REALIZING THE RIGHT TO DEVELOPMENT

UNITED NATIONS

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Realizing the Right to Development

Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development

UNITED NATIONS

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Foreword

We live in challenging times. Across the globe, millions are suffering the merciless, often devastating, effects of the many global crises of our age. The global financial and economic crisis, the food crisis, the energy crisis and the climate crisis have converged in a multi-front assault on human dignity. And our institutions of governance, at both the global and national levels, have been at best negligent, and at times complicit, in this onslaught. As a result, in both North and South, the opening years of the twenty-first century have been marked by growing poverty, inequality, hunger, desperation and social unrest.

This was not the vision of the Universal Declaration of Human Rights that gave birth in 1948 to the modern international human rights movement, promising freedom from fear and want, and declaring that "everyone is entitled to a social and international order in which the rights and freedoms set forth in [the] Declaration can be fully realized".

And it was not the vision of the Declaration on the Right to Development, the twenty-fifth anniversary of which this publication commemorates.

Since the adoption of that landmark document, a debate has been raging in the halls of the United Nations and beyond. On one side, proponents of the right to development assert its relevance (or even primacy) and, on the other, sceptics (and rejectionists) relegate this right to secondary importance, or even deny its very existence. Unfortunately, while generating plenty of academic interest and stimulating political theatre, that debate has done little to free the right to development from the conceptual mud and political quicksand in which it has been mired all these years.

We are determined to change that.

To do so, we must first take a hard look at the parameters of that debate, as they have evolved throughout the years. This book—the first of its kind—collects articles produced by a broad range of authors and reflecting an equally broad range of positions. Most were generated by or for the many successive expert and intergovernmental mechanisms established by the United Nations to study the right to development. Others were specifically written for this book. All are valuable to our task of documenting, and advancing, the right to development debate.

For the coming years, our challenge will be to move beyond the many myths, distortions and misunderstandings that have plagued the right to development since its codification in 1986. Doing so begins with the recognition of the simple fact, affirmed in numerous United Nations declarations and resolutions, from the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights to the 2000 United Nations Millennium Declaration and the 2005 World Summit outcome—and, indeed, the mandate of the High Commissioner for Human Rights—that the right to development is a human right. No more, and no less.

And, because the United Nations recognizes no hierarchy of rights, and all human rights are equal and interdependent, the right to development cannot

correctly be viewed as either a "super-right" (i.e., an umbrella right that somehow encompasses and trumps all other rights) or as a "mini-right" (with the status of a mere political aspiration).

Nor should we permit the fog of political debate to confuse the identity of the right holder to whom the right to development belongs: as with all human rights, the rights holders are human beings. Not Governments, not States, not regions, but human beings—that is, individuals and peoples. And because human rights are universal, the right to development belongs to all people, everywhere—from New York to New Delhi, from Cape Town to Copenhagen, and from the deepest forests of the Amazon to the most remote islands of the Pacific. Wherever the accident of their birth, whatever their race, sex, language or religion, all human beings are born free and equal in dignity and rights, including the right to development.

Like all human rights, the right to development also contains a specific entitlement—in this case *the right "to participate in, contribute to, and enjoy economic, social, cultural and political development"*. This basic entitlement, set out with perfect clarity in article 1 of the Declaration, includes a number of constituent elements, enumerated subsequently in the Declaration. Among them are:

- *People-centred development.* The Declaration identifies "the human person" as the central subject, participant and beneficiary of development
- *A human rights-based approach.* The Declaration specifically requires that development be carried out in a manner "in which all human rights and fundamental freedoms can be fully realized"
- *Participation*. The Declaration calls for the "active, free and meaningful participation" of people in development
- *Equity*. The Declaration underlines the need for "the fair distribution of the benefits" of development
- *Non-discrimination*. The Declaration permits "no distinction as to race, sex, language or religion"
- *Self-determination.* The Declaration integrates self-determination, including full sovereignty over natural resources, as a constituent element of the right to development

Equally explicit are the prescriptions provided by the Declaration for the implementation of this right, among them:

- The formulation of appropriate national and international development policies
- Effective international cooperation
- Reforms at the national and international levels
- Removal of obstacles to development, including, inter alia, human rights violations, racism, colonialism, occupation and aggression
- Promotion of peace and disarmament**,** and the redirecting of savings generated therefrom to development

Thus, when you enter into the right to development discussion, when you hear the phrase invoked in academic discourse or in political debate or, indeed, when you review the contributions to this book, I encourage you to do so critically. Ask yourself these questions: Is this the "right to development" codified in the United Nations Declaration? Is the analysis grounded in the recognition of the right to development as a universal human right, with human beings as the right holders, Governments as the duty bearers, and an entitlement to participate in, contribute to and enjoy development at its centre? Where you are unable to answer these questions in the affirmative, you will know that you have left the realm of human rights analysis, and entered into a geopolitical boxing match that uses the right to development as a proxy for other issues that have long complicated relations between North and South.

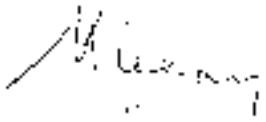
Our mission, on the other hand, is to promote the realization of all human rights—including the right to development—*as* human rights.

Today, the ideological edifices of the dominant economic models of the nineteenth and twentieth centuries are crumbling under the weight of the realities of the twenty-first. Growing inequalities, global poverty, systemic deprivation, hunger, unemployment, environmental degradation and social unrest raise human rights imperatives that cannot be deferred to the invisible hand of the market, the pilfering hand of the greedy few or the repressive hand of autocratic regimes. The call now, written across the banners

of a mobilized citizenry from Tahrir Square to Wall Street, is for accountable and democratic economic and political governance under the rule of law—at both the national and international levels—with the paramount, sacred mission of ensuring freedom from fear and want for all people, everywhere, without discrimination.

In other words, people are demanding a human rights-based approach to economic policy and development, with the right to development at its centre.

This collection is intended to serve as a resource for experts, advocates and other stakeholders in development and in human rights, United Nations delegations and agencies, policy makers, academics and students, and is a part of ongoing efforts by my Office to advance understanding and, ultimately, the realization of the right to development.



Navi Pillay
High Commissioner for Human Rights

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Abbreviations

ACP	African, Caribbean and Pacific
APRM	African Peer Review Mechanism
ASEAN	Association of Southeast Asian Nations
BRICS	Brazil, Russian Federation, India, China and South Africa
CCA	Common country assessment
CDM	Clean development mechanism (of the Kyoto Protocol to UNFCCC)
CEMAC	Economic and Monetary Community of Central Africa
CER	Certified emissions reductions (Kyoto Protocol to UNFCCC)
CIPIH	Commission on Intellectual Property Rights, Innovation and Public Health (WHO)
COP	Conference of the Parties to UNFCCC
CPIA	Country Policy and Institutional Assessment (World Bank)
DAC	Development Assistance Committee (of OECD)
DBS	Direct budget support
DFID	Department for International Development of the United Kingdom
DRF	Debt-reduction Facility (of IDA)
DSF	Debt Sustainability Framework for low-income countries (World Bank-IMF)
EAC	East African Community
ECA	United Nations Economic Commission for Africa
ECE	United Nations Economic Commission for Europe
ECOWAS	Economic Community of West African States
EPA	Economic partnership agreement
FAO	Food and Agriculture Organization of the United Nations
G7	Group of Seven countries
G8	Group of Eight countries
G20	Group of Twenty countries
G77	Group of Seventy-Seven countries
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade (subsumed by the World Trade Organization)
GDP	Gross domestic product
GNI	Gross national income
GNP	Gross national product
GSP	Generalized System of Preferences
HDI	Human Development Index
HIPC	Heavily Indebted Poor Countries (Initiative)
HFCs	Hydrofluorocarbons
IBRD	International Bank for Reconstruction and Development
IBSA	India, Brazil and South Africa
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICT	Information and communications technology
ICTSD	International Centre for Trade and Sustainable Development
IDA	International Development Association of the World Bank
IDB	Inter-American Development Bank

IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILO	International Labour Organization
IMF	International Monetary Fund
LDC	Least developed country
MDGs	Millennium Development Goals
MDRI	Multilateral Debt Relief Initiative
MERCOSUR	Common Market of the South
MIGA	Multilateral Investment Guarantee Agency (IFC)
NAFTA	North American Free Trade Agreement
NEPAD	New Partnership for Africa's Development
NGO	Non-governmental organization
NPoA	National programme of action (APRM)
OAS	Organization of American States
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PFCs	Perfluorocarbons
PFM	Public Financial Management
PPP	Purchasing power parity
PRS	Poverty reduction strategy
PRSP	Poverty reduction strategy paper
REC	Regional economic community (African Union)
SACU	Southern African Customs Union
SADC	Southern African Development Community
SDR	Special Drawing Rights (IMF)
SWAps	Sector-wide approaches
TNC	Transnational corporation
TRIMS	Trade-related investment measures (WTO)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO)
TPRM	Trade Policy Review Mechanism (WTO)
UNASUR	Union of South American Nations
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations (now part of UNCTAD)
UNDAF	United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNICEF	United Nations Children's Fund
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WFC	World Food Council (suspended in 1993; functions absorbed by FAO)
WFP	World Food Programme
WTO	World Trade Organization

References to dollars ($) are to United States dollars.

Introduction

This publication marks a major milestone along the path towards achieving what the States Members of the United Nations committed themselves to in the United Nations Millennium Declaration: making the right to development a reality for all. The right to development celebrated its twenty-fifth anniversary in 2011, marking a quarter century since the adoption of the Declaration on the Right to Development in 1986. The 33 chapters in this book attempt to put flesh on the bones of the Declaration by comprehensively examining the multiple dimensions of the right to development. The contributions to this volume not only clarify the meaning and status of this right but also survey the most salient challenges—based on actual development practice—to its transformative potential, including as a political project building on commitments that have been central to the United Nations since the 1940s; as a normative statement of people-centred development policy; as a framework reaffirming the indivisibility of all human rights; and as a clarification of the social justice outcomes expected from international cooperation and national policy. Policy commitment and coherence, process guidance, action strategies and measurable outcomes: together these concepts address the extraordinary breadth of the right to development.

According to its critics, who find the concept unhelpful to human rights or development, the concepts are too broad. For its most ardent proponents, these concepts define the pre-eminent human right, so valuable it should become a binding norm. Too nebulous, or essential? The debate is far from over. The reader is invited to decide where on this spectrum the right to development lies, not on the basis of an abstract statement but after considering the in-depth analysis and reflections presented here.

They begin, in the four chapters of Part I, with the historical context and normative content of the right to development, reflecting a visionary policy, grounded in international law and relations and responsive to the challenges of late twentieth and early twenty-first century political economy and beyond.

The ten chapters in Part II clarify the process of the right, exploring the richness of the underlying principles and the compelling ethics of the right to development.

The nine chapters in Part III assess some specific settings in which the policies and principles in question could alter development practice and outcomes. Indeed, one of the painful lessons of the last 25 years and more has been the lack of traceable impact of the Declaration on development practice, and this part seeks to provide an evidence-based explanation of some major areas of relevant and potential international cooperation.

Nevertheless, there has been some progress, on which States, peoples' movements and other stakeholders can build, hopefully drawing on the tools and insights of the 10 chapters in Part IV, which seek to provide a road map for action and measuring outcomes, as well as concluding chapters that envisage the way forward.

Each of the parts opens with an introduction that sets out the context and explains the significance of each chapter, describing the relationship between them.

The book's overall purpose is to draw on over three decades of experience with the right to development, going beyond political posturing and analysing its constituent principles and actual applications in development practice and potential applications in the years to come. Taken together, the contributions to this publication illustrate the far-reaching potential of the right to development and its relevance more than 25 years after the adoption of the Declaration. They make the case for reinvigorating this right in order to realize its added value to advancing human rights, development, and peace and security in an increasingly interdependent, fragile and changing world, including in the post-2015 agenda for sustainable development.

PART ONE

Situating the right to development

historical context

introduction ⟩ ⟩ ⟩

Introduction

The idea of the right to development and the formal acknowledgment that it is an internationally recognized human right pre-date the adoption of the Declaration on the Right to Development in 1986. The purpose of the first part of this book is to provide the context for the emergence of the right as an international human right and to recall the substantive understandings that prevailed at the inception and early formulation of the right and demonstrate the relevance of these understandings today.

The first formal reference to the right—in a sense its "birth certificate"—may be found in resolution 4 (XXXIII), adopted without a vote by the Commission on Human Rights on 21 February 1977. In the debate leading up to the adoption of the resolution "several representatives stressed that … assistance for the economic and social development of developing countries was a moral and legal obligation of the international community, in particular of the industrialized countries".[1] That was the germ that grew into a more complex and far-reaching concept of the right to development. The resolution itself called for the Secretary-General, in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and other specialized agencies, to study "the international dimensions of the right to development"; the recommendation was endorsed by the Economic and Social Council. That study[2] was prepared in 1978 by a junior United Nations staff member from Australia, Philip Alston, who has since become a very prominent professor of human rights, member and Chair of the Committee on Economic, Social and Cultural Rights, Special Rapporteur on extrajudicial, summary or arbitrary executions, as well as a prolific author on the right to development.[3]

The study of some 160 pages anticipated by over three decades virtually all the issues that remain salient in the debate today. It laid the groundwork for the Declaration, which was adopted eight years later. The extracts from that study that appear in chapter 1 under the title "The emergence of the right to development" are particularly illustrative of the concerns that continue to confront the international community: ethical aspects, legal norms, subjects and beneficiaries, duties, participation as a central feature, and the dynamic character of the right to development. The study also covered the relationship between the right to development and other rights, including the right to peace, and the New International Economic Order, as well as specific issues of disarmament, self-determination, development assistance and transnational corporations, which are not reproduced in the chapter. It is particularly valuable to reread the study more than three decades later in order to understand how the right to development emerged from the prevailing political climate and to recall that, from the start, the

[1] "Commission on Human Rights: report on the thirty-third session" (E/5927-E/CN.4/1257), para. 40.

[2] "The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirement of the New International Economic Order and the fundamental human needs: report of the Secretary-General" (E.CN.4/1334).

[3] See, for example, Philip Alston, "Making space for new human rights: the case of the right to development", *Harvard Human Rights Yearbook*, vol. 1 (1988), pp. 3-40; Philip Alston, "Revitalising United Nations work on human rights and development", *Melbourne University Law Review*, vol.18 (1991), pp. 216-257; Philip Alston, "The shortcomings of a 'Garfield the cat' approach to the right to development", *California Western International Law Journal*, vol. 15 (1985), pp. 510-523.

United Nations Secretariat, with considerable input from UNESCO, as acknowledged by Alston, brought careful analysis to enrich the understanding of this right. Among many core ideas, the study identified the biggest challenge the international community continues to face today, namely, how to translate the concept of this right "into a notion capable of providing practical guidance and inspiration, based on international human rights standards, in the context of development activities".

Equally essential to understanding the context in which the right to development emerged is the normative basis of the Declaration in the light of major international statements of principles since 1945. For this purpose, we draw on the work of another United Nations staff member at the time, Tamara Kunanayakam (currently Chairperson-Rapporteur of the intergovernmental open-ended Working Group on the Right to Development), who summarized 36 United Nations documents from 1944 in the form of a background paper entitled "Annotations to the Declaration on the Right to Development and related United Nations system instruments, resolutions and reports" (HR/RD/1990/CONF.1).

That document forms the basis of chapter 2, entitled "The Declaration on the Right to Development in the context of United Nations standard-setting", which is selective in extracting summaries of 25 of the 36 documents examined in her 1990 paper, to give a sense of the solid normative heritage on which the Declaration built. However, it is more than a compilation: it draws conclusions that remain relevant to formulating approaches to addressing the challenges faced by humanity in the second decade of the twenty-first century. The chapter provides a trajectory of how various principles historically evolved throughout the standard-setting exercise at the United Nations and resulted in and shaped the Declaration on the Right to Development. It shows how the debate on the right to development was significantly influenced by two major interrelated and interdependent processes: (1) the emergence of newly independent States seeking equal status in their relations with their former colonial masters as a powerful factor in international affairs; and (2) the evident failure of an alien growth-centred profit-oriented development model, based on an unequal international division of labour, to eliminate inequalities, achieve social well-being, and to consolidate political independence through economic independence.

The author argues that the Declaration on the Right to Development retains its relevance and legal validity. The global reality that fuelled the evolution of the principles reflected in the Declaration and the aspirations of its principal architects, the developing countries, have not fundamentally changed. Moreover, its normative character is clearly linked to aspects that render it legally binding. Its legal sources are broad ranging, extending from positive law to "soft" law, many aspects of the right having become part of customary law. While the controversy over its legal validity may continue, the author points out that "the principles at the core of the right to development remain current and, in multiple ways, continue to inspire the actions of numerous States and social organisations." She concludes that the Declaration is a pertinent and valid framework for the development of a society based on equality and social justice, and will continue to inspire present and future generations.

Chapter 3, entitled "The challenge of implementing the right to development in the 1990s", summarizes the outcome of the major event for which the "Annotations" paper in chapter 2 was written, namely, the Global Consultation on the Right to Development as a Human Right, held in Geneva in 1990. This was a significant event for the quality of preparation, diversity and level of the participants, and for the boldness of the conclusion and recommendations. Forty-eight papers were presented by leading authorities from universities and institutions across the world, and senior representatives of numerous United Nations bodies, specialized agencies and international organizations, as well as non-governmental organizations (NGOs), addressed forthrightly the problems posed in implementing the Declaration. A thorough and nuanced final report of the meeting (E/CN.4/1990/9/Rev.1) detailed the depth of the presentations and discussion. The extracts from that report presented in this chapter explore the critical issues of the right to development for the 1990s, including apartheid, women's rights, the rights of indigenous peoples and extreme poverty. The selections from the report also include proposals to improve the implementation of the right to development through national development policies, participation, empowerment of intermediary groups, changes in the concept of the welfare State, legal assistance, and global markets. Its conclusions are also significant, stressing the need for criteria for measuring progress and recommending specific actions by States, international institutions and NGOs. For example, the recommendations anticipated by 15 years the creation of the high-level task force on the implementation of the right to development by proposing that a "high-level committee of experts" formulate "criteria for the

assessment of progress in the realization of the right to development". That task was finally completed in 2010 and is reflected in chapters 28-30.

Chapter 4, the final chapter in this section, sets out the context for the definition of the right to development in the years since 2004. This chapter, entitled "Conceptualizing the right to development for the twenty-first century," is based on the writings of Arjun Sengupta, former Independent Expert on the right to development (1999-2004) and later holder of a similar mandate on extreme poverty before becoming Chair of the intergovernmental Working Group on the Right to Development. Sengupta, a well-known economist with a career that included the International Monetary Fund (IMF) and representing India in Brussels, provided important insights in extracting from the abstract language of the Declaration practical tools for development economists to consider. His reports and scholarly writing, on which this chapter is based, addressed both the theoretical and practical dimensions of the right to development. In the theoretical section of this chapter, he reviews the elements of the definition of the right as well as the controversies surrounding the concept, such as justiciability, monitoring, collective versus individual rights, resource constraints and interdependence of rights. In the section on practice, he addresses the economic context of globalization and growth, before proposing ways in which national policies and international cooperation can contribute to implementing the right to development. Among his specific proposals is that of development compacts (described as a "mechanism … to work out the burden-sharing arrangements among the industrial countries") and elements for a programme to implement the right to development. His demise in 2010 was a great loss to both the scholarly and diplomatic communities; his wisdom, reflected in this chapter, will continue to guide efforts to move the right to development from political commitment to development practice.

The emergence of the right to development

Report of the Secretary-General[1]

I. Observations on the core concept of "development"

The concept of "development" is fundamental to the present study. Yet few terms have been used to convey so many different notions or been subject to as many successive revisions in interpretation. Growing awareness of the complexity of the development process has served to underline the difficulty of describing it within the confines of a single definition. It is possible, nevertheless, to discern the emergence in the years leading up to this report of a strong consensus on the principal definitional elements of the term.

At least until the mid-1960s the terms "development", "economic development" and "growth" were generally considered to be synonymous and were used interchangeably. It was thought possible to measure development in terms of an increase in gross national product, the benefits of which were assumed to flow throughout a society on the basis of a "trickle-down pattern".[2] Thus, the programme for the first United Nations Development Decade, while bearing in mind the undertaking in the Charter of the United Nations "to promote social progress and better standards of life in larger freedom", dealt largely with the measures required to "accelerate progress towards self-sustaining growth of the economy of the individual nations and their social advancement so as to attain in each underdeveloped country a substantial increase in the rate of growth".[3]

The need for economic growth and social and cultural development to be concurrent and complementary was accorded greater emphasis in subsequent formulations of the objectives of development.[4] Promotion of respect for human rights was also seen to be a fundamental ingredient in the process. Indicative of these developments was the warning contained in a United Nations report (E/3447/Rev.1, para. 90) which appraised the prospects for progress during the Development Decade:

> One of the greatest dangers in development policy lies in the tendency to give to the more material aspects of growth an overriding and disproportionate emphasis. The end may be forgotten in preoccupation with the means. Human rights may be submerged and human beings seen only as instru-

[1] This chapter is a condensed version of the report of the Secretary-General on the international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs (E/CN. 4/1334), submitted to the thirty-fifth session of the Commission on Human Rights pursuant to paragraph 4 of Commission resolution 4 (XXXIII) adopted, without a vote, on 21 February 1977. The selected extracts from the study, written eight years before the adoption of the Declaration on the Right to Development, have been chosen because of their salience 25 years after the adoption of that text. They represent less than one tenth of the original text, but are indicative of the in-depth and comprehensive approach taken to the right to development prior to the process of drafting the Declaration. The text, including the references, has been edited as necessary to reflect changes in United Nations practice since the report was issued in 1979, to clarify some ambiguities that have emerged owing to the passage of time and to correct errors where the limited availability of the original sources has made this possible.

[2] See, for example, W.W. Rostow, *The Stages of Economic Growth,* 2nd ed. (Cambridge, United Kingdom, Cambridge University Press, 1971).

[3] General Assembly resolution 1710 (XVI), preamble and para.1, designating the 1960s the United Nations Development Decade.

[4] François Perroux, *L'Économie du XXe siècle* (Paris, Presses Universitaires de France, 1961); David Morawetz, *Twenty-five Years of Economic Development: 1950 to1975* (Washington, D.C., World Bank, 1977) especially chap. 1, "The changing objectives of development".

ments of production rather than as free entities for whose welfare and cultural advance the increased production is intended.

In the mid-1960s, perceptions of development problems, needs and priorities began to evolve towards a concept of "development" that was far broader than just economic growth. The General Assembly, in resolution 2027 (XX), recognized the need to devote special attention on both the national and the international level to the promotion of respect for human rights within the context of the Development Decade. The same point was stressed again in the Declaration on Social Progress and Development adopted in 1969 by the Assembly in its resolution 2542 (XXIV).

Just as implementation of the universal principles embodied in the International Bill of Human Rights may reflect the different perceptions and experience of each nation and each community,[5] so too the complexity and organic character of the development process means that there is no universally applicable model for the process of development.[6] At the same time, it is clear that an effective development strategy, whether at the national or international level, must be based on respect for human rights and incorporate measures to promote the realization of such rights if it is to be effective in fostering development in the most meaningful way.

Development being considered as fulfilment of the human person in harmony with the community is a matter of universal relevance; it should not be considered relevant only to the countries traditionally termed "developing". Once development is no longer viewed merely in terms of growth of national income or even per capita income, but in the larger sense of the creation of conditions conducive to the full realization of the individual in every aspect of his/her being, it is an aspiration which should be pursued in all countries.[7] In the developed countries, for example, some of the following issues might warrant attention because of their bearing on the development process: the relationship between economic growth and the well-being of the individual; problems of alienation, overconsumption and non-participation in decision-making; and environmentally unsound policies.

An analysis of major United Nations instruments and debates indicates the existence of a general consensus as to the need for the following elements to be part of the concept of development:[8] (a) the realization of the potentialities of the human person in harmony with the community should be seen as the central purpose of development; (b) the human person should be regarded as the subject and not the object of the development process; (c) development requires the satisfaction of both material and non-material basic needs; (d) respect for human rights is fundamental to the development process; (e) the human person must be able to participate fully in shaping his/her own reality; (f) respect for the principles of equality and non-discrimination is essential; and (g) the achievement of a degree of individual and collective self-reliance must be an integral part of the process.

II. Observations on the term "international dimensions" as understood in the context of the study

In the light of references to international cooperation in the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, it may be said that the specifically "international" dimensions of the right to development are of major and increasing significance for the following reasons:

(a) The fabric of development in any country consists of many threads which are both national and international in origin. It is therefore impossible to consider development without regard for the international context in which it takes place;[9]

[5] See Manouchehr Ganji, *The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress* (United Nations publication, Sales No. E.75.XIV.2).

[6] Summary record of the Commission on Human Rights (E/CN.4/SR.1391), para. 39. The summary records of the Commission on Human Rights cited in this chapter refer to the thirty-third session, held in 1977.

[7] Kwasi Wiredu, "Human solidarity: a philosophical exposition", paper presented to the United Nations Educational, Scientific and Cultural Organization (UNESCO) expert meeting on human rights, human needs and the establishment of a new international economic order, Paris, 19-23 June 1973 (paper SS-78/CONF.630/4), p. 12.

[8] In addition to materials cited in the report, this consensus is reflected in the following: UNESCO, Medium-Term Plan (1977-1982), Doc.19 C/4; W. Haque and others, *Towards a Theory of Rural Development* (Bangkok, United Nations and Asian Development Institute, 1975), reprinted in *Development Dialogue No. 2* (Uppsala, Dag Hammarskjöld Foundation, 1977), pp. 15-19; *What Now?: The 1975 Dag Hammarskjöld Report on Development and International Cooperation* (Uppsala, Dag Hammarskjöld Foundation, 1975); and *Reshaping the International Order – A Report to the Club of Rome,* coordinated by Jan Tinbergen (London, Hutchinson, 1977), pp. 61-71.

[9] "While, ultimately, it is for the developing countries themselves to do their utmost to accelerate their economic and social progress, their efforts will be frustrated if the necessary international policies are not adopted to create an environment conducive to supplementing and strengthening these efforts." *Towards Accelerated Development: Proposals for the Second United Nations Development Decade: Report of the Committee for Development Planning* (United Nations publication, Sales No. E.70.II.A.2), p. 22.

(b) There is increasing recognition of the fundamental interdependence of societies which is coupled with the interdependence of the problems which mankind is now facing. Thus, account must be taken of a broad range of transnational contacts in the form of the movement of people and ideas, involving individuals, corporations and other private groups. Rapid technological progress in fields such as communications and transport has facilitated the dissemination of information and ideas on an unprecedented scale. On the philosophical level it has been noted that "for contemporary thought the world forms a whole, a unity of interrelated parts; a global approach to world problems is manifestly the only approach which comes to terms with their real nature".[10] Similarly, the *World Development Report, 1978* emphasized the importance of fully recognizing the structural and other implications and benefits of global economic interdependence;[11]

(c) The global development process faces many obstacles which are of a largely transnational character. In the economic sphere these obstacles include continuing patterns of domination and dependency, unequal trade relations and restrictions from external sources on the right of every nation to exercise full sovereignty over its national wealth. Thus, underdevelopment has been said to be the "consequence of plunging a society and its economy into a world whose structures condemn them to a subordinate status and stagnation or internal imbalance".[12] Specifically, some major transnational obstacles were listed in the preamble to Commission on Human Rights resolution 4 (XXXIII) as follows: "the persistence of colonialism, aggression and threats against national sovereignty, national unity and territorial integrity, of foreign occupation, apartheid and all forms of discrimination and domination";

(d) Both the Charter of the United Nations and the International Bill of Human Rights stress the need for international cooperation with a view to achieving universal respect for human rights.

In any analysis of the right to development, the well-being of individuals in areas such as the availability of food, access to health care and education facilities, population policies, the availability of meaningful employment, the achievement of an equitable rural/urban balance and environmental factors must be considered. Many of these issues have become the subject of standard-setting instruments drawn up by the United Nations and its specialized agencies such as the International Labour Organization (ILO) and UNESCO and can thus no longer be considered to be exclusively within the domestic jurisdiction of Member States that are parties to such instruments.

In view of the growing interrelationship between "national" and "international" aspects of development, it may not always be possible to draw a workable distinction between what constitutes the "international" as opposed to the "national" dimensions of particular issues. In some cases the influence of activities at one level on those at the other level may be decisive, and it is thus not feasible to consider only a single side of the coin.

III. Ethical aspects of the right to development

Consideration of the ethical aspects of the human right to development raises a variety of issues which were referred to during the relevant debate at the thirty-third session of the Commission on Human Rights in 1977. These range from the relatively pragmatic view that it is in the best interests of all States to promote the universal realization of the right, to the view that there are fundamental philosophical values which can be said to underlie the right to development in its broadest sense. These issues encompass in particular the following arguments:

(a) *The fundamental character of development:* the promotion of development is a fundamental concern of every human endeavour;

(b) *The international duty of solidarity for development*: in international relations there exists a duty of solidarity which is solemnly recognized in the Charter;

[10] UNESCO, Medium-Term Plan (1977-1982), introduction, para. 25.
[11] World Bank, *World Development Report, 1978* (Washington, D.C., 1978), p. 68.
[12] UNESCO, Medium-Term Plan (1977-1982), p. 57, para 311.

(c) *Moral interdependence*: the increasing interdependence of all peoples underlines the necessity of sharing responsibility for the promotion of development;

(d) *Economic interdependence*: it is in the economic best interests of all States to promote universal realization of the right to development;

(e) *The maintenance of world peace*: existing economic and other disparities are inconsistent with the maintenance of world peace and stability;

(f) *The moral duty of reparation*: the industrialized countries, former colonial powers and some others have a moral duty of reparation to make up for past exploitation.

These are a variety of ethical arguments which may be considered to support the existence, in ethical terms, of a right to development. It is now proposed to consider the legal norms of relevance to the right to development.

IV. Legal norms relevant to the right to development

Recognition of the right to development would appear to be implied by Commission on Human Rights resolution 4 (XXXIII). One scholar has expressed his view of the implications of this resolution as follows: "Thus, a new right is being elaborated before our eyes—the right to development."[13]

The legal norms relevant to the right to development are to be found primarily in the Charter of the United Nations and the International Bill of Human Rights. The approach by which the right to development is viewed as a synthesis of a large number of human rights has found favour with a number of commentators. In a paper presented to a UNESCO-sponsored meeting of experts on human rights, human needs and the establishment of a New International Economic Order, held in Paris in June 1978, the view was expressed that "development appears less as a separate right than as the totality of the means which will make economic and social rights effective for the masses of people who are grievously deprived of them".[14]

Similarly, another scholar has stated that "recognition of the existence of the human right to development may follow from a systematic interpretation of the international instruments which have been cited, insofar as they proclaim and protect the economic and social rights of individuals".[15] In the same vein, another commentator has expressed the view that juridically, almost all of the elements that constitute the right to development are the subject of existing declarations, resolutions, conventions or covenants.[16] This view was endorsed by commission I of the Colloquium on Development and Human Rights held in Dakar in September1978. Among the conclusions of the commission was the following:

> There exists a right to development. The essential content of this right is derived from the need for justice, both at the ... national and the international levels. The right to development draws its strength from the duty of solidarity which is reflected in international cooperation. It is both collective and individual. It is clearly established by the various instruments of the United Nations and its specialized agencies.[17]

It may be considered that the idea of a right to development originates, in part, from a new conception of the redistribution of power and decision-making and sharing of the world's resources based on needs. In the view of some scholars, this idea of need as a basis for entitlement is the central feature of the contemporary international law of development.[18] In the view of one scholar, the conception of international entitlement to aid and preferences based on need is either expressed or implied throughout the entire range of international decision-making pertaining to development: in many of the agreements relating to trade preferences, investment and resources; in the bilateral and multilateral programmes of aid; and in the broad normative resolutions adopted by United Nations bodies on commodities, relocation of industry, the oceans, international liquidity and numerous related matters.[19]

[13] Kéba M'Baye, "Le développement et les droits de l'homme", paper presented to the Colloquium on Development and Human Rights, Dakar, 7-12 Septembre 1978, organized by the International Commission of Jurists and the Association sénégalaise d'études et de recherches juridiques, p. 25.

[14] Jean Rivero, "Sur le droit au développement", paper SS-78/CONF.630/2, p. 3.

[15] Héctor Gros Espiell, "El derecho al desarrollo como un derecho de la persona humana", paper presented to the Seminario sobre Protección y Promoción Internacional de los Derechos Humanos, Universalismo y Regionalismo, Caracas, 31 July–4 August 1978, held under the auspices of the Government of Venezuela, the Inter-American Commission on Human Rights and UNESCO, p. 18.

[16] M'Baye, "Le développement et les droits de l'homme", p. 29.

[17] Commission I, Conclusions and Recommendations, mimeo, Dakar, September 1978, para. 10.

[18] Oscar Schachter, "The evolving law of international development", *Columbia Journal of Transnational Law*, vol. 15, No. I (1976), p. 10.

[19] Ibid., p. 9.

V. Subjects and beneficiaries of the right to development

The preceding analysis of the ethical and legal aspects of the right to development clearly indicates the extent to which it is a multidimensional right. In this and the following section of the study an endeavour is made to list the subjects and beneficiaries of the right, on the one hand, and those for whom the right implies duties, on the other hand; it must nevertheless be recognized that it is not possible within the confines of the present limited study to provide an exhaustive description of all the subjects, beneficiaries and duty bearers which relate to the right to development.

The distinction is of considerable jurisprudential significance[20] and arises in connection with an issue on which a clear worldwide consensus does not yet exist—the status of individuals under international law. The significance of the distinction between "subject of law" and "beneficiary", in all sectors of jurisprudence (domestic or international, family, civil or commercial law) is essentially related to the concept of "legal claim". A subject of law, *ipso jure*, may formulate a legitimate personal demand or "claim" against the duty bearers. A mere "beneficiary" does not have such a personal legal claim, although his/her interests—direct or indirect—in the implementation of a given right may be great. If the individual or collective entities are "subjects" of the human right to development, it follows that they may invoke a legal claim against a duty bearer's community, the State, and the regional and global international community for the pursuit in good faith of efforts to promote their development. Confusion often occurs between the concept of "legal claim" and that of "procedural capacity". As was pointed out, for instance, by Sir Hersch Lauterpacht,[21] there are several examples in various legal spheres of subjects of law, being thereby possessors of legal claims, but not enjoying the procedural capacity themselves to initiate legal action for the implementation of their rights. For instance, in municipal law, infants and weak-minded persons are subjects of law and have claims, but they may not actuate their claims themselves. For a long time, the individual, even if he/she was regarded as a direct subject of international law, had no procedural capacity on the international level.

As regards the human right to development, many scholars now maintain that the individual, States and possibly other collective entities are direct subjects of international law especially under certain articles of the International Covenants on Human Rights and under some ILO conventions. Furthermore, it is no longer true that the subjects of the right to development lack international procedural capacity.

Another issue of major significance is the question of whether it is appropriate to describe the right to development as one attaching to individuals or to collectivities, or to both. However, it is probably unnecessary to pose the issue as one involving the choice of mutually exclusive alternatives. The enjoyment of the right to development necessarily involves a careful balancing between the interests of the collectivity on one hand, and those of the individual on the other. It would be a mistake, however, to view the right to development as necessarily attaching only at one level or the other. Indeed, there seems no reason to assume that the interests of the individual and those of the collectivity will necessarily be in conflict. A healthy regard for the right of the individual to pursue his/her self-realization, manifested by respect for this right within collective decision-making procedures which permit the full participation of the individual, will contribute to, rather than weaken, the efforts of the collectivity to pursue its right to development. In addition, individual development and fulfilment can be achieved only through the satisfaction of collective prerequisites.

As was pointed out at the Commission on Human Rights at its thirty-third session, it is difficult to draw a rigid line of demarcation between the right to development of the individual and of the collectivity (E/CN.4/SR.1398, para. 30). For example, on the one hand, the provision of development assistance, the regulation of trade and cooperation on a multiplicity of other issues is conducted, to a great extent, on a State-to-State basis within the international community. On the other hand, insofar as it is possible to devise and apply indicators which can assess the extent of realization of the right to development, these usually utilize the individual as the relevant unit of measurement (e.g., schools per capita, etc.).[22]

It is clear that there is a universal right of all States to pursue their own development in an international

[20] The distinction is considered in some detail and a list of references provided in D.P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol.1, pp. 106-112.

[21] H. Lauterpacht, *International Law and Human Rights* (London, Stevens, 1950), p. 61; see also *International Law: Being the Collected Papers of Hersch Lauterpacht*, E. Lauterpacht, ed. (Cambridge, United Kingdom, Cambridge University Press, 1975), vol. 2, p. 510.

[22] Kéba M'Baye, "Émergence du 'droit au développement' en tant que droit de l'homme dans le contexte d'un nouvel ordre économique international", paper presented to the UNESCO expert meeting on human rights, human needs and the establishment of a new international economic order, Paris, 19-23 June 1978 (paper SS-78/CONF.630/8), p. 5.

environment which is conducive to that process. In addition to the right and duty to eliminate colonialism, apartheid, racial and other forms of discrimination, neocolonialism and all forms of foreign oppression and domination, every State has the sovereign and inalienable right to choose its economic, political, social and cultural system in accordance with the will of its people.[23] This right includes sovereign and permanent control of every State over its natural resources, wealth and economic activities. Similarly, every State has the sovereign right to rule and exercise effective control over foreign investments.

Just as peoples are entitled to self-determination, so too are they among the subjects and beneficiaries of the right to development.[24] In determining what constitutes a "people" in the context of self-determination, the following criteria were proposed:

(a) The term "people" denotes a social entity possessing a clear identity and its own characteristics;

(b) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;

(c) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights (E/CN.4/Sub.2/404/Rev.1, para. 279).

The rights possessed by peoples are further spelled out in article 3 (e) of the Declaration on Social Progress and Development which affirms "[t]he right and responsibility of each State and, as far as they are concerned, each nation and people to determine freely its own objectives of social development, to set its own priorities and to decide in conformity with the principles of the Charter of the United Nations the means and methods of their achievement without any external interference".

Minority groups and their members are also among the subjects and beneficiaries of the right to development. In his *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed the following interpretation of the term "minority": "A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language" (E/CN.4/Sub.2/384/Add.5, para.10).[25] It may be said that minority groups and their members have a right to share in the development of the whole community, without discrimination.

The preceding analysis has shown that the individual is a subject of the right to development insofar as the entire process of development must be aimed at the spiritual, moral and material advancement of the whole human being, both as a member of society and from the point of view of individual fulfilment. The individual's right to development includes realization of the entire range of rights specified in the International Bill of Human Rights and elaborated in a variety of resolutions and declarations adopted by United Nations conferences on specific subjects.

VI. Duties flowing from the right to development

In the previous section, the study considered the subjects and beneficiaries of the right to development. In this section the focus is on the nature of the corresponding duties and the entities on which they fall. The earlier analysis of the individual and collective characteristics of the right to development is also applicable in the context of the duties correlative to the right.

It is a basic principle of international law that States have the duty to cooperate with one another in order to maintain international peace and security and to promote international economic stability and progress free from discrimination.[26] The specialized agencies of the United Nations must also be consid-

[23] Maurice Flory, "Souveraineté des états et coopération pour le développement", *Recueil des cours 1974*, vol. 141 (I), No. 255, especially pp. 292-302.

[24] In the view of one author the right to development attaches primarily to peoples: "The right to development is for a people what human rights are for an individual. It represents the transposition of human rights to the level of the international community." Société française pour le droit international, *Rapport du Colloque d'Aix-en-Provence*, 24-26 May 1973, p. 28.

[25] The Special Rapporteur noted that this definition was drawn up solely with the application of article 27 of the International Covenant on Civil and Political Rights in mind. Editor's note: The study was revised and issued as a United Nations publication in 1979 (Sales No. E.78.XIV.1); see annex II of that publication for a further discussion on the concept of minority and the scope of article 27 of the Covenant.

[26] See, in addition to the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex.

ered to have a duty to promote the realization of the right to development. The duties of States in promoting the human right to development have two dimensions, both with international implications. The first aspect of the duty of States relates to the peoples living under their jurisdiction. The right to self-determination, which is stated in article 1 of both International Covenants on Human Rights, imposes on States the obligation to respect the rights of peoples under their jurisdiction to freely choose their political status and freely to pursue their economic, social and cultural development without discrimination on grounds of race, religion or colour. Secondly, in their relations with other States, States have the duty to cooperate to promote universal realization of the right to development.

An even more specific statement of the responsibilities of States is to be found in the Declaration on Social Progress and Development. Article 7 states that the equitable distribution of national income and wealth among all members of society should be a major goal of States. Article 8 refers to the responsibility of Governments in planning social development measures to ensure the progress and well-being of their peoples. In this regard, the responsibility of the Governments of developing countries to utilize development assistance in such a way as to promote the right to development could also be mentioned. In 1970 the Committee for Development Planning[27] expressed the view that an effective international development strategy requires "pervasive reforms and institutional changes" in developing countries in order to create an environment conducive to rapid development.[28] Thus, in the Commission it was said that "it was not enough simply to say that the richer countries had an obligation to assist the poorer countries; the question of what that assistance was used for should also be examined" (E/CN.4/SR.1393, para.18).

It may also be considered that, by accepting and promoting their pre-eminent role in international trade and financial institutions as well as by exercising strong influence over the international transfer of social and cultural mores, the industrialized countries should be expected to accept the concomitant responsibility of promoting the realization of the right to development (E/CN.4/SR.1391, para.13).

The same considerations which apply in relation to the international community in general and to the industrialized States and former colonial States are equally applicable in determining the duties of regional State groupings. This is in line with the undertaking in Article 56 of the Charter under which all States Members of the United Nations pledge to take "joint and separate" action. Thus, the duties attaching to States in their individual capacities are in no way diminished when they act jointly in the framework of a regional or subregional grouping.

The duty to promote the right to development is of general application, and thus applies to entities such as transnational corporations, producers' associations, trade unions and others. While it appears to be generally accepted that some form of international regulation of the activities of transnational corporations is desirable, it remains the case that a form of regulation "which could make them more acceptable instruments of international prosperity and cooperation has yet to be devised".[29]

The duties of the individual, both to other individuals and to the community to which he/she belongs, require him/her to strive for the promotion and observance of all human rights, including the right to development. The view was expressed by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities that "every capable individual as a basic element of the society has the duty to participate actively in defining and achieving the common goals of social progress and development of the community. These goals include, among others, the establishment of a harmonious balance between scientific, technological and material progress and the intellectual, spiritual, cultural and moral advancement of humanity".[30] Individuals may also be considered to have a further duty. It is generally recognized that efforts to promote the universal realization of the right to development must include endeavours to ensure the prudent use of the world's limited resources. In this connection, a report by a Commonwealth expert group noted that a part of those endeavours must be the quest for greater simplicity in lifestyles, "especially in those developing countries where conspicuous consumption by the few puts at risk the basic well-being, sometimes even the survival, of the many".[31] Accordingly, the report urges peoples in all countries to adopt

[27] In 1998, the name was changed to the Committee for Development Policy.
[28] United Nations, *Towards Accelerated Development*, p. 5.
[29] Committee for Development Planning, Report on the Fourteenth Session (E/1978/46), para. 27.
[30] "Study of the individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights by Erica-Irene A. Daes" (E/CN.4/Sub.2/415), para. 560. Editor's note: subsequently published by the United Nations Centre for Human Rights under the title *Freedom of the Individual Under Law: A Study of the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, United Nations Study Series No. 3, 1990.
[31] *Towards a New International Economic Order: A Final Report by a Commonwealth Experts' Group* (London, Commonwealth Secretariat, 1977).

the necessary measures of restraint that would allow for the progressive elimination of poverty, a prerequisite for realization of the right to development throughout the world.

VII. Participation as a central factor in realization of the right to development

Popular participation as an integral part of the development process has long been accepted as an ideal at the international level and is increasingly being incorporated into national development strategies.[32] Similarly, the role of participation in fostering respect for human rights is emphasized in international human rights instruments. The Special Rapporteur of the Commission on Human Rights, Manouchehr Ganji, in his 1969 study *The Realization of Economic, Social and Cultural Rights*, concluded that "the basic principle governing the question of human rights in development should be the participation of the people in deciding their own style of individual and corporate life in general, and in particular their participation in decision-making in connection with development programmes, in the implementation of those programmes and in the benefits derived from them".[33] Participation should be viewed both as a means to an end and as an end in itself. As a prerequisite for realization of the right to development, it is required at all levels ranging from the local through the regional and national to the international.

The concept of participation is of fundamental importance in the context of international human rights instruments. The need for participation is also a consistent theme in the declarations, recommendations, resolutions and plans of action of a number of United Nations world conferences on subjects such as population, food, habitat, the environment, women and employment.[34]

Participation in the decision-making processes should encompass much more than participation in the political processes; institutions, both public and private, local and national, that affect the lives of individuals must be concerned with development.[35] A United Nations study concluded that there is little evidence to indicate that popular participation on a sustained basis emerges spontaneously.[36] On the other hand, a study prepared for ILO suggests that participation is more effective where it is endogenous—where it has been demanded and achieved by the participants, perhaps with a struggle, rather than conferred from above.[37] These propositions do not conflict with one another. The needs which emerge are for the fostering of conditions which are conducive to the emergence of participation and for the provision of strong and sustained support for institutions once they have emerged.

The central importance of participation at all levels in order to promote realization of the right to development has thus been widely acknowledged. A report of the United Nations Development Programme indicated that "although there is increasing recognition of the necessity for active participation by the poorer groups in activities aimed at improving their living conditions, progress has been slow" (DP/319/Add.2, para. 64 (i)). Efforts to promote participation are thus crucial to the development process as well as being an essential element in the promotion of human rights.

The international community has an important role to play in fostering the development of participatory institutions at all levels. In addition to setting an example by ensuring that the structure of the international community itself facilitates full and equal participation, the community can provide assistance and encourage the exchange of information between nations and groups. At the same time, it must be recognized that participatory institutions cannot be imported from abroad, but must reflect the needs, traditions and experiences of the local population.

VIII. Summary and conclusion

The report of the Secretary-General considers the ethical aspects of the right to development, which range from the relatively pragmatic view that it is in the best interests of all States to promote the universal realization of the right, to the view that there are fundamental philosophical values which can be said to underlie the right to development. In addition, the analysis of legal norms relevant to the right has indicated that there is a very substantial body of principles based on the Charter of the United Nations and the

[32] See generally *Popular Participation in Decision Making for Development* (United Nations publication, Sales No. E.75.IV.10) and "Popular participation and its practical implications for development" (E/CN.5/532).
[33] United Nations publication, Sales No. E.75.XIV.2, Part. 6, para. 122.
[34] The approach adopted by these conferences is analysed in document E/6056/Add.1, section IV.P, entitled "Participation in the development process", paras. 62-64.
[35] *Report of the Seminar on the Realization of Economic and Social Rights with Particular Reference to Developing Countries*, Lusaka, 23 June–4 July 1970 (ST/TAO/HR/40), para. 36.
[36] See *Popular Participation in Decision Making for Development*, p. 63.
[37] Donald Curtis and others, *Popular Participation in Decision-Making and the Basic Needs Approach to Development* (Geneva, ILO, 1978), para. 8.

International Bill of Human Rights and reinforced by a range of conventions, declarations and resolutions which demonstrate the existence of a human right to development in international law.

The report also considers some of the subjects and beneficiaries of the right, on the one hand, and those for whom the right implies duties, on the other hand. The report acknowledges, however, that the analysis undertaken cannot purport to be exhaustive, nor that it is likely to be the last analysis to be undertaken of the full implications of the existence of the right. The right to development, like other human rights, is not to be considered as a static concept but as an evolving one. Changing perceptions of the development process and the emergence of strong recognition of the need to achieve a new international order in social, economic, political and cultural terms have added an extra dimension to the significance of the right to development. It is expected that a more comprehensive appreciation of the implications of the right and a more detailed elaboration of the rights and duties which attach to it would emerge in the course of the next few years.

The report also draws attention to the fundamental interdependence of objectives such as achievement of a New International Economic Order, satisfaction of fundamental human needs and realization of the right to development. In particular, the report emphasizes the central importance of achieving disarmament and the cessation of the arms race as a prerequisite not only for realization of the right to peace but also of the right to development. In addition, it points to a number of specific issues in relation to which the Commission on Human Rights might consider undertaking further study and analysis. Some of these are outlined below.

While the study examines the broad outlines of the human right to development, the precise content of the right can only be determined by a thorough and comprehensive analysis of the diverse sources upon which the right is based. Such an analysis is especially important in the context of identifying, in more specific terms, those entities which are the subjects, beneficiaries and duty holders of the right to development. Thus, in order to clarify further the concept of the right to development and to accord it greater practical significance, further analysis could be directed towards identifying and elaborating some of the specific rights and duties which, on the basis of existing and evolving international instruments pertaining to the right, are to be attributed to all relevant entities, including the international community as a whole, States, peoples, transnational corporations and individuals. Some materials for an analysis of this type may be found in the survey by the Secretary-General of the "principles, directives and guidelines for action in the field of development" presented to the Economic and Social Council in 1968 (E/4496).

The analysis of the implications of the right to development for official development assistance has indicated that there is considerable international interest in the concept of forging closer links between the promotion of human rights and the provision of official development assistance. In view of the fact that there appears to be no existing comprehensive analysis of the complex issues which arise in this connection, the Commission on Human Rights may wish to consider undertaking a more detailed study of the relevant issues with a view to formulating general principles and criteria which might guide future bilateral and multilateral assistance arrangements, insofar as they seek to promote human rights in general and the human right to development in particular.

The potentially beneficial impact of the activities of transnational corporations is substantial. Nevertheless, certain aspects of their operations have given rise to serious concern. While a number of organs within the United Nations system are at present working on the elaboration of aspects of a code of conduct for transnational corporations, the analysis in the report indicates that much remains to be done in order to clarify the specifically human rights-related obligations of these corporations, both in general terms and in particular situations.

One of the most significant conclusions to emerge from the report is the need to ensure that the promotion of respect for human rights is an integral element in all development-related activities. In this regard, the Commission may wish to consider the most effective ways and means by which the promotion of human rights, including the right to development, might be more fully integrated into the entire range of United Nations development activities. Among the issues of major importance in terms of the right to development which could be considered are: the ways in which human rights, including the right to development, could be given more specific consideration in the context of reports relating to all aspects of development, including, for example, the review of progress in achieving the objectives of the International Development Strategy for the 1980s; the need for improved coordination of the human rights-related

activities of the United Nations system in order to better promote realization of the right to development; the feasibility of establishing a periodic general review or survey by the Secretary-General of trends concerning the implementation of the concept of development as a human right and the integration of human rights standards into the formulation and application of development plans; and the practicability of requiring a "human rights impact statement", which might be similar in concept to an environmental impact statement, to be undertaken prior to the commencement of specific development projects or in connection with the preparation of an overall development plan or programme.

The Commission may wish to consider that a series of interdisciplinary, action-oriented seminars be organized on various aspects of the human right to development such as the integration of human rights standards into the formulation and application of development plans. Similarly, workshops could be held with the objective of involving the existing United Nations regional commissions in discussions of relevant issues with a view to formulating practical proposals for promotion of the human right to development.

The emergence of the human right to development as a concept of major importance is a reflection of its dynamic character. The continuing evolution of the concept and its translation into a notion capable of providing practical guidance and inspiration, based on international human rights standards, in the context of development activities will depend significantly on the future course of action adopted by the Commission on Human Rights. The report of the Secretary-General outlines some of the major issues in relation to which the Commission may wish to consider taking action.

The Declaration on the Right to Development in the context of United Nations standard-setting[1]

*Tamara Kunanayakam**

I. Introduction

The Declaration on the Right to Development was adopted by the General Assembly in its resolution 41/128 of 4 December 1986.

The Declaration defines development in its preamble as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom." Its article 9 (1) stipulates that "[a]ll the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole".

In view of the complex definition of the right to development, its multiple actors, and the corresponding duties that it imposes upon States, individuals and collectivities, as well as the imperative reflected in article 9 (1), it is essential that the multiple dimensions of this complex process be correctly identified, along with the principles upon which they are based, so as to ensure full implementation of the Declaration and the realization of the right to development.

Key concepts reflected in the Declaration include its recognition of development as a dynamic process that requires enabling structures and systems; the interrelationship and interdependence between human rights, development and peace; human beings and peoples as subjects of development; the essential role of participation, individually and collectively, in the process; the indivisibility and interdependence of civil, economic, cultural, political and social rights; the indivisibility of the material and non-material aspects of development; the interdependence and interrelationship between the individual and the collective dimensions, individual rights being ordinarily exercised by associating in collective entities; and the interrelationship and interdependence between national justice

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[1] This chapter consists of extracts from a background paper entitled "Annotations to the Declaration on the Right to Development and related United Nations system instruments, resolutions and reports" (HR/RD/1990/CONF.1), which the author prepared for the former United Nations Centre for Human Rights as input to the Global Consultation on the Realization of the Right to Development as a Human Right held in January 1990. It contains a summary of 25 out of 36 United Nations documents issued since 1944. Documents not included in these extracts purely for reasons of space, but which are no less pertinent to understanding the background to the Declaration on the Right to Development are: Freedom of Association and Protection of the Right to Organize Convention, 1948 (Convention No. 87) of the International Labour Organization (ILO); Declaration on the Rights of the Child; Final Act of the first United Nations Conference on Trade and Development; report of the Seminar on the Promotion and Protection of the Human Rights of National, Ethnic and other Minorities; Universal Declaration on the Eradication of Hunger and Malnutrition; ILO Rural Workers' Organizations Convention (No. 141) and Recommendation (No. 149), 1975; report of the World Conference on Agrarian Reform and Rural Development; Convention on the Elimination of All Forms of Discrimination against Women; report of the Seminar on the Relations that Exist Between Human Rights, Peace, and Development. The extracts and analysis have been edited as appropriate for this publication.

and international justice, between national and international conditions.

The various dimensions of the right to development, as reflected in the Declaration, draw their legitimacy from principles that appear in authoritative United Nations law and policy, which are restated and further developed in the Declaration. These include respect for the principles of equality, non-discrimination, social justice and solidarity at all levels; the realization of the right of peoples to self-determination in all its dimensions—political, economic, social and cultural—as prerequisite for the realization of all human rights and fundamental freedoms; the corresponding right and duty of States to create the national conditions for their realization; their duty of international cooperation and solidarity to create an international order conducive to that process, based on equality and self-determination of all peoples, permanent sovereignty over their natural wealth and resources, non-interference in the internal affairs of States, and national sovereignty and territorial integrity. The sources of these basic principles can be traced back to various studies and legal instruments adopted by United Nations bodies, the League of Nations and the Philadelphia Convention of the General Conference of the International Labour Organization of 1944.

The historical development of the principles gathered in the Declaration reflects the gradual evolution of greater democracy in international relations, as part of the decolonization process and the emergence of the Non-Aligned Movement. The Declaration recognizes that political independence of States cannot be ensured in the absence of economic independence.[2] It also reflects a rethinking of development strategies[3] in the wake of the widespread failure of traditional growth-centred development policies towards one that is human-centred, encompassing a multidimensional and dynamic process that takes into account the structural and the systemic, the individual and the collective, the national and the international.

As indicated, the present chapter contains extracts or summaries of the arguments presented in the background paper prepared by the author for the Global Consultation on the Realization of the Right to Development as a Human Right, held in Geneva in January 1990. That paper sought to trace the concepts incorporated in the Declaration and the evolution of the principles on which they are based, focusing on the substantive relationship between the Declaration and other instruments, resolutions and reports of the United Nations system. Detailed references to the manner in which the principles and concepts are reflected in the Declaration have been removed from the present chapter for want of space and can be found in the original document.

II. Evolution of principles in the Declaration on the Right to Development

A. Declaration of Philadelphia, General Conference of the International Labour Organization (1944)

The Declaration of Philadelphia, adopted in 1944 and incorporated into the ILO Constitution in 1946, clearly expressed the concept implicit in the notion of the right to development and defines some of the basic principles subsequently reflected in the Declaration. It considered as fundamental the objective that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual freedom in conditions of freedom and dignity, of economic security and equal opportunity", recognizing that the individual has the right not only to the material but also to the non-material aspects of development. The Declaration is unequivocal in reaffirming the fundamental principle that "labour is not a commodity".

Such development must be based on principles of non-discrimination, equality and social justice. Development, peace and respect for human rights are interdependent. Freedom and dignity should be both conditions, and ends, of development.

Recognizing that individual rights cannot be disassociated from collective rights, the Declaration acknowledges that individual development must take place within the framework of development in general, which alone can provide the individual with economic security. It also implicitly recognizes the essential role of participation by reaffirming the principle of "freedom of expression and of association" as "essential to sustained progress", thus acknowledging that, although an individual right, it must ordinarily be exercised through collective entities, requiring the democratization of institutions and decision-making processes.

[2] Aureliu Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (United Nations publication, Sales No. E.80.XIV.3).

[3] Development and international cooperation: preparation of the International Development Strategy for the Fourth United Nations Development Decade: note by the Secretary-General transmitting the report of the Administrative Committee on Coordination (ACC) Task Force on Long-Term Development Objectives (E/1989/80).

The creation of national and international conditions in which such human development is possible is the primary responsibility of States, including also their duty to cooperate with each other, and must constitute the central aim of national and international policy. Hence, the Declaration requires that all national and international policies, in particular those of an economic and financial character, are judged in this light and accepted only insofar as they may be held to promote and not hinder its achievement.

B. Charter of the United Nations (1945)

The right to development is in full conformity with the letter and spirit of the Charter of the United Nations, adopted in San Francisco on 25 June 1945 by the United Nations Conference on International Organization, which is a definite statement on the interrelationship and interdependence between peace, development and human rights, between the individual and collective dimensions, between the national and the international and, hence, the duty of States to cooperate with each other to create the international conditions necessary to support national efforts for their promotion and realization.

Chapter I of the Charter defines the purposes and principles of the United Nations, the vital clauses and the unique basis upon which friendly relations among nations can develop. It is the principal source of the Declaration and its multidimensional and structural approach to the realization of the right to development.

Article 1 on the purposes of the United Nations provides, inter alia, for (a) the adoption of collective measures for the maintenance of international peace and security, including prevention and removal of threats to the peace, suppression of acts of aggression or other breaches of the peace, and the peaceful settlement of international disputes or situations which might lead to a breach of the peace, "in conformity with the principles of justice and international law"; (b) the achievement of international cooperation in resolving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms "for all without distinction as to race, sex, language, or religion"; and (c) the development of friendly relations among nations "based on respect for the principle of equal rights and self-determination of peoples".

Article 2 specifies the principles upon which the duty of international cooperation must be based, including, inter alia, the principle of sovereign equality of States, a corollary of the right of peoples to self-determination; the peaceful settlement of international disputes; the duty to refrain from 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 non-intervention in the internal affairs of States.

Thus, in order to promote international peace and stability through the realization of development, human rights and peace, Chapter I requires States to cooperate with each other and develop friendly relations, "based on respect for the principle of equal rights and self-determination of peoples" and its corollary, the principle of sovereign equality.

Article 55 of the Charter is more precise and expands upon the problems that need to be addressed through international economic and social cooperation and the manner in which the United Nations would achieve the purposes defined:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
>
> (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Based on the principles of equal rights and the self-determination of peoples, Articles 55 and 56 of the Charter emphasize the fundamental legal principle of solidarity between nations, which is necessary for the achievement of development, human rights and peace. Under the terms of Article 56, "Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." In accordance with these two articles, the realization of human rights and development are binding legal obligations on Member States and the basis of all future action in this field.

The duty of international solidarity and its result, the right to development, is reiterated in articles 3, 4, 5 and 7 of the Declaration on the Right to Development, which are based on the principles of sovereign equality and international justice. In its article 2 (2), the Declaration also clearly stipulates the duty of solidarity of the individual toward the community: "All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development."

The individual and collective dimensions of the principles defined in the Charter are reaffirmed in the Declaration. The principles of non-discrimination, equality and social justice are applicable equally to individuals and peoples, to collective entities that represent them within States or as States, the entity through which they interact in their international relations with other States. Their application to individuals is expressed, inter alia, in Articles 1 (3), 8, 13 (1), 55, 67 (1), and 76 (c) of the Charter, which require respect for, promotion and realization of "human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"; their application to nations and States is reflected in the preamble, which reaffirms faith in the equal rights of nations "large and small", and in Articles 1 (2), 2 (1), 18 (1), 55, 76 (d), 78 and 109, referring to sovereign equality of States, and others concerning Non-Self-Governing Territories and the International Trusteeship System.

Participation is an essential factor in the achievement of development, peace and human rights. Related to the principles of self-determination, equality, non-discrimination and social justice, the concept recognizes that individuals and peoples are the central subjects of their own history. Whereas in the Charter the concept, as expressed in the articles concerning Non-Self-Governing Territories and the International Trusteeship System, relates to the actual self-determination procedure and self-government taking into account "political aspirations" (Articles 73 (b) and 76 (b)), the Declaration recognizes the right of peoples also to freely pursue their economic, social and cultural development. Article 1 (2) specifies that the right to development implies "the *full* [emphasis added] realization of the right of peoples to self-determination", which also includes "their full sovereignty over all their natural wealth and resources", its realization being a prerequisite for the realization of all human rights, including the right to development. Articles 1 (1), 2 (1) and 8 (2) recognize the right to participate in all spheres of development—political, economic, social and cultural. By focusing the two paragraphs of its first article on participation and self-determination, the Declaration recognizes that these are related, though distinct, concepts.

C. Universal Declaration of Human Rights (1948)

The Universal Declaration of Human Rights was proclaimed as a "common standard of achievement for all peoples and all nations" by the General Assembly in its resolution 217 A (111) of 10 December 1948, to be promoted by progressive measures, national and international. Articles 1 and 2 reaffirm the basic principles defined in the Declaration of Philadelphia—equality, non-discrimination and social justice—upon which the rights and freedoms it proclaims must be based. Article 1 declares, "All human beings are born free and equal in dignity and rights" and article 2, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Articles 22 and 28 of the Universal Declaration provide the conceptual basis for the right to development as a human right as defined in article 1 of the Declaration, which extends the right to "all peoples". Article 1 (1) provides that "[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized". Article 1 (2) states: "The human right to development also implies the full realization of the right of peoples to self-determination."

Article 28 of the Universal Declaration recognizes, for the first time, the need for a structural approach to human rights, at both national and international levels. It also makes a clear statement on the link between the global order and the realization of human rights; and that an enabling international environment is indispensable for the realization of human rights. This general principle is reflected in article 22,

which emphasizes the importance of national effort and international cooperation, thus recognizing the importance of structural transformation at the international level to accompany national reform.

Promoting development and human rights is the shared concern and responsibility of individuals and groups within societies, States and the international community. The obligation to demonstrate solidarity is reflected in articles 1 and 28 of the Universal Declaration. Article 1 states, "All human beings are … endowed with reason and conscience and should act towards one another in a spirit of brotherhood" and article 28, "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised."

The Universal Declaration defines an entire range of rights—civil, cultural, economic, political and social—reflecting the material and the non-material, the individual and the collective, development and human rights, and their interrelatedness and indivisibility. These dimensions were subsequently incorporated and further developed in the Declaration on the Right to Development.

That the human person has the right not only to the material but also to the non-material aspects of development are reflected in the articles of the Universal Declaration that refer to the full development of the human personality. Article 29 (1), for instance, provides that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible". Article 26 (2) relates to the objectives of education. The second preambular paragraph establishes the fundamental link between the two sets of rights: "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."

As for the relationship between the individual and the collective, while the Universal Declaration may seem to emphasize the individual, several articles imply that individual development and fulfilment can be achieved only through the satisfaction of collective prerequisites. In various articles in addition to article 29, the collective dimension is reflected in the importance given to participation, reaffirming the principle, reflected in the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87, that individual rights are often expressed through collective institutions. Article 20 provides for freedom of peaceful assembly and association, article 21, to participate "in the government of his country, directly or through freely chosen representatives", article 23 (4), to form and to join trade unions and article 27, to take part "in the cultural life of the community".

The collective dimension is also expressed through the corresponding duties towards the community to which the rights of individuals set forth in the Universal Declaration give rise. The eighth preambular paragraph calls on every individual and every organ of society to promote respect for the rights and freedoms proclaimed in the Declaration and to undertake measures, at the national and international levels, to secure their recognition and observance, both among the peoples of Member States and among the peoples of territories under their jurisdiction. Article 29 (1) refers to the duties of the individual towards the community. The duties of the individual are further reinforced by the provision in article 30 that "[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein". The duties of individuals towards the community are placed within the broader context of development in the Declaration on the Right to Development (art. 2 (2)), and is reinforced in article 9 (2).

At the international level, this collective dimension is discussed above with reference to articles 22 and 28 of the Universal Declaration.

The Universal Declaration recognizes the need to democratize institutions and decision-making processes for the realization of human rights, both at the national and international levels, a recognition that is explicit in the Declaration on the Right to Development.

The Declaration is unequivocal that all human rights and fundamental freedoms are "indivisible and interdependent" and must be given equal attention (art. 6 (2)). Article 1 provides for the right of human beings and peoples to both material and non-material aspects of development—to "economic, social, cultural and political development". The principles of equality, non-discrimination and social justice are applied equally to individuals and nations. Articles 2 (3), 6 and 8 stipulate the manner in which States must formulate national development policies and the measures they should undertake to ensure development within their countries. Articles 2 (3) and 8 (1) refer to non-discrimination in terms of fair

distribution and equality of opportunity and access. Article 8 (1) requires States to take positive measures in favour of non-discrimination of women. Articles 3, 4 and 5 refer to appropriate international development policies and measures that States and the international community must undertake in a manner that respects these principles.

A crucial dimension of United Nations efforts in the field of human rights, which is provided for in the Declaration, refers to the obligation of States, individually and collectively, to create the conditions necessary, at the national and international levels, for the exercise of the fundamental right of peoples to self-determination, without which individual rights cannot be realized. States have the primary responsibility to create an appropriate national and international environment for the realization of the right to development (art. 3 (1)). At the national level, States have a duty to undertake appropriate economic and social reforms to eradicate all social injustices (art. 8 (1)); at the international level, States should, inter alia, promote a new international economic order (art. 3 (3)), formulate appropriate international development policies (art. 4), eliminate massive and flagrant violations of the human rights of peoples and human beings (art. 5) and promote the establishment, maintenance and strengthening of international peace and security (art. 7). Articles 4, 5 and 7 propose further measures to be adopted by States and the international community.

D. Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)

In many respects the right to development as the logical next step in the programme of decolonization was placed on the table at the United Nations in 1960, when the General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples in resolution 1514 (XV). The Declaration amplified and extended the Charter of the United Nations to take into account the emerging reality of newly independent States.

The General Assembly solemnly proclaimed "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations", declaring its conviction that "the continued existence of colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace"; that the increasing conflicts resulting from the denial of their freedom or obstacles placed in their way constitute a serious threat to world peace; and that "all peoples have an inalienable right to complete freedom and to the exercise of their sovereignty and territorial integrity".

The Declaration is a document of historical importance. Its paragraphs outline what may be described as ordering principles, intended to guide the progressive development of international law in accordance with the General Assembly's own explicit mandate under Article 13 (1) (a) of the Charter. It was followed by a series of resolutions, of which the most important are resolution 1515 (XV) on the sovereign right of States to dispose of their own wealth and natural resources; resolution 1803 (XVII) on States' permanent sovereignty over those natural resources; the 1974 Declaration on the Establishment of a New International Economic Order and the Programme of Action (resolutions 3201 (S-VI) and 3202 (S-VI)); and the Charter of Economic Rights and Duties of States (resolution 3281 (XXIX), which demonstrate the visionary quality of the 1960 Declaration.

In condemning colonialism and other forms of subjection of peoples to foreign domination, subjugation and exploitation and actively promoting decolonization, the Declaration is one of the most significant contributions of the United Nations to the concept of self-determination. It declares that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation" (art. 1) and that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (art. 2).

The General Assembly is explicit in its recognition of the link between the international order and the realization of human rights and development, establishing at the same time the relationship between development, human rights and peace, and the realization of the right of peoples to self-determination as a prerequisite for their achievement.

By affirming that all forms of alien subjugation, domination and exploitation are incompatible with human rights, legally as well as philosophically, and that they should be eliminated, the General Assembly recognizes that the realization of effective national

sovereignty and territorial integrity, notably the right of peoples to associate as nations to exercise their right to self-determination, is a prerequisite for the realization of individual freedoms in whatever form, thus also recognizing that individual rights can only be achieved through the realization of collective rights.

The Declaration unequivocally establishes the interrelation between individual and collective rights; between the national and international dimensions; and between development, human rights and peace. It also validates the multidimensional aspect of the right of peoples to self-determination—political, economic, social and cultural; the recognition that its realization, including the exercise of national sovereignty and territorial integrity, is a prerequisite for the realization of all other rights and freedoms; and the duty of States to cooperate internationally to eliminate obstacles to the realization of rights on the basis of equality and self-determination of all peoples, non-interference in the internal affairs of States, and respect for national sovereignty and territorial integrity.

In a warning against possible attempts to sabotage the decolonization process, the General Assembly established that with the granting of independence, the abolition of domination must be complete; attempts to restore foreign influence should end forever; independence should mean not only political independence but also economic and cultural independence free from any kind of interference or pressures, direct or indirect, on whatever pretext, exercised over peoples or nations. It also provided that the principles contained in the Declaration must be applied to all peoples, universally, not only at the time of obtaining independence—which must be complete and absolute—but also in ensuring the preservation of that independence; that should depend on the free will and determination of the people themselves and not be subjected to any other influence.[4] Relations between the dominant and subject peoples must give way to relations between free peoples, based on an equal footing and on trust. Cooperation and peace could thus also replace antagonism and war.[5]

The logical corollary of the right of peoples to self-determination, reaffirmed by the Declaration, is the duty of States to create the international conditions of stability and well-being and peaceful and friendly relations, based on respect for the principles of equal rights and self-determination of all peoples. States are required to cease "[a]ll armed action or repressive measures of all kinds directed against dependent peoples … in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected" (art. 4). The Declaration also states that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations" (art. 6) and that all States have the obligation to observe the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States and respect for the sovereign rights of all peoples and their territorial integrity (art. 7).

These concepts were subsequently reaffirmed and further developed in the Declaration on the Right to Development. However, the Declaration goes further by underlining the indivisibility of the individual and collective aspects of the right to development, given that it must ordinarily be exercised through collective economic, social and cultural institutions.[6]

E. Programme for the First United Nations Development Decade (1961)

In its resolution 1710 (XVI) of 19 December 1961, the General Assembly designated the 1960s as the United Nations Development Decade, calling on all States to "intensify their efforts to mobilize and to sustain" measures to achieve "self-sustaining growth of nations and their social advancement," with the objective of a minimum annual growth rate in national income of 5 per cent by the end of the Decade.

While the principal aim of the first Development Decade was to increase international financial aid and stimulate growth, the General Assembly also recognized the important link between social conditions and economic growth and, hence, the need to address human needs. The resolution is the first expression of collective awareness of the widespread failure of traditional growth-centred development policies and the need to reconsider these development strategies[7] and move towards one that was more human-centred, encompassing a multidimensional approach. In its resolution, the Assembly requested, inter alia, international agencies to adopt measures to "accelerate the

[4] *Official Records of the General Assembly, Fifteenth Session, 935th meeting* (A/PV.935), paras. 81, 93, 104 and 105.
[5] Ibid., *945th meeting* (A/PV.945), paras. 87 and 187.
[6] "Report of the Working Group on governmental experts on the right to development" (E/CN.4/148) (1982).
[7] See footnote 3 above.

elimination of illiteracy, hunger and disease, which seriously affect the productivity of the people of the less developed countries".

The Declaration further defined the concept of development as a process based on the principles of non-discrimination, equality, social justice and solidarity in which the human person, individually and collectively, is the central subject, rather than the object, the active participant and beneficiary of the right to development.

Appealing for more "equitable" and "mutually acceptable" economic relations between developed and developing countries, the General Assembly reaffirmed the duty of States to cooperate internationally and act in solidarity to create the conditions necessary to achieve the target set. It called upon developed countries to transfer annually a minimum net amount of 1 per cent of their gross national product to developing countries. Thus, the responsibility of States to promote the development efforts of other States in terms of a quantitative target for the net transfer of resources from developed to developing countries became an integral element of international development strategy.

F. Declaration on permanent sovereignty over natural resources (1962)

The General Assembly, in its resolution 1803 (XVII) of December 1962, reaffirming that political independence can only be assured by economic independence, which can be guaranteed only if people have the right to possess and develop their wealth and natural resources, proclaimed the inalienable right of peoples and nations to permanent sovereignty over their natural wealth and resources, and that such sovereignty was a basic constituent of the sovereign and inalienable right of peoples to self-determination, including development.

The Declaration reaffirms the right of peoples to self-determination, including their inalienable right to full sovereignty over all their natural wealth and resources (art. 1 (2)), as a prerequisite for the realization of the human right to development, thus recognizing that individual rights can be achieved only through the realization of collective rights.

Attaching particular importance to the promotion of economic development of developing countries and securing their economic independence, and noting that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence, the General Assembly declared that the violation of the right to sovereignty over natural resources "is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace" (art. 7), and stipulated that this right must be respected "strictly and conscientiously" by States and international organizations (art. 8).

The Declaration explicitly recognizes the State as subject of the right "freely to dispose of their natural wealth and resources", with the corresponding duty to exercise the right in the national interest and for the well-being of its people. The General Assembly, "[c]onsidering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States", and noting that "the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence", declared that this right "must be exercised in the interest of their national development and of the well-being of the people of the State concerned" (art. 1). Respect for the right is, therefore, a precondition for the realization of the rights of individuals within the State.

At the international level, the logical corollary of the right to permanent sovereignty is the duty of States to further this right "by the mutual respect of States based on their sovereign equality" (art. 5).

Considering that it is desirable to promote international cooperation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination, and that the provision of economic and technical assistance, loans and increased foreign investment must not be subject to conditions which conflict with the interests of the recipient State, the Declaration goes on to apply this principle to exploration, development and disposition of the natural wealth and resources; to the import of foreign capital required for these purpose; to the profits derived therefrom; to the nationalization, expropriation or requisitioning of such wealth and resources; and to

foreign investment agreements freely entered into by or between sovereign States. Article 6 provides that "[i]nternational cooperation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources".

Article 1 (2) of the Declaration reaffirms the right of peoples to self-determination, including their inalienable right to full sovereignty over all their natural wealth and resources, and asserts that the realization of that right is a prerequisite for the realization of the human right to development, thus also recognizing that individual rights can only be achieved through the realization of collective rights. It is part of the sovereign and inalienable right of every State to choose its economic, political, social and cultural system in accordance with the will of its people.

The General Assembly reaffirmed the existence of a universal right of all States to pursue their own development in an international environment conducive to that process and based on the principles of equality and of the right of peoples and nations to self-determination. This right provides the basis of article 3 (1) of the Declaration on the Right to Development, which states that States have the primary responsibility to create national and international environment conditions favourable for the realization of the right to development.

G. International Convention on the Elimination of All Forms of Racial Discrimination (1965)

The International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly in 1965 by resolution 2106 (XX), condemned all forms of racial discrimination against individuals and groups, further defined some of the basic principles on which the right to development is based—non-discrimination, equality and social justice—and adopted a multidimensional approach to human rights subsequently reflected in the Declaration on the Right to Development.

Reiterating the principles of non-discrimination, equality and social justice established in the Charter of the United Nations and proclaimed in the Universal Declaration of Human Rights, the Convention outlines the measures that States have a duty to adopt, nationally and internationally, towards the speedy elimination of racial discrimination throughout the world in all its forms and manifestations and securing understanding of and respect for the dignity of the human person.

The structural and systemic character of this Convention is expressed throughout the text, in its condemnation of "colonialism and all practices of segregation and discrimination associated therewith, in whatever form", including apartheid; its condemnation of doctrines of racial superiority and all propaganda and organizations based on such ideas or theories or which attempt to justify or promote racial hatred and discrimination in any form; its recognition that these often result from Government policy and legislation, or promotion or incitement by public authorities or institutions or by non-governmental entities; its enumeration of the measures States parties have the duty to adopt in this regard; and in its acknowledgement of the essential role of participation through collective entities.

The Convention recognizes that individual rights are ordinarily exercised through the realization of collective rights, acknowledging in its article 1 (4) the need for special measures in favour of certain racial or ethnic groups "to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms…" To that end, the Convention requires States parties to "encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division" (art. 2 (1) (e)); to take special and concrete measures, under certain circumstances, in the social, economic, cultural and other fields "to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms" (art. 2 (2)); to guarantee the right of everyone "without distinction as to race, colour, or national or ethnic origin, to equality before the law" in the enjoyment of, inter alia, "[t]he right to freedom of peaceful assembly and association" and "the right to form and join trade unions" (art. 5 (d) (ix) and (e) (ii)). Participation requires the establishment of equitable and appropriate structures through which it can be exercised.

The link between the national and the international is most clearly expressed in the Convention's preamble, which refers to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples; doctrines of racial superiority being an obstacle to friendly and peaceful relations among nations and a threat to international peace and security; the resolve of States parties to adopt measures for the speedy elimination of racial discrimination and related practices "in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination", and the duty of States to cooperate internationally in this regard, as provided for in the Charter of the United Nations.

H. International Covenants on Human Rights (1966)

Although adopted by the General Assembly only in 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) were largely drafted in the 1950s, reflecting the climate of the time. Their provisions are of considerable significance to the Declaration on the Right to Development.

Deriving from the Universal Declaration of Human Rights, both International Covenants recognize that the necessary conditions are a prerequisite for the realization of human rights: "… the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights" (third preambular paragraph). The common paragraph implicitly recognizes that the two sets of rights are interconnected and interdependent.

Common article 1 has special significance for the right to development as a prerogative also of peoples and States, with national and international ramifications.[8] Article 1 (1) proclaims: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 1 (2) provides for the achievement of economic independence by which sovereignty and political independence can be ensured: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

The International Covenants thus underline the political, legal, economic, social and cultural dimensions of the right to self-determination and its continuing character based on the "free disposal" principle, which implies a continuing process of economic relations with other States. Its equivalent in the Covenants is the principle of solidarity, expressed in article 1 (2) as "without prejudice to any obligations". Article 1, in effect, says that States may dispose of their wealth in whatever way they wish, except refuse to contribute to international cooperation for development. The "obligations" are those contained in Articles 55 and 56 of the Charter.

The principle of self-determination requires the establishment of democratic structures based on the principles of non-discrimination, equality, social justice and solidarity through which people can exercise this right. At the national level, it entails a corresponding obligation of States to respect the rights of people under their jurisdiction. However, the Covenants, in their common fifth preambular paragraph, also recall that individuals not only have rights, but also corresponding duties towards their community: "… the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized". At the international level, States have a duty to cooperate in accordance with Articles 55 and 56 of the Charter. Article 2 (1) of ICESCR, recognizing that the realization of these rights greatly depends on international cooperation, imposes upon States a legal obligation to "take steps, individually and through international assistance and cooperation", further strengthening the legal basis to cooperate in achieving economic and social development. Article 11 underlines "the essential importance of international cooperation" to realize the right of everyone "to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". Part IV of the Covenant places considerable emphasis on the role of specialized agencies in the realization of the rights enumerated therein.

[8] Article 1 (1) of the Declaration on the Right to Development provides: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." Article 1 (2) states: "The human right to development also implies the full realization of the right of peoples to self-determination …"

Hence, respect for the principle of self-determination and the related solidarity principle gains recognition as a prerequisite for the realization of the rights set forth in both International Covenants and becomes the basis for the right to development. The Declaration on the Right to Development reaffirms the right to self-determination as a multidimensional and continuing right. Article 1 (2) indicates that the full realization of the right to self-determination is a prerequisite for the realization of the human right to development. Articles 2 (3) and 8 (1) reiterate the universal right of all States to formulate their own development policies and spell out their corresponding duty towards the people under their jurisdiction. States not only have a duty to take concrete steps to improve economic, social, political and cultural conditions, but to do so in a manner that is democratic in its formulation and equitable in its results. At the international level, States have a duty to cooperate to create international conditions conducive to the realization of the right to development (art. 3). Specific measures that States have a duty to undertake in this regard are elaborated in articles 3, 4, 5 and 7 of the Declaration.

The principle of non-discrimination is an essential component in the concept of human rights enunciated in both International Covenants, and is of fundamental relevance to the right to development. Article 2 of each of the Covenants provides that States must guarantee respect for the rights enunciated "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The Declaration explores the complementary principles of equality and non-discrimination and applies them to individuals (art. 2 (3), 6 (1) and 8 (1)) and States (arts. 1 (2), 3 and 5).

Both Covenants recognize the essential role of participation, individually and collectively, for the promotion of their interests and, hence, the right to create equitable and appropriate structures through which it can be exercised. Reaffirming that individual rights are ordinarily exercised through participation in collective entities, which in turn must be guaranteed, they both reaffirm the right of peoples to self-determination in their common article 1, which provides the framework for the rights subsequently enumerated. Articles 8 and 10 of ICESCR and articles 22, 23 and 27 of ICCPR refer to at least three kinds of groups: families, trade unions, and ethnic, religious and linguistic minorities. In terms of participation at the national level, both Covenants provide for the right of everyone to form and join trade unions for the promotion of their interests (ICESCR, art. 8 (1) (a) and ICCPR, art. 22 (1)). ICESCR is more specific in that it refers to "the promotion and protection of [everyone's] economic and social interests". ICCPR enumerates additional participatory rights of a collective nature, including the right to peaceful assembly (art. 21) and to "take part in the conduct of public affairs, directly or through freely chosen representatives" (art. 25). Article 27 stipulates that persons belonging to ethnic, religious and linguistic minorities, "in community with the other members of their group", have the right to enjoy their own culture, to profess and practise their own religion and to use their own language. Although these rights are expressed in terms of individual rights, they are based on the interests of a collectivity and, consequently, it is the individual as member of a minority group—not just any individual—who is the intended beneficiary of the protection guaranteed by article 27.

The individual and collective aspects of these rights may in fact be indivisible, as in the case of the right to self-determination, the right to form trade unions and the rights of persons belonging to minorities, because they can only be satisfied through collective action; this also recognizes the crucial importance of democratizing institutions and decision-making processes at all levels.

I. Final Act of the International Conference on Human Rights, Teheran (1968)

The Final Act of the International Conference on Human Rights was adopted on 13 May 1968 as "The Proclamation of Teheran". It was a clear departure from the traditional approach which gave priority to civil and political rights over economic, social and cultural rights. The realization of economic, social and cultural rights was now recognized as the condition for the realization of civil and political rights: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international development policies of economic and social development" (para. 13). In situations where a lack of resources or other constraints, especially those which are externally imposed, prevent the enjoyment of human rights, States and the international community have a duty to render assistance according to their

abilities. This duty of solidarity arises from the fundamental principle that economic and social progress and development are the common and shared concern and responsibility of the international community.

Almost two decades later, the Declaration on the Right to Development affirmed that the two sets of rights are indivisible and interdependent and should be given equal attention (art. 6 (2)), reflecting the desire of the General Assembly to adopt a balanced approach. However, the Declaration reaffirmed the duty of States to cooperate with each other to create the international conditions conducive to the realization of the right to development and further specified the measures to be adopted, including the duty to formulate appropriate national and international development policies (arts. 2 (3) and 4 (1)), assist developing countries with appropriate means and facilities to foster their comprehensive development (art. 4 (2)), and utilize the resources released through disarmament for comprehensive development, particularly of developing countries (art. 7). The Declaration went further in identifying additional measures to be adopted by States to create an international order conducive to the realization of the right to development (arts. 3 (1), (2) and (3), 5 and 6 (1)).

The Proclamation of Teheran acknowledged the importance of participation in relation to the process of development. Declaring that the primary aim of the United Nations is the achievement by each individual of maximum freedom and dignity, paragraph 5 provided that, for this purpose, "the laws of every country should grant each individual, irrespective of race, language, religion or political belief … the right to participate in the political, economic, cultural and social life of his country". This is the clearest enunciation of a global right to participation in an international instrument. Paragraph 17 underlined the importance of participation by youth in decision-making, thus recognizing that popular participation can take place in a variety of specific institutional settings and focus on a number of specific groups within the community. The International Conference thus expanded the concept, limited in the International Covenants to public affairs and cultural life, to include all economic, social and cultural decision-making. An approach to development which emphasizes the central role of participation also serves to underline the importance of implementing appropriate structural changes conducive to full popular participation. The Declaration, in several of its articles, reiterates the importance of participation in all aspects of development (arts. 1 (1), 2 (1) and (3), and 8 (2)). Article 8 provides that States must take positive measures to ensure this right.

The Conference reaffirmed the fundamental importance of the principle of non-discrimination—an essential component of human rights—as being of central relevance to the right to development. Paragraph 1 of the Proclamation proclaimed that it is imperative that members of the international community fulfil their duties to promote and encourage respect for human rights and fundamental freedoms "without distinctions of any kind such as race, colour, sex, language, religion, political or other opinions". Respect for this principle is also emphasized in the context of the rights to freedom of expression, of information, of conscience, of religion and of participation (para. 5). Moreover, the preamble to resolution IX adopted by the Conference stated that, "in accordance with the United Nations Charter and the Universal Declaration of Human Rights, women should be recognized as having a right to the development of their full potentialities …".[9]

Paragraph 12 of the Proclamation of Teheran recognizes the interdependence between international justice and human rights: "The widening gap between the economically developed and developing countries impedes the realization of human rights in the international community." The interdependence between the international economic order and human rights and development was also acknowledged in resolution XVII entitled "Economic Development and Human Rights".[10] The resolution reaffirmed the existence of the principle of international solidarity, solemnly recognized in the Charter. More specifically, it recognized the collective responsibility of the international community to ensure the attainment of the minimum standard of living necessary for the enjoyment of human rights and fundamental freedoms by all persons throughout the world, and called upon all States to discharge this responsibility fully. Paragraph 12 of the Proclamation affirmed that the failure to reach the objectives of the first Development Decade made it all the more imperative for every nation, "according to its capacities", to make the maximum possible effort to close the widening gap between the economically developed and developing countries.

The Declaration on the Right to Development reiterates this fundamental principle and sets out measures which States have a duty to adopt to create inter-

[9] See United Nations, *Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968* (United Nations publication, Sales No. E.68.XIV.2), chap. III.
[10] Ibid.

national conditions conducive to the full realization of human rights.

J. Study by Manouchehr Ganji (1969)

The 1969 study, *The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress* by Manouchehr Ganji, Special Rapporteur of the Commission on Human Rights on the Right to Development,[11] is significant in that it in many ways anticipates the definition of "development" reflected in the Declaration.

In the wake of widespread failure of traditional growth-centred development strategies, the Special Rapporteur argues in favour of a new concept of development, one that is human-centred and that takes into account its multiple dimensions, without which it will not be possible to achieve a more equal and just society and eliminate underdevelopment and poverty.

Economic growth by itself cannot resolve the problems of poverty and human degradation and ensure social justice. Rather, social justice is a prerequisite for integrated and sustained national development. The use of macroeconomic models and easily quantifiable variables tends to favour the omission of important social and cultural factors of development such as nutrition, income distribution and popular participation in the decision-making process. It is therefore necessary to adopt a unified concept of development planning which gives special attention to the realization of economic, social and cultural rights.[12] An important place must be given to human and social objectives, which essentially means responding to the needs of the entire population and ensuring that the development process primarily aims at achieving greater equality and justice.[13]

A development strategy should give high priority to social justice and consider the human person as the subject of development,[14] not as an object, a factor of production with education, a mere tool for developing narrowly defined skills and meeting the manpower needs of the economy. Development should aim at the realization of the totality of human potential. Such an approach would no longer view education as an activity limited to a definite period, but as a permanent process embracing the entire lifetime.[15]

This human-centred approach to development was subsequently incorporated in the Declaration on the Right to Development. The second preambular paragraph describes it as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom". Article 1 declares that the right to development is an inalienable human right to be enjoyed by individuals and peoples alike; article 2 (1) declares that the human person is the central subject of development.

The Special Rapporteur proceeds to elaborate on the principles upon which a human-centred multidimensional approach to development should be based. A fundamental prerequisite is recognition of the principle of self-determination, with its national and international dimensions, according to which all peoples have the right to freely determine their political status and to freely pursue their economic, social and cultural development. Thus, each State has the right to formulate its own policies to implement the economic, social and cultural rights of its inhabitants, adapted to its particular conditions and needs and without any external interference.[16] Respect for their independence, territorial integrity and national sovereignty are, therefore, preconditions for the effective exercise of all human rights, without which no efforts to promote economic or social development can lead to the creation of a more equal and just society.[17]

This fundamental principle is reiterated in article 1 (2) of the Declaration on the Right to Development and is the basis for the provision that States have the right and duty to formulate appropriate national development policies (art. 2 (3)) and have the primary responsibility to create favourable national and international conditions (art. 3 (1)) and to take resolute steps to eliminate "massive and flagrant violations of the human rights of peoples and human beings … resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to

[11] United Nations publication, Sales No. E.75.XIV.2.
[12] Ibid., Part six (Observations, conclusions and recommendations), chap. II, paras. 55-56.
[13] Ibid., para. 57.
[14] Ibid., para. 63.
[15] Ibid., para. 95.
[16] Ibid., para. 35.
[17] Ibid., para. 36.

recognize the fundamental right of peoples to self-determination" (art. 5). The Declaration thus also recognizes that the rights of individuals and of peoples are indivisible and that the right to development is as much a right of individuals as it is of peoples.

The Special Rapporteur advocated that the new concept of development must recognize the interdependence and indivisibility of civil, cultural, economic, political and social rights, and of development and democracy. Emphasizing the essential role of participation in fostering human rights, the Special Rapporteur pointed to the urgency of strengthening popular participation in politics, planning and development.[18] "The basic principle governing the question of human rights in development should be the participation of the people in deciding their style of individual and corporate life in general, and in particular their participation in decision-making in connection with development programmes, in the implementation of those programmes and in the benefits derived from them."[19] Collective discipline and the participation of all sectors of society are indispensable for the success of any economic and social development plan aimed at hastening the implementation of economic, social and cultural rights,[20] the just distribution of income and consumption goods, and the well-being of all. Otherwise, those who control power will be in a position to change the projects to suit their own interests.[21]

Democratization of political structures is a precondition without which the desired level of economic and social progress cannot be reached, either in terms of quantity or quality.[22] The Special Rapporteur thus acknowledged not only the nexus between the individual and the collective, but also the need to satisfy collective prerequisites, in this case the creation of democratic structures through which individuals can exercise their rights. Underlining the need for a broad development strategy that includes the creation of a series of institutions that enable the less privileged to participate in the decision-making processes, he elaborated on three essential elements they should contain.[23]

The fundamental importance of participation in the development process and in the full realization of human rights is underlined in various articles of the Declaration on the Right to Development. It is notable that the Declaration dedicates its first article, defining the right to development, to the related but distinct concepts—participation and self-determination—that are prerequisites for the realization of the right to development.

Reiterating the importance of the principles of social justice, equality, non-discrimination, national cohesion and solidarity, the Special Rapporteur further elaborated on certain fundamental and general reforms to be adopted by developing countries, including, in particular, agrarian reform, without which inequalities within the rural sector and between the countryside and cities will increase;[24] equal and unrestricted participation of women in all aspects of life; equal distribution of income, wealth and services; harmonization of living standards in the countryside and cities; increased respect for manual labour; and decentralization of decision-making power and administration within the framework of a strong central government and a unified national development plan.[25] The Special Rapporteur stressed the need to give priority to non-discrimination and the prohibition of all forms of de facto and de jure discrimination. He argued that ensuring economic and social progress for all layers of the population, without distinction as to sex, race or ethnic origin, religion, language, place of birth or national or social origin, provides the basis for national integration and consolidation, which in turn are the very basis of national independence and development.[26]

The notion of unified national development implies a multidimensional process encompassing economic, social, political and cultural aspects, and it takes place within the framework of a State with its specific conditions and realities.

K. Declaration on Social Progress and Development (1969)

Preliminary elaboration of the right to development was achieved in the Declaration on Social Progress and Development, which was proclaimed by the General Assembly in resolution 2542 (XXIV) of 11 December 1969, and which can be seen as its predecessor.

[18] Ibid., para. 42.
[19] Ibid., para. 122.
[20] Ibid., para. 50.
[21] Ibid., para. 43.
[22] Ibid., para. 45.
[23] Ibid., para. 58.
[24] Ibid., para. 49.
[25] Ibid., para. 50.
[26] Ibid., para. 75.

It declares that the aim of social progress and development is "the continuous raising of the material and spiritual standards of living of all members of society, with respect for and in compliance with human rights and fundamental freedoms" (Part II, Objectives). This is a dynamic process that places the human person, individually and collectively, at the centre of development and is based on the principles of equality, non-discrimination and social justice, encompassing both material and non-material well-being, and in which development and human rights are closely intertwined. These concepts are central to the right to development.

Part I defines the principles on which social progress and development must be based (these were subsequently incorporated in the Declaration on the Right to Development). Articles 1 and 2 contain the first, most explicit and detailed affirmation of social progress and development as a human right and the interrelationship between human rights and development. They affirm that while development should be based on respect for human rights—which is as much a prerogative of individuals as of peoples—it is also the process by which human rights and social justice can be achieved.

Article 1 declares: "All peoples and all human beings, without distinction as to race, colour, sex, language, religion, nationality, ethnic origin, family or social status, or political or other conviction, shall have the right to live in dignity and freedom and to enjoy the fruits of social progress and should, on their part, contribute to it." Article 2 states: "Social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice, which requires: (a) the immediate and final elimination of all forms of inequality, exploitation of peoples and individuals, colonialism and racism, including nazism and apartheid, and all other policies and ideologies opposed to the purposes and principles of the United Nations; (b) the recognition and effective implementation of civil and political rights as well as of economic, social and cultural rights without any discrimination." Development is not mere economic growth. It is the right of all peoples and individuals to live in dignity and freedom and to benefit from social progress. The right to benefit from society's progress is accompanied by a duty to contribute towards it. Article 2 expresses the interrelationship between development and human rights, the indivisibility of human rights, and the relationship between national justice and international justice. Aimed at achieving social progress and development, the process must be based on the principles of equality, non-discrimination, social justice and solidarity.

Article 3 specifies the primary conditions of social progress and development. Its first subparagraph emphasizes the fundamental importance of "[n]ational independence based on the right of peoples to self-determination" a primary condition of social progress and development, thus acknowledging the social dimension of the right to self-determination. This condition is made more specific in subparagraph (e), which states: "The right and responsibility of each State and, as far as they are concerned, each nation and people to determine freely its own objectives of social development, to set its own priorities and to decide in conformity with the principles of the Charter of the United Nations the means and methods of their achievement without any external interference." Article 3 spells out further conditions of social progress and development that also reflect the corresponding duties of States; these include respect for the principles of "non-interference in the internal affairs of States" (art. 3 (b)); "sovereignty and territorial integrity" (art. 3 (c)); permanent sovereignty and control of each State over its natural wealth and resources (art. 3 (d)); and "[p]eaceful coexistence, peace, friendly relations and cooperation among States irrespective of differences in their social, economic or political systems" (art. 3 (f)). Articles 2 and 3 recognize the universal right of all States to pursue their own development in an international environment conducive to that process, and the corresponding duty of States to cooperate with each other to create such an environment.

In subsequent articles, the Declaration spells out corresponding duties of States at the national and international levels, underlining the human factor in development and reaffirming the interdependence between individual and collective rights and the need to create an enabling national and international environment, including through structural reform.

Articles 4 and 5 (c) recognize that individual development and fulfilment can be achieved only through the satisfaction of collective prerequisites, in the case of the former through the family and in the latter through associations. Article 4 states that the family is "a basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth" and as such "should be assisted and protected so that it may fully assume its responsibilities within the community". Article 5 (c) recognizes the principle that social

progress and development requires "the full utilization of human resources", including the "active participation of all elements of society, individually or through associations, in defining and in achieving the common goals of development". The central role of participation is emphasized throughout the text. Parts II and III highlight the importance of promoting collective structures or institutions through which individuals can exercise this right. Unlike the Declaration on the Right to Development, the Declaration on Social Progress and Development explicitly refers to trade unions and workers' associations (arts. 10 (a) and 15 (b)), non-governmental organizations, cooperatives, rural associations, workers' and employers' organizations, and women's and youth organizations (art. 15 (b)). It also places emphasis on the important role played by the family (arts. 4 and 22). Article 15 (b) requires States to adopt measures "for an increasing rate of popular participation in the economic, social, cultural and political life of countries … with a view to achieving a fully integrated national society, accelerating the process of social mobility and consolidating the democratic system".

The principles of equality and social justice formulated in articles 5, 6 and 7 lay the basis for reforms in national and international justice, reflecting the structural approach adopted by the Declaration on the Right to Development. The primary and ultimate responsibility for the development of developing countries lies within those countries themselves. However, given the urgent need to narrow and close the gap between the advanced and developing countries, States have the duty to pursue internal and external policies designed to promote social development throughout the world and, in particular, to assist developing countries in this regard (tenth preambular paragraph).

At the national level, the State, which has the primary role and ultimate responsibility of ensuring the social progress and well-being of its own people, also has the duty to introduce, inter alia, " necessary changes in the social structure" (art. 8), including the adoption of legislative, administrative, institutional and other measures to ensure the participation of all sectors of society in defining and achieving the common goals of development (art. 5 (c)); the realization by all of all human rights, thus also recognizing the indivisibility of human rights (arts. 18 (a) and 19 (a), (b), (c) and (d)); forms of ownership of land and the means of production, based on the principles of justice, equality and the social function of property (arts. 6 and 18 (b) and (c)); full democratic freedoms for trade unions; freedom of association and the right to form other organizations of working people (art. 20); just and equitable distribution of income and wealth as a major goal and means of development (arts. 7, 10 (c), (e) and (f), 11, 16, 17 and 21 (a)). The Declaration also requires that, in planning social development measures, as an integrated part of balanced overall development planning States must take into due account "the diversity of the needs of developing and developed areas, and of urban and rural areas, within each country" (art. 8), as well as "differing regional conditions and needs, particularly the development of regions which are less favoured or underdeveloped by comparison with the rest of the country" (arts. 14 and 17), indicating the importance of comparing conditions prevailing in different regions and among different sociocultural groups.

The interrelationship between national and international justice is reflected throughout the text of the 1969 Declaration. Respect for the principle of self-determination entails the corresponding duty of States to cooperate with each other to create the international conditions in which that right can be exercised, without which national justice cannot be achieved.

In its fifth preambular paragraph, the Declaration reaffirms the relationship between individual rights and a just international order, acknowledging also the relationship between development, human rights and peace: "…[M]an can achieve complete fulfilment of his aspirations only within a just social order and … it is consequently of cardinal importance to accelerate social and economic progress everywhere, thus contributing to international peace and solidarity." The sixth and seventh preambular paragraphs recognize the interdependence between international and national justice. The former states that "international peace and security … and social progress and economic development … are closely interdependent and influence each other", and the latter that "social development can be promoted by peaceful coexistence, friendly relations and cooperation among States".

In view of this interdependence, the Declaration spells out the rights and duties of States to create an enabling international order and the principles on which they should be based, including the establishment of "new and effective methods of international cooperation in which equality of opportunity should be as much a prerogative of nations as of individuals within a nation" (art. 12 (a)). Reference has been made above to the principles defined in article 3,

based on the fundamental right to self-determination and the principle of international solidarity. In addition, article 7 requires improvement in the position of developing countries in international trade to increase national income and advance social development; article 9, concerted international action to supplement national efforts; and article 10, the exploration, conservation, use and exploitation—exclusively for peaceful purposes and in the interests of all mankind—of areas beyond the limits of national jurisdiction, such as outer space, the seabed and ocean floor and the subsoil thereof.

The main goals include the creation of conditions for rapid and sustained social and economic development, particularly in the developing countries; change in international economic relations; the establishment of international cooperation, based on equality of opportunity (art. 12 (a)); the elimination of all forms of discrimination and exploitation and all other practices and ideologies contrary to the purposes and principles of the Charter of the United Nations (art. 12 (b)); the elimination of all forms of foreign economic exploitation (art. 12 (c)); and the equitable sharing of scientific and technological advances and a steady increase in their use for social development (art. 13 (a)).

States are required to adopt concrete measures to further these aims, including through formulation of international policies and measures and establishment of a just international order, based on equality, mutual advantage and strict observance of and respect for national sovereignty. Concrete measures to be adopted include provisions concerning technical, financial and material assistance to developing countries, based strictly on socioeconomic criteria free of any political considerations (art. 23 (b) and (c)); technical, financial and material assistance for the direct exploitation of their national resources and natural wealth (art. 23 (d)); the establishment of a just international trading system (art. 23 (e)); technical, scientific and cultural cooperation and reciprocal utilization of the experience of countries with different economic and social systems and different levels of development (art. 24 (b)); utilization of science and technology and their transfer and exchange, including know-how and patents, to developing countries (art. 24 (c)); protection and improvement of the human environment (art. 25 (a)); compensation for damages resulting from aggression and illegal occupation of territory (art. 26); general and complete disarmament and the use of the resources released thereby for economic and social progress, particularly for the benefit of developing countries (art. 27 (a) and (b)).

L. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970)

The Declaration, adopted by the General Assembly in resolution 2625 (XXV) of 24 October 1970, reaffirms and elaborates upon the principle of equal rights and self-determination contained in the Charter of the United Nations, reaffirmed in common article 1 of the two International Covenants on Human Rights as the framework for the realization of the individual rights contained therein, and subsequently incorporated in article 1 of the Declaration on the Right to Development which, in its fifth preambular paragraph, recalls United Nations instruments concerning "further promotion of friendly relations and cooperation among States in accordance with the Charter".

The 1970 Declaration is essential to understanding this fundamental principle and its international corollary, the duty of international cooperation and solidarity incumbent upon States, in accordance with Articles 1, 55 and 56 of the Charter, which constitutes the international dimension of the right to development as defined in the Declaration. The principle is recognized as having multiple dimensions, by virtue of which "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter".

Politically, the expression of this principle may take the form of sovereign and independent States, the free association or integration with an independent State, or the emergence into any other political status that is freely determined by the people themselves. The State is thus also endowed with "an inalienable right" to freely choose and develop "its political, economic, social and cultural systems, without interference in any form by another State". All States "enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature."

The foregoing implies that the right of peoples to self-determination involves not only the completion

of the process of achieving independence, but a continuing right that requires recognition of their right to maintain, assure and perfect their full legal, political, economic, social and cultural sovereignty.

This right of peoples gives rise to the corresponding duty of States to recognize and promote it, through international cooperation and solidarity. States are required to bear in mind that "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter". Every State has the duty to cooperate with other States; to promote, through joint and separate action, universal respect for and observance of human rights and fundamental freedoms, including the self-determination of peoples; to bring a speedy end to colonialism; and to render assistance to the United Nations in carrying out its responsibilities to promote friendly relations and cooperation among States. In recognition of the relationship between peace, development and human rights, the Declaration also requires States to cooperate with one another to maintain international peace and security and to promote international economic stability and progress and the general welfare of nations through, inter alia, the promotion of economic growth everywhere, but with special emphasis on developing countries.

States have a legal duty to refrain from opposing and impeding the exercise of the right to self-determination and any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country. However, the duty to protect sovereign and independent States does not apply wherever colonial or alien domination exists under the guise of national unity; it is conditional on the extent to which the State is "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". The Declaration also prohibits using or encouraging 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.

In its final clauses, the Declaration stipulates that the interpretation and application of the principles relating to equal rights and self-determination, the use of threat or use of force against the territorial integrity or political independence of any State, the peaceful settlement of international disputes and non-intervention in the internal affairs of States are interrelated, without prejudice to the provisions of the Charter or the rights and duties of States or of peoples under the Charter, and further declares that the principles of the Charter, which are embodied in the Declaration, constitute basic principles of international law.

M. International Development Strategy for the Second United Nations Development Decade (1970)

The International Development Strategy proclaimed by the General Assembly in resolution 2626 (XXV) for the Second United Nations Development Decade went beyond its predecessor in explicitly recognizing the interdependence of development and human rights, including the right of peoples to self-determination and the related concept of popular participation: "The success of international development activities will depend in large measure on [inter alia] ... the elimination of colonialism, racial discrimination, apartheid and occupation of territories of any State and on the promotion of equal political, economic, social and cultural rights for all members of society" (preamble, para. 5). Paragraph 78 underlines the importance of popular participation and, hence, also the need for structural reform: "Every effort will be made to secure the active support and participation of all segments of the population in the development process."

The importance of promoting national and international justice is implicit in this acknowledgement of the social content of development, reflecting also a widespread perception of the failure of traditional growth-oriented development strategies. However, their interdependence is clearly stated in paragraph 12, which stipulates that "equality of opportunities should be as much a prerogative of nations as of individuals within a nation", echoing the Declaration on Social Progress and Development, which underlined the need for new and more effective international cooperation.

The Strategy recognizes the universal right of States to pursue their development in an enabling international environment and the realization of the right to self-determination as a prerequisite, including to develop their own human and natural resources (para. 10). However, the exercise of this right and duty of States with respect to their peoples will require as a precondition "concomitant and effective international action", without which the country's efforts cannot be realized. The duty of international cooperation and solidarity is further recognized in the Strategy's

reaffirmation of the responsibility of economically advanced countries to promote the development efforts of developing countries in terms of a quantitative target for the net transfer of resources (paras. 42 and 43).

N. Declaration on the Establishment of a New International Economic Order (1974)

The Declaration, adopted by the General Assembly in its resolution 3201(S-VI), "one of the most important bases of economic relations between all peoples and all nations" (para. 7), is of significance for the establishment of legal norms relating to the right to development of peoples and States and the trend towards recognition of developing countries as a specific group of subjects of international economic law. The objectives for international cooperation defined in the Declaration and the principles upon which it should be based are clearly reflected therein. Paragraph 3 requires States to 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 cooperation among all States".

In the early days of the United Nations, concerns about development in international law resembled attempts by metropolitan Powers to manage and control colonial territories. They had claimed the right to colonize overseas territories on the basis of the latter's "underdevelopment"; in the terms of the Covenant of the League of Nations, "peoples not yet able to stand by themselves under the strenuous conditions of the modern world" should be placed under tutelage, their development a "sacred trust of civilization".

At a special session of the General Assembly convened to study, for the first time, the problems of raw materials and development, devoted to the consideration of the most important economic problems facing the world community, Member States proclaimed their united determination to work urgently for the establishment of a new international economic order that would correct inequalities and redress existing injustices, enable elimination of the widening gap between developed and developing countries, and ensure steadily accelerating economic and social development and peace and justice for present and future generations (third preambular paragraph), thereby defining the objectives of international cooperation for development.

The 1974 Declaration reflects the aspirations of newly independent States and their emergence as a powerful factor in all fields of international activity through their association in the Non-Aligned Movement and the Group of Seventy-Seven (G77), enabling them to advance the interests of the peoples they represented by challenging the prevailing normative framework of international economic relations and its attendant legal and political doctrines, proposing a restructuring of the existing system that was "established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality" (para.1). The widening gap between developing and developed countries; the "vestiges of alien and colonial domination, foreign occupation, racial discrimination, apartheid and neocolonialism in all its forms", which continued to be "among the greatest obstacles to the full emancipation and progress of the developing countries"; and the negative impact on developing countries of global economic crises, particularly since 1970 (para.1), had brought into prominence the close interrelationship and interdependence between the prosperity of developed countries and the development of developing countries (para. 2) and made it clear that political independence can be meaningful only if it is accompanied by economic self-determination, implying the right and duty of States to determine their own social, political and economic goals, policies and systems, without any external interference. Their capacity to do so implied their enjoyment of permanent sovereignty to control and develop their natural wealth and resources. It had also become clear that the well-being of present and future generations had become more dependent on international cooperation based on sovereign equality and the removal of the disequilibrium between developed and developing countries (para. 3).

The Declaration spells out the principles upon which the new international economic order should be founded, emphasizing respect for the right of peoples to self-determination and the related principles of sovereign equality of States, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States (para. 4 (a)). The right to self-determination and the related principle of full permanent sovereignty are defined in subparagraphs 4 (d) and (e) respectively as "[t]he right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result", and "[f]ull

permanent sovereignty of every State over its natural resources and all economic activities", which includes "effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals ... No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right".

The 1974 Declaration also spells out the corresponding duties of States, which has two dimensions, both with international implications. Firstly, it imposes on States the obligation to respect the rights of peoples under their jurisdiction to freely choose their political status and freely pursue their economic, social and cultural development. Paragraph 4 (r) declares the need for developing countries to concentrate all their resources for the cause of development. To this end, the Declaration proceeds to identify principles that reflect attempts to redress historical injustices by asserting the right to permanent sovereignty over natural resources, challenging the validity of concessions and contracts concluded prior to independence and denouncing the governance of the existing international economic order. Secondly, it reaffirms the duty of States to cooperate with each other to promote universal realization of the right to development. Paragraph 3 reaffirms the duty of the international community to promote cooperation for development, stating: "International cooperation for development is the shared goal and common duty of all countries." Paragraph 6 evokes the need for a genuinely multilateral United Nations capable of promoting a new international order, based on sovereign equality and international justice.

The Declaration also requires States to apply the principles of equality, non-discrimination and social justice in their international relations. Paragraph 4 (c) emphasizes the importance of participation at the international level as a prerequisite for applying the concept of participation in international relations to States: "The new international economic order should be founded ... [on] full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries." There is an implicit recognition of the social content of development and the social aspects of the right to self-determination. The Declaration reiterates the notion that the realization of development and human rights is inconceivable without effective respect for the right of peoples to self-determination and the establishment of an enabling international order. Accordingly, paragraph 6 provides that implementation of the Declaration "is one of the principal guarantees for the creation of better conditions for all peoples to reach a life worthy of human dignity".

Throughout the text, the Declaration defines the rights of a group of States identified as "developing countries", indicating recognition of the developing countries as a specific group of subjects of international economic law. In paragraph 5, it calls for the implementation of obligations and commitments assumed by the international community concerning the "imperative development needs of developing countries". Paragraph 4 (c) requires particular attention to adoption of special measures for "the least developed, land-locked and island countries, and those most seriously affected by economic crises and natural disasters", and subparagraphs (h) and (i) of the same article refer to States "which are under foreign occupation, alien and colonial domination or apartheid". The Declaration reaffirms the rights of developing countries (arts. 4 (2) and 7) and of peoples affected by, inter alia, "colonialism, foreign domination and occupation" (art. 5) as specific groups of subjects of international law.

O. Charter of Economic Rights and Duties of States (1974)

The fundamental purpose of the Charter of Economic Rights and Duties of States, adopted by the General Assembly on 12 December 1974 in resolution 3281(XXIX), was to promote the establishment of a new international economic order based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems, and to contribute to the creation of conditions for the eradication of injustices and inequalities, for social and economic progress of the developing countries and of other countries, and for the strengthening of world peace and security.

It is among the legal instruments that give content to article 28 of the Universal Declaration of Human Rights, anticipating also provisions contained in the Declaration on the Right to Development. Acknowledging the interrelationship between human rights and development, individual and collective rights, and national and international justice, the 1974 Charter declares that "equal rights and self- determination of peoples", "respect for human rights and fundamental freedoms" and "promotion of international social

justice" are among the principles which shall govern the economic, political and other relations among States (chap. I, subparas. (g), (k) and (m)). Chapter II, article 7, explicitly recognizes the interrelationship between the duty of States to promote development and human rights, including the right to development, at the national level and their right to a just and equitable international order, and, hence, the corresponding duty of all States, individually and collectively, to cooperate in eliminating obstacles to the fulfilment of their primary responsibilities towards their peoples.

Based on the fundamental importance of self-determination as a prerequisite for the realization of the right to development, the 1974 Charter recognizes the State as a subject of international law and lays the legal foundation of the new international economic order on which bilateral and multilateral cooperation among States in trade, finance, industry, science and technology, as well as economic matters, should be based and should develop. Article 1 proclaims the sovereign and inalienable right of every State to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threats; and article 2, its right to freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities. Based on the principle of sovereign equality, the 1974 Charter also recognizes their right to participate internationally, as a prerequisite for the realization of the right to development: "All States are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems, inter alia, through the appropriate international organizations in accordance with their existing and evolving rules, and to share in the benefits resulting therefrom (art. 10).

A dimension of the right to self-determination is reflected in the duty of States to respect the rights of people under its jurisdiction to freely pursue all aspects of their development. In anticipation of provisions reflected in the Declaration on the Right to Development, article 7 of the 1974 Charter provides that the primary responsibility of the State is "to promote the economic, social and cultural development of its people". To this end, each State has not only the right, but also the duty "to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development".

Another aspect of the duties of States in promoting the human right to development has to do with their relations with other States. The 1974 Charter reiterates the fundamental principle that economic and social progress and development are the common and shared concern and responsibility of the international community. Thus, States have a duty to cooperate to promote universal realization of the right to development. In this regard, the 1974 Charter is more specific about the obligations and responsibilities than the Declaration on the Establishment of a New International Order of the same year. It lays particular emphasis on States that have been subject to external constraints in the pursuit of their rights. Chapter I provides that relations among States shall be governed by a number of principles, including "[r]emedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development" (subpara. (i)). Article 16 (2) has an important bearing on the question of the right of self- determination and on the realization of the right to development, stipulating: "No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force."

The 1974 Charter recognizes developing countries as a specific group of subjects of international economic law. Article 9 underlines the duty of all States to cooperate for the promotion of economic and social progress throughout the world, especially of developing countries. Article 17 supplements the general obligation of States to cooperate for development with the duty of every State to cooperate with developing countries' efforts by providing favourable external conditions and extending active assistance "consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty". A similar obligation of all States is contained in article 22. Articles 25 and 31 make special reference to the duty of the "developed members" of the international community to cooperate, given "the close interrelationship between the well-being of the developed countries and the growth and development of the developing countries, and the fact that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts" (art. 31).

P. General Assembly resolution 32/130 (1977)

General Assembly resolution 32/130, entitled "Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms", was adopted on 16 December 1977. It defined the concepts that should be taken into account in approaching human rights questions within the United Nations, including the indivisibility and interdependence of all human rights and fundamental freedoms and the requirement that equal attention and urgent consideration be given to the implementation, promotion and protection of both sets of rights (para. 1 (a)).

Acknowledging the relationship between human rights and development, between individual and collective rights, and between national and international justice, the resolution also decided that lasting progress in the implementation of human rights depended on sound and effective national and international policies of economic and social development (para. 1 (b)); that priority should be given to finding solutions to the mass and flagrant violations of human rights of peoples and persons affected by situations such as colonialism, domination and occupation, aggression and threats against national sovereignty, national unity and territory integrity, and to the refusal to recognize the fundamental rights of peoples to self-determination and of every nation to the exercise of full sovereignty over its wealth and natural resources (para. 1 (e)); and that future activities of the United Nations would be guided by, inter alia, the concept that realization of the new international economic order was an essential element for the effective promotion of human rights and fundamental freedoms, which should be accorded priority (para. 1 (f)). In its preamble, the General Assembly expressed deep concern at the "continuing existence of an unjust international economic order which constitutes a major obstacle to the realization of the economic, social and cultural rights in developing countries".

Q. Report of the Secretary-General on the international dimensions of the right to development as a human right (1979)[27]

The Commission on Human Rights, in resolution 4 (XXXIII) of 21 February 1977, recommended that the Economic and Social Council invite the Secretary-General, in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and other competent organs, to undertake a study of the international dimensions of the right to development as a human right in relation to other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs. The report (E/CN.4/1334) points out that the reference to the right to development made in the resolution appeared to imply the recognition of that right.

The Secretary-General's report points to the existence of a consensus on the view that the development process requires not only economic growth but the realization of human potentialities, requiring satisfaction of both the material and non-material aspects of development, based on equality and non-discrimination. The development process should be directed fundamentally at the human person as the subject, not object, of development and, hence, the ability to participate fully in shaping his/her own reality. There is also consensus that individual rights can only be realized in harmony with the community, individual and collective self-reliance being part of the process (para. 27).

The study adopts a broad and comprehensive approach to defining development and asserts that respect for human rights is fundamental to the development process, being both the condition and aim of development (para. 129). Underlining the importance of participation, self-reliance, equality and non-discrimination, it places considerable emphasis on the ethical aspects of the right to development: the promotion of development is a fundamental concern of every human endeavour; the Charter of the United Nations recognizes the existence of a duty of international solidarity; the increasing interdependence of all peoples underlines the necessity of shared responsibility to promote development; promotion of the universal realization of the right to development is in the economic best interest of all States; economic and other disparities are inconsistent with the maintenance of world peace and stability; industrialized countries, former colonial Powers and some others have a moral duty of reparation to make up for past exploitation (para. 38).

The study concludes, stating that "there is a very substantial body of principles based on the Charter of the United Nations and the International Bill of Human Rights and reinforced by a range of conventions, declarations and resolutions which demonstrates the existence of a human right to development in international law" (para. 305). In addition to individuals, peoples

[27] This section is abbreviated as the study in question is reproduced, in condensed form, in chapter 1 of the present publication.

and States, groups such as minorities are also the subjects and beneficiaries of the right to development: "Minority groups and their members have a right to share in the development of the whole community, without discrimination" (para. 91), thus recognizing that a number of individual rights must ordinarily be exercised through collective institutions. "An example of the interaction between the collective and individual aspects of those rights is the right to form trade unions, which, while applying to the individual, can only be satisfied through collective action" (para. 84). Entities that have duties to promote realization of the right to development include the international community, specialized agencies of the United Nations, States, industrialized States and former colonial Powers, regional and subregional State groupings, transnational corporations, producers associations, trade unions and individuals.

Reaffirming the interdependence between national justice and international justice, the report states that individual development can be achieved only through satisfaction of collective prerequisites, including "self-determination and independence of nations, liberation of peoples from colonialism, neocolonialism and alien economic and political domination; and action by the international community, States, communities and other groups to provide access to necessary resources and services" (para. 85).

The study emphasizes the central importance of participation at all levels–local, regional, national and international–as a prerequisite for the realization of the right to development, and the reciprocal relationship between participation, on the one hand, and human rights and economic and social development, on the other (para. 230), and, hence, the need to democratize institutions and decision-making processes not only at the national level, but also at the international level (para. 241).

R. International Development Strategy for the Third United Nations Development Decade (1980)

The International Development Strategy for the Third United Nations Development Decade, adopted by the General Assembly in resolution 35/56 of 5 December 1980 reaffirms that developing countries are subjects of international law and underlines the relationship between human rights and development, the individual and the collective, national and international justice, and the need for a new international economic order and structural changes at the national and international levels aimed at the democratization of institutions and decision-making processes.

The relationship between development and human rights is reflected throughout the text. Anticipating language subsequently incorporated in the Declaration on the Right to Development, paragraph 8 defines development as a process that must promote human dignity and states that its ultimate aim is "the constant improvement of the well-being of the entire population on the basis of its full participation in the process of development and a fair distribution of the benefits therefrom", thereby recognizing the multidimensional, dynamic and people-centred character of development based on the principles of equality and justice rather than on economic growth. Hence, participation is given a central role in the development process, paragraphs 8 and 51 emphasizing the need to ensure the effective participation of the entire population at all stages and, hence, the need for structural change to democratize institutions and decision-making processes.

The Strategy recognizes the interrelationship between the international economic order and human rights and development, and between national and international justice, applying the principles of equality and justice also to States. The Strategy aims at "the promotion of the economic and social development of the developing countries with a view to reducing significantly the current disparities between the developed and developing countries, as well as the early eradication of poverty and dependency, which, in turn, would contribute to the solution of international economic problems and sustained global economic development, and would also be supported by such development on the basis of justice, equality and mutual benefit" (para. 7). However, it also recognizes that if the ultimate beneficiaries are to be the people themselves, the drive for a new world order must be accompanied by greater internal distributional justice.

S. Study by the Secretary-General on the regional and national dimensions of the right to development as a human right (1980, 1981)

The Secretary-General's study[28] analyses the general concept of a structural approach and certain

[28] The Introduction and Part one, Impact of some international factors on realization of the right to development at the national and regional levels, were issued as document E/CN.4/1421 in 1980; Part two, Promotion of the right to development at the national level, and Part three, Promotion of the right to development at the regional level (and containing concluding observations), were issued as document E/CN.4/1488 in 1981. The paragraph references in this section refer to the latter document.

structures and problems at the national level which constitute obstacles to the realization of the right to development, especially in developing countries. It is based on the principle that it is the right and responsibility of each State and, as far as they are concerned, each nation and people to determine freely its own objectives of social development, to set its own priorities and to decide in conformity with the principles of the Charter of the United Nations the means and methods of their achievement without any external interference.

The structural approach helps demonstrate the relationship between human rights violations, in particular the right to development, and the structures that give rise to them. Human rights violations do not occur in a vacuum. They are the "natural consequences of systems rooted in injustice and inequality and which are often created and reinforced by a range of consciously pursued political, social and economic policies" (para. 13). Such policies are inconsistent with the right to development; hence, those formulated to promote realization of the right to development at the national level must "focus as much on the democratic transformation of existing political power structures as on the quest for achieving more equitable economic and social policies and structures" (para. 27).

Structures that facilitate realization of the right to development at the national level are "those which enable people to control their own destinies and to realize their full potentials" (para. 15). States must not only take concrete steps to improve economic, social and cultural conditions, but do so in a manner that is democratic in its formulation and equitable in its results. The study emphasizes the fundamental relevance of participation and equity. For instance, land reform and related measures must be "undertaken democratically and in such a way that both the resources and the consciousness of the people are mobilized. In particular, land reform measures should be accompanied by respect for the right to freedom of association and should provide for full peasant participation in the discussion and implementation of land-related policies" (para. 37). Non-discrimination is also an essential component of human rights and, hence, of the right to development; in the case of the latter, the concept has been linked to the principle of equality of opportunity (para. 195). However, since formal equality of opportunity is not sufficient for effective development, the promotion of the right to development at the national level "requires positive and unceasing efforts to eradicate racially discriminatory practices and to promote social harmony and well-being" (para. 198).

The report also highlights the interrelationship between participation and human rights: "The full and enduring realization of all human rights must be predicated upon the ability of people to participate in making the decisions which can control or alter the conditions of their very existence. In the absence of genuinely participatory structures and mechanisms a true spirit of respect for human rights cannot prevail" (ibid.). Component rights of participation include the right to hold opinions, the right to freedom of expression and information, freedom of association and the right to take part in the conduct of public affairs, which are fundamental to realization of the right to development. Effective development requires not only absence of repression but also affirmative action by States to introduce structural changes "conducive to full popular participation" (para. 112).

The study furthermore reaffirms and underlines the indivisibility and interdependence between civil and political rights and economic, social and cultural rights for realization of the right to development. While the exercise of the various rights to participate is crucial to ensuring satisfaction of the right to food (para. 98), the "enjoyment of rights such as the rights to food, health care and education, to mention only a few, is essential for the effective exercise of civil and political rights relating to participation" (para. 109).

The report also highlights the interdependence between the right to development and the rights enumerated in the two International Covenants: "A development strategy based on repression and the denial of either civil and political rights or economic, social and cultural rights, or both sets of rights, not only violates international human rights standards but is a negation of the concept of development" (para. 139). An approach which gives priority to economic growth over human development objectives (which include concepts such as equity, non-discrimination, social justice, self-reliance) is incompatible with the human rights obligations of States, in particular the right to development (chap. IX). In this regard, the report is unequivocal: "Any consciously designed development strategy which directly involves the denial of fundamental human rights, in whatever name or cause it may be undertaken, must be deemed to be a systematic violation of the right to development" (para. 159). Moreover, "the persistence of conditions of underdevelopment, in which millions of human beings are denied access to sufficient food, water, clothing, shelter and medicines and are forced to live in conditions which are incompatible with their inherent human

dignity, clearly represents a gross and massive violation of human rights" (para. 160).

T. Study by Héctor Gros Espiell on the right to self-determination (1980)

The study, entitled *The Right to Self-Determination: Implementation of United Nations Resolutions,*[29] was prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It focuses on the right of peoples to self-determination as a prerequisite for the realization of the right to development and as the basis for recognition of the right to development as encompassing economic, social, cultural and political dimensions.

The right to self-determination is a continuing right, its implementation involving not only the completion of the process of achieving independence or other appropriate legal status by the peoples under colonial and alien domination, but also their right to maintain, assure and perfect their full legal, political, economic, social and cultural sovereignty (para. 47). It has lasting force, does not lapse once it has been exercised to secure political self-determination, and extends to all fields, including economic, social and cultural affairs. The political, economic, social and cultural aspects of the right are interdependent and indivisible: "each of them can only be fully realized through the complete recognition and implementation of the others" (para. 113).

Its economic content is expressed, firstly, "in the right of peoples to determine, in freedom and sovereignty, the economic system or regime under which they are to live". It will be "of lasting efficacy and will continue to take effect in the future … in view of all the neocolonialistic and neo-imperialistic schemes, whatever form they may take, to dominate the new States which have come into being as a result of the exercise of the right to political self-determination, through their power or unlawful intervention in the economic field" (para. 135). The economic content of this right also finds expression in the right to permanent sovereignty over natural resources, which includes "problems raised by nationalizations and the harmful activities that may be undertaken in this area by transnational or multinational enterprises" (para. 136). The economic content applies equally to peoples who have not yet achieved independence and those who have formed independent States (para. 137).

