ogoni in this way, it could not have possibly come to the conclusion that their rights under Article 21 had been violated by Nigeria. They would simply have had no rights under that provision! In any case, the Commission did make bold to make explicit reference in the concluding portions of its decision to “the Ogoni people” and “the situation of the *people* of Ogoniland.”⁴² All this will

of course not be at all surprising to a keen student of that body’s jurisprudence given the Commission’s earlier decisions in the now celebrated *Katanga case*,⁴³ as well as in the so-called *Mauritania case*.⁴⁴ In the earlier case, the African Commission clearly treated the people of Katanga province, a sub-state group in the former Zaire, as a people within the meaning of at least one other provision of the African Charter.⁴⁵ In the latter matter, it had no difficulty in treating the ethnic black population of Mauritania as a people within the meaning of another provision of the same treaty.⁴⁶ The logic of these decisions is applicable by analogy to Article 22.

Not only is the African Commission’s interpretation of the term peoples within Articles 21, 22 and other similar provisions (as admitting of claims made by sub-state groups) legally sound, it is also sociologically and politically appropriate. This is so because as Odinkalu has correctly pointed out, “in most African countries where the state is nowhere near as strong as it is in Europe and North America, the community often insures the individual against the excesses of unaccountable state power.”⁴⁷ Such communities include the very kinds of sub-state groups that have been of concern in this paper. As such, these sub-state groups are, at a minimum, as effective as the relevant states as the mechanisms for the economic and social development of the populations which constitute them. As witness the Ogoni and Bakweri cases, these sub-state groups are often forced by circumstances to struggle against their own states for the development of their communities. Thus, to deny these sub-state groups the normative resource provided by Article 22 may, in many cases, amount to seriously impairing rather than advancing the development of their populations.

41 See *Ogoni case*, *supra*, note 33, paras. 55 and 58.

42 *Id.*, paras. 62 and 69. Emphasis supplied.

43 See African Commission on Human and Peoples’ Rights. *Katangese Peoples’ Congress v. Zaire*, Communication No. 75/92, International Human Rights Reports, vol. 3 (1996), p.136.

44 See African Commission on Human and Peoples’ Rights. *Malawi Africa Association v. Mauritania*, Communication No. 54/91, 13th Annual Activity Report of the African Commission on Human and Peoples’ Rights, AHG/222 (XXXVI) Annex V, Addendum, 142 (2000).

45 See Obiora Chinedu Okafor, “Entitlement, Process, and Legitimacy in the Emerging International Law of Secession” *International Journal on Minority and Group Rights*, vol. 9 (2001), p.41.

46 See Odinkalu, *supra*, note 5, p.346.

47 *Id.*, at 344.

III. Who are the Duty-Bearers Envisaged by Article 22?

Following Judge Ougergouz's work, and the basic tenets of *pacta sunt servanda*, I am of the view that Article 22 ought to be read to impose the *primary* duty to ensure the exercise of the RTD on African states, which are the only parties to that treaty.⁴⁸ Every African state does therefore have the primary duty to ensure the realization of the RTD of all the peoples within its territory. It is these same African states that also bear the primary obligation of intervening internationally on behalf of all of their peoples in order to ensure their enjoyment of the RTD.⁴⁹ These points are hardly controversial.

Much more controversial are arguments that posit that similar *legal* obligations are borne by, or ought to be imposed upon, such entities as the federating units within a federal state (such as Nigeria); the rich industrialized states and their development aid agencies; the UN; the international financial institutions (such as the IMF and the World Bank); the World Trade Organization; transnational corporations (TNCs); and even international creditors (such as the members of the so-called Paris club).

With regard to the legal position under the African Charter, as the *Ogoni case* demonstrates fairly clearly, it is of course *not* technically viable for any African people to bring a claim alleging the violation, by any of the above-mentioned actors, of its right to development under Article 22 (or for that matter under any other provision of the African Charter). This is so because none of these actors is a party to the African Charter. In the *Ogoni case*, the African Commission was technically unable to focus its formal attribution of fault in its decision on the Shell Petroleum Development Corporation (Shell), despite the very serious infractions of the African Charter by that TNC that had been alleged by the complainants and explicitly admitted by the new democratic government of Nigeria.⁵⁰ And despite the Commission's firm finding that this

TNC was heavily implicated in the violations of the rights of the Ogoni people, it was forced by the controlling technical legal logic to limit itself to the next best thing: holding the Nigerian state exclusively responsible for the combined actions of Nigeria and Shell, on the basis that Nigeria had an international legal responsibility to control the pernicious activities of private entities operating on its territory which are likely to seriously violate the rights of its citizens.⁵¹ Understandable as the Commission's reasoning is, the rather tortured nature of this sort of logic is all too evident.

Nevertheless, it is useful to consider albeit briefly whether the prevailing situation ought to be changed. Ought the rich industrialized states and their development aid agencies, the United Nations, and the other non-state actors listed above, bear legally-enforceable development duties under provisions like Article 22, or under a possible global treaty on the RTD? As to the possibility of the *federating units within a federal state* being constructed as bearers of legal duties under Article 22, or under any other similar legal provision, the experiences of the various Niger Delta peoples of Nigeria between 1999 and 2007, when the relatively well endowed democratically-elected governments of their own federating units did precious little to advance the RTD of their peoples while relentlessly blaming the federal government for not improving the living standards of these same peoples, suggests that such federating units ought to bear international legal obligations under provisions like Article 22. After all, are not many of the Niger Delta federating units thought to be richer and much more economically endowed than many of the African countries which are parties to the African Charter? Yet, as these federating units are not parties to the African Charter and similar texts, and are in general not viewed as subjects of international law, it is difficult to see how this can be achieved in legal practice without a fundamental re-conception of the norms of treaty-making and implementation.

48 See F. Ougergouz, *supra*, note 3, pp.308–20.

49 *Id.*

50 See *Ogoni case*, *supra*, note 22, para. 42.

51 *Id.*, paras. 57 and 58.

Regarding the question of the UN as a duty bearer, its own *An Agenda for Development* states that “while national governments bear the major responsibility for development, the UN has been entrusted with important mandates for assisting in this task.”⁵² Given how implicated the UN is in development praxis in Africa, ought that august organization be allowed to continue to exercise as much power as it does in Africa with little regulation from autonomously African hard law? Should the legal obligations in Article 22 be imposed on the UN, as for instance through inviting it to accede to the African Charter, or through the conclusion of a new Protocol to that treaty? Is this even possible? Article 1 of the African Charter seems to preclude this possibility since it clearly states that it is the Member States of the African Union (AU) that shall recognize the rights and duties enshrined in that treaty. Can this problem be addressed through the conclusion of a new global treaty on the right to development to which the UN shall subscribe in its own right, or which shall impose specific developmental obligations on the UN?

The other international actors listed above (such as the rich industrialized states and their development aid agencies;⁵³ the international financial institutions;⁵⁴ the World Trade Organization;⁵⁵ transnational corporations;⁵⁶ and international creditors)⁵⁷ are in a similar situation: they all tend to exercise enormous power with respect to the living developmental praxis of virtually every African country, without being constrained nearly enough by a corresponding degree of African hard law. None of them are parties to, or can possibly be held accountable under, the African Charter – at least not as that treaty is presently constituted. Whether or not this situation can in fact be remedied by the adoption of a new global treaty on the RTD is another question.

IV. What Manner of Legal Obligation is imposed by Article 22?

Under Article 1 of the African Charter, states assume the obligation to “adopt legislative or other measures to give effect” to the rights protected under that treaty. Read in consonance with the working definition of the conception of “development” that was adopted earlier in this paper, states are therefore required to enact laws that support the creation of an environment in which people can develop their full potential and lead productive, creative lives in accordance with their needs and interests. Such laws must advance the ability of the relevant state to properly acquire and manage the means (resources) through which that environment can be created; support the process of creating it; and help ensure the equitable enjoyment of the benefits that flow from it. One good example of a law that would accomplish most of these goals would be one that promoted greater public participation in the budgeting and revenue allocation process. Whatever “other measures” states take to ensure the enjoyment of the RTD by their peoples must also perform these same functions. These other measures could include the creation of dedicated poverty alleviation agencies (e.g. Nigeria’s National Poverty Elimination Program), or the establishment of special commissions which focus on the development of a historically disadvantaged group or on the “righting” of some development inequity or the other (e.g. Nigeria’s Niger Delta Development Commission).

As importantly, the African Charter (save with respect to its provision on the right to health) avoids what Odinkalu has accurately referred to as “the incremental language of progressive realization.”⁵⁸ As such, all of the rights protected by that treaty, including the RTD under Article 22, are immediately applicable.⁵⁹ This is a significant de-

52 See *An Agenda for Development*, *supra*, note 5, at paras. 12 and 139.

53 See Cornwall and Nyamu-Musembi, *supra*, note 18, p.1433 (pointing out that despite their increasing use of rights-based development language, these largely Western donor agencies do not intend to be bound by any rights held by people in Africa and the rest of the South).

54 See C. Weaver and S. Park, “The Role of the World Bank in Poverty Alleviation and Human Development in the Twenty-First Century: An Introduction” *Global Governance*, vol. 13 (2007), pp.461–2.

55 See *Agenda for Development*, *supra*, note 5, para.54 (arguing that difficult access to the world trading system is an enormous obstacle to development).

56 See Baxi, *supra*, note 4, p.129 and pp.141–142.

57 See *Agenda for Development*, *supra*, note 5, para. 61.

58 C.A. Odinkalu, *supra*, note 5, p.349

59 *Id.*

parture from the tendency to constrain human rights provisions of a deeply economic and social character by attaching to them the requirement that they be realized progressively. It also poses a serious challenge to most African states to find ways of fulfilling their obligations under provisions like Article 22 in circumstances of generally severe resource scarcity. After all, the fulfillment of the guarantee in Article 22 of the RTD of all peoples in Africa will more often than not require the deployment of significant socio-economic resources. But what does it really mean to ask a poor country in Africa (or elsewhere) to realize the RTD of all its peoples immediately (rather than progressively)? Surely, even under the best circumstances, it will take some time (not to mention far less short-sightedness) for the domestic and international obstacles that militate against the proper acquisition and management of the means of development by such a country to be surmounted; for the process of creating the appropriate environment to unfold to the significant extent; and for the effort to ensure the equitable enjoyment of the benefits that flow from development to bear significant fruit. Development is, of course, not a one-time event and cannot simply happen. With all of these in mind, it seems that the better way to read the “immediate application” requirement in the African Charter is to view the actual concrete developmental obligation as somewhat protean; as varying across space and time; as dependent on the extent of available resources in a particular country at a any specific historical moment. And so, once a state is shown to have done all it possibly could within its means to advance the RTD of all its peoples, then that state cannot possibly be viewed as in violation of its obligation under Article 22, whether or not significant poverty remains among its people.

When the immediate applicability of the RTD in Article 22 is understood in this way, the lack of

a general derogation clause in the African Charter, and the African Commission’s interpretation of the absence of this clause to mean that attempts to limit any of the rights guaranteed in the Charter cannot be justified by emergencies or special circumstances,⁶⁰ becomes far less worrying. Given the harsh economic circumstances that confront far too many states in Africa, without reading into that provision the “available resources” limitation, the *blanket* exclusion of special economic circumstances from constituting grounds for well-reasoned derogations from Article 22 would not seem all that realistic or practical, especially in the context of the immediate applicability of the obligation assumed under that provision.

To conclude this part of the paper, it must be pointed out that, contrary to the impression that might have been created by the focus in the earlier parts of this section on the availability of the resources that must drive the development engine, the exercise of the RTD as guaranteed by Article 22 need not always entail the infusion of resources (i.e. positive obligations). The obligation to ensure the exercise of this right also encompasses negative obligations. Writing in another context, Odinkalu has offered a very good example of these obligations. This is, the implied duty not to subject a poor people to forced evictions from their farmlands or settlements in order to re-develop those lands as up-market enclaves or oil refineries, while denying the relevant people an alternative settlement or farmland, or adequate compensation in order to facilitate their resettlement.⁶¹ As Ocheje has recently shown, this kind of forced displacement is far-too-common in Africa as elsewhere.⁶² Yet, any reasonable interpretation of Article 22 must lead to a requirement that the existing state of development attainment of any poor or disadvantaged people be protected; that what these poor people already have ought not be taken away from them without adequate compensation.

60 *Id.*, p.349.

61 *Id.*, p.350.

62 See Paul Ocheje, “In the Public Interest: Forced Evictions, Land Rights and Human Development in Africa,” *Journal of African Law*” vol. 51 (2007) pp.191-2.

IV. Conclusion

This paper set out to do two main things: to analyze (from a globally contextualized socio-legal perspective) the normative strengths and weaknesses of the guarantee of the RTD under Article 22 of the African Charter; and to consider – in my stride – its global potential or generalizability. In section II, the character of the concept of development that animates Article 22 was teased out. This exercise drew deeply from the surrounding global discourse on the concept of development. Development was understood in human development terms, as the creation of an environment in which people can develop their full potential and lead productive creative lives, and as framed by key corner-stone imperatives such as participation, gender and ethnic equity, the existence of peace, and a rights-based approach. In section III, it was argued that, although it is not clearly defined in the African Charter, the term “peoples” on whom the RTD is explicitly conferred by Article 22 must read to include sub-state groups. In section IV, the argument was made that while African states are clearly the primary bearers of the legal obligation to ensure the exercise of the RTD under Article 22, the current situation which does not admit of the possibility of holding other key development actors legally accountable for their activities in Africa, is problematic. In Section V, the facts that states are required by the African Charter to bear immediately applicable rather than progressively realized development duties that cannot be derogated from in an emergency; to take legislative and other measures to ensure the exercise of the RTD; and to bear positive as well as negative developmental duties, were pointed out. It was also argued that given the harsh economic circumstances that currently confront most African states, the obligations that they assume under Article 22 must – as immediately applicable as they still are - be read as only requiring African states to implement Article 22 to the extent of its available resources.

In this concluding section, I want to propose – albeit rather briefly – a socio-legal agenda derived from the foregoing analysis of Article 22 that might help frame the character of any proposed global treaty on the RTD. First and foremost, any such treaty must be as clear as any treaty can possibly be as to how the basic concepts that must ground its normative content are to be understood. It must therefore define as clearly as possible the rights-holders and duty-bearers of the RTD that it guarantees. In my own view, and for the reasons already offered, such rights-holders must – at the very least – include sub-state groups (such as the Ogoni, Native Americans, or black Mauritians). As has also been argued already, the bearers of the developmental obligations under such a treaty must go well beyond developing countries to include some of the federating units within federal states (especially in Africa), the rich industrialized states, the UN, the IFIs, TNCs, and all the other powerful actors who, for good or for bad, exert a highly significant effect on the state of development of the countries of the South.

In accordance with this necessity for much greater conceptual clarity, I am of the view that while the potential treaty cannot possibly specify with much precision and for all time the concept and model of development that animates its normative content and programmatic ambition, it will still be short on clarity and on the “specification of policy and programmatic ways and means” of achieving its objectives if it uncritically mirrors the gaps in these respects in texts such as the African Charter and the Declaration on the Right to Development.⁶³ For one, the possible treaty can definitely help ensure a minimum content of good development praxis by laying down key corner-stones that will guide understandings of its conception of development. Specifically, such treaty must: 1) reflect the economic, social and cultural dimensions of development; 2) understand development in human development terms; 3) treat the ethnic, gender, and other equity dimensions of

⁶³ See Baxi, *supra* note 4, p.149.

development as key; 4) recognize the participatory development imperative (especially the necessity of allowing the peoples most affected by development to participate far more meaningfully in the determination of the very conception or model of development that will affect their lives, and not merely in the process of development); 5) understand development as, at the very least, a collective human right (bearing in mind the limits of “rights talk”); 6) factor in the relationships between the production of peace and development; and 7) imagine the RTD as inclusive of the rights to the means, processes, and benefits of development. This will not dispose of the ideological divisions that exist over the best processes and goals of development, but it will at least limit and reduce the zone of disagreement.

This question of ideological difference brings to mind the fact that, as imperative as the utilization of human rights norms of a legal quality seems to be in the struggle to improve the lives of poor people through the application of more enlightened development praxis, the mere deployment of human rights law norms does not really address one of the most important global obstacles to the attainment of this goal in our own time: the ascendance of a dominant socio-economic ideology that has dealt most inadequately with the developmental yearnings of the world’s poor. This is why, as Baxi has noted, any effort to affirm or advance the RTD too often “presents an irritating moral nuisance” to ascendant global neo-liberalism.⁶⁴ This is the chief reason why even a well-crafted treaty or other document on the right to development may yet be still-born. Hope, however, must spring eternal.

64 *Id.*, pp.129-30.

Chapter 7: Article 17 and Chapter VII of the revised OAS Charter and relevant experience of OAS institutions

Dante M. Negro*

This chapter examines Article 17 and Chapter VII of the Charter of the Organization of American states to determine whether these provisions make development a right and, if so, who the bearer of that right is and what obligations and duties attend it. If the Charter does indeed uphold a right to development, then an effort will be made to determine its scope by reference to the relevant Charter provisions. Lastly, the paper will describe those areas within the Organization charged with overseeing compliance with the provisions contained in Chapter VII. Reference will be made to a process instituted some years back, intended to broaden the Organization's role in a closely related field: the Social Charter of the Americas.

Rights and Duties of the OAS Member States: Does the State Have a Right to Development?

One should begin by examining Article 17 of the OAS Charter, which ought to be interpreted within the framework of Chapter IV, concerning "Fundamental Rights and Duties of States." In that chapter, the Charter recognizes that Member States have both rights and duties. Specifically, Article 10 provides that "states are juridically equal, enjoy equal rights and equal capacity to exercise those rights, and have equal duties." Article 11 establishes that "every American state has the duty to respect the rights enjoyed by every other state in accordance with international law."

It is clear, then, that the OAS Charter expressly provides that Member States have equal rights and obligations and that every state must respect

those of other states. Moreover, "these fundamental rights may not be impaired in any manner whatsoever" (Article 12).

Article 17 provides that "each state has the right to develop its cultural, political and economic life freely and naturally." The same article stipulates, though, a direct proviso for the right: that the state must also respect "the rights of the individual and the principles of universal morality." Therefore, although in principle the Charter accords the right to self-development to the state, not the individual, it does affirm that such right carries with it the duty to respect an individual's human rights.

Another constraint – echoing the terms of the preceding paragraphs – is that all Member States must respect every member state's right to develop its cultural, political and economic life freely and naturally. These provisions establish the presence of an as yet unnamed right enjoyed by a state, which carries with it an obligation incumbent upon both the state itself, and all other states in the system.

Two questions now arise: 1) whether this right of the state to "develop" is the same as the right to development *per se*; 2) who is the bearer of this right. Is it the state? Is it the individual? Or is it both the state and the individual, albeit with nuanced differences?

The former question will be addressed first: what shall this right be called? Is the right of every state to develop its cultural, political and economic life freely the same as the "right to development"?

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To be clear, the OAS Charter neither defines “development” nor establishes it as a right, either of the state or of the individual. In its Chapter VII, the Charter does contain two basic development-related provisions:

1. “Development is a primary responsibility of each country,” and
2. Development “should constitute an integral and continuous process for the establishment of a more just economic and social order that will make possible and contribute to the fulfillment of, the individual” (Article 33).

In this sense, there is some disconnect between Chapter VII and Article 17 of the Charter. The focus in Chapter VII has shifted from development as a right to development as a responsibility. As stipulated in this section, one of the objectives of development is the individual’s self-fulfillment; in other words, the focus has shifted from the state to the individual, even though the Charter has not yet recognized – or even mentioned – development as an individual’s right. The Charter’s provision that “development must make possible and contribute to the fulfillment of the individual,” defines it as a means (that is the primary responsibility of each state), but not as a right of the individual.

A brief look at the provision that refers to the state as a subject of international law might be instructive. Although Article 33 expressly states that development is the *primary* responsibility of each country, it does follow the state’s *exclusive* responsibility. The concept of “inter-American cooperation” in this connection will be addressed briefly later in this paper.

The second part of Article 33 refers to development as a process that must be integral and continuous. In other words, under this provision of the Charter, the qualities of integrality and continuity become essential properties of the very concept of development. Therefore, when the OAS Charter speaks of “integral development,” which it does repeatedly, it is referring to the concept of development as described in Article 33. What remains to be determined is whether development is a right of the state under Chapter IV of the Organization’s Charter, and who the bearer of that right is.

As was said before, the OAS Charter does not expressly recognize a right to integral development, either of states or of individuals. In the case of the individual, it portrays integral development less as a right and more as a means to achieve self-fulfillment. In the case of states, one could infer that the right of states to develop their cultural, political and economic life, as recognized in Article 17 of the Charter, is the right to integral development. But the concept of “integral development,” which is the central idea in Chapter VII, has to be examined separately to determine whether, based on the concept itself and its treatment in the Charter, one can conclude that it is indeed a right, the same right recognized, in principle, in Article 17.

Integral Development: Article 30 of the OAS Charter does not define the concept of integral development. Instead, it provides that integral development encompasses the economic, social, educational, cultural, scientific and technological fields. So the fields it encompasses are more numerous than those listed in Article 17 of the Charter, which does not mention the social, educational, scientific and technological aspects. By the same token, the concept of integral development in Article 30 does not include the political area mentioned in Article 17 of the Charter. The conclusion, then, is that the right of the state set forth in such clear language in Article 17 is not the same and does not refer to the concept of integral development, which the Charter addresses at length, particularly in its chapter VII, at least with respect to the social, educational, scientific and technological fields. Perhaps some conclusion can be drawn by examining the elements that comprise the concept of integral development.

In Article 34, the OAS Charter lists the following as the basic objectives of integral development: equality of opportunity, elimination of extreme poverty, equitable distribution of wealth and income, and full participation of peoples in decisions relating to their own development. Given the nature of these objectives, achieving integral development is primarily the job of the state itself. A clear example is the third point, which concerns equitable distribution of wealth and income. While this is the exclusive function of the state, its perfor-

mance will have a direct bearing upon an individual's welfare. As is evident, these goals can only be achieved by purposeful, determined action on the part of a state.

Article 34 further establishes a set of basic goals that should be pursued, in order to achieve these fundamental objectives. The goals break down into 8 fields or areas:

- 1) *Production, distribution and taxation (economic)*: increase of per capita national product, and equitable taxation and distribution of income.
- 2) *Agriculture (economic)*: Modernization of rural life through reforms for equitable and efficient land-tenure systems, increased agricultural productivity, expanded use of land and diversification of production, improved processing and marketing systems for products.
- 3) *Industry*: Accelerated and diversified industrialization, especially of capital and intermediate goods.
- 4) *Prices*: Stability of domestic price levels, compatible with sustained economic development and the attainment of social justice.
- 5) *Labor*: Fair wages, employment opportunities and acceptable working conditions for all.
- 6) *Education*: Rapid eradication of illiteracy and expansion of educational opportunities.
- 7) *Health, nutrition and housing*: Protection of man's potential through the extension and application of modern medical science, proper nutrition through increases in production and availability of food, adequate housing for all sectors and urban conditions that offer the opportunity for a healthful, productive, and full life.
- 8) *Investments and exports*: Promotion of private initiative and investment in harmony with action in the public sector, and expansion and diversification of exports.

This list of goals is quite diverse, in the sense that whereas the goals in the areas of labor, education, health, nutrition and housing all center around the individual, the goals in other fields – like investments and exports, industry and prices- speak more to the right of states to develop their economic life, provided for in Article 17. Of the three areas mentioned in Article 17 – the cultural, political, and economic –, it is only in this last one that the Charter – in Chapter VII at least – sets out the states'

goals vis-à-vis integral development. In other areas, such as agriculture, or production, distribution and taxation, the goals are geared toward both the state and the individual. Therefore, the objectives and goals of integral development as articulated in the OAS Charter do not settle the question of whether a right to development is recognized, either in the case of the state or in the case of the individual. In particular, the goals of integral development for the state have to do with only one of the three areas in which, under Charter Article 17, the state has a right to develop. That one area is the economic area.

Finally, as with the objectives of integral development, it is only through a purposeful, determined effort that a state can accomplish these goals, which are its exclusive responsibility. The OAS Charter, however, would seem to submit that the development of any one member state is a responsibility to which all other Member States are committed. Would this, then, transform that responsibility into an obligation that carries with it every other member state's right to development?

An Obligation to Achieve the States' Integral Development?

As previously observed, integral development is a primary responsibility of each country. However, this is not to imply that development is somehow each country's exclusive responsibility.

Article 30 of the Charter states that international social justice and integral development are essential conditions to peace and security. Clearly, peace and security are not dependable on any one state by itself. That being the case, the conditions for achieving peace and security should, in principle, also be a collective duty, to be fulfilled by all Member States. Article 31 of the Charter provides that inter-American cooperation for integral development is the common and joint responsibility of the Member States. A distinction is in order here. The multiparty responsibility required under the Charter is with respect to *inter-American cooperation* for integral development, not integral development *per se*, a fact further reinforced by the provision to

the effect that development is a primary responsibility of each country. Integral development is achieved through inter-American cooperation, but each country sets its own goals for each field to achieve that integral development, as previously observed.

Therefore, integral development is not necessarily an obligation that other states share vis-à-vis a given state. The duty of those other states or, better said, their common and joint responsibility, is that of inter-American cooperation. Having discounted the notion that countries have an obligation to contribute directly to a given country's integral development, the logic of the right-obligation correlation would dictate that no single state has a right to integral development.

