

# Conceptualizing the right to development for the twenty-first century

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## I. The right to development in theory

### A. Definition and content of the right to development

#### 1. The right to development as a human right

There has been considerable debate as to whether the right to development can be regarded as a human right. This issue can now be taken as settled, following the achievement of consensus for the Vienna Declaration and Programme of Action in 1993, which has been reaffirmed at a series of intergovernmental conferences since then. We must distinguish between recognizing the right to development as a human right—which is an undeniable fact—and the creation of legally binding obligations relating to that right—which requires a more nuanced explanation.

Generally, in the human rights literature, to have a right means to have a claim to something of value on other people, institutions, a State or the international community, which in turn have the obligation to provide or help to provide that something of value. “Rights are entitlements that require, in this view, correlated duties. If person A has a right to some x, then there has to be some agency, say B, that has a duty to

provide A with x.”<sup>1</sup> Recognizing a right would necessitate identifying the duty holder who has the obligation to fulfil or enable the fulfilment of the right. Any attempt to justify the use of rights must be preceded by specifying the nature of the valuable elements that are considered as entitlements or rights, and then specifying the agents that have the corresponding duty to bring about the fulfilment of those rights.

In the early history of the human rights movement, this binary matching of rights with duties was understood too inflexibly. Rights would be acceptable only if they were realizable, and that would require matching rights claims with corresponding duties along with identifiable methods of carrying out the obligations by the duty holder.

Over time, this rigid view of rights has given way to a broader understanding of the rights-duty relationship in terms of what Amartya Sen describes as the Kantian view of “perfect” and “imperfect” obligations. Instead of perfectly linking rights to exact duties of identified agents, “the claims are addressed generally to anyone who can help”<sup>2</sup>, and the rights become “norms” of behaviour or action of the agents, such as other individuals, the State or the international community, that can contribute to the fulfilment of those rights. Nevertheless, in order for a claim to be recog-

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<sup>1</sup> Amartya Sen, *Development as Freedom* (New York, Alfred A. Knopf, 1999), p. 228.

<sup>2</sup> *Ibid.*, p. 230.

nized as a right, the feasibility of realizing the right still has to be established. A claim that cannot be realized in a given institutional set-up, however laudable it may be, can be a societal goal, or a “manifesto right” or an “abstract right”; however, it cannot be a right proper, a “valid right” or a “concrete right” related to any practical social arrangement.<sup>3</sup> Even in a world of imperfect obligations, feasibility would still have to be established, at least in principle: how different duty holders, if they operated in a coordinated manner according to a properly designed programme of action, could realize that right, if possible within the existing institutions but if necessary by changing those institutions.

Feasibility in principle does not automatically lead to actual realization. Realization would depend on the agreement of the duty holders to work together according to a programme and some binding procedures to honour the agreement. Legislation that converts an “in-principle-valid” right into a justifiable “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 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 binding legally, morally or by social convention 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.

Human rights set universal standards of achievement and norms of behaviour for all States, civil societies and the international community and impose inviolable obligations on all of them to make those rights achievable. Recognizing the right to development as a human right raises the status of that right to one with universal applicability and inviolability.

<sup>3</sup> “Manifesto rights”, a term used first by Joel Feinberg and later elaborated by others like Rex Martin and Morton E. Winston, are objects of claim as a moral entitlement, or a need requiring social protection; they are “the natural seeds from which rights grow”, but are not yet actual rights, as duty holders are not yet identified, nor are the sources or methods of realization. See Morton E. Winston, ed., *The Philosophy of Human Rights* (Belmont, California, Wadsworth, 1989). Actual rights are valid claims, justified under a system of governing rules and with appropriate procedures for their realization. According to Ronald Dworkin, “abstract rights” are general political aims and concrete rights are “political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions” (Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts, Harvard University Press, 1977), p. 93). Only such concrete rights can spell out the trade-offs with other objectives that would be essential to specify the procedures to realize them.

It also specifies a norm of action for the people, the institution, the State or the international community on which the claim for that right is made.

## 2. Content of the right to development

The content of the right to development can be analysed on the basis of the text of the Declaration on the Right to Development. Article 1, paragraph 1, of the Declaration states: “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.” This article spells out three principles: (a) there is an inalienable human right that is called the right to development; (b) there is a particular process of economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized; and (c) the right to development is a human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy that particular process of development. The first principle affirms the right to development as an inalienable human right and, as such, the right cannot be taken or bargained away. The second principle defines a process of development in terms of the realization of human rights, which are enumerated in the Universal Declaration of Human Rights and other human rights instruments adopted by United Nations and regional bodies. The third principle defines the right to that process of development in terms of claims or entitlements of rights holders, which duty bearers must protect and promote.

Development is defined in the preamble to the Declaration on the Right to 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 therefrom”. The process of development that is recognized as a human right is one “in which all human rights and fundamental freedoms can be fully realized”, consequent to the constant improvement of well-being that is the objective of development. According to article 2, paragraph 3, such a development process would be the aim of national development policies that States have the right and duty to formulate. Article 8 states more specifically that in taking steps to realize the right to

development, States shall ensure “equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income”, and take effective measures to ensure “that women have an active role in the development process”, as well as carrying out “[a]ppropriate economic and social reforms ... with a view to eradicating all social injustices”.

### 3. The right to development as the right to a process of development

Several articles in the Declaration elaborate the point that the right claimed as a human right is the right to a particular process of development. The nature of this process of development is centred around the concept of equity and justice, with the majority of the population, who are currently poor and deprived, having their living standards raised and capacity to improve their position strengthened, leading to the improvement of the well-being of the entire population. The concept of well-being in this context extends well beyond the conventional notions of economic growth to include the expansion of opportunities and capabilities to enjoy those opportunities, captured in the indicators of social and human development, which in turn expand substantive freedoms.

It is important to appreciate the full significance of the point that the right to development implies a process with equity and justice. Any human rights approach to economic and social policy must be constructed on the basis of justice because justice follows from a notion of human dignity and from a social contract, in which all members of civil society are supposed to participate. But not all theories of justice are based on equity. In reading the Universal Declaration, it is clear that equity was one of its fundamental concerns as its first article asserts that all human beings are born free and equal in dignity and rights.<sup>4</sup> Similarly, the Declaration on the Right to Development is founded on the notion that the right to development implies a claim to a social order based on equity.

<sup>4</sup> See also article 2. It is possible to build up a whole structure of relationships with equity on the basis of political and civil rights. But according to article 25 of the Universal Declaration, everyone has a right to an adequate standard of living for health and well-being, including food, clothing, housing, medical care and necessary social services, without mentioning that it should be equitable. Article 8 of the Declaration on the Right to Development, however, states that for the realization of the right to development, States shall ensure “equality of opportunity for all in the access to basic resources, education, health services, food, housing, employment and the fair distribution of income”. This, together with the Declaration’s emphasis on every person being entitled to “participate in, contribute to, and enjoy” the development process where “fundamental freedoms can be fully realized” (art. 1), should be viewed against the preambular statements, in particular, “equality of opportunity for development is a prerogative both of nations and of individuals who make up nations”, to appreciate the central message of equity and justice in the right to development.

Several of its articles call for equality of opportunity, equality of access to resources, equality in the sharing of benefits and fairness of distribution, and equality in the right to participation.

The tenor of the debates that took place at the United Nations prior to the adoption of the Declaration left no one in doubt that what the proponents of the right to development were requesting was an economic and social order based on equity and justice. The “have-nots” of the international economy would have the right to share equally in the decision-making privileges as well as in the distribution of the benefits, just like the rich developed countries. The significance of the North-South divide among the countries in the world economy may have become diluted in the contemporary interdependent world, but the essential spirit of the demand for equity continues to inform all kinds of international cooperation envisaged in the realization of the right to development. Development as a human right as defined in the Declaration has to be firmly rooted in equity within a national economy as well.

The right to development requires that considerations of equity and justice should determine the whole structure of development. For example, poverty has to be reduced by empowering the poor and uplifting the poorest regions. The structure of production has to be adjusted to produce these outcomes through development policy. The aim of the policy should be equity and justice with the minimum adverse impact on other objectives such as the overall growth of output. Any trade-offs, for example that growth will be less than the feasible maximum, will have to be accepted in order to satisfy the concern for equity.

This development process has to be participatory. The decisions will have to be taken with the full involvement of the beneficiaries, keeping in mind that any delays that occur as a result of the consultation process should be minimized. If a group of destitute or deprived people require a minimum standard of well-being, a simple transfer of income through doles or subsidies may not be the right policy. They may instead have to be provided with the opportunity to work or to be self-employed, which may require generating activities that simple reliance on the market forces may not be able to ensure.