As for the social aspect of the right to self- determination, "every people has the right to choose and determine the social system under which it is to live, in accordance with its free and sovereign will and with due respect for its traditions and special characteristics" (para. 152). It is based, particularly, on the principle of social justice, which contains both individual and collective dimensions that are interdependent and indivisible. All people are entitled to social justice which, "in its broadest sense, implies the right to the effective enjoyment by all the individual members of a particular people of their economic and social rights without any discrimination whatsoever" (para. 153). Since the right to development is based on the right to self-determination, which includes social aspects, development cannot be seen merely as economic growth. Therefore, "development, which is not the same as mere economic growth, is inconceivable without effective respect for the right of peoples to self-determination" (para. 155).

As for its cultural aspects, "Every people … has the right to determine and establish the cultural regime or system under which it is to live; this implies recognition of its right to regain, enjoy and enrich its cultural heritage, and the affirmation of the right of all its members to education and culture" (para. 158). The right applies equally to peoples subject to colonial or alien domination and those who have achieved independence. The cultural aspects are essential for effective participation "in order that a people may be aware of its rights and consequently be fully capable of fighting for their recognition and implementation" (para. 160). Implicit in this affirmation is the idea that all aspects of development are interdependent and indivisible.

The study reaffirms that the realization of the collective right to self-determination is a prerequisite for the enjoyment of individual rights: "The effective exercise of a people's right to self-determination is an essential condition or prerequisite … for the genuine existence of other human rights and freedoms. Only when self-determination has been achieved can a people take the measures necessary to ensure human dignity, the social and cultural progress of all human beings, without any form of discrimination" (para. 59).

Concerning its importance for the realization of the right to development, the study states that the full recognition and effective exercise of the right of peoples to self-determination and the elimination of colonialism and neocolonialism are prerequisites for

[29] United Nations publication, Sales No. E.79.XIV.5.

development: "The legal acceptance and truly effective exercise of the right to complete development of peoples struggling for their self-determination—a right which is, of course, also held by States, especially the developing States—can be achieved only if the right of peoples to self-determination is recognized and implemented" (para. 144).

The right to development has individual and collective dimensions: "[The] right to the full development of the individual—which has made it possible to describe the right to development very properly as a fundamental human right—is a basic one which at the same time conditions and implies the right to development of developing States and peoples. The progress of the latter is justified inasmuch as development serves to improve the economic, social and cultural circumstances of every human being" (para. 42). At the same time it demonstrates that the individual and collective aspects of the right to development may be indivisible. Individual rights must often be exercised through collectivities.

The right to self-determination entails the corresponding duty of States and the international community to recognize and promote it. States have a duty to cooperate not only to ensure the right of peoples under foreign domination to political independence, but also to ensure that "those peoples which have already become independent ... achieve their complete sovereignty and full development" (para. 61).

U. Study by Aureliu Cristescu on the right to self-determination (1981)

In May 1974, the Economic and Social Council, on the recommendation of the Commission on Human Rights, authorized the Sub-Commission to designate a special rapporteur to carry out the above study, previously approved by the General Assembly in resolution 3070 (XXXVIII).

The study, undertaken by Aureliu Cristescu as Special Rapporteur and entitled *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*,[30] underlines the central importance of the right to self-determination as a prerequisite for the realization of the right to development, permanent sovereignty over natural wealth and resources constituting the basic element of both: "Responsibility for development lies primarily with the developing countries themselves, which must mobilize to this end all their wealth and resources, but their permanent sovereignty over their wealth and resources must be respected and strengthened, permanent sovereignty being also a basic factor for their economic and social development and their political independence" (para. 699). Hence, respect for permanent sovereignty is a prerequisite for the realization of the right to development and the right to self-determination (para. 709), as reflected also in article 1 (2) of the Declaration on the Right to Development.

The study further underlines the interrelationship and interdependence between the right to self-determination and human rights: States have an obligation to respect the right of peoples freely to determine their political status and to pursue their economic, social and cultural development as the enjoyment of the right to self-determination is essential to the exercise of all individual rights and freedoms. However, since the right to self-determination also implies "that Governments owe their existence and powers to the assent of their people", its realization also requires respect for human rights (para. 692).

Anticipating the provisions of the Declaration, the study goes on to define and elaborate the various concepts incorporated in the right to development. It defines development as a concept going beyond economic growth and the mere raising of material standards of living—the human person being the central subject of the right to development—and focuses on how national and international decisions are made, who reaps the benefits of socioeconomic change, and external constraints on a country's freedom to direct the course of its own socioeconomic change:

> The real purpose of the new international economic order is not the material growth of nations, but the development of all men and women in every way, in a comprehensive cultural process involving profound values and embracing the national environment, social relations, education and welfare; in other words, the achievement of man's economic, social and cultural rights, or human development, for the benefit of man, must be the central factor in the development process. He is the key factor in economic and social development, which must be directed towards fulfilling the needs of an evolving and constantly diversifying human existence, and the unhampered affirmation, at all levels, of the human personality (para. 708).

The right to development is "a means of ensuring social justice at the national and international levels, a better distribution of income, wealth and social services, the elimination of poverty and the improvement of living conditions for the whole population" (para. 707). To do this, there must be an expan-

[30] See footnote 2 above.

sion of the national product and social and economic policies aimed at equal distribution of income and wealth. However, income redistribution through transfers and social services are merely corrective measures. The establishment of democratic structures will be necessary for the achievement of greater equality since, "the initial organization of the distribution of income is a determining factor in its structure and the principal instrument for the achievement of greater equality, having direct impact on the level of income and wealth of individuals and groups" (ibid.).

The driving force of development being peoples and nations themselves, development must be defined within each specific context, based on popular participation: "Development can be neither exported nor imported … it implies the taking into account of many economic, technical and social parameters and a choice of priorities and growth rates on the basis of a knowledge of specific needs, conditions and possibilities, and the participation of the whole community, animated by a common ideal and by individual and collective creativity, in the search for the solutions which are best adapted to the local conditions, needs and aspirations" (para. 711). It will be necessary to create structures and institutions to "ensure the creative participation of the people, fairness in the distribution of the fruits of development and the focusing of all efforts on the main directions of development" (ibid.).

Changes in international structures will also be necessary as social justice at the national level is closely linked to social justice at the international level: for the "genuine promotion of fundamental human rights and … economic, social and cultural development, it is imperative to establish a new international economic order based on the sovereign equality of States and respect for the equal rights of all peoples, an order that also guarantees the integrated economic, social and cultural development of every people and every State, in accordance with its aspirations to progress and well-being" (para. 701). However, because of the close correlation between the prosperity of developed countries and the growth and development of developing countries, the development and well-being of individuals and peoples will depend "on the existence among all the members of the international community of a spirit of cooperation based on sovereign equality and the elimination of the imbalance between them, on the realization of their aspirations and on the right of all peoples to ensure their political, economic, social and cultural development" (para. 707).

The study emphasizes that the realization of the right of peoples to self-determination is essential to achieving a more just and equitable international order (para. 713): "The right of peoples to self-determination has acquired importance as an essential pillar in the construction of the new international economic and political order, since the political, economic, social and cultural problems of mankind are intimately linked and call for concerted action and because economic emancipation is an essential factor for the elimination of political domination" (para. 696). The democratization of international structures, i.e., a new international political order, will be necessary to ensure effective participation of developing countries in the preparation and adoption of decisions concerning the international community (para. 698).

V. Study by Raúl Ferrero of the new international economic order and the promotion of human rights (1983)

The major objective of *The New International Economic Order and the Promotion of Human Rights*[31] by Raúl Ferrero, Special Rapporteur on the Sub-Commission, was to demonstrate the fundamental links which exist between the achievement of full respect for human rights and the establishment of an equitable international economic order, and to lay the basic groundwork for the future examination of specific issues, such as the study on the right to food as a human right.

The study reaffirms the link between human rights and development: "Development is a concept which ought to focus on the human element, on people, who must be both its agents and its beneficiaries, and it should be based on the individual definition which each society forms of it, founded on its own values and objectives" (para. 293). It also reiterates the material and non-material aspects of development: "'[D]evelopment' should not be interpreted solely in terms of economic and material well-being but in much broader terms covering the physical, moral, intellectual and cultural growth of human beings" (para. 292).

Pointing out that the existing unjust international economic order is an obstacle to realization of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights (para. 142), the study underlines the importance of establishing, as a prerequisite, a new international

[31] United Nations publication, Sales No. E.85.XIV.6.

economic order centred on the human being, the ultimate goal of which is respect for human rights and fundamental freedoms (para. 286). Its objective "is not only the reassessment of things and their more equitable distribution, but also the development of all men and of all aspects of man, in a global cultural process which embodies values and encompasses the national context, social relations, education and well-being" (para. 284).

The study reaffirms the principle, contained in the Charter of the United Nations, that economic and social progress and development are the shared concern and responsibility of all States. Based on the universally recognized right of peoples to freely determine their political status and freely pursue their economic, social and cultural development in an environment which is conducive to that process, States have a duty of solidarity to establish a new order based on two important sets of principles: "(i) sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, and territorial integrity; and (ii) the right of the developing countries and the peoples of territories under colonial and racial domination and occupation to achieve their liberation and to regain effective control over their natural resources and economic activities" (para. 148). It is implicit in the right to development that States should agree to assist one another when external factors obstruct the effective implementation of human rights (para. 287). One of the most important recommendations of the study concerns the impact on human rights of the policies and practices of the major international financial institutions, notably the World Bank and the International Monetary Fund (IMF), in which developing countries do not have the right to equal participation.

Realization of the right to development requires that democratization of international structures is accompanied by democratization of national structures: "greater internal distributional justice must be achieved in the developing countries so that the ultimate beneficiaries of the drive for a new world order will be the people themselves" (para. 152). The concept linking structural change at both levels—and, hence, the central element and prerequisite for realization of the right to development—is participation. At the national level, "one method whereby human rights can be truly and effectively safeguarded internally is through fair participation in which the people can express their own will in a free and responsible manner, thus enabling all the members of the community to fulfil themselves and exercise conscious freedom of choice. Workers and their organizations should participate not only in the management of public, economic, social and cultural affairs as part of the democratization of the State, but also in the decision-making processes of economic, labour and social planning, in the determination of social development goals and in the creation of conditions for achieving those goals" (para. 288). The principle must similarly apply to participation of developing countries at the international level (para. 160).

W. Report of the Working Group of Governmental Experts on the Right to Development (1982)

Reflecting the growing international recognition of development as a people-centred multidimensional process, the 1982 report of the Working Group (E/CN.4/1489) defines development as "a concept going beyond economic growth or development per se", and is not satisfied merely by raising material standards of living (paras. 18 and 27).

It emphasizes the role of individuals as subjects of development: "all individuals must be accorded by States the guarantees necessary to the exercise of civil and political rights [and] ... equality of opportunity in their access to the means and resources necessary for [their] development" (para. 28). At the same time, the Working Group recognizes the collective aspects of the right to development and points out that the individual and collective aspects of the right to development may in fact be indivisible, as in the case of the right to self-determination, because the right must ordinarily be exercised through economic, social and cultural institutions (para. 15). It indicates that the right to development might also be exercised by "village bodies and cooperatives and other mediating structures" at the local level (para. 17).

The Working Group provides a broader meaning to the right to participate (para. 35) than that in either article 25 of ICCPR ("take part in the conduct of public affairs, directly or through freely chosen representatives") or article 21 of the Universal Declaration of Human Rights ("take part in the government of his country, directly or through freely chosen representatives"). The right to participate is extended to include collective entities and to economic, social and cultural affairs. Unless "all segments" of the national population are included in the process on equal terms, socio-

economic change will simply result in new inequalities and further violations of human rights (para. 42).

The report emphasizes the important link between the right to development and international solidarity. It states that, in the view of several experts, the right to development "is a human right which creates specific obligations and, in particular, entails a duty for all States in the international community to practice solidarity with each other" (para. 27).

X. Report of the Working Group of Governmental Experts on the Right to Development (1985)

In 1985, at the forty-first session of the Commission on Human Rights, the Working Group continued its work on the draft declaration on the right to development. In its report to the Commission (E/CN.4/1985/11), it was stated that within the group "the general view was that the right to development has both an individual and a collective dimension" (para. 20). The Working Group had before it a proposed draft declaration submitted by the experts from the non-aligned countries containing a more forceful definition of the right to participate, which not only suggested that popular participation should be recognized as a right but also that it relates to both development and human rights. According to article 10, paragraph 1, of the proposal (annex II to the report), "States should take appropriate action to provide a comprehensive framework for popular participation in development and for the full exercise of the right to popular participation in its various forms which is an important factor of development and of the full realization of civil and political rights as well as economic, social and cultural rights."

The proposal was also more explicit about State responsibility with regard to the role of groups and minorities in the realization of the right to development. It stated that "particular attention should be paid to the interests, needs and aspirations of discriminated and disadvantaged groups" (art. 9 (2)).

A comparison of the non-aligned proposal on the new international economic order and a joint proposal contained in the draft declaration submitted by the experts from the Netherlands and France (annex III) on the subject are of interest to the manner in which article 3 (3) of the Declaration was formulated. Article 8 of the non-aligned proposal stated that "it is necessary to take as a matter of priority adequate measures towards the establishment of a new international economic order", whereas the Dutch/French proposal makes no specific reference to the new international economic order, referring only to "international instruments which reflect a consensus among States with different economic and social and political systems" (art. 10).

The non-aligned proposal contained a more robust clause on State responsibility for development than that reflected in the Declaration. Both proposals make fairly strong statements with regard to national Governments having primary responsibility for development. The Dutch/French proposal states that national governments have the primary responsibility to see that development takes place (art. 7), but does not refer to international responsibility. The non-aligned proposal refers to international responsibility, but establishes a hierarchy by providing that it is each State that has primary responsibility: "Each State has the primary responsibility to ensure the full realization of the right to development within its territory" (art. 9 (1)).

The non-aligned proposal was also concrete with regard to implementation of the Declaration within international organizations and agencies. Article 13 states: "In the formulation of strategies and programmes designed to promote development, international organizations and agencies should take this Declaration into account."

Y. Study by the Secretary-General on popular participation (1985)

The study, "Popular participation in its various forms as an important factor in development and in the full realization of all human rights" (E/CN.4/1985/10), uses the term "participation" more broadly than either article 25 of ICCPR or article 21 of the Universal Declaration of Human Rights. It states that it relates to all aspects of social, political, economic and cultural affairs affecting individuals and includes the whole process of decision-making concerning development, as well as evaluation and the sharing of benefits (para. 25 (e) and (f) (i) and (ii)). Moreover, participation should take place with full respect for human rights, without any discrimination and giving special attention to groups, which have so far been kept apart from genuine participation (para. 25 (d)).

The study also points to the interrelationship between participation and human rights, including

the right to self-determination. Popular participation is an essential means of promoting development and ensuring full exercise of human rights, and is an end in itself (para. 25 (b)): "... the relationship between popular participation and human rights is more often than not reciprocal: respect for certain rights is indispensable if genuine participation is to develop; and reciprocally, the more participation is organized, the more the awareness of fundamental rights is accentuated and the stronger the demand for institutional safeguards designed to protect them" (para. 61). It emphasizes the importance of the continued association of people in the exercise of the right to self-determination even after gaining political independence (para. 70). Civil and political rights such as freedom of expression and information, and freedom of assembly and association are closely related to popular participation: "The very motivation to participate in public affairs can develop only through exposure to seminal information and ideas concerning the dignity of the human person within his community and his fundamental human rights" (para. 74).

Moreover, "participatory aspirations express themselves, at first, in assemblies, large or small, which lead normally to more permanent groupings and associations" (para. 82). The same is true for economic, social and cultural rights and participation. The exercise of rights such as the rights to employment and work, social security, housing, environmental protection, health and culture are ordinarily exercised through institutions which ensure participation of various social and economic sectors, other groups and indigenous peoples. Effective participation thus often takes place through collective institutions, and individual rights are exercised through the realization of collective rights such as the right to self-determination, the right to form and join trade unions, and the rights to assembly and association.

III. Conclusions

The Declaration on the Right to Development continues to retain its relevance and validity. Today's global reality is fundamentally no different from the one faced by the authors of the Declaration which inspired the drafting of the text, and which was characterized by Cristescu and Ferrero in 1981 and 1983. International relations continue to be based on unequal power relationships, and economic and financial globalization, based on the same growth-oriented economic model, instead of bringing about the promised well-being for all, has intensified disparities, provoking at the same time the unprecedented systemic global crisis that we are witnessing today.

Within the United Nations, the right to development is an extension of the decolonization debate. The Declaration reflects the aspirations of its principal architects, the newly independent States that had entered the international scene as a result of the decolonization process, to consolidate their newly won political independence with economic independence.

The concept first affirmed itself in the context of global economic crises, with their negative consequences for developing countries, the widening economic and other disparities between them and the developed world—bringing into prominence the interdependence between the poverty of the one and the prosperity of the other—and the widespread failure of traditional growth-centred, profit-oriented development strategies to achieve social well-being. At the same time, the emergence of the newly independent States as a powerful factor in all fields of international affairs enabled them to challenge the prevailing normative framework of international economic relations and its attendant legal and political doctrines and to propose the restructuring of a system that was established prior to their existence as independent States and which perpetuated multiple inequalities.

The transformation of the global political landscape manifested itself in the work of the United Nations in the 1960s and 1970s, through diverse initiatives by the Non-Aligned Movement and its supporters to define the norms and principles that should govern relations between States and ensure that their concerns are reflected within the United Nations. The objective was to further define the norms and principles contained in the Charter and to incorporate them in international instruments. They would subsequently constitute the legal foundation of the Declaration, but would also form the basis for a different kind of international cooperation, one that would operate in a way that would promote the development of peoples and countries emerging from centuries of colonial domination, external aggression and apartheid.

The language of the Declaration, which draws heavily upon documents adopted by the United Nations, underlines this continuity and coherence. It is inspired by the indigenous, cultural and historic heritage of newly independent peoples, their traditions, know-how and technology, and reflects their rejection of an alien—and alienating—ideology of a "single model" of development and an international division

of labour that responds to the material needs of an economic system developed in Europe and imposed on developing countries by former colonial Powers, Powers that emerged after the Second World War, and the international institutions that they continued to dominate.

The Declaration defines development in broad and comprehensive terms, as a complex, subjective, multidimensional, integrated, and dynamic process, which, through multiple interactions in the economic, social, cultural and political spheres generates continuous progress in terms of social justice, equality, well-being and respect for the fundamental dignity of all individuals, groups and peoples. Based on the principles of equality of rights and self-determination of peoples, the human person and all peoples are recognized as central subjects—rather than objects—of development, its driving force and its architect. Such development cannot be exported or imported, but must be based on popular participation, on the basis of equality, in a process of integrated economic, social and cultural development, in accordance with peoples' aspirations to progress and well-being.

While self-determination is generally thought of as a single, indivisible and inalienable right of peoples, it has many aspects. It is not only the culmination of the process of achieving independence and establishing a State, but a continuing process that requires recognition of those States' right and duty to maintain, assure and perfect their full legal, political, economic, social and cultural sovereignty, without external interference. However, the capacity to do this depends on their enjoyment of permanent sovereignty to control and develop their natural wealth and resources for the well-being of their own peoples. If any of these elements is missing, the right to self-determination has not been realized, in legal or practical terms. The mere formation of a State does not, in itself, lead to the full realization of this right unless the State enjoys genuine and continuing freedom of choice, within the bounds of international law.

The Declaration on the Right to Development is founded first and foremost on the Charter of the United Nations, upon which it draws for its fundamental principle: equal rights and the right of peoples to self-determination and its international corollary, sovereign equality. These are vital concepts, since they constitute the unique basis upon which friendly relations and cooperation between States can develop; a requisite for resolving problems of an economic, social, cultural and humanitarian nature and promoting respect for human rights and fundamental freedoms for all, without discrimination. The narrow correlation established during the debate between the right to development and these two vital elements reflects recognition of the need for a just and equitable international order in order for all peoples to be able to fully exercise their human rights, including the right to development, in accordance with their own aspirations and realities.

Since the era of decolonization, there has been growing appreciation within the United Nations system of the critical role of genuine equality in international economic relations for ensuring continuing freedom of choice, and growing recognition of developing countries as a specific group of subjects of international economic law. Discrimination against States and peoples at the international level has the same adverse effect as discrimination against individuals and groups within States: it perpetuates inequalities of wealth and power, and constitutes an obstacle to addressing inequalities through the process of development. Although discrimination against States is, in strict legal terms, an issue of self-determination, friendly relations and solidarity, rather than a human rights question, discrimination at the national and the international levels is inextricably linked owing to its effects on individual human beings.

Given the continuing unequal power relationship between developed and developing countries, the duty of international cooperation and solidarity is a shared responsibility of States, without which development and social well-being for all, without discrimination, will remain unattainable. Respect for the principle of sovereign equality of States continues to be relevant today for the democratization of international structures and institutions and the elimination of political domination. Globalization led by transnational corporations and financial institutions from the rich industrialized countries has accentuated existing disparities between developed and developing countries, at the same time increasing social inequalities within countries. Because of their weak and vulnerable position within the global order, the serious systemic crisis we are experiencing today, with its global implications, is having an unequal impact on developing countries in the same way that it is affecting the weakest and most vulnerable social sectors within countries. Cristescu's words continue to be relevant to today's reality: "If all nations were equal in size and power, the principle of the sovereign equality of States would be less important than it is … Through the application of the principle of sovereign equality, international law should

protect these new States and their peoples from any arbitrary action and afford them genuine equality."[32]

In the understanding of the States that championed the Declaration, international cooperation cannot be summarized merely as "public development aid". The Declaration requires all States, individually and collectively, to adopt, as a priority, international policies aimed at human-centred development; there is no mention of "conquering markets" or victory in "economic wars". It draws upon the fundamentals of international law and pursues humanistic and egalitarian priorities which, in principle and in law, are—or should be—an integral part of development. The duty of international cooperation as applied to the right to development is multifaceted. It not only requires systematization, but further development and codification. The Declaration provides that States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development, as well as the duty to cooperate with each other to ensure development and eliminate the obstacles to development, and to exercise their rights and duties in a manner that promotes a new international economic order and encourages the observance and realization of human rights (art. 3).

The normative character of the Declaration on the Right to Development is clearly linked to aspects that render it legally binding, although it is not a multilateral treaty. Apart from the numerous sources of international law, certain aspects of the right have become part of customary law, evidenced by intergovernmental and multilateral agreements in the area of development cooperation including, inter alia, United Nations strategies and programmes for development, the establishment and development of an entire system of centralized multilateral organs and auxiliary organs, and specialized agencies. Even though the controversy on the Declaration's legal validity continues, the principles at the core of the right to development remain current and, in multiple ways, continue to inspire the actions of numerous States and social organizations. In fact, the principles contained in the Declaration assume new relevance in the contemporary context of globalization.

In its preamble, the Declaration recalls the legal sources upon which it is founded, with the Charter of the United Nations at its core, but also relevant international accords, conventions, treaties, declarations, resolutions, recommendations and other instruments of the United Nations and its specialized agencies, some of which have been examined in the present paper. The sources are, therefore, numerous, belonging to both "positive" and "soft" law. It would be an error to erect an impermeable barrier between these two important orders of international law. The major sources of the principles upon which the Declaration is based were solemnly adopted by an overwhelming majority of States Members of the United Nations, with rare opposition and/or few abstentions.

The Declaration is, hence, the result of a complex process: (a) the aspiration of newly established States to be free and independent and to establish democracy in international relations in which they enjoy equality with other States; (b) the international recognition of the impossibility of separating political independence from sovereign economic, social and cultural independence; (c) the failure of an alien, growth-centred, profit-oriented development strategy based on an unequal and unjust international division of labour to eliminate inequalities and promote social well-being, which has been clearly demonstrated in the light of the widespread systemic crisis of today with its multiple economic, financial, social and ecological dimensions; (d) the recognition that the human person, and all peoples, are subjects, not objects, of development and, consequently, the indigenous, multidimensional, structural and dynamic character of development; and (e) the recognition of the interrelationship and interdependence between development, human rights and peace.

As a framework for the development of a society based on equality and social justice, which reflects the aspirations of the human person and all peoples, the Declaration on the Right to Development continues to retain its pertinence and validity.

[32] Cristescu, *The Right to Self-Determination* (see footnote 2), pp. 165-166.

The challenge of implementing the right to development in the 1990s

Report of the Global Consultation on the Right to Development as a Human Right[1]

I. International legal aspects of the right to development as a human right

Since the Declaration on the Right to Development was adopted by the General Assembly in December 1986, international lawyers have expressed concern about a variety of theoretical and technical aspects of the right to development. Some of these views were reflected in the introductory statements made by legal experts at the Global Consultation. While not challenging the concept or casting doubt on its value and validity as a human right, these concerns have centred on three questions: What is the exact substance of the right to development? Who are its beneficiaries? and How can it be implemented within and by the human rights programme?

A number of legal observations were made on the substance and content of the right to development. A distinction was made, on the one hand, between the interdependence and interrelationship of all human rights, including the right to development, and the consequent demand for respect for human rights in the development process and, on the other hand, the separate content of the right to development. With regard to the latter category, a human right should not be confused with the status and rules of the international economic order, which was an area traditionally assigned to inter-State relations, even though that order might favour one group over another. Nevertheless, the international community had an obligation to intervene and correct obstacles to the right to development to the degree that they could be clearly and specifically identified. Additional obstacles included massive and flagrant violations of human rights and threats of war and of continued damage to the environment.

Relating to the beneficiaries of the right to development, objections were raised to States being considered as beneficiaries because a State could not by definition be the subject of a human right. Instead, emphasis was placed on the individual and collective rights aspects of the 1986 Declaration, which indeed referred to the human person as the central subject of development. Further difficulties of a legal nature were brought up in connection with the identification of the content of the individual's right to development. Apart from the realization of individual rights in the

[1] In accordance with Commission on Human Rights resolution 1989/45, the Secretary-General organized in Geneva from 8 to 12 January 1990 a global consultation on the realization of the right to development, to focus on the fundamental problems posed by the implementation of the Declaration on the Right to Development and the criteria and mechanisms for identifying, evaluating and stimulating progress. Forty-eight papers were presented by leading authorities from all regions; senior United Nations officials made statements and 32 speakers took the floor. Fifty-one countries sent representatives, as did 12 United Nations bodies, specialized agencies and international organizations and 40 non-governmental organizations. This chapter reproduces paragraphs 77-207 of the report on the Global Consultation submitted to the Commission on Human Rights at its forty-sixth session (E/CN.4/1990/9/Rev.1), edited for the present publication. Footnotes have been omitted.

civil, cultural, economic, political and social fields, which were integral to the right to development, the exact substance of an implementable individual right to development could not be easily discerned.

With regard to collective beneficiaries, the term "people" likewise raised difficult questions. Although it had been recognized and more clearly defined in the context of the right to self-determination, the beneficiaries of the two rights to development and self-determination did not necessarily coincide. The problem of who was to be considered as representing the "people" in the right to development context was also discussed, especially as the appearance of non-governmental delegates in that capacity would necessarily overlap or even contradict the role of States as guarantors of the same right. Finally, although the Declaration on the Right to Development did not expressly make such a reference, it was generally felt that the term "people" should encompass groups within the State, such as indigenous peoples and minorities, as far as the right to development was concerned.

The question of the implementation at the international level was also addressed. In this respect, and keeping in mind the relevant provisions of General Assembly resolution 41/120 of 4 December 1986 containing guidelines for United Nations human rights standard-setting activities, the 1986 Declaration was found to be lacking the precision necessary for specific implementation; further, the Declaration had not set up any machinery for that purpose. Consequently, the usefulness of the right to development from a legal point of view was open to question. These observations resulted in extensive discussions about possible implementation methods which are reflected in the conclusions and recommendations of the Consultation.

Regarding the interdependence of human rights, considerable attention was given to the global concept of human rights. The importance of respect for all human rights in the development process was repeatedly underlined, including such civil and political rights as the rights to life, liberty and security of person; the rights and freedoms relating to opinion, expression and information; independence of the judiciary; and other rights and freedoms essential in a democratic society. Popular participation at all levels of development, beginning at the grass roots, was likewise found to be a necessary and fundamental component of development for and by the people involved. Participation was said to be an ideal vehicle for giving people a say in the content and form of development and for transforming the collective aspect of the right to development into individual rights.

In discussing the issue of obligations under the Declaration on the Right to Development, reference was made to both States and the international community, as clearly spelled out in the Declaration. Recognizing that rights could be both absolute and progressive in nature and acknowledging that States could not be expected to render positive services related to the right to development if they had no available resources, the role and obligation of the international community were emphasized, in particular intergovernmental organizations promoting human rights and development. In that connection, references were made to article 28 of the Universal Declaration of Human Rights and to the so-called international law of cooperation which was based on the idea that there were common values which could not be satisfied by means other than cooperation, including the creation of international and national conditions which would make implementation possible.

II. Human rights and the realization of the right to development as a human right

The papers presented to the Consultation and the discussions under every item on the agenda underlined the importance of human rights to the realization of the right to development. Massive and flagrant violations of human rights, apartheid and other violations of human rights were serious obstacles to development. On the other hand, one of the constituent elements of development understood as a human right was respect for and promotion of the human rights of the individual.

A. Massive and flagrant violations of human rights

Massive and flagrant violations of human rights were identified as a major stumbling block to the realization of the right to development. It was pointed out that they arose from aggression and occupation of foreign territories, policies of genocide and apartheid, racism and racial discrimination, colonialism and the denial of the right of peoples to self-determination and development without external interference. All forms of slavery, the slave trade, the arms race and pollution of the environment were seen to be threats to development. The Declaration on the Right to Development, it was observed, regarded international peace and

security as essential elements for the realization of the right to development and the elimination of massive and flagrant violations of human rights as a prerequisite for development. That provision had a sound legal basis since a number of the internationally illegal acts referred to above had been recognized as international crimes in many international documents. It was pointed out that the International Law Commission, in drafting articles on State responsibility, had also been considering ecocide as an international crime.

It was also observed that the uneven character of economic development among countries and peoples, which in the case of developing countries was further exacerbated by the external debt burden, also constituted a threat to humanity. It was pointed out that not only did certain internationally illegal acts constitute massive and flagrant violations of human rights, but so also did unemployment, starvation, poverty and the absence of access to health services and education. If both civil and political as well as economic, social and cultural rights were to be realized, the basic task of the international community would be to help to make available to all peoples and human beings the right to development under conditions of peace and international security. It was suggested that the United Nations should elaborate and adopt a binding comprehensive convention on the right of peoples and every human being to development. That instrument should envisage the creation of a corresponding mechanism to evaluate the levels of development of States and to monitor the realization of agreed-upon obligations.

B. Apartheid

In addressing this issue, it was emphasized that the right to development was inclusive: it involved all the people in a country irrespective of race, colour, creed, sex or age. Apartheid, being a system which had separate development of the races as a goal, not only violated this right politically, economically, socially and culturally, but also violated other fundamental human rights. It was emphasized that violations of human rights by the South African regime were not just a chance aberration in the working of a system, but rather the deliberate functioning of a well-thought-out policy whose theoretical justification was debated long before it was put into effect.

Apartheid created racial tensions and misunderstandings which undermined the cooperation necessary for a healthy development. In explaining how apartheid had had negative impacts on economic and political development, reference was made to the Race Classification Act, the Group Areas Act, the Bantu Areas Act, the Bantu Education Act and the Bantustan or Homeland policy. The Homelands, it was pointed out, were a reservoir of cheap labour and dumping grounds for the old, sick and unemployable. Apartheid violated a range of human rights, respect of which was a precondition for the realization of the right to development. Those rights included the right to live at the place of one's choice, the right to free movement, the right to a decent family life, the right to human dignity, the right to be free from fear of arrest, deportation or ejection from one's dwelling. The result of apartheid had been misery and suffering for the black people of South Africa, the disruption of families and communities, poor living conditions for workers, high death rates in the mines due to accidents, high infant mortality, deterioration of health conditions and the denial of access to education.

The impact that the system of apartheid has had on the economic development of the region was described with reference to the aggressive wars waged against the front-line States by South Africa in defence of apartheid. South Africa's policy of destabilization had caused the destruction of their infrastructure, diversion of enormous sums of money from development to defence, high infant mortality, the mass exodus of refugees and displaced persons, famine and malnutrition.

The dismantling of apartheid was without any doubt a precondition for a normal, healthy, political, social, economic and cultural development that would include and involve the whole population. In that context, attention was drawn to the call of black leaders of the struggle against apartheid, both inside and outside South Africa, for the immediate imposition of United Nations comprehensive mandatory sanctions against that country.

C. Individual human rights

Respect for individual human rights was a constitutive element of the concept of the right to development. And, through the Declaration on the Right to Development, the idea of linking the process of development and individual human rights had gained international legitimacy and broad support. On the question of whether or not the concept of the right to development strengthened or undermined respect for human rights, reference was made to article 28 of the

Universal Declaration of Human Rights which stated that an appropriate social and international order was required for the full realization of human rights. The recognition of, and respect for, individual human rights was, however, demanded without any precondition. Moreover, the primary importance of the right to development lay in its understanding of development as a comprehensive social process which would lead to the full realization of human rights through a process that respected individual human rights.

Attention was also drawn to the current phenomenon at the time of the diminishing ideological element in matters regarding national and international development policies. In the search for new values, participants understood the importance of perceiving development as a comprehensive economic, social, cultural and political process aiming at the constant improvement of the well-being of the entire population and all individuals. In other words, respect for human rights should become an essential criterion for the assessment of the success of national and international development policies. Measurement of the realization of the right to development should, therefore, include the utilization of precise and objective criteria of achievement in the field of civil, political, economic, social and cultural rights.

Several concrete proposals were discussed relating to the implementation of the Declaration on the Right to Development within the framework of the United Nations. Compatibility of United Nations activities with the Declaration should be ensured by adopting appropriate guidelines within all operational programmes and by using human rights impact studies in the approval and evaluation of all projects. That process should involve the effective and meaningful participation of non-governmental organizations, in particular grass-roots organizations. It was also felt that greater cooperation between the Centre for Human Rights, the United Nations Research Institute for Social Development, the United Nations Institute for Training and Research and other appropriate bodies would be necessary in providing technical advice and guidance. An appropriate system of indicators for the assessment of progress in the realization of economic, social and cultural rights should be further developed and adopted.

Finally, practical measures should be undertaken to strengthen the international system for promotion, protection and implementation of human rights in general. They should include the development of an efficient system of response to emergency situations involving gross violations of human rights, strengthening the role of the Secretary-General to exercise humanitarian good offices in human rights cases, strengthening non-governmental organization participation and the development of operational approaches to deal with situations involving problems of minorities, indigenous peoples and other vulnerable groups.

III. Specific aspects of the implementation of the right to development as a human right

The second point on the agenda of the Global Consultation was a review of specific examples of the respect for human rights as an integral factor in promoting development and the problems faced in that regard. In connection with that discussion the following points were made.

A. Women

Ensuring equality for women in development and their contribution to the development process posed many different problems. Despite the recognition of equal rights for women in international instruments, they were often undermined by culturally sanctioned inequalities between men and women or through actions involving short-term gains at the expense of long-term freedom and equity. Figures on income distribution, the structure of the labour force and wages, education and political participation from a 1980 World Bank report were cited to describe the extent of inequality and exploitation faced by women. It had become obvious that development projects that disregarded, threatened or undermined women rather than contributing to their advancement violated their human rights.

A number of serious problems had been encountered with respect to women. Firstly, development experts from Western industrialized countries had been men acting without regard for women's traditional roles in production and decision-making and training packages had likewise focused on men and the establishment of a global economic order serving the needs of Western industrialized countries. Secondly, development itself had become a source of violations of women's rights as much as it had been a source of promoting women's equality. That had occurred, for example, through projects characterized by their benign neglect of women but which subtly reinforced discrimination against women by ignoring traditional gender divisions of labour, placing the

burden on women to implement the projects and by creating inequalities in access to external resources or services generated by the projects; through projects that paid lip service to women's equality yet took advantage of culturally, religiously and socially sanctioned inequalities as they sought short-term gains in production or industrialization; through projects specially aimed at benefiting women but which marginalized and compartmentalized women's development from national economic and social development.

It was discussed that steps could be taken towards bringing about women's right to development as a human right. The United Nations Development Fund for Women (UNIFEM) came into being and continued to exist because of the need to change the vastly unequal situation of women in social, political and economic relations. The General Assembly had created UNIFEM with two key mandates. The first was to serve as a catalyst to ensure the involvement of women in mainstream development activities at national, regional and international levels. The second was to support innovative and experimental activities which benefited women and were in line with national and regional priorities.

As a catalyst, UNIFEM provided resources to extend and strengthen national Governments' abilities to involve women in the national development planning process. For instance, in Honduras, UNIFEM participated in the development of a national policy for women. The development of that document served as a pilot experience for other countries in the region and the Government of Honduras would share its ideas through documentation and workshops.

In that context, all institutions and individuals were called upon to promote women's right to development, for development that violated women's rights was not development. It was suggested that that be done through monitoring operational programmes and policies of Governments, organizations and institutions; serving as catalysts for women's empowerment; and by exposing and condemning projects which required and perpetuated the exploitation of women. Such tasks were not easy but would eventually contribute to equitable development and respect for human dignity.

B. Indigenous peoples

The experience of indigenous peoples and development clearly demonstrated that human rights and development were inseparable, for the abuse of the rights of indigenous peoples was principally a development issue. Forced development had deprived them of their human rights, in particular the right to life and the right to their own means of subsistence, two of the most fundamental of all rights. Indigenous peoples had in fact been victims of development policies which deprived them of their economic base—land and resources—and they were almost never the beneficiaries.

It was underlined that the most destructive and prevalent abuses of indigenous rights were a direct consequence of development strategies that failed to respect the fundamental right of self-determination. Using illustrations, participants described how indigenous people were routinely perceived as obstacles to development and excluded from decision-making in matters that affected them. The result had been the elimination and degradation of the indigenous land base; destruction, degradation and removal of natural resources, waters, wildlife, forests and food supplies from indigenous lands either through commercial exploitation or incompatible land use; the degradation of the natural environment; removal of indigenous peoples from their lands; and their displacement or pre-emption from the use of their lands by outsiders.

In order to ensure the protection of the social and cultural environment of indigenous peoples, it was recognized that sustainable development must also be equitable from an indigenous viewpoint. Access to relevant national and international forums was considered an urgent necessity. Recommendations were also made for the assessment (or audit) of social and environmental impacts of development programmes and projects on the basis of internationally approved standards. These standards should have as their priority respect for basic human rights and fundamental freedoms, including the right of self-determination; require that those affected be beneficiaries of the proposed development; take into consideration the programmes' long-term and non-monetary effects; require that full consideration be given to alternative means to realize the same benefits; require efforts to meeting indigenous economic and social requisites as well as conventional criteria; require that a positive or negative recommendation following an assessment be a determining factor in any decision to permit international financing; and, finally, require that the project or programme be halted subsequent to a negative recommendation.

The experience of the home rule system for Greenland and ways in which the indigenous peo-

ples of that island were allowed to determine their own economic, social and cultural development was described in detail as an evolutionary process leading to a large degree of local autonomy.

C. The extremely poor

Experience with the extremely poor in developing and developed countries demonstrated clearly that extreme poverty involved a denial of the totality of human rights, civil and political as well as economic, social and cultural. Freedom without respect for economic, social and cultural rights was an illusion. Poverty, by endangering all individual rights, prevented people from assuming not only their duties as individuals, but also their collective duties as citizens, parents, workers and electors. In the rich countries, for instance, a person without an official address could not exercise the right to vote or find meaningful employment; in the absence of education, freedom of opinion and association were dead letters; without housing or resources, freedom of movement became nothing more than consignment to a vagrant life, and the right to a family was denied by making it impossible to raise one's own children.

Attention was drawn to the Wresinski report [on extreme poverty and economic and social needs, submitted on behalf of the Economic and Social Council of France (1987)] which had been drafted in consultation with the extremely poor themselves and which had provided a modern description of economic and social vulnerability and poverty in human rights terms, applicable to individuals, peoples and States. That report showed that economic and social vulnerability led to extreme poverty when it affected several areas of existence, became persistent and seriously compromised the chances of restoring one's rights and responsibilities in the foreseeable future.

The central role to be played by the extremely poor themselves in exposing their situation and bringing their concerns to the attention of the public and, in particular, the international community was described. Participation was crucial to the realization of the right to development and to all human rights. The history of the relatively advanced democracies had demonstrated that principles such as "democracy" and "participation" had been applied in too general a manner to reach the extremely poor. If human and democratic rights were to be enjoyed by all, priority should be given to the extremely poor, particularly with regard to the means of democratic participation. However, simple declarations of principles were insufficient. To succeed, they must be accompanied by efforts to improve knowledge and understanding of extreme poverty in partnership with those directly affected. In that context, references were made to efforts being undertaken by the Council of Europe and the Commissioner for Social Affairs of the European Economic Community.

In conclusion, attention was drawn to the fact that the short-term objectives of most development projects had led to greater isolation of the extremely poor. The following measures were proposed to remedy the situation: rely on initiatives of the people themselves; support local associations working with the extremely poor; invest resources, in particular human resources, in extremely poor areas; and involve the people directly affected in all stages of the project cycle and programmes.

IV. The realization of the right to development as a human right at the national level

A. National development policies

Throughout the discussions of the Consultation, emphasis was placed on the key role played by national conditions, policies and programmes in the realization of the right to development as a human right. An important element in success at the national level in realizing the right to development was the adoption of appropriate development strategies which in fact furthered respect for human rights. It was repeatedly underlined that in the past development strategies which relied too heavily on centrally planned command economies or which were oriented merely towards economic growth and guided by purely financial considerations failed to achieve the realization of the right to development. It was for each people to determine its own approach to development in conformity with international human rights standards; no one model for development was adequate or appropriate for all cultures and peoples.

A number of basic elements were necessary in national development policies if real development in the human rights sense was to be achieved. Democracy and participation were seen as important elements in national development strategies. Such strategies should also include explicit provisions for the realization of all human rights.

B. Participation

The central role of participation in the Declaration on the Right to Development was underlined. Participation was a condition for the exercise of many other human rights, and might be of particular importance among people with traditional cultures in which individual rights tended to be defined in relation to the community. Reference was made to countries with weak national constitutions and excessive bureaucratization, where participation was limited to occasional elections. The relationship between political participation, the right to work and equal access to resources was emphasized. The role of popular organizations had to be understood not only in the context of the structure of power within the country, but also at the international level. The poorest people of a poor country faced the greatest obstacles to effective participation.

Where powerful economic, ethnic or regional interests interfered with the democratic functioning of the State, popular organizations often played a crucial role in assuring access to essential services such as health care. In one country, where there was considerable inequality in the distribution of wealth and necessities of life, the activities of peasant communes, agrarian cooperatives and a wide variety of urban organizations, including "microenterprises", were described. In another country, economic reforms of the 1970s had given such organizations greater opportunities and influence in the economy, but a number of problems related to control of productive resources such as land and the legal status or legal capacity of popular organizations had arisen in that context.

C. Intermediate structures

Regarding the issue of participation, it was noted that the Declaration on the Right to Development did not explicitly refer to "mediating structures" or "intermediary groups", nor did it exclude such groups. The meaning of the Declaration would have to evolve in practice, and reference was made to the African Charter of Human and Peoples' Rights, with its notion of African historical traditions and values, as a fertile source of law on the role of intermediary groups. Reference was also made to the third Convention between the European Economic Community and the African, Caribbean and Pacific States (Lomé III Convention), which recognized the role of grass-roots communities and self-help organizations as mediating structures, and to the African Alternative Framework to Structural Adjustment Programmes for Socio-Economic Recovery and Transformation, which conceived of a genuine and active partnership between Governments and the people through their various institutions at the national, local and grass-roots levels.

A distinction was made between "active" and "passive" forms of participation. "Passive" participation was merely a managerial technique, while "active" participation involved empowerment. Active participation depended on awareness- raising and organization-building. While it was generally acknowledged that intermediary groups had become indispensable for sustainable development, the identification of such groups must retain a dynamic character and could not be settled by a simple, positivist legal approach. The political standing and social function of those groups would nonetheless have to be translated eventually into legal terms, especially where different groups made competing claims on resources.

D. Changes in the concept of the welfare State and its impact on the right to development

The welfare society had been characterized by an effort to combine the concern for free and active participation of all its individuals and the need for equality in sharing the benefits deriving from the total activity of the society. That posed a dilemma: a strong State tended to reduce freedom of choice of participation by the individual, but a weak State tended to result in a highly unequal enjoyment of the benefits resulting from the economic activities of the society as a whole. Overextended States and bureaucracies, highly centralized economies and military dictatorships undermined individual participation in development.

Since the individual was the central subject of development, the individual must take responsibility for her or his own welfare to the extent possible. To implement the right to development, States had a responsibility first to respect the freedom of the individual to take action; second, to protect individuals and their resources against other, more assertive or aggressive actors; and third, to assist in the fulfilment of welfare needs by providing assistance to create equal opportunities for individuals or groups and through the direct provision of resources. Consequently, national development programmes should aim explicitly at minimizing disparities between

different groups of society and their elaboration should be based on grass-roots initiatives.

E. Legal assistance

Equal access to justice, for rich and poor alike, was crucial for respect for the primacy of the law. Consequently, it was essential to provide adequate legal assistance to all those who, threatened in respect of their lives, their freedom, their property or their reputation, were not in a position to remunerate a lawyer. But above and beyond the traditional legal assistance usually restricted to criminal cases, the rural populations must be helped to use the law as an instrument for the realization of their rights. Although it was true that the law could be and had been used, misused and abused to institutionalize property and privilege, exploitation and inequality, it could also be properly used to establish social justice and equality, participation and autonomy. In order to do that, however, the law must be the will of the peoples themselves; the consecration of the right of participation in public affairs.

Concern for justice and respect for human rights tended to argue in favour of a development strategy focused on rural populations. Irrespective of the extent of their information concerning their rights, they often had neither the means nor the resources needed to exercise them. Consequently, the right to development could not have a profound meaning at the practical level for rural populations. In order to reverse that trend, it was determined that the concept of the right to development could and should serve as a basis for the adoption of laws and procedures intended to eliminate conditions of underdevelopment or, at the very least, to help overcome the obstacles to development.

In view of the role of jurists in the development process, two questions arose in the context of the third world countries. First, how could one bridge the huge gap separating jurists from the overwhelming majority of the populations? Second, how could one help those populations to gain access to the legal resources necessary in order to enjoy the right to development? The answers to those questions hinged on the three components "development", "law" and "legal resources".

With regard to development, the fundamental issue was the assistance to be given to the rural masses to enable them to determine their priorities themselves, to identify the obstacles to achieving those priorities and to select the methods of achieving them. In other words, the development of the rural population presupposed that they would take their destiny into their own hands; from this viewpoint, the contribution of the law and jurists was desirable, and indeed vital.

On the question of law, it seemed that most of the countries of the third world had copied the various branches of Western law. Further, that extraverted law was often used to maintain the status quo so that it frequently proved to be incapable of reflecting contemporary society and its aspirations. The law was not static, but changed with society and could serve to bring about change and progress. From that standpoint, the law could constitute a resource for rural populations with a view to bringing about a change in their conditions and for development in general. Legal resources constituted the expertise and functional competence allowing those who worked together and in cooperation with other groups to understand the legal system and to use it effectively in order to promote their objectives. They created and strengthened the incitement to and capacity for collective action with a view to promoting and defending common interests. The importance of a knowledge of the law as a vital element in the process culminating in collective self-sufficiency had been underscored. In Africa, Asia and Latin America alike, efforts had been made towards the introduction of legal assistance projects for the destitute populations of the rural areas.

The impact of legal assistance on the economic and social development of rural populations was considerable. Those populations would be in a position to make constructive use of favourable legal provisions capable of neutralizing unjust laws and practices, and even to become generators of rights and agents in social and civic life. When people know their rights, they are able to replace their feelings of alienation, resignation and dependence by a new awareness of their dignity and their rights—a precondition for self-sufficiency.

With regard to legal resources at the national level to ensure that policies and procedures respected the right to development, attention was drawn to the seminar on the judiciary and human rights in Africa of the African Association of International Law, which was held in Banjul on 17 November 1989. That seminar made an appeal to African States and peoples to take measures for the promotion and protection of human rights, inter alia (a) to democratize the national policy and institutions as a precondition and funda-

mental basis for the full enjoyment of civil, political, socioeconomic and cultural rights; (b) to promote and raise the level of consciousness of the African peoples and to disseminate information on human rights; (c) to pay special attention to the situation of women, children, the aged and other disadvantaged groups; (d) to guarantee the absolute independence and integrity of the judiciary; (e) to ensure equal access to legal aid, to the courts and other juridical and legal bodies; (f) to encourage the creation and effective functioning of independent bodies and non-governmental organizations for the promotion and protection of human rights at the national, regional and subregional levels; (g) to ensure the independence and autonomy of the African Commission on Human and Peoples' Rights; (h) to guarantee the protection, well-being and security of refugees, migrants and stateless persons; (i) to give effect to the provisions of the African Charter on Human and Peoples' Rights.

F. International dimensions of national development policies

Looking at national development policies from an international perspective revealed a contradiction between the actual global order as it functioned and the objective of real development based on interdependence. One dominant development thesis maintained that development was only possible through interdependence that was governed by the laws of the globalized economy, which was reduced to the concept of global opening to the "market". However, the global markets for commodities, services, capital, technology and labour were all characterized by structural inequalities. Such markets, in which capital was mobile while labour alone was immobile, could not harmonize social conditions and overcome world polarization. In that regard, one should keep in mind the political, military and cultural dimensions of globalization which underlay inequalities in relations between States, nations and peoples. The balance of power in the world was evolving from one based on two super-Powers to one that was multipolar but excluded countries and regions of the third world. The ideal of the right to development, which was based on the collective rights of peoples, nations and other forms of collectivities, could well be in contradiction with the structure of the global market, which tended to benefit the centre at the expense of the periphery, that is the poorer countries. Unless those conflicting requirements were resolved at the level of collective entities such as regions, villages, families, minorities, women, etc., the right to self-determination would apply only to States and the right to development only to the centre.

V. Realization of the right to development as a human right at the international level

A number of general and specific suggestions concerning the introduction of new international efforts and the coordination of existing activities were made during the Consultation's discussions. Many of these proposals were based on or had grown out of the text of the Declaration on the Right to Development, which indeed addressed the issue; others foresaw more extensive mechanisms and procedures in order to give effect to the right to development.

In order to introduce and solidify human rights standards in the development process, a series of suggestions were made with regard to the ongoing and upcoming activities of international and regional organizations in the field of development. It was suggested that broad cooperation and coordination between intergovernmental and non-governmental institutions be established so that human rights would become a permanent factor in all economic, social and cultural programmes and development projects.

The issues for discussion in this wide range of international forums included structural adjustment, external debt burdens, the marketing and pricing of export commodities, access to and sharing of technology, extreme poverty and other aspects of the international economic system. All of those issues required a human rights input. A linkage of that kind between human rights and economic issues so deeply affecting development would greatly facilitate and strengthen respect for human rights in general and the right to development in particular. The concept of human resources development, by its very nature and as part of international development strategies, called for human rights components based on existing standards and Government commitments.

In the context of international development work, the need for criteria or indicators for evaluating progress was addressed. While some participants preferred to emphasize the minimum conditions necessary for human survival, others felt that all human rights were essential to human development and that a short list or prioritization of rights should not be considered in relation to the realization of the right to development. For example, an analysis of the

qualitative aspects of changes in material conditions, such as food and shelter, should also ensure that such changes were not accompanied by a decrease in local control or self-reliance or by a significant growth of inequalities. Other participants stressed the importance of evaluating the process of development itself, not simply its results or fruits. References were made to a variety of factors such as access to basic resources, control of the workplace, participation in decision-making concerning development and the availability of information, which indicated the extent to which people were able to set their own goals for development and to pursue them freely and participate actively in the process of realization.

The role of non-governmental organizations in the realization of the right to development was stressed. Their traditional and significant participation in international activities for the promotion of both human rights and development would be further strengthened, to the benefit of all, if they were effectively to link those two sectors of work under the umbrella of the right to development. To that end, non-governmental organizations should increase cooperation and coordination among themselves, as well as with the intergovernmental community. Furthermore, contributions should be encouraged from as many non-governmental organizations as possible including those not in consultative status with the Economic and Social Council; that had been the case in the Global Consultation and was the practice of the Working Group on Indigenous Populations and had shown positive results.

VI. Conclusions and recommendations emerging from the Global Consultation

During the course of the Global Consultation numerous ideas and proposals were brought forward and discussed. It emerged clearly from the Consultation that the subject of the right to development as a human right was related in a complex and interdependent way to many other areas of human activity and that that complex interrelationship was only gradually being understood.

With regard to the Consultation itself, numerous participants welcomed the opportunity it provided to focus the attention of an audience reflecting a wide spectrum of world opinion on the problems and challenges posed by the implementation of the Declaration on the Right to Development. They also welcomed the participation and contribution of a number of organizations and bodies of the United Nations system, including the United Nations Conference on Trade and Development (UNCTAD) and its Non-Governmental Organization Liaison Service, the United Nations Development Programme (UNDP), the Office of the United Nations High Commissioner for Refugees (UNHCR), the Centre for Social Development and Humanitarian Affairs, the United Nations Fund for Population Activities (UNFPA), the United Nations Industrial Development Organization (UNIDO), the United Nations Development Fund for Women (UNIFEM), the Economic Commission for Europe (ECE), the International Labour Organization (ILO), the World Bank and International Monetary Fund (IMF), as well as the participation of the Organization of African Unity and the Commission of the European Communities.

Participants expressed appreciation for the introductory statements made by the Under-Secretary-General for Human Rights, the Secretary-General of UNCTAD, the Chairman of the Working Group of Governmental Experts on the Right to Development and the Secretary of the NGO Special Committee on Racism and Racial Discrimination, Apartheid and Decolonization; the presentation made by the Director-General for Development and International Economic Cooperation, in which he underscored the importance of the integration of human rights into the development process was particularly welcomed.

Participants also expressed their appreciation for the very valuable contribution made to the Consultation by the experts who presented papers on the Consultation's major themes.

Appreciation was also expressed for the documents submitted to the Consultation by speakers, participants and observers and in particular for the background paper concerning the development of the principles in the Declaration on the Right to Development in the various United Nations human rights instruments and studies (HR/RD/1990/CONF.1) prepared for the Centre for Human Rights by Tamara Kunanayakam, who was also thanked for her work in preparing the Consultation.

Many participants expressed disappointment that a number of intergovernmental bodies with special responsibility in the field of development did not attend, including the General Agreement on Tariffs and Trade (GATT), the World Health Organization

(WHO), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Environment Programme (UNEP), the International Fund for Agricultural Development (IFAD), the United Nations Centre on Transnational Corporations (UNCTC), the World Intellectual Property Organization (WIPO), the World Food Council (WFC), the World Food Programme (WFP), the United Nations Children's Fund (UNICEF) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). The hope was expressed that they would take a more active role in future programmes and activities for the implementation of the right to development, and that special efforts would be made to inform those bodies of the report and recommendations of the Global Consultation; it was felt that only through the active cooperation of all could progress be made.

The specific conclusions and recommendations set out below found a wide echo among the participants. They are not exhaustive nor do they necessarily fully reflect the views of all the participants or the organizations represented. They may well provide the Commission on Human Rights and other United Nations bodies with a basis for considering action. This is a first step towards a better understanding of the right to development as a human right and the complexity of the subject will require much further analysis and discussion.

A. Conclusions

1. The content of the right to development as a human right

The right to development is the right of individuals, groups and peoples to participate in, contribute to and enjoy continuous economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. This includes the right to effective participation in all aspects of development and at all stages of the decision-making process; the right to equal opportunity and access to resources; the right to fair distribution of the benefits of development; the right to respect for civil, political, economic, social and cultural rights, and the right to an international environment in which all these rights can be fully realized. All of the elements of the Declaration on the Right to Development, including human rights, are complementary and interdependent and they apply to all human beings, regardless of their citizenship.

Development is not only a fundamental right but a basic human need, which fulfils the aspirations of all people to achieve the greatest possible freedom and dignity, both as individuals and as members of the societies in which they live.

The human person is the central subject rather than a mere object of the right to development. The enjoyment of all civil, political, economic, social and cultural rights is both the necessary condition and aim of the right to development. Thus, States must not only take concrete steps to improve economic, social and cultural conditions and to facilitate the efforts of individuals and groups for that objective, but must do so in a manner that is democratic in its formulation and in its results. A development strategy that disregards or interferes with human rights is the very negation of development.

Recognition of the right to development and human rights in the national legal system is not sufficient in itself. States must also ensure the means for the exercise and enjoyment of these rights on a basis of equal opportunity.

Democracy at all levels (local, national and international) and in all spheres is essential to true development. Structural inequalities in international relations, as well as within individual countries, are obstacles to the achievement of genuine democracy and a barrier to development as defined by the Declaration. Fundamental to democratic participation is the right of individuals, groups and peoples to take decisions collectively and to choose their own representative organizations, and to have freedom of democratic action, free from interference.

A major goal of democracy is to achieve a just social order. To be fully effective, democracy itself depends upon the existence of a just and democratic social order, including a fair distribution of economic and political power among all sectors of national society and among all States and peoples and on the employment of such rights as freedom of expression, freedom of association and free elections.

The concept of participation is of central importance in the realization of the right to development. It should be viewed both as a means to an end and as an end in itself. Measures formulated to promote the right to development must focus on the democratic transformation of existing political, economic and social policies and structures which are conducive to the full and effective participation of all persons,

groups and peoples in decision-making processes. Special measures are required to protect the rights and ensure the full participation of particularly vulnerable sectors of society, such as children, rural people and the extremely poor, as well as those who have traditionally experienced exclusion or discrimination, such as women, minorities and indigenous peoples.

Participation, if it is to be effective in mobilizing human and natural resources and combating inequalities, discrimination, poverty and exclusion, must involve genuine ownership or control of productive resources such as land, financial capital and technology. Participation is also the principal means by which individuals and peoples collectively determine their needs and priorities and ensure the protection and advancement of their rights and interests.

The right to development is related to the right to self-determination, which has many aspects, both individual and collective. It involves both the establishment of States and the operation of States once they have been established. The mere formation of a State does not in itself fully realize the right to self-determination unless its citizens and constituent peoples continue to enjoy the right to their own cultural identity and to determine their own economic, social and political system through democratic institutions and actions, and the State genuinely enjoys continuing freedom of choice, within the bounds of international law. Universal respect for the principle of the non-use of force is a fundamental condition for the full realization of the right to development.

2. Human rights and development strategy

The struggle for human rights and development is a global one that continues in all countries, "developed" and "developing", and must involve all peoples, including indigenous peoples, national, ethnic, linguistic and religious minorities as well as all individuals and groups. International implementation and monitoring mechanisms must be of universal applicability.

Development strategies which have been oriented merely towards economic growth and financial considerations have failed to a large extent to achieve social justice; human rights have been infringed directly and through the depersonalization of social relations, the breakdown of families and communities and of social and economic life.

Development strategies which have relied too heavily on a centrally planned command economy, have excluded participation and have not provided opportunities for individuals and groups to take an active part in the economic life of the country have also often failed to achieve the realization of the right to development.

What constitutes "development" is largely subjective, and in this respect development strategies must be determined by the people themselves and adapted to their particular conditions and needs. No one model of development is universally applicable to all cultures and peoples. All development models, however, must conform to international human rights standards.

The world's future can only be ensured if the global environment is adequately protected and restored. In addition, all cultures and peoples form part of the common heritage of humankind and have a dignity and value that must be respected. Both environmental and cultural considerations should therefore be an integral part of national, regional and international development strategies.

Indigenous peoples have been throughout history the victims of activities carried out in the name of national development. Their direct participation and consent in decisions regarding their own territories are thus essential to protect their right to development. In this regard, attention was drawn to the conclusions and recommendations of the seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States, held in Geneva from 16 to 20 January 1989 (see E/CN.4/1989/22).

In order to reverse the situation of growing inequalities in the world, affirmative action in favour of the disadvantaged groups and increased assistance to disadvantaged countries will be required. The removal of barriers to economic activities, such as trade liberalization, is not sufficient.

Peace, development and human rights are interdependent. Respect for and realization of human rights through the process of development is essential to national stability and the promotion of international peace and security. Development policies that disregard human rights, or which foster regional or international disparities, contribute to social, political and other conflicts and endanger international peace. The United Nations, based on the Charter's mandate to

ensure international peace and security, thus has a major stake in the promotion of a concept of development which respects human rights.

The United Nations should take the lead in implementing the Declaration on the Right to Development. This means setting up mechanisms for ensuring the compatibility of all United Nations activities and programmes with the Declaration, according to its letter and intent. Development must be equitable from the viewpoint of the peoples, groups and individuals affected.

3. Obstacles to the implementation of the right to development as a human right

Failure to respect the right of peoples to self-determination and their right to permanent sovereignty over natural resources is a serious obstacle to the realization of the right to development as a human right.

Massive and flagrant violations of human rights and such phenomena as racial discrimination, apartheid and foreign occupation are also serious barriers preventing the realization of the right to development as a human right.

Disregard for human rights and fundamental freedoms and in particular the right to development can lead to conflict and instability, which in turn may undermine the economic conditions needed for development through phenomena such as the diversion of resources to military or police forces, capital flight, the demobilization of human resources, increased national dependence, indebtedness, involuntary emigration and environmental destruction.

Democracy is an essential element in the realization of the right to development and the failure to implement and respect the principles of democratic government has been shown to present a serious obstacle to the realization of the right to development.

The adoption of inappropriate or destructive development strategies, sometimes on the pretext that human rights must be sacrificed in order to achieve economic development, has been a further obstacle to the realization of the right to development. Prevailing models of development have been dominated by financial rather than human considerations. These models largely ignore the social, cultural and political aspects of human rights and human development, limiting the human dimension to questions of productivity. They foster greater inequalities of power and control of resources among groups and lead to social tensions and conflicts. These tensions and conflicts are often the pretext used by States to justify placing restrictions on human rights, freedom of association, action and participation, and this in turn intensifies conflicts and perpetuates the denial of the right to development. Corruption is also an obstacle to the realization of the right to development.

Transfer of control of resources located in developing countries to interests in developed countries, which intensified in the 1980s, is another obstacle to development. Similarly, the growing burden of indebtedness and structural adjustment falls heaviest on the poorest and weakest sectors of society and has clear human rights implications.

Failure to take into account the principles of the right to development in agreements between States and the World Bank, the International Monetary Fund and commercial banks with regard to external debt repayment and structural adjustments frustrates the full realization of the right to development and of all human rights. The prevailing terms of trade, monetary policy and certain conditions tied to bilateral and multilateral aid, which are all perpetuated by the non-democratic decision-making processes of international economic, financial and trade institutions, also frustrate the full realization of the right to development as a human right.

Other obstacles to development can be found in the concentration of economic and political power in the most industrialized countries, the international division of labour and the functioning of the Bretton Woods institutions, the "brain drain" due to growing disparities in wages and income levels among countries, the restrictions on transfers of technology, certain forms of protectionism and the adverse effects of the consumption patterns of the more industrialized countries. The implementation of the Declaration on the Right to Development should seek to overcome these obstacles.

Lack of communication between specialists in human rights, social development and economics, within the United Nations Secretariat, United Nations missions and national Governments, the academic community and non-governmental organizations, has impeded a full understanding of the Declaration of the Right to Development and its implementation.

4. Criteria which might be used to measure progress

The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Declaration on Social Progress and Development, the Declaration on the Right to Development and other international human rights instruments constitute the basic framework for formulating the criteria for determining progress in the implementation of the right to development as a human right.

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 the 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.

These criteria for the right to development may be grouped under the following headings: conditions of life; conditions of work; equality of access to resources; and participation.

Conditions of life include basic material needs such as food, health, shelter, education, leisure and a safe and healthy environment as well as personal freedom and security. When applying criteria to these needs, care should be taken to account for quality as well as quantity. Food may be available abundantly, but may be nutritionally poor or culturally inappropriate; schools may be numerous and free but respond only to material and economic objectives and fail to provide an education which promotes the knowledge, the critical awareness, the analytical capability and the creativity necessary to enable human beings to shape their own environment.

Conditions of work include employment, extent of sharing in the benefits of work, income and its equitable distribution, and degree of participation in management. These factors relate not only to the amount of work and its remuneration, but also to the quality of work, worker control and subjective elements of satisfaction and empowerment.

The degree of *equality of opportunity of access to basic resources* as well as the fair distribution of the results of development are essential criteria for measuring progress in the implementation of the right to development. Relevant indicators therefore must include the relative prices, accessibility and distribution of factors of productive resources such as land, water, financial capital, training and technology.

Significant inequalities in the enjoyment of these conditions and resources of development, whether they exist among regions, ethnic groups, social classes, between men and women or among different States, are incompatible with the right to development, in particular if they increase over time. Special attention therefore must be paid to the disaggregation of national statistics by relevant categories such as sex, ethnicity, socioeconomic sectors and geographic regions.

Since *participation* is the right through which all other rights in the Declaration on the Right to Development are exercised and protected, the forms, quality, democratic nature and effectiveness of participatory processes, mechanisms and institutions are the central and essential indicators of progress in realizing the right to development. At the international level, this applies to the equality and democratic character of intergovernmental bodies, including financial and trade institutions.

Relevant factors in assessing participatory processes include the representativeness and accountability of decision-making bodies, the decentralization of decision-making, public access to information and responsiveness of decision makers to public opinion. The effectiveness of participation must also be assessed from a subjective perspective based on the opinions and attitudes of the people affected—in other words, their confidence in leaders, feeling of empowerment and belief that they are affecting decisions.

Participation is also the primary mechanism for identifying appropriate goals and criteria for the realization of the right to development and assuring the compatibility of development activities with basic human and cultural values. This must be an on-going process at the local, regional, national and international levels, since the goals of development must be established for each level of development activity.

Publication of the criteria for measuring progress in implementing the right to development and the results of the evaluation of their usefulness is important for stimulating effective participation in the development process.

B. Recommendations for action

1. Action by States

All States engage in activities affecting the development process, both internally and in their relations with other States and peoples. The creation of national and international conditions in which the right to development can be realized fully is a responsibility of States and the international community, as well as of all peoples, groups and individuals.

All States should take immediate and concrete measures to implement the Declaration on the Right to Development. In particular, national policy and development plans should contain explicit provisions on the right to development and the realization of all human rights, especially the strengthening of democracy, together with specific criteria for evaluation. They should also identify the needs of groups which have experienced the greatest difficulties in access to basic resources and set specific goals for meeting their needs; establish mechanisms for ensuring participation in periodically assessing local needs and opportunities; and identify obstacles requiring international assistance or cooperation.

All States should take the necessary steps to strengthen their juridical systems including ensuring access by all on a non-discriminatory basis to legal remedies; particular attention should be paid to ensuring access to justice of the extremely poor and other vulnerable or disadvantaged groups.

All States should ensure that corporations and other entities under their jurisdiction conduct themselves nationally and internationally in a way that does not violate the right to development.

All States which have not yet done so should ratify the principal instruments in the field of human rights, in particular the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Discrimination in Education, as well as the relevant conventions of the International Labour Organization, including the Freedom of Association and Protection of the Right to Organize Convention, 1948 (Convention No. 87), the Right to Organize and Collective Bargaining Convention, 1949 (Convention No. 98), the Rural Workers' Organizations Convention, 1975 (Convention No. 141) and the Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169).

All States should renew their commitment to the implementation of the United Nations declarations which have been adopted in the field of social development, in particular the 1969 Declaration on Social Progress and Development, the Nairobi Forward-Looking Strategies on Women, the Guiding Principles for Developmental Social Welfare Policies and Programmes in the Near Future, the Vienna International Plan of Action on Aging, the World Programme of Action Concerning Disabled Persons, the Guidelines for Further Planning and Suitable Follow-up in the Field of Youth, and decisions and recommendations of the United Nations Congresses on the Prevention of Crime and the Treatment of Offenders.

All States should cooperate in creating an international economic and political environment conducive to the realization of the right to development, in particular through the democratization of decision-making in intergovernmental bodies and institutions that deal with trade, monetary policy and development assistance, and by means of greater international partnership in the fields of research, technical assistance, finance and investment.

There is also a need for greater transparency in negotiations and agreements between States and international financial and aid institutions. This must include the publication and widest possible dissemination of proposed and final agreements concerning financial aid, credit, debt, repayment and monetary policy.

2. International action

The international community must renew its efforts to combat massive and flagrant violations of rights, racism and apartheid, and all remaining forms of colonization and foreign occupation. Existing United Nations machinery for the promotion and protection of human rights must be further strengthened and additional resources provided to the Centre for Human Rights.

All United Nations activities (policy, operations and research) related to the development process should have explicit guidelines, appraisal criteria and priorities based upon the realization of human rights, including human rights impact assessments. Impact

assessments should address the possible adverse effects of the proposed activity, temporary and long-term, on the full enjoyment of human rights by any sector of the national society, the contribution of the proposed activity to the full enjoyment of human rights by the population affected and the establishment of participatory mechanisms for monitoring and evaluation.

Implementation of the Declaration on the Right to Development should be coordinated by the Centre for Human Rights, with at least one full-time specialist devoted to this task. Effective coordination should also include a full-time liaison officer on the staff of the Director-General for Development and International Economic Cooperation in New York, regular discussions within the United Nations Conference on Trade and Development, in the Administrative Committee for Coordination and the Committee for Development Planning, and the establishment of focal points for the right to development and human rights in each development-related United Nations programme and agency.

United Nations bodies and specialized agencies should be requested to review their mandates and identify those areas of their activity and responsibility which are related to the right to development and other human rights. In addition, United Nations bodies and agencies, including related financial and trade institutions, should respect the International Covenants on Human Rights and other basic conventions in the field of human rights as if they themselves were parties.

United Nations supervisory bodies in the field of human rights, such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child, should include special comments and recommendations regarding the right to development in their review of the periodic reports of States parties.

The Secretary-General should appoint a high-level committee of independent experts from Europe, Latin America and the Caribbean, Africa, Western Asia, South and South-East Asia and the Asia-Pacific, with relevant direct experience in human rights and development and, serving in their personal capacities, to report annually to the General Assembly through the Commission on Human Rights and the Economic and Social Council on progress made in the implementation of the Declaration at the national as well as international levels, based on information requested from Governments, intergovernmental bodies and non-governmental organizations, as well as information received from all other sources. The Committee, in carrying out its activities, should ensure the effective participation of non-governmental organizations and groups active in development and human rights, including indigenous peoples, workers' organizations, women's groups and other organizations.

The high-level committee of experts should give priority to the formulation of criteria for the assessment of progress in the realization of the right to development; recommendations for a global strategy to achieve further progress in the enjoyment of this right; the examination of reports and information regarding internal and external obstacles to its enjoyment including, as appropriate, the role of transnational corporations; the identification of activities which may be incompatible with the right to development; and promoting wider knowledge and understanding of the right to development as a human right.

The design of appropriate indicators of progress should also be undertaken by the regional economic commissions, on the basis of national experience and in cooperation with the Commission on Social Development, the United Nations Research Institute for Social Development, the International Labour Organization, other United Nations bodies and specialized agencies with relevant expertise and national universities. This process should also include the effective participation of representative organizations of disadvantaged and vulnerable peoples and groups, as well as workers' organizations and other organizations engaged directly in development programmes in the field.

All United Nations-system assistance and cooperation should be provided through an overall programme of assistance which would facilitate monitoring, coordination and implementation of the right to development. This programme should include specific requirements regarding all aspects of the right to development in an appropriate environmental and cultural framework and should be drawn up with each country.

Successful implementation of the Declaration through United Nations-system programmes and activities depends critically on the direct participation of

representatives of the people and groups directly or indirectly affected through their own representative organizations, at all levels of decision-making. The United Nations overall assistance programmes with individual countries should contain specific requirements regarding the establishment of mechanisms for assuring effective participation in their implementation and review.

The high-level committee should initiate a programme of development education with particular emphasis on reaching grass-roots organizations working in the field of development at the community and local levels. This should include regional meetings on practical problems of implementation such as mechanisms for ensuring and evaluating participation, methods for the assessment of progress in the enjoyment of the right to development and ensuring sensitivity to issues of gender and culture, to facilitate dialogue among development agencies, international financial institutions, Governments, and the peoples and communities concerned. The Centre for Human Rights, the International Labour Organization, the Centre for Social Development and Humanitarian Affairs, the United Nations Research Institute for Social Development, the regional economic commissions and other specialized agencies should take part in this programme.

Further research and studies should be undertaken within the United Nations system on strategies for the realization of the right to development and criteria for assessing progress. This could include consultations at the regional level with independent experts and with representative organizations such as workers' organizations, including trade unions, and peasant organizations.

The report and recommendations of the Global Consultation should be taken into account in the International Development Strategy for the Fourth United Nations Development Decade and should be placed on the agendas for the special session of the General Assembly devoted to international economic cooperation for development and the United Nations Conference on the Least Developed Countries to be held in 1990, and the United Nations Conference on Environment and Development to be held in 1992.

This report, its recommendations and the conference papers should be published and given the widest possible distribution as a contribution to the debate on this complex subject. This should be done as part of the World Information Campaign for Human Rights and in cooperation with UNESCO, the United Nations University and national universities. Particular efforts should be undertaken to disseminate this report to workers' organizations, including trade unions, in cooperation with the International Labour Organization and to grass-roots organizations in the fields of development and human rights. Effective use should be made of electronic as well as print media.

The Declaration on the Right to Development should be given the widest possible distribution in as many local languages as possible and should be published together with an explanation and commentary accessible to the general public. The General Assembly should organize periodically a plenary debate on international cooperation for the full realization of the right to development, beginning if possible at its forty-fifth session.

The question of the implementation of the right to development as a human right should be placed on the agenda of the First and Second Committees of the Economic and Social Council and of the Second and Third Committees of the General Assembly on an annual basis.

3. Action by non-governmental organizations

Non-governmental organizations in the fields of human rights and development should make efforts to exchange information and coordinate, both within the United Nations system and in the field, and in particular with regard to the elaboration, implementation and assessment of national development plans.

Non-governmental organizations should play a leading role in the dissemination of information about human rights, including the right to development, and in stimulating national-level awareness and discussion in "developed" and "developing" countries alike.

Conceptualizing the right to development for the twenty-first century

*Arjun K. Sengupta**

I. The right to development in theory

A. Definition and content of the right to development

1. The right to development as a human right

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

Generally, in the human rights literature, to have a right means to have a claim to something of value on other people, institutions, a State or the international community, which in turn have the obligation to provide or help to provide that something of value. "Rights are entitlements that require, in this view, correlated duties. If person A has a right to some *x*, then there has to be some agency, say B, that has a duty to provide A with *x*."[1] Recognizing a right would necessitate identifying the duty holder who has the obligation to fulfil or enable the fulfilment of the right. Any attempt to justify the use of rights must be preceded by specifying the nature of the valuable elements that are considered as entitlements or rights, and then specifying the agents that have the corresponding duty to bring about the fulfilment of those rights.

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

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

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[1] Amartya Sen, *Development as Freedom* (New York, Alfred A. Knopf, 1999), p. 228.
[2] Ibid., p. 230.

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

Feasibility in principle does not automatically lead to actual realization. Realization would depend on the agreement of the duty holders to work together according to a programme and some binding procedures to honour the agreement. Legislation that converts an "in-principle-valid" right into a justifiable "legal" right is one such procedure, but it need not be the only one. There are many other ways of making an agreement binding among different duty holders. This is particularly true if the duty holders are different States and the imperfect obligations cannot be reduced to legal obligations. Even if a right cannot be legislated, it can still be realized if an agreed procedure for its realization can be established. In other words, such an agreed procedure, which can be binding legally, morally or by social convention on all the parties, would be necessary to realize a valid right, that is, a right that is feasible to realize through interaction between the holders of the right and of the obligations.

Human rights set universal standards of achievement and norms of behaviour for all States, civil societies and the international community and impose inviolable obligations on all of them to make those rights achievable. Recognizing the right to development as a human right raises the status of that right to one with universal applicability and inviolability. It also specifies a norm of action for the people, the institution, the State or the international community on which the claim for that right is made.

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

2. Content of the right to development

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

Development is defined in the preamble to the Declaration on the Right to Development as a "comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom". The process of development that is recognized as a human right is one "in which all human rights and fundamental freedoms can be fully realized", consequent to the constant improvement of well-being that is the objective of development. According to article 2, paragraph 3, such a development process would be the aim of national development policies that States have the right and duty to formulate. Article 8 states more specifically that in taking steps to realize the right to

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

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

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

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

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

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

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

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

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

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

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

Is there any further value added to the already recognized rights, such as the economic, social, and cultural rights involved in human development, by invoking and exercising the right to development? The question would be legitimate if the right to development were defined merely as the sum total of those rights. Looking at the right to development as a process brings out the value added clearly: it is not merely the realization of those rights individually, but their realization together in a manner that takes into account their effects on each other, both at a particular time and over a period of time. Similarly, an improvement in the realization of the right to development implies that the realization of some rights has improved while no other right is violated or has deteriorated.

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

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

[5] W.A. Lewis, *The Theory of Economic Growth* (London, Allen and Unwin, 1955), pp. 9-10, 420-421.
[6] United Nations Development Programme, *Human Development Report 2000: Human Rights and Human Development* (New York, Oxford University Press, 2000), p. 22.

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

4. Human development and capabilities

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

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

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

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

[7] Sen, *Development as Freedom* (see footnote 1), pp. 24-25.

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

5. Duties and obligations

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

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

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

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

[8] See "Third report of the Independent Expert on the right to development" (E/CN.4/2001/WG.18/2), paras. 12-14, for further details.

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

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

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

The editors of a leading human rights textbook enumerate the duties of the State in terms of five obligations: (a) to respect the rights of others; (b) to create institutional machinery essential to the realization of rights; (c) to protect rights and prevent violations; (d) to provide goods and services to satisfy rights; and (e) to promote rights.[11] The Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights address the obligations to respect, protect and fulfil, and lay down enforceable remedies (see E/C.12/2000/13). Stephen Marks analyses four categories of obligations, two perfect and two imperfect.[12] In the first category he places the obligations to respect (i.e., preventing a State agent from denying a right and punishing the agent for acts and omissions) and to protect (i.e., preventing third parties from violating rights). These can be enforced through a judicial process. In the second category are obligations to promote or facilitate (undertaking campaigns or creating an enabling environment) and obligations to fulfil or provide (allocating resources to enable people to enjoy the right) and which are "general commitments to pursue a certain policy or achieve certain results".[13] These are not justiciable, as "immediate individual remedies through the courts are not normally provided when the State falls short of its responsibilities", but he still considers them legal obligations because States are required to take steps "in the direction of sound progressive realization" of rights.[14]

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

B. Controversies regarding the right to development[15]

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

[10] Sen, *Development as Freedom* (see footnote 1), p. 230.

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

[12] See Stephen P. Marks, "The human rights framework for development: seven approaches", *Reflections on the Right to Development*, Arjun K. Sengupta, Archna Negi and Mushumi Basu, eds. (New Delhi, Sage Publications, 2005), pp. 23-60. See also Amartya Sen,"Consequential evaluation and practical reason", *Journal of Philosophy*, vol. 97, No. 9 (September 2000), p. 478.

[13] Marks, "The human rights framework for development: seven approaches", p. 45.

[14] Ibid.

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

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

1. Human rights as natural rights

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

All these arguments have been substantially repudiated in the literature. The Universal Declaration has many elements that go beyond the principles of natural rights. In fact, it is firmly based on a pluralistic foundation of international law with many elements of economic and social rights, considering an individual's personality as essentially moulded by the community. Indeed, there is no logical reason to see the human rights of a group or a collective (people or nation, ethnic or linguistic group) as being fundamentally different from an individual's human rights, so long as it is possible to define the obligation to fulfil them and for duty holders to secure them. Even personal rights can be seen as rights to be protected for individuals and groups.[17] Furthermore, it is well established that the identification of civil and political rights with negative rights and economic, social, and cultural rights with positive rights is too superficial because both require negative (prevention) as well as positive (promotion or protective) actions. Therefore, it is logically difficult to regard only civil and political rights as human rights and to not regard economic and social and collective rights as human rights.

2. Justiciability

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

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

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

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

[18] Sen, *Development as* Freedom, p. 228.

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

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

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

3. Monitoring of implementation

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

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

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

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

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

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

4. Collective rights versus individual rights

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

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

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

5. Resource constraints

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

[21] Georges Abi-Saab, "The legal formulation of a right to development", *The Right to Development at the International Level* (see footnote 16), p. 164.
[22] Ibid.

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

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

[23] "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures" (art. 2 (1)).

[24] "Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels" (art. 10).

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

[26] Ibid., paras. 23-24.

[27] Ibid., paras. 26-27.

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

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

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

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

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

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

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

[28] Maastrict Guidelines on Violations of Economic, Social and Cultural Rights, para. 4.
[29] The author is indebted to Professor S.R. Osmani for pointing this out in correspondence.
[30] *The Philosophy of Human Rights*, p. 27.
[31] General comment No. 3 (1990) on the nature of States parties' obligations, para. 10.

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

6. Interdependence of rights and the process of development

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

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

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

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

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

The condition for the improvement of the right to development $dR_D>0$ is specified in terms of the improvement of the vector, such that there is at least one "i" for which $dR_i>0$ and no other right is negative, or $dR_i>0$, meaning that the realization of some or at least one right must have improved and no right—civil, political, economic, social or cultural—is violated.

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

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

[32] This section draws on Arjun K. Sengupta, "On the theory and practice of the right to development", *Human Rights Quarterly*, vol. 24, No. 4 (2002), pp. 868-869.

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

II. The right to development in practice

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

A. The economic context of implementing the right to development

1. Managing globalization[33]

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

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

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

2. Importance of economic growth

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

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

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

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

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

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

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

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

B. National policies for implementing the right to development[36]

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

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

[36] This section is taken from E/CN.4/2004/WG.18/2, para. 33.

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

(a) The liberal model as a development framework was found to be limited in terms of the development goals that it directly addressed and the instruments that it sought to encourage to meet those goals. However, some countries, such as Chile, that went beyond the basket of policies of the liberal model, were able to realize and sustain a high and stable rate of economic growth and reduce poverty incidence and (to some extent) inequality, thereby achieving outcomes consistent with the realization of the right to development;

(b) Stable domestic macroeconomic environmental and fiscal prudence are seen to be necessary for sustaining economic growth at improved and stable rates;

(c) Economic growth has instrumental and constitutive relevance when it is labour absorbing and it benefits from enhanced integration of the economy with global markets through productivity gains and access to larger and deeper markets;

(d) As no country can remain entirely insulated from the dislocative impact of shocks from the global economy and from the unanticipated consequences of domestic policies, it is necessary to have an adequate and appropriate approach to social security and a safety net; and

(e) A well-conceived and -implemented income transfer policy could reduce poverty incidence, but reduction in persistent income inequalities needs a strategy to improve human capabilities and institutional capacity to deliver critical social services.

C. International cooperation for implementing the right to development[38]

The experience of the case studies reveals that, in the current phase of globalization, international cooperation is as important as the package of national policies in implementing a strategy for realizing the right to development. It is, perhaps, even more critical in the case of poor and least developed countries where there is a wide gap in the level of realization of human rights and the relevant international human rights norms and standards, and because such countries do not have an adequate technical and resource capacity for the realization of human rights. It could also be critical in addressing sudden and unanticipated economic crises and their contingent dislocation, in particular in labour markets, even in the middle-income developing countries. Further, unlike the national policies for implementing the right to development that invariably have to be designed contextually, the international framework for supporting the implementation of the right to development has to be global in its reach. It has to provide an environment that is transparent and non-discriminatory and promotes universal access and equity in the distribution of benefits from the development process to the countries' regions and their people. Thus, for instance, the international trade regime under the World Trade Organization that codifies the agreement on international trade in goods and services has to be uniform, consistent and fair in its application. The fact that it has not been so (particularly for trade in agriculture and textiles) is in part a reflection of the fundamental asymmetry in the relationships between the developed and the developing countries. It has occupied a prime slot in the negotiations between the two sets of countries in the most recent trade rounds. The resolution of this issue is key to future progress in evolving a fair and credible international framework for implementing the right to development.

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

[37] See "Country studies on the right to development: Argentina, Chile and Brazil" (E/CN.4/2004/WG.18/3).
[38] This section draws on E/CN.4/2004/WG.18/2, para. 34.

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

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

1. The development compact

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

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

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

[39] See in particular E/CN.4/2002/WG.18/2, sect. III.B.

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

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

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

In a development compact, the developing countries would have to assume obligations regarding fulfilling and protecting human rights. The most equitable manner of monitoring the fulfilment of those obligations would be through the establishment in each country of a national human rights commission, consisting of eminent personalities from the country itself. For that purpose, all countries wishing to implement the right to development through development compacts would have to set up such national commissions, which would investigate and adjudicate violations of human rights. That is initially the only way to ensure against such violations. No country in the world can claim that there are absolutely no violations of human rights in its territory. All that can be ensured is an adequate mechanism in the legal systems to redress such violations. If a developing country sets up a national human rights commission in accordance with international norms and it can function independently without any hindrance or obstacle, and appropriate legislation is framed, then that should be sufficient guarantee that the country will carry out its human rights obligation according to the development compact.

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

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

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

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

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

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

(b) Implementation of any of the rights cannot be an isolated exercise, and plans or projects for the implementation of the other rights should be designed taking into account considerations of time and cross-sectoral consistency;

(c) The exercise of implementing the overall plan and realizing individual rights must be carried out according to the human rights standards, that is, with transparency, accountability and in a non-discriminatory and participatory manner and with equity and justice. In practice, this means that the schemes should be formulated and implemented at the grass-roots level with the beneficiaries participating in the decision-making and implementation, as well as sharing equitably in the benefits. In short, this implies planning that empowers the beneficiaries;

(d) The rules and procedures of economic, political, social and legal institutions must integrate the interdependent elements of the right to development by associating a process of development with human development and expanding opportunity with equity and justice. To accomplish all this will often require a fundamental change in those institutions. The realization of the right to development would in some cases imply a change in the institutional framework, which would often spill over from national to international institutions;

(e) It would therefore be necessary to specify the policies that must be pursued by the duty bearers of the right to development, primarily donor States and the international community, including international agencies and multinational corporations.

Although not clearly identified as an abiding principle in human rights instruments, the motivation of the human rights approach to development guides one along the lines of protecting the worst off, the poorest and the most vulnerable. In theory, this would be the application of the Rawlsian Difference Principle which requires maximizing the advantages of the worst off, no matter how that affects the advantages of the others.[40] This could also be regarded as the minimal principle of equity, on which there may not be much difficulty in generating universal consensus. Poverty is the worst form of violation of human rights and it naturally becomes the target of any programme to realize human rights based on equity and justice. Greater consensus on international cooperation for poverty eradication might be most useful for realizing the right to development.

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

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

[40] John Rawls, *A Theory of Justice* (Cambridge, Massachusetts, Harvard University Press, 1971), pp. 75-80.

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

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

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

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

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

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

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

guarantee the fulfilment of its part of the bargain. A mechanism has to be established to work out the burden-sharing arrangements among the industrial countries. If the political will exists for implementing the development compacts, such arrangements can be devised.

PART TWO

Understanding the right to development

underlying principles

introduction ⟩ ⟩ ⟩

Introduction

Each of the 10 chapters in Part II analyses one or more of the principles underlying the Declaration on the Right to Development or the special obligations towards people whose welfare is a priority for the proper understanding of this right.

The principle of self-determination, like the right to development, has been conceived as a right belonging to peoples. The concept of peoples' rights emerged in human rights standard-setting in large part through the affirmation of the right of peoples to self-determination, which is inextricable from their right to permanent sovereignty over their natural resources. These two peoples' rights, which are the topic of chapter 5 by Nicolaas Schrijver, are related to the right to development in several significant ways. Nico Schrijver attaches particular importance to the development of the principle of permanent sovereignty in the Declaration on Permanent Sovereignty over Natural Resources of 1962 and the United Nations Declaration on the Rights of Indigenous Peoples of 2007. The right to self-determination is reaffirmed in the Declaration on the Right to Development to recognize the economic dimension of this right, complementing the political dimension; both have evolved dynamically and are integral to the right to development today.

Participation emerged as pre-eminent from the earliest efforts to clarify the normative content of the right to development. The Declaration introduced the qualifiers of "active, free and meaningful", which Flávia Piovesan takes as the theme of chapter 6. Piovesan identifies political liberties and democratic rights as instrumental to participatory development. She analyses how this principle applies both in national-level policymaking and in the decision-making processes of global institutions, and concludes by finding the recent political transformation in the Middle East and North Africa region to be a response to the violation of the right to development and an exemplary case of its significance as an empowering process.

Raymond Atuguba addresses in chapter 7 the principles of equality, non-discrimination and fair distribution of the benefits of development and explores how these three principles are reflected in the Declaration. The first two are common to the entire corpus of human rights, while the third is specific to the right to development. Finding that "inequality, inequity, discrimination and unfairness characterize the determination of what constitutes development", Atuguba challenges the "monolithic conception of development", which has produced the "unequal distribution of the benefits of development". He then identifies counter-trends reflected, among others, in the Declaration on the Right to Development, the Vienna Declaration and Programme of Action adopted at the 1993 World Conference on Human Rights, the Monterrey Consensus adopted at the 2002 International Conference on Financing for Development and in the work of the high-level task force. Drawing lessons from the Arab Spring of 2011, he concludes by inviting the reader to contemplate "what will happen if the rest of the world, similarly denied the right to development, rose up in similar fashion on a global scale".

Siddiq R. Osmani clarifies in chapter 8 the meaning of the human rights-based approach to

development in the context of an era of globalization and the right to development. The concepts are often confused, and Osmani sheds light on how they are related. He explains how a human rights-based approach can "be fruitfully used to condition the process of globalization to better harness the positive impact of globalization and to minimize the pain of negative impact". The right to development, on the other hand, refers to a "comprehensive framework of policies and institutions", which complies with three categories of principles: "(a) those informing the process of policy formulation; (b) those shaping the content of policies; and (c) those guiding the monitoring of policy implementation". He concludes that if these principles are followed it will be "possible to harness the growth-promoting potential of globalization to the cause of advancing the right to development".

In chapter 9 on "A human rights approach to democratic governance and development," Francisco Sagasti identifies three processes that reduce inequalities and exclusion: productive modernization; social democratization; and political legitimization. The first of these principles is conducive to establishing a vigorous economy capable of removing economic exclusion; the second contributes to eliminating social exclusion; and the third creates a representative and efficient State apparatus that eliminates political exclusion. He identifies the role of the responsible actors (intergovernmental organizations, international financial institutions, bilateral aid agencies, civil society and the private sector) in advancing these three processes.

Social justice lies at the core of the right to development, and the chapters on poverty, women and indigenous peoples address issues which are particularly significant in the pursuit of social justice outcomes. Irene Hadiprayitno discusses in chapter 10, "Poverty", the interconnection between the right to development and poverty in its multidimensionality. She looks at two of the most distinguishable elements of the right to development, popular participation and fair distribution of benefits, and stresses that, in their absence, poverty persists and perpetuates both in its economic and non-economic forms. She considers global institutional arrangements as tools that can impede or support poverty eradication schemes and recommends their reform in order to realize the fair distribution of benefits, promote participation and address vulnerability and social exclusion stemming from poverty.

Fareda Banda, in chapter 11, entitled "Women, human rights and development", traces the evolution of the promotion of women's rights since the 1970s and notes that the Declaration on the Right to Development emerged at a moment in that history when "women and development" had prevailed over the idea of "women in development". This was due partly to the former's "failure to engage with the particularities of women's experiences of dispossession and dislocation in … development discourse", in spite of its explicit references to women. She regrets that the Working Group has not focused on this issue and recommends that "greater attention … be paid to the impact of discrimination on women's access to resources and power and the impact on their ability to participate in and benefit from development". In her view, even the positive use of human rights-based approaches does not go far enough in generating real improvement in the lives of women.

In chapter 12, Koen De Feyter, addresses "Indigenous peoples" in relation to the right to development, pointing out that they are not mentioned in the Declaration on the Right to Development and that little attention has been paid to them in the work of the United Nations on the right to development, including by the high-level task force. After considering the recognition of an indigenous right to development in Convention No. 169 of the International Labour Organization (ILO) and the United Nations Declaration on the Rights of Indigenous Peoples, he focuses on the *Endorois* case under the African Charter on Human and Peoples' Rights and concludes by arguing that indigenous peoples should be considered as "peoples" as understood in the Declaration.

Balakrishnan Rajagopal, addresses in chapter 13 the important question of global governance. Taking as his starting point the real threats to world economic expansion and to real wealth and, consequently, to economic and social well-being, especially of the most vulnerable populations, Rajagopal finds in the Declaration on the Right to Development a call to identify who is accountable and who will be responsible for ensuring a more sustainable future. The right to development, he asserts, "could provide a framework for tackling these questions". He identifies four challenges of global governance: its changing character and location; the geopolitics resulting from the rise of the "rest" and the transformation of the global development agenda; the reorientation of the third world as a counter-hegemonic force; and the need after the 2008 crisis to "reckon with the limits to development itself, and … with the implications of

such an approach for human rights". He concludes by noting that the Declaration is disconnected from the real politics of human rights and that there is a "need to recover the more progressive elements of the right to development".

The final chapter in this part elucidates a principle that is implicit in the Declaration, namely, international solidarity. Chapter 14, "International solidarity in an interdependent world" by Shyami Puvimanasinghe describes how international solidarity can be a bridge to collective responses to interconnected challenges in an interdependent world. Building on the links between the idea of solidarity and the duty to cooperate, integral to the right to development, she traces its evolution through the course of international law and organization, connecting solidarity to emerging conceptions of shared responsibilities. The chapter considers examples of State practice through international commitments and organizations and the workings of a broad range of stakeholders, notably global civil society, which provide evidence of international solidarity in action, and concludes by reiterating its significance for a shared future.

Self-determination of peoples and sovereignty over natural wealth and resources

*Nicolaas Schrijver**

In no case may a people be deprived of its means of subsistence.[1]

I. Introduction

This chapter addresses the interrelationship between resource sovereignty, self-determination and the right to development, as defined in the Declaration on the Right to Development. After discussing the genesis of sovereignty over natural resources as a principle of international law, reference will be made to the development-related articles in the Charter of the United Nations and the evolution of the principles of self-determination and resource sovereignty in the United Nations, devoting particular attention to the General Assembly resolution 1803 (XVII) of 14 December 1962 entitled "Permanent sovereignty over natural resources" (hereafter "Declaration on Permanent Sovereignty over Natural Resources") and the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007 and annexed to its resolution 61/295. The chapter concludes with an assessment of the pertinence of self-determination and resource sovereignty to the right to development and discusses their continued relevance in an interdependent world.

II. Genesis of sovereignty over natural resources as a principle of international law

In the post-1945 period, permanent sovereignty over natural resources emerged as a new principle of international law. Although its birth was far from easy, its status in international law has now been clearly affirmed in a variety of international legal instruments, as well as by the International Court of Justice in its Judgment of 19 December 2005 in the *Case concerning armed activities on the territory of the Congo*.[2] The principle has its roots in two main concerns of the United Nations, namely, economic development of developing countries and self-determination of colonized peoples. Since the early 1950s, newly independent States supported through this principle an effort to secure, for those peoples still living under colonial rule, the benefits arising from the exploitation of natural resources. They also sought to provide these developing countries with a legal shield against infringements of their economic sovereignty as a result of property rights or contractual rights claimed by other States (often the former colonial Powers) or

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[1] Common article 1, paragraph 2, of the International Covenants on Human Rights.

[2] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), *Judgment, I.C.J. Reports 2005*, p. 168, paras. 243-246.

foreign companies. Thus, the principle reflects the tension between classical principles, such as *pacta sunt servanda* (agreements have to be observed) and respect for acquired rights, on the one hand, and modern international law principles, such as self-determination, the duty to cooperate for development and the right to development, on the other.

The principle of sovereignty over natural resources embodies the right of States and peoples to dispose freely of their natural resources. Over the years the debate on resource sovereignty has both broadened and deepened. It broadened by extending its scope to include natural wealth and marine resources. It deepened by increasing the number of resource-related rights, including those relating to foreign investment, and subsequently—and obviously more hesitantly—by identifying duties emanating from the principle.[3] These duties include respect for the right to development of all peoples, including indigenous peoples. In this way, and under the influence of the right to self-determination and the right to development, the emphasis of the principle of sovereignty over natural resources gradually shifted from a primarily rights-based principle to one based on duties as well, and with specific content.

III. Building on the Charter of the United Nations

Although the principle of sovereignty over natural resources may well be said to have its roots in traditional principles of international law, such as sovereignty and territorial jurisdiction, its provenance lies clearly in the Charter of the United Nations. The Charter does not refer to it explicitly but contains several general references to notions inherent to the principle of sovereignty over natural resources and specific provisions concerning non-self-governing territories. General references to principles such as the equality of States and non-intervention as well as self-determination of peoples can be found throughout the Charter. For example, the second paragraph of the Preamble reaffirms "faith … in the equal rights … of nations large and small", while the fourth paragraph refers to the promotion of "social progress and better standards of life in larger freedom". Furthermore, Article 1, paragraph 2, of the Charter includes among the purposes of the United Nations "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" and Article 2, paragraph 1, recalls that the "Organization is based on the principle of the sovereign equality of all its Members". In addition, Article 55 states, inter alia, that the United Nations shall promote "economic and social progress and development" as well as respect for human rights and fundamental freedoms "[w]ith a view to the creation of conditions of stability and well-being … based on respect for the principle of equal rights and self-determination of peoples". Hence, Article 55 is the first article in the Charter which makes explicit reference to the objective of development. It is not the only one.

Specific provisions on non-self-governing territories in Article 73 include the obligation as "a sacred trust" of States with responsibilities for the administration of non-self-governing territories to ensure "their political, economic, social, and educational advancement, their just treatment, and their protection against abuses" as well as "to develop self-government" for these peoples. Also, the Charter defines in Article 76 (b) as a basic objective of the trusteeship system "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence". It may well be said that both these general references and specific provisions in the Charter lay the foundations for the principle of permanent sovereignty over natural resources as formulated in subsequent United Nations resolutions on self-determination, economic development of developing countries and the right to development. Thus, development as an objective and self-determination as a principle were already included in the Charter. Only in subsequent decades and along very different trajectories were both these concepts upgraded into fully fledged rights.

IV. Evolution of the principles of self-determination and sovereignty over natural resources

The principles of self-determination and sovereignty over natural resources have evolved along parallel lines and notably through normative resolutions originating from a variety of United Nations organs, including resolutions of the General Assembly, the Economic and Social Council, the former Commission on Human Rights and the United Nations Conference on Trade and Development (UNCTAD). From the perspective of the right to development two specific phases in their evolution are of particular relevance:

[3] See N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge, United Kingdom, Cambridge University Press, 1997), chap. 10.

firstly, in the 1950s, the debate on economic as well as political decolonization and, secondly, the controversy over developing countries' economic progress by means of the exercise of their sovereign rights over natural resources.

A. Economic as well as political decolonization

The 1950s were characterized by two related struggles. The first was that of colonial peoples for self-determination, including the right to political self-determination and the right to dispose freely of their natural resources. The second was the struggle of newly independent countries and other developing States, especially in Latin America, for economic independence. In its resolution 523 (VI) on integrated economic development and commercial agreements the General Assembly considered that "the underdeveloped countries have the right to determine freely the use of their natural resources and that they must utilize such resources in order to be in a better position to further the realization of their plans of development in accordance with their national interests, and to further the expansion of the world economy". It also expressly considered that "commercial agreements shall not contain economic or political conditions violating the sovereign rights of the underdeveloped countries, including the right to determine their own plans for economic development". Assembly resolution 626 (VII), adopted upon the initiative of Uruguay, recognized the right of each country "freely to use and exploit" its natural resources.[4]

Meanwhile, the issue of free exploitation of natural resources also entered the debates concerning the formulation of human rights. In resolution 545 (VI), the General Assembly decided to include in the draft International Covenant(s) an article on the right of peoples to political and economic self-determination. Upon a proposal by Chile submitted in 1952, common article 1 of both Covenants (finally adopted in 1966) affirms, in paragraph 2, "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

[4] See also J.N. Hyde, "Permanent sovereignty over natural wealth and resources", *American Journal of International Law*, vol. 50 (1956), pp. 854-867.

B. Economic development of developing States

Building upon the work for the two International Covenants, the General Assembly, in resolution 1314 (XIII), set up a nine-member Commission on Permanent Sovereignty over Natural Resources "to conduct a full survey of the status of this basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening". The work of the Commission resulted in the adoption of the landmark Declaration on Permanent Sovereignty over Natural Resources in General Assembly resolution 1803 (XVII), reviewed in the next section.

V. Declaration on Permanent Sovereignty over Natural Resources

The Declaration comprises eight paragraphs, laying down the basic principles for the exercise of permanent sovereignty over natural resources with a view to promoting development. Paragraph 1 attributes the right to permanent sovereignty to both peoples and nations. It also asserts that this right "must be exercised in the interest of their national development and of the well-being of the people of the State concerned". Paragraph 2 determines that the "exploration, development and disposition" of such natural resources, "as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities".

Paragraphs 3 and 4 contain rules for the treatment of foreign investors. Paragraph 3 determines that when authorization is granted, the imported capital and the earnings on it shall be governed by national legislation and international law. It also lays down the principle that the "profits derived must be shared in the proportions freely agreed upon" with due care for the State's sovereignty over its natural resources. Paragraph 4 deals with the hotly debated issue of nationalization, expropriation or requisition. Its text provides that public utility, security or national interest can serve as the grounds for such taking of property, subject to payment of "appropriate" compensation. With regard to the settlement of disputes on compensation, the paragraph recognizes the "exhaustion of local remedies" rule, but provides for international adjudication and arbitration upon agreement by the

"Calvo doctrine", advocated by the developing countries, with the international minimum standard supported by the industrialized countries.[5]

Moreover, paragraph 5 of the Declaration reaffirms the importance of the sovereign equality of States for the exercise of the principle of sovereignty over natural resources. Paragraph 6 stipulates that international development cooperation must be aimed at furthering the "independent national development" of developing countries and must "be based upon respect for their sovereignty over their natural wealth and resources". Further, paragraph 7 determines that violation of the principle of permanent sovereignty over natural resources "is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace". Similarly, the last principle in the Declaration, enshrined in paragraph 8, stipulates that foreign investment agreements shall be observed in good faith and that States and international organizations shall respect the principle of permanent sovereignty over natural resources "in accordance with the Charter and the principles set forth in the present resolution".

The Declaration on Permanent Sovereignty over Natural Resources was adopted by 87 votes in favour to 2 against (France and South Africa), with 12 abstentions. It is now widely considered as embodying a proper balance between the interests of capital-exporting and capital-importing countries and between permanent sovereignty of developing States and the international legal duties of States. Many political leaders and authors view it as an instrument for development and as the economic equivalent of the Declaration on the Granting of Independence to All Colonial Countries and Territories in Accordance with the Charter of the United Nations.[6]

VI. The United Nations Declaration on the Rights of Indigenous Peoples

Following protracted negotiations over many years, the General Assembly adopted at last the United Nations Declaration on Indigenous Peoples in 2007. This 46-article Declaration deals in a comprehensive way with the identity, the position and the rights of indigenous peoples. It addresses their rights to self-determination, non-discrimination, life and integrity, cultural identity and heritage, an educational system and health services, as well as the rights to their lands and resources. It also provides for consultation and participation in decision-making in resource management. At several places, the Declaration explicitly uses the term "self-determination", especially in article 3. However, the Declaration endorses only a limited form of self-government, which is circumscribed within the framework of the State rather than a full political independence. Article 4 specifies that the autonomy or self-government of indigenous peoples relates to "their internal and local affairs" and the final provision in article 46 (1) stipulates that "[n]othing in this Declaration may be … construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States".

Unfortunately, the Declaration does not contain a definition of indigenous peoples. Equally striking is that the Declaration refers merely once to the concept of "sustainable development", which by the time of the adoption of the Declaration in 2007 featured highly on all natural resource-related agendas. Nevertheless, in many respects the Declaration is quite a far-reaching and ambitious document relating to the right to development of indigenous peoples.

In various provisions, the Declaration touches upon the economic rights of indigenous peoples and their entitlement to their lands, territories and resources. For example, article 26 provides that "[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" and imposes an obligation upon States to "give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned". The previous article 25 determines that indigenous peoples should be able to uphold their responsibilities to future generations in this regard. In a formulation reminiscent of the above-quoted phrase in common article 1 of the two International Covenants on Human Rights, it is provided in article 10 that indigenous peoples deprived of their means of subsistence are entitled to just and fair redress. Article 10 stipulates that "[i]ndigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall

[5] See D.R. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (Minneapolis, University of Minnesota Press, 1955).

[6] General Assembly resolution 1514 (XV), adopted by 89 votes in favour to none, with 9 abstentions.

take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return". In a similar vein, article 28 adds: "Indigenous peoples have the right to redress, by means that can include restitution or, when that is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent." While these rights are certainly far-reaching, it should be noted that none of these provisions vests indigenous peoples *expressis verbis* with permanent sovereignty over their natural wealth and resources or entails exclusive rights for indigenous peoples over the natural resources within their territories. Rather, they vest indigenous peoples with clear-cut rights to consultation in decision-making and to benefit-sharing. This interpretation is confirmed by article 32 of the Declaration, which lays down an obligation for States to consult and cooperate in good faith with the indigenous peoples concerned before engaging in any project affecting their lands and territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. These guarantees go hand in hand with article 2 (3) of the Declaration on the Right to Development, which calls for active, free and meaningful participation in development as well as the fair distribution of the benefits resulting therefrom.

Such interpretation is also confirmed in decisions of some important regional human rights bodies.[7] In the *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua* case, the Inter-American Court of Human Rights interpreted the notion of property to include indigenous peoples' communal land tenure.[8] However, the Court did not use the concept of the sovereign right to control and exploit natural resources. Instead, in relation to the granting of concessions to third parties, it referred in a general sense to article 21 (2) of the American Convention on Human Rights relating to the right to property protection and to international human rights law. Under international human rights law, the rights of indigenous peoples with regard to their traditional lands and the natural resources are inextricably linked to the right to enjoy their culture and to preserve their identity and natural environment. Such rights take shape in particular through participatory rights rather than through sovereign rights. This finding has been confirmed and elaborated in various later decisions by the Inter-American Commission and Court, including in cases of the *Moiwana Community* v. *Suriname* (2005) and the *Saramaka People* v. *Suriname* (2007). In the latter judgement, the Inter-American Court of Human Rights concluded that article 21 of the American Convention, interpreted in the light of the rights recognized under common article 1 of the two International Covenants and article 27 of the International Covenant on Civil and Political Rights on the rights of persons belonging to minorities, grants to the members of the Saramaka community the right to enjoy property in accordance with their communal tradition.[9] The Court also concluded that "Article 21 of the Convention should not be interpreted in a way that prevents the State from granting a type of concession for the exploration and extraction of the natural resources within the Saramaka territory".[10] Rather, the State must observe safeguards and ensure effective participation and reasonable benefit in order to preserve the rights of the Saramaka people. The Court concluded that Suriname had not complied with these safeguards and thus had violated article 21 of the Convention, in conjunction with common article 1 of the International Covenants, to the detriment of the Saramaka people.[11] Therefore, the Court ordered in particular that the "State shall adopt legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory, and to reasonably share the benefits of such the members of the Saramaka people, should these be ultimately be carried out".[12]

In a similar vein, the African Commission on Human and Peoples' Rights appealed in 2001 to the Government of Nigeria to ensure better protection of the human rights of the Ogoni people, in particular to their environment, health, land and natural resources.[13] The Commission did not link this with the

[7] See the Final Report of the Committee on International Law on Sustainable Development of the International Law Association, June 2012, available at www.ila-hq.org and to be published in *Proceedings of the 75th Conference of the International Law Association held in Sofia 2012* (forthcoming in 2013).

[8] Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, judgement of 31 August 2001.

[9] Inter-American Court of Human Rights, *Saramaka People* v. *Suriname* (judgement of 28 November 2007), para. 95.

[10] Ibid., para. 126.

[11] Ibid., para. 158.

[12] Ibid., para. 214 (8).

[13] African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria,* communication No. 155/96, 2001.

people's right to permanent sovereignty over natural resources or the people's right to development as recorded in articles 21 and 22, respectively, of the African Charter.[14] However, eight years later the African Commission in a somewhat similar case directly applied the right to development for the first time. In the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v. *Kenya*,[15] the African Commission on Human and Peoples' Rights found a violation of the right to development, recognizing the African Convention's endorsement of peoples' rights and noting that:

> the right to development is a two-pronged test, that it is both *constitutive* and *instrumental*, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.[16]

Of particular significance was indeed participation, which for the African Commission was not simply consultation within the democratic decision-making process in Kenya—itself important—but, in regard to development projects, must include "obtain[ing] [the Endorois'] free, prior, and informed consent, according to their customs and traditions".[17] It is notable that so far at least one semi-judicial body has applied the right to development as enshrined in article 22 of the African Charter on Human and Peoples' Rights and subjected it to judicial consideration.

Furthermore, concrete examples of the pertinence of a people-centred approach premised on the right to development abound in the practice of the United Nations. For example, the Special Rapporteur on the right to food, Olivier De Schutter, stressed in his report to the General Assembly in 2010 (A/65/281) the link between sovereignty over natural resources and access to land. In this context he refers to indigenous peoples, smallholders cultivating land and herders, pastoralists and fisherfolk. Moreover, the Special Rapporteur, in his report to the Human Rights Council in 2009 (A/HRC/13/33/Add.2), had noted that "land grabbing", which relates to increasing, large-scale acquisitions and leases of land, accelerated after the 2008 global food crisis and was a major concern for the enjoyment of these resource-related rights. There are cases of land being leased at very low prices, sold below market prices, or given away in exchange for promises of employment creation or transfer of technology.[18] In order to correct these failures, the Special Rapporteur has called for leases or purchases to be fully transparent and participatory and the revenues to be used for the benefit of the local population, as provided for by both the Declaration on Permanent Sovereignty over Natural Resources and the Declaration on the Right to Development.[19] Consequently, ensuring participation and fair distribution of revenues demands a positive and responsible exercise of sovereignty by States. Such policies would entail establishing an appropriate institutional framework to ensure benefit to all involved parties, in particular because participation has been identified as key to ensuring long-term sustainability and the success of investments.[20] Conceived in such terms, large-scale investments in farmland have the potential to benefit all parties. When the recipient State is unable or unwilling to discharge human rights obligations, there ought to be a complementary responsibility of the home State of the investor to address this matter and to promote respect for such obligations.[21]

VII. Final observations and conclusions

Rather soon after the creation of the United Nations, both self-determination of peoples and resource sovereignty came to be viewed as important dimensions of the decolonization process. They also feature prominently in debates on the causes of underdevelopment and the conditions for development. Therefore, both principles were considered to be primary development instruments. For a long

[14] Article 21 of the African Charter on Human and Peoples' Rights reads in part: "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."

[15] Communication No. 276/2003.

[16] Ibid, para. 277.

[17] Ibid, para. 291.

[18] Ibid., para. 31. See also T. Kachika, *Land Grabbing in Africa: A Review of the Impacts and the Possible Policy Responses* (Oxfam International, 2010); FoodFirst Information and Action Network (FIAN) International, *Land Grabbing in Kenya and Mozambique–A Report on Two Research Missions: and a Human Rights Analysis of Land Grabbing* (Heidelberg, 2010); The Oakland Institute, *Understanding Land Investment Deals in Africa: Country Report: Sierra Leone* (Oakland, California, 2010); The Oakland Institute, *Understanding Land Investment Deals in Africa: Country Report: Mali* (Oakland, California, 2010); The Oakland Institute, *Understanding Land Investment Deals in Africa: Country Report: Ethiopia* (Oakland, California, 2010); Oxfam, *Land and Power: The Growing Scandal Surrounding the New Wave of Investments in Land*, Oxfam Briefing Paper 151 (September 2011).

[19] A/HRC/13/33/Add.2, para. 32.

[20] Lorenzo Cotula and others, *Land Grab or Development Opportunity?: Agricultural Investments and International Land Deals in Africa* (London and Rome, International Institute for Environment and Development, Food and Agriculture Organization of the United Nations and International Fund for Agricultural Development, 2009), p. 104.

[21] A/HRC/13/33/Add.2, para. 33.

time, the discourse on self-determination of peoples and sovereignty over natural wealth and resources has tended to focus on the formulation of rights of non-self-governing peoples and newly independent States. Developing countries, assembled in the Group of Seventy-Seven (G77), attempted to broaden and strengthen their rights. They sought to "broaden" them by claiming sovereignty over marine resources in substantially extended sea areas and all resource-related activities, including processing, marketing, and distribution of raw materials. Most Western States strongly opposed these extensions. In addition, the G77 sought to "strengthen" resource sovereignty by claiming as many rights as possible, including the right to share in the administration and profits of foreign companies, the right to terminate concession agreements from the past and to determine freely the amount of "possible" compensation in the event of nationalizations, and the right to settle investment disputes solely upon the basis of national law and by national remedies.

At different points in time controversy escalated, especially during the call for a New International Economic Order in the 1970s. However, some of the rough edges were removed and a spirit of compromise and cooperation became possible again, as evidenced by such landmark documents as the Declaration on Permanent Sovereignty over Natural Resources, the Declaration of the United Nations Conference on the Human Environment adopted in Stockholm in 1972, the United Nations Convention on the Law of the Sea of 1982, the Declaration on the Right to Development, the Rio Declaration on Environment and Development of 1992 and the Johannesburg Declaration on Sustainable Development of 2002. Progressively, there emerged a consensus to balance rights and duties in the following six principles, which capture the essence of resource sovereignty:

(a) Natural resources should be employed for national development and the well-being of the people;

(b) The rights of indigenous peoples to their habitat and its natural resources should be protected;

(c) Natural resources should be properly and prudently managed, based upon the principle of sustainable use;

(d) Nationalization and marine resource-related policies should be implemented "in accordance with international law";

(e) Due care should be paid to the environment without compromising the rights of future generations;

(f) States should cooperate for worldwide sustainable development.

Among the legal instruments cited, the Declaration on the Right to Development stands out as it vests the right to development in both "every human person" and "all peoples". The Declaration recalls in particular the right of peoples to exercise "sovereignty over their natural wealth and resources". As discussed above, this resource sovereignty is the economic dimension of the right to self-determination as it evolved in the 1950s. The political dimension of self-determination is also reflected in the Declaration, which stipulates in article 1 (1) that "all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development". These clauses, and the contemporary content of the principles of economic and political self-determination and resource sovereignty, show their interrelatedness to the right to development, if not their symbiotic interaction.

One may wonder, however, whether the principles of self-determination of peoples and resource sovereignty of States have not lost much of their relevance in this era of increasing qualifications with respect to State sovereignty as embodied in human rights law, Security Council resolutions on peace and security and international environmental law, and in an age of globalization and multilateral consultation and cooperation. However, they clearly remain relevant if one interprets them dynamically, using the analysis proposed in this chapter for a people-centred normative approach to a responsible exercise of sovereignty over natural resources.

Nearly all peoples, if not all of them, are still very much attached to their self-determination. Furthermore, in a world with a low level of international integration, States are still the prime layer of international administration and have the primary responsibility for realizing the right to development of their citizens. These principles no longer serve merely as the source of each people's freedom and every State's freedom to benefit from their natural resources, but also as the source of corresponding responsibilities requiring careful resource management and imposing accountability at the national and international levels in an effort to contain and

resolve, if not prevent, resource-extraction conflicts.[22] The challenge is how to inject these established principles of self-determination of peoples and sovereignty over natural wealth and resources into the basic tenets of the right to development and in this way best serve the interests of present and future generations of humankind.

[22] See chapter 5, "Natural resources and armed conflict", in N.J. Schrijver, *Development Without Destruction: The UN and Global Resource Management* (Bloomington and Indianapolis, Indiana University Press, 2010).

Active, free and meaningful participation in development

*Flávia Piovesan**

I. Introduction

Among the extraordinary achievements of the Declaration on the Right to Development is the advancement of a human rights-based approach to development. This approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development.[1]

Crucially, the right to development is the right of individuals and peoples to an enabling environment for development that is equitable, sustainable, participatory and in accordance with the full range of human rights and fundamental freedoms. Such an environment is free from structural and unfair obstacles to development domestically as well as globally.[2]

The current scale and severity of global poverty provides a jarring contrast, and adds urgency, to efforts to attain the sought-for enabling environment. In the light of this situation, the present chapter discusses the key attributes of participatory development efforts undertaken with a human rights perspective. It examines in particular social justice; participation, accountability and transparency; and international cooperation. It gives special emphasis to the democratic component of the right to development at the national and international levels. It concludes with a brief discussion of the Declaration as a dynamic, living instrument that is of enduring value in addressing current and emerging challenges central to development, inspired by the human rights-based approach to development and by a development approach to human rights.

II. Development from a human rights perspective

According to Stephen P. Marks,

> the Declaration [on the Right to Development] takes a holistic, human-centered approach to development. It sees development as a comprehensive process aiming to improve the well-being of the entire population and of all individuals on the basis of their active, free, and meaningful participation and in the fair distribution of the resulting benefits. In other words, recognizing development as a human right empowers all people to claim their active participation in decisions that affect them—rather than merely being beneficiaries of

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[1] Mary Robinson, former United Nations High Commissioner for Human Rights, stated: "The great merit of the human rights approach is that it draws attention to discrimination and exclusion. It permits policymakers and observers to identify those who do not benefit from development … [S]o many development programmes have caused misery and impoverishment – planners only looked for macro-scale outcomes and did not consider the consequences for particular communities or groups of people." (Mary Robinson, "What rights can add to good development practice", in *Human Rights and Development: Towards Mutual Reinforcement*, Philip Alston and Mary Robinson, eds. (Oxford, Oxford University Press, 2005), p. 36).

[2] See "Report of the high-level task force on the implementation of the right to development on its sixth session: right to development criteria and operational sub-criteria" (A/HRC/15/WG.2/TF/2/Add.2).

charity—and to claim an equitable share of the benefits resulting from development gains.[3]

Development from a human rights perspective embraces as key attributes:

(a) Social justice (through inclusion, equality and non-discrimination, taking the human person as the central subject of development and paying special attention to the most deprived and excluded);

(b) Participation, accountability and transparency (through free, meaningful and active participation, focusing on empowerment); and

(c) International cooperation (as the right to development is a solidarity-based right).

According to the Declaration, States have the primary responsibility for the creation of national and international conditions conducive to the realization of the right to development and the duty to cooperate in ensuring development and eliminating obstacles to development (art. 3).

About 80 per cent of the world's population lives in developing countries, marked by low incomes and educational levels and high rates of poverty and unemployment.[4] More than 85 per cent of the world's income goes to the richest 20 per cent of the world's population, while 6 per cent goes to the poorest 60 per cent.[5] The World Health Organization emphasizes that "poverty is the world's greatest killer. Poverty wields its destructive influence at every stage of human life, from the moment of conception to the grave. It conspires with the most deadly and painful diseases to bring a wretched existence to all those who suffer from it."[6]

The Declaration urges that appropriate economic and social reforms be carried out with a view to eradicating all social injustices. It also adds that States should encourage people's participation in all spheres as an important factor in development and in the full realization of all human rights (art. 8).

In addressing the challenge of global social injustice, it is worthwhile mentioning the Action against Hunger and Poverty initiative launched by the former President of Brazil, Luiz Inácio Lula da Silva, at the United Nations in 2004[7] with the objective of identifying "innovative financing mechanisms" capable of scaling up resources to finance development in the poorest countries. The main argument is that poverty ought to be seen as a problem of universal proportions with spillover effects: "Where there is hunger there is no hope; there is despair and pain. Hunger feeds violence and fanaticisms; a world of the hungry will never be a safer place."[8] According to Andrew Hurrell: "It is highly implausible to believe that the 20 per cent of the world's population living in the high-income countries can insulate itself from the instability and insecurity of the rest and from revisionist demands for change."[9]

Development from a human rights perspective was also endorsed in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, which stresses that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing, adding that the international community should support the strengthening and promotion of democracy, development and respect for human rights in the entire world.

III. Participatory development: the principle of participation at the national and international levels

The principle of participation and the principle of accountability are central to the right to development. Article 2 of the Declaration on the Right to Development states that "[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development …

[3] Stephen P. Marks, *The Politics of the Possible: The Way Ahead for the Right to Development* (Friedrich- Ebert-Stiftung, 2011), p. 2. For Arjun K. Sengupta, the right to development is the "right to a process that expands the capabilities or freedom of individuals to improve their well-being and to realize what they value" ("Report of the Independent Expert on the right to development" (A/55/306), para. 22).

[4] Jeffrey Sachs states that "eight million people around the world die each year because they are too poor to stay alive" (Jeffrey Sachs, *The End of Poverty: Economic Possibilities for Our Time* (New York, Penguin Press, 2005), p. 1). He adds: "One sixth of the world remains trapped in extreme poverty unrelieved by global economic growth and the poverty trap poses tragic hardships for the poor themselves and great risks for the rest of the world." (Jeffrey Sachs, *Common Wealth: Economics for a Crowded Planet* (London, Penguin Books, 2008), p. 6).

[5] Andrew Hurrell, *On Global Order: Power, Values and the Constitution of International Society* (Oxford, Oxford University Press, 2009), p. 11.

[6] Paul Farmer, *Pathologies of Power* (Berkeley. University of California Press, 2003), p. 50.

[7] The New York Declaration on Action against Hunger and Poverty, adopted by the Summit of World Leaders for Action against Hunger and Poverty (New York, 20 September 2004).

[8] The message "hunger cannot wait" constitutes one of Brazil's foreign policy priorities. The proposal by Brazil to create a global fund to eradicate hunger was innovative on an international agenda oriented towards the fight against terrorism. The proposal, disseminating the theme of global solidarity, pointed out that historically it has been the developing countries that have propelled transformation of the international order, thus launching Brazil's role as mediator between North and South.

[9] Hurrell, *On Global Order*, p. 296.

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". The Declaration is the only international instrument that makes the nature of participation in development so explicit, emphasizing that States should encourage, promote and ensure free, meaningful and active participation of all individuals and groups in the design, implementation and monitoring of development policies.

Political liberties and democratic rights are among the constituent components of development, as spelled out by Amartya Sen.[10] Democracy demands access to information, alternative sources of information, freedom of expression, freedom of association, political participation, dialogue and public interaction.[11] Based on public reasoning, democracy is conditioned not just by the institutions that formally exist but by the extent to which different voices can be heard. The concept of participation and its relevance as a core element of a right-based approach to development requires addressing democracy at both the procedural and substantive levels. At the procedural level, there are diverse forms by which populations can participate in development through mechanisms such as public consultation, information and decision-making with special consideration given to the participation of vulnerable groups, in particular taking the gender, race and ethnicity perspectives, giving voice to the deprived and the vulnerable.

Civil and political rights are cornerstones of empowerment, strengthening democracy and improving accountability. Democracy enriches reasoned engagement through maximizing the availability of information and the feasibility of interactive discussions. The fact that "no famine has ever taken place in the history of the world in a functioning democracy"[12] is revealing of the protective power of political liberty. Having an effective voice requires material capacities and the material conditions on which meaningful political participation depends.[13]

In the light of the principle of participation,[14] it is essential to promote participatory rights in national-level policymaking as well as in the decision-making processes of global institutions.

At the national level, the right to free, active and meaningful participation demands, on the one hand, the expansion of the universe of those entitled to participate in democratic activity, inspired by the clause of equality and non-discrimination on the basis of gender,[15] race, ethnicity and other criteria, paying special attention to the most vulnerable.[16]

On the other hand, it demands the expansion of participatory arenas and the strengthening of the democratic density, which can no longer be limited to who participates in democratic activity but must also include how to participate,[17] based on the principles of transparency and accountability and focusing on human beings as agents for democracy. The rise of local participatory processes has taken different forms, encouraging citizen participation. People should be active participants in development and implementing developing projects rather than treated as passive beneficiaries. Every democracy requires agents who must be treated with full consideration and respect for their dignity as moral beings.

In addition to being active and free, participation in development should be meaningful, that is, an effective expression of popular sovereignty in the adoption of development programmes and policies. Meaningful participation and empowerment are reflected by the people's ability to voice their opinions

[10] Amartya Sen, *The Idea of Justice* (Cambridge, Massachusetts, Harvard University Press, 2009), p. 347. "Democracy is assessed in terms of public reasoning, which leads to an understanding of democracy as 'government by discussion'." (Ibid., p. XIII).

[11] Every kind of democracy should meet some basic requirements. According to Robert Dahl, democracy shall meet seven requirements: (a) elected authorities; (b) free and fair elections; (c) inclusive suffrage; (d) the right to be elected; (e) freedom of expression; (f) alternative sources of information; and (g) freedom of association (Robert Dahl, *Democracy and Its Critics* (New Haven, Yale University Press, 1989)). See also *The Democracy Sourcebook*, Robert Dahl, Ian Shapiro and José Antonio Cheibub, eds. (Cambridge, Massachusetts and London, MIT Press, 2003); Robert Dahl, "What political institutions does large-scale democracy require?", *Political Science Quarterly*, vol. 120, No. 2 (Summer 2005), pp. 187-197; Robert Dahl, "A democratic paradox?", *Political Science Quarterly*, vol. 115, No. 1 (Spring 2000), pp. 35-40.

[12] Sen, *The Idea of Justice*, p. 343.

[13] Hurrell, *On Global Order*, p. 316.

[14] Participatory rights are also enshrined in international human rights instruments that give universal protection to political rights, including article 21 of the Universal Declaration of Human Rights, article 25 of the International Covenant on Civil and Political Rights and article 7 of the Convention on the Elimination of All Forms of Discrimination against Women.

