**SUBMISSION TO THE UNITED NATIONS GENERAL ASSEMBLY ON**

**THE DRAFT CONVENTION ON THE RIGHT TO DEVELOPMENT**

**[A/HRC/WG.2/21/2]**

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# About the Legal Resources Centre

1. The Legal Resources Centre (LRC) is a public interest, non-profit law clinic in South Africa founded in 1979. The LRC has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument for justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights jurisprudence and the social and economic transformation of society. As such, the right to development is central to our work.
2. The LRC has had consultative status at the United Nations Economic Social Council since 2017.[[1]](#footnote-2) It is in this capacity that we submit our comments on the Draft Convention on the Right to Development.

# Introduction

1. The LRC welcomes the call for comments on the Draft Convention on the Right to Development (Draft Convention).
2. The Right to Development forms an essential framework in promoting the advancement of human rights by making the individual a central component of human rights development. The progressive advancement of a theory of development provides a meaningful roadmap for the realisation of a comprehensive right to development which ensures the utmost advancement of human rights.
3. The LRC supports the Draft Convention’s alignment with the progressive international human rights recognition of a ‘structural approach’ to human rights that balances the addressing of individual human rights violations with equal attention to the causes thereof. The formulation of a human right to development as part of the structural approach to human rights aligns with this recognition.[[2]](#footnote-3)
4. The right to development also has specific significance in the African context. As the African Commission remarked in the landmark case of *SERAC v Nigeria*, the origins of the right to development entrenched in Article 21 of the African Charter on Human and Peoples’ Rights can be:

“[T]raced 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. The drafters of the [African] 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”.[[3]](#footnote-4)

1. We note in this regard the African Commission’s Resolution 224/2012 and its reference to “the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights of access and control of various resources, including land, minerals, forestry and fishing”.[[4]](#footnote-5)

**Preamble**

1. Paragraph 2 to the Preamble expresses concern over the “existence of serious obstacles to the realization of the right to development”. We welcome the expansive and open-ended list of obstacles listed.
2. We, nonetheless, recommend that explicit reference be made to gender inequalities and the impact thereof on the right to development. This is of particular importance given Article 16 of the Draft Convention.
3. In addition, we recommend an explicit reference be added under Paragraph 2 to “the continued disregard for customary and alternative forms of tenure” as a serious obstacle to the right to development.
4. Paragraph 3 to the Preamble emphasises the right to development as an inalienable right of all human persons and peoples. It is advised that it be added that the right to development cannot be denied. We recommend that the paragraph be amended to read as follows;

“Emphasizing that the right to development is an inalienable human right of all human persons and peoples *that cannot be denied based on any ground*, and that equality of opportunity for development is a prerogative both of nations and of individuals who constitute nations” [*recommended insertion*].

# Part I

# Articles 1-3

1. Articles 1-3 deals with the object and purpose of the Draft Convention, relevant definitions, as well as general principles.
2. We are satisfied with the content of these provisions. We note that no definition is provided for ‘peoples’. The African Commission has assigned different meanings to this term in relation to the right to development. We support such a flexible approach but note how foundational this term is to the text as a whole.

**Part II**

**Article 4 – The right to development**

1. We welcome the inclusion of this provision.

**Article 5 – Relationship with the right to self-determination**

1. We welcome article 5 of this convention and highlight the importance of the right to self-determination. The Charter of the United Nations expressly establishes the right to self-determination in article 1.[[5]](#footnote-6)
2. Article 5(1) states that “The right to development implies the full realization of the right of all peoples to self-determination”.
3. Article 5(2) states that “All peoples have the right to self-determination by virtue of which they freely determine their political status and freely pursue the realization of their right to development”.
4. To ensure that article 5(1) is holistic in its scope, we propose that Article 5(1) be amended to read as follows: “The right to development implies the full realization of the right of all peoples to self-determination and freely pursue the realization of their right to development”.
5. Article 5(5) specifically refers to the prevention and elimination of “massive” and “flagrant" violations of human rights. We propose removing both these terms to ensure that all violations of human rights are eliminated, regardless of their size or scope.
6. Article 5(5) also specifically refers to all forms of racial discrimination. To ensure a more comprehensive and consistent approach with this convention, we propose that this article be amended to refer to all forms of discrimination.
7. As such, we recommend that Article 5(5) be amended to read as follows: “States shall take resolute steps to prevent and eliminate violations of the human rights of persons and people affected by situations such as those resulting from apartheid, all forms of racism and discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and the refusal to otherwise recognize the fundamental right of people to self-determination”.

