

# The role of international law

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## I. Introduction<sup>1</sup>

While there is a fairly broad consensus on the underlying principles of the right to development, the most intense political division is between, on the one hand, the Non-Aligned Movement, whose Heads of State and Government have called for the United Nations to draft a convention on the right to development,<sup>2</sup> and, on the other, the European Union, the United States, Canada, Japan and others,

which have strongly opposed this idea. The Working Group on the Right to Development has been able to achieve consensus by keeping a legally binding instrument among the possible outcomes of the process, without establishing that the process must automatically lead there. The key language in this regard is that the process “could evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement”.<sup>3</sup>

It is therefore useful to explore, independently of the politics, the various options available under international law to advance the right to development. Such was the purpose of the Expert Meeting on legal perspectives involved in implementing the right to development. Drawing on the proceedings of the meeting,<sup>4</sup> this chapter will explore: (a) the prospects for transforming the right to development criteria, once approved by the Working Group, into “an international legal standard of a binding nature”; (b) the relationship of the right to development with existing treaty regimes; (c) the potential value of a multi-stakeholder agreement; (d) alternative pathways to a binding legal instrument; and (e) the conclusions of the Château de Bossey conference.

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<sup>1</sup> This chapter is based on the following chapters in Stephen P. Marks, ed., *Implementing the Right to Development: The Role of International Law* (Geneva, Friedrich-Ebert-Stiftung, 2008), a collection of papers for the Expert Meeting on legal perspectives involved in implementing the right to development, held at the Château de Bossey, Geneva, from 4 to 6 January 2008: chapter 8, “A legal perspective on the evolving criteria of the HLTf on the right to development” by Stephen P. Marks; chapter 10, “Towards a multi-stakeholder agreement on the right to development” by Koen De Feyter; chapter 11, “The relation of the right to development to existing substantive treaty regimes” by Beate Rudolf; chapter 13, “Many roads lead to Rome. How to arrive at a legally binding instrument on the right to development?” by Nicolaas Schrijver. In addition, it includes the concluding statement adopted by the participants. The full text of the publication is available at <http://library.fes.de/pdf-files/bueros/genf/05659.pdf>.

<sup>2</sup> The Non-Aligned Movement, at its fifteenth summit in 2009, urged “the UN human rights machinery to ensure the operationalisation of the right to development as a priority, including through the elaboration of a Convention on the Right to Development by the relevant machinery... [and to] [p]ropose and work towards the convening of a United Nations-sponsored High-Level International Conference on the Right to Development”. See Final Document of the XV Summit of Heads of State and Government of the Non-Aligned Movement, Sharm el Sheikh, Egypt, 11-16 July 2009, document NAM2009/FD/Doc.1, paras. 421.13-421.14.

<sup>3</sup> General Assembly resolution 64/172, para. 8. Note that Human Rights Council resolution 15/25 fails to repeat “could” before “evolve”, as in the Assembly resolution, which, in the view of the author, creates an unnecessary ambiguity: “[*The Human Rights Council*] ... 3. *Decides*: ... (h) That the Working Group shall take appropriate steps to ensure respect for and practical application of the above-mentioned standards, which could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature through a collaborative process of engagement”.

<sup>4</sup> See footnote 1 above.

The high-level task force on the implementation of the right to development, which constituted the expert mechanism of the Working Group on the Right to Development from 2004 to 2010, took the view that, while it was not in a position to propose whether or not work should begin on a treaty, “[f]urther work on a set of standards and regional consultations could be an opportunity to explore whether and to what extent existing treaty regimes could accommodate right to development issues within their legal and institutional settings, and thereby assist the Working Group in achieving consensus on whether, when and with what scope to proceed further in this matter” (A/HRC/15/WG.2/TF/2 and Corr.1, para. 77). In the same vein, it recommended that the Working Group “seek information, properly analysed, on existing examples used in the United Nations system, such as guidelines, codes of conduct or practice notes, and examine proposals for the structure and methods for [the] drafting of a set of standards most suited to the right to development. A mechanism could then be put in place to formulate such a set of standards based on the criteria prepared by the task force” (*ibid.*, para. 76).<sup>5</sup> This chapter seeks to provide a starting point for that exploration of the options, although the political obstacles make any conclusion regarding a legally binding instrument unrealistic for the near future.

## II. Transforming criteria into treaty norms: a thought experiment<sup>6</sup>

It is theoretically possible to move quickly from the current state of development of normative standards with respect to the right to development to an omnibus treaty by transforming the criteria as further revised into articles of an international convention on the right to development. However, such a course of action might not be in the best interests of advancing the right to development owing to obstacles arising from the nature of the criteria and to the limitations of a general convention as a tool of international law. After examining the obstacles to transforming the revised criteria into treaty obligations (subsect. A), this part of the chapter will attempt a thought experiment to see what articles of a right to development treaty might look like if those obstacles were overcome (subsect. B).

### A. Obstacles to transforming the revised criteria into treaty obligations

The first observation is that the criteria were initially written to be applied to “global partnerships” as understood in Millennium Development Goal 8, and only expanded at a later phase to all aspects of the right to development, a process to be continued in the ongoing revision of the criteria. For most States, the obligations a treaty might establish in relation to such “global partnerships” are the principal motivation for a treaty. However, in international law a treaty is an agreement between two or more States or other subjects of international law. No international institution has ratified any of the human rights treaties and the obligations of these institutions are a matter of some discussion. It is obvious that no non-State subjects of international law, such as the World Trade Organization (WTO), the Association of Southeast Asian Nations (ASEAN), the World Bank or other entity, would be solicited to be parties to any convention on the right to development. Their cooperation might be provided for, as was done with respect to the specialized agencies in part IV of the International Covenant on Economic, Social and Cultural Rights or to international organizations in the case of the Convention on the Rights of Persons with Disabilities,<sup>7</sup> but the obligations would be those of States parties to an eventual convention rather than “global partnerships” as such.

One may doubt that States parties to such a treaty would intend to commit international organizations, the private sector and categories of countries implicated by the draft criteria. Below, each set of actors is considered in turn:

- (a) *International organizations.* Organizations such as the Organisation for Economic Co-operation and Development (OECD) can be considered partnerships envisaged in the context, for example, of criterion 1 (f), which calls for the duty bearer “to promote and ensure access to adequate financial resources”. WTO, as well as bilateral and regional trading regimes (such as the North American Free Trade Agreement (NAFTA) and the ASEAN Free Trade Area

<sup>5</sup> The criteria and sub-criteria developed by the high-level task force are contained in document A/HRC/15/WG.2/TF/2/Add.2.

<sup>6</sup> This section is based on chapter 7 in the work referred to in footnote 1.

<sup>7</sup> As Stein and Lord point out, the Convention on the Rights of Persons with Disabilities expressly invites States parties to cooperate internationally through partnerships with relevant international and regional organizations. The authors urge the high-level task force “to draw from the experiences of the [Convention] in creating a framework in which a multitude of actors, both State and non-State, participate in implementation processes” (Michael Ashley Stein and Janet E. Lord, “The normative value of a treaty as opposed to a declaration: reflections from the Convention on the Rights of Persons with Disabilities”, in *Implementing the Right to Development* p. 32).

(AFTA)<sup>8</sup> are presumably the focus of criterion 1 (e), which seeks “to create an equitable, rule-based, predictable and non-discriminatory international trading system”. Similarly, one may assume the International Monetary Fund (IMF) to be central to the reference in criterion 1 (b) “to [maintaining] stable national and global economic and financial systems”. The problem with a treaty norm reflecting these criteria would be that, from the developing country perspective, they should create binding obligations on the institutions concerned, but the institutions and many other Governments would most likely vigorously resist the assumption of such obligations through a human rights treaty;

- (b) *The private sector.* Millennium Development Goal 8 calls for cooperation with the private sector in general to “make available the benefits of new technologies, especially information and communications technologies”, and it is the information and communication technologies industry that is most directly concerned by this reference. Goal 8 also contains a target to “provide access to affordable essential drugs in developing countries”, which also refers explicitly to cooperation with pharmaceutical companies. The role of the private sector is particularly relevant to criteria 1 (b) (“To maintain stable national and global economic and financial systems”); 1 (d) (“To establish an economic regulatory and oversight system to manage risk and encourage competition”); 1 (g) (“To promote and ensure access to the benefits of science and technology”); and 2 (c) (“To ensure non-discrimination, access to information, participation and effective remedies”). A treaty obligation concerning the private sector would similarly be unacceptable to the industries concerned and would be strongly resisted by countries that reflect their interests and are powerful economic players in the global economy, by which is understood primarily the OECD countries and the BRICS;<sup>9</sup>

- (c) *Categories of countries.* Three categories are mentioned in goal 8: “the special needs of the least developed countries”, “the special needs of landlocked and small island developing States” and “developing countries”, the last with respect both to “debt problems” and “decent and productive work for youth”. These countries seem by implication to be the subject of “a commitment to good governance, development, and poverty reduction—both nationally and internationally” in goal 8. Creditor countries are involved in the reference to making debt sustainable in the long term. It would be useless to seek an international convention on the right to development to bind those countries or the International Bank for Reconstruction and Development (IBRD), WTO, OECD, NAFTA or any other international institution or treaty regime. However, some intergovernmental organizations may be willing to join a multi-stakeholder agreement, as discussed in section II.B below.

Similarly, although the private sector is ready to commit to investment agreements and a range of other international agreements, this would certainly not be the case with a right to development convention. Cancellation of bilateral debt is more amenable to bilateral agreements, or to initiatives like the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative (MDRI). It is not likely to be considered in a general treaty, although this is not to be excluded. The particular needs of landlocked and small island developing States are also a matter for special agreements rather than an omnibus right to development treaty. Decent and productive work for youth is covered by conventions under the International Labour Organization (ILO) and a right to development convention could do little more than restate ILO norms.

Thus, the first major difficulty in translating the eventual criteria into treaty obligations is that the entities for which the criteria were drafted, namely global partnerships for development, such as the OECD Development Assistance Committee (DAC) and the New Partnership for Africa’s Development (NEPAD), are frameworks of multilateral cooperation rather than

<sup>8</sup> It is estimated that there are some 300 regional trade agreements. See [http://www.wto.org/english/tratop\\_e/region\\_e/regfac\\_e.htm](http://www.wto.org/english/tratop_e/region_e/regfac_e.htm).

<sup>9</sup> BRICS is a group of regional power brokers consisting of Brazil, Russian Federation, India, China and, as of April 2011, South Africa, which account for 40 per cent of the world’s population and have “recently shown a desire to use their combined size and economic might to counter the

West’s global dominion ... [and] to reform such institutions as the UN Security Council and the World Bank”. See “All over the place. South Africa is joining the BRICs without much straw”, *The Economist*, 26 March 2011, p. 56.

States; they are not likely to become parties to an inter-State treaty. Any attempt to bind them by treaty will either be too weak, and developing countries will be disappointed, or too strong, and developed countries will object.