[15] Regarding the participation of women, about one in five countries has a quota imposed by law or the constitution reserving a percentage of parliamentary seats for women. This has contributed to a rise in women's share of parliamentary seats from 11 per cent in 1975 to 19 per cent in 2010. (United Nations Development Programme, *Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development* (Basingstoke, United Kingdom, Palgrave Macmillan, 2010)).

[16] The lack of a voice is a problem afflicting refugees and migrants who no longer live in their countries of origin and are unable to participate politically in their countries of residence.

[17] See Norberto Bobbio, *Democracy and Dictatorship: The Nature and Limits of State Power*, translated by Peter Kennealy (Minneapolis, University of Minnesota Press, 1989). Formal processes of democracy have proliferated at the national level, as can be illustrated by pioneering initiatives in Brazil such as the participatory budget formulation process.

in institutions that enable the exercise of power, recognizing the citizenry as the origin of and the justification for public authority.

At the global level, the principle of participation demands an increase in the role of civil society organizations in policy discussion and decision-making processes. In addition, there is a pressing need to strengthen the participation of developing countries in international economic decision-making and norm-setting.[18] Joseph Stiglitz has noted that "we have a system that might be called global governance without global government, one in which a few institutions—the World Bank, the IMF, the WTO—and a few players—the finance, commerce, and trade ministries, closely linked to certain financial and commercial interests—dominate the scene, but in which many of those affected by their decisions are left almost voiceless. It's time to change some of the rules governing the international economic order …"[19]

The policies of international financial institutions are determined by many of the same States that have legally binding obligations under the International Covenant on Economic, Social and Cultural Rights.[20]

In this context, the struggle to achieve a new multilateralism is urgent. This would involve reforms in the global financial architecture in order to strike a new political balance of power, democratizing financial institutions and enhancing their transparency and accountability.[21] The establishment of the Group of Twenty (G20) (shifting global politics from the old Group of Seven (G7) to a new group of emerging Powers), demands for reform of the voting structures of the Bretton Woods institutions (International Monetary Fund and World Bank), as well as other initiatives aimed at broadening global governance, democratizing international decision-making arenas and strengthening the voice of the South, are worthy of mention. Global challenges cannot be faced without adequate representation for a large proportion of humankind—Africa, Asia and Latin America—at major international forums and decision-making bodies. International order has to be reconceived and reconceptualized. As Andrew Hurrell observed, "Today's new emerging and regional powers are indispensable members of any viable global order. But the cost of this change is both a far greater degree of heterogeneity in the interests of the major states, as well as an enormous increase in the number of voices demanding to be heard."[22]

Owing to the lack of democracy in global governance, it is essential to promote good governance at the international level and the effective participation of all countries in the international decision-making process.[23]

IV. Conclusion: contemporary challenges for participatory development

According to Freedom House, nearly 40 years ago more than half of the world was ruled by one form or another of autocracy, and many millions of people lived under outright totalitarianism.[24] The majority now live in democratic States. In 2010, the number of electoral democracies stood at 115. However, a total of 47 countries were deemed "not free", representing 24 per cent of the world's polities and 35 per cent of the global population. Taking regional criteria, 96 per cent of the countries in Western Europe were considered free, whereas in the Middle East and North Africa just 6 per cent of the countries were considered "free" and 78 per cent were considered "not free". A free country is one where there is open political competition, a climate of respect for civil liberties, significant independent civic life and independent media. A country where basic liberties are widely and systematically denied is not free.

In this context, the Arab Spring translates the democratic claims of expressive sectors of the population–especially unemployed young people–into more

[18] See "Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalization" (E/CN.4/2005/41).

[19] Joseph E. Stiglitz, *Globalization and Its Discontents* (New York and London, W.W. Norton, 2003), pp. 21-22.

[20] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997 (see E/C.12/2000/13) deem a human rights violation of omission as "[t]he failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations" (guideline 15 (j)).

[21] According to Joseph Stiglitz, "We have a chaotic, uncoordinated system of global governance without global government." The author defends a "reform package", including, among other measures: changing the voting structure at the World Bank and IMF, giving more weight to developing countries; changing representation (i.e., who represents each country); adopting principles of representation; increasing transparency (since there is no direct democratic accountability for these institutions); improving accountability; and ensuring better enforcement of the international rule of law (Joseph Stiglitz, *Making Globalization Work* (London, Penguin Books, 2007), p. 21).

[22] Hurrell, *On Global Order*, p. 7.

[23] See A/HRC/15/WG.2/TF/2/Add.2, annex I, Implementation of the right to development: attributes, criteria, sub-criteria and indicators.

[24] The share of countries designated "free" increased from 31 per cent in 1980 to 45 per cent in 2000, and the proportion of countries designated "not free" declined from 37 per cent in 1980 to 25 per cent in 2000. A free country demands free institutions, free minds, civil liberties and law-based societies. (Freedom House, *Freedom in the World 2011: The Authoritarian Challenge to Democracy*, available from http://freedomhouse.org).

political participation and social justice.[25] Since the end of January 2011, many Arab States, where the executive branch dominates, unchecked by any form of accountability, have been confronted with the biggest upheavals since their formation, reflecting political aspirations for democracy, the rule of law and human rights.[26] Through participation and resistance, the Arab Spring reflects the extent to which disadvantaged groups can use the available political rights as a platform of protection and empowerment for struggles towards the expansion of their rights.[27] It also demonstrates the intimate connection between civil, political, social, economic and cultural rights, thus endorsing the holistic concept of human rights and the importance of respecting the right to development, focusing on how human beings live and what substantive freedoms they enjoy in each society.[28]

The major cause of the political shift in the Middle East and North Africa region is the violation of the right to development and its implementation is the major demand, based on active, free and meaningful participation. It reflects how the Declaration on the Right to Development is perceived: as a dynamic and living instrument capable of addressing the contemporary challenge of advancing global democracy and global justice based on international cooperation and the creativity of civil society, and considering development as an empowering process.

[25] There has been widespread use of the Internet as a political platform and a tool to mobilize people for change. See the cases of Bahrain, Egypt, Libya, the Syrian Arab Republic, Tunisia and Yemen.

[26] According to Walter Feichtinger, "People are no longer willing to accept corruption, political exclusion, denial of civil rights or absence of perspective due to unemployment." He also notes that "[t]he political shift in the Middle East and North Africa region will be of similar importance for Europe as the end of the Cold War and the dissolution of the former Soviet Union were" (Walter Feichtinger, "Transition in Arab States: time for an 'EU-master plan'", Geneva Centre for Security, Policy Paper No. 13, April 2011, available from www.humansecuritygateway.com). See also Paul Chamberlin, "The struggle against oppression everywhere: the global politics of Palestinian liberation", *Middle Eastern Studies*, vol. 47, Issue 1 (2011), pp.25-41; Thomas L. Friedman, "Hoping for Arab Mandelas", *New York Times*, 26 March 2011; Ivan Krastev, "Arab revolutions, Turkey's dilemmas: zero chance for 'zero problems'", *Open Democracy*, 24 March 2011; Azza Kazam, "Reclaiming dignity: Arab revolutions of 2011", *Anthropology News*, vol. 52, Issue 5 (May 2011), p. 19; Anouar Boukhars, "The Arab revolutions for dignity", *American Foreign Policy Interests: The Journal of the National Committee on American Foreign Policy*, vol. 33, Issue 2 (2011), pp. 61-68; Michael Sakbani, "The revolutions of the Arab Spring: are democracy, development and modernity at the gates?", *Contemporary Arab Affairs*, vol. 4, Issue 2 (2011), pp. 127-147; Editorial, *Washington Post*, 28 February 2011.

[27] For this discussion, see Guillermo O'Donnell, "Democracy, law and comparative politics", Kellogg Institute for International Studies of Notre Dame University, Working Paper No. 274, April 2000. Endorsing the idea that a democratic regime is a valuable achievement, O'Donnell adds that the installation of a democratically elected Government opens the way to a second transition which is longer and more complex than the initial transition from an authoritarian Government. This is the challenge of institutionalizimg and consolidating a democratic regime. See also the following by Guillermo O'Donnell: "Democratic theory and comparative politics", *Studies in Comparative International Development*, vol. 36, No.1 (Spring 2001); "Democratic theories after the third wave: a historical retrospection", *Taiwan Journal of Democracy*, vol. 3, No. 2 (December 2007), pp. 1-9; "Why the rule of law matters", *Journal of Democracy*, vol. 15, No. 4 (October 2004), pp. 32-46; *Democracy, Agency, and the State: Theory with Comparative Intent* (Oxford and New York, Oxford University Press, 2010).

[28] Note that Arab countries (such as Morocco, Saudi Arabia and Yemen) have the worst gender disparities and inequalities. In these countries, disadvantages facing women and girls are the source of high inequality levels. See Ricardo Hausmann, Laura D. Tyson and Saadia Zahidi, *The Global Gender Gap Report 2010* (Geneva, World Economic Forum, 2010).

Equality, non-discrimination and fair distribution of the benefits of development

*Raymond A. Atuguba**

To invoke the right to development for the sake of greater equity is therefore an untrustworthy undertaking. At the core of this cover-up … lies the semantic confusion brought about by the concept of development. After all, development can mean just about everything. It is a concept of monumental emptiness, carrying a vaguely positive connotation. For this reason, it can be easily filled with conflicting perspectives. On the one hand, there are those who implicitly identify development with economic growth, calling for more relative equity in GDP. Their use of the word "development" reinforces the hegemony of the economic world-view. On the other hand, there are those who identify development with more rights and resources for the poor and powerless. Their use of the word calls for de-emphasizing growth in favour of greater autonomy of communities. For them, development speech is self-defeating; it distorts their concern and makes them vulnerable to hijack by false friends. Putting both perspectives into one conceptual shell is a sure recipe for confusion, if not a political cover-up.[1]

I. Introduction

The era of a global commons is hard upon us.[2] Climate change, terrorism, the social media that connect millions of people from the farthest points of the globe instantaneously and the spread of the idea of democracy in North Africa and through the "Arab Reawakening" have thrust the reality of this phenomenon upon us so hard we barely manage to stand upright.

Throughout history, the global South has consistently raised its artificially hushed voice, now in plea, now in anger, to the North and either begged or demanded the recognition of a global commons. They have insisted that both the North and the South are more intimately connected than some would care to acknowledge, and that they must rise or fall together. The Universal Declaration of Human Rights, the Declaration on the Establishment of a New International Economic Order and the Declaration on the Right to Development are examples of the few instances in which the global South (the "Rest"), supported by some allies in the North, was able to script the story.

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[1] Wolfgang Sachs, ed., *The Development Dictionary: A Guide to Knowledge as Power* (Zed Books, 2010), p. xi.

[2] "In the global South, for instance, initiatives emphasize community rights to natural resources, self-governance and indigenous ways of knowing and acting. In the global North, post-development action instead centres on eco-fair businesses in manufacture, trade and banking, the rediscovery of the commons in nature and society, open-source collaboration, self-sufficiency in consumption and profit-making, and renewed attention to non-material values." (Ibid., p. xiii.)

In this chapter I re-examine the international principles of equality and non-discrimination as they relate to the right to development; give a snapshot of inequality, discrimination and unfair distribution of the benefits of development; establish the centrality of serious, concrete and effective mechanisms to ensure equality, non-discrimination and the fair distribution of the benefits of development, undergirded by human rights principles; and recount a number of efforts to do this in the recent past.

I conclude, apocalyptically and eschatologically, that the globe is inching towards a disaster that can only be averted if the principles of equality, non-discrimination and the fair distribution of the benefits of development are taken seriously, implemented and monitored at the national and international levels. When the benefits of development can be shared, allowing effective opportunities and access for the 80 per cent of the world's population and the 80 per cent of populations within nations that suffer discrimination, we will have begun to pull back from the precipice.

II. Clarifying and rethinking equality and non-discrimination[3]

Equality and non-discrimination are central to the corpus of rights guaranteed by international human rights law. Indeed, international law and international human rights law were born of a desire to ensure that States and their most precious assets, human beings, are treated with some measure of equality and non-discrimination, regardless of their origin and circumstances.[4]

Further, principles of international law, and specifically of international human rights law, allow, at least at a formal, rhetorical level, affirmative action to favour historically disadvantaged States to regain their former strength through greater equality, non-discrimination and access to global resources.[5] It is safe to say that equality and non-discrimination have been widely adopted into law at the international and national levels. They carry a huge potential for underpinning various moves to correct social and economic inequalities through the fair distribution of the benefits of development.

However, the difference between the concepts of equality and non-discrimination is not very clear. They mean different things in particular jurisdictions and circumstances and over time. Despite the limited clarity, it is obvious that in the international economic order, positive equality has a greater propensity than status-based non-discrimination to support the kinds of reforms that can lead to a fair distribution of the benefits of development. As MacNaughton notes:

> Over the past three decades, legal scholars have often affirmed that equality and non-discrimination are equivalent concepts in international human rights law. They further describe these concepts as "two sides of the same coin", or as negative and positive forms of the same principle. Positive and negative concepts of the principle of equality, however, are not equivalent. In positive terms, the principle would require that everyone be treated in the same manner unless some alternative justification is provided. In negative terms, the principle might be restated to allow differences in treatment unless they are based upon a number of expressly prohibited grounds.
>
> Thus, positive and negative forms of equality are very different. When positive equality is the norm, any inequality must be justified. When negative equality is the norm, most inequalities are accepted; only inequalities based upon one of the prohibited grounds, for example, race, sex, language or religion, must be justified.
>
> Importantly, in international law, the equality principle is usually stated in the negative form, which is commonly known as "non-discrimination". By equating the two forms of equality in international human rights law and calling them "non-discrimination", the positive right to equality has disappeared.[6]

The literature on this subject hardly acknowledges that poverty and economic status are prohibited grounds of discrimination under international human rights law. Again, international human rights law has focused primarily on bloc equality, more often known as non-discrimination, in its attempt to ensure that groups such as persons of colour and ethnic and political minorities are not discriminated against.

The equality and non-discrimination provisions in the International Bill of Human Rights would be more useful for ensuring the fair distribution of the benefits of development if "poverty" were recognized as a prohibited ground of distinction. Importantly, the non-discrimination provision in the Universal Declaration of Human Rights lists "property" as one of the prohibited grounds of distinction and this provision applies to all of the rights in the Declaration. This "means that it prohibits wealth-based distribution of education, health care and social security, just as it

[3] Ideas for this section are partly drawn from *Gillian MacNaughton,* "Untangling equality and non-discrimination to promote the right to health care for all", *Health and Human Rights*, vol. 11, No. 2 (2009).

[4] This is evident from the preamble to the Universal Declaration of Human Rights and its articles 1 and 2.

[5] See, for example, *Affirmative Action: A Global Perspective* (Global Rights, 2005), pp. 2 ff. Available at www.globalrights.org.

[6] *MacNaughton,* "Untangling equality and non-discrimination", pp. 1-2.

prohibits wealth-based access to voting in public elections or to justice in the courts".[7]

The Human Rights Committee, in its general comment No. 18 (1989) and drawing on the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, defined "discrimination" in the International Covenant on Civil and Political Rights as "any distinction, exclusion, restriction or preference which 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". Despite the more elaborate provisions on equality and non-discrimination in the Covenant, the Human Rights Committee has almost exclusively limited its discussions to bloc equality.[8]

General comment 20 (2009) of the Committee on Economic, Social and Cultural Rights states that discrimination undermines the fulfilment of economic, social and cultural rights (para. 1). It addresses discrimination in the recognition, enjoyment or exercise, on an equal footing, of the rights in the International Covenant on Economic, Social and Cultural Rights, noting that a similar definition of discrimination appears in other international human rights instruments (para. 7). Both formal and substantive discrimination must be eliminated, implying that, firstly, States' constitutions, laws and policy documents must not discriminate on prohibited grounds (para. 8 (a)) and, secondly, that States must prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination (para. 8 (b)). This general comment addresses direct discrimination, which occurs when a person is treated less favourably than another person in a similar situation for a reason related to a prohibited ground, and indirect discrimination, which takes place when laws, policies or practices that appear neutral have a disproportionate impact on the exercise of rights (para. 10). It also addresses the issues of discrimination in the private sphere, systemic discrimination, the permissible scope of differential treatment, membership of a group and multiple discrimination. It lists the prohibited grounds for discrimination (race and colour, sex, religion, political opinion, national or social origin, property, birth, disability, age, nationality, marital and family status, sexual orientation, health status, place of residence, and economic and social situation) (paras. 15-35) and concludes by laying down measures for national implementation: legislation; policies, plans and strategies; elimination of systemic discrimination; remedies and accountability; and monitoring, indicators and benchmarks.

To ensure real equality, non-discrimination and the fair distribution of the benefits and the burdens of development, the international community must work assiduously to include in the interpretation of the International Bill of Human Rights explicit mention of a prohibition of discrimination on the bases of "social or economic status" and "property". Again, the one-to-one equality for which strict enforcement measures are available, as in the case of the right to vote, for example, must be extended in some measure to economic and social rights as well as the right to development. Without this, our quest for equality and non-discrimination in the distribution of the benefits of development will remain an ideal that is never realized.

The three concepts, discrimination, equality and the equitable distribution of the benefits of development, are well defined in the Declaration on the Right to Development. Regarding discrimination, article 5 stipulates a duty of States to "take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as … racism and racial discrimination …" Regarding equality, the preamble states that "equality of opportunity for development is a prerogative both of nations and of individuals who make up nations", and article 3 refers to "a new international economic order based on sovereign equality." Article 8 calls on States to "undertake, at the national level, all necessary measures for the realization of the right to development", adding that they "shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income". Finally, the Declaration is more explicit when it comes to the unfair distribution of the benefits of development. One of its most juridically significant provisions is article 2 (3), according to which "States have the right and the duty to formulate appropriate national development policies that aim at the constant

[7] Ibid., p. 3.

[8] The Committee's concerns are, inter alia, homelessness among African Americans in the United States of America; discrimination with regard to equal access to health services, social assistance, education and employment against the Roma in some European countries, against lesbian, gay, bisexual and transgender persons in Japan and against the Maori in New Zealand; and the impact of severe cuts in welfare programmes on women and children, especially Aboriginal people and Afro-Canadians, in British Columbia, Canada (ibid., pp. 51-52).

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". Further, as already mentioned, article 8 refers to "the fair distribution of income" in the context of "economic and social reforms [which] should be carried out with a view to eradicating all social injustices".

Twenty-five years after the adoption of the Declaration, frustration with the lack of equal opportunity for development of individuals and nations, and especially with the unfair distribution of the benefits of development, has not abated.

III. Inequality, discrimination and the unfair distribution of the benefits of development

To say that the benefits of development are unfairly distributed is a contradiction in terms. Development, in the real sense of the word, implies fair distribution of resources in an equitable manner.

At the international and national levels, and unfortunately in most of the world, underdevelopment—defined as inequitable distribution of resources—is seen in the face of plenty. Inequality, inequity, discrimination and unfairness characterize the determination of what constitutes development, circumscribe the avenues available for participation in development and hamper access to the resources spawned by development.

> At the international level, one monolithic conception of development has been foisted on the world, fathered, mothered, nannied and nurtured by a small cabal. Many credible insiders have bemoaned the fact that we have a system that might be called global governance without global government, one in which a few institutions—the World Bank, the IMF, the WTO—and a few players—the finance, commerce, and trade ministries, closely linked to certain financial and commercial interests—dominate the scene, but in which many of those affected by their decisions are left almost voiceless. It's time to change some of the rules governing the international economic order.[9]

As noted by Flávia Piovesan in the preceding chapter of the present volume, ironically, these policies of the international financial institutions are determined by the same States that have legally binding obligations under the International Covenant on Economic, Social and Cultural Rights. Thus, the struggle for improving democracy, transparency and accountability in the global financial architecture is becoming an indispensable prerequisite for equality, non-discrimination and the fair distribution of the benefits of development.

Some 80 per cent of the world's resources are consumed by 20 per cent of the world's population.[10] Even the efforts at addressing this glaring disparity by democratizing development processes and ensuring the free, active and meaningful participation of the beneficiaries of development have met serious roadblocks. Generally, those efforts have been defeated and captured by the same rule of law formalism[11] and the same hegemonic forces of globalization that created the problem in the first place.

It is not only at the international level that unequal distribution of the benefits of development exists. Indeed, the international framework that unleashes inequity finds concrete expression in national contexts: it is there that those who are unable to be caught up by the elevating forces of globalization are left behind. This chilling note from an intelligent observer is very long, but worth the reading:

> In hindsight it has become obvious that the events of 1989 finally opened the floodgates for transnational market forces to reach the remotest corners of the globe. As the era of globalization came into being, hopes of increased wealth were unleashed everywhere, providing fresh oxygen for the flagging development creed.
>
> On the one hand, the age of globalization has brought economic development to fruition. The Cold War divisions faded away, corporations relocated freely across borders, and politicians as well as populations in many countries set their hopes on the model of a Western-style consumer economy. In a rapid—even meteoric—advance, a number of newly industrializing countries acquired a larger share of economic activity.
>
> But, on the other hand, the age of globalization has now superseded the age of development. This is mainly because nation-states can no longer contain economic and cultural forces. Goods, money, information, images and people now flow across frontiers and give rise to a transnational space in which interactions occur freely, as if national spaces did not exist. For this reason, development thinking increasingly

[9] Joseph E. Stiglitz, *Globalization and its Discontents* (New York and London, W.W. Norton, 2003), pp. 21-22.

[10] United Nations Development Programme, *Human Development Report 1998: Consumption for Human Development* (New York and Oxford, Oxford University Press, 1998), p. 50. Similar statistics updated to 2011 are contained in World Bank, *World Bank Development Indicators 2011*, p. 17.

[11] This term draws a parallel between: (a) "legal formalism", the legal positivist view that the substantive justice of a law is a question for the legislature and not the judiciary; and (b) "rule of law formalism", the insistence by donor countries and agencies that countries in the South must ensure the rule of law in their countries in order to continue to benefit from aid. The latter does not inquire into the history, circumstances, future and other features of those rules, which would be a prerequisite for achieving equality, non-discrimination and fairness in distributing the benefits of development for historically disadvantaged groups.

> lost its way, as both the actor and the target of development withered away under the influence of transnationalization.
>
> As a result of this shift, development came to mean the formation of a global middle class alongside the spread of the transnational economic complex, rather than a national middle class alongside the integration of a national economy. Seen from this perspective, it comes as no surprise that the age of globalization has produced a transnational class of winners. Though they exist in different densities at different points around the globe, this class is to be found in every country … Western style … development, to be sure, continued spreading during the globalization period, but boosted the expansion of the transnational economic complex rather than the formation of thriving national societies.[12]

While the beneficiaries of "the transnational economic complex" are soaring, "national societies" are fragmenting under the weight of the forces of globalization. Significant minorities in North America and Europe and clear majorities in countries such as South Africa and the Sudan are denied opportunities to live a full life. In particular, they are systematically subjected to policies that ensure that they are starved of food, water, health care, education, peace of mind and happiness. Poverty denies many children an education and the capabilities to live a full life. It leads to struggles over resources, many of which escalate into ethnic, national and regional crises. All these consequences of poverty and underdevelopment diminish the human condition. Thus, inequality, polarization and a threat to national and global peace coexist and increase, together with spiralling growth rates for the "Rest".

One cannot but agree with Stephen Marks when he notes that the right to development has both an external and an internal dimension, "the former referring to the obligations to contribute to rectifying the disparities and injustices of the international political economy and to reduce resource constraints on developing countries, while the latter referred to the duty of each country to ensure that its development policy is one in which all human rights and fundamental freedoms can be fully realized …".[13] Such a development policy—one that is based on human rights—cannot but be equitable, non-discriminatory and fair in the distribution of resources, as required in the articles of the Declaration on the Right to Development quoted above.

IV. Efforts to reverse the trend

The global South has always known development, as operationalized by mainstream development agents, to be quite farcical. As the "Rest", it has always known that a development paradigm that is not centred on a genuine understanding of and respect for human rights—an understanding that has at its core a striving for equality, equity, non-discrimination, fair distribution of resources and broader social justice—is a waste of time.

It is not surprising that the Declaration on the Right to Development calls for appropriate economic and social reforms to be carried out with a view to eradicating all social injustices. Indeed, the right to development as a human right emerged in the United Nations system in parallel to the quest for a new international economic order and the Charter of Economic Rights and Duties of States,[14] obviously as bastions for equity. Nonetheless, as Sachs notes,

> It is crucial to distinguish two levels of equity. The first is the idea of relative justice, which looks at the distribution of various assets–such as income, school years or Internet connections–across groups of people or nations. It is comparative in nature, focuses on the relative positions of asset-holders, and points towards some form of equality. The second is the idea of absolute justice, which looks at the availability of fundamental capabilities and freedoms without which an unblemished life would be impossible. It is non-comparative in nature, focuses on basic living conditions, and points to the norm of human dignity. Generally speaking, conflicts about inequality are animated by the first idea, while conflicts about human rights are animated by the second.[15]

The World Conference on Human Rights, held in Vienna in 1993, reaffirmed that the "Rest" who are committed to the process of democratization and economic reforms (a euphemism for deploying a particular type of development) should be supported by the international community in their transition to democracy and economic development. The World Conference reaffirmed the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights and urged States to cooperate with each other in ensuring development and eliminating obstacles to development.[16]

There was a renewed commitment to development at the turn of the millennium. The United Nations Millennium Summit in 2000 agreed to quite ambitious targets to combat the consequences of underdevel-

[12] Sachs, ed., *The Development Dictionary* (see footnote 1), pp. vii-viii.
[13] Stephen P. Marks, ed., *Implementing the Right to Development: The Role of International Law* (Geneva, Friedrich-Ebert-Stiftung and Harvard School of Public Health, 2008), p. 130.
[14] General Assembly resolution 3281 (XXIX) of 12 December 1974.
[15] Sachs, ed., *The Development Dictionary* (see footnote 1), p. ix.
[16] Vienna Declaration and Programme of Action, Part I, para. 10.

opment—poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women—and to establish a global partnership for development.[17] Soon after, in 2001, these commitments were formulated into goals with a time horizon, targets and indicators, in the form of the Millennium Development Goals. The Ministerial Declaration of the Fourth Ministerial Conference of the World Trade Organization (the Doha Declaration), adopted the same year, underlined the need to ensure that intellectual property rules do not restrict access to medicines for the poor in order to improve public-health. The following year, the Monterrey Consensus of the International Conference on Financing for Development strengthened the framework for a global development partnership, including agreeing on how to mobilize resources, nationally and internationally, to finance development. The World Summit on Sustainable Development, held in Johannesburg, South Africa in 2001, renewed the commitments to sustainable development made a decade earlier across the Atlantic in Rio de Janeiro, Brazil.[18]

In 2005, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, going beyond rhetoric to more concrete action, committed the Parties to reduce greenhouse gases. In the same year, the Paris Declaration on Aid Effectiveness set out principles for donors to improve aid effectiveness and set targets for monitoring progress on new practices. And in September 2008, in Accra, where the present chapter was written, the parties to the Accra Agenda for Action agreed to assist developing countries and marginalized people in their fight against poverty by making aid more transparent, accountable and results-oriented.[19] Two months later, the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus reviewed progress on the subject since 2001, noted the widening of inequality since then and committed to renewed and more aggressive action to address global poverty and inequality, adopting the Doha Declaration on Financing for Development. Since then there have been many more meetings, declarations, resolutions, conventions, plans, programmes and projects at the international level aimed at righting the international wrong of a world of poverty in the midst of plenty.

At the level of rhetoric, therefore, plans, programmes and projects reflect a clear consensus around the exhortation in the Declaration on the Right to Development that "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" (art. 4 (1)). What is not happening quickly enough is a genuine and deep realization of the core international obligation of the Declaration, specifically, effective international cooperation … "[a]s a complement to the efforts of developing countries, in providing these countries with appropriate means and facilities to foster their comprehensive development" (para. 4 (2)). Such cooperation is a crucial antecedent step to operationalizing the Declaration's demand for States to take "[s]ustained action … to promote more rapid development of developing countries" (ibid.).

The imperative of a global response to global inequality and discrimination in the distribution of global resources is clear, especially considering that almost all of the "Rest" were colonized by the "Best":

> The disintegration of the colonial empires brought about a strange and incongruous convergence of aspirations. The leaders of the independence movements were eager to transform their devastated countries into modern nation-states, while the "masses", who had often paid for their victories with their blood, were hoping to liberate themselves from both the old and the new forms of subjugation. As to the former colonial masters, they were seeking a new system of domination, in the hope that it would allow them to maintain their presence in the ex-colonies, in order to continue to exploit their natural resources, as well as to use them as markets for their expanding economies or as bases for their geopolitical ambitions. The myth of development emerged as an ideal construct to meet the hopes of the three categories of actors.[20]

Clearly, lasting progress towards the implementation of the right to development requires effective

[17] United Nations Millennium Declaration, General Assembly resolution 55/2.

[18] The 1992 Rio Declaration on Environment and Development reaffirmed the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm in 1972. It underpinned the importance of: (a) recognizing the integral and interdependent nature of the Earth as our home; (b) ways to promote global partnership; (c) the protection of the global environmental and developmental system; (d) the centrality of human beings in sustainable development; (e) the need to bear present and future generations in mind; (f) eradication of poverty in order to decrease disparities; and (g) prioritizing the least developed countries and those most environmentally vulnerable. The themes for Rio+20, held in June 2012, are the green economy in the context of sustainable development and poverty reduction, and an institutional framework for sustainable development.

[19] The Fourth High Level Forum on Aid Effectiveness was held in Busan, Republic of Korea, in November/December 2011. Delegates representing donor members of the Development Assistance Committee (DAC) of the Organisation for Economic Co-operation and Development (OECD) and developing country signatories to the Paris Declaration of 2005 met to evaluate progress made since the Third High Level Forum in 2008 and to set out a new framework for increasing the quality of aid in order to achieve the Millennium Development Goals by 2015. Priority areas were predictable aid; use of country systems; an end to policy conditionality; country-driven capacity development; mutual accountability; and reduced transaction costs.

[20] Majid Rahnema, ed., *The Post-Development Reader* (Zed Books, 1997), introduction.

development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.

The voices of the "Rest", having shouted themselves hoarse, are now, in frustration, consciously introducing a discourse of apocalyptic eschatology. If their farsightedness is downplayed and extinguished, the "Rest" will become a fertile breeding ground for terrorist activities, cybercrime and piracy, all of which are activities that are aimed at getting back at the "Best" for presiding over their undoing. This cannot continue, for, as Gandhi said, an eye for an eye will leave the whole world blind. What do we do?

First, we need to acknowledge the farsightedness of the "Rest" in drawing attention, half a century ago and continuously since then, to the apocalyptic course that the "Best" were steering. Second, we need to return to the road not taken and excavate all the principles of equality, non-discrimination and fairness in the distribution of the benefits of development from the declarations at the United Nations that were spearheaded by the "Rest". Third, we must recognize that the "Rest", explicitly and implicitly, undergirded the notions of the development for which they fought with human rights principles. As one shrewd observer has noted:

> We owe this thinking on the relationship between development and human rights largely to countries of the South. When the newly independent countries of the 1960s and 1970s joined the United Nations, they took the promise of universal human rights principles [seriously] and insisted that they were applied to the conditions of their peoples. Despite serious problems of governance, and often of corruption, the belief was there. From their efforts came the UN Declaration on the Right to Development of 1986. From that deeply influential statement–adopted in Cold War conditions—has come the current thinking of a rights-based approach to development that seeks to bring about the promise of universal human rights and dignity.[21]

Only a process of agreeing on effective development policies, the mode and timing of their implementation and monitoring their implementation at the national and international levels will get us there. This was the noble effort of the high-level task force on the implementation of the right to development.[22]

V. The work of the high-level task force on the implementation of the right to development

The Working Group on the Right to Development was established by the Commission on Human Rights in 1998 as an open-ended intergovernmental body with an explicit mandate, inter alia, to "monitor and review progress made in the promotion and implementation of the right to development as elaborated in the Declaration on the Right to Development, at the national and international levels, providing recommendations thereon and further analysing obstacles to its full enjoyment".[23] Civil society organizations could participate as observers at the sessions of the Working Group.

From 2004 to 2010, the Working Group gave a high-level task force on the implementation of the right to development the task of translating the right to development from political commitment to development practice.[24] As part of its work, the task force developed criteria and indicators to assess the extent to which States are individually and collectively taking steps to establish, promote and sustain national and international arrangements that create an enabling environment for the realization of the right to development. They were also to serve as a useful tool for stakeholders to assess the current state of implementation of the right to development and facilitate its further realization at the international and national levels; contribute to mainstreaming the right to development in the policies and operational activities of relevant actors at the national, regional and international levels, including multilateral financial, trade and development institutions; and evaluate the human rights implications of development and trade policies and programmes.[25]

The task force was emphatic that the operationalization of the right to development requires the application of human rights principles and the principles of good governance to the activities of all relevant stakeholders at both the national and international levels.

The information provided by the quantitative and qualitative indicators developed by the task force is also useful for measuring progress in the implemen-

[21] Mary Robinson, "Bridging the gap between human rights and development: from normative principles to operational relevance", Presidential Fellows' Lecture by the United Nations High Commissioner for Human Rights at the Preston Auditorium, World Bank, Washington, D.C. (3 December 2001).

[22] See Maria Green and Susan Randolph, "Bringing theory into practice: operational criteria for assessing implementation of the international right to development" (A/HRC/15/WG.2/TF/CRP.5), paper prepared for the high-level task force, summarized and updated in chapter 29 of this publication. See also the report of the task force on its sixth session (A/HRC/15/WG.2/TF/2 and addenda and corrigenda).

[23] Commission on Human Rights resolution 1998/72, para. 10 (a)(i), endorsed by Economic and Social Council decision 1998/269.

[24] The task force was created by Commission resolution 2004/7 and Human Rights Council decision 2004/249.

[25] The criteria developed by the task force (A/HRC/15/WG.2/TF/2/Add.2) are reviewed in the chapters in this volume by Sakiko Fukuda-Parr, Maria Green and Susan Randolph, and Stephen Marks.

tation of human rights in general and of the right to development in particular. The indicators are specific structural, process and outcome indicators that support comprehensive and objective assessments.

The high-level task force ceased to exist upon the termination of its mandate. A good number of stakeholders hope that it, or a similar expert group dedicated to transforming the right to development from political posturing to development practice, will rise again like the phoenix.

VI. Conclusion

Equality, non-discrimination and the fair distribution of the benefits of development can no longer wait. Most of the world have been waiting for over a quarter of a century to see practical results based on the right to development, and they are tired of waiting. They have listened to excuses and endured meetings, conferences, declarations and resolutions. They are now resorting to some inimical actions to reinforce their yearnings: terrorism, money-laundering, piracy, kidnappings, cybercrimes.

The recent events in North Africa and the Arab world are not only an example of uprisings in the face of repression of civil liberties; they are the result of "underdevelopment"—whatever that means—or, more accurately, the absence of "development" in the sense understood by the Declaration. One can only imagine what will happen if the rest of the world, similarly denied the right to development, rose up in similar fashion on a global scale.

The human rights-based approach to development in the era of globalization

*Siddiq R. Osmani**

I. Introduction

There is a compelling case for pursuing development policies within the framework of human rights, with or without globalization.[1] But the need for framing policies on the foundation of human rights becomes even more compelling in a rapidly globalizing world. The process of globalization can have a profound impact on the process of development, in positive as well as negative ways. The central thesis of this chapter is that the human rights approach to development, particularly the concept of the right to development and its attendant principles, may be fruitfully used to condition the process of globalization to better harness the positive impact of globalization and to minimize the pain of negative impact at the national level. The chapter illustrates this main point with specific examples; it does not embark on a comprehensive analysis of all possible positive and negative impacts of globalization or examine how the human rights approach could be used to condition them all. Section II uses the example of structural change in the economy brought about by globalization to illustrate the case of possible negative effects. It shows how the human rights approach can offer protection against the negative consequences of structural change that would inevitably follow from globalization. Section III illustrates the positive effects of globalization with the example of its effect on economic growth. It shows how adherence to the principle of human rights can enable us to convert the growth-enhancing potential of globalization into an instrument for advancing the right to development. Section IV offers concluding remarks.[2]

II. The human rights approach can counter the negative effects of globalization

Globalization brings about structural changes within an economy. It opens up new opportunities for enhancing employment and income. However, it also closes down, or at least diminishes, many existing means of livelihood: opportunities open up in activities in which a country has comparative advantage, and diminish in those in which it has comparative disadvantage. This may have profound implications for the achievement of the right to development.

Economic theory suggests that the gains will in general outweigh the losses; a nation should gain an overall increase in welfare. The problem, however, is that gains and losses may not be distributed evenly

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[1] S.R. Osmani, "An essay on the human rights approach to development", in Arjun K. Sengupta, Archna Negi and Mouchumi Basu, eds., *Reflections on the Right to Development* (New Delhi, Sage Publications, 2005); S.R. Osmani, "The human rights approach to poverty reduction", in *Freedom from Poverty as a Human Right*, Bård A. Andreassen, Stephen P. Marks and Arjun K. Sengupta, eds., vol. 3, *Economic Perspectives* (Paris, UNESCO, 2010).

[2] A more comprehensive analysis of the links between globalization and the human rights approach to development is offered in S.R. Osmani, "Globalization and the human rights approach to development", in *Development as a Human Right: Legal, Political and Economic Dimension*, Bård A. Andreassen and Stephen P. Marks, eds. (Cambridge, Massachusetts, Harvard School of Public Health, 2007).

across the population. Much depends on who happens to be engaged in the expanding activities and who in the contracting ones, and who has the skills and other means of access to the new opportunities that open up. Evidence and common sense suggest that the losses are generally felt disproportionately by the weaker segments of the society. They suffer because, owing to impediments they face in accessing new skills and resources, they lack the flexibility to cope with changes brought about by market forces.

While recognizing that globalization can make the poor more vulnerable in the face of the changing structure of opportunities, excessive alarmism needs to be avoided. First, it is often suggested in a near-axiomatic fashion that globalization has widened income inequality in the world. This is seen as prima facie evidence for the view that the process has hurt the poor. However, quite apart from the fact that widening inequality can easily go hand in hand with absolute improvement in the living conditions of the poor, the very notion that globalization has widened inequality is deeply problematic. The empirical evidence regarding income distribution in the world during the current phase of globalization is inconclusive. More importantly, no one has yet found a satisfactory way of separating out the effects of globalization from the effects of other factors that might have a bearing on income distribution in the world.

Even if it could be shown that globalization has indeed contributed to widening inequality in the world, it does not follow that globalization must necessarily do so. In the 1950s and 1960s, it was believed that when a backward economy initially begins to develop towards capitalism, income distribution necessarily worsens, before improving much later. Known as the Kuznets hypothesis, this belief is now contradicted by empirical evidence. What happens to income distribution at any stage of development depends very much on the nature of policies pursued by Governments. With appropriate policies, distribution can actually improve as an economy grows; there is nothing inevitable about the Kuznets hypothesis. In principle, the same is true about the effect of globalization. Policies—at both national and international levels—can make a difference. As will be argued below, this is precisely the reason for taking the human rights approach to development even more seriously in the age of globalization.

Second, even without globalization, structural changes occur in all economies, except the most moribund ones. Owing to changes in technology, tastes, demographic structure and so on, new opportunities open up in the sphere of production and old ones close down all the time. The effects of these home-grown structural changes are not qualitatively dissimilar to those induced by globalization. They too create new uncertainties and vulnerabilities along with new opportunities. And in this case as well the cost of negative effects tends to fall disproportionately on the weaker segments of the population, and for much the same reasons. If this is not seen as a reason for avoiding structural changes in general, it should not be seen as a reason for shutting the door to globalization either.

There is, however, a very good reason for being especially concerned about the possible negative effects of globalization and for trying to do something about them. Home-grown structural changes typically unfold incrementally over a long period. This allows a breathing space for necessary adjustments. By contrast, globalization tends to bring about sweeping structural changes within a short period of time. The sheer pace of change can entail serious problems of adjustment, especially when it comes to setting up an adequate social protection scheme for those suffering most from the disruptions caused by structural changes. What is worse, this problem can be compounded by two further factors.

The first of these is the problem of shifting comparative advantage. As noted earlier, when a country integrates with the world economy, the structure of production begins to shift away from activities with comparative disadvantage towards those with comparative advantage. The problem, however, is that structural changes caused by this shift may not be once-and-for-all events. This is because the nature of comparative advantage may itself undergo rapid change during the process of globalization. Comparative advantage is inherently comparative in nature; that is, it depends not just on the characteristics of a particular country but also on those of other countries that participate in a trading network. As a result, any country that has already embraced globalization may find that its comparative advantage keeps changing as the net of globalization spreads and brings in new countries. Thus, Malaysia and Taiwan (Province of China) may find that the comparative advantage they have long enjoyed in labour-intensive garment industries is suddenly eroded as Bangladesh and Viet Nam enter the export market with even cheaper labour. Similarly, the Latin American countries that once found comparative advantage in labour-intensive activities

when they first embraced globalization may soon find that they no longer have comparative advantage in those activities once populous countries such as China and India enter the scene. In each case, a country that loses comparative advantage in one sphere will eventually find it elsewhere. However, the problem is that shifting comparative advantage of this kind can keep the structure of an economy in a constant state of flux for a prolonged period. The disruptive effects of globalization may, therefore, be quite serious.

The second problem stems from the erratic behaviour of international finance. One of the presumed gains from globalization is that the free flow of capital will ensure efficient use of resources by moving finance from regions with a low marginal rate of return to regions with higher returns. In reality, however, capital does not always behave in such an efficient manner because of various kinds of market failures that arise from the imperfect and asymmetric knowledge that is inherent in capital markets. In the absence of perfect knowledge, the flow of capital in and out of countries is often guided by "herd behaviour", whereby an initial move by one investor is blindly imitated by others. The magnitude of capital movement can thus be disproportionate to the underlying rates of return. In such cases, what should have been an orderly and limited movement of capital becomes a stampede, plunging a country into a crisis deeper than it "deserves" in terms of its economic fundamentals. Even the direction of flow can sometimes be erratic, for example, when the "contagion effect" takes hold (i.e., when capital moves out of a country not necessarily because anything is fundamentally wrong with it but because some other country of a similar type is experiencing a crisis). The series of financial crises that rocked Asia and Latin America in the last decade and a half bear clear hallmarks of such erratic behaviour on the part of international finance.

This is not to suggest that the countries that experienced crises did not get many of their economic policies seriously wrong, nor that they did not need to make fundamental structural changes in their economies in order to make them more efficient. They generally did, but the erratic movement of international finance forced additional structural changes that were not needed on the grounds of efficiency and were probably quite harmful, such as when the drying-up of capital forced even potentially efficient activities to close down. Many of these uncalled-for changes were probably reversed as the countries concerned emerged out of crisis and international finance resumed business as usual. But the crises caused disruptions and dislocations, not all of which were efficiency enhancing: the harm they caused in terms of human suffering was real and extremely painful.

Globalization can thus have both an accentuating and a distorting effect on structural changes, some of which would occur in economies even without it. The potential for creating new uncertainties and vulnerabilities, along with new opportunities, therefore grows with globalization. As such, globalization has the potential for hurting the weaker segments of the population unless conscious efforts are made to protect them.

This is where the human rights approach to development can play a vitally important role. The normative framework of international human rights is particularly concerned with individuals and groups that are vulnerable, marginal, disadvantaged or socially excluded. That is why it can effectively counterweigh the disruptive effects of globalization, whose burden is likely to fall disproportionately on these very categories of people. Two elements of the international human rights normative framework are especially relevant here. These are the twin principles of non-discrimination and equality and the principle of non-retrogression of rights.

The principles of non-discrimination and equality are among the most fundamental elements of international human rights law. These are elaborated in numerous human rights instruments, including the Universal Declaration of Human Rights, the two International Covenants on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. Recognizing the fundamental importance of these twin principles, the international community has established two treaty bodies, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women, which are devoted exclusively to the promotion and protection of non-discrimination and equality.

If left unattended, the uneven burden of the adjustments to globalization can violate the principles of non-discrimination and equality. The problem is not just that globalization will not have a neutral or uniform effect on everyone in the society—no policy or economic change can be expected to be ideal in

that regard. The problem arises when there is a systematic bias against certain groups or individuals. If the adverse effects of a policy or economic change were to be distributed randomly among the population, the question of discrimination would not arise. But this is unlikely to be the case. Since the brunt of the burden is likely to be borne by the weaker segments of the population, the possibility of discrimination is very real. Two considerations are important to bear in mind in this context.

First, discrimination and inequality may take many different forms and stem from many different sources. They may arise from explicit legal inequalities in status and entitlements. But they can also arise from policies that disregard the needs of particular people, or from social values that shape relationships within households and communities in a manner that discriminates against particular groups. Second, it is important to look at the effects of policies, not just their intentions. For example, if the effect of a policy regime is to impoverish disproportionately women, or indigenous peoples, or some other marginalized group, it is prima facie discriminatory, even if the policymakers had no intention of discriminating against the group in question.

Adherence to the human rights approach to development will, therefore, require that those who are systematically hurt by the disruptions caused by globalization be accorded special attention. In particular, efforts will have to be made to equip them with the skills and resources necessary to take advantage of the new opportunities being opened up by structural changes and to remove the impediments they face in getting access to productive employment so that their loss from adjustments can be minimized and the scope for gaining from new opportunities maximized.

The principle of non-retrogression of rights can also play a vital protective role for vulnerable people. This principle states that no one should suffer an absolute decline in the enjoyment of any right at any time. The right to development approach acknowledges that full enjoyment of all human rights may only be possible over a period of time, and that as time passes some rights may be advanced faster than others. But it does not permit the level of enjoyment of any particular right to decline in comparison with the past. Globalization can clearly lead to a violation of this principle if the rapid and overlapping structural changes it brings about lead to such a serious disruption that the weak and vulnerable suffer an absolute decline in their living standard. Such a decline clearly occurred, and in a spectacular manner, for a large number of people during the financial crises of the recent past. Even in normal times, many individuals and groups have suffered a decline in living standards which was perhaps less significant, but which was no less real. The right to development approach demands that an adequate social protection scheme be put in place to prevent such a decline. This is essential if globalization is to be pursued in a manner consistent with the principle of non-retrogression of rights.

III. Globalization, growth and the right to development

If increased vulnerabilities of the poor are one side of the coin of globalization, the other side is the potential for faster economic growth. This has implications for the achievement of the right to development. In much of the traditional discourse on human rights as well as on development, economic growth is viewed with suspicion. This is not entirely surprising, given that many enthusiasts of economic growth are so obsessed with it as to almost disregard the adverse human consequences of the wrong kinds of economic growth. But one needs to distinguish between economic growth in general and the wrong kinds of economic growth in particular. The kind of growth that either neglects or, even worse, curtails and violates human rights naturally has no place in the human rights approach to development. But that does not mean that the need for economic growth can be neglected by this approach. The power of economic growth can and should be harnessed for speedy realization of the right to development.

It could be argued that economic growth is not just compatible with the human rights approach, but is an integral part of it. One of the salient features of the human rights approach to development is the recognition that the existence of resource constraints may entail a progressive realization of rights over time. But to prevent the duty holders from relying on the leeway offered by the idea of progressive realization in order to relax their efforts to realize human rights, the human rights approach also requires that measures be taken to fully realize all the rights as expeditiously as possible. Once the speed of realization of rights is accorded due importance, it is easy to see why rapid economic growth is essential for the human rights approach to development. The point is made most forcefully by the Independent Expert on the right to development, Arjun Sengupta:

> It is of course possible, by reallocation and redistribution of existing resources, to improve the realization of some of the rights, separately and individually, for a limited period and to a limited extent, without economic growth … However, it must be recognized that all rights, including civil and political rights, involve using resources to expand the supply of the corresponding goods and services and, possibly, public expenditure. Therefore, if all or most of these rights have to be realized fully and together and in a sustainable manner, steps have to be taken to relax the resource constraint by ensuring economic growth.[3]

In short, since realization of rights involves resources, speedy realization of rights calls for softening the resource constraint. This in turn calls for economic growth.

A related reason why growth is essential for the pursuit of a rights-based approach to development is that it will ease the pain of making trade-offs among rights. The idea of trade-offs among rights does not sit easily with the notion of the indivisibility of rights and the principle of non-retrogression of rights, both of which hold hallowed positions in the human rights literature. Strictly speaking, however, trade-offs need not be inconsistent with these principles when one recognizes that there are actually two types of trade-offs. One refers to actually reducing the level of one kind of right in order to raise the level of another right; such trade-offs are obviously incompatible with human rights principles. However, there is another kind of trade-off that is not only compatible with human rights principles, but also unavoidable.

When trying to improve the levels of various rights under resource constraints, we necessarily face the choice of allocating scarce resources among alternative rights. We can either spend more on the improvement of right X and less on right Y, or the other way round: that is the trade-off. For example, when a Government faced with severely limited resources obtains additional revenue (for example, through new taxes), it may have to confront the painful choice of whether to spend the additional revenue on providing health care that will promote the right to health, or to spend it on employment-generating investments that would promote the right to work. A decision to spend on health would mean achieving less in terms of the right to work than what would have been possible with the newly acquired resources; conversely, a decision to spend on employment-generating activities would mean achieving less in terms of the right to health than was potentially achievable. This kind of trade-off at the margin, which might be called an incremental trade-off, is unavoidable in the real world of scarce resources.

Incremental trade-offs do not violate either the principle of indivisibility or the principle of non-retrogression of rights, because they do not require that the level of any particular right be diminished from the existing level in order to promote another right; nor do they require that advancement of one right be put completely on hold while trying to advance another. Nonetheless, they do present painful choices for policymakers who are keen to improve rapidly the realization of all rights at once, but are unable to do so because of resource constraints. In this situation, a faster rate of growth will help ease the pain of making unavoidable trade-offs by making more resources available.

A strategy for promoting economic growth must, therefore, constitute an integral part of the human rights approach to development. Globalization can be a powerful ally in this regard, because of its growth-promoting potential. There is of course no guarantee that by embracing globalization a country will automatically accelerate the rate of growth. Things can go wrong for many reasons. Some of these reasons could be external, such as collapse of the international financial system. However, many could be internal, such as poor governance, civil war, or a deteriorating environment. Other things remaining equal, however, globalization will enhance growth potential by bringing about a more efficient allocation of resources, fostering competition and spurring the diffusion of technology. This potential must be harnessed for advancing the cause of the right to development.

It must be realized, however, that faster growth does not by itself guarantee that the right to development will be advanced. Growth merely makes it easier to advance the right to development by speeding up the progressive realization of rights and by easing the pain of unavoidable trade-offs. It does not ensure that the right to development will in fact be advanced, for the simple reason that the resources made available by growth may not actually be used for the purpose of furthering human rights.

For growth to be put to the service of human rights, any strategy of growth must be embedded in a comprehensive framework of policies and institutions that is consciously designed to convert resources into rights. This comprehensive framework will have

[3] "Fifth report of the Independent Expert on the right to development, Mr. Arjun Sengupta, submitted in accordance with Commission resolution 2002/69: frameworks for development cooperation and the right to development" (E/CN.4/2002/WG.18/6), para. 9. See also Arjun Sengupta, "The human right to development", in *Development as a Human Right.*

to have both international and national components. The precise details of policies and institutions will of course vary from one situation to another, but some general principles can be derived from the normative framework laid down in international human rights law. The more important among these principles, especially those relevant at the national level, have been elaborated by this author elsewhere.[4] These principles may be classified into three categories: (a) those informing the process of policy formulation; (b) those shaping the content of policies; and (c) those guiding the monitoring of policy implementation. A brief summary of the main points under each category is provided below.

A. Principles informing the process of policy formulation

The human rights approach to development demands that the process of policy formulation satisfy two important sets of principles, relating to (a) participation by stakeholders; and (b) the progressive realization of rights. One of the most important principles of the human rights approach to policy formulation is that it should be participatory in nature. In particular, those population groups directly or indirectly affected by a particular policy should be able to play an effective role in the process of formulating that policy. Active and informed participation of stakeholders at all stages of formulation, implementation and monitoring of a development strategy is not only consistent with but also demanded by the human rights approach because the international human rights framework affirms the rights of individuals to take part in the conduct of public affairs.

For genuine participation to be possible, however, some preconditions must be met and certain other rights must be fulfilled. The essential precondition is that ordinary people must be empowered to claim their rights and to participate effectively in the decision-making process. The process of empowerment can be quite complex and time-consuming because of the deep-rooted nature of the asymmetries of power that exist in most societies. To begin with, the character of the polity must be democratic. Though by no means sufficient, democratic governance is a necessary condition for creating a space in which all groups of people can effectively participate in national decision-making processes. The second precondition is to strengthen the bargaining power of the marginalized groups so that they are able to participate effectively in potentially conflictual situations. In part, this will depend on the realization of a minimum degree of economic security without which the poor and the vulnerable are unlikely to be able to resist established structures that hold the power. Furthermore, poor people must be allowed to receive support from sympathetic civil society organizations (including the media) that might be willing to champion their cause. For this to be possible, the State must create the necessary legal and institutional environment in which an independent civil society can flourish. In turn, the creation of such an environment requires simultaneous efforts to promote a range of civil and political rights. These include the right to information, the right to freedom of expression, the right of association and the right of equal access to justice. Since empowerment is not possible without the fulfilment of these rights and without empowerment effective participation is not possible, taking measures to fulfil these rights is also an essential component of the human rights approach to development.

The second set of principles of the human rights approach to policy formulation relates to the notion of progressive realization of rights. The discourse on human rights recognizes that it may not be possible to fulfil many rights immediately because of resource constraints and that they may have to be fulfilled over a period of time in a progressive manner. While the idea of progressive achievement is common to all approaches to policymaking, the human rights approach is distinctive for imposing certain conditions on the behaviour of the State so that progressive realization cannot be used as an excuse for relaxing efforts.

The most important condition is the State's acknowledgement that it may be possible to make rapid progress towards the realization of many human rights even within the existing resource constraints. To the extent that fulfilment of certain rights will have to be deferred because of resource constraints, the State must develop, in a participatory manner, a time-bound plan of action for their progressive realization. The plan will include a set of intermediate as well as final targets, based on appropriate indicators, so that it is possible to monitor the success or failure of progressive realization. Moreover, institutions will have

[4] See, in particular, "An essay on the human rights approach to development" and "The human rights approach to poverty reduction". In the specific context of the human rights approach to poverty reduction strategies, many of these principles are also discussed in OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (HRI/PUB/04/1) and OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (HR/PUB/06/12). Both are available at www.ohchr.org.

to be developed to hold the State accountable if the monitoring process reveals a less than full commitment to realizing the targets the State has set.

B. Principles shaping the content of policies under the human rights approach

The content of policies refers to the goals and targets that are set by the State, the resources that are committed for the realization of those targets and the methods that are adopted to achieve them. It is recognized that setting targets and committing resources for them will necessarily involve setting priorities, which in turn will involve considering trade-offs among alternative goals. Both the act of setting priorities and of accepting trade-offs must necessarily involve some value judgements. For a policy regime to be consistent with the human rights approach, these value judgements must be shaped by the human rights norms. This has several implications for the characteristics of policy content.

First, the goals and targets set by the State must conform to those set by various human rights instruments and elaborated by the relevant treaty bodies. In particular, the State must ensure immediate fulfilment of a set of minimum targets with respect to the rights to food, health and education that have been identified as "core obligations" of the State. Only the obligations not specified as core can be subject to progressive realization.

Second, policies must recognize people's rights to equality and non-discrimination. These rights are among the most fundamental tenets of international human rights law. This implies that development cannot be concerned simply with aggregate improvement in the living conditions of a country's population as indicated by, for example, growth in per capita income or availability of doctors per person. Special consideration must be given to those who fail to share in aggregate improvement owing to explicit or implicit discrimination.

Third, the human rights approach requires sectoral integration at the level of policymaking because of complementarities among rights. Complementarity exists both among the specific rights within the broad category of economic rights and also between the broad categories of economic and non-economic rights. The existence of causal connections between various types of rights implies that a preoccupation with individual rights might fail to achieve the best possible results by ignoring complementarities.

The fourth set of principles relates to the possible trade-offs among rights. While the human rights approach to development cannot avoid such trade-offs, it also imposes certain conditions on them, which must be treated as essential features of rights-based policymaking. In particular, the principles of indivisibility and non-retrogression of rights must be respected. Moreover, decisions regarding trade-offs must respect the stipulations made by treaty bodies about certain minimum core obligations, which the States must fulfil, with immediate effect, even under existing resource constraints.

C. Principles of monitoring policy implementation under the human rights approach

Monitoring and evaluation of performance is a necessary part of any kind of development strategy, rights-based or otherwise. But the characteristic feature of the human rights approach is that it emphasizes the notion of accountability in a way that traditional approaches do not. The very notion of rights implies the notion of duties or obligations. The State needs to adopt appropriate policies for fulfilling various rights not merely because it is desirable for reasons of benevolence; the State has a duty to do so, but a duty can only be meaningful if the duty bearer can be held accountable for failing to perform its duty. The need to ensure accountability is, therefore, central to the human rights approach to development. The emphasis on accountability in turn entails a number of characteristics required of the process of monitoring policy implementation.

First, mechanisms must be in place for the culpability of the State to be ascertained if it fails to adopt and implement appropriate policies and for sanctions to be imposed if it is found culpable. Such accountability mechanisms can be of various kinds: judicial, administrative, community based and so on. Second, accountability procedures must be participatory in nature so that citizens, especially those directly affected by policies, are able to hold the State accountable for its actions. Third, the State must adhere to the accountability procedures adopted by treaty bodies; by signing treaties, the State has agreed to subject itself to such external accountability. Fourth, the international community has a responsibility to help realize universal human rights. This is

the case even as, in international law, the State is the principal duty bearer with respect to the human rights of the people living within its jurisdiction. Thus, monitoring and accountability procedures must extend not only to States but also to global actors, such as the donor community, intergovernmental organizations, international non-governmental organizations and transnational corporations, whose actions bear upon the enjoyment of human rights in any country. Fifth, certain interrelated rights, such as the right to information, the right to free speech, the right to access to justice, etc., which, it was argued earlier, are important for effective participation, are also essential in the context of accountability. Without the fulfilment of these rights, it will be impossible to make accountability effective. Finally, it must be noted that holding the duty bearers to account does not necessarily imply taking recourse through a court of law. There can be both judicial and non-judicial means of accountability. The latter might involve quasi-judicial (e.g., ombudsman, treaty bodies), political (e.g., parliamentary process), administrative and civil society institutions. The human rights approach to development would require setting up an appropriate mix of accountability mechanisms.

Only when all these principles are followed in the process of policy formulation, in choosing the content of policy and in devising monitoring mechanisms would it be possible to harness the growth-promoting potential of globalization to the cause of advancing the right to development.

IV. Concluding observations

This chapter addresses key issues that arise in implementing the human rights approach to development at the national level. It examines the implications of the current wave of globalization for the pursuit of the right to development and goes on to elaborate a set of principles that must guide national development policies if the right to development is to be achieved in a globalizing world.

Globalization brings about structural changes within an economy, opening up new opportunities for enhancing employment and income. However, it also closes down, or at least diminishes, many existing means of livelihood. Although structural changes of this kind will inevitably occur within any economy over its normal course of evolution, globalization tends to have both an accentuating and a distorting effect on structural changes. The uncertainties and vulnerabilities that accompany structural changes are, therefore, much greater in the context of globalization than without it. It is usually the weaker and marginalized segments of the society that bear the brunt of these structural dislocations. The human rights approach can play a vital protective role here by invoking the principle of non-retrogression of rights and the principles of equality and non-discrimination. Recognition of these principles will require policymakers to set up, on the one hand, adequate social protection schemes for those suffering most from disruptions and, on the other, to equip vulnerable groups with the skills and resources necessary to take advantage of the new opportunities opened up by globalization.

Globalization can of course play a more positive role by enhancing the growth potential of the economy. Economic growth, whether induced by globalization or otherwise, is an essential condition for speedy realization of the right to development. Most rights need resources for their realization. This poses a constraint on realizing the right to development in a world of scarce resources. Because of this constraint, policymakers are obliged to undertake progressive realization of rights over a period of time and to make painful trade-offs among alternative rights at any given point in time. Economic growth can help in this regard by softening the resource constraint, which will help speed up the pace of progressive realization and ease the pain of inevitable trade-offs.

Growth, however, does not guarantee that the right to development will be advanced. This is simply because the resources made available by growth may not be used for the purpose of promoting rights. The human rights framework suggests a number of guiding principles that can help achieve this goal. This chapter has discussed these principles under three categories: (a) those informing the process of policy formulation; (b) those shaping the content of policies; and (c) those guiding the monitoring of policy implementation.

A human rights approach to democratic governance and development[1]

*Francisco Sagasti**

I. Introduction

A human rights approach to development starts from the basic premise that the achievement of human rights is the objective of any process aimed at improving the human condition. It uses the various concepts associated with human rights, understood in their broadest sense as the scaffolding of development policy. It invokes the international apparatus of human rights in support of development action. This approach is concerned not just with civil and political rights (e.g., free speech, freedom of assembly, the right to a fair trial, the right not to be tortured), but also with economic, social and cultural rights (access to adequate food, health, education, housing, jobs). In addition to realizing specific human rights, a rights-based approach to development emphasizes accountability, empowerment, participation and non-discrimination.

The definition of the objectives of development in terms of particular rights—considered as legally enforceable entitlements—is an essential ingredient of human rights approaches, as is the creation of express normative links to international, regional and national human rights instruments. Rights-based approaches are comprehensive in their consideration of the full range of indivisible, interdependent and interrelated rights: civil, cultural, economic, political and social. Rights-based approaches also focus on the development of adequate laws, policies, institutions, administrative procedures and practices, as well as on the mechanisms of redress and accountability that can deliver on entitlements, respond to denial and violations, and ensure accountability. They call for the translation of universal standards into locally determined benchmarks for measuring progress and enhancing accountability.

The Declaration on the Right to Development, proclaimed in 1986 by the General Assembly (although not by consensus), specifies that the right to development is an "inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" (art. 1 (1)). Adopting a broad human rights approach to development as its framework, which encompasses the right to development, this chapter explores the interactions between human rights and democratic governance.

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[1] This chapter is a shortened and updated version of a paper prepared by Francisco Sagasti, "Towards a human rights approach to development: concepts and implications", for FORO Nacional Internacional Agenda: PERÚ in April 2004, available at www.fni.pe. See also the study commissioned by the Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/2004/19).

II. Human rights and democratic governance

Concerns about governance have not always been associated with respect for human rights and the reaffirmation of democratic practices. During the 1960s and 1970s, approaches to the subject of governance emphasized the possibility of, and capacity for, exercising power "efficiently", understood in terms of achieving the objectives of the rulers, rather than in terms of the rule of law, accountability, transparency and participation that are characteristics of democracy. In some cases, democracy and governance were treated as inconsistent, with the argument that major increases in social demands were overloading democracies. In other cases, it was argued that democratic practices make it more difficult to introduce economic, social and political reforms that would affect the interests of powerful groups. From this perspective, rights-based approaches to development had to take a backseat to the urgent task of promoting economic reforms and growth.[2]

Nevertheless, this apparent contradiction between democracy and the effective exercise of power is not real, especially when a long-term perspective informed by human rights and right to development approaches is adopted. On the contrary, we have become aware that participation, dialogue and consensus-building have become indispensable for exercising political power in an efficient and effective manner. Recent contributions on the subject of good governance underscore the importance of democratic institutions. Democracy is now conceived not only as an end in itself, but also as a means to achieve economic, political and social rights.

The adoption of a rights-based approach to development broadens the concept of governance and makes it necessary to add the qualifier "democratic" for it to make sense. As a consequence, the older and restricted conception of governance as efficiency in economic management has evolved into a broader understanding of the way in which leaders exercise power and authority in an effective and inclusive manner to advance the cause of human rights. We have learned that participation, dialogue, consensus, transparency, accountability and the rule of law make the State more representative and capable of responding adequately to the concerns of its citizens.

Human rights are inextricably linked with democratic governance. They both require that people be aware of their rights and duties, that appropriate institutional arrangements facilitate their realization and that a democratic civic culture have a role in both issues of national importance and those of everyday life. The sense of belonging to a community is nurtured by individual responsibility and by a collective observance of democratic practices. From this perspective, the unrestricted respect and defence of human rights constitutes the foundation of an equitable and participatory society, in which everyone helps to achieve the common good and in which individualism and competition are balanced by social awareness and solidarity. This foundation implies rejecting violence and intimidation, which are associated with the authoritarian exercise of political power to achieve economic, political or social objectives.

At the international level, technological advances in telecommunications and information processing, together with the growing influence of mass media, have profoundly changed the way political power and authority are exercised. The Internet and electronic mail give citizens greater access to information that was once jealously guarded by the Government. Electronic networks have given political leaders and organized groups of citizens new ways to communicate. The spread of television and social media has changed how elections are carried out and how Governments and politicians manage their images and exercise power.[3] Such technological advances have changed the nature and workings of representative democracy and have brought human rights abuses to light. For example, they were a major contributing factor to the demise of totalitarian regimes in Eastern Europe, the former Soviet Union and in the Middle East, and are also creating a more open and transparent climate for political activity in most developing countries. In addition, modern telecommunications and mass media have allowed information about human rights violations, genocides, civil wars and atrocities inflicted by rulers on their people to reach a wide audience, create indignation and mobilize support for the victims.

[2] See, for example, Michel Crozier, Samuel Huntington and Joji Watanuki, *The Crisis of Democracy: Report of the Governability of Democracies to the Trilateral Commission* (New York, New York University Press, 1975) and also a review of that report 20 years later by Robert D. Putnam, Jean-Claude Casanova and Seizaburo Sato, *Revitalizing Trilateral Democracies: A Report to the Trilateral Commission* (New York, Trilateral Commission, 1995). For a different perspective on the interactions between identity, violence and democracy, see Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New York, W.W. Norton, 2006), and for an account of how human rights are becoming part of a new "cosmopolitan" approach to ethics, see Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York, W.W. Norton, 2006), pp. 162-166.

[3] The recent turmoil in the Arab world is testimony to the power of new forms of communication to influence political change, even in authoritarian regimes.

Developed countries, developing nations and international organizations are finding that their concerns about human rights and good governance converge. After the fall of the Berlin Wall and the end of the cold war, and after the Arab Spring, these issues are increasingly linked to the full exercise of political liberties, improvements in living standards, reducing poverty and the achievement of economic and social objectives. As a result, in many parts of the world societies are exploring different ways of promoting and consolidating democratic governance, often in the aftermath of violent conflicts, in the wake of the demise of authoritarian regimes and following political crises.

The accelerated and uneven processes of economic, financial, social, environmental, cultural and technological globalization are leading to a fractured global order at the beginning of the twenty-first century.[4] This is an order that encompasses the entire planet, yet divides rather than integrates people; an order that puts most of the world's inhabitants in contact with each other but at the same time creates and maintains deep fissures among them. In this fractured global order, human rights and governance problems that transcend national borders have begun to demand increasing attention from the world's political, business and civil society leaders. Issues like combating terrorism, reforming the international financial architecture, reducing pollution and mitigating global warming, and dealing with mass migration and increased numbers of political, environmental and economic refugees, among many others, pose governance problems and challenges that transcend the purview of States and demand international cooperation.

In this context, international public, private and civil society entities have grown increasingly important. Starting in the late 1980s, good governance became a major concern of international financial institutions, especially the World Bank and the Inter-American Development Bank; as well as of the United Nations and regional political organizations like the Organization of American States (OAS), the Council of Europe and the North Atlantic Treaty Organization, and for international non-governmental organizations such as Amnesty International and Human Rights Watch.[5]

International financial institutions have emphasized efficiency in economic management, arguing that openness and the responsible exercise of public functions are key to economic performance. International organizations, and in particular the United Nations, have highlighted respect for human rights, the importance of democratic institutions and the prevention of violent conflicts. In addition to those issues, non-governmental organizations have focused on environmental protection and the rights of minorities and indigenous peoples.

Yet the growing power of international organizations does not mean that—barring the extreme case of failed States—developing countries have no strategic or political options of their own in the management of their economic, political and social affairs.[6] The conditions established by the international financial institutions for obtaining access to their resources are key reference points for the design and implementation of economic policies, but they are not completely rigid, as is often imagined. Within limits, which may be more flexible than they may appear, Governments with technical capacity, a good negotiating strategy and broad political support have a certain degree of room for manoeuvre to modify the conditions set by the international organizations.[7]

[4] See Francisco Sagasti, *Rethinking Technical Cooperation among Developing Countries (TCDC) and South-South Cooperation (SSC): An Issues Paper*, annex B – A fractured global order (Lima, FORO Nacional Internacional Agenda: PERÚ, 2006), available at www.fni.pe. See also Francisco Sagasti and Gonzalo Alcalde, *Development Cooperation in a Fractured Global Order: An Arduous Transition* (Ottawa, International Development Research Centre, 1999).

[5] For example, as Chief of the Strategic Planning Division at the World Bank in the late 1980s I witnessed how democratic governance concerns gradually found a place in the institution's agenda. See World Bank, *World Development Report 1991: The Challenge of Development* (New York, Oxford University Press, 1991), pp. 132-134; on OAS, see Heraldo Muñoz, "The OAS and democratic governance", *Journal of Democracy*, vol. 4, No. 3 (July 1993), pp. 29-38; and for an overview of Council of Europe and North Atlantic Treaty Organization initiatives, see Neil Winn, *Promoting Democracy, Human Rights and Good Governance in Europe's Four Seas Basins*, EU4seas papers, Politics and Security (October 2009), available at www.eu4seas.eu.

[6] A clear and forceful statement regarding the growing concern of international institutions to offer a more varied and pluralistic set of policy options for developing countries is found in a statement by Robert B. Zoellick, President of the World Bank, in 2010, entitled "Democratizing development economics", available at http://web.worldbank.org. For a perspective on the way international financial institutions and developing countries interact, see Francisco Sagasti, Keith Bezanson and Fernando Prada, *The Future of Development Financing: Challenges and Strategic Choices* (Basingstoke, United Kingdom, Palgrave Macmillan, 2005) and Francisco Sagasti and Fernando Prada, "The effectiveness of hemispheric cooperation", OAS-Inter-American Council for Integral Development (CIDI) document OEA/Ser.W/II.4-CIDI/RECOOP/INF.4/09 prepared for the Specialized CIDI Meeting of High-Level Cooperation Authorities, Bogotá (October 2009).

[7] At the same time, financial globalization—and the discipline imposed by international markets on macroeconomic policies—may prove more important for middle-income countries with access to global sources of private capital than the conditions set by the financial institutions. This suggests the need for some kind of mechanism to reduce the potentially destabilizing influence that volatile international capital markets can have on developing countries, which may affect negatively their efforts to embark on a rights-based approach to development. The 2008-2009 financial and economic crises made this abundantly clear.

Similarly, in parallel with the widespread international support regarding the promotion, protection and fulfilment of human rights, international governmental and non-governmental organizations and civil society are playing a larger role in fostering democratic governance (international supervision of elections, assistance with the design of electoral systems), protecting the environment (financing conservation efforts, alerting on potential environmental disasters) and in promoting social and cultural equity (gender awareness campaigns, protection of indigenous peoples).

Thus, over the last several decades, international pressures from public, private and civil society organizations are coming together to link human rights and democratic governance. In this sense, we can speak of a broad-based consensus on the mutually reinforcing character of rights-based approaches to development and the support and promotion of democratic governance.

III. Rights-based approaches to development, exclusion and poverty

It is useful to relate the identification of possible interventions to advance a human rights approach to development to the reduction of different types of poverty and the elimination of the various forms of exclusion associated with each of them. This perspective also helps to define the role of the international community in promoting economic, political and social rights.

It is possible to distinguish between three types of poverty in most developing countries. The first is endemic poverty, which affects people with extremely low standards of living, with a high proportion of unsatisfied basic needs, without access to labour markets and social services and without the possibility of having their voices heard. These are people for whom poverty has a historical and cultural dimension that goes back decades and even centuries, and who usually remain rather isolated from the modern segments of society. The second is chronic poverty, which affects those who generally live in the marginal urban areas and in some of the relatively more developed rural areas. They have greater access to social services, even if these are of rather low quality and do not adequately satisfy their needs. Most of them belong to the informal sector and have been forced to generate their own livelihoods, frequently in family-centred activities and under conditions close to self-exploitation. The third is circumstantial poverty, which affects primarily those who, even though they have access to reasonable social services and can make their voices heard, have lost their jobs, find it difficult to participate in the formal economy, or do not receive adequate salaries, primarily because of recurrent economic crises or temporary shortfalls of income.[8]

Table 1 below summarizes the relationship between the types of poverty and the forms of exclusion—economic, social and political—that are peculiar to each. These forms of exclusion imply the negation of certain specific human rights (rights to work, education, food, non-discrimination and political participation, among others), and a rights-based approach to development would seek to reduce poverty through the elimination of these three types of exclusion.

Table 1: Relationship between types of poverty and exclusion

Type of poverty	Type of exclusion		
	Economic	Social	Political
Circumstantial	High	Low	Low
Chronic	High	Moderate	Low
Endemic	High	High	High

Endemic poverty involves these three dimensions of exclusion: the endemic poor are economically, socially and politically excluded. Productive employment opportunities are very limited, social services non-existent or of extremely low quality, their voices are not heard and they lack channels to participate effectively as citizens in the country's political life. In addition, they generally do not have fluid and continuous access to transport and other means of communication with the rest of the country and the outside world.

Chronic poverty is directly related to economic exclusion due to the obstacles faced by this type of poor to access the formal labour markets and to social exclusion because of the low quality of the social services they receive and the multiple forms of discrimination they are subjected to. They are usually not affected by political exclusion; indeed, they participate actively in electoral processes, have access to mass media, and there are channels—neighbour-

[8] For a more elaborate description of the interactions between poverty and exclusion, see Francisco Sagasti, "Tipología de la pobreza y dimensiones de la exclusión en el Perú", FORO Nacional Internacional, 2008, available at www.foro-nacional-internacional.pe, where other dimensions of exclusion—cognitive-cultural, environmental-resource, knowledge and the exclusion of future generations—are also considered.

hood organizations, trade unions, religious groups, non-governmental organizations, and even street protests—through which they can air their views. As a result, politicians assiduously court the chronic poor, especially at election times.

Circumstantial poverty is characterized mainly by economic exclusion, and affects those who have had access to education and other social services and whose poverty is the result of economic crises that reduce income levels significantly and diminish purchasing power. They do not feel the impact of social and economic exclusion to the same degree as the endemic and the chronic poor. For this reason, they are the first to benefit from economic growth and stability, and from the expansion of productive and service capacities that create employment.

A reduction, and the eventual elimination, of economic exclusion may be achieved through productive transformation, which should lead to an efficient, productive and competitive economic system, to the effective use of market mechanisms and Government regulation for equitable and fair resource allocation and to a viable and sustainable process of accumulation. In addition to sensible macroeconomic policies to maintain stability, productive transformation requires a series of active market-friendly sector polices aimed at increasing productivity, improving competitiveness and seeking a more favourable insertion into the international division of labour. Such productive transformation would allow the country to generate a level of economic activity and redistribution policies consistent with the right to development for all.

A reduction and the elimination of social exclusion is the result of the process of social democratization, which should lead to the elimination of extreme inequalities and all forms of discrimination, to equal opportunities for all, to the provision of good quality basic social services for everyone, particularly health and education, and to an untrammelled respect for individual human rights. Social democratization would lead to a more vigorous and active civil society and to a more socially and culturally integrated and peaceful country. In addition to the provision of social services, policies to generate employment, measures to achieve a more equitable distribution of income and programmes to assist the poorest of the poor are also required to pave the way for the realization of the right to development for all.

A significant reduction and the elimination of political exclusion is achieved through the process of legitimization of State institutions and citizen participation, which should aim at articulating a viable political community with a shared sense of the common good, of history and of the future, and which should lead to representative and efficient State institutions that citizens could identify as their own. This requires political and administrative reforms to bring State institutions at all levels, from central to local governments, closer to the people and promote participation; measures to ensure public accountability; and initiatives to make the exercise of power and authority more open, transparent and participatory. Such initiatives would go a long way towards ensuring the realization of the right to development, including civil and political rights.

The three processes aimed at reducing exclusion and poverty and at advancing a rights-based approach to development interact closely with each other, although each one proceeds at its own pace, at times reinforcing or blocking the other two. Sometimes democratization moves faster than productive transformation and legitimization experiences major setbacks; at other times productive transformation advances significantly without commensurate progress in democratization or legitimization; and there are situations when productive transformation is halted and democratization obstructed, but legitimization does not suffer as much as the other two processes.

Reducing social exclusion through democratization requires a vigorous and efficient economy that is able to grow and to generate wealth, and also a legitimate State capable of creating an environment favourable to economic progress and of redistributing the benefits of growth in an equitable manner, consistent with the right to development. Reducing economic exclusion through productive transformation requires a legitimate State with the capacity to provide public services, implement adequate policies and regulate markets, and also the support of a democratized society that appreciates the benefits of growth. Reducing political exclusion through legitimization requires a modern economy capable of growing in a sustained manner and of providing tax revenues to the State, as well as a more integrated society in which all citizens participate actively in public life.

The interactions between these three processes find concrete expression in a social compact, which, in turn, should underpin a fiscal compact between all segments of society—political leaders, civil servants, members of civil society organizations and the business community, among others. The fiscal compact would aim at providing the State with a tax base that

allows Government institutions to function effectively, maintain economic and social stability and provide security and other public services, particularly those associated with poverty reduction and achieving human rights. These agreements should rest on a broad consensus on the role of the State, on the need to gradually integrate the informal sector into the formal economy so that it receives public services, social security and increased job security in exchange for paying taxes, and on the recognition that, while the poor may not pay taxes, they contribute—through voluntary work, collective undertakings and social mobilization—to the provision of some public goods and social services and to the creation of human social capital. The social and fiscal compacts should ensure that State expenditures reach a level commensurate with the provision of a reasonably adequate level of basic social services to all.[9]

What have been called "national dialogues" could play a significant role in forging the social consensus necessary to underpin the initiatives associated with a rights-based approach to development, poverty reduction and the elimination of exclusion. These processes aim at generating consensus on the main strategic directions for development with a long-term horizon, which would find expression in a set of "State policies" rather than "Government policies", i.e., the policies of the party in power, which all political forces and parties, the private sector and civil society commit to uphold in successive Governments.[10]

While past habits and practices could make the consensus-building exercise of a national dialogue a difficult proposition in many developing countries, should Governments be willing to launch such a process, and political and civil society leaders be willing to participate, it may be possible to overcome some of the severe limitations that usually prevent the articulation of a shared vision of the future and make it difficult to approach it. This may open opportunities for strategic and sustained interventions to advance human rights, reduce poverty and eliminate the various forms of exclusion by combining initiatives from Government, civil society and the private sector at all levels.

[9] For a review of the experience with public dialogues in Peru and Latin America, see Ada Piazze and Nicolás Flaño, eds., *Diálogo Social en América Latina: Un Camino Hacia la Democracia Ciudadana* (Washington, D.C., Inter-American Development Bank, 2005).

[10] For an analysis of the Peruvian experience with the "*Acuerdo Nacional*" as a forum for dialogue, see Max Hernández, *Acuerdo Nacional, Pasado, Presente y Futuro* (Lima, International Institute for Democracy and Electoral Assistance, 2004), available from www.idea.int.

IV. Role of the international community in rights-based approaches to development

The international community has an important but complementary role to play in the complex processes of putting in practice rights-based approaches to development. Human rights considerations can be introduced into development assistance interventions in two ways, first by ensuring that these interventions take explicitly into account the various facets involved in a rights-based approach to development. The idea is to mainstream human rights concerns, incorporating these factors into the design and execution of financial and technical assistance programmes in a variety of fields such as education, health, nutrition, population, agriculture, industry, trade, infrastructure, macroeconomic policy reform, participation, governance and so on.

In addition, it is necessary to take into account the impact of development assistance interventions on the cultural and biophysical contexts, so as to avoid disruptions and unintended negative consequences. This has been the experience in conflict-prone settings where development assistance programmes, designed without an awareness of deep-rooted cultural factors, have sometimes exacerbated ethnic, social or political tensions, ignited violence and led to the violation of human rights. In general, some variation of the "do no harm" or "when in doubt, abstain" precautionary principle appears to be in order when taking into account such contextual factors. However, this should not lead to paralysis or inaction, but rather to more informed and explicit judgements regarding the impact of development interventions to promote human rights.

The second way in which human rights considerations are incorporated into development assistance programmes is by designing and implementing interventions specifically aimed at eliminating exclusion, reducing poverty and promoting empowerment and participation. These interventions can be related to the processes of productive transformation, social democratization and State legitimization, and are informed and influenced by human rights-based approaches to development. They aim at reducing economic, social and political exclusion, primarily by building the capacities in the private, civil society and public sectors and by putting into practice interventions that steer institutional change in the medium term. Each of these three processes will be briefly examined in turn.

Productive transformation. Initiatives in this category refer to the changes in the productive system to make it capable of sustained growth and of creating wealth. Three such initiatives are highlighted below:

(a) Programmes to create new business opportunities and improve the productivity of local firms, and especially small and medium enterprises, so as to generate surpluses for domestic investment and to improve competitiveness in foreign and local markets. These include management and technical assistance programmes (quality control, marketing, waste reduction, process streamlining, technology management, extension services), initiatives to improve the policy environment for the private sector (investment promotion, competition policies, industrial and trade policies, financial policies) and measures to facilitate the operation of productive enterprises (administrative simplification, reduction of bureaucratic requirements). Programmes of this type have been quite common for bilateral agencies and, to a lesser extent, for international financial institutions and private foundations. This category also includes initiatives to help achieve a sustainable use of natural resources, in particular renewable resources (biodiversity, forests, soil, fisheries, aquaculture), and coping with the effects of climate change. This is an important area that has not received sufficient attention and which requires research, studies and pilot programmes to learn more about these resources, as well as to learn how to conserve and use them in a sustainable manner;

(b) Programmes to improve the performance of the informal sector, which should be particularly targeted to the small and micro-enterprises that generate most of the jobs in poor countries. This includes training activities, the provision of appropriate technology packages, the supply of technical information, the simplification of tax collection mechanisms and measures to improve access to credit. There is a need for experimentation with potentially replicable programmes to improve the quality of self-generated jobs, for these jobs will dominate the employment scene in many developing countries for at least for a generation;

(c) Programmes to evaluate and learn from the experience of past public policies and those of countries in a similar situation. In particular, there is the need to take stock of economic policy reforms such as privatization of public services (energy, water, telecommunications, transport), financial liberalization and changes in the tax and fiscal systems. As the debate on such policies has become highly charged and tinted with ideological considerations, there is an urgent need for a sober and dispassionate assessment of how these reforms are actually carried out and of their impact, with the aim of learning from experience and improving public policies to foster modernization.

Social democratization. Initiatives in this category refer to the reduction of inequalities, the promotion of dignified living, the creation of opportunities for the poor and the provision of basic social services. The international community has played an important role in four types of initiatives, especially during the last decade and a half:

(a) Initiatives to design, organize, launch and coordinate special poverty reduction and social emergency programmes, in particular those aimed at reducing endemic poverty. As public sector resources are clearly insufficient to reduce poverty, there have emerged a number of public-private-civil society partnerships (preventive health services, nutrition programmes for children, employment programmes for women) in which public funding, mobilization and volunteer work by beneficiaries, private sector provision of some goods and services, and development assistance have all converged. The international community can help to evaluate the results of these partnerships, to assess their impact and possible replication, and also assist in the design of more appropriate poverty reduction interventions that are consistent both with human rights and right to development approaches;

(b) Initiatives to help improve the provision of basic social services provided by the public sector. Only a very small minority has access to private education and health services and, in general, the quality of public

services in developing countries is rather low. The administrative, financial and technical challenges involved in reforming public-health, education, water supply, sanitation, transport, telecommunications, energy and housing are daunting, and joint efforts between public, private and civil society entities are essential to achieve lasting improvements. These initiatives need to be sustained for several decades to bear fruit, and improvements will be slow at the beginning. However, after overcoming bureaucratic inertia and the opposition of special interest groups, progress is likely to proceed at a faster pace. For this reason it is necessary to have a clear vision of what should be achieved in the medium and long run, while at the same time taking small but firm steps to approach the vision;

(c) Initiatives targeted at reducing the social exclusion of particularly vulnerable groups, such as children with disabilities, old and destitute people, indigenous communities, children orphaned as a result of terrorism and civil wars, and victims of domestic violence. These initiatives should be highly focused and complement public services and poverty reduction programmes, and have often been sponsored by international and national non-governmental organizations;

(d) Initiatives aimed at strengthening civil society organizations, many of which play a leading role in a variety of fields related to social democratization. This involves support for human rights organizations, grassroots groups and local associations active in poverty reduction, and organizations that promote transparency, fairness and accountability in public sector activities.

State legitimization. Initiatives in this category refer to changes in the way the State and Government organizations work and respond to citizen demands. They aim at making State institutions more efficient and representative and to promote citizen participation in public affairs. The international community has played a role in five types of initiatives falling into this category through public sector reform programmes, most of which have focused on improving the capacity of the central Government and of local governments:

(a) Initiatives to help clarify and consolidate the role that the State should play in the economic and social life of the country. In most developing countries, the inconsistencies and contradictions of arguments regarding the role of the State during the last 30 years have left a legacy of confusion that must be overcome. Debates on this issue are clouded by ideological positions, vested interests and unrealistic expectations which underscore the need for clear thinking on what the State could and should do in developing countries during the coming decades. The international community can help in raising the level of debate by providing information on the situation of other countries, promoting the exchange of experiences, supporting research and studies, providing fellowships for young professionals interested in public sector issues and making available the expertise of senior policymakers on the role of the State in economic and social development;

(b) Initiatives to strengthen the role of political parties and their political intermediation role. This is a rather difficult area of intervention for the international community, primarily because of the risk of undue interference in domestic political affairs and the risk of favouring one or other political group (although some foundations with political party ties do precisely this). However, it is possible to identify programmes that could strengthen the political system as a whole and could help to consolidate democratic governance. These include training programmes for political leaders, assistance in the design of electoral systems that could lead to greater political stability and the provision of information on the experience of other countries facing similar processes of political disintermediation;

(c) Initiatives to modify the incentives that condition the behaviour of political leaders, aligning them so as to promote public sector reforms. This is also a difficult area for the international community in which to intervene, primarily because of the short-term gains and losses for one or another political group that are involved.

Yet, considering the political system and the State apparatus as a whole, it is possible to identify specific initiatives—which should be conceived and placed within a broader framework of substantive institutional reforms—that would lead to a more efficient and representative State. In addition to greater transparency, accountability, openness and participation, these would include changing the rules of the electoral process (for example, to balance territorial with functional representation), changes in the way candidates for political office are designated (for example, substituting or complementing decisions by party leaders for internal primary elections) and modifications in the terms of office (to disengage presidential and congressional elections). The idea is to create an incentive system for political actors that would induce behaviour congruent with institutional reforms and also be compatible with the objective of reducing poverty. Learning about the experience of other countries would be most valuable in this regard;

(d) Initiatives to strengthen and improve the functioning and guarantee the independence of the judiciary so as to ensure the protection of human rights and the punishment of those who violate human rights. An independent and well-functioning judicial branch is essential in preventing and combating corruption and to make sure that all citizens have equal access to legal recourse to resolve their conflicts and to obtain redress;

(e) Initiatives to promote decentralization and the devolution of decision-making powers to lower government instances. This has been a long-standing demand of peoples outside metropolitan areas in developing countries which has usually been ignored by political leaders in the central Government. However, the way in which decentralization and the closely related concepts of "de-concentration" and "regionalization" are understood will condition the nature and impact of such initiatives. The international community should support decentralization while pointing out its risks.

V. Actors in the international development assistance community and their roles

Many actors take part in the design and implementation of development interventions within the framework of rights-based approaches. At the national level there are public, private and civil society organizations, and there are also political actors that link all of these with the State apparatus. At the international level, public institutions can be divided into multilateral and bilateral agencies and the first of these comprise international financial institutions (multilateral development banks, the International Monetary Fund (IMF), special funds), as well as international institutions of a political and normative nature (the United Nations system, regional bodies).[11]

Yet, the main actors in rights-based approaches are national organizations. Eliminating endemic poverty is primarily a responsibility of public sector institutions under the strong leadership of political actors. Civil society organizations play a complementary role and the private sector a minor one. The reduction of chronic poverty requires joint interventions by the State and civil society, which in turn should have the support of political actors; private sector entities, and small enterprises in particular, play an important but complementary role. Reducing circumstantial poverty is primarily a task for the private sector with the support of public policies and institutions, with civil society playing a limited role.

International public, civil society and private actors play roles similar to those of their national counterparts in the reduction of the three types of poverty, but with some important variations. In contrast to the domestic private sector, foreign firms play only a limited role in the reduction of circumstantial poverty, while international financial institutions influence significantly the modernization policies aimed at reducing this type of poverty. Bilateral agencies, multilateral institutions and international civil society organizations are increasingly involved in the design, implementation and financing of projects to reduce chronic poverty. On the other hand, international financial institutions, and the international community in general, have a very limited role in addressing endemic poverty.

[11] International assistance is paying greater attention to human rights issues. As Roger Riddell has pointed out, "some donors have started more explicitly to base aid-giving decisions on the human rights records of recipient Governments, in particular by reducing or halting completely the flow of aid to countries whose record on basic human rights they assess as seriously deficient" (Roger C. Riddell, *Does Foreign Aid Really Work?* (New York, Oxford University Press, 2007), p. 92).

It is difficult to venture suggestions on the specific roles that the various international institutions should play in a rights-based approach. They operate through many different financial, technical assistance and information-exchange instruments, and by utilizing their convening power to forge consensus at the country level. The potential for cross-sector synergies is enhanced through policy harmonization and the coordination of the activities and interventions of the different international institutions, as well as through more effective coordination with their national counterparts to advance human rights.

Intergovernmental organizations such as the United Nations and regional organizations have primarily a normative and technical assistance function, but have limited resources to initiate rights-based-approach interventions. These institutions are perceived as more neutral than international financial institutions, and frequently are a source of alternative policy advice to developing countries. They can disseminate information, foster the exchange of experiences, organize and launch demonstration projects, provide technical assistance to policymakers, arrange the provision of public goods and use their convening power to organize dialogues and promote consensus on rights-based interventions at the national and local levels.[12] In many developing countries they have played all of these roles at different times during the last three decades. There is a need for evaluating their experiences and assessing their future roles in the light of the large number of poverty reduction strategy papers and other strategy documents promoted by international organizations in low-income countries The United Nations Development Assistance Framework, which should be prepared by all United Nations agencies under the coordination of the United Nations Development Programme, should specify the activities and programmes each agency should focus on.

International financial institutions, and the multilateral development banks in particular, play three roles: a financing role at the country level; a development role that focuses on building capacities; and a role in helping to finance the provision of global and regional public goods. They can back their advice and policy recommendations with substantial financing, and their involvement in rights-based approaches focuses primarily on the fulfilment of economic, and to a lesser extent social rights, through the provision of large-scale financing for social, productive and infrastructure projects and by supporting administrative and policy reforms to improve the provision of basic social services, to ensure economic stability and to promote growth. However, this does not necessarily mean that in practice their interventions comply with rights-based approaches, nor that they are governed in accordance with democratic practices. For example, IMF deals primarily with short-term financing, although its conditions for access to resources under its control are primarily related to the maintenance of economic stability. However, these conditions usually have important consequences for rights-based approaches and should be carefully examined in terms of their implications. For this purpose, the Government needs a greater capacity to negotiate with international financial institutions. This requires both the articulation of a national development strategy, which should be developed with the active, effective and meaningful participation of all stakeholders, including representatives from relevant ministries, civil society, non-governmental organizations and academics, and the organization of a team of experts, including experienced negotiators, researchers and academics who should have an intimate knowledge of how these institutions operate.

Bilateral development assistance agencies usually have resources at a level somewhere between the tens and hundreds of millions of dollars that are at the disposal of international financial institutions and the tens of thousands that are available to international organizations. In addition, they respond to the foreign and development assistance policies of their own Governments and can be more selective in their involvement in promoting specific aspects of right to development approaches. As a consequence, they have more freedom to experiment with and test alternative ways of promoting development, for example, in the provision of primary health care, in training primary school teachers and in helping to respond to environmental challenges. Their involvement in promoting institutional changes in a particular field or region can be sustained over relatively long periods of half a decade or more, which allows them to see the results of their interventions to a larger extent than other international actors.

International civil society organizations have played a relatively minor role in development assistance, although in some specific fields they have had a major impact. For example, in the environmental field civil society organizations, together with private international foundations, have played a leading role in conservation efforts and in preserving some cultural

[12] On the provision and financing of global and regional public goods, see Sagasti, Bezanson and Prada, *The Future of Development Financing*.

Table 2: **Poverty, exclusion and rights-based approaches to development: Illustrative examples of the role of national and international actors**

Exclusion / Poverty	Economic	Social	Political	National			International			
				State institutions	Civil society	Private sector	Public institutions: International financial institutions	Public institutions: Bilaterals	International civil society	Private sector
Circumstantial	High	Low	None	The private sector and State institutions are primarily responsible for achieving economic growth and reducing economic exclusion.			International financial institutions play an important but supporting role. Bilateral agencies can lobby to remove trade barriers that block exports and hamper growth in developing countries.			
Chronic	High	Medium	Low	In addition to the role of the private sector in reducing economic exclusion, State institutions and civil society organizations play the major roles in reducing social exclusion.			In addition to the above, bilateral agencies, international financial institutions and international non-governmental organizations can contribute to the elimination of social exclusion.			
Endemic	High	High	High	In addition to what is stated above, the main protagonists in eliminating political exclusion is the State, while civil society has a limited role and the private sector plays practically no role.			International entities play a limited role in eliminating political exclusion, with minor exceptions for the international financial institutions and an occasional supporting role for international civil society.			
	State legitimization			• Become more efficient and representative • Openness, transparency, accountability • Improve participation • Change incentives for political actors	• Hold government institutions accountable • Mobilize public opinion for democratic governance and practices	• Reject corrupt practices • Be a good taxpayer	• Avoid supporting authoritarian rule	• Support civil society organizations • Exert pressure on the Government for democratic governance	• Assist in democratic transitions • Support programmes to bring the State closer to the people	• Report corruption in Government • Be a good corporate citizen
	Social democratization			• Improve provision of basic social services • Eliminate discrimination • Poverty reduction programmes • Special programmes for disadvantaged groups	• Participate actively in poverty reduction programmes • Become involved in the provision of basic social services • Demand equity, fairness and efficiency in the delivery of social services	• Social responsibility programmes • Philanthropic activities	• Be sensitive to social demands that are reflected in requests for increased public spending	• Finance special programmes aimed at poverty reduction • Spread best practices	• Uphold respect for human rights • Denounce discrimination and human rights violations • Assist in programmes to reduce inequalities and improve equity	• Social responsibility programmes • Community development initiatives
	Productive transformation			• Create favourable policy environment for investment and growth • Provide services to productive sector • Policies to "formalize" the informal sector	• Consumer protection programmes • Provision of services to members of professional and business associations	• Create wealth to achieve economic growth • Improve efficiency of productive activities • Increase exports • Small and micro enterprises should gradually abandon informality	• Support of local productive initiatives • Assist in the transformation of economic structures	• Provide technical and managerial assistance to private sector • Special programmes for small and informal enterprises	• Provide information about export markets • Assist small firms in complying with foreign standards and regulations • Help achieve environmental sustainability	• Upgrade capabilities of local suppliers • Help in developing human resources • Expand investments in the country

traditions. Similar remarks apply to the international private sector, for foreign investors have not played a major role in rights-based approaches, except in the cases where social and corporate responsibility activities have led to the establishment of community development programmes in the areas adjacent to their centres of operation. Private foundations have played a limited but significant role in a few fields, such as scientific and technological research (seed development, alternative sources of energy, environment) and the provision of some social services (family planning, vaccination, education for girls). Their advantage lies in the great freedom they have to experiment, explore and take risks with new approaches to poverty reduction interventions, for they are not subjected to the same accountability constraints faced by publicly financed bilateral agencies and international organizations.

International community initiatives to foster a rights-based approach can be related to the different types of poverty and exclusion and to the three processes of productive transformation, social democratization and political legitimization of the State. Table 2 provides a few illustrative examples of the types of interventions that the various national and international actors can play in these processes.

VI. Concluding remarks

This paper has briefly reviewed the interactions between a human rights approach to development and democratic governance, the various forms of exclusion that lead to denials of human rights and the types of interventions that are necessary to put in practice processes that would remove the various types of exclusion and create the conditions for people-centred development.

The main idea is that promoting a human rights approach to development requires simultaneous advances in the three processes of social democratization, which reduces inequalities and social exclusion; productive transformation, which establishes a vigorous economy capable of removing economic exclusion; and State legitimization, which creates a representative and efficient State apparatus that eliminates political exclusion.

The various actors in the international community, including public, private and civil society entities, have different roles to play in these three processes. Yet the primary responsibility for putting into practice a human rights approach to development remains at the national level, which requires that political, economic and social elites become aware of the responsibility they bear for advancing towards a prosperous, inclusive and free society for all.

Nevertheless, even though the primary responsibility is national, an enabling international environment is required to facilitate this process, consistent with the right to development. Among other things, this right requires greater democratic governance of international organizations, and particularly international financial institutions. It is not possible to delink national democratic governance from its counterpart at the international level without jeopardizing the implementation of a rights-based approach to development and the right to development.

Poverty

*Irene I. Hadiprayitno**

I. Introduction

The contemporary challenge of poverty eradication entails not only improving the situation of the poor living in least developed countries but also of millions living in middle-income countries such as Brazil, China, India and South Africa. Economic growth and a rise in national incomes have resulted in greater inequalities and social gaps, which deepen the severity of poverty. Thus, addressing poverty requires structural change and not just overcoming lack of income, food or shelter.

The global poor, condensed by Paul Collier in the expression "the bottom billion",[1] face social, cultural and political challenges, characterized by the absence of access to basic services, goods, resources and utilities and in restrained capabilities. Arjun Sengupta, former Independent Expert on both the question of human rights and extreme poverty (2004-2008) and the right to development (1999-2004), depicted extreme poverty as "a combination of income poverty, human development poverty and social exclusion" (E/CN.4/2005/49, para. 22). Substantively, these challenges involve parallel processes of marginalization of the poor, including persistent discrimination, insecurity and denial of justice and redress, which inevitably require different measures and approaches and which are often outside the control of the poor. Sengupta argued, "People living in poverty are typically victims of discrimination on grounds such as birth, property, national and social origin, race, colour, gender and religion. Patterns of discrimination keep people in poverty which in turn serves to perpetuate discriminatory attitudes and practices against them. In other words, discrimination causes poverty but poverty also causes discrimination" (A/63/274, para. 29).

This issue may be addressed in the context of the human right to development, which is composed of several norms concerning the process of development. Starting from the principle that all human rights must be realized in development processes,[2] the right to development considers development as a process that encompasses economic, social, cultural and political aspects.[3] It requires raising both living standards and the capabilities of the poor. This chapter will analyse theories regarding the definition of poverty and how the right to development tackles poverty within the context of these theories. In doing so, it will first examine the connection between development processes and poverty through the lens of the right to development.

The right to development as an "umbrella right"[4] focuses on two novel features: fair distribution of the benefits of development and popular participation. Specific attention will be given to these two elements—which distinguish this right from other economic,

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[1] Paul Collier, The Bottom billion: Why the Poorest Countries Are Failing and What Can Be Done About It (New York, Oxford University Press, 2007).

[2] "Report of the Independent Expert on the right to development" (see A/55/306, paras. 15-25).

[3] Article 1 (1) of the Declaration on the Right to Development refers to "economic, social, cultural and political development". See also footnote 13 below.

[4] Amartya Sen, "Human rights and development", in *Development as a Human Right: Legal, Political and Economic Dimensions*, Bård A. Andreassen and Stephen P. Marks, eds., 2nd ed. (Intersentia, 2010), p.11.

social, cultural and political rights—to explore and explain the connection between the right to development and improving not only the living conditions of the poor, but also their capabilities, choices and level of empowerment.

Emphasis will be placed on efforts to eradicate poverty and address persistent inequality. This means ensuring that development measures aimed at improving the fulfilment of rights and access to services have a critical and transformative impact, which in turn would foster structural improvements. The chapter will also examine how participation contributes to inclusive pro-poor development practices. Finally, it will explore how the right to development can bring new insights to the understanding of poverty eradication from a human rights perspective at the global level.

II. Poverty and the right to development: a close relationship

Although the idea of charity for the underprivileged has been present in Western history from early times, the drawing of an arbitrary line to distinguish the poor from the non-poor can be traced back to England in the 1880s. The concept is accredited to Charles Booth,[5] who undertook to classify London's society statistically into four categories on the basis of daily income.

The "poverty line" was then defined in strictly economic terms, independent of social aspects. Measurability and quantification were crucial for the success of this approach. Since Booth's work, many countries have adopted different criteria for the definition of poverty through income grouping. The World Bank played a major role in establishing the first unified international standard for the measurement of poverty in the 1990s with reference to those earning less than $1 a day.[6] In 2000 the United Nations consolidated this approach by adopting the Millennium Development Goals, particularly goal 1, aimed at the eradication of extreme poverty and hunger.

Although income-based poverty has spread during the twentieth century and beyond, the excessive focus on earning revenue has been the subject of intense criticism, flowing from what is viewed as an oversimplification of the issue. New theories have emerged regarding the phenomenon of poverty as multidimensional, involving unsustainable livelihoods, lack of access to basic services, discrimination, social exclusion and restrictions on freedom to participate in the community and to explore one's capabilities. Multi-dimensionality has progressively become a dominant scholarly approach, including among economists.

Nobel economics laureate Amartya Sen was responsible for introducing the capabilities approach, which is concerned with social choice in terms of rights and freedoms, and indirectly draws on traditional utilitarian welfare economics.[7] With time, academic knowledge spilled over into the international policymaking arena. Lately, international organizations have turned to a socioeconomic perspective on problems, inasmuch as all major multilateral institutions today consider poverty as multidimensional. The World Bank understands poverty as "pronounced deprivation in well-being, comprising many dimensions that range from low incomes and low levels of health and education, to the lack of voice, and insufficient capacity and opportunity to better one's life".[8] The United Nations Secretariat, in particular the Division for Social Policy and Development of the Department of Economic and Social Affairs, shares this vision, perceiving poverty as entailing "more than the lack of income and productive resources to ensure sustainable livelihoods", to include "hunger and malnutrition, limited access to education and other basic services, social discrimination and exclusion as well as the lack of participation in decision-making".[9] The United Nations Development Programme (UNDP) in its annual Human Development Report uses a threefold Human Development Index encompassing health (life expectancy), education (mean number of years of schooling) and living standards (gross domestic product (GDP) per capita). This is a measure of human development and not necessarily of individual poverty. However, despite not being a poverty indicator per se, the Human Development Index is intrinsically related to poverty through this novel multidimensional outlook. Amartya Sen, an early proponent of the Index in the 1990s, recently proposed, in partnership with Oxford University, a framework called the Multidimen-

[5] Charles Booth, *Life and Labour of the People in London*, 17 volumes (London, Macmillan,1902-1903).

[6] New Economics Foundation, *How Poor Is 'Poor'?: Towards a Rights-Based Poverty Line* (April 2008), available from www.neweconomics.org. The World Bank currently defines "extreme poverty" as average daily consumption of $1.25 or less. See http://data.worldbank.org.

[7] Amartya Sen, *Commodities and Capabilities* (Amsterdam, North Holland, 1985) and Amartya Sen, *Development as Freedom* (Oxford, Oxford University Press, 1999).

[8] See World Bank, *World Development Report 2000/2001: Attacking Poverty* (New York, Oxford University Press, 2000).

[9] See http://social.un.org/index/Poverty.aspx.

sional Poverty Index, using 10 indicators to reinforce the tripartite structure.[10]

Along with the use of indices to grasp the complexity of the concept of poverty, a trend to examine poverty through a human rights lens has emerged. The focus here is on the aspects of poverty that reflect situations of human rights violations; this builds upon the proposition that poverty is a denial of human rights.[11] The lack of access to food prevents the poor from breaking free from hunger. Vulnerability to retrenchment without social protection subjects them to income insecurity. Discrimination experienced in social and political life deprives them of their dignity. These circumstances are regarded as violations of human rights because they affect the ability of people to live a dignified life.[12]

In her report to the General Assembly, the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, elucidates State policies as essential factors in the poverty-human rights contention: "States have long recognized that poverty is a complex human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other economic, civil, cultural, political and social rights. Poverty is not an autonomous choice, but rather a multifaceted situation from which it may be difficult, if not impossible, to escape without assistance" (A/66/265, para. 5). Sepúlveda argues that the poor are often regarded as "authors of their own misfortune, who can remedy their situation by simply 'trying harder'"; they are also perceived as "lazy, irresponsible ... dishonest, undeserving and even criminal" (ibid., para. 7). Penalization and stigmatization distance these people from social policies and weaken empowerment efforts, thus sustaining and magnifying their large-scale destitution.

As mentioned above, the current understanding of poverty goes beyond income deprivation and addresses an array of social impairments and misplaced policies. This multidimensional perspective is consistent with the right to development as articulated in the Declaration. Recognition of the inherent relationship between poverty and the denial of human rights is integral to the right to development, which emphasizes the indivisibility and interdependence of all human rights. Thus, failure to respect, protect and fulfil basic entitlements and the principle of non-discrimination would constitute violations of the right to development. In this regard, the High Commissioner for Human Rights explicitly referred to the clear link between poverty and non-fulfilment of the right to development when she said, "It's not an act of nature that leaves more than 1 billion people around the world locked in the jaws of poverty. It's a result of the denial of their fundamental human right to development."[13]

Article 1 (1) of the Declaration states that "every human person and all peoples are entitled to *participate* in, *contribute* to, and *enjoy* economic, social, cultural and political development" (emphasis added). One could claim that these three aspects would constitute a normative core of this right and each must be appropriately interpreted in order to realize the full empowering potential of the right. "Participate" could be understood as knowing and taking part in debate, public hearings and consultations concerning development initiatives. "Contribute" could add to participating, since it conveys the idea of having one's disapprovals, critiques and proposals taken into account and jointly partaking in the tailoring of policy. Furthermore, "enjoy" would correspond to an actual equitable benefit from development outcomes to individuals and peoples. This broad interpretation is consistent with the wording of the Declaration's preamble, which constitutes the lens through which the text can be interpreted:[14]

> *Recognizing* that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Therefore, it could be argued that this right basically has a twofold specificity: sensu lato popular participation, and fair distribution of benefits resulting from development. Sensu lato participation comprises both "participate" and "contribute", and fair distribution of benefits is an unfolding of the "enjoy" core.

The dominant economic paradigm tends to compress the problem of poverty into statistics, with

[10] Oxford Poverty and Human Development Initiative, *Multidimensional Poverty Index*. Available at www.ophi.org.uk/policy/multidimensional-poverty-index/.
[11] Siddiq R. Osmani, "Human Rights and Poverty: Building on the Capability Approach", *Journal of Human Development*, vol. 6, No. 2 (2006), p. 206.
[12] Sen, "Human rights and development", p. 3.
[13] "Declaration on the Right to Development at 25", statement made on the twenty-fifth anniversary of the Declaration, available at www.un.org/en/events/righttodevelopment/.
[14] Sengupta, "The human right to development", in Andreassen and Marks, p. 21.

economic development and aggregated figures of economic growth being treated as the origin of as well as the solution to poverty. However, even among the countries that experienced marked economic growth, extreme poverty continues to affect significant parts of the population. In this context, one needs to look at the arrangements behind development processes: how institutions are carrying out development projects and how policies are shaped; which priorities they uphold; and, most importantly, how such arrangements benefit some and victimize others. Displacement, food insecurity, unemployment and vulnerability to morbidity may result from development projects and policies that emphasize economic growth only.

Adverse impacts of the development process resulting in extreme poverty habitually occur because of people's inadequate command over the distribution of benefits. As illustrated by the phenomenon of economic growth along with the emergence of the "bottom billion", growth is not necessarily neutral, let alone pro-poor; it can also be anti-poor.[15] Additionally, development policies imposed from above, without any opportunity for the beneficiaries to participate in the decision-making process, may also lead to an increase in poverty. It is essential to have opportunities to correct and intervene in policies, not only to ensure that development will fulfil basic needs, but also that it will achieve its critical transformative value. In both instances, vested interests may impose policies on people who are perceived as powerless. Human rights offer a framework for challenging these trends, as they provide legal protection of human dignity, and development processes must be undertaken in a context of accountability in order that those living in disadvantaged and vulnerable positions do not face negative impacts as a result.

The right to development helps to close this protection gap. Indeed, it requires that the primary emphasis in designing development policies be placed on how to protect people from possible adverse consequences and, in particular, from the abuse of power at the initial and execution stages of development processes. The right to development entitles rights holders to a fair distribution of benefits and to participation. The next section will discuss the connection of these two entitlements with the structural improvement of capabilities, choice and power in the eradication of poverty.

[15] Bas de Gaay Fortman, *The Political Economy of Human Rights: Rights, Reality and Realization* (New York, Routledge, 2011), p. 148.

III. Fair distribution of benefits

A quite distinguishable feature of the right to development is the fair distribution of the benefits of development, which is reaffirmed several times in the Declaration. Article 8 (1) calls on States to "undertake, at the national level, all necessary measures for the realization of the right to development and … ensure … fair distribution of income". In a similar vein, article 2 (3) affirms that: "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 … participation in development and in the fair distribution of the benefits resulting therefrom." Although the concept of fair distribution is repeated several times, the Declaration does not explain how it ought to be implemented.

In order to understand what a fair distribution of benefits is, one must first analyse what "fair" means in this context. A brief reference to justice theories is useful to clarify the concept of fairness. One can consider justice—or fairness[16]—an overarching concept, which encompasses both equality (or formal equality) and equity (or substantive equality). Such a divide is evidenced in the work of John Rawls, who proposes that justice is an ethical concept encompassing two main principles. The first is described as the principle of liberty where "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others".[17] This is what could be called "formal equality", where everyone is equal and discrimination is forbidden. Sensu stricto equality would translate essentially into something situated outside of law while the precept of non-discrimination appears as its legal expression. The second principle relates to social and economic inequalities and applies to the distribution of income and wealth and to the design of organizations that make use of differences in authority. Offices of command must be accessible to all.[18] Therefore, distribution of income and wealth is determinant for attaining justice. Rawls's second principle relates to Aristotelian distributive justice, which refers to the sharing among people with regard to proportionality considerations.[19] In this framework, fairness demands combining formal equality—also enshrined in the Declaration's anti-discriminatory general principle—with substantive equality. Complying with the

[16] For the purposes of this chapter, the words "justice" and "fairness" shall be used interchangeably.
[17] John Rawls, *A Theory of Justice* (New York, Oxford University Press, 1971) p. 60.
[18] Ibid., p. 61.
[19] Ibid.

right to development would therefore require both of these elements.

Far from being an abstract speculation, this twofold concept of fairness has already had tangible implications in various international human rights instruments, which recognize that the achievement of a substantively equalitarian society cannot rely solely on *de juris* restrictions. The Human Rights Committee affirmed in its general comment No. 4 (1981) on gender equality: "Firstly, article 3, as articles 2 (1) and 26 insofar as those articles primarily deal with the prevention of discrimination on a number of grounds, among which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights." The International Convention on the Elimination of All Forms of Racial Discrimination similarly states in article 1 (4): "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination ..." Also, the Convention on the Rights of Persons with Disabilities reaffirms this idea in article 5 (4): "Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination ..." In brief, fairness demands action.

Development processes that unravel because of existing, marginalizing structures violate the right to development since the provision on the fair distribution of benefits implies that development processes must have beneficial effects and that these effects must be fairly distributed among the beneficiaries of development. In other words, development processes are to be designed to serve impartially and to be favourable to all the beneficiaries of development, and in particular to those who are vulnerable to the adverse effects of development projects or programmes. The concept of fair distribution of benefits should be interpreted in a holistic manner; this demands recognition that, in many cases, pursuing human-centred development requires the economic means for realizing many human rights entitlements.[20] However, the normative goals contained in the right to development also demand that the structure of production and institutional arrangements be adjusted to serve this ideal.

Furthermore, after its inclusion in the Declaration on the Right to Development, the entitlement to a fair distribution of benefits was again reaffirmed in part I, paragraph 11, of the Vienna Declaration and Programme of Action, which extends the notion of equitable access to the benefits of development to embrace the notion of intergenerational fairness: "The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations." Such developmental needs include, for example, employment, education, health, nutrition, housing facilities, crime prevention and the well-being of children.[21]

Fairness, particularly in terms of equality, is not simply a theoretical and moral concern. The requirement of the distribution of wealth originating from development also has concrete consequences for the enjoyment of other protected human rights. Michael Marmot, in a study on the impacts of social discrepancies in health standards, has acknowledged the impact of social disparities on the living conditions of society as a whole, even among the non-poor.[22] Findings indicate that the mere existence of inequalities is reflected in differentiated enjoyment of the right to health. There is a huge gap in the life expectancy of people living in the same city in the United Kingdom and between the poor black neighbourhoods and well-off white counties in the United States.[23] Though many developing countries still lack disaggregated data to allow similar analysis, the pattern seems to be recurrent wherever inequality exists. These findings are striking since in developed countries such as the United Kingdom and the United States healthcare services are widely available and the extremely poor are far fewer in number when compared to most developing countries. Therefore, how can social imbalances, by themselves, have such a considerable impact on the enjoyment of this human right? Marmot

[20] As Amartya Sen has argued, "development economics was born at a time when government involvement in deliberately fostering economic growth in general, and industrialization in particular was very rare, and when the typical rates of capital accumulation were quite low. That situation has changed in many respects, and, while that may suggest the need to emphasize different issues, it does not in any way invalidate the wisdom of the strategies ... suggested" (Amartya Sen, "Development: which way now?", *The Economic Journal*, vol. 93 (December 1983), p. 752).

[21] The General Assembly, in its resolution 45/87, entitled "World social situation", states in its preamble that "the pace of development in the developing countries should be accelerated substantially in order to enable them to achieve [policies and practices that hinder social progress], especially to meet the basic needs for food, housing, education, employment and health care and to struggle against scourges which endanger the health and well-being of their population".

[22] Michael Marmot, "Health in an unequal world", lecture before the Royal College of Physicians, London (18 October 2006), published in *The Lancet*, vol. 368, No. 9552 (9 December 2006), p. 2083.

[23] Donald Acheson, *Independent Inquiry into Inequalities in Health Report* (London, The Stationery Office, 1998); Mel Bartley, *Health Inequality: An Introduction to Theories, Concepts and Methods* (Oxford and Cambridge, Polity Press, 2004); Lisa F. Berkman, "Social epidemiology: social determinants of health in the United States: are we losing ground?", *Annual Review of Public Health*, vol. 30, Issue 1 (2009), pp. 27-41.

considers good health to be intrinsically related to the elements of capabilities and freedoms as put forward by Amartya Sen. He asserts:

> Above a level where material deprivation is no longer the main issue, absolute income is less important than how much one has relative to others. Relative income is important because, as Sen states, it translates into capabilities. In rich countries, autonomy and social inclusion might influence disease through their effect on health behaviours such as nutrition, smoking, or alcohol, or through more direct neuroendocrine pathways, i.e., chronic stress. Similarly, at the community level empowerment could lead to better availability of resources for health, or operate through psychosocial processes linked to social capital.[24]

The evidence found in relation to the right to health shows that inequality can indeed play a significant role in the realization of human rights and that the question is therefore not simply a moral argument against social injustice. A case could also be made for other rights, such as the right to education—years of schooling and highest grade reached differ substantially between poorer and richer segments of the population—or freedom of expression and assembly, which the dispossessed feel unable to exercise for material or psychological reasons. If inequality is an obstacle to the enjoyment of human rights, an equitable distribution of wealth becomes a decisive variable for the overall system of protection of human rights, as well as for the advantages stemming from development.

The analogy can be extended to address the negative effects of development processes. Important among such effects is the increasing vulnerability of people resulting from large-scale development projects. Such vulnerabilities may point to Governments' failure to meet their obligations to respect, protect and fulfil fair distribution of benefits. To meet their obligations, it is essential that States structure their budgets, legal systems and development projects so as to avoid or minimize harm, and ensure that those who reap the benefits are held accountable for compensating for damage from any harmful effects on the population.

The Special Rapporteur on extreme poverty and human rights in her country missions has added practical recommendations on how States could undertake a fair distribution of benefits. In her report on her visit to Timor-Leste, Sepúlveda voiced concern about adequate budgetary allocations for social policies and called on the Government to ensure "that social protection programmes reach the most vulnerable as a matter of priority" (A/HRC/20/25/Add.1, para. 84 (e)). In her report on the her mission to Paraguay, she observed the unfair situation in that country, where the poorest 10 per cent of population pays 18 per cent of their income in taxes while the richest 10 per cent pays only 4.6 per cent of their income; moreover, the country is the only one in Latin America to not have income-based taxes (A/HRC/20/25/Add.2, para. 44).

Large-scale infrastructure development projects frequently fail to guarantee a fair distribution of benefits. In particular, the poor do not benefit from megaprojects, such as the construction of dams,[25] and mega-events, such as international sports competitions, which may push them further into vulnerability. Not only do the poor suffer material losses, but the projects also disrupt social life and displace people from their communal habitats. In accordance with the right to development, States have the duty to adopt, first, measures to protect against damage caused by an unjust distribution of development benefits and, second, to ensure access to remedies for harm caused by or attributable to development programmes, policies or projects. The issue of large-scale development projects has become a major subject on the human rights agenda, both domestically and internationally. Social movements, activists and experts have called attention to the adverse effects of such projects. The former Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living presented in a 2007 report basic principles and guidelines on development-based evictions and displacement, condemning disruptive development initiatives and recommending the adoption of policies that provide for popular participation, adequate compensation and proper resettlement schemes (A/HRC/4/18, annex I). Likewise, the current Rapporteur, in her 2009 report, referred to major international sports events such as the Olympic Games and the football World Cup, addressing the State's role in implementing pro-poor development (A/HRC/13/20, paras. 36-67).

The idea of equity in terms of the fair distribution of benefits underscores the potential of the right to development as a framework of processes for facilitating a fuller realization of other human rights. It addresses States' obligations to deal with structural and systemic factors attributable to increasingly com-

[24] Marmot, "Health in an unequal world", *The Lancet*, p. 2087.

[25] An example is the construction of the Sardar Sarovar dam in India, which, while causing displacement and loss of land and livelihoods for millions living around the Narmada Valley, also delivered benefits for some people. See Ranjit Dwivedi, "Why some people resist and others do not: local perceptions and actions over displacement risks on the Sardar Sarovar", The Hague Institute of Social Studies, Working Paper Series No. 265 (December 1997), p. 4.

plex combinations of development actors, processes and consequences. Notably, development processes must be adopted to take account of the connections and disconnections among development-related actors, policies and laws in a non-homogeneous and non-harmonious society.

IV. Participation

Beyond the fair distribution of benefits, equity, as understood in the context of the right to development, also calls for the creation of equal opportunities in addressing social exclusion. Social exclusion results from either the systematic exclusion of poor people from having choices and using their capabilities, or more circumscribed social, political, economic or cultural barriers to their participation. Whether through deliberate or circumstantial marginalization, social exclusion reinforced and perpetuates poverty.[26] Temporary access to income or a temporary fulfilment of basic needs does not generally address such deeper facets of poverty. The entitlement of participation as stipulated in the Declaration on the Right to Development seeks to advance social inclusion, in particular promoting the central role of individuals and peoples in the decision-making on and evaluation of development processes.

Scholars highlight at least two benefits of participatory development. First, a Government that makes key decisions without transparency and without providing its population adequate access to information makes it impossible for people to develop informed opinions about policies that are critical to their lives and well-being; this weakens the accountability of decision-making.[27] The policies derived from that process are not only in accordance with popular interests, but have also attained accountability through a justified decision-making process.

Second, participation might add to the process of empowerment of the people. This means that through participation, people can actually learn by reacting to and assessing development policies. It develops the self-reliance necessary among, for instance, rural people seeking redress for damages or injuries.[28] In particular, empowerment implies people's capacity to claim and exercise their rights effectively.[29]

The Declaration on the Right to Development suggests two ways of looking at participation. The first approach considers participation as an entitlement initiated by the State. Under article 2 (3), quoted above, States are obliged to design development policies through a process of participation. A second approach to participation emphasizes the perspectives of right holders. Article 8 (2) of the Declaration says: "States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights." Notably, the term "popular participation" implies the necessity of an enabling environment to facilitate initiatives from the right holders themselves.

Articles 2 (3) and 8 (2) emphasize participation as a cross-cutting principle for implementing the right to development, which led Konrad Ginther to characterize this right as a "participatory right".[30] Participation has been emphasized both as a means to an end and as an end in itself. In this way, participation may serve as a tool that is "effective in mobilizing human and natural resources and combating inequalities, discrimination, poverty and exclusion".[31] Yet, the effectiveness of participation has to be assessed subjectively, based on the views of the affected persons.[32] In other words, the entitlement of participation allows people to make decisions collectively, actively and with genuine power, to choose representative organizations and to have freedom of democratic action free from interference.[33]

This way of looking at participation is useful because, as stated above, poverty reduces individuals' and communities' capacity to exercise their voice and power to take part in development processes. In some circumstances, structures of participation may require top-down initiatives in which the State invites participatory actions during the formulation and execution of development policies. However, such initiatives may not be sufficient to empower the poor.[34] By contrast, it

[26] Stephen C. Smith, *Ending Global Poverty: A Guide to What Works* (New York, Palgrave Macmillan, 2005), p. 127.
[27] Joseph Stiglitz, "Participation and development: perspectives from the comprehensive development paradigm", in *Democracy, Market Economics and Development: An Asian Perspective*, F. Iqbal and Jong-il You, eds. (Washington, D.C., World Bank, 2001), p. 52.
[28] U.J. Lele, *The Design of Rural Development: Lessons from Africa* (Baltimore, Johns Hopkins Press, 1975), p. 150.
[29] Jakob Kirkemann Hansen and Hans Otto Sanno, "The implications and value added of a rights-based approach", in Andreassen and Marks (see footnote 4), p. 62.
[30] Konrad Ginther, "Participation and accountability: two aspects of the internal and international dimension of the right to development", *Third World Legal Studies*, vol. 11 (1992), pp. 55-57.
[31] "Global Consultation on the Right to Development as a Human Right" (E/CN.4/1990/9/Rev.1), para. 150. See also chapter 3 in this publication.
[32] Rajeev Malhotra, "Towards implementing the right to development: a framework for indicators and monitoring methods", in Andreassen and Marks (see footnote 4), p. 258.
[33] E/CN.4/1990/9/Rev.1, para. 147.
[34] In this regard, Yash Ghai once explained that "[a] participatory process should avoid the perils of spontaneity and populism. It must address the

is through bottom-up actions, in which rights holders take the initiative themselves, that the loss of voice and power imbalances can be remedied.

Apart from the strong reference to participation, and more specifically to free, active and meaningful participation, in the Declaration on the Right to Development, its value has been reaffirmed by States in other forums. In the early 2000s, the Commission on Human Rights mandated the drafting of guiding principles on extreme poverty and human rights, in an attempt to develop a coherent theoretical framework on the subject. Draft guidelines were submitted to the Human Rights Council at its second session in 2006. Pursuant to Council resolution 12/19, the Independent Expert on the question of human rights and extreme poverty presented a report containing her recommendations for improving the draft guidelines. While elaboration of these principles is an ongoing process, in her report Sepúlveda asserted the importance of participation in the guiding principles and recommended "the creation of specific mechanisms and institutional arrangements through which persons living in extreme poverty can effectively and meaningfully participate in all stages of decision-making processes that affect them … [and] measures to remove obstacles to participation, such as lack of meaningful and accessible information and opportunity costs, and create enabling conditions for the inclusion of persons living in extreme poverty in participatory processes". She added that "[t]hese measures should include enhancing the capacity of individuals, community-based organizations, social movements and other non-governmental organizations that give visibility to those in extreme poverty" and emphasized the role of institutional arrangements and mechanisms for effective popular participation (A/HRC/15/41, para. 48).

The full incorporation of the right to development into the structure of the State[35] can promote social inclusion and address structural obstacles, such as the centralization or abuse of power, misallocation of resources or lack of democratic processes that lead to marginalization and impoverishment. Such obstacles may occur in the rules and regulations as well as social practices and political procedures that govern not only development processes but also the implementation of human rights. In this respect, incorporating the entitlement to participation in domestic legal orders becomes crucial in order to create a firm legal basis for people to assess their participation in all stages of development, to address the culpability for development harms[36] and to seek compensation for lost entitlements, including social exclusion. This legal basis for participation remains necessary since there is still no other well-established modus operandi for integrating participatory processes in development.

V. The global environment, poverty and the right to development

While the obligation of States towards their own populations in relation to the right to development is largely accepted, at least in principle, international agreements on trade and market relations also influence how States control domestic resources and how people benefit from development. The intricacies and interconnections of the global economy reflected in international agreements on trade, investment, finance and market relations pose critical challenges for efforts to eradicate persistent poverty. With the increasing transfer of capital and resources in an era of globalization, certain structural obstacles to developing countries' anti-poverty strategies lie beyond the control of those countries. Furthermore, the causes of and possible solutions to unsustainable foreign debt, the widening gap between rich and poor and the absence of equitable multilateral trade, investment and financial systems implies that it is increasingly impossible to assume that the Governments of developing countries can act in isolation to eradicate poverty.