The value added of understanding the right to development as the right to a process can first be explained in terms of the evolution of the thinking about development. In earlier years, the basis of

development strategies was maximizing per capita gross national product (GNP), as that would allow the fulfilment of all other objectives of social and human development. This can be best explained by quoting the Nobel laureate W.A. Lewis, who noted that the growth of output per head “gives man greater control over his environment and thereby increases his freedom”.<sup>5</sup> Concerns were expressed that individuals might not automatically increase their “freedoms” unless specific policies were adopted to achieve them. However, social and human development was regarded mostly as the derived objective of development, and almost always as a function of economic growth. Equity was seldom a central concern of these early development policies. For most countries the impact of equity concerns on the nature of development policies was confined to progressive taxation or some supplementary measures promoted by international organizations (e.g., the Basic Needs programmes), which could be added to the usual policies of accelerating economic growth.

The human rights approach to development added a further dimension to development thinking. While the human development approach aims at realizing individuals’ freedoms by making enhancement of their capabilities the goal of development policy, the human rights approach focuses on claims that individuals have on the conduct of the State and other agents to secure their capabilities and freedoms. As the *Human Development Report 2000* put it, “human development thinking focuses on the outcomes of various kinds of social arrangements and many of the tools of that approach measure the outcomes of social arrangements in a way that is not sensitive to how these outcomes were brought about”.<sup>6</sup> Human rights thinking, on the other hand, is primarily concerned with “how” these outcomes are realized, whether the State or other duty holders have fulfilled their obligations and whether the procedures followed are consistent with the rights-based approach to development.

Is there any further value added to the already recognized rights, such as the economic, social, and cultural rights involved in human development, by invoking and exercising the right to development? The question would be legitimate if the right to development were defined merely as the sum total of those rights. Looking at the right to development as a process brings out the value added clearly: it is not merely the

realization of those rights individually, but their realization together in a manner that takes into account their effects on each other, both at a particular time and over a period of time. Similarly, an improvement in the realization of the right to development implies that the realization of some rights has improved while no other right is violated or has deteriorated.

For example, general comment No. 12 (1999) on the right to adequate food adopted by the Committee on Economic, Social and Cultural Rights refers to three levels of obligation in implementing that right: respecting, protecting and fulfilling. That each of them is interrelated with the level of realization of other rights must be taken into account when realization of the right to food is considered as an element of the right to development. For example, it may not be possible to respect or protect the right to food if there is no freedom of information or association. Fulfilling, on the other hand, requires providing people access to adequate food and will depend on the resource base for food, whether for production or for import. The general comment recognizes this (para. 27), but does not go to the extent of stating that this implies looking at the provision of food as a part of a country’s overall development programme, bringing in fiscal, trade and monetary policies and the issues of macroeconomic balance, which the right to development approach does take into account. Similarly, with regard to the right to health, or the right to housing, or even the right to education, fulfilling these rights together would imply augmenting the availability of resources and the proper allocation of existing resources. That would mean changes in overall economic policies so that the increased realization of any one right is achieved without detracting from the enjoyment of the other rights.

There are two obvious implications of looking at the right to development as an integrated process of development of all human rights. First, the realization of all rights, separately or jointly, must be based on comprehensive development programmes using all the resources of output, technology and finance through national and international policies. The realization of human rights is the goal of the programmes, and the resources and policies affecting technology, finance and institutional arrangements are the instruments for achieving that goal. If a rights-based approach to participatory, accountable and decentralized development turns out to be cost-effective, it may be possible to reduce the expenditure of resources in one direction, for example education, and raise it in another, such as health, and thereby register an

<sup>5</sup> W.A. Lewis, *The Theory of Economic Growth* (London, Allen and Unwin, 1955), pp. 9-10, 420-421.

<sup>6</sup> United Nations Development Programme, *Human Development Report 2000: Human Rights and Human Development* (New York, Oxford University Press, 2000), p. 22.

improvement in the realization of both rights. But if these improvements are to be sustained and extended to cover all rights, the resource base of the country must expand to include not only gross domestic product (GDP), but also technology and institutions. In other words, the value added of the concept of the right to development is not just that the realization of each right must be seen and planned as dependent on all other rights, but also that the growth of GDP, technology and institutions must be planned and implemented as part of the right to development. Like the rights to health, education, etc. the growth dimension of the right to development is both an objective and a means. It is an objective because it results in higher per capita consumption and higher living standards; it is instrumental in that it allows for the fulfilment of other development objectives and human rights.

#### 4. Human development and capabilities

The new paradigm of development thinking was also introduced in the human development approach, as built up by the Human Development Reports of the United Nations Development Programme (UNDP) and as articulated by Amartya Sen in his writings on development. In describing the development process, Sen equates expansion of well-being and expansion of “substantial freedoms” and identifies it as the “expansion of capabilities of persons to lead the kind of lives they value or have reasons to value”.<sup>7</sup> These freedoms, as Sen points out, should be seen as both the “primary end” and the “principal means” of development, both in a “constitutive role” and in an “instrumental role”. The freedom to achieve valuable “functionings” is called “capability” and “functionings” are defined as things we value doing or being, such as being in good health, being literate or educated, being able to participate in the life of the community, being free to speak, being free to associate and so on. In that sense, development becomes the expansion of capabilities (i.e., substantial freedoms) that allows people to lead the kind of life they value. Thus, capabilities are also instrumental to the further expansion of other capabilities: being educated and healthy permits them, for example, to enjoy their freedoms. The free agency of people who enjoy civil and political rights is essential for the process.

The right to development builds upon the notion of human development and can be described as the right to human development, which in turn is defined as a development process that expands substantial freedoms and thereby realizes all human rights. How-

ever, when human development is claimed as a human right, it becomes a qualitatively different process: it is not just achieving the objectives of development; the way they are achieved is also important. The objective to fulfil human rights and the process of achieving this objective is also itself a human right, and the process must itself possess the features of all human rights, that is, they must be realized with due regard for equity and participation, they cannot be violated, the respective obligations and responsibilities are clearly specified, and there must be mechanisms for establishing culpability for violations, for monitoring and for redress. Indeed, the right to development approach subsumes the human development approach; it is conducting a process of human development in a manner that adheres to human rights standards.

The right to development thus essentially integrates the human development approach into the human rights-based approach to development. It goes beyond accepting the goals of development in terms of human development and assessing the different forms of social arrangements conducive to achieving the goals of development by converting those goals into rights of individuals and stipulating the responsibility of all the duty holders, in accordance with human rights standards. It aims at the constant improvement of the well-being of the entire population on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom. The concept of well-being here is broader than the concept of “human development”, as it incorporates social, political and cultural processes into the economic process of realizing rights and freedoms. The Human Development Reports have discussed concerns about civil and political rights and democratic freedoms as these often are very important in schemes for enhancing the capabilities of the poor and vulnerable segments of society. But they are rather peripheral to such schemes, which would be better executed if there were greater democracy or broader enjoyment of civil and political rights (although it is not suggested that the schemes would be deemed failures if these rights and freedoms were violated). Conversely, under the right to development approach, fulfilling civil and political rights is as important as fulfilling economic and social rights, not just in their instrumental roles but also in their substantive, constitutive role. A violation of any right is tantamount to a failure to realize the right to development.

This approach, based on the assumption that development is a human right, broadens the human

<sup>7</sup> Sen, *Development as Freedom* (see footnote 1), pp. 24-25.

development approach by making all the human development goals for the provision of the corresponding goods and services rights that belong to individuals. There is further value added where those rights are integrated into the process of realizing the right to development. The realization of all rights together in a manner that takes into account their effects on each other, both at a particular time and over a period of time, in the context of a framework of growth or a development programme, facilitates their realization individually. An improvement in the realization of the right to development in such a programme implies that the realization of some rights has improved while no other right has been violated or has deteriorated.<sup>8</sup>

### 5. Duties and obligations

For the realization of any right, duties must be assigned so as to establish accountability. The Declaration assigns these responsibilities, which need to be analysed in the context of a programme for implementing the right to development.<sup>9</sup>

The national development policies that States have a duty to formulate, according to article 2, paragraph 3, should have two characteristics: (a) they must be participatory (“on the basis of ... active, free and meaningful participation”); and (b) equitable (“the fair distribution of the benefits”). Further, States have the right to adopt these policies, implying that if States acting on their own are unable to formulate and execute those policies in a globalized and interdependent world, they have the right to claim cooperation and help from other States and international agencies. Articles 3 and 4 elaborate on the nature of that international cooperation. Articles 6, 9 and 10 clearly state that the implementation of the right to development involves implementing all civil, political, economic, social, and cultural rights, as they are indivisible and interdependent, and that enhancement of the right to development would imply the adoption and implementation of policies, legislation and other measures at the national and international levels. This means that all of the obligations that the International Covenants on Human Rights impose on States and the international community apply to all measures associated with implementing the right to development.