A further difficulty is that a treaty must state clearly what role each party accepts. For the most part, this requires what legal philosophers call “perfect obligations”, that is, obligations for which there is an identifiable right holder to whom the obligation is due from an identifiable duty holder. How could the revised criteria be translated into such rights? Would the treaty need to be specific, for example: “The governor of the Central Bank of any State party to this treaty to which any other State party owes an official debt shall, within thirty days following the deposit of the instrument of ratification of this treaty, issue an exoneration of debt on behalf of all other States parties having such debt and take all other measures necessary to cancel completely the said debt.”? Such wording illustrating a perfect obligation is already too general. It is difficult to conceive of an international convention on the right to development containing the full range of perfect obligations implied by the right in general or the global partnerships of goal 8 in particular. The problem is compounded when the scope is expanded—as was done with the criteria—beyond goal 8 to the full range of issues raised in the Declaration on the Right to Development. Were an omnibus right to development treaty to be drafted, it might have to be of the dimensions of the General Agreement on Tariffs and Trade (GATT), which contains over 28,000 words and is 65 pages long. A more modest framework agreement governing commitments to undertake unspecified obligations based on key provisions would probably have the normative content of a typical General Assembly resolution, transformed into treaty language. Such an undertaking may or may not be useful, depending on the political will of States to follow up. The key provisions for such a treaty are mentioned in the conclusion to this section.

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

It is important to see that in linking human rights to both perfect and imperfect obligations, there is no suggestion that the right-duty correspondence be denied. Indeed, the binary relation between rights and obligations can be quite impor-

tant, and it is precisely this binary relation that separates out human rights from the general valuing of freedom (without a correlated obligation of others to help bring about a greater realization of human freedom). The question that remains is whether it is adequate for this binary relation to allow imperfect obligations to correspond to human rights without demanding an exact specification of who will have to do what, as in the case of legal rights and specified perfect obligations.<sup>10</sup>

Sen correctly observes that “[i]n the absence of such perfect obligations, demands for human rights are often seen just as loose talk”.<sup>11</sup> He responds to this challenge with two questions: “Why insist on the absolute necessity of [a] co-specified perfect obligation for a putative right to qualify as a real right? Certainly, a perfect obligation would help a great deal toward the realization of rights, but why cannot there be unrealized rights, even rights that are hard to realize?”<sup>12</sup> He resists “the claim that any use of rights except with co-linked perfect obligations must lack cogency” and explains that “[h]uman rights are seen as rights shared by all—irrespective of citizenship—and the benefits of which everyone should have. The claims are addressed generally—in Kant’s language ‘imperfectly’—to anyone who can help. Even though no particular person or agency has been charged with bringing about the fulfillment of the rights involved, they can still be very influential.”<sup>13</sup>

This argument can be applied to the right to development. Indeed, the language of the Declaration on the Right to Development is a catalogue of imperfect obligations, which are nevertheless subject to specification as to what steps should be taken, when, with what forms of assistance, by whom, with what allocation of resources, with what pace of progressive realization and through what means. As Martin Scheinin has demonstrated, the jurisprudence of human rights suggests a justiciable right to development, and therefore perfect obligations, at least in embryonic form.<sup>14</sup> A convention would have to articulate imperfect obligations, although the monitoring of the implementation of the convention could follow the extent to which the legal structure has adapted to meet these obligations and allowed the State party to move from imperfect to perfect obligations.

<sup>10</sup> Amartya Sen, “Consequential evaluation and practical reason”, *The Journal of Philosophy*, vol. XCVII, No. 9 (September 2000), pp. 495.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, p. 496.

<sup>13</sup> *Ibid.*, p. 497.

<sup>14</sup> Martin Scheinin, “Advocating the right to development through complaint procedures under human rights treaties”, in *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd ed., Bård A. Andreassen and Stephen P. Marks, eds. (Antwerp, Intersentia, 2010), pp. 339-352.

## B. What a general treaty on the right to development might look like

While it would seem, for the reasons stated, problematic to reconceive the criteria as formulated by the task force and further revised into treaty obligations, they do have a feature that is relevant to the implied obligations. The task force criteria are structured around three attributes, which were modelled on the indicators prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR)<sup>15</sup> and relate to the three types of right to development obligations: to create an institutional policy framework conducive to the right to development; to engage in conduct consistent with the principles of the right to development; and to achieve results defined by the right to development. These three attributes thus relate to policy, process and outcomes and could conceivably be reformulated in terms of obligations.

It has to be assumed that the global partnerships for which at least the goal 8-based criteria were intended involve States, and that these States could conceivably undertake treaty obligations that would require them to act, within the global partnerships in which they participate, in a way that would increase the compliance of those partnerships with the criteria. The collective obligations of States parties to the International Covenant on Economic, Social and Cultural Rights were addressed in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997). The impact of treaty obligations on their behaviour (influencing the collective decision-making through voice, vote and contribution of resources) in global partnerships implies acceptance of the principle of policy coherence reflected in Maastricht guideline 19, which relates to economic, social and cultural rights but could be extended to obligations arising from a convention on the right to development.<sup>16</sup>

<sup>15</sup> See HRI/MC/2008/3. Editor's note: that document provided the basis for the publication *Human Rights Indicators: A Guide for Measurement and Implementation* (HRI/PUB/12/5), issued by OHCHR in 2012.

<sup>16</sup> That guideline reads as follows: "The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and non-governmental organizations, should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights." See E/C.12/2000/13.

In the spirit of this guideline, it may be a useful exercise to consider what treaty obligations States might accept which would require them to influence global partnerships in the ways suggested by the draft criteria. Some possible formulations are proposed below as a thought exercise, which may be a starting point for a treaty building on the criteria as eventually formulated. It should be stressed, however, that this thought exercise assumes a radical transformation of the present climate; currently, it is politically unrealistic to move into the treaty negotiation phase as significant groups of States do not find it to be in their interest to do so. Nevertheless, a thought exercise consisting of defining the obligations implied by the criteria may prove useful for the purpose of seeking productive avenues to advance implementation of the right by refining the criteria with a view to their application at a later stage.

Some examples drawing from each of the three attributes of the right to development as articulated by the task force that constitute the organizing principles of the criteria (policy, process and outcome) may show the strengths and weaknesses of a general treaty. Where a particular criterion reflects a significant political commitment rather than a legal obligation, it can be transformed into a preambular paragraph; otherwise, the principle implied by the criteria can be restated as a very rough initial formulation of an obligation that might be considered in the context of treaty negotiations.

### 1. Provisions relating to policy

Thus, if we consider the first attribute developed by the task force ("comprehensive and human-centred development policy"), we can take the first criterion, "1(a) To promote constant improvement in socio-economic human well-being", which is based on the second preambular paragraph and article 2 (3) of the Declaration, and express it as a preambular paragraph to a putative treaty:

*Determined* to promote and ensure access to adequate financial resources for development through bilateral and multilateral capital flows, domestic resource mobilization and debt sustainability,

Another criterion under the first attribute is "1(j) To adopt and periodically review national development strategies and plans of action on the basis of a participatory and transparent process", which is based on articles 1 (1), 2 (3), 3 (1) and 8 (2) of the

Declaration. This criterion could conceivably be transformed into a treaty obligation along these lines:

The States parties shall adopt and periodically review national development strategies and plans of action in light of the present Convention and ensure that representatives of affected populations and civil society, as well as elected officials at the local and national levels, participate in a meaningful way in the elaboration, adoption and review of such strategies and plans of action and that information regarding these strategies and plans of action is widely available to the general public.

Other criteria, such as “1 (i) To contribute to an environment of peace and security”,<sup>17</sup> overlap with other treaty regimes to such an extent as to make it very difficult to include them in a general right to development treaty, although the preamble could reaffirm their commitment to contribute to such an environment, using such language as:

*Noting* the obligations States Parties have assumed through treaties and customary international law relating to the protection of victims of armed conflict, refugees and asylum seekers,

Reflecting the draft sub-criteria (reduce the risks of conflict, protect vulnerable populations during conflict, post-conflict peacebuilding, and development and support for refugees and asylum seekers) in such a treaty would require tediously redundant preambular paragraphs and cumbersome articles on substantive obligations, either too vague to be meaningful (e.g., “to agree to protect vulnerable populations during armed conflict”) or recapitulating provisions of the Geneva Conventions of 1949 that would weigh down the convention without addressing any specific issue of development.

## 2. Provisions relating to process

Attribute 2 refers to “participatory human rights processes” and enumerates five types of process criteria which might lend themselves to formulations of treaty obligations: a legal framework for development; human rights standards; principles of non-discrimination, access to information, participation and effective remedies; good governance at the international level; and good governance at the national level. Some would merely reiterate commitments made in other contexts. For example:

The States Parties to the present Convention agree, where they have not already done so, to give priority to the ratifi-

cation of treaties relating to human rights and anti-corruption measures.

Criterion 2 (b) “To draw on relevant international human rights instruments in elaborating development strategies”<sup>18</sup> mentions a “human rights-based approach in national development strategies”, including “human rights in national development plans and [poverty reduction strategy papers]”. Conceivably, a treaty provision could include:

States Parties shall draw on relevant international human rights instruments in elaborating development strategies, such as poverty reduction strategies, and in laws and regulations concerning extraterritorial activities by business enterprises affecting human rights.

Regarding participation, sub-criteria 2 (c) (ii) and 2 (c) (iii) refer respectively to the “establishment of a framework to facilitate participation” and “procedures facilitating participation in social and economic decision-making”. A possible corresponding treaty obligation could be:

States Parties shall provide sufficient political and financial support to ensure effective and meaningful participation of the population in all phases of the development policy and programme design, implementation, monitoring and evaluation.

States Parties shall provide legal or administrative arrangements ensuring free, informed prior consent by indigenous communities to the exploitation of natural resources on their traditional lands.

An issue of keen interest to developing countries is reflected in criterion 2 (d) “To promote good governance at the international level and effective participation of all countries in international decision-making”. Here treaty provisions could draw upon language already agreed to, such as in General Assembly resolutions, conference outcomes such as the Monterrey Consensus of the International Conference on Financing for Development (2002) and meetings such as the Third and Fourth High Level Forum on Aid Effectiveness (2008 and 2011). Thus, the wording of paragraph 10 (a) of General Assembly resolution 64/172 could be used for a treaty provision as follows:

States Parties agree to promote, through the decision-making process of the relevant institutions, the democratization of the system of international governance in order to increase the effective participation of developing countries in international decision-making.

<sup>17</sup> This criterion is based on the ninth, eleventh and twelfth preambular paragraphs and articles 3 (2) and 7 of the Declaration, and on paragraphs 5 and 69-118 of the 2005 World Summit Outcome (General Assembly resolution 60/1).

<sup>18</sup> This criterion is based on the eighth and tenth preambular paragraphs and articles 3 (3), 6 and 9 (2) of the Declaration, and on paragraph 9 of General Assembly resolution 64/172 on the right to development.

Additional provisions relating to aid could be based on such commitments as the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action, separating, where necessary, provisions for “partner countries” (or “States Parties benefiting from development cooperation”) and “donor countries” (or “States Parties belonging to the donor community”), which would need to be defined in the opening articles of the treaty. Thus, provisions relevant to this criterion could include:

States Parties belonging to the donor community agree to base their overall support, as expressed in country strategies, policy dialogues and development cooperation programmes, on partners’ national development strategies and periodic reviews of progress in implementing these strategies, and to link funding to a single framework of conditions and/or a manageable set of indicators derived from the national development strategy.

States Parties benefiting from development cooperation shall exercise leadership in developing and implementing their national development strategies through broad consultative processes and translating these national development strategies into prioritized results-oriented operational programmes as expressed in medium-term expenditure frameworks and annual budgets.

Where there is no need to separate donor from partner countries, the Paris Declaration commitments could take the form of common treaty provisions, such as:

States Parties agree to work together to establish mutually agreed frameworks that provide reliable assessments of performance, transparency and accountability of country systems and to integrate diagnostic reviews and performance assessment frameworks within country-led strategies for capacity development.