Scholarly works on the connection between international arrangements in trade and market relations, especially trade liberalization, and inequality and poverty have led to mixed conclusions.[37] Global trade negotiations are widely criticized for having failed to incorporate poverty reduction considerations. The insistence of affluent countries on asymmetrical protection of their markets through tariffs, quotas, anti-dumping duties, export credits, as well as subsidies to domestic producers greatly impairs export opportunities for poor countries and regions.

issue of whether the people are sufficiently prepared, both psychologically and intellectually, to engage in the process; how to solicit views of the public and special and organized groups and how to analyse, assess, balance and incorporate these views. The engagement cannot be 'one off' but must be continuous and include fresh opportunities to comment on the draft and meaningful forms of participation afterwards. Transparency and integrity throughout the process are essential to win and sustain people's trust and confidence and to guard against the dangers of manipulation." Yash Ghai, "Redesigning the State for 'right to development'", in Andreassen and Marks (see footnote 4) p. 185.

[35] Ibid., p. 182.

[36] Osmani, "Human rights and poverty: building on the capability approach", p. 336.

[37] David Dollar and Aart Kraay, "Trade, growth and poverty", *The Economic Journal*, vol. 114, Issue 493 (February 2004), p. 493.

To address the workings of the global political economy that increase poverty, the Declaration on the Right to Development includes the general duty of all States to cooperate with each other in ensuring development and eliminating obstacles to development (art. 3 (3)). In article 4 (1) the Declaration proclaims: "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." This article reflects the role of the State within the international community to ensure that the external setting is supportive of a human-centred development process. However, it does not specify what steps must be taken by the State in its role as facilitator of an enabling environment for the right to development.[38] However, the way in which this role would be exercised touches upon the international context of power relationships and hierarchies and on how these relations affect the poor at the domestic level.

Thomas Pogge's invocation of the "negative moral duty" of the international community to avoid causing harm is pertinent here. In the context of economic, social and cultural rights, the positive duty to rescue people from life-threatening poverty is frequently recognized. However, Pogge notes, a focus on positive duty can deflect attention from more stringent negative duties, in particular, the negative duties not to expose people to life-threatening poverty and to shield them from harm, which demand urgent consideration.[39] Crucially, these duties do not lie exclusively at the domestic or international level. Thus, Pogge underscores Governments' responsibility for their populations, but rejects a narrow "explanatory nationalism" that would view domestic choices as sole determinants of countries' trajectories.[40] An exclusive focus on global political, economic and institutional relationships would likewise be misleading. Pogge considers that global-level failures to meet negative duties make it urgent to recognize the multiple and interconnected levels of poverty eradication. In particular, national solutions to poverty may be futile in the face of grave global inequalities; such inequalities, Pogge argues, stem from global institutional arrangements that impose unjust and avoidable burdens.

Concretely, developing countries are thus called on to design their economic institutions and policies so as to curb severe poverty within their borders. As stated above, not only are such domestic measures diverse and context-specific—one country might maximize open and free markets, while others might emphasize labour-intensive policies or accelerate investments in health care, education and infrastructural development—but they may also have consequences for other countries. Changes in the control and availability of productive land may influence a country's agricultural investments in other countries, with implications for those countries' efforts at poverty eradication.[41] States thus must consider the effects of their policies on other countries and be accountable for the impact of those policies. Since the impact of resource control and benefits distribution transcend national boundaries, States are obliged to contribute to institutional reform aimed at protecting the victims of poverty, through international cooperation based on social justice.[42] With regard to the obligation not to cause harm, scholarly and policy debates tend to focus on how international arrangements affect the poor, but they should also assess various ways of promoting choices, capability and power through the control of resources and the distribution of benefits as part of the general duty of all States to cooperate in eliminating obstacles to development, as stipulated in the Declaration. The right to development asserts that international cooperation should be conceived and executed through a multilateral process that grants equal access to both developed and developing countries, as well as multilateral agencies and international institutions.[43] The issue of political voice has become the central debate in global efforts on poverty reduction from the human rights perspective. However, while scholarly discussion on poverty and human rights advances, politicians and economists continue to be reluctant to move the discussion from economic growth or increase in per capita GDP through technocratic policies to dealing with poverty in a human rights-informed way. For example, promoting human rights through international development cooperation on the basis of resource and benefit control aimed at enhancing people's choices, capacities and power is at times perceived as unwarranted interference in domestic affairs. Critics of international development cooperation often resist raising concerns over what they perceive as non-economic factors in dealing

[38] See, for example, James Crawford, *The Rights of Peoples* (Clarendon Press, 1988), p. 159.
[39] Thomas Pogge, *World Poverty and Human Rights,* 2nd ed. (Cambridge, Polity Press, 2008), pp. 23-25.
[40] Thomas Pogge, "Do Rawls' two theories of justice fit together?", in *Rawls's Law of Peoples: A Realistic Utopia?*, Rex Martin and David A. Reidy, eds. (Oxford, Blackwell Publishing, 2006), pp. 206-226.
[41] Joachim von Braun and Ruth Meinzen-Dick, "'Land grabbing' by foreign investors in developing countries: risks and opportunities", International Food Policy Research Institute, IFPRI Policy Brief 13 (April 2009).
[42] Pogge, *World Poverty and Human Rights*, p. 26.
[43] Sengupta, "The human right to development", in Andreassen and Marks (see footnote 4), pp. 43-44.

with development partners. These challenges have contributed to a sustained disconnection between programmes aimed at the eradication of poverty and human rights policies.

Scholarly and political debates have begun searching for alternative structures and mandates in order for the International Monetary Fund, the World Bank and the World Trade Organization to take greater account of human rights.[44] Both the Fund and the World Bank currently require a poverty reduction strategy paper as a prerequisite for granting loans or financial assistance to States. In a joint review of these poverty reduction strategies the World Bank and IMF affirmed that country-driven approaches with broad-based participation are core principles of their policy.[45] These approaches strengthen a country's environment for governance and accountability, and are premised on participation contributing to higher- quality strategies. Similar debates are also taking place in official development assistance (ODA) forums such as the Organisation for Economic Co-operation and Development, which conditions aid on respect for human rights standards, transparency, accountability and participatory involvement. Developing countries and civil society have repeatedly criticized the way aid is often used as a neocolonial tool by developed countrie, imposing policy conditionalities on developing countries and tying aid to commercial, political and military interests of donors.[46]

In contrast, South-South cooperation is an increasingly influential source of ODA, as countries like Brazil, China, India, Saudi Arabia and the Bolivarian Republic of Venezuela emerge as donors. This form of aid is based on the principles of non-interference in internal affairs, equality among development partners and respect for their independence, national sovereignty, cultural diversity and identity, and local content.[47] Nonetheless, civil society organizations have also voiced concerns over these "neutral" aid arrangements, after witnessing systematic human rights violations, poor working conditions and non–compliance with environmental safety regulations[48] with no penalization or withdrawal of aid from donors. Furthermore, key elements of the right to development also seem to be overlooked, as there is hardly ever any mention of citizens' or even parliamentary participation in steering these initiatives. ODA from the emerging donors has been restricted to the Government-to-Government level, pursued in purely commercial undertakings and with little opportunity for civil society participation.[49] With the lack of transparency, there is little room for assessing a fair distribution of benefits, and even less for the possibility of constructive participation.

At the international level, the Millennium Development Goals are by and large the internationally agreed goals for global efforts to eradicate poverty. Closely connected to the subject of poverty and the right to development are goals 1 and 8, which respectively aim to eradicate extreme poverty and to develop a global partnership for development. However, the deadline for reaching the Goals is only a few years away, and priorities will need to be revisited. Soon the post-2015 Development Agenda will be redesigned, and the economic focus on poverty is likely to be revised to include a multidimensional perspective to the phenomenon. If this takes place, the elements of popular participation and fair distribution of benefits will certainly become eligible for inclusion as indicators, and development may start to be seen and assessed as a measure of how well States implement the right to development.

Furthermore, using such a holistic assessment tool, it is also imperative to inquire into how national policies support or reject the existing institutional arrangements at the international level to identify different standards imposed by Governments and non-State actors who are benefiting from these arrangements. Reforms of institutional arrangements pertaining to the rules, relationships, values and practices structuring the global economy have a profound impact on global economic distribution, just as those within a State have a profound effect on domestic economic distribution and participation in development policies.

VI. Concluding remarks

Poverty is a complex human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living.[50] The right to development is a framework

[44] For a comprehensive analysis on this topic, see Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford, Hart, 2003); or Willem van Genugten, Paul Hunt and Susan Mathews, eds., *World Bank, IMF and Human Rights* (Nijmegen, the Netherlands, Wolf Legal Publishers, 2003).
[45] World Bank and International Monetary Fund, "2005 review of the PRS approach: balancing accountabilities and scaling up results" (September 2005).
[46] Reality of Aid, "South-South development cooperation: a challenge to the aid system?", Special Report on South-South Cooperation, 2010, p. 1.
[47] Ibid., pp. 1-2.
[48] Ibid., p. 14.
[49] Ibid., p. 16.
[50] Committee on Economic, Social and Cultural Rights, "Poverty and the International Covenant on Economic, Social and Cultural Rights" (E/C.12/2001/10), para. 8.

in which such a perspective becomes a human rights concern. It establishes that systemic denials of control over resources and distribution of the benefits of development are human rights violations insofar as they negatively affect the capacity, choices and power of those living in vulnerable and disadvantaged conditions.

The right to development emphasizes the relationship between rights and duties to assess the processes pertaining to development. The connection is made in the entitlement to a fair distribution of benefits. This entitlement implies that non-fulfilment takes place whenever development does not deliver benefits for everyone concerned or, conversely, harms or otherwise negatively affects rights holders. The entitlement to participation adds the requirement that the rights holders be meaningfully engaged in the process of development. The aim is to qualify the development process as a comprehensive effort that combines the fulfilment of basic needs and the advancement of choices and capabilities.

Human rights traditionally regulate the relationship between the State and its citizens. With regard to development processes, one would need another equation. As argued in this chapter, development is a complex domain with a multiplicity of actors and processes, which should all be addressed in such an equation. The Declaration on the Right to Development is based on the assumption that the dominant actors in the international economy will assume greater responsibility for the damages, imbalances and inequalities that originate from their practices. With its attendant concepts of social inclusion and equity in both the national and global contexts, the right to development draws on established development discourses as well as human rights in order to consolidate its position as a fundamental driver of development policy.

Following the 25-year mark, it is time to consider new sources of institutional support, revitalize the right to development and foster its incorporation into the international economy. A shift in focus onto a fair distribution of benefits and participation as stipulated in the Declaration on the Right to Development could facilitate such incorporation, for example, in the current trade negotiations, which appear to skirt human rights considerations, and in other institutional settings. Such a shift would also have implications for productivity in the international economy and lead to a re-examination of international economic and trade policies in the light of their impacts on social exclusion and the elimination of persistent poverty.

Women, human rights and development

*Fareda Banda**

One half of the world's population is systematically discriminated against and denied opportunity, for the 'crime' of having a female chromosome.[1]

I. Introduction

Women's equal right to development has been called a universal good.[2] However, the realization of their right to development is beset by challenges rooted in the inequalities that pervade their lives.[3] For women, the right to development does not simply require consideration of how income poverty, understood as lack of money and resources, influences their ability to enjoy their human rights; human poverty, in the sense of women's lack of voice and participation in decision-making within their families and societies, also impacts upon their lives and further reinforces their powerlessness.[4]

This chapter aims at analysing the historical evolution of the relationship between women, the right to development and human rights based-approaches, with reference to the main theoretical components that have supported the debate on women's issues, the fight for gender equality and the progressive development of international law in this regard. In order to do so, the chapter starts with a historical overview of the conceptual approaches to women and development as they evolved within the framework of the United Nations Decade for Women. It proceeds to analyse the Declaration on the Right to Development from a gender perspective. It then goes on to examine the adoption of a human rights-based approach to development before moving on to an assessment of the efficacy of the right to development for women. Thereafter, the chapter attempts to integrate a gender perspective into human rights at the international as well regional (African) levels. Finally, the United Nations Millennium Declaration and the Millennium Development Goals are also examined from a gender perspective.

II. From development to women's rights in the United Nations system

Equality, peace and development were central themes of the United Nations Decade for Women

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[1] Kevin Watkins, *The Oxfam Poverty Report* (Oxford, Oxfam Publishing, 1995), p. 2.

[2] United Nations Development Programme (UNDP), *Human Development Report 1995: Gender and Human Development* (New York, Oxford University Press, 1995); World Bank, *Engendering Development:Through Gender, Equality in Rights, Resources, and Voice* (New York, Oxford University Press, 2001), p. 100; Nicholas D. Kristof and Sheryl WuDunn, *Half the Sky: Turning Oppression into Opportunity for Women Worldwide* (London, Virago, 2010), pp. xxi-xxii.

[3] See the reports of the Secretary-General entitled "Effective mobilization and integration of women in development: gender issues in macroeconomic policymaking and development planning" (A/50/399); "Women in development" (A/62/187); and *World Survey on the Role of Women in Development* (A/64/93).

[4] These categories are based on UNDP, *Human Development Report 2000: Human Rights and Development* (New York, Oxford University Press, 2000), p. 17, where "human poverty" is defined as "deprivations in a long and healthy life, in knowledge, in a decent standard of living, in participation". The policy objectives on gender and development of the international development organization Oxfam focus on issues pertaining to both money and human development. See Oxfam, *The Oxfam Handbook of Development and Relief*, D. Eade and S. Williams, eds. (Oxford, Oxfam GB,1995), pp. 171-172; Sakiko Fukuda-Parr, "The human development paradigm: operationalizing Sen's ideas on capabilities" in *Amartya Sen's Work and Ideas: A Gender Perspective*, Bina Agarwal, Jane Humphries and Ingrid Robeyns, eds. (New York, Routledge, 2005), pp. 303-320; "Montréal Principles on Women's Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol. 26, No. 3 (2004), pp. 760-780.

(1976-1985). This period was characterized by increased attention to the economic disenfranchisement and poverty of women and their deprivation of related rights, due in part to the influence of feminist development practitioners.[5] Since the numbers of women in governmental delegations have been small, women's organizations and movements have played an important role in bringing the views of women into the United Nations.[6] Women's movements have been pivotal not only for mainstreaming women's rights and gender issues in general but also for promoting the transition from each of these approaches to the other, continuously aspiring for greater equality and empowerment.

During the Decade for Women, there was a conceptual evolution from women in development (WID), to women and development (WAD) and, finally, to gender and development (GAD).[7]

The first United Nations-sponsored women's conference, held in Mexico City in 1975, assessed conditions leading to women's poverty and highlighted the importance of integrating women into development.[8] The focus reflected the women in development critique of the prevailing development model. Ester Boserup had argued that the existing development discourse ignored women's contribution to national production. She further argued that this was the case as a result of gender-based stereotyping which located women solely within the domestic sphere: "Various colonial and post-colonial governments had systematically bypassed women in the diffusion of new technologies, extension services and other productive inputs."[9]

The women in development approach is considered a landmark in the critique of development models from a women-based perspective. Female economic activities were critically examined and new light was shed on existing conceptions of traditional housework. The approach exposed how the conventional economic rationale for work involving women undermined their work and masked the magnitude of their economic role in society. Under the rubric women in development, the recognition that women's experience of development and of societal change differed from that of men was institutionalized and it became legitimate for research to focus specifically on women's experiences and perceptions.[10] Naila Kabeer has noted that Boserup and other women in development advocates were crucial in shifting the focus of development discourse from welfare to equality.[11]

Apart from creating a fresh outlook for women in the economic arena, the Mexico City conference also called for the drafting of the Convention on the Elimination of All Forms of Discrimination against Women.[12] It set targets for the enactment of equality legislation and declared the following 10 years the United Nations Decade for Women. Targets were also set for the improvement of women's access to economic, social and cultural rights, including improvements in health, reproductive services and sanitation. After the conference, the General Assembly adopted several resolutions relating to women in development.[13]

The period after the conference was taken up with drafting the Convention, which was adopted in 1979.[14] The Convention's preamble states that a "new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women". The women in development approach is embodied in article 14 of the Convention, which focuses on rural women and calls on States to ensure that women "participate in and benefit from rural development" and also that they "participate in the elaboration and implementation of development planning at all levels".[15] Participation is an important component of the right to development, as discussed below. The article also emphasizes the importance of women having access to education, health care, marketing facilities and appropriate tech-

[5] Typical of this influence was the "buzz" generated by Ester Boserup's *Women's Role in Economic Development* (London, Earthscan, 1970).

[6] Charlotte Bunch, "Women and gender: the evolution of women specific institutions and gender integration at the United Nations" in *The Oxford Handbook on the United Nations*, Thomas G. Weiss and Sam Daws, eds. (Oxford University Press, 2007). An edited version of the chapter is available at www.rci.rutgers.edu/~cwgl/globalcenter/charlotte/UN-Handbook.pdf.

[7] N. Kabeer, *Reversed Realities: Gender Hierarchies in Development Thought* (London, Verso, 2003), pp. 1-11; Eva M. Rathgeber, "WID, WAD, GAD: trends in research and practice", *Journal of Developing Areas,* vol. 24, No. 4 (1990), p. 489.

[8] World Plan of Action for the Implementation of the Objectives of the International Women's Year, *Report of the World Conference of the International Women's Year, Mexico City, 19 June-2 July 1975* (United Nations publication, Sales No. E.76.IV.1), Part one, chap. II, sect. A, paras. 8, 9, 14, 16, 18, 22, 145, 147 and 163-169.

[9] Kabeer, *Reversed Realities*, p. 6.

[10] Rathgeber, "WID, WAD, GAD", p. 491.

[11] Ibid.

[12] World Plan of Action, para. 198. See also A. González Martínez, "Rights of rural women: examples from Latin America," in *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women*, Hanna Schopp-Schilling and Cees Flinterman, eds. (Feminist Press, 2007), p. 212.

[13] Resolutions 3522 (XXX) on the improvement of the economic status of women for their effective and speedy participation in the development of their countries; 3523 (XXX) on women in rural areas; 3524 (XXX) on measures for the integration of women in development.

[14] Resolution 34/180, annex.

[15] See F. Banda, "Article 14" in *The UN Convention on on the Elimination of All Forms of Discrimination Against Women: A Commentary*, M. Freeman, C. Chinkin and B. Rudolf, eds. (Oxford, Oxford University Press, 2012), pp. 357-385 and L. Pruitt, "CEDAW and rural development: empowering women with law from the top down, activism from the bottom up", *Baltimore Law Review*, vol. 41 (2012), p. 263.

nology as well as adequate living conditions, including water, electricity, housing and transport and, of course, access to land, loans and credit.

With its focus on modernization through the process of integrating women into pre-existing development practices, the women in development approach was soon criticized for its failure to challenge the gender-biased structuring of many societies and development programmes, the effect of which was to exclude women. It began to be understood as primarily an "add-on" to existing development policies.[16] Specifically, this approach failed to factor women's reproductive and informal-sector work into its analyses. It also treated women as a homogenized category, missing the impact of intersectional discrimination as a result of class and race.[17] In short, this liberal feminist model failed to have a transformative effect on the lives of women.[18] Gender neutrality ignored gendered structural inequalities which had, and indeed continue to have, negative effects on women. The exclusive economic focus of "integrating women into development" often translated into exploitation of women as the targets of top-down development policies.[19] From these critiques emerged the women and development approach.[20]

The women and development approach was introduced in the late 1970s and considered the economic activities performed by women both inside and outside the home as essential for the survival of the family unit[21] and, as such, part of the development process. The women and development approach further argued that the failure to integrate women as economic actors in their societies contributed to sustaining existing international structures of inequality. It aimed at recognizing the concerns of women as occupying a separate, but overlapping, space with the concerns of development.[22] However, women and development was criticized for overlooking the major influence of the ideology of patriarchy and thus being insufficiently gendered. It was also criticized for its failure to engage with issues of dependency (of third world States and women) on international capital and the resultant inequalities. The lack of class as a category of analysis was also critiqued.[23]

The next phase saw greater attention being paid to gender. The concept of gender and development was defined as referring to the ways in which roles, attitudes, privileges, and relationships regarding women and men are socially constructed, and how gender shapes the experience of males as well as females.[24] The gender and development approach was theoretically rooted in socialist feminism and focused on the analyses of: (a) the social constructions of gender, questioning the validity of roles, responsibilities and expectations assigned to women and men in different societies; and (b) why women were systematically assigned inferior or secondary roles. Moreover, it saw women as agents of change rather than passive recipients of development assistance. Its ultimate objective was a substantial re-examination and recalibration of social structures and institutions leading to the loss of power by ingrained elites.[25] This approach, which aims at challenging structural discrimination, has remained the dominant approach, including in feminist human rights jurisprudence.[26] It is also the approach adopted by the Committee on the Elimination of Discrimination against Women (CEDAW).[27]

After the initial breakthrough in Mexico, a mid-Decade World Conference on Women was held in Copenhagen in 1980. In addition to providing the now oft-quoted, but since discredited, statistic that while women "represent 50% of the world adult population and one third of the official labour force, they perform nearly two thirds of all working hours, receive only one tenth of the world income and own less than one third of world property",[28] the conference also served the purpose of launching the Convention, which had then been opened for signature. Held at the height of the debate between developed and developing countries about the need for a new international economic order, the conference resulted in a call for the redistribution of resources and demands that women

[16] Hope Lewis, "Women (under)development: the relevance of 'the right to development' to poor women of color in the United States", *Law and Policy*, vol. 18, Issue 2-3 (July 1996), p. 288.
[17] Rathgeber, "WID, WAD, GAD" (see footnote 7), pp. 491-492; Kabeer, *Reversed Realities* (see footnote 7), pp. 27-39.
[18] S. Fredman, "Engendering socio-economic rights", *South Africa Journal of Human Rights*, vol. 25, part. 3 (2009), pp. 410-441.
[19] Lewis, "Women (under)development", p. 293.
[20] Kabeer, *Reversed Realities* (see footnote 7), pp. 40-68.
[21] Gine Zwart, "From women in development to gender and development: more than a change in terminology?" *Agenda*, No. 14 (1992), p. 16,
[22] Lewis, "Women (under)development", p. 288.
[23] Rathgeber, "WID, WAD, GAD" (see footnote 7), pp. 492-493.
[24] Bunch, "Women and gender" (see footnote 6), p. 1. See also United Nations, *1999 World Survey on the Role of Women in Development: Globalization, Gender and Work* (New York, 1999), p. ix.
[25] Rathgeber, "WID, WAD, GAD" (see footnote 7), pp. 494-495. See also Kabeer, *Reversed Realities* (see footnote 7), pp.46-64.
[26] R. Holtmaat, "Article 5", in *The UN Convention on on the Elimination of All Forms of Discrimination Against Women: A Commentary*, pp. 141-167. See also R. Cook and S. Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010).
[27] See CEDAW, general recommendation No. 25 (1999) on temporary special measures and general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention.
[28] *Report of the World Conference of the United Nations Decade for Women: Equality, Development and Peace, Copenhagen, 14-30 July 1980* (United Nations publication, Sales No. E.80.IV.3), chap. I, sect. A, part one, para. 16.

should both participate in and benefit from general and sectoral development programmes.[29] Here, developing countries' calls for a greater focus on socio-economic and cultural rights, including a focus on development, were foregrounded. Hence, the final document, the Programme of Action for the Second Half of the United Nations Decade for Women, reflected both the women and development approach and the move towards the gender and development approach. As a result, it reflected critiques of unidentified obstacles to development, such as the continuation of legal and factual discrimination against women and the lack of recognition of women's productive and reproductive work, especially in the non-monetized sector.[30] The Programme of Action gave high priority to improving the lives of the most disadvantaged groups, including rural women.[31]

The third World Conference on Women, entitled World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, took place in 1985 in Nairobi at the close of the Decade. In the Nairobi Forward-looking Strategies for the Advancement of Women, the conference highlighted the lack of progress made by States in engendering the development process.[32] This shortcoming was attributed to the impact of the economic crisis, unfair trade practices on the part of developed States, lack of participation by women in national development planning and the low priority given to issues affecting women disproportionately or of direct concern to women.[33] There was, on the other hand, a special focus on food, water and agriculture.[34] Recommendations included urging States to ratify the Convention and to increase the participation of women in all sectors of development.[35] Concurrently, in the arena of the right to development, progress was achieved in recognizing the participation of women in development as a human right when, a year later, the General Assembly adopted the Declaration on the Right to Development.

Following the end of the Decade, development rights in relation to women continued to receive attention at other United Nations conferences and other international forums.[36]

While the concept of gender had taken root in both development and feminist academic discourse, the meaning ascribed to the term varied. For academics and advocates the term implied a radical agenda of societal restructuring, but this vision proved difficult to implement in practice. The terms "sex" and "gender" became interchangeable. Even now, gender is often used to mean women. Furthermore, at the institutional level, the term "gender" was contested by conservative elements and religious groups which argued that the term sought to displace the categories male and female and to impose sexual orientation and gender identity issues through the back door.[37] These tensions exploded at the fourth World Conference on Women, held in Beijing in 1995, where the definition of gender was heavily contested, leading to a vague statement by the President of Conference on its meaning.[38]

In Beijing, the issue of women and poverty made it onto the list of 12 critical concerns. The Conference highlighted the fact that women were disproportionately impacted by poverty: "Women's poverty is directly related to the absence of economic opportunities, autonomy, lack of access to economic resources, including credit, land ownership and inheritance, lack of access to education and support services and their minimal participation in the decision-making process."[39]

[29] Ibid., paras. 3, 4, 12 and 43-45. It is now claimed that these statistics were "made up" by a United Nations official. See S. Baden and A. M. Goetz, "Who needs [sex] when you can have [gender]? conflicting discourses on gender in Beijing", in *Feminist Visions of Development: Gender Analysis and Policy*, C. Jackson and R. Pearson, eds. (Routledge, 1998), pp. 19-38.

[30] *Report of the World Conference of the United Nations Decade for Women.* chap. I, sect. A, part one, paras. 10-16.

[31] Ibid., para. 8.

[32] See *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985* (United Nations publication, Sales No. E.85.IV.10), chap. I, sect. A.

[33] Ibid., paras. 17, 18, 25 and 26.

[34] Ibid., paras. 174-196.

[35] Ibid., paras. 123, 134 and 142.

[36] See, for example, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda, vol. I); *Report of the World Conference on Human Rights, Vienna, 14-25 June 1993* (A/CONF.157/24 (Part I)); *Report of the World Food Summit, 13-17 November 1996* (Food and Agriculture Organization of the United Nations, document WFS 96/REP); *Report of the World Conference on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002* (United Nations publication, Sales No. E.03.II.A.1); General Assembly resolution 62/136 on improvement of the situation of women in rural areas.

[37] Baden and Goetz, "Who needs [sex] when you can have [gender]?", p. 34.

[38] Ibid., pp. 25-26. See also *Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995* (United Nations publication, Sales No. E.96.IV.13), annex IV. A progressive interpretation of gender was agreed in 1999: see United Nations, *1999 World Survey on the Role of Women in Development*, p. ix.

[39] *Report of the Fourth World Conference on Women*, chap. I, resolution 1, annex II, para. 51. These issues were also identified as key to the realization of women's right to development by UNDP in the *Human Development Report 1995: Gender and Human Development.* See also the statement adopted by the Committee on Economic, Social and Cultural Rights on poverty and the International Covenant on Economic, Social and Cultural Rights (E/C.12/2001/10). See further L. Williams, "Towards an emerging international poverty law", in *International Poverty Law*, L. Williams, ed. (London, Zed Books, 2006), p. 6; D. Narayan and others, *Voices of the Poor.* vol. I, *Can Anyone Hear Us?*, World Bank publication (New York, Oxford University Press, 2000), p. 31; and C. Chinkin, "The United

III. Women and the Declaration on the Right to Development

Adopted in 1986, the Declaration on the Right to Development is located within the women and development framework and has been criticized for reflecting an offhand, last-minute "add women and stir" approach.[40] Criticisms of the Declaration centred around its failure to engage with the particularities of women's experiences of dispossession and dislocation in the prevailing development discourse.[41] Women are expressly mentioned in article 8 (1): "Effective measures should be undertaken to ensure that women have an active role in the development process."[42] The nature and scope of the "effective" measures that the State is required to undertake remain undefined.[43]

The Declaration presents the right to development as an umbrella right,[44] in which all other internationally recognized human rights are taken into account; moreover, it introduces two key elements in the process of development: popular participation and fair distribution of benefits. Article 2 (3) proclaims: "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." Hence, the Declaration provides that development should be a broadly participatory right, one that requires the State to take special and effective measures to ensure the active role of women. Similarly, fair and equal distribution of resources cannot be accomplished without female as well as male participation in the process (understood as popular participation earlier).[45]

The Declaration is very focused on inter-State (and specifically North/South or, later, West/Rest) framework of wealth redistribution by way of a new international economic order. This appears to be an ongoing focus. [46] The fact that in many regions of the world, women have little if any contact with State institutions and live their lives in the shadows of what is considered "public" is wholly ignored. There appears to be little engagement with the exclusion of women at both national and international levels from participating, or indeed in addressing the barriers to women's participation so eloquently analysed during the United Nations Decade. The list of human rights violations in article 5 of the Declaration that States are required to address in order to facilitate development include "all forms of racism and racial discrimination" but, interestingly, not sexism or sex discrimination. While the Declaration is rooted in the international law definition of self-determination (State sovereignty), there appears to be no engagement with women's lack of self-determination over their own lives.[47] Moreover, while article 2 (2) of the Declaration highlights the "responsibility for development, individually and collectively", it fails to acknowledge the gendered nature of these responsibilities and specifically the disproportionately unrecognized and unremunerated development work done by women in caring for families, growing, sourcing and preparing food and performing a host of other tasks that go unrewarded.[48] This seems an odd omission, not least because the Declaration was adopted in the same year that the Nairobi conference called on States to take concrete steps "to quantify the contributions of women to agriculture, food production, reproductive and household activities."[49] Marilyn Waring has argued that "housework is specifically excluded from the definition of work, and nowhere is housework defined, so that housework becomes the generic term for everything that women do in an unpaid capacity".[50] In short, the Declaration could be described as built on masculinist foundations.[51]

Alternatively, one might view the Declaration as a good start: national independence from the shack-

Nations Decade for the Elimination of Poverty: what role for international law?" *Current Legal Problems*, vol. 54, No. 1 (2001), pp. 553 and 581-582.

[40] See Rathgeber, "WID, WAD, GAD" (see footnote 7).

[41] C. Chinkin and S. Wright, "The hunger trap: women, food and self-determination", *Michigan Journal of International Law*, vol. 14 (1993), p. 262.

[42] See also the opening paragraph of the preamble and article 6 (1) on non-discrimination, including on the basis of sex.

[43] Cf. article 10 of the Declaration.

[44] Bård A. Andreassen and Stephen P. Marks, eds., *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd ed. (Intersentia, 2010), p. 11.

[45] Lewis, "Women (under)development" (see footnote 16), p. 299.

[46] See the views of the Group of African States and the Non-Aligned Movement in the report of the Working Group on the Right to Development on its eighth session (A/HRC/4/47), paras. 18 and 19; cf. the views of European States, noting that the right to development is the primary responsibility of States, but also highlighting the possibility of using a child- and gender-rights focus in a new human rights engagement in development cooperation (para. 20). See also A. Cornwall and C. Nyamu-Musembi, "Putting the rights-based approach to development into perspective", *Third World Quarterly*, vol. 25. No. 8 (2004), pp. 1415 and 1424-1425.

[47] Chinkin and Wright, "The hunger trap".

[48] See also CEDAW, general recommendation No. 16 (1991) on unpaid women workers in rural and urban family enterprises and general recommendation No. 17 (1991) on measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product.

[49] *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women*, chap. I, sect. A, para. 120.

[50] Marilyn Waring, "Gender and international law: women and the right to development", *Australian Year Book of International Law*, vol. 12 (1988-1989), p. 183

[51] Cf. A. Stewart, "Juridifying gender justice", in *Law and Development: Facing Complexity in the 21st Century*, J. Hatchard and A. Perry-Kessari, eds. (London, Cavendish, 2003), p. 36.

les of colonialism, and the vistas of a new-found sovereign freedom, were the dominant preoccupations of the day. Independence in the international context was an overriding concern. However, given the asymmetries of power, patriarchies and dominant structures that govern(ed) both the international political economy and the gender domain, parallels could be found and extended to, for example, the independence of women. As noted, the preamble and article 6 (1) do mention non-discrimination and explicitly include sex-based discrimination. Moreover, going forward, self-determination as a concept, could also be seen, in a gendered perspective, as the ability of women to determine their own development.[52]

Given this interpretive potential, it is a source of regret that the Working Group on the Right to Development has as yet not taken up some of these themes in its work. Indeed, it has not focused on women at all.[53] Going forward, it may be helpful if greater attention were paid to the impact of discrimination on women's access to resources and power and its impact on their ability to participate in and benefit from development.[54] Specifically, the project would focus on the ways in which women are prevented from accessing, using and owning land; accessing credit and loans; and having independent decision-making over their bodies in both labour and reproductive rights terms while also addressing the disproportionate impact of inadequate water and sanitation facilities on women and girls. including in accessing education.

While there is much rhetorical acknowledgement of women's contributions to national economies, this is not followed through in practice by, for example, changing social security laws to take into account the work that women do in family enterprises and subsistence-level agriculture. Environmental changes and the greater recognition of the need to introduce sustainable development models must take account of women's roles in sourcing food, water and fuel. While there have been many analyses of how violence against women hampers their personal development and the costs entailed, this is an area that remains underrecognized in development discourse and practice. Women's lack of knowledge about their legal entitlements, or indeed how and where to claim them,[55] is fundamental to the fulfilment of their rights. Moreover, also analysed theoretically is the impact of plural laws on women's enjoyment of their human rights. The potential of plural legal systems to both stimulate and stymie development for women and societies at large needs greater focus.[56] The challenge of confronting negative gender stereotyping of women and their integration into cultural and religious norm creation and interpretation is huge, but it must be undertaken, consistently and persistently.[57] Finally, an intersectional approach which embraces women's diversities is crucial.

IV. Progress after 2000: an overview

A. Assessing the human rights-based approach to development for women

As noted above, in 2000 UNDP focused its annual Human Development Report on the human rights-based approach to development,[58] in which human development, human rights and human rights-centred development are intrinsically intertwined and thus pivotal for the full enjoyment of the right to development. The conceptual interaction between these three reflects underlying common motivations and is presented as follows.

The UNDP report built on Amartya Sen's work on developing human capabilities.[59] On the one hand, human development[60] is understood as both the process and the culmination of enlarging people's choices, achieved by increasing human functioning and the capabilities of people. The three capabil-

[52] See Chinkin and Wright, "The hunger trap" (see footnote 41).

[53] Cf. the preliminary study of the Human Rights Council Advisory Committee on discrimination in the context of the right to food (A/HRC/13/32), paras. 32-34.

[54] The Working Group on the Right to Development could work with the Working Group on Discrimination against Women in Law and Practice established by Human Rights Council resolution 15/23.

[55] Federation of Women Lawyers-FIDA Kenya, *Baseline Survey on the Level of Awareness and Impact of CEDAW on Rural Women in Kenya* (FIDA, 2006).

[56] Mary Hallward-Driemeier and Tazeen Hasan, *Empowering Women: Legal Rights and Opportunities in Africa* (Washington, D.C., World Bank, 2012) (forthcoming).

[57] See "The empowerment of rural women and their role in poverty and hunger eradication, development and current challenges: report of the Secretary-General" (E/CN.6/2012/3) and R. Cook and S. Cusack, *Gender Stereotying: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010).

[58] Human rights-based approaches were brought to the fore in the report of the Secretary-General entitled "Renewing the United Nations: a programme for reform" (A/51/950 and addenda), issued in 1997, and have been adopted gradually throughout United Nations organizations, bodies and agencies since 2003, particularly after the publication of "The human rights-based approach to development cooperation: towards a common understanding among the UN agencies" by the United Nations Development Group.

[59] Amartya Sen, *Development as Freedom* (Oxford, Oxford University Press, 1989). See also M. Nussbaum, *Women and the Human Right to Development: The Capabilities Approach* (Cambridge, United Kingdom, Cambridge University Press, 2000); S. Goonesekere, "A rights-based approach to realizing gender equality", study prepared in 1998 in cooperation with the former United Nations Division for the Advancement of Women and available at www.un.org/womenwatch/daw/news/savitri.htm; and Andreassen and Marks, *Development as a Human Right* (see footnote 44).

[60] UNDP, *Human Development Report 2000*, p. 17.

ities considered essential for people are: (a) to lead a long and healthy life; (b) to be knowledgeable; and (c) to have access to the resources needed for a decent standard of living. Human development as such extends further to cover areas such as participation, security, sustainability and guaranteed human rights. The above-mentioned areas are deemed necessary for promoting creativity, productivity, self-respect, empowerment and a sense of belonging to a community.

On the other hand, a human rights-based approach[61] is a conceptual framework for the process of human development, based on international human rights standards and directed towards respecting, protecting and fulfilling human rights. Furthermore, it aims to analyse inequalities underlying development as well as to redress discriminatory practices and unjust distributions of power that impede development.[62]

As described by Maria Green and Susan Randolph, the human rights-based approach seeks to operationalize two key concepts: first, that the goals identified and pursued by national and international development processes should be shaped by, and congruent with, international human rights standards (including the full range of civil, cultural, economic, political and social rights); and second, that the methods used in pursuing development should equally accord with human rights standards, and in particular with cross-cutting norms around participation, accountability, transparency and access to information, and non-discrimination.[63] Moreover, UNDP has clearly spelled out the centrality of equality to the human rights-based approach:

> … inequality matters because it is a fundamental issue for human development. Extreme inequalities in opportunity and life chance have a direct bearing on what people can be and what they can do—that is, on human capabilities. There are also strong instrumental reasons for a concern with inequality. Deep disparities based on wealth, region, gender and ethnicity are bad for growth, bad for democracy and bad for social cohesion.[64]

The human rights-based approach has not managed to deliver the anticipated benefits for women. Many reasons have been put forward for this shortcoming, not least that the lack of conceptual clarity has left practitioners floundering.[65] As noted earlier, there remains a great deal of confusion within the United Nations system about what is precisely meant by gender, about how a gender perspective should be applied in different sectors and what its contribution should or could be.[66] Sari Kuovo asserts that, in the United Nations, gender can be perceived simultaneously as a synonym for sex, as a synonym for women, as an issue with a men-centred focus, or can be isolated and fixed as a sex-related term which can be segregated from other social categories such as race, ethnicity, class, origin and sexual orientation, among others.[67] That mainstreaming has been, or indeed is, seen as a success is questionable. Adopting a gender-based approach in its interpretation of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW notes:

> The term "sex" here refers to biological differences between men and women. The term "gender" refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can likewise be changed by culture, society and community.[68]

While the right of women to live free of sex-based discrimination was one of the founding principles of the United Nations, it was recognized from the outset that a great deal of work would be required to make this a reality. However, little such work has in

[61] Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (Geneva, 2006), pp. 15-16.

[62] World Bank, *World Development Report 2012: Gender Equality and Development* (Washington, D.C., 2012).

[63] Maria Green and Susan Randolph, "Bringing theory into practice: operational criteria for assessing implementation of the international right to development", paper prepared for the high-level task force on the implementation of the right to development (A/HRC/15/WG.2/TF/CRP.5), para. 50. See also chapter 29 of the present publication.

[64] UNDP, *Human Development Report 2005—International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (New York, 2005), p. 51.

[65] For a critique of the human rights-based approach to development see, generally, *Third World Quarterly*, vol. 27, No. 7 (2006), Special Issue, *The Politics of Rights: Dilemmas for Feminist Praxis*; D. Tsikata, "Announcing a new dawn prematurely? human rights feminists and the rights-based approaches to development", in *Feminisms in Development: Contradictions, Contestations and Challenges*, A. Cornwall, E. Harrison and S. Whitehead, eds. (London, Zed Books, 2007), p. 214.

[66] S. Kuovo, "The United Nations and gender mainstreaming: limits and possiblities", in *International Law: Modern Feminist Approaches*, D. Buss and A. Manji, eds. (Oxford and Portland, Oregon, Hart, 2005), pp. 237-252. See also H. Charlesworth, "Not waving but drowning: gender mainstreaming and human rights in the United Nations", *Harvard Human Rights Journal*, vol. 18 (2005), pp. 1-18.

[67] S. Kuovo, *Making Just Rights? Mainstreaming Women's Human Rights and a Gender Perspective* (Uppsala, Iustus Forlag, 2004), pp. 310-311. See also Charlesworth, ibid., p. 8. Although there is greater recognition of sexual orientation being a gender concern, there remain pockets of resistance. See the definition of gender in the Rome Statute of the International Criminal Court, art. 7 (3), and compare it with that given in the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (see A/64/211 and Corr.1), para. 20.

[68] CEDAW, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, para. 5.

fact been done.[69] This has been due in part to an inadequate practical engagement with plural legal systems and the impact of the widely accepted view in certain cultures that women are unable to participate in development on women's ability to participate in development.[70] Proponents of the rights-based approach have called for participation and non-discrimination, yet have not to date developed a vision for, or engaged in the long-term, arduous work of, challenging the gender-based stereotyping that is pervasive in all societies and that leads to the silencing of women's voices and perspectives.[71]

Moreover, neither the human rights-based approach nor right to development practitioners have consistently analysed rights in a gender-sensitive way. For example, the report of the high-level task force on the implementation of the right to development containing right to development criteria and operational sub-criteria (A/HRC/15/WG.2/TF/2/Add.2) identifies a range of priority issues, including the global food crisis. While acknowledging the specific impact of the crisis on poor families, the analyses did not expressly mention the role of women, be it in food sourcing, food preparation, or the self-sacrifice of choosing not to eat so children and other family members can. This seems a startling omission given the centrality of women's role in food production.[72]

B. Human rights jurisprudence after 2000: an overview

Gender discourse has gradually made its way into the United Nations treaty bodies, which have since 2000 focused increasingly on women's rights. The Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights, marked the millennium by adopting general comment No. 28 (2000) on equality of rights between men and women. This comment is an admirable attempt to integrate a gender perspective into a reading of the International Covenant. Illustrating the different ways in which women experience rights violations, it states in paragraph 10:

> When reporting on the right to life protected by article 6, States parties should provide data on birth rates and on pregnancy- and childbirth-related deaths of women. Gender-disaggregated data should be provided on infant mortality rates. States parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions. States parties should also report on measures to protect women from practices that violate their right to life, such as female infanticide, the burning of widows and dowry killings. The Committee also wishes to have information on the particular impact on women of poverty and deprivation that may pose a threat to their lives.

The barriers to women's enjoyment of rights are identified in this comment; it provides States, in paragraphs 3-8, with a comprehensive guide to their obligations to ensure that women do enjoy their Covenant rights. Likewise, the Committee's recognition of the need to move beyond a formal model of equality to one that takes on board socio-structurally embedded inequalities is important.

The Committee on Economic, Social and Cultural Rights followed suit, adopting general comment No. 16 (2005) on the equal right of men and women to the enjoyment of economic, social and cultural rights (article 3 of the International Covenant). Informed by the Montréal Principles on Women's Economic, Social and Cultural Rights, adopted at a meeting of experts meeting in that city in 2002,[73] the general comment recognizes that women are disproportionately impacted by violations of socioeconomic rights and that their experiences of these violations are coloured by gender. Like the Human Rights Committee, the Committee on Economic, Social and Cultural Rights also adopted a substantive definition of equality.[74] The triptych of State obligations to respect, protect and fulfil rights follows through its focus on the ways in which the rights found in the International Covenant should be read in order to apply to women and to reflect women's experiences.[75] Exploring the right to an adequate standard of living, including the right to food, the Committee notes, requires States "to ensure that women have access to or control over means of food production, and actively address customary practices under which women are not allowed to eat until the men are fully fed, or are only allowed less nutritious food".[76] This acknowledgement reflects the still neglected reality of inequality.[77] According to the Food and Agriculture Organization of the United

[69] Chinkin, "The United Nations Decade for the Elimination of Poverty", pp. 586-587; K. Davis, "The emperor is still naked: why the Protocol on the Rights of Women in Africa leaves women exposed to more discrimination", *Vanderbilt Journal of Transnational Law*, vol. 42, No. 3 (May 2009), p. 949.

[70] See C. Nyamu, "How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries?", *Harvard International Law Journal*, vol. 41, No. 2 (Spring 2000), p. 381.

[71] See Cook and Cusack, *Gender Stereotyping* (see footnote 26). See also R. Holtmaat and J. Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Intersentia, 2011).

[72] See General Assembly resolution 62/136 proclaiming the International Day of Rural Women. See also E/CN.6/2012/3, paras. 15-19.

[73] See footnote 4 above.

[74] General comment No. 16 (2005), paras. 7-8, 10-14, 15 and 41. See also general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 34.

[75] General comment No. 16 (2005), paras. 18-21.

[76] Ibid., para. 28.

[77] I. Rae, *Women and the Right to Food: International Law and State Practice* (Rome, FAO, 2008). See also A/HRC/13/32, para. 58.

Nations (FAO), women grow between 60 and 80 per cent of the food in developing countries, yet own less than 2 per cent of the land.[78] This vast disparity is the last frontier in discussions of contemporary agrarian grass-roots politics and one that seems tailor-made for the food sovereignty solution[79] that includes women as protagonists in changing food production schemes.

CEDAW has interpreted provisions of the Convention on the Elimination of All Forms of Discrimination against Women on development as calling on all States to integrate a gender perspective into development planning, ensuring that women can participate in all spheres, including trade negotiations.[80] Similarly, in his report to the thirteenth session of the United Nations Conference on Trade and Development (UNCTAD-XIII) in 2011, the Secretary-General of UNCTAD, Supachai Panitchpakdi, stated that explicit references to gender equality in trade agreements could help to increase the political commitment of key stakeholders and could increase the funding available for gender-related programmes of technical cooperation, including the Aid for Trade framework. Such measures could also further encourage developing country Governments to take ownership of gender-related policy options while enhancing the coverage of gender-related trade assessments.[81]

CEDAW also regularly highlights the failure of States to ensure women's access to land and other resources, including credit, loans, education and health care, while noting the role of aid in meeting Convention goals.[82] The Committee also takes an intersectional approach in its work, highlighting how minority and indigenous women sometimes experience multiple forms of discrimination simultaneously.[83]

C. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The adoption in 2003 by the African Union of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa marks an important milestone in the recognition that women's right to development is central to their empowerment. It echoes the Declaration on the Right to Development in many respects, but differs significantly in one: its engagement with the specific ways in which women can participate in and benefit from development.[84] Article 19 stipulates that women shall have the right to sustainable development, including the right to land and credit,[85] and that States parties shall "introduce the gender perspective in the national development planning procedures". Participation of women is a leitmotif of the Protocol, which requires States parties to take steps to ensure that women are involved in political decision-making processes, in the construction of cultural values,[86] in "the planning, management and preservation of the environment"[87] and, of course, in the "conceptualization, decision-making, implementation and evaluation of development policies and programmes".[88] Women's independent right to housing irrespective of marital status is guaranteed, as is the right to education.[89]

The Protocol calls on States to recognize the work that women do in the home and in the informal sector.[90] It explicitly recognizes that women carry the heavier reproductive burden and thus guarantees them the right to seek contraception without requiring the consent of spouses, the right to abortion in a limited number of circumstances and, crucially, the right to be protected from HIV and to know the status of their partners within internationally recognized guidelines.[91] The Protocol takes an intersectional approach in recognizing the rights of older and disabled women and those in distress.[92] Like the Declaration on the Right to Development, the Protocol calls for States to spend less on defence and more on social development.[93] Moreover, it calls on States parties to "ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programmes are reduced to a minimum for women".[94]

[78] Rajeev Patel, "Transgressing rights: La Vía Campesina's call for food sovereignty", *Feminist Economics*, vol. 13, No. 1 (2007), pp. 87–93, especially pp. 91-92.
[79] Ibid., p. 92.
[80] See the concluding comments of the Committee on Jamaica (CEDAW/C/JAM/CO/5), para 37. See also United Nations Development Fund for Women (UNIFEM), *CEDAW and the Human Rights Based Approach to Programming: A UNIFEM Guide* (May 2007).
[81] "Development-led globalization: towards sustainable and inclusive development paths" (UNCTAD(XIII)/1), p. 65.
[82] See the general statement of the Committee on the Elimination of Discrimination against Women on rural women adopted on 19 October 2011 at its fiftieth session (A/67/38, part two, annex II).
[83] Banda, "Article 14" (see footnote 15), p. 382.
[84] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, arts. 12-21.
[85] Land is also mentioned in article 15 on the right to food security. R. Rebouche, "Labor, land, and women's rights in Africa: challenges for the new Protocol on the Rights of Women", *Harvard Human Rights Journal*, vol. 19 (2006), pp. 235-256.
[86] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 9 (political participation) and art. 17 (culture).
[87] Ibid., art. 18 (2) (a).
[88] Ibid., art. 19 (b).
[89] Ibid., art. 16 (housing) and art. 12 (education).
[90] Ibid., art. 13 (e) and (h).
[91] Ibid., art. 14. See also C. Ngwena "Inscribing abortion as a human right: significance of the Protocol on the Rights of Women in Africa", *Human Rights Quarterly*, vol. 32, No. 4 (2010), p. 783.
[92] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, arts. 22-24.
[93] Ibid., art. 10 (3).
[94] Ibid., art. 19 (f). See generally African Union, Nairobi Declaration on the

Equally important to facilitating the realization of women's right to development has been the adoption of the Millennium Development Goals.

D. Women and the Millennium Development Goals

The United Nations Millennium Declaration and the Millennium Development Goals recognize the importance of women's empowerment by making the connection between development goals and the importance of gender equality. It is also noteworthy that women are the only other group, in addition to children, singled out for special attention: goal 3 provides that States should "promote gender equality and empower women".[95] The high cost paid by women in bearing the reproductive burden is acknowledged in goal 5 on maternal mortality. This goal demands that maternal health be improved and that the maternal mortality rate be reduced by three quarters in the relevant period. This "women focus" is a recognition of the fact that the discrimination experienced by women impacts upon their life chances and their ability to enjoy their human rights.[96] Moreover, as the Millennium Declaration notes, promoting gender equality and empowering women are "effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable" (para. 20).

Admirable as it is that women have been included in the Goals, the lack of progress in their achievement is troubling. This is particularly the case with regard to the aforementioned goal 5.[97] This points to direct discrimination against women, in breach of a multitude of human rights norms guaranteeing life; security of the person; freedom from torture and degrading or inhuman treatment; the right to benefit from scientific progress, education and family planning and information; and, of course, health. Similarly, the general societal failure to regard parenthood as a shared obligation means that failure to realize goal 4 on reducing infant mortality falls particularly heavily on women, who bear a disproportionate burden for child care. In her statement of support commemorating the twenty-fifth anniversary of the Declaration on the Right to Development, the High Commissioner for Human Rights noted: "We must end discrimination in the distribution of the benefits of development. We must stop the 500,000 preventable deaths of women in childbirth every year … the Declaration … calls for equal opportunity and a just social order."

Although receiving greater focus and attention, goal 2 on universal primary education does not look likely to be achieved by 2015. The gendered impact of women's long-term exclusion from education was highlighted in 2008 by the Human Rights Council in its resolution 8/4 in which it noted that of the 774 million adults lacking basic literacy skills, the majority—64 per cent—were women. Education has been linked to a variety of basic goods; among these are access to better employment, the ability to participate in decision-making—with some States requiring a minimum level of education for elected officials—lower birth rates and healthier children who are more likely to receive an education themselves. The denial of an education to women and girls owing to sexual harassment, lack of sanitation facilities, obligation to undertake domestic chores and lack of access to funds is gender-based discrimination which hampers national development and needs urgent attention.

V. Concluding remarks

While much has been done to integrate women's experiences into development discourse and human rights, the condition and situation of women in the world today seem to indicate that the knowledge we have gained has not led to any improvement in their lives. In addition to ongoing discrimination, women continue to be excluded from participating in both public decision-making processes and also in decisions about resource distribution, family size and income usage at the family level. That this continues illustrates the lack of State accountability vis-à-vis the delivery of women's human rights, including development-related ones.[98]

This suggests that women are still undervalued. Might it not be time to move beyond rhetoric and yet more elaborate analyses of human rights to actually delivering them, and thereby honouring our collective humanity? Perhaps in time for the fiftieth anniversary of the Declaration on the Right to Development?

African Women's Decade 2010-2020, para. 15.

[95] See generally M. Buvinić and others, eds., *Equality for Women: Where Do We Stand on Millenium Development Goal 3?* (Washington, D.C., World Bank, 2008).

[96] *The Oxfam Handbook on Development Relief*, pp.180-182.

[97] World Bank, *Global Monitoring Report 2011: Improving the Odds of Achieving the MDGs: Heterogeneity, Gaps, and Challenges* (Washington, D.C., 2011).

[98] C. Hayes, "Out of the margins: the MDGs through a CEDAW lens", *Gender and* Development, vol. 13, No. 1 (2005), pp. 67-78. See also United Nations, *2009 World Survey on the Role of Women in Development: Women's Control over Economic Resources and Access to Financial Resources, including Microfinance* (United Nations publication, Sales No. E.09.IV.7).

Indigenous peoples

*Koen De Feyter**

I. Introduction

Debates on the emergence and implementation of the right to development have not focused on indigenous issues. The growing recognition of indigenous rights, particularly in the context of development projects affecting their access to land and way of life, came about separately from United Nations discussions on the right to development.

This chapter is not mainly concerned with how indigenous peoples can make use or benefit from the right to development. Such an approach would certainly be valid, but the emphasis here is on what developments in indigenous rights (may) mean for the further elaboration of the right to development as a right applicable to all individuals and peoples.

The text briefly introduces the current state of play on the right to development in the Human Rights Council. It then discusses both the lack of attention to indigenous rights in the Declaration on the Right to Development and the inclusion of the right to development in instruments codifying indigenous rights. This is followed by some thoughts on the implications of the African Commission on Human and Peoples' Rights decision in the *Endorois* case for further discussions on the right to development.

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II. Core norm of the high-level task force on the implementation of the right to development

In 2010, the high-level task force on the implementation of the right to development defined what it called the "core norm" of the right to development as "the right of peoples and individuals to the constant improvement of their well-being and to a national and global enabling environment conducive to just, equitable, participatory and human-centred development respectful of all human rights" (A/HRC/15/WG.2/TF/2/Add.2 and Corr.1, annex).

The high-level task force identified three attributes of the core norm: comprehensive and human-centred development policy; participatory human rights processes; and social justice in development. For each of the attributes, the high-level task force drew up a table (ibid.) of criteria, sub-criteria and indicators. The high-level task force aimed at striking a balance between the national and international dimensions of the right to development, i.e., between elements of the right that require adjustments in domestic development policies (aimed at States acting individually within their own jurisdiction) and elements pertaining to duties of international cooperation in order to achieve greater justice in the global political economy (aimed at States acting extraterritorially and collectively) (A/HRC/15/WG.2/TF/2/Add.1 and Corr.1, paras. 81-82 and A/HRC/15/WG.2/TF/2/Add.2 and Corr.1, paras. 16-18). In the table, duty bearers are not indicated for each of the criteria and sub-criteria, although most of the indicators allow identifying

whether the international community or the domestic State is primarily responsible. Nevertheless, when the high-level task force presented its report to the Working Group on the Right to Development, the members of the Non-Aligned Movement expressed disagreement with "the [high-level task force report's] overemphasis on national responsibilities, in neglect of the basic notion of international cooperation".[1]

The high-level task force table contains few explicit references to indigenous peoples. Under the heading "comprehensive and human-centred development policy", the setting up of consultative processes for respecting the rights of indigenous peoples over natural resources is included as an indicator of a policy aimed at the sustainable use of natural resources. Under "participatory human rights processes", free, informed, prior consent by indigenous communities to the exploitation of natural resources on their traditional lands appears as an indicator of the non-discrimination criterion. Under the "social justice in development" heading, no indicators refer specifically to indigenous peoples, although in this section, as elsewhere in the table, references to vulnerable populations or marginalized groups may be taken to include indigenous peoples.

The consolidated findings of the high-level task force do not focus on indigenous rights or issues. This continues a trend in United Nations debates on the right to development. The impact of domestic or international investment and development policies on indigenous peoples has never been central to diplomatic negotiations between developing and developed countries on the right to development. As is evident from the responses to the report of the high-level task force on its sixth session, in 2010 (A/HRC/15/WG.2/2 and addenda and corrigenda), those negotiations deal primarily with reconciling very different views on issues such as the international versus the domestic responsibility for the implementation of the right to development, and the individual or collective dimension of the right. From this perspective, the first finding of a violation of the right to development by an international body, the *Endorois* decision of the African Commission on Human and Peoples' Rights discussed below, in a purely domestic case brought on behalf of an indigenous community against the Government of a developing country, presents negotiators in Geneva from both North and South with an additional challenge.

[1] Submission in follow-up to Human Rights Council resolution 25/15 on the right to development by Egypt on behalf of the Non-Aligned Movement, available at www.ohchr.org/Documents/Issues/Development/Session12/NAM.pdf.

III. Declaration on the Right to Development

During the drafting process of the Declaration on the Right to Development, indigenous issues were not at the forefront. The Commission on Human Rights initiated work on the right to development by inviting the Secretary-General, in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and other specialized agencies, to undertake a study on the right to development in 1977.[2] The Declaration was adopted in 1986. International law on indigenous rights primarily came about subsequent to the adoption of the Declaration on the Right to Development.[3]

In his 1979 report on the international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirement of the New International Economic Order and the fundamental human needs, the Secretary-General does not take into account indigenous issues. It states that "minority groups and their members have a right to share in the development of the whole community without discrimination" (E/CN.4/1334, para. 9), but it does not identify subnational groups as holders of the right to development, nor does it recognize a right of such groups to decide their own development priorities.

The Declaration on the Right to Development does not mention either indigenous peoples or minorities. According to the Declaration, the right to development is a human right of every human person and all peoples. There is no indication in the text or in the *travaux préparatoires* that the drafters intended to include indigenous peoples as peoples, and thus as holders of the right to development. The preamble to the Declaration describes development as a process aimed "at the constant improvement of the well-being *of the entire population* (emphasis added) and of all individuals". Similarly, article 2 declares that States have the right to formulate development policies aiming at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their participation in development and in the fair distribution of the benefits thereof. Article 8 of the Declaration emphasizes the need to ensure that

[2] Commission on Human Rights resolution 4 (XXXIII). The resolution was introduced by Iran and adopted without a vote.

[3] With the exception of the International Labour Organization (ILO) Indigenous and Tribal Populations Convention, 1957 (No. 107), which is premised on the integration of such populations into the life of their respective countries.

women have an active role in the development process and stresses the need to eradicate social injustice and to encourage popular participation. However, it does not refer to communities within States. Such communities may not share the mainstream development paradigm.

In the Declaration on the Right to Development "people" was meant to equal "the entire population" of States. The reference in article 1 of the Declaration to the right to self-determination corroborates this view. According to the second paragraph of the article, the right to development implies the full realization of the right to self-determination, which at the time was understood as a right of the populations of the developing countries to exercise sovereignty over their natural wealth and resources, free from external intervention.

Developed and developing countries held radically different views on the right to development during the drafting process. Neither group was, however, concerned with indigenous peoples.

Developing States favoured a collective right to development owned by the populations of developing countries. A people could enforce the right to development through the Government of its own State which in a post-colonial context was finally able to fully represent its people in international relations; the Government could also claim and receive development aid. One of the most influential proponents of the right to development in developing countries, Mohammed Bedjaoui, wrote at the time that the best way to guarantee an individual's right to development consisted not of granting the individual a claim against the home State, but of setting the State free from international operations which drained its wealth abroad: "In laying claim to development, the individual would undermine the State at a time when the latter is engaged in the attempt to secure him that same development."[4]

Developed States could not disagree more. In their view, the right to development was about enabling individuals to claim development from their own Government. Developed States refused to accept extraterritorial legal obligations to contribute to the development of populations that were not (or were no longer) under their jurisdiction.

The Declaration as adopted is a compromise document, situating the human person as the central subject of development, but also recognizing a collective dimension of the right to development. This collective dimension is not, however, spelled out in any detail. Similarly, the primary responsibility for development lies with the jurisdictionally competent State (i.e., usually the State that has control over the territory), although some supportive efforts from the international community are equally expected. Indigenous issues drowned in the clash between North and South. The Declaration does not set any specific obligations for States on whose territories indigenous peoples reside. Nowhere is the need for a specific indigenous peoples' development plan acknowledged.

IV. International Labour Organization Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples

At the global level, major steps towards the recognition of an indigenous right to development were taken when the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) and the United Nations Declaration on the Rights of Indigenous Peoples were adopted. Both instruments include the right to development.

ILO Convention No. 169 has to date been ratified by 22 States[5] and remains the only international treaty open to ratification on indigenous peoples' rights. ILO Convention No. 169 was drafted with a view to ensuring equal enjoyment of rights by indigenous peoples, who were found to be excluded from national development paradigms and suffered discrimination rooted in historical injustice. The Convention provides for State obligations to protect and recognize indigenous peoples' rights to lands; to consult them in good faith with consent or agreement as the objective; and to promote indigenous peoples' progressive control and management of programmes designed with a view to closing socioeconomic gaps they suffer from as a result of historical marginalization.

Like most ILO-drafted instruments, and given the tripartite nature of the Organization, ILO Convention No. 169 opts for a continuing dialogue between the

[4] M. Bedjaoui, "Some unorthodox reflections on 'the right to development', in *International Law of Development: Comparative Perspective*, Francis G. Snyder and Peter Slinn, eds. (Professional Books, 1987), pp. 90-92.

[5] Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain and Venezuela (Bolivarian Republic of).

constituents (Government, workers and employers) and practical cooperation. Article 34 of ILO Convention No. 169 thus provides that the scope and the nature of State measures to be taken under the Convention "shall be determined in a flexible manner, having regard to the conditions characteristic of each country".

The Convention enshrines two key principles, "consultation" and "participation", which should enable indigenous peoples to retake control of their destiny. The principle of "consultation" aims at providing indigenous peoples with opportunities to have their opinions, perspectives, priorities and values instilled in national development programmes, whereas the principle of "participation" aims at making indigenous peoples the engineer of their own well-being through decision-making.

Article 6, dealing with political participation, is an example of a provision using the language of Government obligations rather than indigenous rights focusing on governmental obligations. The article includes a duty to consult the peoples concerned whenever consideration is given to measures which may affect them directly; a duty to ensure their participation "to at least the same extent as other sectors of the population" in decision-making in the relevant institutions; and a duty to assist them (including financially, when "appropriate") in setting up their own institutions and initiatives.

The objective of the consultations is to achieve agreement or consent, but consent as such is not provided for as a requirement or as a veto right. The ILO supervisory bodies have clarified that a mere sharing of information with indigenous peoples cannot amount to consultation. The adequate implementation of the right to consultation thus implies a qualitative process of good faith negotiations and dialogues, through which agreement and consent can be achieved. This interpretation was confirmed by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in his 2009 report to the Human Rights Council (A/HRC/12/34).[6] Article 16 of the Convention, which deals with relocation, provides that relocation should only take place as an exceptional measure, with the free and informed consent of the people. But the article does add that when consent cannot be obtained, relocation can nevertheless take place, "following appropriate procedures established by national laws and regulations, including public inquiries where approprate, which provide the opportunity for effective representation of the peoples concerned".

Article 7 of the Convention, which deals with development, is phrased in rights language. Indigenous peoples have the right to decide their own priorities for the process of development and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. The remaining paragraphs of the article are formulated as governmental obligations: overall economic development plans of countries in which indigenous people live shall have the improvement of their conditions of life as a priority; studies shall be carried out, whenever appropriate, to evaluate their impact on indigenous peoples; measures shall be taken to protect and preserve the environment or territories they inhabit.

Some States, such as India and Japan, felt that article 7 went too far. Defending the text, the International Labour Office clarified that the indigenous peoples' right to set their own priorities for development did not deprive the Government of decision-making power.[7] An argument can be made that article 7 should today be read in the light of the right to self-determination as formulated in the United Nations Declaration, providing that indigenous peoples are entitled to autonomy or self-governance.

Article 7 (and the ILO Convention as a whole) remains limited to identifying obligations of the State on whose territory the relevant indigenous people reside. The Convention remains silent on the international dimension of the right to development, e.g., the Convention does not call for the withdrawal of support by donor States or international organizations to projects that do not take into account the requirements formulated in articles 6 and 7. The *Guide to ILO Convention No. 169* sensibly argues that both Governments and international develop-

[6] In his report, the Special Rapporteur reads the ILO Convention and the United Nations Declaration together: "The Declaration establishes that, in general, consultations with indigenous peoples are to be carried out 'in good faith … in order to obtain their free, prior and informed consent' (art. 19). This provision of the Declaration should not be regarded as according indigenous peoples a general 'veto power' over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples. In this regard,ILO Convention No. 169 provides that consultations are to take place 'with the objective of achieving agreement or consent on the proposed measure'" (para. 46).

[7] International Labour Conference, seventy-sixth session, 1989, report IV (2A), p. 24.

ment agencies have responsibilities for including indigenous peoples in development processes, but that this appears to be based on the practice of donors, rather than on any legal obligation contained in the Convention.[8]

The General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples by its resolution 61/295.[9] The United Nations Working Group on Indigenous Populations worked on the text for two decades, building on the growing recognition of indigenous rights in regional and domestic legal instruments. The Working Group on the Right to Development played little or no role in the process. The Declaration is not a treaty, but, in its own words, contains minimum standards for the "survival, dignity and well-being of the indigenous peoples of the world" (art. 43). The Declaration includes a right to development that is specific to indigenous peoples and recognizes their distinctness as peoples with their own histories, territories and beliefs, as well as their notions of poverty, well-being and development.

The preamble to the Declaration justifies the formulation of a specific indigenous peoples' right to development by referring to historic injustices that indigenous peoples have suffered as a result of, inter alia, the colonization and dispossession of their lands, territories and resources. A right to development appears as such in article 23:

> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 20 adds that indigenous peoples have the right to be secure in the enjoyment of their own means of subsistence and development. When they are deprived of these means, they are entitled to just and fair redress.

According to the Declaration, the context in which the indigenous right to development is to be exercised is one of autonomy or self-government within the State in which the indigenous peoples reside. Consequently, the State is under a duty to obtain the free, prior and informed consent of the representative institution of the indigenous people before adopting and implementing legislative and administrative measures that may affect them (art. 20). This duty applies to the development or use of indigenous lands (art. 32), particularly in connection with the development, utilization or exploitation of mineral, water or other resources. As noted, according to the Special Rapporteur on the rights of indigenous peoples, the Declaration does not accord indigenous peoples a general "veto power" over decisions that may affect them, but establishes consent as the objective of consultations with indigenous peoples. In two situations, the State is clearly under an obligation to obtain the consent of the indigenous peoples concerned, namely when the project will result in the relocation of a group from its traditional lands, and in cases involving the storage or disposal of toxic waste within indigenous lands (A/HRC/12/34, paras. 46-47).

The indigenous right to development appears in the Declaration as a purely collective right, held by indigenous peoples only. It further differs from the general right to development in requiring indigenous peoples' free, prior and informed consent for projects affecting their lands and resources, a standard that goes beyond the "active, free and meaningful participation" requirement under the general right to development. The view reflected in the Declaration is that the State does not enjoy the sole prerogative to define development; indigenous peoples have a right to say no to a project that is based on a concept of development that the group does not share.

The United Nations Declaration on the Rights of Indigenous Peoples also envisages an international dimension of the indigenous right to development. This is briefly discussed in articles 39-42. According to these provisions, indigenous peoples have a right to financial and technical assistance "from States and through international cooperation". They have the right to access conflict-resolution procedures for the resolution of disputes with States and other parties. The United Nations system has a specific responsibility in contributing to the application of the Declaration.

[8] International Labour Organization, *Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169* (Geneva, 2009), p. 119.

[9] The vote was 144 States in favour, 4 against (Australia, Canada, New Zealand and the United States of America), with 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, the Russian Federation, Samoa and Ukraine). According to the website of the United Nations Permanent Forum on Indigenous Issues (http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx), Australia, New Zealand, Canada and the United States have all reversed their positions and now endorse the Declaration. Colombia and Samoa have also reversed their positions and indicated their support for the Declaration.

V. The *Endorois* case[10]

The African Charter on Human and Peoples' Rights provides for the right to development, but does not include language on indigenous rights. Article 22 of the African Charter reads:

> 1. 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.
>
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

In the African Charter, the right to development appears as a purely collective right, held by peoples; it includes both a national and an international dimension.

The African Commission has been at pains to explain that the African Charter is an "innovative and unique" regional document compared to other regional instruments and "substantially departs" from the "narrow" formulations of other regional and universal human rights instruments, for instance by including group and people's rights.[11] Care should therefore be taken not to perceive of the decisions of the African Commission as a reflection of global human rights law. The African Commission's decisions reflect African human rights law. Regional human rights law may or may not translate into general international human rights law.

In May 2007, the African Commission on Human and Peoples' Rights adopted an advisory opinion on the United Nations Declaration on the Rights of Indigenous Peoples.[12] One of the issues discussed in the advisory opinion (which as a whole is supportive of the adoption by African States of the United Nations Declaration) was the issue of the definition of indigenous peoples in Africa. According to the Commission, "in Africa, the term indigenous populations does not mean 'first inhabitants' in reference to aboriginality as opposed to non-African communities or those having come from elsewhere".[13] In the widely used working definition offered by José Martínez Cobo in the early 1980s,[14] indigenous peoples are different from minorities in that they have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories. But according to the African Commission, Africa is different from other continents where native communities had been almost annihilated by non-native populations. In Africa, all Africans are native to the continent. In identifying Africa's indigenous communities, the following constitutive elements are to be taken into account:

(a) Self-identification;

(b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;

(c) A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.[15]

The *Endorois* case offered the African Commission the opportunity to clarify whether African indigenous peoples were peoples for the purposes of the African Charter. In case of an affirmative response, indigenous peoples would be able to claim the right to development and other collective rights under the African Charter.

The complaint was filed by the Centre for Minority Rights Development with the assistance of Minority Rights Group International and the Centre on Housing Rights and Evictions (which submitted an amicus curiae brief) on behalf of the Endorois community against the Government of Kenya. The complainants alleged violations resulting from the displacement of the Endorois community from their ancestral lands to make room for the establishment of a game reserve; the failure to adequately compensate them for the loss of their property; the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture; as well as their exclusion from the process and benefits of development. The complainants equally alleged that the Government of Kenya

[10] African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group on behalf of Endorois Welfare Council* v. *The Republic of Kenya*, communication 276/2003. The decision, adopted by the African Commission on Human and Peoples' Rights at its forty-sixth ordinary session, held in November 2009, is available at www.achpr.org/english/Decison_Communication/Kenya/Comm.%20276-03.pdf.

[11] Ibid., para 149.

[12] *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, adopted at its forty-first ordinary session, held in May 2007 in Accra, available at www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf.

[13] Ibid., para 13.

[14] See E/CN.4/Sub.2/1982/2/Add.6, available at www.un.org/esa/socdev/unpfii/documents/MCS_v_en.pdf.

[15] *Advisory Opinion* (see footnote 12), para. 12.

forcibly removed the Endorois from their ancestral lands without proper prior consultations or adequate and effective compensation.

In its decision, the African Commission assesses at length whether the Endorois are a people. In the course of the assessment, the African Commission makes it very clear that in the context of the African Charter, peoples are not to be equated with entire populations of States. The Commission recognizes that there is a need to protect "marginalized and vulnerable groups in Africa" who have not been accommodated by dominating development paradigms, leading to mainstream development policies that violated their human rights.[16]

On the basis of a review of factual evidence, the Commission found that the Endorois are both a people (a collective of individuals able to claim the collective rights under the African Charter) and an indigenous people (in the African sense, as described above):

> The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as "peoples", viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy—especially rights enumerated under Articles 19 to 24 of the African Charter—or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.[17]

The decision of the African Commission was therefore as follows:

> From all the evidence (both oral and written and video testimony) submitted to the African Commission, the African Commission agrees that the Endorois are an indigenous community and that they fulfil the criterion of "distinctiveness". The African Commission agrees that the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a "people", a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights—the right to preserve one's identity through identification with ancestral lands.[18]

The decision appears to imply that under the African Charter indigenous peoples are a sub-category of the peoples that can claim collective rights. Other peoples can claim these rights too. These other peoples may not share all the features required of an African indigenous community, but because they are marginalized and vulnerable, they deserve the protection the African Charter offers. The "*Southern Cameroon*" case[19] is particularly informative in this respect. The people of south Cameroon are Anglophone, while north Cameroonians are Francophone. The linguistic difference is a direct result of the history of decolonization. In the dispute, the complainants alleged a host of violations under the African Charter, seeking to demonstrate that Southern Cameroonians were systematically discriminated against by the Government. They also claimed a violation of the right to development. The Commission found that the people of south Cameroon are a people in the sense of the African Charter, even if they are not ethno-anthropologically different from the people living in the northern part of the country. In the African Commission's view:

> The Commission agrees with the Respondent State that a "people" may manifest ethno-anthropological attributes. Ethno-anthropological attributes may be added to the characteristics of a "people". Such attributes are necessary only when determining indigenology of a "people", but cannot be used as the only determinant factor to accord or deny the enjoyment or protection of peoples' rights.[20]

The people of south Cameroon were not an African indigenous community, but they were nevertheless a people because "they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. More importantly, they identify themselves as a people with a separate and distinct identity."[21]

In conclusion, indigenous peoples are considered as peoples under the African Charter, but the two terms are not synonymous. Other peoples sharing common characteristics and self-identifying as a people also hold collective rights. This raises a further issue, namely whether the scope of the collective rights under the African Charter differs depending on whether a people is indigenous or not.

In the *Endorois* case, the complainants argued that the Endorois's right to development was violated

[16] *Endorois* case (see footnote 10), para.148.
[17] Ibid., para. 151.
[18] Ibid., para. 162.
[19] African Commission on Human and Peoples' Rights, *Kevin Mgwanga Gunme et al.* v. *Cameroon*, communication 266/2003. The decision was adopted by the African Commission at its forty-fifth ordinary session, held in 2009, and is available at www.achpr.org/english/Decison_Communication/Cameroon/Comm.%20266-03.pdf.
[20] Ibid., para. 178. Note that the criterion of "ethno-anthropological attributes" is not explicitly used in the *Endorois* decision in determining that the community is indigenous.
[21] Ibid., para 179. Note that the language of article 22 of the African Charter on Human and Peoples' Rights refers to the need to ensure that development respects the *identity* of a people (emphasis added).

as a result of the State's failure to adequately involve them in the development process and to ensure the continued improvement of the Endorois community's well-being.[22] The terminology used in the case is reminiscent of article 2, paragraph 3, of the Declaration on the Right to Development. The claimants argued that the lack of choice between whether to stay or to to leave the Endorois's traditional area contradicted the guarantees of the right to development.[23] In terms of benefit-sharing, they argued that the State did not embrace a rights-based approach to economic growth.[24] The complainants thus hoped to convince the African Commission to interpret article 22 of the African Charter in the light of international standards.

In its decision dealing with the alleged violation of article 22 on the right to development,[25] the African Commission took note of a considerable number of sources. These included the reports of the Independent Expert on the right to development, Arjun Sengupta; work done by the Working Group on Indigenous Populations of the Sub-Commission on the Promotion and Protection of Human Rights; the results of the African Commission's Working Group of Experts on Indigenous Populations/Communities; the Declaration on the Right to Development; the case law of the Inter-American Commission and Court of Human Rights dealing with indigenous issues; and recommendations of the United Nations Committee on the Elimination of Racial Discrimination. None of these sources are binding on the Government of Kenya. The African Commission used these authorities (whose work is primarily of a "soft law" nature) indirectly to give meaning to article 22 of the African Charter. It is also notable that the African Commission amalgamates sources on the right to development and sources on indigenous rights, as the Endorois are considered both a people and an indigenous people. The Commission's extensive use of its interpretive powers is, in any case, striking.

On the issue of inadequate involvement of the Endorois in the development process, the African Commission found that the forced evictions did not allow the Endorois to benefit from the establishment of the game reserve as was required by the right to development as expressed in the African Charter. Consultations had been inadequate and did not meet the standard of effective participation. The State failed to provide adequate assistance at the post-dispossession settlement. The State did not obtain the prior, informed consent of all the Endorois before designating their land as a game reserve.[26] In relation to benefit-sharing, the African Commission held that the State was required to ensure mutually acceptable benefit-sharing, understood as "a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Endorois community".[27] In conclusion, the African Commission found that:

> The Respondent State … is obligated to ensure that the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. *It finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter.*[28]

Would the African Commission have arrived at the same decision on the right to development if the Endorois had not been an indigenous people? Any response is speculative. The text of the African Charter does not distinguish between different kinds of peoples. It is only by interpreting article 22 in the light of general international law that a distinction between indigenous peoples and other peoples can be brought in. When a non-indigenous people alleges a violation of the right to development, the authorities cited above that refer to indigenous rights are irrelevant. In international documents, the requirement of free, prior and informed consent applies only to indigenous peoples. For peoples generally, the lesser, but still significant standard of article 2, paragraph 3, of the Declaration on the Right to Development applies, i.e., the requirement of "active, free and meaningful participation" in decision-making. The latter standard requires adequate and informed consultation, but not consent.

The "*Southern Cameroon*" case may again offer useful insights. In this case, the African Commission dealt summarily with the complaint brought by the non-indigenous people of south Cameroon on the

[22] *Endorois* case (see footnote 10), para. 125.
[23] For a similar approach to the issue of choice in factual circumstances close to those of the *Endorois* case, see World Bank Inspection Panel, India: Ecodevelopment Project, eligibility report (21 October 1998), available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/EcoDevelopmentReport.pdf.
[24] *Endorois* case (see footnote 10), para. 135.
[25] Ibid., paras. 269-298.
[26] Ibid., para. 291: "[T]he African Commission is of the view that [in] any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."
[27] Ibid., para. 296.
[28] Ibid., para. 298 (Commission's emphasis).

right to development. The African Commission spent a mere paragraph on dismissing the complaint, stating:

> The Commission is cognizant of the fact that the realisation of the right to development is a big challenge to the Respondent State, as it is for State Parties to the Charter, which are developing countries with scarce resources. The Respondent State gave explanations and statistical data showing its allocation of development resources in various socio-economic sectors. The Respondent State is under obligation to invest its resources in the best way possible to attain the progressive realisation of the right to development, and other economic, social and cultural rights. This may not reach all parts of its territory to the satisfaction of all individuals and peoples, hence generating grievances. This alone cannot be a basis for the finding of a violation. The Commission does not find a violation of Article 22.[29]

On the other hand, the African Commission found a violation of article 19 of the African Charter on equality of peoples, owing to the relocation of business enterprises and the location of economic projects in Francophone Cameroon, which generated negative effects on the economic life of Southern Cameroon. In the light of the *Endorois* decision, it is difficult to understand why the African Commission failed to apply the "active, free and meaningful participation" standard to the people of south Cameroon. Elsewhere in its decision, the African Commission found that there was some representation of the people of south Cameroon in national political institutions, but that grievances raised were not accommodated properly by the State. That had led to civil unrest, prompting the Commission to call for a comprehensive national dialogue. An appropriate investigation of the "active, free and meaningful participation" standard under article 22 could well have led to a different decision on the right to development.

The *Endorois* decision may be praised for going beyond the Declaration on the Right to Development in placing not the individual but the survival of an (African) indigenous group at the centre of development.[30] It remains to be seen, however, how the African Commission will deal with claims by other peoples based on the right to development in the future.

Finally, the *Endorois* case involved a purely domestic situation, involving Kenyan actors only. The international dimension of the right to development was irrelevant to the facts. Article 22 of the African Charter includes a duty of States collectively to ensure the right to development. The scope of this duty deserves to be tested before the African Commission, e.g., in a case of an indigenous people divided by international borders. It would in principle be even more significant to address the responsibility of donor countries or foreign companies in an African indigenous rights case (for instance, on the exploitation of natural resources). The obvious limitation in such an instance is that only States parties to the African Charter can be held to account before the Charter's monitoring bodies.

VI. Final observations

The *Endorois* decision is of particular importance from an indigenous rights perspective. The decision puts to rest any lingering doubts about whether African indigenous communities can avail themselves of the protection offered to peoples under the African Charter on Human and Peoples' Rights. From a global perspective, a second regional forum, after the Inter-American Court of Human Rights, has opened up to the consideration of indigenous rights claims. The *Endorois* decision also demonstrates that the right to development, at least as it appears in the African Charter and in the context of the Charter's monitoring procedure, is justiciable. On the other hand, the African Commission's findings in the *Endorois* case with respect to compensation (i.e., the State's obligation to recognize the rights of ownership of the community, to provide access to and restore its land and to pay compensation) could arguably have been arrived at even if the complainants had not raised the right to development issue.

The wider question addressed in this chapter is the interaction between indigenous rights and the right to development. This interaction can be looked at from both directions. One aspect is the potential that the general right to development holds for indigenous peoples. Another question is whether progress in the recognition of an indigenous right to development can contribute to the further clarification and implementation of the general right to development.

The potential of the general right to development (as included in the Declaration of the Right to Development) to indigenous peoples should not be overestimated. The indigenous right to development (i.e., the right to development as it appears in the United Nations Declaration on the Rights of Indigenous Peoples) is premised on self-determined development, based on indigenous peoples' own decision-making structures, and the requirement to obtain their free,

[29] *"Southern Cameroon"* case (see footnote 19), para. 206.
[30] J. Gilbert, "Indigenous peoples' human rights in Africa: the pragmatic revolution of the African Commission on Human and Peoples' Rights, *International and Comparative Law Quarterly*, vol. 60, Issue 1 (2011), p. 268.

prior and informed consent on projects involving the use of their lands and the exploitation of natural resources. This goes far beyond what is required by the text of the general right to development as formulated in the Declaration on the Right to Development.

One aspect of the general right to development, however, which is potentially of interest to indigenous peoples is the international dimension of the right. The United Nations Declaration on the Rights of Indigenous Peoples addresses international cooperation (including development cooperaton) in articles 29, 41 and 42, but offers little detail. The criteria developed by the high-level task force on the implementation of the right to development on "States acting collectively" could assist indigenous peoples faced with the adverse effects of global economic and financial policies.

Do new developments in the area of indigenous rights impact on the general right to development?

At the time of the drafting of the Declaration on the Right to Development, only two holders of the right to development were considered, namely the individual and the entire populations of States. Indigenous rights have evolved to the extent that the concept of "people" in the Declaration on the Right to Development is to be understood today as including indigenous peoples.

In addition, an argument can be made that in cognizance of developments at the African Commission on Human and Peoples' Rights and at the Inter-American Court of Human Rights,[31] the concept of "people" in the Declaration should not be limited to indigenous peoples only.

Although adoption of this position may require some diplomatic shifting of positions, from a legal perspective, the result can be achieved through the use of evolutionary interpretation techniques. Evolutionary interpretation is a methodology used frequently by all regional human rights courts. The International Court of Justice recently endorsed the practice.[32] In a dispute between Costa Rica and Nicaragua, the Court ruled that:

> [T]here are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[33]

The evolution in international law with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples has resulted in a broader understanding of indigenous peoples as rights holders when it comes to the "right to development". Regional developments in the African and Inter-American cases have also led to a broader understanding than was the case at the time of drafting the Declaration on the Right to Development. The understanding of the right to development has therefore clearly evolved under international law to include indigenous and other peoples.

[31] See, for example, Inter-American Court of Human Rights, *Saramaka People* v. *Suriname,* judgement of 28 November 2007, para. 78 ff, available at www.forestpeoples.org/sites/fpp/files/publication/2010/09/surinameiachrsaramakajudgmentnov07eng.pdf.

[32] International Court of Justice, *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua*), *Judgment, I.C.J. Reports 2009*, p. 213, available from www.icj-cij.org.

[33] Ibid., para. 64.

Global governance: old and new challenges

*Balakrishnan Rajagopal**

I. Introduction

The current world economic crisis has highlighted a profound challenge to conventional thinking on and approaches to human rights, especially the right to development. Human rights, primarily economic and social rights, are based on a theory of constant expansion of the economic pie for all, and the right to development is explicitly predicated on the idea of the nation State leading the ever-increasing process of economic and social well-being of its citizens through international cooperation and solidarity. These assumptions have never been more under challenge than now: perpetual world economic expansion is under threat; the real wealth of the world—not just the economic wealth—may be shrinking rather than expanding; economic and social well-being are more and more undermined for the most vulnerable populations of the world; the role of the nation State is more and more contested as a vehicle for development; and the international community is more divided than ever. The challenge of who is accountable for these worsening outcomes and who will be responsible for ensuring a different and more sustainable future are central questions of governance and, for the purposes of this chapter, of global governance. The right to development could provide a framework for tackling these questions if it is reoriented to include dimensions of limits imposed by social, environmental and political factors.[1] Indeed, it was realized from the beginning of the articulation of the right to development in the 1980s that its achievement hinged on deep-rooted transformations in the authorities, institutions and processes of decision-making at multiple levels within which nation States pursued their development goals. These levels were not only national and international but also sub-State and within social systems in constant interaction—in other words, a transformation of global governance rather than simply international governance. It is in this sense that I use the term "global governance" instead of seeing "global" as the arena beyond/outside the State and "governance" as a one-dimensional exercise of authority rather than an interactive one among layers of decision-making. In this chapter, I analyse the older, inherited challenges of global governance to the realization of right to development and emerging new challenges, which have become apparent.

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[1] The idea that the right to development needs to be rethought without being abandoned is something I have expressed in many ways before. See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003), pp. 219-230. The idea that development and the right to development have natural and ethically imposed limits, for environmental, social and political reasons, is inspired by many, including Ivan Illich, *Tools for Conviviality* (Marion Boyars,1973), who elaborated the thesis of limits with respect to modern industrial society. On more of this, see below, section IV.D.

II. The right to development and global governance: some preliminary considerations

A. The relationship between development, globalization and human rights

Human rights have been brought to bear on globalization in recent years insofar as decisions made at the meta-State levels—in international organizations, foreign Governments and private networks—affect the fundamental human rights of ordinary people around the world, who have little say in making those decisions. A traditional understanding of human rights as the rights of citizens of a single State to whom that State owes corresponding obligations became increasingly untenable as the model of accountability and justice in a world in which the source of violations and the remedy for them appeared to arise beyond the traditional regulatory competence of such States. A usual call by human rights policy advocates has relied on the idea that globalization can be tamed by human rights, by more participation in the processes of decision-making[2]—usually in the form of civil society—or by developing new norms that impose obligations, which include extraterritorial obligations on States for the conduct of non-State actors.[3] The idea is that there is nothing basically wrong with globalization except that the weak and the vulnerable get little of its benefits and most of its burdens. The idea is that if we can tweak, change, humanize globalization, we can then have it all. Many influential writers such as Joseph Stiglitz articulate this view, which I shall call the dominant view.[4]

It is fair to say that this assumption is not universally accepted. Many scholars and practitioners believe that, in the light of our experience with development and globalization, human rights violations are often essential for the production and reproduction of wealth and productivity in the economic sense. In this view, the violation of human rights is often part and parcel of what we call successful development or globalization. Such a view maintains that in fact it is not the denial of development or the exclusion from globalization that causes human rights violations and economic and social deprivation in general, but that the misery of the poor is in fact a "planned misery", as Susan Marks has called it.[5]

The two above radically opposing views on the nature of globalization and its relationship to human rights have a fundamental impact on how we think about global governance. If we start from the premise that globalization is essentially benign in its impact on the weak and subalterns, and the problem is one of lack of adequate insertion of the poor into global markets, circuits of capital and culture, the reform of global governance yields one set of proposals.[6] Those may include the further democratization of international organizations by increasing the voice of developing countries in their governance, increasing the participation of civil society in global governance and imposing and enforcing obligations against private entities and so on.

However, if we start from the premise that globalization is a problematic project because it has a structural bias against the weak and the poor and the vulnerable which is hard to separate from its logic of production, consumption and distribution, one must then address a different set of reform proposals regarding global governance. Such reforms may be more far-reaching and fundamental than any which are currently on the global agenda. They might include fundamental changes to the way markets, finance and governance are organized at multiple levels and call for sharp augmentation of the capacity for solidarity, collective action and self-governance. There is nothing inherent in the right to development that makes us choose one view over the other, but the politics of that right, and of other human rights, especially the struggle for economic and social rights, may yet determine such a choice.

It is imperative to bear this structural dimension in mind as we approach global governance from the perspective of the right to development.

B. The shift from government to governance

The second issue that we must consider regarding global governance is the meaning of the term "governance". Implied in it is a rejection of the term "govern-

[2] See "Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalization: report of the High Commissioner" (E/CN.4/2005/41).

[3] See the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights of 28 September 2011, available from www.maastrichtuniversity.nl, and the expert commentary of 29 February 2012, available at http://209.240.139.114/wp-content/uploads/2012/03/maastricht-principles-commentary.pdf.

[4] See Joseph Stiglitz, *Making Globalization Work* (W.W. Norton, 2006).

[5] See Susan Marks, "Human rights and root causes", *The Modern Law Review*, vol. 74, Issue 1 (January 2011), pp. 57-78. There is a long line of thinking and writing that echoes this across several disciplines, most recently captured through the post-development critique.

[6] An example of this, which concludes by advocating reform of international governance, is Paul Collier, *The Bottom billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford University Press, 2007).

ment" as the appropriate frame. Indeed, a shift from "government" to "governance" has been one of the signal shifts of the post-cold war consolidation of neo-liberal democracy on a global scale.[7] This shift, which occurred in the literature on international relations, is distinct from but related to the shift to the language of "governance" in new governance theory[8] as well as to "good governance" in the development field.[9] The common ground between the first two senses of the term "governance" is that a government-centred regulatory approach to effectiveness and legitimacy of functioning social and economic systems is no longer adequate. This is due to many reasons, including the rise of non-State actors, networks among them, their ability to act in situations where conventional State-based action seemed to be lacking, as well as the absence of supranational systems of order. But at a deep normative level, the "governance" focus was too often parasitic on the "good governance" agenda, which articulated an ideal vision of what the limits of State action ought to be.[10] It was postulated that such an approach must emphasize deregulation, privatization, public-private partnerships, decentralization, democratization (often procedural), human rights (often thin versions) and transparency. The problems of this ideal vision have, during the last two decades, become apparent, and in many respects, it has been abandoned in practice. This is not the place to discuss these problems at length, but it can be noted that the "good governance" agenda served to undermine the development potential of robust State action, while disciplining the populations using a highly limited and hypocritical deployment of human rights and democracy.[11] Robust State action is now, once again, recognized as central to development success[12] while the need to ensure the accountability of States through human rights and democracy is also well recognized. Where one or the other is missing, it has produced undesirable, and often violent, social consequences. The recent rise of global protests and instability is a consequence.

An approach to global governance must begin by clarifying what one means by governance and, in particular, whether it is related to "good governance" with its anti-third world government ideology. A global governance agenda is doomed to fail if grounded in the idea of disciplining States and celebrating private actors while failing to recognize the centrality of States for positive economic and social outcomes, or if it celebrates a narrow understanding of development while sacrificing accountability of State and private actors. Rather, the challenge we face is the need for a global governance agenda that reinstates accountable and embedded statehood as part of the solution, while committing itself to deep democratic structural transformation of such States, private networks and supranational systems of order, and the creation and strengthening of norms and structures to hold States and other actors accountable to their commitments.

C. Where/what is "global" in global governance?

The third issue that needs to be clarified in advance is the meaning of the word "global" in global governance. Where is "global" located? What is its spatial, geographical domain and how does that relate to other spatial boundaries that we use in political discourse such as that of the nation, village, city or home? This question is central to understanding the ambit and the reach of the global governance reform that one must propose to bring about an improvement in the right to development. If one assumes that "global" is whatever is outside or beyond the reach of all nation States, such as the regulation of the Antarctic, the high seas or outer space, governance of such domains is properly the subject of transnational efforts beyond the State. However, there is no self-evident reason—if there ever was one—why this should be the case at the current world juncture.

[7] See James N. Rosenau and Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics* (Cambridge University Press, 1992).

[8] The literature is vast. See, for example, Bob Jessop, "The rise of governance and the risks of failure: the case of economic development", *International Social Science Journal*, vol. 50, Issue 155 (March 1998), pp. 29-45; and Orly Lobel, "The renew deal: the fall of regulation and the rise of governance in contemporary legal thought", *Minnesota Law Review*, vol. 89 (November 2004).

[9] See, for example., World Bank, "Political institutions and governance" in *World Development Report 2002: Building Institutions for Markets* (Washington, D.C., 2002); International Monetary Fund, *Good Governance: The IMF's Role* (Washington, D.C., 1997); World Bank, *Governance: The World Bank's Experience* (Washington, D.C., 1994); United Nations Development Programme, "Reconceptualising Governance", discussion paper 2 (January 1997); Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobatón, "Governance matters: from measurement to action", *Finance & Development*, vol. 37, No. 2 (June 2000); Merilee Grindle, "Good enough governance revisited", *Development Policy Review*, vol. 25, No. 5 (2007), pp. 533-574.

[10] This is not often recognized. For an attempt to recognize the distinct deployment of the term "governance" but which nevertheless does not make this link, see Thomas G. Weiss, "Governance, good governance and global governance: conceptual and actual challenges", *Third World Quarterly*, vol. 21, No. 5 (2000), pp. 795-814.

[11] See James Gathii, "Good governance as a counter-insurgency agenda to oppositional and transformative social projects in international law", *Buffalo Human Rights Law Review*, vol. 5 (1999).

[12] The heterodox literature that has developed this point is by now vast, starting with Gerschenkron and extending through Amsden, Chang and Rodrik. See A. Gerschenkron, *Economic Backwardness in Historical Perspective: A Book of Essays* (Belknap Press, 1962); Alice Amsden, *The Rise of the "Rest": Challenges to the West from Late-Industrializing Economies* (Oxford University Press, 2003); H. Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press, 2002); Dani Rodrik, "Why do more open economies have bigger Governments?", *Journal of Political Economy*, vol. 106, No. 5 (October 1998).

I have argued for many years that there is a need to move beyond a physical geographical understanding of international order to a cultural geography that takes community and culture more seriously as grounds of resistance, resilience and rebuilding.[13] In many domains of development practice, it is evident that the global influences the local, and local can often be understood only as the interplay of many forces that include the global.[14] To take one example, regulation of land use in Mexico by local communities might be governed by normative and institutional systems of law that stretch from the local to the national and international—Mexican and the North American Free Trade Agreement (NAFTA)—such that it is impossible to say where a "site" of production of the "global" might be.[15] It is everywhere, from the actual site of the land and community to the NAFTA tribunals, which may hear the case in Canada. To "govern" such a "global" phenomenon, one needs change at all those levels in order to protect the human rights of Mexicans affected by such land use. Without such a comprehensive understanding of the term "global", there is a perennial danger that we are like the proverbial blind men groping in the dark around an elephant.

III. The right to development and global governance: challenges at the origin

The key demands of developing countries when the right to development was adopted in 1986 focused on the international barriers to development, although the right to development itself attempted to alter the meaning and process of development in profound ways to position the "human person" as the central subject of the development process. Among the international barriers identified were the lack of democracy at the international level and the resulting concentration of economic and political power of the North, the rigged rules of the system which worked against developing countries, the precarious condition of self-determination in developing countries and the lack of effective sovereignty over natural resources due to aggressive interventionist policies of powerful countries, and the prevalence of structural conditions that prevented the State in the developing world from performing a more robust function in economic policy formulation, coordination and implementation due to the prevailing neoliberal economic orthodoxy in the 1980s. As a legal claim, the right to development attempted to reassert the primacy of national sovereignty in economic policymaking while claiming that the right imposed international obligations on richer countries and on the international system for a more redistributive world order which was also a more level playing field in economic terms. It is fair to say that the original demands of developing countries relating to the right to development were more focused on changes in the international order than on changes within States to achieve rights-based development outcomes, as this has come to be understood in more recent years. The latter meaning, which has attempted to resurrect the more radical interpretation of the right to development as the right of individuals, although with imperfect corresponding obligations, has animated the work of United Nations experts and academics[16] and given substance by the actual struggles of social movements and activists on the ground against the costs of development. But in assessing the meaning of the right to development and its implications historically, one must consider the original challenges as envisaged by its leading proponents. They had more to do with international barriers.

In reflecting upon the 25 years since then, one must render a verdict that the record of achievement of the original demands of the right to development with respect to international barriers has been a mixed bag. In fact, the developing countries have succeeded in resurrecting the idea of the strong State in economic policy formation and implementation, which is undergirded by a strong sense of national sovereignty.[17] There is even a sense that industrial

[13] Balakrishnan Rajagopal, "Locating the third world in cultural geography", *Third World Legal Studies*, vol. 15 (1998-1999).

[14] There is a long line of work that posits and defends such a meaning of the term "global", from Saskia Sassen to Arjun Appadurai. See, for example, Saskia Sassen, "The State and the global city: notes toward a conception of place-based governance", in Saskia Sassen, *Globalization and its Discontents* (The New Press, 1998); and Arjun Appadurai, "Deep democracy: urban governmentality and the horizon of politics", *Environment and Urbanization*, vol. 13, No. 2 (October 2001), pp. 23-43. See also Arif Dirlik, "Globalism and the politics of place", *Development*, vol. 41, No. 2 (June 1998).

[15] For an example, see International Centre for Settlement of Investment Disputes (Additional Facility), case No. ARB(AF)/97/1, *MetalClad Corporation* v. *United Mexican States*, award of 30 August 2000 by the Arbitral Tribunal, presided over by Sir Elihu Lauterpacht. For a discussion, see Fernando Bejarano González, "Investment, sovereignty, and the environment: the Metalclad case and NAFTA's chapter 11", in *Confronting Globalization: Economic Integration and Popular Resistance in Mexico*, Timothy Wise, Hilda Salazar and Laura Carlsen, eds. (Bloomfield, Connecticut, Kumarian Press, 2003).

[16] The late Arjun Sengupta, Philip Alston, Stephen Marks and Upendra Baxi are foremost in this regard. See, for example, the fifth report of the Independent Expert on the right to development, Arjun Sengupta (E/CN.4/2002/WG.18/6 and Add.1); see also Philip Alston, "Ships passing in the night: the current state of the human rights and development debate seen through the lens of the Millennium Development Goals", *Human Rights Quarterly*, vol. 27, No. 3 (August 2005); Stephen Marks, "The human right to development: between rhetoric and reality", *Harvard Human Rights Journal*, vol. 177 (Spring 2004); and Upendra Baxi, "Development as a human right or as political largesse? Does it make any difference?", Founder's Day lecture, Madras Institute of Development Studies (June 2006).

[17] Even *The Economist* recognizes the rise of the State again, in the form of the "visible hand", or State capitalism in emerging economies. See "The visible hand", *The Economist*, 25 January 2012.

policy is now back in action as a policy tool even in Western circles. Large and medium-sized developing countries have also benefited well from the State-based systems of supranational order, especially the World Trade Organization (WTO).[18] Unfair trading rules and unilateral punitive measures in trade relations persist but are increasingly challenged at WTO, while the rules-based regime has been exploited by large developing countries to increase their "policy space". Terms of trade between developing and developed countries have changed for the better, although they tend to be dominated by exporters of fuels and mining products.[19] Exporters of agricultural commodities continue to suffer from long-term negative terms of trade, thereby revealing the structural conditions under which global capitalism operates. Very little has been done to improve their conditions, including through long-advocated international mechanisms such as buffer stocks and price support, or even extending DFQR (duty-free, quota-free) market access to least developed countries (LDCs).[20] Similarly, while South-South trade flows have also vastly increased, they have tended to create new relations of domination, especially by large raw material-consuming countries like China.[21] All this has undoubtedly been made possible by globalization and the resultant circulation of capital, technology, culture and manufacturing. Western domination of capital and technology has become less, even as the formal structures of international economic and political governance continue to be dominated by them. The rise of new contenders to power in the form of BRICS (Brazil, Russian Federation, India, China and South Africa), especially China, has posed new questions of power and accountability unlike those faced by the first generation of right to development champions. In particular, the very same forces that enabled medium and large developing countries to exploit globalization have also revealed serious fissures in the solidarity of developing countries, which were the original champions of the right to development, and given rise to new challenges of global governance.

[18] Alvaro Santos, "Carving out policy autonomy for developing countries in the World Trade Organization: The Experience of Brazil and Mexico", *Virginia Journal of International Law*, vol. 52, No. 3 (March 2012), pp. 551-632.

[19] See United Nations Conference on Trade and Development (UNCTAD), *Development and Globalization: Facts and Figures 2008* (United Nations publication, Sales No. E.07.II.D.20, 2008), p.10.

[20] Indeed, the dire situation of LDCs reveals the stagnant or negative progress made in achieving the goals of the right to development. Only three countries have "graduated" from the status since the 1980s. Most of the global poor do not live in LDCs any longer, but rather in middle-income and emerging economies like India. For an assessment and proposal, see the Istanbul Declaration of the Academic Council on the occasion of the Fourth United Nations Conference on the Least Developed Countries, Istanbul, Turkey, 9-13 May 2011, available from www.ldcintellectuals.org/EN/.

[21] For an assessment of South-South trade, see Bailey Klinger, *Is South–South Trade a Testing Ground for Structural Transformation?*, UNCTAD, Policy Issues in International Trade and Commodities, Study Series No. 40 (UNCTAD/ITCD/TAB/43) (2009).

IV. New challenges of global governance for realizing the right to development

The new challenges of global governance that matter for the right to development are fourfold:

(a) The changing character of global governance and where it is located;

(b) The geopolitics of the right to development stemming from the rise of the "Rest", including BRICS, and the transformation of the global development agenda due to their rise;

(c) The reorientation of the third world—the traditional constituency of the right to development—and the emergence of a more counter-hegemonic form of the third world;

(d) The global crisis of ends and means, most visibly seen in the global financial and economic crisis that burst forth in 2008 and which strongly suggests that the right to development can no longer rest on a conception of development that is merely rights-friendly, humane and participatory and otherwise neoclassical, but must reckon with the limits to development itself and with the implications of such an approach for human rights.

These challenges are by no means the only ones, nor are they entirely new. But they appear to have gained sharp momentum in recent years and have shown the need to rethink the right to development in new and even daring ways.

A. Changing characteristics of global governance

The nature of global governance—who governs, at what level, how and towards what end—has become a central issue with deep implications for the right to development. As mentioned previously, global governance is an ongoing project of transformation in which neither the location of regulation nor the scale of the activities encompassed is already set. Global governance is not merely what lies beyond the nation State; it is also what lies in between and below, and

how all those levels relate to one another. Reform of the United Nations system or of international organizations such as WTO or the Bretton Woods institutions is a necessary but not sufficient condition of real change in global governance. The first reason why this is the case has to do with the question of who governs. The world that existed before 1986, when the right to development was adopted, was much less characterized by the fluidity of identities, the rapidity of cultural and financial flows, and the thickness of private networks of non-governmental organizations (NGOs) or private actors that characterize today's world. It was a world wherein the nation State had a much more central role in the imagination. The State was expected to govern its population internally and statist organizations like the United Nations were expected to coordinate actions towards achieving the goals of the right to development.

Now it is not clear if the State alone governs, if it ever did. Private networks, NGOs, humanitarians, business enterprises and quasi-public sovereign entities all function with much more authority and effectiveness in a range of security, economic, environmental and other domains. To analyse this transformation is not within the purview of this chapter, but it may be noted that many research projects of global governance are under way to try to comprehend the nature of the changes outlined above, such as "global administrative law", autopoesis,[22] law and regulation, global expertise, etc.[23] In each of these modes of comprehension, global governance takes place in different locations; for some it is in the expertise of professionals, for others it is in the inexorable mechanisms of domination and power, and for yet others, it is in the social and cultural domains of meaning creation.

To give one example of this complexity, the climate change regime is composed not only of States, treaties, standards and the behaviour of formal participants in the circulation of norms and institutions; it is also found in the interstices of finance in the form of climate change bonds, or in the form of NGO intervention in local land use by rural and indigenous people in regimes such as UN-REDD.[24] To imagine changes to the global governance of climate from a right to development perspective, one must change all of these mechanisms and actors, their expectations, interests and values, and the way they relate to one another. The complexity of effecting change at so many levels makes the project of global governance much more difficult, from a right to development perspective, compared to the more limited apparent challenge of global governance in the 1980s. The stakes of effecting change in climate change may also differ fundamentally depending on the vantage point of those effecting change: a United Nations official, a Government bureaucrat, a village chief or a climate change expert from a university. They will raise basic questions about the ends of governing climate and for whom governance is intended.

These factors combine to introduce a powerful reality check in determining what kind of global governance reform is the right one from a right to development approach.

B. Rising powers and the transformation of the development agenda

A second challenge to global governance is introduced by the rise of the "Rest", the formerly colonized or marginalized countries which have come to achieve rapid progress in economic terms and a certain measure of political if not military power. This rise has serious implications for the geopolitics of the right to development and the meaning of the development agenda.

At one level, the rise of these Powers, especially in the form of BRICS, has resulted in the demand for changes in the governance of international organizations and has led to the rise of new groupings such as the Group of Twenty (G20), which has now supplanted the Group of Eight (G8) as the world's economic club of nations. Demands for a "second Bretton Woods" were heard after the 2008 global financial crisis, and led to a new lease of life for IMF, which had become discredited and underutilized by then. Now IMF has received replenishment of its funds and the quotas of member States have been increased. In particular, the voices of emerging economies such as Brazil, China, India and the Russian Federation have been increased through an amendment in 2008 and another (yet to enter into force) in 2010.[25] By contrast, reform of the World Bank, the Security Council and WTO has not seen much movement. The proponents

[22] The self-regulating theory of systems, called autopoesis, is further discussed in Anthony D'Amato, "International law as an autopoietic system", in *Developments of International Law in Treaty Making*, Rüdiger Wolfrum and Volker Röben, eds. (Springer, 2005). See also Gunther Teubner, ed., *Autopoietic Law: A New Approach to Law and Society* (European University Institute, 1987).

[23] For an analysis of these various approaches to global governance, see David Kennedy, "The mystery of global governance", *Ohio Northern University Law Review,* vol. 3, No. 3 (2008), pp. 842-845.

[24] The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, launched in 2008.

[25] See "The IMF's 2008 quota and voice reforms take effect", IMF press release No. 11/64, 3 March 2011.

of the right to development have advocated many of these reforms for a long time. There is a question why IMF reform has begun, however weakly,[26] while the reform of others stagnates. The answers lie partly in the political economy of development and globalization in today's world. The response by BRICS to these halting reforms also shows the changed conditions of development and globalization.

In short, one can attribute the limited progress on reform of international organizations to the global financial crisis and the resultant policy weakness of rich countries in macroeconomic terms. As the crisis exposed the weakness of the currency regime prevailing in the world, including the status of the United States dollar as a reserve currency, and the overleveraged nature of private debt, the role of credit and borrowing from countries such as China became imperative as a tool to manage the crisis. The rise of sovereign wealth funds, primarily from emerging economies or economies that experienced a commodity boom, weakened the grip of Western capital over global liquidity. The reforms at IMF can be explained primarily by this weakening and the lessons learned by IMF about the value of short-term capital controls—a reversal of its orthodoxy from the 1990s during the Asian economic crisis. The reform of the other organizations does not have the immediacy and urgency that the global financial crisis provoked and the resistance of the rich countries continues unabated.

BRICS have responded to this impasse by considering alternatives to the current system of global governance. They have held five summits since 2009 (with a sixth planned for 2014); they have strengthened their economic interactions, including trade; and they have tried to coordinate policy on issues like the Islamic Republic of Iran, Libya and the Syrian Arab Republic with partial success. At their summit in China, in April 2011, the BRICS countries adopted the Sanya Declaration spelling out a different vision for international relations from the current United States-dominated world system, a vision that perhaps bears more similarity to the original vision of the Charter of the United Nations. For instance, implicitly rejecting the use of force under emerging principles of the responsibility to protect, the Sanya Declaration pronounces: "We share the principle that the use of force should be avoided. We maintain that the independence, sovereignty, unity and territorial integrity of each nation should be respected" (para. 9). At the March 2012 meeting in New Delhi, they announced their intention to create closer financial integration, starting with the creation of a benchmark equity index derivative shared by the stock exchanges of the five BRICS nations (which would be cross-listed, so stocks could be bought in local currencies), as well as a BRICS Development Bank modelled on the Brazilian development bank BNDES and a possible competitor to the World Bank (which could extend credit guarantees in local currencies).[27] In the Sanya Declaration, the BRICS countries also make it clear that they will pursue diversification of world currencies, including the possibility of replacing the United States dollar as the world's reserve currency by Special Drawing Rights (SDR) or some other basket of currencies. These are significant steps towards reforming global economic governance, although they could turn out to be hegemonic as well. Importantly, the BRICS countries are pursuing reform of global governance through two tracks, one that pushes for a greater voice for them in existing institutions such as the Bretton Woods institutions, and a second track, which explores alternatives to the existing system itself.

A final note on the impact of the rise of the "Rest" on global governance: it is clear from the various BRICS declarations that they aim to offer an alternative blueprint for global governance which may not necessarily result in a right to development-friendly approach. In particular, the BRICS summit declarations barely mention human rights as an important element in the world order that they seek to establish. Instead, the emphasis is solely on sovereignty and territorial integrity based on the Charter of the United Nations. This can be contrasted with the Bandung Declaration of 1955,[28] the founding moment of the third world, which mention human rights as a central element in the kind of world order that those countries wished to establish. The absence of human rights in the BRICS declarations may not mean that they seek to ignore the importance of human rights, but may rather indicate their level of discomfort at the way in which the West has used recourse to rights as a toxic pretext for the use of force and other illegal interventions. The question is whether the new BRICS approach may lead to the toleration of problematic means and ends in their respective fields of development cooperation with less powerful developing countries, for example

[26] See Ngaire Woods, "Global governance after the financial crisis: a new multilateralism or a last gasp of the Great Powers?", *Global Policy*, vol. 1, Issue 1 (January 2010).

[27] See the Delhi Declaration adopted by the Fourth BRICS Summit, New Delhi, 29 March 2012.

[28] For a discussion of the importance accorded to human rights at the 1955 Conference, contrary to the popular misconception that the third world was always anti-human rights, see Roland Burke, "'The compelling dialogue of freedom': human rights at the Bandung Conference", *Human Rights Quarterly*, vol. 28, No. 4 (November 2006), pp. 947-965.

between Africa and China or India. Most importantly, the idea that the "human person" is at the centre of the development process, a central contribution of the right to development, appears to be absent in the BRICS approach.

C. The reorientation of the third world and the emergence of a counter-hegemonic global South

I have detailed elsewhere the ways in which the category "third world" is no longer just a collection of States united by ideology, economic development and a shared sense of historic wrongs, but is instead a fragmented idea with a hegemonic and a counter-hegemonic frame.[29] Indeed, the transition from "third world" to "global South" is indicative of this fragmentation and reorientation. It is by now the case that the third world is a collection of social movements and collective mobilizations of workers, peasants, farmers, urban poor, women, indigenous peoples and many others who do not benefit from the insertion of the "third world" into the "global economy" or who share costs and benefits disproportionately. While many of these movements are embedded in or intertwined with States and statist structures such as the United Nations, States and statist structures have themselves become an arena of contestation between hegemonic and counter-hegemonic social forces.

The rise of counter-hegemonic and hegemonic forces in the third world poses serious challenges of global governance for the right to development, but also an opportunity to reinvent itself. The challenges posed by global social movements to global governance are indicated by the motto of the World Social Forum: "Another world is possible".[30] In this approach, social movements seek to be both modern and different, and not caught up in the binary of modernity versus tradition. The challenge that they pose is one of epistemology and ethics as they seek to problematize the superiority of expert knowledge, the over-reliance on professionalism, the over-bureaucratization of social life, the pervasiveness of power and its tendency to corrupt, and the possibilities inherent in collective action and solidarity. Many of these challenges are, as noted above,[31] the ones identified by current analysts of global governance as key to the understanding of today's world and of the possible ways to govern it better. From a right to development perspective, these challenges reveal the limits of its current framing but also show ways in which it can be made more relevant to the counter-hegemonic global South. It is no secret that the right to development framing has not had a significant impact as a tool of struggle or activism in the human rights field, but has rather remained esoteric at the level of geopolitics of nation States. This can be contrasted to the way other human rights, including economic and social rights, are deployed in struggles around the world. It is partly this failure to "connect" with the real politics of human rights that has kept the right to development weak. The radical potential in it can be better unleashed if it links creatively with the politics of the counter-hegemonic South.

The work by Arjun Sengupta, the former Independent Expert on the right to development, on the measurement of poverty in India in the unorganized sector is one example of how expert knowledge can be deployed in counter-hegemonic ways to help those who need the right to development most.[32] The right to development must expand its domain to include active political engagement on a range of issues that have multiple dimensions—economic, security, livelihood, sustainability and accountability—as it serves as a *Grundnorm* of the human rights regime to legitimate the voices of the most marginalized.

D. Limits to development and their implications for the right to development

The most difficult challenge for the right to development from the perspective of global governance is the one posed by the crisis of development and the models of human rights—especially economic and social rights—now revealed most clearly in the form of the global economic crisis that burst forth in 2008. The debate over the right to development in the 1980s was characterized by the double sense that developing countries were deprived of the fruits of modern technology and economic and social progress due to unjustified and oppressive policies of the rich countries, and that development was unfair in process and outcome to the rights of individuals and communities within States. Ergo, the reasoning went, development

[29] See Balakrishnan Rajagopal, "Counter-hegemonic international law: rethinking human rights and development as a third world strategy", *Third World Quarterly*, vol. 27, No. 5 (2006), pp. 767-783; see also Rajagopal, *International Law from Below* (see footnote 1).

[30] See Jai Sen and Mayuri Saini, eds., *Are Other Worlds Possible?: Talking New Politics* (Zubaan, 2005); Jai Sen and Peter Waterman, eds., *World Social Forum: Challenging Empires*, 2nd ed. (Black Rose Books, 2007); Boaventura de Sousa Santos, *The Rise of the Global Left: The World Social Forum and Beyond* (Zed Books, 2006).

[31] See footnote 23 above and the accompanying text.

[32] See *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector* published by the Indian National Commission for Enterprises in the Unorganised Sector, of which Arjun Sengupta was Chair, in 2007. The report found that 77 per cent of India's population lives on less than Rs. 20 per day, deeply contradicting more rosy Indian Government and World Bank estimates.

should be expanded, countries should grow economically and the standard of living for everyone must rise to catch up with the best of the West. This catching-up rationale had, however, an insidious and self-defeating logic to it. So long as the planet can sustain economic growth, endless growth is indeed possible. But that assumes that the real costs of economic development and globalization, in human and environmental terms, are fully accounted for, assessed when they go too far, and mitigated before crisis becomes catastrophe. The barriers to such honest accounting and response are well known by now: the myopia of expertise and specialization, the narrow professionalism of the ruling class, the lack of ethical regard for the values of human solidarity, and self-serving exploitation of the weak and of the planet's resources. Under these circumstances, it is hard to see how the right to development can rely on a notion of ever-expanding development, material progress and standard of living. Instead, it is necessary to think of an approach to the right to development wherein "development" is within the limits, both natural and ethical, of the industrial and globalizing model, unlike the limitless model dominant today and in the past.

The 2008 global economic crisis is only a symptom of a deeper underlying malaise. It is a crisis of development itself, not just of growth but of the broader idea that a constant improvement in living standards is possible through technology, science and rational thought, and which is realized through an increase in wealth.

The basic idea that the crisis is due to mistakes committed by a few "bad apples"—Lehman Brothers, or overleveraged banks, or spendthrift Greeks or Irish—is a mistaken understanding of the root of the problem. Rather, it has to do, borrowing from Joseph Schumpeter, with a process that I shall call "destructive creation". Schumpeter, of course, is famous for his theory of "creative destruction" to describe the process of economic innovation in capitalism which destroys old structures and creates new ones and would, he has argued, eventually lead to its demise.[33] I want to flip it over—following a more accurate Marxist reading of "creative destruction" by David Harvey[34] and others—that, in fact, the development process is more accurately described as destructive creation. To create anything of value, it needs to destroy what existed before; in relying on the idea of scarcity—which is at the heart of economic theory—the process of development in fact leads to a ceaseless accumulation, consumption and destruction of resources.[35] Every act of creation of value in the economy now involves more destruction than creation. Following this reasoning, the current economic crisis is structural, not exceptional.

The crisis indicates that the model of economic development and globalization dominant today is based on a process of "destructive creation", which is not morally, economically or environmentally sustainable. A search for alternatives through the right to development must begin by critiquing these foundational assumptions which permeate the legal, social, political and cultural orders and which defend development and globalization. As Immanuel Wallerstein asked recently: "After development and globalization, what?"[36] There is broad recognition of the inherent limits of an economic model which is based on scarcity, unending accumulation and consumption instead of human well-being and happiness. There are signals coming from stressed civilizations and a stressed planet that the path we are on is unsustainable.

V. Conclusion

The right to development shattered many shibboleths in world politics, international law and human rights even as it confirmed the centrality of many others. It tried to shift the focus of development, which had remained nation State-centred in legal terms, to individuals and communities; it posited an ethic of solidarity as a soft legal obligation, giving substance to article 28 of the Universal Declaration of Human Rights;[37] it reinforced the centrality of participation in the development process as a key to making it better; it articulated the Gandhian idea that the purpose of development was the fulfilment of the human personality; it fulfilled the geopolitical needs of a frustrated third world coalition at the United Nations which had seen its demand for a New International Economic Order ignored by the West. Despite these impressive

[33] See Joseph Schumpeter, *Capitalism, Socialism and Democracy*, 3rd ed. (Harper, 1962).

[34] See David Harvey, "Neoliberalism as creative destruction", *The Annals of the American Academy of Political and Social Science*, vol. 610, No. 1 (March 2007), pp. 21-44.

[35] For an earlier attempt to argue along the same lines, i.e., that the idea of scarcity drives much of the legal imagination in international law and human rights and why this is unsustainable, see Balakrishnan Rajagopal, "International law and the development encounter: violence and resistance at the margins", in *Proceedings of the American Society of International Law at its 93rd (Ninety-Third) Annual Meeting Held at Washington, D.C., March 24-27, 1999*. See also Leslie Sklair, "Social movements and global capitalism", in *The Cultures of Globalization*, Fredric Jameson and Masao Miyoshi, eds. (Duke University Press, 1998), in which he has articulated a critique of what he calls the "culture-ideology of consumerism".

[36] Immanuel Wallerstein, "After development and globalization, what?", *Social Forces*, vol. 83, No. 3 (March 2005), pp. 1263-1278.

[37] Article 28 of the Universal Declaration states: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." For an articulation of the importance of this revolutionary idea in today's world for the world's most marginalized, see the Istanbul Declaration (footnote 20 above).

achievements, the right to development remained disconnected from the real politics of human rights, which arose from the struggles of social movements; it gave ideological cover to a sovereigntist approach to development, which actually ignored human rights; and, most importantly, it remained wedded to a vision of development and human rights without limits. The global economic crisis of 2008 reveals most clearly the problems with these dimensions of the right to development, even while it highlights the need to recover the more progressive elements of the right. The stakes for global governance in achieving such a progressive vision of the right to development have never been higher.

International solidarity in an interdependent world

*Shyami Puvimanasinghe**

I. Introduction

The Earth is one but the world is not. We all depend on one biosphere for sustaining our lives. Yet each community, each country, strives for survival and prosperity with little regard for its impact on others. Some consume the Earth's resources at a rate that would leave little for future generations. Others, many more in number, consume far too little and live with the prospect of hunger, squalor, disease, and early death.[1]

This chapter describes how international solidarity, which underlies the right to development and is key to its realization, can provide the impetus for our collective responses to interconnected challenges in an interdependent world. It traces the evolution of the idea of international solidarity, connecting it to emerging conceptions of shared responsibilities. Finally, the chapter considers examples of State practice as revealed through international commitments and organizations, and of the workings of a broad range of stakeholders, notably global civil society, which provide evidence of international solidarity in action; it concludes by reiterating the significance of international solidarity for our common future.

Although international solidarity can be understood and interpreted in various ways, this chapter, first and foremost, views international solidarity specifically in relation to the right to development. Secondly, it adopts a contextualized approach to the evolution of the idea of international solidarity, locating it not only within the framework of the progressive development of international law—essentially a State-led process—but also viewing it as linked to the duty to cooperate and driven by developing countries in their quest for global social justice through an equitable international order. Thirdly, it considers international solidarity in the light of the dynamic realities of a world in which our interconnectedness poses common challenges to people in both the developed and developing worlds, perhaps best illustrated by the climate and environmental crisis and the search for just and sustainable development solutions. This chapter proceeds from the premise that the holistic ethos of the right to development, underscored by international solidarity, supports a people-centred approach to human and ecological well-being, through an alternative paradigm to both development and international economic relations which recognizes our common humanity.

II. The idea of international solidarity

[I]nternational solidarity is not limited to international assistance and cooperation, aid, charity or humanitarian assistance; it is a broader concept and

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[1] Report of the World Commission on Environment and Development entitled "Our common future" (A/42/427, annex), chap. 1, para.1.

principle that includes sustainability in international relations, especially international economic relations, the peaceful coexistence of all members of the international community, equal partnerships and the equitable sharing of benefits and burdens, refraining from doing harm or posing obstacles to the greater well-being of others, including in the international economic system and to our common ecological habitat, for which all are responsible.[2]

Prior to the establishment of the Human Rights Council mandate on human rights and international solidarity, Rui Baltazar Dos Santos Alves, in a working paper submitted to the Sub-Commission on the Promotion and Protection of Human Rights of the Commission on Human Rights, argued that solidarity must inspire international relations:

> The need for increasing affirmation of international solidarity arises from the state of iniquity that characterizes international relations. This iniquity derives from a certain historical context in which peoples and countries were deprived of the right to development, but it also results from factors and circumstances which continue to pose obstacles to bringing the living conditions in the developing countries closer to those in the developed countries (these factors include policies on subsidies, imposed conditionalities, the structural adjustment policies developed by the international financial institutions and policies of domination, to mention just a few of them) (E/CN.4/Sub.2/2004/45, para. 25).

The former Independent Expert on human rights and international solidarity, Rudi Mohamed Rizki, posited international and global solidarity in the light of peace, non-harm, equity, equality and sustainability in international relations, especially international economic relations, and defined international solidarity as "the union of interests, purpose and actions among States and social cohesion between them, based on the interdependence of States and other actors to preserve the order and very survival of international society, and to achieve common goals that require international cooperation and collective action. Global solidarity encompasses the relationship of solidarity among all stakeholders in the international community" (A/HRC/15/32, para. 57).

Elaborating further, Virginia Dandan, the current Independent Expert on human rights and international solidarity, asserts that

> Solidarity is a persuasion that combines differences and opposites, holds them together into one heterogeneous whole, and nurtures it with the universal values of human rights. International solidarity therefore does not seek to homogenize but rather to be the bridge across those differences and opposites, connecting to each other diverse peoples and countries with their heterogeneous interests, in mutually respectful, beneficial and reciprocal relations, imbued with the principles of human rights, equity and justice.[3]

In her message on International Human Solidarity Day 2011, "2011: testing to the limit the capacity of international solidarity", she said:

> Global challenges require multilateral global responses. Efforts undertaken in isolation no longer work in [view of] the enormity and expanse of the problems involved. These challenges also require a change of mindset in the way decisions are made, and how actions are taken, to recover and rediscover the time-honoured common values of humanity such as solidarity … Solidarity should, and must be a positive force in the lives of people and of nations, and must therefore be protected from exploitation and corruption… We must strive for a socially resilient, more equal and more inclusive world community, and the vehicle that will bring us towards that goal is international solidarity.[4]

The idea of international solidarity calls for unity in diversity among all peoples, irrespective of all distinctions. Throughout the course of history, struggles for political and social transformation have been inspired by universal values such as justice, from the demand for *liberté, égalité, fraternité* to the struggles against colonialism, racism and apartheid and the demands for dignity, democracy and freedom in the Arab revolutions and Occupy movements. Throughout the history of the modern human rights movement, international solidarity has been among the most powerful and essential tools of advocates and activists seeking to advance the vision of the Universal Declaration of Human Rights.[5] Globally, the prevailing international economic system, its primary actors and structures drive the processes of globalization and connect with the erosion of State institutions and the undermining of communities and families.[6] The unequivocal concentration on economic wealth creation though the market, based on the misguided notion that social issues will resolve themselves once economic fundamentals are achieved, has led to new quests for identity, social tensions and the breakdown of social cohe-

[2] "Report of the independent expert on human rights and international solidarity, Rudi Muhammad Rizki" (A/HRC/15/32 and Corr.1), para. 58. In citing this report, it has been considered whether a new approach to accountability in the global economy could be based on international solidarity and shared responsibility. See International Council for Human Rights Policy, *Human Rights in the Global Economy* (Geneva, 2010), p. 11. This chapter draws substantially on the reports of the Independent Expert on human rights and international solidarity submitted to the Human Rights Council in 2009 (A/HRC/12/27 and Corr.1) and 2010 (A/HRC/15/32).

[3] Panel discussion entitled "The way forward in the realization of the right to development: between policy and practice" held on 13 September 2011 during the eighteenth session of the Human Rights Council.

[4] Available at www.un.org/esa/socdev/documents/intldays/solidarity/Dandan-Message.pdf.

[5] See opening statement by Craig Mokhiber, Chief, Development and Economic and Social Issues Branch, Office of the High Commissioner for Human Rights, at the Expert Workshop on Human Rights and International Solidarity, Geneva, 7-8 June 2012, available at www.ohchr.org/Documents/Issues/Development/OHCHRStatementWorkshop07June2012.pdf.