With respect to the obligation of States operating at the international level, the Declaration is forthright in emphasizing the crucial importance of international cooperation. According to article 3, paragraph 3, “States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development” and should “fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence [and] mutual interest”. Further, article 4 declares quite categorically that States have the duty, individually and collectively, to formulate international development policies to facilitate the realization of the right to development; this should be read in conjunction with the reference in the preamble to the Declaration to the principles of “international cooperation in solving international problems of an economic, social, cultural or humanitarian nature, and ... promoting and encouraging respect for human rights and fundamental freedoms” contained in the Charter of the United Nations, in particular, the pledge “to take joint and separate action in cooperation with the Organization for the achievement of ... (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” (Articles 55 and 56). Because the Charter enjoys special status as the foundation of the present international system, this pledge is a commitment to international cooperation by all States within the United Nations. It was reinforced with respect to ensuring development and eliminating obstacles to development and promoting the realization of the right to development in paragraph 10 of part I of the Vienna Declaration and Programme of Action.

In sum, the Declaration clearly indicates that the primary responsibility for implementing the right to development belongs to States and that the beneficiaries are individuals. The international community has the duty to cooperate to enable States to fulfil that obligation. But the obligation to realize the right to development through international cooperation requires the realization of all, or most, rights in a planned manner in tandem with an appropriately high and sustainable growth of the economy and appropriate changes to its structure. Realizing the right to education or to primary health care in isolation, for example by making changes to the legal

<sup>8</sup> See “Third report of the Independent Expert on the right to development” (E/CN.4/2001/WG.18/2), paras. 12-14, for further details.

<sup>9</sup> The following articles of the Declaration on the Right to Development identify the responsibilities of: individuals (art. 2 (2)) States at the national level (art. 2 (3), art. 3 (1), art. 5, art. 6 (1) and 6 (3), art. 8); States at the international level (art. 3 (1) and 3 (3), art. 4, art. 6 (1), art. 7); and all agents and duty bearers (arts. 9 and 10).

framework and reallocating the resources available within the country, is not the same as implementing a plan of development that includes fundamental institutional changes, which may not be possible for some States without substantial help from or cooperation of the international community.

With regard to the notion of accountability and applying human rights standards in the implementation of human development, the obligations involved are clearly not always “perfect”, in the sense that the non-fulfilment or violation of a right cannot be attributed to a specific duty holder; such is the nature of obligations in the case of justiciable, “legal” rights. The obligations related to the right to development are more in the nature of “imperfect” obligations, with a number of agents, individuals, States and the international community having different kinds of obligations, with no specific agent responsible for its violation. But that does not mean that the right-duty correspondence cannot be established, or that the obligations of the different agents or duty holders cannot be specified. For some of the duty holders—whom Sen describes as “anybody who can help”—the specifications of the obligations may not be exact, but they may still be helpful for securing rights, because if somebody can help they have an obligation to help.<sup>10</sup> But for other duty holders the obligations can be more precisely formulated and imposed. Or some obligations can be formulated in a manner such that accountability for them takes the form of enforceable remedies. Thus, for the right to development, as in the case of economic, social, and cultural rights, not to mention civil and political rights, the rights-duty correspondences, or the obligations of the different parties—and therefore the accountability—can be established.

The editors of a leading human rights textbook enumerate the duties of the State in terms of five obligations: (a) to respect the rights of others; (b) to create institutional machinery essential to the realization of rights; (c) to protect rights and prevent violations; (d) to provide goods and services to satisfy rights; and (e) to promote rights.<sup>11</sup> The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights address the obligations to respect, protect and fulfil, and lay down enforceable remedies (see E/C.12/2000/13). Stephen Marks analyses four categories of obligations, two perfect and two imperfect.<sup>12</sup> In the first category he places the obligations to

respect (i.e., preventing a State agent from denying a right and punishing the agent for acts and omissions) and to protect (i.e., preventing third parties from violating rights). These can be enforced through a judicial process. In the second category are obligations to promote or facilitate (undertaking campaigns or creating an enabling environment) and obligations to fulfil or provide (allocating resources to enable people to enjoy the right) and which are “general commitments to pursue a certain policy or achieve certain results”.<sup>13</sup> These are not justiciable, as “immediate individual remedies through the courts are not normally provided when the State falls short of its responsibilities”, but he still considers them legal obligations because States are required to take steps “in the direction of sound progressive realization” of rights.<sup>14</sup>

The right to development, as mentioned above, involves the realization of all civil, political, economic, social and cultural rights, and therefore all the characteristics of State obligations also apply to its implementation. But in the nature of things, the right to development largely entails obligations to fulfil or to promote and provide, which are in general “imperfect” obligations to elaborate policies or programmes of action wherein all parties, particularly States and the international community, have clear roles to play in helping to realize the right to development. These roles can be translated into obligations with provisions for corrective action and enforceable remedies if the obligations are not fulfilled. Since these policies or programmes involve the action of a number of agents and are vulnerable to exogenous influences and uncertainties, they can be evaluated only in terms of a probability of success, and therefore rights may remain unrealized or unfulfilled. However, these programmes can be designed with a high probability that the right in question will be delivered and with a clear assignment of the roles and obligations of each of the parties concerned.

## B. Controversies regarding the right to development<sup>15</sup>

Most of the arguments presented above regarding the grounding of the right to development are gen-

seven approaches”, *Reflections on the Right to Development*, Arjun K. Sengupta, Archana Negi and Mushumi Basu, eds. (New Delhi, Sage Publications, 2005), pp. 23-60. See also Amartya Sen, “Consequential evaluation and practical reason”, *Journal of Philosophy*, vol. 97, No. 9 (September 2000), p. 478.

<sup>13</sup> Marks, “The human rights framework for development: seven approaches”, p. 45.

<sup>14</sup> *Ibid.*

<sup>15</sup> Most of the arguments in this section are taken from Arjun Sengupta, “The right to development as a human right”, François-Xavier Bagnoud Center for Health and Human Rights, Harvard University, FXB Working Paper No. 7, 2000, available at [www.harvardfxbcenter.org](http://www.harvardfxbcenter.org).

<sup>10</sup> Sen, *Development as Freedom* (see footnote 1), p. 230.

<sup>11</sup> Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed. (Oxford, Oxford University Press, 2008), pp. 185-189.

<sup>12</sup> See Stephen P. Marks, “The human rights framework for development:

erally accepted. Other propositions surrounding this right are the subject of some controversy and need to be addressed before we can explore the practical dimensions of the right.

### 1. Human rights as natural rights

The traditional argument against economic, social and cultural rights, and hence the right to development, has been that they are not human rights because they cannot be identified with natural rights. As Jack Donnelly puts it, in the Universal Declaration, "human rights are clearly and unambiguously conceptualized as being inherent to humans and not as the product of social cooperation. These rights are conceptualized as being universal and held equally by all; that is, as natural rights".<sup>16</sup> In that paradigm, human rights are only personal rights based on negative freedom, such as the rights to life, liberty and free speech, whereby the law prohibits others from killing, imprisoning or silencing an individual who has a claim to freedoms that the State is expected to protect. Economic and social rights are, however, associated with positive freedoms, which the State has to secure and protect through positive action. According to this view they are not natural rights and, therefore, are not human rights. The right to development is seen as a collective right, which is more than just the sum of individual or personal rights, and therefore would not be regarded as a human right.

All these arguments have been substantially repudiated in the literature. The Universal Declaration has many elements that go beyond the principles of natural rights. In fact, it is firmly based on a pluralistic foundation of international law with many elements of economic and social rights, considering an individual's personality as essentially moulded by the community. Indeed, there is no logical reason to see the human rights of a group or a collective (people or nation, ethnic or linguistic group) as being fundamentally different from an individual's human rights, so long as it is possible to define the obligation to fulfil them and for duty holders to secure them. Even

<sup>16</sup> Jack Donnelly, "Human rights as natural rights", *Human Rights Quarterly*, vol. 4, No. 3 (Autumn 1982), p. 401. These issues have been debated extensively in human rights literature. Most of the arguments are well summarized in two articles by Philip Alston, "The right to development at the international level", *The Right to Development at the International Level*, René-Jean Dupuy, ed. (The Hague, The Hague Academy of International Law, 1980), p. 99, and "Making space for new human rights: the case of the right to development", *Harvard Human Rights Yearbook*, vol. 1 (Spring 1988), pp. 3-40. See also Jack Donnelly, "In search of the unicorn: the jurisprudence of the right to development" and "The theology of the right to development: a reply to Alston", *California Western International Law Journal*, vol. 15 (Summer 1985), pp. 473 ff and 519-523. See further Sen, *Development as Freedom*, chap. 12.

personal rights can be seen as rights to be protected for individuals and groups.<sup>17</sup> Furthermore, it is well established that the identification of civil and political rights with negative rights and economic, social, and cultural rights with positive rights is too superficial because both require negative (prevention) as well as positive (promotion or protective) actions. Therefore, it is logically difficult to regard only civil and political rights as human rights and to not regard economic and social and collective rights as human rights.

