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Review of progress in the implementation of the right to development

The international dimensions of the right to development: a fresh start towards improving accountability

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Summary

According to the Declaration on the Right to Development proclaimed in 1986 by the General Assembly of the United Nations, States have "the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom". This pledge can only be fully kept, however, once the international environment is reshaped in order to enable the efforts that each State can deploy at domestic level, in order to guarantee the right to development to all: "Lasting progress towards the implementation of the right to development", the Vienna Declaration and Programme of Action stated in 1993, "requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level".

The Declaration on the Right to Development therefore imposes international obligations on States. Such obligations are complementary to their national-level obligations. They stem from the recognition that the full realization of the right to development requires taking into account the interdependency of States, and that collective action is needed in order to reshape the global environment in which they operate. Such international obligations comprise two sets of duties. They include both

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extraterritorial obligations imposed on States as regards their unilateral actions or omissions, insofar as such actions or omissions can affect people or situations outside their territories and/or jurisdiction; and global obligations, which concern States acting collectively in global and regional partnerships.

This report clarifies the normative content of these international obligations. It provides such clarification on the basis of the jurisprudence of human rights treaty bodies and the progressive development of international human rights law by the Human Rights Council Special Procedures, as well as on the basis of consensus documents adopted in intergovernmental settings. It aims thereby to guide the efforts to implement the right to development, and to strengthen its monitoring.

Chapter II lists a number of areas directly relevant to the realization of the right to development in which, in recent years, States have achieved a broad consensus. The adoption of the 2030 Agenda for Sustainable Development and the Paris Agreement adopted in December 2015 under the United Nations Framework Convention on Climate Change are perhaps the most spectacular successes of multilateralism, but other achievements deserve recognition as well: from the business and human rights agenda to the call for universal social protection floors, and from the question of the foreign debt to the area of extreme poverty and human rights, the range of victories is in fact impressive. These achievements can be built upon, in order to strengthen the international dimensions of the right to development.

We can build, too, on advances in general international law. Now that it has been realized that the fragmentation of international law can weaken global governance, diminishing the ability of the international community to meet collective challenges effectively, bridges are being built between the different regimes that have hitherto coexisted, in a more or less peaceful truce: a search for greater coherence has started to reconcile trade and investment, finance, the environment, development cooperation, and human rights. Significant progress was achieved in the understanding of the duties of States as members of international organisations. And the extraterritorial dimensions of the duties of States under international human rights law have become increasingly prominent and widely accepted. These advances can support a new understanding of the international dimensions of the right to development, as articulated in the Declaration on the Right to Development, thus placing the right at the confluence of these efforts to build an international economic and legal order that is conducive to the full realization of all human rights.

In order to make progress towards such an understanding, chapters III and IV offer a conceptual framework. After recalling the distinction between extraterritorial and global obligations, it highlights the different components of the latter category. Global obligations derived from the right to development are specific insofar as they are imposed on States as actors in international relations, not simply taking measures that might affect situations under the jurisdiction of other States, but also interacting with other States to shape global governance. These global obligations fall in three categories: they impose on States that they negotiate with other States on certain issues that call for collective action for the full realization of the right to development; that they comply with the right to development in participating as members in the life of international organisations; and that they implement, in good faith, decisions and recommendations emanating from international organisations of which the State concerned is a member.

Particular attention is paid to the first of these three categories of global obligations, which is also the most remarkable: imposing an obligation on a State to enter into any form of international agreement or to negotiate such an agreement may seem both odd and impractical, since it can hardly be reconciled with the principle of State sovereignty – one of the implications of which is that States cannot be forced to enter into agreements against their will. This report moves beyond this facile conclusion, however. Noting the many references international human rights law makes to duties of international cooperation, it explains the content of the duty of the State to seek, in good faith, to conclude an international agreement in order to contribute to the realization of the right to

development. It argues that, far from being purely rhetorical, such a duty requires that the State put forward proposals, with a view to strengthening international cooperation, that are both sufficiently concrete and "reasonable", which means in particular that in the distribution of the burdens and benefits, such proposals should take into account the principle of common but differentiated responsibilities and respective capabilities.

Chapter V then applies the conceptual framework to seven key areas in which the international environment should be improved in order to enable efforts at realizing the right to development at domestic level. For the realization of the right to development, priority areas are the management of the foreign debt, which requires in particular that loans take into account the impact of adjustment programmes on the right to development and that States act against vulture funds (A); eliminating illicit financial flows, by strengthening the fight against tax evasion and transfer pricing within multinational groups (B); improving the effectiveness of development cooperation policies (C); designing trade policies and channelling foreign direct investment so as to further the realization of the right to development (D and E); reshaping the global regime of intellectual property rights, to ensure that more research and development efforts are directed to "neglected" diseases and to food crops grown primarily in developing countries, and to favour technology transfers to developing countries (F); and supporting the establishment of universal social protection floors (G).

In each of these seven areas, the report summarizes the emerging international consensus, as well as the findings and recommendations of human rights mechanisms, from which it derives key attributes of the right to development. The number of areas covered has deliberately been narrowed down in order to arrive at a manageable set of attributes, and corresponding indicators. The aim is to make the right to development operational, and to encourage existing human rights mechanisms to refer to it more systematically: that requires identifying, from within the full range of the implications of the right, those that best capture its essence, considered in its international dimensions, and listing the attributes that correspond to the most recent evolutions in international human rights law and general international law.

Finally, chapter VI closes with a proposal to build on the mechanisms established to ensure policy coherence for sustainable development in order to institutionalize the assessment of the extraterritorial human rights impacts of measures adopted by States, as well as of the positions they take in international negotiations. In contrast to the obligations corresponding to the fulfilment of the right to development listed in chapter V, the establishment of such mechanisms cannot be said to be required under human rights law. It nevertheless was considered to be sufficiently relevant to be included in the summary table of indicators, presented as an annex to the report.

Contents

I. Introduction

1. When it adopted the Declaration on the Right to Development on 4 December 1986, the General Assembly of the United Nations defined the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".[1] Although the Declaration is not, as such, binding international law, many of its provisions are anchored in binding legal instruments, including the Charter of the United Nations[2] and human rights treaties: as such, the Declaration can be seen as making explicit and bringing together a number of obligations already well recognized in international law, to highlight their contribution to a human-centred form of development, and to the establishment of a social and international order in which all the rights of the Universal Declaration of Human Rights can be realized.[3]

2. The right to development however shall only be achieved if States accept corresponding duties, and if such duties are effectively monitored. This requires strengthening the consensus on the normative components of the right, as well as on appropriate indicators to measure compliance. Such a consensus has proven particularly difficult to achieve as regards the international dimensions of the right to development, i.e., the dimensions that go beyond the adoption by States of measures that affect only people on their national territories and/or subject to their jurisdiction. The objective of this report is to help to overcome the obstacles to such a consensus.

3. The report takes no position as to whether or not the right to development should be codified into a new legally binding instrument open to the ratification by States. It does seek to contribute, however, to the right to development being more systematically taken into account both in the implementation of existing international human rights law, by human rights mechanisms such as expert human rights treaty bodies and the Special Procedures established by the Human Rights Council; and in the design and implementation of new standards in various international fora. Since it was first enunciated in 1986, and especially since the launch of the first attempts to define criteria which could be used to measure progress in its realization,[4] the right to development has been lost in debates on criteria and operational sub-criteria, partly due to disagreement over the concept and its normative content. Far from facilitating the achievement of a consensus, the proposals made so far have proven both divisive politically, and -- because the proposals that were made came to diverge from the methodology designed to measure compliance with other human rights, and used in other parts of the UN human rights system -- difficult to incorporate in human rights monitoring. The result is that, more than thirty years after its proclamation, the right to development remains contested and has not been utilized as a human right enshrining obligations for which States can be held accountable. It continues to be the subject of

[1] A/RES/41/128 (4 Dec. 1986), art. 1. The Declaration was adopted by 146 votes to 1, with 8 abstentions. Neither the definition of the right to development nor the Declaration in its entirety refer to sustainable development, particularly in its environmental dimension. This dimension was added with the Rio Principles adopted at the United Nations Conference on Environment and Development of 3-14 June 1992 (A/CONF.151/26). The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 and endorsed by General Assembly resolution 48/121 of 20 December 1993, proclaimed that "The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations" (para. 11). This was reaffirmed most prominently in the 2030 Development Agenda.

[2] Charter of the United Nations (June 26, 1945), 59 Stat. 1031, *entered into force* Oct. 24, 1945.

[3] GA Res. 217, UN GAOR, 3d sess., UN Doc. A/810 (1948) (Art. 28).

[4] The search for such criteria was initiated by para. 171 of the Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45 (E/CN.4/1990/9/Rev.1) (26 Sept. 1990), where it was noted that : "The formulation of criteria for measuring progress in the realization of the right to development will be essential for the success of future efforts to implement that right. Such criteria must address the process of development as well as its results; quality as well as quantity; the individual as well as social dimension of human needs; and material as well as intellectual and cultural needs. Both objective and subjective measurements must be included in any analysis".

academic interest and political rhetoric and debate, but its significance is largely confined to intergovernmental debates.

4. This report proposes a new start. It identifies a number of reasons why the time has come to further strengthen the international dimensions of the right to development (II). It then recalls the three levels of obligations that correspond to the right to development -- national, extraterritorial, and global --, each of which poses specific challenges (III). Next, focusing on the so-called "international" dimensions of the right to development, which include the extraterritorial and the global obligations of States, it seeks to identify the key normative components of the right, or its "attributes". It proceeds in two steps. It first offers a conceptual framework (IV). It then applies that framework to seven key areas in which the international environment should be improved in order to enable efforts at realizing the right to development at domestic level (V). For the realization of the right to development, priority attention should be given to managing the debt burden (A); addressing illicit financial flows (B); improving the design of development cooperation policies (C); directing trade and channelling foreign direct investment towards the realization of the right to development (D and (E); reshaping the global regime of intellectual property rights (F); and supporting the establishment of social protection floors (G).

5. The number of areas covered has deliberately been narrowed down in order to arrive at a manageable set of attributes of the right to development, from which a limited number of indicators can be derived. The aim is making the right to development operational, and encouraging existing human rights mechanisms to refer to it more systematically: that requires identifying, from within the full range of implications of the right, the implications that best capture its essence, considered in its international dimensions, and listing the attributes that correspond to the most recent evolutions in international human rights law and international law more broadly, where relevant.

6. Finally, the report closes with a proposal to build on the mechanisms established to ensure policy coherence for sustainable development in order to institutionalize the assessment of the extraterritorial human rights impacts of measures adopted by States, as well as of the positions they take in international negotiations (VI).

7. Although the study does include an examination of the duties of States to control transnational corporations and to ensure that international organisations of which they are members comply with the right to development, its focus is exclusively on States. It seeks to clarify the duties that are imposed on States by the Declaration on the Right to Development and the normative instruments in which the Declaration is grounded, in order to contribute to making the right to development operational in the United Nations human rights machinery. This is not to deny, of course, the important role of non-State actors (including transnational corporations and international intergovernmental and non-governmental organizations) in the realization of the right to development;[5] but that would be the topic of another study.

[5] See for instance, on the roles of the World Bank and the International Monetary Fund, the reports by the Independent Expert on the promotion of a democratic and equitable international order (in particular the report submitted to 36th session of the Human Rights Council (A/HRC/36/40) and to the 72nd session of the General Assembly (A/72/187), respectively on the World Bank and on the impact of the conditionality of loans from the International Monetary Fund on development and human rights); and the report of the Special Rapporteur on extreme poverty and human rights on the World Bank and human rights, submitted to the 70th session of the General Assembly (A/70/274). As regards the role of transnational corporations, the Committee on Economic, Social and Cultural Rights observes that "In certain jurisdictions, individuals enjoy direct recourse against business entities for violations of economic, social and cultural rights, whether in order to impose on such private entities (negative) duties to refrain from certain courses of conduct or to impose (positive) duties to adopt certain measures or to contribute to the fulfilment of such rights" (General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 4 (citing Constitutional Court of South Africa, Daniels v. Scribante and others, case CCT 50/16, judgment of 11 May 2017, paras. 37-39 (leading judgment by J. Madlanga) (positive duties imposed on the owner to ensure the right to security of tenure in conditions that comply with the requirements of human dignity)). Indeed, the idea that corporations may be imposed to comply with human rights, including with economic, social

II. Three opportunities

A. Victories of multilateralism

8. The present context provides a number of opportunities. First, a number of international agreements or consensus documents have been adopted in recent years, on which the interpretation of the Declaration on the Right to Development can build. They include in particular the Rio Declaration on Environment and Development, adopted in 1992,[6] and the outcome document "The Future We Want" adopted at the United Nations Conference on Sustainable Development convened in Rio de Janeiro from 20 to 22 June 2012;[7] the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, adopted in 2015,[8] which builds on the 2002 Monterrey Consensus and the 2008 Doha Declaration on Financing for Development; the 2030 Agenda for Sustainable Development,[9] as summarized in the Sustainable Development Goals, adopted in 2015; and the Paris Agreement, adopted on 13 December 2015 under the United Nations Framework Convention on Climate Change, and in force since 4 November 2016.[10] International agreements with a broad membership in more specialized areas also deserve to be taken into account, such as the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture, in force since 29 June 2004.[11] In addition, standard-setting has made progress within the Human Rights Council, in a number of areas directly related to the implementation of the right to development. Major achievements include the endorsement of the Guiding Principles on Business and Human Rights[12] by the Human Rights Council in resolution 17/4; of the Guiding Principles on Foreign Debt and Human Rights,[13] by resolution 20/10; and of the Guiding Principles on Extreme Poverty and Human Rights,[14] by resolution 21/11. In the areas covered by the International Labour Organisation, the adoption by the International Labour Conference of the 2012 Recommendation (No. 202) concerning National Floors of Social Protection[15] and of the 2016 Resolution concerning decent work in global supply chains[16] are significant advances.

9. This list of achievements is striking by its heterogeneity, whether we consider the status of these various documents or their subject-matter. It is also very incomplete. It does illustrate, however, the ability of the international community to achieve consensus on certain issues essential for the realization of the right to development, where the right conditions are present. The further implementation of the right to development should build on this consensus, rather than seek to develop in isolation. Considering the full implications that can be drawn from these instruments and consensus documents, significant progress could be achieved in clarifying the content of the international dimensions of the right to development.

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and cultural rights, is increasingly accepted: see, e.g., International Centre for Settlement of Investment Disputes case No. ARB/07/26, Urbaser S.A. and others v. Argentina (award of 8 December 2016), paras. 1194 and 1195.

6 A/CONF.151/26.

7 Endorsed by General Assembly resolution 66/288, adopted on 11 September 2012.

8 Adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015.

9 A/RES/70/1.

10 FCCC/CP/2015/10/Add.1.

11 Adopted 3 Nov. 2001, Res. 3/2001, FAO, 31st Sess.

12 A/HRC/17/31.

13 Guiding principles on foreign debt and human rights. Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, to the twentieth session of the Human Rights Council (10 April 2011) (A/HRC/20/23).

14 A/HRC/21/39.

15 Adopted by the 101st session of the General Conference of the International Labour Organisation, on 14 June 2012.

16 Adopted by the 105th session of the General Conference of the International Labour Organisation, on 10 June 2016.

Moreover, as this report will illustrate, the interpretation of international human rights law has developed significantly in recent years, particularly as regards the extraterritorial and global dimensions of States' obligations under the human rights treaties they have ratified. The right to development can be further strengthened by aligning its reading on the current understanding of human rights law.

B. Bridges across different international regimes

10. Second, significant efforts have been made recently to move beyond the fragmentation of international law and the existing division of labour in global governance. Due to the increasingly technical and complex nature of the topics that are the subject of international cooperation, specific instruments have established separate arrangements in areas such as international trade, the environment, technology transfers and intellectual property rights, or human rights. Each of these areas of international cooperation has specific negotiation fora and means of enforcement, including dispute settlement mechanisms. As a result, international law is divided into a number of self-contained regimes, each with their own norms and dispute-settlement mechanisms, and relatively autonomous both vis-à-vis each other and vis-à-vis general international law.[17] While the tendency towards regime-specialization can provide benefits, including a greater effectiveness in problem-solving with the assistance of technical expertise provided by international agencies, it also may lead to inconsistencies. And, unless we manage to bridge different regimes, we may fail to identify potential synergies, by identifying mechanisms in which one regime can serve to support the achievement of objectives that are the primary goal of other regimes.

11. In addition to the adoption by the international community of global development goals, such as the Millennium Development Goals and the Sustainable Development Goals, and beyond the role of Article 103 of the Charter of the United Nations -- which implies that, in case of conflict between human rights obligations and commitments under other instruments, the former should prevail[18] --, various mechanisms have been resorted to in order to overcome the negative effects of fragmentation. Increasingly, with a view to ensuring greater consistency, international agreements refer to values or objectives pursued in other international agreements. Human rights may be referred to in climate change agreements, for instance;[19] the reference to sustainable development may appear in trade agreements;[20] or

[17] Report of the Study Group of the International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, A/CN.4/L.702, 18 July 2006, para 8. See also, *inter alia*, Bruno Simma, "Self-contained regimes", *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 111–36; George Abi-Saab, "Fragmentation or Unification: Some Concluding Remarks", *New York Univ. Journal of International Law and Politics*, vol. 31(4) (1999), pp. 919-933; Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands", *Michigan Journal of International Law*, vol. 25 (2004), pp. 903-917; Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law", *Eur. Journ. Int'l L.*, vol. 17(3) (2006), pp. 483-529.

[18] Charter of the United Nations, cited above (article 103, combined with article 56).

[19] Thus, the 2015 Paris Agreement adopted at the 21st Conference of Parties to the United Nations Framework Convention on Climate Change states in its Preamble, "[a]cknowledging that climate change is a common concern of humankind", that the Parties "should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

[20] Thus, the preamble of the Agreement establishing the World Trade Organization (WTO) states that Members' relations "should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development" (emphasis added). Similarly, it has become routine in bilateral and regional free trade agreements to include references to sustainable development.

investment agreements may refer to health, labour rights and environmental objectives as legitimate reasons to restrict investors' rights.[21] The preparation of impact assessments prior to the conclusion of international agreements constitutes another tool: one of their objectives is to ensure that issues not explicitly addressed in the agreements under discussion, but that the implementation of such agreements could affect, shall be taken into consideration.[22] Attempts are now emerging to systematize the use of human rights impact assessments in trade and investment agreements,[23] as well as in the negotiation of loan agreements,[24] as recommended by various human rights treaty bodies.[25] A third tool is to impose policy coherence for sustainable development. Under Sustainable Development Goal 17, one target is to "enhance policy coherence for sustainable development", and the associated indicator is the number of countries with mechanisms in place to this effect.[26] Finally, at the level of

[21] For instance, para. 4, b) of Annex B to the 2012 Model Bilateral Investment Treaty proposed by the United States of America, in which the notion of "expropriation" is further clarified, provides that: "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations".

[22] For instance, in the Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia) adopted on 10 May 1944, and integrated to the Constitution of the ILO, the International Labour Conference reaffirmed the need to ensure that the growth of trade should not be at the expense of workers' rights (paras. I(a) and (c)) and it stated that "all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective [of ensuring that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity]" (para II(c)). These principles were reaffirmed in the ILO Declaration on Social Justice for a Fair Globalization adopted statement of principles and policies adopted unanimously on 10 June 2008 by the International Labour Conference at its ninety-seventh session. The Declaration builds on principles recognized in the Constitution of the International Labour Organization, including the Declaration concerning the Aims and Purposes of the ILO of 1944 and the Declaration on Fundamental Principles and Rights at Work of 1998.

[23] See Guiding Principles on human rights impact assessments of trade and investment agreements, Addendum to the Report of the Special Rapporteur on the right to food, Report of the Special Rapporteur on the right to food to the 19th session of the Human Rights Council (A/HRC/19/59, Add.5) (2012).

[24] See in this regard the work currently undertaken by the Independent Expert on foreign debt and human rights, following the request expressed in Human Rights Council resolution 34/3 that he develop in consultation with States, international financial institutions and other relevant stakeholders Guiding Principles for human right impact assessments of economic reform policies. In its Statement of 24 June 2016 on "Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights" (E/C.12/2016/1), the Committee on Economic, Social and Cultural Rights considers that both Lenders and States seeking loans should carry out a human rights impact assessment prior to the provision of the loan concerned, in order to ensure that any conditionalities attached shall not disproportionately affect economic, social and cultural rights (para. 11).

[25] See, e.g., Committee on the Rights of the Child, Concluding Observations: El Salvador, 30 June 2004, CRC/C/15/Add.232 at para. 48; Committee on the Elimination of Discrimination against Women, Concluding Observations: Colombia, 2 February 2007, CEDAW/C/COL/CO/6, at para. 29; Committee on the Elimination of Discrimination against Women, Concluding Observations: Philippines, 25 October 2006, CEDAW/C/PHI/CO/6 at para. 26; Committee on the Elimination of Discrimination against Women, Concluding Observations: Guatemala, 2 June 2006, CEDAW/C/GUA/CO/6 at para. 32. The Committee on Economic, Social and Cultural Rights highlighted in particular the contribution such impact assessments could make to the right to development. "The conclusion of [trade or investment] treaties", the Committee writes, "should [...] be preceded by human rights impact assessments, taking into account both the positive and negative human rights impacts of trade and investment treaties, including their contribution to the realization of the right to development" (Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities (E/C.12/GC/24) (24 June 2016), para. 13).

[26] Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development (A/RES/71/313, Annex), target 17.14 and indicator 17.14.1. See further below, chapter V.

implementation, a fourth tool consists in encouraging an interpretation of international treaties in the light of other relevant rules of international law applicable between the Parties.[27]

12. These various mechanisms are the functional equivalent of bridges, that link different international regimes to one another, reducing the risk of inconsistencies -- or even worse, of conflicting obligations being imposed on States --, and encouraging the search for synergies between the different objectives pursued through global partnerships. These bridges too present opportunities for the further realization of the right to development. In the face of the increased fragmentation of international law, a virtuous cycle might emerge, in which the right to development supports greater coherence across regimes, while benefiting in turn from this search for coherence.

C. Advances of international law

13. Third, international law itself, and international human rights law in particular, have been evolving in recent years in ways that can strengthen the international dimensions of the right to development. The most significant advances concern the understanding of the responsibility of States as members of international organisations, and the rise of extraterritorial obligations in the area of human rights, and of economic, social and cultural rights in particular.

14. The International Law Commission, after literally decades during which it was unable to arrive at a consensus on this issue,[28] has now made it clear that "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation".[29] In other terms, where a State seeks to avoid compliance with an international obligation by transferring powers to an international organization and allowing it to take measures that run counter to such international obligations, it engages its responsibility under international law.

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[27] Article 31.3(c) of the Vienna Convention on the Law of Treaties provides that, in the interpretation of treaties, "[t]here shall be taken into account together with the context … any relevant rules of international law applicable in the relations between the parties" (Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, 8 ILM 679). Occasionally, international agreements refer to the rules of interpretation set out in the Vienna Convention on the Law of Treaties (see, e.g., Article 3(2) of the Dispute Settlement Understanding included among the WTO agreements (Agreement establishing the World Trade Organization, Marrakesh, 15 April 1994, entered into force on 1 January 1995 (33 ILM 1125 (1994)), stating that WTO agreements must be interpreted 'in the light of customary rules of interpretation'). However, even absent such a reference, it is generally recognized that the Vienna Convention has acquired the status of customary international law: see, e.g., International Court of Justice, *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, (1994), I.C.J. Reports p. 6.

[28] See International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly*, Fifty-sixth session, Supplement No. 10 and corrigendum (A/56/10 and Corr. 1), chap. IV, sect. E.1; annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49 (Vol. I)/Corr.4)). When it discussed the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, the International Law Commission ended up agreeing simply on a 'non-prejudice' clause on the highly contentious topic of the responsibility of States for the acts adopted by the international organizations of which they are members. Under the slightly misleading title of 'Responsibility of an international organization', article 57 of the *Draft Articles* reads: 'These articles [listed in the text adopted by the ILC in August 2001] are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization'.

[29] Art. 61 of the Draft Articles on the Responsibility of International Organizations, adopted by the International Law Commission at its sixty-third session, in 2011 (A/66/10, para. 87), welcomed by the United Nations General Assembly in resolution 66/100 of 9 December 2011.

15. This provides a helpful clarification to the scope of States' duties as members of international organizations. It imposes on States that, prior to transferring powers to an international organization, they act with due diligence to ensure that such powers shall only be exercised in conformity with their pre-existing human rights obligations.[30] More generally, the Draft Articles on the Responsibility of International Organizations adopted by the International Law Commission prohibit the use by its member States of the channel of an international organisation in order to commit acts that would be a violation of those States' obligations if they were to be committed by those States acting alone.[31] This is similar to the view long adopted by human rights treaty bodies, which consider that States "cannot ignore their human rights obligations when acting in their capacity as members of these organisations".[32] In the framework of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights has expressed its view on a number of occasions that States parties to the Covenant would be acting in violation of their obligations if they were to delegate powers to international agencies and to allow such powers to be exercised without ensuring that they do not infringe on human rights, or if they were to exercise their voting rights within such agencies without taking such rights into account.[33]

16. In parallel, the extraterritorial dimensions of the duties of States under international human rights law have become increasingly prominent and widely accepted. The Members of the United Nations have pledged “to take joint and separate action in cooperation with the Organization...” to achieve the purposes set out in Article 55 of the Charter, including: “... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”[34] This duty is expressed without any territorial limitation, and should be taken into account when addressing the scope of States' obligations under human rights treaties. Also in line with the Charter, the International Court of Justice has acknowledged the extraterritorial scope of core human rights treaties, focusing on their object and purpose, legislative history and the lack of territorial limitation provisions in the text.[35] Customary international law also prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a requirement that has

[30] The International Law Commission remarked that: "the existence of an intention to avoid compliance is implied in the use of the term 'circumvention'. International responsibility will not arise when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as the unintended result of the member State's conduct. On the other hand, the present article does not refer only to cases in which the member State may be said to be abusing its rights". However, a result cannot be said to be 'unintended' if it is the consequence of the deliberate choice by a State not to ensure that its pre-existing international obligations shall be taken into account in the activities of the organisation, where the State knew or should have known that such would be the result of transferring powers to the organisation in the field concerned. Bearing witness, perhaps, to the difficulty of defining with sufficient clarity the scope of the due diligence obligation that States must accept when they transfer powers to an international organisation, the commentary to article 25 in an earlier draft, the equivalent of article 61 in the final text of the Articles, tended to impose on the State a slightly higher burden if it wished to avoid responsibility: it was explained then that "the existence of a specific intention of circumvention is not required and responsibility cannot be avoided by showing the absence of an intention to circumvent the international obligation" (Report of the International Law Commission on the work of its fifty-eighth session, 1 May-9 June and 3 July-11 August 2006, I.L.C. Report, A/61/10 (2006), chap. VI, paras. 77-91).)

[31] For instance, a State would be engaging its international responsibility if it were providing aid or assistance to an international organisation for the commission of an act that would be internationally wrongful if committed by that State (Article 58. Aid or assistance by a State in the commission of an internationally wrongful act by an international organization).

[32] Committee on Economic, Social and Cultural Rights, Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights (24 June 2016) (E/C.12/2016/1), para. 9.

[33] General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, para. 39.

[34] Charter of the United Nations, cited above note 2, article 56.

[35] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (9 July), paras. 109-112.

gained particular relevance in international environmental law.[36] The Human Rights Council has confirmed that such prohibition extends to human rights law, when it endorsed the Guiding Principles on Extreme Poverty and Human Rights in resolution 21/11.[37]

17. Human rights treaty bodies have long recognized the extraterritorial implications of the instruments that they are tasked to supervise. Thus for instance, in its 2011 Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights reiterated that States Parties' obligations under the Covenant do not stop at their territorial borders, and that States Parties are required to take necessary steps to prevent human rights violations abroad by corporations which they can control, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.[38] The Committee has also addressed specific extraterritorial obligations of States Parties concerning business activities in General Comments relating to the right to water,[39] the right to work,[40] the right to social security[41] or the right to just and favourable conditions of work,[42] and in its General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.[43] Similar positions have been adopted by the Committee on the Rights of the Child,[44] as well as by other human rights treaty bodies.[45]

18. This is, therefore, a time of opportunities. The advances summarized above can guide the identification of the normative components (or attributes) of the international dimensions of the right to development, as articulated in the Declaration on the Right to Development, thus placing the right at the confluence of these efforts to build an international economic and legal order that is conducive to the full realization of all human rights. This shall firmly anchor the right to development as part of international human rights law and contribute to the acceptance of this right, enabling human rights mechanisms – including the Universal Periodic Review and the Special Procedures of the Human Rights Council, including the

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[36] *See* Trail Smelter Case (United States v. Canada), 3 R.I.A.A. 1905 (1941), pg. 1965; *Corfu Channel Case (United Kingdom v. Albania) (Merits)* 1949 I.C.J. 4 (9 Apr.), para. 22; and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (8 July), para. 29. See also International Law Commission, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, adopted at the fifty-eighth session of the International Law Commission (A/61/10) (2006) (in particular Principle 4, stipulating that "Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control"). The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by a range of academics, research institutes and human rights non-governmental organizations in 2011, provide a restatement of the current state of international human rights law on this topic, contributing to its progressive development.