**Articles 6-7:**

1. We are satisfied with the content of these provisions.

**Part III**

**Article 8 – General obligations of States Parties**

1. We welcome the inclusion of general obligations on State Parties without discrimination.
2. Given the progressive development under international and regional human rights law prohibiting discrimination based on sexual orientation, we nonetheless recommend that this ground be explicitly included under Article 8(1). In this regard, we refer the following resolutions, decisions, and concluding observations adopted by United Nations treaty bodies.
3. As a point of departure, it should be noted that the Human Rights Council has adopted Resolution 17/19 and Resolution 27/32 which specifically deals with the discrimination and violence against persons based on their sexual orientation and gender identity, calling on UN member states to take steps to recognise the inherent rights of all persons regardless of their sexual orientation and gender identity.[[6]](#footnote-7)
4. Importantly, Resolution 27/32 appointed the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity. The Independent Expert is mandated to assess how international human rights instruments have been implemented to address violence and discrimination against persons based on their sexual orientation and gender identity and to “address the multiple and intersecting and aggravated forms of violence and discrimination” committed against them.[[7]](#footnote-8)
5. The Independent Expert has, in its reports, expressed concern over the human rights violations that individuals face based on their sexual orientation.[[8]](#footnote-9)
6. Beyond the Independent Expert, the Human Rights Commission have also found right violations under the International Convention on Civil and Political Rights as a result of discrimination based on sexual orientation. The relevant decisions include *Toonen v Australia*[[9]](#footnote-10), *Young v Australia*[[10]](#footnote-11), and *Fedotova v Russia*[[11]](#footnote-12). Similarly, the Committee for Economic, Social and Cultural Rights have also referred to the prohibition of discrimination based on sexual orientation under “other status” in its general comments. For example, General Comment 14 referred to the prohibition of discrimination based on sexual orientation in the context of the right to the highest attainable standard of health.[[12]](#footnote-13) The reference to sexual orientation as a prohibited ground of discrimination under General Comment 20 is of particular importance due to its focus being on the meaning of discrimination under the Convention on Economic, Social and Cultural Rights.[[13]](#footnote-14)
7. In light hereof, there are strong arguments in favour of that sexual orientation is a prohibited ground for purposes of the United Nations treaties.
8. As such, we recommend that Article 8(1) be amended to read as follows:

“States Parties undertake to respect, protect and fulfil the right to development for all, without discrimination of any kind on the basis of race, colour, sex, gender, *sexual orientation,* language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth, age or other status, in accordance with obligations set forth in the present Convention” [*recommended insertion*].

**Articles 9-11:**

1. We welcome the inclusion of these provisions.

**Article 12 – Obligation to fulfil**

1. Article 12(1) provides that each State Party undertakes to take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the right to development. The article further provides that States Parties may take such measures through any appropriate means, including the adoption of legislative measures.
2. We welcome the inclusion of this provision but strongly recommend the inclusion of an encouragement or recommendation for the adoption of regional measures which contribute to the progressive enhancement of the right to development. The recommendation of adopting regional undertakings, which advance the right to development, would serve as a valuable additional form of undertaking which promotes the obligation to fulfil on the individual, regional and international level.
3. The recommendation of implementing regional measures which progressively enhance the right to development would serve an important purpose in ensuring a greater collective regional effort in promoting the obligation to fulfil the right to development.

**Article 13 – Duty to cooperate**

1. The LRC welcomes the obligation to cooperate paired with an obligation to align all international legal instruments and their implementation for collective action in areas including the environment, trade, finance, investment and development cooperation without conflict and with the full realization of the right to development for all.
2. The LRC, furthermore, supports the expectation that the adoption of a binding instrument on the right to development will lead States to cooperate in good faith and the commitment to an instrument that may orient the international order towards greater equity by international cooperation.[[14]](#footnote-15)

**Articles 14-15**

1. We welcome the inclusion of these provisions.

**Article 16 – Gender equality**

1. Article 16(1) states that “State Parties, in accordance with their obligations under international law, shall ensure full gender equality for all women and men”.
2. The reference to women and men represents a narrow approach to gender equality which fails to recognise gender diverse individuals and can also exclude intersex individuals who do not fall within a traditional understanding of either woman or man.
3. To promote a more inclusive approach, we recommend that Article 16(1) be amended to read as follows:

“State Parties, in accordance with their obligations under international law, shall ensure *equality for all persons regardless of sex or gender*” [*recommended amendmen*t].