A Common and Joint Responsibility vis-à-vis Inter-American Cooperation for Integral Development

Summing up, what the Charter refers to as 'integral development' is not any given state's right; instead, it is the responsibility of that state to cooperate with the other states to ensure that they achieve integral development. The central principle, therefore, is inter-American cooperation.

What is "inter-American cooperation," then? In Chapter VII of the Charter, it is regarded as "the common and joint responsibility of the Member States, within the framework of the democratic principles and the institutions of the inter-American system," which should "support the achievement of the Member States' national objectives" and "respect the priorities established by each country in its development plans, without political ties or conditions."¹ Article 32 develops the concept further by establishing that "it should be continuous" and "preferably channeled through multilateral organizations, without prejudice to bilateral cooperation."

Therefore, the concept of inter-American cooperation is, *inter-alia*, respectful of the Member States' national objectives and the priorities that each country sets in its development plans. This further reinforces the point made in the preceding section, which is that the Charter does not speak of a right to integral development that carries with it a corresponding obligation vis-à-vis that right. Given this frame of reference, one can hardly make the case for a right to integral development that carries with it a correlative obligation. Nor could one interpret a country's integral development as the corollary of an obligation shared by the other states when, for obvious reasons, the latter have no say over the national objectives and priorities that each country sets in its development plans. One can hardly posit the existence of a right when there is no attendant obligation or when the possibilities for realization of that right depend to a large extent on a given state's own resolve. Given these facts, the conclusion is that the responsibility of inter-American cooperation for integral development is one of means, and not of ends. The essence of that responsibility is spelled out in the OAS Charter itself.

The Essence of the Responsibility of Inter-American Cooperation for Integral Development

In Chapter VII, the OAS Charter enumerates a series of responsibilities incumbent upon the states and the essence of the cooperation under discussion. The basic idea is to enhance the unity in addressing the region's problems and in seeking social justice and "integral development for their peoples."² Each state is encouraged to contribute "in accordance with their resources"³ and to avoid "actions or measures that have serious adverse effects on the development of other Member States."⁴ More specifically, members are encouraged to work to-

1 Article 31

2 Article 30

3 Article 32

4 Article 35

gether to face problems of economic stability of a Member State when it cannot remedy them itself,⁵ and to promote the exchange of “scientific and technical knowledge.”⁶

One of the main aims of the Charter is to accelerate the integration process, “with a view to establishing a Latin American common market in the shortest possible time,”⁷ for which the Charter proposes to encourage multinational projects and financial institutions.⁸ It also promotes, in Article 45, specific principles and mechanisms to seek for a just social order. The Charter further specifies the importance of encouraging “education, science, technology, and culture, oriented toward the overall improvement of the individual,”⁹ and of cooperation in these areas. Article 48 suggests that Member States should “consider themselves individually and jointly bound to preserve and enrich the cultural heritage of the American peoples.” Articles 49 to 52 deal with the responsibilities of states to “exert the greatest efforts” to ensure education, to eradicate illiteracy, to promote scientific research, to “stimulate activities in the field of technology for the purpose of adapting it to the needs of their integral development,”¹⁰ to “increase exchange of knowledge,”¹¹ and “to promote cultural exchange as an effective means of consolidating inter-American understanding.”¹²

One notes that all these are responsibilities undertaken by the Member States in the Charter as part of their common and joint responsibility to cooperate to achieve integral development. And, as stated previously, these responsibilities are of means and not of ends.

Principles Articulated in Chapter VII of the OAS Charter: This section will now examine the principles established in Chapter VII of the OAS Charter, to see whether they reveal some new element

that can be used to prove or disprove the thesis of this paper. The in-depth analysis done of Chapter VII found the following principles:

- Solidarity
- Inter-American cooperation: Inter-American cooperation for integral development is the common and joint responsibility of the Member States.
- “When the more developed countries grant concessions in international trade agreements that lower or eliminate tariffs or other barriers to foreign trade so that they benefit the less developed countries, they should not expect reciprocal concessions from those countries that are incompatible with their economic development, financial, and trade needs.”¹³
- “All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security.”¹⁴
- “Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working.”¹⁵
- “Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers’ right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws.”¹⁶

5 Article 37

6 Article 38

7 Article 42

8 Article 43

9 Article 47

10 Article 51

11 Article 51

12 Article 52

13 Article 40

14 Article 45

15 Article 45

16 Article 45

As in earlier cases, some of these principles apply to the state, while others apply to the individual. The first three have to do with the state, although none would appear to endow it with any right; instead, they provide the framework for the common and joint responsibility to cooperate. The other three principles concern the individual. The first of this second set of three principles is representative in the sense that it clearly establishes a right to material well-being (no reference to development) and spiritual development (while the right referenced here is clear, it is within a very narrow context). The last two principles, related to the individual in the arena of labor, uphold rights that are already recognized in international law, in a very specific and well defined area. Nothing new appears to have been added that would establish an individual's right to development.

Initial Conclusions

From this examination of Article 17 and Chapter VII of the Charter of the Organization of American States, one can conclude that the Charter does not clearly establish an individual's right to development. Development is more of a means to the individual's self-fulfillment. While Article 17 establishes the right of the state to develop its cultural, political and economic life freely and naturally, nothing in Chapter VII of the Charter would seem to indicate that this right pertains to integral development, which is the central theme of that chapter. First, no clause of the Charter clearly provides that integral development is a right that creates an obligation incumbent upon the other states (the common and joint responsibility of the other states is to cooperate *to achieve* integral development). Second, the right recognized in Article 17 is much narrower in that it encompasses only three fields – the cultural, the political and the economic –, and does not include others like the social, educational, scientific and technological. Still, the lingering question is this: if the state's right to develop its cultural, political, and economic life freely and naturally has been clearly established in Article 17, does it follow, then, that all those

aspects of integral development mentioned in Chapter VII of the Charter and related to these three areas, are what define, describe and elaborate upon that right? In other words, each time these three fields is touched upon in Chapter VII of the Charter as responsibilities of states, does it follow that they are rights of another state?

This is highly doubtful. First, as noted previously, the authors of the Charter did not intend to make Article 17 part of Chapter VII. The language is different (development vs. integral development). The fields that they encompass are not the same. Finally, the wording of Article 17 and its position in the text seem to suggest that for the authors of the Charter, the adverbs mattered more than the nouns. In other words, the emphasis was less on the right to develop and more on the right to develop *freely and naturally*. This idea is reinforced by the fact that the article appears in the chapter on the fundamental rights and duties of states, one that highlights non-interference, non-intervention, and respect for state sovereignty. The purpose of this provision was not to set the stage for elaboration of a right in a later chapter, but to establish a general right to which the principles of non-interference and non-intervention were to be strictly applied. The language in which integral development is couched is that of a primary responsibility (not an obligation) of a state, which the other states have a responsibility (not an obligation) to cooperate to achieve, all as a means (not a right) to achieve the individual's self-fulfillment.

OAS Organs and Offices Involved in Integral Development

This paper will briefly touch upon the organs and offices in the OAS that are directly involved in the subject of integral development. One such OAS organ is the Inter-American Council for Integral Development (CIDI), one of the Organization's two Councils. The CIDI is composed of one principal representative, of ministerial or equivalent rank, for each Member State (Article 93).

The purposes that CIDI serves as described in Article 94 of the Charter, are basically "to promote

cooperation among the American states for the purpose of achieving integral development” in the economic, social, educational, cultural, scientific, and technological fields, and “to help eliminate extreme poverty.” The CIDI, then, is the preeminent organ for promoting cooperation among the Member States, a concept that is central to its raison d’être. Its principal activity is formulating “a strategic plan which sets forth policies, programs, and courses of action in matters of cooperation for integral development.”¹⁷ The CIDI holds at least one meeting each year at the ministerial or equivalent level and may “convene meetings at the same level for the specialized or sectorial topics it considers relevant, within its province or sphere of competence.”¹⁸ It also has such nonpermanent specialized committees as it decides to establish.

The Organization’s General Secretariat also has the Executive Secretariat for Integral Development (SEDI), charged with executing and coordinating the projects that CIDI approves (Article 98). The framework for its activities is the Strategic Plan for Partnership for Integral Development 2006–2009, as well as the mandates from the Summits, the General Assemblies, and ministerial meetings. To accomplish its objectives, SEDI is divided into six departments. Those departments are listed below, as they represent SEDI’s principal areas of endeavor:

- A) Follow-up, Policies and Programs.
- B) Education and Culture.
- C) Science and Technology.
- D) Trade, Tourism and Competitiveness.
- E) Sustainable Development.
- F) Social Development and Employment.

Before closing, this paper cannot fail to mention a process that has been underway for some years and is perhaps the most important that the OAS is now conducting in connection with integral development. That process is the crafting of the Social Charter of the Americas.

At its XXXIV regular session (Quito, June 2004), the General Assembly approved resolution AG/RES.2056 (XXXIV-O/04) “Draft Social Charter

of the Americas: Renewal of the Hemispheric Commitment to Fight Extreme Poverty in the Region,” wherein it instructed the Permanent Council and the Permanent Executive Committee of the Inter-American Council for Integral Development (CEPCIDI) to jointly prepare a draft Social Charter of the Americas and a Plan of Action. It should include the principle of social development, and establish specific goals and targets that reinforce the existing instruments of the Organization of the American states on democracy, integral development, and the fight against poverty. They were to submit the results to the General Assembly at its thirty-fifth regular session for consideration, given that promotion and observance of economic, social, and cultural rights are inherently linked to integral development and to equitable economic growth.

Then, at its XXXV regular session (Fort Lauderdale, June 2005), the OAS General Assembly adopted resolution AG/RES.2139 (XXXV-O/05) where it took note of the report on the implementation of previous resolution (AG/doc. 4459/05) and of the establishment of the Joint Working Group of the Permanent Council and the Permanent Executive Committee of the Inter-American Council for Integral Development (CEPCIDI) to carry out the mandate contained in that resolution. It also resolved to renew that mandate.

The heads of state and government of the hemisphere underscored the importance of this initiative when they gathered for the Fourth Summit of the Americas held in Mar del Plata in November 2005, and offered their encouragement to the OAS in drafting the Social Charter of the Americas, whose principles and objectives will be directed towards the achievement by Member States of societies that offer all citizens more opportunities to benefit from sustainable development with equity and social inclusion.

At its XXXVI regular session (Santo Domingo, June 2006), the OAS General Assembly adopted resolution AG/RES.2241 (XXXVI-O/06), where it took note of the report on implementation of the

¹⁷ Article 95

¹⁸ Article 96

previous year's resolution (GTC/CASA/doc.29/06 rev.1), the draft preamble to the Social Charter of the Americas (GTC/CAS/doc.24/06 rev.11) and the work done by the Joint Working Group. The General Assembly renewed that mandate yet again and instructed the Group to work intensely to conclude the negotiation of those documents.

On September 22, 2006, the Chair of the Working Group presented a proposed methodology which suggested that negotiations on the preamble be temporarily suspended and that negotiation of the operative part of the Social Charter get underway. On November 21, 2006, the Working Group received a proposal for the operative part of the Social Charter, prepared by the Executive Secretariat for Integral Development for the Working Group to analyze.

Then, at its XXXVII regular session (Panama City, June 2007), the OAS General Assembly adopted resolution AG/RES.2278 (XXXVII-O/07) in which it welcomed the report on the implementation of the previous year's resolution (GTC/CASA/doc.48/07 rev.2), and renewed the mandate yet again. It instructed the OAS' Executive Secretariat for Integral Development to prepare the Draft Plan of Action, which was to be crafted to achieve specific, feasible goals on the basis of existing mandates and following the structure of the Social Charter of the America.

So far, the Draft Social Charter has a preamble and five chapters:

1. Social Justice, Development with Equity and Democracy.
2. Economic development.
3. Social development.
4. Cultural development.
5. Solidarity and collective effort of the Americas.

While it is true that negotiation of this instrument has thus far not made great strides, the mere fact that a forum now exists to discuss this topic – which some states consider highly controversial – is indicative of its importance. Since this paper concerns the provisions of the OAS Charter on the right to development, its comments on the Social Charter will go no further than this brief introduction.

Concluding in light of the recent developments lined out above, it can be said that although the OAS Charter does not have a direct mention of the RTD as such, the Social Charter is a way in which the Member States are planning to address some of the issues related to integral development, concretizing their commitment to the Right to Development.

Part III: OPTIONS FOR A LEGAL FRAMEWORK FOR IMPLEMENTING THE RIGHT TO DEVELOPMENT

Chapter 8:

A legal perspective on the evolving criteria of the HLTF on the right to development

Stephen P. Marks*

Introduction

The Human Rights Council (HRC) entrusted the High-Level Task on the Implementation of the Right to Development (HLTF) with the elaboration and application of criteria for the periodic evaluation of global partnerships, as identified in Millennium Development Goal 8, from the perspective of the right to development. The HLTF has been perfecting these criteria as part of its effort to provide practical tools for the implementation of the right to development. The purpose of this chapter is to consider whether and to what extent the current criteria for the periodic evaluation of global partnerships (reproduced in the annex to this chapter) are relevant to a possible international convention on the right to development (RTD). I will explore the obstacles to this transformation arising from the nature of the criteria and conduct a thought experiment by adapting the language of the current criteria to that of typical treaty obligations.

Incompatibility of criteria with obligations of parties to a treaty

The first observation is that the criteria were written to be applied to “global partnerships” as understood in MDG 8, whereas a treaty in international law is an agreement between two or more states or other subjects of international law. No international institution has ratified any of the human rights treaties and the obligations of these institutions are a matter of some discussion. For our purposes, we can be quite sure that no non-state subjects of international law, such as the WTO, ASEAN, the World Bank or other entity, will be solicited to be parties to any convention on the RTD. Their cooperation might be provided for, as that of the specialized agencies is in the international covenants, but the obligations would be those of States Parties to an eventual convention rather than “global partnerships” as such.¹

So what would be the value of the criteria for States Parties to such a treaty? Most of the criteria begin with the words “the extent to which a part-

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1 As the chapter in this publication by Michael Ashley Stein and Janet E. Lord points out, the Convention on Right of Persons with Disabilities (CRPD) expressly invites States Parties to cooperate internationally through partnerships with relevant international and regional organizations. The authors urge the HLTF “to draw from the experiences of the CRPD in creating a framework in which a multitude of actors, both State and non-State, participate in implementation processes.”

nership...” and then specify the matter subject to the periodic review. The review seeks to determine whether the partnership enables an environment conducive to the RTD, is conducted in conformity with the RTD, or results in changes sought by the RTD. Such matters relate to the partnership, which may involve international organizations, the private sector, and, in exceptional cases, categories of countries. Let us examine each of these addressees of MDG 8:

International organizations: By interpretation, organizations such as the OECD have been deemed to be the partnerships envisaged in the context, for example, of “more generous official development assistance for countries committed to poverty reduction.” WTO and regional trading regimes (such as NAFTA and AFTA)² are presumably envisaged by the reference to developing “further an open trading and financial system that is rule-based, predictable and non-discriminatory,” and the World Bank by the reference to “enhanced debt relief for heavily indebted poor countries.”

The private sector: MDG 8 calls for cooperation with the private sector in general to “make available the benefits of new technologies – especially information and communications technologies” and it is the Information and Communication Technology (ICT) industry that is most directly concerned by this reference. MDG 8 also contains a target to “provide access to affordable essential drugs in developing countries,” which also refers explicitly to cooperation with pharmaceutical companies.

Categories of countries: Three categories are mentioned: “the least developed countries’ special needs,” “the special needs of landlocked and small island developing states,” and “developing countries” both with respect to “debt problems” and “decent and productive work for youth.” These countries seem by implication to be the subject of “a commitment to good governance, development, and poverty reduction – nationally and internationally” in MDG 8. Creditor countries are involved in the reference to “cancellation of official bilateral debt.”

It would be useless to seek an international convention on the RTD to bind the IBRD, WTO, OECD, NAFTA or any other international institution or treaty regime. Similarly, although the private sector is ready to commit to investment agreements and a range of other international agreements, this would certainly not be the case with a right to development convention. That leaves the various groups of countries. Cancellation of bilateral debt is more amenable to bilateral agreements and is not likely to be considered in a general treaty, although this is not to be excluded. The particular needs of landlocked and small island developing states are also a matter for special agreements rather than an omnibus RTD treaty. Decent and productive work for youth is covered by ILO conventions. Thus, the first major difficulty in translating the HLTF’s criteria into treaty obligations is that entities for which the criteria were drafted, namely global partnerships for development such as OECD/DAC and NEPAD, are frameworks of multilateral cooperation rather than States and are not likely to become parties to an inter-State treaty.

Perfect and imperfect obligations

A further difficulty is that a treaty must state clearly what performance each party accepts. For the most part, this requires what philosophers call “perfect obligations,” that is, obligations for which there is an identifiable right-holder to whom the obligation is due from an identifiable duty-holder. How could the criteria be translated into such rights? Would the treaty need to specify, for example, “The governor of the Central Bank of any state party to this treaty to which any other state party owes an official debt shall, within thirty days following the deposit of the instrument of ratification of this treaty, issue an exoneration of debt on behalf of all other States Parties having such debt and take all other measures necessary to cancel completely said debt”? That wording for a clause

² It is estimated that there are some 300 regional trade agreements. See http://www.wto.org/english/tratop_e/region_e/regfac_e.htm.

illustrating a perfect obligation is already too general. It is difficult to conceive of an international convention on the RTD containing the full range of perfect obligations implied by the RTD in general or the global partnerships of MDG 8 in particular. Were one to be drafted, it might have to be of the dimensions of the General Agreement on Tariffs and Trade, which has over 28,000 words and is 65 pages long.

It may be argued that a treaty reflecting some of the obligation implied by the HLTF criteria need not be limited to perfect obligations. As a human rights treaty, the convention could draw on the consequentialist argument of Amartya Sen:

It is important to see that in linking human rights to both perfect and imperfect obligations, there is no suggestion that the right-duty correspondence be denied. Indeed, the binary relation between rights and obligations can be quite important, and it is precisely this binary relation that separates out human rights from the general valuing of freedom (without a correlated obligation of others to help bring about a greater realization of human freedom). The question that remains is whether it is adequate for this binary relation to allow imperfect obligations to correspond to human rights, without demanding an exact specification of who will have to do what, as in the case of legal rights and specified perfect obligations.³

Sen correctly observes that “[i]n the absence of such perfect obligations, demands for human rights are often seen just as loose talk.”⁴ He responds to this challenge with two questions: “Why insist on the absolute necessity of [a] co-specified perfect obligation for a putative right to qualify as a real right? Certainly, a perfect obligation would help a great deal toward the realization of rights, but why cannot there be unrealized rights, even rights that are hard to realize?”⁵ He resists “the claim that any use

of rights except with co-linked perfect obligations must lack cogency” and explains that “[h]uman rights are seen as rights shared by all – irrespective of citizenship – and the benefits of which everyone should have. The claims are addressed generally – in Kant’s language “imperfectly” – to anyone who can help. Even though no particular person or agency has been charged with bringing about the fulfillment of the rights involved, they can still be very influential.”⁶

This argument can be applied to the RTD. Indeed, the language of the Declaration on the Right to Development is a catalogue of imperfect obligations, which are nevertheless subject to specification as to what steps should be taken, when, with what forms of assistance, by whom, with what allocation of resources, with what pace of progressive realization, and through what means. As Martin Scheinin has demonstrated, the jurisprudence of human rights suggests a justiciable RTD, and therefore perfect obligations, at least in embryonic form.⁷ A convention would have to articulate imperfect obligations, although the monitoring of the implementation of the convention could follow the extent to which the legal structure has adapted to meet these obligations and allowed the State Party to move from imperfect to perfect obligations.

Preliminary attempt to transform the criteria into human rights treaty obligations

While it would seem, for the reasons stated, nearly impossible to reconceive the criteria as currently formulated by the HLTF into treaty obligation, they do have a feature that is relevant to the implied obligations. The criteria, even at their present stage of elaboration, are modeled on the indicators being prepared by an international team under the guidance of Rajeev Malhotra, recently retired from

3 Amartya Sen, “Consequential Evaluation and Practical Reason,” *The Journal of Philosophy*, Vol. XCVII, No. 9, September 2000, pp. 493–494.

4 *Id.*

5 *Id.*, p. 496.

6 *Id.*, p. 497.

7 Martin Scheinin, “Advocating the Right to Development Through Complaint Procedures Under Human Rights Treaties,” in Bård A. Andreassen and Stephen P. Marks, *Development as a Human Rights: Legal, Political and Economic Dimensions*, distributed by Harvard University Press, 2006, pp. 274–283.

the OHCHR. This means that they relate to the three types of pro-RTD obligations: to create an institutional framework conducive to the RTD, to engage in conduct consistent with the principles of the RTD, to achieve results defined by the RTD. The criteria conceivably could be reformulated – in a sense by working backward – to articulate those obligations.

It has to be assumed that the global partnerships for which the criteria were intended involve states, and that these states could conceivably undertake treaty obligations that would require them to act within the global partnerships in which they participate, in a way that would increase the compliance of those partnerships with the criteria. The obligations of States Parties to the ICESCR to act in certain ways within international organizations was addressed in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. The impact of treaty obligations on their behavior (voice, vote and contribution of resources) in global partnerships implies acceptance of the principle of policy coherence reflected in Maastricht Guideline 19, which relates to economic, social and cultural rights but could be extended to obligations arising from a convention on the RTD. That guideline reads as follows:

The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organi-

zations, individually or through the governing bodies, as well as the secretariat and nongovernmental organizations should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.⁸

In the spirit of this guideline, it may be a useful exercise to consider what treaty obligations states might accept which would require them to influence global partnerships in the ways suggested by the criteria. As a thought exercise, I will suggest below some possible formulations, which may be a starting point for a treaty building on the criteria. It should be stressed, however, that this thought exercise leaps over the four steps that would be required before any such drafting could be considered⁹ and that the criteria are likely to be rather significantly altered by that point. Certainly, in the present climate, it is politically unrealistic to skip any of the steps. Nevertheless, a thought exercise consisting of defining the obligations implied by the criteria may prove useful for the current phase of applying and refining the criteria.

The three tables below follow the three types of obligations implied by the criteria (structural, process, and outcome). Where a criterion reflects a significant political commitment rather than a legal obligation, I have indicated a possible preambular paragraph; otherwise the left hand column indicates the current wording of the criteria as formulated by the HLTF in January 2008, while the right-hand column suggests a very rough initial formulation of an obligation that might be considered in the context of treaty negotiations.

8 The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, *Human Rights Quarterly*, Vol. 20 (1998), pp. 691–705.

9 As mentioned in the introduction to this volume, these four steps are: 1) apply the criteria to the four existing partnerships; 2) extend the application to other areas of MDG 8; 3) expand the criteria into a “comprehensive and coherent set of standards for the implementation of the right to development” and 4) further advance the application of these standards through steps as yet undetermined but which may take the form of guidelines and may evolve as a basis for consideration of a treaty norm, called “an international legal standard of a binding nature.”

Structural criteria/obligations

A. As regards obligations to enable an environment conducive to the RTD, the relevant current criteria might be transformed as follows:

<p>Current formulation of structural criteria (A/HRC/8/WG.2/TF/2, January 31, 2008, Annex II): “The extent to which a partnership...”</p>	<p>Possible formulation of a treaty obligation: “The States Parties to the present convention agree...” [This wording does not apply to preambular paragraphs.]</p>
<p>a) Contributes to creating an enabling environment for sustainable development and the realization of all human rights;</p>	<p>[Preambular paragraph] Considering that sustainable development and the realization of human rights require the creation of a suitable enabling environment;</p>
<p>b) Draws on all relevant international human rights instruments, including those relating to the RTD, in elaborating the content of development strategies and tools for monitoring and evaluating their implementation;</p>	<p>To make explicit reference to the relevant constitutional, legislative, and treaty obligations it has accepted in the field of human rights in the formulation of any national and international development strategies or international arrangement regarding aid, trade and lending and to ensure that such strategies and arrangements are conceived so as to ensure maximum compliance with those obligations.</p>
<p>c) Promotes good governance, democracy and the rule of law and effective anti-corruption measures at the national and international levels;</p>	<p>To introduce in their development programmes and policies where appropriate commitments to good governance, democracy and the rule of law, and effective anti-corruption measures.</p>
<p>d) Follows a human rights-based approach to development, and integrates the principles of equality, non-discrimination, participation, transparency, and accountability in its development strategies;</p>	<p>To ensure that its policies and practices relating to economic development reflect a human rights-based approach and respect the principles of equality, non-discrimination, participation, transparency, and accountability.</p>
<p>e) Establishes priorities that are responsive to the needs of the most vulnerable and marginalized segments of the population, with positive measures to realize their human rights;</p>	<p>To take special measures to respond to the needs and realize the human rights of the most vulnerable and marginalized segments of the population.</p>
<p>f) Recognizes mutual and reciprocal responsibilities among the partners, taking into account their respective capacities and resources and the special vulnerability of Least Developed Countries;</p>	<p>[Preambular paragraph] Recognizing that there are mutual and reciprocal responsibilities among development partners, taking into account their respective capacities and resources and the special vulnerability of Least Developed Countries.</p>
<p>g) Ensures that human rights obligations are respected in all aspects of the relationship between the partners, through harmonization of policies;</p>	<p>[Preambular paragraph] Aware of the need to harmonize their policies and practices for development with their human rights obligations in all aspects of their relationship with development partners.</p>

Process criteria/obligations

B. For obligations to engage in conduct in conformity with the RTD, the relevant current criteria might be transformed as follows:

Current formulation of process criteria (A/HRC/8/WG.2/TF/2, 31 January 2008, Annex II): “The extent to which a partnership...”	Possible formulation of a treaty obligation: “Each State Party to the present convention agrees...”
h) Ensures that adequate information is freely available to enable effective public scrutiny of its policies, working methods and outcomes;	To include by legislation and administrative measures access of the public to adequate information concerning its policies and practices in all areas of development, including international arrangements in the areas of trade, aid, and lending.
	To ensure that the determination of development policies and practices draws on statistical and empirically developed data, disaggregated as appropriate, updated periodically, and presented impartially and in a timely fashion, drawing on international assistance and cooperation as necessary to ensure the quality and accessibility of these data.
i) Promotes gender equality and the rights of women;	To ensure gender equality and the rights of women in accordance with its obligations under the Convention on the Elimination of All Forms of Discrimination Against Women and other relevant treaties to which it is a party.
j) Provides for the meaningful consultation and participation of all stakeholders, including affected populations and their representatives, as well as relevant civil society groups and experts, in processes of elaborating, implementing and evaluating development policies, programmes and projects;	To ensure that the elaboration, implementation, and evaluation of development policies, programmes, and projects are conducted with the meaningful participation of the concerned populations through their representatives and through that of relevant civil society groups and experts.
k) Respects the right of each state to determine its own development policies in accordance with international law, and the role of national parliaments to review and approve such policies.	To respect the right of each state to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from.