### 2. Justiciability

Another criticism of the right to development is related to its justiciability. There is a view, particularly among lawyers of the positivist school, that if certain rights are not legally enforceable, they cannot be regarded as human rights. At best, they can be regarded as social aspirations or statements of objectives. The sceptics, who doubt the appeal and effectiveness of ethical standards of rights-based arguments, would not recognize a right as such unless the entitlement to the right is sanctioned by a legal authority, such as the State, based on appropriate legislation. As Sen puts it, these sceptics would say: "Human beings in nature are, in this view, no more born with human rights than they are born fully clothed; rights would have to be acquired through legislation, just as clothes are acquired through tailoring."<sup>18</sup> This view, however, confuses human rights with legal rights. Human rights precede law and are derived not from law but from the concept of human dignity. There is nothing in principle to prevent a right being an internationally recognized human right even if it is not individually justiciable.<sup>19</sup>

Human rights can be fulfilled in many different ways depending on the acceptability of the ethical base of the claims. This should not, of course, obfuscate the importance or usefulness of such human rights being translated into legislated legal rights. In fact, every attempt should be made to formulate and adopt appropriate legislative instruments to ensure the

<sup>17</sup> See Charles Taylor, "Human rights: the legal culture", *Philosophical Foundations of Human Rights*, Alwin Diemer and others., eds. (Paris, UNESCO, 1986), pp. 49-57; and Vernon Van Dyke, *Human Rights, Ethnicity and Discrimination* (Westport, Connecticut, Greenwood Press, 1985).

<sup>18</sup> Sen, *Development as Freedom*, p. 228.

<sup>19</sup> This issue has been dealt with extensively in the deliberations of the Committee on Economic, Social and Cultural Rights and its general comments (for example, general comment No. 3 (1990) on the nature of States parties' obligations. See also Julia Hauserman, "The realization and implementation of economic, social and cultural rights", and Michael K. Addo, "Justiciability re-examined", in *Economic, Social and Cultural Rights: Progress and Achievement*, Ralph Beddard and Dilys M. Hill, eds. (London, Macmillan in association with the Centre for International Policy Studies, University of Southampton, 1992).

realization of the claims of a human right once it is accepted through consensus. These rights would then be backed by justiciable claims in courts and by the enforcement authorities. But to say that human rights cannot be invoked if they cannot be legally enforced would be most inappropriate. For many of the economic and social rights and the right to development, and even for some elements of civil and political rights, the positive actions that are necessary may often make it very difficult to identify precisely the obligations of particular duty holders to make them legally liable to litigation. Enacting appropriate legislative instruments for any of these rights is often a monumental task, and it would be both necessary and useful to find alternative methods of enforcing the obligations rather than through the courts of law.

While civil and political rights and economic, social, and cultural rights have been codified in international treaties or covenants and ratified by a large number of States and supplemented by protocols allowing for individual complaints, the Declaration does not have that status and therefore cannot be enforced in a legal system. That fact does not diminish the responsibility of States, nationally or internationally, nor that of individuals and agencies of the international community, to realize the right to development. It may be necessary to suggest some mechanism to monitor or exercise surveillance over States and agencies of the international community to ensure that they are complying with their commitment to realize the right to development. Such a mechanism might not have the same legal status as a treaty body, but it could still be effective in encouraging the realization of this right through the exercise of peer pressure, democratic persuasion and the commitment of civil society.

### 3. Monitoring of implementation

For many of the positive rights, implementability is often a more important issue than enforceability. Designing a programme of action that would facilitate the realization of the right might be a better way of achieving it than trying to legislate. In that case, what may be required is a monitoring authority or a dispute settlement agency, rather than a court of law for settling claims. Democratic institutions of local bodies, non-governmental organizations or public litigation agencies may prove to be quite effective in dealing with the rights-based issues that are not amenable to resolution under precisely formulated legislative principles.

Establishing such monitoring agencies, in whatever guise, may often be the only way to enforce the obligations of the international community. Indeed, the justiciability of international commitments must be dealt with differently from the enforcement of national obligations. There are of course many different agencies of international adjudication, of which the International Court of Justice is only one. There are established institutions and procedures for settling trade and financial disputes. However, such agencies may not be useful in the area of human rights unless the failure of the obligation can be put into a form that is admissible to these institutions. The human rights treaty bodies, which operate mainly on the basis of reporting, may often be quite inadequate, even when direct complaint procedures are available. What is needed in most cases is a forum where international agencies and concerned Governments could meet and talk to each other. A transparent consultation mechanism, subject to the democratic pressure of public opinion, can often play a much more significant role in enforcing institutional agreements, especially those on human rights, than any outside judicial authority.

Monitoring implies the use of indicators.<sup>20</sup> In the absence of a consensus on what can be considered human rights and right to development indicators, the Independent Expert focused in his report to the Working Group on the Right to Development on various conventionally used socioeconomic indicators to monitor and assess the development process for the realization of the right to development. Attainments of individuals and population groups, for instance in the fields of education, health, food or shelter and the civil and political aspects of life (corresponding to the international human rights standards), could be interpreted as the realization of rights that comprise the composite right to development. The constitutive elements of the composite right chosen for realization in sequence would depend on the country context and the priorities of the respective State. The Independent Expert has argued that the characteristics of the process for realizing the right to development and the success or failure of those efforts could be analysed by focusing on the policies to eradicate poverty—the worst form of deprivation of human rights—and the policies to protect vulnerable groups in society from the dislocating impacts of development. Poverty is multidimensional, extending beyond income poverty to capability poverty covering nutrition, health, education, social security, etc., making poverty, in effect,

<sup>20</sup> This section draws on "Sixth report of the Independent Expert on the Right to Development" (E/CN.4/2004/WG.18/2), paras. 5-6.

a denial of the right to development. The well-being of the poor and vulnerable groups could be determined both in terms of their income and consumption and their capabilities, reflected, for example, in their access to food, education, health, shelter, work, etc. Policies to eradicate poverty are therefore appropriate examples of policies to secure the right to development.

In his preliminary study on the impact of international economic and financial issues on the enjoyment of human rights (E/CN.4/2003/WG.18/2), the Independent Expert argued that indicators for the right to development would be a combination of indicators on the availability of goods and services corresponding to the realization of different rights, and appropriate indicators of rights-based access (with equity, non-discrimination, participation, accountability and transparency) to those goods and services. While appropriate indicators of access may not be easy to formulate, indicators of availability could be derived from the conventionally used socioeconomic indicators such as the ones tabulated by UNDP in its Human Development Reports.

#### 4. Collective rights versus individual rights

A different type of criticism has been persistently levelled against the right to development in particular, which is applicable to rights other than civil and political rights. The right to development was promoted both by its third world protagonists and first world critics as a collective right of States and of peoples to development. We have already dealt with the problem of collective rights as human rights and have argued that it is perfectly logical to press for collective rights to be recognized as human rights. However, care must be taken to define collective rights properly and not as being in opposition to individual rights per se. Indeed, there are legal institutional agreements and covenants that recognize and build upon collective rights and the Declaration on the Right to Development itself recognizes the collective right of peoples in article 1, which states that “every human person and all peoples” are entitled to the human right to development and also the right to self-determination, which includes “the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”. That collective rights are not to be seen as opposed to, or superior to, the rights of individuals is made clear in article 2 which states categorically that “[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development”.

One of the most articulate defenders of the third-world position regarding collective rights, Georges Abi-Saab, suggested two possible ways of looking at collective rights: “The first ... is to consider the right to development as the aggregate of the social, economic and cultural rights ... of all the individuals constituting a collectivity. In other words, it is the sum total of a double aggregation of the rights and of the individuals.”<sup>21</sup> This, Abi-Saab says, has the advantage of highlighting the link between the rights of the individual and the rights of the collectivity. “The second way of looking at the right to development as a collective right ... is to approach it directly from a collective perspective (without going through the process of aggregating individual human rights) by considering it either as the economic dimension of the right of self-determination, or alternatively as a parallel right to self-determination.”<sup>22</sup>

Indeed, most of the demands of the developing countries during the 1970s, when the content of the right to development was negotiated, can be put forward in these terms. The Integrated Programme for Commodities, the Generalized System of Preferences, industrialization, technology transfers and all the essential components of the New International Economic Order were claims made on behalf of the developing countries and were all meant to be pre-conditions for development for all peoples in those countries. In 1979, the Commission on Human Rights stated in resolution 5 (XXXV) “that the right to development is a human right and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations”. Indeed, in many cases individual rights can be satisfied only in a collective context, and the right of a State or a nation to develop is a necessary condition for the fulfilment of the rights and the realization of the development of individuals. Those who would detract from the significance of the right to development by arguing that it is a collective right of the State or nation, in conflict with the individual rights foundations of the human rights tradition, are more often than not politically motivated.