Regarding governance at the national level (criterion 2 (e) “To promote good governance and respect for rule of law at the national level”), treaty provisions could draw on the Accra Agenda along these lines:

States Parties benefiting from development cooperation shall facilitate parliamentary oversight by implementing greater transparency in public financial management, including public disclosure of revenues, budgets, expenditures, procurement and audits.

States Parties belonging to the donor community agree to publicly disclose regular, detailed and timely information on volume, allocation and, when available, results of development expenditure to enable more accurate budget, accounting and audit by developing countries.

Similar provisions could be included for non-discrimination, gender equality, voting procedures in international financial institutions and other process-oriented aspects of the right to development.

### 3. Provisions relating to outcomes

The third and final attribute relates to outcomes in terms of social justice in development and begins with criterion 3 (a) “To provide for fair access to and sharing of the benefits of development”, which contains language suitable for a preambular paragraph similar to the second preambular paragraph and article 2 (3) of the Declaration:

*Convinced* that the right to development requires that national and international development strategies and programmes result in the fair distribution in the benefits of development,

Some of the four sub-criteria may lend themselves to treaty provisions. For example, sub-criterion 3 (a) (ii) (“Equality of access to resources and public goods”) could be translated into a treaty provision such as:

States Parties shall guarantee equality of access to resources publicly available as a result of progress in achieving development goals as well as to public goods, such as water, clean air, public recreation areas, bandwidth and similar goods as shall be determined by national policy to belong to all consumers on the basis of need rather than ability to pay.

Criterion 3 (b) (“To provide for fair sharing of the burdens of development”) includes matters of climate change, negative impacts of development investments and policies, and natural, financial or other crises. Like some of the policy criteria mentioned above (e.g., securing peace, protecting refugees), it would weigh down a convention to repeat other treaty obligations in areas such as climate change, migration and humanitarian assistance. However, some issues are so central to the right to development, and to its attribute of social justice, that it may be possible to include a provision. For example, a possible article might be:

States Parties agree that adequate compensation must be provided to all who suffer from negative impacts of development investments and policies, such as hazardous industries, dams causing displacement of populations, natural resource concessions that do not adequately benefit the local population, granting of patents that infringe on ownership of traditional knowledge and similar activities, on the basis of an equitable sharing of responsibility between the international entity carrying out the activity and the national agency authorizing it.

States Parties agree to ensure, through the United Nations Framework Convention on Climate Change and related instruments, that developing countries have the resources and technology to carry out nationally appropriate mitigation actions to reduce emissions and adapt to climate change, in accordance with the principle of common but differentiated responsibilities and respective capabilities, and taking into account social and economic conditions and other relevant factors.

Similar provisions could be written to give effect to sub-criteria 3 (a) (iii) (“Reducing marginalization of least developed and vulnerable countries”) and 3 (a) (iv) (“Ease of immigration for education, work and revenue transfers”). Regarding criterion 3 (c) (“To eradicate social injustices through economic and social reforms”), issues of social protection, trafficking, child labour and land reform could also be addressed in articles defining the policy priorities to which States parties would commit in accordance with the social justice dimension of the right to development. To these should be added a more general gender equality provision, such as:

States Parties agree to ensure that their development strategies and programmes reflect the important role and the rights of women and the application of a gender perspective as a cross-cutting issue in the process of realizing the right to development, with special provisions to guarantee women’s and girls’ education and their equal participation in the civil, cultural, economic, political and social activities of the community.

The above examples of treaty provisions are merely a thought exercise to test the idea—independent from political considerations—of transforming into treaty language the draft criteria developed by the task force to draw the attention of development practitioners to the development priorities and practices that are conducive to the right to development. The purposes are different and considerable effort would be required for one to build on the other.

### C. Final observations concerning transforming the criteria as eventually revised into treaty provisions

This exercise reveals several problems with the drafting of a convention based on the criteria. The first is that the norms are either too vague to be of much value, or unlikely to be acceptable to most Governments (although perhaps desirable from the perspective of an ideal right to development). Terms like “participation” and “equity” may be acceptable in a political declaration, but in a treaty that would be enforceable, these terms and many others would require definition and clarification. It would probably take several years before a formulation could be found that is acceptable to an intergovernmental drafting conference. However, the level of generality in the criteria developed by the task force is not much greater than that in many other human rights treaties. Additionally, drafters could provide more specificity if they felt there was a good-faith effort on all sides to find a common ground. The polarized political cli-

mate that results in 53 negative votes (see below) at the mere mention of a convention is not conducive to the fleshing out of specific treaty norms expanding on the criteria, perhaps in any possible formulation. A related problem is that many of the proposed treaty obligations are at least in part duplicative of treaty obligations already assumed. It would be necessary to ensure (a) that there is compatibility among similar norms; and (b) that there is sufficient novel substance matter to justify a new treaty. The more precise the treaty obligation the more likely it is to reveal the tension between a general commitment to the right to development and the willingness to change practices.

Although it is impossible to separate the feasibility of an international treaty on the right to development from the charged political climate, it is possible for legal scholars and practitioners, not acting on Government instructions, to make an honest determination of the advantages and disadvantages of the treaty route. It should be possible to assess whether or not a treaty is a good idea on the basis of the extent to which it would improve the prospects of reducing the resource constraints on developing countries while systematically integrating human rights into the development process and, conversely, development perspectives into human rights, rather than the extent to which this or that group of States favours the treaty. The draft criteria are perhaps not the best starting point because they relate to structure (conducive environment), process (principles of conduct) and outcome (just results), which overlap and are more useful for practitioners’ guidelines than for drafters concerned about keeping a treaty precise and concise.

However, the task force criteria reflect six core normative propositions that merit inclusion should the political will be found to draft a treaty and that can be articulated in a language suitable for an international treaty: (a) that the development environment must be conducive to human-centred and comprehensive development at the national and international levels aimed at the constant improvement of the well-being of all; (b) that local ownership of development policy must be conditioned by a human rights-based approach, the fair distribution of the benefits, and the principles of equity, non-discrimination, participation, transparency, accountability and sustainability; (c) that active, free and meaningful participation of the affected populations must be part of the process; (d) that due attention must be given to gender equality and the needs of vulnerable and marginalized populations; (e) that the donor countries must commit to



reducing resource constraints on developing countries in the areas of trade liberalization, private financial flows, debt forgiveness, domestic resource mobilization and development assistance; and (f) that the monitoring must be based on reliable data and subject to *ex ante* impact assessments, public scrutiny, and institutionalized mechanisms of mutual accountability and review. The willingness of developing countries to accept item (b) (“rights-based development”) should be based on their support for articles 2 and 6 of the Declaration and that of developed countries to accept item (e) (“development-based human rights”) should be based on their support for articles 3 and 4 of the Declaration. These six core ideas could form the basis for the negotiation of a convention in a climate of mutual trust and shared commitment to move the right to development from political rhetoric to development practice. For the moment, there is little evidence of either such a climate or such commitment.

### III. Relationship of the right to development to existing substantive treaty regimes<sup>19</sup>

#### A. Relationship to human rights treaties

##### 1. Substantive overlaps and lacunae

There is an obvious overlap between the rights-based approach to development and human rights treaties. The latter define the priorities to be set in the development process. They do so in particular through the definition of core rights within the framework of the International Covenant on Economic, Social and Cultural Rights.<sup>20</sup> They also define priorities by circumscribing the permissible limitations of civil and political rights. Moreover, human rights treaties contain rules on the right to political participation, in particular article 25 (a) of the International Covenant on Civil and Political Rights, which guarantees the right of every citizen to take part in the conduct of public affairs. Finally, human rights treaties presuppose respect for the rule of law and the existence of functioning judicial control over private law disputes and criminal proceedings. Thus, they largely overlap with all three aspects of the procedural dimension of the right to development. They concur with the result

dimension of the right to development in their emphasis on the realization of the rights guaranteed.

What, then, is the value added by the recognition of a legally binding right to development? It is submitted here that it has two advantages with respect to the substantive content. First, the right to development brings to the foreground the obligation to create enabling structures at the national level. These structural requirements are participatory procedures and structures, the rule of law and the independence of the judiciary. Such structures are, to a large extent, also required under human rights treaties. Yet, in that context, they serve only as a support to the rights guaranteed. Therefore, and moreover, individual rights holders can only contest the lack of such structures insofar as that infringes upon their rights. A good illustration is the right to a fair trial before an independent tribunal: it does not give rise to an individual right of everyone to have an independent judiciary, but only for a person in a specific private law dispute or when standing accused of a crime. Even if one were to consider it sufficient that the possibility of individuals claiming this right has, as a result, an obligation for the State to create an independent judiciary, there remains a gap: human rights treaties do not require an independent judiciary for most of administrative law. But it is submitted here that, even beyond this latter consequence, a general individual right and concomitant State obligation to set up a court system of independent judges is a value in itself. It goes hand in hand with legal certainty as a basic feature of the rule of law, both serving to establish order, *i.e.*, foreseeability for individuals and hence security in all their present and future activities. It thus contributes to allowing and safeguarding individual autonomy.

Second, human rights treaties focus on the individual as the bearer of rights. Therefore, the collective dimension of the right to development can be regarded as another added value: since human rights are claims against the (territorial) State, the right of peoples to development is, first and foremost, directed at the authorities of their own State. In other words, the collective dimension of the right to development emphasizes the responsibility of State authorities towards their own populations. On a conceptual level, the right to development thus links with the new trend in international politics and public international law: it builds on the conviction that the State is not an end in itself, but that its purpose is the improvement of the human condition. Hence, the right to development becomes an additional yardstick for measuring

<sup>19</sup> This section is based on chapter 11 in the work referred to in footnote 1.

<sup>20</sup> For the concept of core rights, see The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (E/CN.4/1987/17, annex, and Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations, paras. 1-2.

the legitimacy of a State.<sup>21</sup> On a more practical level, the collective dimension of the right to development leads to the consequence that a Government can only call for international cooperation if it fulfils its duties towards its own population. On this basis, linking official development assistance with the fulfillment of this duty is a kind of conditionality that helps realize the collective dimension of the right to development.

## 2. Duty bearers and right bearers

A comparison of human rights regimes and the right to development as concerns the determination of duty bearers reveals that the latter goes further because of its extraterritorial applicability and, through this dimension, also with respect to private actors.

The uncontested extraterritorial reach of human rights treaties is rather limited: the International Covenant on Civil and Political Rights presupposes that a person is “within [the] territory and subject to [the] jurisdiction” of a State to engage that State’s responsibility. Although the Human Rights Committee does not understand “jurisdiction” as being limited to the State’s own territory, it requires a physical contact of a State (through the actions of its agents) with the territory of another State to trigger the duty to respect, protect and fulfil the rights guaranteed.<sup>22</sup> The provisions of the International Covenant on Economic, Social and Cultural Rights concerning international cooperation, in particular article 2 (1), do not create an enforceable claim to cooperation for one State against others.<sup>23</sup> In contrast, the right to development as recognized by the Vienna Declaration and Programme of Action contains a recommendation addressed to third States to cooperate to the best of their abilities and available resources. This recommendation neither permits less developed States to claim financial aid, nor does it give third States carte blanche to deny assistance. Instead, it compels third States and the international community to justify a denial of support. In the same vein, the international community would

be obliged to justify itself if it did not step in to support development by eliminating the worst obstacles to development in cases where States were extremely weak or failing. This aspect of a legally binding right to development would link with the preventive dimension of the responsibility to protect as recognized by the international community in the World Summit Outcome adopted in 2005.<sup>24</sup> It would help shift the (wrong) focus that scholars and practitioners apply when discussing the responsibility to protect from military measures (responsibility to react) to development (responsibility to prevent).<sup>25</sup>

The second problem of duty bearers under existing human rights treaties arises from the fact that individuals are not legally bound to respect, protect and fulfil human rights. Human rights treaties only extend to individuals indirectly: the obligation to protect requires the State to take measures for the protection of individual rights holders from violations of their rights by other individuals. This legal approach becomes problematic when States face powerful private actors. Under the right to water, for example, States may privatize the water supply infrastructure, but must ensure that private contractors provide access to the resources on a non-discriminatory basis and through affordable prices.<sup>26</sup> A weak State, however, may be unable to control a large, transnational, private contractor effectively, let alone sanction violations. Or it may be that the State authorities are not willing to take action because the office holders receive personal profits from the corporation’s activities.