[37] The *Guiding Principles on Extreme Poverty and Human Rights submitted by the Special Rapporteur on extreme poverty and human rights* (A/HRC/21/39) provide that "as part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices" (para. 92).

[38] Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights (E/C.12/2011/1), paras. 5-6.

[39] General Comment No. 15 (2002): The right to water (arts. 11 and 12) (E/C.12/2002/11), paras. 31, 33.

[40] General Comment No. 18 (2006): The right to work (art. 6) (E/C.12/GC/18), para. 52.

[41] General Comment No. 19 (2008): The right to social security (art. 9) (E/C.12/GC/19), para. 54.

[42] General Comment No. 23 (2016): The right to just and favourable conditions of work (E/C.1/GC/23), para. 70.

[43] E/C.12/GC/24, paras. 25-37.

[44] General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights (CRC/C/GC/16), paras. 43-44.

[45] For example, Committee on the Elimination of Racial Discrimination, Concluding Observations: Norway (2011) (CERD/C/NOR/CO/19-90), para. 17; Human Rights Committee, Concluding Observations: Germany (2012) (CCPR/C/DEU/CO/6), para. 16.

Special Rapporteur on the right to development – to monitor its implementation.[46] It is to this effort that this report seeks to contribute.

III. The national and international obligations corresponding to the right to development

19. As noted by the 1993 Vienna Declaration and Programme of Action: "Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level".[47] Indeed, the Declaration on the Right to Development defines corresponding States' obligations both at the national and at the international levels: in adopting the Declaration, States have accepted "the primary responsibility for the creation of *national and international* conditions favourable to the realization of the right to development";[48] and they have acknowledged that "Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures *at the national and international levels*".[49] The High-Level Task Force on the implementation of the right to development also noted that the right to development implied three levels of States' responsibility, including (i) States acting collectively in global and regional partnerships; (ii) States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction; and (iii) States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction.[50]

A. National, extraterritorial and global obligations

20. Three levels of obligations ought therefore to be distinguished. First, States have *national-level* obligations. These are obligations that concern the relationship between the State and individuals and groups on its territory or subject to its jurisdiction. In particular, States have "the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom".[51] Article 8 of the Declaration clarifies further the scope of this obligation, which has also been clarified by case-law.[52]

21. Second, States have *extraterritorial* obligations. States' actions and omissions may have impacts on persons or situations outside the States' territory or jurisdiction, including

[46] Appointed in accordance with United Nations Human Rights Council resolution 33/14, adopted on 29 September 2016.

[47] Adopted by the World Conference on Human Rights on 25 June 1993 and endorsed by General Assembly resolution 48/121 of 20 December 1993, para. 10.

[48] Art. 3(1).

[49] Art. 10.

[50] High-Level Task Force on the implementation of the right to development, right to development criteria and operational sub-criteria, A/HRC/15/WG.2/TF/2/Add.2 (8 March 2010), Annex.

[51] Art. 2(3).

[52] Article 22 of the African Charter on Human and People's Rights provides that "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind", and imposes on States a duty, "individually or collectively, to ensure the exercise of the right to development". For examples of how this provision is interpreted, see in particular African Commission on Human and Peoples' Rights, Complaint No. 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, decision adopted at the 46th Ordinary Session of the African Commission on Human and Peoples' Rights held from 11-25 November 2009; or African Court of Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Kenya (in the case of the Ogiek Community of the Mau Forest)*, Appl. No. 006/2012, Judgment of 26 May 2017, paras. 207-211.

human rights impacts that they cannot ignore. The Declaration on the Right to Development is relatively vague on this point, however it does recognize the duty of each State to adopt international development policies not only collectively, but also *individually*. This acknowledges the impacts that measures adopted unilaterally by one State can have on the ability of populations under the territorial jurisdiction of another State to benefit from the right to development.[53]

22. Third, States have *global* obligations: as actors in international relations, they should contribute to the establishment of bilateral, regional and global cooperation agreements, including for the setting up of international agencies, and they should exercise their rights within intergovernmental organizations, in accordance with the requirements of the right to development. Article 3(3) of the Declaration on the Right to Development provides in this regard that "States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights". This is further clarified in Article 4, which stipulates a duty of all States "to take steps, individually *and collectively*, to formulate international development policies with a view to facilitating the full realization of the right to development", with "sustained action [being] required to promote more rapid development of developing countries". The Vienna Declaration and Programme of Action further confirm that "States should 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 obstacles to development".[54]

B. The interaction between the levels

23. A careful reading of the Declaration on the Right to Development suggests the existence of a hierarchy, expressed in terms of subsidiarity, between the different levels. The design by each State, at domestic level, of national development policies, as defined in article 2(3) of the Declaration, comes first: provided such policies are defined "on the basis of [the] active, free and meaningful participation" of the population, as they must be in accordance with the same provision, they may be seen as the result of the exercise of the right of peoples to self-determination which, referring to article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights, article 1(2) of the Declaration reaffirms. For such a right to self-determination to be effectively exercised however, an enabling international environment should be established, consistent with article 28 of the Universal Declaration of Human Rights.[55] This imposes obligations on States, both as they act unilaterally (extraterritorial obligations) and as they act jointly (global obligations).

24. Importantly however, the duty to contribute to the establishment of an enabling international environment does not authorize States to act unilaterally in order to enforce the duty of another State to adopt measures at domestic level that support the right to

[53] See art. 4(1): "States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development".

[54] Vienna Declaration and Programme of Action, cited above note 47, para. 10.

[55] The Declaration on the right to development speaks in this regard of "international conditions favourable to the realization of the right to development" (Art. 3(1)) or of "international development policies ... facilitating the full realization of the right to development" (Art. 4(1)). The Addis Ababa Action Agenda (cited above, note 8) also notes that "national development efforts need to be supported by an enabling international economic environment, including coherent and mutually supporting world trade, monetary and financial systems, and strengthened and enhanced global economic governance" (para. 9); and it includes a commitment to "pursuing policy coherence and an enabling environment for sustainable development at all levels and by all actors" (id.; see also para. 20).

development, for instance by the adoption of discriminatory trade measures or of other forms of economic sanctions. Indeed, the Declaration on the Right to Development emphasizes that the realization of the right to development "requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations".[56] The Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (approved by General Assembly resolution 2625(XXV) of 24 October 1970), commits of each State to "refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations", and not to "use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind", consistent with the "inalienable right" of each State "to choose its political, economic, social and cultural systems, without interference in any form by another State".[57]

25. The right to development therefore does not justify the adoption of unilateral measures as a means to obtain from a State that it changes its course of conduct. In particular, threatening a State with the denial of certain advantages in order to force the State to conclude an international agreement would constitute coercion in the meaning of article 52 of the Vienna Convention on the Law of Treaties.[58] Indeed, the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations recalls that "States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences". This in turn has inspired articles 3(3) and 4 of the Declaration on the Right to Development, already referred to above. Article 6(1) provides that "All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion".

26. Such duties to cooperate have been reiterated on many occasions since, both in consensus documents[59] and in various international human rights instruments.

27. It may therefore be concluded that, under the Declaration on the Right to Development, (i) States should adopt national policies that ensure that every human person is "entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" (Art. 1); (ii) States should abstain from taking measures that might obstruct the efforts towards realizing the right to development in other countries, and instead should adopt policies supportive of such efforts; and (iii) in order to create an international environment conducive to the full realization of the right to development, States should cooperate with one another. These are the three levels of obligations corresponding to the right to

[56] Art. 3(2).

[57] See also Guiding Principles on foreign debt and human rights, cited above note 13, paras. 25-26 (referring in the context of States borrowing from foreign lenders, to "the sovereign and inalienable right [of States] to implement a process of national development independently and free from pressure, influence or interference from external actors, including other States and international financial institutions").

[58] See the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties, Annex to the Final Act of the United Nations Conference on the Law of Treaties (First and Second sessions, 26 March – 24 May 1968 and 9 April – 22 May 1969) (A/CONF.39/26), p. 285 (which "condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent").

[59] See, e.g., Millennium Declaration, General Assembly Resolution 55/2 (8 September 2000), para. 2 (in which the Heads of States and Governments recognized unanimously 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").

development. This report seeks to clarify the implications of the two latter, "international" obligations. This first requires a definition of the normative components of these obligations, or what might be called the attributes of the right to development, in its international dimensions.

IV. The international dimensions of the right to development: A conceptual framework

28. In order to clarify the normative content of human rights, it has become increasingly common to distinguish between three categories of duties imposed on States: States must respect human rights, by abstaining from interfering with existing levels of enjoyment of human rights unless this is justified as necessary for the pursuance of a legitimate public welfare objective; they must protect human rights from interference by private actors, which the State must therefore control, adopting to that effect all measures that can reasonably be taken in order to avoid such interference from occurring; finally, they must fulfil human rights, by putting in place regulatory and policy frameworks that shall be conducive to the full realization of the right in question. This typology of State obligations is appropriate for the discussion both of the domestic and of the international dimensions of human rights obligations of States. At the same time however, both categories of international obligations outlined above present special characteristics that distinguish them from domestic human rights obligations.

A. Extraterritorial human rights obligations

29. Extraterritorial human rights obligations encounter what we might call the "paradox of the many hands": the larger the number of States involved in a situation that creates obstacles to the ability of any one State to fulfil its human rights obligations, the more difficult it will be to assert a responsibility of any individual State in that situation. This problem is well known in the area of climate change.[60] But it is equally relevant here, where the question is whether any State may be held responsible for a situation – resulting in the lack of realization of the right to development in another State – for which not the conduct of the former State alone, but that conduct *in combination with that of a large number of other States*, has contributed to this result.[61]

30. In international law, it is accepted that the responsibility of the State may be engaged even though the adoption by that State of a different conduct may not have led to a different result: if a particular conduct of the State is illegal, responsibility is not conditional upon the likelihood that the outcome, in terms of prejudice suffered by the victims, would have been different. In the *Bosnian Genocide Case*, the International Court of Justice noted that, in order to find Serbia responsible for not having prevented acts of genocide: "...it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce".[62] According to the Court, how much the adoption by

[60] Christina Voigt, "State Responsibility for Climate Change Damages", *Nordic Journal of International Law*, vol. 77 (2008), pp. 1-22.

[61] See in particular Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007).

[62] International Court of Justice, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment of 26 February 2007), *ICJ Reports*, para. 430.

the State of a different conduct could have altered the outcome would only be relevant to the question of damages to be awarded.[63]

31. This is consistent with the position adopted by the International Law Commission in the 2001 *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, which stipulates that "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act".[64] Such a responsibility exists even though, if the State had refrained from the action or omission that constitutes a violation of its international obligations, the result could have been no different. As the International Law Commission remarked when it addressed the issues of foreseeability and causality – the link between conduct and result – in its Commentary to Principle 4 of its 2006 *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*: "The principle of causation is linked to questions of foreseeability and proximity or direct loss. Courts in different jurisdictions have applied the principles and notions of proximate cause, adequate causation, foreseeability and remoteness of the damage. This is a highly discretionary and unpredictable branch of law. Different jurisdictions have applied these concepts with different results. It may be mentioned that the test of proximity seems to have been gradually eased in modern tort law. Developments have moved from strict *conditio sine qua non* theory over the foreseeability ('adequacy') test to a less stringent causation test requiring only the "reasonable imputation" of damage".[65]

32. Thus for instance, a particular violation of economic, social and cultural rights may be attributed to the conduct of one State, even if other, intervening causes, or the conduct adopted by a number of other States, have also played a role in the violation. The problem nevertheless remains that alleging the responsibility of one State in a situation for which other States also bear some responsibility (potentially to an even larger degree) may be politically difficult to justify. This is especially the case where the argument made is that the State in question should have done more to support the realization of the right to development and economic and social rights in another State, not only by the adoption of certain unilateral measures, for instance by increasing the level of development aid or by facilitating access of that State to international finance, but also by contributing to reshaping the international economic order by the conclusion of agreements involving other States. It is one thing for a State to be found responsible for implementing trade policies that destroy local producers' ability in another State to compete on their own domestic markets;[66] it is quite another to seek to engage the responsibility of the former State for not ensuring that the multilateral trading system works for the benefit of the State which, due to its poor trade balance, finds it difficult to make progress on development indicators. The first situation may be addressed by relying on classic understandings of causality and attribution: if the conduct attributable to one State negatively impacts human rights in another State and is in breach of the duties of the former State, the responsibility of that State may be engaged.[67] The second situation raises the question of whether a State may be responsible for what is, in essence, a failure not of that State alone, but of a plurality of States (or the "international community" as a whole), to establish an international environment that enables the realization of the right to development. This is the specific challenge raised by the emergence of global obligations.

[63] Id., para. 461.

[64] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, cited above note 28, article 47 (Plurality of responsible States).

[65] International Law Commission, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, adopted at the fifty-eighth session of the International Law Commission (A/61/10) (2006).

[66] See, for instance, Committee on Economic, Social and Cultural Rights, Concluding Observations: Germany (E/C.12/DEU/CO/5 (2011)), para. 9.

[67] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, cited above note 28, article 2 (Elements of an internationally wrongful act of a State).

B. Global obligations

33. Global obligations are the duties of States as actors in international relations. With a view to facilitating accountability in the implementation of the right to development by clarifying the legal regime of the range of duties implicated, this report proposes to distinguish three categories of global obligations: duties to seek to conclude *new* agreements (bilateral or multilateral, including regional), which may or may not lead to the establishment of a new international organisation with a separate international legal personality;[68] duties to cooperate internationally by taking part in *existing* fora, by participating in decision-making bodies of international organisations (as such organisations have become a major source of normative development of international law);[69] and finally, duties to comply with obligations already stipulated under *existing* international agreements, or to implement decisions or recommendations emanating from bilateral, regional or global partnerships. From the point of view of international law, each of these categories of global obligations poses specific questions. Each therefore deserves a specific treatment.

1. A duty of States to seek to conclude new bilateral or multilateral agreements

34. The first category of duty is to seek a solution at bilateral or multilateral level in order to address an issue that presents a transnational dimension and thus calls for international cooperation, by cooperating with other States. It is common for human rights treaties to refer to a duty of international cooperation, and to include in the definition of such a duty the duty to seek to conclude agreements with other States. A duty to cooperate for the full realization of human rights is included, for instance, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which requires States Parties to provide each other "the greatest measure of assistance in connection with criminal proceedings" relating to torture including "the supply of all evidence at their disposal necessary for the proceedings."[70] A comparable commitment is contained in the International Convention for the Protection of all Persons from Enforced Disappearance.[71] Similarly, the Convention on the Rights of Persons with Disabilities,[72] "recogniz[ing] 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", commits States parties to "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".[73] The Convention on the Rights of Child also provides that States Parties shall take measures for the implementation of the economic,

[68] The notion of 'international organizations' is understood here, as under Article 2(1)(i) of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, p. 331) or under Article 2(1)(i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 (A/CONF.129/15), as organizations set up by States in order to favour intergovernmental cooperation. In principle, the members of such international organizations are States, who conclude among themselves a treaty in order to establish the organization. However, the discussion in this report would not be significantly affected if such organisations included non-State actors as members.

[69] See also José E. Alvarez, *International Organizations as Law-Makers* (Oxford, Oxford University Press, 2005), pp. 601-608 (suggesting that, due to the large representation within modern international organizations of both states and non-state actors, treaties may be negotiated within that framework which are "intended to codify, but that also progressively develop, the fundamental constitutive rules of the international system – such as the rules governing treaties, the way states ought to conduct their diplomatic relations, or those governing the global commons", such "legislative treaties" in addition having the capacity to influence the formation of customary rules of general applicability).

[70] Art. 9 (1).

[71] Article 15 provides that "States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains."

[72] United Nations, *Treaty Series*, vol. 2515, p. 3 (opened for signature on 13 December 2006 by resolution 61/106 of the General Assembly (A/RES/61/106)).

[73] Article 32(1).

social and cultural rights of the child, "where needed, within the framework of international co-operation",[74] leading the Committee on the Rights of the Child to note that "When States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation."[75]

35. While some instruments refer simply to a duty of international assistance and cooperation without referring explicitly to the conclusion of new international agreements, others do provide such an explicit reference, where the conclusion of such agreements is seen as essential for the fulfilment of the aims of the convention. Thus for instance, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,[76] provides that "States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. (...)".[77]

36. The duty of international assistance and cooperation is given a particular emphasis in the International Covenant on Economic, Social and Cultural Rights. Article 2(1) of the Covenant provides that the States parties to the Covenant undertake to "take steps, individually *and through international assistance and co-operation*, especially economic and technical", to the maximum of their available resources, "with a view to achieving progressively the full realization of the rights" recognized in the Covenant. The notion of international co-operation also is mentioned in relation to the right to an adequate standard of living in article 11(1) of the Covenant, according to which "States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent". Under Part IV of the Covenant, which relates to the measures of implementation, two provisions relate to international assistance and co-operation. Article 22 states that the Economic and Social Council may bring to the attention of other UN bodies and agencies concerned with furnishing technical assistance any information arising out of the reports submitted by States under the Covenant which "may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant". Article 23 specifies the different forms international action for the achievement of the rights recognized in the Covenant may take: such international action

> includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional

[74] Convention on the Rights of the Child (United Nations, *Treaty Series*, vol. 1577, p. 3; opened for signature on 20 November 1989 by resolution 44/49 of the General Assembly (A/RES/44/49)), art. 4. Article 45 of the Convention refers to the relations that may develop between the Committee on the Rights of the Child and the specialized agencies of the United Nations, the United Nations Children Fund (UNICEF), and other United Nations organs.

[75] Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child (CRC/GC/2003/5), para. 5.

[76] Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000.

[77] Art. 10(1). The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict**,** also adopted by General Assembly resolution A/RES/54/263 of 25 May 2000, provides for a duty of States parties to "cooperate in the implementation of the ... Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations" (art. 7(1)). It is less explicit, however, on the conclusion of new agreements to that effect.

meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.[78]

37. Imposing an obligation on a State to enter into any form of international agreement or to negotiate such an agreement may seem both odd and impractical, since it can hardly be reconciled with the principle of State sovereignty -- one of the implications of which is that States cannot be forced to enter into agreements against their will. In fact however, it is not unusual for international law to impose a duty to *seek, in good faith, to conclude an international agreement*.[79] In general international law, an obligation to negotiate emerges in particular in situations where States are recognized to have conflicting rights, which can only be reconciled through a process of negotiation clarifying the respective rights and duties.[80] A duty to negotiate in good faith may also be derived from situations where, in the absence of a negotiation, States would have to resort to unilateral measures. It has been noted above that, by referring in article 3(2) to the Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Declaration on the Right to Development expresses a preference for multilateralism, and cautions against the adoption of unilateral measures by States to impose compliance with the right to development.[81] In its various resolutions on unilateral coercive measures, the Human Rights Council has emphasized the threat to human rights, including the right to development, which could result from the adoption of such measures, as well as the risk that multilateralism be circumvented by the most powerful States, who are best

[78] The implication is that, for instance, in order to comply with the right to food, "States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention *and consider the development of further international legal instruments to that end*" (Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999): The right to adequate food (art. 11) (E/C.121999/5) (1999), para. 36 (emphasis added)).

[79] A classic example is Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, which was opened for signature on 1 July 1968 (*United Nations Treaty Series*, vol. 729, p. 161): "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control".

[80] International Court of Justice, *Fisheries Jurisdiction Case*, 1974 I.C.J., p. 31 (negotiations are required between Iceland and Great Britain who both have legitimate fishing rights in certain maritime areas). A most authoritative voice has dismissed as purely hortatory, rather than binding, provisions in international treaties that call on parties to negotiate further agreements. Such provisions, it has been written, "are *pacta de contrahendo*, which cannot be enforced if the parties do not reach agreement. There is no way in which an agreement can be forced upon them and there is likewise no way in which they can be compelled to negotiate. The assertion that the duty to negotiate or to conclude an agreement implies a duty to negotiate in good faith is an empty one. Unless appropriate machinery has been set up, no court or other agency can determine whether a State has or has not negotiated in good faith and what the duty to negotiate in good faith requires. In the relations of States, a complaint that negotiations have not been carried on in good faith is mere rhetoric" (R.R. Baxter, "International Law 'In Her Infinite Variety'", *The International and Comparative Law Quarterly*, vol. 29, No. 4 (1980), pp. 549-566, at p. 552). This however conflates a duty to *negotiate in good faith*, with the duty to *reach an agreement*; yet, the former may be imposed without the latter necessarily following: the Permanent Court of International Justice established this distinction long ago (Advisory Opinion No. 42, *Railway Traffic Between Lithuania and Poland*, 1931 P.C.I.J. (ser. A/B) No. 42, at p. 116 (about the duties following from a resolution of the Council of the League of Nations recommending that "the two governments [Polish and Lithuanian]... enter into direct negotiations as soon as possible" concerning the railway connections between the two countries); see also M.A. Rogoff, "The Obligation to Negotiate in International Law: Rules and Realities", *Michigan Journal of International Law*, vol. 16 (1994), pp. 141-185, at p. 148 (emphasizing the importance of distinguishing the obligation to negotiate from the obligation to conclude an agreement)). Moreover, here – as regards a duty to enter negotiations for the conclusion of international agreements in support of the right to development – we do have "appropriate machinery" which could assess whether the efforts of the State are genuine, or the negotiation conducted "in good faith": the Special Rapporteur on the right to development and, in their respective fields of competence, human rights treaty bodies, may perform such a role. Indeed, this report proposes criteria which, in so doing, they may seek inspiration from.

[81] See above, text corresponding to notes 56-58.

placed to impose their views by resorting to unilateral measures.[82] But there is a positive obligation implied in this condemnation of unilateral coercive measures: it is to cooperate in good faith in the search of solutions through multilateralism.

38. Such a duty to enter into negotiations in order to find solutions through multilateralism has been regularly affirmed in the new area of sustainable development. Principle 12 of the 1992 Rio Declaration on Environment and Development[83] expresses a strong encouragement for the search for solutions at the multilateral level:

> Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.

39. Similarly, paragraph 2.22(i) of Agenda 21, also adopted at the 1992 Earth Summit, provides:

> Governments should encourage GATT, UNCTAD and other relevant international and regional economic institutions to examine, in accordance with their respective mandates and competences, the following propositions and principles: …
>
> i) Avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. Environmental measures addressing transborder problems should, as far as possible, be based on an international consensus.

40. A similar duty to enter into bilateral or multilateral agreements can be identified for the realization of the right to development. Such a duty should be treated as an obligation of means: the State should deploy its best efforts to cooperate internationally with a view to finding such agreement. The responsibility of the State cannot be engaged merely due to its failure to arrive at an agreement. A State may however be accountable for its failure to seek, in good faith, to conclude new partnerships. Indeed, the precedents cited above in the field of sustainable development were referred to by the Appellate Body of the World Trade Organisation when, in the *Shrimp/Turtle* dispute, it took the view that the requirement of non-discrimination under article XI:1 of the 1994 General Agreement on Tariffs and Trade prohibited the adoption of unilateral measures, unless such measures have been preceded by good faith attempts to reach an agreement with the trading partners on the adoption of common standards achieving the desired objective. The Appellate Body could of course not require that such agreement be reached: unilateral measures remain available to the WTO Members, as a last resort, should multilateralism fail. In its view however, it would not be acceptable for a Member to impose on other Members compliance with certain standards, without giving at least a fair chance for a joint approach to succeed.[84]

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[82] See, for instance, resolution 34/13, Human rights and unilateral coercive measures (adopted on 24 March 2017 by a recorded vote of 32 to 14, with no abstentions); and resolution 21/27, Human rights and unilateral coercive measures (adopted on 26 September 2014 by a recorded vote of 32 to 14, with two abstentions) (establishing the mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on human rights).

[83] Adopted at the United Nations Conference on Environment and Development, Rio de Janeiro (Brazil), 3-14 June 1992 (A/CONF.151/26).

[84] *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998 (Report of the Appellate Body), paras 161 to 165, 171, 172. At issue in this case was Section 609 of Public Law 101-162, adopted by the United States in 1989. This provision required the imposition of an import ban on imports from countries where shrimp were harvested with technology that could adversely affect certain sea turtles, unless the countries concerned were certified by the President, on an annual basis, as having a regulatory programme governing the incidental taking of sea turtles in the course of harvesting comparable to that of the United States, or having an average rate of incidental taking of sea turtles comparable to that by United States vessels using turtle-excluding devices, or having a fishing environment such that there exists no threat of incidental taking of sea turtles in the course of such harvesting. Faced with this unilateral measure adopted by the United States, the Appellate Body noted: "...the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in *serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection*

41. The case illustrates that it is possible, in such a quasi-judicial context, to assess the "seriousness" of the efforts of a country to search for a negotiated solution to the issue at hand, by examining for instance the time and energy that went into searching for such a solution, the reasonableness of the offers made to the other parties, and so forth. For the understanding of global obligations corresponding to the realization of the right to development, this can be essential, since the right to development is, *inter alia*, about the duty to contribute to design solutions through bilateral or multilateral partnerships, including partnerships at regional level that can lead towards shaping an international environment enabling development efforts deployed at domestic level.

42. In order to assess whether States have sought, in good faith, to conclude an international agreement in order to contribute to the realization of the right to development, it shall be required to consider: first, whether they have put forward proposals, with a view to strengthening international cooperation, that are sufficiently concrete; and second, whether such proposals have a reasonable chance of attracting support. The first requirement is of a procedural kind. It is that States do not remain passive, but make concrete steps towards reaching an international agreement. Under the International Covenant on Economic, Social and Cultural Rights, States are expected to take steps towards the progressive realization of the rights recognized in the Covenant that are "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".[85] A similar requirement could be imposed, at the level of global obligations, as regards the duty to put forward proposals that could move towards an international environment supporting efforts at domestic level at achieving the right to development. Thus, though this obligation is procedural in nature, it is not simply a *pro forma* obligation to be open to discussions: rather, to borrow from the language of the *Graeco-German* Arbitration, the engagement should be "meaningful".[86]

43. The second requirement concerns the substance of the negotiation position taken. It is that the proposals States put forward in negotiation fora be reasonable. Though there exists no clear consensus on precise benchmarks in this regard, it may be suggested that this requires assessing the potential impacts of the proposals put forward in order to examine:

(a) whether such proposals shall enable the States to whom such proposals are addressed to respect, protect and fulfil human rights, consistent with their international obligations;

(b) whether they shall benefit, as a matter of priority, the most marginalized groups within the States concerned; and

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and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members" (emphasis added) (para. 166). The resort to unilateral trade measures is condemned in the following terms: "... an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures. The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, *attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles* before imposing the import ban" (emphasis added) (para. 171).

[85] Committee on Economic, Social and Cultural Rights, General Comment No 3 (1990): The Nature of States Parties' Obligations (art. 2(1)) (E/1991/23), para 2.

[86] In this case, in which Greece argued that Germany was under an obligation under Article 19 of the 1953 Agreement on German External Debts (333 United Nations, *Treaty Series*, p. 3) to enter into negotiations to settle certain outstanding claims, the Arbitral Tribunal explained that "To be meaningful, negotiations have to be entered into with a view to arriving at an agreement. Though ... an agreement to negotiate does not necessarily imply an obligation to reach an agreement, it does imply that serious efforts towards that end will be made" (Graeco-German Arbitration (1972), 91 R.I.A.A., p. 57). The duty, the Tribunal stated, is to "negotiate, bargain, and in good faith attempt to reach a result acceptable to both parties" (id., p. 56).

(c) whether, in the distribution of the burdens and benefits, such proposals take into account the principle of common but differentiated responsibilities and respective capabilities.