1. Article 16(1) then continues, requiring State Parties to “undertake measures … to end all forms of discrimination against all women and girls”. Article 16(2) places an obligation on State Parties to take appropriate measures in respect of the right to development of women and girls.
2. We recognise that women and girls are particularly vulnerable to gender-based discrimination and that steps should be taken to promote and protect their rights. At the same time, attention should be drawn that gender diverse individuals are also vulnerable to gender-based discrimination. In the context of gender diverse individuals, their vulnerability stems from their gender not corresponding to the gender that is assigned based on their sex characteristics at birth. In light hereof, we recommend that gender diverse persons be included under Article 16 and that the provision, therefore, reads as follows:

1. States Parties, in accordance with their obligations under international law, shall ensure *equality for all persons regardless of sex or gender*, and undertake to take measures, including through temporary special measures as and when appropriate, to end all forms of discrimination against *women, girls, and gender diverse persons* everywhere to ensure their full and equal enjoyment of the right to development.

2. To that end, States Parties undertake to take appropriate measures, separately and jointly, inter alia:

(a) To eliminate all forms of violence and harmful practices against *women, girls, and gender diverse persons* in the public and private spheres;

(b) To ensure women *and gender diverse persons* full and effective participation and equal opportunities for leadership at all levels in the conceptualization, decision-making, implementation, monitoring and evaluation of policies and programmes in political, economic and public life, and within legal persons;

(c) To adopt and strengthen policies and enforceable legislation for the promotion of gender equality and the empowerment of *women, girls, and gender diverse persons* at all levels;

(d) To mainstream gender perspectives in the formulation, adoption and implementation of all national laws, policies and practices and international legal instruments, policies and practices;

(e) To ensure equal and equitable access to resources necessary for the full realization of the right to development by *women, girls, and gender diverse persons* everywhere.

**Article 17 – Indigenous and tribal peoples**

1. We submit that the terms ‘indigenous’ and ‘tribal’ are inappropriate in the African context where ‘indigenous’ remains deeply contested and ‘tribal’ is seen as a relic of colonial times and therefore no longer used.
2. It is strongly recommended that the text includes a term that would resonate with the communities in Africa who find themselves in the same position as the indigenous and tribal peoples of, for example, Latin America.
3. As such, we propose the inclusion of ‘customary communities’.
4. We make this recommendation with some urgency. Should the text retain only ‘indigenous’ and ‘tribal’ – terms that exclude most African customary communities – it will exaggerate their vulnerability in the face of large-scale development.

**Articles 18-22:**

1. We welcome the inclusion of these provisions.

**Article 22 – Sustainable development**

1. The conceptof sustainable development first gained prominence in 1987 when it was defined in the Report of the then World Commission on Environment and Development: Our Common Future (“Brundtland Report”).[[15]](#footnote-16) Although this international law notion had been referred to in previous international law reports and conventions, the Brundtland Report finally offered a concise definition of sustainable development, which remains widely recognized to this day:[[16]](#footnote-17)

“Sustainable Development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.

1. It contains within it two key concepts: the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organisation on the environment’s ability to meet present and future needs.[[17]](#footnote-18)
2. The Johannesburg Declaration on Sustainable Development refers to the reinforcing pillars of sustainable development, namely, economic development, social development and environmental protection.[[18]](#footnote-19)
3. The Rio Declaration on Sustainable Development also refers to this relationship or pillars in article 6:

“We recognize that people are at the centre of sustainable development and in this regard, we strive for a world that is just, equitable and inclusive, and we commit to working together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all”.[[19]](#footnote-20)