<p>l) Includes fair institutionalized mechanisms of mutual accountability and review, through which the fulfillment by all partners of their agreed commitments is monitored and publicly reported, responsibility for action is indicated, and effective remedies are provided;</p>	<p>To provide, in its development projects and in its arrangements with international aid, trade, and lending institutions, for fair institutionalized mechanisms of mutual accountability and review, including effective remedies where partners have not complied with agreed commitments.</p>
<p>m) Monitors and evaluates progress in achieving development strategies by carrying out systematic assessments of the human rights impact of its policies and projects based on appropriate indicators and contributes to strengthening the capacity to collect and disseminate timely data, which should be disaggregated sufficiently to monitor the impacts on vulnerable population groups and the poor;</p>	<p>To provide for ex ante human rights impact assessments prior to the approval of development projects, and, when such assessments reveal unacceptable risks from any development project for certain groups, to provide, as needed, for social safety nets to ensure that such adversely-affected groups are informed of the risks and have the opportunity to either accept a compensation scheme or reject the project.</p>

Outcome criteria/obligations

C. For obligations to produce results sought by the RTD, the relevant current criteria might be transformed as follows:

<p>Current formulation of outcome criteria (A/HRC/8/WG.2/TF/2, January 31, 2008, Annex II): “The extent to which a partnership...”</p>	<p>Possible formulation of a treaty obligation: “Each State Party to the present convention agrees...”</p>
<p>n) Ensures that developing countries, through their own efforts and through international assistance and cooperation, have the human and financial resources to implement successfully development strategies based on these criteria;</p>	<p>[Preambular paragraph] Stressing that developing countries, through their own efforts and through international assistance and cooperation, must have adequate human and financial resources to implement successful development strategies based on the obligations contained in the present convention.</p>
<p>o) Establishes, as needed, safety nets, to provide for the needs of vulnerable populations in time of natural, financial or other crisis;</p>	<p>To provide, by legislation and administrative measures, social safety nets to meet the needs of vulnerable populations in time of natural, financial or other crisis, including stocking of emergency provisions, training of emergency response teams, establishing funds to cover urgent needs of affected population, and conclusion of arrangements with international aid, trade, and lending institutions to meet the needs of the most vulnerable and marginalized segments of the population during such crises.</p> <p style="text-align: right;">▣▣▣▣▶</p>

<p>p) Achieves the constant improvement of the well-being of populations and all individuals, on the basis of their active, free, and meaningful participation in development and in the fair distribution of the benefits, in accordance with article 2, paragraph 3, of the Declaration on the Right to Development;</p>	<p>[See obligation opposite criterion (k) above.]</p>
<p>(q) Contributes to development that is sustainable and equitable, with a view to ensuring continually increasing opportunities for all and a fair distribution of resources.</p>	<p>[Preambular paragraph] Reaffirming that development must be a sustainable and equitable process, with a view to ensure continually increasing opportunities for all and a fair distribution of resources.</p>

Conclusion

This exercise reveals several problems with the drafting of a convention based on the current criteria. The first is that the norms are either too vague to be of much value, or unlikely to be acceptable to most governments (although perhaps desirable from the perspective of an ideal RTD). Terms like “participation” and “equity” may be acceptable in a political declaration, but in a treaty that would be enforceable, these terms and many others would require definition and clarification. It would probably take several years before a formulation could be found that is acceptable to an intergovernmental drafting conference. However, the level of generality in the criteria is not much greater than that in many other human rights treaties. Additionally, drafters could provide more specificity if they felt there was a good faith effort on all sides to find a common ground. The current climate that results in 53 negative votes at the mere mention of a convention is not conducive to the fleshing out of specific treaty norms expanding on the current criteria. A related problem is that many of the proposed treaty obligations in the right-hand column are at least in part duplicative of treaty obligations already assumed. It would be necessary to ensure (a) that there is compatibility among similar norms and (b) that there is sufficient novel substance to justify a new treaty.

Although it is impossible to separate the feasibility of an international treaty on the RTD from the charged political climate, I believe it is possible

for legal scholars and practitioners, not acting on government instructions, to make an honest determination of the advantages and disadvantages of the treaty route. It should be possible to assess whether or not a treaty is a good idea on the basis of the extent to which it would improve the prospects of reducing the resources constraints on developing countries while systematically integrating human rights into the development process, rather than the extent to which this or that group of states favors the treaty.

My task was limited to a reflection on whether and to what extent the current criteria used by the HLTF could evolve into treaty norms. My conclusion is that they are not a good starting point in their current state. They were conceived in an ad hoc way to assist the HLTF in developing a method for the periodic review of global partnerships as defined in MDG 8, not as a method for clarifying to governments their putative legal obligations regarding the RTD.

However, because they relate to structure (conducive environment), process (conduct) and outcome (results), the current criteria touch on the main obligations that any useful treaty on the subject would necessarily include. These could be reduced to five core ideas that merit inclusion should the political will be found to draft a treaty and that can be articulated in a language suitable for an international treaty: (1) that the development environment must be conducive to systematic integration of human rights into development at the national and international levels; (2) that

the local ownership of development policy is conditioned by respect a human rights-based approach, the fair distribution of the benefits, and the principles of equality, non-discrimination, participation, transparency, accountability, and sustainability; (3) that active, free, and meaningful participation of the affected population be part of the process; (4) that due attention be given to gender equality and the needs of vulnerable and marginalized populations; (5) that the process be based on reliable data and subject to ex ante impact assessments, public scrutiny, and institutionalized mechanisms of mutual accountability and review.

The current 15 criteria (reproduced in the annex) do reflect these five core ideas, which are at the heart of the RTD. However, a sixth core normative proposition is missing for the understandable reason that the criteria were intended to apply to the global partnerships enumerated in MDG 8, which sets out the actions donor countries must take to support developing countries to achieve MDGs 1–7. Those actions presume a commitment on the part of donor countries to reduce resource constraints on developing countries in the areas enumerated in MDG 8, namely, trade liberalization, private financial flows, debt forgiveness, domestic resource mobilization, and development assistance. This commitment is consistent with Articles 3 and 4 of the Declaration on the Right to Development, which stipulate:

Article 3

1. States have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development.
2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations.
3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfill their

duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all states, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

These two articles contain what one can assume is the principal reason for the push by NAM countries for an international convention. The second sentence in Article 3 (3) on NIEO is not likely to be effective since the concept lacks currency in the 21st century. The rest of these articles reflect the moral obligations of donor countries to reduce resource constraints on developing countries. The presumed aim of the sponsors of a convention would be to transform these moral obligations into legal obligations in the hope that the later would increase the likelihood that agricultural subsidies in developed countries would cease, that the debt burden would be eliminated, that donor countries would reach the goal of 0.7% of GNI devoted to ODA, that trade relations would be fairer and the markets in rich countries would be open to poor countries, and that foreign direct investment would create jobs, build infrastructure, and increase growth while developing indigenous industrial capacity.

Most developed countries favor these outcomes and many have done a lot to achieve them, but do not want to submit to a legal obligation to bring them about. Nevertheless, some version of

the obligation to provide resources would necessarily join the five other core ideas mentioned above and probably have pride of place in the preference of the sponsors. Whether it is the obligation to commit 0.7% of GNI to ODA or some other version of a duty to transfer resources, it is likely that this provision will be the most difficult

to negotiate. These six core ideas could form the basis for the negotiation of a convention in a climate of mutual trust and shared commitment to move the RTD from political rhetoric to development practice. For the moment, there is little evidence of either that climate or that commitment.

Annex

CRITERIA FOR PERIODIC EVALUATION OF GLOBAL DEVELOPMENT PARTNERSHIPS
FROM A RIGHT TO DEVELOPMENT PERSPECTIVE(As revised by the task force at its fourth session)¹⁰

To facilitate their application, the criteria remain organized in three groups related to development partnerships: structure and institutional framework, process and outcome.

Structure/institutional framework¹¹

The extent to which a partnership:

- a) Contributes to creating an enabling environment for sustainable development and the realization of all human rights;¹²
- b) Draws on all relevant international human rights instruments, including those relating to the right to development, in elaborating the content of development strategies and tools for monitoring and evaluating their implementation;¹³
- c) Promotes good governance, democracy and the rule of law and effective anti-corruption measures at the national and international levels;¹⁴
- d) Follows a human rights-based approach to development, and integrates the principles of

equality, non-discrimination, participation, transparency, and accountability in its development strategies;¹⁵

- e) Establishes priorities that are responsive to the needs of the most vulnerable and marginalized segments of the population, with positive measures to realize their human rights;¹⁶
- f) Recognizes mutual and reciprocal responsibilities among the partners, taking into account their respective capacities and resources and the special vulnerability of Least Developed Countries;¹⁷
- g) Ensures that human rights obligations are respected in all aspects of the relationship between the partners, through harmonization of policies;¹⁸

Process

The extent to which a partnership:

- h) Ensures that adequate information is freely available to enable effective public scrutiny of its policies, working methods and outcomes;¹⁹

10 The revision is in response to the request of the Working Group that the task force review the criteria and enhance their effectiveness as a practical tool for evaluating global partnerships, and that it “progressively develop and further refine the criteria, based on actual practice” (A/HRC/4/47, paras. 51 and 55). This version maintains essentially the same content, while reordering, clarifying and developing some of them slightly based on lessons learned from applying the criteria so far. It represents an intermediary stage for use in phase II of its work (2008) and anticipates a more significant refinement of the criteria to be carried out in phase III (2009).

11 For conceptual clarity, “enabling environment” has been replaced by “institutional framework.”

12 Former criterion (a)

13 Former criterion (b) and see revised criterion (n) for new wording that reflects “and the extent to which partner countries receive support from international donors and other development actors for these efforts.”

14 Former criterion (c).

15 Former criterion (e).

16 Former criterion (n).

17 Former criterion (j).

18 New criterion reflects lesson from partnerships reviewed.

19 Former criterion (f).

- i) Promotes gender equality and the rights of women;²⁰
- j) Provides for the meaningful consultation and participation of all stakeholders, including affected populations and their representatives, as well as relevant civil society groups and experts, in processes of elaborating, implementing and evaluating development policies, programmes and projects;²¹
- k) Respects the right of each State to determine its own development policies in accordance with international law, and the role of national parliaments to review and approve such policies.²²
- l) Includes fair institutionalized mechanisms of mutual accountability and review, through which the fulfilment by all partners of their agreed commitments is monitored and publicly reported, responsibility for action is indicated, and effective remedies are provided;²³
- m) Monitors and evaluates progress in achieving development strategies by carrying out systematic assessments of the human rights impact of its policies and projects based on appropriate indicators and contributes to strengthening the capacity to collect and disseminate timely data, which should be disaggregated sufficiently to monitor the impacts on vulnerable population groups and the poor;²⁴

Outcome

The extent to which a partnership:

- n) Ensures that developing countries, through their own efforts and through international assistance and cooperation, have the human and financial resources to implement successfully development strategies based on these criteria;²⁵
- o) Establishes, as needed, safety nets, to provide for the needs of vulnerable populations in time of natural, financial or other crisis;²⁶
- p) Achieves the constant improvement of the well-being of populations and all individuals, on the basis of their active, free, and meaningful participation in development and in the fair distribution of the benefits, in accordance with article 2, paragraph 3, of the Declaration on the Right to Development;²⁷
- q) Contributes to development that is sustainable and equitable, with a view to ensuring continually increasing opportunities for all and a fair distribution of resources.²⁸

20 Former criterion (d).

21 Former criterion (l).

22 Former criterion (g).

23 Former criterion (k).

24 Former criterion (h) and former criterion (i); with social safety nets appearing in revised criterion (o).

25 Former criterion (b), expanded to reflect lesson from partnerships reviewed.

26 Former criterion (i).

27 Former criterion (m).

28 Former criterion (o).

Chapter 9: Towards the Implementation of the Right to Development Field-testing and Fine-tuning the UN-Criteria on the Right to Development in the Kenyan-German Partnership*

Britt Kalla**

(Summary of an article by Felix Kirchmeier, Monika Lüke, and Britt Kalla)

1. Introduction

Development cooperation has changed and improved during the last decades. Many approaches before had proven unsuccessful, some projects even counterproductive. One major flaw in the overall conception and implementation of development cooperation was the external approach of donors, neglecting the real needs of the population concerned. To counter these problems, policies have been changed many times, yet mostly unilaterally by the donors. Conditionality was obvious in all arrangements, forcing the partner countries to accept and implement policies that were deemed helpful by the donors. As the problems created by this approach became apparent, little by little a shift towards increasing participation of the partner countries took place, allowing them more space for policy formulation.

Recently the donor community has been “rethinking conditionality”¹ in a process of discussion with partner countries and it has adopted cooperation policies, which strongly promote the part-

nership aspect. Since then, concepts like ownership, policy space and sustainability dominate thinking and planning of and within development cooperation. All these aspects are embedded in the overall goal of working towards good governance and democratic structures in partner countries, to be achieved in partnership.

This paper² conceptualizes and applies a new policy approach for development partnerships: the implementation of the Right to Development (RTD). Emerging from the development debate in the 1960s, this human right has become universally accepted in theory, but lacks examples of practical application. In the context of the UN, the work on the RTD is currently mostly advanced through the open-ended intergovernmental Working Group on the Right to Development (WG) and its High-level Task Force on the Right to Development (HLTF). These two bodies were set up in the UN human rights framework to explore further ways to implement the RTD. Only recently, the WG has started to focus on the implementation of the RTD to certain global partnerships³ as a piloting

* The present text is a shortened version of the paper presented at the expert meeting in January 2008. The full text can be accessed at <http://library.fes.de/pdf-files/bueros/genf/05105.pdf>. For the purpose of this publication, Britt Kalla focuses in her text on the structural and methodological part of the original paper, shortening the bilateral example to the necessary minimum.

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1 This approach has been laid out for example in a UK policy paper, prepared by DFID: “Partnerships for poverty reduction: rethinking conditionality,” DFID, March 2005: <http://www.dfid.gov.uk/pubs/files/conditionality.pdf>.

2 Please note that this is only an abstract of the original paper, which was presented at the Expert Meeting on legal perspectives involved in implementing the right to development on January 4-6, 2008 in Geneva, Switzerland. The original paper including the matrix and the complete lists of criteria and indicators can be accessed at: <http://www.fes-globalization.org/geneva/publications.htm>.

3 It has to be kept in mind, of course, that the RTD is applicable to far more than just global development partnerships. It has been repeatedly stressed that the RTD has to be respected not only in partnerships but also as regards the international trade and financial systems and global governance. Due to constraints in resources and time, however, the HLTF considered it necessary to take one step at a time and decided to focus its current work on global partnerships as defined in MDG 8. The HLTF gave priority to the evaluation of multilateral partnerships such as the ECA/OECD-DAC Mutual Review of Development Effectiveness, the African Peer Review Mechanism (APRM) and the monitoring system of the Paris Declaration on Aid Effectiveness. Those partnerships were chosen because their core principles – accountability, transparency and ownership – are also contained in the RTD concept. Moreover, they provide specific characteristics regarding ownership in a South-South cooperation (APRM) and advanced methodologies in the monitoring of international partnership commitments.

exercise to bring the RTD “from conceptual debates and general principles to its operationalization.”⁴ For this purpose, a list of “criteria for periodic evaluation of global development partnerships from a right-to-development perspective” has been developed and amended with a suggested initial “implementation checklist” of indicators.

Bilateral partnerships were discussed by the HLTF and subsequently by the WG but their consideration deferred to a later stage – or to the initiative of civil society organizations (CSOs).⁵ For this reason, following up on a series of workshops and presentations, the Friedrich-Ebert-Stiftung (FES) decided to carry out a study on a bilateral partnership attempting to close this temporary gap in the consideration of partnerships. The intention of this paper, therefore, is to apply the RTD to a concrete project of bilateral development cooperation, using and field-testing the criteria elaborated by the HLTF and subsequently endorsed by the WG for this purpose. This field-testing will also make use of the list of indicators that has been proposed by the HLTF and is currently under revision by the WG.

As a test-case, the chosen pilot project deals with Kenyan-German development cooperation. This partnership has been selected for practical reasons: Kenya has shown commitment to align its development policies to human rights. The Gesellschaft für Technische Zusammenarbeit (GTZ), which leads the cooperation on the German side, has been chosen because it pursues a human rights-based approach in the partnership with Kenya. This means that a general orientation towards human rights is discernible and materials for the evaluation were available. Moreover, the FES in Geneva focuses much of their work on the issue of human rights and the RTD, accompanying the international debate at the Geneva based UN Human Rights Council. In pursuing this project, GTZ and FES picked up on the deferral of the consideration of bilateral development partnerships to the initiative of CSOs.

The paper will evaluate the Kenyan-German development partnership along the criteria established by the HLTF and the WG (see Box 1 below).

Box 1

A/HRC/4/47

CRITERIA FOR PERIODIC EVALUATION OF GLOBAL DEVELOPMENT PARTNERSHIPS FROM A RIGHT-TO-DEVELOPMENT PERSPECTIVE (List as adopted by the Human Rights Council)

Structure/enabling environment

- a) The extent to which a partnership contributes to creating an environment and supports a process in which all human rights are realized;
- b) The extent to which partnerships for development promote the incorporation by all parties concerned of all human rights, and particularly the right to development, into their national and international development strategies, and the extent to which partner countries receive support from international donors and other development actors for these efforts;
- c) The extent to which a partnership values and promotes good governance, democracy and the rule of law at the national and international levels;
- d) The extent to which a partnership values and promotes gender equality and the rights of women;
- e) The extent to which a partnership reflects a rights-based approach to development, and promotes the principles of equality, non-discrimination, participation, transparency and accountability;
- f) The extent to which a partnership ensures that adequate information is available to the general public for the purpose of public scrutiny of its working methods and outcomes;
- g) The extent to which a partnership respects the right of each State to determine its own development policies, in accordance with its international obligations;



⁴ Report of the Working Group on the Right to Development. UN Doc. A/HRC/4/47, para. 47 (2007).

⁵ *Id.*, paras. 19, 35, 36 and 53.

Process

- h) The extent to which, in applying the criteria, statistical and empirically developed data are used, and, in particular, whether the data are disaggregated as appropriate, updated periodically, and presented impartially and in a timely fashion;
- i) The extent to which a partnership applies human rights impact assessments and provides, as needed, for social safety nets;
- j) The extent to which a partnership recognizes mutual and reciprocal responsibilities between the partners, based on an assessment of their respective capacities and limitations;
- k) The extent to which a partnership includes fair institutionalized mechanisms of mutual accountability and review;
- l) The extent to which a partnership provides for the meaningful participation of the concerned populations in processes of elaborating, implementing and evaluating related policies, programmes and projects;

Outcome

- m) The extent to which policies supported by a partnership ensure the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free, and meaningful participation in development and in the fair distribution of the benefits resulting therefrom, as required by article 2, paragraph 3, of the Declaration on the Right to Development;
- n) The extent to which the priorities set by a partnership are sensitive to the concerns and needs of the most vulnerable and marginalized segments of the population, and include positive measures in their favor;
- o) The extent to which a partnership contributes to a development process that is sustainable and equitable, with a view to ensuring continually increasing opportunities for all.

For this purpose, we have developed a matrix to allow the application of the criteria and indicators to a given development partnership in a standardized and easy-to-use manner. Using this bilateral example, the study will elaborate suggestions for the further development of the criteria and the accompanying indicators whose “provisional” nature has been repeatedly stressed by UN bodies and Member States alike.⁶ It makes recommendations to bilateral development partnerships and to the future work of the HLTF and the WG.⁷ Most prominently, it makes suggestions concerning a possible refinement and reframing of the criteria and indicators. Thus, some new criteria and indicators are proposed and difficulties in applying and evaluating others are discussed. In doing so, the study takes into account the developments in the political debate since the adoption of the De-

claration on the Right to Development in 1986. It is hoped that this input will help move the debate further so as to lead to the full implementation of the RTD, making it a reality for all.

2. Theoretical Frame: A Matrix for the Application of the RTD Criteria and Indicators

The evaluation of the implementation of the RTD to the Kenyan-German bilateral development partnership is based on a matrix, which utilizes the criteria and indicators developed by the HLTF. Its aim is to facilitate the evaluation by subdividing it into several independent steps and, in doing so, reducing the complexity of the issue. Indicators, in particular, can be seen “as useful tools in reinforcing accountability, in articulating and advan-

6 Report of the 3rd session of the high-level task force on the implementation of the right to development, UN Doc. A/HRC/4/WG.2/TF/2, para. 72 (2007).

7 Please note that this abstract will concentrate on the recommendations made to the HLTF and the WG. For a complete list of recommendations, please access the original paper at: <http://www.fes-globalization.org/geneva/publications.htm>.

Box 2					
Criteria <i>Structure/ enabling environment</i>	Partnership countries (Kenya and Germany)	Indicators (Implementation Checklist)	Implementation of the RTD to the Bilateral Development Partnership between Kenya and Germany		
			Yes, No, Partly	Comments/ Explanations	Tendency re. Criteria (↑, →, ↓)
(b) The partnership respects the right of each state to determine its own development policies, in accordance with its international obligations. <i>Respect re. the right to determine one's own develop- ment policies</i>	Germany:	7. Do developed countries respect national development strategies and priorities elaborated by developing countries?		<ul style="list-style-type: none"> • KJAS in consultation with the Kenyan government and non-state actors (KJAS, 7); • KJAS supports various strategies and priorities (KJAS, 19ff.); • One of the central principles of German development cooperation is to align itself to partners' priorities, thus following the political commitments of the Paris Declaration on Aid Effectiveness. 	↑

Excerpt from the Matrix for the Application of the RTD Criteria and Indicators to the Kenyan-German Partnership.

cing claims on the duty-bearers and in formulating requisite public policies and programmes for facilitating the realization of human rights.”⁸

The Box 2 is a very short excerpt from the suggested matrix. It is supposed to help the reader fully comprehend the following description of it: The first column of the matrix lists the suggested criteria that evaluate the partnership in question. The third column specifies the indicators that can be applied to each criterion. Because not all of the indicators can be fulfilled by both sides of the partnership, the second column illustrates which country, donor or partner country, has to fulfill

which indicator. The last column is divided into three smaller ones. It is here that the evaluation of the implementation of the RTD to the Kenyan-German bilateral development partnership is carried out. In sub-column one, the indicators, which are formulated as binary questions, are answered. Sub-column two serves as the place where comments and explanations regarding the answers given can be made. Sub-column three, finally, provides the user of the matrix with the possibility to display a tendency regarding the conformity of the evaluated criterion with the RTD. This tendency can be either positive (↑) or negative (↓),

8 Report of the OHCHR on indicators for monitoring compliance with international human rights instruments: HRI/MC/2006/7, para. 3. Undeniably, the employment of criteria and indicators is not the panacea to the difficult task of assessing such an implementation. In fact, their utilization entails a few challenges to be presented later in this part of the study. Nevertheless, the matrix is seen as facilitating and improving the evaluation of the implementation of the RTD to bilateral development partnerships generally, and the Kenyan-German partnership specifically.

meaning that the criterion tends to be fulfilled or tends not to be fulfilled and thus a contribution towards the implementation of the RTD is made or not made. Taken together, the evaluation of the criteria with the help of the matrix presents valuable information with regard to successful or failed steps towards the implementation of the RTD to the Kenyan-German partnership.

3. A Brief Note on the Content of the Kenyan-German Partnership⁹

German development cooperation with Kenya focuses on the priority areas of water (sector reform), private sector development in agriculture and reproductive health. This focus has been a joint decision by the Kenyan and German governments in the process of inter-governmental consultations and negotiations.

As mentioned above, the RTD is an overarching concept, so looking only at certain sectors within a certain project of development cooperation necessarily presents a limited view.¹⁰ But in light of the interconnectedness and indivisibility of human rights, the meaning of those sectors for the promotion of human rights and development becomes obvious: The water sector is intrinsically linked to the right to water and sanitation, as contained in a number of international human rights treaties and declarations.¹¹ The area of agriculture relates to the right to food¹² and also to trade capacity, both of them of relevance in the context of the RTD. Reproductive health, the third priority area, directly relates to the right to the highest attainable standard of health¹³.

