

The right to development at 25: renewal and achievement of its potential

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I. Introduction

After 25 years, the Declaration on the Right to Development continues to seek to establish the principal attributes of the right to development as a vector of all rights; as a detector of incoherence in norms and policies on human rights, trade and development at both national and international levels; and as a framework for reinforcing the indivisibility and universality of human rights, as well as for sustainable and equitable growth. Going beyond mere human rights-based approaches to development, the right to development framework underscores the requirement for a specific and qualified process of development that must itself be a human right. Such a process constitutes the environment to which every person and all peoples are entitled.¹

Twenty-five years into its evolution, the right to development seems to remain conceptually hostage to the cold war-influenced motivations for the “two-track” approach to elaborating on the Universal Declaration of Human Rights. With the growth in the number of human rights treaty bodies from 6 to 10 within six years, and with more treaties expected, the right to development now has renewed relevance in ensuring that “all human rights are universal, indivisible and interdependent and interrelated” and that “the inter-

national community ... [treats] human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.²

Despite appearances, progress has been made with respect to the right to development. During the emergence and progressive development of the right to development, the United Nations has supported a series of expert mechanisms to promote the implementation of the right to development both prior to and following the adoption of the Declaration. Of particular prominence is the open-ended intergovernmental Working Group on the Right to Development (the Working Group), which was established pursuant to Commission on Human Rights resolution 1998/72 and endorsed by Economic and Social Council decision 1998/269. The Working Group was mandated to monitor and review progress made in the promotion and implementation of the right to development, as elaborated in the Declaration on the Right to Development, at the national and international levels, providing recommendations thereon and further analysing obstacles to its full enjoyment. To support the Working Group in its mandate, the high-level task force on the implementation of the right to development was established by the Commission in its resolution 2004/7, endorsed by the Economic and Social Council in its decision 2004/249.

This chapter examines key elements of the recent progress achieved by these two United Nations

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¹ Bård A. Andreassen and Stephen P. Marks, eds., *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd ed. (Antwerp, Intersentia, 2010), p. 384.

² Vienna Declaration and Plan of Action, part I, para. 5.

mechanisms and explores options for further clarification and operationalization of the right to development framework, using as its starting point the important methodological consensus reached by the Working Group in 2007, a milestone in the evolution of the right to development. It was the consensus of the Working Group that the “work of the task force constitutes a process of progressively identifying and refining right-to-development standards”. This, the Working Group noted, “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”.³

This chapter encompasses five main elements: (a) an updated reiteration of the added value of the right to development; (b) an overview of the symbiosis between the right to development and the existing human rights treaties and special procedures of the Human Rights Council; (c) an analysis of recent significant developments in the justiciability of the right to development; and (d) suggestions for possible ways forward in the light of the current stage of development of the discourse on the right to development.

II. Added value of the right to development

The right to development is at times viewed as limited by its essentially declaratory nature. However, this can clearly be countered by cross-referencing the human rights treaty provisions and obligations that constitute the elements of the right to development. This refutes the notion that the right to development is an “imperfect obligation”,⁴ carrying general political commitments but without corresponding specific entitlements that can be invoked by the beneficiary of the right.

If the right to development is simply a reiteration of both pre-existing rights and principles, what is its added value? In answering this question, the elaboration of the right to development as a “vector right”⁵ — the right to an enabling environment that systemically integrates civil, political, economic, social and cultural rights—should be borne in mind.

The recognition in other human rights instruments of constituent elements of the right to development does not supplant the comprehensive framework of the right to development. In this regard, two aspects must be borne in mind. First, overlapping and interrelated restatements of human rights are characteristic of the historical and political contexts within which the negotiation of human rights instruments takes place.⁶ Second, the right to development necessarily echoes the core principles of all human rights including, first and foremost, its constitutive elements of equity, non-discrimination, active and meaningful participation, accountability and transparency.⁷ By stipulating that there is a right to a national and international environment free from obstacles to the enjoyment of all rights and a right to a process of development characterized by growth with equity, with the human person as the central subject, the right to development adds important process guarantees to the more commonly espoused rights-based approach to economic growth and development.⁸ With such an expansive and complex scope, the right to development can mean different things to different stakeholders in different contexts. This is one of its major advantages, as it has the potential to provide frameworks for placing the core principles at the centre of the relevant national and international norms and policies.