#### 5. Resource constraints

A related issue is the question of resources—financial, physical and institutional, both at the national and the international level—the lack of which would constrain the speed and coverage of the realization of the right to development and of the individual rights

<sup>21</sup> Georges Abi-Saab, “The legal formulation of a right to development”, *The Right to Development at the International Level* (see footnote 16), p. 164.

<sup>22</sup> *Ibid.*

recognized in the International Covenants on Human Rights. The argument that civil and political rights have a greater claim to being regarded as human rights because they can be protected immediately by law and that economic, social and cultural rights consume resources, which are always limited, does not hold because many civil and political rights require as much positive action as economic and social rights and also consume resources.

Once rights are recognized as human rights, the methods of their realization should depend upon the objective conditions in the respective States, including the availability of resources, and the international environment. The human rights instruments, including the International Covenant on Economic, Social and Cultural Rights<sup>23</sup> and the Declaration on the Right to Development,<sup>24</sup> recognize the importance of resource constraints. These concepts have been clarified in, inter alia, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (see E/C.12/2000/13)<sup>25</sup> formulated at the University of Limburg (Maastricht, the Netherlands) by a group of distinguished experts. According to the Principles, “[p]rogressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realization by everyone of the rights recognized”, noting further that “[t]he obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available”.<sup>26</sup> The Principles state that the term “its available resources” refers to “both the resources within a State and those available from the international community through international cooperation and assistance”. “In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant”, the Principles reiterate, “attention shall be paid to equitable and effective use of and access to the available resources”.<sup>27</sup>

<sup>23</sup> “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, 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” (art. 2 (1)).

<sup>24</sup> “Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels” (art. 10).

<sup>25</sup> In particular, “[t]he obligation to achieve progressively the full realization of the rights requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant” (para. 21).

<sup>26</sup> *Ibid.*, paras. 23-24.

<sup>27</sup> *Ibid.*, paras. 26-27.

Thus, States must use their best efforts to realize not only economic, social and cultural rights but the right to development as well, by accessing available resources, whether through measures that can be adopted immediately and without great expenditure of resources, such as prohibiting discrimination in the access to available services and benefits and adopting legislation and administrative measures to fulfil or redress the violation of obligations, or by prioritization in the expenditure of resources, the supply of which remains limited. The problem should not be blown out of proportion or used as a pretext for avoiding action. Most of the activities needed to fulfil these rights do not require a high level of financial resources; they may require more input of administrative or organizational resources whose supply is relatively elastic, depending upon political will rather than on finance or physical infrastructure. Similarly, the resources requested may not be limited to national availability but can be complemented by international supply of appropriate quantity and quality. As a result, for many countries the resource constraints may not be insurmountable. In addition, using the existing resources more efficiently and less wastefully may have a much greater impact on realizing the rights than increasing the supply of financial resources.

Resource constraints affect different countries differently. For very poor countries, the institutional constraints may be so important that, unless they are removed, little can be done to use financial and other resources efficiently to realize rights. For other developing countries, the fiscal resources of the Government rather than the overall savings may be more crucial. For many others, infrastructure, such as roads, communications, transportation, electricity or water supply, may turn out to be the binding constraint. If all rights are of equal value or have the same importance, as human rights instruments claim, it is the nature of the resource constraints that may determine the priorities. The rights that require the least expenditure of the resources which are in shortest supply will tend to be realized first. There is a risk that this may, as a result, fail to bring about the social change that is the ultimate objective of following the rights-based approach to development. For example, if providing primary education to poor children is equally important whether they live in a remote village or in an urban area in a country with limited roads or transport facilities, the children in the remote village are likely to be ignored. If providing food to poor families in all parts of the country is given equal value in a financially expensive programme of food security, the female children in

villages may continue to be deprived if social reforms are not pursued effectively. As noted above, one of the benefits of a human rights-based approach to development is that it focuses attention on those who lag behind in enjoying their rights and requires that positive action be taken on their behalf.

However, if resource constraints do become acute, it may be necessary to prioritize among the different rights. But such prioritization need not contradict the principle that “all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity”.<sup>28</sup> That principle requires that any programme or mechanism for influencing human rights address all rights in their totality as an integrated whole, recognizing fully the implications of their interrelationship, and that no one right should be violated in fulfilling any other right. There cannot be any trade-off between rights and the violation of one right cannot be compensated for by the improved realization of any other right.

When the right to development is taken as a process wherein all rights are progressively realized, prioritization would mean that some rights could be realized earlier than the others, without violating or retrogressing on the fulfilment of any right. Progress would then be measured by comparing the incremental changes in the realization of a specific right rather than giving up some rights in exchange for progress in the realization of others.<sup>29</sup>

Even then, the question would arise of how to decide on the relative preference between rights. Henry Shue refers in this regard to a set of “basic” rights, the enjoyment of which is essential to the enjoyment of all others. “When a right is genuinely basic, any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating, cutting the ground from beneath itself.”<sup>30</sup> The Committee on Economic, Social and Cultural Rights has treated this problem somewhat differently. It referred to

a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights ... [F]or example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.<sup>31</sup>

<sup>28</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 4.

<sup>29</sup> The author is indebted to Professor S.R. Osmani for pointing this out in correspondence.

<sup>30</sup> *The Philosophy of Human Rights*, p. 27.

<sup>31</sup> General comment No. 3 (1990) on the nature of States parties’ obligations, para. 10.

Whatever the resource constraints, these minimum obligations must be satisfied. The only way to decide which are the “minimum core obligations” or “basic rights” or preferred incremental changes in the realization of some rights is through public discussion in a human rights framework. The decision should be based on genuine public choice through a participatory process of consultation with the beneficiaries or in a democratic forum of a State.

## 6. Interdependence of rights and the process of development

The right to development as the right to a process of development is not just an umbrella right or the sum of a set of rights. It is the right to a process that expands the capabilities or the freedom of individuals to improve their well-being and to realize what they value. A process implies an interdependence of different elements. The interdependence can be understood over time, as a sequence of occurrences, and also at a particular point in time, as the interaction of cross-sections of elements that are related to each other where the value of a single element depends upon the value of other elements.

The process is not the same thing as the outcome of the process, although in the right to development both the process and the outcome of the process are human rights. It is possible for individuals to realize several rights separately, such as the right to food, the right to education or the right to housing. It is also possible that these rights are realized separately in full accordance with human rights standards, with transparency and accountability, in a participatory and non-discriminatory manner, and even with equity and justice. But even then, the right to development may not be realized as a process of development if the interrelationships between the different rights are not fully taken into account. A programme of policies can be worked out based upon the relationships between different rights and a process can be established that would facilitate the realization of those rights. In other words, the process must be distinguished from the outcomes of the process. Even if all civil, political, economic, social and cultural rights cannot be fully realized, or are realized only after a long time, the process itself can be established and realized immediately and so long as there is a high probability that the process will lead to the desired outcomes, claiming that process as a right may be the best option in a given situation.

The right to development as a right to a particular process of development can best be described as a “vector” of all the different rights and freedoms. Each element of the vector is a human right just as the vector itself is a human right. They will all have to be implemented, in full accordance with human rights standards. Furthermore, all the elements are interdependent, both at any point in time and over a period of time, in the sense that the realization of one right—for example the right to health—depends on the level of realization of other rights, such as the rights to food, to housing, to liberty and security of the person or freedom of information, both at the present time and in the future. Similarly, realization of all these rights in a sustainable manner would depend upon the growth of GDP and other resources, which in turn would depend upon the realization of the rights to health and education, as well as to freedom of information given the initial stock of human, material and institutional assets.

The logic of this process can be described as follows:<sup>32</sup> the state of well-being of a country or the level of rights-based development ( $R_D$ ) can be defined as  $R_D = (R_1, R_2 \dots R_n)$ , or a vector of the level of realization of the “n” different rights recognized as human rights in the international instruments. Each  $R_i$  is an index of the realization of the  $i^{\text{th}}$  right, which depends upon the availability or supply of the  $i^{\text{th}}$  good or service corresponding to that right and the access or the manner in which individuals can enjoy that good and service. Both the availability of and the access to these goods depend on resources or GDP determining their supply and public policy using these resources.  $R_i$ 's, which are interdependent, can be described as  $R_i = f(R_j, \text{GDP, policy})$ ,  $j = 1, 2, \dots, n$ ;  $i \neq j$ .