44. Thus, the reasonableness of a proposal for a new international agreement may be assessed on the basis of three criteria. The first criterion is that the agreement should not make it more difficult, or impossible, for the States concerned to comply with their duties to respect, protect and fulfil human rights. This follows from the principle of *pacta sunt servanda*,[87] as well as from the axiomatic rule according to which States may not escape pre-existing treaty-based commitments by the conclusion, with other parties, of another treaty covering the same subject, whose provisions would in some way conflict with the earlier treaty: the posterior treaty could not be invoked against the parties to the earlier treaty, for whom it is a *res inter alios acta*.[88] Indeed, even if it were suggested that all States parties to a human rights treaty be involved in negotiations on a new agreement reducing these pre-existing obligations, the status of human rights norms as norms that cannot be derogated from by mutual agreement because of their peremptory character would in most cases prohibit such an agreement from entering into force;[89] if it were to be signed and ratified by the States concerned, it would have to be considered as null and void.[90] Such an agreement, in any event, would have to be treated as incompatible with Article 103 of the UN Charter, and thus inapplicable.[91]

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87 Vienna Convention on the Law of Treaties of 23 May 1969 (cited above note 27), art. 26.

88 Vienna Convention on the Law of Treaties, cited above note 27, art. 30 (‘Application of successive treaties relating to the same subject-matter’) (see, specifically, Article 30 § 4, b)). As explained by Special Rapporteur Fitzmaurice: "Since anything that some of the parties to a treaty do *inter se* under another treaty is clearly *res inter alios acta*, it cannot in law result in any formal diminution of the obligation of these parties under the earlier treaty, or affect juridically the rights or position of the other parties, which remain legally intact and subsisting" (G. Fitzmaurice, ‘Third Report’, *ILC Yearbook* (1958), vol. II, p. 43). For further discussions of the rule, see in particular Ch. Rousseau, ‘De la compatibilité des normes juridiques contradictoires dans l’ordre international’, *Revue générale de droit international public*, vol. 39 (1932), pp. 133-192; E.W. Vierdag, ‘The Time of the Conclusion of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions’, *British Yearbook of International Law*, vol. 59 (1988) pp. 92-111; W. Czaplinski and G.M. Danilenko, ‘Conflict of Norms in International Law’, *Netherlands International Law Review*, vol. 21 (1990) pp. 12-28; J. B. Mus, ‘Conflicts Between Treaties in International Law’, *Netherlands International Law Review*, vol. 29 (1998), pp. 208-232.

89 Vienna Convention on the Law of Treaties, cited above note 27, art. 53 (defining a peremptory norm of international law as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character)". Disagreements persist as to whether the full list of human rights recognized in the International Bill of Rights have the status of *jus cogens*, however (see, for instance, Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford Univ. Press, 2012)). The debate is not new: fifty years ago, Judge Tanaka was already suggesting in his dissenting opinion in the *South West Africa* case that human rights law belonged to the *jus cogens*, which is imperative, as opposed to the *jus dispositivum*, that States could freely dispose of: 'If we can introduce in the international field a category of law, namely jus cogens, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to jus dispositivum, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the jus cogens’ (Judge Tanaka, dissenting opinion in the *South West Africa* Case (*Ethiopia v. South Africa; Liberia v. South Africa*), Second Phase, Judgment [1966] ICJ Rep 298). The issue of peremptory norms of general international law (*jus cogens*) is currently under examination within the International Law Commission, with a view to contributing to the codification and progressive development of the topic.

90 Vienna Convention on the Law of Treaties, cited above note 27, art. 64.

91 Whereas a treaty found to be in violation of a *jus cogens* norm is void and must be considered to have never existed, a treaty incompatible with obligations flowing from membership in the United Nations does not disappear; however, as a result of article 103 of the UN Charter, it shall not be applied to the extent of such an incompatibility: see P.-M. Dupuy, ‘L’unité de l’ordre juridique international. Cours général de droit international public’, *Recueil des cours*, t. 297 (2002), p. 305 ; and see also the Report of the Study Group of the International Law Commission, *Fragmentation of international law:*

45. The second criterion on the basis of which the reasonableness of a proposal may be assessed is by asking whether, if accepted, the proposal would contribute to the reduction of inequalities.

46. The prohibition of discrimination is a core obligation of States both under the UN Charter and under international human rights law. Discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. Any proposal for an international agreement that would entail discrimination thus defined would not pass the reasonableness test. But human rights law goes further. It also prohibits any action or omission that disproportionately affects members of a particular group, in the absence of a reasonable and objective justification, thus constituting *de facto* discrimination.[92] Thus, proposed international agreements should be assessed in order to ensure that they shall not have such impacts. Such agreements may, however, provide for differential treatment benefiting certain categories of the population facing systemic disadvantage. Indeed, in order to eliminate *de facto* discrimination, States may be under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportionate means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved.

47. The third criterion is that the agreement put forward takes into account the principle of common but differentiated responsibilities and respective capabilities. This principle originally emerged in international economic law to justify positive discrimination in favour of developing countries: as an illustration, the Second UNCTAD conference expressed itself in favour of "the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries".[93] It then penetrated international environmental law, inspiring the 1987 Montréal Protocol on Substances that Deplete the Ozone Layer to the 1985 Vienna Convention for the Protection of the Ozone Layer.[94] Principle 7 of the Rio Declaration describes it as follows:

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difficulties arising from the diversification and expansion of international law, cited above note 17, para. 41: '(*a*) A rule conflicting with a norm of *jus cogens* becomes thereby *ipso facto* void; (*b*) A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of such conflict and to the extent of such conflict'. Comp. Jean Combacau, 'Logique de la validité contre logique d'opposabilité dans la Convention de Vienne sur le droit des traités', in *Mélanges M. Virally* (Paris, Pedone, 1991), pp. 195-203.

92 Human Rights Committee, General Comment No. 18: Non-discrimination (thirty-seventh session, 1989); Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) (E/C.12/GC/20).

93 Resolution 21 (ii) adopted at the Second United Nations Conference on Trade and Development (1968). This commitment resulted, in particular, in the adoption of decisions granting waivers from the most-favoured nation principle under the General Agreement on Tariffs and Trade, allowing for General Systems of Preferences to be set up in order to accelerate the integration of developing countries in international trade: see Decision relating to the establishment of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries, Decision L/3545 (25 June 1971) GATT B.I.S.D. (18th Supp) at 24 (1972); Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision L/4903 (28 November 1979) GATT B.I.S.D. (26th Supp) at 203 (1980) (providing that "contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties").

94 United Nations, *Treaty Series*, vol. 1522, p. 3, in force since 1 Jan. 1989. In the Preamble of the Montréal Protocol, the Parties acknowledge that "special provision is required to meet the needs of developing countries, including the provision of additional financial resources and access to relevant technologies, bearing in mind that the magnitude of funds necessary is predictable, and the funds can be expected to make a substantial difference in the world's ability to address the scientifically

> States should co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

48. As illustrated by the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, the first examples of the implementation of the principle of common but differentiated responsibilities agreed on in Rio,[95] this principle requires that the allocation of responsibilities between States should take into account both each State's contribution to the issue to be addressed through international cooperation,[96] and each State's ability to contribute to addressing that issue (capabilities, as measures by financial resources and technologies).[97] In its New Delhi Declaration of Principles of International Law relating to Sustainable Development, adopted at the 70th Conference of the ILA held in New Delhi on 2-6 April 2002, the ILA described the principle thus:

> 3.1. States and other relevant actors have common but differentiated responsibilities. All States are under a duty to co-operate in the achievement of global sustainable development and the protection of the environment. International organizations, corporations (including in particular transnational corporations), non-governmental organizations and civil society should co-operate in and contribute to this global partnership. Corporations have also responsibilities pursuant to the polluter-pays principle.
>
> 3.2. Differentiation of responsibilities, whilst principally based on the contribution that a State has made to the emergence of environmental problems, must also take into account the economic and developmental situation of the State, in accordance with paragraph 3.3
>
> 3.3. The special needs and interests of developing countries and of countries with economies in transition, with particular regard to least developed countries and those affected adversely by environmental, social and developmental considerations, should be recognized.

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established problem of ozone depletion and its harmful effects"; see also art. 5 (providing for specific treatment of developing countries).

95 United Nations Framework Convention on Climate Change (1992, in force on 21 March 1994 (U*nited Nations Treaty Series*, vol. 1771, p. 107; 31 ILM 851 (1992)), Art. 3 (States parties should act "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities"); Convention on Biological Diversity (1992, in force on 29 December 1993 (*United Nations Treaty Series*, vol. 1760, p. 79)), Art. 20(4) ("The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties"). The principle of common but differentiated responsibilities has now grown into a general principle of international environmental law: see Philippe Cullet, *Differential Treatment in International Environmental Law* (Alderschot, Ashgate, 2003); L. Rajamani, *Differential treatment in International Environmental Law* (New York: Oxford University Press, 2006); Tuula Honkonen, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements* (Kluwer Law International, 2009).

96 In international environmental law, this may be seen as a manifestation of the polluter-pays principle. See the International Law Association New Delhi Declaration on Principles of International Law relating to Sustainable Development, adopted at the seventieth conference of the International Law Association (ILA resolution 3/2002, annex as published in UN doc. A/57/329), principle 3.

97 These two dimensions, which are respectively looking backward and looking forward, shall often converge: an inequitable trading system, for instance, shall often be the result of past unfair trading practices, and the partner having benefited most shall have greater capacities to remedy the resulting imbalances.

> 3.4. Developed countries bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption and in contributing to capacity-building in developing countries, inter alia by providing financial assistance and access to environmentally sound technology. In particular, developed countries should play a leading role and assume primary responsibility in matters of relevance to sustainable development.

49. At the World Summit on Sustainable Development held in Johannesburg in August-September 2002, at which the implementation of the Agenda 21 and the Rio Declaration on Environment and Development was discussed, Heads of State and governments pledged to take "concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles, including, inter alia, the principle of common but differentiated responsibilities as set out in principle 7 of the Rio Declaration on Environment and Development".[98] The principle of common but differentiated responsibilities also appears in the 2030 Development Agenda, particularly in targets 10.a and 12.1 of the Sustainable Development Goals, and in the Addis Ababa Action Agenda of the Third International Conference on Finance for Development.[99]

50. One obstacle to the implementation of the principle of common but differentiated responsibilities and respective capabilities is that there exists no unanimous agreement on how countries should be classified in order to operationalize the principle. The category of "developing countries" – leaving aside even its implicit but highly contestable suggestion that there would exists a single pathway to development, one "script" that all countries should follow – is hardly helpful to identify the countries' differentiated responsibilities. Today, the group of 159 "developing countries", categorized as such by the United Nations, is widely heterogeneous: they include countries whose situations, trajectories and prospects differ widely, leading the World Bank to reject the use of this category since the 2016 edition of its *World Development Report*.

51. Other classifications are barely more helpful, however. The World Bank classifies countries as "low-income", "lower middle income", "upper middle income" and "high-income", on the basis of their GNI per capita, using a three year average exchange rate to avoid the classification being influenced by short-term changes in currency values.[100] However, though for most countries there is a strong correlation between GNI per capita and social indicators,[101] GNI per capita remains a crude proxy to assess the level of development of a country. It does not, for instance, take into account adequately the activity in the informal sector or the non-monetary segments of the economy. Nor does it reflect fully the nature of the challenges certain countries may be facing: small island developing States and landlocked developing countries, for instance, face specific constraints due to their geography, which may have to be taken into account, although such constraints may not be reflected in their position on a GNI per capita ranking; similarly, poor countries with a high level of debt face challenges of their own, which were recognized when a separate category of "heavily indebted poor countries" eligible for special assistance from the International Monetary Fund and the World Bank was defined when the HIPC initiative was launched in 1996. Finally, a separate classification is based on the list of Least-Developed Countries (LDCs). This list is decided upon by the United Nations Economic and Social Council and, ultimately, by the General Assembly, on the basis of recommendations made by the Committee for

[98] See paragraphs 2 and 81 of the 2002 Plan of Implementation adopted at the Johannesburg Summit.

[99] See in particular paragraph 59.

[100] The classification is published on http://data.worldbank.org and is revised once a year on July 1st, at the start of the World Bank fiscal year. For instance, for the current 2018 fiscal year, low-income economies are those with a GNI per capita of $1,005 or less in 2016; lower middle-income economies are those with a GNI per capita between $1,006 and $3,955; upper middle-income economies are those with a GNI per capita between $3,956 and $12,235; high-income economies are those with a GNI per capita of $12,236 or more. See https://datahelpdesk.worldbank.org/knowledgebase/articles/906519

[101] See N. Fantom and U. Serajuddin, *The World Bank's classification of countries by income* (Policy Research Working Paper WPS7528) (World Bank: Washington, D.C., 2016) (available on: http://documents.worldbank.org/curated/en/408581467988942234/pdf/WPS7528.pdf).

Development Policy, using a set of criteria including per capita GNI, a human assets index and an economic vulnerability index.[102]

52. These various approaches were each designed for specific purposes and in specific institutional settings, and they are more or less well suited to those ends. But they appear insufficient to capture the full spectrum of conditions that countries face. Classifying countries in "groups", separated by more or less arbitrarily defined boundaries, may not be the most justifiable approach. Instead, taking into account the principle of common but differentiated responsibilities and respective capabilities for the implementation of the right to development may require to identify for each country (i) the contribution that it has made in the past to the emergence of environmental problems, (ii) the capacity of each country to contribute to the right to development, based on the resources (natural, financial, technological and human) that it could mobilize to that effect, and (iii) the constraints (including geographical constraints, the debt burden and the lack of diversification of the economy) the country faces. The classification of countries on the basis of these criteria could be regularly updated, ideally on an annual basis, in order to arrive at a shared understanding of which efforts can be expected from each State, where the burden of realizing the right to development should be shared between countries. Proposals to improve the international social and economic order should be assessed on the basis of whether they take account the respective responsibilities of countries, on the basis of this set of criteria.

2. A duty of the State to take the right to development into consideration as a member of international organisations

53. The second category of obligation raises the question of whether the State has exercised its rights as a member of the organisation (particularly, its voting rights), taking into account its human rights obligations and the right to development. In addressing the impact of structural adjustment programmes on the enjoyment of economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights took the view in 1990 that "States parties to the Covenant, as well as the relevant United Nations agencies, should [...] *make a particular effort to ensure* that [the protection of the most basic economic, social and cultural rights] is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment".[103] The implication is that States parties to the Covenant have obligations, *as member States* of the international financial institutions, insofar as such institutions impose on indebted States certain austerity programmes as a condition for access to the international financial markets. In the General Comment on the right to the highest attainable standard of health, which it adopted in 2000,[104] the Committee on Economic, Social and Cultural Rights uses an even stronger formulation, moving from the affirmation of an obligation of means to an obligation of result. It notes that "States parties have an *obligation to ensure* that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions".[105] A very similar formulation appears in the General Comment on the right to water.[106]

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[102] See *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures* (United Nations publication, Sales No. E.07.II.A.9). Available from: http://www.un.org/esa/analysis/devplan/cdppublications/2008cdphandbook.pdf

[103] Committee on Economic, Social and Cultural Rights, General Comment No. 2 (1990): International technical assistance measures (art. 22) (E/1990/23), para. 9.

[104] Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000): The right to the highest attainable standard of health (art. 12) (E/C.12/2000/4) (2000), para. 39 ("In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health").

[105] Id.

[106] See Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)

54. Nor is the duty of States to take their human rights obligations into account as members of international organisations limited to international financial institutions; it is relevant also, for instance, to the conduct of trade negotiations. The Committee on Economic, Social and Cultural Rights takes the view, for instance, that "the right to water [should be] given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water".[107]

55. This is not a new requirement. In its 1997 General Comment on the relationship between economic sanctions and respect for economic, social and cultural rights,[108] the Committee on Economic, Social and Cultural Rights already took the view that States imposing sanctions should not, in doing so, jeopardize the economic, social and cultural rights of the population in the targeted State. In other terms, a State may engage its responsibility under the International Covenant on Economic, Social and Cultural Rights by voting in favour of economic sanctions, for instance as a member of the UN Security Council. The Committee stated the following:

56. While this obligation of every State is derived from the commitment in the UN Charter to promote respect for all human rights, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China and the United States) have yet to ratify it.[109] Most of the non-permanent members at any given time are parties. Each of these States has undertaken, in conformity with article 2, paragraph 1, of the Covenant to "take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...". When the affected State is also a State party, it is doubly incumbent upon other States to respect and take account of the relevant obligations. To the extent that sanctions are imposed on States which are not parties to the Covenant, the same principles would in any event apply, given the status of the economic, social and cultural rights of vulnerable groups as part of general international law, as evidenced, for example,

(E/C.12/2002/11) (26 November 2002), para. 36: "States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures".

107 Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), cited above note 106, paras. 31 and 35-36. See also, e.g., Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, Seattle, 30 November- 3 December 1999 (E/C.12/1999/9); Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), *The right to adequate food (art. 11)* (E/C.12/1999/5), at paras. 19 and 36 ("States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention"); Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), cited above note 104, para. 39 ("In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health").

108 Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights (E/1998/22).

109 China ratified the International Covenant on Economic, Social and Cultural Rights in 2001, after the date at which this General Comment was adopted.

by the near-universal ratification of the Convention on the Rights of the Child and the status of the Universal Declaration of Human Rights.[110]

57. The notion of an obligation that is "doubly incumbent" on a State refers to the fact that, while a State party to the International Covenant on Economic, Social and Cultural Rights would violate its obligations under this instrument if it were to contribute to the adoption of sanctions that violate the economic, social and cultural rights of populations in the country targeted by the sanctions, it is prohibited, in addition, to coerce another State into violating its own obligations under international human rights law. It matters not, according to the Committee on Economic, Social and Cultural Rights, that a State imposes such sanctions unilaterally, or that it imposes such sanctions by exercising its voting rights within an organisation (such as the United Nations, acting through the Security Council) so as produce the same effect. As summarized most recently by the Committee in its Statement of 24 June 2016 on public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights:

> States parties to the Covenant would be acting in violation of their obligations if they were to delegate powers to the IMF or to other agencies and to allow such powers to be exercised without ensuring that they do not infringe on human rights. Similarly, they would be acting in breach of their obligations if they were to exercise their voting rights within such agencies without taking such rights into account. The same duties apply to States that are not parties to the Covenant, under human rights law as part of general international law. Their responsibility would not be absolved even where a State party, in its capacity of a member State of an international organisation, would be acting fully in accordance with the rules of the organisation.[111]

58. This is noteworthy, since under general international law, a member State of an international organisation can only exceptionally be considered to engage its responsibility simply as a result of exercising its rights within the organisation. In article 58 (Aid or assistance by a State in the commission of an internationally wrongful act by an international organization) of its Draft Articles on the Responsibility of International Organizations, the International Law Commission does provide that a State may be responsible for aiding or assisting an international organisation in the commission of an internationally wrongful act by the latter "if (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State".[112] Such a responsibility however would not in principle arise where a State does no more than exercise its rights in accordance with the constitutive rules of the organisation:

> An act by a State member of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of that State under the terms of this article.[113]

59. The commentary to article 58 states in part that where the State is a member of the international organisation concerned, "the possibility that aid or assistance could result from conduct taken by the State within the framework of the organization cannot be totally excluded. However, as specified in paragraph 2 [quoted above], an act by a member State which is done in accordance with the rules of the organization does not as such engage the international responsibility of that State for aid or assistance. These criteria could entail some difficulties in ascertaining whether aid or assistance has taken place in borderline cases. The factual context such as the size of membership and the nature of the involvement will probably be decisive."[114]

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[110] Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997) (E/1998/22), para. 51.

[111] E/C.12/2016/1, para. 9.

[112] Article 58, para. 1.

[113] Id., para. 2.

[114] Report of the International Law Commission on the work of its fifty-eighth session, 1 May-9 June and 3 July-11 August 2006, I.L.C. Report, A/61/10 (2006), chap. VI, paras. 77-91.

60. General international law therefore appears to impose stricter conditions on the engagement of the responsibility of States for the acts adopted in accordance with the rules of the organisation of which it is a member, than does international human rights law;[115] even under general international law, however, such a responsibility cannot be excluded. Thus, a State could engage its responsibility if it were to exercise its powers as a member of an international organisation, so as to lead the organisation to take measures that do not comply with the right to development.

3. A duty of States to faithfully implement decisions and recommendations emanating from international organisations, where this supports the right to development

61. The third category of global obligations consists in implementing, in good faith, decisions and recommendations emanating from international organisations of which the State concerned is a member, where such decisions and recommendations contribute to the realization of the right to development. This goes beyond the duty to comply, in good faith, with the treaties which the State is a party to.[116] It includes the expectation that States involved in regional or global partnerships which contribute to the right to development shall treat as binding the decisions and recommendations adopted in such settings, and accept to be held accountable for implementation. The requirements of the right to development, in other terms, are gradually clarified by such decisions and recommendations, insofar as they are supportive of the right. The criteria on the basis of which such decisions and recommendations should be identified, however, remain unclear. One of the objectives of this report is to help make progress towards such identification.

C. Summary

62. The conceptual framework presented here may be summarized in the form of a table, linking each category of obligations to a specific legal regime:

Extraterritorial obligations	
Respect	1. Duty of each State not to take measures that have negative impacts on the right to development outside the State's national territory
Protect	2. Duty of each State to take measures that ensure that actors over which it can exercise control / authority shall not infringe on the right to development outside the State's national territory
Fulfil	3. Duty of each State, commensurate with its abilities, to contribute to the realization of the right to development in other States by supporting their efforts
Global obligations	
Establish new forms of international cooperation	4. Duty to seek, in good faith, to conclude new partnerships with a view to shaping an international environment enabling development efforts deployed at domestic level, by putting forward proposals for international agreements that (i) enable all States to respect, protect and fulfil human rights; (ii) shall benefit, as a matter of priority, the most marginalized groups within the States concerned; and (iii) take into account the principle of common but differentiated responsibilities and respective capabilities
Operate within international negotiation fora	5. Duty of each State to join existing partnerships that contribute to the realization of the right to development and, as member of such partnerships, to exercise its rights within them with a view to supporting the right to development

[115] The Guiding Principles on foreign debt and human rights (cited above, note 13) define the duty of international assistance and cooperation as including a requirement that States, "*individually or through membership of international institutions*, do not adopt or engage in policies that undermine the enjoyment of human rights or further engender disparities between and within States" (para. 22 (emphasis added)).

[116] Vienna Convention on the Law of Treaties, cited above note 87, art. 26.

Extraterritorial obligations	
Implement existing partnerships	6. Duty of each State to implement decisions and recommendations adopted within international organisations that contribute to the realization of the right to development

V. The international dimensions of the right to development: attributes and indicators

63. The attributes of the international dimensions of the right to development are defined here in seven areas, which are considered as essential to the implementation of the right: these are the alleviation of the burden of the foreign debt; the tackling of illicit financial flows; the management of international development cooperation; the direction of trade towards sustainable development; the channelling of foreign direct investment towards development needs; ensuring intellectual property rights shall not result in obstacles to technology transfers and to the right of everyone to enjoy the benefits of scientific progress; and the universalization of social protection floors. For each of these areas, this report recalls the current understanding of the requirements of international human rights law; it seeks to relate such understanding to the various categories of extraterritorial and global obligations defined in the conceptual framework described above; and it lists the corresponding indicators.

64. A set of indicators may be derived from the attributes of international dimensions of the right to development. These indicators are developed in order to allow the assessment of individual States' contribution to the Right to Development, in particular in the context of the Universal Periodic Review (UPR), but also through other mechanisms whose mandates include a reference to the right to development. They differ, therefore, from the indicators associated for instance with the Sustainable Development Goals, although some overlap exists. The indicators below are based on a human rights framework, which development indicators are not. In addition, they address State obligations, rather than the progress made by the international community as a whole. Indeed, although most SDGs-related indicators address results achieved by *individual States* (for instance, in lowering the proportion of the population below the international and national poverty lines (indicators 1.1.1 and 1.2.1)), some are formulated as if it were the progress of the *international community* rather than of individual States that should be assessed (for instance, indicator 5.c.1 refers to the "proportion of countries with systems to track and make public allocations for gender equality and women's empowerment"). In contrast, the indicators presented here are addressed to States considered individually: they are conceived of as a tool to ensure adequate monitoring and accountability of the duties of States, with regard to the international dimensions of the right to development.

Box 1. The indicators derived from the attributes of the right to development

The indicators fall in three categories. Some of the indicators refer to the commitments made by the State, or to the legal, institutional and policy frameworks that the State establishes (*structural indicators*). Others refer to the efforts made by the State to ensure that the commitments are effectively implemented, i.e., translated into the adoption of concrete measures and policies (*process indicators*). Finally, a last set of indicators relate to the results achieved (*outcome indicators*). This typology of indicators is distinct from, and plays a separate role than, the typology of State obligations that define the international dimensions of the right to development, whether in its extraterritorial dimensions (distinguishing the obligation to respect, to protect and to fulfil) or in its global dimensions (distinguishing the establishment of new partnerships, the operation within existing partnerships, or the implementation of partnerships). The tables below refer separately to these different dimensions.

As regards outcome indicators, however, a distinction should be made between extraterritorial obligations of States and global obligations. Extraterritorial obligations impose on States duties to abstain from taking measures that might obstruct the efforts towards realizing the right to development in other countries, and to adopt policies supportive of such efforts. Global obligations are duties to create an international environment

conducive to the full realization of the right to development, through inter-State cooperation. The gestures of goodwill of States and their concrete efforts can be assessed for both categories of obligations (respectively, though structural and process indicators). As regards global obligations, however, the results achieved shall in many cases depend on whether other States have been constructively engaging in the collective effort to reshape the international environment: such results may not rely on the efforts of one State alone. Therefore, outcome indicators should be treated with caution insofar as they are used in order to assess the contributions of any single State to the realization of the right to development, insofar as global obligations are concerned. The promise of Article 28 of the Universal Declaration of Human Rights is, in effect, the responsibility of the community of States as a whole, rather than that of any individual State in particular

Most of the indicators of the right to development, based on the attributes identified in this report, belong to the category of structural indicators: they relate to legislative measures States should take, to provisions they should include in future international agreements they are parties to, or to policy or institutional frameworks they should put in place. This should come neither as a surprise nor as a disappointment. The emphasis on structural indicators illustrates that compliance with the international dimensions of the right to development is not, or mostly not, a matter of having sufficient resources (financial, human, technological) at the State's disposal; it is a matter, rather, of ensuring that any gaps in the legislative framework that result in obstacles to the right to development are closed. In fact, it is the widespread presumption that the right to development can only be subject to progressive realization, which in turn is dependent on economic growth allowing the State to mobilize resources that explains to a large extent the devaluation of this right. This presumption moreover has perverse effects on public action. Governments tend to reason that growth should come first, and that a concern for the right to development should follow, if not as an afterthought, then at least as a reward for the sacrifices imposed on the population in the name of growth, after such sacrifices have been imposed and have borne fruit. This view is mistaken. The right to development is an integral ingredient of growth – supporting it, making it more sustainable, and increasing its impacts on poverty reduction and on the reduction of inequalities. The fact that structural indicators play such an important role in assessing the international dimensions of the right to development serves as a reminder that political will is key to shifting to this form of economic growth, and that whether there is such a political will can be effectively monitored using the traditional techniques of human rights monitoring.

The indicators have been chosen for their relevance, for their ability to be collected without having to rely exclusively on information held by the State concerned, for their applicability across a wide range of countries, for their alignment with the normative components of human rights, for the transparency with which they may be relied upon, and for their simplicity and specificity.[117]

Although the indicators are for the most part global (applying to all countries), they should be applied in order to take into account the specific duties of each State: the responsibilities are common, but they are also differentiated and depend on the respective capabilities of each country. In this regard, the report recommends to move beyond the excessively crude distinction between different groups of countries (particularly between "developed" and "developing" countries, which has become unworkable), and to consider each country in its specificity, based on (i) the contribution that it has made in the past to the emergence of environmental problems (consistent with the polluter-pay principle), (ii) the capacity of each country to contribute to the right to development, and (iii) the constraints the country faces. Ideally, this would lead to situate different States on a scale, based on a classification which should be regularly updated (ideally on an annual basis), allowing to assess more precisely which efforts can be demanded from each country.