Such frameworks should systemically address the interlinkages between rights and the obstacles to the creation of the environment required for their fulfilment in a coherent and sustainable manner. The constitutive elements of the right to development mentioned above thus provide the parameters for norms and policies to guide both development and governance at the national as well as the international level. In this light, the right to development has the potential to function also as a proactive means of detecting gaps and/or inconsistencies between norms and policies that have an impact on all human rights. Such obstacles can exist at both the national and international levels. The right to development can serve a fundamental pre-emptive as well as corrective role by detecting and addressing gaps before they manifest themselves as violations to which other human rights instruments or mechanisms must respond. This would also add

³ “Report of the Working Group on the Right to Development on its eighth session” (A/HRC/4/47), para. 52.

⁴ Amartya Sen, *Development as Freedom* (New York, Alfred A. Knopf, 1999), pp. 227-231.

⁵ Arjun Sengupta, “On the theory and practice of the right to development”, *Human Rights Quarterly*, vol. 24, No. 4 (November 2002) pp. 269-270.

⁶ Gerald L. Neuman, “Human rights and constitutional rights: harmony and dissonance”, *Stanford Law Review*, vol. 55 (2003), pp. 1863 ff.

⁷ See the reports of the Working Group on the Right to Development on its fifth session (E/CN.4/2004/23 and Corr.1), para. 43 (a); sixth session (E/CN.4/2005/25), para. 42; and seventh session (E/CN.4/2006/26), paras. 31, 40, 46 and 67 (g).

⁸ E/CN.4/2005/25, para. 42.

value to the emerging engagement on the part of international financial institutions in examining the human rights impact of their policies.⁹

The first quarter-century of the right to development spanned the collapse of the Soviet Union and the food, financial and economic crises that have afflicted free markets, most recently following the 2008 recession. These crises amply attest to the need for systematized integration of all human rights into national and global governance; it is precisely such integration that the right to development encompasses. Moreover, events have clearly demonstrated the fundamental weakness of an approach that splits human rights into categories.¹⁰ Crucially, during the twenty-fifth anniversary of the right to development, the self-immolation of Mohamed Bouazizi in Tunisia catalysed the Arab Spring, which in many ways was an uprising against the realities of a constrained and stifling environment that is in stark contrast to the “enabling environment” called for by the right to development. Bouazizi’s tragically representative situation of wilfully unfulfilled economic, social and cultural rights compounded by the suppression of civil and political rights in a degrading manner is one of the main factors fuelling the call for change sweeping across the North African region. It is a poignant illustration of the importance of integrating the constitutive principles of the right to development into the foundations of governance and development, i.e., the principles of equity, non-discrimination, active and meaningful participation, accountability, transparency, self-determination, permanent sovereignty of peoples over their natural resources and international cooperation. These elements are at the core of the call for and surge of progress from Tunisia to Egypt and other States in the Arab world. A central lesson that has emerged from those events is that human rights play a crucial role in development, in particular the equitable distribution of the dividends of growth and the fair sharing of burdens generated by economic policies.

⁹ Ana Palacio, “The way forward: human rights and the World Bank” and Pascal Lamy, “Towards shared responsibility and greater coherence: human rights, trade and macroeconomic policy”, statements made at the colloquium on human rights in the global economy, co-organized by the International Council on Human Rights and Realizing Rights, Geneva, 13 January 2010.

¹⁰ See the documentation prepared for the expert meeting “25 Years of the Right to Development: Achievements and Challenges” convened by the Friedrich-Ebert-Stiftung and the Office of the United Nations High Commissioner for Human Rights, Berlin, 24-25 February 2011, available at www.fes.de/gpol/en/RTD_conference.htm, and Stephen P. Marks, “The past and future of the separation of human rights into categories”, *Maryland Journal of International Law*, vol. 24 (2009), pp. 208-241.