The right to development is an improvement of this level of well-being over a span of time and can be described as a vector  $dR_D = (dR_1, dR_2 \dots dR_n, g^*)$ , where  $g^*$  denotes rights-based growth of GDP or growth with equity, participation and respect for other human rights norms. The policies that determine the access to and availability of the goods and services corresponding to these rights and the expansion of GDP in a rights-based manner are the obligations that the duty holders must carry out to fulfil these rights.

The condition for the improvement of the right to development  $dR_D > 0$  is specified in terms of the improvement of the vector, such that there is at least

one “i” for which  $dR_i > 0$  and no other right is negative, or  $dR_i > 0$ , meaning that the realization of some or at least one right must have improved and no right—civil, political, economic, social or cultural—is violated.

Looking at the right to development as a vector of rights brings out clearly that any programme that raises the level of any of the elements of the vector without lowering the level of any other element would increase the level of development. Such an approach would essentially mean not violating, or actually improving, some rights, for example civil and political rights, and improving all other rights, for example economic, social, and cultural rights, by promoting and providing the goods and services relating to those rights for all people, and respecting the principles of equity, non-discrimination, participation, accountability and transparency that constitute the basic human rights standards. In a practical programme, the interrelation between the various rights and the provision of the goods and services associated with them should be taken fully into account, both at the present time and into the future. The optimal programme, that is the programme that yields the maximum value of the indicators of each of these rights, when all of them are taken together, will be a constituent element of the development process claimed under the right to development. Any such programme must take fully into account the constraints imposed by the process of economic growth, or “g” as we have defined it above. That “g” is a function of or related to all human rights, and the human rights themselves are a function of “g”. In that sense growth becomes both a means and an end in the process of development. Any programme for realizing the right to development must be designed to expand resources through a process of sustainable growth consistent with human rights standards.

However, to be recognized as an element of the programme for the right to development, growth of resources must be realized in the manner in which all human rights are to be realized, that is, in accordance with human rights standards, ensuring in particular equity or the reduction of disparities. That would imply a change in the structure of production and distribution in the economy that ensures growth with equity and would imply a programme of development and investment that may not depend on reliance on market mechanisms alone but may require substantial international cooperation. Indeed, once the right to development is seen in the context of a development programme aiming at the sustained, equitable growth of resources, it becomes clear that national action and

<sup>32</sup> This section draws on Arjun K. Sengupta, “On the theory and practice of the right to development”, *Human Rights Quarterly*, vol. 24, No. 4 (2002), pp. 868-869.

international cooperation must reinforce each other in order to realize rights in a manner that goes beyond the measures for realizing individual rights.

## II. The right to development in practice

Translating the above concepts into social arrangements for the implementation of the right to development is dependent on the nature of the current global economic situation, described in section A below, and its implications for national policies, discussed in section B. The final section, C, will focus on international cooperation.

### A. The economic context of implementing the right to development

#### 1. Managing globalization<sup>33</sup>

The process of managing market-based global economic integration to deliver a desired process of development in general, and the fulfilment and realization of the right to development in particular, is bound by a major inherent constraint. The constraint arises because such a process of globalization tends to favour those with better endowments and greater command over resources, and hence with favourable initial conditions, as against those that are at a disadvantage on these counts and are “latecomers” to the process of development. There are, of course, ways to overcome these initial handicaps and to chart a development path that not only reverses the inherent inequities but, more importantly, yields outcomes consistent with the fulfilment and realization of the right to development. That path is founded on the recognition that the State has the primary responsibility to identify, devise and implement appropriate development policies and to follow the requisite sequencing of strategies so as to harness the opportunities provided by the global economy. Notwithstanding this role that the State has to play, there is also a definite and substantive role for the international community, which has the responsibility of creating a supportive global environment for countries to realize those development policies. At the same time—and not necessarily out of humanitarian concern alone—it is obliged to step in with such development assistance and technical cooperation as could help countries committed to the universal realization of all human rights in meeting their goals.

<sup>33</sup> This section draws primarily from E/CN.4/2004/WG.18/2, paras. 31-32.

There is, however, clearly no uniform policy prescription that can be followed by all countries in pursuing the objectives of development, the more so when it comes to implementing the right to development. The strategy and the economic policy instruments must be devised and deployed in accordance with the development objectives in the specific country context. The nature of the policy adopted would, however, be strongly “path dependent”.<sup>34</sup> It would be dependent on the initial conditions and the course of development of the economy. Such “path dependency” would rule out any universally optimal public interventions. In most cases there would be a set of policies to reach the desired outcomes—a corridor, so to speak—from among which the optimal may have to be chosen. Furthermore, policies that affect different aspects of the desired performance will have to be coordinated and applied together as a package or as a programme of reform, so that they reinforce each other in the process of attaining the desired development outcomes. Thus, it is possible, for instance, that an external shock originating in the international economy has a distinct impact in different countries, generating different policy responses or adjustment processes in keeping with the respective initial conditions, institutions, and level and path of development, and accordingly results in non-uniform outcomes.

#### 2. Importance of economic growth

It may be useful to highlight the most important feature of the programme for realizing the right to development, which is that it is based on a strategy of growth of resources with equity and respect for human rights standards. Resources here include not only GDP, but also legal, technical and institutional resources. Any improvement in those resources improves the prospects of realizing all rights and increases the value of their indicators.

The doubts raised in the human rights discussion about the relationship between growth of GDP and the values of those indicators have been mostly the result of confusion between what is the necessary and what is the sufficient condition in the relationship. For any sustained increase in the value of the indicators, it is necessary to have higher GDP growth; however,

<sup>34</sup> The theoretical literature on this subject is large and well known. However, the best account of the importance of policies in a set-up of dynamic equilibrium may be seen in a published lecture on path dependency given by the noted economist, the late Professor Sukhamoy Chakravarty, at Erasmus University, the Netherlands, in April 1990. See S. Storm and C.W. Naastepad, eds., *Globalization and Economic Development: Essays in Honour of J. George Waardenburg* (Cheltenham, United Kingdom, Edward Elgar Publishing, 2001).

higher GDP growth is not sufficient for high value of the indicators.

Several studies have shown that a reduction of income poverty is almost always associated with growth (in income or consumption) and that negative growth is accompanied by an increase in poverty.<sup>35</sup> However, for any given rate of growth, different countries may have different values of income poverty, depending upon how the results of growth are distributed or the pattern of growth; whether the sectors producing labour-intensive outputs, such as agriculture, are growing more; or whether regions that have higher growth of population or labour force are growing faster. With regard to the non-income variables or other social indicators, it is possible at a given moment to raise those values by reallocating resources within a given level of income. But this cannot be sustainable, even in the medium term, without an increase in the availability of resources, especially when a number of such indicators, each with its claim on resources, are expected to increase together in a coordinated manner in a programme for realizing the right to development.

In other words, the resource implications of implementing any one right separately and independently from others are different from implementing all or most rights together as part of a development programme. It may be possible to implement any one single right without spending many additional resources just by using the current level of expenditure more efficiently, or through better allocation of the expenditures. In most cases, it would only be necessary for States to adjust their method of functioning and fulfil their obligations to the beneficiaries in accordance with the human rights approach. This would have the indirect effect of not fulfilling other rights because, as noted earlier, the level of enjoyment of any one right will depend upon the level of enjoyment of the other rights, but those effects could be ignored if the concern is with the implementation of one single right in isolation. However, if implementing a single right is part of a programme for development, it would have to take into account the interdependence between all rights or between the flows of goods and services that are reflected in the social indicators associated with different rights. That would call for a substantial increase in net resources, often to a level well beyond the domestic resources that are available.

In order to sustain a high and feasible level of growth that expands the supply of resources over time, most developing countries require a domestic rate of investment that is higher than the rate of savings, which must be bridged with a supply of foreign savings or the international transfer of resources. Developing countries' claim on international cooperation, to which they would be entitled by virtue of the international acceptance of the right to development, will include, in addition, a change in the framework of international relations giving them an equitable share in the fruits of international transactions. The need for such cooperation will be much greater than in the usual human rights approach to realizing individual rights.

The obligation of the developing countries themselves would also be to design and implement policies that produce not only equitable but also sustainable growth. They have to be based on redistribution programmes as well as resource allocations which ensure the fulfilment of basic rights and which must not allow inefficiency and market distortions that cause avoidable waste of resources. They must also adhere to the conditions of macroeconomic stability to ensure sustainability of the process of growth. A programme for realizing the right to development should not be seen as ignoring the policies of stability and sustainability of economic growth with efficient allocation of resources; instead, it builds on those policies to channel economic activities while maintaining human rights standards, to realize all human rights and fundamental freedoms.

## B. National policies for implementing the right to development<sup>36</sup>

In analysing the impact of globalization on the realization of outcomes consistent with the right to development, it emerged that in every instance, the most successful cases were those where the countries were able to use contextually appropriate domestic investment and institution-building strategies to harness the opportunities of growing integration with the world markets. This was true whether the desire was to improve economic performance and sustain future growth prospects, or to bring down poverty incidence and inequality in incomes and social indicators, or to successfully access the required technology for implementing and sustaining the development process, or to minimize the impact of volatility in capital flows and their dislocative impact on the economy.