But this is not an ideal world, and until such a ranking of countries is prepared based on consensually agreed criteria, we shall have to content ourselves with the usual classifications between "low-income", "lower middle income", "upper middle income" and "high-income"

[117] These are the "RIGHTS" criteria generally recommended for the choice of indicators in human rights monitoring. See OHCHR, *Human Rights Indicators: A Guide to Measurment and Implementation* (Geneva, 2012), p. 50.

countries. This classification is relevant for a limited number of the indicators listed in the table below, identified here by an asterisk (*). Most indicators however, apply to all countries whatever the category to which they belong.

A final remark concerns the specific kind of "global obligation" that consists in "establishing new partnerships" – the first of the three global obligations in the typology proposed here. Examples listed below are a duty to initiate negotiations towards a multilateral convention to combat abusive tax practices, a duty to encourage the adoption of a multilateral framework to guide the use of blended finance to support the achievement of SDGs, or a duty to seek to improve judicial cooperation / mutual legal assistance, in support of the prosecution or litigation of human rights abuses that have a transnational dimension. The report attempts to demonstrate that such a duty to seek to strengthen international cooperation can be treated as a legal obligation, and that it can be effectively monitored. To that effect, it defines such a duty as a duty to put forward proposals, with a view to strengthening international cooperation, that are sufficiently concrete, and that have a reasonable chance of attracting support. Whether a proposal is "reasonable" in that sense is to be assessed based on whether the proposal is designed (a) to enable the States concerned to respect, protect and fulfil human rights, consistent with their international obligations; (b) to benefit, as a matter of priority, the most marginalized groups within the States concerned; and whether (c) the proposal takes into account, in the distribution of the burdens and benefits, the principle of common but differentiated responsibilities, by considering for each country (i) the contribution that it has made in the past to the emergence of environmental problems, (ii) the capacity of each country to contribute to the right to development, based on the resources (natural, financial, technological and human) that it could mobilize to that effect, and (iii) the constraints (including geographical constraints, the debt burden and the lack of diversification of the economy) the country faces.

However, assessing whether a State complies with such duties to make constructive ("reasonable") proposals for the improvement of the international economic and social order remains contentious politically and remains difficult to ground in international law, at least in the current stage of its development. Whether an "indicator" can be designed to operationalize such an obligation is therefore also very doubtful. Although the tables below do include indicators related to this attribute of the right to development, the author is fully aware of the practical difficulties that would be involved in using such indicators in practice.

A. Alleviating the burden of foreign debt

1. Attributes related to the alleviation of the foreign debt

65. In reviewing the human rights records of States parties to the various United Nations human rights treaties, expert human rights treaty bodies have regularly been confronted with the argument that the burden of the foreign debt or the macroeconomic adjustment programmes imposed by international financial institutions as a condition for the continued receipt of loans constituted a major obstacle to the ability of States to comply with their human rights obligations, particularly as regards the realization of economic, social and cultural rights.[118] Conversely, some countries reported an improvement after they managed

[118] See, for example, the reports submitted to the Committee on the Rights of the Child, in chronological order, by the Central African Republic (CRC/C/11/Add.18 (1998)), by Honduras (CRC/C/65/Add.2 (1998), paras. 35-36 and 124 ("the economic contraction resulting from reforms of the economic system and the payment of a crushing external debt, considerably reduces the possibilities for priority attention to human development")), by Suriname (CRC/C/28/Add.11 (1998)), by Mozambique (CRC/C/41/Add.11 (2001), para. 8 ("a heavy foreign debt service burden, which has delayed much-needed investment in the social area to provide the majority of Mozambicans"), by Madagascar (CRC/C/70/Add.18 (2003), para. 67), by Zambia (CRC/C/11/Add.25 (2002), para. 16 ("The burden of servicing a huge external debt has taken a heavy toll on the national budget, and severely shrunk resources available for development")), by Sri Lanka (CRC/C/70/Add.17 (2002), paras. 128 and 144), by Nepal (CRC/C/65/Add.30 (2004), paras. 36 and 37 ("Debt servicing already claims about 14 per cent of the total budget and its impact adversely affects public investments and expenditure in the social sector, and, in particular, the provision of basic social services")), by Ecuador

to reimburse their debt[119] or benefited from debt relief measures, for instance under the Heavily Indebted Poor Countries initiative, allowing them to increase the budgets dedicated to social sectors.[120]

66. This has led the Committee on Economic, Social and Cultural Rights to express the view that, while "adjustment programmes [imposed on indebted countries as a condition for receiving further loans] will often be unavoidable and that these will frequently involve a major element of austerity", where such programmes are adopted,

> ... endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as "adjustment with a human face" or as promoting "the human dimension of development" requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, *inter alia*, international cooperation. In many situations, this might point to the need for major debt relief initiatives.[121]

67. The Committee on Economic, Social and Cultural Rights, as well as other human rights treaty bodies, have regularly noted that the burden of the reimbursement of the foreign debt, as well as the implementation of structural adjustment programmes (or poverty reduction strategy papers premised on similar macro-economic considerations), might seriously impede the ability of the States concerned to realize economic, social and cultural rights.[122] In a typical formulation, the Committee on Economic, Social and Cultural Rights

(CRC/C/65/Add.28 (2004), para. 53), by Kenya (CRC/C/KEN/2 (2006), para. 30 ("large allocations for debt servicing, salaries and other recurrent costs in the Government budget have crowded out spending on social services")); the reports submitted to the Committee on Economic, Social and Cultural Rights by Soudan ((E/1990/5/Add.41)(1998), para. 64), by Morocco ((E/1990/6/Add.20) (1999), para. 209), by Algeria ((E/1990/6/Add.26) (2000), paras. 59-61), by Benin ((E/1990/5/Add.48), para. 35), by Ecuador (E/1990/6/Add.36) (2002), para. 309 ("The constraints imposed by the adjustment policies implemented by Governments in order to achieve a balanced budget have had an impact on the lowest income groups. In recent years, they have accelerated demographic changes in Ecuador in the shape of migration from the countryside to the cities, resulting in extremely fast growth of marginal urban areas forming belts of poverty,...")); or by Kenya ((E/C.12/KEN/1)(2007), para. 90 ("Although the structural adjustment programmes were presented as the panacea to underdevelopment and poverty in the country, the cut in public expenditure in key social sectors have had a devastating effect on the enjoyment of socio-economic rights in general and the right to adequate standard of living in particular")).

119 See, for instance, the report submitted by Egypt to the Committee on Economic, Social and Cultural Rights (E/1990/5/Add.38) (1998), para. 8.

120 See, for instance, the combined third to fifth reports of States parties due in 2012 submitted by the Democratic Republic of Congo in 2016 (CRC/C/COD/3-5) (24 June 2016), para. 25 ("In 2010, external debt relief for the Democratic Republic of the Congo was approved to the level of US$ 13 billion, that is to say approximately 90 per cent; this has made it possible to redirect the resources earmarked for debt payment to social welfare measures and stabilization of the macroeconomic framework").

121 Committee on Economic, Social and Cultural Rights, General Comment No. 2: International technical assistance measures (art. 22 of the Covenant) (E/1990/23 (2 Feb. 1990)), para. 9.

122 See, for instance, the Concluding Observations adopted by the Committee on the Rights of the Child on Tanzania in 2001 ((CRC/C/15/Add.156) (2001), para. 9 (noting "the impact of the structural adjustment programme, high external debt payments, and increasing levels of unemployment and poverty within the State party")), on Niger in 2002 ((CRC/C/15/Add.179) (2002), para. 8 (recommending that Niger "ensure the effective implementation of the Poverty Reduction Strategy Paper, paying special attention to the possible negative short-term impact of structural adjustment on the social rights of children")), or on Burkina Faso in 2002 ((CRC/C/15/Add.193) (2002), para. 16 (recommending that Burkina Faso "Undertake a study on the impact of structural adjustment programmes on the right of children to social services")); or the Concluding Observations adopted by the Committee on Economic, Social and Cultural Rights on Zambia in 2005 ((E/C.12/1/Add.106)

noted that the efforts of Honduras to comply with its obligations under the International Covenant on Economic, Social and Cultural Rights "are impeded by the fact that it is classified as a highly indebted poor country and that up to 40 per cent of its annual national budget is allocated to foreign debt servicing", and it acknowledged that "the structural adjustment policies in the State party have negatively affected the enjoyment of economic, social and cultural rights by the population, especially the vulnerable and marginalized groups of society".[123]

68. On 24 June 2016, the Committee on Economic, Social and Cultural Rights adopted a Statement titled "Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights".[124] The statement examines in particular the duties under the Covenant of States parties as lenders. The Committee remarked that "States parties to the Covenant would be acting in violation of their obligations if they were to delegate powers to [international organisations providing loans] and to allow such powers to be exercised without ensuring that they do not infringe on human rights. Similarly, they would be acting in breach of their obligations if they were to exercise their voting rights within such agencies without taking such rights into account".[125] When States provide bilateral loans, they should keep in mind the prohibition imposed under international law of "coercing other States into violating their own obligations under either the Covenant or under other rules of international law."[126] Therefore, the Committee concluded : "Both as Lenders in bilateral loans and as members of international organisations providing financial assistance, all States should [...] ensure that they do not impose on borrowing States obligations that would lead the latter to adopt retrogressive measures in violation of their obligations under the Covenant."[127]

69. The Vienna Declaration and Programme of Action adopted on 25 June 1993 by the World Conference on Human Rights call upon the international community to "make all efforts to help alleviate the external debt burden of developing countries, in order to supplement the efforts of the Governments of such countries to attain the full realization of

(2005), para. 48); CRC/C/Add.207 (Sri Lanka); CRC/C/15/Add.197 (Republic of Korea); CRC/C/15/Add.193 (Burkina Faso); CRC/C/15/Add.190 (Sudan); CRC/C/15/Add.186 (Netherlands/Netherlands Antilles); CRC/C/15/Add.179 (Niger); CRC/C/15/Add.174 (Malawi); CRC/C/15/Add.172 (Mozambique); CRC/C/15/Add.160 (Kenya); CRC/C/15/Add.152 (Turkey); CRC/C/15/Add.138 (Central African Republic); CRC/C/15/Add.130 (Suriname); CRC/C/Add.124 (Georgia); and CRC/C/15/Add.115 (India). See also Human Rights Council, Consolidation of findings of the high-level task force on the implementation of the right to development, 25 March 2010, A/HRC/15/WG.2/TF/2/Add.1, para. 54.

123 E/C.12/1/Add.57 (2001), paras. 9-10.

124 Committee on Economic, Social and Cultural Rights, Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights (24 June 2016) (E/C.12/2016/1).

125 Id., para. 9.

126 Id., para. 11 (referring to International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, cited above, art. 18; and to Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, E/1998/22, para. 51).

127 Id., para. 11. The position expressed by the Committee in this recent statement was largely foreshadowed in earlier statements by the same body, in particular in the General Comment No. 18: The right to work (E/C.12/GC/18 (2005)), where it had already made it clear that "To comply with their international obligations in relation to article 6, States parties should endeavour to promote the right to work in other countries as well as in bilateral and multilateral negotiations. In negotiations with international financial institutions, States parties should ensure protection of the right to work of their population. States parties that are members of international financial institutions, in particular the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to work in influencing the lending policies, credit agreements, structural adjustment programmes and international measures of these institutions. The strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right to work and impact negatively on the right to work of women, young persons and the disadvantaged and marginalized individuals and groups" (para. 30).

the economic, social and cultural rights of their people".[128] In 2000, the Millennium Declaration also included a call on industrialized countries to "implement the enhanced programme of debt relief for the heavily indebted poor countries without further delay and to agree to cancel all official bilateral debts of those countries in return for their making demonstrable commitments to poverty reduction",[129] and it included a pledge to "deal comprehensively and effectively with the debt problems of low- and middle-income developing countries, through various national and international measures designed to make their debt sustainable in the long term".[130] Building on the 2002 Monterrey Consensus[131] and the 2008 Doha Declaration, the Addis Ababa Action Agenda recognizes "the need to assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief, debt restructuring and sound debt management, as appropriate", and includes a pledge to "continue to support the remaining HIPC-eligible countries that are working to complete the HIPC process" and, "on a case-by-case basis" to "explore initiatives to support non-HIPC countries with sound economic policies to enable them to address the issue of debt sustainability". It acknowledges that, while "maintaining sustainable debt levels is the responsibility of the borrowing countries", "lenders also have a responsibility to lend in a way that does not undermine a country's debt sustainability".[132]

70. The Addis Ababa Action Agenda also notes "the importance of debt restructurings being timely, orderly, effective, fair and negotiated in good faith", and that "successful debt restructurings enhance the ability of countries to achieve sustainable development and the sustainable development goals."[133] However, in a clear reference to so-called "vulture funds", it expresses its concern at "the ability of non-cooperative minority bondholders to disrupt the will of the large majority of bondholders who accept a restructuring of a debt-crisis country's obligations", and encourages Governments to adopt legislation to counter such actions.[134]

71. Fortunately, the international community has made progress on both issues. On 10 September 2015, the UN General Assembly adopted resolution 69/319, declaring that sovereign debt restructuring processes should be guided by nine Basic Principles, including the right to sovereign debt restructuring, good faith, transparency, equitable treatment, sovereign immunity, legitimacy, sustainability and the principle of majority restructuring. The resolution was adopted by a vote of 136 in favour and 6 against, with 41 abstentions. The Independent Expert on the effects of foreign debt and human rights expressed the view that the nine Basic Principles "reflect customary law and general principles of international law to a large extent and, as such, are legally binding".[135]

72. In parallel, some creditor States, including the EU Member States and the Members of the Club of Paris, pledged not to sell their claims on highly-indebted poor countries (HIPCs) to creditors unwilling to provide debt relief, and two countries (the United Kingdom and Belgium) adopted legislation specifically aimed to combating the abusive practices of vulture funds.[136] The Advisory Committee of the Human Rights Council, in a report requested by resolution 27/30 of the Human Rights Council, recommends that States enact legislation aimed at curtailing the predatory activities of vulture funds within their jurisdiction, (i) covering both HIPCs and other countries; (ii) applying to commercial creditors that refuse to negotiate any restructuring of the debt; (iii) prohibiting the filing of claims that are manifestly disproportionate to the amount initially paid to purchase the sovereign debt.[137] It also

[128] Vienna Declaration and Programme of Action, cited above note 47, para. 12.
[129] Millennium Declaration, adopted by resolution 55/2 of the General Assembly, para. 15.
[130] Id., para. 16.
[131] Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002 (A/CONF.198/11), chapter 1, resolution 1, annex, paras. 47-51.
[132] Addis Ababa Action Agenda, cited above note 8, para. 97.
[133] Addis Ababa Action Agenda, cited above note 8, para. 98.
[134] Addis Ababa Action Agenda, cited above note 8, para. 100.
[135] "Restructuring of sovereign debt: UN expert stresses GA Principles are binding", press release, New York, 10 September 2015.
[136] See Report of the Human Rights Council Advisory Committee on the activities of vulture funds and the impact on human rights (A/HRC/33/54) (20 July 2016).
[137] Id., para. 87(a).

recommends that States refuse to "give effect to foreign judgments or conduct enforcement procedures in favour of vulture funds that are pursuing a disproportionate profit", i.e., granting claims that are in excess of the discounted price originally paid for the bonds.[138] This is consistent with, and clarifies the implications of, the call included in Human Rights Council resolution 27/30, that States "consider implementing legal frameworks to curtail predatory vulture fund activities within their jurisdictions".[139]

Extraterritorial obligations	
Respect	(A1.1) Lender States should design foreign debt strategies so as to avoid hampering the improvement of conditions guaranteeing the enjoyment of human rights and so as to ensure, inter alia, that "debtor States achieve an adequate level of growth to meet their social and economic needs and their development requirements, as well as fulfilment of their human rights obligations".[140] (A1.2) Lender States should also "perform due diligence on the creditworthiness and ability to repay of the borrower"; "refrain from providing a loan in circumstances where the lender is aware that the funds will be used for non-public purposes or for a non-viable project";[141] and ensure that the loan "will not be wasted through official corruption, economic mismanagement or other unproductive uses in the Borrower State",[142] and that it shall not "increase the Borrower State's external debt stock to an unsustainable level that will make debt repayment difficult and impede the creation of conditions for the realization of human rights".[143] (A1.3) Borrower and Lender States should prepare human rights impact assessments prior to negotiating structural adjustment programmes with creditors.[144]
Protect	(A2.1) Adoption of legislation against vulture funds, prohibiting commercial creditors that refuse to negotiate any restructuring of the debt from filing claims that are manifestly disproportionate to the amount initially paid to purchase the sovereign debt, and refusing the execution of foreign judgments in favour of vulture funds that are pursuing a disproportionate profit.[145]
Fulfil	

Global obligations	
Establish new partnerships	(A4.1) Borrower and Lender States should enter into renegotiation and restructuring of the foreign debt in good faith where servicing the debts compromises the Borrower State's capacity to fulfil its international human rights obligations,[146] or when a

[138] Id., para. 87(b).
[139] A/RES/37/30, para. 2. The resolution was adopted by a recorded vote of 33 to 5, with 9 abstentions.
[140] Guiding Principles on foreign debt and human rights, cited above note 13, para. 8.
[141] Id., para. 23.
[142] Id., paras. 38.
[143] Id., para. 39.
[144] Id., para. 12: "States should analyse policies and programmes, including those relating to external debt, macroeconomic stability, structural reform and investment, with respect to their impact on poverty and inequality, social development and the enjoyment of human rights, as well as their gender implications, and adjust them as appropriate, to promote a more equitable and non-discriminatory distribution of the benefits of growth and services"; see also id., para. 40-41 (clarifying the content of such human rights impact assessments).
[145] Report of the Human Rights Council Advisory Committee on the activities of vulture funds and the impact on human rights (A/HRC/33/54) (20 July 2016), para. 87. See also UNCTAD's Principles on Promoting Responsible Sovereign Lending and Borrowing (2012), Principle 7 (Debt Restructurings) ("A creditor that acquires a debt instrument of a sovereign in financial distress with the intent of forcing a preferential settlement of the claim outside of a consensual workout process is acting abusively").
[146] Guiding Principles on foreign debt and human rights, cited above note 13, paras. 52-54.

Extraterritorial obligations	
	moratorium on repayment would be justified following a change in circumstances beyond the control of the Borrower State.[147]
Operate within partnerships	(A5.1) As members of international financial institutions, States should ensure any economic, financial or technical advice, instruction guidance or similar recommendation by such institutions, which are meant to address the problems occasioned by external indebtedness, must respect the debtor State's independent process of national development.[148]
Implement partnerships	

2. Corresponding indicators

Structural indicators	*Process indicators*	*Outcome indicators*
(A5.1) The State exercises its voting rights within international financial institutions in order to respect the debtor State's independent process of national development, and to ensure that structural adjustment programmes imposed on borrowers include social and human rights safeguards.		(A1.3 and A4.1) All memoranda of understanding between lender and borrower (i) are preceded by a human rights impact assessment, (ii) include a provision allowing for the renegotiation / restructuring of the debt where the service of the debt compromises the Borrower State's capacity to fulfil its international human rights obligations, or following a change in circumstances beyond the control of the Borrower State
(A2.1) Legislation against vulture funds is adopted		(A2.1) Commercial creditors are effectively prohibited from filing claims that are manifestly disproportionate, and foreign judgments in favour of vulture funds pursuing a disproportionate profit are refused execution

B. Eliminating illicit financial flows

1. Attributes related to the elimination of illicit financial flows

73. Tax evasion and avoidance as well as other illicit money flows represent a huge loss to countries, and it is of particular consequence (as a percentage of their public budgets) in low- and middle-income countries.[149] In 2008, Global Financial Integrity estimated that,

[147] Id., para. 58. See also UNCTAD's Principles on Promoting Responsible Sovereign Lending and Borrowing (2012), Principle 7 (Debt Restructurings); and General Assembly resolution 69/319, basic principle 2.

[148] Guiding Principles on foreign debt and human rights, cited above note 13, para. 75.

[149] For a useful assessment, see OECD, *Development Co-Operation Report 2014. Mobilising Resources for Sustainable Development* (OECD Publishing, Paris, 2014), chapter II.13. See also the Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky (A/HRC/31/61) (15 January 2016), paras. 10-11 (recalling estimates concerning the levels of wealth, mostly undeclared, sheltered in tax havens, and noting that these amounts have significantly increased in recent years).

during the 2002-2006 period, illicit financial flows represented an average of between 859 billion and 1.06 trillion USD on a yearly basis.[150] For Africa alone, a conservative estimate is that illicit financial flows have amounted to a total of 854 billion USD for the period 1970-2008.[151] These outflows have been steadily growing throughout the period at an average rate of 12.1 percent per year (with peaks reached in oil-producing countries such as Nigeria and Sudan linked to increases in the price of oil). The impacts are considerable: by the end of 2008, the same study notes, the cumulative impact of these outflows meant that each African woman, man or child lost 989 USD to illicit financial outflows.[152] In fact, the total financial flows for 1970-2008 represent a sum far in excess of the external debt of all African countries (279 billion USD in 2008): in other terms, taking into account illicit financial flows, Africa is a net creditor to the world, and by tackling such illicit financial flows, about 600 billion USD could have been mobilized for the fight against poverty on the continent.[153] Although the situation in Africa is particularly troubling, the continent is not alone in this regard. For instance, according to the Inter-American Development Bank, evasion rates of personal and corporate income taxes average 50 percent in 10 representative Latin American countries, with Guatemala topping the league with an evasion rate of 70 percent.[154]

74. This is now described to be a priority in various international outcome documents. In the Addis Ababa Action Agenda, the Heads of State and Government and High Representatives recognize the need to curb illicit financial flows.[155] Specifically, governments have committed to "redouble efforts to substantially reduce illicit financial flows by 2030, with a view to eventually eliminating them, including by combating tax evasion and corruption through strengthened national regulation and increased international cooperation"; and to "reduce opportunities for tax avoidance". The means to achieve this which are relevant to understanding the international dimensions of the right to development include (i) "inserting anti-abuse clauses in all tax treaties"; (ii) "enhanc[ing] disclosure practices and transparency in both source and destination countries, including by seeking to ensure transparency in all financial transactions between Governments and companies to relevant tax authorities"; (iii) ensuring that "all companies, including multinationals, pay taxes to the Governments of countries where economic activity occurs and value is created, in accordance with national and international laws and policies";[156] (iv) implementing the "Financial Action Task Force standards on anti-money-laundering/counter-terrorism financing";[157] (v) "making the [United Nations Convention against Corruption] an effective instrument to deter, detect, prevent and counter corruption and bribery, prosecute those involved in corrupt activities, and recover and return stolen assets to their country of origin";

150 Dev Kar and Devon Cartwright-Smith, Illicit Financial Flows from Developing Countries: 2002-2006 (Global Financial Integrity, Washington DC, Dec. 2008).

151 Dev Kar and Devon Cartwright-Smith, *Illicit Financial Flows from Africa: Hidden Resource for Development* (Global Financial Integrity, Washington DC, 2010).

152 Ibid., at page 12.

153 This was also the conclusion reached by Léonce Ndikumana and James K. Boyce, *New Estimates of Capital Flight from Sub-Saharan African Countries: Linkages with External Borrowing and Policy Options* (University of Massachusetts, Amherst, April 2008).

154 Ana Corbacho, Vicente Frebes Cibils and Eduardo Lora (eds), *More than Revenue: Taxation as a development tool* (Inter-American Development Bank and Palgrave Macmillan, 2013), at 121 (fig. 7.4.). These estimates are based on data from the period 2003-2010, with different years for the different countries (for Guatemala for instance, the reference year in 2006). They should therefore be treated with caution as a source of cross-country comparisons. They do provide, however, an idea of the magnitude of the problem.

155 Addis Ababa Action Agenda, cited above note 8, para. 18.

156 Id., para. 23.

157 Id., paras. 23-24. The Financial Action Task Force (FATF), an independent intergovernmental body established in 1989 to support the fight against money laundering, adopted a set of recommendations addressed to its Member States. Known as the *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (AML/CFT standards) the recommendations were initially drawn up in 1990; they were most recently updated in 2017, and have been endorsed by 180 countries. See for the text of the recommendations: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf (last consulted on 10 Jan. 2018).

and (vi) "eliminat[ing] safe havens that create incentives for transfer abroad of stolen assets and illicit financial flows".[158] While, in 2000, the Millennium Development Goals had remained silent on the issue, States have now pledged to significantly reduce by 2030 illicit financial flows and strengthen the recovery and return of stolen assets in the Sustainable Development Agenda 2030 (target 16.4). Though the commitments contained in the Addis Ababa Action Agenda and, especially, in the Sustainable Development Goals, remain too vague to be truly enforceable, they nevertheless send a strong political signal.

75. The Special Rapporteur on Extreme Poverty and Human Rights recalled that: "Individual countries, in particular low-income countries, are severely constrained in the measures that they alone can take against tax abuse. Illicit financial flows are international in nature and therefore beyond the capacity of one State alone to tackle. The availability of offshore financial centres (tax havens) that offer low or no taxes and secrecy is a major factor."[159] The Addis Ababa Action Agenda explicitly acknowledges the need for enhanced international tax cooperation on these issues,[160] beyond the more classic forms of international cooperation in the form of "aid for tax" strategies.[161] As noted by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, entering into such forms of cooperation to contribute to fight illicit financial flows, including both tax evasion and tax avoidance, is an obligation for States parties to human rights instruments such as the International Covenant on Economic, Social and Cultural Rights : "While the Covenant refers in particular to economic and technical assistance and cooperation, international assistance may comprise other measures, including provision of information to people in other countries or cooperation with their State, for example, to trace stolen public funds".[162]

76. Stepping up efforts against illicit financial flows is thus clearly a human rights issue, and has clear implications for the realization of the right to development.[163] Indeed, recognizing that “illicit capital flight undermines the capacity of State Parties to implement the African Charter on Human and Peoples’ Rights and to attain the Millennium Development Goals”, the African Commission on Human and Peoples’ Rights has called upon States parties to the African Charter on Human and Peoples’ Rights “to examine their national tax laws and policies towards preventing illicit capital flight in Africa”.[164] That these efforts are essential for the fulfilment of human rights is made increasingly explicit by United Nations human rights treaty bodies. The Committee on Economic, Social and Cultural Rights noted in concluding observations related to the United Kingdom that "financial secrecy legislation [allowing its Overseas Territories and Crown Dependencies to prosper as tax havens] and permissive rules on corporate tax are affecting the ability of the State party, as well other States, to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights", and it recommended that it "intensify its efforts, in coordination with its Overseas Territories and Crown Dependencies,

158 Id., para. 25.

159 Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, presented at the 26th session of the Human Rights Council (A/HRC/26/28) (22 May 2014), para. 61.

160 Id., para. 27.

161 These consist in supporting local institutions in charge of tax collection: see in this regard OECD, *Tax and Development: Aid Modalities for Strengthening Tax Systems* (OECD Publishing, Paris, 2013). As part of the Third International Conference on Financing for Development, Tax Inspectors without Borders was launched as an OECD/UNDP joint initiative to help developing counties bolster domestic revenues by strengthening their tax audit capacities.

162 Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky (A/HRC/31/61) (15 January 2016), para. 42.

163 See, e.g., Research-based study on the impact of flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights, including economic, social and cultural rights - Progress report of the Advisory Committee of the Human Rights Council (A/HRC/36/52) (9 August 2017).

164 Resolution adopted by the Commission at its 53rd ordinary session, 23 April 2013.

to address global tax abuse".[165] The Committee on the Elimination of Discrimination against Women also recently recommended that Switzerland "Undertake independent, participatory and periodic impact assessments of the extraterritorial effects of its financial secrecy and corporate tax policies on women's rights and substantive equality, and ensure that such assessments are conducted in an impartial manner with public disclosure of the methodology and finding".[166]

77. Importantly, the Addis Ababa Action Agenda includes a reference to the risks entailed in the use of tax incentives to attract investment, which may lead to a race to the bottom and, ultimately, to a reduced ability of all States to mobilize the domestic resources required to finance their sustainable development strategies.[167] This is particularly the case where corporations operating across different jurisdictions are allowed to resort with impunity to profit-shifting, taking advantage of differences between tax rates by artificially shifting profits across borders. This is done by declaring profits in tax havens where they may have no staff or productive activities or only minimal activities, rather than declaring such profits (and paying the corresponding taxes) where their activities take place, thus leading to eroding the tax base allowing States to finance public policies and the provision of social services essential to the enjoyment of human rights.[168] Transfer pricing between different companies of a multinational group is one technique that allows to achieve this, in general, without violating the law. And it plays an increasingly important role: intra-group trade is currently estimated to represent 30 per cent of global trade.[169] This is why instruments such as the United Nations Model Double Taxation Convention between Developed and Developing Countries[170] or the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital[171] encourage countries to adopt the "arm's length standard", according to which (following the wording of article 9 of the UN Model Double Taxation Convention) they should prohibit mispricing between different parts of the multinational group, which is deemed to occur where such relations between related enterprises "differ from those which would be made between independent enterprises".