III. Symbiosis between the right to development and the treaty bodies

The five principles underpinning the right to development mentioned above are already well established and, crucially, have been voluntarily ratified in binding human rights instruments.¹¹

Among others, article 8 (1) of the Declaration on the Right to Development states that “States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.” The table on the next page is a non-exhaustive illustration of the correlation between these and other fundamental principles of the right to development and the respective human rights treaties.

Abbreviations:

CEDAW—Convention on the Elimination of All Forms of Discrimination against Women; CERD—International Convention on the Elimination of All Forms of Racial Discrimination; CMW—International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; CRC—Convention on the Rights of the Child; CRPD—Convention on the Rights of Persons with Disabilities; ICCPR—International Covenant on Civil and Political Rights; ICESCR—International Covenant on Economic Social and Cultural Rights; UDHR—Universal Declaration of Human Rights.

In addition to the linkages between the right to development and the numerous corresponding provisions of the treaties mentioned above, there are other such linkages of particular normative proximity. Article 8 (2) of the Declaration on the Right to development stipulates that “States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights”. This is strongly linked to the right to participate in public life, including freedom of expression,

¹¹ The Committee on Economic, Social and Cultural Rights has constantly addressed elements of the right to development, beginning with its general comment No. 3 (1990) on the nature of States parties’ obligations.

| <i>Principles affirmed in the Declaration on the Right to Development</i> | <i>Corresponding provisions in human rights treaties</i> |
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| Self-determination | |
| Sixth and seventh preambular paragraphs and articles 1 and 5 | ICCPR art. 1; ICESCR art. 1 |
| Active, free and meaningful participation | |
| Second preambular paragraph | CRC arts. 12 and 15; CMW art. 26; CRPD arts. 9, 21, 29 and 30 |
| Elements from article 8 of the Declaration | |
| Education | UDHR art. 26; ICESCR art. 13; CRC art. 28; CMW art. 30; CRPD art. 24 |
| Health services | ICESCR art. 12; CRC art. 24; CMW arts. 28 and 70; CRPD arts. 25 and 26 |
| Housing and food | UDHR art. 25; ICESCR art. 11 |
| Employment | UDHR art. 23; ICESCR arts. 6 and 8; CRC art. 32; CMW arts. 25, 51 and 52; CRPD art. 27 |
| Basic resources and/or fair distribution of income | UDHR art. 22; ICESCR arts. 7 and 9; CRC arts. 26 and 27; CMW arts. 27, 43, 47 and 70; CRPD art. 28 |
| Effective measures undertaken to ensure women have an active role in the development process | UDHR art. 2; ICESCR art. 2 (2); ICCPR art. 2 (1) |
| Non-discrimination | |
| First and eighth preambular paragraphs and art. 6 (1) | ICCPR art. 27; CERD; CEDAW; CRPD art. 3 |
| Duty to provide international assistance and cooperation | |
| Arts. 3 and 4 | ICESCR art. 2 (1), CRC arts. 4 and 23 (4); CRPD art. 32 |

freedom of assembly and freedom of association, which are clearly stated in articles 19 and 20 of the Universal Declaration of Human Rights and articles 19, 21 and 22 of the International Covenant on Civil and Political Rights.

Moreover, the right to development integrates process-related guarantees into development policy and the fulfilment of economic, social and cultural rights. The “active, free and meaningful participation” in the Declaration elaborates on political participation rights in article 25 of the International Covenant.

Further prominent examples include: (a) article 14 of the Convention on the Elimination of All Forms of Discrimination against Women, which refers to the right of rural women to equal access to and equal benefits from development processes; and (b) articles 6, 8, 2 (1), 22 (4) and 30 (1) of the Convention on the Rights of the Child,¹² in relation to which the Committee on the Rights of the Child has emphasized that the right to development is essential for ensuring that the circumstances of families, including

single-parent families or those with limited capacities, are taken fully into account in the programming of economic strategies. Considerations such as labour deregulation and flexibility should be incorporated in such strategies so as to facilitate the provision of adequate care for the child. Moreover, the adequacy of financial and other support for the family should be promoted to ensure children’s well-being and development. The Committee on the Rights of the Child has also underscored the importance of the right to development for ensuring that children in vulnerable or marginalized situations are provided with resources, conditions and opportunities on an equitable basis with other children.¹³

The human rights treaty bodies, bound by their respective treaties, clearly look into a wide range of right to development issues. A further example is found in the two International Covenants, whose common article 1 on self-determination is clearly linked with the right to development. In the International Covenant on Civil and Political Rights, this provision is also complemented by article 27 on minority rights and article 25 on the right of public participation.