[6] See United Nations Research Institute for Social Development (UNRISD), *States of Disarray: The Social Effects of Globalization* (Geneva, 1995).

sion in many societies, especially across the global South.[7] As evidenced by the financial and economic crises, no country is immune from the adverse effects of globalization, which have also caused economic downturn and social degradation in the industrialized North and global challenges for all people.[8]

The notion of solidarity is fundamental to the right to development, born of the common aspirations of newly independent States in an era of decolonization and enshrined in the Declaration on the Right to Development. Prior to the Declaration, a conference on development and human rights held in Dakar in 1978 concluded that international solidarity underlies the right to development and is a key to its realization: "There exists a right to development. The essential content of this right is derived from the need for justice, both at the national and the international levels. The right to development draws its strength from the duty of solidarity which is reflected in international cooperation."[9] The right to development makes development a human right, and has the potential to respond to global challenges in an interconnected global economy within an interdependent world because its vision of development and cooperation for development goes beyond economic growth to embrace a holistic paradigm for human well-being. It belongs to all individuals and peoples and envisages a process which advances all human rights; its idea of rights and responsibilities transcends the geographical borders of States. The right to development also includes peace, security and disarmament; self-determination and sovereignty over natural resources; and a social and international order conducive to development.

The magnitude, depth and confluence of the global challenges we face and the interdependence of the planet and its people validate the urgent call for all to unite to shape a future based on the founding values of the United Nations: peace and security, human rights and development. The international community, and most of all its leadership, assumes an unprecedented role in the governance of an interdependent existence, especially the regulation of international economic relations and globalization.[10] The key stakeholders—States, both individually and collectively through international organizations; civil society, particularly through non-governmental organizations; and the private sector—have a new role in realizing rights and upholding duties. In a renewed endeavour to address global challenges, further amplified in an era of globalization, the Human Rights Council has affirmed that everyone and every people have the right to a democratic and equitable international order which requires, inter alia, the right of every person and all peoples to both development and international solidarity.[11] It has since created a special procedure and appointed a mandate holder in this regard.[12]

III. International solidarity, the duty to cooperate and international law

In a world of interconnected threats and challenges, it is in each country's self-interest that all of them are addressed effectively. Hence, the cause of larger freedom can only be advanced by broad, deep and sustained global cooperation among States. Such cooperation is possible if every country's policies take into account not only the needs of its own citizens but also the needs of others. This kind of cooperation not only advances everyone's interests but also recognizes our common humanity.[13]

International solidarity underlies the very idea of the United Nations and permeates the three interlinked pillars of the Charter: peace and security, development and human rights. Development and human rights are the most secure basis for peace.[14] The most manifest expression of solidarity in international law and policy is in international cooperation, which lies at the heart of solidarity. The obligation of States to cooperate is anchored in Articles 1, 55 and 56 of the Charter. Article 1 calls for international mechanisms to promote the economic and social advancement of all peoples and for international cooperation in solving problems of an economic, social, cultural or humanitarian nature, a fundamental purpose of the

[7] The implications of globalization have been contradictory, showing both national and social disintegration and new forms of international cooperation (ibid., p. 167).

[8] See Charles Dumas, *Globalisation Fractures: How Major Nations' Interests are Now in Conflict* (London, Profile Books, 2010).

[9] Commission I, Conclusions and Recommendations, *Colloque sur le développement et les droits de l'homme*, Dakar, 7-12 September 1978, mimeo, para. 10, quoted in "The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs: report of the Secretary-General" (E/CN.4/1334), para. 65.

[10] See UNRISD, *Visible Hands: Taking Responsibility for Social Development* (Geneva, 2000).

[11] See resolution 8/5.

[12] Resolution 18/6.

[13] "In larger freedom: towards development, security and human rights for all: report of the Secretary-General" (A/59/2005), para. 18.

[14] See "An agenda for peace: preventive diplomacy, peacemaking and peacekeeping: report of the Secretary-General" (A/47/277-S/24111) and "An agenda for development: report of the Secretary-General" (A/48/935).

Organization. Under Article 55, the United Nations shall promote higher standards of living, full employment and conditions of economic and social progress and development; solutions to international economic, social, health and related problems; international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms. In Article 56, "Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55", imposing a legal obligation on States.[15] Article 55 is intended to implement the purposes of the United Nations, set out in Article 1.[16] As an Assembly of Nations, the General Assembly, through successive decisions,[17] has persistently declared the need to cooperate.

The need to adapt the Charter to new challenges has called for an evolutionary, progressive and dynamic interpretation in relation to fundamental issues of the international community.[18] Developing countries have led efforts to elaborate the normative content of Article 55, beginning with resolutions on the establishment of a new international economic order. In several resolutions, the international community has agreed that States shall cooperate in the maintenance of international peace and security and the promotion and respect of human rights, and should cooperate in the economic, social, cultural and science and technology fields and work together with the aim of promoting economic growth in developing countries.[19] Particular attention was given to cooperation among developing countries, which were called upon to evolve, in a spirit of solidarity, all possible means to assist each other to cope with the immediate problems arising from the establishment of a new international economic order.[20] The role of the United Nations brings the international obligation of cooperation within the context of the right to development because, in practice, implementation of Article 55 of the Charter has been carried out with a focus on development.[21]

Further along the course of international law, the Universal Declaration of Human Rights states in article 1 that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Under article 28, everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized; and according to article 29, everyone has duties to the community. Thus, in principle, both rights and responsibilities attach to the broadest possible range of stakeholders.

Obligations of international cooperation are elaborated in general comments of the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child. The former, in general comment No. 3 (1990), states that international cooperation for development, and thus the realization of economic, social and cultural rights, is an obligation of all States (para. 14). In its general comment No. 12 (1999), the Committee requested States to bear in mind the right to food when concluding international agreements (para. 36). Under article 4 of the Convention on the Rights of the Child, "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation." Towards the progressive realization of rights, States must demonstrate that they implemented to the maximum extent of their available resources and, where necessary, have sought international cooperation. General comment No. 5 (2003) of the Committee on the Rights of the Child outlines obligations to develop "general measures of implementation". When States ratify the Convention, they agree to obligations not only to implement within their jurisdiction, but also to contribute, through international cooperation, to global implementation (para. 7).

[15] "Globalization and its impact on the full enjoyment of human rights" (E/CN.4/Sub.2/2000/13), para. 41. According to the authors of this report, action taken by Member States, collectively or individually, to defeat this pledge may be a violation of the principles of *jus cogens* under certain circumstances. This position supports the view that international cooperation and solidarity involve legal obligations of a prime nature. It can further be argued that obligations based on international solidarity, where they concern the most fundamental human rights, can go beyond the limits of State borders, as they are owed *erga omnes* (to all humanity/to the international community), rather than merely *inter partes* (between the parties) (A/HRC/12/27, paras. 21 and 42).

[16] Bruno Simma and others, eds., *The Charter of the United Nations: a Commentary*, vol. II (Oxford, Oxford University Press, 2002), p. 898.

[17] Ibid., pp. 902-903.

[18] These include issues such as self-determination, prohibition of the use of force, the definition of the term "State" and the admission of permanently neutral States. In this sense, many adaptations have taken place through General Assembly resolutions, the most relevant being the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV)), the Universal Declaration of Human Rights and the development of peacekeeping missions (Ibid., pp. 16-17).

[19] For instance, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States is underlined by the need for international cooperation.

[20] See General Assembly resolution 3202 (S-VI), sect. VII, para. 1 (a).

[21] See Simma (footnote 16), p. 901.

From the 1960s, collective rights, based on the shared aspirations of peoples, began to be advocated by the Non-Aligned Movement and gradually extended beyond the right to self-determination to include other rights. This happened through the elevation of the duty to cooperate to achieve the objectives of the Charter, combined with the then emerging principle of international solidarity. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and the 1974 Charter of Economic Rights and Duties of States[22] provide further evidence of international consensus on the need for solidarity. With time, the correlative duties in human rights were transformed into concrete obligations[23] and by the 1980s several collective rights were enshrined in the African Charter on Human and Peoples' Rights.[24] This era witnessed the emergence of the right to development and of rights relating to the environment, minorities and indigenous peoples. More recent regional treaties have also integrated the concept of solidarity.[25] Solidarity underscores peoples' rights in hard- and soft- law norms, including provisions of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. It further underlies most expressions of rights described as collective or people's rights.

In the 1980s, the Secretary-General reported to the General Assembly on "the international law of cooperation", a phrase coined by Wolfgang Friedman.[26] This law went beyond the peaceful coexistence of States and mandated them to act jointly to achieve common ends.[27] It took into account the real conditions of States in assigning rights and duties consonant with specific situations. It was also established that the legal obligation to cooperate requires an institutional legal organization to sustain it.[28] In fact, a survey of the mandates of the various United Nations agencies—in particular those created to foster development—reveals that international cooperation has been translated into operative norms and institutions with which most States work together to achieve jointly established global objectives.

Steps to operationalize the right to development and Millennium Development Goal 8 on a global partnership for development, inter alia through aid, trade, debt relief, transfer of technology and access to medicines, provide practical examples of how international cooperation and solidarity can be implemented. The concept of a "common heritage of mankind" was established in article 136 of the 1982 United Nations Convention on the Law of the Sea, as well as other instruments, embodying the notions of sharing, cooperation and solidarity. The 1992 Rio Declaration on Environment and Development makes international cooperation and partnership central to sustainable development. The 1993 Vienna Declaration and Programme of Action identifies increased and sustained efforts of international cooperation and solidarity as essential to substantial progress in human rights. It also recognizes that implementing the right to development requires both effective national development policies and a favourable international economic environment.

The duty to cooperate and shared responsibilities are linked to the responsibility aspect of solidarity, while peoples' rights flow from its rights dimension. Solidarity rights are a product of social history, representing collective claims on the international community and premised on the idea that human rights are dynamic and constantly evolving as each generation infuses the values of its time (A/HRC/12/27 and Corr.1, para. 11). They have been effective in shifting the balance of power in international relations, creating widely recognized, if not always realized, entitlements in international law and responding to the societal effects of globalization.[29] They function at a community level to assure public benefits that can only be enjoyed in common with others.[30] Over time, they have become firmly established in international law,[31] although soft-law norms pose a challenge to effective implementation and enforcement and need to develop progressively into hard law. A survey of the field of international solidarity reveals the existence of numerous global public values, policies, concepts and norms in international instruments of law and policy, mostly in the realms of soft law, *lex ferenda* or international public policy (ibid., para. 41). International solidarity and international cooperation are distinct, yet inextricably interlinked. International as well as

[22] General Assembly resolution 3281 (XXIX), chap. I, Fundamentals of international economic relations and article 17.
[23] Philip Alston, ed., *Peoples' Rights* (Oxford, Oxford University Press, 2001), p. 1.
[24] Article II (4) of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa of the Organization of African Unity also includes the principle of solidarity.
[25] Signed in 2004 and 2007 respectively, the Arab Charter on Human Rights, arts. 1 (3) and 37, and the Charter of the Association of Southeast Asian Nations, preamble and art. 41 (4), call for international and regional solidarity.
[26] "Progressive development of the principles and norms of international law relating to the New International Economic Order: report of the Secretary-General" (A/39/504/Add.1), annex III, paras. 121-135.
[27] Ibid., para. 21.
[28] Ibid., paras. 124-125.
[29] B. M. Meier, "Advancing health rights in a globalized world: responding to globalization through a collective human right to public-health", *Journal of Law, Medicine & Ethics*, vol. 35, Issue 4 (2007), pp. 545 and 550.
[30] Ibid.
[31] James Crawford, "Some conclusions", in James Crawford, ed., *The Rights of Peoples* (Oxford, Clarendon Press, 1988), p. 166.

transnational cooperation, including among non-State actors, is at the core of solidarity, and supports its movement from an ethical concept and legal principle to an actionable practice. In the specific context of the right to development, has manifested itself primarily through the duty to cooperate, essential to any global partnership for development.

IV. International solidarity, development and shared responsibilities

One important aspect of globalization is the increasingly dense and consequential regime of global rules that govern and shape development everywhere. Covering trade, investment, loans, patents, copyrights, trademarks, labour standards, environmental protection, use of seabed resources and much else, these rules—structuring and enabling, permissive and constraining—have a profound impact on the lives of human beings and on the health of our planet. This impact is catastrophic.[32]

Cooperation for our common future is a sine qua non, and requires a new approach to international relations[33] based on compromise and globalism, common interests and long-term perspectives.[34] Collaboration for global social justice is often constrained as the priorities of nations tend naturally to be driven by self-interest and short-term gain. But our interdependence, and the interconnectedness of the challenges we face collectively, makes international solidarity a precondition for the survival and well-being of both people and the planet. It has been stated, with respect to the humanitarian crisis in the Horn of Africa, that the crisis "looks like a natural calamity, but it is in part manufactured. Climate change will result in such events being more frequent … With a rate of child malnutrition above 30% in many regions of these countries, the failure of the international community to act would result in major violations of the right to food", and "[i]nternational law imposes on States in a position to help that they do so immediately, where lives are at stake".[35]

"Many of the most serious social and economic problems certainly remain at the local or national level, but people's life chances are also fundamentally affected by decisions taken in international forums that in some cases are profoundly unrepresentative and unaccountable. This has led to a form of international regulation—or non-regulation—that permits global markets to wreak havoc with the livelihoods of many of the world's people."[36] The increased movement of people and goods across borders has led to multiple challenges of a transboundary nature, including human trafficking, dumping of toxic wastes and problems faced by migrants and refugees, which inevitably have their greatest impact on the most vulnerable (A/HRC/15/32, para. 46). The international sale of arms can destroy millions of lives, especially in poor countries plagued by civil strife and with weak governance structures (ibid.). Human rights can and must play a central role in addressing the challenges posed by globalization: "The task before us is how to reconcile differences and create consensus, without resiling from the principle that respect for human rights is the ultimate foundation upon which rests the legitimacy of the actions of our Governments, our international institutions, our corporations and business enterprises, our organs of civil society, and ourselves, presently and in future."[37]

A. International solidarity and the right to development

There is a growing awareness of the need to develop multilateral mechanisms capable of controlling the destructive impact of economic restructuring. A focus on the right to development may assist people to realize that globalization is a political, public and contestable process, rather than an unstoppable force that will inevitably overtake all states. International human rights lawyers will have to harness creatively both the inspirational and the legalistic aspects of the right to development if they are successfully to use that right to effect change in the current agendas of states, international economic institutions and foreign investors.[38]

[32] Thomas Pogge, "Aligned: global justice and ecology", in *Reconciling Human Existence with Ecological Integrity*, Laura Westra, Klaus Bosselmann and Richard Westra, eds. (London, Earthscan, 2008), p. 147.

[33] Kamal Hossain, "Sustainable development: a normative framework for evolving a more just and humane international economic order?", in S.R. Chowdhury, E. Denters and P. de Waart, eds., *The Right to Development in International Law* (Dordrecht, Martinus Nijhoff, 1992), p. 259.

[34] Ileana M. Porras, "The Rio Declaration: a new basis for international cooperation", in P. Sands, ed., *Greening International Law* (London, Earthscan, 1993), pp. 20-33.

[35] Olivier De Schutter, Special Rapporteur on the right to food, "Large-scale starvation in Somalia and in the Horn of Africa unless the international community steps in, say UN experts", press release, 12 July 2011, available from www.ohchr.org.

[36] UNRISD, *States of Disarray* (see footnote 6), p. 168.

[37] David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge, United Kingdom, Cambridge University Press, 2009), p. 239.

[38] Anne Orford, "Globalization and the right to development", in Altston, *Peoples' Rights* (see footnote 23), pp. 183-184. "While the Declaration articulates some unconventional demands for a human rights instrument the ways in which it frames the nature and scope of human rights duties is fitting under current conditions of economic globalisation. It is concerned with structural disadvantage that engenders the poverty afflicting half the global population today, and is preoccupied not with a state's duties to its own nationals, but with its duties to people in far-off places. As is argued herein, this legal cosmopolitanism is critical to the realisation of

A major result of developing countries' action for development can be seen in the fact that this issue has become one of the central questions of the world community[39] and, further, has been addressed in close connection with international cooperation. International cooperation for development rests on the premise that developing countries may not possess the resources for the full realization of rights set forth in conventions, calling for shared responsibilities. Some have argued that the notion of a right to development takes development into the sphere of obligations: "The State seeking its own development is entitled to demand that all the other States, the international community and international economic agents collectively do not take away from it what belongs to it, or do not deprive it of what is or must be its due in international trade …"[40] As defined in the preamble to the Declaration on the Right to Development, development is a comprehensive economic, social, cultural and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of its benefits.

Economic and social transformation based on people-centred development[41] and globalization[42] is supported by the Declaration, which states, again in the preamble, that "equality of opportunity for development is a prerogative both of nations and of individuals who make up nations". An evolutionary interpretation of the Declaration can encompass sustainability, integrating both human and ecological well-being. At the International Court of Justice, Vice-President Christopher Gregory Weeramantry, in a separate opinion in *Gabčíkovo-Nagymaros Project (Hungary* v. *Slovakia)*,[43] wrote: "'Development' means, of course, development not merely for the sake of development and the economic gain it produces, but for its value in increasing the sum total of human happiness and welfare. That could perhaps be called the first principle of the law relating to development."[44]

The Declaration on the Right to Development requires States to collectively create national and international conditions favourable to development. While the primary responsibility is on States, "[a]ll human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development" (art. 2 (2)). It has been observed that the real basis of the right to development finds its justification in the obligation to demonstrate solidarity, linked to articles 1 and 28 of the Universal Declaration of Human Rights.[45] Further:

> States' ability to realize human rights through a democratic, participatory international environment depends to a great extent on their enjoyment of genuine equality in international relations. Discrimination among States and peoples, at the international level, has the same adverse effect as discrimination among individuals and groups within States: it perpetuates inequalities of wealth and power, and frustrates any efforts to address inequalities through the process of development. Although discrimination among States is, in strict legal terms, an issue of self-determination, friendly relations and solidarity, rather than one of human rights, discrimination at the national and the international levels is inextricably linked by its effects on individual human beings.[46]

The open-ended Working Group on the Right to Development has underlined that, in the international economic, commercial and financial spheres, the core human rights principles of equality, equity, non-discrimination, transparency, accountability, participation and international cooperation, including partnership and commitments, are essential to the realization of the right to development (E/CN.4/2002/28/Rev.1, para. 100). The need for international cooperation, solidarity and international responsibility for creating an enabling global environment and policy space for

human rights in the 21st century." Margot E. Salomon, "Legal cosmopolitanism and the normative contribution of the right to development", London School of Economics (LSE) Law, Society and Economy Working Paper 16/2008. See also Isabella D. Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions*, Studies in International Trade Law No. 13 (Oxford, Hart, 2012).

[39] Antonio Cassese, *International Law* (Oxford, Oxford University Press, 2005), p. 418.

[40] Mohammed Bedjaoui, "The right to development", in *International Law: Achievements and Prospects*, Mohammed Bedjaoui, ed. (Martinus Nijhoff, 1991), pp. 1191-1192.

[41] William Easterly, in *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (Oxford, Oxford University Press, 2006), pp. 229- 334, concludes that home-grown development in the "Rest" and genuinely supportive citizen action in the "West" to help the poor can be more effective than grand global plans for aid. On the other hand, Paul Collier, in *The Bottom billion: Why the Poorest Countries are Failing and What Can be Done About It* (New York, Oxford University Press, 2007), calls for a more intelligent approach to aid and complimentary actions in trade policies, changes in laws and new international charters.

[42] Dani Rodrik, in *The Globalization Paradox: Democracy and the Future of the World Economy* (New York, W. W. Norton, 2011), makes the case for country-specific paths to economic development and the need to preserve national democracies if we want to find a balance between globalization and national sovereignty.

[43] *I.C.J. Reports 1997*, p. 7.

[44] Available at www.icj-cij.org/docket/files/92/7383.pdf.

[45] In chapter 2 of the present volume, Tamara Kunanayakam explains that the right to development approaches development as a complex process which, through multiple interactions in the economic, social, cultural and political spheres, generates continuous progress in terms of social justice, equality, well-being and respect for the fundamental dignity of all individuals, groups and peoples, based on their effective participation in all aspects of the development process.

[46] Ibid.

the realization of the right to development has been consistently emphasized in the Working Group (see, for example, A/HRC/15/23, paras. 27 and 43). The importance of both the national and international dimensions of the right to development and of shared responsibilities and mutual accountability of all were underlined by the high-level task force on the implementation of the right to development in addenda to the report on its sixth session (A/HRC/15/WG.2/TF/2/Add.1 and Corr.1, para. 81 and A/HRC/15/WG.2/TF/2/Add.2, para 1). The task force went on to elaborate that for the right to development, States had obligations to their own populations, to persons outside their jurisdiction who could be affected by their domestic policies and in their collective role through international organizations (A/HRC/15/WG.2/TF/2/Add.2, paras. 16-17 and annex).

The right to development has been continuously and consistently reaffirmed by the international community, including in the Rio Declaration on Environment and Development, the Vienna Declaration and Programme of Action, the United Nations Millennium Declaration, the 2002 Monterrey Consensus on Financing for Development, the 2005 World Summit Outcome, the 2007 United Nations Declaration on the Rights of Indigenous Peoples, the 2010 outcome document of the High-level Plenary Meeting of the General Assembly on the Millennium Development Goals,[47] the 2011 Istanbul Programme of Action for the Least Developed Countries for the Decade 2011-2020, the 2012 outcome documents of the thirteenth session of the United Nations Conference on Trade and Development (UNCTAD XIII), and the United Nations Conference on Sustainable Development. Several elements of the right to development, including international cooperation or the duty to cooperate, are legal norms embodied in binding obligations contained in international conventions, form part of customary international law and general principles of international law, or are elaborated in other international instruments and general comments of the treaty bodies. International solidarity and shared responsibility are core values underlying the United Nations Millennium Declaration.[48] It could also be argued that the Millennium Development Goals, as well as legal and policy measures adopted for their implementation, form part of the substance of emerging legal norms related to third-party responsibility and the duty to cooperate.[49]

[47] Resolution 65/1.

[48] "Keeping the promise: a forward-looking review to promote an agreed action agenda to achieve the Millennium Development Goals by 2015: report of the Secretary General" (A/64/665), paras. 5, 38 and 107.

[49] Christina T. Holder, "A feminist human rights law approach for engendering the Millennium Development Goals", *Cardozo Journal of Law & Gender*, vol. 1, No. 1 (Fall 2007), pp. 125 and 156.

B. International solidarity and shared responsibilities

The nation which is free from egoism and is aware of its duties as well as its rights and does not only take advantage of benefits, but meets the obligations and the risks of solidarity, discovers in itself an unexpected capacity for expansion that enriches its individuality and, at the same time, turns this new capacity into a means of progress for other nations.[50]

International solidarity and shared responsibilities are intrinsic to policy coherence across human rights, development and the global partnership for development:

> [W]e must embrace shared responsibilities across national boundaries. For example, self-interest and short-term thinking have plagued progress on global trade reform … When Governments provide development assistance, but at the same time continue massive agriculture subsidies to their own farmers, they aren't promoting sustainable development for all. They are undermining development prospects and damaging the livelihoods of some of our most vulnerable sisters and brothers.[51]

Unbridled market economics and globalization were not intended, even by the founding fathers of economic liberalism, John Stewart Mill[52] and Adam Smith,[53] who accepted that the market must not sell its soul to the devil of unalloyed economic efficiency, but instead must recognize and respect the social ends it seeks to serve, and that moral and social implications must guide and justify the enterprise. Philosophers over the centuries have advocated for global social justice, among them, John Rawls[54] and Thomas Pogge.[55] In recent years, economists, jurists and philosophers, among others, have called for an enlightened globalization[56] and civilizing globalization.[57] Attention has been drawn[58] to the unsustainability of the global economic system and the dire need for change.

[50] P. A. Ramella, "Los principios del derecho internacional público a través de la Carta de la Naciones Unidas", *Revista de Política Internacional* (Spain), No. 93 (September/October 1967), pp. 65–87. Cited in A/HRC/15/32, para. 6.

[51] Mary Robinson, former United Nations High Commissioner for Human Rights, speaking at a public symposium entitled "Responding to global crises: new development paths" convened by UNCTAD, Geneva, 11 May 2010.

[52] John Stuart Mill, *On Social Freedom: or the Necessary Limits of Individual Freedom Arising out of the Conditions of our Social Life* (1907).

[53] Adam Smith, *The Theory of Moral Sentiments* (1759) and *The Wealth of Nations* (1776).

[54] John Rawls, *The Law of Peoples* (Cambridge, Massachusetts, Harvard University Press, 1999).

[55] Thomas Pogge, *World Poverty and Human Rights* (Polity Press, 2002), pp. 196-215.

[56] Jeffrey Sachs, *The End of Poverty: How We Can Make It Happen in Our Lifetime* (Penguin Books, 2005).

[57] Kinley, *Civilising Globalisation* (see footnote 37) and Rodrik, *The Globalization Paradox* (see footnote 42).

[58] Walden Bello, *Deglobalization: Ideas for a New Global Economy* (Lon-

Thomas Pogge advocates for global social justice, going beyond fulfilling basic needs.[59] He calls for recognition of the fact that poverty has multiple and interconnected levels and for its eradication, given the capacity of poverty to transcend national boundaries. Pogge explains the causal nexus between the unjust global institutional order and the persistence of severe poverty, and how severe poverty is fuelled by local misrule, which is in turn fuelled by the global order. He goes on to ask: "What entitles a small global elite … to enforce a global property scheme under which we may claim the world's natural resources for ourselves and can distribute these among ourselves on mutually agreeable terms?"[60] He continues: "This institutional order is implicated in the reproduction of radical inequality in that there is a feasible institutional alternative under which such severe and extensive poverty would not persist."[61] Pogge also explains how the removal of protectionist barriers in developed countries could lead to employment of hundreds of millions in poor countries and a rise in incomes in those countries of hundreds of billions of dollars each year. Similarly, he points out that there is great scope for change in the regimes relating to intellectual property and access to medicines, natural resource management and sustainable development: "Millions would be saved from diseases and death if generic producers could freely manufacture and market life-saving drugs in the poor countries."[62]

It has been advocated[63] that obligations arise between persons by virtue of the global social and economic processes that connect them across national jurisdictions; structural social injustices can cause harm to people, justifying responsibilities that recognize this link. The contribution of Iris Marion Young provides a framework for conceptualizing responsibility for global structural injustices. In opposition to the "liability model", which establishes responsibility based on the connection between specific actions and results,[64] Young presents a "social connection model", which views responsibility as participation in and connection to social-structural problems establishing individual, shared responsibilities that can only be discharged collectively.[65] An example would be retailers and consumers who, by buying goods produced in another country, are connected to the workers in that country.[66] According to the "social connection model",[67] shared responsibility falls on all agents who contribute to the structural processes that cause injustice. This includes the responsibility to remedy. The collective ability of agents is particularly relevant to international solidarity, as it calls on individuals and organizations who find themselves in positions where they can capitalize on resources already organized to advance changes in innovative ways.

Young acknowledges that expecting power to be exercised to undermine structural injustice is problematic because agents with power usually have an interest in the perpetuation of the status quo. To counteract this, political responsibility should be exercised by exposing such structural failures and holding those in power to public accountability. The role of States and international institutions goes as far as limiting the power of other powerful agents, organizing incentives to help agents coordinate joint actions and establishing policies and programmes with direct effects on people. However, States fail to fulfil such a role because the rules and processes regulating their activities tend to perpetuate the powers and processes that cause injustice.

Margot Salomon reflects on the internationalization of responsibility for world poverty.[68] First, she argues that ensuring human rights in response to poverty caused by the current global system means having two clearly defined legal dimensions: extraterritorial obligations of States, for example, the negative effects of a State's policies and activities on the people in another country; and obligations of international cooperation: responsibilities of States in their collective capacities, including as members of international organizations, with regard to their influence over the global order as a whole. Second, world poverty is attributable to the existing global system, in which benefits are concentrated among a few to the disadvantage of the majority. It is the system that causes and/or fails to remedy poverty. Third, because the system is composed of the "undifferentiated state players of the global institutional order", establishing

don, Zed Books, 2002); and Joseph Stiglitz, *Globalization and its Discontents* (Penguin Books, 2002) and *Freefall* (Penguin Books, 2010).

[59] Pogge, *World Poverty and Human Rights*, p. 26.

[60] Pogge, "Aligned: global justice and ecology" (see footnote 32), pp. 156-157.

[61] Ibid., p. 153.

[62] Ibid., pp. 155-156.

[63] Onara O'Neill, *Bounds of Justice* (New York, Cambridge University Press, 2000). See also International Council on Human Rights Policy, *Duties Sans Frontières: Human Rights and Global Social Justice* (Versoix, Switzerland, 2003).

[64] Iris M. Young, *Responsibility for Justice* (Oxford University Press, 2011), p. 71.

[65] Ibid., p. 146.

[66] Ibid., p. 143.

[67] Ibid., pp. 143-151.

[68] See Margot E. Salomon, *Global Responsibility for Human Rights* (Oxford University Press, 2007), pp. 196-204. See also Ngaire Woods, *Governing the Global Economy: Strengthening Multilateral Institutions* (International Peace Institute, 2008) and José Antonio Ocampo, "Rethinking global economic and social governance", *Journal of Globalization and Development*, vol. 1, Issue 1 (2010).

State responsibility can be challenging. Nonetheless, the due diligence standard, according to which State responsibility also exists where the perpetrator cannot be identified, has been considered as a tool in establishing individualized responsibility and the obligation to cooperate. Such attribution becomes possible because the due diligence standard eliminates the requirement to establish a causal link for responsibility. Fourth, due to the dramatic difference between developed and developing countries, any burden of proof lies with the powerful and wealthy countries which, as the main recipients of the benefits of development, are able to foresee and avert the devastating effects of their decisions and should demonstrate that they have done all they can to redress world poverty.

Finally, Salomon argues that State responsibility for the creation of a just institutional economic order and the level of the obligation to cooperate is based on the principle of common but differentiated responsibilities and can be derived from several factors, including a State's global economic weight and capacity; a State's relative power and influence over the direction of finance, trade and development; and the degree to which a State benefits from the existing distribution of global wealth and resources.

Scholars have contributed to the advancement of the legal content and understanding of extraterritorial obligations on economic, social and cultural rights. Their efforts led in 1986 to the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (see E/C.12/2000/13), which elaborated on the nature and scope of State obligations and the role of the Committee on Economic, Social and Cultural Rights. Expanding on the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (ibid.) were agreed in 1997. In September 2011, international experts elaborated the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights,[69] which address how extraterritorial obligations encompass the acts and omissions of a State within or beyond its territory in addition to the obligations established by the Charter of the United Nations. The principles also touch on the scope of jurisdiction and State responsibility within the framework of human rights as well as on mechanisms for accountability. Further, on the issue of human rights obligations of international financial institutions, the Tilburg Guiding Principles on World Bank, IMF and Human Rights[70] were drafted by a group of experts in 2001/2002. The Guiding Principles link legal obligations in the field of human rights to the economic and political realities of these organizations and discuss possible redress for adverse human rights impacts stemming from their activities. The Guiding Principles on Business and Human Rights (see A/HRC/17/31) are a positive step in the direction of regulation of international business.

It has been questioned whether these regimes for different actors have been convincingly established in a way that they are able to address the responsibility gaps perceived on the ground; whether the fragmented method of elaboration of principles for each actor has led to a coherent legal framework in dealing with the global landscape and its various actors; whether a holistic approach is to be preferred; and whether the only fully developed regime of (territorial) State responsibility can be used by analogy, or whether we need to start from scratch:[71]

> … none of the sets of principles comprehensively addresses all issues of attribution and distribution of responsibility. However, it is safe to say that the Maastricht Principles are the most detailed and elaborate ones. The Tilburg Principles are much less advanced, and mainly seem to serve the purpose of supporting the point that [international financial institutions] do have human rights obligations. The Guiding Principles stop from making the basic point that transnational corporations are direct human rights duty bearers … A recurrent theme in all sets is the human rights obligations of States as members of international organisations. A theme specific to the Guiding Principles is the human rights responsibility of home States of transnational corporations. All in all, the responsibility regimes emerging from the different sets of principles under scrutiny here do not seem to capture yet the full scope of the respective actors' impact on human rights on the ground.[72]

The right to development, underpinned by the duty to cooperate, international solidarity and shared responsibilities, has the normative potential to fill this accountability gap in global governance.

V. International solidarity in action

This section will present some examples of international solidarity in action. Solidarity manifests itself through the daily actions of a range of stake-

[69] Available from www.maastrichtuniversity.nl.

[70] Willem van Genugten, Paul Hunt and Susan Mathews, eds., *World Bank, IMF and Human Rights* (Nijmegen, Wolf Legal Publishers, 2003), pp. 247-255.

[71] Wouter Vandenhole, "Emerging normative frameworks on transnational human rights obligations", European University Institute, Florence, Italy, Robert Schuman Centre for Advanced Studies, Global Governance Programme, EUI Working Paper, RSCAS 2012/17, p. 21.

[72] Ibid.

holders, including States, civil society, global social movements, corporate social initiatives and people of goodwill, especially in the aftermath of major disasters. The alarming increase in disasters disproportionately affects poor countries. In response to natural disasters, the Committee on Economic, Social and Cultural Rights expressed the view that States and international organizations have a joint and individual responsibility to cooperate in providing disaster relief and humanitarian assistance in times of emergency,[73] in which processes priority is to be given to Covenant rights.[74] Ideally, solidarity should be preventive, to avoid or mitigate harm, especially during disasters. The precautionary principle—included in principle 15 of the Rio Declaration on Environment and Development—can support a preventive approach. Since poor countries lack resources to install infrastructure and early warning systems, adequate investment is required to reduce vulnerability to hazards and the severity of disasters and to rebuild better facilities in their aftermath. Technology and the benefits of scientific progress need to be shared for the common good of all (principle 9).

Progressive development in international law and policy, supported by related actions, can serve to strengthen policy coherence across sectors for greater social justice in global governance. On the right to food, it has been recognized that, in a globalized world, actions taken by one Government may have a negative impact for people living in other countries. All States should therefore ensure that their policies do not contribute to human rights violations abroad. In human health, the collective enjoyment of public-health is a precondition for an individual human right to health care, with public-health systems addressing the collective social determinants of health beyond the control of the individual. Through a right to public-health, the discourse of collective rights can be used to supplement individual rights in affirming the equality and solidarity of all people.[75] Faced with the HIV/AIDS pandemic, the right to health could lead to a broad movement of international solidarity, which would require that the right be given primacy over, for instance, intellectual property rights. Many organizations practise international solidarity on a daily basis, for instance the Global Fund to Fight AIDS, Tuberculosis and Malaria, which finances the saving of millions of lives, and numerous philanthropic initiatives, which do immense good work worldwide.

Across national borders, there are an ever-increasing number of alliances, of people reaching out to others. International assistance and cooperation in the form of aid and debt relief have traditionally been a major component of North-South relations. However, only an overarching international solidarity supporting social justice and accountability in all international economic relations can sustain the lives of people on a daily basis, in the wake of the continuing rise in poverty and inequality both within and among countries in a crisis-ridden world. Human rights-based approaches to development are non-discriminatory and require safeguards for the vulnerable and marginalized, including the poor, women, youth, children, the disabled, the elderly, minorities, migrants, refugees and indigenous peoples. The international dimension of the right to development requires justice for the globally vulnerable, including the populations of developing countries, least developed countries, landlocked developing countries, small island developing States,[76] States in armed conflict and post-conflict situations, States in transition to democracy and those in other fragile contexts.

A. International cooperation for the environment and sustainable development

Environmental issues, including natural-resource management, best illustrate the need for international solidarity and a holistic approach: "The international architecture for environmental conservation and global resource management needs to be strengthened substantially … More bold steps have to be taken to create an integrated ecosystem approach to sustainably using natural resources and healing the earth's fragile environment."[77]

Sustainable development is defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[78] The principles of sustainable

[73] General comment No. 14 (2000) on the right to the highest attainable standard of health, para. 40; general comment No. 12 (1999) on the right to adequate food, para. 38.
[74] General comment No. 15 (2002) on the right to water, para. 34.
[75] B. M. Meier, "Employing health rights for global justice: the promise of public-health in response to the insalubrious ramifications of globalization", *Cornell International Law Journal*, vol. 39 (2006), pp. 711 and 773.
[76] The 2011 Istanbul Programme of Action of the Fourth United Nations Conference on the Least Developed Countries calls for a strengthened global partnership and makes explicit reference to human rights, including the right to development and gender equality and empowerment.
[77] Nico Schrijver, *Development without Destruction: The UN and Global Resource Management* (Bloomington, Indiana University Press, 2010), p. 221.
[78] "Report of the World Commission on Environment and Development: our

development in the Rio Declaration on Environment and Development and underlying the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change integrate the notions of sustainability, justice and equity to all in the present generation and to those yet unborn: inter- and intra-generational equity. Principle 1 of the Rio Declaration proclaims: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." Since the World Summit on Sustainable Development in 2002, which adopted the Johannesburg Plan of Implementation, sustainable development has evolved to integrate the three pillars of economy, society and the environment. The right to development is integral to sustainable development, as reflected in the Rio Declaration (principle 3) and the Vienna Declaration and Programme of Action (part I, para. 11), both of which read: "The right to development should be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

The Rio Declaration sets the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people.[79] The idea of shared responsibilities is further developed therein to recognize the principle of common but differentiated responsibilities embodied in international legal instruments, taking into account global inequalities and the need to deal with them equitably. Practice, however, has lagged far behind principle, especially in international cooperation and solidarity in the implementation of sustainable development. In the best interests of both people and the planet, "The future we want", the outcome document of the United Nations Conference on Sustainable Development (Rio+20) held in June 2012,[80] should be interpreted in the light of all agreed principles of sustainable development and the progressive development of international law.

B. Debt relief

Target 8.D of Millennium Development Goal 8 calls on the international community to deal comprehensively with the debt problems of developing countries through national and international measures to make debt sustainable in the long term. In poor countries, debt repayment may take place at the expense of peoples' most basic rights such as food, health and education, and conditions linked to debt relief can undermine a country's policy space and a people's ability to determine its own development paths. Debt relief has evolved over the years from short-term debt-restructuring operations to debt forgiveness and other debt-relief measures adopted by creditors to lessen the debt burden of low-income countries; they include the Heavily Indebted Poor Countries and Multilateral Debt Relief Initiatives by multilateral creditors.

International solidarity underscores debt relief, and strengthened solidarity and shared responsibilities by both debtors and creditors can help debt sustainability while safeguarding basic human rights. Debt sustainability is an important form of international solidarity through which indebted countries can acquire appropriate means and facilities to foster their comprehensive development.

C. Transfer of technology, climate change and development

Solidarity across national boundaries as well as generations underlines the United Nations Framework Convention on Climate Change and is implicit in its article 3, which lays down the principles of the Convention. Under this article, the Parties should, inter alia, protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities; accordingly, developed countries should take the lead in combating climate change and its adverse effects. Further, the specific needs and special circumstances of developing countries, especially those particularly vulnerable to the adverse effects of climate change and those that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Under article 4, Commitments, developed country Parties are required to take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing countries, to enable them to implement the provisions of the Convention. All Parties are required to take full account of the specific needs and special situations of the least

common future" (the Brundtland Report) (A/42/427, annex), chap. II, para. 1.

[79] Principle 5 states: "All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world."

[80] General Assembly resolution 66/288, annex.

developed countries in their actions with regard to funding and transfer of technology.[81]

Also in the area of technology transfer, article 66 of the Agreement on Trade-Related Aspects of Intellectual Property Rights states that in view of the special needs and requirements of least developed country members of the World Trade Organization, their economic, financial and administrative constraints and their need for flexibility to create a viable technological base, they will not be required to apply the provisions of the Agreement, other than articles 3, 4 and 5, for a period of 10 years from the date of application. Developed countries are required to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country members, to enable them to create a sound and viable technological base. Article 67 states that in order to facilitate the implementation of the Agreement, developed country members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least developed country members.

D. Financing for development

The seminal role of solidarity within the framework of financing for development, first highlighted in the Monterrey Consensus on Financing for Development, was confirmed in the 2008 Doha Declaration on Financing for Development, the outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, reiterating commitments to address such financing in the spirit of global partnership and solidarity. Addressing the Conference, the Secretary-General made a plea for selflessness and solidarity and the building of bridges to include the entire international community.[82] Within the broader framework of financing for development, the search for innovative sources of development finance is linked closely to international solidarity. Such ties were recognized, explicitly and implicitly, in the World Summit Outcome and the 2005 Declaration on innovative sources of financing,[83] as well as at the 2006 Paris Ministerial Conference on Innovative Development Financing Mechanisms, whose theme was "Solidarity and Globalization". In his progress report on innovative sources of development finance (A/64/189 and Corr.1) the Secretary-General described international solidarity as a basis for international cooperation in the context of financing for development and highlighted existing and potential initiatives that could contribute to international and human solidarity, including solidarity levies. Solidarity also underpinned the outcome documents of the second and third High-Level Forums on Aid Effectiveness held in 2005 and 2008 respectively: the Paris Declaration on Aid Effectiveness[84] and the Accra Agenda for Action;[85] the 2009 Conference on the World Financial and Economic Crisis and Its Impact on Development;[86] the 2010 special high-level meeting of the Economic and Social Council with the Bretton Woods institutions, the World Trade Organization and the United Nations Conference on Trade and Development[87] and its follow-up meetings. The *World Economic and Social Survey 2012* includes an analysis of current and proposed mechanisms for innovative development finance to complement traditional official development assistance. The *Survey* highlights the potential of innovative financing for development, but concludes that realizing this potential will require new types of international agreements and changes in global governance.[88]

E. South-South cooperation

South-South cooperation derives from a joint struggle for justice, and bonds that were nurtured in a spirit of solidarity and friendship. It implies cooperative interaction through building solidarity based on mutual benefit among developing countries in their struggle to compensate for their relative lack of global power.[89] South-South cooperation has been found to be extensive and diverse in terms of financing for development, knowledge and experience-sharing, networking, institution-building and formalization of cooperative arrangements.[90] The changing geopolitical realities will have significant implications for international relations, especially in the economic sphere, in the years to come.

[81] See International Council on Human Rights Policy, *Beyond Technology Transfer: Protecting Human Rights in a Climate-Constrained World* (Geneva, 2011).

[82] See *Report of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, Doha, Qatar, 29 November-2 December 2008* (United Nations publication, Sales No. 09.II.A), annex II.

[83] Known as the New York Declaration, the Declaration on innovative sources of financing for development was adopted on 14 September 2005 at a meeting convened at the initiative of former President Luiz Inácio Lula da Silva of Brazil to discuss international action to fight hunger, overcome poverty and increase financing for development. Seventy-nine countries supported the Declaration, the text of which is available at www.leadinggroup.org/article72.html.

[84] See, in particular, paragraph 1 and section II, Partnership commitments.

[85] See, in particular, paragraphs 9. 15, 19 and 21. See also the 2011 Busan Partnership for Effective Development Cooperation, available from www.aideffectiveness.org.

[86] General Assembly resolution 63/303, annex, paras. 10, 11 and 46.

[87] Summary by the President of the Council (A/65/81–E/2010/83), para. 20.

[88] *In Search of New Development Finance* (United Nations publication, Sales No. E.12.II.C.1).

[89] "The state of South-South cooperation: report of the Secretary-General" (A/66/229), para. 4 (c).

[90] Ibid.

The greater involvement of Asian and Latin American countries in Africa is increasing that continent's cooperation at the bilateral level. Trade and investment arrangements with newly emerging economies, notably China, are seeing a large increase in economic activity in Africa. India has become a key trading partner for sub-Saharan Africa, including in the sale of life-saving medicines at affordable prices, and Brazil's annual trade with Africa has increased substantially.[91] South-South trade relations hold much promise for the future, provided they are implemented in the context of sovereign equality, fairness and equity, information-sharing, and equal partnerships for all and avoid historical patterns of exploitation. Brazil adopts a policy of "solidarity diplomacy" whereby it makes its own experience and knowledge available to other developing countries to promote economic and social progress without imposing conditions, and areas of cooperation are defined by recipient countries (A/HRC/15/32, para. 58).

An example of Latin American initiatives in international solidarity is contained in the principles of the Union of South American Nations (UNASUR). Invoking a shared culture and history and a future of integration, and inspired by the spirit of the wars of independence, South American presidents reaffirmed the ideals of freedom, equality and solidarity in the foundation documents.[92] They have declared that their common political and philosophical thought recognizes the primacy of human beings, their dignity and rights, and the plurality of peoples and cultures; and that a South American identity and shared common values, including solidarity and social justice, have been established.[93]

The new global architecture for international cooperation calls for strengthening of all forms of international cooperation: North-South, South-South, triangular, as well as South-North. However, the global South is an increasingly fragmented group, divided by levels of development, regional, cultural and political concerns and other nuances which make solidarity for achieving common goals a complex endeavour. The Group of 77 and China and the Non-Aligned Movement are the largest groups of developing countries, within the broader framework of a mosaic of groupings of States and the United Nations. From across the South, new groups have emerged, including Brazil, Russian Federation, India, China and South Africa (BRICS); India, Brazil and South Africa (IBSA); and the Bolivarian Alliance for the Peoples of Our America-Peoples' Trade Agreement (Alianza Bolivariana para los Pueblos de Nuestra América-Tratado de Comercio de los Pueblos, ALBA-TCP),[94] in addition to numerous earlier groupings. Both South-South and regional cooperation would be supported by thinking outside the mainstream model in order to enhance human-centred development and human-centred globalization.

F. Transnational civil society and non-State-based forms of solidarity

In realizing the right to development, civil society can be the vital impetus in moving forward in the common interests of all, despite the divisions which have traditionally coloured the intergovernmental debate. In the quest for sustainable development, global civil society has played a critical role and may hold the keys to a shared future. In labour regulation and corporate governance, initiatives by non-governmental organizations and voluntary codes by business involving corporate social responsibility provide scope for responsibility-sharing. In the tourism sector, efforts have been made to ensure that poor and marginalized communities do not suffer from the disproportionate costs associated with tourism development while also missing out on the benefits. In this respect, the Global Code of Ethics for Tourism, adopted by the General Assembly of the World Tourism Organization in 1999, stipulates in article 9 (5):

> As an irreplaceable factor of solidarity in the development and dynamic growth of international exchanges, multinational enterprises of the tourism industry should not exploit the dominant positions they sometimes occupy; ... in exchange for their freedom to invest and trade, which should be fully recognized, they should involve themselves in local development, avoiding, by the excessive repatriation of their profits or their induced imports, a reduction of their contribution to the economies in which they are established.

Cooperatives and socioeconomic movements based on livelihoods are examples of efforts founded on human solidarity and resonant with salient elements of the right to development, including equity; active, free and meaningful participation in development; and fair distribution of its benefits. Livelihoods of peo-

[91] Ibid., para. 10.

[92] Paragraph 2 of the Declaration of Ayacucho, signed on 9 December 2004 by Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Mexico, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela (Bolivarian Republic of).

[93] Section I of the Cuzco Declaration, signed on 8 December 2004 by Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela (Bolivarian Republic of).

[94] ALBA-TCP is an international cooperation organization based on the idea of social, political and economic integration between the countries of Latin America and the Caribbean, which will include bartering and mutual economic aid rather than trade liberalization and free trade agreements. Members are Antigua and Barbuda, Cuba, Ecuador, Nicaragua, Saint Vincent and the Grenadines and Venezuela (Bolivarian Republic of), with Saint Lucia and Suriname as guest members.

ple are critical in the quest for sustainable development and the productive engagement of all people, especially women and youth. Currently, over 1 billion people belong to cooperative movements, which create over 100 million jobs. The experiences of farmers and farmer activists have contributed to a variety of collective expressions and actions for change. Alternative food production and distribution systems managed by localized *sangham* cooperatives in India, the growth of fair and ethical trade in Kenya and across Africa, and global grass-roots food sovereignty movements such as La Via Campesina have created practical, context-specific and successful alternatives to unsustainable development.[95]

VI. Conclusion

A human being is a part of a whole, called by us "universe", a part limited in time and space. He experiences himself, his thoughts and feelings as something separated from the rest … a kind of optical delusion of his consciousness. This delusion is a kind of prison for us, restricting us to our personal desires and to affection for a few persons nearest to us. Our task must be to free ourselves from this prison by widening our circle of compassion to embrace all living creatures and the whole nature in its beauty.[96]

Climate change and the confluence of the global economic, financial, food, energy and other crises raise fundamental, even existential, questions about our value systems. International law constitutes both a value system and a regulatory framework. Yet, its fragmented nature, illustrated by the lack of convergence of international law in relating to economic policy, trade, human rights and the environment, underlines, firstly, a need for coherence, one which gives primacy to human dignity.[97] Secondly, and in relation to the first point, it also emphasizes the need for international law to reflect an emerging body of shared global public values.[98] The right to development, underlined by international solidarity, can serve not only as a normative basis for such coherence but also as a normative bridge connecting the world's peoples, in that it stresses global justice and an equitable international order for all.

Mark Malloch-Brown has shown how, in fact, the plethora of international agreements evolving in all aspects of international life, including globalization, are in themselves a revolution in international cooperation. He argues for a new global social contract, with inclusive global economic policy based on shared goals, and a shift in political culture to embrace global responsibility and meet global objectives. From this point of view global solidarity, if defined as living by rules and limits suitable to our fragile shared habitat, would encourage finding value in our history.[99]

Stewardship of the Earth and all its people is the responsibility of Governments and all others in a multi-stakeholder world. Human rights and responsibilities are fundamental to global governance that can ensure ecological integrity: "If we see ourselves as citizens of social and ecological communities, we become aware of the incredible power of connectedness and responsibility."[100] Yet, 20 years after the Rio Declaration on Environment and Development, a group of civil society organizations can point out: "To date, a holistic approach of sustainability has not been adopted for action. It is necessary to redefine, for public policy and public life, the concepts of development and well-being, along with their content, their metrics and their strategies."[101] They proposed eight interconnected principles which, taken together rather than in isolation, constitute a solid foundation for a new sustainability rights framework: solidarity principle; "do no harm" principle; principle of common but differentiated responsibilities; "polluter pays" principle; precautionary principle; subsidiarity principle; principle of free, prior and informed consent; and principle of peaceful dispute settlement.[102] Both globally and locally, approaches to development which uphold human rights, respect nature and foster a culture of peace and non-violence are emerging[103] and can be paths to social justice. They share much in common with the right to development, including the ideas of self-determined development in harmony with local cultures and value systems, and a sense of sharing, community and solidarity.

[95] Sarah Cook and Kiah Smith, "Introduction—green economy and sustainable development: bringing back the 'social'", *Development*, vol. 55, No. 1 (March 2012), pp. 5-9.
[96] Albert Einstein, cited in Westra, Bosselmann and Westra, *Reconciling Human Existence with Ecological Integrity* (see footnote 32), p. 319.
[97] Shyami Puvimanasinghe, *Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development* (Leiden and Boston, Koninklijke Brill MV, 2007), pp. 254-260.
[98] Ibid.
[99] Mark Malloch-Brown, *The Unfinished Global Revolution: The Road to International Cooperation* (Penguin Books, 2012), pp. 236-241.
[100] Klaus Bosselmann, "The way forward: governance for ecological integrity", in *Reconciling Human Existence with Ecological Integrity* (see footnote 32), p. 329.
[101] "No future without justice: report of the Civil Society Reflection Group on Global Development Perspectives", *Development Dialogue No. 59* (Uppsala, Dag Hammarskjöld Foundation, 2012), p. 20.
[102] Ibid., pp. 23-26.
[103] For instance, the emerging concept of a solidarity economy put forward by global civil society groups and locally, from Bhutan (see Dasho Karma Ura, "The gross national happiness index of Bhutan", ibid., pp. 59-60) and from Bolivia and Ecuador (see Jorge Ishizawa,"The concept of *Buen Vivir*", ibid., p. 28).

The far-sighted wisdom of the Declaration on the Right to Development provides an alternative paradigm of development and international economic relations, the realization of which is dependent on international solidarity, through which we "declare our responsibility to one another, to the greater community of life, and to future generations".[104]

[104] The Earth Charter, available from www.earthcharterinaction.org.

Looking towards the future of human and ecological well-being in a globalizing world, any path to development, including the Post-2015 Development Agenda, must be guided by the realization of all universal human rights and social justice for all people everywhere. The right to development, with its holistic normative foundations, broad cosmopolitan nature and deep structural approach, has the transformative potential to move us along this path.

PART THREE

Cooperating for the right to development

global partnership

introduction ⟩ ⟩ ⟩

Introduction

The previous parts established the normative content and guiding principles of the right to development. These remain abstract unless and until they inform the practice of international relations and domestic policy. The purpose of this part is to examine, from the right to development perspective, key partnerships through which development is supposed to take place and to ask whether and how the norms and principles of the right to development have any impact upon them.

The eight chapters in this part explore whether and how the right to development has had an impact on international cooperation to reach development goals. These chapters reflect the work commissioned by OHCHR for the task force in order to comply with the mandate, given to it by the Working Group on the Right to Development in 2005, to focus on Millennium Development Goal 8, that is, on a global partnership for development, and to suggest criteria for its periodic evaluation with the aim of improving the effectiveness of global partnerships with regard to the realization of the right to development (E/CN.4/2005/25, para. 54 (i)). Among the most significant factors for successful global partnership are: cooperation to realize the Millennium Development Goals; aid effectiveness; trade; debt sustainability; access to medicines; and climate change.

The first of these studies, presented in chapter 15, examines whether and to what extent the global partnership as understood in goal 8 contributes to the right to development. The author, Sakiko Fukuda-Parr examines in detail the overall approach of goal 8 as a potential tool for filling the gap between principle and policy. Goal 8 lists trade, aid, debt relief and technology transfer as the policy areas of required action, which she considers significant for the right to development because this goal involves an internationally agreed mechanism of review and accountability. Fukuda-Parr finds that goal 8 indicators and targets set weak standards for accountability and fail to address adequately key human rights principles regarding resources, the international policy environment and systemic asymmetries in global decision-making processes. She concludes with a recommendation that the international community revisit goal 8 targets and indicators from a right to development perspective, shifting international cooperation from charity to solidarity.

An example of South-South partnership is presented in chapter 16 on the African Peer Review Mechanism (APRM) and its focus on the rule of law and good governance, which are both principles and outcomes of the right to development. Bronwen Manby examines the nature and functioning of the APRM in the context of the New Partnership for Africa's Development (NEPAD). Specifically, she explores whether and how this innovative mechanism will live up to its promise as a tool for the improvement of governance and the realization of the right to development in African States.

In chapter 17, Roberto Bissio examines the Paris Declaration on Aid Effectiveness from a right to development perspective. He is critical of the Paris Declaration insofar as it "can work in practice against

the right to development and erode national democratic processes". Even after the explicit mention of human rights in the Accra Agenda for Action, the targets still make reference to preconditions that developing countries have to meet, and human rights are not part of the scope of the official review, monitoring and evaluation. Moreover, many of them "could result in substantial erosion of the right to development of 'partner' countries". Echoing the civil society call for "development effectiveness" to replace "aid effectiveness", he joins with civil society in advocating that such effectiveness be strengthened "through practice based on human rights standards".

Moving from aid to trade, Robert Howse considers in chapter 18 the world trading system and its complementarity with the international human rights regime, before examining how the right to development could be mainstreamed into legal and institutional practice at the World Trade Organization (WTO). Specifically, he suggests how this right might be advanced through the Trade Policy Review Mechanism and technical assistance provided to assist developing countries in taking advantage of WTO treaties. While the dispute settlement procedure has not taken advantage of the potential of this right in interpreting WTO law, Howse urges reform of the epistemic community to give greater attention to the normative value of the right to development in WTO negotiations.

A specific example for global trade, the Cotonou Agreement between the European Union and African, Caribbean and Pacific Countries and economic partnership agreements (EPAs), is studied in chapter 19 by James Thuo Gathii. After analysing the right to development, he examines the five pillars of the Cotonou Agreement with special reference to the right to development and the obstacles to the incorporation of human rights concerns within the Agreement and EPA negotiations. Finding potential areas of congruence and synergy between the Cotonou Agreement and the right to development, he proposes specific steps to bring this right into the operational framework of the Agreement.

In chapter 20, Boris Gamarra, Malvina Pollock, Dörte Dömeland and Carlos A. Primo Braga address "Debt relief and sustainability", drawing on their own work on the subject and a 2009 World Bank conference and publication presented to the task force in January 2010 as part of its consideration of target 8.D under goal 8. In this chapter, the authors review the evolution of debt relief from short-term debt-restructuring operations to outright debt forgiveness and describe the range of debt-relief measures adopted by creditors. They then analyse the extent to which debt relief has alleviated the debt burden of low-income countries and how the global financial crisis underscores the importance of strengthening public debt-management capacity and institutions. They conclude by stressing the challenge of translating debt relief into sustainable growth and avoiding the temptation to over-borrow, and the potential benefits for the right to development of better debt management.

The Millennium Development Goals also focus on debt by calling on the international community to "deal comprehensively with developing countries' debt". Chapter 21, by Cephas Lumina, casts a critical eye on the role of international financial institutions from the right to development perspective. He expresses concern over the evidence indicating "that in many of the poorest countries debt repayment is often carried out at the expense of basic human rights, including the rights to food, health, education, adequate housing and work". After reviewing the global debt crisis and the impact of debt servicing on the realization of human rights, he explains how conditions linked to debt relief undermine country ownership of national development strategies and the shortcomings of current creditor-driven responses to the debt crisis. He proposes a rights-based approach to debt sustainability, underscores the need for the principle of shared responsibility of creditors and debtors, and calls for a "fundamental restructuring of the international economic system".

Goal 8 includes target 8.E: "In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries." In chapter 22, Lisa Forman addresses the role of the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property and the Global Strategy and Plan of Action from the perspective of goal 8 and the right to development. She finds that they may have "the potential to significantly advance access to medicines, as well as realization of the right to development and associated human rights to health, life and the benefits of scientific progress", in spite of some shortcomings.

The final chapter in this part, chapter 23, relates to target 8.F of goal 8: "In cooperation with the private sector, make available benefits of new technologies, especially information and communications". Marcos Orellana in his chapter on "Climate change, sustainable development and the clean development mechanism", addresses sustainable development,

which has been explicitly incorporated as one of the objectives of the clean development mechanism (CDM), established by the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC). He considers that the right to development "expresses a common ethos, an articulating principle and a transcendent goal for our global society if it is to survive and thrive in a climate-constrained planet". After examining climate change, the related Millennium Development Goals and the role of international cooperation, in particular CDM, he examines the problems of UNFCCC in terms of governance practices, environmental integrity and contribution to sustainable development. He concludes that the right to development is central to addressing the climate change crisis effectively because of its value to development models, its potential to "unlock UNFCCC negotiations by underscoring the need for a technology leap in the global and local economies", and its value as "the vital moral compass to guide the economic transformation required to effectively address climate change and achieve sustainable development through the integration of economic, environmental and human rights issues".

Taken together, these nine chapters underscore the challenges facing international cooperation in mobilizing resources and altering priorities in order to make the right to development an integral component of development practice. The incentives for action and the tools for measuring progress to assist Governments, civil society and international institutions to move from affirmations of principles to development practice are addressed in Part Four.

A right to development critique of Millennium Development Goal 8

*Sakiko Fukuda-Parr**

I. Introduction

The idea that human solidarity transcends national boundaries and extends to all people of the world is expressed in key human rights documents[1] from the Charter of the United Nations[2] to the Universal Declaration of Human Rights[3] to the International Covenant on Economic, Social and Cultural Rights.[4] And the principle that States have international obligations arising from solidarity is stated in these and several other documents, notably in the Declaration on the Right to Development[5] and in the 1993 Vienna Declaration and Programme of Action.[6] Yet this cherished idea has not developed beyond a statement of principle, either in concept or international human rights law. Not much work has been done to define these obligations over the last decades. No clear body of norms and standards has emerged. Several United Nations legal instruments refer to international cooperation but essentially restate the principle set out in the International Covenant on Economic, Social and Cultural Rights. No formal procedures exist to hold States accountable for their international responsibilities. In fact, as the review by Rui Baltazar Dos Santos Alves for the United Nations Sub-Commission on the Promotion and Protection of Human Rights concludes, this concept is a broad area that has not been analysed adequately (E/CN.4/Sub.2/2004/43, para. 32).

The principle of human rights obligations has barely had any influence on the thinking of States, scholars and advocates in formulating international development cooperation policies. Even the most ardent advocates of international solidarity in the fight against global poverty invoke moral compulsion, not international State obligation, as the reason why rich countries should make greater efforts. And if human rights are invoked in their discourse, it is merely to disparage extreme poverty as a denial of human dignity, stopping short of evoking the correlate duties and responsibilities of States and other actors to do their utmost to help achieve realization of rights. This misses the essential value added of human rights to development policy, namely the framework of obligations and accountability for what are otherwise aspi-

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[1] See "Human rights and international solidarity", working paper submitted by Rui Baltazar Dos Santos Alves to the Commission on Human Rights Sub-Commission on Promotion and Protection of Human Right at its fifty-sixth session (E/CN.4/Sub.2/2004/43).

[2] "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED … to employ international machinery for the promotion of the economic and social advancement of all peoples" (Preamble); "The Purposes of the United Nations are … [t]o achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights …" (Article 1)

[3] "Everyone … is entitled to realization, through national effort and international cooperation [of indispensable economic, social and cultural rights]" (art. 22).

[4] States undertake to act "individually and through international assistance and cooperation … with a view to achieving progressively [the rights recognized in the Covenant …" (art. 2).

[5] "States have a duty to cooperate with each other in ensuring development and eliminating obstacles to development" (art. 3.3);"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" (art. 4).

[6] "States have the duty to cooperate with each other in ensuring development …" (A/CONF.157/23 (Part I), chap. III, art. 3); "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 (ibid., art. 4).

rational objectives. At the same time, the growing literature and programmes promoting the "rights-based approach to development" focus on national policy and have done little to address the international dimension of State obligations. Conceptually, the idea of development cooperation is still rooted in the logic of charity, rather than the logic of shared responsibilities in a global community.[7]

The purpose of this chapter is to examine goal 8 of the Millennium Development Goals, the internationally agreed commitment to stronger international partnership for development, as a potential tool for filling the gap between principle and policy. Goal 8 is arguably the most significant development since the International Covenant on Economic, Social and Cultural Rights because it takes the idea of international State obligations beyond a statement of principle to list specific policy areas of required action: trade, aid, debt relief and technology transfer. Moreover, goal 8 is part of an internationally agreed mechanism of review and accountability.

The eight Millennium Development Goals, including their targets and indicators,[8] emanate from the United Nations Millennium Declaration[9] adopted at the United Nations Millennium Summit held in 2000. Heads of State and Government gathered in record numbers to define a common vision for the twenty-first century. With all countries of the world present, they committed their States to work together and make stronger efforts for global peace, human rights, democracy, good governance, environmental sustainability and poverty eradication.[10] Although there is more to the right to development than the Millennium Development Goals,[11] the Goals overlap with many important human rights. Mobilization of complementary development efforts to implement the Goals can take the agenda forward. Moreover, key human rights principles are reflected in the Millennium Declaration and in the resolution adopted by the 2010 World Summit[12] that reviewed progress and reaffirmed the commitments made in 2000.

The Millennium Development Goals are unique in their ambition and scope, but also in two other ways. First, they set quantifiable targets with a timetable for achievement and indicators to monitor implementation. In the years since the Millennium Summit, the international community has adopted the Goals as a common set of priorities and a common yardstick for measuring progress. A global monitoring process has been put in place. The General Assembly reviews global progress annually and held special high-level review sessions in 2005 and 2010, while regional and country reports are also prepared and reviewed. A critical part of this follow-up process was the agreement on the Monterrey Consensus[13] adopted at the International Conference on Financing for Development held in Mexico in 2002. The Consensus sets out a framework for international cooperation by identifying key issues, policy priorities and principles regarding the respective roles of national Governments, donors and other actors. These commitments were specifically reaffirmed at the World Summit held in 2010.[14]

The Millennium Development Goals are also unique in their explicit recognition that they cannot be achieved by national efforts alone, but require international cooperation. So while goals 1–7 set benchmarks for evaluating progress with respect to income poverty, hunger, primary schooling, gender inequality, child and maternal mortality, HIV/AIDS and other major diseases and environmental degradation, goal 8 sets out action to be taken by rich countries, including action on trade, debt, technology transfer and aid. Goal 8 can therefore be considered to provide a framework for assessing accountability of rich countries.

[7] See further literature on this issue, for example by Margot Salomon, "Global economic policy and human rights: three sites of disconnection", *Carnegie Ethics Online*, 25 March 2010, available from www.carnegiecouncil.org.

[8] The list of 19 targets and 60 indicators was last revised in 2008, and is available at http://unstats.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm.

[9] General Assembly resolution 55/2.

[10] The United Nations Millennium Declaration articulated the objectives reflected in the Millennium Development Goals, while the original list of goals, targets and indicators is contained in the report of the Secretary-General on the road map towards the implementation of the United Nations Millennium Declaration (A/56/326).

[11] The Millennium Development Goals do not include all relevant priorities of the right to development. There are several notable gaps when considering the substantive content of the right to development. First, they miss out several important development objectives. For example, only equality in schooling is mentioned as a relevant indicator together with gender equality, leaving out all other important areas such as employment and political participation, to name just two. Second, the goals do not refer at all to the right to a process of development that is transparent, participatory, equitable, and in which rule of law and good governance are practised. Third, the Goals miss the equity dimension of the right to development. The targets and indicators all refer to national averages without attention to redressing discrimination that results in exclusion and inequalities. However, we should not interpret from this that the Goals have no relevance for human rights. The Goals are benchmarks of progress and they do not necessarily claim to represent a comprehensive list of all important development objectives. Moreover, they are indicators of progress and are not intended to be a coherent development strategy or a new development paradigm.

[12] General Assembly resolution 65/1.

[13] *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (A/CONF.198/11), chap. I, resolution 1, annex.

[14] See General Assembly resolution 65/1.

Thus, goal 8 has the potential to be used as a tool of accountability, taking the principle of international solidarity beyond an abstract concept to a concrete policy that is consequential to the actions of States. The aim of this chapter is to analyse whether the current list of goal 8 targets and indicators captures the essential elements of international responsibilities for development. To answer this question requires first asking what targets and indicators should measure; what constitutes progress and regress. This in turn requires clarifying the concept of human rights, what constitutes international obligations and what are the substantive policy priorities.

II. Conceptual framework for assessing progress in the realization of human rights

How should progress in the realization of human rights be assessed? What are the key elements that define progress? "Human rights" is a complex concept with multiple dimensions; securing human rights requires progress on multiple fronts. Each of these facets needs to be captured in indicators to assess progress.

Consider the concept of the right to development. The right to development is not the same as development. It is not just about improvement in the economy or in social conditions such as schooling. It is also not the same as "human development", the expansion of capabilities and freedoms that individuals have to lead lives they value. As both Martha Nussbaum and Amartya Sen have written, capabilities and human rights are closely related concepts.[15] They share a common commitment to freedom and justice as central political objectives.[16] So Nussbaum remarks: "The two approaches (one being a species of the other) should march forward as allies in the combat against an exclusive focus on economic growth and for an approach to development that focuses on people's real needs and urgent entitlements."[17] Yet, as they point out, capabilities and rights are distinct concepts, each with a distinct theory, even if they are complementary.[18] The right to development is a much more complex concept than development in many ways. Although human development and human rights may overlap in defining essential entitlements as important social objectives, the concept of rights emphasizes the obligations that are correlative to the entitlements. Human rights define obligations of the duty bearers and the need to put in place social arrangements to ensure people can enjoy their rights and realize their human dignity and freedoms.

Economists often argue that human rights are incorporated in development policies when these policies promote equitable economic growth and social development. This position misses the essence of the human rights concept, namely that rights carry correlate obligations on individuals and institutions, particularly the State. The concept of human rights is concerned with how these obligations have been dispensed to create social arrangements so that people can realize their rights. The concept goes further and is concerned with obligations of "conduct" as well as "result", and whether that conduct is true to the principles of non-discrimination, participation, adequate progress and availability of a remedy. The value added of human rights to development is therefore the concern with the accountability of States for putting in place adequate institutions, norms and processes.

Another way of approaching this concept is to contrast human rights with development aspirations; human rights are claims that are to be enforced, for which others—duty bearers—are to be held accountable. To evaluate progress in human rights requires an assessment of the conduct of duty bearers in putting in place the appropriate social arrangements.

Dimensions of human rights and implications for assessing international obligations under Millennium Development Goal 8

The realization of human rights needs to progress along multiple dimensions on different fronts.

Two areas of outcome: the condition of people's lives and the social arrangements put in place. To assess human rights, we are concerned with pro-

[15] See the review of this literature in the 2011 Special Issue on human rights and capabilities of the *Journal of Human Development and Capabilities*, vol. 12, No. 1 (February 2011), particularly Polly Vizard, Sakiko Fukuda-Parr and Diane Elson, "Introduction: the capability approach and human rights", pp. 1-22.

[16] See Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge, United Kingdom, Cambridge University Press, 2000); "Capabilities as fundamental entitlements: Sen and social justice", *Feminist Economics*, vol. 9, Nos. 2-3 (2003), pp. 33-59; "Capabilities, entitlements, rights: supplementation and critique", *Journal of Human Development and Capabilities*, vol. 12, No. 1 (February 2011), pp. 23-37. See also Amartya Sen, "Rights and Agency", *Philosophy and Public Affairs*, vol. 11, No. 1 (Winter 1982), pp. 3-39; "Human rights and capabilities", *Journal of Human Development*, vol. 6, No. 2 (July 2005), pp. 151-166.

[17] Nussbaum, "Capabilities, entitlements, rights", p. 37. She conceptualizes capabilities as a species of right.

[18] Nussbaum argues that capabilities help clarify the theory of rights (ibid).

gress not only in the condition of people's lives, but also in the social arrangements that are in place. Much of work on monitoring human rights focuses on documenting violations of rights by monitoring the condition of people's lives. These make up two quite distinct strands of the work on human rights measurement. Lack of consensus in the work on indicators arises from the focus on one or the other priority,[19] but progress needs to be assessed in both areas and indicators are needed in both.

The implication for goal 8 is that indicators should focus on State conduct—on whether adequate public policies are in place—rather than on human outcomes.

Several actors. Many actors in society in addition to the State influence the condition of human lives and therefore have human rights obligations. The State has the primary responsibility for securing people's rights, but many other actors such as the media, civil society organizations, private companies, the household and individuals also have a role. In the market economy, the conduct of private companies is a significant factor and that conduct cannot be entirely controlled by the State. In an increasingly globalized world, global actors such as international organizations and global corporations have considerable influence and are beyond the reach of any individual State to regulate. All these actors are duty bearers.

The implication for goal 8 is that international responsibilities reside not only with the State but also with other globally powerful organizations, notably corporations, media and networks of non-governmental organizations (NGOs). States also have an obligation to ensure that these other actors do not violate human rights. International cooperation is needed when actors are global, such as global corporations.

Several key characteristics of process. It is not only the human condition but social processes in which people participate that are part of human rights. The right to development is conceptualized as a right to a process. The key features of the process include participation, equality, transparency, accountability, non-discrimination and remedy. What matters therefore in the realization of the right to development is not, for example, just raising school enrolment rates but achieving greater equality in schooling, reducing disparities among population groups and addressing obstacles such as language for marginalized groups. There must also be a process put in place for accountability and remedy in the case of violation.

The implication for goal 8 is that the question of the participation of poor and weak countries in international decision-making processes that affect their development is an important concern.

Benchmarking progressive realization. It has long been recognized that the pace of progress in realizing rights depends on the context; obstacles are specific to each country and point of time as a result of history. Progress cannot be assessed by a uniform standard internationally. What is important is for each country to make the maximum effort; to monitor these efforts requires setting realistic benchmarks.

The implication for goal 8 is that partnership targets should also take account of these different needs and be disaggregated, recognizing that some countries face larger obstacles and can be expected to accomplish less. Partnership obligations would vary from one group of countries to another.

III. Structuring indicators for assessing State conduct

Over the last decade, much work has been done on conceptualizing human rights measurement methodologies.[20] Some useful approaches have been developed to structure indicators into sets that capture diverse dimensions and objectives. This chapter draws particularly on the framework proposed in the *Human Development Report 2000*[21] structured by seven aspects of State conduct. This includes identifying the scope of State conduct in three categories of obligation (to respect, protect and fulfil human rights) and identifying four key principles of process (non-discrimination, participation, adequate progress and remedy).[22] This framework is consistent with and incorporated in the framework proposed by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and endorsed at the inter-committee meeting of human rights treaty bodies in June 2008, which uses three categories of indicators—outcome,

[19] Kate Raworth, "Measuring human rights", *Ethics & International Affairs*, vol. 15, Issue 1 (March 2001), pp. 111-131.

[20] See Rajeev Malhotra and Nicolas Fasel, "Quantitative human rights indicators: A survey of major initiatives", mimeo, 2005, available at http://web.abo.fi/instut/imr/research/seminars/indicators; Sakiko Fukuda-Parr, "The metrics of human rights: complementarities of the human development and capabilities approach", *Journal of Human Development and Capabilities*, vol. 12, No. 1 (February 2011), pp. 73-89.

[21] United Nations Development Programme (UNDP), *Human Development Report 2000: Human Rights and Human Development* (New York, Oxford University Press, 2000).

[22] Kate Raworth is acknowledged as a main author of this section of the chapter and as having developed the conceptual framework (see note 19 above).

process and structure—within the context of human rights monitoring systems.[23]

Scope of State conduct: policies to respect, protect and fulfil

The principles contained in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997 (see E/C.12/2000/13) have come to be widely used in defining the scope of State responsibility in the national context in three dimensions: to respect, to protect and to fulfil. The same principles can be usefully applied in conceptualizing the scope of international obligations.[24] This can be illustrated by drawing examples from national State obligations for education and international obligations in the use of flexibilities that are built into the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to extend access to patented medicines during a public-health emergency.[25]

To respect refers to not standing in the way of people's pursuit of their rights. An example in the national context would be to not restrict access to schools by minority populations. In the international context, an example would be refraining from obstructing a country pursuing the use of flexibilities in the TRIPS Agreement to protect public-health. Several years ago, a group of multinationals sued the Government of South Africa over this issue, specifically concerning the manufacture of antiretroviral drugs for the treatment of HIV/AIDS. Their home Governments could have refrained from backing the multinationals' position, considering that HIV/AIDS at the time affected over a fifth of South Africa's adult population.[26]

To protect refers to preventing other actors from violating human rights. An example in the national context would be to intervene when parents refuse to let girls attend school. An example in the international context would be to take measures to encourage multinationals producing HIV/AIDS antiretrovirals to refrain from standing in the way of using compulsory licensing to allow generic production of the drugs.

To fulfil refers to taking measures that assist in the realization of rights. In the national context, an example would be building schools. At the international level, an example would be investing in vaccines for HIV/AIDS that are urgently needed to stem the spread of this pandemic, especially in poor countries.

Key human rights principles as policy goals: non-discrimination, participation, adequate progress and effective remedy

Cutting through all these outcomes and processes are the key human rights principles of non-discrimination, participation, adequate progress and remedy.

Non-discrimination means that equitable treatment of all and equal achievement of all in the realization of human rights is a central policy goal. Disparities in the human condition can reveal policy discrimination. In the national context, minority groups may have lower educational achievements reflecting lower spending from public budgets. In the international context, non-discrimination is an important issue in trade policy. Market access for developing countries may be restricted by higher tariffs or subsidies to domestic production. Policies aimed at achieving greater equality imply greater priority to improvement of the most deprived and excluded.

This principle has significant implications for goal 8. Numerous discriminatory rules exist in the international trading system, its rules and institutional procedures. It is arguably a matter of a human rights obligation on the part of rich countries to dismantle tariffs on developing country exports and subsidies on farm products that compete with developing country exports.

Participation is a key principle in the right to development, as a right to a process is the ability to participate in making decisions that affect one's life. Participation is secured only when decision-making is democratic, where institutions are in place that ensure that the voices of people are heard, where there is

[23] See "Report on indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework" (HRI/MC/2006/7); "Report on indicators for promoting and monitoring the implementation of human rights" (HRI/MC/2008/3); "Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights: note by the Secretary General (A/63/280); "The right of everyone to enjoy the highest attainable standard of physical and mental health: note by the Secretary-General" (A/58/427).

[24] The intention here is to use these principles to develop a conceptual framework for identifying international obligation, not to make a legal argument.

[25] Medicines under patent are expensive as compared with generics, or in short supply. While the TRIPS Agreement requires WTO member countries to put in place a system of intellectual property, it also includes provisions to ensure that patents do not stand in the way of public-health and other critical issues of human well-being. These provisions include, in particular, compulsory licensing—allowing companies to produce without a licence—the use of which has been hotly contested in recent years. See the discussion of human rights obligations related to TRIPS in the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, on his mission to WTO (E/CN.4/2004/49/Add.1).

[26] According to the *Human Development Report 2005*, the figure was 21.5 per cent of the population aged 15 to 49.

transparency in Government decision-making and procedures for accountability.

An important implication for goal 8 is the human rights obligation of all countries, especially the powerful ones, to ensure that the voices of developing countries are heard in decision-making processes such as multilateral trade negotiations.

Adequate progress in the realization of rights depends on the context. Progress has to be assessed in view of the obstacles in the way which are a result of history. Intermediate targets and benchmarks need to be set. In the national context, this would imply, for example, achieving a consensus between people and Government on how much the school enrolment rate should be raised each year. In the international context, a similar process would be for donors and Governments to agree on a framework; the Independent Expert on the right to development has therefore proposed "compacts" between developing countries and partners (see, for example, E/CN.4/1999/WG.18/2).

An important implication for goal 8 is that in fact, the Millennium Development Goals constitute a framework of benchmarking for adequate progress. The Goals set ambitious targets requiring faster progress. Millennium Development Goals monitoring reports published by the United Nations, the World Bank and other organizations[27] consistently conclude that at the rates achieved over the last decade, only a handful of countries, mainly in Asia and Latin America, would achieve the goals by 2015; most goals would be missed globally and in most countries of Africa and in most of the poorest countries, whether categorized as least developed countries (LDCs), low-income countries or countries with low human development. The Millennium Development Goals are a demand for States to do much more internationally.

Remedy means that States have the obligation to put in place procedures for remedying violations and for holding responsible parties accountable. In the national context, procedures exist for legal and administrative recourse and the effectiveness of these procedures can be monitored. In the international context, such procedures are exceptional. The WTO dispute settlement procedure is one of them. Note that this is an exception; enforcement mechanisms at the international level rely on peer pressure, "naming and shaming", with no recourse to punitive measures except for sanctions against States and military intervention justified as a " responsibility to protect" .

[27] See, for example, the Millennium Development Goals Reports published annually by the United Nations and the Global Monitoring Reports published annually by the World Bank.

IV. The concept of international obligations

How should international obligations be defined? How has the case been made? One frequently used argument is the existence of mass poverty in poor countries and the inequalities in the world. Some argue that these inequalities are the result of entrenched structural injustices, rooted in history and reflecting the huge asymmetries in economic and political power among countries. However, these are not sufficient reasons for international responsibility since it is widely agreed among both Governments and human rights scholars that the primary responsibility for human rights and the eradication of poverty resides at the national level. This principle is also entrenched in United Nations human rights documents. Indeed, most rich country Governments insist on this point and have been reluctant to embrace the notion of international obligations in United Nations forums and documents because the limits of national responsibility and international responsibility are ambiguous. Thus, international obligations are not a substitute for national responsibility. International action, however, is indispensable for addressing obstacles that are beyond the capacity of national Governments to tackle on their own.

Three categories of obstacles beyond the reach of national action

It is often thought that international support for development is essentially about transferring resources: a claim to a handout. The logic of human rights is not, however, an entitlement to a handout or charity. The entitlement is to social arrangements that can secure a person's rights. International cooperation is certainly needed because developing countries cannot raise adequate resources on their own, but there are two other obstacles that developing countries cannot address on their own. One is international policies and the other is systemic asymmetry in global governance.

Resource constraints are the first obstacle. There is little argument over the fact that developing countries need additional resources beyond what domestic savings and borrowing can mobilize. There is also wide agreement that achieving the Millennium Development Goals requires substantial additional resources

since at the current pace of development, most of the low-income/low human development countries would miss the 2015 targets. Additional resources can come from better national policies for domestic resource mobilization, but must also come from development aid, debt relief, private investment flows and access to private capital markets.

International policies arising from the constrained international policy environment are the second obstacle. For example, most developing countries are highly dependent on primary commodities for their foreign exchange earnings and face wildly fluctuating prices. They also face "tariff escalation", also dubbed "development tax", where developed countries impose higher tariffs on processed goods such as tinned tomatoes compared with unprocessed goods such as tomatoes. These and other issues have been identified as elements of the "development agenda" of the Doha Round of trade negotiations.[28] A single country cannot address these problems on its own; international action is needed to set up schemes to stabilize resource flows in the face of commodity price fluctuations or to reform unfavourable trade rules. In fact, it is the need for an "enabling international economic environment" that drove developing countries to advocate for recognizing the right to development in the 1970s and 1980s.[29] In today's context, several other critical issues are evident such as global warming and other environmental pressures, the need to invest in technology for poor people such as medicines for "neglected diseases", low-cost clean energy, higher-performing varieties of crops for the poorest farmers, and human trafficking and other international criminal activity.

Systemic asymmetry in global governance is the third obstacle. It concerns systemic weaknesses in global institutions and processes. An important issue today relates to the international financial architecture and its ability to monitor and prevent financial crises. Another major issue is the inadequate participation of developing countries in international decision-making. This is related to the democratic deficit in global governance and the lack of transparency and broad participation in institutional structures and decision-making processes. The most significant concerns have been raised with respect to agreements on norms and standards in trade and finance. For example, developing countries have weak bargaining power in WTO multilateral trade negotiations, which results in trade rules that favour the interests of rich and powerful countries. Developing country representation is also weak in other institutions such as the World Bank, the International Monetary Fund (IMF) and the Basel Committee on Banking Supervision. Not only is their voice constrained due to lack of financial and technical resources and capacity, but asymmetries are institutionalized in decision-making structures and processes, such as in the voting structures of the World Bank and IMF where votes are allocated by share holdings rather than on the basis of equal votes for each member country.

[28] The round of multilateral trade negotiations launched in 2001 that address a number of issues of priority concern to the developing countries.

[29] See the report of the Independent Expert on the right to development, Arjun Sengupta (A/55/306).

Assigning responsibility for violations: imperfect obligations

State conduct is about State policy and action, whether it is budget allocations, regulation or institutional procedures. There is intrinsic difficulty in identifying the content of policies and actions that meet State obligations since there is no indisputable consensus on the causal impact of policy on human well-being. There are always controversies concerning data, methodology and analysis of policy choices. For example, human rights activists have often argued that structural adjustment programmes have resulted in unemployment, declines in educational enrolment and other adverse impacts on the realization of the right to development. But these policy consequences depend on the specific context, and the causal links are vigorously contested among economists. Many economists argue that these policy packages have had positive effects on employment, education and other aspects of development.

Moreover, there are multiple factors and actors behind any given outcome that makes attributing responsibility for human rights violations extremely difficult. For example, if a girl is not in school, is it because the parents are opposed to the education of girls? Is it because the community has failed to ensure that the school is safe? Is it because the Ministry of Education has mismanaged its budget? Is it because the Ministry of Finance, which controls the national budget, has not provided sufficient resources? Or is it because IMF insisted that expenditure cuts are necessary to restore macroeconomic balances? While it is clear that it is not possible to ascribe exact responsibility for a human rights failure to an international actor, it does not follow that the latter has no obligations; there are obstacles which an international actor

can address that a national Government, community or parent is not able to. As Sen has argued, obligations to help realize a right may not be precisely attributable, but are obligations nonetheless. These should then be considered "imperfect obligations".[30]

These imperfect obligations may be particularly difficult to pin down in a legal framework, but they can be agreed among stakeholders in a politically negotiated consensus. While there will always be a rich diversity of analyses and disagreements among scholars, policymakers can draw on a body of social science knowledge on which there is strong consensus.

One of the most important achievements of the international community since the emergence of the United Nations Millennium Declaration in 2000 and the Millennium Development Goals in 2001 has been the Monterrey Consensus of 2002. The Consensus identifies key policy priorities, thus providing a framework for partnership for development, as well as the roles and commitments of developing countries for putting in place effective governance of the development process and the commitment of donors to take new policy actions in the areas of trade, debt, technology transfer, financial markets and private sector flows. This structure echoes the proposal by the former independent expert on the right to development for a "compact".

V. Goal 8: targets and indicators for human rights accountability?

Goal 8, to develop a global partnership for development, includes targets and associated indicators in the areas of global trade and finance, aid and the special needs of least developed and landlocked countries. Do these targets address key development constraints that require international actions which relate to resources, the international policy environment and global governance?

The table at the end of the chapter compares goal 8 targets and indicators with the priorities on which there is broad consensus. These include the priorities that Governments have committed to in the Monterrey Consensus and additional commitments that are identified in policy studies. It is outside the scope of this chapter to make an independent assessment of international policy priorities, but we can draw on studies commissioned and/or produced by the United Nations system that build on the large empirical and analytical literature. I review here three of the many such reports because these are global and most comprehensive: the 2005 report of the United Nations Millennium Project[31] led by Jeffrey Sachs, which brought together hundreds of specialists from international academia, civil society, Government and United Nations agencies; the *World Economic and Social Survey 2005*;[32] and the 2003 and 2005 editions of the Human Development Report.[33]

This comparison shows that goal 8 indicators and targets set weak standards for accountability, are narrow in the coverage of the policy agenda and are inadequate in addressing key human rights principles in each of the three areas where international action is required to supplement domestic efforts: lack of resources; improving the international policy environment; and addressing systemic asymmetries in global decision-making processes.

Priority 1 – Resources: aid, debt, private flows

Goal 8 focuses on increasing aid and debt relief, with attention to aid allocation to LDCs and landlocked developing countries and small island developing States and to social services. However, goal 8 indicators and targets raise a number of issues.

First is aid allocation to the countries in greatest need, in order to achieve the Millennium Development Goals as well as to fulfil human rights according to the principles of equality and non-discrimination. Targets 8.B and 8.C "address the special needs" of developing countries in the categories mentioned, to be measured by net total official development assistance (ODA) and flows to those countries measured in total amounts and as a percentage of the donor countries' gross national income. As is well known, goal 8 does not include any quantitative targets, in particular the target of 0.7 per cent of gross national product for ODA originally adopted by the General Assembly,[34] which has already proven to be an important benchmark in driving policy change in donor country members of the Organisation for Economic Co-operation and Development (OECD). Beginning in 2003, aid disbursements began to increase and many donors,

[30] See UNDP, *Human Development Report 2000* (see footnote 21).

[31] *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals,* United Nations Millennium Project Report to the Secretary-General (London, Earthscan, 2005).

[32] *World Economic and Social Survey 2005: Financing for Development* (United Nations publication, Sales No. E.05.II.C.1).

[33] UNDP, *Human Development Report 2003—Millennium Development Goals: A Compact Among Nations To End Human Poverty* (New York, Oxford University Press, 2003) and *Human Development Report 2005.*

[34] Resolution 2626 (XXV), para. (43).

especially in the European Union, had committed to increase overall aid budgets.

The Monterrey Consensus sets a broader agenda that includes issues of exploring new and innovative sources of financing, exploring innovative mechanisms to address debt problems comprehensively and measures to encourage private capital flows. These issues are also emphasized in the reports reviewed. The reports address the issue of aid allocation with a slightly different emphasis. While goal 8 includes indicators for allocations to LDCs and other categories of developing counties and to the social sectors, the United Nations Millennium Project report and the *Human Development Report 2003* argue for aid to be allocated on the basis of a realistic country-level analysis of resources required to achieve the Millennium Development Goals.

The critical policy issue is ensuring the flow of resources to countries in greatest need, and that these resources are used effectively. Developing countries can be separated into two groups. A group of countries are on track to meeting the Goals at current rates of progress. Most of these are middle-income countries or countries like China which are experiencing rapid growth and development. They do not require additional aid to achieve the targets. Another group of countries are high-priority countries that are far behind and progressing slowly, and in some cases are in development reversal.

United Nations reports propose that aid allocations be based on country-by- country estimates of resources needed to achieve the Goals. Millennium Development Goals benchmarks are more ambitious for the poorest countries; consider the contrast between Burkina Faso and South Africa. Achieving universal primary schooling by 2015 is much more difficult for Burkina Faso where the primary enrolment rate in 2001 was 36 per cent compared with 89 per cent in South Africa. Moreover, Burkina Faso's GDP per capita was $1,120 (purchasing power parity, PPP) and 61 per cent of its population was living on less than $1 per day, while South Africa had 10 times the resource base with per capita GDP of $11,290 (PPP).[35]

The Millennium Development Goals set targets that take no account of this reality; in fact, they do the reverse since they ask Chile and Niger to achieve universal primary schooling in the same time frame. The countries with the largest backlog of deprivation tend also to have the largest resource constraints and therefore require the strongest support or "partnership". In fact, the Monterrey Consensus proposal to favour countries that have good policies also works against the poorest countries because many of them have weak policy capacity. A way has to be found for international cooperation to effectively accelerate progress in these countries.

Second is the need for new approaches to the debt issue. Goal 8 makes an important commitment to "deal comprehensively with the debt problems" (target 8.D). Indicators focus on outcomes such as proportion of official bilateral debt cancelled under the Heavily Indebted Poor Country (HIPC) Initiative, debt service as a percentage of exports of goods and services and number of countries reaching their HIPC decision and completion points. However, goal 8 indicators and targets do not reflect policy changes that are needed in the design of debt sustainability initiatives. All the United Nations reports reviewed conclude that the HIPC experience has been important but that process has been slow, and that deeper relief is required as countries find themselves with unsustainable debt levels not long after benefiting from debt relief.

Third is the need to explore new sources of financing. Ideas about innovative sources of financing for development have long been discussed. Proposals have been made by independent researchers for several sources of financing but have not been vigorously pursued to date. Some ideas, such as the "Tobin tax" on international capital transactions, can raise huge amounts but have had support from only a few countries. Though it gained momentum in 2011 with the proposal by France and Germany to introduce a financial transaction tax to finance rescue plans for European economies facing default on sovereign debt, it still faces strong opposition from the United States and the United Kingdom of Great Britain and Northern Ireland and from financial markets and is far from achieving consensus. However, the Monterrey Consensus has recognized the importance of exploring new sources; in fact, it is widely acknowledged, as reflected in the *World Economic and Social Survey 2005*, that there are serious limitations to ODA as a way of meeting financing requirements for development. Political realities of budget constraints and competing priorities as well as the lack of a political constituency in donor countries would, for example, make it difficult to double ODA levels (the resources required to meet the Millennium Development Goals are estimated at about $50 billion, or equivalent to a doubling of current ODA levels).

[35] Data from UNDP, *Human Development Report 2010—The Real Wealth of Nations: Pathways to Human Development* (New York, Oxford University Press, 2010),

Priority 2 – International policies

Goal 8 makes an important commitment to work towards greater fairness in trade and finance, with a focus on market access. Goal 8 also refers to access to essential medicines and access to new technologies. The targets and indicators, however, state broad objectives and outcomes without pinpointing the concrete policy changes required.

In comparison, the Monterrey Consensus contains a broader agenda for policy reform in trade, but also extends to issues of financial markets, commodity price fluctuations, intellectual property and aid effectiveness. The United Nations reports reviewed also cover these issues.

First, the Monterrey Consensus incorporates commitments to address a wider range of issues restricting market access, including agricultural subsidies, tariffs on labour-intensive manufactures and sanitary and phytosanitary measures, and the increasingly important issue of migration under liberalizing the movement of persons further to the General Agreement on Trade in Services mode 4. This would facilitate migration from developing countries.

Second, the Asian financial crisis of 1997 demonstrated the risk of financial crises for emerging economies. The Monterrey Consensus commits countries to explore policy reforms in the direction of stable flows. The *World Economic and Social Survey 2005* contains detailed analyses and proposals in this area.

Third, commodity price fluctuations are major obstacles to developing countries, most of which are highly dependent on primary commodity exports as a source of foreign exchange earnings. The Monterrey Consensus commits countries to do more to mitigate the effects of these fluctuations through implementation of mechanisms such as the IMF Compensatory Financing Facility, as well as through export diversification.

Fourth, intellectual property rights and access to and development of technology are important issues for developing countries. There are growing technological disparities of access and capacity. The Monterrey Consensus commits countries to proactive positions with respect to access to medicines and traditional knowledge. Intellectual property rights are important for rich and technologically advanced countries with technology-based industries. Developing countries also need help with investments in research and development for technologies that can address enduring problems of poverty such as improved varieties of crops, cures for major diseases, low-cost sources of clean energy, etc. Developing countries need access to global technology such as pharmaceuticals, many of which are patented and priced much higher than generics. Goal 8 refers to this problem (target 8.E) and states the objective of expanding access to essential medicines, but stops short of identifying concrete action needed, for example expanding access to patented medicines through implementation of TRIPS flexibilities such as compulsory licensing and measures to recognize rights to indigenous knowledge. The goal 8 technology target (8.F) focuses on information and communications technology (ICT). It is true that developing countries are falling behind in connectivity and the ICT gaps are huge, but goal 8 ignores some of the other major issues in this area that require action, including investment in pro-poor technologies. These issues are also addressed in the reports commissioned by the United Nations, which in addition propose some quantitative indicators and deadlines, especially for removal of agricultural subsidies and merchandise tariffs.

Fifth, aid effectiveness requires reforms by both recipient and donor. Important progress has been made in the donor community in identifying and addressing key issues, notably to align priorities to recipient national priorities, to improve harmonization and reduce administrative costs to recipients, both of which contribute to another objective of increasing developing country ownership of the aid process. The 2005 Paris Declaration on Aid Effectiveness and the 2008 Accra Agenda for Action adopted by the OECD Development Assistance Committee (DAC) set out an important framework for accountability and include goals and indicators. While the Monterrey Consensus and the United Nations reports identify these issues, the goal 8 indicator for aid effectiveness is the proportion of untied aid (indicator 8.3). This is an important issue, and one that was a central concern of developing countries in earlier decades but one that is of decreasing priority in the twenty-first century.

Priority 3 – Systemic issues

The Monterrey Consensus identifies as a priority the need to address "systemic issues" to enhance the coherence, governance and consistency of international monetary, financing and trading systems. Two types of problems are widely acknowledged. The first is the growing imbalance in the monetary and finan-

cial systems that expose the global economy to shocks, such as the Asian financial crisis, to which developing countries are particularly vulnerable. The second is the asymmetry in decision-making and norm-setting in international trade and finance.

Analyses in the *World Economic and Social Survey 2005* and in the Human Development Reports further identify problems. For example, developing countries are not represented at all in the Basel Committee on Banking Supervision or the Financial Stability Forum. The voting structures of the World Bank and IMF are heavily weighted in favour of developed countries. WTO rules give an equal vote to each country but decision-making is by consensus, and consensus-making processes are not all open and transparent to everyone. This issue of developing country voice and participation in decision-making is not included in the goal 8 agenda.

Other priorities

Corporate responsibility. While the behaviour of private sector actors has always had an important influence on the enjoyment of human rights, such as through impact on working conditions and on the environment, there is no reference in goal 8 to State responsibilities with respect to corporate conduct. In the age of globalization, the increase of foreign direct investment and liberalization of the economy, their influence has grown further. An important element of international responsibility of the State is to protect human rights from violations by corporate actors. Goal 8 makes no mention of this role.

VI. Strengthening goal 8 accountability and implementation of the right to development

This detailed review of goal 8 targets and indicators as a potential framework for monitoring international accountability for the right to development shows that the current formulation of targets and indicators is weak on two accounts. One is that there are no quantitative targets and no timetable for implementation. The other is that they state general objectives and desired outcomes but stop short of identifying concrete policy changes that can be monitored, even though Governments have committed to specific changes in the Monterrey Consensus and in subsequent agreements such as the Paris Declaration.

Goal 8 targets are also narrow; they do not capture the broader and in some sense the more critical policy issues that are included in the Monterrey Commitments. The most significant gaps are the commitments to explore new sources of financing, technology issues in TRIPS related to access to medicines and indigenous knowledge, aid effectiveness reforms to enhance ownership by developing countries, and the systemic issues of the voice of developing countries in international decision-making processes.

Goal 8 does not take on board key principles and priorities of the human rights normative framework. The most glaring omissions concern priority attention to countries in greatest need, protecting human rights against violations by others—notably on the issues of corporate behaviour—and addressing the systemic issue of greater transparency and equality by promoting developing country participation in global governance processes. Overall, goal 8 emphasizes resource transfer through ODA, arguably the mechanism least compatible with the right to development, which emphasizes empowerment of developing countries. Goal 8 is less concrete on changes in the policy environment and even less on systemic issues.

It is beyond the scope of this chapter to develop a definitive proposal to strengthen goal 8 targets and indicators. To do so would require an in-depth analysis of each of the policy constraints. However, it is possible to identify the key directions for refining goal 8 targets and indicators as a tool for strengthening accountability for international responsibilities as follows:

Resources (aid, debt). Targets and indicators should focus on aid allocation and reform of donor practices. Some concrete quantitative or action indicators could be considered:

- Increase of a specific amount in concessionary financing received by low human development countries
- Agreement before 2015 on new HIPC criteria to provide deeper debt reduction for HIPC countries that reached their completion points to ensure sustainability[36]
- Agreement before 2015 on new sources of financing for development

[36] Target proposed in *Human Development Report 2003* (see footnote 33).

- Agreement before 2015 on reforms in aid practices, to prioritize achievement of the Millennium Development Goals, to make resource flows more predictable and to put in place measures to increase ownership by national Governments

Policy environment. Priority areas are removal of agricultural subsidies, removal of tariffs on merchandise exports of developing countries, commodity price fluctuations, TRIPS flexibilities and indigenous knowledge. Some concrete indicators could be considered:

- As proposed by the United Nations Millennium Project Report, set quantitative benchmarks and longer time frames for progressive removal of barriers to merchandise trade and agricultural export subsidies

- As proposed by the United Nations Millennium Project Report, agree to raise public financing of research and development of technologies in agriculture, health and energy for poverty reduction to $7 billion by 2015

- As proposed by the *World Economic and Social Survey 2005*, establish a compensation facility for commodity price fluctuations

- As proposed by the *Human Development Report 2003*, agree on introducing protection and remuneration of traditional knowledge in the TRIPS Agreement

- As proposed by the *Human Development Report 2005*, agree on a commitment to avoid "WTO plus" arrangements in regional agreements

Systemic asymmetry in global governance. Although there has been increasing attention to augmenting the voice of developing countries, the international community is far from reaching significant solutions to this problem. Concrete targets should focus particularly on developing country participation in the WTO decision-making process where most is at stake.

The 2010 Summit that reviewed progress towards the Millennium Development Goals reaffirmed human rights commitments as part of the United Nations Millennium Declaration and the Millennium Development Goals agendas. The outcome document[37] also presents a more detailed agenda of priority policy measures necessary to achieve the Goals. Issues of equity within and between countries are included in these proposals, but without much emphasis. Paragraph 43 refers to the importance of inclusive and equitable economic growth. Paragraph 53 reaffirms the role of human rights as an integral part of the Goals. Paragraph 68 calls for more efforts to collect disaggregated data. Paragraph 70 reiterates the role of international cooperation in achieving growth and poverty reduction and for food security. Paragraph 73 refers to the universal access to services in primary health care. The priority agenda for goal 8 (para. 78) does not go beyond the original Millennium Declaration, with a few minor exceptions, namely to explore new innovative finance mechanisms and reaffirming the commitments made in the Monterrey Consensus, the Paris Declaration and the Accra Agenda, and to pursue the Doha Round of multilateral trade negotiations. The issues central to the right to development, namely discrimination within countries and the asymmetry in the decision-making processes on global economic issues, are not adequately addressed.

[37] General Assembly resolution 65/1.

Globalization, global solidarity and international obligations

Increasing global interdependence has meant that people's lives are much more influenced by events that take place outside of their country, whether it is the spread of disease, depletion of fishing stocks or fluctuations in international financial flows. The impact of Government policy similarly extends beyond national borders. Developing countries are consequently more dependent on international resources, policy change and systemic improvement in global governance to accelerate progress in achieving the right to development. The global community needs instruments for making global solidarity work, in order to strengthen accountability for international responsibilities for global poverty eradication and development.

Goal 8 targets and indicators are operational tools for benchmarking progress in implementing the Millennium Declaration and the international agenda agreed at Monterrey and at the 2005 Summit. These are clearly frameworks for international solidarity and an agenda for promoting the right to development. The Millennium Declaration starts squarely with the statement of values that underpin the entire declaration: freedom, solidarity, equality, shared responsibility.

Targets and indicators are not meant to substitute for the broader agenda. But the danger is that in policy debates, numbers focus policymakers' attention and have the potential to hijack the agenda. Thus, raising ODA to 0.7 per cent of GDP dominates much of the reporting and policy advocacy for the Goals and poverty reduction. Indicators are powerful in driving policy debates. Goal 8 presents an important challenge and an opportunity for effectively using targets and indicators to drive implementation of the right to development. It is therefore urgent for the international community to revisit goal 8 targets and indicators, realign them to the central policy challenges identified in the Monterrey Consensus, and shift international cooperation from an instrument of charity to an instrument of solidarity.

Table 1: **Goal 8 targets and indicators compared with priorities in the Monterrey Consensus and identified major United Nations reports**

Category of policy priorities: development constraints requiring international action	Priorities in goal 8 targets and indicators	Additional priorities in Monterrey Consensus and subsequent agreements	Additional priorities identified in policy research as per United Nations Millennium Project Report (MP), World Economic and Social Survey (WESS 2005), Human Development Reports (HDR) 2003 and 2005[a]
Resources	*ODA (target 8.B)* More generous ODA for countries committed to poverty reduction Indicator 8.2: proportion of ODA to social services Indicator 8.3: proportion of ODA that is untied *Landlocked countries and small island developing States (target 8.C)* Indicator 8.4: ODA receipts as proportion of GNI received in small island developing countries Indicator 8.5: ODA received in small island states as proportion of GNI *Debt (target 8.D)* Deal comprehensively with debt problems of developing countries through national and international measures to achieve debt sustainability Indicators 8.10-8.13: number of countries reaching HIPC decision and completion points, total debt relief committed and debt service as percentage of exports	*ODA* Make concrete efforts to increase ODA to 0.7% of GNP and 0.15- 0.2 % of GNP to LDCs *New sources* Explore innovative sources of finance, e.g., Special Drawing Rights allocations for development *Private capital flows* Provide support such as export credit, cofinancing, venture capital, risk guarantees, leveraging aid resources, information on investment opportunities, business development services, business forums, finance feasibility studies *Debt* Speedy, effective and full implementation of the enhanced HIPC facility Put in place a set of clear principles for management and resolution of financial crises Ensure debt relief does not detract from ODA resources Explore innovative mechanisms to comprehensively address debt problems	*ODA* *Aid allocation* Aid allocations according to requirements for achieving Millennium Development Goals (MP) Allocate more ODA to low-income countries (WESS) *New sources* Innovative sources of financing, e.g., international finance facility (WESS)

[a] Includes points not already in the Monterrey Consensus and follow-up, including the World Summit.

[b] The United Nations Convention against Corruption was adopted in 2003 by General Assembly resolution 58/4.

Category of policy priorities: development constraints requiring international action	Priorities in goal 8 targets and indicators	Additional priorities in Monterrey Consensus and subsequent agreements	Additional priorities identified in policy research as per United Nations Millennium Project Report (MP), World Economic and Social Survey (WESS 2005), Human Development Reports (HDR) 2003 and 2005[a]
Policy environment	*Trade (target 8.A)* Develop further an open, rule-based, predictable, non-discriminatory trading and financial system (includes a commitment to good governance, development and poverty reduction–both nationally and internationally) Indicator 8.6: proportion of imports from developing countries admitted free of duty Indicator 8.7: average tariffs and quotas on agricultural products, textiles and clothing Indicator 8.8: agricultural support estimates as a percentage of GDP in OECD countries Indicator 8.9: proportion of ODA provided to build trade capacity *Address the special needs of LDCs (target 8.C)* Including tariff- and quota-free access for LDCs' exports; enhanced programme for HIPCs and cancellation of official bilateral debt; more generous ODA for countries committed to poverty reduction *Access to essential drugs (target 8.E)* Indicator 8.13: proportion of population with access to affordable essential drugs on a sustainable basis *Technology (target 8.F)* Make available benefits of new technologies, especially information and communications Indicator 8.14: fixed telephone subscriptions per 100 people Indicator 8.15: mobile cellular subscriptions per 100 people Indicator 8.16: Internet users per 100 inhabitants	*Private financial flows Measures* to sustain sufficient and stable flows—address transparency and information, mitigate excessive volatility; initiatives to enhance access to financial markets strengthen capacity for risk assessment *Trade* Increase market access Address trade barriers, trade-distorting subsidies and other trade-distorting measures, especially in sectors of special export interest including agriculture; abuse of anti-dumping measures; technical barriers and sanitary and phytosanitary measures; trade liberalization in labour- intensive manufactures and trade in services Improve supply competitiveness for low-income-country exports. *Intellectual property rights* Implementation and interpretation of TRIPS supportive of public-health Protection of traditional knowledge and folklore *Commodity price fluctuations and dependence on primary commodity exports* IMF Compensatory Financing Facility Support export diversification *Aid effectiveness* Improve aid effectiveness by addressing the following issues: harmonization of procedures; alignment with national priorities; national ownership; untying aid; strengthen recipient capacity to manage aid; ODA as leverage to additional financing and trade; South-South cooperation; and ODA targeting to the poor	*Trade* Set longer-term (for example 2025) quantitative targets for the total removal of barriers to merchandise trade, substantial across-the-board liberalization of trade in services and universal enforcement of the principle of reciprocity and non-discrimination (MP) Before 2015, agree and finance, for HIPCs, a compensatory financing facility for external shocks, including collapses in commodity prices (HDR 2003) Before 2025, priority effort in agriculture to achieve significant reductions in tariff peaks and escalation, phase out specific duties on low-income country exports A binding commitment to abolish export subsidies and two- tier price schemes Reduce tariffs on non-agricultural merchandise to zero by 2015 Services: liberalize mode 4 of GATS—temporary movement of labour to provide services Special and differential treatment: set up "aid for trade fund" to address adjustment costs associated with implementation of Doha reform agenda Promote export competitiveness—additional aid, especially for investments in agricultural productivity and labour-intensive exports in LDCs (MP, HDR 2003, HDR 2004, WESS) Commitment to avoid "WTO plus" arrangements in regional trade agreements (HDR 2005) *Intellectual property* By 2015, introduce protection and remuneration of traditional knowledge in the TRIPS Agreement Agree on what countries without sufficient manufacturing capacity can do to protect public-health under TRIPS Agreement (HDR 2003) *Regional and global public goods* Aid for overlooked priorities, especially neglected public goods and long-term goals such as scientific capacity, environmental management, regional integration and cross-border infrastructure (MP) Public financing of research of $7 billion by 2015 of which $4 billion for public-health, $1 billion for agriculture, $1 billion for improved energy and $1 billion for greater understanding of climate change *Security* Reduce threats of violent conflict within countries through aid to post-conflict States, greater transparency in resource management and cutting flow of small arms (HDR 2005)

Category of policy priorities: development constraints requiring international action	Priorities in goal 8 targets and indicators	Additional priorities in Monterrey Consensus and subsequent agreements	Additional priorities identified in policy research as per United Nations Millennium Project Report (MP), World Economic and Social Survey (WESS 2005), Human Development Reports (HDR) 2003 and 2005[a]
Systemic (institutional) asymmetry in global governance		Enhance coherence, governance and consistency of international monetary, financial and trading systems, including reform of the international financial architecture; strong coordination of macroeconomic policies among leading industrial countries for global stability and reduced exchange rate volatility; national ownership and needs of the poor; effective and equitable participation of developing countries in the formulation of financial standards and codes; stronger IMF surveillance to prevent crises *Global governance* Broaden the base for decision-making and norm-setting. IMF and World Bank, WTO, Bank for International Settlements, Basel Committee and Financial Stability Forum and other ad hoc groupings to make efforts to enhance participation of developing and transition countries and to ensure transparent processes Strengthen the United Nations system and other multilateral institutions, including stronger coordination among United Nations agencies and funds with the Bretton Woods institutions Strengthen international tax cooperation Finalize a United Nations convention against corruption, including repatriation of illicitly acquired funds and money laundering.[b] Signature and ratification of the United Nations Convention against Transnational Organized Crime and International Convention for the Suppression of the Financing of Terrorism	Redress global macroeconomic imbalances and enhance measures to reduce developing country vulnerability to crises such as IMF facilities to compensate for short-term shocks (WESS) Enhance voice and participation of developing countries in international financial decision- making, especially Basel Committee and Financial Stability Forum which have no developing country representation (WESS)

Development, good governance and South-South cooperation: the African Peer Review Mechanism

*Bronwen Manby**

I. Introduction

This chapter analyses the African Peer Review Mechanism (APRM) in the light of the version of the criteria to assess development partnerships prepared by the high-level task force on the implementation of the right to development and submitted to the Working Group on the Right to Development in 2010 (A/HRC/15/WG.2/TF/2/Add.2). After setting the Mechanism in the context of the New Partnership for Africa's Development (NEPAD), it examines the nature and functioning of the Mechanism, explores whether it is a development partnership, and then focuses on the content and process of integrating the right to development into the Mechanism.

II. Africa and the right to development

The African Charter on Human and Peoples' Rights, adopted in 1981, five years before the Declaration on the Right to Development, specifically recognizes the right to development in its article 22:

> 1. 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.
>
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

In line with this commitment, for several decades African States have taken an active part in debates concerning the strengthening of the concept of the right to development as an international obligation. Indeed, the Declaration on the Right to Development was adopted in 1986 in large part as a result of African support. At the level of the African continent itself, there is also a more recent commitment to action to achieve sustainable development through mobilization of domestic resources and through reform of continental and national institutions supporting governance and development. Among the most important initiatives in this regard are the transformation of the Organization of African Unity into the African Union in 2002 and the adoption by the African Union of many new normative documents, including NEPAD and APRM.

III. The New Partnership for Africa's Development and the African Peer Review Mechanism

A. New Partnership for Africa's Development

The New Partnership for Africa's Development is a strategic framework setting out a "vision for Africa's renewal", initially adopted by African Heads of State

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in 2001 and endorsed by the first Summit of the new African Union held in Durban, South Africa, in 2002.[1] It is an amalgamation of different plans for an "African renaissance" developed by President Thabo Mbeki of South Africa, President Olusegun Obasanjo of Nigeria, President Abdelaziz Bouteflika of Algeria and President Abdoulaye Wade of Senegal, as well as documentation prepared by the Economic Commission for Africa (ECA), and was devised originally as an initiative separate from the creation of the African Union, in part at least to avoid the "lowest common denominator" effect of a continent-wide body. Following many years of discussion on the need for greater integration of the NEPAD initiative into African Union processes and structures, the Assembly of Heads of State and Government of the African Union adopted a decision in February 2010 that approved various measures to ensure greater coordination between NEPAD and the rest of the African Union, as well as renaming the NEPAD Secretariat the NEPAD Planning and Coordinating Agency (NPCA).[2] However, NPCA remains headquartered in South Africa, distant from the main African Union institutions in Addis Ababa. NEPAD is governed by the Heads of State and Government Orientation Committee (HSGOC) (until February 2010 called the Heads of State and Government Implementation Committee (HSGIC)), made up of three States from each of the African Union's five regions, which in turn reports to the African Union Assembly. The first Chair of the Committee was President Obasanjo, who handed over to Prime Minister Meles Zenawi of Ethiopia in 2007. A 20-member steering committee of personal representatives of the Heads of State oversees programmes, supported by NPCA, which is seen as a technical body and is supervised by the Chair of the African Union Commission (the Secretariat of the African Union).

The NEPAD document[3] focuses primarily on economics: bridging the infrastructure gap and the digital divide; agriculture, science and technology; capital flows; and market access. Its stated aim is to lift Africa out of poverty; to achieve the average 7 per cent growth rate needed to meet the Millennium Development Goals, for which it estimated that an additional $64 billion a year, or 12 per cent of Africa's gross domestic product (GDP), would be needed. In order to achieve this goal, NEPAD emphasizes both the responsibility of Africans and the concept of mutual accountability, i.e., that those who trade with or give aid to Africa have responsibilities of their own. Though much criticized by civil society groups for its neoliberal bent and lack of analytical rigour, and even by some of its original Government supporters (notably President Wade) for failure to deliver, the NEPAD vision has received wide endorsement within Africa and is the official economic development programme of the African Union.

NEPAD explicitly recognizes that "peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development".[4] Accordingly, democracy and good governance form the second point of an eight-point agenda, by which "African leaders will take joint responsibility for … [p]romoting and protecting democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at the national and subnational levels".[5] Overall, "[t]he objective of the *New Partnership for Africa's Development* is to give impetus to Africa's development by bridging existing gaps in priority sectors in order to enable the continent to catch up with developed parts of the world. The new long-term vision will require massive, heavy investment to bridge existing gaps. The challenge ahead for Africa is to be able to raise the required funding under the best conditions possible. We therefore call on our development partners to assist us in this endeavour."[6]

The NEPAD document has many weaknesses, but the central recognition of the dependence of economic progress on political good governance is of critical importance: hitherto, many African Governments had been content to blame their economic problems on the history of colonialism and continuing injustice of the international system rather than taking clear responsibility for aspects within their own control. The document does not, however, go on to use concepts of rights-based development or the right to development in its analysis of existing problems and proposals for future action: the NEPAD endorsement

[1] Assembly of Heads of State and Government of the African Union, thirty-seventh ordinary session/fifth ordinary session of the African Economic Community, Lusaka, 9-11 July 2001, Declaration on the New Common Initiative, document AHG/Decl.1(XXXVII); Assembly of the African Union, first ordinary session, Durban, South Africa, 9 and 10 July 2002, Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD), document ASS/African Union/Decl.1(I). The Durban Summit was both the last of the Organization of African Unity and the first of the African Union. The NEPAD Declaration adopted at Durban was adopted by the African Union.

[2] Decision on the integration of the New Partnership for Africa's Development (NEPAD) into the structures and processes of the African Union including the establishment of the NEPAD Planning and Coordinating Agency (NPCA), document Assembly/AU/Dec.283(XIV) (2 February 2010).

[3] New Partnership for Africa's Development (NEPAD) (October 2001), available from www.nepad.org.

[4] Ibid., para. 71.

[5] Ibid., para. 49.

[6] Ibid., paras. 65-66.

of human rights is segregated from its discussion of objectives in relation to infrastructure, health or education.[7]

NPCA is not itself an implementing body, and it must work through the African Union's regional economic communities (RECs)—the "building blocks" of African economic integration recognized in the 1991 Abuja treaty establishing the African Economic Community—and other African Union institutions to realize its vision. While it may have been a good decision not to create another new institution with overlapping authority, the ability of NEPAD to act is currently constrained by the lack of will of its collaborating partners to move forward along the same path. The RECs vary greatly in their own institutional capacity and overlap with each other in geographical reach. In operation, NPCA has focused largely on economic matters and development policies, starting with the development of action plans for each of its sectoral priorities, including agriculture, health, capacity development and infrastructure. NEPAD has developed partnerships with international development finance institutions, including the World Bank, the Group of Eight (G8), the European Commission, ECA and others, and with the private sector. After the initial phase, more concrete programmes were developed, including perhaps most prominently the Comprehensive Africa Agriculture Development Programme (CAADP).[8] Governance issues have been mostly left to the NEPAD companion institution, the African Peer Review Mechanism.

B. African Peer Review Mechanism

In July 2002, the African Union Summit supplemented NEPAD with the Declaration on Democracy, Political, Economic and Corporate Governance. According to the Declaration, the States participating in NEPAD "believe in just, honest, transparent, accountable and participatory government and probity in public life".[9] The Declaration sets out an action plan with three main substantive headings: democracy and good political governance; economic and corporate governance; and socioeconomic development.

The Declaration also committed participating States to establishing an African peer review mechanism, "to promote adherence to and fulfilment of the commitments contained" in the Declaration.[10] The first document describing the mechanism in some detail, adopted at the same summit in July 2002, sets out its mandate as "to ensure that the policies and practices of participating States conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance".[11] On 9 March 2003, HSGIC adopted the Memorandum of Understanding on the African Peer Review Mechanism[12] (hereafter "Memorandum of Understanding") and six countries signed it right away, bringing it immediately into force. States members of the African Union that do not sign the Memorandum of Understanding are not subject to peer review: APRM is a voluntary process. As of early 2012, 33 countries had signed the Memorandum of Understanding, well over half of the 53 States members of the African Union, representing more than three quarters of Africa's population.[13]

At the same meeting HSGIC also agreed to the establishment of a secretariat for APRM and the appointment of a seven-person "panel of eminent persons" to oversee the conduct of the APRM process and ensure its integrity. In May 2003, HSGIC announced the first seven members of the panel.[14]A member of the panel is assigned to lead the process for each country reviewed, and in particular to head at least two

[7] See Bronwen Manby, "The African Union, NEPAD, and human rights: the missing agenda", *Human Rights Quarterly*, vol. 26, No. 4 (November 2004), pp. 983-1027.

[8] See Wiseman Nkuhlu, "NEPAD—a look at seven years of achievement: and the challenges on the way forward", *NEPAD Dialogue* (25 January 2008); "Mayaki reports broad progress on NEPAD priority programmes as 41st meeting of NEPAD Steering Committee opens", NEPAD Secretariat (22 January 2011); "At the 24th meeting of NEPAD Heads of State and Government Orientation Committee, African leaders put focus on programme delivery", NEPAD Secretariat (30 January 2011). For these and other news stories on APRM, see the website of the Africa Governance Monitoring and Advocacy Project (AfriMAP), www.afrimap.org.

[9] Document AHG/235 (XXXVIII), annex I, para. 8.

[10] Ibid., para. 28.

[11] Ibid., annex II, para. 1.

[12] Memorandum of Understanding on the African Peer Review Mechanism, document NEPAD/HSGIC/03-2003/APRM/MOU (9 March 2003).

[13] The countries are, in order of signing: Algeria, Burkina Faso, Congo, Ethiopia, Ghana and Kenya (March 2003); Cameroon, Gabon and Mali (April and May 2003); Benin, Egypt, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa and Uganda (March 2004); Angola, Lesotho, Malawi, Sierra Leone and the United Republic of Tanzania (July 2004); the Sudan and Zambia (January 2006); Sao Tome and Principe (January 2007); Djibouti (July 2007); Mauritania (January 2008); Togo (July 2008); and Liberia (January 2011). The communiqué of the Sixteenth Summit of the APR Forum reported that Cape Verde (which had promised to sign in 2009 but did not complete the formalities at that time), Equatorial Guinea and Niger were expected to sign at that summit (January 2012). A map of participating and applicant States is available at aprm-u.org/aprm-map.

[14] Communiqué issued at the end of the seventh Summit of HSGIC, 28 May 2003. The first set of seven "eminent persons" was Adebayo Adedeji (Nigeria), Bethuel Kiplagat (Kenya), Graça Machel (Mozambique), Mourad Medelci (Algeria, replaced by Mohammed-Séghir Babès when Mr. Medelci took a domestic governmental appointment), Dorothy Njeuma (Cameroon), Marie-Angélique Savané (Senegal) and Chris Stals (South Africa). Ms. Savané was the first Chair, succeeded by her deputy, Ambassador Kiplagat. Dr. Njeuma was in turn Ambassador Kiplagat's deputy and succeeded him as Chair. When Dr. Njeuma became Chair, Professor Adedeji was elected her deputy, and in turn became Chair in July 2007.

missions to the country (the "country support mission" at the outset of the process and the "country review mission" when the final report is being prepared). Some members of the panel stepped down during 2008 and 2009, leaving the panel seriously under strength until four new members were appointed in January 2010.[15] Following further retirements, five new panel members were appointed in January 2012, bringing its membership to eight.[16]

The founding documents of APRM provided for a robust review process that would insist on remedial measures for identified governance issues. States would undertake to submit to and facilitate periodic peer reviews by a team directed and managed by the eminent persons "to ascertain progress being made towards achieving mutually agreed goals". The report of the team would be discussed with the Government concerned. This would include establishing whether there is "the will on the part of the Government to take the necessary decisions and measures to put right what is identified to be amiss". Then, "if the necessary political will is not forthcoming", there are steps to engage in "constructive dialogue". Ultimately, "[i] f dialogue proves unavailing, the participating Heads of State and Government may wish to put the Government on notice of their collective intention to proceed with appropriate measures by a given date". These measures shall be undertaken as a "last resort". "Six months after the report has been considered by the Heads of State and Government of the participating member countries, it should be formally and publicly tabled" at various regional structures, including the African Commission on Human and Peoples' Rights.[17] In practice, the tone of the meetings of the Forum of the African Peer Review Mechanism (hereafter "APR Forum"), made up of the Heads of State or Government of all States participating in APRM (a group separate from HSGOC), has been rather less robust, while reporting to other African Union institutions has been weak (see below). Discontent around the functioning of the APR Forum, especially the selection process for the new members of the Panel of Eminent Persons appointed in 2010, led to the recognition by the Forum in January 2012 of an additional governance structure, the APR Committee of Focal Points, made up of personal representatives of Heads of Stage and Government participating in APRM, to serve as an intermediary between the APR Forum and the APRM Secretariat.[18]

The APRM Secretariat, functioning by late 2003 and also based in South Africa, developed a questionnaire[19] to guide the assessment of participating States' compliance with the principles of NEPAD and its Declaration on Democracy, Political, Economic and Corporate Governance. The questionnaire was formally adopted in February 2004, in Kigali, at the first meeting of the APR Forum. Recognizing that the NEPAD documents were inadequate in themselves for this task, it drew on a wide range of African and international human rights treaties and standards, including all the African human rights treaties, as well as non-binding documents such as the Grand Bay (Mauritius) Declaration and Plan of Action for the Promotion and Protection of Human Rights (1999) and best practices and codes adopted by the World Bank and the International Monetary Fund (IMF). The questions are grouped under four broad thematic headings (based on but expanded from the initial three in the NEPAD Declaration): democracy and good political governance; economic governance and management; corporate governance; and socioeconomic development. While the questionnaire has been the subject of a fair amount of criticism—including that it tries to cover too many issues, has a somewhat confusing structure with questions that often overlap and is unmanageable both for Governments and for civil society organizations seeking to respond to it—it is much more conceptually rigorous and comprehensive in its lines of inquiry around governance than the original NEPAD documents.

In order to implement APRM, several institutions have been established at country level, in accordance with the "country guidelines" issued by the APRM Secretariat. Although these have varied somewhat in form, they include: (a) a national APRM focal point, ideally at ministerial level or in the office of the presidency and reporting directly to the Head of State; (b)

[15] The new panel consisted of Adebayo Adedeji (Nigeria, Chair since 2007), Mohamed-Séghir Babès (Algeria) and Domitilia Mukantangazwa (Rwanda) (appointed in 2009), Akere Tabang Muna (Cameroon), Siteke Mwale (Zambia), Julienne Ondziel-Gnelenga (Congo) and Amos Sawyer (Liberia). Professor Adedeji stepped down as Chair and as a member of the panel at the next meeting of APRF in July 2010. However, his deputy, Graça Machel, who would normally have replaced him, was (controversially) not reappointed as a member of the panel in January 2010 although she had been due to lead a second review of Kenya. Professor Adedeji was instead replaced as Chair by the next most senior member, Professor Babès. Professor Mwale was already ill when appointed to the panel in January 2010 and unfortunately died later that year. The two empty places on the panel were not filled at the 2011 APRF meeting.

[16] The full panel then consisted of: Professor Amos Sawyer (Liberia), replacing Mohamed-Séghir Babès as Chair; Barrister Julienne Ondziel Gnelenga (Congo); Barrister Akere Tabeng Muna (Cameroon); Ambassador Professor Okon Edet Uya (Nigeria); Ms. Baleka Mbete (South Africa); Ambassador Ashraf Gamal (Egypt); Dr. Mekideche Mustapha (Algeria); and Ambassador Fatuma Ndangiza Nyirakobwa (Rwanda).

[17] See document AHG/235 (XXXVIII), annex II.

[18] South African Institute of International Affairs, *Governance Perspectives* (February 2010); communiqué of the Sixteenth Summit of the APR Forum (28 January 2012).

[19] Available from www.afrimap.org, in the African Standards section.

a national commission or national governing council, responsible for overseeing the national process and signing off on the documents produced, which should be diverse and representative of a wide range of interest groups and should be autonomous of Government (though not all countries have fully respected this rule); (c) a national APRM secretariat, to provide administrative and technical support to the national commission or governing council, ideally established outside of Government and with an independent budget; and (d) technical research institutions, given the responsibility to administer the APRM questionnaire and carry out background research.[20]

The work of these institutions results in three important documents:

(a) The first is a **country self-assessment report** by the country concerned using the APRM questionnaire. The development of this self-assessment is supposed to be highly participatory and managed by the national governing council rather than controlled by the Government, a "national dialogue" about the challenges the country faces. In practice, the record in relation to participation has been mixed, but positive.[21] The eminent person assigned to the country and representatives of the APR Secretariat visit early during the preparation of the self-assessment to oversee the process and assist in its implementation (the "country support mission"). Once the draft report is completed, it is "validated" at a series of meetings with different stakeholder groups, where presentations are made about the findings and recommendations and comments solicited;

(b) Based on the self-assessment report, each country prepares a draft **national programme of action** (NPoA) to address the problems identified; this is the second important document at national level. Both documents are then submitted to the APRM Secretariat;

(c) On the basis of this documentation and separate expert inputs, including one or several "issues papers" as well as information collected during a "country review mission", the APRM Secretariat coordinates the drafting of a separate "**country review report**"—the third important document—and comments on NPoA. The APRM Secretariat is assisted in this work by technical partners, including the African Development Bank, ECA and the United Nations Development Programme (UNDP), which supply information and also participate in the country missions.