At the same time, the promotion of those sectors is directly vital to the implementation of the RTD in the given situation and the given partnership as essential and structural features of development are being addressed. The indicators will be used in the evaluation of the realization of the RTD at three institutional levels: 1) National constitutions and legal systems, 2) Government negotiations and partnership agreements and 3) Programs and projects implemented.

4. Evaluation

Before this section turns to the Kenyan-German partnership, it needs to be emphasized that we do not believe the matrix and, hence, the assessment of the implementation of the RTD to the partnership to be all-inclusive. On the contrary, the pilot implementation is merely supposed to help the potential user become familiarized with the matrix and its application, to discover additional issues of significance and, possibly, to change the matrix accordingly.

Moreover, one needs to be aware that although we have researched each of the criteria and indicators extensively, we do not possess full information on each aspect. Therefore, we were not able to give definite answers to all the indicators. Indicators 1a; 2; 3; 12 and 14, in particular, have been problematic to respond to with the materials available. Consequently, these indicators could only be answered with “partly.” Of course, these responses might differ if, for example, the matrix was filled out by representatives of the governments of Kenya and Germany.

⁹ As the heading indicates, this part is only a short version of the content of the Kenyan-German partnership and its relationship to the RTD. For a complete overview, please access the original paper at: <http://library.fes.de/pdf-files/bueros/genf/05105.pdf>.

¹⁰ At this point we want to reiterate that the RTD criteria will be applied to the partnership only and can therefore not evaluate the state of economical, social and political development of Kenya in general.

¹¹ While not being laid out in any International Covenant, the right to water can be found in the following resolutions and declarations: Mar del Plata Declaration, United Nations Water Conference 1977, preamble; Commission on Human Rights Resolution, UN Doc CN.4/RES/2004/17; Commission on Human Rights Resolution 2005/15, E/CN.4/RES/2005/15; Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment: Development Issues for the 21st Century, UN Doc. A/CONF.151/PC/112 (1992); Agenda 21, Report of the United Nations Conference on Environment and Development 1992; Principle No. 2, Programme of Action of The United Nations International Conference on Population & Development; European Parliament, Resolution on water management in developing countries and priorities for EU development cooperation, September 4, 2003.

¹² As guaranteed in Art. 11 of the International Covenant on Economic, Social and Cultural Rights to which both, Kenya as well as Germany, are parties. United Nations human rights treaties are accessible at www.ohchr.org/english/law/index.htm.

¹³ As guaranteed in Art. 12 of the International Covenant on Economic, Social and Political Rights and also in Art. 16 of the African Charter for Human and Peoples' Rights.

Our utilization of the matrix shows that the majority of the RTD criteria and indicators can be applied to the Kenyan-German development partnership and, as can be gathered from the matrix and the illustrations above, the political strategies as well as the objectives of German Development Cooperation (GDC) provide a good basis for it. Moreover, and central to the evaluation, the Kenyan-German bilateral development partnership is fulfilling many aspects required by the RTD. Of the 13 criteria evaluated, three have been marked with an “up-arrow” (↑); these are criteria (a); (b) and (h). The remaining ten criteria have been marked with a “side-arrow” (↓), none with a “down-arrow” (→). This means that overall, successful steps have been taken towards the implementation of the RTD to the Kenyan-German partnership. Nevertheless, other aspects are being neglected such as, most strikingly, the issue of non-discrimination. Further important aspects like remedies for human rights claims and the use of standardized outcome indicators – covered in the indicators (new) 15, 11, 16¹⁴ – are also not yet fully addressed. This could be changed if the partnership took the “criteria” into account and made fulfilling them a policy aim. The following paragraphs will elaborate on the background and meaning of those weaknesses. While we are concentrating here on the three issues mentioned above, we are acknowledging that aspects of tied vs. untied aid (as covered by indicators 9 and 10) and participation and ownership of the national development priorities (indicator 1b) are important fields as well. It is due to the available background information that we are restricting our comments to the following points.

Discrimination

According to the central data examined for this evaluation, there does not seem to be any discrimination on the given grounds within the scope of this partnership. However, further background

information reveals that there are some critical questions, which lead to the conclusion that discrimination still remains a fundamental problem in Kenya and, therefore, within the bilateral partnership. Three examples illustrate this point:

In agriculture, for a considerable time subsistence farmers and those without land had been outside the foci of Kenyan-German development cooperation – the primary focus was on the economic development of smallholders. This has changed. Due to the sensitization on human rights issues, the revised program now considers its impact upon subsistence farmers and upon those without land and it explicitly intends to improve their situation. The same holds true for young and female farmers. There is one issue, however, which has not been tackled yet: discrimination as regards access to land; here, Article 82 of the Kenyan Constitution allows for exceptions.¹⁵ In some communities, women still cannot become the formal owner of land. Consequently, they cannot inherit their husband’s plots – a circumstance that gives space for discrimination through traditional rules.

In water, GDC’s contribution to sector reform through political advice and capacity development at the national level provides strong support for the realization of the right to water and has a stringent poverty focus, e.g. through the extension of networks to the poor, including low-cost solutions. At the meso- and micro-level, German support focuses geographically on Nyeri in Central Province and middle-sized towns in Lake Victoria North in Western Province. It is arguable that Kenyan-German cooperation does not fully address the most striking inequalities. For example, 44.6 per cent of residents in Western Province have a water source less than 15 minutes distance from their home while this figure drops to 22.1, 31.6 and 38.7 respectively for North Eastern, Nyanza and Eastern Provinces. The Matrix of Donor Activities in the Water and Sanitation Sector does not reveal any focused support for the Northern WSB Region. With the exception of Busia, it is doubtful

¹⁴ See Annex II.

¹⁵ See Article 82 of the Kenyan Constitution.

whether the other cluster towns where German investment takes place are among the poorest and most disadvantaged locations in Kenya as far as access to water and basic sanitation is concerned. Therefore, it would be useful for Kenyan-German cooperation to consider increased cooperation in areas not addressed by other donors, including the Northern Region and districts of other Regions with low levels of access.

Finally, as stated above, the viewed documents show no discrimination within the frame of the partnership (or if, then only in favor of the ones most marginalized). Nevertheless, there are no guarantees against discrimination mentioned either. Further, a positive evaluation of this criterion does not imply any judgment of the situation in Kenya in general, where a worrying degree of discrimination can still be observed. This problem is also reflected in the matrix annexed to the original paper.

Standardized Outcome Indicators

As can be gathered from the above, with the issues of water and health, which are addressed by the partnership, outcome is measured by the authorities – though not by using standardized indicators. International comparison and the objective measurement of progress would profit from the use of such indicators.

Human Rights Mechanisms

A somewhat delicate topic is the reference to human rights mechanisms. While asking for a mechanism for human rights claims and remedies within the partnership might overstretch the reach of the partnership, what is needed is a linkage to existing human rights mechanisms (e.g. National Human Rights Institution, National Human Rights Commission/Council) empowering the partners to deal with accusations of violations within or resulting from the partnership. Within this frame, the issue of claims and remedies should be addressed. It cannot be expected that each development partnership creates a new mechanism, but accep-

tance of legal authority of existing mechanisms should be expressly acknowledged.

5. Conclusions and Recommendations

Related to the evaluation above, a number of recommendations can be made to the different actors involved in the process. These are bilateral development partnerships that plan to undertake such an evaluation as well as the HLTF and the WG on the RTD. The following paragraphs focus on five main recommendations to the HLTF and the WG.¹⁶ It is hoped that these recommendations, despite being developed out of the evaluation of a particular bilateral development partnership, are also useful for the HLTF's and the WG's evaluation of multilateral development partnerships as well as for the evaluation of other bilateral development partnerships.

Exclude Broad Criteria

As stated, the HLTF originally created 15 criteria (see Box 2 above) and 17 indicators for the evaluation of global development partnerships from an RTD perspective. During the development of the matrix, it was decided to leave out four of the 15 criteria but to apply all of the indicators. The criteria excluded from the matrix are a, e, j and o. These four criteria take up central features and general goals of good development cooperation as well as of the human rights-based approach and are therefore important for the overall evaluation of a partnership. However, they do not relate to specific questions and thus do not fit into the context of the other criteria. Instead, they could rather be considered as main headings. We believe that an effective evaluation of them is difficult to achieve, as can be seen from the example of Kenyan-German development cooperation.

Develop New Criteria

The aim of the criteria and indicators is to evaluate development partnerships from a "right-to-devel-

¹⁶ The remaining recommendations to bilateral development partnerships can be found in the original paper, accessible at <http://library.fes.de/pdf-files/bueros/genf/05105.pdf>.

opment perspective.” However, a closer examination of the 1986 Declaration on the RTD reveals that while many Articles have been addressed through the criteria established, a few have been left out. The *raison d’être* lies in the politically careful creation of the criteria. Although this circumstance is acknowledged, it is deemed important that at least one of the Articles, namely Article 8.1, is being introduced to the revised list of criteria.¹⁷ Article 8 of the Declaration reads as follows:

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

This Article in mind, the following two criteria are proposed:

Process

- h) The partnership supports necessary economic and social reforms with a view to eradicating all social injustices.

Outcome

- m) The partnership ensures equality of opportunity for all in their access to basic resources, education, health services, food, water and sanitation services,¹⁸ housing, employment and the fair distribution of income.

Both criteria would serve as a means to cover these important aspects of the Declaration, which currently have not been explicitly addressed. To incorporate them is of major significance since the access to these basic resources constitutes a fundamental human right.

Reformulate Existing Criteria

Criterion (i) The partnership applies human rights impact assessments and provides, as needed, for social safety nets.¹⁹

In our view, it cannot be the task of a bilateral partnership to provide for social safety nets. Every country has a primary responsibility to establish those national social safety nets that are needed. Development partners can only support these processes. This should be a coordinated effort of all partners. A provision of social safety nets through external actors could lead to a fragmentation of the system and prove unsustainable in the long run. A reformulation of this criterion is necessary if the above train of thought is to be included. The following reframing is proposed:

- i) The partnership applies human rights impact assessments and supports, as needed, the establishment of social safety nets.²⁰

Develop New Indicators

Recommending new criteria entails proposing new indicators. The following indicators are suggested for none of the existing ones can be applied to the new criteria:

5. Do a government’s national development strategies and priorities include economic and social reforms, such as education, health or water sector reforms?
6. Does the government provide public access to basic resources or, if they are provided through private operators, does the government ensure that access is not denied?

18 Please note that Article 8.1 of the 1986 Declaration on the Right to Development does not mention “water and sanitation services.” This is probably due to the fact that the right to water was not a prominent issue at the time. Over the past 20 years, however, discussions on a right to water have proliferated and so it must not be excluded in a criterion, which covers the issue of basic resources.

19 See Annex I.

20 See Annex II.

Whereas the first indicator should support creating a realistic tendency for criterion (h),²¹ the second one should help to formulate a realistic tendency for criterion (m).²² These additional indicators have been established because it was felt that the other indicators by themselves do not entirely capture these two criteria.

Moreover, it is recommended that at least two additional indicators be developed:

- 1a. Are the national development strategies and priorities pro-poor, i.e. are they considerate of marginalized and vulnerable groups?
4. Does the government make use of anti-corruption measures?

Reformulate Existing Indicators

Indicator 10²³ [formerly 4] was deemed problematic because of the way it was formulated. Originally, it read as follows:

4. Is there an increasing or decreasing trend in terms of the percentage of untied aid?²⁴

For the sake of unification, this indicator has now been reformulated for the use in this paper. It has become a binary question:

10. Is there an increasing trend in terms of the percentage of untied aid?²⁵

As such, all the indicators are now of the same style, thereby facilitating the utilization of the matrix.

One of the indicators which needs clarification is indicator 11 [formerly 6]:

6. Do accountability mechanisms provide remedies for human rights claims relevant to the right to development, and complaint and oversight mechanisms?²⁶

When answering this question, it was not entirely clear what the term “accountability mechanisms” refers to. Does it refer to the bilateral development

partnership in particular or the partnership countries in general? We have decided that it can only refer to the latter for any other use of the term would make the question unanswerable.

Nevertheless, to avoid such confusion in the future, it is suggested to reformulate indicator 11 as follows:

11. Do partnership countries’ accountability mechanisms provide remedies for human rights claims relevant to the right to development, and complaint and oversight mechanisms?²⁷

Finally, there is indicator 15 [formerly 11], which also needs clarification. This indicator asks whether non-discrimination is guaranteed to all persons and whether there is “equal and effective protection against discrimination on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, income, birth, disability and health status, or a combination of these grounds?”²⁸

In the context of this paper, the indicator is to be understood very narrowly, i.e. it only asks for non-discrimination within the actions and projects of the partnership. If it was considering the issue of non-discrimination in the broader national context, the answers given in the matrix would differ substantially. Clarification in the indicator’s formulation might therefore be necessary for any future application.

Restructure the List of Suggested Indicators

The Suggested Initial Implementation Checklist for the Criteria complementing the list of criteria created by the HLTF and approved by the WG is, by itself, a great achievement. The checklist covers many aspects of the criteria. However, when used together with the list of criteria, its organization appears disordered.

21 Criterion (a) [formerly b] reads as follows: The partnership for development promotes the incorporation by all parties concerned of all human rights, and particularly the right to development, into its national and international development strategies and partner countries receive support from international donors and other development actors for these efforts.

22 Criterion (c) reads as follows: The partnership values and promotes good governance, democracy and the rule of law at the national and international levels.

23 The numbers of the indicators refer to their order in the list annexed to this paper. This list is a restructured and amended version of the original list by the HLTF, as suggested by the authors.

24 See Annex II.

25 See Annex II.

26 See Annex II.

27 See Annex II.

28 See Annex II.

This is due to the fact that the indicators are structured like the criteria along the categories of “structure, process and outcome,” equivalent to the method used by OHCHR and others in the development of other human rights indicators. Yet, this composition of indicators proves ineffective for the three categories of indicators do not apply to the corresponding categories of criteria.

It is therefore proposed to restructure the list of suggested indicators along the categories “indicators for the developing countries, for the donor countries and for both.”²⁹ It seems that such a composition much better supports the specific evaluation of bilateral as well as multilateral development partnerships.³⁰

Develop Effective Measurement Mechanisms

The last two recommendations hint at the difficulties of assessing the efforts of operationalizing the RTD as “success” or as “failure.” In short, how many indicators per criterion have to be fulfilled to consider a certain criterion to be accomplished? How many criteria have to be realized for a development partnership to be successful from the perspective of the RTD? As long as the criteria and indicators do not provide any guidance on this, it will be difficult to use them as guidelines for measuring progress on the RTD.

As regards the first query, it cannot be expected that all of the indicators for evaluating a partnership within a given matrix will be answered in the affirmative. If this were so, the RTD would be fully implemented and so there would be neither the need for evaluations nor for improvements.

Consequently, it is anticipated that some of the indicators might be answered in the neutral or in the negative. But how many “partly” or “no” are acceptable? What would be a reasonable guideline? The answer to this can not be given by this study but will need to be addressed by the HLTF in the future.

In regard to the second query, the recommendation is more straightforward. It is understood that if one of the criteria is marked with a “down-arrow” (↓) one cannot speak of successful steps towards the implementation of the RTD to the Kenyan-German bilateral development partnership. To do so would contradict the overall purpose of moving towards such implementation. Therefore, while there is some leeway concerning the first question, the second one does not allow any flexibility. As a result, the partnership in question would need to be revised in the points concerned and the developments would need to be monitored regularly.

It is hoped that the elaboration above provides the reader with an idea of how a utilization of the matrix may look in practice. Having employed the matrix ourselves, we have learned that it did facilitate the application of the RTD criteria and indicators to the Kenyan-German partnership. Yet, every new invention brings with it new challenges. To successfully address these and, in doing so, to improve the evaluation of the implementation of the RTD to global partnerships, should be our common concern to get closer to the goal of making the Right to Development a reality for all.

²⁸ See Annex II.

²⁹ It is certainly recognized that the current structure of indicators as suggested by the HLTF and endorsed by the WG reflects the current methods used by OHCHR and others in the development of other human rights indicators. This method of clustering indicators is used e.g. by Eibe Riedel et al. in their “IBSA” project and by Fasel/Malhorta at OHCHR, UN Doc. HRI/MC/2006/7.

Annex I

Suggested List of Criteria for the Periodic Evaluation of Global Development Partnerships from a Right-to-Development Perspective

Restructured and Amended List as Suggested by the Authors

Structure/enabling environment

- (a) [formerly b] The partnership for development promotes the incorporation by all parties concerned of all human rights, and particularly the right to development, into its national and international development strategies, and partner countries receive support from international donors and other development actors for these efforts.
- (b) [formerly g] The partnership respects the right of each state to determine its own development policies, in accordance with its international obligations.
- (c) The partnership values and promotes good governance, democracy and the rule of law at the national and international levels.
- (d) The partnership values and promotes gender equality and the rights of women.
- (e) [formerly f] The partnership ensures that adequate information is available to the general public for the purpose of public scrutiny of its working methods and outcomes.

Process

- (f) [formerly l] The partnership provides for the meaningful participation of the concerned populations in processes of elaborating, implementing and evaluating related policies, programmes and projects.
- (g) [formerly k] The partnership includes fair institutionalised mechanisms of mutual accountability and review.
- (h) The partnership supports necessary economic and social reforms with a view to eradicating all social injustices.

(i) The partnership applies human rights impact assessments and supports, as needed, the establishment of social safety nets.

(j) [formerly h] In applying the criteria, statistical and empirically developed data are used, and, in particular, the data are disaggregated as appropriate, updated periodically, and presented impartially and in a timely fashion.

Outcome

(k) [formerly m] The policies supported by a partnership ensure the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free, and meaningful participation in development and in the fair distribution of the benefits resulting there from, as required by article 2, paragraph 3, of the Declaration on the Right to Development.

(l) [formerly n] The priorities set by a partnership are sensitive to the concerns and needs of the most vulnerable and marginalized segments of the population, and include positive measures in their favor.

(m) The partnership ensures equality of opportunity for all in their access to basic resources, education, health services, food, water and sanitation services, housing, employment and the fair distribution of income.

Please note: newly established and reformulated criteria are highlighted.

Annex II

List of Suggested Indicators to be Applied to the Criteria

Restructured and Amended List as Suggested by the Authors

Indicators for the developing countries

1. Do the developing country partners have their own national development strategies and priorities?
 - 1a. Are the national development strategies and priorities pro-poor, i.e. are they considerate of marginalized and vulnerable groups?
 - 1b. [formerly 9] Are the national development strategies and priorities owned by all stakeholders within the country, including women, indigenous people, minorities, the poor and other vulnerable sectors of society?
 - 1c. [formerly 12] Are the national development strategies and priorities discussed and approved in institutionalized mechanisms of political representative participation, such as parliament?
 - 1d. [formerly 5] Do the national development plans have measurable, time-bound targets, particularly in regard to indicators on advancement of human rights, well-being and equality?
2. [formerly 13] Are the country's national development strategies and priorities reflected in the Government's budget in its actual allocations and expenditures and in their impact at the community level?
3. [formerly 17] Is the government's budget transparent and easily known and monitored by the citizens?
4. Does the government make use of anti-corruption measures?
5. Do a government's national development strategies and priorities include economic and social reforms, such as education, health or water sector reforms?
6. Does the government provide public access to basic resources or, if they are provided through private operators, does the government ensure that access is not denied?

Indicators for the developed / donor countries

7. [formerly 2] Do developed countries respect national development strategies and priorities elaborated by developing countries?
8. [formerly 3] Are the development partners using and fostering national mechanisms in the developing countries to channel aid and other support?
9. [formerly 14] Are the development partners providing sufficient and appropriate assistance in support of the country's national development strategy (e.g. is all aid untied)?
10. [formerly 4] Is there an increasing trend in terms of the percentage of untied aid?

Indicators for both partners

11. [formerly 6] Do partnership countries' accountability mechanisms provide remedies for human rights claims relevant to the right to development, and complaint and oversight mechanisms?
12. [formerly 16] Are mutual accountability, review and monitoring processes transparent? Is the public adequately informed?
13. [formerly 10] Does participation cover preference revelation, policy choice, implementation and monitoring, assessment and accountability?
14. [formerly 11] Are there specific mechanisms and institutional arrangements – both at the partnership level as at the country level – in place, through which the marginalised and disadvantaged sectors, particularly women, effectively participate at different stages of decision-making, including review and monitoring?
15. [formerly 8] Is non-discrimination guaranteed to all persons and is there equal and effective protection against discrimination on the grounds of race, colour, sex, language, religion,

political or other opinion, national or social origin, property, income, birth, disability and health status, or a combination of these grounds?

16. [formerly 7] Do the partners in a partnership use outcome indicators (such as the Human Development Index, the Gender Development Index, the Gini Coefficient, the Children's Human Rights Index and the Trade and Development Index), in order to measure progress and ensure accountability?

17. [formerly 15] Are sufficient funds made available for the collection of timely and appropriate data, properly disaggregated, that will assist in the review and monitoring of the performance of the partners and other stakeholders?

Please note: newly established and reformulated indicators are highlighted.

Chapter 10: Towards A Multi-Stakeholder Agreement on the Right to Development*

Koen De Feyter**

This chapter contains a proposal for a Multi-Stakeholder Agreement on the Right to Development. The purpose of the proposed Agreement is to bring together a coalition of public and private actors who are willing to commit to the right to development (RTD) by establishing best practices that demonstrate that it can be implemented in a meaningful way.

On 30 March 2007, the United Nations Human Rights Council enabled the Working Group on the Right to Development to gradually move towards the consideration of “an international legal standard of a binding nature”¹ on that right. This note discusses the potential added value of such a binding agreement and its possible contents.

The added value of a binding agreement on the right to development

The non-binding UN Declaration on the Right to Development² perceives of the RTD as a human right of every human person and all peoples to economic, social, cultural and political development. It has both an internal and an external dimension. The internal dimension consists of the duty of the domestic State to formulate national

development policies that aim at the realization of all human rights. The external dimension includes duties of all States to co-operate with a view to achieving the RTD.

A new instrument on the RTD – whether binding or not – could be used to update the Declaration’s approach to the concept of development. While the Declaration already perceives of development as a multi-dimensional concept,³ subsequent developments⁴ particularly in the field of international environmental law on the need to ensure that development is sustainable, and on democracy as a component of development, could be taken into account. It may also be useful to reaffirm that progress made in one dimension should not be at the expense of another dimension. These are clarifications rather than departures from the Declaration’s text, and they should not prove to be very controversial.

The internal aspect of the RTD concerns the domestic State’s obligation to respect, protect and promote human rights in the context of national development policies. The main aim of the rule was to make clear that State obligations under existing human rights treaty law apply to domestic development policies. Lack of economic development could not ever be used as a pretext for human

* This note is based on a presentation at the Expert meeting on Legal perspectives involved in implementing the right to development (Geneva, January 4–6, 2008) organised by the Program on Human Rights in Development of the Harvard School of Public Health and the Friedrich Ebert Stiftung. I am grateful to the participants in that meeting for their input. The Note is part of a work in progress; comments are most welcome at koen.defeyter@ua.ac.be. This version of the text is dated March 1, 2008.

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1 UN Human Rights Council Resolution 4/4 (March 20, 2007), par.a 2, d. The resolution was adopted without a vote.

2 UN General Assembly Resolution 39/11 (November 12, 1986), adopted by a 146-1-8 vote.

3 The second preambular paragraph of the Declaration describes development as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.”

4 The 1994 UN Secretary-General’s *Agenda for development* spells out five dimensions of development: peace, economic growth, the environment, social justice and democracy. See UN doc. A/48/935 (May 6, 1994).

rights violations, and, in addition, states were required to ensure that human rights are fully integrated into domestic poverty reduction strategies.⁵

In a recent analysis, Martin Scheinin convincingly argues that it may well be a viable option “to strive for the realization of the RTD also under existing human rights treaties and through their monitoring mechanisms, provided that an interdependence-based and development-informed reading can be given to the treaties in question.”⁶ Arguably, an interdependence-based and development-informed reading of human rights treaties does not depend on the further codification of the RTD. The Vienna Convention on the Law of Treaties already requires that treaties are interpreted in the light of their context and their object and purpose,⁷ and this should in principle suffice to ensure that human rights, when they are applied to an aspect of development policy, are interpreted in a development informed way and with full acknowledgment of the interdependence of human rights. A strengthening of the legal status of the RTD may reinforce this type of interpretation, but is perhaps not essential.

From a normative point of view, the internal dimension of the RTD is already part of existing international human rights law (with the exception of the peoples’ right aspect). There is no pressing need for a new instrument of a binding nature if it is limited to the internal, individual dimension of the right only. No new norms are needed to establish that a state should abide by its human rights obligations in the context of the domestic development process.

But if a binding instrument on the right to developed were to be drafted for other reasons (as discussed below), it would be essential to include the internal dimension as well – as it is legally and politically not feasible to codify external obligations, without reaffirming a parallel obligation of the domestic State to commit available resources to the realization of human rights.⁸

In addition, in a context of economic globalization, it is increasingly difficult in any case to separate the internal and external dimensions of the RTD. For example, when human rights problems arise in the context of the provision of a human rights sensitive service to a foreign company, it makes eminent sense to discuss both the responsibility of the domestic state and of the external actors involved.