In this situation, the external dimension of the right to development is highly useful insofar as it obliges the home State of a transnational corporation

<sup>21</sup> Other yardsticks are the realization of fundamental human rights and the fulfilment of the State’s “responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity” (General Assembly resolution 60/1, para. 138).

<sup>22</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (Kehl am Rhein, Germany, N.P. Engel, 2005), article 2, marginal note 30 (with further references).

<sup>23</sup> Although the Committee on Economic, Social and Cultural Rights assumes that “international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States”, it rightly does not speak of a corresponding claims-right by other States (general comment No. 3 (1990), para. 14), as the Covenant does not set up a structure of reciprocal rights and duties between States. In contrast, an individual right is theoretically conceivable, but does not give rise to a claim to a specific amount of only financial aid.

<sup>24</sup> General Assembly resolution 60/1, para. 139: “The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity .... We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”

<sup>25</sup> These dimensions of the responsibility to protect were developed by the International Commission on Intervention and State Sovereignty set up by the Government of Canada. As a conceptual approach, they are helpful for understanding the responsibility to protect, even if they were not expressly adopted by the World Summit. They can be considered as an emanation of the principle of proportionality and the prohibition of intervention under public international law. See *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, International Development Research Centre, December 2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

<sup>26</sup> For details, see Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water. See also Eibe Riedel, “The human right to water”, in *Weltinnenrecht: Liber Amicorum Jost Delbrück*, Klaus Dicke and others, eds. (Berlin, Duncker and Humblot, 2005), p. 585, and Beate Rudolf, “Menschenrecht Wasser—Herleitung, Inhalt, Bedeutung und Probleme”, in *Menschenrecht Wasser*, Beate Rudolf, ed. (Frankfurt, Peter Lang, 2007), p. 15.

to help realize the right to development by controlling that corporation. However, as has been shown above, this extraterritorial dimension is only contained in a recommendation to cooperate, and hence it gives rise to a mere obligation to justify non-compliance. Under this “comply-or-explain” approach, the home State of a transnational corporation (TNC) is not under an absolute obligation to prevent any human rights violations by the corporation that infringe upon the right to development. It is, however, compelled to provide for appropriate sanctions mechanisms, or explain their absence, in case the State in which the activities of the TNC have been incriminated is not able or not willing to ensure the right to development. Such instruments may be criminal prosecution for corruption abroad or civil remedies for foreign claimants (individuals or groups). For States with functioning independent judiciaries, it would seem difficult to defend inaction in these areas. At the same time, the cooperative character of the right to development requires States not to take these measures if the host State of the TNC is capable of taking them itself.

### 3. Mechanisms for implementation

The last important point in the comparison concerns mechanisms for implementation. The legal debate in this field tends to focus on individual complaints mechanisms under human rights treaties. Yet, such a mechanism for the right to development would be highly problematic and, at the same time, of little relevance since there is little that an individual complaints mechanism for the right to development could achieve that is not achievable through existing human rights complaints procedures. Most aspects of the right to development concern either structural requirements (process dimension) or the realization of human rights (result dimension). Moreover, the procedural aspects of the right to development do not lend themselves easily to an individualized violations approach. Under which conditions should a complaint be admissible and successful if, for instance, the acts of the administration cannot be challenged in an independent court? An individual complaints procedure would, in reality, be a barely disguised *actio popularis*. For this reason, a complaints mechanism for the right to development should focus more appropriately on the collective dimension of the right. Within this dimension, it should focus especially on the question of who shall have standing to bring a claim for a population. One might think, for example, of collectivities that have representations under municipal law, such as the states within a federation or groups that enjoy autonomy, and, in

the absence of these, independent bodies, such as national human rights institutions that fulfil the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles),<sup>27</sup> could be empowered.

With respect to State reporting, one might argue that no new supervisory mechanism is needed for the right to development because State reporting can be extended to supervising national development policies, for example, by referring to the Millennium Development Goals.<sup>28</sup> This approach would be comparable to that of the Committee on the Elimination of Discrimination against Women, which takes into account the Beijing Platform for Action, adopted by the Fourth World Conference on Women in 1995. It is not convincing to argue that human rights expert members of treaty bodies are not capable of performing this task because they are not development specialists. This view disregards the fact that members of various treaty bodies have long dealt with a variety of policy fields, and there is no reason why they should not be able to address development politics from a human rights perspective. What seems more problematic is that such monitoring will not be very effective. This is to be expected, since treaty bodies already have very limited time allocated for their constructive dialogue with States. Therefore, the implementation mechanisms available under human rights treaties are not sufficient to ensure implementation of the right to development. In addition, the reporting procedure only engages a specific State and non-governmental organizations (NGOs) with a particular interest in that State, but not other relevant actors within the donor community such as third States, international financial organizations and (State or private) institutions with relevant technical expertise.

For these reasons, the right to development needs other mechanisms for implementation. These should focus less on deficiencies in a State’s actions and possible remedies and more on assisting it in devising effective development strategies that respect the procedural requirements of the right to development and helping to bring about its result dimension. From this perspective, the proposal for a development compact has a lot of potential, particularly because it sets up a structure for elaborating a development strategy in cooperation with the stakeholders involved.<sup>29</sup>

<sup>27</sup> General Assembly resolution 48/134, annex.

<sup>28</sup> Scheinin, “Advocating” (see footnote 14), p. 340.

<sup>29</sup> See section IV below.

## B. Relationship to development cooperation treaties

Given the number and diversity of development cooperation instruments, a comprehensive comparison between the right to development and treaties in that area is impossible. Therefore, this part will examine the Cotonou Agreement as an important example of comprehensive and institutionalized development cooperation.<sup>30</sup> The focus will be on the concept of development and on the implementation mechanism set up by that treaty.

The concept of development underlying the Cotonou Agreement derives from its article 1, according to which its objective is “to promote and expedite the economic, cultural and social development” of the African, Caribbean and Pacific (ACP) States. As the next sentence reveals, the priority is on poverty reduction. This, in turn, has to be “consistent with the objective of sustainable development”. In article 9 (1), the Cotonou Agreement defines its concept of sustainable development to be “centered on the human person, who is the main protagonist and beneficiary of development”. It furthermore names “[r]espect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance ... an integral part of sustainable development”. Thus, the Cotonou Agreement recognizes a rights-based approach to development;<sup>31</sup> taken together with its recognition of the need for (democratic) public participation, rule of law structures and transparency, it reflects the main procedural aspects of the right to development as expressed in the Declaration on the Right to Development and the Vienna Declaration and Programme of Action. In addition, the results dimension of development can be discerned in the emphasis on respect for all human rights. Moreover, article 10 (1) emphasizes that the benefits of development must be available to the whole population in an equitable way.<sup>32</sup> Missing in the Cotonou Agreement is an express reference to the international dimension of development as being required by international law.<sup>33</sup>

Yet, the Agreement avoids all language that might indicate the recognition of an individual, let alone a collective, right to development against the home State or third States. For instance, it does not list the right to development among the fundamental principles of ACP-European Community cooperation (art. 2), and the preamble refers merely to the “pledges” made at major United Nations and international conferences. The term “right” is used only with reference to the States: article 4 expressly recognizes the right of each of them to determine its own path of development.<sup>34</sup> Nevertheless, it would seem that the significant substantive overlap between the concept of development underlying the Cotonou Agreement and the right to development should and could be used for rallying support among the European States to recognize the right to development.

As the following analysis will show, a right to development may even be useful for effective implementation of the Cotonou Agreement. The Agreement provides for sanctions in case of a violation of one of the essential principles enumerated in article 9. According to article 96, the permitted reactions are, first and foremost, consultations, but if these do not reach a result within 60 days, or in case of flagrant and serious violations, “appropriate measures” can be taken. These measures must be compatible with international law, proportionate, and should aim at the least disruption of the Agreement. They may include suspension of the Agreement (and thus financial or other aid granted under it) as a last resort. These limitations point to a fundamental problem of sanctions: it is highly probable that the suspension of financial or other aid will harm the population much more than the targeted Government. Yet, donor States are—quite understandably—unwilling to continue financial support for a Government that flagrantly disregards human rights, and they are subjected to serious political pressure at home if they do so. A way out of this impasse may be to focus more on participation, that is, cooperation with civil society. This option is opened by the Agreement’s provisions on implementation, which emphasize public participation in the development process, both at the level of determination of policies (art. 4) and of their execution (art. 2).<sup>35</sup> Thus, a shift to cooperation with civil society in case of flagrant human rights violations by the receiving State

<sup>30</sup> For a detailed discussion of the Cotonou Agreement, see chapter 19 of the present publication.

<sup>31</sup> Article 1 expressly requires that “[t]hese objectives and the Parties’ international commitments ... shall inform all development strategies and shall be tackled through an integrated approach taking account at the same time of the political, economic, social, cultural and environmental aspects of development”.

<sup>32</sup> “[S]ustainable and equitable development involving, inter alia, access to productive resources, essential services and justice ...”

<sup>33</sup> Evidently, the Agreement itself is an example of cooperation, yet on a purely voluntary basis.

<sup>34</sup> “The ACP States shall determine the development principles, strategies and models of their economies and societies in all sovereignty.”

<sup>35</sup> That provision explains “participation” as one of the fundamental principles of ACP-European Community cooperation as follows: “[A]part from central government as the main partner, the partnership shall be open to ... different kinds of other actors in order to encourage the integration of all sections of society, including the private sector and civil society organizations, into the mainstream of political, economic and social life ...”

could be achieved by choosing measures that leave out the Government and go directly to the population, especially through local NGOs. This approach would also reflect the principle, recognized in the Cotonou Agreement, the Declaration on the Right to Development and the Vienna Declaration and Programme of Action, that humans are the ultimate protagonists and beneficiaries of development. In other words, this interpretation of the sanctions mechanism under the Cotonou Agreement in the light of the right to development would lead to a further restriction of the States' reserved domain in permitting direct contact between third States and organizations of civil society so as to realize development. It would also reflect the collective dimension of the right to development as a claim of the population with respect to its home State.

The same approach could be used under the right to development itself so as to balance the responsibilities of the national State and the international community. However, the problem that arises then is that—unlike under the Cotonou Agreement—the right to development so far does not encompass procedural or institutional structures at the international level, such as a fixed time period for consultations or oversight by an inter-State body (such as the Council of Ministers under the Cotonou Agreement, which determines whether a flagrant violation of human rights is taking place). Such provisions could, of course, be introduced under a binding legal instrument on the right to development. In this case, the external dimension of the right to development would limit the principle of non-interference to the benefit of the (individual and collective, not State) right to development, i.e., the internal dimension of the right.

### C. Relationship to international economic law

As in the area of development cooperation, the agreements in the field of international economic law are manifold. Constraints of time and space permit only two observations here, the first with respect to the World Bank and the second with respect to WTO.