¹² See the concluding observations of the Committee on the second periodic report of Finland in 2000 (CRC/C/15/Add.131), paras. 24 and 27, and on the third periodic report of Japan in 2010 (CRC/C/JPN/CO/3), para. 67.

¹³ See the concluding observations of the Committee on the initial report of Slovakia in 2000 (CRC/C/15/Add.140), para. 21.

As yet, however, the practical effect of common article 1 as a basis for petitions remains limited. There are a number of reasons for this. First, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is not yet in force; second, in accordance with the constant jurisprudence of the Human Rights Committee, only individuals are entitled to submit communications alleging a violation of their individual rights.¹⁴ Also, the inter-State complaint procedure, which involves the filing of a formal complaint by a State or group of States against another State for non-compliance with the norms of a human rights instrument, has never been used in practice.¹⁵

Notwithstanding the above limitations, the right to development widens the set of actors who can be viewed as rights holders and duty bearers by underscoring the collective and fundamental dimensions of development. In that context, rather than being a reiteration of pre-existing constituent rights, the right to development adds further value to these rights by reinforcing the standards set in existing human rights treaties and by engendering inter-relatedness and interdependence among the treaty bodies. Moreover, it contributes to the creation of an enabling environment, including the removal of structural impediments, so as to guarantee the rights elaborated in the International Covenants.

In addition to the above-mentioned complementarities with human rights treaties and treaty bodies, there are also complementarities between the right to development and the relevant special procedures of the Human Rights Council. In particular, the work of both the Independent Expert on human rights and international solidarity and of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises are de facto extensions and implementations of key elements of the right to development.

The Independent Expert on human rights and international solidarity has also (a) underscored and expanded on the conclusions and recommendations of the Working Group on aspects of international cooperation identified under goal 8 of the Millennium Development Goals;¹⁶ and (b) emphasized that “the obligations of international assistance and cooperation are complementary to the primary responsibility

of States to meet their national human rights obligations. International cooperation rests on the premise that some members of the international community may not possess the resources necessary for the full realization of rights set forth in conventions” and that “in the context of the right to development, the open-ended Working Group on the Right to Development underlined that, in the international economic, commercial and financial spheres, core principles, such as equality, equity, non-discrimination, transparency, accountability, participation and international cooperation, including partnership and commitments, are important for the realization of the right to development”. He further underscored that “studies reflecting on the international dimension of the right to development have identified different levels of responsibility for development, for instance that of corporations at the microlevel, States at the macrolevel and the international community at the mesolevel”.¹⁷

With his Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (A/HRC/17/32, annex), the Special Representative addresses the fact that while “the activities of transnational corporations (TNCs) and other business enterprises can have positive effects on the development efforts of host countries ... the practices of TNCs may negatively impact on the enjoyment of human rights and degrade basic social, economic and environmental standards. TNCs should operate in a manner consistent with the domestic and international human rights obligations of the host countries and the countries of origin.”¹⁸ This fact had already been highlighted in the Working Group’s previous conclusions and recommendations. Indeed, the Guiding Principles effectively represent the “elaboration of criteria [which] should be considered for periodic evaluation of the effects of TNC activities. Such criteria may contribute to ensure their compliance with human rights laws and regulations, and the effectiveness of the enforcement of these laws and regulations, taking into account the degree of influence exercised by many TNCs.”¹⁹

¹⁴ See, for example, *Lubicon Lake Band v. Canada*, communication No. 167/1984 (A/45/40, vol. II, chap. IX, sect. A).

¹⁵ Martin Scheinin, “Advocating the right to development through complaint procedures under human rights treaties” in Andreassen and Marks, *Development as a Human Right* (see footnote 1), p. 341.

¹⁶ A/HRC/4/47, para. 54.