The country review report is submitted to the Government concerned for its comments. The report, with the Government commentary annexed, and the final NPoA are ultimately presented and approved by the APR Forum; six months after this meeting, they are made public. The national programme of action, in practice mostly prepared by the Government, includes a detailed logical framework (logframe) presentation of costed activities and targets to achieve; the APRM Secretariat tries to ensure that this is not just a "wish list" but a serious attempt to cost and prioritize national objectives. The self-assessment report is only made public after the completion of the entire process and at the discretion of the country concerned, and none of those developed so far are easily available.

The country review reports and NPoAs of 13 countries had been published by the end of 2011: Ghana (review carried out by the APR Forum in January 2006); Kenya and Rwanda (July 2006); Algeria, Benin and South Africa (January 2008); Uganda (June 2008); Burkina Faso and Nigeria (October 2008); Lesotho, Mali and Mozambique (June 2009); and Mauritius (July 2010).[22] Ethiopia was reviewed at the African Union Summit held in January 2011 and Sierra Leone in January 2012, though neither country review report was yet public by that time. The United Republic of Tanzania and Zambia were expected to be reviewed during 2012, which would bring the total to 17 of the 33 States that had signed the Memorandum of Understanding; other countries that had taken steps towards their self-assessment process included Cameroon, Djibouti and Gabon. However, at least

[20] See *African Peer Review Mechanism: Annual Report 2006* (APRM Secretariat, 2007).

[21] See the guidelines for civil society and national focal points available on the website of the South African Institute of International Affairs (www.saiia.org.za) and the evaluations of the APRM processes available on the AfriMAP website (www.afrimap.org).

[22] AfriMAP has published critical reviews of the APRM process in Algeria, Benin, Burkina Faso, Ghana, Kenya, Mauritius, Nigeria, Rwanda and South Africa, compiled in a 2010 report of the Open Society Institute for Southern Africa, *The African Peer Review Mechanism: A Compilation of Studies of the Process in Nine African Countries*; additional reports on Ethiopia, Mali, Mozambique and Uganda were in published in 2011 (see www.afrimap.org/ReportTheme/APRM).

10 signatory countries had yet to formally launch their APRM process.

The time taken to complete all these steps has varied greatly: for South Africa eight months elapsed between the country support mission and the country review mission; for Ghana and Rwanda the period was 10 months and for Kenya 14 months; Mauritius was among the first four countries to start the APRM process in 2004 but only completed its review in mid-2010.

The APRM national reviews are funded by the Governments concerned, with assistance from a trust fund managed by UNDP to which bilateral and other donors can make voluntary contributions. The costs of implementation have varied: the Government of Kenya, for example, indicated that the total cost of the self-assessment was about $1 million. An important review of the APRM process at the sixth Africa Governance Forum (AGF-VI) held in 2006 noted that "[t]he highly consultative nature of the APRM process has been quite expensive for the relatively weaker economies".[23] To that must be added the costs of the APRM Secretariat and of technical partners to prepare the country review reports, initially estimated at $15 million for the first three years. Countries that have signed up for review are supposed to contribute a minimum of $100,000; some have contributed more, while others are in default. As at the end of 2006, the total financial contributions received from member States stood at $8.8 million; this was equal to 62 per cent of the total contributions to the Mechanism since it was established, with the remaining 38 per cent coming from bilateral and multilateral development partners (largely the Governments of Canada, Spain and the United Kingdom of Great Britain and Northern Ireland, and UNDP).[24] The *Annual Report 2008* indicates that the percentages had exactly reversed: of total 2008 income of $9,880,000, 38 per cent was from member States with bilateral partners contributing 62 per cent.[25] The *Annual Report 2010* showed that African States had contributed 70 per cent of the previous year's income and the European Union the remaining funds (of a total $3,654,000 for the year). Since 2003, member States had contributed just over $22 million in total, and bilateral and multilateral partners just over $15 million. By far the largest contributions from African States were from Algeria, Nigeria and South Africa, with all other APRM members except for Burkina Faso, Egypt, Ghana, Mali and Mozambique in arrears for their obligations. [26] Money paid from member States or development partners is paid into an account managed by the Development Bank of Southern Africa or a trust fund held by UNDP. The African Development Bank, UNDP and ECA fund their own participation in the country missions carried out by APRM and provide other support. For example, during 2010 the African Development Bank provided a grant to support the project to revise the APRM tools and processes, while ECA organized workshops on the role of African parliamentarians in APRM.[27]

The implementation of the programmes of action resulting from the APRM reviews was not addressed in detail in the APRM founding documents. One result is that the relationship of NPoA to other national development plans is not clear, nor is the extent to which NPoAs actually require new money or consist essentially of plans that are already under way. Calls for the APRM plans to be coordinated with other strategies have resulted in initiatives such as a meeting organized in March 2007 by UNDP, the African Development Bank and ECA to discuss support for the implementation of the plans of action of Ghana, Kenya and Rwanda.[28]

Countries that have completed the process are supposed to prepare progress reports on the implementation of their NPoA for the APR Forum meetings, and Algeria, Burkina Faso, Ghana, Kenya, Lesotho, Mali, Nigeria, South Africa, Uganda and others have done so. However, these reports are for the most part prepared by the Governments concerned, without the civil society participation prominent earlier in the process, and have often been submitted late; there is no real capacity in the APRM Secretariat for independent monitoring of their content.

In practice, the APRM process is now to a great extent delinked from NEPAD. Although the APRM and NEPAD Secretariats are located close to each other

[23] *Implementing the African Peer Review Mechanism: Challenges and Opportunities*, Report of the Sixth Africa Governance Forum (AGF-VI), Kigali, 9-11 May 2006, p. 37.

[24] *African Peer Review Mechanism: Annual Report 2006* (APRM Secretariat, 2007).

[25] *African Peer Review Mechanism: Annual Report 2008* (APRM Secretariat, 2009).

[26] *African Peer Review Mechanism: Annual Report 2010* (APRM Secretariat, 2011). Bilateral contributions over the period 2003-2010 came from Canada, Germany, Italy, Spain, Switzerland and the United Kingdom, and multilateral contributions from the African Development Bank, UNDP and the European Union.

[27] See "New Partnership for Africa's Development: eighth consolidated progress report on implementation and international support: report of thet Secretary-General" (A/65/167); these reports are available on the website of the United Nations Office of the Special Adviser on Africa.

[28] See the report of the Secretary-General on United Nations system support for the New Partnership for Africa's Development (E/AC.51/2007/4); see also *Implementing the African Peer Review Mechanism: Challenges and Opportunities*, p. 38.

in Midrand, South Africa, there is not a great deal of communication between them. The APRM founding questionnaire relies only to a limited extent on the NEPAD documents, ranging much wider for the standards and sources of best practice that inform the assessment process. The eminent persons operate independently of the NEPAD Secretariat and the NEPAD HSGOC. And the focus of the APRM reports is not on the "big-ticket" infrastructure issues that have come to dominate the NEPAD programme but on the machinery of Government itself and on domestic accountability for resource management.

In November 2007, the APRM Secretariat hosted a workshop in Algiers at which it was announced that the APRM questionnaire and other documents would be reviewed by the Secretariat and other stakeholders.[29]An extraordinary summit of the APR Forum was convened in Benin in October 2008 to discuss a number of cross-cutting issues emerging from the first APRM country review reports: managing diversity and xenophobia; elections; resource control and management; land; and corruption.[30] In early 2010, the APRM Secretariat issued a call for submissions to the Project for Streamlining and Fast Tracking the Implementation of the African Peer Review Mechanism.[31] However, these review processes had yet to bear fruit in the form of a published revision of the APRM questionnaire and process by early 2011, when another workshop on cross-cutting issues was announced.[32] The Summit of the APR Forum in January 2012 again failed to consider the new questionnaire.[33]

In part, this delay may be due to problems at the APRM Secretariat, as well as conflicts dating from 2007 to 2010 between the Chair of the panel and other members and the reduced number of APRM panel members in 2008 and 2009. The manner in which the new panel members were appointed in January 2010 was also contested by some States members of the APR Forum,[34] while the new appointees took time to find their feet. In 2009, the APRM Secretariat finally signed a headquarters agreement with the Government of South Africa, in principle enabling long-standing problems with staff contracts and other issues to be resolved; however, by January 2012 APRM had still to be recognized as an autonomous special agency of the African Union, which would allow this agreement to be implemented. Like most other African Union institutions, APRM is woefully understaffed and its existence appears to be ensured only until the next country review and APRM Summit. Moreover, the position of executive secretary, vacant since 2008, had still not been filled by early 2012; an Ethiopian acting director is in place. Financial management at the APRM Secretariat has also been a concern, and as a result development partners gave no money directly to the APRM Secretariat in 2009; the audit of the Secretariat for 2009 was approved only in January 2011, after being the subject of controversy at the July 2010 Summit.[35]

IV. Is the African Peer Review Mechanism a "development partnership"?

Although NEPAD explicitly calls for development assistance to support its programmes, it is seen by African States and its own Secretariat as an African initiative that is in the first instance concerned with mobilizing African resources and generating African policies and actions. Once these policies are

[29] The workshop brought together those involved in APRM assessments at the national level, the members of the eminent persons panel, representatives of the APRM Secretariat and technical partners. The aim of the meeting was to carry forward the recommendations of AGF-VI held in Kigali in May 2006, with a view to presenting revisions to the questionnaire and other documents for adoption by the APR Forum at the African Union Summit in January 2008. See "APRM Secretariat gears up for major implementation workshop in Algiers", *NEPAD Dialogue* (19 October 2007).

[30] The final communiqué of the Extraordinary Summit of the APR Forum held in Cotonou on 25 and 26 October 2008 and other reports of the meeting are available in the News section of the AfriMAP website (www.afrimap.org/newsarchive.php). A number of other cross-cutting issues have also been identified, including poverty and inequality, violence against women and gender inequality, violence against children, external dependency, crime and xenophobia, transformative leadership, constitutionalism, chieftaincy, political pluralism and competition for ideas, reform and modernization of Government, spatial inequality and environmental degradation, unemployment, capacity constraints, and poor service delivery. The original APRM questionnaire also identified cross-cutting issues which, however, are slightly different: poverty eradication, gender balance, decentralization, country capacities to participate in APRM, access to and dissemination of information, corruption, broad-based participation, and sustainability in financial, social and environmental issues.

[31] The call for papers requested inputs on seven interrelated components: revision of the APRM methodology and processes (assignment A); revision of the APRM assessment questionnaire (democracy and political governance) (assignment B1); revision of the APRM assessment questionnaire (economic governance and management) (assignment B2); revision of the APRM assessment questionnaire (corporate governance) (assignment B3); revision of the APRM questionnaire (socioeconomic development) (assignment B4); development of an NPoA monitoring and evaluation framework (assignment C); and elaboration of modalities for enhancing the participation of civil society in the African Peer Review Mechanism (assignment D).

[32] Communiqué of the Fourteenth Summit of the APR Forum (4 February 2011). The Validation Workshop on the Revised Questionnaire was held in March in Johannesburg, South Africa. The results were transmitted to the Fifteenth Summit of the APRM Forum, held in Malabo in June 2011, where it was decided that the revised questionnaire would be examined at the next summit.

[33] Communiqué of the Sixteenth Summit of the APR Forum (28 January 2012).

[34] See South African Institute of International Affairs, *Governance Perspectives* (February 2010).

[35] See, for example, the AfriMAP submission to the Project for Streamlining and Fast Tracking the Implementation of the African Peer Review Mechanism (April 2010); Jerry Okungu, "APRM at a crossroads: Where is the African Union leadership?", *New Vision* (Uganda) (4 September 2009); APRM Secretariat, "APRM Secretariat responds to criticism" (7 October 2009); Steven Gruzd, "Peer review under scrutiny", *City Press* (Johannesburg) (7 February 2010); Jerry Okungu, "Did Adedeji's tenure at the APRM derail the African dream?", *Africa News Online* (17 August 2010).

developed, donors may be asked for assistance as part of the new partnership. The review mechanism that NEPAD set in motion was also developed as a free-standing African initiative to improve continental governance, referring to African-endorsed standards and working in an African context. Indeed, APRM was adopted in part specifically because of suspicion of the governance-monitoring efforts of the World Bank, the European Union, bilateral donors and non-governmental organizations (NGOs) in the United States and Europe such as Freedom House. Those exercises were and are seen as essentially no more than old-fashioned conditionality, externally imposed and without roots in African realities. There is very strong resistance to ranking countries on the basis of the opinions of experts from rich countries, whatever the strength or otherwise of the methodology used.

Thus, APRM has taken on a life of its own in Africa and operates with little reference to development assistance. APRM does not examine development assistance to African countries and the extent to which it may comply with the Paris Declaration on Aid Effectiveness (2005) or other relevant standards: its focus, even more than that of NEPAD, is almost exclusively internal. To that extent, it does not really fit within the "global partnership for development" of Millennium Development Goal 8.

However, APRM provides an interesting and unique example of South-South peer review. No other regional grouping has committed itself to similar peer review on political as well as economic governance issues.[36] In this respect, it is an example of a genuine partnership among States of more equal economic power than has generally been the case in the supply of development assistance.

The country review reports and national programmes of action are discussed in plenary session by the Heads of State of all the countries that have signed up for peer review: the Head of State of the country concerned must defend his/her record before his/her peers, responding to the comments of the independent eminent person assigned to lead the reporting on that particular country. In this regard, though APRM could certainly be strengthened in terms of its enforcement powers, and though it may be charged that Heads of State are unlikely to be too hard on one another, the mechanism provides a useful model for other development partnerships. Even its most powerful participants can potentially be embarrassed, and the accountability does not run only in one direction.

Moreover, that APRM focuses on governance and domestic accountability for resource management makes it a particularly useful tool for examining right to development issues outside the highly politicized debates over the international economic order. APRM was developed not only in a context of full awareness of the many injustices of the international trade, aid and debt regimes, but also by people who were convinced that complaints about these injustices would not in themselves actually help the delivery of development within Africa. Thus, while the fight for international economic reform should continue, African Governments should also be held to account for their own commitments to use the resources that are already at their disposal to deliver respect for the full range of development and governance standards at the national level.

Nevertheless, APRM does of course have links to international trade, aid and debt negotiations. At the outset these links were to a certain degree implicit (and at times they were explicit) in the interactions between the NEPAD initiative and the Group of Eight industrialized nations (G8). In June 2002, in direct response to the adoption of NEPAD, the G8 adopted the Africa Action Plan at the Summit held at Kananaskis in Canada, elaborating and strengthening statements on Africa adopted at previous summits.[37] In November 2003, the G8 established the Africa Partnership Forum, in the wake of the Evian Summit, as a way of broadening the existing high-level G8-NEPAD dialogue, to encompass Africa's major bilateral and multilateral development partners.[38] The promises made were elaborated and repeated at successive summits, most importantly in 2005 at Gleneagles following the publication of the report of the Commission for Africa appointed by United Kingdom Prime Minister Tony Blair.[39] The basic premise appeared to be that the African Heads of State committed to NEPAD would improve governance in their countries and the continent in general (through APRM among other tools); in return, development partners would increase the level and quality of assistance and access they gave to Africa. In that sense, APRM is also relevant to the concept of development partnerships as they are usually understood.

[36] Prior to APRM, the Organisation for Economic Co-operation and Development (OECD) had developed the concept of peer review furthest and has put in place mechanisms for a peer review of a range of economic issues, including development assistance. OECD does not, however, review nearly such a wide range of issues. See Fabrizio Pagani, "Peer review: a tool for cooperation and change: an analysis of an OECD working method", OECD, document SG/LEG(2002)1 (11 September 2002).

[37] G8 Africa Action Plan adopted on 27 June 2002, Kananaskis, Canada, available from www.g8.gc.ca.

[38] See www.africapartnershipforum.org.

[39] *Our Common Interest: Report of the Commission for Africa* (March 2005).

Insofar as this more conventional development partnership aspect of the role of APRM is concerned—the quid pro quo of increased aid from the donor countries in return for action on governance within Africa—there were at the outset several distinctly different interpretations on the G8 and African sides of what APRM should achieve. Among the G8 (and, more generally, OECD), the prevalent view seemed to be that the purpose of APRM and similar assessments should be to rate African countries on their governance performance: if a country achieved a certain standard, then it should be rewarded with additional aid. This approach was made explicit in the European Commission's governance profiles developed beginning in 2006.[40] The understanding of African Governments, however, is rather that the purpose of APRM is to enable each country to decide for itself what its main challenges are and that development assistance should be awarded to support the process of addressing whatever challenges are identified in the national programme of action. This seems to be the interpretation that would fit much more closely into an analysis from the point of view of the right to development.

V. Integration of the right to development into the African Peer Review Mechanism

The APRM questionnaire that shapes the self-assessment and the country review reports was not developed with the right to development specifically in mind. Nevertheless, a comparison of the questionnaire with the criteria for implementation of the right to development provides some useful insights for both documents. There are two main areas in which APRM could be improved in relation to its commitment to the right to development. The first is the content of the subject matter that it is investigating, and the second is the process by which it carries out its work. On the other hand, the APRM questionnaire addresses some areas in more depth than the right to development criteria, while the process itself holds some lessons for the implementation of the right to development at the international level, in particular the element of independent review of progress towards achieving development goals.

A. Content

The country review reports produced by the APRM process have, if anything, exceeded expectations. There are certainly many points that could be criticized in any one of the reports, both in terms of factual content and in analysis, but on the whole they have been remarkably successful at identifying the key issues facing each country and making recommendations that could begin to address them. While no radically new findings have been made, the reports are forthright in tone, avoiding the usual circumlocutions and politeness of reports by intergovernmental bodies. In South Africa, for example, xenophobia was identified as a key issue, while the challenge of managing diversity was stressed for Kenya; both countries faced violent proof of these issues soon after the reports were published. The national programmes of action are notably weaker. They are drafted by the Government in each case rather than the APRM continental team, and though the continental structures may comment on the drafts with the aim of strengthening them, the Government tends to avoid clear commitments to deal with the most problematic issues. In the case of Kenya, for example, the report decried the lack of independence of the judiciary, and especially the vulnerability to executive influence of the process for the nomination and appointment of judges. Yet the programme of action referred only to "enforcement of judicial reforms and existing administrative measures to ensure members of the bench improve efficiency, accountability and monitoring of judicial functions". There was no mention of steps to end executive interference and ensure respect for the rule of law.[41]

The four headings of the APRM questionnaire used to guide country self-assessments and review reports—democracy and good political governance; economic governance and management; corporate governance; and socioeconomic development—give it many strengths from the right to development perspective. It includes detailed questions related to respect for human rights, good governance, the rule of law and democracy, as well as delivery of socio-economic development for all sectors of society. These questions address many of the issues identified by the attributes, criteria and indicators recommended by the task force in its report on right to development criteria and operational sub-criteria submitted to the Human Rights Council at its fifteenth session in March 2010 (A/HRC/15/WG.2/FT/2/Add.2). Nevertheless, the process of revising the questionnaire could well

[40] See European Commission, Communication "Governance in the European Consensus on Development" (30 August 2006), document COM (2006) 421 final, and the working document that accompanied it, document SEC(2006) 1020. See also the AfriMAP commentary on this communication, available at www.afrimap.org/researchDetail.php?id=20.

[41] See Bronwen Manby, "Was the APRM process in Kenya a waste of time? Lessons that should be learned for the future" (AfriMAP, April 2008).

benefit from a close review of the criteria developed by the task force. At the same time, APRM addresses important issues that the criteria overlook, while the overall organization of the APRM questionnaire into four themes is intuitively easier to follow than the three "attributes" of the 2010 version of the right to development criteria.

1. Democracy and good political governance

The questionnaire opens with the section on democracy and good political governance, in itself an important indication of the priority placed on these issues for the overall development objectives of NEPAD. The first issue to be noted in relation to the content of this section is that the list of "standards and codes" to which States are invited to indicate their adherence is quite incomplete,[42] and the questionnaire does not ask about cooperation with the monitoring mechanisms for these standards. The absence of these standards also means that important issues have been omitted in the questions in the APRM questionnaire that follow.

This section addresses five broad "objectives" for African States: prevention and reduction of intra- and inter-State conflicts; upholding constitutional democracy, including strengthening the role of the legislature and judiciary; promotion and protection of human rights, including women's and children's rights and the rights of vulnerable groups; ensuring accountable, efficient and effective public office holders; and fighting corruption in the political sphere. These would cover many of the issues under the right to development framework,[43] and some themes in substantially more detail than put forward in the proposed criteria. For example, the APRM questionnaire asks specific questions about elections and democratic governance. While these could be strengthened with greater reference to international instruments in the area (including the African Union's own African Charter on Democracy, Elections and Governance, which was adopted in 2007 after the APRM questionnaire was finalized, but built on standards that already existed in 2004), the right to development criteria refer only to participation in a more diffuse sense and could usefully borrow from the focus on representative democracy included in the APRM surveys.

There are other important ways in which this section of the APRM questionnaire could be strengthened. Objective three, question 1, in the democracy and good political governance section, is a "catch-all" question, asking "What measures have been put in place to promote and protect economic, social, cultural, civil and political rights as enshrined in African and international human rights instruments?" The breadth of this question is not helpful in prompting a clear response, while the indicators that are provided do not help to shape an analysis of the country situation. This question includes the only mention in the entire questionnaire of freedom of speech, as one in a list of six rights whose recognition by law is to be described (the others are employment, education, health, freedom of religion and housing). There are no follow-up questions relating to freedom of expression more generally, including freedom of the press and broadcast media as well as access to information, nor of freedom of assembly and association. The questions on discrimination also fail to look specifically at issues of discrimination in access to citizenship and to the political rights that follow, except in relation to women's participation in politics and leadership positions: in many African countries exclusion of marginalized ethnic groups from citizenship rights has been central to political crises and conflict. All of these issues are critical to the development of accountable and responsive Government, and thus the achievement of equitable development outcomes.

2. Economic governance and management

The section of the questionnaire dealing with economic governance and management has five "objectives": macroeconomic strategies that support sustainable development; transparent, predictable and credible Government economic policies; sound public financial management; fighting corruption and money laundering; and acceleration of regional integration. These objectives would address several of the proposed right to development criteria.[44]

However, the list of standards and codes at the outset of the section again seems lacking in comprehensiveness, and this limited range has affected the questions posed, which are—as has been widely

[42] For a list, see the AfriMAP submission to the Project for Streamlining and Fast Tracking the Implementation of the African Peer Review Mechanism (April 2010).

[43] In particular, 1(i) "To contribute to an environment of peace and security"; 1(j) "To adopt and periodically review national development strategies and plans of action on the basis of a participatory and transparent process"; 2 (c) "To ensure non-discrimination, access to information, participation and effective remedies"; and 2 (e) "To promote good governance and respect for the rule of law at the national level" (see A/HRC/15/WG.2/TF/2/Add.2, annex).

[44] In particular, 1 (b) "To maintain stable national and global economic and financial systems"; 1 (d) "To establish an economic regulatory and oversight system to manage risk and encourage competition"; and 1 (f) "To promote and ensure access to adequate financial resources".

noted by civil society commentators—quite focused on macroeconomic orthodoxy with little if any attention to distributive justice and broader development issues. In part, this may be because the relationship between the heading of this section and the heading on socioeconomic development is not clear. Although objective one, question 1, refers to "sustainable development", there is no definition of the term, nor does the guidance on how to answer refer to questions of how models for development are chosen and the environmental constraints that must be considered in national economic planning processes. Neither here nor under the heading on socioeconomic development are Africa's environmental treaties mentioned.[45] The right to development criteria are also weak on this point, beyond referring to promoting sustainable management of the environment and the use of natural resources,[46] reflecting a general failure to reach international consensus on a model for development that ensures that all countries enjoy a fair share of finite planetary resources.

Subsequent questions refer to public financial management, yet do not address many relevant issues, including the well-known challenges of management of primary resource revenues (especially from oil) or development assistance, which between them form a large part of the revenue of many African countries. There are a wealth of resources that could have been drawn on in relation to extractive industry best practice, while the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action would be important source documents on development assistance. Moreover, the questionnaire is notable for not mentioning the process of drafting poverty reduction strategy papers (PRSPs) which, in the context of obtaining debt relief, have been a principal tool for developing national economic policies in many African countries. The proposed criteria on implementing the right to development are also not much help in this regard, since they focus for the most part, understandably, on ensuring that development assistance is provided.[47]

3. Corporate governance

The inclusion of the third section of the APRM questionnaire, on corporate governance, is an important and unusual recognition of the need to hold powerful private sector institutions to account. It examines five objectives, which urge countries to promote an enabling environment for economic activities and at the same time ensure that corporations act as good corporate citizens, respect good business ethics and treat their shareholders, employees, communities, suppliers and customers in a fair and just manner; and to hold corporations, directors and officers accountable for their actions. Notably, the criteria on implementation of the right to development hardly touch upon this issue, beyond calling for an economic system to "manage risk and encourage competition".[48]

Nevertheless, the APRM questionnaire does not draw as widely as it could on the many relevant standards and codes in this area, including the rapidly increasing number of (largely voluntary) standards that apply to the operations of multinational corporations operating in African countries, for example, the OECD Guidelines for Multinational Enterprises of 2011 or the Guiding Principles on Business and Human Rights (A/HRC/17/31, annex) endorsed by the Human Rights Council at its seventeenth session in June 2011.[49]

4. Socioeconomic development

The fourth section of the questionnaire, on socioeconomic development, is perhaps of most interest to the right to development as it has been traditionally understood; indeed, the section on standards and codes does refer to the Declaration on the Right to Development, though once again this list is not exhaustive. It is in this section that questions are asked about outcomes in social and economic rights: health, education and other indicators of relevance to the Millennium Development Goals, including in relation to vulnerable groups. This heading thus covers the largest number of criteria included in the proposals by the task force, especially those under attribute 1, "Comprehensive and human-centred development policy" and attribute 3, "Social justice in development".[50] Its six objectives focus on self-reliance in development; poverty eradication; outcomes in key areas of social policy including education and health; access

[45] Including the African Convention on the Conservation of Nature and Natural Resources (1968) and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991).
[46] Criterion 1(h).
[47] For example, 1(f) "To promote and ensure access to adequate financial resources".
[48] Criterion 1(d).
[49] For a comprehensive list of international principles, see www.business-humanrights.org/Categories/Principles.
[50] Including 1 (a) " To promote constant improvement in socioeconomic well-being"; 1 (c) " To adopt national and international policy strategies supportive of the right to development"; 1 (g) "To promote and ensure access to the benefits of science and technology"; and 1 (h) "To promote and ensure environmental sustainability and sustainable use of natural resources"; 3 (a) "To provide for fair access to and sharing of the benefits of development"; 3 (b) "To provide for fair sharing of the burdens of development"; 3 (c) "To eradicate social injustices through economic and social reforms".

to water, sanitation, energy, finance, markets, technology, housing and land; gender equality; and broad-based participation in development.

APRM thus makes an important contribution to ensuring accountability in achieving these socio-economic goals that is often not integrated into "governance" assessments (even though they may be the subject of separate reviews). Under this heading, objective one, question 1, asks how national development programmes are designed, adopted and implemented and who participates; this process would allow for discussion of the PRSPs and similar initiatives. Objective six is to "encourage broad-based participation in development by stakeholders at all levels", and question 1 asks about the mechanisms put in place to achieve this. However, it is unfortunate that these questions are separated from section 2 of the questionnaire on economic governance and management; they are important additions which should be integrated into the questions about economic strategies, not regarded as separate from macroeconomic policy and the other issues dealt with under section 2.

B. Process

Among the most positive aspects of APRM are the insistence in its core documents on broad-based participation in national development strategies in general and its own processes in particular. The role of independent oversight in the shape of the panel of eminent persons and the national governing councils is perhaps the most important innovation within APRM as a development partnership itself; these strengths of the Mechanism could usefully be emphasized for development partnerships more generally. However, APRM still has many weaknesses, notably the lack of mechanisms to ensure that the national programmes of action are integrated into other national planning processes and properly monitored to ensure their effective implementation.

1. Participation and access to information

One of the strengths of the APRM process has been its emphasis on national-level participation in the completion of the self-assessment reports.[51] In this regard, APRM takes good account of the participatory criteria outlined in the right to development criteria.[52] Each one of the review processes so far has had weaknesses in this regard, and sometimes major ones; but overall, they have generally provided new space for national dialogue that did not previously exist, especially for civil society groups that are not among the leading policy think tanks invited to other meetings. In some countries, notably Benin, Ghana and Mali, genuinely independent processes were led by respected figures and research was carried out by accomplished and independent research bodies. And even in the countries with a weak tradition of open public debate, such as Algeria, Ethiopia and Rwanda, a (small) space for discussion was opened by APRM that would not otherwise have existed.

Nevertheless, in most of the countries that have implemented APRM the rhetoric has not been fully respected in reality, and Governments have to a greater or lesser extent sought to control the process by limiting the participation of non-State actors. This has been the case even in countries with relatively good democratic credentials, such as South Africa.

Among the weaker aspects of the process has been access to information at all levels, a critical aspect of a rights-based approach to development (and thus also the right to development). Access to and dissemination of information is identified in the APRM questionnaire as one of the cross-cutting issues that require "systematic attention across all areas of the questionnaire". Yet gaining access to information about APRM implementation itself can be extremely difficult, especially for those who are not directly involved in national processes or who are not among the few organizations that have been able to develop links with the continental structures.

During the key self-assessment phase, access to information made available by implementing Governments has been highly variable. Official national websites and media outreach have varied enormously in quality, and some processes have been quite closed, without easy access to critical documentation. On a positive note, several countries have adapted the questionnaire using non-technical language for use at the national level in focus groups and opinion polls. However, systems for reporting back to those who have made submissions to the self-assessment on how their inputs have been used have been limited, and there has often been confusion between "consulting

[51] On this issue, see, generally, G. Masterson, K. Busia and A. Jinadu, eds., *Peering the Peers: Civil Society and the African Peer Review Mechanism* (Electoral Institute for the Sustainability of Democracy in Africa, 2010).

[52] Including: 1 (j) "To adopt and periodically review national development strategies and plans of action on the basis of a participatory and transparent process"; 2 (a) "To establish a legal framework supportive of sustainable human-centred development"; 2 (b) "To draw on relevant international human rights instruments in elaborating development strategies"; and 2 (c) "To ensure non-discrimination, access to information, participation and effective remedies".

civil society" and "hiring civil society groups as consultants" to implement the self-assessment process, whether as technical research institutes or in another role. The involvement of national parliaments has also been limited, despite the emphasis in principle on democratic governance. Perhaps most importantly, although presentations are made during the national validation process that summarize the content of the draft self-assessment reports, neither these presentations nor the full draft report are made generally available, meaning that there is no way for those who made inputs to see how they were reflected in the report submitted to the APRM Secretariat. The excuse often given—that the material is extremely voluminous and publication not practical—is not a sufficient response to this criticism. The finalized self-assessment reports are only published at the discretion of the authorities conducting the process (for example, in Uganda); indeed, the APRM Secretariat instructs Governments not to publish them until the process is completed and the country review report and NPoA are approved by the APR Forum.

At the continental level, the APRM website[53] is out of date, despite at least two redesigns, and fails to include many relevant documents, including APR Forum communiqués, country review reports and core texts (especially the French versions). It is left for the most part to a handful of NGOs to provide useful background information on how the Mechanism is progressing, but these organizations do not have access to all relevant documents.

It is also problematic that the publication of the country review report and NPoA is delayed until six months after the APR Forum meeting that adopts them. In addition, the discussions of the report by Heads of State at the APR Forum are held in camera and are fed back to the national level in a haphazard way, depending on the efforts of independent journalists. Although some of the APR Forum communiqués have included information about the presentations and discussions by Heads of State, it would be desirable for the APR Forum to adopt formal public "concluding observations" on each country review report and plan of action that do not simply report factually on the presentations made but also express the collective view of the Heads of State present on the report and NPoA.

[53] As of early 2012, at aprm-au.org, with even fewer documents than at the previous address (www.aprm-international.org). The only "annual"reports publicly available – and not on this website – are for 2006, 2008 and 2010. Editor's note: as at the time of publication, the annual report for 2011 had been posted on the website.

2. Harmonization

Many commentators have noted the potential or actual overlap of the APRM process with other governance and development initiatives in Africa; this was recognized also by the discussions at the sixth session of the APRM Forum on implementation of the Mechanism.[54] At the moment, however, NPoAs fail to address many of the issues raised by the country review reports, or to give a clear sense of priorities or linkages to ongoing work that is planned through other initiatives. There seems to be little clarity on what their purpose actually is. If they are in fact to be a tool for national development, the APRM programmes of action need to be appropriately integrated and harmonized with other documents such as the PRSPs, "sector-wide approaches" for reform and development assistance, the Millennium Development Goals reporting documents, or the national adaptation programmes of action required under the United Nations climate change regime. For this purpose, it is likely that national planning ministries are best placed to take responsibility within the executive for implementation and reporting on NPoAs. The country review reports (if done well) could be the major source of information for bilateral and multilateral donors, which themselves seek to assess governance performance and support national development.

This need for harmonization relates also to the concept of "policy coherence" among different interactions between the same partners: a human rights and right to development analysis should not only be integrated throughout the APRM assessments themselves, but that analysis should also inform other development strategies that guide Government policy at the national level and interactions between the same partners internationally.[55] Consensus on the key measures of governance and what needs to be done will greatly help in achieving agreement on a rights-respecting national development framework which development partners can successfully fund.

3. Independent oversight: the eminent persons and the national governing councils

The APRM panel of eminent persons is a unique and positive innovation among systems for monitoring development assistance. Although the record is mixed, some of the eminent persons have not been afraid

[54] *Implementing the African Peer Group Mechanism: Challenges and Opportunities*, p. 38. See also Faten Aggad-Clerx, "Addressing the APRM's national programmes" in *Grappling with Governance: Perspectives on the African Peer Review Mechanism*, Steven Gruzd, ed. (South African Institute of International Affairs, 2010).

[55] I am grateful to Margot Salomon of the London School of Economics for this point.

to speak out when they have believed that national self-assessment processes have been insufficiently participatory or lacking in content. They have made perhaps the most significant contribution to the process where they have complemented their technical command of the governance issues of APRM with the strong sense of political stewardship that the process requests from them. The competence and credibility of these individuals is thus central to the effectiveness of the APRM reviews.

For this reason, the fact that the panel was left seriously under strength for about two years is a matter of particular concern, as is a lack of clarity in the way in which the vacant places were then filled in January 2010. The APRM procedures relating to the panel's mandate and reporting systems and the appointment and term limits of its members should be formalized on the basis of consultation. As it currently stands, the appointments are made on an ad hoc basis that does not conform to standard procedures for filling other African Union posts. Although the recognition of the APR Committee of Focal Points in January 2012, with responsibility for oversight of the budget process; resource mobilization; liaison between the Secretariat, focal points and partners; and the APRM Trust Fund and audit should improve governance of the process, there remain serious concerns.

At the national level, the establishment of an independent national governing council outside the control of the executive to govern the APRM process and validate the self-assessment reports has also been of key importance, though not occurring in every case. The national governing council is the body that provides strategic policy direction to the implementation of APRM, and it should be autonomous from Government and inclusive of all key stakeholders. It should, in principle, have the key responsibilities during the self-assessment process, commissioning the technical research institutions to do the research, signing off on the final report and hosting the country support and country review missions from the continental structures. The APRM guidelines require the establishment of a national APRM secretariat to provide technical and administrative support to the national governing council. Even where the council has been relatively independent, its secretariat has sometimes been very closely controlled by the Government and this has reduced the freedom to act of those involved in the conduct of the process.[56]

[56] See the overview chapter in Open Society Institute, *The African Peer Review Mechanism: A Compilation of Studies of the Process in Nine African Countries*.

4. Monitoring and enforcement

Concern has been raised about the voluntary nature of APRM. In favour of this approach is the argument that the countries that have signed up have done so not because they feel compelled, or as an empty exercise (as sadly seems to be the case with many human rights treaties), but because they see real value in the process. The counterargument is that NEPAD is premised on the notion that Africa's development has to be approached from a holistic perspective, and making the APRM voluntary undermines integration efforts.

Similarly, there is discussion among those following APRM about the relative importance of "national ownership"—which everyone agrees is critical for the success of the project—and independent monitoring and enforcement of the Mechanism's findings and conclusions. Certainly, the idea that APRM should issue condemnations of countries' performance in governance in the style of a human rights group or "take action" on the behaviour of recalcitrant Governments is rejected. APRM is not a human rights monitoring body but rather a tool for mutual learning, and there are other, more appropriate African Union institutions for the more obviously critical and political role.

It is in the light of these criticisms that the role of the independent oversight systems is so important. To date, they seem only a partially realized commitment: a model from which international development partnerships in general could learn, but a model that needs strengthening nonetheless.

The fact that Heads of State consider and debate the APRM country review reports and national programmes of action—which are then made public, enabling others also to comment on them—gives them a status and importance across African countries that is not available to any other development or governance assessment process. On the other hand, the fact that the formal debate takes place only before Heads of State means that the process is at risk of political capture by individuals with no interest in seriously addressing the issues at stake.[57] Civil society groups feel strongly that peer review by fellow Heads of State should be backed up by a greater effort to monitor the performance of a Government against the programmes of action to which they have agreed. It is particularly unfortunate that the national governing councils are often disbanded following the completion

[57] See, for example, Jerry Okungu, "Kenya passed 'ordeal' with flying colours", *The Nation* (Kenya), 14 July 2006.

of the self-assessment process, and even if they are continued in some form they have had little or no role in preparing or commenting on the progress reports on the NPoA to the APR Forum. Governments have thus for the most part been left to pick and choose the issues that they report on to the Forum, leaving the more difficult issues aside.

There is a lack of follow-up on the reports by other African Union institutions, despite the original commitment made in the APRM founding documents. Although the head of the APRM Secretariat has on occasion reported on the APRM process to the Pan-African Parliament, there is no formal process of validation of the reports and programmes of action by the Parliament, nor do representatives of the Governments concerned appear before the Parliament to answer questions on the findings and recommendations of the reports, though there have been efforts by ECA and others to inform the Parliament about the APRM processes. No APRM review report has been submitted to the African Commission on Human and Peoples' Rights as part of its process of reviewing States' respect for the African Charter.[58]

VI. Concluding remarks

The most important innovation of APRM is the move towards providing more serious accountability for resource allocation and implementation of policy decisions at both domestic and international levels. It is this innovation that makes APRM, whatever its shortcomings, a useful step forward in realizing the right to development in the relationships between Africa and the rich world. If the concerns of content and process raised in this chapter and by others were dealt with, its contribution would be that much stronger.

Both NEPAD and APRM were developed as part of an important process towards strengthening continental integration in both the economic and political spheres, symbolized by the transformation of the Organization of African Unity into the African Union and the adoption of a range of new commitments by member States. Although the downfall of President Muammar Gaddafi of Libya means that some of the more ambitious projects are no longer on the agenda, the future institutional structures of the African Union and the procedures by which the member States interact with each other are still in development and may have a profound impact on the implementation of NEPAD and APRM, whose status within the African Union has been a subject of debate since it was first established. Significant efforts have been made since 2008 for the development of an "African governance architecture", bringing together the various relevant organs of the African Union in a more coordinated way to create an overall political and institutional framework for the promotion of democracy, governance and human rights in Africa, the relationship of APRM to other African Union structures is still not clear. This lack of clarity has relevance for the impact of APRM in other African Union decision-making forums. Many States also defend national sovereignty in ways that undermine the integrationist ideal, and others are so fragile that their chances of implementing any collective vision are slim.

To date, the verdict on APRM is mixed: though the reports have been more thorough and forthright than many expected and every country reviewed has seen at least some national debate that perhaps would not have taken place, every country has also seen significant weaknesses in the way that research and participation were conducted, and especially in the structures that are supposed to ensure that the issues identified for action are in practice addressed. The greatest test of APRM as a continental and national tool for the improvement of governance, and consequently the realization of the right to development, will be the extent to which the analysis of the country review reports and the action points in the national programmes of action are actually used in practice. On this matter, the jury is still out, and a retreat from some of the initial commitments to a robust process raises concerns that the full potential of this interesting and innovative mechanism will not be fulfilled.

[58] "APRM countries fail to table reports to African rights body", *Agence de presse africaine*, 13 November 2010, accessed at afrimap.org.

The Paris Declaration on Aid Effectiveness

*Roberto Bissio**

I. Introduction: the Paris Declaration is not a global partnership for development

The Paris Declaration on Aid Effectiveness was adopted in 2005 and reaffirmed in Accra[1] in 2008 at ministerial-level forums convened by the Organisation for Economic Co-operation and Development (OECD). The principles and indicators included in the Paris Declaration frame what OECD calls a "landmark reform" in development cooperation[2] endorsed by leading development practitioners. The Paris Declaration did not emerge from the United Nations or any of its bodies, but given the high level of support that the Declaration has received from the major bilateral donors and the active engagement of key multilateral organizations such as the World Bank and OECD itself in its implementation, it is important to analyse it from the point of view of the right to development.

According to article 3 (3) of the Declaration on the Right to Development, "States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development." Cooperation can take many forms, some of them explicitly described in this Declaration, but "development cooperation" is usually understood as being synonymous with official development assistance (ODA), which politicians and the press translate to the public as "aid".

The United Nations Millennium Declaration adopted by Heads of State and Government in 2000 reaffirmed that "[they are] committed to making the right to development a reality for everyone and to freeing the entire human race from want".[3] The commitments made at the Millennium Summit were later summarized in the eight Millennium Development Goals,[4] all of them extracted or literally quoted from the Millennium Declaration. Goal 8, Develop a global partnership for development, spells out what developed countries should do to enable developing countries to achieve the other seven in a set of six targets:

- Target 8.A: develop further an open trading and financial system that is rule based, predictable and non-discriminatory, and that includes a commitment to good governance, development and poverty reduction, nationally and internationally

- Target 8.B: address the least developed countries' special needs. This includes tariff- and quota-free access to markets for their exports, enhanced debt relief for heavily indebted poor countries, cancellation of official bilateral debt and more extensive official development assistance for countries committed to poverty reduction

- Target 8.C: address the special needs of landlocked and small island developing States

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[1] The Paris Declaration and the Accra Agenda for Action are available at www.oecd.org/dataoecd/11/41/34428351.pdf.

[2] OECD, *Development Cooperation Report 2005* (Paris, 2006), chap. 3, Aid effectiveness: three good reasons why the Paris Declaration will make a difference. Available at www.oecd.org/dataoecd/53/30/36364587.pdf.

[3] General Assembly resolution 55/2, para. 11.

[4] See www.un.org/millenniumgoals/.

- Target 8.D: deal comprehensively with developing countries' debt problems through national and international measures to make debt sustainable in the long term

- Target 8.E: in cooperation with pharmaceutical companies, provide access to affordable essential medicines in developing countries

- Target 8.F: in cooperation with the private sector, make available the benefits of new technologies—especially information and communications technologies

Goal 8 expresses the highest consensus of the international community on what developed countries' responsibilities should be and its realization would effectively discharge the duties spelled out in article 3 of the Declaration on the Right to Development, as its targets both ensure development and remove the major obstacles thereto. Yet, the targets of goal 8 are not time bound (as six of the first seven goals are) and, while monitorable, they do not make individual Governments accountable.

In March 2005 the accountability of donors was explicitly addressed—in a more restricted set of targets—by the second High-Level Forum on Aid Effectiveness convened by OECD, which adopted the Paris Declaration on Aid Effectiveness. In the Paris Declaration the signatories explicitly aim at taking "far-reaching and monitorable actions to reform the ways we deliver and manage aid" (para. 1). The Paris Declaration was supported by Governments of developed and developing countries and also by many non-governmental organizations (NGOs). The United Nations Resident Coordinator for Zambia, Aeneas Chuma, made a detailed assessment of the Paris Declaration during the official State dinner held in his honour when he left the country in 2008, in which he recognized that "it breathed new life into the development agenda after years of declining commitment; it provided the shot in the arm donors needed to redouble their efforts". Yet, he added, "We are now several years into this experiment at both global and national levels and the time is right to take a critical look at whether this experiment is delivering intended outcomes and to anticipate where it is taking us."

The third High-Level Forum on Aid Effectiveness, held in Accra in 2008, convened ministers of developing and donor countries responsible for promoting development and Heads of multilateral and bilateral development institutions in order, according to OECD, to accelerate and deepen implementation of the Paris Declaration.[5] The Accra Agenda for Action notes that "in the Paris Declaration, we agreed to develop a genuine partnership, with developing countries clearly in charge of their own development processes".[6] Since the establishment of a new "global partnership for development" is at the core of goal 8, and since "effective international cooperation" is considered "essential" by the Declaration on the Right to Development, it is important to establish whether the Paris Declaration is consistent with the right to development and, further, if the "partnership" it establishes is consistent with the Millennium Declaration and the Millennium Development Goals. The present chapter concludes that the Paris Declaration cannot be considered as coming under the rubric of "global partnerships" as envisaged under goal 8 because (a) it is not a partnership; and (b) it does not deal with any of the targets of goal 8.

A. The Paris Declaration as a partnership

The Paris Declaration was the outcome of a meeting attended by representatives of 90 countries and, by the end of 2011, 135 countries and territories, plus the European Commission, were listed on the OECD website[7] as adhering to the Paris Declaration and the Accra Agenda for Action. The Paris Declaration is a non-binding declaration and does not establish a partnership as such, since it does not constitute a contractual relationship between the signatories. The obvious asymmetries between donors and recipients are emphasized by the Paris Declaration process, negotiated outside the United Nations where all countries have, at least, equal status. Rights and responsibilities are not distributed fairly in the Paris Declaration process. Recipient countries can be penalized if they do not implement the conditionality framework (even when, in practice, only small countries are actually sanctioned), but they have no way of penalizing their donors/creditors.

Much of the discourse around the Paris Declaration is about "partnerships", and the phrase "inclusive partnerships" is now used more frequently to denote the participation of "all stakeholders" (meaning parliamentarians, foundations, the private sector and civil society). Yet, the usual language of OECD permanently distinguishes between "donor countries" and "partner countries". It is probably fair to say that while

[5] See www.oecd.org/dataoecd/58/16/41202012.pdf.
[6] Accra Declaration, para. 5.
[7] www.oecd.org/document/22/0,3746, en_2649_3236398_36074966_1_1_1_1,00.html.

not constituting a partnership itself, the Paris Declaration is an attempt to provide a common framework for the many bilateral partnerships established between ODA donors and recipients.[8]

For recipient countries, the Paris Declaration creates a new level of supranational economic governance above the World Bank and the regional development banks. The same Western Governments that contribute to ODA and significantly control the International Monetary Fund (IMF) and the World Bank comprise the OECD Development Assistance Committee (DAC). At the country level, this new international governance increases the asymmetry between the aid recipient country and its donors and creditors, which gather together as a single group in the new aid modalities described below. While this is intended to save costs and make procedures easier for the recipient country (and thus make aid more efficient), the inherent risks of such greater imbalance in negotiating power at country level are not compensated in any way by the international mechanisms set in motion by the Paris Declaration.

In a wider sense (which is the one used in this chapter), the Paris Declaration is not just the declaration signed in the French capital in 2005, but also the whole political process that started at the first High-Level Forum on Aid Effectiveness (Rome, 2003), continued at the 2005 Paris High-Level Forum (which endorsed the Paris Declaration), at the 2008 Accra High-Level Forum (which endorsed the Accra Agenda for Action), and at the fourth High-Level Forum in Busan, Republic of Korea, in 2011.[9]

Reference to those meetings as "forums" and not "conferences" or "assemblies" can be understood as an attempt to build consensus around certain principles without necessarily creating new institutions or collective contractual obligations. In describing the preparations for the third Forum, the OECD on its website, under "Management", stated that "the overall responsibility for the substance of the [third Forum] rests with the Working Party on Aid Effectiveness", which itself is described as "an international *forum* [emphasis added] in which equal numbers of bilateral donors and partner countries are represented, with participation from all the multilateral banks, the OECD, and the United Nations". Further, "under the umbrella of the Working Party, the Steering Committee, presided over by the Chair of the Working Party with the World Bank and the Government of Ghana as vice-chairs, meets on a quarterly basis to provide advice on the content of the Forum. The Core Group, comprised of the World Bank, the Government of Ghana and OECD, is undertaking much of the preparatory work, including overseeing the planning of preparatory events". Thus, while one of the three objectives of the preparatory process for the third Forum was to "build ownership of the Accra agenda", the institutional ownership clearly rested with OECD and to a lesser extent with the World Bank. This is essentially the same mechanism that was preparing for the Busan Forum.[10]

While developing and developed countries are represented in equal numbers in the Working Party, the predominant role of the World Bank and the OECD Secretariat in the process tilts the balance in favour of the developed countries. Further, in such an ad hoc body, developing countries lack the tradition and expertise of their own negotiating groups that they have put together over the years in other international negotiating forums (such as the Group of Seventy-Seven (G77) in the United Nations and several regional or interest groupings in the World Trade Organization (WTO)).

Finally, the voice of developing countries in the High-Level Forums or the Working Party is largely ineffective, since those are not decision-making bodies. The complex set of assessment criteria and even the definition of the indicators by which the Paris Declaration is being reviewed and the new conditionality packages for disbursement of ODA under new mechanisms such as direct budget support and sector-wide approaches, as well as the criteria for evaluating recipient country governance systems, are all ultimately decided upon by DAC, in a close working relationship with the World Bank.

[8] While the designation "recipient countries" has been rightly criticized by some of the right to development literature, usage of the term "partner countries" as an equivalent in the usual OECD language is particularly odd, as it seems to imply that donors and creditors are not partners in the aid process.

[9] Editor's note: The present chapter was drafted prior to the holding of the fourth High-Level Forum. Participants in Busan adopted the Busan Partnership for Effective Development Cooperation, in which they agreed to move towards a new global partnership for development effectiveness. The document establishes, for the first time, an agreed framework for development cooperation that embraces multiple stakeholders, including traditional donors, South-South cooperators, BRICS, civil society organizations and private funders. The intent was to forge a broader, more inclusive agenda since Paris and Accra, reaffirming the respective and different commitments of the various actors along with their shared principles. It was felt that while the Accra Agenda for Action recognized the importance and specificities of the new actors, the Paris Declaration failed adequately to address their complexities. Within the new context, the parties that endorsed the mutually agreed actions set out in Paris and Accra agreed in Busan to intensify their efforts to implement their respective commitments in full. This new global partnership would be facilitated by UNDP and OECD. For full information concerning the Busan meeting and its outcome, see www.oecd.org/document/12/0,3746,en_2649_3236398_46057868_1_1_1_1,00.html.

[10] See www.oecd.org.

All those instruments are still being developed and were not available when the Paris Declaration was drafted. If the Paris Declaration were some kind of legal contract, it would be null and void because the "small print" was not known by the partner countries when they signed it.

B. The Paris Declaration and Millennium Development Goal 8

The main, and almost exclusive, concern of the Paris Declaration is to "reform the ways we deliver and manage aid" (para. 1). Only one of the six targets of Millennium Development Goal 8 refers directly to aid, and it clearly demands more generous ODA for countries committed to poverty reduction. The Paris Declaration states that "while the volumes of aid and other development resources must increase to achieve [the Millennium Development Goals], aid effectiveness must increase significantly as well to support partner country efforts to strengthen governance and improve development performance" (ibid.). The Paris Declaration makes no commitment to increase aid, as demanded by goal 8, but expresses the belief that more efficient aid delivery "will increase the impact aid has in reducing poverty and inequality, increasing growth, building capacity and accelerating achievement of the [Millennium Development Goals]" (para. 2).

Aid is of utmost importance to achieve the Goals. The Millennium Development Goals "focused on social development, and the main instrument that they incentivised was aid", summarizes Claire Melamed, Head of the Growth, Poverty and Inequality Programme of the British Overseas Development Institute.[11] It seems obvious that an increase in ODA, as requested by the Millennium Declaration and the Monterrey Consensus of the International Conference on Financing for Development[12] in 2002, would be inconsequential if that aid is ineffective or serves other purposes. Nevertheless, it cannot be forgotten that making current aid more effective is not enough, and that even increasing aid to the levels estimated by the United Nations Millennium Project (2002-2006)[13] is not enough if the international trade and financial rules are not reformed in the way envisaged by the Millennium Declaration and enshrined in goal 8.

[11] Claire Melamed, "The Millennium Development Goals after 2015: no goals yet, please", Overseas Development Institute, Opinion 156 (21 September 2011).

[12] *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (A/CONF.198/11), chap. I, resolution 1, annex.

[13] The Millennium Project estimated that twice the amount of ODA would be needed to achieve the Goals. See www.unmillenniumproject.org/.

To gain the broad ownership it claims, the whole Paris Declaration process would need to be under the auspices of the United Nations rather than OECD. As Resident Coordinator Chuma stated in his remarks:

> Concerns about the legitimacy of the Paris Declaration have resulted in Member States of the United Nations establishing a Development Cooperation Forum under ECOSOC … The Forum will try to place the aid discussion within a larger development context, in which South-South cooperation, remittances and new forms of development cooperation are emerging to give developing countries more strategic choice. It is telling that almost all of the local attention on international meetings this year has been focused on Accra, which is a donor-led process about aid. Fora such as the DCF, which offers a level playing field to all, have little oxygen left to breathe.

II. Aid effectiveness, human rights and the right to development

Human rights and the right to development in particular are not mentioned at all in the Paris Declaration. The Paris Declaration does not even reaffirm the Millennium Declaration, which emphasizes human rights and the right to development in its "values and principles" and only refers to the signatories "looking ahead" to the 2005 five-year review by the United Nations of the Millennium Declaration and the Millennium Development Goals.

To address this concern, the Workshop on Development Effectiveness in Practice: Applying the Paris Declaration to Advancing Gender Equality, Environmental Sustainability and Human Rights was held in Dublin in April 2007. A key message of the workshop, which brought together 120 participants representing DAC members, partner countries, civil society and United Nations agencies, was that "human rights, gender equality and environmental sustainability are key goals of development. They are functionally essential to achieving the ultimate goal of the Paris Declaration—increasing the impact of aid on reducing poverty and inequality, increasing growth, building capacity and accelerating achievement of the [Millennium Development Goals]".

In his closing remarks at the workshop, Ambassador Jan Cedergren (Sweden), Chair of the DAC Working Party on Aid Effectiveness, reiterated the recurring message emerging from the discussions: that gender equality, environmental sustainability and human rights are fundamental for achieving good development results. He stressed that the application of the Paris Declaration framework to those key policy

issues would move them to the centre and serve to increase the effectiveness of aid.

Also in 2007, OECD published the *DAC Action-oriented Policy Paper on Human Rights and Development*[14] which formulates 10 principles "where harmonised donor action is of particular importance". The paper formulates recommendations, but it does not in any way modify the Paris Declaration, its goals and indicators and the conditionalities derived from them. Thus, while the point is well made that the goal of reducing poverty, if achieved, would benefit the situation of human rights on the ground, the reverse question was left open: how does the human rights framework (as well as gender equality, which is also a human right, and environmental sustainability) apply to the Paris Declaration? In other words, can the human rights legal obligations of all States (be they donors or "partners") help the principles of the Paris Declaration evolve into contractual commitments that could make it qualify as a real partnership in terms of goal 8?

The Accra Agenda for Action, which resulted from the third High-Level Forum commits "[d]eveloping countries and donors" to "ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability" (para. 13 c)). Yet, while talking about "reforms" in the aid effectiveness process, the Accra Agenda renewed "our commitment to the principles and targets established in the Paris Declaration" (para. 27). I underline the phrase "and targets" as it is the "small print" formulation of the targets of the Paris Declaration that contradicts the right to development with which the principles of the Paris Declaration, particularly the common-sense understanding of "ownership", seem inconsistent.

From a right to development point of view, the five principles of the Paris Declaration (ownership, alignment, harmonization, managing for results and mutual accountability) have different implications. While "ownership" and "mutual accountability" can easily be understood as a reformulation of the concepts already included in the Declaration on the Right to Development (even if downgraded from "rights" to "principles"), "alignment", "harmonization" and "managing for results" can be supportive, neutral or detrimental to the right to development, depending on how they are understood and implemented.

[14] Available at www.oecd.org/dataoecd/50/7/39350774.pdf.

III. Challenges to the incorporation of human rights into the implementation of the Paris Declaration

The Accra Agenda mentions human rights twice. It affirms that "[g]ender equality, respect for human rights, and environmental sustainability are cornerstones for achieving enduring impact on the lives and potential of poor women, men, and children" (para. 3) and, as quoted above, promises "consistency" between development policies and programmes and human rights (and other) commitments. Since the human rights conventions are legally binding documents, the "consistency" of all national policies and programmes with them is an existing legal requirement. A policy or programme found to be inconsistent (and therefore violating) human rights would be illegal. While paying lip service to human rights and recognizing them explicitly, the carefully constructed language of the Accra Agenda avoids any responsibility in promoting human rights, in recognizing the right to development (which is not yet legally binding, as it derives from a declaration and not from a convention), or in creating any new commitments that could be construed as "entitlements" of developing countries or, symmetrically, as binding obligations of donor countries.

Thus, for example, OECD takes pride in the fact that "back in 1996, the DAC pioneered the International Development Goals as concrete targets in its *Shaping the 21st Century* report, stating it was time to 'select, taking account of the many targets discussed and agreed at international fora, a limited number of indicators of success by which our efforts can be judged'".[15]

The publication *2000—A Better World for All: Progress Towards the International Development Goals*, published jointly by OECD, IMF, the World Bank and the United Nations, is mentioned by DAC as an immediate precedent of the Millennium Development Goals. And, in fact, that report included the first seven goals which later in the year became the Millennium Development Goals. The report was heavily criticized by civil society organizations and by developing countries during the twenty-fourth special session of the General Assembly on the five-year review of the World Summit for Social Development

[15] OECD-DAC, *Shaping the 21st Century: The Contribution of Development Co-operation* (Paris, May 1996), p. 2, available at www.oecd.org/dataoecd/23/35/2508761.pdf.

precisely for not including any commitments by developed countries to support the achievement of those goals, and it was only after the inclusion of goal 8 that the Millennium Development Goal "package" became consensual. Yet, even as goal 8 has largely been recognized as a necessary condition for the achievement of the other seven goals, it lacks time-bound targets for the implementation of the responsibilities of developed countries.

IV. Operational analysis of the Paris Declaration and human rights

The Paris Declaration includes 12 Indicators of Progress "[t]o be measured nationally and monitored internationally", which are in turn subdivided into 17 targets for 2010. Those targets, and not just the principles, were explicitly reaffirmed by the Accra Agenda for Action: "We renew our commitment to the principles and targets established in the Paris Declaration, and will continue to assess progress in implementing them" (para. 27). The formulation of these targets has several major implications for human rights standards and obligations.

From a conceptual point of view, the positive linkage between the Paris Declaration and human rights has been made by pointing out that the intended result of the Paris Declaration is to make aid more effective for the achievement of the Millennium Development Goals and that this is equivalent to the progressive realization of social and economic rights. Yet, none of the targets makes reference to those desired results; they only refer to how aid is managed and delivered and to several preconditions that developing countries have to meet. Thus, whether the implementation of the Paris Declaration actually produces the intended positive human rights and development results is out of the scope of the official review, monitoring and evaluation. This is a major flaw.

In actual fact, many of the targets set in the Paris Declaration, if achieved as currently defined, could result in substantial erosion of the right to development of "partner" countries, since the definition and indicators of the targets frequently contradict the announced principles, as will be demonstrated below.

V. The Paris Declaration: the small print behind the targets

A. Ownership

Indicator 1 is the only indicator on "ownership", defined as "Partners have operational development strategies" (including poverty reduction strategies (PRSs)), and the target for 2010 was for "[a]t least 75% of partner countries" to have them.

Poverty reduction strategies have been requested from low-income developing countries for many years as a precondition to applications for debt relief, and they require the approval of the World Bank and IMF. However, as described below, bilateral and multilateral donors have a decisive say in the formulation of those strategies and are frequently said to "steer the Government from within"[16]—through their financing arrangements for direct budget support (DBS), Sector-Wide Approaches (SWAps), etc.

If countries do not have a national development strategy, donors have nothing with which to align or harmonize their aid. But national ownership is defined, tautologically, as countries having plans that conform to what the donor wishes, as articulated in conditionalities attached to loans and grants. According to a study by the Government of the Netherlands, "donors—particularly the international financial institutions—are limiting the scope for [devolving more control and accountability for the policy and aid to the Government] by interfering intensively with the PRSP [poverty reduction strategy papers] and with macro and sector policies".[17]

"Operational development strategies", as defined by the Paris Declaration, do not include Government plans, national legislation or any other nationally generated "policy, legislative and other measures" as required by the Declaration on the Right to Development in its article 10, but are documents negotiated between the recipient countries (usually the finance or planning ministry) and its donors and creditors.

Civil society and trade unions have often opposed the PRS precisely because external actors influence the

[16] Interview with Nancy Alexander, Director of the Citizens' Network on Essential Services, a project of the Tides Center, Silver Spring, Maryland, United States of America.

[17] The Netherlands Ministry of Foreign Affairs, "From project aid towards sector support : an evaluation of the sector-wide approach in Dutch bilateral aid 1998-2005", IOB Evaluations, No. 301, Policy and Operations Evaluation Department (November 2006), p. 132.

content of the strategy by, among other things, rating systems such as the World Bank's Country Policy and Institutional Assessment (CPIA), which the indicators of the Paris Declaration use intensively (see below). There is little or no civil society or legislative input to the macroeconomic dimension of PRSs and IMF and the World Bank usually define their own means (e.g., privatization, liberalization) to PRS goals.

The Paris Declaration calls for a joint assistance strategy (JAS) and joint analysis supported by many donors/creditors, but most of the analysis and strategic planning for lending to a country remains with the World Bank, which is almost always the coordinator of the donors at national level. In practice, JAS is a new name for the old CAS (country assistance strategy) of the World Bank (see the comment on indicator 10 below). JASs are owned by donors/creditors rather than by the recipient countries that formally sign off on them.

Further, programmatic aid facilitates corruption in ways that "projectized" aid does not. Unlike projects in which each dollar is allocated for a particular use, programmatic aid (DBS, SWAps and country procurement) involves large infusions of donor/creditor financing that supports a general policy framework. Accountability of the donor country aid agencies to their own citizens and taxpayers is also undermined, since a pool of money formed by a variety of donor contributions is much more difficult to follow and assess than specific projects. Those disadvantages are not compensated by greater recipient-country accountability or by new mechanisms for tracking the results of the pooled aid, since, as will be shown below, those are non-existent in the Paris Declaration.

A comparative review of the implementation of the Paris Declaration in seven countries (Cambodia, Kenya, Malawi, Nepal, Rwanda, Sierra Leone and the United Republic of Tanzania) carried out by the international non-governmental organization (NGO) ActionAid shows that while "many of the countries reviewed are making positive efforts to comply with the principles" of the Paris Declaration, "[t]he low quality and level of inclusiveness and participation of [civil society organizations] and citizens emerge as concrete and serious problems".[18] Such considerations led Resident Coordinator Chuma in his remarks referred to above to conclude that "in my experience in Zambia, the Paris Declaration and its local variants [are] weakest on precisely those aspects of the development encounter that could best promote actual national ownership over the content of development". Undermining national capacity to design a country's own development strategy, parliamentary ability to oversee those plans and democratic control by civil society can amount to a violation of the right to development as well as civil and political rights. According to Chuma, "what we appear to have is more national donorship than national ownership".

B. Alignment

Indicator 2, the first to assess the "alignment" principle, requires "[r]eliable country systems" and is measured by the "[n]umber of partner countries that have procurement and public financial management systems that either (a) adhere to broadly accepted good practices or (b) have a reform programme in place to achieve these". This target is clearly not about aligning ODA with the recipient-country strategies, but about aligning country governance with the requirements of donors/creditors.

The Paris Declaration Indicators of Progress track and score the performance of public financial management systems (i.e., financial management, budget execution, auditing). The performance of each Government's Public Financial Management (PFM) system is rated by the World Bank's Country Policy and Institutional Assessment as well as the Public Expenditure and Financial Accountability (PEFA) partnership. The World Bank uses CPIA to provide an annual rating of each Government's performance in 16 policy areas, including PFM. The PEFA partnership of donors and creditors provides another input to the Paris Declaration PFM indicator.

According to the World Bank, the purpose of CPIA is to measure a country's policy and institutional development framework for poverty reduction, sustainable growth and effective use of development assistance. These ratings are used to allocate aid and credit, design policy conditionality and establish debt ceilings.

The view of many critics is that "CPIA rates the extent to which a government has: a) adopted neoliberal economic policies (i.e., liberalization and privatization in the context of strict budget discipline) and b) developed institutions, particularly those that protect property rights and promote a business-friendly environment".[19] There is no participation whatsoever of

[18] ActionAid, "Is the implementation of the Aid Effectiveness agenda reducing aid dependency?" (June 2011).

[19] Nancy Alexander, "Judge and jury: the World Bank's scorecard for borrowing governments" in *Social Watch*, 2004, available at unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN018179.pdf.

developing countries in the definition of the criteria that result in better grading by CPIA or in the designation of the experts in charge of assigning the grades.

The Paris Declaration indicators also track and score the procurement systems of each recipient country. The explicit goal of eliminating corruption is consistent with the promotion of human rights, but no other human rights values are attached to the use of country systems and none of the criteria to assess them explicitly support the practice of requiring suppliers to adhere to core labour standards. The use of Government procurement as a tool of affirmative action in favour of local producers or of vulnerable sectors of the population (small businesses, cooperatives, female- or minority-run firms) is an established practice to contribute to the progressive realization of economic, social and cultural rights, but such policies are deemed to be "discriminatory" against foreign firms and explicitly forbidden.

OECD has developed a methodology for assessment of national procurement systems, based on indicators derived from an OECD-DAC/World Bank round table, which sets out "compliance and performance indicators" for partner countries. Among those, sub-indicator 1 (d) "assesses the participation and selection polices to ensure that they are non discriminatory. As a general principle, firms, *including qualified foreign firms* [emphasis added], should not be excluded from participating in a tendering process for reasons other than lack of qualifications".[20]

For some procurement, countries may and frequently do elect to engage foreign firms, but for donors/creditors to insist on international competition for all procurement over a certain dollar level is inappropriate. Industrialized countries gained economic strength by using procurement to strengthen local economic development, and the Paris Declaration curbs this practice.

The opening up of procurement to foreign firms "applies to all procurement (goods, works and services, including consulting services) undertaken using public funds" and "to all public bodies and sub-national governments and entities" including "the army, defence or similar expenditures, autonomous or specialized state owned enterprises".[21] This is a standard that OECD countries do not meet themselves. All national security-related expenditures in developed countries are normally excluded from the transparency norms that apply to other Government expenditures and defence-related trade is explicitly excluded from WTO regulations. To impose transparency conditions on security-related expenditures in developing countries interferes with their sovereignty in ways OECD countries would not allow to be applied to themselves.

The procurement standards attached to the Paris Declaration go beyond the transparency in procurement that developed countries demanded from developing countries in WTO as part of the so-called "Singapore issues". Those requests were widely rejected by developing countries at the Fifth WTO Ministerial Conference in Cancun, Mexico, in 2003 as being contrary to their right to development, despite the fact that the procurement policies of many developing countries contain transparency principles, because of the fear that international restrictions on national procurement could lead to complete liberalization and the forcible opening of national procurement to foreign bidders. By imposing such a condition in the small print of the partner countries' obligations, the Paris Declaration limits the policy options of the recipient country to prefer domestic providers and thereby uses Government procurement as part of an industrial policy or as an element to promote production in certain regions or employment of vulnerable sectors of society.

The use of country procurement systems is very controversial. For instance, in the United States it is a high priority of the National Foreign Trade Council to stop the use of country procurement systems, claiming that country systems are inferior to those of donor countries and prone to corruption. The Council does not believe that country systems can guarantee United States corporations competitive access to bidding and urged that the World Bank not use country systems, as that would "abrogate the World Bank's responsibility to continue to set high and appropriate standards for procurement and ensure effective oversight of the procurement process".[22]

The cross-country comparative research by ActionAid found that "donors are unwilling to use country systems when it comes to procurement"[23] and that local companies are discriminated against because of their capacity constraints or requirements they are unable to meet.

[20] OECD, *Methodology for Assessment of National Procurement Systems (Based on Indicators from OECD-DAC/World Bank Round Table*, version 4 (17 July 2006), p. 11.
[21] Ibid., p. 9.
[22] Letter to Paul D. Wolfowitz, President of the World Bank, dated 25 May 2005, available at www.nftc.org/default/Trade%20Policy/Trade_Policy/May%2025%202005%20Letter%20to%20World%20Bank%20President-Elect%20Wolfowitz.pdf.
[23] ActionAid, "Aid effectiveness agenda reducing aid dependency?", p. 13.

According to the Paris Declaration small print, even after having made the effort to get an A or B score, the targets under indicator 5b are only for a reduction of two thirds or one third, respectively, in the percentage of aid to the public sector not using partner countries' procurement systems by 2010. At the same time, if countries reform their procurement systems as required, foreign firms would not only be allowed to compete for ODA contracts but would get access to a major share of the national budgets generated by taxes from nationals. The net result in terms of the proportion of Government procurement spent at home could even be negative. The language of "non-discrimination" (among firms) in this context means the opposite of the "affirmative action" required by human rights norms to ensure non-discrimination among people.

"In many developing countries, public procurement accounts for over 20% of GDP, making it the largest public expenditure after wages" states a study by an expert of the independent Bolivian research institute CEDLA (Centro de Estudios para el Desarrollo Laboral y Agraria).[24] This study finds that the Government of Bolivia has "rules like DS 181, which try to encourage the participation of the private sector in the national bidding processes, primarily small and medium producers".

Those principles, targeted at promoting the Bolivian private sector, come into direct conflict with the principles and practices of the World Bank and the Inter-American Development Bank. Those institutions insist on using their own procurement systems, and not those of Bolivia, because the public procurement system in Bolivia is negatively evaluated from the standpoint of the OECD methodology. These two were identified by the study as the donors that make the greatest use of their own procurement systems and, at the same time, as "particularly keen on promoting the liberalization of the procurement market".

The study found that the OECD methodology for assessment of national procurement systems is being recommended by the Group of Development Partners in Bolivia "as a condition to start providing budget support". This methodology "is based on donor-defined best practices, and its implementation could therefore result in a package of reforms for the national system, which would be promoted as part of the alignment process. Based on the processes underway and the policies of different players …, the reforms would in all likelihood lead to complete liberalization of the public procurement market". That would be a major setback for the efforts by Bolivia to promote its own private sector and, therefore, to its right to development.

Indicator 3 is the only one in the "alignment" section of the Paris Declaration that specifically requires that "[a]id flows are aligned on national priorities". Yet, this is to be measured by the "[p]ercent of aid flows to the government sector that is reported on partners' national budgets". While reporting ODA inflows in national budgets can be helpful to simplify monitoring, both by donor/creditors and by national parliaments or citizens, it does not guarantee by itself that those flows, or the budget itself, are consistent with national priorities.

Indicator 4 aims to "[s]trengthen capacity by co-ordinated support" and is measured by the percentage of capacity-development support provided by donors through coordinated programmes consistent with partners' national development strategies, with a target of 50 per cent of technical cooperation flows doing so by 2010. This indicator has proved particularly difficult to assess, owing to the lack of a common definition among donors of what constitutes "technical cooperation". It is important that the concept be defined properly so as to curb the practice of replacing local expertise with much more expensive foreign services that are not attuned to the local realities.

Indicators 5a and 5b call for the measurement of the actual use by donors of the recipient country's financial management and procurement systems, which should increase according to the "score" of those systems, as defined in the discussion of indicator 2. Even when a country procurement system achieves an A score (and very few countries do), a substantial part of the donors' aid to the public system may still be disbursed outside the recipient country system. All the comments made above for indicator 2 apply here.

Realization of indicator 6 is intended to "[s]trengthen capacity by avoiding parallel implementation structures" and the target is to reduce by two thirds the stock of parallel project implementation units. This is consistent with the pressure of the Paris Declaration on donors and creditors to shift from projectized aid to programme aid.

[24] Juan Luis Espada Vedia, *Procurement, Tied Aid and Country Systems in Bolivia* (Brussels, European Network on Debt and Development (Eurodad), May 2011). Available at www.eurodad.org/uploadedFiles/Whats_New/Reports/BoliviaFINAL.pdf.

Indicator 7 calls for ODA to be "more predictable", which should be measured by the percentage of aid disbursements released according to agreed schedules in annual or multi-year frameworks. Yet the target for 2010 is only to "halve the proportion of aid not disbursed within the fiscal year for which it was scheduled" (an unambitious target!), with no mention of longer-term commitments.

Donors and creditors have such unpredictable aid that, in some circumstances, its late arrival constitutes a major external shock to the economy of the "partner". The unpredictability of ODA is one of the major problems limiting the use of aid to achieve the Millennium Development Goals. Promoting the realization of economic, social and cultural rights and achieving the Goals implies essentially more and better delivery of public services (in particular health, education and water) to the poor, which in turn requires hiring doctors and nurses, teachers and hydraulic engineers. However, there is ample evidence from the IMF Independent Evaluation Office that the Fund imposes inflation targets and fiscal limits on Government spending that often result in suppressing Governments' ability to hire key personnel.[25] Moreover, Governments are not able to commence hiring or spending on additional wages and salaries because of volatile, unpredictable and unreliable aid inflows.

According to a study published by Social Watch:

> The 2007 UN MDG progress report shows that adequate resources are still not being made available to countries in a predictable way. Genuinely predictable long-term aid is not being delivered. Donors are still—by and large—unable to commit to three-year budget support cycles that would facilitate medium-term expenditure framework planning. In practice, even longer-term commitments would be necessary to assure partner governments that they have a stable source of financing for MDG-related recurrent costs of social and other public services. Social security types of expenditures need to be predictable, continuous, and not subject to the "stop-go" features of aid politics.[26]

Further, the study notes:

> [E]xperience shows that budget support, and especially general budget support, is especially vulnerable when there is a deterioration in political relations. This undermines budget support as a long-term instrument. Apart from immediate disruptive effects, it makes partner governments less likely to treat budget support as a reliable source of financing for medium and long-term planning, and this in turn may undermine some of the distinctive benefits of budget support.

Donors can also stop the flow of aid when a Government fails to meet the conditions contained in the Performance Assessment Framework (PAF) attached to budget support agreements. It is ironic that the goal to make aid less volatile and more predictable does not in any way limit or discipline the power of donors to pull the plug from recipient Government budgets, as IMF currently does.[27] According to the Evaluation Service of the United Kingdom Department for International Development (DFID): "This implies a danger for 'stop-go' resource allocations from donors to the partner countries, and this may have serious, devastating effects on the development in the partner countries. Apparently, however, such risks are not sufficiently analysed and discussed, neither among the donors, nor among the partner countries."[28]

The modest target associated with indicator 7 does not ensure that this situation will be corrected in the near future.

Indicator 8 has as its goal the untying of aid and the measure is the percentage of aid that is untied, yet the target for 2010 is only "[c]ontinued progress over time", without specific figures.

Together with unpredictability, the tying of ODA is one of the major factors reducing aid efficiency. The percentage of tied aid over total aid can be as high as 69 per cent for Italy and 57 per cent for the United States. The Washington-based Center for Global Development estimates that "tying raises the cost of aid projects a typical 15–30%".[29]

Untying aid is probably the single most important factor that could contribute to aid efficiency, and one that depends only on donors. Failure to include untying of aid among the binding targets in the Paris Declaration does not help to build credibility in the process among "partner" countries.

C. Harmonization

Indicator 9 calls upon donors to use common arrangements or procedures, as measured by the percentage of aid provided as programme-based approaches, e.g., Direct Budget Support and

[25] Independent Evaluation Office of the IMF, *The IMF and Aid to Sub-Saharan Africa* (Washington, D.C., March 2007).

[26] Rebecca Carter and Stephen Lister, "Budget support: as good as the strategy it finances", *Social Watch*, 2007, available at http://old.socialwatch.org/en/informesTematicos/124.html.

[27] Nancy Alexander, "The new aid model: implications for the aid system", mimeo (September 2007).

[28] Evaluation Service of the Department for International Development, *Evaluating Coordination and Complementarity of Country Strategy Papers with National Development Priorities* (Brussels, Evaluation Services of the European Union, 2006), p. 44.

[29] David Roodman, "An index of donor performance", Center for Global Development, Working Paper No. 67, revised October 2011, p. 11. Available at www.cgdev.org/files/3646_file_Roodman_Aid_2011.pdf.

Sector-Wide Approaches or Poverty Reduction Support Credits. The target for 2010 is for 66 per cent of aid flows to be provided in the context of programme-based approaches from a baseline of 43 per cent in 2005. The Netherlands already channels approximately 70 per cent of its development assistance through sectoral and general budget support. DFID disburses approximately 50 per cent of its development assistance through budget support and approximately 25 per cent through SWAps.

As of June 2006, the World Bank had provided approximately 40 per cent of its new lending through budget support. In fiscal year 2005/2006, the Bank committed funding to 46 operations using these approaches in 28 countries; and in Bangladesh, Brazil, Malawi, Morocco, Nepal, Nicaragua, the Philippines, Poland and the United Republic of Tanzania, the Bank has supported more than one sector-wide approach.

The sectors that move quickly toward a SWAp are health, education, and water and sanitation. But SWAps are increasingly being used not only for single sectors, but also for multiple sectors and cross-cutting institutional areas such as private sector development, justice and law and order.[30]

DBS and SWAps are believed to reduce transaction costs, increase efficiency in public spending, lead to greater predictability in aid flows and ensure greater convergence of ODA with public funds. The Netherlands, which has undertaken an extensive assessment of its engagement in DBS and SWAps, found that in "the education sector in Zambia ... the number of donor support accounts managed by the Ministry declined from about 800 in 1999 to 10 in 2004. The number of donor missions in the sector per annual (sic) also declined: from about 120 to about ten."[31] However, a case study on Zambia[32] challenges the notion that transaction costs necessarily decline when shifting from projectized to sector-wide approaches.

The critique of SWAps[33] centres on the fact that they focus predominantly on the "supply side" dimensions of service delivery rather than the "demand side". The implications of this problem are significant. For instance, if donors create a "basket fund" for a sector that ring-fences a minimum percentage of total resources for delivery of a particular local service, then it is essential that the specified service be a priority of the local government that receives the earmarked resources.

In part, the solution to this fundamental problem lies in implementing policy dialogue to bridge the macro-meso-micro (or national-state-local) divide. The dialogue should have this vertical dimension (national-regional-local); a horizontal dimension that embraces tripartite social dialogue; and an external-domestic dialogue between donors and creditors, on the one hand, and domestic constituencies, on the other.

In practice, SWAps have come to be perceived by many donors and partner Governments not as a multi-stakeholder process, but as a specific public expenditure programme funded by a select group of donors. The focus is on the national Government's policy and budgetary framework rather than on the diverse set of actors engaged in the sector.

Sector strategies are "highly influenced by donor priorities. They tend to be technical, uniform documents, which lack an in-depth insight into local (political) dynamics. Proposed solutions are often based on experiences elsewhere, including the donor countries' own systems, which usually do not reflect the local dynamics at hand".[34]

While most SWAps are negotiated for traditional sectors, such as education, health and water supply, others focus on a theme, such as private sector development. In the case of Ghana,[35] donors and consultants were aggressive in terms of forging a private sector development strategy to which the Government would agree. The Ministry for Private Sector Development was staffed with eight donor-funded consultants and five civil servants. Attempts to form a private sector strategy "pooled fund" floundered since the majority of donors were funding the private sector directly and bypassing Government. Donors also rejected the Government's initial procurement plans and, ultimately, the Government had to use a World Bank template for procurement that was utterly

[30] OECD, *2006 Survey on Monitoring the Paris Declaration: Overview of the Results* (Paris, 2007).
[31] Cited in A/HRC/8 /WG.2/TF/CRP.7, para. 64.
[32] Patrick Watt, *Transaction Costs in Aid: Case Studies of Sector Wide Approaches in Zambia and Senegal* (UNDP, Human Development Report 2005, Occasional Paper 2005/26).
[33] Ellen van Reesch, "Bridging the macro-micro gap: micro-meso-macro linkages in the context of sector-wide approaches" (2007).
[34] Ibid.
[35] Lindsay Whitfield and Emily Jones, "Ghana: the political dimensions of aid dependence", Global Economic Governance Programme, GEG Working Paper 2007/32, updated February 2008. Available at www.globaleconomicgovernance.org/wp-content/uploads/Whitfield%20Jones%20Final.pdf.

unsuited to the small-scale purchasing required by the projects.

Donors are rhetorically in favour of Government ownership, but in practice they openly disagreed with the Government of Ghana's priorities for funding: "Ministry staff went in circles trying to get a prioritisation that the donors would approve."[36] Furthermore, transaction costs were very high.

Indicator 10 calls upon donors to collaborate in (a) field missions and/or (b) country analytic work, including diagnostic reviews. The 2010 targets are: (a) 40 per cent of donor missions to the field are to be joint missions (up from the 2005 baseline of 18 per cent) and (b) 66 per cent of country analytic work is to be joint analysis (up from a baseline of 42 per cent).

In addition, donors and creditors are preparing World Bank-led joint assistance strategies. Historically, the World Bank prepares a CAS for each recipient country that outlines the institution's investment plan over the medium term, e.g., three years. Increasingly, however, the Bank participates in formulating joint assistance strategies with other donors and creditors. In the case of the United Republic of Tanzania, 35 countries and multilateral organizations of the Development Partners Group endorsed and/or adopted the joint assistance strategy for the country.

One danger of such harmonization is that once a joint assistance strategy has been approved by such a large number of donors, after lengthy negotiations, it becomes "written in stone", making it impossible for any democratic country-driven process to change it, undermining the power of parliament (and even the executive branch of Government) to introduce changes if practice demonstrates that they are needed and therefore eroding local democracy and human rights.

Another danger is further empowerment of the World Bank relative to other donors that take a less ideological view of development. A concern expressed by diplomats participating in a retreat on financing for development organized by the Friedrich-Ebert-Stiftung in New York on 4 and 5 October 2007 "is that the donor coordination process may impede innovation by donors and reduce the range of choice of programs by aid recipients. There is value in competition among donors, especially with the entry of new donors, who have not signed on to the Paris Declaration".[37]

D. Managing for results

Indicator 11 aims at having "[r]esults-oriented frameworks" by reducing "the proportion of countries without transparent and monitorable performance assessment frameworks by one- third". All DBS programmes and SWAps have a corresponding PAF with policy conditions. Parliaments and citizens' groups are not meaningfully involved in the construction of the Framework, although it spells out the requirements for the release of successive budget tranches.

In budget support operations already in place by the World Bank, the policy conditions attached to World Bank budget support loans or grants are derived from the Framework. These conditions involve lengthy negotiations with a variety of bilateral and multilateral donors. Civil society advocacy and even parliamentary participation in decision-making becomes virtually impossible, since the elimination or modification of conditionality would need to be pursued not only with the recipient Government, but also with multiple donors and creditors.

Contrary to what "managing for results" might suggest, the "results" upon which disbursements are tied are not measured in terms of poverty reduction or Millennium Development Goal achievement, but only refer to governance and macroeconomic policies. "Results management" will be deemed successful if those policies are in place, even if poverty actually increases, which has frequently been the case in the past when similar structural adjustment programmes have been implemented without proper social impact assessments and "safety nets".

E. Mutual accountability

Indicator 12 is the only one about "[m]utual accountability", one of the five principles of the Paris Declaration. It should be measured by the "number of partner countries that undertake mutual assessments of progress in implementing agreed commitments on aid effectiveness including those in this Declaration", and the target for 2010 is that all partner countries should have "mutual assessment reviews" in place.

[36] Ibid., p. 18.

[37] Barry Herman, Frank Schroeder and Eva Hanfstaengl, "Challenges in financing for development: policy issues for the Doha Conference" (Friedrich-Ebert-Stiftung, 2007), p. 6. Available at library.fes.de/pdf-files/iez/global/06133.pdf.

Thus, one of the key principles of the Paris Declaration is reduced in its implementation to separate exercises to be conducted at country level in the recipient countries.

Considering the experience of OECD/DAC in conducting "peer reviews" of donors' aid practices, one would expect a mutual accountability exercise to be undertaken at the international level, with opportunities for developing countries to be advised by international NGOs and other experts and to share experiences among themselves about the performance of donors individually or collectively. A country-level exercise, where the aid-recipient country sits in front of the whole set of its donors, implies an enormous imbalance of power and resources. The developing country can easily be made accountable for its part in the "partnership" under threat of seeing its aid cut or reduced, but the donors can hardly be made accountable for any eventual shortcomings. The sum of those reviews cannot be expected to add up to a fair "mutual accountability" exercise.

Further, in the standard-setting and "scorekeeping" bodies of the Paris Declaration, neither developing countries nor any international institution where the interests of developing countries are predominant are represented; instead, it is essentially OECD and the World Bank that predominate, even when it is recipient-country Governments, not donors, that are penalized if those standards are not met.

VI. Towards development effectiveness

The above analysis of key Paris Declaration indicators underscores their close connections to governance, particularly in the fields of Government procurement and financial management. Yet, while major changes in recipient-country governance are demanded, donors have not made comparable shifts in their own practices, e.g., by untying aid or making it more predictable. Indeed, the new aid modalities, by aligning bilateral and multilateral donors around certain governance requirements, might even undermine local democratic processes and the "policy space" that developing country Governments need to make their own plans. In such instances, the modalities might in fact undermine efforts toward the realization of the right to development.

Indeed, while there is congruence and synergy between the principles of country ownership and mutual accountability with the right to development, the implementation and assessment of the principles may result in violations of the right to development. At present, insurance, complaint mechanisms and exceptions are lacking. Mutual accountability reviews should be conducted at the international level and not at country level, with the participation of international civil society organizations with development and human rights expertise. The Economic and Social Council Development Cooperation Forum was created by the 2005 World Summit[38] to enhance the implementation of the internationally agreed development goals, including the Millennium Development Goals, and promote dialogue to find effective ways to support them. The Forum would discuss issues relating to effectiveness and coherence and provide policy guidance and recommendations on how to improve international development cooperation. It could become an adequate mechanism for mutual accountability and should be identified as such explicitly. Developing countries, civil society organizations and international organizations, such as the United Nations Conference on Trade and Development (UNCTAD), should be included in the groups and consultations that define the implementation criteria, targets and review of ODA. Exceptions have to be provided in the Paris Declaration conditionality to address circumstances in which the Paris Declaration criteria might undermine the right to development or other human rights, similar to the WTO exemptions.

The civil society organizations interacting with the official preparatory process of the fourth High-Level Forum on Aid Effectiveness in 2011 explicitly demanded "development effectiveness" as an alternative to "aid effectiveness". Acting as a coalition named BetterAid,[39] these groups expect development effectiveness to measure international cooperation for its outcomes in terms of development rather than for the transfer of money; moreover, the coalition argues that such effectiveness should be strengthened "through practices based on human rights standards".

To that end, the key goal of this civil society coalition is to end conditionality: "Policy conditionality fundamentally undermines democratic ownership and the right to development." Instead, "Scope for alternative and nationally developed policy choices should be guaranteed."[40] Approaches to aid that link it directly to results have been developed by, for

[38] See General Assembly resolution 60/1.
[39] See membership and other details at www.betteraid.org.
[40] BetterAid, "CSOs on the road to Busan: key messages and proposals" (April 2011), p. 4. Available at www.cso-effectiveness.org/IMG/pdf/cso_asks_final_.pdf.

example, the Washington-based Center for Global Development.[41] Those mechanisms drastically reduce transaction costs and only require evidence of results to trigger the cash transfer. "How are we going to enforce conditionalities if we do that?", the representative of a major development agency inquired candidly. With conditionality abandoned as a policy tool, development assistance would no longer call for Governments to adjust their policies to donor wishes in areas unrelated to the aid's specific objectives. Instead, BetterAid argues, "Only fiduciary conditions, which are negotiated in a transparent and inclusive manner with mechanisms for public monitoring, ought to be attached to development assistance."[42]

ODA, even in the form of budget support, does not operate in this way under the current criteria of "aid effectiveness", and the current agenda of and discourse on aid have resisted such conceptual and practical reorientations. Nonetheless, the critique of conditionalities is having an impact. During a meeting in Paris in 2010 between the members of BetterAid and the Governments and intergovernmental organizations that form the Working Party on Aid Effectiveness, the poor reputation of conditionalities was noted: "Conditionalities have indeed a bad name lately and we are seriously considering … using another term",[43] announced a participant. Needless to say, it was the practice and not the name that BetterAid was criticizing. After having peaked in 2010 at $129 billion,[44] ODA from members of DAC declined, in absolute terms and as a percentage of GDP, during 2011. This is due to a combination of budget cuts, changes in accounting[45] and a trend towards tying ODA to hiring services or buying products from the donor country.

VII. Conclusion

Development cooperation is essential for promoting the right to development. Article 3.3 of the Declaration makes it mandatory: "States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development." Moreover, article 4.2 stipulates: "As a complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development." The Paris Declaration on Aid Effectiveness honours that stipulation in its title. The principles spelled out by the Paris Declaration, starting with "national ownership", seem consistent with the right to development principles of "sovereign equality, interdependence, mutual interest and cooperation among all States" (art. 3 (3)).

However, the Paris Declaration contributes only indirectly to the fulfilment of these principles. While relatively minor gains might be obtained from avoiding duplication in delivery and simplifying reporting, the main causes of aid inefficiency (i.e., tied aid and unpredictability of aid income) are not properly addressed in the Paris Declaration. By concentrating political and diplomatic energies around a limited agenda, it draws attention away from the need to build global development partnerships around the still largely unmet commitments of Millennium Development Goal 8.

Indeed, as this chapter has discussed, the Paris Declaration does not in itself constitute a partnership. Rather, it brings together national and international actors in the aid cycle under extremely asymmetrical conditions and does not spell out corresponding rights and obligations. As a framework for bilateral relations between donors and creditors, on the one hand, and individual aid-recipient countries, on the other, the Paris Declaration fails to provide institutional mechanisms to address the asymmetries in power. Institutional ownership of the Paris Declaration process rests with the Development Assistance Committee of the Organisation for Economic Co-operation and Development and the World Bank, where donors and creditors have exclusive or majority control, with developing countries having little or no voice or vote.

The practice of the Paris Declaration and the detailed definition of its principles given by the World Bank and OECD can limit the policy space of developing countries instead of removing obstacles to development. This has important ramifications for the right to development: while some Paris Declaration principles (national ownership and mutual accountability) can be supportive of the right to development, the practical implementation of the Paris Declaration and the attendant objectives, as spelled out in its indicators, can in practice work against the right to development and erode national democratic processes. The end result is "donorship and not national ownership". In particular, by rein-

[41] See Alex Ergo and Ingo Puhl, "TrAid+ channeling development asssistance to results", Center for Global Development, Working Paper 247 (Washington, D.C., March 2011).
[42] BetterAid, "CSOs on the road to Busan", p. 4.
[43] The meeting was held, as they usually are in this process, under Chatham House rules: participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s) may be revealed.
[44] OECD/DAC, "Development aid reaches an historic high in 2010", available at www.oecd.org/document/35/0,3746,en_2649_34447_47515235_1_1_1_1,00.html.
[45] To consider migrant and peacekeeping operation expenses as ODA, whereas these expenses had not previously been counted as such.

forcing the policy conditionalities attached to ODA and unifying the OECD donors in a single front, the Paris Declaration reduces the options of developing countries and imposes on them a "one size fits all" model. The administrative costs of ODA disbursements might be lowered, but the "development effectiveness" of the assistance is diminished. To counterbalance such developments, the Development Cooperation Forum is important: this emerging site of collaboration has the legitimacy and moral authority to bring together key North-South actors, as well as to support crucial South-South cooperation in a genuine dialogue not mediated by power asymmetries. It is such dialogue and such collaboration that are required to make the right to development a reality in the coming years.

Mainstreaming the right to development into the World Trade Organization

*Robert Howse**

I. Introduction: general considerations on human rights and the World Trade Organization

Since the end of the cold war, two main visions have underpinned the normative evolution of international order: the vision of human rights and humanity and that of economic globalization.[1] Historically, the legal, institutional and policy cultures of international human rights law and of international trade law operated almost entirely in isolation from one another. At the same time, as a matter of international law, the international human rights system and the World Trade Organization (WTO) regime are both based primarily on treaty obligations. A large majority of States are signatories to both the core WTO treaties (the so-called Covered Agreements) and the main United Nations human rights instruments. Although some human rights norms are arguably *jus cogens* and therefore of higher legal status than ordinary treaty commitments, in general, treaty-based WTO commitments and human rights treaty obligations have equal normative force in international law. As a report of the International Law Commission on fragmentation of international law notes: "In international law, there is a strong presumption against normative conflict" (A/CN.4/L.682 and Corr.1, para. 37). The implication is that one must explore how the WTO regime and the human rights regime can operate and evolve together, complementing each other in positive ways. Since the Third WTO Ministerial Conference, held now more than a decade ago in Seattle, Washington, United States, in 1999, there has been a concerted effort in the international human rights community, by activists, academics and the Office of the United Nations High Commissioner for Human Rights (OHCHR), to understand how trade affects the realization of human rights and what implications human rights obligations have for the interpretation and negotiation of trade agreements. The current Director-General of WTO, Pascal Lamy, has written about globalization with a human face and his conception of the economic sphere, including the international economic sphere, is deeply rooted in the notion of humanity. More recently, a joint study by the International Labour Organization (ILO) and the WTO Secretariat explicitly refers to freedom of association and the right to collective bargaining as "universally recognized human rights", urges that they be respected as such and not just for instrumental reasons of social peace, and refutes with empirical evidence the notion that respect for such rights must come at a cost to economic development and competitiveness.[2]

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[1] Robert Howse and Ruti Teitel, *Beyond the Divide: the Covenant on Economic, Social and Cultural Rights and the World Trade Organization*, Dialogue on Civilization, Occasional Paper No. 30 (Geneva, Friedrich-Ebert-Stiftung, 2007). The introductory material that follows draws extensively from this study.

[2] International Labour Office and Secretariat of the World Trade Organization, *Trade and Employment: Challenges for Policy Research* (Geneva, 2007), pp. 66 ff.

II. Mainstreaming the right to development into the practice of the World Trade Organization

In the light of the general context informing the relationship between the WTO system and the international human rights regime, we now examine how the right could be mainstreamed into legal and institutional practice at WTO. We look at a select set of current practices and structures in WTO and suggest how those might be re-examined in the light of the right to development.

A. The assessment of trade rules and policies

States, whether acting domestically and individually, or collectively through international institutions, cannot assure that development-related trade policies are consistent with the interconnected realization of human rights unless the effects of those policies on human rights can be assessed and understood. Ex post economic assessment of the application of WTO rules and policies in WTO member States is a formalized process, the Trade Policy Review Mechanism (TPRM). The function of TPRM is to assess the "impact of a Member's trade policies and practices on the multilateral trading system".[3] From the perspective of the right to development, however, the analytical inquiry and method entailed in this review, and the procedures followed, may not be appropriate for gaining insight into the human rights impact of trade rules and policies.

The treaty text that sets out the requirements of TPRM emphasizes the "inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system".[4] While transparency is not linked explicitly to the fulfilment of human rights obligations, the phrase "inherent value" suggests some understanding that transparency has a non-instrumental foundation.

In the first paragraph of its preamble, the WTO Agreement defines the goal of the multilateral trading system in terms of the principle that "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". The references to "raising standards of living" and "sustainable development", as well as "full employment" suggest that the mandate of TPRM, while not explicitly stated in human rights terms, would include analyses of the effect of trade rules and policies on human capacities, the protection and enhancement of which is a fundamental dimension of human rights as related to development. Similarly, the focus on transparency would apparently suggest the participation of a wide range of domestic and international actors in the process of assessing the effects of trade policies under TPRM. Neither turns out to be the case.

Despite the reference to the "inherent value" of transparency in the legal instrument establishing TPRM, the entire process of trade policy review is typically dominated by the WTO Secretariat and the particular Government whose policies are under review. There are no explicit avenues for civil society participation and no accountability to citizens for the judgements made in the reports on the basis of which the trade policy review operates. If the right to development were to be mainstreamed into the practice of TPRM, that would obviously need to change given the emphasis on individuals and social groups as the makers, not simply the takers, of "development". Barbara Evers has argued that such a change in the way that TPRM operates, in particular the institution of a transparent, inclusive, participatory process of domestic trade policy review as a basis for review at WTO, would assist in bringing a "pro-poor" perspective into TPRM.[5]

B. Technical assistance

The notion that technical assistance is to be provided to assist developing countries in implementing and taking advantage of the benefits conferred by WTO rights and obligations is contained in the WTO treaties themselves, and has been reaffirmed in the Doha Declaration. Such technical assistance has come from WTO itself, funded by various donors, and from other organizations, such as the Organisation for Economic Co-operation and Development (OECD) and the World Bank

[3] WTO, Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), annex 3, Trade Policy Review Mechanism, para. A, available at www.wto.org/english/res_e/booksp_e/analytic_index_e/tprm_01_e.htm#P1.

[4] Ibid., para. B.

[5] Barbara Evers, "Linking trade and poverty: reinventing the Trade Policy Review Mechanism", Development Studies Programme, University of Manchester (June 2003).

(including within the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries). The issue is whether technical assistance as it is currently defined and implemented in WTO reflects the normative concerns that underlie the right to development. One emphasis has been on training Government officials in WTO law, including advice on how to implement such law in domestic regulations. Knowledge of the law is of course important to attaining the goal, entailed in the right to development, of equal participation in the institutions and processes that affect the realization of development in a manner consistent with the fulfilment of all internationally recognized human rights. A number of questions deserve to be asked, however, about the nature of the technical assistance in question.

First of all, how widely is knowledge of the law being disseminated? Is technical assistance being targeted at trade officials, or is it being used to provide individuals and social groups with knowledge of WTO rules and policies and how those affect their interests? Secondly, is the emphasis on "training" officials to implement the "law" in its maximally trade-liberalizing version or interpretation, or on interpretations and legal strategies that would maximize the flexibilities and limit the dimensions of trade-liberalizing obligations, where necessary, to insure that domestic regulators have sufficient scope to address development needs (services, Trade-Related Aspects of Intellectual Property Rights (TRIPS), etc.)? Who are the experts communicating the meaning of the law? Do they represent diverse perspectives, rather than belonging to an epistemic community that still tends to regard trade liberalization (rather than improving standards of living for all and achieving sustainable development) as the telos, or end, in the light of which the law is to be understood? Thirdly, from the perspective of the right to development, should technical assistance not entail advice on the kinds of governmental policies as well as policies of other countries and international organizations (such as debt forgiveness) that would allow the maximization of opportunities afforded by WTO rules and policies across individuals and social groups?

The WTO Biennial Technical Assistance and Training Plan 2010-2011 reveals that while some technical assistance activities, such as intensive trade policy and law courses held in Geneva, seem oriented almost exclusively towards Government officials, others, including some regional seminars, are explicitly geared to a broader audience and parliamentarians. There is also a conscious effort to emphasize programmes that lead to permanent empowerment, for example, by developing local academic expertise and creating local reference centres on WTO. According to the Plan:

> Outreach activities for Parliamentarians and civil society are part of an overall WTO strategy to help legislators and civil society representatives better understand the provisions of the Doha Ministerial Declaration and follow the Doha Development Agenda negotiations. They are also a response to challenges in the Declaration for greater transparency in the WTO's operations and improved dialogue with the public. Throughout the regional workshops, parliamentarians and civil society representatives are encouraged to consider their respective roles in multilateral processes and ways to increase parliamentary and public awareness of the international trade agenda.[6]

At the same time, there is language in the Plan that raises concerns about the inclusiveness of the constituencies at which technical assistance is aimed. Trade unions, non-governmental organizations (NGOs) and the non-profit sector are rarely mentioned explicitly, in contrast to business and academia.

Clearly, in Geneva, much of the training is done by officials in the Secretariat, who are assumed to "know" what the law means. Outside consultants and professors are also used in specialized dispute settlement courses, and in these and other courses experts from other international organizations may be involved. However, when training is delivered in the various regions, local perspectives and expertise are more adequately incorporated into the programmes. It is far from clear that much diversity of perspective on the law is ensured in this way. In the case of technical assistance to least developed countries under the Enhanced Integrated Framework, there is participation by the other agencies involved in this mechanism, such as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Development Programme (UNDP). These agencies have already gone some distance in recognizing the importance of human rights in development to trade policy.

A logical extension would be the inclusion of United Nations human rights institutions in the delivery of technical assistance, as well as perhaps partnering with human rights NGOs in the context of WTO training programmes for developing countries.

[6] WTO document WT/COMTD/W/170/Rev.1 (21 October 2009), para. 135.

C. Reform of the architecture and governance of the World Trade Organization

Within the United Nations human rights institutions, a significant beginning has been made in understanding the impact of specific WTO laws and policies (TRIPS and services, most notably), actual or proposed, on the realization of particular rights. Understanding the right to health as a basic human right undoubtedly played some role in addressing the question of access to essential medicines under TRIPS in the Doha Declaration on that subject, and the subsequent implementing instrument.[7]

Mainstreaming the right to development, with its focus on values such as inclusiveness, participation and interconnectedness of rights in development, requires considerable attention to what might be called the "meta-structures" of WTO, some formal and explicitly stated in WTO rules and some informal but nevertheless with revealed normative influence.[8] These determine in some measure which issues get on the negotiating table, how they are negotiated and with what degree of inclusive participation, how legal rights and obligations are structured—especially in relation to exceptions, limitations and reservations—and how they are applied to particular countries. The Uruguay Round of trade negotiations brought into being WTO as a structure known as the "single undertaking". The main features of this structure, as exemplified by the WTO Agreement and the Covered Agreements under its umbrella, are as follows:

(a) All WTO members must participate in (almost all) WTO treaty regimes (the single undertaking concept of the Uruguay Round). Thus, a WTO member that would gain from participating in liberalization of trade in goods under the General Agreement on Tariffs and Trade (GATT) must in order to do so also adhere to the obligations of, for instance, the TRIPS Agreement or the Agreement on Sanitary and Phytosanitary Measures, even if that member believes that adhering to those agreements would be disadvantageous to its development;

(b) As a default, all WTO rules apply to all members; again, as a general rule, no reservations are permitted (WTO Agreement, art. XVI, para. 5). Some flexibilities do exist in the unique structure of the General Agreement on Trade in Services (GATS) for individual WTO members to choose what policies they wish to subject to discipline in particular economic sectors, but subject to general rules on technical standards and domestic regulation;

(c) Individual WTO members may not reverse or adjust their obligations except, in certain instances, through entering into negotiations with other members and offering compensation, or seeking a waiver that would depend on acceptance by most or all of the WTO membership. While the GATT safeguards regime allows for temporary adjustment of certain GATT commitments, GATS has no equivalent safeguards (despite a promise to negotiate on them and conclude an agreement by 1998), nor does TRIPS, for instance;

(d) Though not formalized, an implicit structural norm is that, despite significant doubts that have been raised about the effects of, for example, TRIPS and GATS on development, the substantive rights and obligations in the Agreements, as a single undertaking, are not to be revisited with a view to explicit amendment, and certainly not between "rounds" of negotiations, where such changes might be linked to demands in other areas. Thus, the access to medicines issue was handled by the creation of two new instruments that purport to operate within the four corners of the TRIPS Agreement as it now stands or, at most, to provisionally waive, as opposed to amend, problematic provisions of TRIPS. Of course, this may reflect as well the (arguably correct) legal judgement that the various exceptions and balancing provisions in the existing TRIPS Agreement allow the needed flexibility, if rightly interpreted;

(e) There is a practice of WTO rules being adopted by consensus. There has also been a practice of marginalizing smaller countries in negotiations on particular

[7] Declaration on the TRIPS Agreement and Public Health of 14 November 2001 (WTO document WT/MIN(01)/DEC/2) and the Decision of the General Council of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public-health (document WT/L/540 and Corr.1).

[8] John Jackson captures the spectrum of formal to informal by grouping many of these under the label "mantras". See J. H. Jackson, "The WTO 'constitution' and proposed reforms: seven 'mantras' revisited", *Journal of International Economic Law*, vol. 4, Issue 1 (March 2001).

issues; they may have little or no influence on the shape of the rules, and be faced with a virtual fait accompli. These "green room" tactics and the attempt by developing countries to remove them from the set of acceptable, legitimate WTO meta-structures had an important impact on the "failure" of the Third WTO Ministerial Conference, held in Seattle in 1999, and later on at the Fifth Ministerial in Cancun, Mexico, in 2003;

(f) From a right to development perspective, there is a significant issue of the costs to developing countries of implementing WTO obligations, which often entail the deployment of significant judicial and administrative resources, in short supply in many developing countries. Directing these resources to creating mechanisms for anti-dumping adjudication or intellectual property enforcement may result in fewer opportunities for strengthening the rule of law in the area of human rights. Kevin Davis and Benedict Kingsbury have noted:

> As the volume and burden of non-pecuniary obligations imposed on states by global governance institutions continues to grow (anti-terrorism, anti-money laundering, anti-trafficking, investment protection, environmental and human rights monitoring and reporting…), "obligation overload" is becoming an increasingly serious concern. Fragile and failed states, in particular, may be simply unable to meet all of their obligations. Yet international institutions, foreign states and courts may insist on performance. There is no system for prioritizing obligations and managing overloads.[9]

As new WTO obligations are negotiated and the implementation of existing obligations reviewed, a right to development perspective needs to be applied to addressing the risk of "obligation overload".

Understood in terms of the right to development, many of the meta-structures leave much to be desired. They narrow the possibilities for individual WTO members to shape and reshape their trade rights and obligations in order to pursue development through and within the fulfilment of all internationally recognized human rights. They also may limit the kind of voice that smaller or poorer countries have in collectively shaping or reshaping the rules. As a general matter, these meta-structures are the product of the mindset that trade liberalization is an end in itself, not a means, and that WTO rules and structures should favour linear progress in that direction, even while tolerating some straggling by countries that are in any case on the margins of the global economy.

It is noteworthy that the Doha Development Agenda as reflected in the Doha Declaration and the accompanying instrument on implementation do not include a review of these meta-structures from a development perspective. To the extent that "flexibility" is included as being of importance to development, the focus is on specific deviations from the defaults, not questioning the default structures themselves. For example, the Doha Declaration does contemplate that an agreement on investment, if it were to be negotiated, should permit participation by individual countries depending on their needs and capacities. The main exception is special and differential treatment for developing countries, where the Doha Declaration does contemplate a comprehensive review of all existing provisions on special and differential treatment and the possibility of strengthening their effectiveness. However, the Director-General of WTO assigned the consideration of these cross-cutting meta-structural, or architectural, issues to a little-known group of "wise men" with no mandate to consult with individuals and social groups. This treatment of the meta-structural, or architectural, issues—which, as noted, may have a major impact on the right to development—is itself at variance with the right to development, which entails the notion of broad participation in the making of policies that affect development. The likely failure of the Doha Round will provide an opportunity for more fundamental and broadly based reconsideration of some of the architectural features of WTO. Susan Esserman and I have argued for a more flexible and varied architecture, which can better take into account the specific and diverse needs of individual WTO members.[10]

There is a further set of issues concerning the governance and accountability of WTO as an organization that bears on the right to development. The fact that WTO is based on consensus decision-making by delegates of member States has been invoked to suggest that there is no need for further accountability of the activities of WTO as an institution. This ignores the considerable role of its Secretariat as well as of

[9] Kevin Davis and Benedict Kingsbury, "Obligation overload: adjusting the obligations of fragile or failing States", paper prepared for the Hauser Globalization Colloquium, Fall 2010, New York University School of Law. Available from www.iilj.org.

[10] Susan Esserman and Robert Howse, "Rethinking the WTO" (4 September 2008), available at: www.forbes.com/2008/09/04/wto-global-economy-oped-cx_se_rh_0904trade.html.

particular delegates assigned, for example, as chairs of negotiating or other committees in WTO to set agendas, "spin" the way that issues are discussed, make judgements that have normative impact about the meaning of WTO rules and even (for example, in the case of Secretariat reports with respect to TPRM or technical assistance) to judge and advise the policymakers of individual WTO members. As recent disputes concerning the interpretation of commitments with respect to trade in services illustrate, Secretariat documents may influence the interpretation of legal rights and obligations by WTO tribunals.

The right to development implies accountability to individuals concerning how these activities are conducted and by whom, inasmuch as they affect the realization of human rights in and through development. Accountability with respect to the Secretariat means, first of all, a public process defining, among other things:

(a) The diversity of perspectives and knowledge areas that is appropriate for the professional staff of WTO;

(b) The set of conceptual tools that ought to be used by the professional staff in their analysis of development-related trade issues (arguably including human rights instruments), especially in trade policy review functions and technical assistance functions; and

(c) Rules and guidelines to ensure that staff in particular divisions of WTO do not become consciously or unconsciously beholden to particular interests or lobbies (service industries or intellectual property holders, for instance) and, collectively, are oriented towards the holistic, development-oriented thinking about policy and law that is required by the right to development.

With respect to the procedures of accountability, consideration should be given to the formation of a citizen's advisory board, comparable in some ways to the board of directors in a private corporation, which would evaluate the performance of the Secretariat and the leadership of WTO in the light of the kinds of rules and guidelines discussed above, on the basis of consultation with Governments, civil society and other intergovernmental organizations. The inclusive and participatory dimensions of the right to development also suggest the importance of facilitating the involvement of the broadest range of social actors in the deliberations and negotiations of WTO, as well as deliberations within individual polities concerning the choice of negotiating positions and decisions as to whether or not to consent to given proposed rules. Here, the trend at WTO is generally a positive one, despite the continued need to change the mindset that the organization is a Government "club".[11] There is now a default rule that negotiating proposals are public; they have generally been made accessible, so that they can be subjected to broad citizen scrutiny before being cast in bronze in packages of rules that must be either accepted or rejected en masse. An enormous amount of WTO documentation in areas most relevant to development and human rights is unclassified and accessible electronically to the general public. In the area of trade in services, for example, public dissemination of the basic proposals allowed civil society and international institutions to provide useful input and observations, including on the implications of various proposed disciplines and approaches for aspects of development. Civil society was able to play a functional role at the Fifth WTO Ministerial Meeting in Cancun, despite limited observer rights, and accreditation of civil society groups has generally respected the notion of inclusiveness. Moreover, some WTO members have included representatives of broad social interests in their Government delegations, although they do not typically participate in all negotiating activities.

At the same time, there are instances where inclusive participation has been rejected or undermined. To use the example of services again, while the general negotiating proposals have been published, members' offers for sectoral commitments—which contain the proposed specific disciplines on Government policies—have remained confidential in many instances, limiting the ability to provoke broad public debate and scrutiny of the implications, including human rights implications, of the proposed undertakings, much to the consternation of some civil society groups; even polities apparently committed as a constitutional matter to democratic openness, such as the European Union, have resisted publicity with respect to what is being proposed in regard to specific commitments.

[11] See Robert Keohane and Joseph S. Nye Jr., "The club model of multilateral cooperation and problems of democratic legitimacy", in *Efficiency, Equity, and Legitimacy: the Multilateral Trading System at the Millennium*, Robert B. Porter and others, eds.(Washington, D.C., Brookings Institution Press, 2001).

With respect to facilitating inclusive domestic deliberation on proposed trade rules, this is partly a question of ensuring that technical assistance is targeted broadly enough (see above) and partly one of strengthening domestic political processes as they relate to trade policy. WTO has made a number of efforts to engage with parliamentarians in member countries; such efforts at engagement with domestic political structures must, from the perspective of inclusive participation, also take into account the limits of official structures in the representation of marginalized or disadvantaged groups and therefore extend further, into civil society itself. Sylvia Ostry has concluded that "WTO is an outlier in its rejection of the conception of participatory decision-making" because of its failure to reach out to civil society in this context.[12]

III. The right to development in the interpretation of World Trade Organization law

The appropriateness of the WTO dispute settlement organs—the Panels (tribunals of first instance) and the Appellate Body—utilizing non-WTO international legal material is now well established in practice. In the "*Shrimp/Turtle*" dispute, for instance, the Appellate Body had recourse to various international instruments concerning biodiversity and sustainable development in order to determine the meaning of the expression "exhaustible natural resources".[13] Mainstreaming the right to development into WTO dispute settlement therefore entails, in general, understanding where the right to development might relevantly affect the interpretation and application of the WTO Agreements. In this section, I confine myself to a case study of one dispute and ask how the legal interpretation of the Appellate Body would have been, or could have been, affected had the right to development been considered.

In the *India–Balance of Payments* case, the United States challenged India's decision to maintain import restrictions on balance of payments grounds.[14] The relevant exceptions provision in GATT allowed such restrictions but required that they be removed as soon as the crisis conditions to which they were addressed had passed, unless the removal was likely to provoke the return of those conditions. However, a further proviso was that, in any case, a developing country should not be required to remove balance of payments import restrictions if doing so could require a change in that country's development policies. India's reliance on this provision required the Appellate Body to determine what a "development policy" is and whether, were India to remove its balance of payments restrictions, it would be required to change those policies. What the Appellate Body did was to rely entirely on a judgement of the International Monetary Fund (IMF) that India did not need to change its development policies because it could address the consequences of removing its balance of payments-based import restrictions through "macroeconomic" policies.

I would argue that had the Appellate Body considered the right to development in connection with this dispute, it would have analysed the legal issue quite differently. First of all, the Appellate Body would not have accepted that one institution, and particularly the technocrats in that institution, can have "ownership" of the meaning of a "development policy". Secondly, the Appellate Body could not have embraced the stark contrast between "development" policy and "macroeconomic" policy. This implies that development policy is restricted to a series of techniques that "experts" view as formulas for "development", rather than including all those policies that people—in this case, at a minimum, India and Indians—see as affecting the fulfilment of the right to development. Under a right to development approach, it would be obvious that macroeconomic policies, which affect revenues available for government programmes to fulfil social and economic rights, as well as the cost of imported goods and services needed to fulfil such rights and the reserves of currency with which to pay for them, are "development policies". Thirdly, and relatedly, on the question of whether India would be required to change its development policy in order to be able to remove the balance of payments restrictions without a return to the crisis conditions that had led to their imposition, the Appellate Body would have held that the Panel should have considered, and indeed solicited, the views of a broader range of institutions and social actors—at a minimum, the international organ-

[12] Sylvia Ostry, "Civil society—consultation in negotiations and implementation of trade liberalization and integrated agreements: an overview of the issues", paper presented at the seminar "Good Practices in Social Inclusion: a Dialogue between Europe and the Caribbean and Latin America", Inter-American Development Bank, Milan, Italy (March 2003), p. 4. The author is grateful to Dr. Ostry for discussions of these issues on various occasions.

[13] *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (AB-1998-4), report of the Appellate Body, WTO document WT/DS58/AB/R (12 October 1998). See Robert Howse, "The Appellate Body rulings in the *Shrimp/Turtle* case: a new legal baseline for the trade and environment debate", *Columbia Journal of Environmental Law*, vol. 27 (2002), pp. 491-521.

[14] *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (AB-1999-3), report of the Appellate Body, WTO document WT/DS90/AB/R (23 August 1999, paras. 125-130.

izations with express mandates on development, such as UNCTAD and UNDP. Finally, the Appellate Body might have considered that the provision in question was largely a matter of self-declaration; that it empowered India, and above all Indians, to chart their own course in development policy, and therefore was not intended to invite the dispute settlement organs to examine *de novo* India's judgement that if it removed the restrictions, it would have to change its development policy.

In fairness to the Appellate Body, the right to development was not apparently invoked before the dispute settlement organs by lawyers representing India in the case, or by any third party in the dispute. This suggests that the major challenge with respect to mainstreaming the right to development into WTO dispute settlement may be in sensitizing Governments and civil society (which may submit amicus curiae briefs in WTO proceedings, both at the first instance and the appellate level) about the possibilities of invoking the right to development in dispute settlement, in relation of course to other human rights. In the short term, at least, OHCHR might consider submitting communications itself to the dispute settlement organs on the right to development, where appropriate to the dispute in question.[15]

Subsequently, the Appellate Body, in the *EC – Tariff Preferences* case,[16] deployed the concept of development in ruling on the sensitive issue of whether developed country WTO members could link the level of preferences under the Generalized System of Preferences (GSP) regime they provide to specific developing countries to policy conditions such as those related to drug enforcement, labour rights and environmental performance. Relying on a provision of the Enabling Clause, the WTO legal instrument that sets out the basic guidelines for GSP preferences in the WTO system, the Appellate Body held that such conditionality was permissible where "taken with a view to *improving* the development, financial or trade situation of a beneficiary country, based on the particular need at issue" (para. 164). The Appellate Body held that a "development, financial [or] trade need" would have to be determined by an "*objective* standard" and that "[b]road-based recognition of a particular need, set out in the [Marrakesh Agreement] or in multilateral instruments adopted by international organizations, could serve as such a standard" (para. 163). The reference to "multilateral instruments adopted by international organizations" clearly includes the main United Nations human rights instruments. The right to development may well offer a framework for assessing, in an objective and also holistic manner, whether human rights conditionalities in developed countries' preferences schemes make a positive contribution to the development needs of the countries at which they are targeted. More generally, the notion of referring to "multilateral instruments adopted by international organizations" to understand what is entailed in "development" and what are "development needs" indicates a broader approach to interpreting the concept of "development" in WTO law than that taken earlier by the Appellate Body in the *India–Balance of Payments* case.

IV. Conclusions

Development is supposed to be the big guiding idea of the Doha Round of WTO negotiations. But the relationship of development to trade liberalization and other policies affected by it is highly contested. Thus, "development" has tended to be the backdrop to a sharpening of divisions rather than playing the expected normatively unifying role. The concept of the right to development, linking development to the entire human rights framework, with its strong global legitimacy, evokes the possibility of the reorientation of the WTO project such that it may once again regain a kind of normative unity, which it possessed around the conclusion of the Uruguay Round through the neo-liberal ideology of globalization, development and growth that prevailed at the time, but which is certainly not a basis for consensus, but rather the opposite, today.

Some might ask why such a normative vision or normative unity is even needed for successful trade negotiations. Isn't it enough to have reciprocity, the possibility of mutual gains? The answer to that question belongs to another paper, but in part it has to do with the need to motivate adequately a community of leaders that can produce meaningful agendas, suggest principled compromises and trade-offs, and inspire politicians and opinion-makers to put their reputation behind a complex deal. In a word, the problem is one of reforming the epistemic community. As anyone could see at Cancun (and some could already see at Seattle), the old

[15] In the *Sardines* case (*European Communities – Trade Description of Sardines*, DS231), the Appellate Body held that it had the discretion to consider amicus submissions from official as well as private, non-governmental entities. Communications from other international organizations (such as the World Intellectual Property Organization (WIPO)) have been considered and used in dispute settlement.

[16] *European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries* (AB-2004-1), report of the Appellate Body, WTO document WT/DS246/AB/R (7 April 2004).

epistemic community, based on the technocracy of neo-liberal economics, has largely broken down as a viable force for coherence and leadership of the multilateral trading system into the future (even if its "resistances"—some of which are discussed above—still prove a formidable obstacle to the reformation of an epistemic community true to the current situation and its challenges). A human rights sensibility and understanding, especially in relation to development, is likely to be, and is already becoming, a constituent element in the ethos of this new or reformed epistemic community.

The Cotonou Agreement and economic partnership agreements

*James Thuo Gathii**

I. Introduction

This chapter examines the right to development in the context of the ongoing negotiations to finalize economic partnership agreements (EPAs) that African, Caribbean and Pacific (ACP) countries are signing with the European Union. EPAs are being negotiated within the framework of the Cotonou Agreement.[1] As an essential part of the Cotonou Agreement, EPAs have the following development objectives: poverty reduction, promotion of sustainable development and facilitation of the integration of ACP countries into the global economy through trade.[2]

The European Union and ACP countries agreed in 2000 to negotiate EPAs pursuant to article 36 (1) of the Cotonou Agreement with a view to designing trading arrangements that would be compatible with World Trade Organization (WTO) rules by progressively removing "barriers to trade between them and enhancing cooperation in all areas relevant to trade". The EPA negotiations, in essence, have sought to end non-reciprocal trade preferences that ACP countries enjoy from the European Union. These preferences have ended since the WTO waiver of the most-favoured-nation norm that allowed their existence expired at the end of 2007, in accordance with article 37 (1) of the original text of the Cotonou Agreement. EPA negotiations have not, however, been concluded in many of the ACP regions.[3]

The Cotonou Agreement does not specifically incorporate the right to development in its substantive, as opposed to its hortatory, positions. However, the Agreement makes human rights an essential element and one of the five pillars of the European Union-ACP partnership, and it incorporates most of the rights contained in the Declaration on the Right to Development.[4] While human rights are not explicitly made a part of the other four pillars of the partnership, certain provisions of the Agreement that positively impact human rights could, arguably, be read as cross-cutting all five partnership pillars. These provisions do not provide an explicit basis for assessing the human rights impacts of commitments made under the five pillars of the Cotonou Partnership. That means that new European Union-ACP commitments under the EPAs are not bound by the human rights mandate within the Cotonou Agreement. This is especially true since EPAs are being negotiated as stand-alone agreements

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[1] Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000. The first revision to the Agreement, negotiated in 2004/2005, entered into force in 2008. The second revision, negotiated in 2010, became applicable on a provisional basis in November 2010. The references in the present chapter are to the text as modified in the agreed consolidated text (March 2010) of the second revision of the Agreement, available at http://ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf.

[2] See at the European Commission website http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/africa-caribbean-pacific.

[3] Articles 35 (2) and 37 (3) of the Cotonou Agreement provide a basis for conducting EPA negotiations within the regions rather than bilaterally as part of the Agreement's goal of strengthening regionalism as a strategy of integrating ACP countries better within the international trading system.

[4] The five pillars being: a wide-ranging political dimension; participatory approaches; an increased focus on poverty reduction; a new framework for economic and trade cooperation; as well as a reform of financial cooperation.

that, unlike the four other partnership pillars, will be governed by a separate treaty regime in each of the seven ACP regions.[5]

From a right to development perspective, EPAs are being negotiated under conditions that undermine the full participation of ACP States, preventing them from determining the development objectives set for them in the EPAs, as I explore in section VI of this chapter. For ACP countries, these agreements will result in huge losses in revenue and restricted access to the European Union market. This makes it highly likely that the social and economic human rights of millions will be adversely affected. Other concerns include expanding negotiations into new areas like competition and Government procurement that will impose a heavy cost burden on ACP countries that far outweighs the potential dynamic benefits that the new commitments will create.

EPA negotiations on trade need to take into account the special needs of developing and least developed countries, particularly the need for preferential treatment in trade relations which are increasingly becoming the dominant pillar of European Union-ACP relations. Human rights ought to take centre stage in EPA negotiations and in the European Union-ACP partnership. This is consistent with article 177 (2) of the EC Treaty,[6] which provides that European Union development cooperation should contribute to respect for human rights and fundamental freedoms. Similarly, article 11 (1) of the Treaty of the European Union provides that one of the objectives of the European Union's foreign and security policy is "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms".

In section II of the chapter, I will examine the meaning and legal status of the right to development. Section III examines the status and human rights implications of the various EPA negotiations. Section IV deals with the five pillars of the Cotonou Agreement with special reference to the right to development and section V reviews the main obstacles to the incorporation of human rights concerns within the Cotonou Partnership Agreement. Section VI discusses the impact of the EPA negotiations on human rights within ACP countries from a right to development perspective and section VII examines the potential areas of congruence and synergy between the Cotonou Partnership Agreement, on the one hand, and the right to development, on the other. Before concluding, section VIII proposes recommendations to factor essential elements of the right to development into the Cotonou Partnership Agreement's operational framework.

II. Status of the right to development

The Declaration on the Right to Development holds the human person to be "the central subject of development" and an "active participant and beneficiary of the right to development", both "individually and collectively". It makes the right to development an "inalienable human right" through which all persons can come to enjoy "all human rights and fundamental freedoms" as well as "the right of peoples to self-determination", including "the exercise of their inalienable right to full sovereignty over all their natural wealth and resources". The Declaration also provides that the promotion, implementation and protection of the right to development shall not justify "the denial of other human rights and fundamental freedoms".

Although the legal status of the right to development continues to be debated among States Members of the United Nations as well as in academic circles, its importance continues to be reflected in its reaffirmation and reiteration in subsequent General Assembly resolutions, in the African Charter on Human and Peoples' Rights as well as in the United Nations Millennium Declaration.[7] As I note below, the European Union has reiterated its "attachment" to the right to development.[8] The continued relevance of the right to development is also evidenced in the appointment and work of the high-level task force on the implementation of the right to development, and before that in the appointment of an independent expert (who produced eight reports) and an open-ended working group (which held its thirteenth session in 2012) by the Commission on Human Rights. The Human Rights Council has continued to give attention to the recognition of the right to development. In international law, the reiteration of a right is recognized as additional evidence of its existence.[9] Notwithstanding the

[5] These regions are: West Africa; Central Africa; East African Community; Eastern and Southern Africa; South African Development Community; Pacific Countries; and Caribbean countries. Of these groups, only the Caribbean one has a finalized EPA. There have been splinters within many of these groups, as I allude to further below.

[6] Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community (25 March 1957), *Official Journal of the European Union*, C 321 (29 December 2006) (hereafter "EC Treaty").

[7] General Assembly resolution 55/2.

[8] Statement by the European Union to the Commission on Human Rights at its fifty-eighth session (16 April 2002).