78. The international consensus on the issues above has been strengthening significantly during the past decade. In 2010, the Convention on Mutual Administrative Assistance in Tax Matters, initially the result of a joint effort of the OECD and the Council of Europe in 1988, was amended in order to allow for the participation of developing countries. The new text was opened for signature on 1 June 2011. It now covers 109 jurisdictions, including 15 jurisdictions covered by extension.[172] It provides for various forms of administrative

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165 Committee on Economic, Social and Cultural Rights, Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (E/C.12/GBR/CO/6, 14 July 2016), paras. 16-17.

166 Committee on the Elimination of Discrimination against Women, Concluding Observations on the combined fourth and fifth reports of Switzerland (CEDAW/C/CHE/CO/4-5) (18 November 2016), para. 41.

167 The Addis Ababa Action Agenda (cited above note 8) states in this regard that: "Tax incentives can be an appropriate policy tool. However, to end harmful tax practices, countries can engage in voluntary discussions on tax incentives in regional and international forums" (para. 27).

168 Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky (A/HRC/31/61) (15 January 2016), para. 18.

169 *United Nations Practical Manual on Transfer Pricing for Developing Countries*, UN Department of Economic and Social Affairs (ST/ESA/347) (United Nations, New York, 2013), para. 1.1.3. Estimates of the volume of intra-group trade (trade between different enterprises related to a same multinational group) are however notoriously difficult to arrive at: see Rainer Lanz and Sébastien Miroudot, "Intra-Firm Trade: Patterns, Determinants and Policy Implications", *OECD Trade Policy Papers* No. 114 (OECD Publishing, Paris, 2011).

170 The United Nations Model Double Taxation Convention between Developed and Developing Countries was initially adopted in 1980, and revised subsequently in 1999 and in 2011.

171 The OECD Model Tax Convention on Income and on Capital has been regularly updated. The current version dates from 2014, but it is undergoing a revision at the time of writing.

172 Thus, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, Guernsey, the Isle of Man, Jersey, Montserrat and the Turk and Caicos Islands are covered by extension from the

cooperation between States in the assessment and collection of taxes, facilitating the exchange of information and the recovery of foreign tax claims with a view to supporting States' efforts to combat tax avoidance and evasion. At the same time, the G20 has identified base erosion and profit shifting (BEPS) as a major concern for tax justice worldwide, and the OECD adopted a 15-point action plan in 2013 in order to address this, to be progressively implemented in the next few years ("OECD/G20 BEPS package").[173] Finally, on 7 June 2017, 68 jurisdictions signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), and nine other jurisdictions pledged to join. The MLI amends the large number of bilateral tax treaties concluded to eliminate double taxation between the parties; and it contains provisions aimed at combating tax abuse.

Extraterritorial obligations	
Respect	(B1.1) Refrain from competitive taxation strategies as a means of attracting investors.[174]
Protect	(B2.1) Require corporations whose activities are transnational to report publicly on a country-by-country basis, in order to expose major misalignments between the distribution of profit and the location of real economic activity.[175]
Fulfil	(B3.1) Close tax havens which, thanks to bank secrecy laws, allow undeclared or illegally acquired assets or revenues to escape taxation, thus undermining the ability of all countries to broaden the tax base allowing for the collection of public revenue.[176] (B3.2) Strengthen tax administrations, by a targeted use of ODA.[177]

Global obligations	
Establish new partnerships	(B4.1) Ensure that any future tax convention incorporates the "arm's length principle" as a means to avoid tax avoidance through transfer pricing, taking into account the United Nations Model Double Taxation Convention between Developed and Developing Countries, and initiate negotiations towards a multilateral convention to combat abusive tax practices, a consolidation and apportionment system for taxing global corporate profits, leading to treat transnational corporations as single and unified firms.[178]

United Kingdom; Aruba, Curaçao and Sint Maarten, the latter two formerly part of the Netherlands Antilles, are covered by extension from the Netherlands; the Faroe Islands are covered by extension of Denmark.

173 OECD, *Development Co-Operation Report 2014. Mobilising Resources for Sustainable Development*, cited above (note 11), at 167-176.

174 Addis Ababa Action Agenda, cited above note 8, para. 27.

175 Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky (A/HRC/31/61) (15 January 2016), para. 81.

176 E/C.12/GBR/CO/6, paras. 16-17; CEDAW/C/CHE/CO/4-5, para. 41.

177 Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky (A/HRC/31/61) (15 January 2016), para. 85.

178 Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky (A/HRC/31/61) (15 January 2016), para. 88. This proposal is inspired by the Independent Commission for the Reform of International Corporate Taxation, which suggested in the set of recommendations it presented in 2015 that: "Multinational corporations act – and therefore should likewise be taxed – as single firms doing business across international borders. This is essential because multinational corporations often structure transfer pricing and other financial arrangements to allocate profits to shell operations in low tax jurisdictions" (para. 3 of the Statement of Principles).

Extraterritorial obligations	
Operate within partnerships	(B5.1) Accede to the OECD Convention on Mutual Administrative Assistance in Tax Matters (B5.2) Accede to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI)
Implement partnerships	(B6.1) Implement the Financial Action Task Force standards on anti-money-laundering/counter-terrorism financing.[179]

2. Corresponding indicators

Structural indicators	*Process indicators*	*Outcome indicators*
(B1.1) The average tax rate on corporate profits is not reduced, and it is increased where necessary to be aligned with the regional average.[180] (B2.1) Corporations domiciled in the State concerned are required to report publicly on the profits made, on a country-by-country basis. (B4.1) Steps are taken to towards a multilateral convention putting in place a consolidation and apportionment system for taxing global corporate profits, leading to treat transnational corporations as single and unified firms. (B5.1 and B5.2) Accession to the OECD Convention on Mutual Administrative Assistance in Tax Matters and to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI)	(B3.2) Portion of ODA directed towards the strengthening of tax administrations	(B3.1) Tax havens are closed following the reform of bank secrecy laws and the generalization of the automatic exchange of information between tax authorities. (B4.1) Tax conventions incorporate the "arm's length principle" as a means to avoid tax avoidance through transfer pricing, taking into account the United Nations Model Double Taxation Convention between Developed and Developing Countries

C. Supporting the right to development through official development assistance

1. Attributes of the duty to provide international assistance

79. An international consensus exists on the commitment of rich countries to contribute 0.7 per cent of their gross national income (GNI) to official development assistance (ODA). The benchmark originated from the UNCTAD II conference, held in New Delhi in February

[179] Such implementation requires both that legislative/regulatory reforms be undertaken where there are lacunae, and that the legislative/regulatory framework is effectively implemented. The Financial Action Task Force (FATF) supports mutual evaluations between members, ensuring that both these dimensions are taken into account.

[180] The corresponding attribute is to "refrain from competitive taxation strategies as a means of attracting investors". The evolution of the average tax rate on corporate profits is an indicator of whether this duty is complied with: States where the average tax rate has been diminishing are presumed to encourage fiscal competition and thus a race to the bottom between States, reducing their capacity to implement public policies in support of the realization of human rights.

and March 1968, as part of a broader objective that 1 per cent of the wealth created in "economically advanced" countries (gross national product (GNP)) be transferred to developing countries as a combination of both official and private financial flows. UNCTAD II took note of the fact that some developed countries declared their willingness, within the framework of the 1 per cent target for total flows, to provide a minimum of 0.75% of their GNP in net flows of official resources.[181] The 1 percent target of total flows was supported the following year by the Commission on International Development (headed by Lester B. Pearson, and established at the request of the President of the World Bank Robert McNamara), which in addition recognized "a special need for official development assistance on concessional terms, that is, [for aid] in the form of grants or loans on soft terms. [...] On the assumption that increases in aid can be more closely linked to efficient use and performance than hitherto, we recommend a substantial increase in official aid flows. Specifically, official development assistance should be raised to 0.70 percent of donor GDP by 1975, and in no case later than 1980".[182] This target was endorsed by the United Nations General Assembly in Resolution 2626 (XXV) on the International Development Strategy for the Second United Nations Development Decade adopted on 24 October 1970, which stated that:

> Each economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7% of its gross national product at market prices by the middle of the Decade.

80. The target has been refined since it was initially affirmed in 1970, in order to ensure that the LDCs would be given priority in ODA. Most developed countries have pledged to achieve the target of 0.7 per cent of ODA/GNI and 0.15 to 0.20 per cent of ODA/GNI to least developed countries, and the UN human rights treaty bodies have regularly emphasized that delivering on this promise forms part of their duty of international cooperation.[183] Yet, as noted in the Addis Ababa Action Agenda, this commitment appears to be honoured more in the breach than in the observance.[184] Meanwhile, there is a growing consensus that aid as usual (quite apart from the levels of aid provided) is inadequate to address the real causes of poverty, which are more structural in nature.

81. The critique has two layers. Some authors, such as Erik Reinert, have questioned the Millennium Development Goals for their failure to encourage the diversification of economies in the global South: the MDGs, he states, "are far too biased towards palliative

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[181] Decision on the aid volume target, adopted on 28 March 1968 at the 79th plenary meeting, Proceedings of the United Nations Conference on Trade and Development, Second Session, New Delhi, 1 Feb.-29 March 1968, vol. I: Report and Annexes, pp. 38-39. The decision was adopted by 69 votes to none, with 8 abstentions.

[182] *Partners in Development. Report of the Commission on International Development* (New York: Praeger Publ., 1969), p. 18. Indeed, the decision on the desirable volumes of aid endorsed at UNCTAD II included as part of official financial flows: "official cash grants and grants in kind including grants for technical assistance but excluding grants for defence purposes; sales of commodities against local currencies exclusive of utilization of such currencies by the donor country for its own purposes; government lending for periods exceeding one year net of repayments of principal; grants and capital subscriptions to multilateral aid agencies, and net purchases of bonds, loans and participation from those agencies." No distinction was made therefore, in the 0.75 per cent target for official flows, between concessional and non-concessional financing.

[183] See, for instance, Committee on Economic, Social and Cultural Rights, Concluding Observations: Germany (E/C.12/DEU/CO/5 (2011), para. 33); Committee on Economic, Social and Cultural Rights, Concluding Observations: Finland (E/C.12/FIN/CO/6 (2014), para. 8); Committee on the Rights of the Child, Concluding Observations: Germany (CRC/C/DEU/CO/3-4 (2014), para. 21); Committee on the Rights of the Child, Concluding Observations: Finland (CRC/C/FIN/CO/4 (2011), para. 22). This practice appears not to be followed by the Committee on the Rights of Persons with Disabilities, however. Article 32 of the Convention on the Rights of Persons with Disabilities does include a detailed set of prescriptions on international cooperation, laying the emphasis however on the need to support specifically the rights of persons with disabilities through international cooperation; it is this more targeted approach that the CRPD Committee has retained.

[184] Addis Ababa Action Agenda, cited above note 8, para. 51.

economics rather than structural change, towards treating the symptoms of poverty rather than its causes"; in his view, unless the productive capacities of poor countries are improved, the MDGs shall amount to little else than "a system where nations producing under increasing returns (industrialized nations) pay annual compensation to nations producing under constant or diminishing returns (raw material producers) for their losses".[185] This argument is that advocates of higher levels of development aid are proponents of "palliative economics" (in Reinert's phrase), and that they fail to question existing obstacles to development that result from the established international division of labour. Aid, in other terms, should not become a substitute (a palliative) for the restructuring of the international economic order in order for it to be made more "fair" – less biased in favour of the countries that are currently most industrialized and who own the technologies on which the most advanced sectors of the economy depend. Another critique is more radical, however, since it denounces the perverse incentives of aid itself. Angus Deaton, the 2015 Laureate of the Nobel Prize in Economics, notes that foreign aid can lead to a lack of accountability of governments in receiving countries: the aid received allows these governments to maintain in place a system favourable to their interests without having to collect revenues from the population, and the population therefore has fewer incentives to control how the money is spent.[186] This argument against foreign aid as a development tool already figured prominently in the pamphlets of William Easterly[187] and Dambisa Moyo,[188] published respectively in 2006 and 2009.

82. These critiques tend to ignore that development aid too can be made more transparent and accountable to the population.[189] Yet, both the denunciation of foreign aid as purely "palliative" and the questions that have been raised as to how it affects the bonds between the governments in developing countries and their populations, explain the efforts in recent years to strengthen aid effectiveness.[190] It remains vital to maintain (and in many cases to increase) levels of official development assistance, and to ensure that how ODA levels are calculated is consistent with the promise of rich countries to dedicate 0.7 per cent of their GNI to ODA (and 0.15 to 0.20 per cent to least developed countries). But, in addition, indicators should be developed to assess aid effectiveness.

83. Official Development Assistance, as monitored by the OECD's Development Assistance Committee (DAC), includes financial support provided by OECD-DAC member countries to developing countries in the form either of grants or of "concessional" loans to developing countries, to support sectors such as health, sanitation, education, infrastructure,

185 Erik S. Reinert, *How Rich Countries Got Rich... and Why Poor Countries Stay Poor* (London: Constable, 2007), pp. 262 and 265. See also Ha-Joon Chang, *Kicking Away the Ladder. Development Strategy in Historical Perspective* (London: Anthem Press, 2005).

186 Angus Deaton, *The Great Escape. Health, Wealth, and the Origins of Inequality* (Princeton: Princeton Univ. Press, 2013), p. 121. See also Ingnacio Saiz, "Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective", in Aiofe Nolan, R. O'Connell & Colin Harvey, *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Oxford: Hart Publishing, 2013), pp. 77-104, p. 83.

187 William Easterly, *The White Man's Burden. Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (Penguin Books, 2006) 15-17 ("Feedback and Accountability").

188 Dambisa Moyo, *Dead Aid. Why aid is not working and how there is another way for Africa* (Penguin Books reprint, 2010) 58 ("In most functioning and healthy economies, the middle class pays taxes in return for government accountability. Foreign aid short-circuits this link. Because the government's financial dependence on its citizens has been reduced, it owes its people nothing.").

189 See Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the tenth session of the Human Rights Council, The role of development cooperation and food aid in realizing the right to adequate food: moving from charity to obligation (A/HRC/10/5) (11 February 2009), para. 26 ("A human rights framework requires that we deepen the principles of ownership, alignment and mutual accountability, by shifting our attention to the role of national parliaments, civil society organizations, and the ultimate beneficiaries of aid - the rights-holders - in the implementation and evaluation of foreign aid. It is this triangulation, away from a purely bilateral relationship between Governments, which the adoption of a human rights framework requires").

190 These critiques also explain the demand that donor countries better align their policies in other areas that may impact on developing countries with their professed aim to support development efforts: the claim for "policy coherence for development" (now reframed as "policy coherence for sustainable development") emerged from that preoccupation. It is dealt with separately in this report.

and strengthening tax systems and administrative capacity, among others.[191] For monitoring purposes, an official definition of ODA has been approved, which refers to financial assistance, channelled bilaterally or through multilateral agencies, which is:

> i. provided by official agencies, including state and local governments, or by their executive agencies; and
>
> ii. each transaction of which:
>
> a) is administered with the promotion of the economic development and welfare of developing countries as its main objective; and
>
> b) is concessional in character and conveys a grant element of at least 25 per cent (calculated at a rate of discount of 10 per cent).

84. Neither military aid nor contribution to peacekeeping operations are included in ODA, with the exception of certain aspects of peacekeeping under a UN mandate. Support to civilian police can be included, except for certain aspects that relate to the paramilitary role of the police in controlling insurgencies or to intelligence work for counter-terrorism. Perhaps more controversially, in addition to assistance to refugees in developing countries, the temporary assistance (up to 12 months) provided to refugees from developing countries arriving in donor countries is reportable as ODA, and all costs associated with eventual repatriation to the developing country of origin are also reportable. How ODA is calculated of course has major impacts on how the 0.7 per cent of GNI is assessed. For instance, due to the large inflow of refugees in the EU in 2015, some EU Member States were reported to have increased ODA in significant proportions (Greece by 39%, Germany by 26% and Hungary by 25%), but this has been discounted as "inflated aid" by non-governmental organizations, as it corresponds to the disbursements linked to the arrival or refugees in these countries, and does not contribute to meeting development needs in the countries of origin of these migrants. Indeed, one estimate is that for the year 2015, 17% of the aid from the EU countries "did not reflect a real transfer of resources to developing countries, because it went to “in-donor” refugee spending, debt relief, student costs, tied aid and interest payments".[192]

85. Moreover, industrialized countries pledged to mobilize jointly $100 billion a year by 2020 for climate mitigation and adaptation strategies in developing countries. The commitment was initially made at the December 2009 Copenhagen fifteenth session of the Conference of Parties (CoP) to the UN Framework Convention on Climate Change,[193] and it was reiterated at the twenty-first session of the CoP held in Paris in December 2015.[194] The roadmap presented in October 2016 by developed countries offered estimates from the OECD that the aggregate volume of public and private climate finance mobilised by developed countries for developing countries reached US$62 billion in 2014, up from US$52 billion in

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[191] This definition is slightly adapted from the OECD DAC definition as it appears on: http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/ (last consulted on 1 Oct. 2017).

[192] Concord (European NGO confederation for relief and development), *Aidwatch Report 2016*, p. 6.

[193] See para. 8 of the Copenhagen Accord of 18 December 2009, agreed at the fifteenth conference of parties to the UN Framework Convention on Climate Change held in Copenhagen from 7 to 19 December 2009 (FCCC/CP/2009/11/Add.1) ("In the context of meaningful mitigation actions and transparency on implementation, developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries. This funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance").

[194] See para. 114 of Decision 1/CP.21, Adoption of the Paris Agreement (CCC/CP/2015/10/Add.1) (the Conference of Parties "strongly urges developed country Parties to scale up their level of financial support, with a concrete road map to achieve the goal of jointly providing USD 100 billion annually by 2020 for mitigation and adaptation while significantly increasing adaptation finance from current levels and to further provide appropriate technology and capacity-building support"). The figure itself does not appear, however, under the corresponding clause (Article 9) of the Paris Agreement, which states that "Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention" (art. 9.1).

2013.[195] However, even apart from the important controversies about how such calculations are made (what "counts" as climate finance), it would be a source of concern if this funding were ODA repackaged, and diverted from the assistance provided to other sectors such as health, education or rural development. Nothing in the decisions made by the Parties to the UNFCCC appears to prevent that risk.

86. Finally, neither nominal flows of ODA nor levels of ODA as a proportion of GNI provide indications as to the quality of aid that is provided, and in particular, as to whether aid is predictable over a number of years[196] and untied, thus allowing receiving countries to plan long-term strategies and ensuring national ownership. The Paris Declaration on Aid Effectiveness, adopted in 2005, put forward the five key principles of ownership (developing countries set their own strategies for poverty reduction, improve their institutions and tackle corruption), alignment (donor countries align behind these objectives and use local systems), harmonisation (donor countries coordinate, simplify procedures and share information to avoid duplication), results (developing countries and donors shift focus to development results and results get measured) and mutual accountability (donors and partners are accountable for development results), in order to improve the quality of aid. Consistent with the 2001 DAC Recommendation on Untying Official Development Assistance to the Least Developed Countries, the commitments adopted in the Paris Declaration on Aid Effectiveness included untying aid, as a means to "reduce transaction costs for partner countries and improving country ownership and alignment".[197] Indeed, tied aid (linking the aid provided to the purchase of goods and services from the donor country) not only makes the purchases of beneficiary countries more expensive; it also undermines national ownership and makes it more difficult for aid finance to contribute to local economic development, despite the multiplier effects that could result from buying from local service providers and manufacturers and generating local jobs. Similarly, the need to make aid more predictable was emphasized both in the 2005 Paris Declaration on Aid Effectiveness, and in the 2008 Accra Agenda for Action, in which donors pledged, in particular, to "provide developing countries with regular and timely information on their rolling three- to five-year forward expenditure and/or implementation plans, with at least indicative resource allocations that developing countries can integrate in their medium-term planning and macroeconomic frameworks".[198]

87. The Addis Ababa Action Agenda reiterated these earlier pledges to "improve the quality, impact and effectiveness of development cooperation and other international efforts in public finance", reaffirming governments' "adherence to agreed development cooperation effectiveness principles". It stated:

> We will align activities with national priorities, including by reducing fragmentation, accelerating the untying of aid, particularly for least developed countries and countries most in need. We will promote country ownership and results orientation and strengthen country systems, use programme-based approaches where appropriate, strengthen partnerships for development, reduce transaction costs, and increase transparency and mutual accountability. We will make development more effective and predictable by providing developing countries with regular and timely indicative information on planned support in the medium term.[199]

88. The Global Partnership for Effective Development Co-operation was established following the 2011 Busan High Level Forum to sustain political momentum and accountability for implementing Busan commitments. It supports a monitoring of progress

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195 *Roadmap to US$100 billion*, October 2016.

196 The 2005 Paris Declaration on Aid Effectiveness included a commitment to "provide more predictable and multi-year commitments on aid flows to committed partner countries" (para. 4, ii).

197 Id., para. 31. See also the 2008 Accra Agenda for Action (adopted at the Third High-Level Forum on Aid Effectiveness, Accra, 2-4 September 2008), which includes a pledge by donors to "elaborate individual plans to further untie their aid to the maximum extent", to "promote the use of local and regional procurement by ensuring that their procurement procedures are transparent and allow local and regional firms to compete", and to "build on examples of good practice to help improve local firms' capacity to compete successfully for aid-funded procurement" (para. 18).

198 Accra Agenda for Action, para. 26.

199 Addis-Ababa Action Agenda, cited above note 8, para. 58.

towards aid effectiveness by a regular reporting process, based on a set of 10 indicators based on the 2005 Paris Declaration on Aid Effectiveness and on the additional dimensions introduced by the 2012 Busan Partnership agreement, at the request of developing countries. These indicators are the following:

Indicator	*Description*
Indicator 1 Development co-operation is focused on results that meet developing countries' priorities	Extent of use of country results frameworks by cooperation providers
Indicator 2 Civil society operates within an environment which maximises its engagement in and contribution to development	A preliminary assessment of CSO Enabling Environment building on qualitative, multi-stakeholder information
Indicator 3 Engagement and contribution of the private sector to development	A three-dimensional index providing a measure of the quality of public-private dialogue
Indicator 4 Transparency: information on development co-operation is publicly available	Measure of state of implementation of the common standard by co-operation providers
Indicator 5(a) Development co-operation is more predictable – Annual Predictability	Proportion of development co-operation funding disbursed within the fiscal year within which it was scheduled by co-operation providers; and Halve the gap – halve the proportion of aid not disbursed within the fiscal year for which it was scheduled (baseline year 2010)
Indicator 5(b) Development co-operation is more predictable – Medium-term Predictability	Proportion of development cooperation funding covered by indicative forward spending plans provided at country level
Indicator 6 Aid is on budgets which are subject to parliamentary scrutiny	% of development co-operation funding scheduled for disbursement that is recorded in the annual budgets approved by the legislatures of developing countries
Indicator 7 Mutual accountability among development co-operation actors is strengthened through inclusive reviews	% of countries that undertake inclusive mutual assessments of progress in implementing agreed commitments
Indicator 8 Gender equality and women's empowerment	% of countries with systems that track and make public allocations for gender equality and women's empowerment
Indicator 9(a) Effective institutions: country systems are strengthened	Quality of developing country public financial management systems
Indicator 9(b) Effective institutions: developing country systems are used	Use of country public financial management and procurement systems
Indicator 10 Aid is untied	% of aid that is fully untied

89. A relatively new trend in development finance concerns the role of blended finance, defined as "the strategic use of public or private investment with a development objective, including concessional tools, to mobilise additional finance with a commercial motivation for SDG-aligned investments in developing countries".[200] Consistent with the new paradigm, originating in the 2002 Monterrey Consensus and confirmed in the subsequent Financing for Development conferences, according to which development finance should span a much larger set of tools than ODA alone, blended finance refers to the catalytic use of ODA in

[200] OECD Development Action Committee, Blended Finance for Sustainable Development: moving the agenda forward (OECD, DCD/DAC(2017)9), 24 February 2017, para. 15.

order to stimulate the mobilization of other sources of financing to achieve development objectives: its objective is "to generate additional funds and finance through crowding-in commercial finance, that does not have a development mandate, into projects or programmes that are development priorities – i.e., to make development (more) investable".[201] Blending finance therefore aims to reduce the risk of private investment in certain areas related to development, or to provide concessional funding to maximize the contribution of private investment to a development objective, in order to harness the potential of private investment to serve sustainable development objectives.[202] Until now, blended finance has primarily focused on the financial sector and infrastructures, and climate action represents a significant proportion of the facilities (about one in five) relying on blended finance.[203]

90. The Addis Ababa Action Agenda identified both opportunities and risks in the reliance on blended finance:

> For harnessing the potential of blended finance instruments for sustainable development, careful consideration should be given to the appropriate structure and use of blended finance instruments. Projects involving blended finance, including public-private partnerships, should share risks and reward fairly, include clear accountability mechanisms and meet social and environmental standards.[204]

91. Indeed, while blended finance are often described as a necessity in a context in which the fulfilment of development goals shall require considerable financial contributions that ODA alone shall not be able to provide,[205] it also involves certain challenges. Such challenges include: (i) agreeing on a clear definition of blending and how ODA's role in support of blended finance should be reported, in order to ensure that ODA commitments are not circumvented by the "double accounting" of ODA when combined with private finance; (ii) ensuring that the contribution of concessional funding is not simply a way to compensate for poor project design by private financiers or investors; (iii) ensuring that blending operations do not crowd out private investment, especially local investors; (iv) ensuring that blending does not distort the targeting of ODA towards LDCs and social sectors, insofar as blending is better suited to middle-income countries and to the productive sectors, and thus could ultimately divert ODA support from where it is most urgently needed; (v) ensuring that blending does not result in tying aid – in violation of the commitments reiterated in the Addis-Ababa Action Agenda[206] –, by linking aid to support to economic actors from the donor country; (vi) ensuring that blending remains consistent with the principles guiding aid effectiveness, including in particular country ownership and mutual accountability.

92. The Financing for Development follow-up process could set for itself, as a priority in the next few years, to achieve a consensus on these various items, in order to maximize the potential of blended finance while avoiding that such risks associated with the growth of blending materialize. OECD's Development Action Committee is currently considering a set of *Principles on Blended Finance*, in order to guide OECD Member States in their use of these new financing tools. This could provide a useful starting point for a multilateral approach to this issue.

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201 Id., para. 16.

202 See Javier Pereira, *Blended finance for development.* Background paper prepared in support of the first session of the Intergovernmental Group of Experts on Financing for Development (Geneva, 8-10 November 2017), p. 5.

203 Id., para. 3.

204 Addis Ababa Action Agenda, cited above note 8, para. 48.

205 The financing gap in developing countries to achieve the SDGs is estimated to be about 2.5 trillion USD (UN Conference on Trade and Development (UNCTAD), *World Investment Report 2014: Investing in the SDGs: An Action Plan* (Geneva: UNCTAD, 2014)); this compares with 142,6 billion USD in ODA for the year 2016 (OECD, *Blended finance. Mobilising resources for sustainable development and climate action in developing countries. Policy perspectives* (Paris: OECD, 2017)).

206 Addis Ababa Action Agenda, cited above note 8, para. 58 (in which countries pledge to "align activities with national priorities, including by reducing fragmentation, accelerating the untying of aid, particularly for least developed countries and countries most in need"). The percentage of untied aid is indicator 10 of the Global Partnership monitoring framework, referred to above.