¹⁷ In his report (A/HRC/15/32, para. 43), the Independent Expert on human rights and international solidarity cites *The Human Right to Development in a Globalized World* by D. Aguirre and resonates with the report of the Working Group on the Right to Development on its fifth session, paragraph 42 of which reads in part as follows: “While recognizing that States have the primary responsibility for their own economic and social development, lasting progress towards the implementation of the right to development requires effective policies at the national level and a favourable economic environment at the international level. For this, States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote effective international cooperation for the realization of the right to development and the elimination of the obstacles to development.”

¹⁸ E/CN.4/2006/26, para. 56.

¹⁹ *Ibid.*

While such applications were not pursued under “the banner of right to development”, they still further its realization. Seen in this light, far more than merely reiterating pre-existing constituent rights, the main strategic value added of the right to development lies in restoring the indivisibility of interlinked sets of rights in one global vision, addressing the grass-roots elements by stressing the requirement of an enabling environment for the fulfilment of all human rights at the national and international levels, as well as in the possible creation of operational frameworks for its implementation—frameworks that link valid but “dislocated” sets of principles and obligations. The mandate of the Working Group encompasses “(taking) appropriate steps for ensuring respect for and practical application of these standards, which could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement”.²⁰ This further enhances the practical orientation of the right to development discourse.

All this demonstrates that it “might 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”.²¹ On the other hand, no single treaty body can provide the global vision or the policy tools and guidelines. This affirms the value added of the mandate of the Working Group. As mentioned above, its high-level task force provided a promising prototype,²² the first operational right to development policy guidance tool. Without such an incremental and pragmatic approach, the right to development discussion faces the risk of sliding back to an irresolvable politicized debate.

IV. Justiciability of the right to development

Further building on the pre-existence of an operational—albeit as yet unconsolidated²³—definition of the right to development, two further points are pertinent here.

Firstly, it is fundamentally erroneous to consider that because it was first embodied in a declaration, the right to development is not legally enforceable and cannot be regarded as a human right. Human rights reflect the entitlements of persons and peoples even if such entitlements cannot be achieved in an immediate and/or categorical manner. Furthermore, it should be borne in mind that the principle of progressive realization of economic, social and cultural rights is particularly relevant with respect to the right to development as its implementation requires a greater degree of multi-stakeholder action and negotiations on specific modalities than economic, social and cultural rights per se. As the right to development itself is a framework, progress in its implementation necessarily involves an incremental process arising from consultations and/or negotiations. Such a process, and the environment it creates, is symbiotic with the implementation of the right to development.

Secondly, in a 2010 ruling, the African Commission on Human and Peoples’ Rights established a precedent for the justiciability of the right to development and a further elaboration of its operational parameters. Specifically, in its decision on communication No. 276/2003, the so-called *Endorois* case, the African Commission found that the respondent State (Kenya) was in violation of six articles of the African Charter on Human and Peoples’ Rights including, importantly, article 22 on the right to development. Of particular significance, the African Commission stated that the right to development contains both procedural and substantive elements and that a violation of either constitutes a violation of the right.²⁴ The African Commission also recognized that “the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.”²⁵

In its ruling, the African Commission referred to a report of the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (A/HRC/4/32/Add.3) on the detrimental impacts of large-scale projects on indigenous peoples, their traditional ways of life, health and security, and to a working paper (E/CN.4/Sub.2/

²⁰ Human Rights Council resolution 4/4, para. 2 (d).

²¹ Scheinin, “Advocating”, p. 340.

²² See paragraph 67 in the report of the Working Group on the Right to Development on its seventh session (E/CN.4/2006/26), which garnered consensus among the members of the Working Group, and the addendum to the report of the high-level task force on the implementation of the right to development on its sixth session: right to development criteria and operational sub-criteria (A/HRC/15/WG.2/TF/2/Add.2) which, while not the subject of consensus among the members of the Working Group, contained some elements that could nonetheless be taken into consideration in the further work of the Working Group.

²³ The Working Group may indeed wish to consider this further.

²⁴ African Commission on Human and Peoples’ Rights, communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, para. 277.

²⁵ *Ibid.*, citing Arjun Sengupta, “Development cooperation and the right to development”, François-Xavier Bagnoud Centre for Health and Human Rights, Harvard School of Public Health, Working Paper No. 12 (2003), and the Declaration on the Right to Development, art. 2 (3).