With regard to the external dimension of the RTD existing human rights treaty regimes and monitoring mechanisms leave a substantial gap. Human rights treaty law links obligations to State jurisdiction. Except in special circumstances, jurisdiction coincides with domestic territory. Most often therefore human rights treaties identify the territorially responsible domestic State as the sole duty holder. Although some of the treaty bodies, and in particular the UN Committee on Economic, Social and Cultural Rights have invested in elaborating extraterritorial obligations of international assistance and cooperation,⁹ such obligations are not yet fully established, and hardly enforced. International human rights obligations of intergovernmental organizations and of private actors, that have an important impact on development, are equally contested.¹⁰

5 Note that there is also a debate on the degree to which international development strategies integrate human rights, e.g. see Paul J. Nelson, “Human rights, the Millennium Development Goals, and the Future of Development Cooperation,” *World Development*, vol. 35/12 (2007), pp. 2041–55.

6 M. Scheinin, “Advocating the right to development through complaint procedures under human rights treaties” in B.A. Andreassen, S. Marks (eds.), *Development as a Human Right* (Cambridge: Harvard University Press, 2006) p. 274.

7 Vienna Convention on the Law of Treaties (May 23, 1969), Article 31, para. 1

8 In the context of his proposal on the establishment of a development compact, the UN individual expert on the right to development, Arjun Sengupta, proposed that developing countries should assess the cost of programs needed to realise basic human rights, and the extent to which the State itself could mobilise resources. On that basis, the requirements of international cooperation could be worked out. The process would result in the developing country, the OECD donor countries and the financial institutions accepting mutual obligations to implement the agreement reached at the domestic level. See UN doc. E.CN.4/1999/WG.18/2 (July 27, 1999), para. 73–74.

9 Compare Magdalena Sepulveda, “Obligations of ‘international assistance and cooperation’ in an optional protocol to the International Covenant on Economic, Social and Cultural Rights,” *Netherlands Quarterly of Human Rights*, vol. 24 (2006), pp. 271–303.

10 See Koen De Feyter, *Human Rights. Social Justice in the Age of the Market* (London: Zed Publications, 2005), 238 p.

The normative potential of a binding instrument on the RTD therefore relates primarily to the external dimension of the right, or, in Karel Vasak's words,¹¹ to the solidarity aspects of it. The added value of a binding instrument on the RTD lies in the establishment of a common responsibility¹² for the realization of the right among a multiplicity of duty holders including non-State actors, and in the further elaboration of the collective aspects of the right. Shared responsibilities would by necessity have to be based on a multi-stakeholder agreement, to which States, intergovernmental organizations and private actors alike could become parties, since it is difficult to perceive how direct international obligations could be imposed on any of the actors without their consent. In order to have a significant added value, a future binding agreement on the RTD would therefore have to differ substantially from traditional inter-State treaties, as well as from the core human rights treaties that currently exist.

Existing Multi Stakeholder Agreements

Multi Stakeholder agreements are no longer unusual in international relations. They are increasingly prevalent in the field of development, since States do not monopolize international development cooperation. A variety of public and private actors engage in development and all produce specific policies and competencies. The number and variety of initiatives has led to calls for harmonization and increased cooperation. Collaboration between the various actors and mutual accountability – which is deemed to improve effectiveness – often takes the form of legal agreements. Such agreements constitute a useful source of in-

spiration for a tentative multi stakeholder agreement on the RTD. A full analysis or assessment of these initiatives is not attempted here; features are selected on the basis of their relevant usefulness to a future instrument on the RTD.

The OECD Paris Declaration on Aid Effectiveness (2 March 2005) is the main current instrument for the harmonization of development policies. The document was adhered to not only by Ministers of developed and developing states, but also by heads of multilateral and bilateral development institutions, who all resolve to take far-reaching and traceable actions to reform aid delivery and management. The document contains 56 commitments by participants; these include “partner countries” and “donors.” The “development institutions” in the Paris Declaration are inter-governmental organizations identified in Appendix B to the document. This Appendix also contains a list of civil society organizations who were present at the High Level Forum adopting the text, but who are not considered participants. The OECD Paris Declaration is a non-binding instrument, but its impact on donor policy is considerable. The Declaration is complemented by a Joint Venture on Monitoring that surveys country results to achieve the agreed country commitments. Human rights are not explicitly addressed in the text.

The Voluntary Principles on Security and Human Rights are a multi-stakeholder initiative established in 2000 that introduced a set of principles to guide extractive companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms. The participants to the Voluntary Principles include four governments¹³ and a number of multinational corporations and international human rights NGOs.¹⁴ Under the

11 Together with Keba M'Baye, Karel Vasak launched the idea of a right to development. See “Le droit international des droits de l'homme,” *Revue des Droits de l'Homme*, vol. 51 (1972), pp. 43–51.

12 The UN Millennium Declaration includes a largely rhetorical commitment by all governments recognising that “in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs.” See UN General Assembly resolution 55/2 (September 8, 2000), adopted without a vote, at para. 2.

13 The Netherlands, Norway, United States of America, United Kingdom.

14 The International Committee of the Red Cross, the International Council on Mining & Metals and the International Petroleum Industry Environmental Conservation Association act as observers.

scheme¹⁵ all participants agree to meet a set of criteria, and are permitted to raise concerns about another participant's lack of effort to implement the Principles. If concerns persist, participants agree to engage in consultations facilitated by the organs established in the Voluntary Principles: the Steering Committee and the Plenary. The expulsion of a participant requires a unanimous decision of the Plenary, but recommendations can be adopted by a special majority consisting of 66% of the government vote, 51% of the NGO participants vote, and 51% of company participants. The Voluntary Principles do not create legally binding standards, and participants explicitly agree that alleged failures to abide by the Voluntary Principles shall not be used in legal or administrative proceedings. This does not mean, however, that the Voluntary Principles do not have any external impact. In the context of the review of its social and environmental performance standards,¹⁶ the International Finance Corporation built on the Voluntary Principles. As a result, any extractive industry project wishing to secure MIGA¹⁷/IFC support must now implement not only the IFC's own standards, but also operate consistently with the Voluntary Principles. The voluntary character of the Principles has thus hardened into a MIGA/IFC conditionality.

The *Partnerships for Sustainable Development* are voluntary, multi-stakeholder initiatives aimed at implementing sustainable development. They were established as a side-product of the World Summit on Sustainable Development (in Johannesburg, 2002). The UN Commission on Sustain-

able Development acts as the focal point for discussion on these partnerships. Here, partnerships are defined as voluntary initiatives undertaken by governments and relevant stakeholders, e.g. major groups¹⁸ and institutional stakeholders,¹⁹ which contribute to the implementation of Agenda 21. As of June 2006, a total of 321 partnerships had been registered with the Secretariat of the Commission.²⁰

Intergovernmental and non-governmental organizations cooperate closely in the delivery of humanitarian aid. Both the World Food Programme²¹ and UNHCR²² regularly conclude *Memoranda of Understanding* (MOU) with non-governmental partners. Such MOUs are used both to establish a framework for institutional cooperation, as well as for more contract-like agreements with locally active NGOs for specific operations. According to Anna-Karin Lindblom, the legal character of the Memoranda demonstrates a scale where some are clearly intended to be binding; some are not, and others are difficult to characterise.²³ There is little doubt, however, that agreements on specific operations in particular are intended to be binding, as they spell out rights and duties of the parties (including financial obligations). Interestingly, these agreements also contain dispute settlement provisions, with disputes to be decided under UNCITRAL arbitration rules by an international arbiter, or by the International Chamber of Commerce. Choice of law clauses are not common in the MOUs, but arbitral practice suggests that, given the nature of the parties and of the agreements, the most obvious solution is to apply general prin-

15 New participation criteria and mechanisms were adopted at a Plenary Meeting on 7–8 May 2007. See www.voluntaryprinciples.org. The original requirement that companies and non-governmental organizations could participate in the Plenary only if their home government was also a participant, was also dropped.

16 The review was concluded in 2006, and led to the adoption of the IFC Performance Standards on Social & Environmental Sustainability, that entered into force on April 30, 2006. The standards are available from the IFC website.

17 Multilateral Investment Guarantee Agency.

18 Agenda 21 recognises nine 'major groups': Women, Children and Youth, Indigenous People, NGOs, Local Authorities, Workers and Trade Unions, Business and Industry, Scientific and Technological Communities, Farmers. In practice, NGOs, business and industry, scientific and technological communities and local authorities are best represented in the partnerships.

19 In practice, mostly UN system and other intergovernmental organisations.

20 For a critical review, see Jens Martens, *Multi Stakeholder Partnerships – Future Models of Multilateralism?* (Occasional Paper Friedrich-Ebert-Stiftung, January 2007).

21 A recent example of a WFP/NGO cooperation agreement is the December 2006 Memorandum of Understanding between WFP and Islamic Relief.

22 United Nations High Commissioner for Refugees. Recent examples of a UNHCR/NGO cooperation agreement are the 2007 Memoranda of Understanding signed with two US-based NGOs, the International Rescue Committee and the International Medical Corps.

23 Anna-Karin Lindblom, *Non-governmental Organisations in International Law* (Cambridge: Cambridge University Press, 2005) p. 507.

ciples of international law²⁴ to such disputes as may arise. As Lindblom argues, increasing responsibilities for NGOs in field operations may create a need for explicit provisions in the agreements requiring compliance with international humanitarian law and human rights.²⁵

The purpose of the *Global Aids Fund* is to gather resources through a public-private partnership that will make a significant contribution to the reduction of the effects of HIV/AIDS, tuberculosis and malaria in countries in need, as part of a strategy aiming at the realization of the Millennium Development Goals. The Fund is a financial instrument, not an implementing agency. The focus is on funding best practices that can be scaled up, and on strengthening high-level commitment to allocate resources. Participation of communities affected by the three diseases in the development of proposals to the Fund is particularly encouraged. Its By-laws²⁶ establish the Fund as a non-profit Foundation under Swiss Law. The organs of the Fund include a Partnership Forum and a Foundation Board. The Partnership Forum meets biennially to express views on the Foundation's policies and strategies; it is open to a wide range of stakeholders that support the Foundation's objectives. The Foundation Board sets policies and makes funding decisions, on the recommendation of a Technical Review Panel consisting of independent experts that review applications. The Board consists of twenty voting members and four non-voting members.²⁷ Each voting member has one vote. The twenty voting members are:

- Seven representatives from developing countries, one representative based on each of the

- six World Health Organization ("WHO") regions and one additional representative from Africa;
- eight representatives from donors²⁸ and
- five representatives from civil society and the private sector (one representative of a non-governmental organization ("NGO") from a developing country, one representative of an NGO from a developed country, one representative of the private sector,²⁹ one representative of a private foundation,³⁰ and one representative of an NGO who is a person living with HIV/AIDS or from a community living with tuberculosis or malaria).

The Board decides by consensus if possible, or by voting (motions require a 2/3 majority of those present of both the group encompassing the eight donor seats and the two private sector seats and of the group encompassing the seven developing country seats and the three NGO representatives). Decisions can also be taken on a no-objection basis³¹.

Finally, the UN Convention on the Rights of Persons with Disabilities (13 December 2006) is the first core human rights treaty that enables intergovernmental organizations (IGOs) to become parties to the treaty. Article 43 provides that the Convention is open to formal confirmation by signatory regional integration organizations.³² The purpose of the provision was to allow the European Community to adhere to the Disability Convention, in deference to the internal division of competencies between the regional organization and its member States.³³ Complementary of competencies also exists with regard to European development policy, so a similar clause in a future RTD agreement would make eminent sense. In

24 Or the domestic legislation applicable to the operation, to the extent that such legislation is in conformity with such rules of international law as may be applicable.

25 See *supra*, note 20., p.509.

26 By-Laws of the Global Aids Fund (as amended on November 12, 2007) – available from the Fund's website at www.theglobalfund.org. The Fund secretariat is in Geneva.

27 Including one representative from the World Health Organization, and one from UNAids.

28 Representatives from six developed states, but also the European Community and the World Bank.

29 Currently, a Senior Partner in the consulting firm McKinsey @ Company.

30 Currently, the Bill and Melinda Gates Foundation.

31 On such basis, a motion is approved unless four Board members of one of the voting groups objects to the motion, except that a motion not to take a funding commitment can be approved unless four Board members of each of the voting groups object to the motion.

32 Defined in Art.44 as organizations "constituted by sovereign states of a given region, to which its Member States have transferred competence in respect of matters governed by the present Convention."

33 The European Community signed the Convention on March 30, 2007.

addition, Article 43 can be used as establishing a more general precedent for the participation by IGOs in human rights treaties. Given the amount of assistance states channel through multilateral organizations in the field of development, opening up a future RTD agreement to IGOs would be of considerable importance. The capacity of these organizations under international law to enter into international agreements is not in doubt.³⁴

A Multi-Stakeholder Agreement on the Right to Development

The Vienna Convention on the Law of Treaties applies to agreements between States, but explicitly provides that agreements concluded by non-State actors can also be binding under international law. Article 3 (a) of the Vienna Convention on the Law of Treaties reads:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements (...)³⁵

Article 3, (a) of the Vienna Convention could therefore constitute the legal basis of a binding Multi-Stakeholder Agreement on the RTD. The Vienna Convention itself would not formally apply to the Agreement, but if one so wished, the Agreement could make the Vienna Convention applicable (by analogy) as a default treaty on all issues on which the Agreement remains silent. Depending on the nature of the Agreement, it may be possible to provide that all parties to the Agreement can express consent to be bound through signature only,

thus dispensing of cumbersome procedures of ratification. In order to avoid doubt, it would in any case be useful to include a clause declaring that the Agreement is governed by international law, and that disputes arising under the instrument will be settled through international arbitration.

It would not be the primary ambition of the Agreement to aim for universal ratification, nor would it serve as a substitute for normative initiatives of a purely intergovernmental nature. Rather, the objective would be to bring together a coalition of the willing, consisting of a variety of public and private actors, committed to demonstrating that the RTD can be implemented in a meaningful way through joint initiatives. Cooperation in the context of the Agreement would aim at the creation and identification of the best practices, using successful field experiences and partnership practice as an instrument for building more general political support for the RTD.

The Agreement would be open to accession to States (both developing and developed), IGO's, companies and NGO's.

The institutions created by the Agreement could or could not be part of the UN system, but would in any case work in close relationship with its bodies entrusted with responsibilities on the RTD.

Building on the examples discussed above, a Multi-Stakeholder Agreement on the Right to Development could contain the following elements:

a) Commitment to the right to development

The commitment would simply reaffirm the RTD as a human right, formulated in general terms, as in the 1986 Declaration,³⁶ or, as suggested above, in a formulation that takes into account subsequent developments with regard to the ecological and

34 The Disability Convention also includes a separate article on international cooperation. According to Article 32, "States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities."

35 The reference to 'subjects of international law' in Article 3, para. a should not prevent private actors from acceding to the Agreement. Although companies and NGOs are not usually considered as subjects of international law, this has not prevented them from concluding agreements governed by international law, or from submitting claims to (certain) international tribunals on an ad hoc basis. As Lindblom argues, it is the consent of the parties that enables agreements to be placed under international law. See A.-K. Lindblom, O.c., p. 492.

36 The United Nations Millennium Declaration (UN GA resolution 55/2 (September 18, 2000), par. 11 simply states: "We are committed to making the right to development a reality for everyone and to freeing the entire human race from want."

democratic aspects of the right. The commitment serves to establish the realization of the RTD as the object and purpose of the Agreement.

b) Commitment to engage in assisting local communities on the implementation of the right to development

The main instrument through which the Agreement (and its parties) would seek to contribute to the realization of the RTD would be to provide assistance to communities in adhering states whose human rights have been adversely affected as a consequence of both internal and external factors. As the Millennium Declaration acknowledges, the benefits of globalization are unevenly shared, and the costs unevenly distributed.³⁷ The parties to the Agreement would therefore seek to support communities whose rights have suffered as a consequence of globalization, i.e. whose human rights have been affected by the actions of both domestic and external actors. The focus would thus be on situations where both the internal and the external dimension of the RTD are relevant. By identifying communities as the potential beneficiaries of assistance, the collective component of the RTD would be taken into account.³⁸

In addition, in considering applications for assistance from local communities, existing international treaties emphasizing aspects of the RTD of specific categories of persons, i.e. women,³⁹ children,⁴⁰ and indigenous peoples,⁴¹ could also be taken into account.

Arguably, there are two alternative ways in which the Agreement could organize the implementation of the commitment. One way would be through the establishment of a central Fund that would provide assistance to selected projects; the other way would be through a system of registra-

tion and monitoring of partnership agreements proposed by the parties to the Agreement:

– Right to Development Fund

The purpose of the Fund would be to collect resources for the assistance of local communities seeking redress in situations where their human rights are affected as a consequence of both internal and external factors. The assistance would be directed towards enabling these communities to develop and implement a RTD strategy that addresses the global nature of the situation in which they find themselves. This could, for instance, include assistance on connecting the communities to transnational networks, or on providing them with legal aid to address human rights responsibilities in a variety of judicial or administrative fora when a multiplicity of domestic and foreign actors is involved. Decisions on funding would be taken by a Multi-Stakeholder Board, on the recommendation of a review panel consisting of independent experts. Such a Fund would not require huge amounts of money; it would function as a vehicle for creating best practices demonstrating how a common responsibility for the RTD can be operationalised.

– Right to Development Partnership Agreements

In this model, partnership contracts between parties adhering to the Agreement and relevant communities, focusing on the assistance of the community whose human rights are affected as a consequence of both internal and external factors, would be presented to a Multi-Stakeholder Board (assisted by an independent review panel)⁴² for registration as a RTD partnership. For the purposes of registration, use could be made of the criteria and indicators developed by the UN High Level

37 United Nations Millennium Declaration (UN GA resolution 55/2 (September 18, 2000), par. 5.

38 For the purpose of analogy: requests to the World Bank Inspection Panel can be filed by “any group of two or more people in the country where the Bank-financed project is located who believe that as a result of the Bank’s violation their rights or interests have been, or are likely to be adversely affected in a direct and material way. They may be an organization, association, society or other grouping of individuals” (emphasis added).

39 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, (2003), Article 19,

40 Convention on the Rights of the Child, (November 20 1989), Article 6, para. 2,

41 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, (June 27, 1989), Article 7, par.1.

42 It would be important to ensure that actors who are often underrepresented in traditional inter-governmental cooperation, in particular civil society organizations from the South, are well represented in these bodies.

Task Force on the Right to Development.⁴³ It could also be provided that any partnership contract approved under the Agreement should provide human rights recourse for the affected community with regard to any of the parties involved in the partnership contract. Actors involved in RTD contracts would be expected to report on implementation of the projects to the Agreement's institutions.

c) Participation in a Forum for policy discussions

The Forum would be a plenary body of all parties to the Agreement. The primary function of the Forum would be to review and appraise the practice built up under the Agreement in operationalising the RTD. The purpose of the review would be to identify the best practices that can be scaled up, and to strengthen high-level commitment to the RTD. The Forum could make a special effort to invite independent experts from the countries

where the practice under the Agreement has been built up to participate in its policy discussions.

In addition, the Forum could also be used as a venue for organising a dialogue on presentations by adhering parties on their policies (in general) with regard to, or affecting the RTD.

d) Commitment to engage in Conciliation and Dispute Settlement

The parties to the Agreement would commit to engage in conciliation and international dispute settlement with regard to any aspect of the Agreement.

One option would be to include a provision in the Agreement referring disputes to the Permanent Court of Arbitration in The Hague. The Permanent Court currently provides rules for arbitrating disputes involving a variety of actors, and guidelines for adapting these rules for disputes arising under multiparty contracts⁴⁴.

43 The list of criteria is included in the 8th report of the UN Working Group on the Right to Development; see UN doc. A/HRC/4/47 (14 March 2007). An amended implementation checklist of 17 indicators appears in the third report of the High Level Task Force; see UN doc. A/HRC/4/WG.2/TF/2 (13 February 2007). The current criteria (that are a work in progress) include structural criteria, process criteria and outcome criteria.

44 The Permanent Court of Arbitration offers arbitration procedures for disputes involving States and non-State actors, states and international organizations, international organizations and NGOs, and has guidelines for adapting the rules if disputes arise under multi-stakeholder contracts. For more details, see www.pca-cpa.org.

Chapter 11: The Relation of the Right to Development to Existing Substantive Treaty Regimes

Beate Rudolf*

I. Introduction

More than twenty years have passed since the UN General Assembly adopted the Declaration on the Right to Development¹ and yet the contents of this right remain contested. To a large extent, the debate was, and still is, fuelled by mutual distrust: Numerous industrialized countries fear that a right to development may constitute the legal basis for monetary claims by developing countries against them; many developing countries are suspicious of concepts focusing on the duty of the territorial state to fulfill the right to development. They worry that this approach serves to deny the responsibility of developed states, many of the former colonial states, and to permit interferences with the internal affairs of the territorial state.

It is before this background that this contribution analyzes the overlap and gaps between the contents of the RTD and existing treaties in areas relevant to it. It shows that there are substantial overlaps between the RTD and substantive treaty regimes, even if the latter do not recognize the RTD as such. Acknowledging these overlaps might help gain support for the view that the legal recognition of a right to development would not disrupt the present international legal order. The gaps identified point to the areas where a concretization of the RTD, and possibly a binding legal instrument, could be useful.

II. Contents and Structure of the Right to Development

While the 1986 Declaration on the Right to Development (“1986 Declaration”) could only be adopted by a vote,² the Declaration of the 1993 Vienna World Conference on Human Rights (“Vienna Declaration,”) which contains the RTD, was adopted by consensus. It “reaffirms the right to development, as established in the Declaration on the Right to Development.”³ Although the Vienna Declaration is not binding as such, its solemn and unequivocal proclamations of rights reflect the participating states’ understanding of present-day international law. Therefore, it is a strong argument in favor of the states’ recognition of a right to development, *i.e.* their *opinio iuris*. However, the determination of whether a right to development exists under customary international law hinges not only on the question of whether there is concomitant state practice, but, even before that, on the question of its contents. This is so because a norm can only be deemed to exist if at least its main features are discernible. Otherwise, it would be impossible to examine whether there is state practice based on the obligation arising from the norm.

Although the purpose of the present comment is not to answer the question of the character of the RTD as customary international law, it may

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¹ Declaration on the Right to Development, General Assembly A/RES/41/128 (December 4, 1986), (hereinafter: “1986 Declaration.”)

² It was adopted by 146 states with one state voting against (US) and 8 states abstaining (Germany, Italy, Luxembourg, and the United Kingdom being among them).

³ A/CONF.157/23 of July 12, 1993, para. 10.

indirectly contribute to answering this question because an analysis of whether the RTD overlaps with existing treaty regimes must start by defining its contents. To do so, the 1986 Declaration must be used as the point of departure since the Vienna Declaration explicitly reaffirms it. Where the Vienna Declaration differs from the 1986 Declaration, it prevails, as it reflects the consensus of the international community of states.

A. The Right to Development and the Concept of Development as a Process and a Result

According to Article 1(1) of the 1986 Declaration, the RTD as a human right means that “every human person and all peoples are entitled to *participate in, contribute to, and enjoy* economic, social, cultural and political *development*, in which all human rights and fundamental freedoms can be fully realized.” These dimensions of the RTD reflect the understanding of the Declaration according to which development is both a process⁴ and a result.⁵ The right to participate in, and contribute to, development, relates to the process aspect; the right to enjoy development is linked with the understanding of it as a result.

The process dimension of the RTD emphasizes two features: Its gradual realization (“*constant improvement* of the well-being of the entire population”)⁶ and its participatory nature (“on the basis of their active, free and meaningful *participation in development*”)⁷: Public participation in development relates not only to the definition of priorities, but also to the determination of the “fair distribution of the benefits”⁸ gained.

The understanding of development as a result, and the concomitant right to enjoy it, has two consequences: First, states are obliged to build and maintain institutions that ensure both the participatory decision-making process and the full realization of all human rights. This is borne out by the entitlement to “a social and international *order* (. . .).”⁹ Second, since the benefits from development must be distributed in a fair way, the right to enjoy development encompasses a right to receive a share of the benefits from it.

Both the process and the result dimensions of the RTD have, at their center, the realization of human rights.¹⁰ Moreover, both dimensions are limited by the understanding of development as “sustainable development.” The reason is that the Vienna Declaration qualifies the RTD by calling to “respect equitably the needs of present and future generations.”¹¹ However, the cautious language of the Vienna Declaration (“should”) indicates that sustainability is not yet an indispensable characteristic of development under the RTD. Rather, the hortatory character of the Vienna Declaration in this respect is better translated into an obligation to take the concept of sustainability into account when taking decisions concerning development, and to disregard it only with good reasons (which will be few; *e.g.* when the survival of the present generation is at stake).

Finally, it is noteworthy that 1986 Declaration defines the RTD as extending not only to measures on the internal level, but also on the international plane.¹² In contrast, the Vienna Declaration merely recognizes the importance of “equitable economic relations and a favorable economic environment at the international level,”

4 According to the 2nd recital of the 1986 Declaration, *supra* note 2 (“(. . .) development is a *comprehensive economic, social, cultural and political process*, which aims at the *constant improvement* of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.” (emphasis added).

5 In the words of the 3rd recital of the 1986 Declaration, *supra* note 2: “(. . .) everyone is entitled to a social and *international order in which the rights and freedoms set forth in that Declaration can be fully realized.*”

6 1986 Declaration, 2nd recital, *supra* note 5 (emphasis added).

7 *Id.* (emphasis added).

8 *Id.*

9 1986 Declaration, 2nd recital, *supra* note 6 (emphasis added).

10 *Id.* By “rights and freedoms set forth in that Declaration,” the 1986 Declaration refers to the Universal Declaration of Human Rights of the UN General Assembly [A/RES/217 A (III)] of December 10, 1948].