<sup>35</sup> See Martin Ravallion and Shaohua Chen, "What can new survey data tell us about recent changes in distribution and poverty?", *World Bank Economic Review*, vol. 11, No. 2 (May 1997), p. 360.

<sup>36</sup> This section is taken from E/CN.4/2004/WG.18/2, para. 33.

For many developing countries in Latin America and Africa, this increase in the pace of integration with the global economy started with the adoption of a liberal model of economic reform. In an assessment of this experience,<sup>37</sup> the Independent Expert concludes:

- (a) The liberal model as a development framework was found to be limited in terms of the development goals that it directly addressed and the instruments that it sought to encourage to meet those goals. However, some countries, such as Chile, that went beyond the basket of policies of the liberal model, were able to realize and sustain a high and stable rate of economic growth and reduce poverty incidence and (to some extent) inequality, thereby achieving outcomes consistent with the realization of the right to development;
- (b) Stable domestic macroeconomic environmental and fiscal prudence are seen to be necessary for sustaining economic growth at improved and stable rates;
- (c) Economic growth has instrumental and constitutive relevance when it is labour absorbing and it benefits from enhanced integration of the economy with global markets through productivity gains and access to larger and deeper markets;
- (d) As no country can remain entirely insulated from the dislocative impact of shocks from the global economy and from the unanticipated consequences of domestic policies, it is necessary to have an adequate and appropriate approach to social security and a safety net; and
- (e) A well-conceived and -implemented income transfer policy could reduce poverty incidence, but reduction in persistent income inequalities needs a strategy to improve human capabilities and institutional capacity to deliver critical social services.

### C. International cooperation for implementing the right to development<sup>38</sup>

The experience of the case studies reveals that, in the current phase of globalization, international cooperation is as important as the package of national policies in implementing a strategy for realizing the right to development. It is, perhaps, even more critical in the case of poor and least developed countries where there is a wide gap in the level of realization of human rights and the relevant international human rights norms and standards, and because such countries do not have an adequate technical and resource capacity for the realization of human rights. It could also be critical in addressing sudden and unanticipated economic crises and their contingent dislocation, in particular in labour markets, even in the middle-income developing countries.

Further, unlike the national policies for implementing the right to development that invariably have to be designed contextually, the international framework for supporting the implementation of the right to development has to be global in its reach. It has to provide an environment that is transparent and non-discriminatory and promotes universal access and equity in the distribution of benefits from the development process to the countries' regions and their people. Thus, for instance, the international trade regime under the World Trade Organization that codifies the agreement on international trade in goods and services has to be uniform, consistent and fair in its application. The fact that it has not been so (particularly for trade in agriculture and textiles) is in part a reflection of the fundamental asymmetry in the relationships between the developed and the developing countries. It has occupied a prime slot in the negotiations between the two sets of countries in the most recent trade rounds. The resolution of this issue is key to future progress in evolving a fair and credible international framework for implementing the right to development.

At the same time, international cooperation for implementing the right to development could also take other contextually suitable forms. This could be the case in meeting specific exigencies in time of locally or externally induced crisis; it could also be the case in unfolding a medium- to long-term development strategy. Thus, for instance, in his country study on the South American economies, the Independent Expert reports that in the context of the crisis in Argentina in 2002, international cooperation could have taken the form of providing for implementing a counter-cyclical policy on social safety nets in the post-crisis period rather than forcing the country to generate a larger primary surplus. This, it could be argued, would have helped in alleviating the dislocative impact of the crisis which at its peak brought the number of the poor, unemployed and destitute (those categorized as extremely poor) to a level unprecedented in the history of the country. In the case of Chile, the Independent Expert has argued that in an effort to bring about a greater degree of certainty in its external environment for trade, the country sought and gained international support for its medium- to long-term development strategy by improving market access for its exports—primarily commodities—through a series of trade agreements with its partners. Finally, in the case of Brazil, it has been suggested that international cooperation could take the form of protecting resource flows to maintain social sector and social security spending while releasing resources to fuel growth and imple-

<sup>37</sup> See "Country studies on the right to development: Argentina, Chile and Brazil" (E/CN.4/2004/WG.18/3).

<sup>38</sup> This section draws on E/CN.4/2004/WG.18/2, para. 34.

ment a development strategy that potentially reflects the notion of the right to development. Finally, an important kind of international cooperation administered through the transfer of grants and concessional assistance relates to the official development assistance (ODA) flows that could be contextually tailored to the needs of the recipient countries.

Two examples of international cooperation are development compacts and a programme for the implementation of the right to development, described in the following paragraphs.

### 1. The development compact

In his earlier reports the Independent Expert extended the notion of a “development compact” as a mechanism for implementing a right to development programme.<sup>39</sup> He has argued that if a country finds itself in a situation where its commitment to pursue rights-based development involving an adequate development policy, including provisioning for public goods and a policy on social sector development, is threatened or compromised by its inability to find resources to sustain growth, then, under the right to development framework, it has the option of entering into a development compact with the international community to seek assistance and cooperation in meeting its development goals. The logic of a development compact rests on the acceptance by, and a legal commitment of, the international community to pursue, individually and collectively, the universal realization of all human rights and, on their part, for the developing countries to follow explicitly a development strategy geared towards the universal realization of human rights. The Independent Expert has invoked the notion of a development compact as a means of pursuing a rights-based approach to development that is anchored in a framework of “mutual commitment” or “reciprocal obligations” between the State and the international community to recognize, promote and protect the universal realization of all human rights. The purpose of development compacts is to assure developing countries that, if they fulfil their obligations, their programmes for realizing the right to development will not be disrupted for lack of resources.

There are three essential elements in implementing a development compact. First, there has to be a programme, formulated by a developing country

through a process of consultation, both within the country among the people concerned, with transparency and fair participation, and with other countries and donor institutions on an equal footing. The programme should indicate policies and sequential measures to be adopted in order to realize the right to development. Secondly, it should spell out the responsibilities of others, such as the donors and multilateral agencies, for steps to be taken by them for cooperation, including the provision of ODA. The third element would require setting up a mechanism to monitor the implementation of the programme. This monitoring mechanism must be credible, independent and fair, so that the conditionalities associated with the programme can be accepted by all concerned. To finance the development compacts, the Independent Expert invoked the commitment of the international community, particularly the members of the Development Assistance Committee, to contribute up to 0.7 per cent of their GNP for ODA and proposed that a “callable fund” be established that can be resorted to when contingencies arise and a country’s right to development programme is threatened by lack of finance. A support group is expected to service the mechanism and call for a release of funds when it approves the mutually agreed plan of the developing country that puts forth the proposal.

In proposing the development compact, the Independent Expert made clear that it would not entail the creation of an additional development instrument. On the contrary, it offers a mechanism to provide for effective implementation of the existing development instruments like the poverty reduction strategy papers or the Comprehensive Development Framework in a manner that is consistent with the principles of a rights-based development approach. If implemented as proposed, the development compact would allow for the mutuality of responsibilities and for independent and credible monitoring of the actions of the aid recipients and the donors alike and, at the same time, provide for an appropriate mechanism of redress in case of policy failures in the course of a development process. This brings into play two of the central concerns of a rights-based development approach, namely the principle of accountability and the recourse to a mechanism of redress that allows for relief, not necessarily through legal means alone, for those who bear the unanticipated and dislocative consequences of external development, or when a programme for realizing the right to development cannot be implemented owing to lack of finance or an unsupportive international environment.

<sup>39</sup> See in particular E/CN.4/2002/WG.18/2, sect. III.B.

The donors have a legitimate concern about the effectiveness of the resources they provide to the developing countries in furthering the objectives of development. Conditionalities, when they are imposed without the willing consent of the recipients, go against the spirit of the rights approach to development and the right to development. But if they were part of an understanding and were perceived as a “compact” based on mutual commitment to fulfilling conditions for implementing programmes, they could become an effective instrument for realizing the right to development.

The idea of a compact was first floated by the Foreign Minister of Norway, Thorvald Stoltenberg, in the late 1980s and was elaborated upon by other development economists and in the Human Development Reports. It was meant to support programmes which the developing countries were supposed to implement according to a sequenced design of policies with a clear commitment by donors to provide the required assistance in terms of both finance and trade access and other policies to match the efforts of the recipient countries.

It would be useful to invoke the concept of a development compact once again in working out programmes for implementing the right to development. It does not have to detract from existing arrangements and the use of resources for ongoing programmes. But the international community might like to decide to adopt a few specific international programmes to realize at least some of the targets as human rights and to begin implementing the right to development by means of compacts between developed and developing countries which would take on the obligations of following mutually agreed upon policies and procedures and of providing required financial and other assistance as identified. As long as implementing these programmes does not worsen the achievement of other programmes or objectives, there will be definite progress towards realizing the right to development.