AC.4/2004/24) submitted to the former Working Group on Indigenous Populations on the principle of free, prior and informed consent to development.

This ruling is important in further validating the multisource and multidimensional nature of the right to development. It further contributes to the consolidation of a proposed “core norm” which the high-level task force suggested at its concluding session;²⁶ the Working Group could constructively build on the articulation of this norm. In noting the ways in which the respondent State failed adequately to involve the community in the national development process, in the sharing of its benefits and in creating conditions favourable to a people’s development, the parameters of what constitutes “development” is reclaimed. Secondly, there is an identifiable agent able to claim the right: as per the African Charter on Human and Peoples’ Rights, it is a people, understood in this context as an indigenous people. Thirdly, the elaboration of the content of the right by the African Commission confirmed that what was perceived by some to be merely a moral claim and an aspirational standard was an enforceable right.²⁷ Although this regional human rights mechanism does not respond to all that is required of the right to development, the Commission’s judgement does provide a groundbreaking and inspiring precedent for the international community at large. While the right to development is still far from being a justiciable right in the full sense of the word, this case contributes to clarifying the particular circumstances under which the right to development could be claimed by a right holder to constitute a core norm.

On another important level, this legal precedent also serves to highlight an additional integral dimension of the right to development: the capacity of the right to development to provide concrete elements of State responsibility to fulfil its “obligation to protect” individuals and communities from harm committed by non-State actors over which they are in a position to exert control, regulate or influence, as well as its duty of international cooperation in ensuring human rights more broadly.

The evaluation of decision-making structures in the context of national and international financial institutions could be a further context in which to build on the criteria developed by the African Commission in the *Endorois* case to assess political participation.

This approach could, for example, consider options for improved processes of dialogue in the preparation of decision-making and the contribution that civil society could make to such processes.

Indeed, that neither the core norm proposed by the high-level task force nor the recent case law responds comprehensively to all concerns regarding the realization of the right to development is not an indication that the right remains too vague, but rather of how widely applicable it is and how much it has yet to do.²⁸

V. The way forward: towards sustained and collaborative realization of the right to development

The progress achieved so far within the right to development discourse can be summarized as consisting of conceptual clarity, methodological consistency and a promising institutional experience, particularly of the high-level task force. Lessons learned from these three elements can help the Working Group to further improve and enhance its collaborative endeavour to fulfil its mandate.

Restoring coherence to the substantive focus of the Working Group is crucial. The more political the right to development discourse is, the lower the chances that it can reach a concrete operational outcome, and the more divided Member States are, the lesser will be the role of the Office of the United Nations High Commissioner for Human Rights in contributing to the realization of the right to development.

In the longer term, the link between human rights and the Millennium Development Goals should be emphasized. Such a mutually reinforcing connection could occupy a middle ground between a declaration of general principles and a binding normative document on the right to development; this connection could, for instance, be translated into a global framework agreement inspired by existing development assistance agreements.

As a contribution to this timely and important reflection, I would submit the following three options for consideration.

²⁶ A/HRC/15/WG.2/TF/2/Add.2, para. 13 and annex.

²⁷ Margot Solomon, open background paper presented at the expert meeting, “25 Years of the Right to Development: Achievements and Challenges”.

²⁸ *Ibid.*

A. Pursuing the methodological consensus of 2007

The promising, incremental and collaborative approach which the methodological consensus achieved at the eighth session of the Working Group in 2007²⁹ represents ought to be continued and implemented through the high-level task force. In particular, it is vital not to lose this arduously achieved, narrow but genuine ground of convergence which could be broadened by systematically undertaking an incremental process of progressively identifying and refining right to development standards in a manner customized to their specific sectors of application. The mandate of the high-level task force was limited to Millennium Development Goal 8; it would be both logical and useful to extend it to cover all of the Goals. That would also create a natural time frame to accompany the Millennium Development Goals process leading up to 2015, as well as to the thirtieth anniversary of the right to development. A work programme incorporating all the Millennium Development Goals would also strengthen the human rights dimension of the Goals.