[9] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1996*, p. 14, on how reiteration and elucidation of a norm can affirm its existence in a different context (para. 188).

debate about the legal validity of the right to development, the desire to move vigorously towards the realization of its underlying objectives and principles has remained.[10] Below, the attributes of the right to development that have continued to be reiterated or affirmed as rights or principles are briefly outlined.

The Rome Declaration on World Food Security, adopted at the World Food Summit in 1996, recognized in its opening paragraph "the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free of hunger". The work of the Food and Agriculture Organization of the United Nations (FAO) in this respect mirrors article 8 (1) of the Declaration on the Right to Development which obliges States to undertake "all necessary measures" to "ensure … equality of opportunity for all in their access to … food".[11]

The United Nations Millennium Declaration explicitly acknowledges a commitment to "making the right to development a reality for everyone and to freeing the entire human race from want" (para. 11).[12] The adoption of the Millennium Development Goals, which include the elimination of poverty, disease and illiteracy and the elimination of discrimination against women and environmental degradation, demonstrates that States accept the responsibilities set out in the Declaration on the Right to Development to "have the primary responsibility for the creation of national and international conditions favourable for the realization of the right to development" (art. 3 (1)); to take steps "individually or collectively, to formulate international development policies with a view to facilitating the full realization of the right to development" (art. 4 (1))[13] as well as to formulate, adopt and implement "policy, legislative and other measures at the national and international levels" to realize the "progressive enhancement of the right to development" (art. 10).

The interdependence and indivisibility of economic, social and cultural rights and civil and political rights was reaffirmed at the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993. The indivisibility and interdependence of human rights is also recognized in the Declaration on the Right to Development. Notably, the Vienna Declaration and Programme of Action also recognizes "all aspects of the right to development" contained in the Declaration on the Right to Development, thereby indicating that the Declaration and the outcome of the 1993 Vienna conference are in harmony with regard to the attributes of the right to development.

It is also important to emphasize that while the Declaration on the right to development frames the various rights by using words like "should" and "shall", which suggest a heightened obligation to comply, very much like the International Covenant on Civil and Political Rights, the Declaration also recognizes that these rights ought to be realized progressively (art. 10).[14] Progressive achievement in the context of the International Covenant on Economic, Social and Cultural Rights has been interpreted as not indefinitely postponing the realization of the rights in the Covenant. This principle arguably also applies to the Declaration on the Right to Development. However, unlike the Covenant, the Declaration does not contain the stipulation that the rights enshrined in it should be realized within "available resources". As such, the development policies adopted by States and international financial institutions ought to be directly tied to the realization of the right to development.

III. Status of negotiations of economic partnership agreements

Since reciprocal trading relationships are the defining feature of European Union-ACP negotiations, it is important to be cognizant of the experience of developing countries the last time they assumed broad-ranging trade commitments. In 1994, at the conclusion of the Uruguay Round, several new trade treaties came into effect in the areas of intellectual property and trade in services, among others. Research since then shows that the cost of implementing these new treaties far outweighs the dynamic benefits the treaties would confer on developing countries.[15] Fur-

[10] Stephen P. Marks, "The human right to development: between rhetoric and reality", *Harvard Human Rights Journal*, vol. 17 (2004), pp. 139-140.

[11] There has been and continues to be a Special Rapporteur on the right to food of the Human Rights Council.

[12] See also the report of the Working Group on the Right to Development on its ninth session (A/HRC/9/17).

[13] See also article 5 (obliging States to "take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings" in certain circumstances); article 6 (enjoining States to promote all rights on the basis of equality); article 7 (obliging States to cooperate in the "establishment, maintenance and strengthening of international peace and security"); article 8 (obliging States to ensure rights to "basic resources, education, health services, food, housing, employment and the fair distribution of income.").

[14] See also Stephen P. Marks, "Obligations to implement the right to development: political, legal, and philosophical rationales", in *Development as a Legal Right: Legal, Political and Economic Dimensions*, Bård A. Andreassen and Stephen P. Marks, eds. (Intersentia, 2010), pp. 73-100.

[15] See J. Michael Finger and Philip Schuler, "Implementation of Uruguay Round commitments: the development challenge", World Bank Working Paper No. 2215 (October 1999), p. 1.

ther, this research shows that the trade-liberalization mandates contained in these new trade treaties were working at cross purposes with the World Bank's poverty reduction programmes.[16] Such an impact on new trade commitments made by ACP States would almost certainly adversely affect poverty elimination programmes and invariably make it harder for ACP countries to meet their social and economic rights obligations to their citizens.

The EPAs are being negotiated by ACP countries on a regional basis, although ratification will be on a bilateral level.[17] EPA negotiations have raised a number of issues including market access commitments in the EPAs; capacity-building and technical support in the EPAs; human rights implications; and the incorporation of what are referred to as the "Singapore issues". Each of these issues is examined briefly below.

A. Market access commitments

ACP countries have difficulty making market access commitments to the European Union because of differing interpretations of the obligation in article XXIV of the General Agreement on Tariffs and Trade (GATT) to liberalize "substantially all trade". [18] ACP States have largely construed this provision to allow them not to make concessions on market access with respect to areas of their economies such as agriculture where they would not be able to compete effectively with the more superior European Union agricultural sector. In their view, they are not ready to compete in these areas unless there is phased implementation of the commitments. The basis for the accommodation that the ACP countries are seeking is the commitment in article 37 (4) of the Cotonou Agreement, which obliges the European Union to "aim at improving current market access for the ACP countries". The European Union has shown little inclination to give ACP countries improved access. Lack of market access or reductions in levels of current market access for ACP countries after the expiry of the non-reciprocal arrangements is going to result in revenue losses and lost export opportunities in a manner that will adversely impact the social and economic rights of those affected.

The West African region, for example, has been unwilling to enter into an agreement that would be unfavourable to the region, even as it has sought access to the European Union market.[19] In fact, in many regions, the economic benefits of EPA are considered to be very one-sided, favouring the European Union much more than ACP countries.[20] Many of the commitments are regarded as unlikely to fulfil the commitment to development which is a central pillar of the Cotonou Agreement.[21] For example, market liberalization under EPA would result in lost income on import taxes, which is an important source of income for many West African countries. In addition, it is unlikely that African goods will be able to compete favourably in European markets as they will have to compete with brands that already command consumer familiarity, confidence and taste. This may further lower the value of EPA to West Africa.[22]

Negotiations in Central Africa have not fared better. The European Union has not been particularly flexible in relation to the concessions sought by Central African States, particularly with regard to the liberalization of trade in goods.[23] Throughout the negotiations, Central Africa offered to raise the percentage of market access liberalization from 60 per cent to 71 per cent over a 20-year period, but the European Union has refused to budge from its position of 80 per cent market access liberalization over a 15-year period.[24] In 2009, Cameroon signed an interim EPA with the 80 per cent provision in place.[25] None of the other Central African States has signed an interim EPA.[26]

B. Capacity-building, technical support and Singapore issues

None of the draft or interim EPAs contains binding commitments on capacity-building and technical support, yet "lack of capacity to conduct complex negotiations" within the tight time frame for conclud-

[16] Ibid.

[17] Cotonou Agreement, art. 35 (2) (providing that "[e]conomic and trade cooperation shall build on regional integration initiatives of ACP States. Cooperation in support of regional cooperation and integration … and economic and trade cooperation shall be mutually reinforcing".)

[18] Meeting of Legal Experts of the ACP on EPA Negotiations, ACP House, 9-11 October 2007: Final Report, document ACP/00/051/07 Rev.1, para. 4.2.

[19] See "We won't sign bogus trade pacts", *Daily Graphic* (Accra), 22 July 2009 (the Minister of Trade and Industry of Ghana, Hannah Tetteh, informed the press of the importance of having access to the European Union market in the horticultural sector, the cocoa processing sector and the canned fish and processed food products sector; and "EPA: a carrot for Africa", *Daily Trust* (Kaduna, Nigeria), 31 July 2009 (Nigeria, constituting two thirds of the continent's market, hesitated to sign a dubious and controversial EPA.

[20] Ibid.

[21] Ibid.

[22] Ibid.

[23] Platform of Central African Non-State Actors (PANEAC), "Why EPA negotiations have slowed: a Central African perspective", *Trade Negotiations Insights*, vol. 8, No. 2 (March 2009). Available from ictds/org. PANEAC is a non–governmental organization.

[24] Ibid.

[25] European Trade Commission, "Negotiations and agreements: the ACP regions".

[26] Editor's note: for the "state of play" of EPAs as at June 2012, see trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf.

ing EPA negotiations[27] has been a major barrier in various ACP regions.[28] The right of ACP States to participate effectively in the EPA negotiations will therefore be undermined by their lack of capacity to effectively participate. This is also inconsistent with the participation principle in formulating policies relating to development as anticipated in the Declaration on the Right to Development (see A/HRC/8/TF/CRP.6).

The European Union has sought to include a set of new-generation issues known as the Singapore issues. These new issues, which are currently not part of the multilateral treaty framework of WTO, are: Government procurement; competition law in WTO; trade facilitation, such as regulations ensuring that ports effectively and efficiently process imports and exports; and liberalizing foreign investment. Developing countries objected to expanding the trade agenda to these new areas before they had fully implemented their previous commitments following the end of the Uruguay Round in 1994. As such, in the context of the Doha Round of negotiations, developing countries managed to secure a commitment that these issues would only be negotiated if there was "explicit consensus" to proceed with negotiations on them. ACP States regard European Union pressure on these issues as an attempt to achieve a trade agenda in the context of EPAs that they cannot achieve in WTO.

While negotiations on competition policy are contemplated in article 45 of the Cotonou Agreement, negotiations on Government procurement are not expressly contemplated as a negotiating item in the Agreement. Yet, there are ongoing negotiations on Government procurement in various EPAs. These additional commitments, if included in EPAs, will cost ACP countries much more in the short term than any gains they may reap from these commitments. These additional costs will affect the ability of ACP States to provide budgetary support for sectors like education and health as well as other human rights obligations. Further, commitments in Government procurement will require ACP States to open the procurement process to competition from foreign providers of goods and services they seek to source, thereby undermining their ability to support local companies and, in effect, keep their revenue to support the domestic economy and local employment. The pressure exerted by the European Union in these negotiations arguably reduces the policy space of ACP over their economies (ibid.).

C. Stakeholder involvement

Stakeholders have not been effectively involved in EPA negotiations, although consultation of all stakeholders, including non-State actors, is anticipated in the Cotonou Agreement. In 2007, a suit, still ongoing, was filed by a small-scale farmers' association and a human rights organization seeking to prevent the Government of Kenya from signing on to the Eastern and Southern Africa (ESA) EPA primarily on the basis that negotiations on the ESA EPA had not widely consulted all stakeholders.[29] A stalemate on the ESA EPA continues to date. The European Union has already warned Kenya that it would impose import tariffs on a range of Kenyan exports to the European Union that currently enjoy preferential access unless it signs the EPA.[30] East Africa is seeking the European Union's agreement to a lower than 82.6 per cent liberalization of its trade with the East African Community (EAC) with a view to avoiding EAC merely selling primary commodities to the European Union which the European Union would then re-export to EAC once Europe had added value to them, because it "would be difficult, if not impossible under these conditions of competing with Europe ... to develop and economically diversify".[31]

Thus, EPAs would significantly limit the ability of developing countries to earn revenue from their exports by undermining a conventional way of accommodating countries through special and differential treatment, as well as through the built-in flexibilities of the multilateral trading system.[32] This is reflected by

[27] Jane Kelsey, "Going nowhere in a hurry? The Pacific's EPA negotiations with the European Union", *Victoria University of Wellington Law Review*, vol. 38, Issue 1 (2007), pp. 81, 84.

[28] See Meeting of ACP Legal Experts. Notably, capacity-building in trade negotiations is an objective specified in article 34 (3) of the Cotonou Agreement.

[29] M. Agutu, "Lobby files suit to stop EU pact", *Daily Nation* (Nairobi), 27 October 2007.

[30] Paul Wafula, "Kenya exports to EU face taxation in trade agreement stalemate", *Business Daily* (Nairobi), 28 June 2011.

[31] Benjamin Mkapa, "EPA a threat to region's industrialisation", *Business Daily* (Nairobi), 23 June 2011.

[32] See the Kigali Declaration on the Economic Partnership Agreement Negotiations, adopted by the African Union Conference of Ministers of Trade at its sixth ordinary session (29 October–2 November 2010), document AU/EXT/TD/Decln/2(VI) at para. 3 ("*Reiterate* our commitment to concluding development-friendly EPAs that will contribute meaningfully to reducing and ultimately eradicating poverty in our countries. In this regard, we urge the EU to dedicate additional, predictable and sustainable resources to specifically address EPA-related adjustment costs and build productive capacities.") and para. 6 ("*Further reaffirm* our commitment to the proposals by the ACP Group that the objective criteria which form part of the political objectives agreed by the international community, at the multilateral level, are retained to determine the parameters that have to be met to enable the conclusion of the EPAs", implicitly referring to the need for special and differential treatment principles applicable in WTO to apply in EPA negotiations).

the attitude of a European official who argued at an EPA negotiation meeting that "[t]he European Commission's mandate is to negotiate a trade agreement, not a cooperation for development agreement".[33] Although one of the primary negotiating pillars of EPAs is development, the European Union has not always regarded development with the seriousness ACP countries have. As result, in the Southern African Development Community (SADC) region, Angola, Namibia and South Africa have emerged as a separate configuration, known as ANSA, in the EPA negotiations, united in their scepticism of the current provisions of EPA.[34] Namibia has asked Europe to stop its "'bully' trade negotiations" and declared that it would not sign the interim agreement until contentious issues are resolved and the changes reflected in the agreement.[35] Some commentators have argued that EPAs have become a new opportunity for Europe to give its large businesses another go at the African market.[36]

The process of negotiating EPAs among African countries has also been contentious. For example, the signing of an interim economic partnership agreement by three of the five Southern African Customs Union (SACU) members—Botswana, Lesotho and Swaziland—could tear apart the oldest customs union on the continent.[37] The main reasons that these States chose to sign an interim agreement were (a) to diversify trade and investment; and (b) to move away from their dependence on South African subsidies.[38] Botswana and South Africa especially do not see eye to eye on issues such as "foreign policy orientation". This became increasingly evident under the Mbeki administration as tensions escalated regarding the policy toward Zimbabwe.[39] The European Union's insistence on the most favoured nation clause has not helped the situation either. The clause would require South Africa, and other African States, to offer the identical market-access terms that it offers to other emerging markets such as Brazil and India to all EPA signatories as well.[40] The Deputy Director-General for International Trade and Economic Development in South Africa's Department of Trade and Industry has argued that unless differences in the trade regimes, such as tariffs and rules of origin, between the South African free trade agreement with the European Union and the EPA are addressed, "SACU itself, and the coherence of SACU [will be] undermined".[41]

D. Inattention to development issues

ACP States have consistently noted that the European Union has not given adequate attention to the development chapters in the interim EPAs.[42] Many ACP States have expressed reservations at the heavy pressure from the European Union to sign EPAs even while they may not represent the best interests of ACP countries.[43] The EPAs were scheduled to be implemented by 1 January 2008. However, owing to lack of agreement in negotiations between the European Union and ACP, the EPAs were not concluded within the specified period and both parties decided to enter into "interim agreements" instead that conformed to WTO rules on trade in goods.[44]

"Development" remains the major theme of the EPA negotiations for the Economic Community of West African States (ECOWAS) region. When it became clear that an agreement would not be concluded by 31 December 2007, ECOWAS negotiators identified several areas, including "joint definition of the EPA support measures and their funding by the European Commission", as areas to be negotiated as a precondition for signing the agreement.[45] West African States argued that they were committed to establishing support measures, such as the EPA Development Programme (PAPED), to enable EPA to become "a tool for development".[46] PAPED would focus on the following five strategic areas: diversification and growth of production capacity; developing intraregional trade and facilitating access to international markets; improvement and strengthening of trade-related infrastructure; carrying out necessary adjustments and consideration of other trade-related needs; and implementation and monitoring and assessment of the EPA.[47]

[33] PANEAC, "Why EPA negotiations have slowed".
[34] "Namibia caught in stand-off between South Africa and EU", *Inter Press Service*, 20 August 2009, available at afrika.no/Detailed/18623.html.
[35] Muritala Bakare, "Europe's abusive EPA condemned as it tears Africa apart: now Africans are hitting back at Europe", *Afrik-News*, 4 June 2009, available at www.afrik.com/article15771.html.
[36] Ibid. See also James Gathii, "The neo-liberal turn in regional trade agreements", *Washington Law Review*, vol. 86, No. 3 (October 2011) and *African Regional Trade Agreements as Legal Regimes* (Cambridge, United Kingdom: Cambridge University Press, 2011).
[37] Peter Draper and Nkululeko Khumalo, "The future of the Southern African customs union", *Trade Negotiations Insights*, vol. 8, No. 6 (August 2009).
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] C. van der Merwe, "EU trade agreements undermine regional integration, says SA official", *Engineering News* (South Africa), 3 August 2009.
[42] See Addis Ababa Ministerial Declaration on Economic Partnership Agreement Negotiations, adopted by the Conference of Ministers of the African Union at its third extraordinary session (Addis Ababa, 15-16 January 2007, document Ext/Exp/Trade/Decl.(2) III, available from www.uneca.org.
[43] Nairobi Declaration on Economic Partnership Agreements, adopted by the African Union Conference of Ministers of Trade at its fourth ordinary session (Nairobi, 12-14 April 2006), document TI/TMIN/MIN/Decl.2 (IV), available from www.africa-union.org.
[44] European Commission, "Fact sheet on the interim economic partnership agreements: an overview of the interim agreements" (undated).
[45] "EPA: a carrot for Africa" (see footnote 19).
[46] CTA Agritrade, executive brief, "EU-West Africa EPA negotiations" (March 2009), p.10, available from www.acp-eu-trade.org.
[47] Ibid.

However, according to the President of the ECOWAS Commission, the EPA negotiations stalled partly because a definite position on the sources of funding for PAPED could not be determined.[48]

As in the West African negotiations, "development" is the central theme around which the Economic and Monetary Community of Central Africa (CEMAC)-European Union EPA negotiations are expected to continue; however, the negotiations have slowed down for several reasons. For one, the European Union has moved back on several development aspects of the partnership agreement.[49] For example, the European Union has ignored the agreement on a "roadmap for strengthening capacities and developing central African economies".[50] The European commissioners and ministers have not signed this agreement either.[51] Additionally, while the two parties have agreed that the Central African countries should be compensated for lost tax revenue following the dismantling of tariff barriers, the European Union has been reluctant to consider the individual economic and political situations of each country, despite Central Africa's efforts to provide a simplified method that would allow for such considerations.[52]

E. Interim Economic Partnership Agreement between Eastern and Southern African States and the European Community: an example

The Interim ESA EPA eliminates duties placed on goods originating in ESA States.[53] It also allows ESA States to maintain existing duties on goods originating in the European Union.[54] ESA States are prohibited from instituting any new duties and the European Union shall be granted the same treatment as those of most favoured nations in other trade agreements.[55] Under the Agreement, the European Union maintains safeguards that allow temporary suspension of preferential treatment to ESA States in the event that increased quantities of ESA goods pose a substantial threat to domestic industries in the European Union.[56]

The Interim EPA has provisions for the removal of any quantitative restrictions on trade.[57] It seeks to ensure that once European Union goods enter ESA States, they are not subject to any indirect taxation and are granted the same treatment as domestic products.[58] Administrative cooperation is encouraged.[59] In the event that the provisions regarding administrative cooperation are not observed, the Interim EPA allows the European Union to temporarily suspend any preferential treatment.

The EPA recognizes that fisheries constitute a key economic resource in ESA States, which it seeks to develop.[60] The partnership agreement has provisions for special and differential treatment for ESA fisheries and for preferential access into the international market.[61] Similar provisions encourage the development of marine fisheries and inland fisheries.[62] The agreement also aims to diversify ESA economies. It has provisions to encourage development in other areas of the private sector.[63] For example, there are provisions for the development of industry and secure investment climates within ESA States.[64] It also seeks to promote mining and tourism services in these States.[65]

The Interim EPA does contain some provisions concerning the development of innovation systems and modern standards of environmental protection. It addresses the production of renewable energy sources in ESA States[66] and seeks to promote information and communications technology development.[67] Some consideration is given to bringing ESA States up to international standards with regard to environmental issues.[68]

EPA negotiations between the European Union and West Africa (consisting of 16 countries) commenced in 2003. By December 2007, Côte d'Ivoire and Ghana had agreed to an interim EPA with the European Union in order to prevent trade disruption when the Cotonou Agreement expired that month.[69] The EPA negotiations with West Africa were expected to continue in two phases: in the first phase, an agreement covering trade in goods, some trade rules and

[48] "EPA: a carrot for Africa" (see footnote 19).
[49] "Why EPA negotiations have slowed" (see footnote 33).
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern African States, on the one part, and the European Community and its Member States, on the other part, 2007, art. 11. Available at http://register.consilium.europa.eu/pdf/en/09/st05/st05556.en09.pdf.
[54] Ibid., art. 12.
[55] Ibid., arts. 15-16.
[56] Ibid., arts. 20-21.
[57] Ibid., art. 17.
[58] Ibid., art. 18.
[59] Ibid., art. 22.
[60] Ibid., arts. 25-26.
[61] Ibid., art. 29.
[62] Ibid., arts. 30-35.
[63] Ibid., art. 39.
[64] Ibid., arts. 40-41.
[65] Ibid., arts. 43-44.
[66] Ibid., art. 47.
[67] Ibid., art. 48.
[68] Ibid., arts. 49-51.
[69] See European Commission, Trade, The ACP regions. Available at http://ec.europa.eu/trade/issues/bilateral/regions/acp/regneg_en.htm.

development cooperation was expected to be finalized by October 2009, and in the second phase, negotiations covering trade in services and other trade-related issues, to commence in January 2010.[70]

Central Africa consists of the CEMAC trade bloc and Sao Tome and Principe.[71] In February 2009, Cameroon and the European Union entered into an interim EPA.[72] Negotiations for a full EPA continue at the regional level, but have stalled for a number of reasons.[73] EPA negotiations between ESA and the European Union began in 2004 and by April 2009, Seychelles, Zambia, Zimbabwe, Mauritius, Comoros and Madagascar had signed interim agreements with the European Union.[74] Ethiopia did not sign an IEPA and is still trading with the European Union under the Everything But Arms (EBA) regime. An EPA is not expected to be of any great advantage over the current EBA regime for Ethiopia. However, negotiations for a full EPA with the ESA States were expected to be concluded by the end of 2009, but that had not happened as of June 2012.

The European Union and the East African Community (EAC), consisting of Burundi, Kenya, Rwanda, the United Republic of Tanzania and Uganda, signed an interim agreement in April 2009. Negotiations for a full EPA were expected to be concluded in July 2009; however, they came to a halt when the European Union introduced other voluntary trade-related issues including Government procurement, environment and sustainable development to the negotiations.[75] EAC is reluctant to enter into a final EPA before these issues are finalized under the WTO talks on trade.[76] EAC is also dissatisfied with the development aspects of the agreement and is unwilling to proceed before these issues are addressed.[77]

As of June 2012, four of the 15 members of SADC, namely, Botswana, Lesotho, Mozambique and Swaziland, had entered into interim EPAs with the European Union. Namibia had initialed an interim EPA, but it will not sign it until outstanding issues are ironed out.[78] Although the European Union has trade regimes with Angola and South Africa in place, namely, the EBA initiative with Angola and the Trade and Development Cooperation Agreement signed in 1999 with South Africa, the European Union is also working with these countries to resolve outstanding issues in order to sign interim EPAs with them.

The European Union-SADC EPA could also potentially remove differences between the Trade and Development Cooperation Agreement and the other SACU members, thus bringing the region closer to a single trade regime with the European Union. Such an outcome would be "conducive to regional integration and economic development".[79] However, the negotiation process has been a bumpy ride for the European Community and South Africa, with both parties having walked away from the negotiations at critical moments.[80]

At present, the EPA negotiations are taking place in five separate configurations in Southern Africa.[81] The Permanent Secretary in the Namibian Ministry of Finance stated in August 2009 that the European's tried and tested strategy of "divide and rule" had not helped current regional integration efforts in Southern Africa.[82] Additionally, the separate negotiation configurations had made establishing a common external tariff for the 2010 SADC customs union impossible.[83]

IV. Human rights and the five pillars of the Cotonou Partnership: where does the right to development fit?

A. European Union and African, Caribbean and Pacific States' commitment to the right to development

The right to development does not appear in the text of the Cotonou Agreement. However, both the European Union and ACP States have affirmed their support for and commitment to the right to development. For example, the European Union Presidency's statement at the fifty-eighth session of the Commission

[70] Ibid.
[71] Ibid.
[72] Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, *Official Journal of the European Union*, L 57, vol. 52 (28 February 2009). Available at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:057:SOM:EN:HTML.
[73] "Why EPA negotiations have slowed" (see footnote 33).
[74] EPA negotiations–Where do we stand?: East and Southern Africa. Available at www.acp-eu-trade.org/index.php?loc=epa/.
[75] "East Africa may delay trade pact with EU", *New Vision* (Kampala) (29 July 2009).
[76] Ibid.
[77] Editorial, "EAC right on trade deal", *Business Daily* (Nairobi), 4 August 2010.
[78] Muritala Bakare,"Europe's abusive EPA condemned as it tears Africa apart" (see footnote 35).
[79] Aurelie Walker, "The EC-SADC EPA: the moment of truth for regional integration", *Trade Negotiations Insights*, vol. 8, No. 6 (August 2009). Available at http://ictsd.org/i/news/tni/52416/.
[80] Ibid.
[81] "Namibia caught in stand-off between South Africa and EU" (see footnote 34).
[82] Ibid.
[83] Ibid.

on Human Rights in 2002 noted that the European Union had in the past repeatedly reaffirmed its attachment to the right to development. In that statement, the European Union Presidency reaffirmed that the human person was the central subject of development and should be the active participant and beneficiary of the right to development. The European Union reiterated its position in 2005, and continues to refer to the need to "fight poverty and achieve the Millennium Development Goals".[84] Under the European Union's strategy, "Trade, growth and world affairs", adopted by the European Union Commission in November 2010, the Union's approach to EPAs is based on its commitment "to promoting sustainable development ... outside the [European Union]" and its position that "integrating developing countries into the global economy helps poverty eradication".[85]

The centrality of the human person as a subject of development is repeated word for word in the preamble to the Declaration on the Right to Development. Similarly, the European Union-ACP Joint Assembly has emphasized the role of the European Union-ACP Group in seeking to change WTO rules to more fully protect the right to development of ACP States.[86] While these and other European Union and ACP statements acknowledge the importance of the right to development, it is important to emphasize that the commitment to make the right an inalienable one, in which the "equality of opportunity for development is a prerogative both of nations and of individuals who make up nations",[87] is not explicitly acknowledged in the Cotonou Agreement. Nevertheless, most of the rights protected in the Declaration are also incorporated in the text of the Agreement, as is elaborated on below.

B. Specific rights incorporated in the Cotonou Agreement

In this section, I outline those rights recognized in both the Declaration on the Right to Development and the Cotonou Agreement. Human rights are incorporated in the Cotonou Agreement as one of the "essential and fundamental elements" that underpin European Union-ACP relations (art. 2). Article 9 (1) of the Cotonou Agreement, which lays the basis for European Union-ACP political dialogue, provides that "respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development". Article 9 (2) reiterates the European Union-ACP States' "deep attachment to human dignity and human rights", including reaffirming the "equality of men and women". In the same article, European Union-ACP States also undertake "to promote and protect all fundamental freedoms and human rights". Article 9 (2) also provides that "[h]uman rights are universal, indivisible and interrelated". Article 9 (4) further provides that the partnership "shall actively support the promotion of human rights".

Article 6 (2) of the Declaration on the Right to Development recognizes the indivisibility and interdependence of all human rights and further calls on States to give "equal attention and urgent consideration ... to the implementation, promotion and protection of civil, political, economic, social and cultural rights". Article 9 (1) of the Declaration also provides that all aspects of development are "indivisible and interdependent and each of them should be considered in the context of the whole".

Article 96 of the Cotonou Agreement, also known as the non-execution clause, provides for consultations on human rights where political dialogue under articles 8 and 9 (4) of the Agreement have been exhausted.[88] The 2010 revisions to the Cotonou Agreement make "child labour, or discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (art. 8 (4)) part of the political issues of mutual concern and dialogue between the European Union and ACP States. Failure to "fulfil an obligation stemming from respect for human rights" triggers European Union-ACP States to enter into "consultations that focus on the measures taken or to be taken by the Party concerned to remedy the situation". If consultations fail, "appropriate measures" such as aid suspension could follow (art. 96 (2) (a)).

The same article provides that in "cases of special urgency" which involve "exceptional cases of

[84] Council of the European Union, "Council conclusions on 'First annual report to the European Council on EU development aid targets'", 3091st Foreign Affairs Council Meeting, Brussels (23 May 2011). Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/122163.pdf.

[85] European Commission, "Trade, growth and world affairs: trade policy as a core component of the EU's strategy", document COM(2010)612, p. 8. Available at http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf.

[86] ACP-EU Joint Parliamentary Assembly, resolution on cotton and other commodities, document ACP-EU 3668/04/fin. Available at http://www.europarl.europa.eu/intcoop/acp/60_07/pdf/resolution04_en.pdf.

[87] Declaration on the Right to Development, preamble.

[88] See also article 4 of annex VII, Political dialogue as regards human rights, democratic principles and the rule of law.

particularly serious and flagrant violation" (art. 96 (2) (b)) of human rights, "appropriate measures may be taken" (art. 96 (2) (c)). This provision allows the suspension of the partnership between the European Union and a particular ACP member country. In such cases, the Cotonou Agreement is not regarded as having been abrogated but rather remains operational,[89] though arguably suspended between the European Union and the country subject to a suspension of commitments pursuant to action taken under article 96 of the Agreement.[90] This happened with the Sudan in 1990 and Zaire (now the Democratic Republic of the Congo) in 1992.[91] Similarly, under the European Union Common Position on Burma/Myanmar of 1996, the European Union imposed sanctions on Myanmar, which suspended all non-humanitarian assistance and banned visas for Government officials from that country under the non-execution clause of the Cotonou Agreement.[92]

This consultation procedure reflects the duties imposed on States in the Declaration on the Right to Development in articles 3 and 10. Article 3 requires that "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development". The consultation procedure also certainly reflects the obligation in article 10 of the Declaration which provides that States have an obligation to formulate, adopt and implement "policy, legislative *and other measures* [emphasis added] at the national and international levels" to "ensure the full exercise and progressive enhancement of the right to development". In short, the Declaration on the Right to Development anticipates States having policy space over their economic policies so that they can ensure the existence of conditions that are consistent with their ability and duties to protect, respect and fulfil their human rights obligations and to provide remedies in the event of their violation.

Finally, article 8 (4) of the Cotonou Agreement makes non-discrimination on the basis of ethnicity, religion or race as well as respect for human rights part of the European Union-ACP political dialogue. Article 5 of the Declaration on the Right to Development also obliges States to eliminate "all forms of racism and racial discrimination". Article 6 (1) of the Declaration requires States to promote, encourage and strengthen all "human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion".

V. Obstacles to the incorporation of human rights into the Cotonou Partnership Agreement

As noted, the Cotonou Agreement explicitly incorporates human rights as an essential element of the European Union-ACP partnership. However, the Agreement does not explicitly incorporate the right to development. More significantly, the Cotonou Agreement primarily restricts the scope of human rights to political dialogue and to consultations where dialogue fails. This is so because human rights concerns are not explicitly included in the other four pillars of the European Union-ACP partnership as contained in the Agreement. These are: involvement of civil society, the private sector and other non-State players; poverty reduction within the context of objectives and targets agreed at the international level such as the Millennium Development Goals; the economic and trade cooperation framework; and the rationalization of financial instruments and a system of flexible programming. However, as I will note below, other provisions of the Cotonou Agreement could be construed to suggest that at least some human rights are intended to be cross-cutting concerns within the other pillars of the European Union-ACP cooperation under the Agreement.

Since the main text of the Cotonou Agreement does not explicitly make the human rights provisions in articles 8, 9 and 96 cross-cutting issues within the other pillars of the partnership, those human rights specifically incorporated in the Agreement may be regarded as having no operational relationship to the other pillars of the partnership. In other words, it does not appear that there is any consequence contemplated under the Cotonou Agreement to remedy the situation where a specific European Union-ACP economic and trade cooperation programme undermines the observance of human rights. Should this occur, the Agreement does not contemplate invoking either the political dialogue or consultation procedures. Therefore, political dialogue and consultation procedures may only be regarded as frameworks for European

[89] See Communication Com (95) 216 of 23 May 1995 on the inclusion of respect for democratic principles and human rights in agreements between the Commission and third countries, p. 3. Available at www.eulib.com/documents/com95_216_en.pdf.

[90] Moussounga I. Mbadinga, "The non-execution clause in the relationship between the European Union (EU) and the African, Caribbean and Pacific States (ACP)", *German Law Journal*, vol. 3, No. 11 (2002), para. 17.

[91] Ibid., para. 19.

[92] See "The EU's relations with Burma/Myanmar". Available at www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/dase20050419_003/dase20050419_003en.pdf (complete background, including efforts to support civil society).

Union-ACP collaboration on human rights issues unrelated to the other pillars of the partnership.

However, such an interpretation is contrary to what is contemplated in the Declaration on the Right to Development. Under the Declaration, in order to promote development, States are urged to give "equal attention and urgent consideration … to the implementation, promotion and protection of civil, political, economic, social and cultural rights and … promotion of, respect for and enjoyment of certain human rights and fundamental freedoms".[93]

Further, the criteria identified in the Cotonou Agreement for allocation of resources within the European Union-ACP partnership are insufficient from the human rights perspective, for two reasons. First, the criteria do not include consideration of human rights, but are based exclusively on needs and performance indicators and criteria.[94] Some of these indicators and criteria are closely related to issues of human rights, like poverty alleviation and reduction.[95] However, some of the other criteria, such as allocations for macroeconomic support,[96] may not necessarily be consistent with human rights, especially if macroeconomic support is used to support economic programmes that reduce public spending that might undermine "access to basic resources, education, health services, food, housing, employment and the fair distribution of income".[97] Fortunately, the Financial Cooperation section of the Cotonou Agreement provides that European Union-ACP countries "shall ensure that adjustment is economically viable and socially and politically bearable" (art. 67 (1)). Although this provision does not provide an explicit basis to assess macroeconomic programmes against human rights norms, it arguably suggests that such reforms should not undermine social and economic conditions in a manner that may be inconsistent with the protection of social and economic rights.

Second, the criteria and indicators of resource allocation do not limit allocation of resources in the European Union-ACP partnership on the basis that a beneficiary ACP State has engaged in human rights abuses. Article 5 (7) of the Cotonou Agreement's Implementation and Management Procedures provides that reviews of resource allocations may be made in the light of "current needs and performance of the ACP State concerned" (annex IV, art. 5 (7)). This emphasis on using criteria and indicators that do not include human rights in allocating resources indicates that human rights are not an important priority as compared to other criteria specified in the Cotonou Agreement in determining resource allocations.

Political dialogue under article 9 and consultations that may lead to resources being suspended or cut off under article 96 of the Cotonou Agreement are the only ways in which the European Union-ACP partnership explicitly requires human rights to be taken into account. This does not, of course, prevent human rights from being seen as a cross-cutting issue among all the pillars of the European Union-ACP partnership, since article 9 refers to human rights as an essential element of the relationship. However, the European Union-ACP approach of leaving political dialogue and consultations outside the other equally important programmatic areas of partnership arguably formally relegates human rights to the sidelines within the other four pillars of the partnership.

Another potentially adverse effect of the European Union-ACP partnership on human rights is that new mandates of European Union-ACP relations, such as those relating to EPAs, are currently not independently funded under the European Development Fund. As such, resources that previously may have been designated for existing pillars and programmes of European Union-ACP cooperation, such as the Governance Initiative, which more explicitly embraces human rights, could receive a relatively smaller monetary allocation since there is no additional allocation of resources in the partnership to fund the EPA mandate. The European Union has indicated to Pacific countries that unless they sign an EPA on time, programmed assistance for the period 2008-2014 would be reprogrammed. Thus, the European Union is now conditioning access to committed aid on signing an EPA.[98]

Another issue on which ACP States have long expressed concern is the continuation of the European Union's Common Agricultural Policy, in particular providing subsides to agricultural products for which ACP farmers would otherwise have a comparative advantage. ACP States, together with other developing countries, have not been successful at the World Trade Organization in getting European Union concessions

[93] Declaration on the Right to Development, tenth preambular paragraph. Note also mention in the same paragraph that the promotion of "certain human rights … cannot justify the denial of other human rights and fundamental freedoms".
[94] See Cotonou Agreement, annex IV, Implementation and management procedures, art. 3.
[95] Ibid., art. 3 (1) (b).
[96] Ibid., art. 3 (2) (a).
[97] Declaration on the Right to Development, art. 8 (1).
[98] "EU, Pacific clash over EPA funds", *Trade Negotiations Insights* (September 2007), pp. 10-11.

on agriculture that will remove trade-distorting subsidies and other farm-support measures even though they are detrimental to ACP farmers.[99] One example of European Union subsidies having an adverse impact on the comparative advantage of ACP farmers is sugar.[100] Though the European Union has a Sugar Protocol that addresses this issue, the subsidies continue to have a negative impact on the ability of ACP farmers to compete with the cheaper subsidized European Union sugar that ends up being dumped in ACP countries. This is a good example of how the social and economic rights of ACP farmers and the poor are directly affected by European Union trade policy.[101] The European Union has committed to remedying the imbalance. Current economic conditions have created greater demand for raw sugar, which places ACP countries in an advantageous position.[102] However, in 2012, price guarantees ended and prices will be determined by the market.[103] How that change will impact ACP countries may depend on the European Union working more closely with ACP countries to create food supply chain transparency.[104] Another issue on which the Doha Round of talks has failed to make substantial progress on is cotton. Ten million farmers in Central and West Africa depend on the income generated from cotton. However, although these farmers are the lowest-cost producers of cotton, huge subsidies in the United States in particular have taken African cotton off the world market. Brazil has already won an important victory against the United States at WTO, which found that United States subsidies were in violation of WTO rules.[105] A final settlement on African cotton in the ongoing negotiations has yet to be reached.[106]

Another example of how European Union policies adversely affect social and economic rights of ACP countries is the extremely stringent sanitary and phytosanitary measures (SPS) that are imposed on access to the European Union market by products from ACP countries.[107] Given the huge dependence of ACP countries on agriculture and the importance of agriculture to the rural economies in which the majority of people in poor countries live, the continuation of subsidies and non-tariff measures, including SPS measures, that make it difficult for farmers to access world markets at competitive prices not only exacerbates their poverty but also contributes to the deterioration of their social and economic rights. The impact of these subsidies and distortions is actually much broader: they also adversely affect the poor populations in the rural areas that rely on the incomes that farmers otherwise connected to world markets earn in the absence of such distortions.[108]

Some ACP States are very vulnerable to pressures from the European Union since their budgets are heavily dependent on European Union programme assistance. This is particularly so since the indicators used in European Union budget support for ACP countries do not necessarily reflect the concerns of the right to development and are not explicitly required to take human rights considerations into account. The indicators used in budget support programmes are primarily of a quantitative rather than a qualitative nature, especially insofar as they do not specifically include human rights considerations. Further, the European Union has not been particularly transparent in designing the criteria for its budget support programmes. The participation of ACP countries in decisions on budget support has, therefore, not reflected the commitment in the Cotonou Agreement to underpin European Union-ACP relations on the basis of the principle of "equality of the partners and ownership of the development strategies" (art. 2). This is also incon-

[99] See, generally, James Gathii, "The high stakes of WTO reform", *Michigan Law Review*, vol. 104, No. 6 (2006), pp. 1361, 1370 (discussing Western countries' unwillingness to make concessions on agriculture issues in international agreements).

[100] Nsongurua J. Udombana, "A question of justice: the WTO, Africa, and countermeasures for breaches of international trade obligations", *The John Marshall Law Review*, vol. 38, No. 2 (2005), pp. 1153, 1173.

[101] See World Bank, *Global Economic Prospects and the Developing Countries 2003* (Washington, D.C., 2004), chap. 4, International agreements to improve investment and competition for development, especially pp. 117, 134 (noting that though subsidies have on the whole been reducing, they have effectively been on the rise because of increases in domestic support measures).

[102] Agritrade, executive brief, "Sugar: trade issues for the ACP", sect. 3.2, update, March 2010, available at http://agritrade.cta.int/Agriculture/Commodities/Sugar/Sugar-Trade-issues-for-the-ACP.

[103] Ibid.

[104] Ibid.

[105] The WTO Appellate Body found United States cotton subsidies to be inconsistent with that country's WTO obligations. As a countermeasure, Brazil settled for technical assistance and capacity-building assistance to the cotton sector in Brazil worth $147 million annually. See press release, "U.S., Brazil agree on memorandum of understanding as part of path forward toward resolution of cotton dispute", April 2010. Available at www.ustr.gov/about-us/press-office/press-releases/2010/april/us-brazil-agree-memorandum-understanding-part-path-f.

[106] WTO, Sub-Committee on Cotton, "Implementation of the development assistance aspects of the cotton-related decisions in the 2004 July package and paragraph 12 of the Hong Kong Ministerial", document TN/AG/SCVC/W/12-WT/CFMC/28 (21 May 2010). The Group of Twenty (G20) developing country negotiating bloc within WTO was "disappointed by the fact that no progress has been achieved in discussion of the trade aspects of cotton during the July 2008 Ministerial. The G20 was also concerned that current substantive negotiations on cotton seemed to be deadlocked and even back-tracking in the consultations of the Special Session on Agriculture. Developing country producers and exporters of cotton, particularly the poorest among them, continued to face unfair competition from developed country subsidies. The G20 urged developed countries, which accounted for the bulk of trade-distorting subsidies in cotton to live up to the mandate" (para. 29).

[107] Denise Prévost, *Sanitary, Phytosanitary and Technical Barriers to Trade in the Economic Partnership Agreements between the European Union and the ACP Countries*, Programme on EPAs and Regionalism, Issue Paper No. 6 (Geneva, International Centre for Trade and Sustainable Development, 2010), p. 28. Available at http://ictsd.org/i/publications/84277/?view=document.

[108] See, generally, James Gathii, "Process and substance in WTO reform", *Rutgers Law Review*, vol. 56 (2004), p. 885 (discussing the bias against agriculture and other developing country concerns).

sistent with requirement in the Declaration on the Right to Development that "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" (art. 3 (3)).

VI. Impact of the negotiations on economic partnership agreements on human rights within African, Caribbean and Pacific countries from a right to development perspective

In 2000, the European Union-ACP countries agreed to negotiate EPAs pursuant to article 36 of the Cotonou Agreement. One objective of negotiating EPAs was to design trading arrangements that were compatible with WTO rules by "removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade" (art. 36 (1)). EPAs ended non-reciprocal trade preferences that ACP countries enjoyed from the European Union in 2007; a WTO waiver of the most favoured nation norm allowed the European Union's trade preferences to come to an end in that year.[109] The current negotiations on Economic Partnership Agreements are incomplete but ongoing, as we saw in section III above.[110]

In accordance with the Cotonou Agreement, the other objectives of enacting EPAs are to integrate ACP States into the world economy while promoting sustainable development and contributing to poverty eradication (art. 34 (1)); "to enable the ACP States to play a full part in international trade", in part by ensuring that they "manage the challenges of globalisation" and "adapt progressively to new conditions of international trade" (art. 34 (2)); and finally to strengthen ACP States' "trade and investment policies and ... improv[e] [their] capacity to handle" trade issues (art. 34 (3)).

One of the major concerns with regard to the current EPA drafts is that none of them explicitly incorporates human rights, either as stand-alone entitlements or as cross-cutting concerns. It may be argued that the provisions of articles 8, 9 and 96 of the Cotonou Agreement would apply to EPAs. Yet, EPAs will, in an important respect, recast European Union-ACP relations within a trading framework without, simultaneously, explicitly making human rights norms an essential element. Thus, while the objectives of EPAs, such as poverty eradication, are laudable, the Cotonou Agreement does not explicitly make human rights an objective to be met within or to be promoted by EPAs. When poverty is induced by trade policies such as the heavy agricultural subsidies in Western markets that displace cheaper produce from developing countries, the ability of Governments to safeguard social and economic rights is undermined. This is because such Governments may not be able to generate revenue or foreign exchange from trading relationships they previously enjoyed. As a consequence, budgetary allocations to support education and health, which are social and economic rights, would be undermined.

A danger that must be avoided is EPAs appearing to be like a bill of rights for investors, as has been the case of the North American Free Trade Agreement (NAFTA). In addition, it is unlikely that investor and trade rights would be widely respected in a context where there is no simultaneous commitment to the respect for human rights.

Article 37 (4) of the Cotonou Agreement contemplates one method for safeguarding human rights concerns within EPAs by providing for monitoring their "socioeconomic impact" on ACP countries. In addition, the Agreement anticipates that negotiations should take into account "the current level of development" of ACP countries (art. 34 (2)). Indeed, the Agreement provides for flexibility in the commitments that ACP countries may assume in a variety of ways. First, as noted above, an objective of economic and trade cooperation is poverty eradication in ACP States (art. 34 (1)).[111] Second, economic and trade cooperation is to take into account "the current level of development of ACP countries" so that they can "adapt progressively to the new conditions of international trade" (art. 34 (2))[112] This provision anticipates that EPAs will not lead to sudden revenue losses for ACP States since the new commitments are required to be adapted over time rather than all at once. Third,

[109] According to article 37 (1) of the original text of the Agreement (providing that EPAs "shall be negotiated during the preparatory period which shall end by 31 December 2007").

[110] See Cotonou Agreement, arts. 35 (2) and 37 (3) (providing a basis for conducting EPA negotiation with the regions rather than bilaterally as part of the Agreement's goal of strengthening regionalism as a strategy of better integrating ACP countries within the international trading system).

[111] See Uwe Holtz, "Poverty reduction strategy papers and country strategy papers and their relationship to the combat against desertification: the role of parliaments" (Bonn, 26 May 2003), p. 12 (discussing the complexity of poverty reduction where the population lives in rural areas).

[112] This mandate may not be executed unless the ACP countries have resources to meet the demands of international trade. Edward Anderson and Christopher Stevens, "The 'development dimension': matching problems and solutions", Overseas Development Institute, Briefing Paper 6 (June 2006), p. 4. Available at www.odi.org.uk/resources/docs/1798.pdf.

the Cotonou Agreement also requires the inclusion of special and differential treatment and taking into account the respective levels of development of the different countries (art. 34 (4)). These provisions do not suggest the inevitability of reciprocal free trade; rather, they contemplate a phased and gradual easing of ACP States into a new trading relationship with the European Union that is sensitive to their levels of development and in particular to the social and human rights impacts of such a relationship. This principle of flexibility is further contained in article 39 (3) of the Cotonou Agreement, which notes the "importance of flexibility in WTO rules to take into account the ACP's level of development as well as the difficulties faced in meeting their obligations".

VII. Potential areas of congruence and synergy of the Cotonou Partnership Agreement with the right to development

One of the most significant areas in which there is potential congruence and synergy between the right to development and the Cotonou Agreement is the incentive tranche that the European Union uses to reward countries that observe certain human rights standards.[113] Under the incentive tranche, those countries that, for example, ratify the core conventions of the International Labour Organization (ILO) get more money.[114] Such positive incentives have potential to have greater influence on human rights observance than negative pledges such as those contained in the political dialogue and consultation procedures of the European Union-ACP relationship or aid suspension. At the moment, the European Union takes into account a governance profile that includes human rights criteria.

Another potential area of synergy between the Cotonou Agreement and the Declaration on the Right to Development is the recognition of the requirement in the Agreement to "integrate a gender-sensitive approach and concerns at every level of development cooperation including macro-economic policies, strategies and operations" (art. 31 (a)). This provision was reinforced by the 2005 revision to the Cotonou Agreement by adding "the protection of sexual and reproductive health and rights of women" (art. 25 (d). In addition, the Agreement provides that the promotion of "human dignity, social justice and pluralism" requires "systematic attention" in all aspects of European Union-ACP cooperation (art. 33 (1) (a)). Even more directly, article 33 (1) (b) of the Agreement provides that cooperation shall support efforts to "promote and sustain universal and full respect for and observance and protection of all human rights and fundamental freedoms" in all aspects of European Union-ACP relations. These and similar provisions provide an ample opportunity for a more robust presence of human rights within European Union-ACP relations.

The European Union requires sustainability impact assessments of its programmes, including those funded by the European Union-ACP partnership. This provides additional space for taking human rights into account more systematically and as an integral element in the European Union-ACP partnership. The use of independent monitors with a human rights background has potential to highlight human rights in the context of European Union-ACP relations.

The Cotonou Agreement further provides that cooperation on social sector development shall encourage "respect for basic social rights" (art. 25 (1) (g)). This provision is consistent with the call in the Declaration of the Right to Development for "effective international cooperation … to foster … comprehensive development" (art. 4 (2)).

VIII. Recommendations to enhance the right to development in the operational framework of the Cotonou Partnership Agreement

There are a number of ways in which the right to development can fit within the operational framework of the Cotonou Partnership. One of the most significant is to find ways to reform the European Union's Common Agricultural Policy insofar as it adversely affects ACP States within the ambit of the Cotonou Agreement's EPA negotiation mandate. Currently, the Common Agricultural Policy falls outside of the Agreement's objectives and omits the possibility of questioning how the Policy adversely affects ACP countries. There is, therefore, an assumed element of unevenness in the obligations. Reform via the negotiation mandate

[113] Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on governance in the European Consensus on Development: towards a harmonised approach within the European Union (Brussels, 30 August 2006), document Com(2006) 421 final, p. 12, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0421en01.pdf, specifically providing incentives for good governance, which includes "respect of human rights and fundamental freedoms" (ibid., p. 5).

[114] See Governance Profile, annex 1, Aid allocation criteria for the geographic cooperation with the ACP countries in the framework of the 10th European Development Fund covering the period 2008-2013, p. 21 (listing ratification of the ILO conventions as a criterion for receiving incentives). Available at www.oecd.org/dataoecd/13/27/40099520.pdf.

would create the appearance of equality between the European Union and the ACP States while in reality, the EPAs would contain obligations applying to both the European Union and the ACP countries in an even-handed manner.

Trade negotiations need to take into account the special needs of developing and least developed countries, especially the need for preferential treatment in trade relations, which are increasingly becoming the dominant pillar of European Union-ACP relations.[115] As noted above, article 39 of the Cotonou Agreement emphasizes the principle of special and differential treatment, suggesting that though full reciprocity is the ultimate goal of the European Union-ACP relationship, flexibility in getting there is a primary principle moving forward. Trade between industrialized countries with economically vulnerable countries like least developed countries (LDCs), which dominate the ACP group, can hardly be conducted on the basis of reciprocity since the share of LDCs in international trade is very limited; LDCs hardly have the market power the European Union has to impose its economic interests on ACP States. Furthermore, impoverished populations tend to be more dependent on natural resources which can be threatened by land degradation if development is not properly managed.[116] Thus, without effective reciprocity, EPAs are likely to merely open up ACP countries to European Union goods and services without giving any corresponding benefits to LDCs and adversely impact impoverished populations.[117]

Fortunately, LDCs[118] will continue to enjoy duty- and quota-free access as under the EBA initiative. [119] For all ACP States, final EPAs ought to come with generous trade-related adjustment assistance, trade-related development and infrastructure support, support to build production capacity, and the financing of trade law and policymaking in ACP States. Such aid-for-trade measures may offset some of the losses that would accompany ending preferential agreements when EPAs come into effect.

It would also be important to ensure that human rights take primacy within the negotiation of EPAs. In the Pretoria Declaration on Economic, Social and Cultural Rights in Africa,[120] adopted by the African Commission on Human and Peoples' Rights in 2004, States were urged to make human rights a priority in negotiating trade treaties.[121] This is consistent with article 177 (2) of the Treaty Establishing the European Community which provides that European Union development cooperation should contribute to the respect for human rights and fundamental freedoms. Similarly, article 11 of the Treaty on European Union provides that one of the objectives of the European Union's foreign and security policy is "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms". These human rights concerns ought to take centre stage in EPA negotiations.

IX. Conclusions

While human rights are an essential element in European Union-ACP relations, the Cotonou Agreement does not explicitly make them binding on the operationalization of the other pillars of the Cotonou Partnership. Thus, even though elements of the right to development are evident in the partnership's definition of human rights, the Agreement cannot be persuasively read to protect human rights across all the areas of the Partnership. This is particularly worrisome in view of the fact that negotiations on EPAs are recasting the Partnership within a trade and economic framework which has become a major, if not the most significant, aspect of European Union-ACP relations. In this respect, the measurement of the Partnership in general and EPAs in particular against the criteria developed by the high-level task force on the implementation of the right to development could play a crucial role in giving human rights a central place in European Union-ACP relations. The more significant the role human rights plays in European Union-ACP relations, the more likely it is that the right to development will be realized. This would also be consistent with Millennium Development Goal 8 insofar as it aims at addressing the needs of least developed countries, which comprise 40 of the 77 ACP States.[122]

[115] See Cosmas Milton Obote Ochieng, "The EU-ACP economic partnership agreements and the 'development question': constraints and opportunities posed by article XXIV and special and differential provisions of the WTO", *Journal of International Economic* Law, vol. 10, No. 2 (2007), p. 363.

[116] Holtz, "Poverty reduction strategy papers", p. 13.

[117] Aaditya Mattoo and Arvind Subramanian, "The WTO and the poorest countries: the stark reality", *World Trade Review*, vol. 3, No. 3 (2004), p. 385. For proposed solutions, see Dominique Njinkeu, "Uniform treatment for Africa in the DDA [Doha Development Agenda]", ibid., p. 433.

[118] See European Commission, Negotiations and agreements, at http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/negotiations-and-agreements/#_esa.

[119] See European Commission, Everything But Arms, at http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/everything-but-arms/.

[120] Available at www.achpr.org/instruments/pretoria-declaration.

[121] Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa (17 September 2004), adopted by the African Commission on Human and Peoples' Rights at its thirty-sixth ordinary session (Dakar, 23 November– 7 December 2004) (ACHPR/Res.73(XXXVI)04).

[122] Cotonou Agreement, arts. 84-90 (providing for special measures for LDCs, landlocked countries as well as small island developing ACP States); see also annex VI to the Agreement, List of the least developed, landlocked and island ACP States.

Debt relief and sustainability[1]

Boris Gamarra, Malvina Pollock,** Dörte Dömeland*** and Carlos A. Primo Braga*****

I. Introduction

At the Millennium Summit in 2000, Heads of State and Government undertook "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" and expressed their determination "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".[2] This commitment, and the corresponding target 8.D of the Millennium Development Goals ("Deal comprehensively with the debt problems of developing countries"), was addressed by the open-ended Intergovernmental Working Group on the Right to Development, which recognized "that an unsustainable debt burden is a major obstacle for developing countries in achieving the Millennium Development Goals and in making progress in the realization of the right to development" and was a component of the mandate of its expert mechanism, the high-level task force on the implementation of the right to development. It is also noteworthy that the Working Group welcomed and encouraged "efforts by donor countries and the international financial institutions to consider additional ways, including appropriate debt swap measures, to promote debt sustainability for both [heavily indebted poor countries (HIPCs)] and non-HIPCs" (E/CN.4/2005/25, para. 54 (a)). Given the importance from the perspective of the right to development of the HIPC Initiative and other forms of debt relief, it is useful to examine the history of debt relief and the range of measures implemented to deal with the issue in the spirit of these policy positions.

The machinery for sovereign debt workouts has been evolving since the United Nations Monetary and Financial Conference, held at Bretton Woods, New Hampshire in 1944. Over the past half-century, 85 developing countries, including 52 low-income countries, have been unable to service their external debt and requested debt relief from their creditors. This chapter provides a retrospective on how debt relief has been granted to low-income countries since Bretton Woods.[3] It traces the evolution of debt relief from short-term debt-restructuring operations to outright debt forgiveness, describes the range of debt-relief

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[1] This chapter is adapted from Boris Gamarra, Malvina Pollock and Carlos A. Primo Braga, "Debt relief to low-income countries: a retrospective", and from the introduction by Carlos A. Primo Braga and Dörte Dömeland to the book they edited entitled *Debt Relief and Beyond: Lessons Learned and Challenges Ahead* (Washington, D.C., World Bank, 2009).

[2] General Assembly resolution 55/2, paras. 15-16.

[3] Debt relief covered in this chapter includes rescheduling of principal and interest payments by Paris Club creditors; forgiveness of official development assistance (ODA) loans by bilateral creditors; debt restructuring and debt forgiveness by non–Paris Club creditors; reduction of commercial debt, including through the International Development Association (IDA) Debt Reduction Facility; special programmes to help debtors meet obligations to multilateral creditors, including the World Bank's Fifth Dimension programme and the rights accumulation programme of the International Monetary Fund (IMF); debt swaps; the HIPC Initiative; and the Multilateral Debt Relief Initiative (MDRI).

measures adopted by creditors and analyses the extent to which debt relief has alleviated the debt burden of low-income countries.

II. Debt relief: a brief history

During the first 25 years after the Second World War, few countries requested debt relief. By the end of the 1970s, however, serious balance of payments problems and high levels of external debt caused many countries to do so. Since the late 1970s, creditor countries have repeatedly modified debt-relief efforts, making them increasingly generous.

A. Debt relief before 1972

In the years after 1945, most lending to developing countries was provided through new programmes of official development assistance or in the form of insured private credit to support export-related lending. Before the quadrupling of oil prices in 1973, requests for debt relief from developing countries were limited: from the time the World Bank opened its doors in 1946 until 1972, only nine countries (Argentina, Brazil, Chile, Ghana, India, Indonesia, Pakistan, Peru and Turkey) sought relief on their external obligations. Their experiences are instructive, because many of the principles and procedures that still govern debt restructuring were formulated at that time.

Creditors' initial motivation in helping debtor countries over periods of payment difficulties was to increase the likelihood of collecting on the claims they held. That was accompanied by a desire to treat all creditors equally and to see debtor countries make the maximum effort to redress their economic problems. Creditors quickly determined that those objectives could best be met by restructuring their claims on sovereign Governments in a concerted framework. The Paris Club has provided such a framework since the mid-1950s.[4]

Not all of the negotiations for the nine countries took place within the Paris Club forum: restructuring with Turkey (1955-1970) was conducted under the auspices of the Organisation for Economic Co-operation and Development (OECD)[5] and debt relief for India (1968-1976) and Pakistan (following the separation of Bangladesh in 1971) was arranged through aid consortium meetings organized and chaired by the World Bank. Since 1971, no debt relief has been arranged through aid consortia. Still, in all cases the negotiations followed the format developed in the Paris Club, in both the nature of the agreement and the rescheduling terms granted.

The debt relief granted was aimed at helping the debtor country avoid "imminent default".[6] A common guiding principle was that the period of debt relief should be short. One year was the typical consolidation period granted. During this period, creditors could reassess the debtor country's need for further relief; its economic performance, which was subsequently linked to its ability to maintain eligibility for IMF upper-tranche resources; and the debtor country's success in renegotiating debts to other creditors on terms comparable to those extended by Paris Club creditors. The possibility of additional debt relief was often embodied in a goodwill clause—an implicit recognition that the initial debt-relief arrangements might prove inadequate.

For the first nine countries with which agreements were concluded, Paris Club creditors restructured $6.9 billion of principal and interest in 35 separate agreements.[7] From the perspective of this chapter, the agreements with Ghana and Indonesia are the most interesting because they were the first instances in which the importance of debt sustainability for low-income countries was addressed in the restructuring process.

Both countries approached their Paris Club creditors in 1966 for debt relief to help restructure their economies, following programmes of vast, unproductive public sector expenditures by recently overthrown Governments. In the first round of negotiations, creditors tried to impose the type of terms established with the Latin American countries to help overcome liquidity crises. In the face of the unsustainable levels of external debt accumulated by both countries, creditors were forced to modify their approach, in the end extending highly concessional terms.

[4] In 1956, the Treasury of France hosted a group of creditor countries in Paris to renegotiate supplier and buyer credits to Argentina. The assembly, an informal group of official creditors dedicated to finding "coordinated and sustainable solutions to the payment difficulties experienced by debtor countries". came to be known as the Paris Club. It remains a voluntary group of creditor countries that makes decisions by consensus. Since its inception, it has helped 85 debtor countries restructure debt totalling $513 billion (see www.clubdeparis.org). For analyses of Paris Club activities, see Lex Rieffel, *Restructuring Sovereign Debt: The Case for Ad Hoc Machinery* (Washington, D.C., Brookings Institution Press, 2003) and Enrique Cosio-Pascal, "The emerging of a multilateral forum for debt restructuring: the Paris Club", Discussion Papers No. 192 (UNCTAD/OSG/DP/2008/7) (November 2008).

[5] See, for example, V. Lavy and H. Rapoport, "External debt and structural adjustment: recent experience in Turkey", *Middle Eastern Studies*, vol. 28, No. 2 (April 1992), pp. 313-332.

[6] See, for example, Lex Rieffel, "The Paris Club, 1978-1983", *Columbia Journal of Transational Law*, vol. 23 (1984).

[7] See www.clubdeparis.org.

Under the agreement concluded with Indonesia in 1970, the entire stock of debt owed to Paris Club creditors was consolidated and paid over 30 years, interest free. There was no grace period, but the agreement had a "bisque" clause (the right to unilaterally suspend or defer payments) which allowed 50 per cent of payments during the first six years to be deferred, at an interest rate of 4 per cent, and repaid at the end of the 30-year term.

After prolonged negotiations, the outcome for Ghana was comparable. Under the agreement concluded in 1974, the entire stock of debt was consolidated and paid over 28 years, with 11 years of grace at an interest rate of 2.5 per cent.

B. Debt relief 1973-1986

The shock of the fourfold rise in petroleum prices at the end of 1973 and the simultaneous rise in the prices of primary commodities generated economic winners and losers in sub-Saharan Africa. But as commodity prices collapsed following a global recession in the mid-1970s and oil prices rose in 1979, many of those countries ran into serious balance of payments problems. Their problems were compounded by high levels of external debt, built up as the result of massive public sector spending during the commodity price boom.[8]

By the end of the 1970s, requests from African countries for debt relief from Paris Club creditors were pouring in. Countries leading the way included the Central African Republic, the Democratic Republic of the Congo, Liberia, Senegal, Sierra Leone, the Sudan, Togo and Uganda, all subsequently classified as HIPCs.

Paris Club creditors responded to this avalanche of requests by building on their earlier experiences with the middle-income countries of Latin America. The accepted wisdom of the day was that the low-income countries were confronting short-term liquidity crises and that rescheduling debt service would provide sufficient breathing space and debt relief to enable them to get back on an even keel and grow out of their debt problems.

The agreements with Ghana and Indonesia were set aside as "exceptional" and the lesson of the importance of debt sustainability in the restructuring process was lost. This proved to be a costly mistake for debtor countries and creditors alike.

The modus operandi adopted by creditors was to determine the minimum amount of relief to be granted to allow debtors to pay their remaining debt service without recourse to further debt relief. Emphasis was put on the need for adjustment by the debtor country. Paris Club agreements in the 1970s and much of the 1980s (as well as those concluded with commercial creditors under the auspices of the London Club, described below) were on non-concessional "classic" terms, with relatively short maturities of 8-10 years. Market-related interest rates were also retained. The creditors' position was that the interest rate charged on rescheduled debt (the so-called moratorium interest) must be equal to the cost of borrowing for the export credit agencies that had extended or guaranteed the debt.

Despite these efforts, the nature of the debt problem in sub-Saharan Africa (which was magnified by political shocks, such as wars and social strife) and the persistent tendency of creditors to underestimate the amount of debt relief needed led to a continued build-up of debt stocks and repeated debt rescheduling. By the end of 1986, the Paris Club had restructured the debt of 22 sub-Saharan African countries in 55 agreements. Between 1973 and 1986, 14 African countries went to the Paris Club more than once, and nine went three times or more. The principle that debts, once rescheduled, were not to be rescheduled again proved unworkable. In almost half of the 55 agreements signed with African countries during this period, creditors were forced to restructure previously rescheduled claims.

C. Debt relief 1987-1996: a coordinated policy response

The turning point came in 1987, at a time when growth prospects for developing countries continued to be adversely affected by persistent weakness in commodity prices, modest growth in industrial countries and increasing protectionism. It became clear that for the poorest, most indebted countries in sub-Saharan Africa, faced with unsustainable debt burdens and inadequate external financing, something more radical had to be done. The focus of the debt restructuring efforts moved from cash flow considerations to an attempt to deal with the unsustainable build-up of debt stocks.[9]

[8] For a detailed discussion of the reasons underlying the debt build-up in HIPCs, see Christina Daseking and Robert Powell, "From Toronto terms to the HIPC Initiative: a brief history of debt relief for low-income countries", IMF Working Paper WP/99/142 (October 1999).

[9] Ibid.

The Strategic Partnership with Africa (SPA) for low-income, debt-distressed countries in Africa was launched in September 1987 at the annual meeting of IMF and the World Bank.[10] The programme was significant because it marked the international community's first coordinated framework to respond to the widespread debt and development crisis on the African continent. Geared towards the resumption of economic growth, SPA was essentially a commitment by donors to provide balance of payments support, including debt relief, to eligible African countries with credible and sustained economic reform programmes in place. Three criteria were established for eligibility for debt relief. Countries had to be low-income countries, defined as eligible for (concessional) loans from IDA, debt distressed defined as having a debt-service-to-export ratio of 30 per cent or more; and engaged in adjustment, defined as implementing a programme supported by IMF and IDA.

The SPA framework identified six channels through which donors' resources could be delivered. Four of them—IDA adjustment credits, the IMF Structural Adjustment Facility and the Enhanced Structural Adjustment Facility, bilateral and other multilateral adjustment financing, and debt relief by bilateral donors—involved adjustment financing. The other two were supplemental financing to offset debt service owed to the International Bank for Reconstruction and Development (IBRD) (known as the Fifth Dimension) and funding for commercial debt reduction through the IDA Debt Reduction Facility (known as the Sixth Dimension).

Between 1988 and 1996, 17 donors, including IDA and IMF, disbursed more than $27.7 billion in adjustment support. These resources accounted for almost half of total concessional assistance to SPA-eligible countries over this period. Among the 31 countries eligible for SPA assistance, the United Republic of Tanzania ($1.8 billion), Mozambique ($1.6 billion) and Zambia ($1.4 billion) received the most adjustment assistance. They were followed by Côte d'Ivoire, Ghana, Kenya, Senegal and Uganda, each of which received between $800 million and $1.1 billion. Over the same period, Paris Club creditors rescheduled or cancelled $28.2 billion in claims on SPA countries.[11]

[10] From 1987 to 1997 the programme was called Special Programme of Assistance to Africa.

[11] For key results of an ex post evaluation of the Special Programme of Assistance for Africa, see http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/B9308361A99ACB5F852568150051D59F.

D. From debt relief to debt reduction

The first tentative move towards incorporating an element of debt reduction (or forgiveness) of non-concessional debt by Paris Club creditors followed the summit meeting of the Group of Seven (G7) countries held in Venice, Italy, in June 1987. In their communiqué, leaders of the major industrial countries recommended that for low-income African countries undertaking adjustment efforts, "consideration should be given to the possibility of applying lower interest rates on their existing debt and agreement should be reached, especially in the Paris Club, on longer repayment and grace periods to ease the debt burden".[12] Following this communiqué, the Paris Club quickly declared Mauritania, Mozambique, Somalia and Uganda eligible for special treatment in view of their large debt-service obligations, poor balance of payments prospects and low per capita income. Agreements signed with these countries extended the repayment term for rescheduled non-concessional debt to 20 years, with a 10-year grace period.

A year later, at the economic summit in Toronto, Canada, in June 1988, G7 leaders went a step further.[13] Consistent with the SPA framework, they agreed that the non-concessional, bilateral official debt and guaranteed commercial debt of low-income (defined as "IDA–only") African countries could be reduced by up to 33 per cent in net present value terms. A menu of restructuring options for creditors was introduced. Creditors could choose to deliver debt reduction through outright cancellation of their claims or by setting the interest rate on restructured claims at below-market rates. The repayment period for restructured claims was also greatly extended (to 23 years). In 1990, Toronto terms were extended to IDA-only countries outside Africa.

Between October 1988 and September 1990, Paris Club creditors restructured their claims on Toronto terms with 19 countries, including two outside sub-Saharan Africa (Bolivia and Guyana), in 26 agreements. These agreements consolidated $5.8 billion in arrears and debt-service payments falling due and reduced the present value of the debt of the recipient countries by more than $800 million. Seven African countries (Central African Republic, Madagascar, Mali, Niger, Senegal, Togo and United Republic of Tanzania) concluded more than one agreement on Toronto terms during this period. Although Toronto

[12] See www.g8.utoronto.ca/summit/1987venice/communique/develope.html.

[13] See, for example, www.g8.utoronto.ca/summit/1988toronto/communique.html#debt.

terms had some beneficial effect on the debt situation of recipient countries, it did not take long for the international community to recognize that most low-income countries were going to need more far-reaching concessions to achieve a sustained improvement in their external debt situation. Moreover, there was growing recognition that a change in approach was needed: experience had demonstrated that the long-standing practice of Paris Club creditors to restructure only debt service payments falling due during a limited consolidation period was simply setting the stage for a successive round of rescheduling agreements. For example, between 1976 and 1990, nine Paris Club agreements were concluded with the Democratic Republic of the Congo and with Senegal, and seven Paris Club agreements were concluded with Madagascar.

The starting point for discussions on more far-reaching debt relief for low-income countries was the Trinidad terms proposed by the United Kingdom of Great Britain and Northern Ireland in September 1990.[14] In the spring of 1991, political expedience led Paris Club creditors to restructure the entire stock of debt of two middle-income countries (Egypt and Poland) on highly concessional terms. Both agreements reduced the net present value of all future debt-service payments by 50 per cent. Subsequently, some of the innovative features of these two agreements were incorporated into the menu of enhanced concessions for low-income countries (the "enhanced Toronto terms") that the Paris Club creditors agreed to in December 1991.

The enhanced menu increased the reduction in non-concessional, bilateral official debt and guaranteed commercial debt to 50 per cent in net present value terms. It contained several innovative features. The most important was the two-step approach to debt restructuring, which combined the flexibility of the flow approach (that is, restructuring debt-service payments falling due in a defined consolidation period) with the possibility of a later stock-of-debt operation to allow the debtor country to "exit" the rescheduling process. Another innovation was the introduction of a graduated repayment schedule for debt service due on restructured claims, which rose by an annual rate of about 3 per cent in nominal terms. With exports projected to increase at a faster rate, the debt-service burden on restructured debt was expected to decline over time.

[14] See Daseking and Powell, "From Toronto terms to the HIPC Initiative" (footnote 8 above).

Once again, however, resolution of the debt problems of the poorest countries proved elusive. By the mid-1990s, it became clear that resolving the structural problems inherent in the debt problems of the most severely indebted countries would require even deeper concessions. Following the G7 summit in Naples, Italy, in July 1994, Paris Club creditors agreed that, where necessary, concessionality could be increased to 67 per cent on debt eligible for restructuring.[15]

The Naples terms built on the enhanced Toronto terms menu, but extended those terms significantly in several respects. In addition to the increase in the level of concessionality, creditors also agreed that for debtor countries with good track records (under an IMF-supported programme and prior rescheduling agreements), a concessional rescheduling of the entire stock of eligible debt could be implemented. The Naples terms also allowed more flexibility on the coverage of debt to be rescheduled. In particular, debt rescheduled on concessional (Toronto or enhanced Toronto) terms could be rescheduled again and the level of concessionality increased (or topped up) to the new level of 67 per cent.

Uganda was the first country to receive an exit rescheduling agreement on Naples terms. The February 1995 agreement provided a massive reduction in debt contracted before 1 July 1981 (the cut-off date), excluding debt previously rescheduled in February 1992 on enhanced Toronto terms (which had already received a 50 per cent net present value reduction). Debt rescheduled in 1989 on Toronto terms, including arrears and late interest, was increased (topped up) to 67 per cent in net present value (from the 33 per cent net present value reduction granted in the earlier agreement). In the first half of 1995, 10 other low-income countries concluded agreements on Naples terms, consolidating about $2.7 billion of debt.

Naples terms were heralded as an exit strategy from the rescheduling process. The expectation was that in the context of sound economic policies of adjustment and reform, these terms would bring debt to sustainable levels in most low-income countries and permit a sustainable "exit". This hope was based on an overestimation of the impact of the reforms on the economies in question. Of the 37 low-income

[15] In their communiqué leaders of the G7 at the Naples summit "encourage[d] the Paris Club to pursue its efforts to improve the debt treatment of the poorest and most indebted countries. Where appropriate, [they] favour[ed] a reduction in the stock of debt and an increase in concessionality for those countries facing special difficulties." See www.g8.utoronto.ca/summit/1994naples/communique/develope.html.

countries that concluded agreements on Naples terms between 1995 and 2008, only two (Cambodia and Yemen) had their external debt reduced to sustainable levels and exited from the rescheduling process. All of the other countries were declared eligible for debt reduction under the HIPC Initiative, launched in 1996.

As the HIPC Initiative got under way, creditors increased the level of debt forgiveness. In November 1996, they agreed to increase the present value reduction to up to 80 per cent (Lyon terms); in June 1999, they agreed to reduce debt relief to 90 per cent (Cologne terms). Such operations could be in the form of flow restructuring or stock-of-debt reductions.

III. Complementary measures

Some Paris Club creditors took important complementary measures. These measures included forgiveness of ODA loans (using the OECD Development Assistance Committee as a platform to coordinate these efforts), and debt-conversion arrangements under Paris Club auspices and through special initiatives such as the United States Enterprise for the Americas Initiative and the Swiss Debt Reduction Facility.

A. Forgiveness of official development assistance debt

An important component of debt reduction is the forgiveness by bilateral donors of their ODA loans. Many middle-income countries and virtually every low-income country have benefited from the forgiveness of at least part of these loans.

Forgiveness of ODA loans, like forgiveness of aid more generally, has always been considered a strictly bilateral issue between individual donor and debtor countries. Periodically, however, there have been rounds of concerted action by donors, often in the face of global crises. In the late 1970s, in response to the burgeoning debt crisis and the resolution[16] adopted by the Trade and Development Board of the United Nations Conference on Trade and Development (UNCTAD) in 1978, most member countries cancelled all or part of their ODA loans to a group of low-income countries considered less developed. In tandem, they began to provide all new bilateral aid flows to this group of countries in the form of grants. Between 1978 and 1986, 15 Development Assistance Committee (DAC) member countries granted about $3 billion in debt forgiveness under this initiative. More than two thirds of this debt forgiveness related to debt owed by developing countries in sub-Saharan Africa. Beneficiary countries included both those that had rescheduled debt and those that had avoided debt difficulties.

DAC member countries launched a second concerted round of ODA debt forgiveness in 1988, as part of the coordinated programme of assistance to Africa and in parallel with the decision by Governments represented at the Paris Club to provide partial debt reduction on non-concessional claims rescheduled within the Paris Club. In keeping with the SPA framework, ODA debt forgiveness was focused primarily on the HIPCs of sub-Saharan Africa. It was also increasingly linked directly to policy performance by the debtor country. However, some countries that had avoided debt difficulties were again the beneficiaries of debt forgiveness.

In 1989 alone, donors announced ODA debt cancellation of more than $6 billion. This included cancellations by France of $3.1 billion in ODA loans contracted by 35 low-income African countries before the end of 1988; by Germany of $1.4 billion in ODA loans to least developed countries; and by Belgium of $330 million in ODA loans to several African countries. In July 1989, the United States announced its intention to forgive $500 million in ODA loans to certain low-income countries of sub-Saharan Africa and to provide future aid to those countries as grants. The forgiveness was delivered in tranches, conditional upon satisfactory implementation of structural adjustment programmes supported by IMF and the World Bank. Later in the year, Canada cancelled $570 million in ODA loans to 13 sub-Saharan African countries and pledged to provide future aid as grants.

B. Debt swaps and debt conversion

A swap arrangement transforms one type of asset into another with different characteristics. The most common type of swap arrangements are debt for equity, debt for development, debt for investment in environmental conservation projects, debt for debt and debt for local currency. The market for these types of operations evolved in the context of the market-based debt reduction schemes that emerged to deal with the commercial debt crises of the 1980s in middle-income countries. Swap arrangements involving bilateral creditors emerged in the 1990s as

[16] Resolution 165 (S-IX) on debt and development problems of developing countries, adopted by the Trade and Development Board at the third (ministerial) part of its ninth special session (A/33/15, part two, annex I).

another instrument in the ongoing effort to reduce the external debt burden of low-income countries.

The first of these arrangements was the United States Enterprise for the Americas Initiative, announced in June 1990.[17] Its aim was to enhance development prospects through action in the areas of trade, investment and debt. For eligible countries in Central and Latin America, debt owed to the United States could be reduced provided the country was undertaking macroeconomic and structural reforms, was liberalizing its investment regime and had concluded a debt restructuring agreement with its commercial bank creditors. Under the Initiative, bilateral concessional loans extended by the United States Agency for International Development or the Department of Agriculture under the food aid programme governed by Public Law 480 could be reduced and interest payments made in local currency provided those resources were committed to environmental or child development projects. In addition, a portion of non-concessional loans extended by the Export-Import Bank of the United States or the Commodity Credit Corporation could be bought back by the debtor to facilitate debt-for-nature, debt-for-development or debt-for-equity swaps. Bolivia was the only low-income country to qualify for this initiative.

The Swiss Debt Reduction Facility, which became operational in January 1991, was aimed at HIPCs.[18] Access was limited to countries with a strong track record of reform, acceptable conditions of governance and adequate debt management systems that were implementing structural reform programmes supported by IMF and the World Bank. The 45 countries eligible for the Facility included low-income countries considered by the United Nations to be least developed (a definition that takes into account per capita income, the stock of human assets and economic vulnerability) and other developing countries that had either rescheduled with Paris Club creditors on enhanced concessional terms or were recipients of Swiss ODA. The resources of the Facility could be used for a wide range of measures, including buy-back of officially insured Swiss export credits and commercial non-insured debt and contributions to clearing arrears and financing debt-service payments owed to multilateral institutions. Debt cancellation could also be linked to creation by the debtor Government of a local currency counterpart fund to be used to finance development projects. An estimated $1.8 billion in outstanding claims were eliminated through the Facility.

Other bilateral initiatives for debt forgiveness included the Libreville Debt Initiative, announced by France at the Franco-African summit in 1992[19] and the United States Tropical Forest Conservation Act of 1998.[20] Under the Libreville Debt Initiative, France committed to set up a 4 billion franc (about $800 million) fund to cancel or convert ODA loans to four African countries (Cameroon, the Republic of the Congo, Côte d'Ivoire and Gabon) in conjunction with specific development projects approved by the Agence française de développement.

The Tropical Forest Conservation Act established a facility that allowed low- and middle-income countries with tropical forests to finance debt buy-backs with concessional debt owed to the United States provided that the debtor country had a bilateral investment treaty with the United States and an ongoing investment reform programme supported by the World Bank or the Inter-American Development Bank. Five low-income countries (Bolivia, Côte d'Ivoire, Guyana, Liberia and Madagascar) were eligible for this facility.

Debt conversions for lower-middle-income countries under Paris Club agreements were first introduced in September 1990. A provision allowed creditors to swap a limited amount of their ODA claims and 10 per cent of their guaranteed commercial claims (on a purely voluntary and bilateral basis) in the form of debt for aid, debt for equity, debt for nature and debt for local currency. In December 1991, these provisions were extended to low-income countries.

Between 2002 and 2007, Paris Club creditors concluded more than 376 operations that extinguished $8.3 billion in claims. Sixty per cent of the total amount swapped was in the form of debt for aid; 31 per cent was in the form of debt-for-equity swaps. Five creditors (France, Germany, Italy, Spain and Switzerland) accounted for 80 per cent of the total volume of debt swapped. The largest beneficiaries of debt swaps were Côte d'Ivoire, Egypt, Honduras, Jordan, Morocco and Peru, which together accounted for 60 per cent of all debt swapped by Paris Club creditors.

[17] See, for example, R. Porter, "The Enterprise for the Americas Initiative: a new approach to economic growth", *Journal of Interamerican Studies and World Affairs*, vol. 32, No. 4 (Winter 1990).

[18] See, for example, "The Swiss debt-reduction program 1991-2001: achievements, perspectives", available at www.alliancesud.ch/en/policy/expertise/downloads/swiss_debt_reduct1.pdf.

[19] See www.diplomatie.gouv.fr/fr/pays-zones-geo/afrique/sommets afrique-france/article/la-rigueur-economique-17eme-sommet.

[20] For more information on the Act, see www.usaid.gov/our_work/environment/forestry/tfca.html.

Twenty HIPCs have concluded debt-swap operations with Paris Club creditors, primarily in the form of debt-for-aid swaps. These operations have extinguished almost $2 billion of these countries' external debt.

C. Debt relief by non-Paris Club creditors

Many countries have debt-service obligations to official bilateral creditors that do not participate in Paris Club rescheduling or other established institutional forums for negotiation. Individual creditor countries not participating in the Paris Club have developed various approaches, which have been adapted to the individual circumstances of each debtor country. Most non-Paris Club bilateral creditors have agreed to a rescheduling of obligations, although in some cases debt buy-backs involving substantial discounts have been implemented. In some instances, claims have been forgiven: in 1991, the Gulf countries (principally Kuwait and Saudi Arabia) forgave $6 billion of their claims on Egypt and more than $2 billion of their claims on Morocco.

As a condition of debt rescheduling, Paris Club creditors require that debtor countries seek debt relief on terms comparable to those of other creditors. Because of the ad hoc and bilateral nature of negotiations with non-Paris Club bilateral creditors, comprehensive information on the terms of agreements concluded and the volume of claims restructured is not generally available. However, in the context of the HIPC Initiative, debt relief by non-Paris Club bilateral creditors is monitored in parallel with debt relief provided by all other categories of creditor.

About 13 per cent of total debt is owed by HIPCs to non-Paris Club bilateral creditors. Of the 51 non-Paris Club bilateral creditors with claims on those countries, only eight (Egypt, Hungary, Jamaica, Morocco, Republic of Korea, Rwanda, South Africa and Trinidad and Tobago) had provided full relief and another 22 creditors partial debt relief by June 2008.[21]

Twenty-one creditors have not yet delivered any HIPC Initiative debt relief, although some, including Colombia and Kuwait, are making efforts to modify their national laws so that they no longer hinder their delivery of such relief. For individual HIPCs, the relief delivered by non-Paris Club bilateral creditors varies significantly. Four such countries (Honduras, Madagascar, Sao Tome and Principe and Zambia) have received less than 15 per cent of their expected debt relief from non-Paris club creditors. Others (Benin, Cameroon, Ghana and Sierra Leone) have received more than 75 per cent of the expected debt relief.

D. Debt relief by commercial creditors

The debt crisis that engulfed low-income countries in the 1970s and 1980s also led to restructuring with commercial creditors. These agreements evolved from ad hoc arrangements by individual creditors to a more coordinated restructuring through commercial bank advisory committees, often referred to as the London Club.

Unlike the Paris Club, the London Club held no regular group meetings with debtors: a special advisory committee, representing the major creditor banks, was formed for each negotiation (meetings did not always take place in London). Membership in the advisory committee was based on the size of an individual bank's exposure and the need to spread representation among key creditor countries. Normally, only principal payments were rescheduled, and arrears were expected to be paid at the time the restructuring agreement went into effect. In addition to restructuring outstanding loan maturities, commercial bank creditors sometimes provided new money (normally extended in proportion to existing exposure) and maintained or extended short-term credit facilities.

The process followed by the London Club required the advisory committee and the debtor Government to first reach an agreement in principle for a restructuring. That agreement was then signed by all creditor banks. The agreement became effective when a specified proportion of creditors signed the agreement and other conditions (such as payment of arrears) were met.

In an effort to eliminate uncertainties, in some cases commercial banks concluded multi-year agreements that consolidated principal payments over a three- to five-year period. Formal arrangements to monitor economic performance were an essential element of multi-year agreements, for which the debtor country was required to have an upper-credit tranche agreement in place with IMF.

[21] IDA and IMF, "Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI)—Status of implementation" (12 September 2008).

Between 1980 and the end of 1988, 20 low-income countries restructured their commercial bank debt one or more times.[22] During this period, $18.7 billion in commercial bank debt owed by low-income countries was restructured. Five countries (Côte d'Ivoire, Democratic Republic of the Congo, Nicaragua, Nigeria and the Sudan) accounted for 85 per cent of this amount.

By the mid-1980s, it had become evident that the debt crisis in low-income countries was too deep-rooted to be resolved through rescheduling of principal payments owed to commercial creditors, and participation in concerted lending was becoming increasingly difficult to arrange. Creditor banks began to recognize that some form of debt cancellation was essential to a viable debt-relief package.

In March 1989, the creditor community established a mechanism to support voluntary debt and debt-service reduction operations based on a plan by Nicholas Brady, then Secretary of the Treasury of the United States. The Brady Plan was designed to provide the debtor country with a reduction in the stock of debt or future debt service as well as new money, with support from international financial institutions and bilateral donors, notably Japan. Commercial lenders found the plan attractive because it provided a menu of instruments from which they could choose depending on their balance-sheet needs. The main instruments were buy-backs and discounted exchanges for debt-stock reduction, par exchanges at reduced interest rates for debt-service reduction and a new money option for debt not subject to debt or debt-service reduction.[23]

The Brady Plan was aimed primarily at middle-income countries. Operations under the Plan were concluded with only two low-income countries: Nigeria in 1992 and Côte d'Ivoire in 1997. The agreement with Nigeria restructured $5.4 billion through a cash buy-back of $3.3 billion at 40 cents per dollar and an exchange of $2.1 billion for collateralized 30-year bullet maturity par bonds with reduced interest rates. A recovery value provision allowed bondholders to recapture part of the discount if the international price of oil rose above an agreed reference price. The total cost of the operation ($1.7 billion) was paid from Nigeria's own resources.

The agreement with Côte d'Ivoire was something of a hybrid: in essence a Brady Plan operation but with a portion of the costs provided by the Debt Reduction Facility for IDA-only countries (described below). In total, $6.5 billion were restructured and debt owed to commercial creditors was reduced by $4.1 billion in nominal terms, equivalent to a reduction of just under 80 per cent in net present value terms. Of the $2.3 billion of eligible principal, $700 million were bought back at 24 cents per dollar, $200 million were exchanged for 50 per cent discount bonds and $1.4 billion were exchanged for front-loaded interest reduction bonds. Of the $4.2 billion of past-due interest, $900 million were exchanged for past-due interest bonds, $30 million were paid in cash at closing and $3.3 billion were written off. The principal component of the discount bond was collateralized with 30-year United States Treasury or French Treasury zero-coupon bonds, delivered at closing. The total cost of the operation was $226 million, of which $19 million came from Côte d'Ivoire's own resources and $207 million were funded with external loans and grants ($70 million from IMF, $52 million from France, $50 million from IDA and $35 million from the Debt Reduction Facility, supported by $15 million in grants from the Netherlands and Switzerland).

E. Debt Reduction Facility

Created in July 1989, the IDA Debt Reduction Facility (DRF) was designed to address the commercial debt problems of low-income countries. Its objective is to help reforming, heavily indebted, IDA-only countries reduce their sovereign commercial external debt as part of a broader debt-resolution programme, and thereby to contribute to growth, poverty reduction and debt sustainability.

Under a typical DRF-supported operation, a Government buys back its public and publicly guaranteed debts from external commercial creditors for cash at a deep discount.[24] DRF provides grants for both the preparation and the implementation of commercial debt-reduction operations. The preparation grants support eligible Governments in retaining the services needed to prepare such operations. The implementa-

[22] The low-income countries involved were: Bolivia, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Gambia, Guinea, Guyana, Honduras, Liberia, Madagascar, Malawi, Mozambique, Nicaragua, Niger, Nigeria, Senegal, Sierra Leone, Sudan, Togo and Zambia.

[23] For a discussion of the Brady Plan, see, for example, Ian Vásquez, "The Brady Plan and market-based solutions to the debt crises", *The Cato Journal*, vol. 16, No. 2 (Fall 1996).

[24] Other modalities have also occasionally been used. They include debt swaps (which have been part of operations in Albania, Bolivia, Niger, Senegal, the United Republic of Tanzania and Zambia) and debt restructurings (used in Viet Nam and for a substantial part of the debt reduction in Côte d'Ivoire).

tion grants finance the costs of debt buy-backs as part of the implementation of commercial debt–reduction operations. In April 2008, the policies and practices of DRF were modified to enhance its effectiveness (by, for example, allowing it to provide more rapid support for the preparation of commercial debt-reduction operations) and better align it with the HIPC Initiative framework.

Since its inception, DRF has helped extinguish about $10 billion of external commercial debt and become one of the key instruments used to promote commercial creditor participation under the HIPC Initiative. As such, it helps reduce the risk of these creditors taking advantage of debt relief provided by other creditors. By settling commercial claims, which are generally in arrears, DRF may also help improve the climate for foreign direct investment and trade. In addition, DRF enables countries to manage their debts and reserves in a more cost-effective way, by reducing the likelihood that their debts will be sold to aggressive distressed debt funds and by avoiding litigation and attempted attachment of assets. In some cases, DRF can help HIPCs extinguish court judgements, even after awards have been distributed.[25]

DRF is financed mainly from transfers from IBRD, grant contributions from other donors and investment income earned on such contributions. As of March 2009, DRF had received $350 million in transfers from IBRD net income. In addition, bilateral donors, including Canada, Finland, France, Germany, Norway, the Netherlands, the Russian Federation, Sweden, Switzerland, the United Kingdom and the United States, had contributed grants to support commercial debt-reduction operations. The European Commission, France, Germany, Japan, Switzerland and the United States have made grants directly to debtor Governments in support of DRF-sponsored operations. Debtor Governments' own financing has also been contributed to DRF-supported operations.

F. Debt-relief initiatives by multilateral creditors

Three initiatives—the Fifth Dimension of the Strategic Partnership with Africa, the HIPC Initiative and the Multilateral Debt Relief Initiative—provide debt relief. Each is described below.

[25] A significant number of litigating creditors participated in the recent DRF-supported buy-back operations in Liberia and Nicaragua. These arrangements extinguished almost half of the overall value of reported court judgements against post-decision point HIPCs.

1. Fifth Dimension

The Fifth Dimension of the Strategic Partnership with Africa was aimed explicitly at IDA-only countries with outstanding obligations on IBRD loans. These loans were contracted when the debtor country had access to IBRD and other market-based financing. Initially, concessional bilateral assistance, mainly from the Nordic countries, was provided to help finance debt-service payments to IBRD. Subsequently, IDA introduced supplemental (Fifth Dimension) credits to offset interest payments to IBRD.

Financed with IDA reflows, the supplemental credits were allocated to eligible countries on an annual basis, in proportion to the interest payments due on their IBRD loans. In order to receive supplemental IDA credits, the debtor country had to be current with its debt-service payments to IBRD and IDA and have an ongoing adjustment programme supported by IDA. In total, IDA provided about $1 billion in supplemental IDA credits to SPA countries to offset debt-service payments to IBRD; donors contributed another $200 million.

2. Heavily Indebted Poor Countries Initiative

After a difficult period at the onset of the debt crisis of the 1980s, the debt situation of most middle-income countries improved substantially, thanks to the support provided by the international financial community and the implementation of structural adjustment. However, a number of low-income countries, most of them in sub-Saharan Africa, continued to bear heavy external debt burdens. These burdens reflected several factors, including imprudent external debt management, deficiencies in macroeconomic management, adverse developments in the terms of trade and poor governance. By the mid-1990s, with an increasing share of debt owed to multilateral creditors, it became clear that further action from the international community was needed to help those countries overcome their external debt difficulties. During the debt crisis, most low-income countries continued to receive positive net transfers from the international community. This contrasts with the negative net transfers to the HIPCs in the mid-1980s. The positive net transfers resulted mainly from increased grants from official bilateral creditors, bilateral debt forgiveness/restructuring and increased loans from multilateral institutions, mostly on highly concessional terms.

In February 1996, the Executive Boards of the World Bank and IMF discussed two papers that set

out the scope and nature of the debt problems of the HIPCs.[26] The analyses concluded that the debt burden of about half of the countries studied was likely to remain above manageable levels in the medium to long term, even with strong policy performance and full use of existing debt-relief mechanisms. During the discussion, there was a widespread sense that the initiatives to assist such countries in dealing with their debt problems needed to be supplemented with new strategies and instruments. As a result, a new debt-relief initiative was called for at the G7 summit in Lyon, France.

In response to that call, in September 1996 the World Bank and IMF launched the HIPC Initiative.[27] The key objective of the Initiative was to ensure that adjustment and reform efforts were not put at risk by continued high debt and debt-service burdens. The Initiative aimed to reduce the debt burden of eligible countries to predetermined levels, provided they adopted and carried out strong programmes of macroeconomic adjustment and structural reforms. Its launch represented a major departure from past practice in that, for the first time, debt relief was offered on multilateral debt.

Key features of the Heavily Indebted Poor Country Initiative

To be considered for HIPC Initiative debt relief, a country must be IDA-only and eligible for a Poverty Reduction and Growth Facility;[28] have debt burden indicators above the HIPC Initiative thresholds after full use of traditional debt-relief mechanisms; establish a track record of policies and reform through IMF- and IDA-supported programmes; and have developed a poverty reduction strategy paper through a broad-based participatory process.

Once a country has met or made sufficient progress in meeting these criteria, the World Bank and IMF decide on its eligibility for debt relief. This decision is called the HIPC Initiative decision point. At the decision point, the World Bank and IMF decide how much debt reduction a country will receive in the context of the HIPC Initiative. The World Bank and IMF also come to agreement with authorities from debtor countries on the requirements that need to be fulfilled (the so-called completion point triggers) for the country to receive irrevocable debt relief. Once a country reaches its decision point, it may immediately begin receiving interim relief from some creditors upon its debt service falling due.[29]

In order to receive irrevocable debt relief under the HIPC Initiative, a country must meet the completion point triggers. Once it does, it can reach the HIPC Initiative completion point, at which time lenders are expected to provide the full debt relief committed at the decision point. This amount is equal to the reduction needed to bring down the country's debt to the relevant HIPC Initiative threshold (150 per cent of the net present value of the debt-to-exports ratio or 250 per cent of the net present value of the debt-to-revenue ratio). The Initiative was based on six guiding principles:

(a) Overall debt sustainability should be assessed on a case-by-case basis that focuses on the totality of a country's debt;

(b) Action should be taken only when a debtor has shown the ability to put the debt relief provided to good use;

(c) Existing debt-relief mechanisms should be built upon;

(d) The provision of debt relief should be coordinated by all creditors, with broad and equitable participation;

(e) The delivery of debt relief by multilateral creditors should preserve the financial integrity of the institutions and their preferred creditor status;

(f) New external financing to beneficiary countries should be provided on appropriate concessional terms.

At the onset of the Initiative, a two-year limit was established, at the end of which a comprehensive review would be conducted to decide whether to continue the programme. The 1998 review of the Initiative acknowledged that, while the Initiative had accomplished significant results over its first two years, more needed to be done.[30]

[26] World Bank and IMF, "Analytical aspects of the debt problems of heavily indebted poor countries" and "Debt sustainability analysis for the heavily indebted poor countries".

[27] "A programme for action to resolve the debt problems of the heavily indebted poor countries: report of the Managing Director of IMF and the President of the World Bank to the Interim and Development Committees" (September 1996).

[28] Superseded in 2010 by the Extended Credit Facility.

[29] For a list of countries that have reached the decision point, see http://go.worldbank.org/4IMVXTQ090.

[30] World Bank and IMF, "The initiative for heavily indebted poor countries: review and outlook", document DC/98-15 (22 September 1998).

To make the Initiative as effective as possible, the Executive Boards of the World Bank and IMF called for a comprehensive review of its framework. The review was informed by a two-stage consultation process.[31] The first phase, finalized in mid-March 1999, addressed concerns about, and possible modifications to, the Initiative's framework, including debt-relief targets, timing of decision and completion points and performance under economic and social reform programmes.[32] The second phase, finalized in mid-June 1999, focused on the link between debt relief and social development. Three clear messages emerged from the consultation process. First, there was general acknowledgment that the Initiative was a positive step forward towards solving the debt problems of HIPCs. Second, there was disappointment with the depth of debt relief and the pace of implementation (often expressed as "too little, too late"). Third, there was a clear desire for a more direct link between debt-relief and poverty-reduction measures. Proposals for modifying the HIPC Initiative framework ranged from building on the existing framework (by, for example, making changes to timing, conditionality, debt ratios and targets) to adopting a completely different approach to debt relief (for example, adopting the human development approach or introducing international insolvency procedures).[33]

In April 1999, the President of the World Bank and the Managing Director of IMF outlined a set of guiding principles for modifying the HIPC Initiative framework. The proposed principles stated that debt relief should

- Reinforce the wider tools of the international community to promote sustainable development and poverty reduction
- Strengthen the incentives for debtor countries to adopt strong programmes of adjustment and reform
- Focus on the poorer countries, for which excessive debt can be an obstacle to development that is particularly difficult to overcome
- Remove the debt overhang and provide an appropriate cushion against exogenous shocks
- Be provided to all countries, including those that have already reached decision and completion points under the Initiative, provided that they qualify under any revised thresholds
- Be provided in a simplified framework
- Be accompanied by proposals for financing the cost to multilateral institutions

In line with these principles, the President and the Managing Director proposed a number of specific modifications. They included more debt relief to a broader group of countries by a reduction in the Initiative's debt-burden thresholds and the calculation of assistance based on actual data at the decision point rather than projected data for the completion point (as under the original framework). They also proposed providing faster debt relief, by delivering interim debt relief on a voluntary basis and front-loading debt relief after the completion point. In addition, they proposed the introduction of "floating" completion points, contingent on an outcome-based assessment of country performance rather than a fixed track record (as under the original framework). These changes aimed to provide incentives to implement reforms quickly, speed up the delivery of debt relief and develop country ownership of reforms. At the G7 summit in Cologne, Germany, in June 1999, Government leaders endorsed a number of specific suggestions by their finance ministers to provide "faster, deeper and broader debt relief for the poorest countries that demonstrate a commitment to reform and poverty alleviation".[34] In response, the World Bank and IMF enhanced the HIPC Initiative framework in accordance with the approach proposed in April 1999.[35]

At the same time, the HIPC Initiative process was linked to progress in preparing and implementing poverty reduction strategies, which were designed to be country driven and developed with the broad participation of civil society. The framework was adapted to provide an adequate cushion against exogenous shocks: under the revised framework, additional debt relief ("topping up") can be provided if, by the time a heavily indebted poor country reaches the completion point, its debt burden indicators have deteriorated owing to factors beyond its control.

[31] A request for comments and proposals was posted on the World Bank and IMF websites, and staff from both institutions attended seminars and conferences in Africa, Europe, Latin America and the United States. As of the end of March 1999, 65 written comments and proposals for improvement of the HIPC Initiative framework had been received.

[32] See World Bank and IMF, "Heavily Indebted Poor Countries (HIPC) Initiative: perspectives on the current framework and options for change" (2 April 1999).

[33] For sceptical views on the HIPC Initiative, see, for example, L. Rieffel, *Restructuring Sovereign Debt: The Case for Ad Hoc Machinery* (Washington, D.C., Brooking Institutions Press, 2003) or B. Gunter, "What's wrong with the HIPC Initiative and what's next?", *Development Policy Review*, vol. 20, Issue 1 (March 2002), pp. 5-24.

[34] Report of the G7 Finance Ministers on the Köln Debt Initiative to the Köln Economic Summit, Cologne, Germany (18-20 June 1999), para. 2.

[35] World Bank and IMF, "Modifications to the Heavily Indebted Poor Countries (HIPC) Initiative" (23 July 1999).

The flexibility of the enhanced framework has facilitated access by HIPCs to debt relief while preserving the Initiative's principles.[36] In particular, as the universe of countries in need of debt relief changed, operational modalities were adapted to better fit their challenging circumstances. Flexibility has been exercised with respect to three features:

- The eligibility criteria, which were reviewed to ensure that no country with debt burdens in excess of the HIPC Initiative's thresholds would be left without a comprehensive framework to address its debt problems
- The definition of a satisfactory track record of policy performance
- The preparation and implementation of poverty reduction strategies

3. Multilateral Debt Relief Initiative.

The HIPC Initiative was supplemented in 2005 by MDRI. This initiative, called for at the Group of Eight (G8) Summit at Gleneagles, Scotland, United Kingdom, seeks to achieve two objectives: (a) deepen debt relief to HIPCs to support their progress towards the Millennium Development Goals while safeguarding the long-term financial capacity of the international financial institutions; and (b) encourage the best use of additional donor resources for development by allocating them to low-income countries on the basis of policy performance.

Key features of the Multilateral Debt Relief Initiative

Unlike the HIPC Initiative, MDRI is not comprehensive in its creditor coverage; it does not involve participation by official bilateral or commercial creditors or multilateral creditors other than IDA, IMF, the African Development Fund (administered by the African Development Bank) and the Inter-American Development Bank (IDB). While MDRI is an initiative common to the four institutions, their implementation modalities vary. The Initiative covers all countries that reached the HIPC completion point. Debt relief covers all debt disbursed by IMF, the African Development Fund and IDB by the end of December 2004 and all debt disbursed by IDA by the end of December 2003 and still outstanding at the time of qualification (after HIPC Initiative debt relief). MDRI entails the cancellation of all eligible debts owed to IDA, IMF and the African Development Fund for countries reaching the HIPC completion point. In 2007, the Inter-American Development Bank agreed to cancel eligible debts to HIPCs through an initiative similar to MDRI.

Substantial progress has been made in implementing the HIPC Initiative and MDRI. As of December 2011, 32 HIPCs that had received debt relief under both the HIPC Initiative and MDRI had reached the completion point (when debt relief becomes irrevocable); another four were receiving interim assistance after having reached the decision point (when they qualify for HIPC). The debt relief already committed to the 36 post-decision point countries represents almost 35 per cent of the 2010 gross domestic product (GDP) of the countries concerned.[37] If all potentially eligible countries reach completion point, total debt relief provided is estimated at about $76 billion (under HIPC) and $33.8 billion (under MDRI) in end-2010 present value terms, with IDA providing $14.9 billion under HIPC and $21.9 billion under MDRI in end-2010 present value terms. Furthermore, debt-service payments have declined as a result of the initiatives in the 36 post-decision point HIPCs, for which the average debt-service payment relative to exports has dropped from 13 per cent in 2001 to 2.9 per cent in 2011 (debt service/GDP, in turn, decreased from 3.1 per cent in 2001 to 0.9 per cent in 2011). Moreover, on average, poverty reduction-related expenditures increased by more than 3 per cent of GDP between 2010 and 2011 in the 36 post-decision point countries.[38]

IV. The road ahead[39]

Debt relief has provided low-income countries with new opportunities, but formidable challenges remain. Broadening the production and export bases of these economies remains a challenge, particularly given the impact of the "great recession", which is likely to put additional pressure on debt-burden indi-

[36] For a detailed discussion of the flexibility of the Framework, see IDA and IMF, "Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI): Status of implementation" (12 September 2008).

[37] See IDA and IMF, "Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI): Status of implementation and proposals for the future of the HIPC Initiative" (8 November 2011). It is worth noting that in reviewing this document the Boards of IMF and IDA approved further ring-fencing of countries eligible for the HIPC Initiative. Accordingly, taking into account eligibility criteria and reported willingness to avail themselves of the Initiative, the number of pre-decision countries declined from four to three (since Kyrgyzstan did not meet the HIPC thresholds at the end of 2010) and the total number of HIPC Initiative countries from 40 to 39.

[38] Ibid., p. 4.

[39] From the introduction to Carlos A. Primo Braga and Dörte Dömeland, eds., *Debt Relief and Beyond: Lessons Learned and Challenges Ahead* (Washington, D.C., World Bank, 2009).

cators in many low-income countries. Declines in commodity prices and plummeting capital inflows, combined with limited tools with which to address the economic downturn, are fostering liquidity problems and are likely to raise the probability of debt distress in many of these countries if the effects of the financial crisis persist. What can be done to dampen the impact of the financial crisis on low-income countries and ensure that the benefits from HIPC Initiative and MDRI debt relief are not reversed in the years to come?

Most low-income countries and emerging economies perform better now than in the past on key dimensions the literature identifies as relevant to the risk of sovereign defaults. On average, for example, Latin American countries and emerging markets in Asia have significantly reduced the ratio of external debt to GDP in recent years. Only Eastern European countries had higher external debt levels in 2008 than they did in 2000 (the result of increases in private sector external debt). Accordingly, a wave of sovereign defaults seems less likely than in previous global economic crises.

That said, the impact of the current crisis is just beginning to reach low-income countries, as the spillover of the slowdown in richer economies and the resulting decline in external demand for commodity exporters affects their trade flows. A reversal in financial flows, particularly private capital flows, could lead to a strong decline in capital formation and eventually to liquidity problems. Before the boom in private sector flows, low-income countries had limited or no access to private foreign capital, even in good times. As global credit conditions tighten and investors' risk aversion increases, credit has once again become more limited. As a result, investment flows are moving to higher-quality and more liquid assets. After peaking in the second quarter of 2007, for example, portfolio flows to African markets decreased substantially, leaving countries that had begun to integrate into global financial markets particularly vulnerable.

Given the dependence of many low-income countries, especially African countries, on primary exports and the bleak near-term prospects of substantial private capital inflows, a shortfall in aid could be an additional harmful side effect of the global crisis.

Implementation of the joint World Bank-IMF Debt Sustainability Framework (DSF) can play a role in helping countries manage the impact of the financial crisis. By enabling better monitoring of the debt sustainability outlook, increasing coordination among creditors and raising the amount of grant financing, especially to countries with elevated levels of risk distress, DSF partly offsets the negative impact of the financial crisis on debt sustainability prospects. DSF suffers, however, from the still limited understanding of the complex link between debt and economic growth, especially in low-income countries, which lies at the heart of debt sustainability. More analytical work in this area is therefore needed.

The global financial crisis also underscores the importance of strengthening public debt-management capacity and institutions.[40] Better debt management not only can improve the quality and comprehensiveness of debt data and information systems and increase the coordination with fiscal policies, but also may enable low-income countries to develop a sound and efficient domestic debt market, which could provide Governments with a stable alternative source of financing. These efforts take time to bear fruit, however; in the interim, continuing donor support and creditor coordination will be essential to maintain the momentum gained to date.

The road ahead remains extremely challenging. Translating debt relief into sustainable growth requires low-income countries to invest in building strong and accountable institutions and avoiding the temptation to over-borrow. In the absence of such efforts, debt relief is unlikely to have a lasting impact on the realization of the right to development.

[40] See, for example, S. Gooptu and C. A. Primo Braga, "Debt management and the financial crisis", in *The Day After Tomorrow: A Handbook on the Future of Economic Policy in the Developing World*, O. Canuto and M. Giugali, eds. (Washington, D.C., World Bank, 2010).

Sovereign debt and human rights

*Cephas Lumina**

I. Introduction

Over the last two decades the international community has made numerous political commitments to address the debt crisis of developing countries and implemented a number of schemes to address it. Nevertheless, these have either not been fully translated into action or have failed to deliver an equitable and lasting solution to the debt problem. The debt crisis continues to constrain the development prospects of many low- and middle-income countries and to undermine the capacity of poor countries to create the conditions for the realization of human rights, particularly economic, social and cultural rights and the right to development.[1] Empirical evidence indicates that in many of the poorest countries debt repayment is often carried out at the expense of basic human rights, including the rights to food, health, education, adequate housing and work. In addition, debt servicing and harmful conditions linked to loans and debt relief often limit investment in and undermine the provision of accessible public services.

This chapter discusses the link between external debt and human rights, focusing on the impact of debt on the realization of economic, social and cultural rights and the right to development.[2] The chapter is organized as follows. Section II provides a brief overview of the global debt crisis. Section III discusses the impact of debt servicing on the realization of human rights. The section highlights how the diversion of scarce national resources from public programmes threatens the realization of human rights, including the right to development, and how conditions linked to debt relief undermine country ownership of national development strategies. Section IV highlights the shortcomings of current creditor-driven responses to the debt crisis and proposes a rights-based approach to debt sustainability, and underscores the need for the principle of shared responsibility of creditors and debtors to inform the design and implementation of international debt restructurings. Section V is the conclusion.

II. The global debt crisis: a brief overview

The external debt crisis of developing countries has been on the international agenda for several decades and, although a number of official initiatives to address it have been implemented over the years, the debt of these countries has continued to grow. The total external debt of emerging and developing economies rose from $2,678.4 billion in 2003 to $5,414.6 billion in 2010 and was projected to

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[1] It is accepted that external financing (including loans) can contribute to countries' economic development. However, this depends on a variety of factors, including responsible lending and borrowing, the loan conditions, prudent use of loans and proper debt management. See "Consolidation of findings of the high-level task force on the implementation of the right to development" (A/HRC/15/WG.2/TF/2/Add.1 and Corr.1), para. 52.

[2] The chapter focuses on these rights because of their close relationship and complementarity. See Committee on Economic, Social and Cultural Rights, "Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development" (E/C.12/2011/2), paras. 1 and 5-7.

rise to $6,446.3 billion in 2012.[3] In 2010, a significant portion of this debt ($4,339.9 billion) was held by banks and other private creditors, while the balance ($1,074.7 billion) was official debt. Debt service payments rose from $795.2 billion in 2003 to $1,743.7 billion in 2010, and were projected to rise to $2,010.8 billion and $2,265.5 billion in 2011 and 2012, respectively.

In 2003, the total external debt of the heavily indebted poor countries (HIPCs)—those countries whose debts are deemed "unsustainable" by the International Monetary Fund (IMF) and World Bank—was $172 billion. In 2010, it decreased marginally to $147.9 billion, presumably due to debt cancellation under international debt relief schemes. However, it was projected to rise to $163.3 billion in 2011 and $178 billion in 2012 largely as a consequence of new loans taken out to mitigate the impacts of the global financial crisis.

The non-HIPCs have debts that are deemed "sustainable" by the World Bank and IMF based on the debt sustainability criteria devised by the two institutions.[4] Although ineligible for debt relief under the HIPC Initiative, many of these countries continue to struggle under the burden of high external debt repayments that significantly reduce their available resources for social investment.

Creditors have often cast the debt crisis of the developing countries as a problem of poor debt management on the part of the debtor countries and have largely failed to acknowledge their role in the development of the crisis.[5] This is evident from the design of current international mechanisms to address the crisis. Although endogenous factors, such as corruption and poor decisions taken by national Governments which often resulted in investment in public projects that yielded little or no long-term social or economic benefit, played a role in the development of the crisis, it is above all external factors such as profligate lending (due to excess liquidity in the global financial system), uncertainty in domestic production, volatility in global prices, deteriorating terms of trade and increases in interest rates that played a critical role in the development of the debt crisis.[6] These factors adversely impacted on the fragile economies of many developing countries. In particular, the high interest rates made the repayment of debt extremely difficult. Thus, many countries were left with huge debts, even after repaying far more than the amounts originally borrowed. For example, by 1993, the debt-to-gross domestic product (GDP) ratio for sub-Saharan Africa had reached 80 per cent.

Many affluent countries also lent money to corrupt or oppressive regimes in return for support during the cold war. Some loans were extended by private companies in return for contracts which were often overvalued and of little or no value to the borrowers. Thus, many of the debts are questionable.

Although it appears that the debt problem is largely confined to the poor developing countries that have participated or are participating in the HIPC Initiative and Paris Club debt restructuring process, many countries that do not meet the threshold criteria for participation in the HIPC Initiative are also faced with heavy debt burdens.[7] Further, as the European sovereign debt crisis demonstrates, debt crises are not the exclusive preserve of poor developing countries.[8]

[3] IMF, *World Economic Outlook September 2011: Slowing Growth, Rising Risks*, World Economic and Financial Surveys (Washington, D.C., 2011).

[4] Sustainable debt is the level of debt which allows a debtor country to fulfil its current and future debt service obligations in full, without recourse to debt relief or restructuring, while allowing an acceptable level of economic growth. For the debt sustainability criteria used by the two institutions for low-income countries, see IMF, Factsheet, "The joint World Bank-IMF debt sustainability framework for low-income countries", available at www.imf.org/external/np/exr/facts/pdf/jdsf.pdf.

[5] See Jubilee Australia, Australian Council for International Development (ACFID) and Institute for Human Security, "Alternatives to debtors prison: developing a framework for international insolvency", ACFID Research in Development Series Report No. 4 (October 2011), pp. 9-10. The exception is Norway. In 2006, the Government of Norway acknowledged as a "development policy failure" its Ship Export Campaign (1976-1980) and unilaterally and unconditionally cancelled the debt of five countries arising out of the Campaign, partially acknowledging its responsibility for the debts.

[6] For a discussion of the causes of the debt crisis of developing countries, see, among others, William R. Cline, *International Debt: Systematic Risk and Policy Response* (Washington, D.C., Institute for International Economics, 1984); Michael P. Dooley, "A retrospective on the debt crisis", National Bureau of Economic Research Working Paper No. 4963 (December 1994); Christopher G. Locke and Fredoun Z. Ahmadi-Esfahani, "The origins of the international debt crisis", *Comparative Studies in Society and History*, vol. 40, No. 2 (1998), pp. 223-243; David Roodman, *Still Waiting for the Jubilee: Pragmatic Solutions for the Third World Debt Crisis*, Worldwatch Paper 155 (Washington, D.C., Worldwatch Institute, 2001); South Centre, "Third world debt: a continuing legacy of colonialism", *South Bulletin*, Issue 85 (August 2004); Stephen Kretzmann and Irfan Nooruddin, "Drilling into debt: an investigation into the relationship between debt and oil" (Oil Change International, Institute for Public Policy Research and Jubilee USA, 2005); Noel G. Villaroman, "A fate worse than debt: an alternative view of the right to development and its relevance in the external debt problem of developing countries", unpublished LLM thesis, Monash University, Australia (2010), pp. 17-22; "Alternatives to debtors prison", pp. 5-6. Editor's note: this paper is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1895449.

[7] For example, in 2004, Ecuador's external debt was $16.9 billion and its debt service payments amounted to $3.7 billion (more than six times its expenditure on health care); in 2006, Kenya spent more on debt servicing than on health; in 2006, the Philippines spent over 32 per cent of its annual budget on servicing interest payments compared with about 14 per cent on education and 1.3 per cent on health. See Jubilee Debt Campaign, briefings on debt and health (December 2007); debt and education (April 2007); and debt and public services (October 2007). Available from www.jubileedebtcampaign.org.uk.

[8] In recent years, Europe has experienced a series of debt crises affecting Greece, Iceland, Ireland, Portugal and Spain.

III. Debt and its impact on human rights

A. External debt as a human rights problem

Developed and developing countries hold divergent views, reflected in decisions and resolutions of the Human Rights Council and its predecessor, the Commission on Human Rights, on whether foreign debt should be treated as a human rights issue.[9] The developed (mainly creditor) countries oppose consideration of the impact of foreign debt on the realization of human rights by the United Nations human rights bodies, arguing that these bodies are not the "appropriate" ones to address the debt problem. For example, at the sixteenth session of the Human Rights Council, in March 2011, the United States delegate, in a statement made in explanation of the delegation's vote on a draft resolution on the mandate 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, argued:

> [W]e continue to believe that it is incorrect to treat the issue of foreign debt as a human rights problem to be addressed by this Council. Rules other than human rights law are most relevant to the contractual arrangements between States and lenders. There are other international fora which are much better equipped to deal with the questions of foreign debt and debt forgiveness, which are principally economic and technical in nature. Unfortunately, continuing the mandate of the Independent Expert does not simply further the inappropriate treatment of this important issue as a human rights problem. It also diverts the focus and finances of this Council away from serious human rights issues that more urgently require our attention.[10]

A number of comments on the above statement are apposite. First, the "rules other than human rights law" and "other international fora which are much better equipped to deal with the questions of foreign debt and debt forgiveness" have thus far failed to deliver an equitable and durable solution to the sovereign debt problem. Further, these rules provide no protection for States that experience debt repayment difficulties in much the same way that domestic insolvency laws do for individuals and entities at the national level,[11] nor do they acknowledge or address the unjust circumstances in which some of the debt was incurred.[12]

Secondly, the position reflected in the statement is arguably inconsistent with the core principle of the indivisibility, interdependence and interrelatedness of all human rights. In this regard, it is noteworthy that the Declaration on the Right to Development underscores in its preamble that, in order to promote development, "equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for, and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms".

Thirdly, the argument put forth in the statement is inconsistent with the holistic approach to the promotion and protection of human rights that is envisaged in the Vienna Declaration and Programme of Action, which calls upon States to "eliminate all violations of human rights and their causes, as well as obstacles to the enjoyment of these rights" (part I, para. 13).[13]

Fourthly, article 22 of the International Covenant on Economic, Social and Cultural Rights provides that the Economic and Social Council "may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports [submitted by the States parties to the Covenant] which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to

[9] See, for example, Commission on Human Rights resolution 2004/18, adopted by a recorded vote of 29 votes (Argentina, Bhutan, Brazil, Burkina Faso, China, Congo, Cuba, Dominican Republic, Egypt, Eritrea, Ethiopia, Gabon, Guatemala, Honduras, India, Indonesia, Mauritania, Nepal, Nigeria, Pakistan, Russian Federation, Sierra Leone, South Africa, Sri Lanka, Sudan, Swaziland, Togo, Uganda and Zimbabwe) to 14 (Australia, Austria, Croatia, France, Germany, Hungary, Ireland, Italy, Japan, Netherlands, Republic of Korea, Sweden, United Kingdom of Great Britain and Northern Ireland and United States of America), with 10 abstentions (Armenia, Bahrain, Chile, Costa Rica, Mexico, Paraguay, Peru, Qatar, Saudi Arabia and Ukraine); and Human Rights Council decision 12/119, adopted by a recorded vote of 31 votes (Angola, Argentina, Bahrain, Bangladesh, Bolivia (Plurinational State of), Brazil, Burkina Faso, Cameroon, Chile, China, Cuba, Djibouti, Egypt, Gabon, Ghana, India, Indonesia, Jordan, Kyrgyzstan, Madagascar, Mauritius, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa and Uruguay) to 13 (Belgium, Bosnia and Herzegovina, France, Hungary, Italy, Japan, Netherlands, Republic of Korea, Slovakia, Slovenia, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America), with 2 abstentions (Mexico and Norway).

[10] Available at http://geneva.usmission.gov/2011/03/23/eov-foreign-debt/.

[11] See, for example, Kunnibert Raffer, "Internationalizing US municipal insolvency: a fair, equitable and efficient way to overcome a debt overhang", *Chicago Journal of International Law,* vol. 6, No. 1 (Summer 2005), p. 361.

[12] The Office of the United Nations High Commissioner for Human Rights (OHCHR) has stressed the need, from a human rights perspective, for developed countries and international financial institutions to "acknowledge that a significant portion of the debt was not acquired fairly". See *Claiming the Millennium Development Goals: A Human Rights Approach* (United Nations publication, Sales No. E.08.XIV), p. 47.

[13] Although the Vienna Declaration and Programme of Action does not create binding obligations on States, it provides an indication of global opinion on the issues that it covers.

contribute to the effective progressive realization of the present Covenant". According to the Committee on Economic, Social and Cultural Rights, this provision includes "virtually all United Nations organs and agencies involved in any aspect of international development cooperation". The Committee goes on to express the view that "it would be appropriate for recommendations in accordance with article 22 to be addressed, inter alia, to the Secretary-General, subsidiary organs of the Council such as the Commission on Human Rights, the Commission on Social Development and the Commission on the Status of Women".[14] It is therefore within the competence of the Human Rights Council to consider the impact of foreign debt on the realization of the rights under the Covenant and other human rights treaties.

Fifthly, the "other international fora" (presumably, the international financial institutions) adverted to in the statement lack the expertise to properly factor human rights into their policies and strategies. Consequently, in line with the provisions of article 22 of the Covenant, the United Nations human rights bodies (including the Council) are competent to address this issue and to bring the recommendations made by its independent experts to the attention of, inter alia, the international financial institutions dealing with foreign debt and debt relief. Thus, for example, the Committee and other treaty bodies have often urged international financial institutions to pay greater attention to the protection of human rights in their lending policies, credit agreements and debt relief initiatives. In addition, it may be argued that creditors cannot realistically be expected to focus on finding a solution to the debt crisis, which prioritizes social and economic justice over debt repayment.[15]

Sixthly, the human rights obligations of States are clearly relevant in the context of their external debt arrangements. Thus, for example, the Committee on Economic, Social and Cultural Rights has often urged borrower States to take into account their obligations under the Covenant in all aspects of their negotiations with international financial institutions in order to ensure that economic, social and cultural rights, particularly of the most vulnerable sectors of society, are not undermined. It has also encouraged creditor countries to do all they can to ensure that the policies and decisions of the international financial institutions of which they are members, in particular the International Monetary Fund and the World Bank, are in conformity with the obligations of States parties to the Covenant, particularly the obligations contained in articles 2 (1), 11, 15, 22 and 23 concerning international assistance and cooperation.[16]

Seventhly, the declarations, resolutions and decisions of major United Nations conferences and bodies as well the concluding observations of the various treaty bodies have confirmed the link between debt, human rights and development.[17] Since the 1990s, the Commission on Human Rights and its successor, the Human Rights Council, have in numerous decisions and resolutions referred to the challenges that excessive external debt burdens and economic reform policies (particularly structural adjustment policies) pose to the realization of human rights in the developing countries.[18] With respect to the issue of debt, the Committee on Economic, Social and Cultural Rights has underscored that "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."[19]

Eighthly, under international human rights law, States have the primary responsibility for ensuring that all people under their jurisdiction enjoy basic human rights, such as the rights to health care, education, food, safe drinking water and adequate housing. Thus, Governments should not be placed in a situa-

[14] Committee on Economic, Social and Cultural Rights, general comment No 2 (1990) on international technical assistance measures, para. 2.

[15] It has been asserted that the Bretton Woods institutions "helped create the very situation of indebtedness that they themselves had responsibility for fixing" (see "Alternatives to debtors prison" (footnote 5), pp. 19-22).

[16] See the concluding observations of the Committee on Belgium (E/C.12/1/Add.54), para. 31; Italy (E/C.12/1/Add.43), para. 20; Germany (E/C.12/1/Add.68), para. 31; Sweden (E/C.12/1/Add.70), para. 24; France (E/C.12/1/Add.72), para. 32; Ireland (E/C.12/1/Add.77), para. 37; and the United Kingdom (E/C.12/1/Add.79), para. 26. It is also notable that the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (see E/C.12/2000/13) deem a human rights violation of omission "[t]he failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations" (para. 15 (j)).

[17] Examples include the Universal Declaration on the Eradication of Hunger and Malnutrition, adopted in 1974 by the World Food Conference (E/CONF.65/20, chap. I)); the Copenhagen Declaration on Social Development, adopted in 1995 by the World Summit for Social Development (A/CONF.166/9, chap. I, resolution 1, commitments 1 (k) and 7 (c)); the Beijing Declaration and Platform for Action, adopted in 1995 by the Fourth World Conference on Women (A/CONF.177/20/Rev.1, chap. I, resolution 1, annex II, para. 13); the Programme for the Further Implementation of Agenda 21 (General Assembly resolution S/19-2, annex, paras. 20 and 8); the United Nations Millennium Declaration (General Assembly resolution 55/2, paras. 15 and 28); the Plan of Implementation of the World Summit on Sustainable Development, adopted in 2002 (A/CONF.199/20 and Corr.1, chap. I, resolution 2, para. 89); the Vienna Declaration and Programme of Action, adopted in 2003 by the World Conference on Human Rights (A/CONF.157/23, part I, para. 12).

[18] See Commission resolutions 1998/24, 1999/22, 2000/82, 2001/27, 2002/29, 2003/21, 2004/18 and 2005/19 and Council decision 2/109.

[19] General comment No. 2 (1990) on international technical assistance measures, para. 9.

tion where they are unable to ensure the realization of basic human rights because of excessive debt repayments. It may be contended that States' responsibility to ensure the enjoyment of basic human rights may take priority over their debt service obligations, particularly when such payments further limit the ability of States to fulfil their human rights obligations. The primacy of this responsibility becomes stark when the large gap in the fulfilment of basic human rights is quantified: 67 million children of primary school age (53 per cent of whom are girls) are not in school;[20] nearly 9 million children a year die before their fifth birthday, mostly of largely preventable causes;[21] and an estimated 1.1 billion people lack clean water and sanitation.[22]

Finally, there is extensive evidence that excessive debt service burdens undermine poor countries' development and significantly diminish the capacity of these countries to create the necessary conditions for the full realization of human rights, particularly economic, social and cultural rights.

B. Impact of debt servicing on human rights

Excessive external debt burdens have an adverse impact on the realization of human rights and development in debtor countries in two main interrelated ways: (a) through diversion of resources from basic social services; and (b) through policy conditionalities attached to international debt relief mechanisms which undermine country ownership of national development strategies.

1. Diversion of resources from basic social services

As stated above, there is extensive evidence that the diversion of scarce national resources from fundamental programmes of education, health and infrastructure to debt servicing significantly reduces the capacity of developing countries to create the conditions for the realization of human rights and undermines countries' development.[23] In these circumstances, several human rights, including the rights to education, health, adequate housing, work and development, are placed under threat or violated, and millions face poorer living conditions.[24] In addition, conditions that debtor countries have to fulfil to qualify for international debt relief often compel further reductions in Government spending on basic social services (see below).