Since the late 1980s, good governance has become a yardstick in the World Bank's loan-granting process, as bad governance was considered the main reason for the ineffectiveness of loans.<sup>36</sup> An

analysis of the World Bank's concept of good governance reveals large overlaps with the substantive content of the right to development. According to the World Bank, good governance encompasses four elements: (a) accountability in the sense of disciplinary and criminal responsibility of public officials; (b) participation; (c) transparency; and (d) the supremacy of law, i.e., the rule of law.<sup>37</sup> As was shown earlier, the three last-mentioned elements are features of the procedural dimension of the right to development. The decisive difference between the right to development and the good governance approach, however, is that the World Bank considers the elements of the latter only to be means of enhancing the effectiveness of loans; unlike the right to development, they are not an end in themselves.

Nevertheless, this conceptual difference must not distract from the fact that the World Bank grants loans to promote development in the receiving State. The recognition of the right to development, under customary international law or within a specific legal instrument, would give a firm legal basis for introducing the realization of elements of good governance as obligations into loan agreements. For now, good governance is only an obligation by virtue of a teleological interpretation of the World Bank's Articles of Agreement.

With respect to WTO law, the first observation is that the right to development can be inferred in the WTO Agreements, even if they do not mention it expressly. One avenue is to interpret the provisions focusing on the special situation of developing countries in the light of this right.<sup>38</sup> The second, more extensive, way would introduce the concept of the right to development via the requirement of interpreting WTO law in the light of applicable international law.<sup>39</sup> These

ance – How does it relate to human rights?", in *Human Rights and Good Governance: Building Bridges*, Hans-Otto Sano and Gudmundur Alfredsson, eds. (Springer, 2002), pp. 4-7; and David Gillies, "Human rights, democracy and good governance: stretching the World Bank's policy frontiers", in *The World Bank: Lending on a Global Scale (Rethinking Bretton Woods)*, Jo Marie Griesgraber and Bernhard G. Gunter, eds. (London, Pluto, 1996), pp. 101 and 116.

<sup>37</sup> For a detailed analysis, see Beate Rudolf, "Is 'good governance' a norm of public international law?", in *Völkerrecht als Wertordnung/Common Values in International Law. Festschrift für/Essays in Honour of Christian Tomuschat*, Pierre-Marie Dupuy and others, eds. (Kehl am Rhein, N.P. Engel, 2006), p. 1007.

<sup>38</sup> Such provisions may be found in articles XVIII and XXXVI (8) of the General Agreement on Tariffs and Trade.

<sup>39</sup> This requirement was recognized by the Appellate Body. See, e.g., *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, 20 May 1996, document WT/DS2/AB/R, sect. III.B, reprinted in *International Legal Materials*, vol. 35 (1996), p. 605; *Korea – Measures Affecting Government Procurement*, Panel Report, 19 January 2000, document WT/DS163/R, para. 7.96; *United States – Import Prohibition of Shrimp and Certain Shrimp Products (Shrimp/Turtle case)*, Appellate Body Report, 6 November 1998, document WT/DS58/AB/R, paras. 127-132. For a detailed analysis see James Cameron and Kevin R. Gray, "Principles of international law in the WTO Dispute Settlement

<sup>36</sup> World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington, D.C., 1989), pp. 60-61, and *Governance: The World Bank's Experience* (Washington, D.C., 1994), pp. 17-18. For an account of this development see, e.g., Adrian Leftwich, "Governance, the State and the politics of development", *Development and Change*, vol. 25, Issue 2 (April 1994), p. 363; Mette Kjær and Klaus Kinnerup, "Good govern-

possibilities are helpful for the right to development, yet—and this is the second observation—they miss the main problem of WTO law, namely, the failure of existing WTO agreements to address, or to address adequately, areas that are of particular importance to developing countries. The best known example is insufficient access of agricultural products from developing countries to the markets of industrialized States because of the subsidies the latter grant to their farmers or agricultural industries. As the Doha Round shows, the reliance of the WTO system on negotiations, which hinge on the States' economic and political power, is inappropriate to meet the developmental needs of States in an adequate and timely way. Thus, as long as no substantive principles, such as equity or the right to development, are explicitly recognized within the WTO system, a serious impediment to realizing the right to development will remain. This situation will work to the disadvantage of the least developed countries because, unlike "threshold countries" (such as Brazil or China), they do not possess the bargaining chips necessary for successful negotiations.

#### D. Relationship to international environmental law

Again, the lack of a comprehensive international agreement in the area of international environmental law prevents a general comparison of the right to development with treaty arrangements. Instead, one notes seemingly contradictory approaches of the right to development and environmental law to the relationship between development and sustainability, and to a possibility of harmonizing them. Note the decisive difference between the Rio Declaration on Environment and Development of 1992, which puts development and sustainability on an equal footing,<sup>40</sup> and the Vienna Declaration and Programme of Action, adopted one year later, which reduces sustainability to one of several recommended approaches. Although the conflict can be mitigated by a restrictive interpretation, allowing States to prefer development over sustainability only under extreme circumstances, the fact remains that the right to development under the Vienna Declaration and Programme of Action gives precedence to development over sustainability, whereas the Rio Declaration creates no hierarchy

between the two concepts. In a similar vein, the United Nations Framework Convention on Climate Change of 1992 uses the right to development to limit the environmental obligations of States that serve the aim of sustainability.<sup>41</sup>

Thus, it would seem that the relationship between development and sustainability depends on the legal text taken as a point of departure in resolving a conflict. However, it is submitted here that this is not the only outcome possible. If we conceive of international law as an integrated legal order, such a compartmentalized approach is not tenable. International obligations must be interpreted, as far as possible, so as to avoid contradictions. International courts and tribunals have long adopted this approach.<sup>42</sup> Therefore, it is preferable to understand all norms cited here as reflecting the need to balance development and environmental concerns, a requirement that is encapsulated in the notion of sustainable development. Under this approach, the balancing process is between two interests of equal importance, neither of which takes automatic precedence over the other. Consequently, what has to be achieved in the balancing process is an outcome which advances both concerns as far as possible. The realization of this harmonizing approach is best furthered by breaking down the notions of development and sustainability into factors that help carry out the balancing process. In this sense, the International Law Commission established a set of factors to be weighed to determine States' obligations to prevent extraterritorial harm.<sup>43</sup> Thus, the right to development can build on the experience of international environmental agreements and documents in that the future debate should focus on the establishment of factors to allow principled balancing between development and sustainability.

#### E. Final observations on existing treaty regimes

As the foregoing analysis has shown, the right to development can be accommodated within the pres-

Body", *International and Comparative Law Quarterly*, vol. 50, Issue 2 (April 2001), p. 248, and Joost Pauwelyn, "The role of public international law in the WTO. How far can we go?", *American Journal of International Law*, vol. 95, No. 3 (April 2001), pp. 538, 540-543 and 560.

<sup>40</sup> See, in particular, principle 3 ("The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.") and principle 4 ("In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process ...")

<sup>41</sup> Article 3 (4) of the Convention states: "The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate to the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change."

<sup>42</sup> For details see Beate Rudolf, "Unity and diversity of international law in the settlement of international disputes", in *Unity and Diversity in International Law*, Rainer Hofmann and Andreas Zimmermann, eds. (Berlin, Duncker and Humblot, 2006), p. 389.

<sup>43</sup> Cf. International Law Commission, draft articles on Prevention of Transboundary Harm from Hazardous Activities (A/56/10 and Corr.1, chap. V.E), art. 10. See also Convention on the Law of Non-navigational Uses of International Watercourses (General Assembly resolution 51/229, annex), art. 6, which is based on work of the Commission.

ent system of international law. With respect to human rights treaties, it adds the important collective dimension of development. At the same time, the recognition of the right to development reinforces human rights by focusing on States' obligation to create the procedural and institutional framework for development and the protection of human rights. The juxtaposition of the primary obligation of the State and the secondary obligations of other States and the international community as a whole must be interpreted as establishing a "positive conditionality", meaning that only a State that undertakes honest efforts to realize its population's right to development can make a claim to the fulfillment of the secondary obligation of other States, which, in turn, must justify any refusal to act upon that request. The analysis of developmental treaties has shown that the implementation of the right to development would be improved if it encompassed specific provisions permitting the international community and third States to provide development assistance directly to the population if the home State seriously violates its own people's right to development. With respect to international economic law, it was shown that the World Bank's concept of good governance overlaps to a significant extent with the procedural dimension of the right to development. This observation, and the weak legal basis for the World Bank under public international law as it stands today, supports the argument that States and institutions wishing to promote good governance should recognize the right to development. In contrast, the political structure of the WTO system would be fundamentally altered by the recognition of a right to development because it would provide substantive weight to the negotiation position of least developed countries. Finally, international environmental law militates in favour of establishing clear criteria for a principled balancing of development and sustainability. Developing instruments to concretize the right to development—whether legally binding or not—are a good way to tackle these issues and might help overcome the pointless continuance of outdated confrontations.

#### IV. Advantages of a multi-stakeholder agreement on the right to development<sup>44</sup>

This section contains a proposal for a multi-stakeholder agreement on the right to development, which would bring together a coalition of public and private actors who are willing to commit to the right

to development by establishing best practices that demonstrate that it can be implemented in a meaningful way. The discussion will focus on (a) the potential added value of such a binding agreement; and (b) its possible content in the light of the decision of the Human Rights Council that the Working Group on the Right to Development should move gradually towards "consideration of an international legal standard of a binding nature".<sup>45</sup>

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

Under the non-binding Declaration on the Right to Development, the right to development is a human right of every human person and all peoples to economic, social, cultural and political development. It has both an internal and an external dimension. The internal dimension consists of the duty of the State to formulate national development policies that aim at the realization of all human rights. The external dimension includes duties of all States to cooperate with a view to achieving the right to development.

A new instrument on the right to development—whether binding or not—could be used to update the Declaration's approach to the concept of development. While the Declaration already perceives of development as a multidimensional concept,<sup>46</sup> subsequent developments, particularly on the sustainability requirement of international environmental law and on the democracy component of development, could be taken into account.<sup>47</sup> It may also be useful to reaffirm that progress made in one dimension should not be at the expense of another dimension. These are clarifications rather than departures from the Declaration's text, and they should not prove to be very controversial. The internal aspect of the right to development concerns the State's obligation to respect, protect and fulfil human rights in the context of national development policies. The main aim is to make clear that State obligations under existing human rights treaty law apply to domestic development policies. Lack of economic development can never be used as a pretext for human rights violations and, in addition, States are required to ensure that human rights are fully inte-

<sup>45</sup> Resolution 4/4, para. 2 (d).

<sup>46</sup> The second preambular paragraph of the Declaration describes development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom".

<sup>47</sup> The report of the Secretary-General, "An agenda for development" (A/48/935), spelled out five dimensions of development: peace, economic growth, the environment, social justice and democracy.

<sup>44</sup> This section is based on chapter 10 in the work referred to in footnote 1.

grated into domestic poverty reduction strategies.<sup>48</sup> Martin Scheinin convincingly argues that it may well be a viable option “to strive for the realization of the right to development also under existing human rights treaties and through their monitoring mechanisms, provided that an interdependence-based and development-informed reading can be given to the treaties in question”.<sup>49</sup> Arguably, an interdependence-based and development-informed reading of human rights treaties does not depend on the further codification of the right to development. The Vienna Convention on the Law of Treaties already requires that treaties be interpreted in the light of their context and their object and purpose (art. 31 (1)), and this should in principle suffice to ensure that human rights, when they are applied to an aspect of development policy, are interpreted in a development-informed way and with full acknowledgement of the interdependence of human rights. A strengthening of the legal status of the right to development may reinforce this type of interpretation, but is perhaps not essential.