As a result of various circumstances and political considerations, which will not be addressed in detail here, the high-level task force was brought to a close. Re-establishing it would have the merit of (a) adapting the nature of required standards to different applications of the right to development; (b) involving relevant stakeholders to contribute to the process of the elaboration of such standards; and (c) enhancing a technical approach to the right to development, which would minimize the risk of reviving old stereotypical controversies.

The high-level task force would be expected to develop separate sets of guidelines with contextualized implementation strands. This could take the form of multisectoral outcomes of varying legal natures as appropriate to the specific context in which they are intended to operate. Goal 8 on a global partnership for development constitutes a natural road map for the Working Group in this respect. The unfinished business of integrating human rights into the Millennium Development Goals could be strategically pursued through a right to development framework initiated by the high-level task force and endorsed by the Working Group.

On balance, working towards the formulation of guidelines for the implementation of the right to

development would appear to be the wisest course of action at this stage in the realization of the right. This would create confidence and hasten progress. In terms of content, the guidelines could be based on the Declaration on the Right to Development, the relevant existing human rights treaties and the criteria adopted by the task force. Similar to the draft guidelines on a human rights approach to poverty reduction,³⁰ the guidelines should be kept separate from human rights indicators because policy guidelines relate to policy formulation while indicators are practical tools for assessing implementation. Indicators, which are not constituent elements of the right to development, would be useful at a later stage, once the new standards had been elaborated, tested and accepted. Confusing possible human rights indicators with emerging right to development standards is a potential, and avoidable, source of misunderstanding.

Furthermore, concentrating on guidelines would have the added advantage of leaving open the option of subsequent instruments of a binding nature being negotiated, possibly even the Declaration itself becoming such an instrument. Precedents for the progressive realization of such legally binding standards include the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development and the Declaration on Fundamental Principles and Rights at Work of the International Labour Organization (ILO).³¹

B. An enhanced Working Group through an ad hoc expert body

The rationale for the option of an enhanced Working Group is that the right to development involves cross-cutting issues requiring an interdisciplinary and multi-stakeholder process for its realization. Therefore, it is important that the institutional setting for realizing the right to development reflect those characteristics. This can be accomplished by the institutional engineering of the complementary roles of existing human rights mechanisms.

Another option is to replace the high-level task force with an ad hoc expert body. The main difference would lie in the mandate and composition of such a body. The mandate should be considered by the

²⁹ See OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (HRI/PUB/06/12).

³¹ See Koen De Feyter, "Towards a multi-stakeholder agreement on the right to development", in Stephen P. Marks, ed., *Implementing the Right to Development: The Role of International Law* (Geneva, Friedrich-Ebert-Stiftung, 2009), pp. 97-104; and Nico Schrijver, "Many roads lead to Rome. How to arrive at a legally binding instrument on the right to development?", *ibid.*, pp. 127-129.

²⁹ A/HRC/4/47, para. 52.

Working Group in the light of a list of issues for future consideration on which States agree. The expert body would undertake to integrate in its structure relevant intergovernmental organizations and the relevant mandate holders of existing human rights mechanisms among the special procedures of the Human Rights Council and the treaty bodies. It could undertake a review of inputs and concerns from all stakeholders and formulate concrete proposals that reflect them. It could also provide guidance to the Working Group with respect to (a) the identification of areas in which guidelines for the implementation of the right to development could be both useful and feasible; (b) the elaboration of such guidelines in collaboration with relevant stakeholders and intergovernmental organizations; and (c) human rights impact assessments, an area of existing agreement within the Working Group and of direct relevance to the right to development. These three areas have not been acted upon for the purpose of mainstreaming the right to development in operational terms. The expert body could develop an impact assessment methodology for voluntary use by States. Notwithstanding their current workload, the relevant treaty bodies could be associated with the elaboration of such a tool. From the perspective of human rights mainstreaming and system-wide coherence, human rights impact assessments related to trade and investment norms and policies would be of great value in promoting a new paradigm for development that fully integrates all human rights. The Working Group could thus become a “gap identifier” as well as a permanent “standards nursery” for the development of tools to address such gaps whenever necessary, and as agreed among States. Such tools should be of practical use to all stakeholders with respect to policy formulation and standard-setting.