93. Indicators should be developed to ensure that developed countries keep their promise to dedicate 0.7 per cent of their GNI to ODA (and 0.15 to 0.20 per cent to least developed countries), and to improve the effectiveness of aid. This should mean agreeing with receiving countries how ODA levels are to be calculated (and the extent to which, in particular, expenses in the donor country can be included); ensuring that new pledges linked specifically to climate finance are not included in ODA count (so that the pledge to finance climate mitigation and adaptation in developing countries up to 100 billion USD by 2020 is additional to, not a substitute for, the earlier ODA pledges in support of economic development); and further strengthen the monitoring the effectiveness of aid, particularly to ensure that the principles of country ownership, predictability and mutual accountability are complied with, building on the work of the Global Partnership for Effective Development Co-operation. The increased use of blended finance deserves special attention in this regard, since – given the financing gap that ODA in itself shall not be sufficient to fill – it is bound to increase in the future. Taking into account the significant misunderstandings that persist about blending finance for development and the risks of aid diversion, moving development assistance away from commitments made since the 2005 Paris Declaration on Aid Effectiveness, it is urgent to improve transparency and discipline in its use. At a minimum, countries relying on blended finance by supporting private sector-driven projects should ensure that, consistent with the UN Guiding Principles on Business and Human Rights,[207] the private actors they support fully respect human rights and act with due diligence to seek information about the human rights impacts of their activities, including the impacts on the right to development, and mitigate any negative impacts identified.

Extraterritorial obligations	
Respect	(C1.1) All countries should ensure that the transboundary impacts of the measures they adopt are assessed, where such measures could have an impact on the right to development through channels such as finance, trade or investment. This could be achieved by relying on the existing tools that have been established to ensure policy coherence for sustainable development (PCSD).[208]
Protect	(C2.1) Donor countries should ensure that any private actor (whether for-profit or non-profit) supported through ODA or through other (non-concessional) forms of support comply with the UN Guiding Principles on Business and Human Rights.
Fulfil	(C3.1) Rich countries should deliver on their commitment to dedicate 0.7 per cent of their GNI to ODA (and 0.15 to 0.20 per cent to least developed countries), and to improve the effectiveness of aid.

Global obligations	
Establish new partnerships	(C4.1) Agree on a multilateral framework to guide the use of blended finance to support the achievement of SDGs
Operate within partnerships	
Implement partnerships	(C6.1) Cooperate with the Global Partnership for Effective Development Co-operation and further strengthen its ability to ensure that progress is accelerated towards aid effectiveness

[207] See Principle 4 of the Guiding Principles on Business and Human Rights (A/HRC/17/31), providing that, in addition to their general duty to protect human rights, "States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence".

[208] See below, chap. V.

2. Corresponding indicators

Structural indicators	*Process indicators*	*Outcome indicators*
(C1.1) A mechanism ensures that the impacts on the RtD in other countries of measures adopted by the State concerned are assessed, relying on the tools established to ensure policy coherence for sustainable development (PCSD) where such tools exist. (C4.1) Steps are taken to encourage the adoption of a multilateral framework to guide the use of blended finance to support the achievement of SDGs	(C2.1) Support provided through ODA or through other (non-concessional) means is made conditional on compliance of the beneficiary with the UN Guiding Principles on Business and Human Rights (C3.1) Rich countries dedicate 0.7 per cent of their GNI to ODA (and 0.15 to 0.20 per cent to least developed countries)*	(C3.1) Effectiveness of aid, as measured by the indicators of aid effectiveness relied on by the Global Partnership for Effective Development Co-operation*

D. Putting trade in the service of the right to development

1. Attributes of the duty to support the right to development through trade

a. Ensuring trade agreements do not impede the realization of the right to development

94. The conclusion of trade agreements can have an impact on the right to development through various channels. Insofar as such agreements lower barriers to trade, they can affect livelihoods, where they lead some sectors of the economy of one State to face new forms of competition, especially when such competition is "unfair", due to the various forms of support that foreign competitors receive from their own governments.[209] The new generation of trade agreements moreover addresses non-tariff barriers (obstacles to trade that result from States adopting different regulatory approaches), which may lower the standards of protection of the health of consumers or affect the right to life or the right to health of the general population by lowering environmental requirements. Such agreements also routinely include chapters on intellectual property protection, which may result in obstacles to the dissemination of technologies and reduce access to medicines or to new plant varieties, with impacts on the right to health or on the right to food.[210] Finally, many free trade agreements now include investment chapters that protect the rights of the investors of the other Party, and ensure that they have access to arbitral tribunals in order to complain about any restrictions to such rights, which may make it more difficult for the host State to effectively regulate these actors.[211]

95. For all these reasons, as noted above, human rights treaty bodies and Special Procedures established by the Human Rights Council have insisted that the negotiation and conclusion of trade agreements should be preceded by human rights impact assessments – assessments which, it has been stated, should be conducted independently according to a transparent and participatory methodology, and relying on the normative content of human rights.[212]

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[209] For instance, in its concluding observations addressed to Germany in 2011, the Committee on Economic, Social and Cultural Rights expressed its concern at "the impact of the State party's agriculture and trade policies, which promote the export of subsidized agricultural products to developing countries, on the enjoyment of the right to an adequate standard of living and particularly on the right to food in the receiving countries", and it therefore urged the State party to "fully apply a human rights-based approach to its international trade and agriculture policies, including by reviewing the impact of subsidies on the enjoyment of economic, social and cultural rights in importing countries" (E/C.12/DEU/CO/5, para. 9).

[210] On this issue, see below, section F.

[211] On this issue, see below, section E.

[212] See above, text corresponding to notes 22-25.

96. In addition, in its General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, the Committee on Economic, Social and Cultural Rights recommended that trade and investment agreements include a specific provision about the primacy of human rights obligations:

> The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations. (Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay* (judgment of 29 March 2006, Series C No. 146), para. 140). States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude. They are encouraged to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.[213]

97. The inclusion of a reference to the primacy of human rights and the preparation of human rights impact assessments of trade agreements are important safeguards. But they remain *defensive* in nature. They seek to ensure that the conclusion of trade agreements shall not negatively affect human rights, including the right to development; but they generally do not inquire as to how such agreements, if properly designed, could make a positive contribution to the realization of human rights. Moreover, human rights impact assessments of trade *agreements* are not a substitute for the need to ensure that trade *policies* States implement comply with human rights, and support efforts towards their progressive realization. In order to ensure that trade contributes to the right to development, it is therefore important to move beyond assessing the human rights impacts of trade agreements per se, and to ask how trade can become a tool to that effect.

b. Ensuring trade agreements contribute to the right to development

98. The growth of trade opportunities, by the lowering of barriers to trade (both tariff and non-tariff), presents a dual relationship to the realization of the right to development. On the one hand, it can provide an opportunity for growth and it allows countries to have access to foreign currencies, which in turn allows them to import consumer items and technologies to favour the diversification of the economy. On the other hand, however, export-led growth may lock countries into certain lines of production that are not sustainable, either because they are highly labour-intensive and require that competitiveness be based on low wages and poor conditions of work (especially in the manufacturing sector, for countries that are latecomers to globalization), or because they rely on the exploitation of natural resources, that are used (and potentially depleted) to serve not the needs of the local population, but those of industries in more developed countries or the affluent lifestyles of rich countries' consumers.

99. What is needed is to shape trade in order to ensure that it contributes to the right to development. The choice is not between unregulated liberalization of trade, in which labour rights, environmental standards and human rights are eroded in order to improve the competitiveness of the export sector and in which regulatory standards are gradually lowered or removed in order to avoid the accusation of protectionism, and mercantilist policies in which restrictions to imports are seen as a means to protect local producers; the choice is, rather, between trade governed by rules set with a view exclusively to maximize wealth creation by efficiency gains, and trade governed by rules that serve the right to development – supporting diversified economies, inclusive societies, and sustainable forms of growth. Trade can be a tool for development, provided countries use the flexibilities allowed under the multilateral trade regime, and provided they remain guided, in their reliance on such flexibilities, by the universally agreed human rights norms.

[213] At para. 13.

100. Unfortunately, the guidance provided by the SDGs is woefully inadequate in this regard. The SDGs propose to "promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda" (Target 17.10, associated with an indicator referring to the lowering of the worldwide weighted tariff-average (17.10.1)); to "significantly increase the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020" (Target 17.11, associated with an indicator referring to the share of global exports of developing countries and LDCs (17.11.1)); and to "realize timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries, consistent with World Trade Organization decisions, including by ensuring that preferential rules of origin applicable to imports from least developed countries are transparent and simple, and contribute to facilitating market access" (Target 17.12, associated with an indicator referring to the lowering of the average tariffs faced by developing countries, LDCs and small island developing States (17.12.1)). These targets provide a blueprint for trade liberalization, and for increasing exports of developing countries; they are entirely silent, however, about the type of development that would result from the deepening of the international division of labour under current conditions. They do not even allude to the risk that export-oriented growth will result in a lack of diversification of economies (although diversification is both a condition for development and a source of resilience against economic shocks, such as exchange rate variations and fluctuations of commodity prices), and they say nothing about how the gains and losses from specialization should be spread. It is as if the increase of trade volumes were an end in itself. But trade is just an instrument for sustainable development, as emphasized in the Preamble of the Marrakesh Agreement itself.[214]

101. The inadequacy of the current trade regime as a tool for sustainable development is most obvious once one considers its relationship to climate change. First, international competition may be a disincentive for the adoption of regulatory standards that, though motivated by the will to mitigate climate change, may raise costs to the enterprises operating from within the State seeking to adopt such standards. It is arguable at least that the more economies are characterized by a high degree of openness to trade – depending more on exports to be able to important more in order to satisfy their needs –, the more difficult it will be to justify the adoption of measures imposing constraints on companies, in the form of stronger environmental requirements, that are perceived as reducing the competitiveness on global markets.[215] Moreover, the expansion of trade as such affects the volume of greenhouse

[214] Agreement establishing the World Trade Organization, Marrakesh, 15 April 1994, entered into force on 1 January 1995 (33 ILM 1125 (1994)). The preamble of the Agreement establishing the World Trade Organization (WTO) states that Members' "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".

[215] Of course, the relationship between constraints imposed on companies based on environmental concerns, leading for instance to a higher price of energy or to obliging a company to acquire allowances for greenhouse gas emissions, and the competitiveness of companies, understood as their ability to maintain sufficient profit margins, is not a direct one, and depends on a range of factors, including the trade openness of the sector concerned and the ability for the companies concerned to pass on the increases in production costs to the consumer: see, for a detailed discussion of this point, *Trade and Climate Change. A Report by the United Nations Environment Program and the World Trade Organization*, World Trade Organization, Geneva, 2009, at p. 99 (finding that "the effects on competitiveness of environmental regulations, including climate change policies, are relatively small, or are likely for only a small number of sectors, because the costs of compliance with a regulation are a relatively minor component of a firm's overall costs", yet acknowledging at the same time that environmental regulations impact the competitiveness of "a few energy-intensive manufacturing industries" and that "the carbon constraint in some emission trading schemes ... is expected to be

gas emissions. International trade favours increased economic growth and higher levels of consumption. It therefore frees up resources from their less productive uses to be reinvested or spent elsewhere. This ‘scale effect’ of trade is built into the very idea of trade contributing to improved allocative efficiency, and thus to increased levels of outputs and reduced prices for the end consumer. But it opens up the question under which conditions it is compatible with SDG 12, which refers to the need to ensure sustainable consumption and production patterns.

102. This is not to deny, of course, that trade may also make a positive contribution to the mitigation of climate change. Trade may support sustainable production patterns, especially in agriculture and in production that is intensive in the use of natural resources, if each country specializes into lines of production in which it has a comparative advantage, increasing allocative efficiency. Moreover, trade favours in many cases the diffusion of cleaner technologies which, once taken up, can lead to less carbon-intensive types of growth in the importing country.[216] This 'technology effect' occurs through a variety of channels, including by the importation of innovations embodied in intermediate goods (products used in further production processes) and capital goods (machinery and equipment); the transfer of knowledge about new production processes; and increased learning opportunities from international economic relations, accelerating the ability for developing countries to develop cleaner technologies.[217]

103. On the whole, however, the trade agenda is poorly aligned with the climate change agenda. In the absence of special incentives rewarding countries or exporters that rely on the cleanest technologies available and use the least polluting methods of production by improved market access, export-led policies result in a regulatory chill: regulators fear to increase environmental standards, in particular related to greenhouse gas emissions, if this could put certain of their industries at a disadvantage. And various studies show that the 'scale effects' of increased trade volumes significantly outweigh the more benevolent 'technology effects': the paradox is that, while we seek to encourage more sustainable consumption patterns, trade presents consumers with a cornucopia of goods that are cheap, disposable, and have an increasingly short life span – in other terms, the increased consumption of which cannot be reconciled with sustainability goals.[218]

104. Labour rights provide another example. With the progress of trade liberalization, particularly since the finalization of the Uruguay round of trade negotiations which led to the establishment of the World Trade Organization, concerns have increased about the dangers of regulatory competition between States. The fear is that in labour-intensive industries (in which labour costs represent a significant proportion of the total costs of production), States that do not raise labour standards, particularly as regards minimum wage, health and safety at work, or freedom of association and collective bargaining, would be gaining an "unfair

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increasingly stringent, with fewer free allowances, which will therefore increase the potential impact on the competitiveness of a number of sectors").

216 WTO Members have pledged to accelerate this diffusion by prioritizing the liberalization of trade of environmental goods and services. See Doha Ministerial Declaration, WTO doc. WT/MIN(01)/DEC/1, para. 31 (iii) (committing to negotiate "the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services").

217 See, describing these various channels, *Trade and Climate Change. A Report by the United Nations Environment Program and the World Trade Organization*, World Trade Organization, Geneva, 2009, at p. 61 (and referring, in particular, to J. Eaton and S. Kortum, "Trade in Capital Goods", *European Economic Review*, vol. 45(7) (2001), pp. 1195-1235; and E. Helpman, *R&D and Productivity: The International Connection*, National Bureau of Economic Research (NBER) Working Paper 6101, Cambridge, Mass., 1997).

218 See M. Heil and T. Selden, "International Trade Intensity and Carbon Emissions : A Cross-Country Econometric Analysis", *Journal of Environment and Development*, n° 10(1) (2001), pp. 35-49 ; M. Cole and R. Elliott, "Determining the Trade-Environment Composition Effect : the Role of Capital, Labor and Environmental Regulations", *Journal of Environmental Economics and Management*, n° 46(3) (2003), pp. 363-383. For an overview, see *Climate and Trade. Why climate change calls for fundamental reforms in world trade policies*, report authored by Tilman Santarius for the German NGO Forum on Environment and Development and Heinrich Böll Foundation, 2009.

advantage" in global competition, and would thereby be able to attract investors in increasingly segmented global production chains.

105. The evidence is mixed. Econometric studies tend to show that the countries with the most open trade policies have witnessed improvements in working conditions, at faster rates than countries with closed trade policies.[219] But that does not prove that fears of social dumping are without foundation. First, correlation does not imply causality. The improvement in labour conditions may be attributable to a range of other factors than trade per se. Among such factors, we may include the role of foreign investment and the arrival of multinational corporations in the country concerned, general progress in the standard of living (i.e. that trade may or may not have accelerated, depending on the position of the country in the international division of labour and the evolution of the terms of trade) or, perhaps most importantly, the level of organization of workers and the strength of their bargaining position. Secondly, a generally positive correlation between trade openness and working conditions does not provide information about the counter-factual: although trade openness may be correlated to improvements in working conditions, this does not exclude that if a country had resorted to more protectionist policies, shielding certain sectors from competition, working conditions would have improved even further.

106. It is equally difficult to arrive at definitive conclusions concerning the relationship between trade openness and the evolution of labour regulations in any particular country. How the regulatory framework evolves depends, first and foremost, on the balance of political forces in a country at any point in time, as well as on the respective bargaining power of employers and workers' unions. Trade openness is one among many factors that influences the respective positions of the different social and political actors in the country. It implies, for instance, that the employers may with some plausibility threaten to relocate production plants if the workers demand too much, or if the labour legislation imposes excessive costs on them: such a threat becomes realistic once it appears that they could easily produce goods in another location, or provide services from elsewhere, without losing access to the consumers in the home country. How much weight this argument will have, however, will depend on the particular context of the country concerned, and this again is only one of the inputs in a political system that shall receive many others.

107. Arguments about the empirical relationship between trade and the evolution of labour standards are therefore difficult to assess. Establishing a stronger linkage between trade and labour rights may be justified, however, even in the absence of a consensus that trade openness will result in a deterioration of working conditions or a dismantling of labour regulations, all in the name of ensuring competitiveness on global markets. 'Trade openness' can be designed in a number of ways, and forms of trade liberalization that include a protection against the risks of global competition leading to a worsening of working conditions may be seen to be preferable to forms of trade liberalization that simply ignore that there may be any such link. Improving the linkages between trade and labour standards seeks to ensure that trade will not be used as an opportunity to lower labour standards or as a pretext to refuse to improve the protection of workers or to raise their wages as labour productivity improves. It is precisely because the risks of abuse are difficult to ascertain that taking out such an insurance policy makes sense.

108. Various attempts have been made to define a trade regime that would serve sustainable development and, thus, contribute to full realization of the right to development.[220] Though

[219] See, eg, providing a systematic empirical analysis, Robert J Flanagan, *Globalization and Labor Conditions. Working conditions and worker rights in a global economy* (Oxford, Oxford University Press, 2006). Flanagan concludes that fears of 'social dumping' are largely ill-founded. However, even he does note one exception: 'If trade threatens working conditions, the threat is strongest for some workers in the richest countries, not the poorest countries. The evidence suggests that trade has a small negative impact on the wages of unskilled workers in industrialized countries' (p. 85).

[220] See, *inter alia*, Olivier De Schutter, *Trade in the Service of Sustainable Development. Linking Trade to Labour Rights and Environmental Standards* (Oxford: Hart, 2015); Elisabeth Bürgi Bonanomi, *Sustainable Development in International Law Making and Trade* (Cheltenham: Edward Elgar, 2015); Joseph E. Stiglitz, *Making Globalization Work* (New York: W.W. Norton & Co., 2006);

the details may differ, the general approach is that trade can, and should, be shaped in order to serve development objectives. It is wrong to think of trade and development in sequential terms, as if trade could be conceived of simply as an engine for economic growth, to then be complemented by policies that serve development needs. Instead, because trade influences production and consumption patterns, the bargaining powers of social partners, regulatory choices and how resources are allocated, how trade is designed should from the start take into account the need to serve development.

109. Even taking into account the disciplines they imposed under the WTO framework, WTO Members can use a number of flexibilities to that effect. The most obvious option is to impose higher import tariffs on goods or services that are not produced according to certain environmental standards (or that do not use the cleanest technologies available), or that do not ensure full compliance with labour rights in the supply chain.[221]

110. The WTO Dispute-Settlement Bodies have generally treated regulatory requirements that concern *production or process methods* (PPMs) (as opposed to requirements that concern the *physical characteristics* of the product), when extended to foreign goods, as a quantitative measure, comparable to a quota or an import ban. Since Article XI GATT forbids quantitative restrictions without allowing for measures that take that form to be justified (leaving aside the narrow exceptions of Article XI:2), restrictions of that category can only be allowed by the successful invocation of the General Exception Clause of Article XX GATT, which contains a closed set of admissible justifications to otherwise prohibited measures. This Clause could justify the reliance on environmental conditions to restrict access to markets of certain products (as a means to ensure the 'conservation of exhaustible natural resources' (Article XX(g), GATT)). It could also justify imposing similar restrictions on goods or services that do not comply with labour rights: such conditions could be considered 'necessary to protect public morals', a wording which appears in both Article XX(a) GATT and Article XIV(a) GATS, provided at least that the restriction is justified by the need to protect internationally recognized labour rights (such as those that appear in the 1998 ILO Declaration on Fundamental Principles and Rights at Work), and is neither discriminatory nor resulting in a disguised restriction on international trade.

111. The more a WTO Member resorts to trade policy measures that are unilateral to encourage positive development outcomes, however, the more it will be important to do so by referring to objectives that are shared by the international community as a whole, and by coupling any restrictions to trade with appropriate burden-sharing towards developing countries. The right to development may serve as a useful reference in this regard, especially if combined with a reference to the common but differentiated responsibilities and respective capabilities of different States. The significance of such a reference is that trade policy measures should provide positive incentives, rewarding jurisdictions that achieve the most to ensure the realization of the right to development, and that the other jurisdictions should be supported in their efforts to improve further in this regard. Such trade policy measures should

Joseph E. Stiglitz and Andrew Charlton, *Fair Trade for All. How Trade can Promote Development* (Oxford Univ. Press, 2005).

[221] Other options include border tax adjustments, which aim to compensate for differences between the respective taxation systems of the exporting and the importing countries (Article II:2(a) of the General Agreement allows WTO Members to apply a charge on imports equivalent to an internal tax provided that such a charge complies with the national treatment principle, in other terms, provided the charge is not 'in excess of those applied … to like domestic products'); state-sponsored labelling schemes, that fall to be examined under the Agreement on Technical Barriers to Trade (TBT Agreement); or the use of public procurement schemes, since the Government Procurement Agreement (GPA) now allows the inclusion of considerations that are not purely economic in public tenders (Target 12.7 of the SDGs is to "Promote public procurement practices that are sustainable, in accordance with national policies and priorities"). These various options cannot be explored in detail here.

not turn into a sanctioning mechanism: they should rather be a mechanism encouraging countries to move in the right direction.[222]

112. As already noted, the right to development therefore does not justify the adoption of unilateral measures as a means to obtain from a State that it changes its course of conduct.[223] Therefore, in order to dispel any risk that such incentives would be abused to serve protectionist objectives, and a means to deprive developing countries of what they may see as their comparative advantage, confidence-building measures could be adopted, such as (i) reference to universally recognized standards, rather than standards imposed unilaterally by the importing jurisdiction; (ii) assessment of compliance with these standards by independent monitoring bodies, rather than by the importing jurisdiction alone; (iii) a phased application of the measures, leaving time for consultations and for improvements to be made in the exporting country concerned, before any disadvantages are imposed; (iv) a use of any funds collected as a result of an increase in import tariffs aiming to encourage compliance with the standards, for the benefit of programmes supporting reforms in developing countries, including through the transfer of technologies and capacity-building, or by financing the establishing of standing social protection schemes.

113. Trade can be made fair. The inclusion in trade policies of conditions based on universally agreed standards derived from the right to development can contribute to reconciling trade with the development agenda of the international community. But such unilateral measures should only be seen as a solution if they are not a pretext for protectionist policies, and if they fit within a broader set of policies, that include strong support to the development objectives of poor countries.[224] In contrast to the current fragmentation, linking access to markets to the right to development can encourage all countries to step up efforts towards the realization of this right. WTO law generally allows for such linkages to be established. This would ensure a greater consistency between the right to development and the trade agendas. It would support the least well organized and weakest segments of the workforce in all countries to obtain a better share of the benefits of whatever growth trade may serve to stimulate, and it encourage civil society globally that seeks to defend and promote the right to development.

Extraterritorial obligations	
Respect	(D1.1) Prepare human rights impact assessments both prior to the conclusion of trade or investment agreements and at regular intervals following the entry into force of such agreements, to ensure that the agreement shall not create obstacles to the ability for each of the States concerned to respect, protect and fulfil human rights, including the right to development. (D1.2) Refrain from measures that seek to achieve a competitive advantage in global trade by the lowering of standards that contribute to the realization of the right to development, conceived as a right to enjoy a form of development "in which all human rights and fundamental freedoms can be fully realized" (art. 1(1) of the Declaration on the right to development).
Protect	(D2.1) By effectively regulating corporations domiciled in the territory and/or jurisdiction of the State, ensuring that such corporations shall not encourage regulatory competition between States in areas that relate to the realization of the right to development.

[222] See Martin Khor, Manuel F. Montes, Mariama Williams, and Vicente Paolo B. Yu III, *Promoting Sustainable Development by Addressing the Impacts of Climate Change Response Measures on Developing Countries*, South Centre Research Paper No. 81 (Oct. 2017).

[223] See above, text corresponding to notes 56-58.

[224] For a detailed attempt to identify the institutional conditions that could ensure that the linkage of trade policies to labour standards will benefit the poorer countries, by increasing the rewards for improving such standards, and the most disadvantaged groups, by increasing the incentives for their governments to design policies that will benefit them, see Christian Barry and Sanjay G Reddy, *International Trade and Labor Standards. A Proposal for Linkage* (New York, Columbia University Press, 2008).

Extraterritorial obligations	
Fulfil	(D3.1) Design trade policies that reward countries and/or supply chains that have the best track record in contributing to the full realization of the right to development.

Global obligations	
Establish new partnerships	(D4.1) Gradually move towards a common understanding, agreed upon at multilateral level, as to the best practices that States could rely on in order ensure an appropriate linkage between trade and the realization of the right to development.
Operate within partnerships	(D5.1) Within the WTO framework, encourage an interpretation of the flexibilities available to countries that allows to better link trade to the right to development.
Implement partnerships	

2. Corresponding indicators

Structural indicators	*Process indicators*	*Outcome indicators*
(D1.1) Before being signed, all trade agreements are preceded by a human rights impact assessment. (D2.1) All corporations domiciled in the territory and/or jurisdiction of the State are imposed to comply with the full range of internationally recognized human rights wherever they operate, and to exercise due diligence to ensure that their subsidiaries and business partners comply with human rights.		(D3.1) % of trade that is subject to mechanisms ensuring that the goods and services imported are produced in conditions that respect human rights, including labour rights as stipulated in the core ILO conventions.

E. Channelling foreign direct investment towards development needs

1. Attributes of the duty to ensure foreign direct investment supports the right to development

114. Already in 2006, referring to MDG8 on a global partnership for development, the Working Group on the right to development stated that the right to development "implies that foreign direct investment (FDI) should contribute to local and national development in a responsible manner, that is, in ways that are conducive to social development, protect the environment, and respect the rule of law and fiscal obligations in the host countries. The principles underlying the right to development... further imply that all parties involved, i.e. investors and recipient countries, have responsibilities to ensure that profit considerations do not result in crowding out human rights protection. The impact of FDI should, therefore, be taken into account when evaluating progress in Goal 8 in the context of the right to development".[225]

115. Two human rights norms are of particular relevance concerning the regime of international investment law. The Declaration on the Right to Development makes direct

[225] Report of the Working Group on the right to development. 7th session (conclusions) (E/CN.4/2006/26), para. 59.

reference, as one of its key components, to the right to self-determination of peoples and, specifically, the right of all peoples freely to dispose of their natural wealth and resources, as stipulated under article 1 of both 1966 Covenants implementing the Universal Declaration of Human Rights.[226] The right to self-determination is one of the most under-rated and under-utilized norms in the international human rights system of protection. If taken seriously, self-determination means that the peoples, not governments alone, should be making the fundamental choices as to how the resources available should be used: in essence, it is a norm about participatory democracy, particularly in the context of the use, exploitation and allocation of natural resources.

116. The norm has been invoked, for instance, in order to protect indigenous communities or traditional groups from being deprived of equitable access to the resources on which they depend for their livelihoods. In *Apirana Mahuika et al. v. New Zealand*, the Human Rights Committee reads Article 1(2) of the International Covenant on Civil and Political Rights – in conjunction with Article 27 of the Covenant, that recognizes the rights of minorities – as allowing an arrangement about the management of fishing resources, noting that the Maori people "were given access to a great percentage of the quota, and thus effective possession of fisheries was returned to them", and that the new control structure put in place ensures not only a role for the Maori in safeguarding their interests in fisheries but, in addition, their "effective control".[227] The implication would appear to be that these provisions would be violated should any people be deprived of the use they make traditionally of the land and resources on which they rely.[228]

117. This component of the right to self-determination should not benefit indigenous peoples alone. The requirements applicable to indigenous peoples are now extended to at least certain traditional communities that entertain a similarly "profound and all-encompassing relationship to their ancestral lands" centred on "the community as a whole" rather than on the individual: this, the Inter-American Court of Human Rights noted, applies for instance to the Maroon communities living in Suriname, which are not indigenous to the region, but are tribal communities of former slaves that settled in Suriname in the 17th and 18th century.[229]

118. Indeed, under Article 1 of the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which the Declaration on the Right to Development refers to, the right to self-determination is recognized to all "peoples", and its enjoyment is

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[226] International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, G.A. Res. 2200(XXII), U.N. GAOR, 21st sess., Supp. No. 16, U.S. Doc. A/6316 (1966) (993 UNTS 3); and International Covenant on Civil and Political Rights (A/RES/21/2200A, 16 December 1966) (999 UNTS 171).

[227] Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, CCPR/C/70/D/547/1993 (2000), para. 9.7. The Human Rights Committee observed that "minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture [, which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority": General Comment No. 23: The rights of minorities (Art. 27) (Fiftieth session, 1994), (CCPR/C/21Rev.1/Add.5) (4 August 1994), paras. 1 and 3.2.