From a normative point of view, the internal dimension of the right to development is already part of existing international human rights law (with the exception of the peoples’ right aspect). There is no pressing need for a new instrument of a binding nature if it is limited to the internal, individual dimension of the right. No new norms are needed to establish that a State should abide by its human rights obligations in the context of the domestic development process. But if a binding instrument on the right to development were to be drafted for other reasons (as discussed below), it would be legally and politically unfeasible to codify external obligations without reaffirming a parallel obligation of the State to commit available resources to the realization of human rights.<sup>50</sup> In addition, in a context of economic globalization, it is increasingly difficult to separate the internal and external dimensions of the right to development. This is particularly evident, for example, when forced labour is used in the context of complying with an investment agreement with a foreign company.

With regard to the external dimension of the right to development, existing human rights treaty regimes and monitoring mechanisms leave a substantial gap. Human rights treaty law is based on State jurisdiction and typically applies *ratione loci* and *ratione personae* to the territory of the State party as the sole duty holder. Although some of the treaty bodies, in particular the Committee on Economic, Social and Cultural Rights, have enumerated extraterritorial obligations of international assistance and cooperation,<sup>51</sup> such obligations are not yet fully established, and hardly enforced. International human rights obligations of intergovernmental organizations and of private actors that have an important impact on development are equally contested.<sup>52</sup>

The normative potential of a binding instrument on the right to development therefore relates primarily to the external dimension of the right, the added value of which lies in the establishment of a common responsibility<sup>53</sup> for the realization of the right among a multiplicity of duty holders, including non-State actors, and in the further elaboration of the collective aspects of the right. Shared responsibilities would by necessity have to be based on a multi-stakeholder agreement, to which States, intergovernmental organizations and private actors alike could become parties, since it is difficult to perceive how direct international obligations could be imposed on any of the actors without their consent. In order to have a significant added value, a future binding agreement on the right to development would therefore have to differ substantially from traditional inter-State treaties, as well as from the core human rights treaties that currently exist.

## B. Existing multi-stakeholder agreements

Multi-stakeholder agreements are no longer unusual in international relations, especially in the field of development, where a variety of public and private actors engage in development with specific policies and competencies. The number and variety of initiatives has led to calls for collaboration between the various actors, and mutual accountability, which is

<sup>48</sup> Note that there is also a debate on the degree to which international development strategies integrate human rights. See, e.g., Paul J. Nelson, “Human rights, the Millennium Development Goals, and the future of development cooperation”, *World Development*, vol. 35, No. 12 (December 2007), pp. 2041–2055.

<sup>49</sup> Scheinin, “Advocating” (see footnote 14), p. 340.

<sup>50</sup> In the context of his proposal on the establishment of a development compact, the Independent Expert on the right to development, Arjun Sengupta, proposed that developing countries should assess the cost of programmes needed to realize basic human rights and the extent to which the State itself could mobilize resources. On that basis, the requirements of international cooperation could be worked out. The process would result in the developing country, the OECD donor countries and the financial institutions accepting mutual obligations to implement the agreement reached at the domestic level. See E/CN.4/1999/WG.18/2, paras. 73–74.

<sup>51</sup> Compare Magdalena Sepúlveda, “Obligations of ‘international assistance and cooperation’ in an optional protocol to the International Covenant on Economic, Social and Cultural Rights”, *Netherlands Quarterly of Human Rights*, vol. 24, No. 2 (2006), pp. 271–303.

<sup>52</sup> See Koen De Feyter, *Human Rights: Social Justice in the Age of the Market* (London, Zed Books, 2005), p. 238.

<sup>53</sup> The United Nations Millennium Declaration includes a largely rhetorical acknowledgement by all Governments that “in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world’s people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs” (General Assembly resolution 55/2, para. 2).



deemed to improve effectiveness, often takes the form of multi-stakeholder agreements. Six such agreements will be examined briefly below as illustrations for a possible multi-stakeholder agreement on the right to development. A full analysis or assessment of these initiatives cannot be attempted here; features are selected on the basis of their relevance to a future instrument on the right to development.

The Paris Declaration on Aid Effectiveness (2005) and the Accra Agenda for Action (2008) are the main instruments for the harmonization of aid policies.<sup>54</sup> The documents were agreed to not only by ministers of developed and developing States, but also by heads of multilateral and bilateral development institutions, who all resolved to take far-reaching and traceable actions to reform aid delivery and management. The Paris Declaration contains 56 commitments by participants, consisting of "partner countries", "donors" and "development institutions". The latter are intergovernmental organizations identified in an appendix, which also lists civil society organizations that were present at the High Level Forum where the text was adopted but which are not considered participants. Neither document is binding, but their impact on the aid policy of the 135 countries and territories and 29 international organizations that have adhered to them is considerable. The Paris Declaration is complemented by a Joint Venture on Monitoring that surveys country results to achieve the agreed country commitments. Human rights are not explicitly addressed in the text of the Paris Declaration but are in the Accra Agenda.

The Voluntary Principles on Security and Human Rights (2000) are a multi-stakeholder initiative established in 2000 that introduced a set of principles to guide extractive companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms. The participants in the Voluntary Principles include four Governments<sup>55</sup> and a number of multinational corporations and international human rights NGOs.<sup>56</sup> Under the scheme<sup>57</sup> all participants agree to meet a set of criteria and are permitted to raise concerns about another participant's lack of effort to implement the Voluntary Principles.

If concerns persist, participants agree to engage in consultations facilitated by the organs established in the Voluntary Principles, namely, the Steering Committee and the Plenary. The expulsion of a participant requires a unanimous decision of the Plenary, but recommendations can be adopted by a special majority consisting of 66 per cent of the Government vote, 51 per cent of the NGO vote and 51 per cent of the company vote. The Voluntary Principles do not create legally binding standards, and participants explicitly agree that alleged failures to abide by the Principles shall not be used in legal or administrative proceedings. This does not mean, however, that the Voluntary Principles do not have any external impact. In the context of the review of its social and environmental performance standards,<sup>58</sup> the International Finance Corporation (IFC) built on the Voluntary Principles. As a result, any extractive industry project wishing to secure Multilateral Investment Guarantee Agency (MIGA)-IFC support must now implement not only the Corporation's own standards, but also operate consistently with the Voluntary Principles. The voluntary character of the Principles has thus hardened into a MIGA-IFC conditionality.

The Partnerships for Sustainable Development are voluntary, multi-stakeholder initiatives aimed at implementing sustainable development. They were established as a side-product of the World Summit on Sustainable Development (2002). The Commission on Sustainable Development acts as the focal point for discussion on these partnerships. Here, partnerships are defined as voluntary initiatives undertaken by Governments and relevant stakeholders, e.g., major groups<sup>59</sup> and institutional stakeholders,<sup>60</sup> which contribute to the implementation of Agenda 21. As of April 2011, a total of 348 partnerships had been registered with the Secretariat of the Commission.<sup>61</sup>

Intergovernmental and non-governmental organizations involved in the delivery of humanitarian

<sup>54</sup> For a full discussion of these instruments, see chapter 17 of the present publication.

<sup>55</sup> The Netherlands, Norway, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

<sup>56</sup> The International Committee of the Red Cross, the International Council on Mining and Metals and the International Petroleum Industry Environmental Conservation Association are observers.

<sup>57</sup> See participation criteria and mechanisms, adopted in 2007, at [www.voluntaryprinciples.org](http://www.voluntaryprinciples.org).

<sup>58</sup> The review, concluded in 2006, led to the adoption of the IFC Performance Standards on Social and Environmental Sustainability, which entered into force on 30 April 2006. The standards are available from the IFC website ([www.ifc.org](http://www.ifc.org)).

<sup>59</sup> Agenda 21 recognizes nine "major groups" of civil society: Women; Children and Youth; Indigenous Peoples; NGOs; Local Authorities; Workers and Trade Unions; Business and Industry; Scientific and Technological Communities; and Farmers. In practice, NGOs, business and industry, scientific and technological communities and local authorities are best represented in the partnerships.

<sup>60</sup> In practice, mostly members of the United Nations system and intergovernmental organizations.

<sup>61</sup> The Partnerships for Sustainable Development – CSD Partnerships Database is available at <http://webapps01.un.org/dsd/partnerships/public/welcome.do>. For a critical review, see Jens Martens, *Multi-Stakeholder Partnerships: Future Models of Multilateralism?* Dialogue on Globalization Occasional Paper No. 29 (Berlin, Friedrich-Ebert-Stiftung, January 2007).

aid cooperate through the World Food Programme (WFP)<sup>62</sup> and the Office of the United Nations High Commissioner for Refugees (UNHCR)<sup>63</sup> on the basis of memorandums of understanding defining either a framework for institutional cooperation or more contract-like agreements with locally active NGOs for specific operations. According to Anna-Karin Lindblom, in terms of their legal character the memorandums reflect a scale: some are clearly intended to be binding and some are not, while others are difficult to characterize.<sup>64</sup> There is little doubt, however, that agreements on specific operations in particular are intended to be binding, as they spell out the rights and duties of the parties (including financial obligations). Interestingly, these agreements also contain dispute settlement provisions, with disputes to be decided by an international arbiter under the arbitration rules of the United Nations Commission on International Trade Law, or by the International Chamber of Commerce.

The Global Fund to Fight AIDS, Tuberculosis and Malaria is a public-private partnership that mobilizes resources to develop and implement effective, evidence-based programmes to respond to the three diseases. The Fund is a financial instrument, not an implementing agency. The focus is on funding best practices that can be scaled up and on strengthening high-level commitment to allocate resources. Participation of communities affected by the three diseases in the development of proposals to the Fund is particularly encouraged. It has committed some \$25 billion in over 150 countries.<sup>65</sup> Originally incorporated as a non-profit foundation under Swiss law on 22 January 2002, the Fund is considered a non-governmental organization and benefits from privileges and immunities similar to those of an intergovernmental organization under agreements with the Government of Switzerland. It had signed an administrative services agreement with the World Health Organization, which was discontinued as of 1 January 2009 when the Fund became autonomous. The international structure of the Fund includes a Foundation Board (with voting representatives from developing countries, donors, civil society and the private sector), a Partnership Forum (open to a wide range of stakeholders), chairpersons, the secretariat and the Technical Review

Panel (independent experts who review applications and make recommendations). At country level there are a country coordinating mechanism, the principal recipient and a local Fund agent. The World Bank manages the Fund's resources as trustee. The Board decides by consensus if possible, or by voting (motions require a two-thirds majority of those present, of both the group encompassing the eight donor seats and the two private sector seats and of the group encompassing the seven developing country seats and the three NGO representatives).

Finally, the Convention on the Rights of Persons with Disabilities (2006) is the first core human rights treaty that permits, under article 43, "regional integration organizations" to become parties to the treaty.<sup>66</sup> The purpose of the provision was to allow the European Community to adhere to the Convention, in deference to the internal division of competencies between that regional organization and its member States.<sup>67</sup> Complementarity of competencies also exists with regard to European development policy, so a similar clause in a future right to development agreement would make eminent sense. In addition, article 43 can be seen as establishing a more general precedent for the participation by intergovernmental organizations in human rights treaties. Given the amount of assistance States channel through multilateral organizations in the field of development, opening up a future right to development agreement to intergovernmental organizations would be of considerable importance. The capacity of these organizations under international law to enter into international agreements is not in doubt.<sup>68</sup>

### C. Towards a multi-stakeholder agreement on the right to development

The Vienna Convention on the Law of Treaties applies to agreements between States, but explicitly provides that agreements concluded by non-State actors can also be binding under international law. Article 3 (a) of the Vienna Convention reads: "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between

<sup>62</sup> An example of a WFP-NGO cooperation agreement is the Memorandum of Understanding between WFP and Islamic Relief (December 2006).