In a development compact, the developing countries would have to assume obligations regarding fulfilling and protecting human rights. The most equitable manner of monitoring the fulfilment of those obligations would be through the establishment in each country of a national human rights commission, consisting of eminent personalities from the country itself. For that purpose, all countries wishing to implement the right to development through development compacts would have to set up such national commissions, which would investigate and adjudicate violations of

human rights. That is initially the only way to ensure against such violations. No country in the world can claim that there are absolutely no violations of human rights in its territory. All that can be ensured is an adequate mechanism in the legal systems to redress such violations. If a developing country sets up a national human rights commission in accordance with international norms and it can function independently without any hindrance or obstacle, and appropriate legislation is framed, then that should be sufficient guarantee that the country will carry out its human rights obligation according to the development compact.

The obligation of the international community should also be set out in the context of the development compact. If a developing country carries out its obligations, the donor countries and the international agencies must ensure that all discriminatory policies and obstacles to access for trade and finance are removed and the additional cost of implementing those rights is properly shared. The exact share may be decided on a case-by-case basis or in accordance with an international understanding between representatives of the international community and the country concerned that, for example, the additional cost will be shared equally.

The details of the compacts and the rights-based approach to the implementation of such a programme could be worked out without much difficulty by experts from the countries concerned and the international agencies that were involved in the countries and experienced in the appropriate fields. What is necessary is political will, that is, determination on the part of all the countries that have accepted the right to development as a human right to implement the right to development in a time-bound manner through obligations of national action and international cooperation.

## **2. Elements for a programme to implement the right to development**

The basic characteristics of any programme for realizing the right to development can be summarized as follows:

- (a) The implementation of the right to development should be seen as an overall plan or programme of development where some or most human rights are realized while no other rights are violated. In addition, there should be sustained overall growth

of the economy, with increased provision of resources for the realization of those rights and with an improved structure of production and distribution facilitating that realization;

- (b) Implementation of any of the rights cannot be an isolated exercise, and plans or projects for the implementation of the other rights should be designed taking into account considerations of time and cross-sectoral consistency;
- (c) The exercise of implementing the overall plan and realizing individual rights must be carried out according to the human rights standards, that is, with transparency, accountability and in a non-discriminatory and participatory manner and with equity and justice. In practice, this means that the schemes should be formulated and implemented at the grass-roots level with the beneficiaries participating in the decision-making and implementation, as well as sharing equitably in the benefits. In short, this implies planning that empowers the beneficiaries;
- (d) The rules and procedures of economic, political, social and legal institutions must integrate the interdependent elements of the right to development by associating a process of development with human development and expanding opportunity with equity and justice. To accomplish all this will often require a fundamental change in those institutions. The realization of the right to development would in some cases imply a change in the institutional framework, which would often spill over from national to international institutions;
- (e) It would therefore be necessary to specify the policies that must be pursued by the duty bearers of the right to development, primarily donor States and the international community, including international agencies and multinational corporations.

Although not clearly identified as an abiding principle in human rights instruments, the motivation of the human rights approach to development guides one along the lines of protecting the worst off, the poorest and the most vulnerable. In theory, this would

be the application of the Rawlsian Difference Principle which requires maximizing the advantages of the worst off, no matter how that affects the advantages of the others.<sup>40</sup> This could also be regarded as the minimal principle of equity, on which there may not be much difficulty in generating universal consensus. Poverty is the worst form of violation of human rights and it naturally becomes the target of any programme to realize human rights based on equity and justice. Greater consensus on international cooperation for poverty eradication might be most useful for realizing the right to development.

Eradicating poverty as a means of improving the well-being of the most vulnerable segments of the population meets the criterion of equity and the Rawlsian principle of justice, and if the lot of the poorest 30-40 per cent of the population is improved, it may not matter, at least in the first phase of development, what happens to the other, richer segments of the population. Economic policies other than poverty eradication programmes can be built on a reliance on market forces to improve the well-being of the other segments of the population. However, an overdependence on market forces should not create the conditions for an economic and financial crisis that may suddenly have an adverse effect on the nature of the poverty or increase the number of the poor. There should be enough international cooperation, for example creating a lender of last resort or contingency financing facilities with international institutions, to take care of that problem. The consensus and goodwill generated by such arrangements could then be focused on programmes for the eradication of poverty.

Poverty has at least two dimensions. The first is income poverty, which relates to the percentage of a country's population that subsists below a minimum level of income or consumption. The second is related to the capability of the poor to come out of poverty in a sustainable manner by having increased access to facilities like health, education, housing and nutrition. In that context, pursuing policies to realize some of the other basic rights, such as the right to food, the right to health and the right to education, in a framework of international cooperation would be wholly consistent with a programme for the reduction of income poverty. Capabilities are not limited to basic education and health care alone, although they are undoubtedly important not just as values, but also in raising the capacity of individuals to increase their income and

<sup>40</sup> John Rawls, *A Theory of Justice* (Cambridge, Massachusetts, Harvard University Press, 1971), pp. 75-80.

well-being. Several studies that asked poor people in different countries what they considered to be basic characteristics of poverty found that income mattered, but so too did other aspects of well-being and the quality of life, including health, security, self-respect, justice, access to goods and services, and family and social life.<sup>41</sup>

Therefore, for a programme for the eradication of poverty, it is necessary to look at a number of indices of well-being or social indicators together, and an approach based on the right to development implies considering improvement in each of the indices through schemes that have to be implemented following the rights-based approach and as a part of a coordinated programme of growth and development. The rights-based approach, where the beneficiaries are empowered to participate in the decision-making and in executing the different schemes, transparently and accountably, and sharing the benefits equitably, is not just an end in itself, realizing the human right to development; such an approach also improves the outcome of the schemes that increase the value of the different social indicators. The rights-based approach would then also be instrumental to improving the realization of the right to development.

In the light of the discussion above, it may be useful to reformulate an international programme for realizing the right to development based on national action, international cooperation and development compacts for the countries that adopt the programme. Surely a programme of coordinated actions may take the form of a development plan that strives for growth of GDP and other resources, as well as sustained improvement of the social indicators related to the different rights. All the individual and interdependent schemes need to be designed and implemented following the human rights standards, based on empowerment and participation in the decision-making and execution, with transparency and accountability, and equity and non-discrimination in the enjoyment of the benefits. Such a plan would be totally different from the earlier forms of central planning because it would be based entirely on decentralized decision-making with the participation and empowerment of the beneficiaries. The plan has to be formulated through a process of consultation with civil society and the beneficiaries in a non-discriminatory and transparent manner.

In the initial phase, such a development plan may concentrate on a well-designed and well-targeted programme for the eradication of poverty in its broad dimensions; not just income poverty, but also the denial of capabilities. The reduction of income poverty would require a plan that not only would raise the rate of growth of the country but also would change the structure of production to facilitate the income growth of the poor, as well as increase equality of consumption, both within the region concerned and between regions. In addition, the plan would include application of a rights-based approach to the expansion of capabilities, resulting in an improvement of the social indicators, while maintaining the planned rate of growth of the overall output. However, since all these rights cannot be realized in the immediate future, it may be practicable to concentrate on at least three basic rights, those to food, health and education, to be realized first. In accordance with our approach to the right to development, it must be ensured that while the realization of at least these three rights improves, no rights, including civil and political rights, deteriorate or are violated.

These three rights are chosen because their realization has to be associated with any sustainable programme of poverty reduction; their fulfilment is a prerequisite for the realization of many other rights. They also involve provision of goods and services on which people in the early stage of development spend most of their incremental income to raise their well-being. But this does not mean that other rights are not important and that it is not possible to choose targets for the achievement of other rights, for example housing and sanitation, or the response to problems such as HIV/AIDS. The focus would depend upon the political consensus in the countries concerned and in the donor community as well as the availability of resources. At a minimum, there should be no disagreement in adopting targets related to the three basic rights, for example abolishing hunger and malnutrition, illiteracy and lack of basic education, and ensuring access to primary health-care facilities, within a well-specified period.

Once the programme is worked out and accepted by the countries concerned, the developed industrial countries can enter into development compacts with developing countries, setting out the benchmarks for reciprocal obligations. If the developing country concerned fulfils its obligation in accordance with those benchmarks, the international community would

<sup>41</sup> Robert Chambers, "Poverty and livelihoods: whose reality counts?", Discussion Paper No. 347, Institute of Development Studies, University of Sussex, 1995.

guarantee the fulfilment of its part of the bargain. A mechanism has to be established to work out the burden-sharing arrangements among the industrial coun-

tries. If the political will exists for implementing the development compacts, such arrangements can be devised.