[228] A similar conclusion has been derived by the Committee on the Elimination of Racial Discrimination from Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination, which protects the right to property: this requires from States parties that they "recognize and protect the rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources" (Committee on the Elimination of Racial Discrimination, Concluding Observations: Guyana (CERD/C/GUY/CO/14), 4 April 2006, para. 16).

[229] *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*, Judgment of June 15, 2005. Series C No. 124, paras. 132-133. See also *Saramaka People. v. Suriname*, Judgment of 28 November 2007, para. 86 (finding that "the Court's jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival").

not made conditional on these peoples being "indigenous". Indeed, the clearest illustration of how this relates to the regulation of foreign investors is provided by a case that did not relate, strictly speaking, to indigenous peoples. In Nigeria, local Ogoni communities complained that they were not protected from the negative impacts of the presence of foreign oil companies exploiting the subsoil of the Niger delta in disregard of the consequences on the surroundings. On the basis of a provision of the 1981 African Charter on Human and Peoples' Rights worded in terms very similar to those of Article 1(2) of the 1966 Covenants – which recognizes the right of all peoples to "freely dispose of their natural wealth and resources" and prohibits depriving any people from its own means of subsistence –,[230] the African Commission on Human and Peoples' Rights affirmed a State violates its duties under the Charter if it allows private actors, including foreign companies, to "devastatingly affect the well-being" of the peoples under its jurisdiction.[231]

119. The second norm relevant to the definition of international investment law regimes is derived from the extraterritorial duties of States under existing human rights instruments. Human rights treaty bodies have regularly found that human rights treaties impose duties on States also outside their national territories. One of the implications is that States should control private actors over which they can exercise control, consistent with general international law, in order to prevent such actors from infringing on human rights in foreign territories.[232] The Committee on Economic, Social and Cultural Rights has addressed the duty of States to control transnational corporations in its General Comments relating to the right to water,[233] the right to work,[234] the right to social security[235] and the right to just and favourable conditions of work.[236] Its most systematic treatment of the topic appears in General Comment No. 24 on the Obligations of States under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, adopted in 2017. Consistent with the Resolution concerning decent work in global supply chains adopted in

[230] Article 21 of the African Charter on Human and Peoples' Rights **(**adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986), provides that: "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic co-operation based on mutual respect, equitable exchange and the principles of international law. 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. 5. States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources".

[231] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), para. 58. The Commission was explicit on the contribution that Article 21 of the African Charter on Human and Peoples' Rights was expected to make in getting rid of the remnants of colonialism. The origins of that provision, it recalled, "may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. [In adopting Article 21,] the drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society" (id., para. 56).

[232] Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights (E/C.12/2011/1), paras. 5-6,

[233] General Comment No. 15 (2002): The right to water (arts. 11 and 12) (E/C.12/2002/11), paras. 31, 33.

[234] General Comment No. 18 (2006): The right to work (art. 6) (E/C.12/GC/18), para. 52.

[235] General Comment No. 19 (2008): The right to social security (art. 9) (E/C.12/GC/19), para. 54.

[236] General Comment No. 23 (2016): The right to just and favourable conditions of work (art. 7) (E/C.12/GC/23), para. 70.

2016 by the International Labour Conference,[237] the Committee took the view that States should "regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory".[238] This position is similar to that of other human rights treaty bodies.[239] For instance, in the general comment it adopted in 2013 on State obligations regarding the impact of the business sector on children's rights, the Committee on the Rights of the Child takes the view that:

> Home States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned. [240]

120. In practice, and in order to avoid any controversy concerning the legitimate scope of extraterritorial jurisdiction of States, this means imposing on corporations that are domiciled under the State's jurisdiction (whether they are incorporated within the State, or whether they have located their statutory seat or their principal place of business within the territory of that State) not only that they respect human rights, but also that they act with due diligence to ensure that their subsidiaries or business partners (suppliers and franchisees) comply. Far from interfering with the sovereignty of the State under the jurisdiction of which such subsidiaries are established or on the territory of which these business partners operate, the home State discharging thus its obligation to protect human rights would strengthen the ability for the host State to effectively enforce the regulatory measures adopted by that State in the name of public health, a healthy environment, workers' rights, or the rights of local communities.

121. Victims of business-related human rights abuses should therefore have access to effective remedies also in a transnational context. A number of obstacles remain in this regard, however: they relate, for instance, to the existence of collective redress mechanisms in mass tort litigation; to the admissibility of evidence collected abroad; to the availability of legal aid; or, unless parent-company direct liability is organized, to the restrictive conditions under which the corporate veil may be lifted. A number of recommendations were made for

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[237] Conclusions attached to the Resolution concerning decent work in global supply chains, adopted by the 105th session of the General Conference of the International Labour Organisation (2016), para. 16, i).

[238] Committee on Economic, Social and Cultural Rights, General Comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), para. 31.

[239] The Committee on the Elimination of Racial Discrimination considers that State parties should also protect human rights by preventing their own citizens and companies, or national entities from violating rights in other countries (Committee on the Elimination of Racial Discrimination, Concluding Observations: Canada (CERD/C/CAN/CO/18), para. 17; Concluding Observations: United States (CERD/C/USA/CO/6), para. 30). The Human Rights Committee, operating under the International Covenant on Civil and Political Rights, encourages States to "set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations" and to "take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad" (CCPR/C/DEU/CO/6, par. 16). See also Human Rights Committee, comm. n°2285/2013, *Yassin et al. v. Canada*, Views of 26 July 2017, para. 6.5 ("While the human rights obligations of a State on its own territory cannot be equated in all respects with its obligations outside its territory, the Committee considers that there are situations where a State party has an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction").

[240] General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights (CRC/C/GC/16), para. 43. This goes further than the position adopted by the Committee on Economic, Social and Cultural Rights, since it refers to a duty of the State to control any extraterritorial impacts of the activities not only of corporations that are domiciled under its jurisdiction, but also that have "substantial business activities" on the State's territory.

the removal of such obstacles in the report of the United Nations High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse.[241] By facilitating access to justice for victims of transnational corporate human rights abuses, States would be facilitating the efforts of the host State to regulate the activities of business enterprises which may affect the enjoyment of human rights, and thus to ensure that the arrival of foreign direct investment supports the right to development.

122. Ensuring that transnational corporations respect human rights in the States in which they operate, thus ensuring that they shall not create obstacles to the realization of the right to development in the State concerned, can be achieved primarily by States operating unilaterally: both the territorially competent State (where the corporation operates) and the home State (where the corporation is domiciled) have duties in this regard. Further international cooperation may be required, however, for such measures to be fully effective. Global obligations emerge in two areas:

123. Firstly, as noted by the Committee on Economic, Social and Cultural Rights, the adoption of international instruments could strengthen the duty of States to cooperate in order to improve accountability and access to remedies for victims of violations of Covenant rights in transnational cases: "Improved international cooperation should reduce the risks of positive and negative conflicts of jurisdiction, which may result in legal uncertainty and in forum-shopping by litigants, or in the inability for victims to obtain redress".[242] The Working Group on the issue of human rights and transnational corporations and other business enterprises has also dedicated a study on best practices and on how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights.[243] Specifically, agreements providing for mutual legal assistance might include provisions related to the collection of evidence; to the freezing or seizure of assets; to the execution of judgments; or to the sharing of information between law enforcement authorities. Such forms of cooperation would ensure that the transnational nature of the corporation's activity shall not result in a form of impunity. In a resolution on "Business and human rights: improving accountability and access to remedy", adopted at its 32nd session in June 2016, the Human Rights Council expressed its concern at the "legal and practical barriers to remedies for victims of business-related human rights abuses, which may leave those aggrieved without opportunity for effective remedy, including through judicial and non-judicial avenues".[244] Referring to the above-mentioned report of the United Nations High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse, the resolution further

> *[E]ncourages* States to take steps to improve the effectiveness of international cooperation between State agencies and judicial bodies with respect to law enforcement of domestic legal regimes to address business-related human rights abuses;
>
> *Invites* regional and international bodies responsible for promoting and facilitating international cooperation with respect to cross-border investigation, legal assistance and enforcement of judicial decisions to take steps to improve the speed and effectiveness of such cooperation in cross-border cases of business-related human rights abuses through legal, practical and capacity-building means.[245]

124. Therefore, any progress towards improved cooperation between States for the enforcement of human rights duties in the context of transnational corporate human rights abuses should be seen as a contribution towards the establishment of an international legal

[241] A/HRC/32/19 and Add.1. The Human Rights Council welcomed the report at its 32nd session (2016), A/HRC/RES/32/10, OP 1.
[242] General Comment No. 24, para. 35.
[243] A/HRC/35/33.
[244] Preamble, para. 5.
[245] OP 5 and 6.

order in which human rights can be fully realized, as required under article 28 of the Universal Declaration of Human Rights[246] and the right to development.

125. Secondly, international cooperation may be required to ensure that human rights obligations are given priority over investors' rights, whenever a risk of conflict occurs. States have routinely concluded bilateral or multilateral trade or investment agreements including provisions protecting investors' rights, in order to attract foreign direct investment. In general, these treaties pertain to admission of investment (defining the conditions of entry of FDI into the country); they protect investors from various forms of expropriation, both direct and indirect (the latter often under the requirement of a "fair and equitable treatment"); they include guarantees of "national treatment" (according to which investors enjoy a treatment similar to that enjoyed by the nationals of the host State) and "most-favoured nation" (according to which they enjoy treatment similar to the best treatment accorded to investors from any other country), as well as provisions allowing the transfer and repatriation of profits (capital transfer provisions); and they have dispute settlement clauses allowing investors to challenge measures taken by the host State before international arbitral tribunals designated as competent to settle disputes between the investors covered by the treaty and the host State, established under the rules of the 1965 International Convention on the Settlement of Disputes between States and the nationals of other Parties (ICSID)[247] or under the UNCITRAL Arbitral Rules.[248]

126. Because investment treaties (or provisions on investors' rights in trade agreements) protect investors from the adoption of regulations that amount to indirect expropriation, situations may arise in which the rights of investors are pitted against those of the individuals or communities whose rights are negatively affected by the investment -- which is why the Guiding Principles on Business and Human Rights insist that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts".[249] The Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises notes in his commentary to the Guiding Principles that :

> Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.[250]

127. In order to avoid the risk that investment treaties result in obstacles to the right to development, for instance by chilling a State from adopting certain measures that the investor of the other Party may seek to challenge as discriminatory or as imposing a disproportionate cost, investment treaties (or investment chapters in free trade agreements) may have to include specific references to the human rights obligations of the host State. Where investment agreements are insufficiently explicit about the right of the State to regulate foreign investors in order to ensure full compliance with the State's human rights obligations, as such obligations may evolve from time to time in the name of progressive realization, there

246 Cited above (note 3).
247 575 U.N.T.S. 159.
248 The Arbitral Rules adopted by the United Nations Commission on International Trade Law (UNCITRAL) were adopted initially on 28 April 1976; they were revised in 2010.
249 A/HRC/17/31, Principle 9.
250 Id.

is a need to ensure that these human rights obligations are fully taken into account in investor-State dispute settlement proceedings.[251]

Extraterritorial obligations	
Respect	
Protect	(E1.1) Adequately monitoring investments that negatively impact human rights and the right to development in the host country, or that foreseeably create such a risk, in the absence of appropriate safeguards; in particular, where land-related investments are concerned, ensure that the investment does not result in a violation of the right to self-determination of peoples, as an element of the right to development.
Fulfil	

Global obligations	
Establish new partnerships	(E4.1) Seeking to conclude international agreements providing for judicial cooperation / mutual legal assistance, in support of the prosecution or litigation of transnational cases. (E4.2) In future investment treaties, insert a clause referring specifically to the primacy of human rights and to the requirement that the protection of investors' rights should not interfere with the right to development.
Operate within partnerships	(E5.1) Encouraging arbitral tribunals established under existing investment treaties to interpret general clauses concerning public welfare, public health or the environment, in line with the requirements of international human rights law, including the right to development.
Implement partnerships	

2. Corresponding indicators

Structural indicators	*Process indicators*	*Outcome indicators*
(E4.1) Steps are taken to seek to improve judicial cooperation / mutual legal assistance, in support of the prosecution or litigation of human rights abuses that have a transnational dimension.	(E1.1) Resources dedicated to ensure adequate monitoring of investments that could negatively impact human rights and the right to development in the host country, including by ensuring victims have access to legal aid	(E4.2) Proportion of investment treaties that include a clause referring specifically to the primacy of human rights and to the requirement that the protection of investors' rights should not interfere with the right to development

F. Intellectual property rights and technology transfers

1. Attributes of the duty to ensure intellectual property rights regimes serve the right to development

128. Development has become a knowledge-intensive process, more so than a resource-intensive one. Technologies matter, increasingly more than minerals, land, water or sunlight. The global intellectual property rights regime appears entirely inadequate to serve the fulfilment of the right to development, however, because of the barriers to technology transfers it imposes in the name of rewarding innovation. Indeed, it is a regime that is failing

[251] See Committee on Economic, Social and Cultural Rights, General Comment No. 24 (cited above, note 25), para. 13 (encouraging States parties to "insert a provision explicitly referring to their human rights obligations in future [trade or investment agreements], and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements").

even if judged by its own standards: it appears to stifle the very innovative processes it was meant to favour.

129. The regime we inherited was initially set up in industrialized countries during the early 20th century. It has been gradually extended beyond that perimeter, and has now a global reach through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), one of the multilateral agreements of the WTO. Whereas the TRIPs Agreement also covers copyright and related rights, trademarks, geographical indications and industrial designs, it is the duty to allow patents (and to protect patent holders) – or to set up "an effective *sui generis* system", to protect plant-breeders' rights – that present the greatest potential conflict with the right to development.

130. The TRIPs Agreement requires that WTO Members allow patents to be obtained "for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step [i.e., are non-obvious] and are capable of industrial application",[252] and that they protect such patents. In effect, the patent confers on the patent-holder a monopoly right prohibiting third parties from making, using, offering for sale or selling the patented product or from using the patented process, for a period of at least twenty years.[253]

131. The protection of plant breeders, developing new varieties of plants, deserves a specific comment.[254] The TRIPs Agreement provides that patents should not necessarily be available as regards plants and animals other than micro-organisms. However, WTO Members which do not allow the patentability of new plant varieties are expected to put in place, at a minimum, "an effective *sui generis* system", to provide at least some protection of plant-breeders' rights.[255] How the "effectiveness" of the protection is to be judged, remains disputed. Plant-breeders' rights are protected, in particular, under the International Convention for the Protection of New Varieties of Plants, developed under the auspices of the *Union Internationale pour la protection des obtentions végétales* (UPOV). The UPOV convention protects the rights of plant breeders provided they develop plant varieties which are new, distinct, uniform, and stable.[256] It was initially adopted in 1961, and it was most recently revised in 1991, strengthening further the rights of plant-breeders against those of farmers.[257] Clearly, WTO Members who do not wish to grant patents on plant varieties are *not* obliged to choose, instead, to grant plant variety protection (PVP) under the UPOV convention: Article 27(3)(b) of the TRIPS agreement deliberately did not refer to the UPOV convention when it was drafted.[258] WTO Members are, therefore, allowed to opt for a *sui generis* form of protection best suited to their specific circumstances. In particular, if they feel that the farmers' privilege of saving, sharing, and replanting seeds is unduly restricted under the 1991 version of the UPOV convention, they may choose not to adhere to UPOV, and opt instead for a *sui generis* protection for plant varieties. Indeed, it was one of the recommendations of the Commission on Intellectual Property Rights, established at the

252 Art. 27(1) of the TRIPs Agreement.

253 Art. 28 and 33 of the TRIPs Agreement.

254 See in detail Interim report of the Special Rapporteur on the right to food, Olivier De Schutter, to the 64th session of the General Assembly (UN doc. A/64/170) (27 July 2009) (on seed policies and the right to food).

255 Art. 27(3) of the TRIPs Agreement.

256 These criteria are lower than for the delivery of patents, since it is not required from plant breeders in UPOV-compliant legislations that, in addition, they comply with the criteria of non-obviousness (requiring an inventive step) and of utility (industrial applicability).

257 At the time of writing (October 2017), the UPOV convention had seventy-five members, including all large commercial powers with the notable exception of India. However, Brazil, China, and South Africa, in contrast to the US and EU are parties to the 1978 version of the UPOV convention, and not to the 1991 version. All countries joining the UPOV convention after 1999 are, in principle, obliged to accede to the 1991 version.

258 This assertion has been contested by some States, however. *See*, describing the range of positions adopted by states, Council for Trade-Related Aspects of Intellectual Property Rights, *Note by the Secretariat: The Protection of Traditional Knowledge and Folklore*, IP/C/W/370/Rev.1 (9 Mar. 2006).

initiative of the United Kingdom in 2002, that countries should tailor their plant variety protection (PVP) regime to their specific needs.

132. Nevertheless, in practice, developing countries increasingly have been led to adopt UPOV-compliant domestic legislation. This has often been the result of technical advice provided to developing countries, which often consists in recommending the adoption of UPOV-compliant domestic legislation, without taking into account the specific needs of the countries concerned or, for instance, differentiating between crops. In addition, developing countries sometimes may not have the required expertise to draw up domestic legislation which is truly *sui generis* and corresponds to their development needs. Finally, a number of developing countries have been pressured to adopt UPOV-compliant national legislation as part of trade or investment agreements they have concluded.[259] Some free trade agreements require the introduction of patent protection for plants, animals, and biotechnological innovations. Others refer to the need for both parties to ratify the 1991 UPOV convention, or to adopt legislation complying with that instrument.[260]

133. Whether we consider new products or processes or new plant varieties, the challenges posed by the strengthening of intellectual property rights at the global level are similar. The chief justification for the granting of patents on inventions (or for protecting plant breeders' rights) is that this would reward innovation. However, this argument has been increasingly criticized for a number of reasons. Scholars have noted that, while some innovation may be stimulated by the prospect of being awarded a patent, patents also block further creation, so that the net effect on the progress of science and technology is in many cases negative.[261] Indeed, for firms to innovate, they generally must be able to build on innovations from others, which patents may obstruct -- and in the most technologically advanced sectors as in software production, pharmaceuticals or the seeds industry, it is the need to overcome such "patent thickets" that explains the drive towards increased concentration of the industry.

134. The impacts of IP rights on economic growth, which increasingly relies on access to technologies and knowledge, are also being questioned. A recent review of 124 developing countries' intellectual property rights frameworks, seeking to identify correlations with economic growth and innovation, concluded that growth has an even greater effect on strengthened IP protection than the opposite, and that therefore IP protection's impact on growth should primarily be seen as indirect, stemming from what the authors call a "placebo" effect: the *belief* that strengthened IP rights shall stimulate growth (rather than the direct

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259 *See* GRAIN, *Bilateral Agreements Imposing TRIPS-Plus Intellectual Property Rights on Biodiversity in Developing Countries* (Mar. 2008), *available at* http://www.grain.org/rights_files/TRIPS-plus-March-2008.pdf. *See also Intellectual Property in Investment Agreements: The TRIPS-plus Implications for Developing Countries,* South Centre Analytical Note, SC/TADP/AN/IP/5, May 2005 (describing how North- South investment agreements are increasingly being used to expand the protection and enforcement of IP rights in developing countries).

260 *See, e.g.*, United States-Chile Free Trade Agreement, U.S.-Chile, art. 17.1(3), 6 June 2003, 42 I.L.M. 1026 (2003); United States-Morocco Free Trade Agreement, U.S.-Morocco, art. 15.1(2), 15 June 2004, 44 I.L.M 544 (2005); Central America-Dominican Republic-United States Free Trade Agreement, art. 15.1(5), 5 Aug. 2004, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements (requiring that all states ratify the 1991 UPOV convention by 1 January 2006, although Costa Rica (1 June 2007) and Nicaragua (1 Jan. 2010) benefit from further deadlines); United States-Peru Trade Promotion Agreement, U.S.-Peru, art. 16.1(3), 12 Apr. 2006, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements. An earlier example is the Agreement between the United States and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, art. 4(1), 24 Oct. 2000, 41 I.L.M. 63 (2002). (in addition, art. 4(17) of this agreement suggests that patents may have to be available for all technologies, including presumably biotechnologies or plant varieties ("patents shall be available for any invention, whether product or process, in all fields of technology, provided that it is new, involves an inventive step and is capable of industrial application")).

261 Michele Boldrin & David K. Levine, *Against Intellectual Monopoly* (Cambridge University Press, 2008), pp. 4 and 10-11. A similar point is made by James Bessen and Michael J. Meurer, *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk* (Princeton Univ. Press, 2008).

contribution of IP rights to favouring technology imports and innovation) has the virtues of a self-fulfilling prophecy.[262]

135. Finally, whereas strong IP rights protection has often been presented as a condition for the transfer of technologies through investment flows (i.e., firms owning the technologies would be reluctant to invest where their IP rights would not be adequately protected), in fact the real determinants of investment are the size of markets and the quality of the infrastructure and of the institutional framework: strong IP rights protection will not attract investors if these conditions are not present, and once these conditions are present, the weakness of IP rights protection would not appear to constitute a major obstacle.[263]

136. Article 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights states that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation into the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations". Yet, intellectual property rights have major impacts on a range of human rights, and in particular, on the right to development.

137. First, IP favours the technology-provider over the user of technology: the pharmaceutical company's search for profits are prioritized above the needs of the patients in need of a particular medicine, and the seed company may charge high prices to farmers, forcing them to incur high levels of debt in order to be able to plant varieties that the buyers demand. The prioritization of IP rights above human rights such as the right to food or the right to health should not be framed as the result of a weighing exercise between two conflicting rights, which are presumptively of equal value. The Committee on Economic, Social and Cultural Rights recalls that most IP rights are not human rights: "Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity".[264] Indeed, it states, "intellectual property is a social product and has a social function. States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education".[265]

138. In the area of public health, it is in order to respond to this concern that the 2001 WTO Ministerial Conference adopted the Doha Declaration on the TRIPS Agreement and Public Health, recognizing WTO Members' right to protect public health and promote access to medicines for all, and to use the flexibilities provided for by the TRIPs Agreement, including the provisions relating to compulsory licensing and parallel imports. However, in addition to pressures from the pharmaceutical industry or from trading partners, "TRIPs-plus" provisions in free trade agreements (extending IP rights beyond the minimum protection provided for in the TRIPs Agreement) or in Anti-Counterfeiting Trade Agreements may make it difficult for

[262] E. Richard Gold, Jean-Frédéric Morin and Erica Shadeed, "Does Intellectual Property Lead to Economic Growth? Insights from an Improved IP Dataset", *Regulation & Governance* (2017) DOI: 10.1111/rego.12165.

[263] Dean Baker, Arjun Jayadev and Joseph Stiglitz, *Innovation, Intellectual Property, and Development. A Better Set of Approaches for the 21st Century* (Shuttleworth, July 2017), p. 30.

[264] Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005): The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1(c) of the Covenant) (E/C.12/GC/17), para. 1. Although the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15(1)(c)), this is a human right stipulated in order to safeguard "the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living", whereas in contrast "intellectual property regimes primarily protect business and corporate interests and investments" (ibid., para. 2).

[265] Ibid., para. 35.

developing countries to use the flexibilities allowed for by the TRIPs Agreement.[266] This is one of the reasons why the SDGs again make reference to this Declaration in target 3.b, and refer (as target 3.8) to the objective of achieving "quality and affordable essential medicines and vaccines for all", thus providing a powerful reminder that the cost of medicines can significantly worsen the situation of those living in poverty who must dedicate a large part of their incomes to buying essential drugs.[267] This is also a duty of States under article 12 of the International Covenant on Economic, Social and Cultural Rights, which the Committee on Economic, Social and Cultural Rights views as requiring that "health facilities, goods and services ... be affordable for all",[268] and imposing as a core obligation that States "provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs".[269]

139. Quite apart from the direct impacts on the right to health or the right to food for technology users, the strengthening of IP rights may increase the gaps between countries, since most technology owners are firms headquartered in the industrialized counties, whereas a growing number of technology users are in the developing world. Moreover, though firms in emerging countries may come close to the technology frontier, the globalized IP rights regime is one in which the most technologically advanced firms capture all the benefits from their technologies being adopted worldwide.[270] This imbalance is recognized in article 66.2 of the TRIPs Agreement, which commits the developed country WTO Members to "provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base."

140. Third, where research and development of new products and processes is driven by the expectation of profits that patents may provide in the form of rents, the direction of innovation is biased towards the needs of the wealthiest groups of the population, or those that prevail in affluent countries. Medicines will not be designed for diseases that are specific to tropical countries, for instance, and agronomic research will not focus on crops (such as tropical maize, sorghum, millet, banana, cassava, groundnut, oilseed, potato or sweet potato) which are of interest chiefly to poor farmers in developing countries: these are "orphan" diseases or crops because of a lack of interest of research where it is motivated by the expectation of gain stimulated by intellectual property rights.

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266 It is this kind of agreement that the Committee on Economic, Social and Cultural Rights had in mind when it noted that, as part of their international obligations in relation to article 12 of the International Covenant on Economic, Social and Cultural Rights, "States parties have to respect the enjoyment of the right to health in other countries", *inter alia* by refraining from concluding international agreements that may "adversely impact upon the right to health" (General Comment No. 14 (2000): The right to the highest attainable standard of health (E/C.12/2000/4), para. 39). Similarly, the Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH), established in 2004 by WHO at the request of the World Health Assembly, recommended that "bilateral trade agreements should not seek to incorporate TRIPS-plus protection in ways that may reduce access to medicines in developing countries" (WHO, *Public Health, Innovation and Intellectual Property Rights: Report of the Commission on Intellectual Property Rights, Innovation and Public Health* (Geneva: WHO, 2006), recommendation 4.26).

267 One indicator associated with target 3.8 is the "proportion of population with large household expenditures on heath as a share of total household expenditure or income" (3.8.2).

268 Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000): The right to the highest attainable standard of health (E/C.12/2000/4), para. 12, b), iii) (noting that "equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households").

269 Ibid., para. 43, d).

270 As noted by Baker, Jayadev and Stiglitz: "Developing economies are, almost by definition, significantly distant from the global innovation and production frontier. While individual industries and firms can often be close to the frontier, the generalised adoption of latest generation technologies and the garnering of the positive externalities that often result from these is a key feature of advanced industrialised economies. What separates developing from developed countries is as much a gap in knowledge as a gap in resources" (Baker, et al., *Innovation, Intellectual Property, and Development*, cited above, p. 29).

141. It is in order to respond to this issue that the 2008 Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines, issued by the Special Rapporteur on the right to the highest attainable standard of health,[271] encourage companies to publicly commit to "contribute to research and development for neglected diseases" and to "either provide in-house research and development for neglected diseases, or support external research and development for neglected diseases, or both".[272] It is this concern also that led to the establishment in 2006, under the auspices of the WHO, of the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property,[273] which led in 2008 to the adoption of a Global Strategy on Public Health, Innovation and Intellectual Property (GSPA-PHI) [274] and a Plan of Action,[275] providing "a medium-term framework for securing an enhanced and sustainable basis for needs-driven essential health research and development relevant to diseases which disproportionately affect developing countries, proposing clear objectives and priorities for research and development, and estimating funding needs in this area".[276] It is this concern, finally, that led to the inclusion within the SDGs of a target (3.3) to end, by 2030, "the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases and combat hepatitis, water-borne diseases and other communicable diseases", one of the indicators for which is the "number of people requiring interventions against neglected tropical diseases" (3.3.5), while another target (3.b) is to "support the research and development of vaccines and medicines for the communicable and non-communicable diseases that primarily affect developing countries".

Extraterritorial obligations	
Respect	(F1.1) Refrain from including "TRIPs-plus" provisions in bilateral or regional free trade agreements or in Anti-Counterfeiting Trade Agreements
Protect	(F2.1) Ensure that corporations domiciled in the territory and/or jurisdiction of the State, do not claim protection of IP rights, when this would lead to threaten human rights such as the right to the highest attainable standard of health or the right to food
	(F2.2) Incentivize such corporations to take into account the Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines, and to dedicate a larger part of the research and development efforts to design vaccines and medicines for the communicable and non-communicable diseases that primarily affect developing countries
	(F2.3) Incentivize such corporations in the seed sector to dedicate a larger part of the research and development efforts to improve plant varieties that are primarily cultivated as food crops in developing countries
Fulfil	(F3.1) Consistent with article 66.2 of the TRIPs Agreement, design incentives and adopt regulations that actively encourage corporations domiciled in the territory and/or jurisdiction of the State to transfer technologies in the LDCs, for instance by concluding licensing agreements with local partners

[271] The guidelines are annexed to the report presented by the Special Rapporteur on the right to the highest attainable standard of health to the 63rd session of the General Assembly (A/63/263) (11 August 2008).