<sup>63</sup> Examples of a UNHCR-NGO cooperation agreement are the Memorandums of Understanding signed with two United States-based NGOs, the International Rescue Committee and the International Medical Corps (2007).

<sup>64</sup> Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge, United Kingdom, Cambridge University Press, 2005), p. 507.

<sup>65</sup> See <http://portfolio.theglobalfund.org/?lang=en>. Data as of June 2012.

<sup>66</sup> Defined in article 44 as organizations "constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention".

<sup>67</sup> The European Community signed the Convention on 30 March 2007.

<sup>68</sup> The Convention also includes a separate article on international cooperation. According to article 32, "States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities."

such other subjects of international law ... shall not affect the legal force of such agreements ..."<sup>69</sup> This article could therefore constitute the legal basis of a binding multi-stakeholder agreement on the right to development. The Vienna Convention itself would not formally apply to the agreement, but if one so wished, the agreement could make the Vienna Convention applicable (by analogy) as a default treaty on all issues on which the agreement remains silent. Depending on the nature of the agreement, it may be possible to provide that all parties to the agreement can express consent to be bound through signature only, thus dispensing with cumbersome procedures of ratification. In order to avoid doubt, it would in any case be useful to include a clause stating that the agreement is governed by international law and that disputes arising under the instrument will be settled through international arbitration.

It would not be the primary ambition of the agreement to aim for universal ratification, nor would it serve as a substitute for normative initiatives of a purely intergovernmental nature. Rather, the objective would be to bring together a coalition of the willing, consisting of a variety of public and private actors, committed to demonstrating that the right to development can be implemented in a meaningful way through joint initiatives. Cooperation in the context of the agreement would aim at the creation and identification of the best practices, using successful field experiences and partnership practice as an instrument for building more general political support for the right to development.

The agreement would be open to accession by States (both developing and developed), intergovernmental organizations, companies and NGOs. The institutions created by the agreement could or could not be part of the United Nations system, but would in any case work closely with its bodies entrusted with responsibilities in connection with the right to development. Building on the examples discussed above, a multi-stakeholder agreement on the right to development could contain the following elements:

- (a) *Commitment to the right to development.*  
The commitment would simply reaffirm the right to development as a human right for-

<sup>69</sup> The reference to "subjects of international law" in article 3 (a) should not prevent private actors from acceding to the agreement. Although companies and NGOs are not usually considered subjects of international law, this has not prevented them from concluding agreements governed by international law, or from submitting claims to (certain) international tribunals on an ad hoc basis. As Lindblom argues, it is the consent of the parties that enables agreements to be placed under international law. See Lindblom, *Non-governmental Organisations*, p. 492.

ulated in general terms, as in the Declaration or, as suggested above, in a formulation that takes into account subsequent developments with regard to the ecological and democratic aspects of the right. The commitment serves to establish the realization of the right to development as the object and purpose of the agreement;

- (b) *Commitment to engage in assisting local communities in the implementation of the right to development.* The main instrument through which the agreement (and its parties) would seek to contribute to the realization of the right to development would be to provide assistance to communities in adhering States whose human rights have been adversely affected as a consequence of both internal and external factors. As the United Nations Millennium Declaration acknowledges, the benefits of globalization are unevenly shared and the costs unevenly distributed.<sup>70</sup> The parties to the agreement would therefore seek to support communities whose rights have suffered as a consequence of globalization, i.e., whose human rights have been affected by the actions of both domestic and external actors. The focus would thus be on situations where both the internal and the external dimensions of the right to development are relevant. By identifying communities as the potential beneficiaries of assistance, the collective component of the right to development would be taken into account.<sup>71</sup> In addition, in considering applications for assistance from local communities, existing international treaties emphasizing aspects of the right to development of specific categories of persons, e.g., women,<sup>72</sup> children<sup>73</sup> and indigenous peoples,<sup>74</sup> could also be taken into account.

Arguably, there are two alternative ways in which the agreement could organize the implementa-

<sup>70</sup> General Assembly resolution 55/2, para. 5.

<sup>71</sup> For the purpose of analogy: requests to the World Bank Inspection Panel can be filed by "any group of two or more people in the country where the Bank-financed project is located who believe that as a result of the Bank's violation their rights or interests have been, or are likely to be adversely affected in a direct and material way. They may be an organization, association, society or other grouping of individuals".

<sup>72</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), art. 19.

<sup>73</sup> Convention on the Rights of the Child (1989), art. 6, para. 2.

<sup>74</sup> ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989), art. 7, para. 1.

tion of the commitment. One way would be through the establishment of a central fund that would provide assistance to selected projects; the other way would be through a system of registration and monitoring of partnership agreements proposed by the parties to the agreement:

- (a) *Right to development fund.* The purpose of such a fund would be to collect resources for the assistance of local communities seeking redress in situations where their human rights are affected as a consequence of both internal and external factors. The assistance would be directed towards enabling these communities to develop and implement a right to development strategy that addresses the global nature of the situation in which they find themselves. This could, for instance, include assistance with connecting the communities to transnational networks, or providing them with legal aid to address human rights responsibilities in a variety of judicial or administrative forums when a multiplicity of domestic and foreign actors are involved. Decisions on funding would be taken by a multi-stakeholder board, on the recommendation of a review panel consisting of independent experts. The fund would not require huge amounts of money; it would function as a vehicle for creating best practices demonstrating how a common responsibility for the right to development can be operationalized;
- (b) *Right to development partnership agreements.* In this model, partnership contracts between parties adhering to the agreement and relevant communities, focusing on assistance to the community whose human rights are affected as a consequence of both internal and external factors, would be presented to a multi-stakeholder board (assisted by an independent review panel)<sup>75</sup> for registration as a right to development partnership. For the purposes of registra-

tion, use could be made of the criteria and indicators developed by the high-level task force on the implementation of the right to development. It could also be provided that any partnership contract approved under the agreement should provide human rights recourse for the affected community with regard to any of the parties involved in the partnership contract. Actors involved in right to development contracts would be expected to report on implementation of the projects to the agreement's institutions;

- (c) *Participation in a forum for policy discussions.* The forum would be a plenary body of all parties to the agreement. The primary function of the forum would be to review and appraise the practice built up under the agreement in operationalizing the right to development. The purpose of the review would be to identify the best practices that can be scaled up and to strengthen high-level commitment to the right to development. The forum could make a special effort to invite independent experts from the countries where the practice under the agreement has been built up to participate in its policy discussions. In addition, the forum could also be used as a venue for organizing a dialogue on presentations by adhering parties on their policies (in general) with regard to, or affecting, the right to development;
- (d) *Commitment to engage in conciliation and dispute settlement.* The parties to the agreement would commit to engage in conciliation and international dispute settlement with regard to any aspect of the agreement. One option would be to include a provision in the agreement referring disputes to the Permanent Court of Arbitration in The Hague. The Permanent Court currently provides rules for arbitrating disputes involving a variety of actors and guidelines for adapting these rules for disputes arising under multiparty contracts.<sup>76</sup>

<sup>75</sup> It would be important to ensure that actors who are often underrepresented in traditional intergovernmental cooperation, in particular civil society organizations from the South, are well represented in these bodies. In this regard, Rory Truex and Tina Søreide propose as a solution to the imbalance issue in the context of multi-stakeholder groups to promote accountability in the construction process, "to tilt the composition of the [multi-stakeholder groups] in favour of naturally weaker stakeholders". See Rory Truex and Tina Søreide, "Why multi-stakeholder groups succeed and fail", available at [www.csa.e.ox.ac.uk/conferences/2011-EDiA/papers/077-Soreide.pdf](http://www.csa.e.ox.ac.uk/conferences/2011-EDiA/papers/077-Soreide.pdf).

<sup>76</sup> The Permanent Court of Arbitration offers arbitration procedures for disputes between States and non-State actors, States and international organizations, and international organizations and NGOs, and has guidelines for adapting the rules if disputes arise under multi-stakeholder contracts. For more details, see [www.pca-cpa.org](http://www.pca-cpa.org).

## V. Many roads lead to Rome: how to arrive at a legally binding instrument on the right to development?<sup>77</sup>

Wide agreement exists on the need to strengthen the implementation of the right to development. While the high-level task force on the implementation of the right to development has focused on the practical methods through which current partnerships between developed and developing countries, as well as between developing countries, have given flesh and blood to the right to development in practice (see A/HRC/15/WG.2/TF/2/Add.1 and Corr.1), the General Assembly decided, in a deeply split vote on resolution 64/172 of 135 in favour to 53 against, with no abstentions, that “an international legal standard of a binding nature” on this right should be developed (para. 8). The discussion centres on the pros and cons of the elaboration of a convention on the right to development as a new human rights treaty.

The purpose of this section is to argue that a United Nations treaty on the right to development is not the only way to achieve the goal of a legally binding instrument. In principle, a variety of legal techniques of international law exist to serve the same goal.<sup>78</sup> The following summary merely indicates these techniques without entering into detail. The range of options includes:

(a) *Consolidating, updating and enhancing the status of the Declaration on the Right to Development.* It is gratifying to note that the Declaration enjoys considerable support in the United Nations, as became especially evident during the World Conference on Human Rights in Vienna in 1993. Moreover, the Declaration is perceived as a living document which is capable of responding to and incorporating major strategic priorities of poverty reduction, good governance and sustainability, as defined at the global conferences and summits and resulting strategy documents, including the Millennium Development Goals. The examples of the Universal Declaration of Human Rights (1948), the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the Dec-

laration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (1970) and the United Nations Millennium Declaration demonstrate that declarations can have considerable legal effect beyond their formally non-binding legal status and can at times be a more effective technique in generating consensus, and subsequently compliance, than the instrument of a formal treaty;

(b) *Reviewing the Declaration at its twenty-fifth anniversary.* The follow-up to the twenty-fifth anniversary of the Declaration in 2011 might provide an appropriate occasion to review and appraise the document and to adopt a meaningful, updated Declaration. This could specify who the right holders are and who the duty bearers are, and indicate remedies. Special reference could be made to the solutions available under widely ratified human rights mechanisms, such as those under the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol providing for an individual right of complaint, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child;

(c) *Preparing new instruments in the form of guidelines or recommendations.* Based on a review of best practices for implementing the Declaration as undertaken by the high-level task force, the Working Group and, subsequently, the Human Rights Council, the Council could adopt guidelines or recommendations on how individual States and other relevant actors, such as international and non-governmental organizations, could contribute to the implementation of the right to development. Furthermore, recommendations could be drafted on how business entities could mainstream human rights approaches to development in their self-regulatory codes. The use of guidelines and recommendations is a frequently applied technique in international law, as exemplified by the practices of OECD in the field of the regulation of foreign investment and the International Labour Organization (ILO) in the field of labour norms;

<sup>77</sup> This section is based on chapter 13 of the work referred to in footnote 1.

<sup>78</sup> It is to be noted that paragraph 2 (d) of Human Rights Council resolution 4/4 refers to “a collaborative process of engagement”, “guidelines” and a “legal standard of a binding nature”.