11 Vienna Declaration, *supra* note 4, para. 11: “The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.”

12 1986 Declaration, 3rd recital, *supra* note 6.

but falls short of couching this in terms of a recommendation, let alone an obligation.¹³

Taking these features into account, the RTD can be understood as having the following contents:

- (1) The process of development must follow the priorities set by human rights. Thus, states are duty bound to pursue a rights-based approach to development.
- (2) The process of development must be participatory; this cannot be achieved without transparency, both in the agenda-setting of development and the elaboration of rules concerning the distribution of the benefits.
- (3) The process of development presupposes structural conditions on the national level ensuring the rule of law. In particular, this means the proper administration of justice, notably an independent judiciary. The Vienna Declaration expressly recognizes this dimension of the RTD.¹⁴ The proper administration of justice is not only necessary to control the respect for human rights within a state, *i.e.* the result of the development process, but also for the control of the participatory nature of the process.
- (4) Moreover, with regard to the result of the development process, all human rights, civil and political as well as economic, social and cultural, must be realized. This imposes on states the obligation to respect, to protect, and to fulfill these rights according to the applicable international treaties and customary international law. A corollary of this obligation is the procedural duty to create appropriate mechanisms of implementation and supervision.

These features refer both to the internal and the international level.

(5) On the international level, the procedural dimensions of the RTD are complemented by recommendations

- to cooperate in ensuring development,¹⁵
- to meet equitably the needs of present and future generations.¹⁶

These recommendations must be considered in good faith, but can be disregarded with good reasons.

Having thus determined the contents of a right to development under the two Declarations, the question can be answered as to the identity of the duty-bearers and of the bearers of this right.

B. The Right to Development: Duty Bearers and Right Bearers

If the RTD is a human right, then the states are duty-bound to guarantee it to everyone within their territorial jurisdiction. Indeed, Article 2(3) of the 1986 Declaration recognizes the states' duty expressly. It is true that the Vienna Declaration only speaks of the necessity of "effective development policies at national level,"¹⁷ and not of an obligation to pursue them. Yet, this shortcoming cannot alter the unequivocal recognition of the RTD as a human right in the Vienna Declaration.

Important – and contested – is the point of whether the RTD has an extraterritorial application, thus obliging states to ensure its realization outside their own territory, be it only when they exercise effective control over a foreign territory, or even when their actions produce effects there. The latter interpretation would extend, in a general way, the states' duty from their own (internal) development to the development of other states. The 1986 Dec-

13 Vienna Declaration, *supra* note 4, para. 10 (following the two preceding sentences, *supra* note 16): "Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level."

14 Vienna Declaration, *supra* note 4, para. 27: "The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development." (emphasis added).

15 Vienna Declaration, *supra* note 4, para. 10: "States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development." (emphasis added).

16 Vienna Declaration, *supra* note 12.

17 1986 Declaration, *supra* note 2, Article 2(3): "States have the right and duty to formulate appropriate national development policies" (emphasis added); Vienna Declaration, *supra* note 4, para. 10.

laration proclaims this extraterritorial duty in its Article 3(1): All other states are obliged to cooperate in ensuring development and eliminating obstacles to it. Yet, the Vienna Declaration reduces this obligation to a recommendation.¹⁸ As the character of the RTD does not hinge on the existence of an extraterritorial obligation, the restrictive approach of the Vienna Declaration in this respect must be deemed as reflecting the prevailing *opinio iuris*.

At the same time, the Vienna Declaration extends the circle of the addressees of this recommendation to the “international community.”¹⁹ It is submitted here that this not only covers states acting collectively through an international organization, but it also targets international organizations directly, *i.e.* in all their activities. If the RTD is a human right under customary international law, then *all* subjects of international law are bound by it when they act within the substantive scope of application of this right. One might argue that, presently, this consequence is of little impact in light of the hortatory nature of the call for cooperation. However, this conclusion underestimates the function of a recommendation, since it imposes on the addressee the obligation to justify a deviating action.

In contrast, individuals are not under a duty to further development, but merely have a “responsibility,” *i.e.* a moral, not legal, obligation. This restrictive reading is not only based on the language of Article 2(2) of the 1986 Declaration, but in particular on the concept of human rights under public international law: human rights do not impose obligations on individuals, and rightly so, because doing so would turn them from entitlements against the state into a basis for state interference. As a result of this interpretation, the two Declarations cannot be used as an argument in favor of a legal duty of non-state actors, in particu-

lar transnational corporations (TNCs) and Non-Governmental Organizations (NGOs), to further development.

The question of the bearers of the RTD turns around the issue of whether it is only an individual right or also a collective right. Article 1(1) of the 1986 Declaration presumes that the right has a double character: It is the entitlement of “every human person *and all peoples*.” In contrast, the Vienna Declaration does not contain any reference to a collective dimension of the RTD. It merely characterizes it as “a universal and inalienable right and an integral part of fundamental human rights.”²⁰ However, this wording cannot be interpreted as ruling out a collective dimension for two reasons. First, the Vienna Declaration speaks of a “universal and inalienable right,” thus does not limit it to individuals. Second, it considers the RTD as an integral part of “human rights,” and it is generally recognized that this category not only encompasses individual rights, but also collective rights. Although it is still problematic to identify the pertinent collective, and thus the bearer of the right - as the debate on the right of peoples to self-determination illustrates, - the existence of such “third-generation rights” is no longer contested.²¹

II. Relationship of the Right to Development to Substantive Treaty Regimes

It is before this background that the relationship of the RTD to substantive treaty regimes is analyzed here. In the following sections, the RTD is juxtaposed to human rights treaties (A.), to treaties in the area of development cooperation (B.), to treaties on international economic law (C.), and to environmental law treaties (D.), so as to determine overlaps and lacunae.

18 Compare the 1986 Declaration, *supra* note 2, Article 3(3)(1): “States have the *duty* to co-operate with each other in ensuring development and eliminating obstacles to development,” with the Vienna Declaration, *supra* note 4, para. 10: “States should cooperate with each other in ensuring development and eliminating obstacles to development.” (emphasis added).

19 Vienna Declaration, *supra* note 4, para. 10: “The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development.”

20 Vienna Declaration, *supra* note 4, para. 10.

21 Cf. Manfred Nowak, CCPR Commentary, 2nd ed. (2005), Art. 1, marginal note 15.

A. Relationship to Human Rights Treaties

1. Substantive Overlaps and *Lacunae*

There is an obvious overlap between the rights-based approach to development and human rights treaties: The latter define the priorities to be set in the development process. They do so in particular through the definition of core rights within the framework of the International Covenant on Economic, Social and Cultural Rights.²² They also define priorities by circumscribing the permissible limitations of civil and political rights. Moreover, human rights treaties contain rules on the right to political participation, in particular Article 25 lit. at the ICCPR, guaranteeing the right of every citizen to take part in the conduct of public affairs. Finally, human rights treaties presuppose the respect for the rule of law and the existence of functioning judicial control over private law disputes and criminal proceedings. Thus, they largely overlap with all three aspects of the procedural dimension of the RTD. They concur with the result dimension of the RTD in their emphasis on the realization of the rights guaranteed.

What, then, is the value added by the recognition of a legally binding RTD? It is submitted here that it has two advantages with respect to the substantive contents. First, the RTD puts into the foreground the obligation to create enabling structures on the national level. These structural requirements are participatory procedures and structures, the rule of law, and the independence of the judiciary. Such structures are, to a large extent, also required under human rights treaties, yet in that context, they serve only as a support to the rights guaranteed. Therefore, and moreover, individual rights holders cannot attack the lack of such structures as such, but only insofar as it infringes upon their rights. A good illustration is the right to a fair

trial before an independent tribunal: It does not give rise to an individual right of everyone to have an independent judiciary, but only for a person in a specific private law dispute or when standing accused of a crime. Even if one were to consider it sufficient that the possibility of individuals claiming this right has, as a result, an obligation for the state to create an independent judiciary, there remains a gap: Human rights treaties do not require an independent judiciary for most of administrative law. But it is submitted here that, even beyond this latter consequence, a general individual right and concomitant state obligation to set up a court system of independent judges is a value in itself. It goes hand in hand with legal certainty as a basic feature of the rule of law, both serving to establish order, i.e. foreseeability for individuals and hence security in all their present and future activities. It thus contributes to allowing and safeguarding individual autonomy.

Second, human rights treaties focus on the individual as the bearer of rights. Therefore, the collective dimension of the RTD can be regarded another added value: Since human rights are rights against the (territorial) state, the right of peoples to development is, first and foremost, directed against the authorities of their own state. In other words, the collective dimension of the RTD emphasizes the responsibility of state authorities towards their own populations. On a conceptual level, the RTD thus links with the new trend in international politics and public international law that builds on the conviction that the state is not an end in itself, but that its purpose is the improvement of the human condition. Hence, the RTD becomes an additional yardstick for measuring the legitimacy of a state.²³ On a more practical level, the collective dimension of the RTD leads to the consequence that a government can only call for international cooperation if it fulfills its

22 For the concept of core rights see the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN-Doc. E/CN.4/1987/17, Annex, *reprinted in* 9 Hum. Rts. Q. 122 (1987). ESCR Committee, General Comment Nr. 3 (The Nature of States Parties' Obligations: Article 2(1) of the Covenant), 1990, paras. 1–2, *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN-Doc. HRI/GEN/1/Rev.7 (2004), p. 15.

23 Other yardsticks are the realization of fundamental human rights and the fulfillment of the state's "responsibility to protect its populations (*sic*) from genocide, war crimes, ethnic cleansing and crimes against humanity," World Summit Outcome, A/RES/60/1 of September 16, 2005, para. 138.

duties towards its own population. On this basis, linking ODA with the fulfillment of this duty is a kind of conditionality that helps realize the collective dimension of the RTD.

2. Duty Bearers and Right Bearers

A comparison of human rights regimes and the RTD as concerns the determination of duty bearers, reveals that the latter goes farther because of its extraterritorial applicability and, through this dimension, also with respect to private actors.

The uncontested extraterritorial reach of human rights treaties is rather limited: The ICCPR presupposes that a person is “within [the] territory and subject to [the] jurisdiction” of a state to engage that state’s responsibility. Although the Human Rights Committee does not understand “jurisdiction” as being limited to the state’s own territory, it requires a physical contact of a state (through the actions of its agents) with the territory of another state so as to trigger the duty to respect, protect, and fulfill the rights guaranteed.²⁴ The provisions of the Social and Economic Covenant concerning international cooperation, in particular Article 2(1), do not create an enforceable claim to cooperation for one state against others.²⁵ In contrast, the RTD as recognized by the Vienna Declaration contains a recommendation addressed to third states to cooperate to the best of their abilities and available resources. This recommendation neither permits less developed states to claim financial aid, nor does it give third

states carte blanche to deny assistance. Instead, it compels third states and the international community to justify a denial of support. In the same vein, the international community would be obliged to justify itself if it does not step in to support development by eliminating the worst obstacles to development in cases where states are extremely weak or failing. This aspect of a legally binding RTD would link with the preventive dimension of the responsibility to protect as recognized by the international community at the World Summit in 2005.²⁶ It would help shift the (wrong) focus that scholars and practitioners apply when discussing the responsibility to protect from military measures (responsibility to react) to development (responsibility to prevent).²⁷

The second problem of duty bearers under existing human rights treaties arises from the fact that individuals are not legally bound to respect, protect and fulfill human rights. Human rights treaties only extend to individuals indirectly: The obligation to protect requires the state to take measures for the protection of individual rights holders from violations of their rights by other individuals. This legal approach becomes problematic when states face powerful private actors. Under the right to water, e.g., states may privatize the water supply infrastructure, but must ensure that the private contractors provide access to the resources on a non-discriminatory basis and through affordable prices.²⁸ A weak state, however, may be unable to control a large, transnational, private contractor effectively, let alone sanction

24 Manfred Nowak, *supra* note 22, Art. 2, marginal note 30 (with further references).

25 Although the Committee on Economic, Social and Cultural Rights assumes that “international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States,” it rightly does not speak of a corresponding claims-right by other states (ESCR Committee, General Comment Nr. 3, *supra* note 23, para. 14.), as the Covenant does not set up a structure of reciprocal rights and duties between states. In contrast, an individual right is theoretically thinkable, but does not give rise to a claim to a specific amount of only financial aid.

26 A/RES/60/1 of September 16, 2005, para. 139: “The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. (. . .) We also intend to commit ourselves, as necessary and appropriate, to *helping States build capacity to protect* their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to *assisting those which are under stress before crises and conflicts break out.*” (emphasis added).

27 These dimensions of the responsibility to protect were developed by the ICISS (International Commission on Intervention and State Sovereignty), ICISS Report p. XI, <<http://www.iciss.ca/pdf/Commission-Report.pdf>>. As a commission set up by the Canadian government, it did not have any law-making powers. However, as a conceptual approach they are helpful for understanding the responsibility to protect, even if not expressly adopted by the World Summit. They can be considered as an emanation of the principle of proportionality and the prohibition of intervention under public international law.

28 For details, see ESCR Committee, General Comment No. 15 (The Right to Water (Articles 11 and 12)); *reprinted in* Compilation, *supra* note 23, p. 106, *cf.* also: Eibe Riedel, “The Human Right to Water,” in Klaus Dicke, Stephan Hobe et al. (eds.), *Weltinnenrecht. Liber Amicorum Jost Delbrück*, (2005), p.585; and Beate Rudolf, “Menschenrecht Wasser – Herleitung, Inhalt, Bedeutung und Probleme,” in Beate Rudolf (ed.), *Menschenrecht Wasser?*, (2007), p. 15.

violations. Or it might be that the state authorities are not willing to take action because the officeholders receive personal profits from the corporation's activities.

In this situation, the external dimension of the RTD is highly useful, as it obliges the home state of a transnational corporation to help realize the RTD by controlling that corporation. However, as has been shown above, this extraterritorial dimension is only contained in a recommendation to cooperate, and hence it gives rise to a mere obligation to justify non-compliance. Under this "comply-or-explain" approach, the home state of a transnational corporation (TNC) is not under an absolute obligation to prevent any human rights violations by the corporation that infringe upon the RTD. It is, however, compelled to provide for appropriate sanctions mechanisms, or explain their absence, in case the state of the TNC's incriminated activities is not able or not willing to ensure the RTD. Such instruments may be criminal prosecution for corruption abroad or civil remedies for foreign claimants (individuals or groups). For states with functioning independent judiciaries, it would seem difficult to defend inaction in these areas. At the same time, the cooperative character of the RTD requires states not to take these measures if the TNC's host state is capable of taking them itself.

3. Mechanisms of Implementation

The last important point in the comparison concerns mechanisms for implementation: The legal debate in this field tends to focus on individual complaints mechanisms under human rights treaties. Yet such mechanism for the RTD would be highly problematic and, at the same time, of little relevance: As most of the aspects of the RTD concern either structural requirements (process dimension) or the realization of human rights (result dimension), there is little that an individual complaints mechanism for the RTD can achieve that is not achievable through the human rights com-

plaints procedures. Moreover, the procedural aspects of the RTD do not lend themselves easily to an individualized violations approach. Under which conditions should a complaint be admissible and successful if, *e.g.*, the acts of the administration cannot be challenged in an independent court? An individual complaints procedure would, in reality, be a barely disguised *actio popularis*. For this reason, a complaints mechanism for the RTD should better focus on the collective dimension of the right and hence especially on the question of who shall have standing to bring a claim for a population. One might think, *e.g.*, of collectivities that have representations under municipal law, such as the states within a federation, or groups that enjoy autonomy, and, in the absence of these, independent bodies, such as national human rights institutions that fulfill the Paris Principles,²⁹ could be empowered.

With respect to state reporting, one might argue that no new supervisory mechanism is needed for the RTD because state reporting can be extended to supervising national development policies, *e.g.* by referring to the Millennium Development Goals (MDGs).³⁰ This approach would be comparable to that of the CEDAW Committee, which takes into account the Beijing Program of Action. It is not convincing to argue that human rights experts in treaty bodies are not capable of performing this task because they are no development specialists. This view disregards the fact that committee members have long dealt with a variety of policy fields, and there is no reason why they should not be able to address development politics from a human rights perspective. What seems more problematic is that such monitoring will not be very effective. This is to be expected since already treaty bodies have very limited time allocated for their constructive dialogue with states. Therefore, the implementation mechanisms available under human rights treaties are not sufficient to ensure implementation of the RTD. In addition, the reporting procedure only engages a specific state and

29 UN General Assembly Resolution, "National Institutions for the Promotion and Protection of Human Rights," A/RES/48/143 of December 20, 1993.

30 Martin Scheinin, "Advocating the Right to Development Through Complaint Procedures Under Human Rights Treaties," in Bård A. Andreassen and Stephen P. Marks (eds.), *Development as a Human Right*, (Harvard University Press, 2006), p. 274

NGOs with a particular interest in that state, but not other relevant actors within the donor community, such as third states, international financial organizations, and (state or private) institutions with relevant technical expertise.

For these reasons, the RTD needs other mechanisms for implementation. These should focus less on deficiencies in a state's actions and possible remedies, and more on assisting it in devising effective development strategies that respect the procedural requirements of the RTD and help bringing about its result dimension. From this perspective, the proposal for a development compact has a lot of potential, particularly because it sets up a structure for elaborating a development strategy in cooperation with the stakeholders involved.³¹

B. Relationship of the RTD to Development Cooperation Treaties

Given the number and diversity of development cooperation instruments, a comprehensive comparison between the RTD and treaties in that area is impossible. Therefore, this part will look at the Cotonou Agreement as an important example of comprehensive and institutionalized development cooperation. The focus will be on the concept of development and on the implementation mechanism set up by that treaty.

The concept of development underlying the Cotonou Agreement derives from its Article 1, according to which its objective is "to promote and expedite the economic, cultural and social development of the ACP States." As the next sentence reveals, the priority is on poverty reduction. This, in turn, has to be "consistent with the objective of sustainable development." In Article 9(1), the Cotonou Agreement defines its concept of sustainable development to be "centered on the human person, who is the main protagonist and beneficiary of

development." It furthermore names "[r]espect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law, and transparent and accountable governance (. . .) an integral part of sustainable development." Thus, the Cotonou Agreement recognizes a rights-based approach to development;³² taken together with its recognition of the need for (democratic) public participation, rule of law structures, and transparency, it reflects the main procedural aspects of the RTD as expressed in the 1986 Declaration and the Vienna Declaration. In addition, the results dimension of development can be discerned in the emphasis on respect for all human rights. Moreover, Article 10(1) emphasizes that the benefits of development must be available to the whole population in an equitable way.³³ Missing in the Cotonou Agreement is an express reference to the international dimension of development as being required by international law.³⁴

Yet, the Agreement avoids all language that might indicate the recognition of an individual, let alone a collective, RTD against the home state or third states. For instance, it does not list the RTD among the fundamental principles of ACP-EC cooperation (Article 2), and the preamble refers merely to the "pledges" made in the Rio and the Vienna Declarations. The term "right" is used only with reference to the states: Article 4 expressly recognizes the right of each of them to determine its own path of development.³⁵ Nevertheless, it would seem that the significant substantive overlap between the concept of development underlying the Cotonou Agreement and the RTD should and could be used for rallying support among the European States to recognize the RTD.

As the following analysis will show, a right to development may even be useful for effective implementation of the Cotonou Agreement. The Agreement provides for sanctions in case of a vio-

31 See the contribution by Koen de Feyter, this volume.

32 Article 1(3) expressly requires that "[t]hese objectives and the Parties' international commitments shall inform all development strategies and shall be tackled through an *integrated approach* taking account at the same time of the political, economic, social, cultural and environmental aspects of development." (emphasis added).

33 "[S]ustainable and equitable development involving, *inter alia*, access to productive resources, essential services and justice; (. . .)."

34 Evidently, the Agreement itself is an example of cooperation, yet on a purely voluntary basis.

35 "The ACP States shall determine the development principles, strategies and models of their economies and societies in all sovereignty."

lation of one of the essential principles enumerated in Article 9. According to Article 96, the permitted reactions are first and foremost consultations, but if these do not reach a result within 60 days or in case of flagrant and serious violations, “appropriate means” can be taken. These measures must be compatible with international law, proportionate, and should aim at the least disruption of the Cotonou Agreement. They may include suspension of the agreement (and thus financial or other aid granted under it) as a last resort.

These limitations point to a fundamental problem of sanctions: It is highly probable that the suspension of financial or other aid will harm the population much more than the targeted government. Yet, donor states are – quite understandably – unwilling to continue financial support for a government that flagrantly disregards human rights, and they get under serious political pressure at home if they do so. A way out of this impasse may be to focus more on participation, viz. cooperation with civil society. This option is opened by the Agreement’s provisions on implementation, which emphasize public participation in the development process, both at the level of determination of policies (Article 4) and of their execution (Article 2).³⁶ Thus, a shift to cooperation with civil society in case of flagrant human rights violations by the receiving state could be achieved by choosing measures that leave out the state government and go directly to the population, especially through local NGOs. This approach would also reflect the principle, recognized in the Cotonou Agreement, the 1986 Declaration, and the Vienna Declaration, that humans are the ultimate protagonists and beneficiaries of development. In other words, this interpretation of the sanctions mechanism under the Cotonou Agreement in light of the RTD would lead to a further restriction of the states’ reserved domain in permit-

ting direct contact between third-states and organizations of civil society so as to realize development. It would also reflect the collective dimension of the RTD as a right of the population against its home state.

The same approach could be used under the RTD itself so as to balance the responsibilities of the national state and the international community. However, the problem that arises then is that – unlike under the Cotonou Agreement – the RTD so far does not encompass procedural or institutional structures at the international level, such as a fixed time-period for consultations or oversight by an inter-state body (such as the Council of Ministers under the Cotonou Agreement, which determines whether a flagrant violation of human rights is taking place). Such provisions could, of course, be introduced under a binding legal instrument on the RTD. In this case, the external dimension of the RTD would limit the principle of non-interference to the benefit of the (individual and collective, not state) RTD, i.e. the internal dimension of the right.

C. Relationship of the Right to Development to International Economic Law

As in the area of development cooperation, the agreements in the field of international economic law are multifold. Constraints of time and space permit only two observations here, the first with respect to the World Bank, and the second with respect to the WTO.

In the World Bank’s activities, the concept of Good Governance has taken a prime of place. Since the late 1980s, Good Governance has become a yardstick in the determination of granting loans, as bad governance was considered the main reason for ineffectiveness of loans.³⁷ An analysis of the

36 That provision explains “participation” as one of the fundamental principles of ACP-EC cooperation as follows: “[A]part from central government as the main partner, the partnership shall be open to different kinds of other actors in order to encourage the integration of all sections of society, including the private sector and civil society organizations, into the mainstream of political, economic and social life; (. . .)”

37 World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, (1989), pp. 60-61; and id., *Governance: The World Bank’s Experience*, (1994), pp. 17-18. For an account of this development see, e.g. Adrian Leftwich, “Governance, the State and the Politics of Development,” *Dev. & Change* 25, (1994), p. 363; Mette Kjær & Klavs Kinnerup, “Good Governance – How Does It Relate to Human Rights?,” in Hans-Otto Sano and Gudmundur Alfredsson (eds.), *Human Rights and Good Governance. Building Bridges* 1, (2002), pp. 4-7; and David Gillies, “Human Rights, Democracy and Good Governance: Stretching the World Bank’s Policy Frontiers,” in Jo Marie Griesgraber and Bernhard G. Gunter (eds.), *The World Bank – Lending on a Global Scale. Rethinking Bretton Woods*, (1996), pp. 101, 116.

World Bank's concept of Good Governance reveals large overlaps with the substantive contents of the RTD. According to the World Bank, Good Governance encompasses four elements: (1) accountability, i.e. the disciplinary and criminal responsibility of public officials; (2) participation; (3) transparency; and (4) the supremacy of law *i. e.* the rule of law.³⁸ As was shown earlier, the three last-mentioned elements are features of the procedural dimension of the RTD. The decisive difference of the RTD to the Good Governance approach, however, is that the World Bank considers them only to be means to enhance the effectiveness of loans. Thus, they are not an end in themselves, as they are within the RTD.

Nevertheless, this conceptual difference must not distract from the fact that the World Bank grants loans to promote development in the receiving state. The recognition of the RTD, under customary international law or within a specific legal instrument, would give a firm legal basis to introducing the realization of elements of Good Governance as obligations into loan agreements, which, until now, rests on a teleological interpretation of the World Bank's Articles of Agreement and whose convincing force depends on whether one accepts the extensive understanding of the economic effectiveness of a loan.

With respect to WTO law, the first observation is that the RTD can be read into the WTO Agreements even if they do not mention it expressly. One avenue is to interpret the provisions focusing on special situation of developing countries in light of this right.³⁹ The second, more extensive, way would lead via the requirement interpreting of WTO in light of applicable international law.⁴⁰ These possibilities are helpful for the RTD, yet – and

this is the second observation – they miss the main problem of WTO law: The fact that the existing WTO agreements do not, or not adequately, cover areas that are of particular importance to developing countries. The best known example is insufficient access of agricultural products from developing countries to the markets of industrialized states because of the subsidies the latter grant to their farmers or agricultural industries. As the Doha Round shows, the reliance of the WTO system on negotiations, which hinge on the states' economic and political power, is inappropriate to meet the developmental needs on states adequately and timely. Thus, as long as no substantive principles, such as equity or the RTD, are recognized within the WTO system, a serious impediment to realizing the RTD will remain. This situation will work to the disadvantage of the least developed countries, because, unlike "threshold countries" (such as Brazil or China), they do not possess the bargaining chips necessary for successful negotiations.