[272] Guideline 24. As explained in the commentary to the guidelines: "By providing an incentive for pharmaceutical companies to invest in research and development, the intellectual property regime makes a major contribution to the discovery of new medicines that save lives and reduce suffering. Where there is no economically viable market, however, the incentive is inadequate and the regime fails to generate significant innovation. For this reason, a different approach is needed to address the vitally important right-to-health challenge of neglected or poverty-related diseases [which] mainly afflict the poorest people in the poorest countries. The record shows that research and development has not addressed key priority health needs of low-income and middle-income countries. More specifically, research and development has given insufficient attention to neglected diseases".

[273] This followed one of the recommendations of the Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH), referred to above.

[274] World Health Assembly, res. WHA61.21, annex.

[275] Ibid., annex.

[276] Global Strategy, para. 13.

Extraterritorial obligations	
Global obligations	
Establish new partnerships	(F4.1) Contribute to the establishment of new tools, including funding, to support research and development on neglected diseases and crops.
Operate within partnerships	
Implement partnerships	(F6.1) Take concrete actions to implement the commitments listed in the Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property (GSPA-PHI) which are still pending implementation.

2. Corresponding indicators

Structural indicators	*Process indicators*	*Outcome indicators*
(F1.1) Bilateral or regional free trade agreements or in Anti-Counterfeiting Trade Agreements do not contain "TRIPs-plus" provisions.		(F2.2 and F2.3) Percentage of total research and development expenditures (both private and public) that is dedicated to vaccines and medicines for the communicable and non-communicable diseases that primarily affect developing countries, and to food crops that are primarily cultivated in developing countries (F3.1) Number of licensing agreements concluded with local partners by the corporations domiciled in the territory and/or jurisdiction of the State, favoring transfers of technologies to such partners

G. Establishing universal social protection floors

1. Attributes of the duty to support universal social protection floors

142. In June 2012, the General Conference of the International Labour Organisation adopted Recommendation (No. 202) Concerning National Floors of Social Protection, referred to as Social Protection Floors Recommendation, 2012. An overwhelming majority of delegates from the ILO's 185 member States, including government, employer and worker delegates, supported the initiative, with 453 votes in favour of adopting the Recommendation and one abstention. Social protection and, in particular, universal social protection, figure prominently among the set of SDGs: Goal 1.3 is to "Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and vulnerable".

143. Recommendation No. 202 defines social protection floors as "nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion."[277] The Recommendation calls on ILO member States, "in accordance with national circumstances", to "establish as quickly as possible and maintain their social protection floors comprising basic social security guarantees."[278] Social protection floors as envisaged in Recommendation No. 202 should include at least four basic social security guarantees: (a) access to a nationally defined set of goods and services,

[277] International Labour Organisation, Text of the Recommendation Concerning National Floors of Social Protection, para. 2 (2012).

[278] ILO, Recommendation Concerning National Floors, at para. 4.

constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality; (b) basic income security for children providing access to nutrition, education, care and any other necessary goods and services, at a nationally defined minimum level; (c) basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and (d) basic income security, at least at a nationally defined minimum level, for older persons.[279]

144. Since it was initially articulated, the concept of the social protection floor has been gaining international recognition and support.[280] The United Nations Chief Executive Board adopted the Social Protection Floor Initiative in April 2009 as one of the nine UN joint initiative multilateral actions to address the global crises of 2008 (food, financial and economic). The social protection floor approach was again endorsed by the United Nations Chief Executives Board and by the Heads of State and Government in the 2010 Millennium Development Summit, where it was part of an integrated set of "social policies designed to guarantee income security and access to essential social services for all, paying particular attention to vulnerable grounds and protecting and empowering people across the life cycle."[281] Following the publication of the ILO's Advisory Group's Report in 2011 and only days after the adoption of Recommendation No. 202, the leaders of the G-20 meeting in Los Cabos on 18-19 June 2012 released a declaration in which they offered support for the promotion and adoption of social protection systems.[282] Similar messages have also been put forward, for instance, in the High Level Segment Ministerial Declaration of the United Nations Economic and Social Council.[283]

145. The international dimensions related to the universal establishment of social protection floors has been comparatively neglected. That dimension, however, was present from the outset. Recommendation No. 202 was inspired by the report presented on 27 October 2011 by the Social Protection Floor Initiative's advisory group convened by the ILO with the collaboration of the World Health Organization (WHO).[284] The report includes recommendations for coherence and coordination among international organizations and calls for innovative solutions to address economic shocks, structural changes and sustainability as well as for finding creative sources for financing social protection.[285] It stresses the importance of linking the social protection floor initiative to other strategies on the international level, noting that adopting social protection could be a major step towards achieving the UN Millennium Development Goals in 2015, in particular to eradicate extreme poverty and hunger, reduce child mortality rates, improve maternal health and combat

[279] *Id.* at para. 5.

[280] For a list of endorsements of the Social Protection Floor, see International Labour Organisation, Social Protection Flood Advisory Group: International Endorsement, http://www.ilo.org/public/english/protection/spfag/endorsement/index.htm.

[281] Advisory Report, at xxii.

[282] G-20, Leaders Declaration, at para. 22 (Mexico, 2012). The Declarations supports this by stating "Recognizing the impact of the continuing crisis on developing countries, particularly low income countries, we will intensify our efforts to create a more conducive environment for development, including supporting infrastructure investment. Our policy actions will improve living conditions across the globe and protect the most vulnerable. In particular, by stabilizing global markets and promoting stronger growth, we will generate significant positive effects on development and poverty reduction across the globe." *Id.* at para. 9.

[283] *See* High Level Segment of the United Nations Econ. & Soc. Council, Draft Ministerial Declaration of the 2012 High-Level Segment para. 10, E/2012/L.10 (July, 2012) ("We stress the need to provide social protection to all members of society, fostering growth, resilience, social justice, and cohesion, including those who are not employed in the formal economy. In this regard, we strongly encourage national and local initiatives aimed at providing social protection floors for all citizens. We support global dialogue on best practices for social protection programmes that takes into account the three dimensions of sustainable development and, in this regard, we note the International Labour Organization Recommendation 202 concerning National Floors of Social Protection.").

[284] Advisory Group, *Report of the Advisory Group: Social Protection Floor for a Fair and Inclusive Globalization* (International Labour Organisation, Geneva, 2011).

[285] Advisory Report, at xi-xii, 71-75, 82-83.

HIV/AIDS, malaria and other diseases.[286] Perhaps in response, Recommendation No. 202 provides that, while "national social protection floors should be financed by national resources", "Members whose economic and fiscal capacities are insufficient to implement the guarantees may seek international cooperation and support that complement their own efforts".[287]

146. The international dimension of the effort to establish national social protection floors remains conspicuously absent, however, from the Concept Note presenting the Global Partnership for universal social protection to achieve the Sustainable Development Goals, presented jointly by the ILO and the World Bank Group on 21 September 2016, which refers instead to the "sustainable domestic financing" of national social protection floors, and does not refer to international assistance among the sources of financing -- although it does mention "using reductions of debt or debt servicing" to that effect.[288] This is particularly disappointing, since Goal 1.6 of the Sustainable Development Goals is to "Ensure significant mobilization of resources from a variety of sources, including through enhanced development cooperation, in order to provide adequate and predictable means for developing countries, in particular least developed countries, to implement programmes and policies to end poverty in all its dimensions".

147. International obligations are key, however, to the realization of right to social security, and thus to the achievement of SDG 1 and to the right to development. A number of proposals have been made in this regard. In 2002, the Independent Expert on the right to development argued in favour of the conclusion of development compacts between developing countries adopting a development programme through participatory means (setting out the sequence of measures to be adopted) and donors (who would accept a responsibility to support the programme), adequately supervised by a monitoring mechanism to ensure each party complies with its commitments.[289] In October 2012, the Special Rapporteur on the right to food and the Special Rapporteur on extreme poverty and human rights jointly proposed the establishment of a new fund, called the Global Fund for Social Protection, which, they suggested, could provide two services: (1) to respond to “structural,” or endemic, poverty by providing support for States to meet basic social protection floors; and (2) to serve as a reinsurance provider offering protection to the State against unexpected shocks to their social insurance systems, thus allowing LDCs, whose economies are typically less diversified and more susceptible to shocks due to weather-related events or to sudden commodity price variations, to cede the relevant risks and sustainably operate social protection systems.[290] The proposal was referred to (though not explicitly endorsed) by the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda in the Report they submitted in May 2013 to the Secretary-General.[291] The Committee on Economic, Social and Cultural Rights saw it as "an important step in the right direction [that] could support initial investment in sustainable

[286] Advisory Report, at 39-41, 96.

[287] ILO, Recommendation Concerning National Floors, at para. 12.

[288] Concept Note, p. 3.

[289] Thus conceived, development compacts are "a mechanism for ensuring that all stakeholders recognize the mutuality of obligations, so that the obligations of developing countries to carry out rights-based programmes are matched by reciprocal obligations of the international community to co-operate to enable the implementation of the programmes. The purpose of development compacts is to assure the developing countries that if they fulfil their obligations, the programme for realizing the right to development will not be disrupted owing to lack of financing" (*Fifth Report of the Independent Expert on the Right to Development*, E/CN.4/2002/WG.18/6, para. 14). Such development compacts thus clarify, by mutual agreement, the content of the obligations that correspond to the right to development, both for developing countries and for developed countries that are in a position to assist (see also A. Sengupta, ‘On the Theory and Practice of the Right to Development’, *Human Rights Quarterly*, 24, No. 4 (2002), 837–89).

[290] Special Rapporteur on the right to food and Special Rapporteur on extreme poverty and human rights, *Underwriting the Poor: A Global Fund for Social Protection* (October 2012).

[291] *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development*, Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda (May 2013), p. 60.

public social protection systems", in the Statement on social protection floors it adopted in March 2015.[292]

148. Various contributions presented to the Third International Conference on Financing for Development referred to this proposal and suggested various modes of implementing it.[293] The Addis Ababa Action Agenda includes a call to establish "fiscally sustainable and nationally appropriate social protection systems and measures for all, including floors, with a focus on those furthest below the poverty line and the vulnerable, persons with disabilities, indigenous persons, children, youth and older persons".[294] It remains vague, however, on the international dimension, although the Heads of State and Government and High Representatives do pledge to provide "strong international support for these efforts".[295]

149. Nor does the Addis Ababa Action Agenda take into consideration the impact of structural adjustment programmes (now generally referred to as poverty reduction strategy documents), the adoption of which has been imposed by international financial institutions in exchange for loans, on the ability of countries to finance social protection schemes. However, such programmes have major impacts in low-income countries.[296] Strongly diverging views exist as to whether these programmes have included sufficient social safeguards in the past: for instance, whereas an IMF Staff Policy Paper argued, in May 2017, that two thirds of IMF-supported programmes included targets for social spending or other priority spending, on sectors such as health and education,[297] researchers have reviewed the data presented and have challenged the effectiveness of the social safeguards, which have been routinely ignored as priority has been given to cuts in social spending to maintain budget balance, criticizing the methodology followed by the Fund in its study.[298] Moreover, the IMF advocates greater targeting of social spending, in the name of the improved effectiveness of social programmes, whereas many fear that targeting create a risk of exclusion, particular of the most marginalized groups of the population.

Extraterritorial obligations	
Respect	
Protect	
Fulfil	(G3.1) Support the establishment of social protection floors through ODA

[292] Committee on Economic, Social and Cultural Rights, Statement on social protection floors: an essential element of the right to social security and of sustainable development goals (E/C.12/54/3), para. 15.

[293] In particular, the Global Coalition for Social Protection Floors proposed the setting up of Global Fund for Social Protection Floors (GFSPFs), t**o** "provide technical support for national efforts to plan and design national SPFs and the training of national planning and administrative staff", and to "co-finance of SPF transfers in exceptional cases" (*Global Coalition Paper: A Global Fund for Social Protection: A proposal for the Conference on Financing for Development* (April 2015), see: http://www.socialprotectionfloorscoalition.org/wp-content/uploads/2015/05/FfD_GFSP14April2015final.pdf). The proposal also received support from the International Labour Office.

[294] Addis Ababa Action Agenda, cited above note 8, para. 12.

[295] Id.

[296] See, e.g., A. Kentikelenis, "Structural adjustment and health: A conceptual framework and evidence on pathways", *Social Science & Medicine* (2017). doi: 10.1016/j.socscimed.2017.02.021; A. Kentikelenis, T. Stubbs, and L. King, "IMF conditionality and development policy space, 1985–2014", *Review of International Political Economy*, 23 (2016), pp. 543–582. doi: 10.1080/09692290.2016.1174953.

[297] IMF, Social safeguards and program design in PRGT and PSI-supported programs, 21 April 2017, available at: http://www.imf.org/en/Publications/Policy-Papers/Issues/2017/06/01/pp042117social-safeguards-and-program-design-in-prgt-and-psi. PRGT refers to the concessional financial granted through the Funds' Poverty Reduction and Growth Trust; PSI refers to Policy Support Instrument provided by the Fund.

[298] T. Stubbs and A. Kentikelenis, "Targeted social safeguards in the age of universal social protection: the IMF and health systems of low-income countries", *Critical Public Health* (2017), doi.org/10.1080/09581596.2017.1340589.

Extraterritorial obligations	
Global obligations	
Establish new partnerships	(G4.1) Launch a negotiation on a new international mechanism for the financing of the establishment of social protection floors in low-income countries (countries with a gross national income per capita of less than US$1,215).
Operate within partnerships	(G5.1) As members of international financial institutions, ensuring that structural adjustment programmes imposed on Borrowers include social safeguards ensuring that priority shall not go to reducing public deficits at the cost of the right to social security
Implement partnerships	

2. Corresponding indicators

Structural indicators	*Process indicators*	*Outcome indicators*
(G4.1) Take steps towards negotiating a new international mechanism for the financing of the establishment of social protection floors in low-income countries (countries with a gross national income per capita of less than US$1,215).	(G3.1) Proportion of ODA that is dedicated to the establishment of social protection floors, including through capacity-building	

VI. Operationalizing the international dimensions of the right to development at domestic level: institutional and policy frameworks

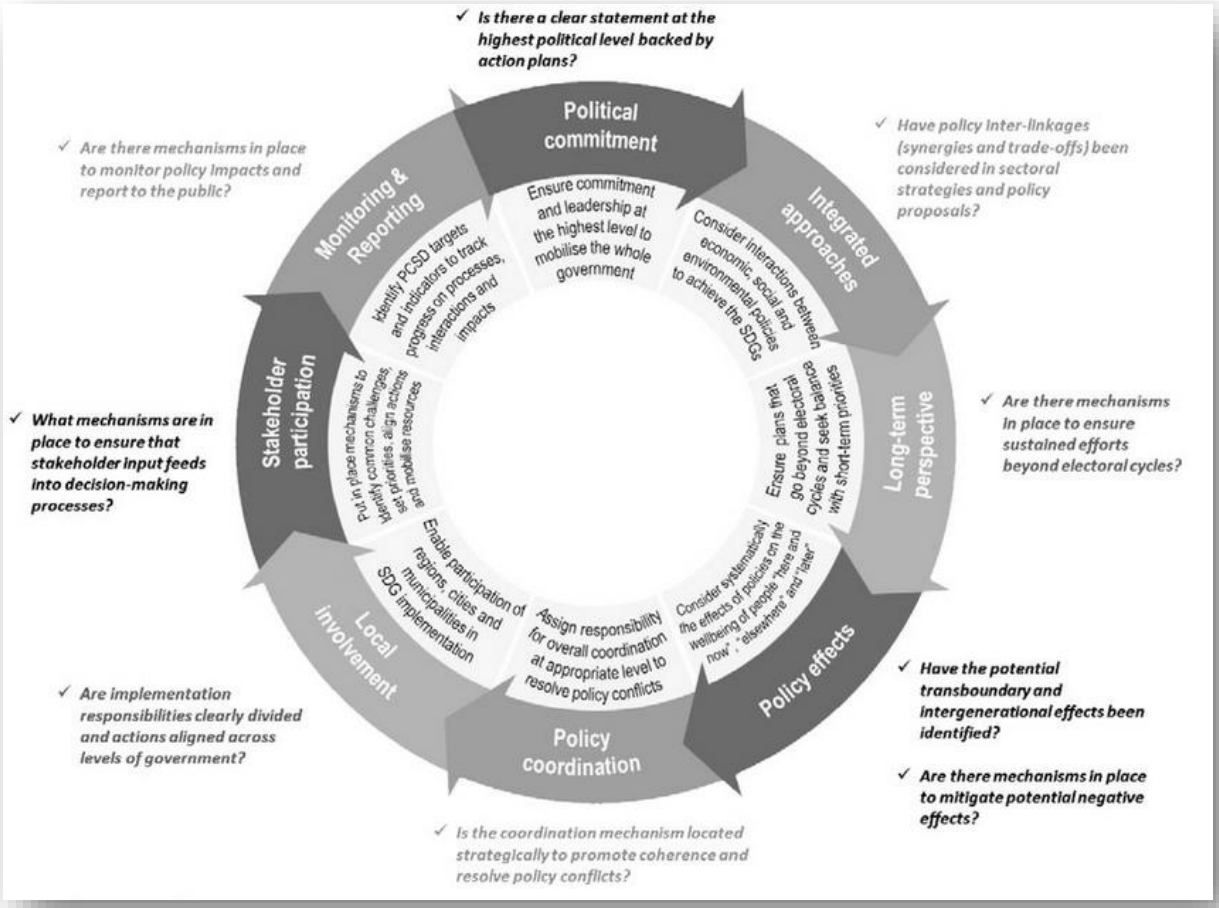
150. In order to discharge their international obligations in support of the right to development, States should establish appropriate institutional mechanisms ensuring that their extraterritorial and global obligations are complied with. The tools developed to ensure policy coherence for sustainable development, insofar as they aim to ensure synergies across different policy areas with a view to supporting sustainable development in its transboundary (and intergenerational) dimensions, may be built on in this regard, where such tools already exist.

151. Target 17.14 of the Sustainable Development Goals refers to the need to enhance policy coherence for sustainable development (PCSD), and the associated indicator is the number of countries with mechanisms in place to enhance policy coherence of sustainable development (17.14.1). Policy coherence for development (as it was initially referred to) aims to ensure that the policies developed countries design and implement in areas that may have an impact on developing countries (such as trade, investment, technology transfer and intellectual property, or international cooperation in the area of taxation and in the fight against illicit financial flows) shall support, and not undermine, development efforts. The OECD refers to eight "building blocks" which contribute to PCSD.

These are:

Political commitment and leadership	PCSD requires a whole-of-government approach ensuring that the SDGs are translated into concrete and coherent actions at international, national and local levels.
Integrated approaches to implementation	Implementation measures should consider the linkages between economic, social and environmental policy areas before their adoption.
Intergenerational timeframe	Prior to the adoption of decisions, the long-term impacts (and impacts on future generations) should be considered.
Analysis and assessments of potential policy effects	The potential impacts, both positive and negative, of decisions on the well-being of people in other countries, should be assessed prior to the adoption of a decision.
Policy and institutional coordination	Conflicts of interests or inconsistencies between different priorities and policies should be addressed.
Local and regional involvement	Different levels of government should be assigned responsibilities in the implementation of the SDGs.
Stakeholder participation	In order to ensure that SDGs are owned by people, actions should be taken to mobilize knowledge and resources about the Goals.
Monitoring and reporting	Assess where progress has been achieved and where it has been lacking, in order to take corrective measures and accelerate learning.

152. The following chart, developed by the OECD PCD Unit, provides a useful summary of the various "building blocks" that can ensure policy coherence for sustainable development:



Source: OECD PCD Unit, in Policy Coherence for Sustainable Development 2017: Eradicating Poverty and Promoting Prosperity (Paris: OECD, 2017), chap. 2, p. 5.

153. Although the concrete institutional tools that States have established in order to deliver on PCSD differ from State to State, such tools typically include the following: (i) an inter-ministerial taskforce or an office located under the prime minister in order both to demonstrate political commitment at the highest level and to ensure coordination across policy areas; (ii) a strategic framework or action plan, regularly updated in line with the evolving international political commitments, to set the general direction, to ensure consistent approaches across different levels of government (national, regional, local) and to better take into account intergenerational timeframes and the need to preserve and enhance stocks of capital (economic, natural, human and social); (iii) tools to assess the long-term impacts of measures adopted now and to assess the potential transboundary effects, i.e., how production and consumption, as well as policy choices, in one country, may affect the well-being of populations elsewhere (in particular, through finance, trade, migration and knowledge transfers)[299]; (iv) platforms or fora allowing for a broad participation of various parts of society, including the private sector and civil society (ensuring a "whole-of-society" approach and thus facilitating ownership),[300] whether within or outside parliament, in order to increase

[299] For instance, production and consumption patterns in one country may affect the use of natural resources in other countries, making it more difficult for those other countries to ensure a sustainable use of such resources; the international division of labour encouraged by trade relations may be an obstacle to the diversification of the economies of raw materials exporting countries; migration policies may lead to "brain-drain" at the risk of creating obstacles to the development of countries from where trained professional emigrate.

[300] Target 16.7 of the Sustainable Development Goals is to ensure "responsive, inclusive, participatory and representative decision-making at all levels". Target 17.16 of the Sustainable Development Goals includes the establishment of "multi-stakeholder partnerships that mobilize and share knowledge,

accountability, to help addressing trade-offs between different components of the 2030 Agenda for Sustainable Development, and to identify the social and technological innovations that can support changes in production patterns and in lifestyles within the population; (v) robust monitoring and reporting tools to ensure that the strategies in place are regularly adjusted in the light of their results, and to increase accountability and transparency in their implementation.

154. The institutional frameworks that have been set up since the Rio Earth Summit of 1992 in support of sustainable development, and that have been gradually established in OECD countries since the mid-1990s in support of policy coherence for development, are now merging into mechanisms for policy coherence for sustainable development. They aim to ensure both a "whole-of-government" approach and a "whole-of-society" approach; to integrate both an intergenerational perspective and a transboundary perspective on policy choices; and to ensure adequate monitoring, accountability and feedback.

155. The growing preoccupation with the establishment of institutional and policy frameworks to ensure Policy Coherence for Sustainable Development (PCSD) presents an opportunity for the implementation of the right to development, not only in its national dimension, but also as regards its extraterritorial and global dimensions. Such frameworks aim to assess the transboundary impacts of production and consumption patterns and policy choices. They therefore could be adjusted to serve the implementation of the right to development, by relying on indicators guiding impact assessments that are informed by the normative content of human rights. This would give such indicators a strong legitimacy, and allow them to serve as a bridge between sustainable development and human rights.

1. Corresponding indicators[301]

Structural indicators	*Process indicators*	*Outcome indicators*
(H1.1) Mechanisms are established to ensure monitoring and follow-up of the international dimensions of the right to development, including an independent component (a platform involving the participation of stakeholders outside the Executive)	(H1.2) The mechanisms are sufficiently well resourced to ensure their independence and effectiveness	(H1.3) Both unilateral measures adopted by the State and its conduct as actor in international relations are assessed in relation to the right to development

expertise, technology and financial resources, to support the achievement of the Sustainable Development Goals in all countries, particularly developing countries"; the associated indicator (17.16.1) is the number of countries reporting progress in the establishment of multi-stakeholder development effectiveness monitoring frameworks" that support achievement of the SDGs.

[301] For ease of exposition, the indicators in this table are labelled "H", as if the institutional dimension of the implementation of the international dimensions of the right to development were an eighth substantive area (following the seven areas discussed in the previous section).

Annex: Summary table of indicators

	Structural indicators	*Process indicators*	*Outcome indicators*
A. Alleviating the burden of foreign debt	(A2.1) Legislation adopted against vulture funds (A5.1) The State votes within IFIs in order to respect the debtor State's independent process of national development, and to ensure that adjustment programmes include social and human rights safeguards.		(A1.3 and A4.1) Loan agreements (i) are preceded by a human rights impact assessment, (ii) include a provision allowing for the renegotiation / restructuring of the debt where needed (A2.1) Commercial creditors are prohibited from filing claims that are manifestly disproportionate, and foreign judgments in favour of vulture funds pursuing a disproportionate profit are refused execution
B. Eliminating illicit financial flows	(B1.1) The average tax rate on corporate profits is not reduced, and it is increased where necessary to be aligned with the regional average. (B2.1) Corporations domiciled in the State concerned are required to report publicly on the profits made, on a country-by-country basis. (B4.1) Steps are taken to towards a multilateral convention putting in place a consolidation and apportionment system for taxing global corporate profits, leading to treat transnational corporations as single and unified firms. (B5.1 and B5.2) Accession to the OECD Convention on Mutual Administrative Assistance in Tax Matters and to the Multilateral Convention to Implement	(B3.2) Portion of ODA directed towards the strengthening of tax administrations	(B3.1) Tax havens are closed following the reform of bank secrecy laws and the generalization of the automatic exchange of information between tax authorities. (B4.1) Tax conventions incorporate the "arm's length principle" as a means to combat tax avoidance through transfer pricing, taking into account the United Nations Model Double Taxation Convention between Developed and Developing Countries

	Structural indicators	*Process indicators*	*Outcome indicators*
	Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI)		
C. Supporting the right to development through official development assistance	(C1.1) A mechanism ensures that the impacts on the right to development in other countries of measures adopted by the State concerned are assessed, relying on the tools established to ensure policy coherence for sustainable development (PCSD) where such tools exist. (C4.1) Steps are taken to encourage the adoption of a multilateral framework to guide the use of blended finance to support the achievement of SDGs	(C2.1) Support provided through ODA or through other (non-concessional) means is made conditional on compliance of the beneficiary with the UN Guiding Principles on Business and Human Rights (C3.1) Rich countries dedicate 0.7 per cent of their GNI to ODA (and 0.15 to 0.20 per cent to least developed countries)*	(C3.1) Effectiveness of aid, as measured by the indicators of aid effectiveness relied on by the Global Partnership for Effective Development Co-operation*
D. Putting trade in the service of the right to development	(D1.1) Before being signed, all trade agreements are preceded by a human rights impact assessment. (D2.1) All corporations domiciled in the territory and/or jurisdiction of the State are required to comply with the full range of internationally recognized human rights wherever they operate, and to exercise due diligence to ensure that their subsidiaries and business partners comply with human rights.		(D3.1) % of trade that is subject to mechanisms ensuring that the goods and services imported are produced in conditions that respect human rights, including labour rights as stipulated in the core ILO conventions.
E. Channelling foreign direct investment towards development needs	(E4.1) Judicial cooperation / mutual legal assistance improved, in support of the prosecution or litigation of human rights abuses that have a transnational dimension	(E1.1) Resources dedicated to ensure adequate monitoring of investments that could negatively impact human rights and the right to development in the host country, including by ensuring victims have access to legal aid	(E4.2) Proportion of investment treaties that include a clause referring specifically to the primacy of human rights and to the requirement that the protection of investors' rights should not interfere with the right to development

	Structural indicators	*Process indicators*	*Outcome indicators*
F. Intellectual property rights and technology transfers	(F1.1) Bilateral or regional free trade agreements or in Anti-Counterfeiting Trade Agreements do not contain "TRIPs-plus" provisions.		(F2.2 and F2.3) Percentage of total research and development expenditures (both private and public) that is dedicated to vaccines and medicines for diseases that primarily affect developing countries, and to food crops that are primarily cultivated in developing countries (F3.1) Number of licensing agreements concluded with local partners by the corporations domiciled in the territory and/or jurisdiction of the State, favouring transfers of technologies to such partners
G. Establishing universal social protection floors	(G4.1) Negotiation of a new international mechanism for the financing of the establishment of social protection floors in low-income countries (countries with a gross national income per capita of less than US$1,215).	(G3.1) Proportion of ODA that is dedicated to the establishment of social protection floors, including through capacity-building	
H. Institutional mechanism established to ensure policy coherence for the right to development, building on PCSD mechanisms	(H1.1) Mechanisms are established to ensure monitoring and follow-up of the international dimensions of the right to development, including independent component by participation of stakeholders outside the Executive	(H1.2) The mechanisms are sufficiently well resourced to ensure their independence and effectiveness	(H1.3) Both unilateral measures adopted by the State and its conduct as actor in international relations are assessed in relation to the right to development