- (d) *Enhancing the institutional status of the right to development within the United Nations system.* Currently, the right to development is addressed in a variety of organs and none of them is particularly in the lead. The Third Committee of the General Assembly tends to pay considerable attention to it. The Working Group and its high-level task force operated under the auspices of the Human Rights Council (a subsidiary body of the Assembly). Furthermore, the various human rights treaty bodies also touch on the right to development, both in concrete cases and in general comments. One may well consider upgrading the Working Group to a standing commission, establishing a fund (compare the example of the Global Fund to Fight AIDS, Tuberculosis and Malaria, discussed above) and mainstreaming concerns around the right to development into the universal periodic review, in due course, as complementary ways to enhance the status of the right within the United Nations system;
- (e) *Concluding development compacts.* Increasingly, development treaties between developed and developing countries, or multi-stakeholder agreements involving international organizations, enterprises, commercial banks and civil society organizations are being concluded. Some of them contain references to human rights in their development-related provisions. Such legal instruments could usefully incorporate best practices and guidelines and recommendations based on such practices. This may well be a relevant complementary method of implementing the right to development and enhancing its status;
- (f) *Mainstreaming the Declaration into regional and interregional agreements.* Similarly, treaties concluded in the context of regional associations (African Union, European Union, ASEAN, NAFTA, MERCOSUR) and interregional agreements, such as the Cotonou Agreement, could refer to the right to development and incorporate the core of its content as well as best practices and guidelines and recommendations based thereon. A number of multilateral treaties already contain explicit or implicit references to the key dimensions of the right to development, especially in the areas of development, human rights, the environment and trade;
- (g) *Drafting a new human rights treaty on the right to development.* Finally, a new human rights treaty could be drafted (either a specific right to development treaty or a general framework treaty), to be followed up by one or more specific protocols or a set of guidelines for implementation. This method has often been employed, including in areas which, in the view of many States, were not yet sufficiently crystallized so as to lend themselves to codification. However, the treaty instrument has often been employed to foster the progressive development of international law, including in the field of human rights, labour norms and environmental protection. Furthermore, the potential of a treaty to raise awareness, stimulate national legislation and promote action at the national and regional levels is not to be underestimated.

In sum, a variety of legal techniques can be used to enhance the status of the right to development in international law and politics. Some of them may be employed simultaneously, some successively. Obviously, the feasibility of a treaty regime has also to be assessed in terms of ratification and follow-up procedures. In considering these alternative options, it is best to follow a step-by-step approach to implementing the right to development, beginning with the phases approved by the Working Group on the Right to Development and the Human Rights Council and gauging at each step whether it is advisable to move to a new form of legal instrument. Each State should also emphasize the mutual responsibilities of States to move from political aspirations to practical applications. It may well be a wise policy to give priority to the implementation of the right to development through a process of establishing, refining and applying guidelines, as requested by the Human Rights Council and proposed by the high-level task force, rather than hastily embarking on a treaty-making process.

## VI. Concluding statement of the Expert Meeting on legal perspectives involved in implementing the right to development

The Expert Meeting on legal perspectives involved in implementing the right to development, sponsored by the Harvard School of Public Health and the Friedrich-Ebert-Stiftung, was held at the Château de Bossey near Geneva from 4 to 6 January 2008. The following statement was adopted by the 24 participants<sup>79</sup> at the close of the meeting:

We, twenty-four experts, coming from all continents and acting in our personal capacity, met near Geneva on 4–6 January 2008 to exchange views on the legal issues involved in improving the implementation of the right to development, including the problems and prospects of a legal standard of a binding nature on this right. Our meeting was not premised on any political preference for or against the elaboration of a convention but sought to provide clarity regarding the legal problems to be addressed in furthering efforts to move the right to development from political aspiration to development practice. The specific context of the meeting was the implementation, by the United Nations high-level task force on the implementation of the right to development, of its mandate in light of Human Rights Council resolution 4/4, adopted on 30 March 2007, by consensus, and General Assembly resolution 62/161, adopted on 18 December 2007 by a vote of 135 to 53.

While we were acutely aware of the political context and the support of many countries for a UN treaty on the right to development, our deliberations focused on the merits and problems of various techniques of international law independently of the current political climate. The following summary can only highlight the themes discussed and cannot do justice to the thorough and innovative presentations and the insightful and constructive discussion, which we hope will be made available in the published proceedings of the workshop.

Under the first theme on the right to development as a legal norm, we considered the nature and scope of the right to development in international law. We agreed that the right to development, like the right to self-determination, had both an external and an internal dimension, the former referring to the obligations to contribute to rectifying the disparities and injustices of the international political economy and to reduce resource constraints on developing countries, while the latter referred to the duty of each country to ensure that its development policy is one in which all human rights and fundamental freedoms can be fully realized, as required by the Declaration on the Right to Development of 1986. The content of the legal norm of the right to development has evolved since 1986 to incorporate major strategic priorities of poverty reduction, good governance and sustainability, as

defined in the global conferences and summits and resulting strategy documents, including the Millennium Development Goals.

We then addressed the normative content of a treaty as opposed to a declaration on the right to development and specifically how a treaty would differ from the Declaration of 1986. We noted that there was a vast grey area between “soft law” and “hard law” and that the shift from the first to the second was contingent on the clarity of the obligations to be assumed by the parties, the degree of political consensus on the need for a treaty, and the feasibility of a treaty regime in terms of ratification and follow-up procedures.

We compared the potential for a treaty on the right to development with the experience in drafting the Convention on the Rights of Persons with Disabilities (CRPD) and noted similarity in terms of the integration of rights of various categories, the enhanced status of the subject of the rights involved, and the potential of a treaty to raise awareness, stimulate legislation and promote national action. The CRPD also contains certain innovations, which might be relevant to an eventual right to development instrument, such as the capacity of a treaty monitoring body to receive collective complaints, to draw upon the expertise and inputs of NGOs and UN bodies, and to conduct proactive inquiries; the requirement that technical assistance and development and humanitarian aid be in conformity with the treaty; and the opening to accession by regional international organizations. However, the transition from a declaration to a treaty took 30 years in the less controversial case of the CRPD. Therefore, we felt that more time was needed before the conditions could be met for a successful treaty-drafting process on the right to development, so that a better understanding could be acquired of the appropriate institutional setting for effective implementation and financial implications could be worked out. However desirable an eventual treaty might be, we considered it preferable to give priority to the implementation of the right to development through a process of establishing, refining and applying guidelines as requested by the Human Rights Council.

We considered alternatives to a treaty, such as a compact for development involving both human rights and trade cooperation, a multi-stakeholder international agreement and other ideas without reaching any definitive conclusion on them. Further, it was noted that a non-binding document, such as the Universal Declaration of Human Rights, the Millennium Declaration and the Millennium Development Goals or the Declaration on the Right to Development itself can sometimes be more effective in generating compliance than a formal treaty. We also explored the advantages and disadvantages of various options for a global mechanism, inside or outside the UN, along the lines of the Global Fund to Fight AIDS, Tuberculosis and Malaria. The emergence of related customary norms of international law was also seen as a form of entrenchment of the right to development in international law.

The second theme we addressed was the experience with existing treaty norms relating to the right to development. These relate both to substantive treaty regimes and regional cooperation treaties containing explicit or implicit references to the right to development. Numerous treaties were mentioned in the areas of development, the environment, trade and indeed human rights, which covered key dimensions of the right to development but without covering the shared responsibilities and multiplicity of duty holders implied by the right to development. Regarding regional treaties, we examined the content and case law of article 22 of the African Charter on Human and Peoples’ Rights, article 19 of its

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Protocol on the Rights of Women in Africa, as well as the experience with article 17 and chapter VII of the revised Charter of the Organization of American States, and considered that the regional experience with implementing the right to development through a treaty had not yet achieved significant results.

Similarly, a concentrated effort would be necessary to ensure that the implementation of article 37 of the Arab Charter on Human Rights (adopted in 2004 and entered into force on 15 March 2008) and the Charter of the Association of South-East Asian Nations (adopted in 2007) contributed to the effective implementation of the right to development.

The third theme was the evolving criteria of the high-level task force on the implementation of the right to development, and specifically the request of the Human Rights Council in resolution 4/4 that these might eventually be the basis of a binding international instrument. It was recalled that consideration of this eventuality could only occur after the criteria had been applied to the four partnerships currently under review, extended to other areas of Millennium Development Goal 8, expanded into a “comprehensive and coherent set of standards for the implementation of the right to development” and then further evolved as a basis for consideration as a treaty norm. If and when these stages were completed, the transformation of the criteria into treaty obligations would have to contend with the fact that they were conceived to apply to “global partnerships” rather than States parties to a treaty and were based on the issues enumerated in Millennium Development Goal 8 rather than the 1986 Declaration. One feature of the current criteria that would be helpful if they were to serve eventually as a basis for drafting a treaty norm was the fact that they have already evolved to cover obligations relating to a conducive environment, conduct and results, all of which are relevant to treaty obligations, and that they have been accepted by consensus by Member States.

We then explored national experience with the implementation of the right to development, focusing on South Africa, a case study field-testing the criteria on a Kenyan-German development partnership, and a five-year study on the right to development in China. These were regarded as examples of the sovereign right of each State to determine its own development path. The right to development requires that the process of development be both democratic and sustainable and involve the empowerment of citizens to seek redress for human rights violations. Further, a peer review mechanism at the regional level is needed to control for good governance, democracy and popular participation, such as the African Peer Review Mechanism, although the APRM model may not work in all regions.

Finally, we examined approaches to complying with paragraph 2 (d) of Human Rights Council resolution 4/4 and the meaning of “a collaborative process of engagement”, “guidelines”, a “legal standard of a binding nature” and steps to be taken during the phases of the workplan in 2008–2009. The accomplishments of the task force were noted in terms of valuing impact assessments and social safety nets, enhanced positive engagement of agencies, especially international financial institutions, acceptance of the process of periodic review by the partnerships, linking with the Millennium Development Goals, involvement of civil society, acceptance of the criteria by the Working Group and successful pilot testing of their application. The challenges to the task force were assessed, including the political divide between the Non-Aligned Movement and the European Union countries, which can and must be bridged.

It was suggested that the option of a convention should be seen in the context of a range of alternative approaches for meeting the intention of paragraph 2 (d) of Human Rights Council resolution 4/4. This range of options includes: (a) consolidating, updating and enhancing the status of the 1986 Declaration; (b) revising the Declaration for adoption on the occasion of the twenty-fifth anniversary of the Declaration in 2011; (c) preparing new instruments in the form of guidelines or recommendations, based on a review of best practices, for implementing the Declaration; (d) enhancing the institutional status of the right to development within the UN system, for example by upgrading the Working Group to a standing commission, establishing a fund and mainstreaming the right to development into the universal periodic review of the Human Rights Council; (e) concluding development compacts between developed and developing countries or multi-stakeholder agreements involving international organizations, enterprises, commercial banks and civil society organizations; (f) mainstreaming the Declaration into regional and interregional agreements, such as treaties concluded in the context of regional associations (African Union, European Union, ASEAN, NAFTA, Mercosur) and interregional agreements such as the European Union-ACP Partnership Agreement; and (g) drafting a new human rights treaty on the right to development, either a specific right to development treaty or a general framework treaty, to be followed up by one or more specific protocols or a set of guidelines for implementation.

In considering these options, it is best to follow a step-by-step approach to the implementation of the right to development, beginning with the phases approved by the Human Rights Council and gauging at each step whether and how it is advisable to move to a new form of legal instrument, emphasizing at each stage the mutual responsibility of States to move from political aspirations to practical applications.