D. Relationship of the Right to Development to International Environmental Law

Again, the lack of a comprehensive international agreement, here in the area of international environmental law, prevents a general comparison of the RTD to treaty arrangements. Instead, a look will be taken at the seemingly contradictory approaches of the RTD and environmental law to the relationship between development and sustainability, and on a possibility of harmonizing them.

When one compares the Vienna Declaration and the Rio Declaration, one cannot fail to notice a decisive difference: While the Rio Declaration of

38 For a detailed analysis, see Beate Rudolf, "Is 'Good Governance' a Norm of Public International Law?," in Pierre-Marie Dupuy, Bardo Fassbender et al. (eds.) *Völkerrecht als Wertordnung. Common Values in International Law. Essays in Honour of Christian Tomuschat* (2006), p. 1007.

39 These provisions are, e.g., Article XVIII GATT and Article XXXVI:8 GATT.

40 This requirement was recognized by the Appellate Body, see, e.g., US – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body of May 20, 1996, WT/DS2/AB/R, Sect. III B, p. 18, *reprinted* in *Int'l Legal Materials* 35, (1996), 605; Korea – Measures Affecting Government Procurement, Panel Report of January 19, 2000, WT/DS163/R, para. 7.96; United States – Import Prohibition of Shrimp and Certain Shrimp Products (Shrimp/Turtle Case), Report of the Appellate Body of Nov. 6, 1998, WT/DS58/AB/R, paras. 127–132. For a detailed analysis see James Cameron & Kevon R. Gray, "Principles of International Law in the WTO Dispute Settlement Body," in *Int'l & Comp. L. Q.* 50, (2000), p. 248, and Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?," in *Am. J. Int'l L.* 95, (2001), pp. 538, 540-3 and 560.

1992 puts development and sustainability on an equal footing,⁴¹ the Vienna Declaration, one year later, reduces sustainability to a recommended approach. Although the conflict can be mitigated by a restrictive interpretation, allowing states to prefer development over sustainability only under extreme circumstances,⁴² the fact remains that the RTD under the Vienna Declaration gives precedence to development over sustainability, whereas the Rio Declaration sees no hierarchy between the two concepts. In a similar vein, the UN Framework Convention on Climate Change of 1992 uses the RTD to limit the environmental obligations of states that serve the aim of sustainability.⁴³

Thus, it would seem that the relationship between development and sustainability depends on the legal text taken as a point of departure in resolving a conflict. However, it is submitted here that this is not the only outcome possible. If we conceive of international law as a legal order, such a compartmentalized approach is not tenable. International obligations must be interpreted, as far as possible, so as to avoid contradictions. International courts and tribunals have long adopted this approach.⁴³ Therefore, it is preferable to understand all norms cited here as reflecting the need to balance development and environmental concerns, a requirement that is encapsulated in the notion of sustainable development. Under this approach, the balancing process is between two interests of equal importance, none of which takes automatic precedence over the other. Consequently, what has to be achieved in the balancing process is an outcome which advances both concerns as far as possible.

The realization of this harmonizing approach is best furthered by breaking down the notions of development and sustainability into a set of factors that help carrying out the balancing process. In this sense, the International Law Commission established a set of factors to be weighed to determine states' obligations to prevent extraterritorial harm.⁴⁴ Thus, the RTD can build on the experience of international environmental agreements and documents in that the future debate should focus on the establishment of factors to allow principled balancing between development and sustainability.

III. Conclusion

As the foregoing analysis has shown, the RTD can be accommodated within the present system of international law. With respect to human rights treaties, it adds the important collective dimension of development. At the same time, the recognition of the RTD reinforces human rights by focusing on states' obligation to create the procedural and institutional framework for development and human rights protection. The juxtaposition of the primary obligation of the national state and the secondary obligations of other states and the international community as a whole must be interpreted as establishing a "positive conditionality:" Only a state that undertakes honest efforts to realize its population's right to development can make a claim to the fulfillment of the secondary obligation of other states, who, in turn, must justify any denial of acting upon that request. The analysis of

41 See, in particular, Report of the United Nations Conference on Environment and Development, Annex I ("Rio Declaration on Environment and Development"), of June 14, 1992, A/CONF.151/26 (Vol. I), Principle 3 ("The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."), and Principle 4 ("In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process (. . .).") (emphasis added).

42 See *supra*, text following note 12.

43 Article 3(4) of the UN Framework Convention on Climate Change, May 9, 1992, 31 ILM 849 (1992): "The parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate to the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change."

44 For details see Beate Rudolf, "Unity and Diversity of International Law in the Settlement of International Disputes," in Rainer Hofmann and Andreas Zimmermann, (eds.), *Unity and Diversity in International Law*, (2006), p. 389.

45 Cf. ILC, Prevention of Transboundary Harm from Hazardous Activities, text adopted at the 53rd session 2001, UN-Doc. A/56/10, Article 10. See also the UN Convention on the Law of Non-navigational Uses of International Watercourses, adopted by GA Res. 51/229 of May 21, 1997, UN-Doc. A/51/49, Article 6, which is based on work of the ILC.

developmental treaties has shown that the implementation of the RTD would be improved if it encompassed specific provisions permitting the international community and third states to provide development assistance directly to the population if the home state seriously violates its own people's right to development. With respect to international economic law, it was shown that the World Bank's concept of Good Governance overlaps to a significant extent with the procedural dimension of the RTD. This observation, and the weak legal basis for the World Bank under public international law as it stands today, supports the argument that states and institutions wishing to

promote Good Governance should recognize the RTD. In contrast, the political structure of the WTO system would be fundamentally altered by the recognition of a right to development because it would provide substantive weight to the negotiation position of LDCs. Finally, international environmental law militates in favor of establishing clear criteria for a principled balancing of development and sustainability. Developing instruments to concretize the RTD – whether legally binding or not – are a good way to tackle these issues and might help overcome the pointless continuance of outdated confrontations.

Chapter 12: The Right to Development: renewal and potential

Ibrahim Salama*

“The reasoned basis of human rights lies in the importance of human freedom and the need for solidarity. That far-reaching recognition demands engagement – both at the local and at the global level. The right to development has to be seen in the context of this much larger challenge.”¹

Introduction

The right to development (RTD) has raised many expectations and controversies over the years. For some, it is the ‘missing link’ between trade, development and human rights, the “father of all rights.” For others it is just rhetoric, a political attempt to shift human rights from their normal course. Nevertheless, it is not a miracle that we need in order to reconcile those two camps and reach a shared workable vision for the realization of the RTD. What we need is a new approach, a combination of political will, sustained commitment, conceptual clarity, creative thinking, a collaborative action through partnerships involving all relevant stakeholders, and, finally, sound joint expertise informing the political discussions.

This combines the two facets of the current diplomatic crossroad within the inter-governmental negotiating process on the RTD. On the one hand the international community has committed itself in the Millennium Declaration – at the highest world political level – to this inspiring slogan: making the RTD “a reality for every one.” On the other hand, we confront the well-known obstacles to the RTD. While obstacles cannot be minimized, there seems to be an emerging new

approach to address the realization of the RTD. These obstacles have in large measure been perceived as both political and legal. This has been further amplified by the particularities of RTD, namely that it consists of imperfect obligations, and that it requires flexibility of definition and scope and progressive implementation.

The slogan of ‘right to development’ as embodied in the Declaration of the Right to Development in 1986 has undergone a renewal in recent years with a clear focus on implementation. This has led to a cautious optimism as to the future of the RTD. This article explores how this focus on implementation has evolved and the key factors that have triggered this renewal, with a look as to where this process might lead. Some of the key aspects that will be examined are how the RTD is defined, its conceptual and methodological clarity, and the institutional mechanisms that have contributed to this evolution of the right in recent years.

This evolution is examined from an operational perspective in light of the recently agreed conclusions of the past four sessions of the Working Group on the RTD held in Geneva, from 2004–2007.

Functional approach to the definition of the RTD

Twenty years have elapsed since the RTD was formally recognized by the UN General Assembly as “an inalienable human right.”² Despite constant efforts, scholars and delegates alike continue to voice some degree of confusion with regard to its

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1 Amartya Sen, *Human Rights and Development, Development As a Human Right*, Harvard School of Public Health (Cambridge: Harvard University Press, 2006), p. 8.

2 General Assembly resolution 41/128, Declaration on the Right to Development, December 4, 1986, operative para. 1.

definition. Ultimately, the basic premise of the RTD finds its origin in article 28 of the UDHR: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” The similarities are clear between this article and the first article of the RTD General Assembly Declaration of 1986 stating that: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized,” as well as article 3 of the same declaration emphasizing that “States have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development.” It is a human right which is both individual and collective, which depends more than any other human right on international cooperation and which raises issues of norms and policy coherence among different disciplines and processes.

Many scholars have pointed out that these definitions do not lead to clarity and can result in significant ambiguity of the concept. This should not create, however, political or legal bottlenecks in moving forward in elaborating on concepts and in operationalization, which is precisely the path the Working Group has taken in this regard. In recent sessions, the Working Group avoided debating the definition of the RTD. In fact, rigid definitions are in essence incompatible with the very nature of the RTD, which is process-oriented. Professor Sengupta, the former independent expert on the RTD and current Chair of the Working Group, outlined in a more constructive manner the features of the process of development that integrates the right. His analysis produced a descriptive model avoiding any controversies related to defi-

nitions which make the negotiating process somewhat self-defeating. A content analysis led him to the conclusion that the RTD is a right to “a particular process of development.” He describes this process as follows:

A country can develop by many different processes..... However they will not be regarded as a process of development, as objects of claim, as human rights, so long as they are attended by increased inequalities or disparities and rising concentrations of wealth and economic power, and without any improvement in indicators of social development, education, health, gender balance and environmental protection and, what is most important, if they are associated with any violation of civil and political rights. It is only that process of development ‘in which all human rights and fundamental freedoms can be fully realized’ that can be universal human rights, which is the entitlement of every person.¹

Such a functional approach to the definition of the RTD is particularly useful as both developing and developed countries need a clear common ground beyond their traditional divides. The RTD remains valid even without a “perfect” corresponding obligation.² In fact, the only way to by-pass the problems that arise from fixing on an RTD definition, and to avoid a prolonged abstract and legalistic debate on the scope of obligations of different stakeholders, is to adopt a progressive case by case functional approach to different situations.

The case-by-case approach to the RTD, and its close links to international cooperation, does not reduce it to a “right to international cooperation.” The RTD addresses first and foremost the national environment where states, according to article 8 of the Declaration, should undertake

all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to

3 Arjun Sengupta, Third Report of the Independent Expert on the Right to Development, E/CN.4/2001/WG.18/2 para. 5.

4 According to Professor Sengupta “feasibility in principle does not automatically lead to actual realization. Realization would depend on the agreement of all the duty holders to work together according to a program and some binding procedures to make that agreement honored. Legislation that converts a “valid” right into a “legal” right is one such procedure, but it need not be the only one. There are many other ways of making an agreement binding among different duty holders. This is particularly true if the duty holders are different States Parties and the imperfect obligations cannot be reduced to legal obligations. Even if a right cannot be legislated, it can still be realized if an agreed procedure for its realization can be established. In other words, such an agreed procedure, which can be legally, morally or by social convention binding on all the parties, would be necessary to realize a valid right, that is, a right that is feasible to realize through interaction between the holders of the right and of the obligations.” Arjun Sengupta, Report of the independent expert on the RTD pursuant to CHR resolution 2000/5, 17 August 2000, para. 9.

basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure the women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

States do not always need international cooperation to assume such obligations, as well as those stipulated by article 6 of the RTD declaration, which states that “States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.”

Functional definitions of the RTD as the right to a “particular process of development” or, as I see it, the right to “an environment free from structural obstacles to the enjoyment of all human rights and to development” are clearly not incompatible. These two formulations address a challenge which is more of intellectual nature than a properly legal one. The challenge is how to translate an abstract declaration of principles into concrete suggestions to be understood and implemented by development practitioners. Such functional definitions show that the RTD is an ongoing process, a permanent work in progress, a continuous effort to monitor developments that impact negatively on the core principles enumerated by the 1986 declaration, a commitment to eradicate such obstacles (which is the primary responsibility of every state within its own boundaries), and a duty to cooperate at the international level to achieve the same objectives.

Institutional mechanisms as a positive factor in operationalizing the RTD and providing conceptual clarity and rigor

The RTD by its nature is a holistic, comprehensive and multifaceted right and one of its particularities has been the obvious weakness of enforcement mechanisms. This raised the specter of the potential for the operationalization of RTD. After all it is

hard to conceive a direct implementation of the RTD viewed as a set of general principles embodied in the Declaration, without prior negotiations based on the specific merits in question. If such principles seem ambiguous, “*ambiguity of obligation, however, whether in law or in ethics, does not indicate that there are no obligations at all and that one simply need not bother.*”⁵ With respect to the RTD, “*what is demanded is nothing like an automatic agreement on some pre-determined formula, but a commitment to participate in a process, which includes an exercise of social ethics, within each country and across borders.*”⁶

This intermediary phase of implementation is reflected in paragraph 44 of the agreed conclusions of the 6th Session of the Working Group on the RTD which addressed this question in its proper perspective and right sequence by stating that “*mutual commitments, as part of the duty of international cooperation, can lead to specific binding arrangements between cooperating partners to meet the right to development requirements. Such arrangements can only be defined and agreed upon through genuine negotiations.*” That case by case, progressive and sectorial approach to international cooperation reveals the potential contributions and flexibility of a right to development framework in concrete terms adapted to different situations.

Experience has shown that early attempts to “push” the RTD from the sphere of general principles to the concrete implementation level were still premature. The challenge of bringing the RTD abstract concepts all the way down to development practitioners have always seemed to be almost insurmountable. Two main phases can be distinguished in this respect. Prior to CHR resolution 1989/46 of 6 March 1989 the UN efforts to address the RTD were of an exploratory nature and could hardly stimulate genuine negotiations. It was a phase of contradictory claims and general opposing assertions. Successive RTD agendas were characterized by their too wide scope which in fact did not allow the debates to be focused on specific areas.

The Commission on Human Rights (CHR) resolution 1998/72 was the starting point for a new

5 Amartya Sen, op-cit, p. 7.

6 Amartya Sen, op-cit, p. 7.

phase which took shape progressively towards the realization of the RTD and set up the institutional mechanisms which have triggered and made the operationalization of RTD a concrete possibility. This resolution created a follow up mechanism for an initial period of 3 years consisting of a governmental open-ended working group mandated to review progress in the promotion and implementation of the RTD at the national and international levels and to formulate recommendations in this respect. This resolution introduced two elements of great importance from a methodological and, subsequently, substantive points of view. The first was that this new mechanism should operate *“focusing each year on specific commitments of the Declaration.”* The second major addition enhancing the specificity of this follow-up mechanism and its capacity to stimulate focused and fruitful debates was the appointment of an independent expert *“with a mandate to present to the Working Group at each of its sessions a study on the current state of progress in the implementation of the RTD as a basis for a focused discussion, taking into account, inter alia, the deliberations and suggestions of the Working Group.”* The Working Group naturally continued to act as a political body in the sense that its debates related more to political inclinations than to the technical merits of the issues under consideration. Nevertheless, the independent expert was successful in providing substantive reports that tried to bridge gaps between the abstract notions of the 1986 RTD declaration and the realities on the ground.

The fifth session of the Working Group on the Right to development, held in Geneva in February 2004 witnessed the emergence of a new approach to the realization of the right, which has added value to the institutional mechanism of the Working Group in place. In his statement to the third committee of the General Assembly in 22 October 2004, the chairperson of the Working Group enumerated the methodological features of this new approach as follows:

to avoid legal definitions and conceptual controversies; to accommodate the progressive nature of

the realization of RTD; to divide the problems of RTD into smaller sections and address them separately, progressively and consensually; to resort to technical expertise as a tool to study those sections; to encourage a bottom-up approach; to rely on ground experiences and to involve developmental institutions, NGOs and the civil society in a more structural manner to the process of realization of the RTD.

The Commission on Human Rights (CHR) vide its resolution 2004/7 endorsed the agreed conclusions and recommendations adopted by the Working Group on the Right to Development at its fifth session, especially the recommendation to establish a High-Level Task Force on the implementation of the RTD within the framework of the Working Group with a view to help fulfill its mandate. The Task Force was composed of high-level representatives from the identified trade, finance and development institutions/organizations, in addition to five experts from diverse backgrounds with practical experience related to the implementation of the RTD. The UN High-level Task Force on the RTD was an innovative approach inspired by lessons of the past attempts to negotiate the realization of the right as well as by its increasingly visible particularities.

The main added value of the Task Force, demonstrated since its first meeting in Geneva in December 2004, consisted of:

- a) Creating a space for a structured dialogue between the human rights community and the real world of trade rules makers and development practitioners. This dialogue produced tangible results. The agreed conclusions of the 6th session of the Working Group emphasized *“the importance of continued partnerships, within the framework of the Working Group, between the Commission Human Rights and United Nations bodies, agencies, funds and Organizations, with a view to benefiting from their experience and expertise in identifying concrete measures to implement the right to development and to mainstream it into their spheres of action, in order to progressively achieve a fuller realization of the right.”*⁷

⁷ E/CN.4/2005/25, para.35.

- b) Addressing the discrepancies in vocabulary which sometimes hide divergent concepts and approaches towards the links between development, trade and human rights. In this context, the Working Group “*encourages all stakeholders – Member States, experts, development practitioners, international institutions and the civil society – to move towards a common understanding of the substantive components of the right to development regardless of the possible nuances in the use of terminology in the discussions on the right to development. The Working Group considers that such nuances have no bearing on the right to development as embodied in the Declaration on the Right to Development.*”⁸
- c) Studying a limited number of issues which allowed the most focused discussion related to the RTD since the Working Group was established in 1998. The Working Group on the RTD in its 6th session adopted this methodology for future work as well, “*The Working Group, recognizing that many issues have been raised and proposed for the future follow-up work on the right to development, decides to prepare a list of issues to guide its future work. The Working Group believes that such an approach is important to retain a focus in the task force in order to make progress in specific areas relevant to the implementation of the right to development.*”⁹

This shift to more focused issues in recent Working Group sessions resulted in a discussion on MDG 8, on global partnerships for development. Following the task force’s recommendations at its second session (14–18 November 2005), the Working Group adopted a set of criteria for periodic evaluation of global development partnerships from the perspective of the RTD, at its seventh session in January 2006.¹⁰ It also recommended that these criteria be applied, on a pilot-basis, to selected partnerships, aiming to operationalize and develop them progressively, thus contributing to mainstreaming the RTD in the policies and operational activities of relevant actors at the national, regional

and international levels, including multilateral, financial, trade and development institutions. The adoption of criteria for the implementation of the right is a clear cut illustration of how far the debate has come. From conceptual debates to a set of criteria aimed at concrete implementation, the ground has considerably shifted from the political to the practical.

The positive momentum generated by the adoption of the criteria has continued, with the task force focusing on the pilot application of the criteria in its third session (January 2007). The criteria were applied to three selected development partnerships including the African Peer Review Mechanism, the ECA/OECD-DAC Mutual Review of Development Effectiveness in the context of NEPAD, and the Paris Declaration on Aid Effectiveness. At its eighth session (26 February – 2 March 2007), the Working Group considered the report of the task force, and adopted its conclusions and recommendations by consensus, which included further implementation, application to additional partnerships and continuing dialogue with partner institutions.¹¹ A key aspect of this ongoing implementation is the progressive development and refinement of the criteria through lessons learned from their pilot application in different global partnerships. The recommendations were divided into a three phase roadmap covering 2007–2009. This was also hailed as a significant step leading to their endorsement by the Human Rights Council at its fourth session in April 2007. Specifically, the Council decided to:

*Endorse the road map outlined in paragraphs 52 to 54 of the report of the eighth session of the Working Group, which would ensure that the criteria for the periodic evaluation of global partnerships, as identified in MDG 8, prepared by the high-level task force and being progressively developed and refined by the Working Group, is extended to other components of Millennium Development Goal 8, by no later than 2009.*¹²

8 Ibid, para. 38.

9 Ibid, para. 55.

10 Ibrahim Salama, Report of the Working Group on the Right to Development on its 7th session, UN Doc. E/CN.4/2006/26 (2006), para. 67.

11 Ibrahim Salama, Report of the Working Group on the Right to Development on its 8th session, UN Doc. A/HRC/4/47(2007), para. 47.

12 Human Rights Council Resolution 4/4, (2007).

The new approach to the RTD that the CHR endorsed in its 60th session in 2004, namely the establishment of a High-level Task Force within the framework of the Working Group, is the main factor which stimulated collective thinking, focused debates and conceptual clarity of the RTD on many fundamental points of legitimate concern for both developed and developing countries. The potential implications of the RTD indeed raise legitimate concerns at both sides of the international political spectrum. The very notion of a “right to” creates a profound doubt that an “ambiguously claimed and ill-drafted” RTD may be nothing more than a rhetorical exercise designed to score political points and distort the human rights notions and agenda by shifting its focus from state’s obligations towards its citizens to state’s obligations towards other states. The RTD could also be seen as an antithesis of free market economy and a “natural ally” of a certain concept of social justice. Even if we sideline ideological perceptions, many western countries have an understandable concern that the RTD becomes a valid basis for countries of the South to claim direct specific entitlements to which their partners from the North did not subscribe.

Although the recent sessions of the Working Group avoided conceptual debates, both the letter and spirit of its agreed conclusions and recommendations based on the reports of the Task Force clearly indicate that the RTD is not a right to assistance, not a license to claim the fruit of the work of others or share their wealth, not a negation of the voluntary basis of international commitments and not a romantic remnant of a certain idea of social justice. The agreed conclusions and recommendations also excluded that the RTD would be seen as a simple addition of all human rights, synonymous with the rights based approach to development, an act of charity, a wishful thinking, or merely an impossible mission.

The role of the Working Group as a follow-up mechanism is, inter alia, to send credible thought-

ful messages from a human rights perspective to the trade and development community. The Working Group recognized in this respect that some of its recommendations

*relate to the activities of other international organizations and, therefore, agrees that its role, as a part of its mandate as a follow-up mechanism to contribute to making further progress towards the realization of the right to development, is to draw the attention of those organizations to the importance of including the right to development perspective.*¹³

This role, if continued on a technically sound basis in a coherent, consensual and consistent manner, can ensure incremental progress in the mainstreaming of the RTD.

The roadmap agreed to in the eighth session of the Working Group on RTD exemplifies this approach of encouraging dialogue with trade and development institutions. The continuing effort of the task force constitutes a real opportunity for the Working Group to keep the RTD on a technically sound track, which is a prerequisite for the success of the new approach to its realization. The continuation of these innovative institutional mechanisms of the Working Group and the task force requires political support, including through dialogue with institutions involved in the implementation of selected global partnerships. It is through this dialogue that the Working Group expects the task force to further refine the evaluation criteria of these partnerships from the perspective of the right to development.¹⁴

Overcoming obstacles to the RTD

Contrary to the general perception, it is not obvious that the main obstacle to the realization of the RTD is a predominantly political one. The principal problem is also related to the lack of conceptual clarity. The two major obstacles in this respect are the weakness of innovative conceptual thinking

13 Ibrahim Salama, Report of the Working Group on the Right to Development on its sixth session, UN Doc. E/CN.4/2005/25 (2005), para. 54. The same paragraph formulated recommendations concerning debt burden for developing countries and its impact on the achievement of the Millennium Development Goals, financial assistance, ODAs, special and differential treatment and the impact assessment of trade agreements and policies on the RTD.

14 Ibrahim Salama, Report of the Working Group on the Right to Development on its 8th session, UN Doc. A/HRC/4/47(2007), para.55.

on the RTD within both development literature and human rights literature. The second major deficiency is almost the total lack of empirical knowledge on the matter. These two points explain that despite their rhetoric of human rights, partnership agreements, including those concluded among developing countries, such as NEPAD, do not invoke the RTD. The same applies to United Nations Development Assistance Framework UN-DAFs, Common Country Assessments (CCAs) and Poverty Reduction Strategy Papers (PRSPs).

It is also striking to note the growing convergences between the RTD and the outcome of numerous UN conferences such as Beijing+5, Copenhagen+5 and the Monterrey consensus on Financing Development. The fact that explicit reference to the RTD was avoided in all these related areas of international cooperation is indeed quite significant and it is far from being an accidental omission. It rather indicates that the RTD framework is not yet an understandable convincing operational tool for development policies. The aim should be to discover a genuine common understanding, a shared workable vision of the RTD in practice. This situation indicates that the realization of the RTD cannot be achieved by the human rights community alone but requires taking stock of where human rights feature within the programs of various agencies and find synergies that can be tapped for further action.

The lack of reference to the RTD in relevant UN forums and beyond also indicates that the human rights community, including at the individual states level, has not yet been sufficiently associated, if at all associated, with the preparatory stages of policy-making and standard-setting exercises in the areas related to the RTD. A fundamental reason explains this situation: the negotiations on the RTD should achieve a sustainable level of maturation and productivity providing states with concrete credible results to rely on, individually and collectively, to mainstream the RTD into their policies, norms and decision making process in all related fields. The same reason explains the relative lack of visibility of the tireless efforts by the OHCHR in relation to the RTD.

The added value of such analysis of the nature of the obstacles to the realization of the RTD is es-

entially to determine the priorities and methods of the Working Group on the RTD. The new approach, adopted during the recent sessions of the Working Group, which culminated in the adoption, application, and refinement of RTD criteria, is precisely the beginning of a structured transparent and inclusive process which needs the support of all governments and a more active involvement of the civil society and academic circles in order to implement the present roadmap that if pursued bodes well for the future of the RTD.