The expert group could thus function alongside the Working Group as a “treaty body without a treaty”. If this second option is implemented, it is essential that it not lose the substantive ground of convergence mentioned above, that is, it should not disregard the results of years of productive and consultative work undertaken by the task force.

C. Thinking further “outside the box”: a framework agreement?

A framework agreement for the right to development could be considered as another option. Such an agreement should not be difficult to conclude as it would contain a number of principles derived from the conclusions and recommendations agreed by con-

sensus in the Working Group over the past years.³² At its inception stage, the framework agreement would create a basis for further technical discussion, conducted either directly among interested States or within an expert component of the Working Group in accordance with the second option proposed above. Learning from the experience of international development assistance frameworks such as the Cotonou Agreement, and reserving a role for the evaluation of progress by an independent expert, could indeed facilitate the realization of assistance agreements with a view to ensuring that they benefit all parties involved. The technical discussions could then form the basis for negotiating more specific obligations, in the form of protocols, among the contracting parties. It would also be possible to establish a database of different types of agreements (regional, bilateral, multi-stakeholder) that satisfy the right to development criteria and could thus be labelled “right to development compacts”, which would serve as evolving models for subsequent forms of partnerships for development within a right to development framework.

The framework agreement could be prepared by an expert group under the auspices of the Working Group and would be open to signature by States. Expertise from within the treaty bodies and relevant special procedures mandate holders could also be integrated into this group to ensure synergy with existing human rights norms and standards, which are at the heart of the right to development.

The framework agreement could also include an incentive mechanism: a staged process whereby concrete human rights achievements by States would be “rewarded” through the conclusion of development compacts which would include incremental implementation of right to development commitments.

VI. Final thoughts

What human rights mechanisms do not need is duplication of work and increasing the reporting burden on States parties. Missing links do, however, exist. The right to development, if properly and consensually realized by means of incremental building blocks of standards and tools, can provide important missing links and fit into the existing architecture of human rights protection.

³² The United Nations Framework Convention on Climate Change (UNFCCC), mentioned at meetings of the high-level task force and of the Working Group, offers a good example.

A “re-engineering” of the high-level task force could benefit from the lessons learned and involve in its structure relevant intergovernmental organizations, international financial institutions, donor agencies and regional organizations as well as the right to development constituency within civil society; such architecture has hitherto been missing at both the national and international levels. Collaborative action by all relevant stakeholders, under the auspices of the Working Group, can further the realization of the right to development and identify the “blind spots” in the current human rights protection frameworks. The mandate of the Working Group on the Right to Development provides a valuable space and a tool for accomplishing this mission, but creative thinking is required.

Rethinking the right to development so that it can achieve its potential can bridge the fragmented human rights approaches and mechanisms. The right to development needs to be “rediscovered” as a guarantor of the indivisibility of all human rights and a tool for reconciliation between artificially divided sets of rights. This holistic vision requires coherent State policies respectful of human rights and obligations at both the national and international levels to strengthen the indivisibility and universality of all human rights. It requires an incremental process, flexible tools and the involvement of numerous stakeholders.

The essence of the right to development is simple: it is the right to a national and international envi-

ronment conducive to the enjoyment by individuals and peoples of their basic human rights and fundamental freedoms, an environment that is free from structural inconsistencies and inequitable obstacles that hinder equal access to development by everyone.

A quarter of a century after its adoption, the Declaration on the Right to Development has renewed relevance in a world that has become profoundly globalized. The impact of States’ policies transcends their territories and affects persons and peoples beyond their jurisdiction. These emerging “diagonal dimensions” of international law in general and of international human rights law in particular have thus far remained in the “blind spots” of national and international policy and governance. As the Committee on Economic, Social and Cultural Rights noted in its statement of 20 May 2011 commemorating the twenty-fifth anniversary (E/C.12/2011/1), “the right to development, through the systematic application of the core principles of equality, non-discrimination, participation, transparency and accountability at both the national and international levels, establishes a specific framework within which the duty to provide international cooperation and assistance has to be implemented”. In a globalized world facing recurrent economic and other crises, the duty of international cooperation, more than ever, provides a framework for the progressive and consensual realization of all human rights for all.