1. The Brundtland Report, Johannesburg, and Rio Declarations on Sustainable Development refer to the important pillars of Sustainable Development and their relationship with one another.
2. We believe, therefore, that conventions and treaties referring to sustainable development should refer to these underlying pillars, namely, economic growth, social development and environmental protection.
3. We, therefore, propose adding an additional clause referring to the above-mentioned points: "Their actions will mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognizing their interlinkages, so as to achieve sustainable development in all its dimensions”.
4. As such, we recommend that Article 22 be amended as follows:

” State Parties, individually and jointly, undertake to ensure that:

(a) Laws, policies and practices relating to development at the national and international levels pursue and contribute to the realization of sustainable development

(b) Their decisions and actions do not compromise the ability of future generations to realize their right to development

(c) The formulation, adoption and implementation of all such laws, policies and practices aimed at realizing sustainable development are made fully consistent with the provisions of the present Convention”.

(d) Their actions will mainstream sustainable development at all levels, integrating economic, social and environmental aspects and recognizing their interlinkages, to achieve sustainable development in all its dimensions”.

**Article 23 – Harmonious interpretation**

1. We welcome the inclusion of this provision.

**Part IV**

**Articles 24 – 26:**

1. We welcome the inclusion and formulation of these provisions.

**Part V**

**Articles 27 – 36:**

1. We are satisfied with the inclusion and formulations of these provisions.

# Conclusion

1. We trust that you will find this submission useful. Should you have any comments or questions, please do not hesitate to contact Devon Turner at devon@lrc.org.za.

**ENDS**

1. List of non-governmental organisations in consultative status with the Economic and Social Council as at 1 September 2019, E/2019/INF/5 (2 March 2021). [↑](#footnote-ref-2)
2. N Schrijver “A new Convention on the human right to development: Putting the cart before the horse?” (2020) 38 *Netherlands Quarterly of Human Rights*. [↑](#footnote-ref-3)
3. 155/96: *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria* at para 56. [↑](#footnote-ref-4)
4. ACHPR/Res.224 (LI) 2012: Resolution on a Human Rights-Based Approach to Natural Resources Governance. [↑](#footnote-ref-5)
5. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, article 1, paragraph 2. [↑](#footnote-ref-6)
6. Human Rights Council “Human rights, sexual orientation and gender identity” (14 July 2011) A/HRC/RES/17/19; Human Rights Council “Human rights, sexual orientation and gender identity” (2 October 2014) A/HRC/RES/27/32. [↑](#footnote-ref-7)
7. Human Rights Council “Mandate of the Independent Expert of protection against violence and discrimination based on sexual orientation and gender identity” (10 July 2019) A/HRC/41/L.10/Rev.1 [↑](#footnote-ref-8)
8. Commission of Human Rights “Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity” (11 May 2018) A/HRC/38/43. [↑](#footnote-ref-9)
9. Communication 488/1992 (31 March 1994) CCPR/C/50/D/488/1992. [↑](#footnote-ref-10)
10. Communication 941/2000 (18 September 2003) CCPR/C/78/D/941/2000. [↑](#footnote-ref-11)
11. Communication 1932/2010 (30 November 2012) CCPR/C/106/D/1932/2010. [↑](#footnote-ref-12)
12. CESCR “General Comment 14: The Right to the Highest Attainable Standard of Health” (11 August 2000) E/C.12/2000/4. [↑](#footnote-ref-13)
13. CESCR “General Comment 20: Non-discrimination in economic, social and cultural rights” (2 July 2009) E/C.12/GC/20. [↑](#footnote-ref-14)
14. CETIM Bulletin No 59 (June 2019) <https://www.cetim.ch/wp-content/uploads/Bull-59-EN.pdf>. [↑](#footnote-ref-15)
15. J Verschuuren “Sustainable Development and the nature of environmental legal principles” (2006) *PELJ* 1-15; ME Donald *Advancing the constitutional goal of social justice through a teleological interpretation of key concepts in the environmental rights in section 24* LLM thesis, Stellenbosch University (2014) 126. [↑](#footnote-ref-16)
16. 128. [↑](#footnote-ref-17)
17. 128. [↑](#footnote-ref-18)
18. *Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development: The Final Text of Agreements Negotiated by Governments at the World Summit on Sustainable Development* (26 August-4 September 2002), Johannesburg, South Africa. [↑](#footnote-ref-19)
19. UNGA “Resolution 66/288: The future we want” (11 September 2012) A/RES/66/288. [↑](#footnote-ref-20)