Ultimately, the objective of any new approach to the RTD should be to move it from generalities to specifics, from rhetoric to action and from Geneva to the field. The success of the new approach to the RTD, even with the highest possible degree of both conceptual clarity and political commitment, is unachievable without empirical evidence, impact assessment, public awareness, and involvement of development practitioners at all levels on the ground. The added value of the RTD as a concept to clarify the development process can only be established through structured and continued dialogue among all stakeholders, so as to bridge the various perspectives and propose operational models for furthering its implementation.

Towards a Right to Development Convention?

If there is one issue which has driven and divided camps in the RTD debate, it is the issue of whether a legally binding standard on RTD can be attained and the calls for treaty obligations to be laid down in a convention. Member States have traditionally been divided into three distinct political groupings, in respect of the RTD and this issue. First, the Like-Minded Groups/Non-Aligned Movement (G-77 countries & China) represents the most active and vocal front in support of an aggressive programme for the advancement of the RTD, and deserving of a separate legally binding instrument. The European Union and Associated (Eastern European) States occupy a generally constructive “middle ground,” advocating an approach that sees the RTD as a right like other rights, balancing national and international obligations, and encouraging partnership approaches in development cooperation

towards the realization of the RTD. Countries including Japan, the U.S., Canada, Australia and New Zealand largely oppose conceptions of the RTD as a collective right and resist any emphasis of associated international obligations connected to the RTD.

The history of political negotiations have fragmented many human rights notions and led to artificial distinctions among certain human rights norms and the instruments outlining them. The indivisibility and interrelatedness of all human rights requires that the RTD be treated like all other human rights norms: if other norms can be codified in not just 'soft law,' which is seen as non binding or as non enforceable, then so can the RTD. This equal emphasis on the RTD along with other rights notwithstanding, the obstacle to a convention is possibly less political than what might be the conclusion from the views of political groupings as noted above. It has more to do with conceptualizing what a legal binding standard would entail, what legal form it would take and deciding on and clarifying its content. However, there is no glossing over the point that there are definitely 'political' lightning rods in this issue, especially on the notion of collective/state versus individual rights, and on setting out specific international obligations.

The work of the high-level task force has proven crucial in this regard as it has contributed to keeping the Working Group's focus on the concrete and practical, by exploring specific themes such as MDG 8 and allowing the building of political consensus even if the larger political debates might loom in the background. These changes have been spurred by a shift of focus from the conceptual to the practical and from abstract discussions to concrete issues. In effect, changes such as the adoption of the RTD criteria have allowed for the discussion on a possible convention or other legally binding form for the RTD to be allowed to ripen and mature before taking premature or hasty action in that regard.

Following through with the RTD criteria in terms of its development, refinement and applica-

tion, allows the Working Group and governments to articulate norms and standards in potential treaty obligations, or other legally binding form, after careful consideration of lessons learned and reviewing progress. It also allows the Working Group to take stock of what RTD operationalization looks like, to consolidate best practices, create synergies with processes that embody RTD principles without necessarily avowing to it, and, importantly, to bring on board non state actors including trade and development institutions, who, along with states, are necessary to take the RTD forward in a constructive and meaningful manner.

The Working Group seems to have embraced this approach in its eighth session in 2007, where there was contestation over the call for a legally binding standard. The Working Group opted for a pragmatic approach towards the issue and agreed that the

...ongoing work of the task force constitutes a process of progressively identifying and refining right-to-development standards. The experience gained from further work of the task force in applying, refining and developing the criteria would be conducive to the elaboration and implementation of a comprehensive and coherent set of standards. These standards could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement.¹⁵

Changing dynamics of the RTD

The RTD process overlaps with a number of core concerns at the heart of trade, globalization and global governance issues. The RTD framework is among the most useful tools to achieve coherence through intensive interaction between various actors and sets of norms and policies. This should be done in an inclusive, collective, transparent and cooperative manner.

¹⁵ Ibid., para. 52.

The realities of today's world, namely the growing interdependence among different nations in many fields, should temper the classical North-South divide and reduce the traditionally categorical conflict of interest in areas related to the RTD in its different applications. The consequences of lacking the national environments conducive to the realization of the RTD can affect international relations in variable forms such as illegal immigration, organized crime, terrorism and can even constitute threats to international peace and security. Hence the growing joint interest of North and South to genuinely cooperate to achieve equitable and sustainable development all over the world.

Globalization accelerates the interaction between all those factors and actors, including non-State actors. This makes the RTD a much more complex ground in an increasingly multi-actor world, not only internationally but even within states. The positive side of this rather challenging reality for the future of the RTD is simply that securing globalization objectively requires the realization of the RTD.

At both national and international levels we can also identify many policies and programmes which do not deviate much, if at all, from a RTD framework with the sole exception of that title, and with it all the moral weight of the concept of human rights, as well as the monitoring of its follow-up mechanisms. In fact many applications of the RTD emerged out of necessity and progressively took shape at both national and international levels, such as the French initiative UNITAID, launched on September 29th 2006 in the UN General Assembly by President Chirac, the NEPAD initiative and the Cotonou agreement between the EU and ACP, without "labeling" them as RTD applications.

Conclusion

In light of the preceding analysis of the evolution of the RTD, the question then becomes: can this right survive its institutional weaknesses and substantive complexities as they stand today? This article answers that in the affirmative. The RTD has begun to gain credibility through a cumulative process of application, especially applying the adopted RTD criteria to global partnerships for development.¹⁶ Partners in trade and development institutions play an increasingly positive role in the sessions of the Task Force and in the implementation phase beyond. This has been made possible by engaging in constructive dialogue and not using a 'scorecard' approach to their activities, allowing the possibility of incremental change in their programmes, policies and activities on the ground.

The RTD is a holistic human right of a particular nature, added value and increasing relevance. It is the only "box" in human rights that one can hardly "think outside." Almost every development in policies, programs strategies and norms at both national and international levels has an impact, positively or negatively, on the RTD. In the criteria adopted, the principles that have been identified as being critical to this process include accountability, transparency, non-discrimination, equity and participation as well as the rule of law and good governance at all levels. In addition, there are at least two other aspects that are central in both the conceptualization and the operationalization of the RTD and the policy framework that it supports. The first is the emphasis on the notion of indivisibility of human rights – civil and political, as well as the economic, social and cultural rights – and the second is the importance of international cooperation in the implementation of the RTD.

The past four sessions of the Working Group on the RTD have adopted a new, innovative and

¹⁶ Kirchmeier, Lüke, Kalla, *Towards the Implementation of the Right to Development – Field-testing and fine-tuning the UN Criteria on the Right to Development in the Kenyan-German Partnership* (Geneva/Eschborn: Friedrich-Ebert-Stiftung and Gesellschaft für Technische Zusammenarbeit, 2007).

dynamic approach to the RTD. This approach has made the RTD more technically challenging and politically less divisive. At least the spirit of the debates and the voting patterns during the past four years suggest a net amelioration. Yet, this positive development is fragile. Its sustainability depends on the behavior of all relevant actors. It requires hard work, creative thinking, good faith and political commitment. It requires in particular a more active role by academic and non-governmental circles to shape a viable and constructive road-map for the RTD.

The “operational theatre” of the RTD is much more multi-actor than that of all other human rights. The degree of sophistication of the required “institutional engineering” is therefore much higher than any other cross-cutting issue on the multilateral agenda. To stimulate such new thinking we need to overcome the “historical legacy” of deliberately and artificially fragmented human rights notions. We need to rediscover the RTD as a guarantor of the indivisibility of all human rights and a tool of reconciliation between artificially dislocated sets of norms, within and even beyond the human rights arena. Such historical reconciliation requires coherence of states’ policies and obligations which would enhance the indivisibility and universality of all human rights. The very essence of the RTD is simple, comprehensive and clear: it is the right to a national and international environment that enables or at least does not hinder the enjoyment by individuals and peoples of their basic human rights and fundamental freedoms, an environment that is free from structural and unfair obstacles to development.

The institutional mechanisms of the Working Group and the Task Force which assists its mandate have taken serious steps in this direction, embracing the holistic nature of the RTD, with due respect to the specificities of its sectors of application and the institutional engineering and creativity which are required for its implementation.

Some scholars refute the assumption that the RTD only generates “imperfect obligations” and consider that the existing monitoring mechanisms for human rights treaties could use the provisions of these treaties as valid grounds for potential claims related to the RTD.¹⁷ However, it is clear that “*due to the underdeveloped acceptance of international complaint procedures for economic and social rights, the dimensions of the right to development related to these rights have had less opportunity to develop under existing mechanisms than certain other dimensions.*”¹⁸ One of the main gaps in the legislation framework that weakens the capacity of treaty bodies to address the RTD is undoubtedly the absence of a complaint procedure for economic, social and cultural rights. It is therefore promising to note that the intergovernmental working group on the elaboration of an optional protocol to the CESCR concluded successfully its work in April 2008. If the Human Rights Council endorses the outcome of the working group, a new horizon will be widely open for the indivisible and interrelated implementation of all human rights, including the RTD.

17 Martin Scheinin, “Advocating the Right to Development Through Complaint Procedures Under Human Rights Treaties,” in Bård Andreassen and Stephen P. Marks (eds.), *Development As a Human Right*, (Cambridge, MA: distributed by Harvard University Press, 2006), p. 274.

18 *Ibid.*, p. 283.

Chapter 13: Many roads lead to Rome. How to arrive at a legally binding instrument on the right to development?

Nico Schrijver*

Wide agreement exists on the need to strengthen the implementation of the right to development (RTD). While the UN High-level Task Force on the Right to Development has focused on the practical methods through which current partnerships between developed and developing countries, as well as between developing countries, have given flesh and blood to the RTD in practice,¹ the UN General Assembly decided – in a deeply split vote of 135 to 53 – that “a legal standard of a binding nature” on this right should be developed.² The discussion on this is generally known as the discussion on the pros and cons of the elaboration of a convention on the RTD as a new human rights treaty.

The purpose of this contribution is to argue that a UN treaty on the RTD is not the only way to achieve the goal of a legally binding instrument. In principle, a variety of legal techniques of international law exist to serve the same goal.² The following summary can merely indicate these techniques without entering into detail on them. The range of options includes:

I. Consolidating, updating and enhancing the status of the 1986 Declaration.

It is gratifying to note that the 1986 Declaration on the Right to Development enjoys considerable support in the UN, as became especially evident

during the 1993 Vienna World Conference on Human Rights. Moreover, the Declaration is perceived as a living document which is capable of responding to and incorporating major strategic priorities of poverty reduction, good governance, and sustainability, as defined in the global conferences and summits and resulting strategy documents, including the Millennium Development Goals. The examples of the Universal Declaration of Human Rights (1948), the Decolonization Declaration (1960), the Declaration on Principles of International Law (1970), the Millennium Declaration, and the MDGs demonstrate that declarations can have considerable legal effect beyond their formally non-binding legal status and can at times be a more effective technique in generating consensus, and subsequently compliance, than the instrument of a formal treaty.

2. Reviewing the Declaration at its 25th anniversary.

The 25th anniversary of the UN Declaration in 2011 may provide an appropriate occasion to review and appraise the document and to adopt a meaningful follow-up Declaration. This would provide an opportunity to specify who are the right-holders and who are the duty bearers and to indicate remedies. Special reference could be made to the solutions available under widely ratified

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1 See Report of the high-level task force on the implementation of the right to development on its fourth session, UN Doc. A/HRC/8/WG.2/TF/2, January 31, 2008.

2 See General Assembly Resolution 62/161, adopted on December 18, 2007.

3 It is to be noted that paragraph 2 (d) of Human Rights Council Resolution 4/4 (2007) refers to “a collaborative process of engagement,” “guidelines,” and a “legal standard of a binding nature.”

human rights mechanisms, such as those under the Covenant of Economic, Social and Cultural Rights (soon supplemented with a Optional Protocol providing for an individual right of complaint), the Covenant of Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.

3. Preparing new instruments in the form of Guidelines or Recommendations.

Based on a review of best practices for implementing the 1986 Declaration as currently undertaken by the High-level Task Force, the Working Group and subsequently the Human Rights Council could adopt guidelines or recommendations on how individual states and other relevant actors, such as international and non-governmental organizations, could contribute to the implementation of the RTD. Furthermore, recommendations could be drafted on how business entities could mainstream human rights approaches to development in their self-regulatory codes. The use of guidelines and recommendations is a frequently applied technique in international law, as exemplified by the practices of the OECD in the field of the regulation of foreign investment and the ILO in the field of labor norms.

4. Enhancing the institutional status of the right to development within the UN system.

Currently, the RTD is addressed in a variety of organs and none of them is particularly in the lead. The Third Committee of the UNGA tends to pay considerable attention to it. The Working Group on the Right to Development and its High-level Task Force operate under the auspices of the Human Rights Council. Furthermore, the various human rights treaty bodies also touch on the RTD, both in concrete cases and in General Comments. One may well consider the upgrading of the Working Group to a standing commission, establishing a fund (compare the example of the Global Fund to Fight

AIDS, Tuberculosis and Malaria), and mainstreaming concerns around the RTD into the Universal Periodic Review of the Human Rights Council, in due course, as complementary ways to enhance the status of the right within the UN system.

5. Concluding Development Compacts

Increasingly, development treaties between developed and developing countries, or multi-stakeholders agreements involving international organizations, enterprises, commercial banks, and civil society organizations, are being concluded. Some of them contain references to human rights in their development-related provisions. Such legal instruments could usefully incorporate best practices and guidelines and recommendations based on such practices. This may well be a relevant complementary method of implementing the RTD and enhancing its status.

6. Mainstreaming the Declaration into regional and interregional agreements.

Similarly, treaties concluded in the context of regional associations (AU, EU, ASEAN, NAFTA, Mercosur) and interregional agreements, such as the ACP-EU Partnership Agreement (Cotonou Convention), could refer to the RTD and incorporate the core of its contents as well as best practices and thereupon based guidelines and recommendations. A number of multilateral treaties already contain explicit or implicit references to the key dimensions of the RTD, especially in the areas of development, human rights, the environment and trade.

7. Drafting a new human rights treaty on the right to development.

Finally, as discussed already at some length in the context of the Third Committee of the UN General Assembly, a new human rights treaty could be drafted, either a specific RTD treaty or a general framework one, to be followed up by one or more

specific protocols or a set of guidelines for implementation. This method has often been employed, including in areas which in the view of many states were not yet sufficiently crystallized so as to lend themselves for codification. However, the treaty instrument has often been employed to foster the progressive development of international law, including in the field of human rights, labor norms and environmental protection. Furthermore, the potential of a treaty to raise awareness, stimulate national legislation, and promote action at national and regional levels is not to be underestimated.

In sum, a variety of legal techniques exists to contribute to enhancing the status of the RTD in international law and politics. Some of them may be employed simultaneously, some successively. Obviously, the feasibility of a treaty regime has also to be assessed in terms of ratification and

follow-up procedures. In considering these alternative options, it is best to follow a step-by-step approach to the implementation of the RTD, beginning with the phases approved by the Working Group on the Right to Development and the Human Rights Council and gauging at each step whether it is advisable to move to a new form of legal instrument. Each state should also emphasize the mutual responsibilities of states to move from political aspirations to practical applications. It may well be that it is wise policy to give priority to the implementation of the RTD through a process of establishing, refining, and applying guidelines as requested by the Human Rights Council and currently undertaken by the High-level Task Force rather than hastily embarking on a treaty-making process.

Concluding Statement of the Expert Meeting on legal perspectives involved in implementing the right to development

Château de Bossey, Switzerland, 4–6 January 2008

We, twenty-four experts, coming from all continents and acting in our personal capacity, met near Geneva on 4–6 January 2008 to exchange views on the legal issues involved in improving the implementation of the right to development, including the problems and prospects of a legal standard of a binding nature on this right. Our meeting was not premised on any political preference for or against the elaboration of a convention but sought to provide clarity regarding the legal problems to be addressed in furthering efforts to move the right to development from political aspiration to development practice. The specific context of the meeting was the implementation, by the United Nations High Level Task Force on the Right to Development, of its mandate in light of Human Rights Council in its resolution 4/4, adopted on 30 March 2007, by consensus, and General Assembly resolution 62/161, adopted on 18 December 2007 by a vote of 135 to 53.

While we were acutely aware of the political context and the support of many countries for a UN treaty on the right to development, our deliberations focused on the merits and problems of various techniques of international law independently of the current political climate. The following summary can only highlight the themes discussed and cannot do justice to the thorough and innovative presentations and the insightful and constructive discussion, which we hope will be made available in the published proceedings of the workshop.

Under the first theme on *the right to development as a legal norm*, we considered the nature and scope of the right to development in international law. We agreed that the right to development, like the right to self-determination, had both an ex-

ternal and an internal dimension, the former referring to the obligations to contribute to rectifying the disparities and injustices of the international political economy and to reduce resource constraints on developing countries, while the latter referred to the duty of each country to ensure that its development policy is one in which all human rights and fundamental freedoms can be fully realized, as required by the Declaration on the Right to Development of 1986. The content of the legal norm of the right to development has evolved since 1986 to incorporate major strategic priorities of poverty reduction, good governance and sustainability, as defined in the global conferences and summits and resulting strategy documents, including the Millennium Development Goals.

We then addressed the *normative content of a treaty as opposed to a declaration on the right to development* and specifically how a treaty would differ from the Declaration of 1986. We noted that there was a vast grey area between “soft law” and “hard law” and that the shift from the first to the second was contingent on the clarity of the obligations to be assumed by the parties, the degree of political consensus on the need for a treaty, and the feasibility of a treaty regime in terms of ratification and follow-up procedures.

We compared the potential for a treaty on the right to development with the experience in drafting the Convention on the Rights of Persons with Disabilities (CRPD) and noted similarity in terms of the integration of rights of various categories, the enhanced status of the subject of the rights involved, and the potential of a treaty to raise awareness, stimulate legislation and promote national action. The CRPD also contains certain innovations, which might be relevant to an even-

tual right to development instrument, such as the capacity of a treaty monitoring body to receive collective complaints, to draw upon the expertise and inputs of NGOs and UN bodies, and to conduct proactive inquiries; the requirement that technical assistance and development and humanitarian aid be in conformity with the treaty; and the opening to accession by regional international organizations. However, the transition from a declaration to a treaty took 30 years in the less controversial case of the CRPD. Therefore, we felt that more time was needed before the conditions could be met for a successful treaty-drafting process on the right to development, so that a better understanding could be acquired of the appropriate institutional setting for effective implementation and financial implications could be worked out. However desirable an eventual treaty might be, we considered it preferable to give priority to the implementation of the right to development through a process of establishing, refining and applying guidelines as requested by the Human Rights Council.

We considered alternatives to a treaty, such as a compact for development involving both human rights and trade cooperation, multi-stakeholder international agreement, and other ideas without reaching any definitive conclusion on them. Further it was noted that a non-binding document, such as the Universal Declaration of Human Rights, the Millennium Declaration and MDGs or the Declaration on the Right to Development itself can sometimes be more effective in generating compliance than a formal treaty. We also explored the advantages and disadvantages of various options for a global mechanism, inside or outside the UN, along the lines of the Global Fund to Fight AIDS, Tuberculosis and Malaria. The emergence of related customary norms of international law was also seen as a form of entrenchment of the right to development in international law.

The second theme we addressed was the *experience with existing treaty norms relating to the right to development*. These relate both to *substantive treaty regimes and regional cooperation treaties* containing explicit or implicit references to the right to development. Numerous treaties were mentioned in the areas of development, the environ-

ment, trade and indeed human rights, which covered key dimensions of the right to development but without covering the shared responsibilities and multiplicity of duty-holders implied by the right to development. Regarding regional treaties, we examined the content and case law of Article 22 of the African Charter on Human and Peoples' Rights, Article 19 of the Protocol on the Rights of Women in Africa, as well as the experience with Article 17 and Chapter VII of the revised OAS Charter, and considered that the regional experience with implementing the right to development through a treaty had not yet achieved significant results.

Similarly, a concentrated effort would be necessary to ensure that the implementation of Article 37 of the Arab Charter on Human Rights (adopted in 2004 and entered into force March 15, 2008.) and the Charter of the Association of Southeast Asian Nations (adopted in 2007) contributed to the effective implementation of the right to development.

The third theme was the *evolving criteria of the High Level Task Force on the right to development*, and specifically the request of the Human Rights Council in resolution 4/4 that these might eventually be the basis of a binding international instrument. It was recalled that consideration of this eventuality could only occur after the criteria had been applied to the four partnerships currently under review, extended to other areas of MDG 8, expanded into a "comprehensive and coherent set of standards for the implementation of the right to development," and then further evolved as a basis for consideration of treaty norm. If and when these stages were completed, the transformation of the criteria into treaty obligations would have to contend with the fact that they were conceived to apply to "global partnerships" rather than States Parties to a treaty and were based on the issues enumerated in MDG 8 rather than the 1986 Declaration. One feature of the current criteria that would be helpful if they were to serve eventually as a basis for drafting a treaty norm was the fact that they have already evolved to cover obligations relating to a conducive environment, conduct, and results, all of which are relevant to treaty obli-

gations, and that they have been accepted by consensus by Member States.

We then explored national experience with the implementation of the right to development, focusing on South Africa, a case study field-testing the criteria on a Kenyan-German development partnership, and a five-year study on the right to development in the People's Republic of China. These were regarded as examples of the sovereign right of each state to determine its own development path. The right to development requires that the process of development be both democratic and sustainable and involve the empowerment of citizens to seek redress for human rights violations. Further, a peer review mechanism at the regional level is needed to control for good governance, democracy and popular participation, such as the African Peer Review Mechanism, although the APRM model may not work in all regions.

Finally, we examined approaches to complying with paragraph 2 (d) of Human Rights Council Resolution 4/4 and the meaning of "*a collaborative process of engagement*," "*guidelines*," a "*legal standard of a binding nature*" and steps to be taken during the phases of the work plan in 2008–2009. The accomplishments of the task force were noted in terms of valuing impact assessments and social safety nets, enhanced positive engagement of agencies, especially international financial institutions, acceptance of the process of periodic review by the partnerships, linking with the MDGs, involvement of civil society, acceptance of the criteria by the Working Group, and successful pilot testing of their application. The challenges to the task force were assessed, including the political divide between NAM and the EU countries, which can and must be bridged.

It was suggested that the option of a convention should be seen in the context of a range of alternative approaches for meeting the intention

of paragraph 2 (d) of Human Rights Council Resolution 4/4. This range of options includes: (1) consolidating, updating and enhancing the status of the 1986 Declaration; (2) revising the Declaration for adoption on the occasion of the 25th anniversary of its adoption in 2011; (3) preparing new instruments in the form of Guidelines or Recommendations, based on a review of best practices, for implementing the Declaration; (4) enhancing the institutional status of the right to development within the UN system, for example, by upgrading the Working Group to a standing Commission, establishing a Fund, and mainstreaming the right to development into the Universal Periodic Review of the Human Rights Council; (5) concluding Development Compacts between developed and developing countries or multi-stakeholders agreements involving international organizations, enterprises, commercial banks and civil society organizations; (6) mainstreaming the Declaration into regional and interregional agreements, such as treaties concluded in the context of regional associations (AU, EU, ASEAN, NAFTA, Mercosur) and interregional agreements, such as the EU-ACP Partnership Agreement; and (7) finally, drafting a new human rights treaty on the right to development, either a specific right to development treaty or a general framework treaty, to be followed up by one or more specific protocols or a set of guidelines for implementation.

In considering these options, it is best to follow a step-by-step approach to the implementation of the right to development, beginning with the phases approved by the Human Rights Council and gauging at each step whether and how it is advisable to move to a new form of legal instrument, emphasizing at each stage the mutual responsibilities of states to move from political aspirations to practical applications.

6 January 2008

Participant List

Expert Meeting on legal perspectives involved in implementing the right to development

Château de Bossey, Geneva, Switzerland, 4–6 January 2008

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TOPICAL BIBLIOGRAPHY ON LEGAL ISSUES RELATING TO THE RIGHT TO DEVELOPMENT

(Prepared by the Program on Human Rights in Development of the Harvard School of Public Health)

Introduction

This bibliography includes books, law review articles (and, where appropriate, legally-relevant writing in journals in political science, development economics and other fields), commentaries and other documents that deal with the legal nature of the right to development, enforcement, institutional developments, and treaty regimes relating to this right. The full table of contents is provided for selected publications. It has been prepared for the Expert Meeting on legal perspectives involved in implementing on the right to development, held at the Château de Bossey, Bogis-Bossey, Switzerland, on 4–6 January 2008. A “Compilation of selected legal Instruments on the Right to Development”, prepared for the same meeting, is available on www.fes-geneva.org.

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Jakob Kirkemann Hansen & Hans-Otto Sano

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Stephen P. Marks
5. *The Right to Development and Its Corresponding Obligations*
David Beetham
6. *International Human Rights Obligations in Context: Structural Obstacles and the Demands of Social Justice*
Margot E. Salomon
7. *Development and the Human Rights: Responsibilities of Non-State Actors*
Bård A. Andreassen

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Yash Ghai
9. *Making a Difference: Human Rights and Development – Reflecting on the South African Experience*
Sandra Libenberg
10. *Towards Implementing the Right to Development: A Framework for Indicators and Monitoring Methods*
Rajeev Malhotra

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11. *Human Rights-Based Development in the Age of Economic Globalization: Background and Prospects*
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12. *Globalization and the Human Rights Approach to Development*
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