According to a 2005 study by the New Economics Foundation, 20 countries spent more than 20 per cent of their budget on debt service.[25] That year, Lebanon spent 52 per cent of its budget on debt service as compared with 23.1 per cent on education and health; Jamaica spent 27.9 per cent on debt service and 16.1 per cent on education and health; and Bulgaria spent 23 per cent on debt service and 11.6 per cent on education and health.[26] In a similar vein, the MDG Gap Task Force reported in 2008 that, despite the increase in social expenditures as a result of debt relief, "a large number of countries [were] still spending more on debt servicing than on public education or health".[27] According to the Task Force, in 2006, there were 10 developing countries spending more on debt service than on public education and 52 where debt servicing exceeded the public-health budget.[28] Other independent studies have confirmed the high level of spending on debt servicing relative to expenditure on basic social services such as education and health care.[29]

Various United Nations human rights bodies have consistently recognized that high debt burdens constrain the ability of many States to fulfil their human rights obligations. For example, in its concluding observations on Ecuador, the Committee on Economic, Social and Cultural Rights stated that "[i]t especially notes the high percentage of the annual national budget (around 40 per cent) allocated to foreign debt servicing [which] seriously limits the resources available for the achievement of effec-

[20] United Nations Educational, Scientific and Cultural Organization (UNESCO), *UNESCO and Education* (Paris, 2011), p. 6. See also UNESCO, *EFA Global Monitoring Report 2010: Reaching the Marginalized* (Paris, 2010), p. 5.

[21] World Health Organization (WHO) and United Nations Children's Fund (UNICEF), *Countdown to 2015 Decade Report (2000-2010): Taking Stock of Maternal, Newborn and Child Survival* (Geneva, 2010), p. 7.

[22] See United Nations Environment Programme (UNEP), *Vital Water Graphics: An Overview of the State of the World's Fresh and Marine Waters*, 2nd ed. (Nairobi, 2008).

[23] "Report of the high-level task force on the implementation of the right to development on its fifth session" (A/HRC/12/WG.2/TF/2), para. 87. See also Isabella Bunn, "The right to development: implications for international economic law", *American University International Law Review*, vol. 15, No. 6 (October 2000), pp. 1452-1467.

[24] See Jubilee Debt Campaign briefings.

[25] See Lucie Stephens, "Debt relief as if justice mattered: a framework for a comprehensive approach to debt relief that works" (New Economics Foundation, 2008), p. 3.

[26] Ibid., p. 11.

[27] United Nations, *Millennium Development Goal 8—Delivering on the Global Partnership for Achieving the Millennium Development Goals: MDG Gap Task Force Report 2008* (United Nations publication, Sales No. E.08.I.17), p. 30.

[28] Ibid.

[29] See, for example, Christian Barry, Barry Herman and Lydia Tomitova, eds., *Dealing Fairly with Developing Country Debt* (Wiley-Blackwell, 2008) p. 2; Jubilee Debt Campaign, briefing on debt and public services; Alcino Ferreira Camara Neto and Matías Vernengo, "Lula's social policies: new wine in old bottles?", University of Utah, Department of Economics Working Paper No. 2006-07, p. 11.

tive enjoyment of economic, social and cultural rights" (E/C.12/1/Add.100, para. 9).

In a similar vein, the Committee on the Rights of the Child has acknowledged that "the external debt, the structural adjustment programme and the limited availability of financial and skilled human resources [have] had a negative impact on social welfare and on the situation of children and impeded the full implementation of the Convention" in Madagascar (CRC/C/15/Add.218, para. 4).[30]

Apart from undermining obligations on economic, social and cultural rights, heavy debt burdens pose major obstacles for some low-income countries in achieving the Millennium Development Goals (see A/HRC/15/WG.2/TF/2/Add.1 and Corr.1, para. 54).[31] In 2011, the World Bank and IMF, while reporting that HIPCs had increased their poverty-reducing expenditure, noted that "HIPCs have made uneven, and in some cases limited, progress towards achieving" the Goals.[32] Only a quarter of completion point HIPCs were on track to achieve goal 1 (to eradicate extreme poverty and hunger), with progress towards goal 5 (to improve maternal health) less certain.[33] Further, only "a few HIPCs" were on track to meet goal 8 (to build a global partnership for development).[34]

The lack of progress towards the Millennium Development Goals has also been noted in a report by WHO and UNICEF covering 68 countries where more than 95 per cent of all maternal and child deaths occur. The report indicates that 49 of the countries surveyed are off track for achieving goal 4 (to reduce child mortality) and goal 5.[35] Moreover, 53 of those countries were experiencing acute shortages of doctors, nurses and midwives.[36] It is interesting to note that while the report does not identify the external debt burden as the cause of this lack of progress,[37] 33 of the countries surveyed are HIPCs (including 27 post-completion HIPCs).

In circumstances where debt has been cancelled, countries have been able to invest more in public services such as health care, education, water and sanitation and to abolish user fees for some of these services (such as fees for health care and primary education previously introduced as part of austerity measures imposed by the international financial institutions), thereby enhancing the enjoyment of the rights to health care, education, water and sanitation.

2. Undermining country ownership of national development strategies

It is widely accepted that country ownership of national development strategies is the foundation of development effectiveness and aid effectiveness.[38] According to the United Nations Conference on Trade and Development (UNCTAD), country ownership does not mean "some form of national commitment (or buy-in) to the policy reforms advocated by the [international financial institutions]", as it is often understood; rather it "implies that national Governments should have the ability to freely choose the strategies which they design and implement, and take the lead in both policy formulation and implementation".[39]

The Declaration on the Right to Development recognizes the importance of country ownership of national development strategies. Article 3 (1) of the Declaration underscores that "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development of peoples".

[30] See also the concluding observations of the Committee on Economic, Social and Cultural Rights on Zambia (E/C.12/1/Add.106), Benin (E/C.12/1/Add.78), Algeria (E/C.12/1/Add.71), Nepal (E/C.12/1/Add.66), the Syrian Arab Republic (E/C.12/1/Add.63), Senegal (E/C.12/1/Add.62), the Plurinational State of Bolivia (E/C.12/1/Add.60), Honduras (E/C.12/1/Add.57), Morocco (E/C.12/1/Add.55), Kyrgyzstan (E/C.12/1/Add.49) and the Sudan (E/C.12/1/Add.4); the Committee on the Rights of the Child on Eritrea (CRC/C/15/Add.204), Sri Lanka (CRC/C/Add.207), the Republic of Korea (CRC/C/15/Add.197), Burkina Faso (CRC/C/15/Add.193), the Sudan (CRC/C/15/Add.190), the Netherlands Antilles (CRC/C/15/Add.186), Niger (CRC/C/15/Add.179), Malawi (CRC/C/15/Add.174), Mozambique (CRC/C/15/Add.172), Kenya (CRC/C/15/Add.160), Turkey (CRC/C/15/Add.152), the Central African Republic (CRC/C/15/Add.138), Suriname (CRC/C/15/Add.130), Georgia (CRC/C/Add.124) and India (CRC/C/15/Add.115); and the Committee on the Elimination of Discrimination against Women on Uganda (A/57/38, part three, para. 149), Trinidad and Tobago (ibid., part one, para. 155), Jamaica (A/56/38, part one, para. 227), Guyana (ibid., part two, para. 161), the Netherlands (ibid., para. 227) and Cameroon (A/55/38, part two, para. 44).

[31] It should be noted that there are many linkages between the Millennium Development Goals and human rights. See *Claiming the Millennium Development Goals* (footnote 12), pp. 3-4 and 7-48.

[32] International Development Association (IDA) and IMF, "Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI): status of implementation and proposals for the future of the HIPC Initiative", p. 4 (hereinafter HIPC and MDRI: status of implementation 2011).

[33] Ibid.

[34] Ibid.

[35] WHO and UNICEF, *Countdown to 2015 Decade Report* (see footnote 21), p. 1.

[36] Ibid., p. 2.

[37] The report identifies user fees and inadequate levels of official development assistance as the key financial barriers (ibid).

[38] UNCTAD, *The Least Developed Countries Report 2010: Towards a New International Development Architecture for LDCs* (United Nations publication, Sales No. E.10.II.D), p. 162.

[39] Ibid.

However, as UNCTAD has pointed out, achieving country ownership of national development strategies is very difficult in a situation of chronic aid dependence, and even more so where the country concerned is heavily indebted. Indeed, severe indebtedness renders debtor countries subject to the control of international financial institutions and other creditors,[40] thereby eroding the ability of these countries to freely determine and pursue policies favourable to their development in line with the Declaration on the Right to Development. As Sabine Michalowski puts it:

> [T]he debt burden adversely affects the protection of economic and social rights not only because of the diversion of money from social purposes to debt servicing. Rather, the dependency in which it puts the debtor countries might result in a factual loss of sovereignty over their economic and social policies, and in the imposition of policies with potentially negative consequences for the protection of social rights. Even where the governments of debtor countries are willing to accept such policies, the dependency on the country's creditors might provide them with a powerful tool to sell these policies to the people of the country as inevitable and non-negotiable.[41]

Several commentators have made similar observations concerning the influence that the international financial institutions have over the design of macroeconomic policy in poor countries, including the preparing of programme documents supposedly "owned" by debtor countries.[42]

Poor countries' eligibility for new loans or debt relief is typically subject to conditionalities set by the international financial institutions.[43] For example, in order to complete the HIPC Initiative and have their debts cancelled, debtor countries often have to comply with a large number of onerous conditions.[44] These conditions include privatization of State-owned enterprises (such as electricity generation and distribution facilities, water utilities and telecommunications); reduction of Government expenditures for public services; wage ceilings; redundancies from the public service (the major employer in many countries); introduction of user fees for basic services like health and education; trade liberalization (involving removal or reduction of subsidies and import tariffs and promotion of exports); deregulating investment; financial sector liberalization; fiscal and monetary reforms (strict inflation targeting, accumulation of international reserves, currency devaluation and expansion of domestic credits); taxation reforms (such as introduction of a value added tax and other regressive taxes, tax holidays for foreign corporations and improvement of customs collection); and land reform (i.e., changes to laws governing ownership of land by foreigners).

Although the ostensible aim of conditionalities is to promote economic growth and prosperity, as well as to restore the debt repayment capacity of a country,[45] studies indicate that in fact they have an adverse impact on the realization of human rights in the longer term and have contributed to increasing poverty and the marginalization of the poor in many debtor countries.[46] Illustratively, the privatization of public enterprises often results in large-scale retrenchments, thereby depriving many individuals of a liveli-

[40] See Jubilee Debt Campaign briefing on debt and women (July 2007).

[41] Sabine Michalowski, "Sovereign debt and social rights: legal reflections on a difficult relationship", *Human Rights Law Review*, vol. 8, No. 1 (2008), p. 5.

[42] See, for example, Villaroman' "A fate worse than debt" (footnote 6), pp. 65-69; Angela Wood, "Power without responsibility? enhancing learning and policy accountability at the IMF", in *Accountability of the International Monetary Fund*, Barry Barin and Angela Wood, eds. (Ashgate Publishing, 2005), pp. 67 and 70; Margot E. Salomon, "International economic governance and human rights accountability", London School of Economics Law, Society and Economy Working Paper 9/2007, p. 2; Anne Orford, "Globalization and the right to development", in *Peoples' Rights*, Philip Alston, ed. (Oxford University Press, 2001), p. 152; Gerry Helleiner, "External conditionality, local ownership and development", in *Transforming Development: Foreign Aid for a Changing World*, Jim Freedman, ed. (University of Toronto Press, 2000), pp. 90-91. Creditor leverage over policymaking in debtor countries is also inconsistent with the Paris Declaration on Aid Effectiveness of 2005 and the Accra Agenda for Action of 2008, both of which underscore alignment of international assistance with national development priorities and country ownership.

[43] The term "conditionality" refers to macroeconomic targets, policy and institutional reforms that a debtor State must achieve or implement in order to receive (or continue to receive) loans or relief on old debts. For a discussion of typical conditionalities, see N. Molina and J. Pereira, "Critical conditions: the IMF maintains its grip on low-income governments" (Eurodad-European Network on Debt and Development, 2008); James Raymond Vreeland, *The International Monetary Fund: Politics of Conditional Lending* (Routledge, 2007), pp. 23-25; Robin A. King and Michael D. Robinson, "Assessing structural adjustment programs: a summary of State experience", in *Debt Disaster? Banks, Governments, Multilaterals Confront the Crisis*, John F. Weeks, ed. (New York University Press, 1989), p. 103; and Villaroman, "A fate worse than debt" (see footnote 6), pp. 115-116. It has been estimated that IMF imposes an average of 13 conditions per low-income country loan. See Molina and Pereira, p. 4. Although the international financial institutions claim that there has been a shift in their policies from conditionalities in the form of structural adjustment policies to "country-owned" poverty reduction strategy papers (PRSPs), independent analyses have shown that there is very little difference, if any, in terms of substance. As long ago as 2001, a UNDP review of poverty reduction strategy papers concluded: "A review of the macroeconomic policies in different countries' PRSP indicates that they are not significantly different from earlier stabilisation and structural adjustment lending" (UNDP review of the poverty reduction strategy paper (PRSP) (December 2001), p. 5).

[44] When a country enters the HIPC Initiative, a decision point document sets out what the country needs to do to qualify for HIPC. Typically, these conditions include measures to reduce poverty but also include various economic policy conditions (see Villaroman, footnote 6).

[45] See IMF, Factsheet, "IMF conditionality" (30 March 2012). Available at www.imf.org/external/np/exr/facts/conditio.htm. See also IMF Independent Evaluation Office, "Structural conditionality in IMF-supported programs: background documents" (29 October 2007), available at www.ieo-imf.org/ieo/files/completedevaluations/01032008SC_background_documents.pdf.

[46] See, for example, Jeffrey D. Sachs, *The End of Poverty: Economic Possibilities for Our Time* (Penguin Press, 2005), pp. 81-88, 280-281 and 342; Martin Dent and Bill Peters, *The Crisis of Poverty and Debt in the Third World* (Ashgate, 1999), pp. 73-79. For concerns expressed by the United Nations human rights mechanisms on the adverse impacts of conditionalities, see the concluding observations cited in notes above. See also the reports of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari (E/CN.4/2001/51 and E/CN.4/2002/59 and Corr.1) and the annual report of the Special Rapporteur on the right to education, Katarina Tomasevski (E/CN.4/2001/52).

hood; the reduction of Government expenditures for public services (such as education, health and housing) and/or the introduction of user fees for these services) limit access to them for many sectors of the population, especially the poorest; and a decrease in tax revenues arising from the general impoverishment of the population and from tax incentives offered to transnational corporations leaves Governments with little income for social investment. UNCTAD has reported that the rapid and extensive trade liberalization undertaken by the least developed countries during the 1990s failed to benefit the poor and in fact resulted in increased unemployment, wage inequality and poverty.[47]

Policy conditions linked to current international debt relief mechanisms not only significantly reduce a debtor country's prerogative regarding its own process of economic development (including regulating for the benefit of vulnerable groups and in favour of their development agendas),[48] they also limit investment in social services such as education and health in many low-income countries. A few case studies can illustrate the gravity of the problem.

In 2004, the IMF condition that Zambia freeze public sector wages resulted in the Government's failure to address the massive shortage of teachers by recruiting 9,000 newly qualified teachers. Similarly, a study by the United Nations Development Programme (UNDP) International Poverty Centre in 2006 found that "the net fiscal gain from debt relief had been marginal because of the external policy conditionalities linked to the relief and associated ODA".[49] Thus, even after receiving debt cancellation, Zambia would still not be able to significantly scale up public spending or investment owing to the continuing demands for exceedingly tight fiscal and monetary policies in its IMF loan arrangements.[50]

In the United Republic of Tanzania, debt cancellation was made conditional on the privatization of water utilities in Dar es Salaam, the country's largest city. This significantly reduced access to water for the poorest, both through cuts in services and higher user fees.[51]

As a condition for debt relief, IMF and the World Bank insisted that the Government of Malawi privatize its agricultural marketing agency (which used to store crops and provide subsidized fertilizer to small-scale farmers), end agricultural subsidies and sell maize stocks in order to reduce fiscal deficits and because they were considered to be trade distortions. In 2001/02 and 2004/05, the removal of support for farmers and the sale of grain stocks, combined with drought, undermined food security for 7 million of the country's population of 11 million.[52]

The impact of debt and related conditionalities extends to civil and political rights. Thus, for example, the implementation of harsh austerity measures (involving cuts to pensions and public spending), as well as privatization of public services, imposed by the European Union and IMF as part of their efforts to address the Greek sovereign debt crisis since 2009, has not only led to job losses and impoverishment, but also to widespread social unrest in the country. Efforts by the authorities to deal with the protests have resulted in violations of the rights to life, personal security and freedom of association, to mention a few.

Further, it is evident that women are more adversely affected by debt and related conditionalities than men.[53] For example, shortages of basic health care or other social services or the introduction of user fees for health-care services often result in women assuming the burden of the extra work arising from caring for the young, sick and elderly. For younger women, this is often at the expense of their education. In addition, since women and children are the most frequent users of health-care facilities, they often bear the brunt of reductions in health-care budgets in the context of the implementation of fiscal adjustment policies. Privatization of water services can reduce access to water, through cutbacks in services and increased fees or the introduction of user fees. This can increase the workload of women, who tend to bear the burden of fetching water in poor countries.[54] To compound matters, women are often marginalized and routinely excluded from decision-making at all levels and often lack independent control over resources.

[47] UNCTAD, *The Least Developed Countries Report 2002: Escaping the Poverty Trap* (United Nations publication, Sales No. E.02.II.D.13).

[48] Regulation is a duty: human rights law enjoins States to take appropriate legislative, administrative, budgetary, judicial and other measures to fulfil their human rights obligations. See, for example, International Covenant on Economic, Social and Cultural Rights, art. 2 (1).

[49] See John Weeks and Terry McKinley, *Does Debt Relief Increase Fiscal Space in Zambia?: The MDG Implications*, Country Study No. 5 (Brasilia, UNDP International Poverty Centre, 2006).

[50] Ibid.

[51] See Jubilee Debt Campaign briefing on debt and women.

[52] See K. Owusu and F. Ng'ambi, "Structural damage: the causes and consequences of Malawi's food crisis" (World Development Movement, October 2002). See also Anne Pettifor, "Resolving international debt crises fairly", in *Dealing Fairly with Developing Country Debt*.

[53] See, for example, concluding comments of the Committee on the Elimination of Discrimination against Women on Uganda (A/57/38, para. 149) and Guyana (A/56/38, para. 161) and concluding observations of the Committee on Economic, Social and Cultural Rights on Zambia (E/C.12/1/Add.106).

[54] See Jubilee Debt Campaign briefing on debt and women.

In short, while conditionalities can be beneficial,[55] the overwhelming view is that they have destroyed livelihoods, increased poverty and inequality and left many poor countries ensnared in externally prescribed or approved policy frameworks that not only make it difficult for them to comply with their human rights obligations but also undermine their development and result in impoverishment of their citizens.[56]

The Declaration on the Right to Development also highlights that development is a participatory process and that the human person "is the central subject of development and should be the active participant and beneficiary of the right to development" (arts. 1 (1), 2 (1) and (3), and 8 (2)). It further provides that States are entitled and have 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" (art. 2 (3)). In order for a development process to be characterized as "participatory", however, the people must have control over its direction, rather than being merely consulted about policies or projects that have already been decided upon.[57] Further, as one scholar has observed, there is no accountability when economic policy decisions are "externally imposed by international financial institutions which are far removed from the people in terms of effective remedial measures".[58]

It is clear that high debt burdens continue to constrain development prospects and the realization of human rights, as well as the attainment of the Millennium Development Goals, in many developing countries. Moreover, country ownership of national development strategies is undermined and the right to development violated when external actors (including creditors) influence economic policymaking or effectively restrict policy choices in indebted countries through their economic policy prescriptions or "suggestions".[59] Thus, the facts that people in heavily indebted poor countries are often unable to participate in making the decisions that affect their lives and welfare, are deprived of control over their own natural resources, cannot assure basic public services for the needy and suffer the diversion of their resources to debt repayment constitute violations of the right to development.

IV. A rights-based approach to sovereign debt

A. Limitations of creditor responses to the debt crisis

In response to the debt crisis of developing countries, creditors have devised and implemented two main measures with the aim of reducing the external debt of poor countries pursuing IMF and World Bank adjustment and reform programmes and helping them achieve debt sustainability: the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative (MDRI). The HIPC Initiative, which was first launched in 1996 by IMF and the World Bank and revised in 1999, links debt relief to poverty reduction, macroeconomic stability and structural reform. In order to qualify for debt relief under HIPC, a country must (a) be eligible to borrow from the International Development Association (IDA, the World Bank arm which provides interest-free loans and grants to the world's poorest countries) and from the IMF Extended Credit Facility, which provides loans to low-income countries at subsidized rates; (b) face an unsustainable debt burden that cannot be addressed through traditional debt relief mechanisms; (c) have established a track record of reforms and sound policies through World Bank- and IMF-supported programmes; and (d) have developed a poverty reduction strategy paper through "a broad-based participatory process" in the country.[60] Thus, as mentioned in section III above, debt relief is conditional on the progress made by qualifying countries in the preparation and implemen-

[55] For example, trade liberalization may lead to more competition and lower commodity prices.

[56] For a discussion of the long-term impact of conditionalities, see Sachs, *The End of Poverty* (footnote 46), pp. 81-82, 280-281 and 342; Peter Hardstaff, "Treacherous conditions: how IMF and World Bank policies tied to debt relief are undermining development" (World Development Movement, May 2003); Dent and Peters, *The Crisis of Poverty and Debt* (see footnote 46), pp. 73-79; Eric Toussaint, *Your Money or Your Life!: The Tyranny of Global Finance* (Pluto Press, 1999) pp. 155-165.

[57] Human Rights Council of Australia, *The Rights Way to Development—A Human Rights Approach to Development Assistance: Policy and Practice* (1995), pp. 118-121.

[58] Villaroman, "A fate worse than debt" (see footnote 6), p. 55.

[59] Michalowski, "Sovereign debt and social rights" (see footnote 41), pp. 4-5.

[60] IMF, Factsheet, "Debt relief under the Heavily Indebted Poor Countries (HIPC) Initiative" (December 2011). PRSPs describe a country's macroeconomic, structural and social policies and programmes to promote growth and reduce poverty, as well as related external financing needs. They are supposed to be prepared by Governments through a "participatory" process involving civil society and development partners, including the World Bank and IMF. In reality, however, PRSPs are subject to joint review and final approval by IMF and the World Bank. See IMF and World Bank, "2005 review of the poverty reduction strategy approach: balancing accountabilities and scaling up results", p. 1; Jim Levinsohn, "The poverty reduction strategy paper approach: good marketing or good policy?", in *Challenges to the World Bank and IMF: Developing State Perspectives*, Ariel Buira, ed. (Anthem Press, 2003), pp. 119 and 123; IMF Independent Evaluation Office, *Evaluation of the IMF's Role in Poverty Reduction Strategy Papers and the Poverty Reduction and Growth Facility* (Washington, D.C., 2004), pp. 16-17.

tation of social policies and strategies for reducing poverty.

As of November 2011, 36 out of 40 HIPCs had reached decision point under the HIPC Initiative and 32 had reached completion point and also benefited from debt relief under MDRI.[61] According to the World Bank and IMF, debt relief under the Initiatives "has substantially lowered the debt burdens of HIPCs" and "[f]or the 36 post-decision point countries, poverty reducing spending increased by more than three percentage points of GDP, on average, between 2001 and 2010, while debt service payments declined by a somewhat smaller amount".[62] It is not the purpose of this chapter to assess these claims. Nevertheless, it is important to underscore that HIPC and MDRI have reduced debt burdens only for a small group of indebted countries (that is, it excludes many countries that need or deserve debt cancellation),[63] after long delays and at high cost in terms of loss of policy space. It is also important to stress that debt service reductions as a result of relief under the initiatives is largely offset by an equivalent reduction in future concessional borrowing.[64] Thus, they do not offer much additionality. Moreover, there are indications that a number of countries (including some post-HIPC completion countries) are at risk of debt distress.[65] In March 2009, IMF reported that the debt-to-GDP ratios of 28 low-income countries exceeded 60 per cent[66]—twice the official threshold level for debt sustainability for countries with weak institutions. In 2011, IMF and World Bank reported that "a third of low income countries [were] either in debt distress or at high risk of debt distress" and that "a quarter of the post-completion point HIPCs" were at "high risk of debt distress".[67]

Apart from the foregoing issues, the HIPC Initiative has a number of other shortcomings. These include that it does not cancel all unpayable and unjust debt; it comes with harmful and unfair conditions attached (which are not necessarily consistent with the poverty reduction goals of debt relief); and it is entirely controlled by creditors who typically fail to accept responsibility for their role in creating and maintaining the debt crisis or to allow poor countries to have a say. Further, not all creditors have participated in the Initiative. In particular, the voluntary nature of the Initiative has created opportunities for some commercial creditors holding defaulted sovereign debt (which they have purchased at significant discounts) to refuse to participate, hold out for other creditors to cancel their debts and then aggressively pursue repayments vastly in excess of the amount they paid for the debt obligation.[68]

B. The need for a new debt sustainability framework

One of the most contentious elements of the current international debt relief schemes is the joint World Bank-IMF Debt Sustainability Framework (DSF) for low-income countries. According to IMF, the main aim of the Framework, introduced in 2005 and periodically reviewed, is "to help guide countries and donors in mobilizing the financing of low-income countries' development needs, while reducing the chances of an excessive build-up of debt in the future".[69] However, under DSF, "debt sustainability" has been defined narrowly according to the ability of debtor countries to repay their debts in terms of their export earnings, irrespective of other pressing demands on these countries' resources.

Under the Framework, the World Bank and IMF conduct debt sustainability assessments that involve making projections of intended borrowings and economic variables over a 20-year period and then using ratios comparing debt stock, present value or service with GDP, exports or budget revenue to assess payment capacity. This approach simply assesses whether, given certain analyses of economic growth, external trade dynamics and availability of external financial resources, a debtor country is able to service its debt.[70] Accordingly, the criteria for assessing debt

[61] HIPC and MDRI: Status of implementation 2011 (see footnote 32).
[62] Ibid, pp. 3-4.
[63] According to the World Bank and IMF, HIPC was not meant to be a permanent mechanism to relieve the external debts of low-income countries and it was effectively closed to new entrants in 2006 when the sunset clause took effect and the list of potentially eligible HIPCs was ring-fenced (ibid., p. 17).
[64] See Gail Hurley, "Multilateral debt: one step forward, how many back?: HIPC and MDRI update", Eurodad-European Network on Debt and Development, 2007, pp. 8-12.
[65] See Jürgen Kaiser, Irene Knoke and Hartmut Kowsky, *Towards a Renewed Debt Crisis?: Risk Profiles of the Poorest Countries in the Light of the Global Economic Slowdown*, Dialogue on Globalization Occasional Paper No. 44 (Berlin, Friedrich-Ebert-Stiftung, 2009), pp. 3 and 13. Drawing mainly on existing debt analyses from the international financial institutions but also considering the medium- and long-term effects of climate change and other ecological challenges, largely ignored in official assessment of debt sustainability, this study concludes that there is "strong evidence" that the global financial economic slowdown was likely to have major consequences for the external debt sustainability of many poor developing countries and that there is a need to overhaul the international strategies.
[66] IMF, "The implications of the global financial crisis for low-income countries" (March 2009), available at www.imf.org/external/pubs/ft/books/2009/globalfin/globalfin.pdf. See also UNCTAD, *The Least Developed Countries Report 2009: The State and Development Governance* (United Nations publication, Sales No. E.09.II.D.9).
[67] HIPC and MDRI: Status of implementation 2011 (see footnote 32), pp. 14-15.
[68] See "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" (A/HRC/14/21).
[69] See IMF, Factsheet, "The joint World Bank-IMF Debt Sustainability Framework for low-income countries" (October 2007).
[70] The assumptions underlying the World Bank and IMF debt sustainability assessments are questionable. This is confirmed by the IMF Independent Evaluation Office which has reported that "there is evidence that invest-

sustainability under the Framework focus almost exclusively on the ability of debtor countries to repay their debts; they do not take into account a country's ability to provide basic public services such as safe water, sanitation, health care, education and housing. Thus, the Framework ignores the primary human rights obligation of States to provide for the basic social needs of their people.

In August 2009, the DSF was reviewed to address concerns that it had "unduly constrained the ability of [low-income countries] to finance their development goals".[71] The ostensible aim of the review was to afford countries greater space to borrow more to cope with the challenges of the global economic downturn. Thus, the framework was "flexibilized" to enable countries to take on more debt without being deemed in debt "distress". The revised Framework overlooks certain State liabilities (i.e., debts of State-owned enterprises) and includes migrant remittances as contributions to countries' capacities to repay sovereign debt. In January 2012, the Framework was further reviewed "to assess whether it [remained] adequate in the light of changing circumstances" in low-income countries.[72]

It is worthy of note that while the review focused on options to enhance the flexibility of the Framework, this flexibility does not include human rights concerns, nor does it take human development and ecological challenges into consideration. It is clear that the IMF-World Bank concept of debt sustainability is very narrow and does little to advance the poverty reduction goals of debt relief, let alone sustainable development. The key objective of assessing debt sustainability should be to balance financing needs for development with sustainable debt levels. From a human rights and human development viewpoint, debt sustainability analyses should take account of the need to protect Government spending required to meet basic human development needs and to create the conditions for the realization of human rights, particularly economic, social and cultural rights. In other words, debt sustainability analyses should include an evaluation of the level of debt a country can carry without undermining its capacity to fulfil its human rights obligations (including the right to development) and to pursue its own development agenda.

The omission of human rights considerations from the "flexibilized" Framework is scarcely surprising because both the World Bank and IMF often justify their failure to incorporate human rights considerations into their policies and programmes by asserting that this is outside their respective mandates. Nevertheless, in view of the broadly accepted position that international organizations such as the World Bank and IMF have obligations under international law, including those arising under the Charter of the United Nations and human rights law, this position must be considered untenable.[73] It is also notable that in 2006, the General Counsel of the World Bank opined that the Bank's Articles of Agreement "permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities".[74] It can therefore be contended that taking human rights into account during debt sustainability assessments would be wholly consistent with the Bank's development mandates.

In addition, it is well established that States must adhere to their international law obligations when they act through international organizations.[75] Thus, for example, the European Court of Human Rights has held that the human rights obligations of member States continue even after the transfer of competences to international organizations.[76]

Other grounds for contending that human rights considerations should be factored into debt sustain-

ment is consistently overestimated in IMF-supported programmes". See IMF Independent Evaluation Office, *Evaluation Report: Fiscal Adjustment in IMF-Supported Programs* (Washington, D.C., 2003), p. 4. See also Weeks and McKinley, *Does Debt Relief Increase Fiscal Space in Zambia?* (see footnote 49),p. 6.

[71] IMF and World Bank, "A review of some aspects of the low-income country Debt Sustainability Framework" (5 August 2009).

[72] See IMF and World Bank, "Revisiting the Debt Sustainability Framework for low-income countries" (12 January 2012).

[73] See, for example, Salomon, "International economic governance" (footnote 42), p. 5; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), pp. 137-159; C. Lumina, "An assessment of the human rights obligations of the World Bank and the International Monetary Fund with particular reference to the World Bank's Inspection Panel", *Journal for Juridical Science*, vol. 31, No. 2 (2006), pp. 108-129; August Reinisch, "The changing international legal framework for dealing with non-State actors", in *Non-State Actors and Human Rights*, Philip Alston, ed. (Oxford University Press, 2005); Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Hart, 2006); Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London, Cavendish Publishing, 2001); Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions,* 5th ed. (Sweet and Maxwell, 2001), pp. 458-459; Thomas Buergenthal, "The World Bank and human rights", in *The World Bank, International Financial Institutions and the Development of International Law*, E. Brown Weiss, A. Rigo Sureda and L. Boisson de Chazournes, eds. (American Society of International Law, 1999); Daniel D. Bradlow, "The World Bank, the IMF and human rights", *Transnational Law and Contemporary Problems*, vol. 6, No. 1 (1996), pp. 48-89.

[74] See Robert Dañino, "Legal opinion on human rights and the work of the World Bank: Senior Vice President and General Counsel" (27 January 2006), para. 25.

[75] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights provide that "the obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively" (para. 19).

[76] See European Court of Human Rights, *Mathews* v. *United Kingdom*, application No. 24833/94, Grand Chamber judgement of 18 February 1999, paras. 29, 32 and 34; *Waite and Kennedy* v. *Germany*, application No. 26083/94, Grand Chamber judgement of 18 February 1999, para. 67; *Bosphorus Airways* v. *Ireland*, application No. 45036/98, Grand Chamber judgement of 20 June 2005, paras. 152-156.

ability analyses can be found in the observations and recommendations of the United Nations human rights treaty bodies. For example, the Committee on Economic, Social and Cultural Rights has emphasized that international agencies "should scrupulously avoid involvement in projects" that infringe human rights and should promote projects and approaches that contribute not only to economic growth and other defined objectives, but also to enhanced enjoyment of all human rights.[77] In a similar vein, the Committee on the Rights of the Child has recommended that the World Bank Group, the International Monetary Fund and the World Trade Organization should ensure that their activities related to international cooperation and economic development promote the full implementation of the Convention on the Rights of the Child.[78]

It is also notable that the United Nations treaty bodies have often urged international financial institutions to pay greater attention to the protection of human rights in their lending policies, credit agreements and debt relief initiatives. Thus, as noted above, the Committee on Economic, Social and Cultural Rights has recommended that full account be taken of the need to protect economic, social and cultural rights in dealing with the debt crisis.[79] Further, the Relationship Agreements between the United Nations and the Bretton Woods Institutions provide that these institutions should "consider" the decisions and recommendations of the United Nations.[80]

C. Towards a rights-based approach to sovereign debt

Despite the adverse human rights effects of high external debt burdens, creditor-driven policy responses to the sovereign debt crisis have hitherto ignored consideration of human rights. This is regrettable since human rights offer a transparent, coherent and universally recognized framework that can inform the design and implementation of a debt restructuring mechanism that can provide a just, equitable and durable solution to the debt crisis.[81] In particular, the core principles of equality, non-discrimination, participation, transparency and accountability at both the national and international levels offer a specific framework within which policies and strategies to address the sovereign debt crisis in a durable manner must be devised and implemented. Thus, for example, a human rights-based approach to external debt means that debt sustainability analyses should take into account the human rights implications of debt service.

Moreover, the effective and meaningful participation of all elements of society in the planning, implementation and evaluation of strategies, policies and national economic and social development programmes; equality of opportunity; equality of access to basic social services; and accountability of debtor Governments to their citizens for their external debt arrangements are all crucial aspects of a human rights-based approach to the debt problem.[82] Accountability also entails the scrupulous avoidance by creditors of intrusive policy conditions for new loans or relief on old debt that tend to restrict or undermine country ownership of national development strategies.

D. Reinforcing the principle of shared responsibility

As stated above, the debt crisis of developing countries has largely been presented as a problem of poor debt management. This is evident from the design of the current international debt relief mechanisms, which focus largely on "debt sustainability" and implementation of economic reforms by the countries seeking debt relief.[83] In particular, there has been a noticeable failure or reluctance on the part of the creditors who drive the debt relief mechanisms to recognize the roots of the crisis and to acknowledge their own role in its development. For this reason, it is doubtful that, in their current form, international debt relief schemes can ever provide a durable and just solution to the debt crisis that has plagued the developing countries for decades.

The burden of loans extended irresponsibly cannot rest only with borrowers, as it does at present. In most domestic legal systems, lenders have a duty to exercise due diligence when they extend a loan to an individual. National laws also typically provide guar-

[77] General comment No. 2 (1990), para. 6.
[78] General comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, para. 64.
[79] General comment No. 2 (1990), para. 6. See also general comments No. 4 (1991) on the right to adequate housing, para. 19; No. 12 (1999) on the right to adequate food, para. 41; No. 13 (1999) on the right to education, para. 60; and No.14 (2000) on the right to the highest attainable standard of health, para. 64.
[80] See the Agreement between the United Nations and the International Bank for Reconstruction and Development, United Nations, *Treaty Series*, vol. 16, No. 109, p. 346 and the Agreement between the United Nations and the International Monetary Fund, ibid., p. 328.
[81] See "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" (A/64/289 and Corr.1), para. 74.
[82] Ibid., para. 34.
[83] For example, IMF has stated that in order "[t]o reduce their debt vulnerabilities decisively, countries need to pursue cautious borrowing policies and strengthen their public debt management". See IMF, Factsheet, "Debt relief under the Heavily Indebted Poor Countries (HIPC) Initiative", p. 3.

antees against extortionate interest rates and penalty charges. Significantly, insolvency laws also provide for a resolution to avoid a run on the borrower's assets.[84] No such safeguards are currently available for States. It is therefore critical that lenders and borrowers jointly explore ways to resolve the debt crisis in line with the principle underscored in the Monterrey Consensus of the International Conference on Financing for Development that "[d]ebtors and creditors must share the responsibility for preventing and resolving unsustainable debt situations" (para. 47).

But what precisely does "shared responsibility" mean in the context of sovereign debt? There are two aspects to the principle. Firstly, it means that lenders and borrowers have a mutual obligation to ensure that their lending or borrowing behaviour does not contribute to or culminate in unsustainable debt situations. Thus, for example, lenders must not extend loans without conducting due diligence or, in the case of development loans, must not lend for projects that have no developmental benefit for the population of the borrower State. For their part, borrowers must not contract loans that they are not in a position to repay, or they must not conclude loan agreements in circumvention of the applicable national legal and institutional frameworks.

Secondly, it requires that lenders and borrowers accept responsibility for their role in the creation of debt crises and take appropriate remedial action. For the lender, this might entail the unconditional cancellation of loans extended by them in a profligate manner,[85] while for the borrower this might require the establishment of a transparent and accountable system for the management of public debt.

It is important that the principle of shared responsibility should inform the design and implementation of international debt restructuring schemes. Only then can the vision of "a fully inclusive and equitable global economic system" to which Heads of State and Government committed themselves in Monterrey a decade ago, become a reality.

V. Conclusion

Although the debt crisis has largely been portrayed as a problem of poor debt management, good debt management alone does not prevent crises from occurring. It is therefore important to recognize that the debt crisis, particularly of developing countries, is a multidimensional problem with economic, political, social and historical dimensions and that, as such, it cannot be resolved with an exclusively economic and technical approach. In particular, no equitable and durable solution to the debt problem can be found without the underlying causes of the crisis being addressed and creditors and debtors sharing responsibility for resolving it, taking into consideration the imperatives of sustainable human development and the realization of all human rights. Further, as the former United Nations Independent Expert on the effects of structural adjustment policies observed more than a decade ago, long-term development (and the effective realization of human rights) requires a fundamental restructuring of the international economic system (E/CN.4/1999/50, paras. 122-128). In the absence of such change, the needs of millions around the world will continue to be subordinated to commercial and national interests[86] and the right of every person to a social and international order in which the rights and freedoms enshrined in the Universal Declaration of Human Rights will remain illusory.

[84] See Raffer, "Internationalizing US municipal insolvency" (see footnote 11).

[85] Indeed, there is precedent for this. As noted above, in October 2006 the Government of Norway unilaterally and unconditionally cancelled the official debts of around $80 million incurred by five developing countries under its Ship Export Campaign, which it acknowledged as a "development policy failure". See Government of Norway, Ministry of Foreign Affairs, press release No. 118/06 (2 October 2006). See also "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: missions to Norway and Ecuador" (A/HRC/21/Add.1), paras. 19-25.

[86] See the aid, debt and development page on the website of Share The World's Resources (www.stwr.org).

The Intergovernmental Working Group on Public Health, Innovation and Intellectual Property

*Lisa Forman**

I. Introduction

The inaccessibility of medicines in low- and middle-income countries poses serious human rights and developmental challenges for Governments and international organizations, as well as raising grave ethical and human rights questions about the responsibilities of the research and development-based pharmaceutical industry. In response to this human rights and public-health dilemma, there has been growing attention to the relationship between intellectual property rights, innovation and public-health, leading to an intergovernmental process initiated and led by the World Health Organization (WHO) between 2006 and 2008. The Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (hereinafter "Intergovernmental Working Group") engaged WHO member States, non-governmental organizations (NGOs), intergovernmental organizations and the pharmaceutical industry in an 18-month process to produce a global strategy and plan of action. The object of the Global Strategy on Public Health, Innovation and Intellectual Property[1] (hereinafter "Global Strategy") and its Plan of Action[2] is to "provide 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".[3] The Global Strategy and Plan of Action aim to meaningfully reform the failure of global research and development to produce medicines for diseases of the developing world and to ensure more public-health-consistent applications of intellectual property rights protected under international and bilateral trade agreements.

At their best, the procedure and content of the Global Strategy and Plan of Action developed by the Intergovernmental Working Group may reflect a critical milestone in global policy on access to medicines in developing countries with the potential to significantly advance access to medicines, as well as realization of the right to development and associated human rights to health, life and the benefits of scientific progress. However, if the Global Strategy and Plan of Action are ineffective, they will simply acquiesce to a global intellectual property rights system increasingly viewed as favouring pharmaceutical industry interests at the expense of health and development in low- and middle-income countries. Whether the Global Strategy and Plan of Action successfully achieve these broader goals will only be revealed over time. This chapter focuses exclusively on whether the Intergovernmental

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[1] World Health Assembly, resolution WHA61.21, annex.

[2] Ibid., appendix.

[3] Global Strategy, para. 13.

Working Group process and resulting Global Strategy and Plan of Action are theoretically congruent with and capable of advancing the realization of the right to development in international law. Accordingly, section II explores the background leading to the Intergovernmental Working Group, section III documents the Intergovernmental Working Group process in detail and section IV analyses the Intergovernmental Working Group from a right to development perspective, assessing areas of synergy and rupture with the principles and substantive content of the right to development.[4]

II. Public health, innovation and intellectual property: the initiation of the Intergovernmental Working Group

Almost 2 billion people, virtually one third of the global population, lack regular access to essential medicines, a figure that rises to over half the population in some low-income countries in Africa and Asia.[5] Medicines are an important tool to prevent, alleviate and cure disease.[6] The inaccessibility of medicines directly impedes the realization of human rights, including the highest attainable standard of health ("the right to health") and the benefits of scientific progress.[7] It also obstructs realization of the right to development, whereby "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", according to article 1 of the Declaration on the Right to Development. The Declaration is explicit that this right incorporates State duties to take all necessary measures to ensure equality of opportunity for all in their access to health services.

Access to medicines bears particularly upon individual abilities to alleviate poverty, since pharmaceuticals can consume 50-90 per cent of out-of-pocket expenditures for the poor in developing countries.[8] The accessibility and affordability of medicines similarly bears on State capacity to realize the rights to health and development, given the magnitude of pharmaceutical costs as a proportion of health-care expenditure in many developing countries (ranging between 25 and 70 per cent of total health-care expenditures). Moreover, as Amartya Sen illustrates, health has powerful instrumental effects on economic development, empowering people to make better choices and lead fuller lives, improving individual productivity, reducing poverty and income inequality and stimulating economic growth.[9] Viewed in this light, the realization of the right to health is "both a goal of the exercise of the right to development, and a means of contributing to achieving development".[10]

The relationship between medicines and development is underscored by its inclusion within Millennium Development Goal 8, which aims to develop a global partnership for development, and which explicitly includes target 8.E: "In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries."[11] The relationship between medicines and development is similarly underscored by the Noordwijk Medicines Agenda, adopted by the Organisation for Economic Co-operation and Development (OECD) in 2007, which recognizes that "access to affordable essential drugs and availability of the benefits of new technologies is a core element of development as identified in the Millennium Development Goals (goal 8), which calls for a global partnership in this area".[12] Access to medicines is therefore appropriately viewed as a core element of both the right to development and the right to health.

The human rights and development consequences of inaccessible medicines have prompted growing attention to the impact of price and intellectual property rights. While access to medicines is determined by several factors, such as rational use,[13] adequate

[4] The chapter is based on an analysis of documentation of the Intergovernmental Working Group available from the WHO website, other relevant literature (including media and scholarship on the Intergovernmental Working Group) and interviews with the secretariat of the Working Group and other WHO personnel conducted in Geneva from 18 to 20 February 2009.

[5] WHO, *WHO Medicines Strategy: Countries at the Core 2004–2007* (Geneva, 2004), p. 3.

[6] "Interim report of Task Force 5 Working Group on Access to Essential Medicines (1 February 2004), p. 9.

[7] See Alicia Ely Yamin, "Not just a tragedy: access to medications as a right under international law", *Boston University International Law Journal*, vol. 21, Issue 2 (Fall 2003).

[8] *WHO Medicines Strategy*.

[9] Amartya Sen, *Development as Freedom* (New York, Anchor Books, 2000).

[10] Daniel Tarantola and others, *Human Rights, Health and Development*, Technical Series Paper No. 08.1 (Sydney, University of New South Wales Initiative for Health and Human Rights, 2008), p. 5.

[11] See www.un.org/millenniumgoals/global.shtml. The original formulation of this commitment in the United Nations Millennium Declaration was to "encourage the pharmaceutical industry to make essential drugs more widely available and affordable by all who need them in developing countries" (General Assembly resolution 55/2, para. 20).

[12] OECD, Noordwijk Medicines Agenda, adopted on 21 June 2007 at the OECD High-Level Forum on Medicines for Neglected and Emerging Infectious Disease: Policy Coherence to Enhance Their Availability, held at Noordwijk-aan-Zee, Netherlands.

[13] Rational use of medicines denotes that they are "used in a therapeutically sound and cost-effective way by health professionals and consumers in order to maximize the potential of medicines in the provision of health care". "Progress in the rational use of medicines: report by the WHO Secretariat", document A60/24, para. 2.

infrastructure and sustainable financing,[14] pricing can have a disproportionate impact. Patents are the primary determinants of drug prices and are protected internationally under the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement requires WTO members to provide 20-year exclusive patent protection to pharmaceuticals, preventing non-consensual use.[15] The TRIPS Agreement also provides "flexibilities", which permit limits to exclusive patent protection to enable Governments to meet public-health needs. TRIPS flexibilities include measures such as compulsory licensing, where countries manufacture or import generic medicines under strict conditions, and parallel importing, where countries import lower-cost versions of patented medicines.

Countries may, however, face considerable obstacles in using these flexibilities, including corporate litigation, unilateral trade pressures and "TRIPS-plus" intellectual property rules adopted in bilateral and regional free trade agreements as well as more recently in Anti-Counterfeiting Trade Agreements.[16] In response, the Declaration on the TRIPS Agreement and Public Health, adopted in 2001 at the Doha WTO Ministerial, confirmed that TRIPS "does not and should not prevent members from taking measures to protect public-health" and that TRIPS should be interpreted and implemented in a manner supportive of a State's right to protect public-health and promote access to medicines for all.[17] The "right to use, to the full" provision was reaffirmed by the High-level Plenary Meeting of the General Assembly on the Millennium Development Goals at its sixty-fifth session in 2010.[18] At the same time, there has been growing attention to the inadequacies of the medical innovation system for producing medicines to treat diseases prevalent primarily in the developing world. As Patrice Trouiller and others illustrate in their article, only 0.1 per cent of new chemical entities produced between 1975 and 1999 were for tropical diseases and tuberculosis.[19] This neglect of innovation for medical products to treat diseases overwhelmingly incident in developing countries has seen the designation of many of these conditions as "neglected diseases".

These controversies have contributed to tensions in the relationship between the pharmaceutical industry and the broader public globally, to the extent that some suggest an unravelling of the tacit "grand bargain" between the pharmaceutical industry and society which allowed the modern global pharmaceutical industry to emerge in the second half of the twentieth century, whereby the industry's immense profits were balanced by the social enjoyment of a wide variety of life-saving and life-enhancing drugs.[20] Questions about the impact of TRIPS on access to medicines were brought into sharp focus by the explosive growth of the global AIDS pandemic in sub-Saharan Africa and the inability of millions of people infected with HIV and AIDS to access expensive antiretroviral medicines protected under TRIPS rules.[21] The contribution of pricing to inaccessibility and the dearth of new products for diseases disproportionately affecting developing countries have prompted growing attention to the relationship between intellectual property rights, innovation and public-health.[22] Thus, in February 2004, at the request of the World Health Assembly, WHO established the Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH) to analyse the relationship between intellectual property rights, innovation, and public-health.[23] CIPIH released its extensive final report in April 2006, considering "the various effects of intellectual property rights on upstream research, the subsequent development of medical products in both developed and developing countries and the possibility of ensuring access to them in developing countries, the impact of other funding and incentive mechanisms and fostering innovation capacity in developing countries".[24]

[14] *WHO Medicines Strategy* (see footnote 5), p. 24.
[15] TRIPS Agreement, art. 28 (1) (a) and (b).
[16] See, for instance, Richard D. Smith, Carlos Correa and Cecilia Oh, "Trade, TRIPS, and pharmaceuticals", *The Lancet,* vol. 373, Issue 9664 (2009), p. 687, and Henning Grosse Ruse-Khan, "From TRIPS to ACTA: towards a new 'gold standard' in criminal IP enforcement", Max Planck Institute for Intellectual Property, Competition and Tax Law Research Paper No.10-0 (April 2010).
[17] Declaration on the TRIPS Agreement and Public Health, para. 4 (hereinafter "Doha Declaration").
[18] General Assembly resolution 65/1, para. 78 (t).
[19] Patrice Trouiller and others, ''Drug development for neglected diseases: a deficient market and a public-health policy failure'', *The Lancet*, vol. 359, Issue 9324 (June 2002), p. 2188.
[20] Michael A. Santoro and Thomas M. Gorrie, *Ethics and the Pharmaceutical Industry: Business, Government, Professional and Advocacy Perspectives* (West Nyack, New York, Cambridge University Press, 2005).
[21] See, for example, Ellen F.M 't Hoen, "TRIPS, pharmaceutical patents, and access to essential medicines: a long way from Seattle to Doha", *Chicago Journal of International Law*, vol. 3, No. 1 (Spring 2002); Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (Oxford, Oxford University Press, 2007); Carlos Correa, "Public health and intellectual property rights", *Global Public Policy*, vol. 2, No. 3 (December 2002); Smith, Correa and Oh, "Trade, TRIPS, and pharmaceuticals"; and Zita Lazzarini, "Making access to pharmaceuticals a reality: legal options under TRIPS and the case of Brazil", *Yale Human Rights and Development Law Journal*, vol. 6 (2003).
[22] See, for example, Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (London, 2002); "Intellectual property rights and human rights: report of the Secretary-General (E/CN.4/Sub.2/2001/12 and Add.1); "The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights: report of the High Commissioner" (E/CN.4/Sub.2/2001/13).
[23] World Health Assembly, resolution WHA56.27, para. 2.
[24] WHO, *Public Health, Innovation and Intellectual Property Rights: Report of the Commission on Intellectual Property Rights, Innovation and Public Health* (Geneva, 2006), p. 174 (hereinafter "CIPIH report").

The report made 60 recommendations for improving current incentive and funding regimes to stimulate the creation of new medicines and facilitate access to these and existing medicines. In particular, the Commission recommended that "WHO should develop a global plan of action to secure enhanced and sustainable funding for developing countries and making accessible products to address diseases that disproportionately affect developing countries."[25] Accordingly, in May 2006 the World Health Assembly at its fifty-ninth session adopted a resolution in which it decided to establish an intergovernmental working group open to all interested member States to draw up a global strategy and plan of action in order to provide a medium-term framework based on the CIPIH recommendations. The framework would "aim, inter alia, at securing an enhanced and sustainable basis for needs-driven, essential health research and development relevant to diseases that disproportionately affect developing countries, proposing clear objectives and priorities for research and development, and estimating funding needs in this area".[26]

The resolution also stipulated that the Working Group should report on its progress to the Assembly at its sixtieth session, through the Executive Board, giving particular attention to "needs-driven research and other potential areas for early implementation".[27] The resolution also requested the Director-General to invite a range of observers to the sessions of the Working Group to provide advice and expertise as necessary, including United Nations organizations, intergovernmental organizations, NGOs with which WHO had established official relations, as well as private and public entities.[28]

III. Intergovernmental Working Group on Public Health, Innovation and Intellectual Property

Between December 2006 and April 2008, the Intergovernmental Working Group met in three sessions in Geneva, bringing together WHO member States, NGOs, intergovernmental organizations and the pharmaceutical industry. In addition, regional and intercountry consultations and two public Web-based hearings were held to allow broad consultation on the draft global strategy and plan of action. The following section documents the Intergovernmental Working Group's path towards a final negotiated text as a prelude to analysing its potential lessons for realizing the right to development and achieving target 17 of Millennium Development Goal 8 (which became target 8.E in the current formulation).

A. First session: 4-8 December 2006

The first session of the Intergovernmental Working Group focused on producing a first draft of a global strategy consistent with the CIPIH report and resolution WHA59.24 and in consultation with member States, NGOs, international organizations, pharmaceutical companies and other relevant parties. To ensure broad consultation on this draft, from 1 to 14 November 2006, the secretariat of the Working Group arranged a Web-based public hearing, receiving 31 submissions from NGOs, Governments, academia, public-private partnerships and industry. These submissions introduced some of the prominent debates that were to take centre stage throughout the Intergovernmental Working Group process, including in relation to the feasibility of new incentive mechanisms like patent pools, prize funds and a medical research and development treaty in successfully generating research and development on neglected diseases.[29] Other submissions underscored the need to view access to medical care and treatment as a basic human right[30] and recommended incorporation of the four interrelated components of this right outlined in the CIPIH report, namely availability, acceptability, accessibility and quality of health-care goods, facilities and services.[31] A synopsis of these submissions was presented at the session.

A total of 103 WHO member States (over 50 per cent) attended this session.[32] In conformity with resolution WHA59.24, four additional organizations and one expert were invited to participate. Sixteen NGOs in official relations with WHO and seven

[25] Ibid., p. 187.
[26] World Health Assembly, resolution WHA59.24, para. 3 (1).
[27] Ibid., para. 3 (3).
[28] Ibid., para. 4 (2).

[29] Submissions available at www.who.int/phi/public_hearings/first/en/index.html. See, for instance, Trevor M. Jones, a previous CIPIH commissioner, and Tracey Heller, Vice-President of International Public Affairs of Novartis International Inc., arguing that incentive schemes like patent pools were unlikely to achieve their objectives, and that public-private partnerships were likelier routes to successful research and development for drugs to treat diseases in developing countries. For alternative views, see Médecins Sans Frontières, Health Action International Europe, the Consumer Project on Technology and Third World Network, saying that public-private partnerships were insufficient and that what was required was more governmental responsibility and innovative measures like patent pools, prize funds and a medical research and development treaty.
[30] Ibid. See Debra Hayes and Caroline J. Gallant, Universities Allied for Essential Medicine.
[31] Ibid. See International AIDS Vaccine Initiative.
[32] Delegation information is drawn from the official participants lists posted on the WHO website for the Intergovernmental Working Group sessions: www.who.int/phi/documents/en/.

United Nations organizations, specialized agencies and intergovernmental organizations also attended. Concerns about insufficient participation led the Working Group to recommend a process to enable NGOs which met the requirements for admission into official relations with WHO but had not yet been admitted to facilitate their participation in the Group's second session.[33] This process was approved at the 120th session of the WHO Executive Board, which authorized several additional NGOs in official relations with WHO to participate in the next intergovernmental working group session.[34] In recognition of the fact that some experts from developing countries were unable to attend, member States were also invited to submit proposals for additional experts and entities to attend the second session, in order to expand the pool available and ensure balanced regional, gender and developing-/developed-country representation.[35]

The Working Group prepared a first draft of a global strategy and plan of action which drew from the CIPIH report to propose six elements, namely prioritizing research and development needs to identify gaps in research; promoting research and development; building and improving innovative capacity; improving delivery and access; ensuring sustainable financing mechanisms for research and development; and establishing monitoring and reporting systems.[36] During negotiations, member States requested the addition of separate elements on the transfer of technology to develop new technologies and products and on management of intellectual property, as a means of emphasizing the importance of these measures.[37] Member States also added new areas of action, including ensuring that bilateral trade agreements did not seek to incorporate TRIPS-plus protection in ways that might reduce access to medicines in developing countries and encouraging trade agreements to take into account TRIPS flexibilities recognized in the Doha Declaration.[38]

In addition, at the request of the Working Group, its secretariat prepared a second draft drawing from legally binding and consensus-agreed language in the WHO Constitution, the CIPIH report, resolution WHA59.25 and other resolutions and work. This draft[39] introduced a number of overarching global principles for the strategy, including explicit reference to the rights, contained in the Universal Declaration of Human Rights, to share in scientific advancement and its benefits, and to protection of moral and material interests. The draft also recognized that research and knowledge were critical for achieving the health-related Millennium Declaration Goals.

The official report of the first session drew from both comments made by member States during the session and the public Web-based submissions to record prominent debates about the role of intellectual property rights, the mandate of WHO and the inclusion of rights language.[40] It was agreed that member States could make additional comments and suggestions on the draft global strategy before the end of February 2007 and that their input would be listed on the WHO website.[41] After soliciting comments from member States through two circular letters dispatched on 12 January and 15 February 2007,[42] 22 submissions were received with comments.[43] In July 2007, the secretariat of the Working Group released a revised version of the global strategy and a first draft plan of action[44] as the basis for negotiation at the second session and associated consultations and hearings. The draft added new areas of action within each element, notably in element 5 on the management of intellectual property, recognizing the need to explore and implement "complementary, alternative

[33] WHO, "Public health, innovation and intellectual property: progress made by the Intergovernmental Working Group: report by the secretariat", document A60/27, para. 8.

[34] The Standing Committee decided to provisionally admit NGOs to facilitate their participation in the work of the Intergovernmental Working Group if they had been in working relations with WHO for two years and otherwise met the criteria contained in section 3 of the Principles governing relations between the World Health Organization and nongovernmental organizations (available from http://www.who.int). See WHO Executive Board, "Reports of committees of the Executive Board: Standing Committee on Nongovernmental Organizations", document EB120/41, para. 21.

[35] WHO, "Intergovernmental Working Group on Public Health, Innovation and Intellectual Property: report of the first session: Geneva, 4-8 December 2006", documents A/PHI/IGWG/1/6, para. 3, and A60/27, para. 12.

[36] WHO, "Elements of a global strategy and plan of action", document A/PHI/IGWG/1/4.

[37] WHO, "Elements of a global strategy and plan of action: progress to date in the Intergovernmental Working Group", document A/PHI/IGWG/1/5, paras. 5-6.

[38] Ibid., annex 1, para. 6 (a), (f) and (h).

[39] Ibid., annex 2.

[40] For example, some member States and NGOs argued that strong intellectual property rights negatively affect access to medicines and innovation for the developing world, while others claimed that the real barriers to access to medicines were not intellectual property rights, but rather a lack of funding, infrastructure and political will. See, for example, A/PHI/IGWG/1/6, para. 14. Other countries disputed the competence of WHO to monitor intellectual property rights, arguing that the transfer of technology and management of intellectual property rights were within the jurisdiction of organizations like WTO and the World Intellectual Property Organization (WIPO), and that both WHO and the Working Group should remain focused on health. Other delegations viewed these concerns as unfounded, since neither WTO nor WIPO deal with the impact of intellectual property on access to affordable medicines and health treatment in developing countries. There was also disagreement about incorporating reference to access to medicines as a human right, although one country insisted that a global strategy would be incomplete without recognizing that "human public-health considerations have precedence over rights to intellectual property protections". See A/PHI/IGWG/1/4, annex 2, appendix.

[41] A/PHI/IGWG/1/6, para. 39.

[42] A60/27, para. 11.

[43] WHO, "Report on developments since the first session of the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property: report by the secretariat", document A/PHI/IGWG/2/3, para. 7.

[44] WHO, "Draft global strategy and plan of action on public-health, innovation and intellectual property: report by the Secretariat", document A/PHI/IGWG/2/2, annex.

and/or additional incentive schemes for research and development",[45] including prize funds and advance market commitments.

The strategy also identified global responsibility for implementing the strategy with "a range of actors, including WHO Member States, the WHO Secretariat, WIPO, WTO, national institutions, development partners, academia, pharmaceutical companies, public-private partnerships, charitable organizations and nongovernmental organizations".[46] Accordingly, the strategy attached a draft plan of action that identified lead actors and other relevant stakeholders, with Governments taking the lead for the majority of actions while WHO was designated as lead actor on approximately 30 other actions. The draft plan set medium-term time frames for implementation by 2015. It also identified 139 progress indicators, although there was consensus that these were too numerous and would be costly and difficult to apply.[47]

Regional consultations and the second Web-based public hearing

Regional and intercountry consultations were organized in August, September and October 2007 in all the WHO regions.[48] The consultations brought together member States, NGOs and experts from the regions to review the draft global strategy and plan of action. The most influential of these consultations was a subregional consultation held in Rio de Janeiro, Brazil, between Argentina, Brazil, the Plurinational State of Bolivia, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Honduras, Mexico, Peru, Suriname, Uruguay and the Bolivarian Republic of Venezuela. The meeting produced a consensus document, the "Rio document", which came to have a significant influence on negotiations.[49] The Rio document emphasized the importance of considering poverty, disease burdens and growing criticism "in developed and developing countries alike, on the barriers posed by proprietary rights over the access to medicines, in particular with regard to anticompetitive practices in the field of patent rights".[50] The Rio document also proposed rights-based principles for the global strategy that became the subject of considerable debate. These principles stated that:

(a) The right to health protection is a universal and inalienable right and it is the Government's duty to ensure the means for its enforcement;

(b) The right to health takes precedence over commercial interests;

(c) The right to health implies equitable access to medicines;

(d) The promotion of technological innovation and the transfer of technology is a right of all States and should not be restricted by intellectual property rights.[51]

The influence of the Rio document was apparent at the Americas regional consultation held in Ottawa on 22 and 23 October 2007. Here, States debated the impact of intellectual property rights on access and whether WHO should act as a lead actor in the plan of action. Countries also debated the appropriateness of including the principles contained in the Rio document on the right to health. [52] The consultation introduced a new debate on whether the Intergovernmental Working Group process could appropriately deal with diseases also experienced in developed countries. This discussion relied on the specific wording of resolution WHA59.24, which, drawing on the CIPIH report, focused on type II diseases, incident in both rich and poor countries but with a substantial proportion of cases in developed countries, and type III diseases, overwhelmingly or exclusively incident in developing countries, rather than type I diseases incident in both rich and poor countries.

A second two-part Web-based public hearing was held from 15 August to 30 September 2007, dedicated to comments on the strategy and plan of action and responding to the World Health Assembly's request to the WHO Director-General to encourage the development of proposals for research and development, including incentive mechanisms.[53] Some 70 contributions were received from a wide range

[45] Ibid., para. 16.
[46] Ibid., para. 26.
[47] "Subgroup of drafting group B meeting, 17-19 March 2008: outcome document of IGWG2, subgroup discussions (November 2007 version: report of subgroup chair and plan of action elements 1 and 2)", White Paper 1, para. 4.
[48] The reports of the regional and subregional consultations and contributions from member States are available at www.who.int/phi/public_hearings/second/regional_consultations/en/index.html.
[49] Ibid.
[50] Rio document, para. 6.
[51] Ibid., paras. 12-15.
[52] For example, while Bolivia supported access to essential drugs as a fundamental part of the human right to life, Canada refused to support the principles included in the Rio document, arguing that "[t]he focus of the Global Strategy and its contents needs to be on the practical strategies and actions that should be taken to fulfill the [Working Group's] mandate … [I]f we are to have a principles section Canada would suggest that we use to the extent possible already agreed upon language".
[53] Resolution WHA60.30, para. 3 (4).

of stakeholders, including Governments and national institutions, civil society, academics, the private sector and patients' organizations.[54]

At the second hearing there was a dramatic intensification of the debates over the role of intellectual property rights and the feasibility of innovative incentive mechanisms like patent pools, a medical research and development treaty, a comprehensive advance market commitment and prize funds.[55] For example, several submissions disputed the need for new incentive mechanisms, arguing that strong intellectual property rights played a constructive role in providing incentives to medical innovation,[56] urging instead the adoption of market-based mechanisms like advance market commitments and public-private partnerships.[57] Indeed, some submissions went so far as to suggest that the Working Group sought to alter private innovation in ways akin to Soviet-style communism.[58] One submission even questioned whether the Working Group's real objectives were to strike "at the heart of the pharmaceutical industry's global franchise: chronic disease therapies … [in order to have] these therapies listed on WHO's Essential Drugs and Medicines Programme, so that developing countries can issue compulsory licenses and produce these drugs with the imprimatur of WHO and UN agencies".[59]

Other submissions debated the mandate of WHO with regard to intellectual property rights[60] and the appropriate extension of the scope of the Working Group to type I diseases.[61] Several submissions argued that the Working Group should recognize and frame itself around the right to health and medicines[62] and adopt the CIPIH report's framing of this issue as implicating the legal imperative to progressively realize the right to the highest attainable standard of health contained in the International Covenant on Economic, Social and Cultural Rights.[63]

B. Second session: 5-10 November 2007

Member State participation at the second session increased significantly, with 140 attending. In addition, 18 NGOs, 7 organizations and 11 experts as invited participants, and 16 United Nations organizations, specialized agencies and intergovernmental organizations attended. Two drafting groups were created to explore elements 5 and 6 of the global strategy respectively (on management of intellectual property and improving delivery and access), and a subgroup was created to look at the plan of action.

The draft strategy produced at the end of the second session marks a considerable shift from the prior version in several key respects. Notably, the draft strategy now framed the necessity of developing new products for diseases in developing countries and increasing access to existing products in terms of the health-related Millennium Development Goals.[64] The Rio document's influence is apparent in the strategy's incorporation of some of its key principles relating to the right to health. Interestingly, member States

[54] "Public health, innovation and intellectual property: draft global strategy and plan of action: report by the Secretariat", document EB122/12, para. 11.

[55] Contributions available at www.who.int/phi/public_hearings/second/contributions_section1/en/index.html. See also Oxfam International, "Ending the R&D crisis in public-health: promoting pro-poor medical innovation", Oxfam Briefing Paper 122 (November 2008); Frederick M. Abbott and Jerome H. Reichman, "Strategies for the protection and promotion of public-health arising out of the WTO TRIPS Agreement amendment process"; James Love, Director, Knowledge Ecology International, at http://keionline.org/; Itaru Nitta, "Green intellectual property scheme: a blueprint for the eco-/socio-friendly patent framework", Green Intellectual Property Project, *GIP Progress* (Summer 2006); Aidan Hollis, "A comprehensive advance market commitment: a useful supplement to the patent system?"

[56] Jeremiah Norris, Hudson Institute, United States of America; Harvey Bale, International Federation of Pharmaceutical Manufacturers and Associations, Switzerland; Ronald Cass, Centre for the Rule of Law, United States; Wayne Taylor, Health Leadership Institute, McMaster University, Canada; Anne Sullivan, International Association for Business and Health, United States; Jorge Quel, Hispanic-American Allergy Asthma and Immunology Association, United States; Leroy Watson, National Grange of the Order of Patrons of Husbandry, United States; Daphne Yong-d'Hervé, International Chamber of Commerce, France; Margaret De Rooy, Healthcare Evolves with Alliances and Leadership, United States; and David Hirschmann, United States Chamber of Commerce.

[57] Harvey Bale; Lawrence Kogan, Institute for Trade, Standards, and Sustainable Development, United States; Tracy Haller, Novartis, United States; Lila Feisee, Biotechnology Industry Organization, United States; Council Nedd II, Tabetha B. Ralph and Leslie O. Anderson, Alliance for Health Education and Development, United States; Brendan Barnes, European Federation of Pharmaceutical Industries and Associations, Belgium; Randall Maxey, Community Life Improvement Program and Alliance of Minority Medical Associations, United States; Herbert Perry, Health Care Advocacy Alliance, United States; and BIO Ventures for Global Health, United States.

[58] Alexander Gershman, American Russian Medical Association, United States; and Catherine Benavidez Clayton, Alliance of Health Disparities, United States.

[59] Philip Stevens, on behalf of a coalition of 24 civil society groups in the United Kingdom of Great Britain and Northern Ireland.

[60] A joint submission by Daniele Capezzone and Benedetto Della Vedova, members of the Italian Chamber of Deputies; Veaceslav Untila, Member of Parliament, Moldova; and Kelsey Zahourek, Property Rights Alliance, United States; Harald Zimmer, German Association of Research-based Pharmaceutical Manufacturers; and Ronald Cass, Centre for the Rule of Law, United States.

[61] Submissions opposing the Working Group's attention to type I diseases included Gene Copello, The AIDS Institute, United States; Lawrence Kogan; and Lila Feisee. Submissions supporting attention by the Working Group to type I diseases included Kevin Outterson, Boston University, United States; and Peter Munyi, Health Alliance International, Africa.

[62] Peter Munyi, African Civil Society Coalition on IGWG, Kenya; Christian Wagner-Ahifs, Health Action International, the Netherlands; Mohga Kamal-Yanni, Oxfam International, United Kingdom; and Spring Gombe, Knowledge Ecology International, Swtizerland.

[63] Spring Gombe.

[64] WHO, "Draft global strategy and plan of action on public-health, innovation and intellectual property: progress to date in the drafting groups A and B", document A/PHI/IGWG/2/Conf. Paper No.1 Rev.1, annex, para. 3.

came to a consensus on the principled recognition that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition".[65] They could not, however, agree on two other principles stating respectively that "[t]he right of everyone to the enjoyment of the highest attainable standard of physical and mental health is recognized as a fundamental human right in the international human rights instruments, in particular, in [article 12 (1) of] the International Covenant on Economic, Social and Cultural Rights" and that "[t]he objectives of public-health and the interests of trade should be appropriately balanced and coordinated" or "[t]he right to health takes precedence over commercial interests".[66] Additional rights language that remained bracketed at the conclusion of the session included recognition of the need for more efforts to implement State obligations under human rights treaties with provisions relevant to health, and to prioritize research and development in traditional medicine in accordance with international instruments referring to the rights of indigenous peoples and local communities.

Member States were similarly unable to reach agreement on the appropriate scope of the strategy with regard to type I diseases, and whether new incentive mechanisms should aim to complement the existing system of intellectual property rights or produce an alternative system. Nonetheless, the strategy does refer to some of these mechanisms, including (by consensus) the need to encourage further exploration of an essential health and biomedical research and development treaty. However, other proposed mechanisms remained bracketed, including patent pools and the consideration of alternative mechanisms such as appropriate patenting and licensing policies.

Element 5 relating to intellectual property evoked the most debate, and little agreement was achieved on it at the second session. The inability of delegations to reach consensus on this point ultimately lead the Working Group to suspend its work on 10 November 2007, agreeing to resume the second session before the sixty-first session of the World Health Assembly to be held in May 2008. The subgroup tasked with drafting the plan of action met again from 17 to 19 March 2008, in advance of the resumed second session beginning on 28 April 2008, to review proposals for stakeholders, time frames and progress indicators for all consensus sub-elements and specific actions in elements 3-8, and to discuss approaches to costing the draft strategy. The secretariat also proposed a small number of summary indicators or "reporting components", meant to provide indicators that all parties would be expected to collect as an absolute minimum within a particular period.[67] Twenty-seven member States provided written submissions for consideration at this meeting on the draft strategy and plan of action prior to the final session of the International Working Group.

C. Resumed second session: 28 April-3 May 2008

Member State participation at the resumed second session reached its highest levels, with 147 member State delegations attending. Non-State participation was also high, with 7 organizations and 11 experts invited, and 23 NGOs attending, as well as 17 United Nations organizations, specialized agencies and intergovernmental organizations. Member States engaged in intense negotiation over the draft global strategy and plan of action, with the penultimate session ending at 3 a.m. Delegates were able to reach consensus on five elements within the strategy, including element 1 on prioritizing research and development, element 2 on promoting research and development, element 3 on building and improving innovative capacity, element 7 on promoting sustainable financing mechanisms and element 8 on the establishment of monitoring and reporting systems.[68] However, delegations could not reach agreement on element 4 on transfer of technology, element 5 on management of intellectual property and element 6 on improving delivery and access. In addition, delegations could not reach consensus on the principled recognition of the right to health as a fundamental human right in the International Covenant on Economic, Social and Political Rights,[69] nor the inclusion of principles recognizing that the objectives of public-health and trade should be appropriately balanced, or that the right to health should take precedence over commercial interests.[70] Nor was there consensus on a provision that countries should avoid incorporating TRIPS-plus measures in trade agreements and national legislation that could negatively impact access to health products in developing countries, or that they

[65] Ibid., para. 16.
[66] Ibid., paras. 17-18.
[67] "Subgroup of drafting group B meeting, 17-19 March 2008 – plan of action: summary indicators/reporting components: secretariat draft text", White Paper 3, p. 1.
[68] WHO, "Draft global strategy on public-health, innovation and intellectual property, outcome document at 14.00 hours, Saturday, 3 May 2008" (hereinafter "Draft global strategy outcome document").
[69] All countries save Ecuador reached consensus on the need to delete this principle.
[70] Draft global strategy outcome document, paras. 17-18.

should take account of the impact of TRIPS-plus measures on access to health products. A range of other areas relating to counterfeit medicines and patent abuse remained bracketed, including issues relating to data exclusivity, anti-competitive practices, patentability criteria and the use of undisclosed test data.

Some bracketed provisions reflected the disagreement of a sole country. For example, all countries save the United States of America reached consensus on the need to develop new incentive mechanisms around the World Health Organization's active role in public-health, innovation and intellectual property, and the need to encourage pharmaceutical companies to adopt equitable pricing policies. Brackets also remained around many of the stakeholders identified in the draft plan of action that was concluded at the resumed second session.

D. Sixty-first session of the World Health Assembly: 24 May 2008

Most of the remaining elements of the draft global strategy and plan of action were finalized at the World Health Assembly held a few weeks later. The effort to broker a final negotiated text saw many critical debated areas either deleted or amended, including in relation to TRIPS-plus rules, new global bodies, global responsibilities and rights-based principles. For example, the provision cautioning against the adoption of TRIPS-plus protection in bilateral trade agreements was deleted, as was a reference to bilateral agreements in a provision requiring regular monitoring of agreements that may have an impact on access to health products in developing countries. In their place, countries were to take into account the public-health impact when considering adopting or implementing more extensive intellectual property protection than required by TRIPS.

Other provisions that were deleted included provisions to allow parallel imports, exploit expired or invalid patents to introduce generics, restrict the impact of data exclusivity on access, prevent anti-competitive practices and avoid restricting the use of undisclosed test data. Several institutional reforms were also removed, including recommendations to set up a global research and development fund[71] and create a coordination committee among WHO, WIPO and WTO for looking at solutions on the issue of public-health and intellectual property.[72]

Important acknowledgements of international responsibilities were deleted, including provisions that urged developed countries to increase funding for research and development focusing on the health needs of developing countries and to allocate a progressive percentage of their health research budget to the health needs of developing countries. Notably, the entire section titled "global responsibility"[73] was deleted, and instead the Plan of Action is prefaced with explanatory notes that identify stakeholders as including WHO, Governments and international intergovernmental organizations and other relevant stakeholders.

There were mixed outcomes regarding explicit recognition of the right to health. While the two bracketed principles recognizing the right to health were deleted, there was consensus about including explicit recognition of the need to implement States' obligations and commitments "arising under applicable international human rights instruments with provisions relevant to health".[74] Moreover, the Global Strategy includes, as a founding principle, recognition that the enjoyment of the right to health is a fundamental right of every human person.[75]

In many places, language was considerably altered, significantly changing the meaning and force of provisions. For example, the sentence "The high prices of medicines impede access to treatment which requires a new thinking on the mechanisms to support innovation" was altered to read "The price of medicines is one of the factors that can impede access to treatment".[76] Similarly, an earlier provision stating "The CIPIH Report provides an effective analysis of the problems" was changed to simply state "The [CIPH report] provides an analysis of the problems."[77] Moreover, the "action" language of several provisions was considerably blunted through the consensus process, with actions altered from the stronger imperative to ensure, prioritize, enable and support to the weaker recommendations to urge, encourage and promote.[78]

There are, however, several important advances in the Global Strategy. First, the debate on the scope of the Strategy regarding type of disease was resolved in favour of a broad focus. For example, the aim of the Strategy was no longer articulated as being focused on type II and III diseases and the needs of developing

[71] A/PHI/IGWG/2/Conf.Paper No.1 Rev.1, para. 42 (7.3).
[72] Ibid., para. 36 (5.1) (i).
[73] Ibid., p. 26.
[74] Global Strategy, para. 3.
[75] Ibid., para. 16.
[76] Ibid., para. 11.
[77] Ibid., para. 6.
[78] Compare, for example, paragraphs. 28 (1.2) (d), 28 (1.3) and 29 (2.2) (g).

countries in relation to type I diseases, but instead was "to promote new thinking on innovation and access to medicines".[79] Similarly, a long-contested footnote relating to the definitions of this typology of disease was retained, albeit with the specific focus on nine neglected diseases replaced by the recognition that the "prevalence of diseases and thereby their categorization in the typology can evolve over time".[80] Other previously contested sections referring to the typology were agreed to. Consensus was also reached on the need to explore new incentive mechanisms for innovations like patent pools, prizes and a medical research and development treaty, although provisions considering the use of advance market commitments were deleted. The Global Strategy also called for the establishment of a results-oriented and time-limited expert working group to examine current research and development financing and coordination, and to consider proposals for new and innovative sources of funding to stimulate research and development. However, the WHO mandate in relation to intellectual property remained unresolved and several actions remained bracketed even at the close of the Assembly.[81]

The Global Strategy as adopted is comprised of various preambular sections including context, principles and aim. Its main focus is on specifying actions and sub-actions in each of the eight elements; there are 108 actions in total. The Plan of Action appended to the Global Strategy specifies lead actors, relevant stakeholders and time frames for completion by 2015. Its specific content is discussed in more detail in the following section.

With almost all elements agreed upon, on 24 May 2008, all 193 member States attending the World Health Assembly adopted the Global Strategy and agreed parts of the Plan of Action. resolution WHA61.21 urged member States to implement them, including by providing adequate resources, and requested the Director-General to support such implementation on request, including through coordinating with intergovernmental organizations, including WIPO, WTO and the United Nations Conference on Trade and Development (UNCTAD). The resolution also requested the Director-General to urgently finalize outstanding components of the Plan of Action concerning time frames, progress indicators and estimated funding needs, and to prepare a quick start programme and begin immediate implementation of those elements falling under the responsibility of WHO.

The Director-General was further requested to urgently establish an expert working group to examine research and development financing and coordination and consider proposals for innovative funding to stimulate research and development. The Consultative Expert Working Group on Research and Development: Financing and Coordination was established under a mandate set out in resolution WHA63.28. It held its first meeting from 5 to 7 April 2011 in Geneva, attended by 19 of its 21 members. In accordance with its workplan, after Web-based public submissions, it scheduled its second meeting for July 2011, planned to conduct regional consultations, circulate a first draft of its report to members, hold its third meeting in November 2011 and then submit its progress report to the Executive Board at its 130th session, with a view to finalizing the report in early 2012 for submission to the sixty-fifth session of the World Health Assembly.[82]

Finally, resolution WHA61.21 requested the Director-General to monitor performance and progress in implementing the Global Strategy and Plan of Action and to report progress, through the Executive Board, in 2010 to the sixty-third session of the World Health Assembly and every two years thereafter, until 2015.[83]

Since the 2008 World Health Assembly, the outstanding components of the Plan of Action have been finalized, including time frames, progress indicators and estimated funding needs. The Expert Working Group on Research and Development has been established and its work is under way. The secretariat of the Intergovernmental Working Group has undertaken further work on a set of indicators to allow monitoring of overall progress in implementation. The WHO Secretariat has initiated the Quick Start Programme, which is mapping global research and development activities; identifying research gaps and setting research priorities; supporting research and development;

[79] Global Strategy, para. 13.

[80] Ibid., para. 14 (b), footnote 1.

[81] For example, there was no agreement on WHO taking a lead role in relation to education, training and capacity-building for implementing intellectual property from a public-health perspective, initiating regional programming to harmonize regulatory approval, exploring incentive schemes for research and development, encouraging the establishment of award schemes for health-related innovation and taking into account the impact on public-health of TRIPS-plus intellectual property protection.

[82] WHO Executive Board, "Consultative Expert Working Group on Research and Development: Financing and Coordination", document EB129/3, annex, appendix. Editor's note: further information on the Consultative Expert Working Group can be found at www.who.int/phi/news/cewg_2011/en/index.html. The report to the Executive Board at its 130th session on the work of the Working Group is available at http://apps.who.int/gb/ebwha/pdf_files/EB130/B130_23-en.pdf.

[83] Editor's note: the report to the World Health Assembly at its sixty-third session (2010) is contained in document A63/6 and Add.1 and 2, available from the WHO website.

promoting standard-setting for traditional medicines in developing countries; developing and strengthening regulatory capacity in developing countries; and developing a monitoring and reporting framework.[84] WHO has costed the Global Strategy at a total of $149 billion for all member States, averaging $21 billion per year.[85]

IV. Analysing the Intergovernmental Working Group and the Global Strategy and Plan of Action from a right to development perspective

Does the substance of the Global Strategy and Plan of Action serve the interests it ostensibly seeks to serve? Moreover, did the Intergovernmental Working Group process assure sufficient attention to the core human rights principles, including accountability, transparency and participation, which are at the heart of the right to development?[86] In line with these two questions, the remainder of the chapter explores (a) areas of potential congruence; and (b) rupture between the Intergovernmental Working Group process and the Global Strategy and Plan of Action and specific aspects of the right to development implicated by medicines.

A. Areas of congruence between the Intergovernmental Working Group, the Global Strategy and Plan of Action, and the right to development

Potential synergies between the Intergovernmental Working Group process, the Global Strategy and Plan of Action, and the right to development can be assessed in two separate areas: first, the extent to which the Global Strategy and Plan of Action themselves hold the potential to realize the right to development and second, the extent to which the Global Strategy and Plan of Action and Intergovernmental Working Group process were synergistic with principles central to the realization of the right to development, including participation, accountability and transparency.[87]

Synergies between the Intergovernmental Working Group, the Global Strategy and Plan of Action, and the right to development

The Declaration on the Right to Development aims to realize "economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" (art. 1 (1)). As former Independent Expert on the right to development Arjun Sengupta has suggested, this articulation of the right to development can be understood as founding an entitlement to "a particular process of development in which all human rights and fundamental freedoms can be fully realized".[88] Other prominent human rights scholars argue that such a process presupposes a range of obligations, both "on individual states to ensure equal and adequate access to essential resources, and on the international community to promote fair development policies and effective international cooperation".[89]

In this light, it is apposite to ask whether the Global Strategy and Plan of Action contribute to the realization of the human rights implicated in access to, and innovation of, medicines, including in particular the rights to health and to benefit from scientific progress. Guidance in assessing the Global Strategy in this regard is provided by the interpretation of these rights by the Committee on Economic, Social and Cultural Rights, as explained in its general comments Nos. 14 (2000) and 17 (2005). In general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12 of the Covenant), the Committee indicates that this right requires as an essential element that health-care facilities, goods and services (including essential medicines) should be available, accessible, acceptable and of good quality (para. 12). State obligations in relation to medicines include a minimum core duty to provide essential drugs as defined by WHO (para. 43 (d)), as well as duties to respect (not obstruct), protect (prevent third party obstruction) and fulfil (provide) access (para. 33). States also hold international duties under this right, including the duty not to obstruct this right in other countries, to prevent corporations from violating it elsewhere, and to ensure that international agreements do not adversely impact realization of the right (para. 39).

[84] WHO Executive Board, "Public health, innovation and intellectual property—Global Strategy and Plan of Action: report by the Secretariat", document EB124/16, paras. 4-5.
[85] WHO Executive Board, "Public health, innovation and intellectual property—Global Strategy and Plan of Action: proposed time frames and estimated funding needs", document EB124/16 Add.2.
[86] See "The right to development and practical strategies for the implementation of the Millennium Development Goals, particularly goal 8: preliminary concept note" (E/CN.4/2005/WG.18/TF/2), para. 5.
[87] Ibid.
[88] Arjun Sengupta, "The human right to development," in *Development as a Human Right: Legal, Political and Economic Dimension*, Bård A. Andreassen and Stephen P. Marks, eds. (Cambridge, Massachusetts, Harvard School of Public Health, Francois-Xavier Bagnoud Centre for Health and Human Rights, 2007), p. 11.
[89] Tarantola and others, *Human Rights, Health and Development* (see footnote 10), p. 5.

The specific implications of these duties with regard to intellectual property are spelled out in general comment No. 17 (2005) on 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 (art. 15, para. 1 (c), of the Covenant). Here, the Committee differentiates between human rights, which are fundamental as they are inherent to the human person, and intellectual property rights, which are first and foremost a means to incentivize invention and creativity (para. 1). Viewed in this light, the Committee suggests that intellectual property rights can be subjected to necessary and proportional limitations that do not unduly favour the private interests of authors. This means that States parties should ensure that their legal or other regimes protecting intellectual property rights do not impede their ability to comply with their core obligations under the rights to food, health and education. In particular, States parties "have a duty to prevent unreasonably high costs for access to essential medicines ... from undermining the rights of large segments of the population to health ..." (para. 35).

To what extent therefore do the Global Strategy and Plan of Action enable States to realize their domestic and international duties to respect, protect and fulfil access to affordable, accessible, acceptable and good quality medicines? Certainly, the Global Strategy's efforts to improve both access and innovation can be viewed as contributing to these goals, although improvements in access may have a more proximal impact on affordability, accessibility and safety than the more distal impacts of innovation. There is nonetheless a clear and important link between the innovation of new medical products and the ability of poor people to access the benefits of science, and both goals are equally important from the perspective of accessibility and affordability.

There is explicit recognition of the need to address these factors in the Global Strategy and Plan of Action, which adopt as a founding principle that they should promote the development of health products needed by States, especially developing countries, that are developed ethically; available in sufficient quantities; effective, safe and of good quality; affordable and accessible; and used in a rational way.[90] Similarly, the Global Strategy adopts as a principle that public policy should address the factors that contribute to the high price of health products in order to increase their affordability and accessibility, including through the promotion of competition.[91]

Several elements of the Global Strategy directly seek to ensure the affordability, accessibility and safety of medicines, particularly element 6 on improving delivery and access, which emphasizes the importance of stimulating competition and adopting appropriate pricing policies, including through the use of TRIPS flexibilities recognized by the Doha Declaration. The section on element 6 also specifies a range of actions to promote competition, including national legislation/policy to support generic production and introduction, policy to improve access to affordable health products, reducing tariffs on health products, encouraging pharmaceutical companies to consider policies conducive to promoting affordability, developing policy to monitor pricing and improve affordability and taking TRIPS-compliant measures to prevent the abuse of intellectual property rights.

Other parts of the Global Strategy address measures to ensure affordability through managing intellectual property rights, including using TRIPS flexibilities "to the full" to protect public-health[92] and providing technical support to countries to do so,[93] as well as supporting information-sharing and capacity-building.[94] Affordability is also directly impacted by measures to promote the transfer of technology, including through the production of health products in developing countries, and developing new mechanisms to promote access to key health-related technologies, including voluntary patent pools. The Global Strategy similarly seeks to assure safety and quality through improved ethical review; strengthening national regulatory capacity to monitor quality, safety and efficacy; complying with good manufacturing practices; strengthening the WHO prequalification programme; ensuring regional harmonization of regulatory approval of drugs; and promoting ethical principles for clinical trials.[95]

The Global Strategy's focus on promoting innovation of health products for diseases prevalent in developing countries has similarly important implications for affordability and accessibility. This potential impact is particularly apparent in the Global Strategy's aim of examining new incentive schemes that delink the costs of research and development from the

[90] Global Strategy, para. 24.

[91] Ibid., para. 26.
[92] Ibid., para. 35.
[93] Ibid., para. 36 (5.2).
[94] Ibid., para. 36 (5.1).
[95] Plan of Action, element (6.2) (a)-(g).

price of products, such as the awarding of prizes.[96] In this regard, the establishment at WHO of an expert working group to explore new innovative research and development funding is a promising development. Adopting innovative approaches to research and development may have significant influence on the pricing of new products developed as a result, promising important congruence with the rights to health and development.

The Global Strategy is weaker, however, in regard to emphasizing States' international obligations under the right to health. For example, while the Strategy strongly encourages the critical need to use TRIPS flexibilities to the full, this focus is undercut by the deletion from the final text of the Strategy of explicit caution against the adoption of TRIPS-plus protection in bilateral trade agreements. Instead, countries are simply encouraged to take into account the public-health impact when considering adopting or implementing more extensive intellectual property protection than required by TRIPS.[97] This provision falls far short of the recommendation in the CIPIH report that "bilateral trade agreements should not seek to incorporate TRIPS-plus protection in ways that may reduce access to medicines in developing countries".[98] This omission is problematic given a growing understanding that the adoption of TRIPS-plus standards in trade agreements can immediately prevent access to medicines.[99] This deletion therefore may significantly undercut the international duty of States to respect the realization of the right to health, including by not obstructing access. The deletion also threatens to undercut realization of the right to development since, as the high-level task force on the implementation of the right to development has recognized, "Government policies consistent with TRIPS flexibilities and conducive to access to medicines in developing countries would conform to article 2 (3) of the Declaration on the Right to Development, according to which Governments have the 'right and the duty to formulate appropriate national development policies'".[100]

International duties to fulfil the right to health are similarly undercut by the weakness of the Global Strategy and Plan of Action regarding international financing of health products. This is not to ignore the Strategy's laudable encouragement of increased investment in health-delivery infrastructure, human resource development and health-product financing,[101] given that State capacity to realize access may be constrained by resource limitations and inadequate health infrastructures. Nonetheless, this encouragement is undercut by the Plan's failure to specify the need for international financing of health products in the element of the Plan specifically devoted to promoting sustainable financing mechanisms. Instead, the Plan recommends facilitating the maximum use of existing financing to develop and deliver safe, effective and affordable health products. There are no recommendations for additional financing, and the measures specified to achieve this element are focused entirely on supporting, documenting and assessing public-private and product development partnerships.[102] The Strategy therefore fails to adequately realize international duties to fulfil the realization of the right to health in other countries, including by providing international economic assistance.[103]

Despite these weaknesses, the Global Strategy's focus on assuring the affordability, safety and quality of medicines may support the realization of the right to health and ergo the right to development. Other elements of the Strategy are directly congruent with the right to development, including the focus on building and improving innovative capacity and encouraging technology transfer. These are positive inclusions that may contribute to the realization of the right to development.

B. Synergies between the Intergovernmental Working Group process, the Global Strategy and Plan of Action, and right to development principles

Are there synergies between the Intergovernmental Working Group process and the Global Strategy and Plan of Action, and core right to development principles such as participation, accountability and transparency?[104] These principles are predominant themes within human rights more generally and implicitly mandate a focus on the poorest and most marginalized, and require effective mutual accountability and ownership and adequate mechanisms for monitoring and review.[105]

[96] Ibid., element (5.3) (a).
[97] Draft global strategy outcome document, para. 36 (5.2) (b).
[98] Recommendation 4.26.
[99] Richard D. Smith and others, "Trade, TRIPS, and pharmaceuticals," *The Lancet*, vol. 373, Issue 9664 (2009) p. 688.
[100] "Technical mission to the World Health Organization, the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property, the Special Programme on Research and Training in Tropical Diseases and the Global Fund to Fight AIDS, Tuberculosis and Malaria", report of the high-level task force on the implementation of the right to development (A/HRC/15/WG.2/TF/CRP.2), para. 8.
[101] Plan of Action, element (6.1) (a), (e) and (g).
[102] Ibid., element (7.2) (a)-(c).
[103] Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), para. 38.
[104] E/CN.4/2005/WG.18/TF/2, para. 5.
[105] See "Report of the high-level task force on the implementation of the right to development on its third session" (A/HRC/4/WG.2/TF/2).

1. Participation

The Intergovernmental Working Group process reflects a significant effort by the WHO Secretariat to ensure broad and effective participation, which, beyond holding three negotiating sessions in Geneva, also convened two public Web-based hearings and several regional and intercountry consultations. From the perspective of the right to development, these participatory efforts should be assessed in terms of whether the population groups affected directly or indirectly by a particular policy could play an effective role in the process of formulating that policy.[106] Moreover, the right to development requires that participation extend beyond "preference revelation", to include "policy choice, implementation and monitoring, assessment and accountability".[107] Genuine participation is therefore intimately connected to adherence to the other principles underlying the right to development, including non-discrimination, transparency and accountability.

Recognition of the need to ensure broad participation is evident from the very initiation of the Intergovernmental Working Group in resolution WHA59.24, which explicitly called for the participation of NGOs, experts and concerned private and public entities in the sessions (paras. 3 (2) and 4 (3)). These experts and NGOs were able to participate in the committees that negotiated the draft strategy, and this was one of the first times that non-member State participants were able to provide inputs on negotiations.[108] This certainly is an important contribution to genuine and broad participation in the Intergovernmental Working Group process. It is notable, however, that other NGOS in official relations with WHO that were invited to observe these sessions could only attend the plenary sessions and not the drafting groups; their impact on the formulation of the Strategy was therefore limited in important respects, although they could make inputs at the plenary sessions and through the public submission process.[109] It is also significant that only NGOs in "official relations" with WHO were invited as observers. WHO rules define "official relations" as applying primarily to NGOs that are international in scope and have at least two years of successful working relations with WHO.[110] These requirements both directly limit the participation of nationally oriented groups and indirectly ensure this outcome, given the resource limitations that may condition the ability of even internationally oriented groups within developing countries to establish official relations with WHO.

It is therefore unsurprising that the lists of participants in the sessions indicate that the NGOs attending were primarily international groups. While it is apparent that these NGOs played important advocacy roles within the Intergovernmental Working Group process, the absence of national groups is a significant deficit in the genuinely broad nature of participation in the sessions themselves. It is apparent that the WHO Secretariat was alive to these problems, and sought at the first session explicitly to fast-track the participation of NGOs to ensure broader participation at the second session and to expand the pool of experts and entities invited to "ensure balanced regional, gender and developing/developed country representation".[111]

Participation outside the sessions was similarly augmented through the two public Web-based hearings and regional and intercountry consultations held in each of the WHO regions. It is significant that several of the latter permitted NGO participation, albeit again primarily only of international NGOs. The public hearings provided an important participatory mechanism within the Intergovernmental Working Group process, and over 90 submissions were made through these two hearings by a range of actors, including academics, patients' groups and the private sector. The Working Group secretariat sought to ensure that the content of these submissions was considered at the sessions, and synopses of the submissions were presented at both the first and second sessions. Certainly, a number of the recommendations made in the public hearings are ultimately reflected in the final text of the Global Strategy, including regarding patent pools, a medical research and development treaty, prize funds and the inclusion of language recognizing the right to health.

The public accessibility of these hearings is certainly congruent with the principle of participation. However, it is questionable whether a Web-based hearing requiring typed submissions on a highly technical area of international policy would be genuinely accessible to the majority of people directly affected by the inaccessibility of medicines in developing countries. The implication is that if policy initiatives addressing the health needs of people in develop-

[106] "Economic, social and cultural rights—study on policies for development in a globalizing world: what can the human rights approach contribute?" (E/CN.4/Sub.2/2004/18), para. 35.
[107] Ibid., para. 36.
[108] E-mail correspondence with Dr. Elil Renganathan, Executive Secretary of the WHO Secretariat on Public Health, Innovation, Essential Health Research and Intellectual Property (25 March 2009).
[109] Ibid. (18 March 2009).
[110] WHO, Principles Governing Relations between the World Health Organization and Nongovernmental Organizations, art. 3.2-3.6.
[111] A60/27, para. 12.

ing countries are to be genuinely participatory, they should seek to ensure participation by affected communities within countries, including through measures such as national public hearings.

The unmanaged nature of Web-based hearings is similarly not without concern. For example, there was controversy around the second public hearing, given the significant increase in submissions supporting strong intellectual property rights and opposing various aspects of the Intergovernmental Working Group strategy. This increase was viewed with suspicion by civil society groups, which alleged that pharmaceutical companies had compromised the hearings through financial support of participating groups and advocacy to oppose the Working Group.[112] Irrespective of the veracity of these claims, the incident suggests the need for the management of public submissions, including through basic measures such as declarations of conflicts of interest.

The participation of WHO member States in the sessions themselves was also mixed. Just over 50 per cent of them participated in the first session, and a third of those States absent were least developed countries.[113] The Working Group secretariat recognized this deficit, and explicitly sought to broaden participation by funding the attendance of one delegate from each such country at all three sessions and engaging in additional advocacy through regional WHO offices and consultations to encourage greater developing country participation in the Working Group process. Whether because of increased funding or a growing awareness of the significance of the process, member State participation at the second session increased significantly, to 140. It reached its highest level (147) at the resumed second session.

Participation was certainly also influenced by the size of national delegations, since Working Group sessions and side meetings were sometimes held concurrently. It is notable in this respect that delegation size seemed to vary according to developmental levels; for example, many least developed countries sent only one or two delegates to the sessions, in comparison to the larger delegations of two to four delegates that most other countries could send (this was the case for 82 countries at the first session).

[112] Suwit Wibulpolprasert and others, "WHO's web-based public hearings: hijacked by pharma?", *The Lancet,* vol. 370, Issue 9601 (2007), p. 1754.

[113] See, for example, "Global strategies need truly global discussions", *The Lancet*, editorial, vol. 368, Issue 9552 (2006), p. 2034.

2. Transparency

The Intergovernmental Working Group process largely complies with the right to development criteria requiring adequate and freely available information to enable effective public scrutiny of policies, working methods and outcomes. WHO official documentation on this process is publicly accessible, with full documents from each session, public hearing and regional consultation posted on its website. The transparency of the process is, however, limited, since in line with standard WHO practice, member State negotiations were closed and remain undocumented. This lack of transparency is certainly incongruent with any human rights-based approach to policy formation, and points to a broader structural deficiency in the negotiating processes that produce important pieces of international policy such as the Intergovernmental Working Group. This lack of transparency speaks to the ultimately political nature of the document and suggests in some respects both its potential strengths and weaknesses.

3. Accountability

The Global Strategy specifies 108 actions to realize its goals of promoting innovation, building capacity, improving access and mobilizing resources. The Plan of Action identifies the lead stakeholders to take such actions, as well as additional relevant stakeholders, and explicitly establishes systems for monitoring and reporting on its progress. In accordance with the right to development, are these fair, institutionalized mechanisms of mutual accountability and review through which fulfilment is monitored and publicly reported, responsibility for action indicated and effective remedies provided?

With regard to the allocation of duties, it is apparent that the Plan of Action places responsibility for action primarily on Governments, which are identified as lead actors on most of the actions (91 of the 108 actions). There is, however, no indication of whether the Governments in question should be developed or developing countries, and this seems a prominent deficit in identifying mutual responsibilities of both developed and developing countries. It is notable that earlier versions of the Plan of Action were more explicit in specifying the responsibilities of developed countries.

It is also notable that the language of the exhortations to action in the Plan of Action is weak, with stakeholders "urged", "requested" and "invited" to

take action. This is a marked departure from a prior section that was deleted from the final text of the Global Strategy, which spoke of the "global responsibility" of a range of actors to ensure discovery and development of health products and ensure that health products are accessible and affordable for people and Governments in developing countries.

WHO is given the second most prominent role in the Global Strategy, taking the sole lead on 10 actions and sharing leadership with Governments on another 39. The organization is also designated as lead actor in monitoring performance and progress in implementation and other key areas. This prominence is an important outcome, definitively answering critiques that WHO would exceed its mandate if it were to address intellectual property issues and carving out its institutional mandate with regard to the public-health implications of intellectual property rights. The Strategy provides for regular and public monitoring of progress, requiring that progress reports be submitted to the World Health Assembly through the Executive Board every two years, with a comprehensive evaluation of the strategy to be undertaken after four years. This process is an important measure that could enable accountability as well as transparency in the realization of the Global Strategy and Plan of Action.

Since the completion of the Global Strategy, 30 progress indicators have been devised to form the basis for regular reporting to the World Health Assembly on performance and overall progress over a two-year reporting period. Each element in the Strategy has a set of indicators measuring results with respect to its key objectives.[114] A key weakness of these indicators is that all are quantitative, and none set defined targets. Thus, while they will be able to measure numerical progress in programming, policies and reports, they cannot measure the impact of such measures. Notably absent are any indicators measuring the production of new medicines or the proportion of the population with access to existing medicines. These are significant deficits in a strategy aimed at improving both innovation and access.

V. Conclusion

The Intergovernmental Working Group process is the first global cooperative initiative aimed at reforming a global system of medical research and development that to date has largely failed to meet the needs of people in developing countries.[115] The Intergovernmental Working Group and negotiated final Global Strategy and Plan of Action are seen as milestones in global policy relating to public-health and intellectual property rights, at least as important as the Doha Declaration.[116] The endorsement of the Global Strategy and Plan of Action by all 193 member States of WHO suggests its potential to advance global cooperation in relation to innovation of and access to health products for diseases prevalent in developing countries. The Global Strategy and Plan of Action may also protect developing countries seeking to use TRIPS- and Doha Declaration-compliant measures such as compulsory licensing to ensure access to affordable medicines.

The Global Strategy and Plan of Action may also serve an important normative function in global and domestic law and policy relating to access to medicines. The seriousness with which delegations treated its negotiations certainly seems to reflect a sense that its provisions could have a powerful influence as a political document.[117] Indeed, members of the Intergovernmental Working Group secretariat reported that member States treated the Working Group in the same way as treaty negotiations, with hours spent negotiating a word or comma, and the final document approved sentence by sentence, word by word. Delegations evidently realized that they were not drafting a simple WHO technical document.

The Global Strategy and Plan of Action do include potentially powerful elements capable of contributing to the realization of the right to development and health. The Global Strategy advances thinking in important respects, including confirming that the policy debate over intellectual property rights extends to diseases of the developed world and emphasizing the need for new innovative mechanisms to provide incentives for drug production. The inclusion of explicit recognition of the right to health is a similarly important element. These elements are all the more important given the endorsement of the Global Strategy and Plan of Action by all 193 WHO member States.

[114] WHO Executive Board, "Global Strategy and Plan of Action: proposed progress indicators", document EB124/16 Add.1.

[115] K. Satyanarayana and S. Srivastava, "The Inter-Governmental Working Group on Public Health, Innovation and Intellectual Property (IGWG): the way ahead", *Indian Journal of Medical Research*, vol. 128, No. 5 (November 2008), pp. 577, 579.

[116] See, for example, William New, "WHO adopts 'most important document since Doha' on IP and public-health", *IP-Watch* (29 May 2008). Available from www.ip-watch.org (quoting a leading developing country negotiator).

[117] See also Kaitlin Mara and William New, "WHO IP and health group concludes with progress; tough issues remain for Assembly", *IP-Watch* (6 May 2008). Available from www.ip-watch.org.

Yet, the failures are equally important. The utility of the Global Strategy and Plan of Action for enabling policy supportive of public-health may have important functional limitations, as its failure to caution against TRIPS-plus measures suggests. The deletion in the Strategy of acknowledgement of global responsibilities for funding is similarly problematic. Moreover, the language of many of the actions is very vague, and while the Intergovernmental Working Group may have advanced new thinking on this topic, it may have been at the expense of achieving concrete results.

Ultimately, the success of the Global Strategy and Plan of Action should be measured by the extent to which 2015 brings a marked improvement in access to existing and new medicines both between and within developing countries. Whether this goal is reached may depend in the interim on the extent to which the Global Strategy and Plan of Action contribute to remedying the material and structural inequalities that condition governmental abilities to realize the right to the highest attainable standard of health and ergo, the right to development.

Climate change, sustainable development and the clean development mechanism

*Marcos Orellana**

I. Introduction

The reality of climate change is today beyond doubt. Our planet will become more dangerous and less hospitable in the coming decades. For millions of people this means hunger, poverty, loss of livelihoods, forced displacement, conflict, and even loss of statehood. In short, climate change constitutes a systematic denial of fundamental human rights.

As we look at 25 years of progress since the Declaration on the Right to Development, we can also look into the future and identify a role for the right to development in addressing the climate change crisis. In so doing, we may legitimately ask whether the right to development can be central to enabling and guiding a non-carbon, sustainable development path in a climate-constrained world.

The planet's atmosphere is already saturated with greenhouse gases that will cause dangerous interference with the global climate. In other words, there is no more space in the atmosphere to increase emissions of greenhouse gases without further damaging the climate system. This is a simple statement with profound implications. If emissions cannot continue to increase without causing severe global environmental and social harm, then by necessity development must follow a sustainable, non-carbon path. In this regard, only a significant technological leap will enable our global society to address the moral imperatives of development in a way that avoids further environmental destruction of our only planet. Without a doubt, given historical responsibility and current capabilities, the industrialized countries bear the obligation to provide the financial and technological support to make this leap possible.

At the same time, the actions required to address climate change represent an unparalleled opportunity to generate new levels of development. In this regard, the right to development highlights the need for development models that are integrated with the underlying ecology. The right to development also provides an ethical vision that can direct and sustain the economic transformation demanded by climate change.

Certain core elements of the right to development acquire special importance in the climate change context, namely respect for all human rights, equity and international cooperation. Issues of international cooperation are addressed below in the context of climate change and human rights and the United Nations Framework Convention on Climate Change (UNFCCC). As to respect for human rights, the Declaration on the Right to Development places the human person at the centre of development, and provides that the development process must respect all human

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rights and fundamental freedoms and contribute to the realization of rights for all (preamble and arts. 1, 2 (1) and 6). Also, the realization of the right to development may not justify violations of other human rights.[1] This is the basis for a human rights-based approach to development,[2] which is particularly relevant in the climate change context.[3]

The right to development also requires that consideration of the core elements of equity and justice determine the structure of the development process. For example, poverty has to be eradicated and the structure of production has to be adjusted through development policy.[4] In this sense, UNFCCC recognizes equity as one of the central principles that must guide the actions of States parties to achieve its objective and implement its provisions (art. 3).

The emphasis on equity in the right to development provides a direct linkage with the notion of sustainable development, and this linkage is particularly relevant in the climate change context. Sustainable development has been conceptualized by the United Nations Commission on Sustainable Development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains two key concepts: (a) the concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given; and (b) the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[5] Sustainable development is thus central to the climate change regime in general, and has been explicitly incorporated as one of the objectives of the clean development mechanism (CDM), established by the Kyoto Protocol to UNFCCC. Further, sustainable development calls for the integration of environmental, social and economic issues in the development process, which is essential for an adequate and effective response to climate change and highlights the linkages between the right to development and sustainable development.

In our age of globalization, when time is compressed in electronic transactions to create a culture of the instant, we need a moral compass that can provide direction to the necessary transformation of the economy. The right to development, and the indivisibility of human rights in the process of development, establishes the ethical vision necessary for our age to effectively address climate change. Confronting climate change requires nothing less than the fundamental transformation of the economic patterns and structures that have been set up since the dawn of industrialization. Can the nation State structure of governance successfully address the fundamental challenge confronting humanity in our time? Or will climate change negotiations and implementation remain locked in a zero-sum game that is running out the clock? This is where the right to development provides the indispensable moral compass that can guide the needed economic transformation. In this sense, the right to development expresses a common ethos, an articulating principle and a transcendent goal for our global society if it is to survive and thrive in a climate-constrained planet.

Economic transformation, and particularly the transition to a sustainable economy, is one of the two themes of the United Nations Conference on Sustainable Development (Rio+20) process, which highlights the need to reconceptualize the relations between the economy and the environment. It posits that the environment is the infrastructure of society, and not a mere input into economic systems. The transition towards a sustainable economy has direct implications for development models that ignore biological tenets. It also has clear and direct implications for human rights, including resource rights, livelihoods and, of course, development. In this regard, the right to development, and its emphasis on a participatory and accountable development process guided by respect for and promotion of rights, provides essential guiding principles. It is thus central to the success of the sustainable economy and governance discussions involved in the Rio+20 process.

Against this background, this chapter explores the linkages between the right to development and climate change, focusing on CDM as a case study of

[1] The Vienna Declaration and Programme of Action states: "While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights" (part I, para. 10).

[2] See "Fifth report of the Independent Expert on the right to development, Mr. Arjun Sengupta, submitted in accordance with Commission resolution 2002/69: frameworks for development cooperation and the right to development" (E/CN.4/2002/WG.18/6), para. 46. The Working Group on the Right to Development, at its sixth session in 2005, recognized the "multifaceted nature of the right to development [and] agreed that a rights-based approach to economic growth and development contributes to the realization of the right to development while it does not exhaust its implications and requirements at both the national and international levels". See "Report of the Working Group on the Right to Development on its sixth session" (E/CN.4/2005/25). See also S. Nwauche and J.C. Nwobike, "Implementing the right to development", *SUR–International Journal on Human Rights*, Issue 2 (2005), p. 96.

[3] See Marcos Orellana, "A rights-based approach to climate change mitigation" in *Conservation with Justice: A Rights-based Approach*, Thomas Greiber, ed. (Gland, Switzerland, International Union for Conservation of Nature, 2009), p. 37.

[4] Arjun Sengupta, "On the theory and practice of the right to development," *Human Rights Quarterly*, vol. 24 (2002), p. 849.

[5] Report of the World Commission on Environment and Development: our common future (A/43/427, annex), chap. 2, para. 1.

a global partnership and technology transfer. CDM is a mechanism of the Kyoto Protocol that aims to help developing countries move to cleaner technology and reduce their greenhouse gas emissions while helping industrialized countries achieve their legally binding targets as established in the Protocol. CDM is also designed to achieve cost-effective emissions reduction and promote sustainable development in developing countries by encouraging investments that achieve emission reductions additional to what would otherwise have occurred. In doing so, CDM exemplifies an international partnership between the global South and the industrialized North that seeks to promote sustainable development and mitigate climate change.

The present chapter is structured as follows: section II will discuss the broad aspects of human rights and climate change, followed in section III by the relationship between climate change and the Millennium Development Goals. The framework for international cooperation and climate change consisting of the United Nations Framework Convention on Climate Change, the Kyoto Protocol and financial arrangements for climate change will be presented in section IV. Section V analyses and critiques CDM, including a discussion of the relevance of the right to development in the implementation of a rights-based approach to the mechanism. Finally, section VI will assess CDM in the light of the right to development criteria developed by the high-level task force on the implementation of the right to development and suggest steps to improve it. The chapter concludes with a discussion of how the right to development can effectively address the climate change crisis.

II. Human rights and climate change

The impacts of climate change on human rights underscore the human face of climate change. The Human Rights Council has affirmed that climate change "poses an immediate and far-reaching threat" for the "full enjoyment of human rights".[6]

Pursuant to Council resolution 7/23, its first on climate change and human rights, the Office of the United Nations High Commissioner for Human Rights (OHCHR) prepared in 2009 a comprehensive report on the relationship between climate change and human rights (A/HRC/10/61, hereinafter "OHCHR report"). As the report explains, "looking at climate change vulnerability and adaptive capacity in human rights terms highlights the importance of analysing power relationships, addressing underlying causes of inequality and discrimination, and gives particular attention to marginalized and vulnerable members of society". It concludes that "global warming will potentially have implications for the full range of human rights", and particularly the rights to life, adequate food, water, health, adequate housing and the right to self-determination. Moreover, the study found that most at risk are the rights of already vulnerable people, such as indigenous peoples, minorities, women, children, the elderly, persons with disabilities and other groups especially dependent on the physical environment.

The World Bank estimates that even with a 2° C increase from pre-industrial levels, existing greenhouse gas concentrations will cause irreversible climate change that will drive between 100 and 400 million people into hunger, and between 1 and 2 billion more people may no longer have enough clean water.[7] Levelling at 2° C looks more and more unlikely, however. In the words of Secretary-General Ban Ki-moon in his speech to World Climate Conference 3, held in Geneva in September 2009, "our foot is stuck on the accelerator and we are heading towards an abyss". At the same meeting, the Chair of the Intergovernmental Panel on Climate Change recalled the moral and legal obligations "to ensure that we prevent by every means these abrupt and irreversible changes". In this regard, the Deputy High Commissioner for Human Rights, in her address to the thirteenth Conference of the Parties to UNFCCC (COP 13), held in Bali, Indonesia, in December 2007, had stated that human rights obligations introduced an accountability framework that was an essential element of the promotion and protection of human rights.

A framework of accountability is indispensable for development given that climate change aggravates the vulnerability of groups already marginalized, facing discrimination or living in poverty. As noted by the Independent Expert on human rights and extreme poverty in her preface to a 2010 study commissioned to advise her on this matter,[8] "climate change disproportionately affects those living in extreme poverty, further undermining their ability to live their lives in dignity".

[6] Resolution 7/23; see also resolution 10/4.

[7] World Bank, *World Development Report 2010: Development and Climate Change* (Washington, D.C., 2010).

[8] Thea Gelbspan, "Exposed: the human rights of the poor in a changing global climate", Dialogue on Globalization (Friedrich-Ebert-Stiftung Geneva, March 2010), p. 3.

The Charter of the United Nations and several treaties recognize the role of international cooperation and assistance in achieving universal respect for human rights.[9] United Nations treaty monitoring bodies have also emphasized the role of international cooperation and assistance in the realization of economic, social and cultural rights. In particular, the Committee on Economic, Social and Cultural Rights has emphasized that, in accordance with the Charter, well-established principles of international law and the provisions of the Covenant, international cooperation for development is an obligation of all States.[10] Similarly, the Declaration on the Right to Development identifies international cooperation as a key element to assist developing countries to secure the enjoyment of basic human rights.[11] In this light, the OHCHR analytical study on climate change and human rights concluded that measures to address climate change should be informed and strengthened by international human rights standards and principles. The study also noted that climate change is a truly global problem that can only be effectively addressed through international cooperation, as climate change disproportionately affects poorer countries with the weakest capacity to protect their populations.

Increased attention to the human dimension of climate change, including in the current negotiations, can improve the likelihood that climate change-related measures respect human rights. Accordingly, understanding and addressing the human consequences of climate change lie at the very heart of the climate change challenge. Moreover, linking the climate change negotiations and structures to existing human rights norms enables States to use indicators and mechanisms anchored in the well-established human rights system to address the challenges posed by the changing climate and response measures.

III. Climate change and the Millennium Development Goals

The impacts of climate change have direct implications for the efforts of the international community to achieve the Millennium Development Goals. At the same time, as the Secretary-General has observed, the Goals should also contribute to the capacities needed to tackle climate change by providing opportunities for broader improvements in economies, governance, institutions and intergenerational relations and responsibilities.[12] Capturing these opportunities, however, will require "a global new deal capable of raising investment levels and channelling resources towards massive investment in renewable energy, and building resilience with respect to unavoidable climate changes".[13] In this regard, the clean development mechanism established by the Kyoto Protocol is an example of a mechanism deployed to raise investments and channel resources to the global South. CDM thus provides a valuable case study for further exploring the links between climate change and the Millennium Development Goals.

The relationship between climate change and the Millennium Development Goals involves both threats and opportunities and works in both directions, with each impacting the other in positive and negative ways.[14] The United Nations Development Programme (UNDP) has analysed the ways in which climate change affects the Goals, concluding that climate change threatens to exacerbate current challenges to their achievement.[15] In this regard, major issues of concern for the Goals resulting from climate change include population displacement, forced migration, conflict and security risks, food insecurity and the human rights impacts of climate change response measures.[16]

[9] Article 1 (3) of the Charter states: "The Purposes of the United Nations are: … To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"; Article 55 (b) states: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote … solutions of international economic, social, health, and related problems, and international cultural and educational cooperation"; Article 56 states: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55". Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights states: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." The importance of international assistance and cooperation to the realization of human rights is also reflected in other international and regional human rights treaties such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

[10] General comment No. 3 (1990) on the nature of States parties' obligations, para. 14.

[11] See Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford and New York, Oxford University Press, 2007), pp. 3-6.

[12] "Keeping the promise—a forward-looking review to promote an agreed action agenda to achieve the Millennium Development Goals by 2015: report of the Secretary-General" (A/64/665), para. 37.

[13] Ibid., para. 39.

[14] See United Nations Millennium Campaign, "Seal a JUST deal: the MDG path to a climate change solution" (2010).

[15] See, for example, UNDP, "What will it take to achieve the Millennium Development Goals?: an international assessment" (June 2010).

[16] See Marcos A. Orellana, Miloon Kothari and Shivani Chaudhry, "Climate change in the work of the Committee on Economic, Social and Cultural Rights" (Friedrich-Ebert-Stifttung Geneva, Housing & Land Rights Network – Habitat International Coalition and Center for International Environmental Law, May 2010).

More particularly, climate change impacts have obvious repercussions on Millennium Development Goal 7 regarding environmental sustainability with respect to access to safe drinking water and basic sanitation, as well as biodiversity loss. Climate change impacts on agricultural production and water availability are also relevant for goal 1 regarding extreme poverty[17] and hunger eradication.[18] Millennium Development Goal 2 regarding universal primary education is affected given the potential destruction of schools and other infrastructure, as well as pressures on family livelihoods that may keep children from school. Goal 3 regarding gender equality is affected by the increased degradation of natural resources, upon which women are particularly dependent. Goals 4, 5 and 6 regarding child mortality, maternal health and combating malaria, HIV and other diseases are affected by increased vulnerability to poor health due to reduced food and water security, in addition to the spread of waterborne, vector-borne and airborne diseases. Finally, goal 8 regarding global partnerships and technology transfer also directly concerns climate change and the clean development mechanism, as examined by the high-level task force on the implementation of the right to development.

Development assistance, both technical and financial, has an important role to play in supporting countries in achieving the Millennium Development Goals. The report of the Secretary-General on progress in achieving the Goals observes that the switch to low greenhouse gas-emitting, high-growth pathways to meet the development and climate challenges is both necessary and feasible, but will require much greater international support and solidarity (A/64/665, para. 38).

IV. International cooperation and climate change

To respond to growing scientific concern, the international community, under the auspices of the United Nations, has come together to tackle the climate change problem. Its efforts have led to the development of UNFCCC and the Kyoto Protocol, as well as a number of financial arrangements to address the costs associated with climate change.

A. United Nations Framework Convention on Climate Change

UNFCCC was signed and adopted at the United Nations Conference on Environment and Development, held in Rio de Janeiro, Brazil, in 1992 and entered into force in 1994. The Convention acknowledges that the global nature of climate change calls for the widest possible cooperation by all countries.[19] The ultimate objective of UNFCCC, stated in article 2, is to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".

Development considerations play a central role in the design and implementation of the Convention, the preamble to which affirms that "responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter". More significantly, the ultimate objective stated in article 2 should be achieved within a time frame sufficient, inter alia, "to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner". Furthermore, the Convention articulates, in articles 3 and 4, the principle of "common but differentiated responsibilities and respective capabilities", underscoring that industrialized countries are to "take the lead in combating climate change".

In discussions at UNFCCC meetings, States often equated the right to development with the right to pollute. In order to meet pressing development imperatives, developing countries have largely resisted any quantifiable limitations on emissions. To some extent this position assumes that development calls for a fossil fuel-based energy policy. And since energy is the lifeblood of modern economies, this myth is aggravating paralysis with respect to the Convention. The right to development is not a right to pollute. Instead, the right to development highlights the need for a technological leap forward that can bypass the destructive environmental impacts of industrialization. Such an advance can only be achieved through the deployment of climate-friendly technologies that can enhance local resilience to climatic changes and reduce greenhouse gas emissions in economic activity.

[17] See Gelbspan, "Exposed" (see footnote 8).
[18] See Columbia Law School Human Rights Institute, *Climate Change and the Right to Food: A Comprehensive Study*, Heinrich Böll Stiftung Publication Series on Ecology, vol. 8 (Berlin, Heinrich Böll Foundation, 2009).
[19] In this vein, the duty to cooperate in the climate change context requires States to negotiate and implement international agreements under the auspices of UNFCCC, which features the necessary membership and expertise. See John H. Knox, "Climate change and human rights law", *Virginia Journal of International Law*, vol. 50, No. 1 (2009), p. 213.

The right to development could thus help to unlock negotiations by stressing technology transfer in the necessary economic transformation. A first step lies in the conceptual strength of the right to development, i.e., arguing for equitable distribution of wealth and social justice, which could help overcome the distorted conceptualization of the right to development as a right to pollute. A second step lies in reinvigorating the technology transfer dimensions of the Bali Action Plan adopted at COP 13.[20] Thirdly, industrialized countries must face their responsibility for causing the climate crisis and provide financial, technological and other support to enable the technology leap in the developing world. In this regard, the principle of "common but differentiated responsibilities" can synergize with the right to development in highlighting the need for effective technology transfer mechanisms that can open development paths that reduce emissions and enhance resilience.

Evaluating the effectiveness of international cooperation in addressing climate change is a complex undertaking. From one perspective, the fact that States have negotiated and are implementing two major international treaties on the topic, namely UNFCCC and the Kyoto Protocol, in addition to undertaking a significant negotiating effort over the past several years to define the post-Kyoto climate framework, would suggest that they have clearly sought to cooperate. From another angle, if the duty to cooperate requires effective solutions to the climate change problem, then the fact that the actual and impending consequences of climate change are increasing in intensity owing to the failure to arrive at a binding agreement providing for effective mitigation, adaptation and other climate measures could be regarded as a failure of States to cooperate effectively.

B. Kyoto Protocol

In line with the objective and principles of UNFCCC, the Kyoto Protocol was finalized in 1997 and entered into force in 2005. Under the Protocol, 37 industrialized countries and countries in transition to a market economy, plus the European Union, made legally binding commitments to reduce their overall emissions of the six major greenhouse gases[21] by at least 5 per cent below 1990 levels in the commitment period 2008-2012. As the emission reduction targets of the Protocol expire in 2012, the next step remains unknown and is subject to ongoing international negotiations.

The fifteenth Conference of the Parties to UNFCCC (COP 15) and the fifth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP 5) took place in Copenhagen from 7 to 18 December 2009. Despite two years of intense negotiations, the Parties were unable to reach agreement on all the issues.[22] Instead, the main outcomes from the negotiations include a number of decisions by the Conference of the Parties which, inter alia, provided the mandate to continue negotiations, and the Copenhagen Accord,[23] a non-binding political agreement drafted by certain Heads of State outside the UNFCCC process. In the final hours of COP 15, the parties "took note of" rather than "adopted" the Copenhagen Accord, which introduces significant ambiguity regarding its legal status and implementation.

Similarly, the sixteenth Conference of the Parties to UNFCCC (COP 16), which took place in Cancun, Mexico, from 29 November to 10 December 2010, resulted in a set of decisions adopted by the Parties, not a legally binding treaty. The Parties again "took note of" their pledges to mitigate climate change. While the Parties agreed that urgent action was needed, they did not reach an agreement on the rules and targets for a second commitment period of the Kyoto Protocol, which will be further negotiated at the Conference of the Parties scheduled to be held in Bonn, Germany, in May 2012.[24] However, in its decision on the outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention,[25] established under the Bali Action Plan, the Conference of the Parties did recognize the important role of human rights in climate change. In the decision, the Conference of the Parties, noting Human Rights Council resolution 10/4, which recognizes that climate change has many direct and indirect impacts on the full enjoyment of human rights, especially for already vulnerable segments of the population, emphasized that human rights should be respected by the Parties in all climate change-related actions.

The clean development mechanism under the Kyoto Protocol has provided a mode of cooperation between industrialized and developing countries. However, the mechanism still needs to be improved

[20] FCCC/CP/2007/6/Add.1, decision 1/CP.13.
[21] CO2, CH4, N2O, hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF6).
[22] See Dan Bodansky, "The Copenhagen Climate Change Conference", *American Journal of International Law*, vol. 104 (2010), p. 230.
[23] FCCC/CP/2009/11/Add.1, decision 2/CP.15.
[24] Editor's note: information concerning the Bonn Climate Change Conference can be found at http://unfccc.int/meetings/bonn_may_2012/meeting/6599.php.
[25] FCCC/CP/2010/7/Add.1, decision 1/CP.16.

in order to secure a rights-based approach to development and further the right to development while promoting sustainable development in developing countries.

C. Financial arrangements for climate change

The costs associated with climate change, both in respect of mitigation of greenhouse gases and of adaptation to a changing climate, pose a severe challenge to the international community. Developing countries in particular generally lack the resources to address this new environmental and social threat. Consequently, developing countries are especially vulnerable to climate change since their budgets are stretched to meet basic needs such as access to food, water and housing.

International cooperation in the form of financial assistance acquires critical relevance in the light of the development challenges and vulnerabilities aggravated by climate change, especially in developing countries. While financial arrangements for climate change are numerous and dispersed,[26] efforts by the international community to address the costs associated with climate change have fallen short of what is necessary to ensure that progress towards achieving the Millennium Development Goals is not undermined by climate change.

UNFCCC and the Kyoto Protocol have established mechanisms to channel financial assistance to developing countries. UNFCCC assigns the Global Environment Facility as the operating entity of its financial mechanism on an ongoing basis, subject to review every four years. The Kyoto Protocol establishes two main financial arrangements. First is the operation of the market mechanisms, including CDM, creating economic incentives for the reduction of emissions of the six major greenhouse gases. Second is the specific Adaptation Fund to assist developing countries to adapt to the adverse effects of climate change. The Adaptation Fund is replenished through, inter alia, contributions from CDM.[27]

This cursory overview of international cooperation and the climate change regime shows the relevance of CDM to encouraging investment and technology transfer to developing countries. Similarly, CDM provides financial resources for the Adaptation Fund, which is critical in building community resilience in developing countries. These features highlight the significance of CDM in the interface between climate change and the Millennium Development Goals. Concerns have been raised, however, about the mechanism's environmental integrity, its ability to ensure respect for human rights as well as its actual contribution to sustainable development. In the light of its importance, CDM is analysed below in further detail.

V. The clean development mechanism

CDM was designed to achieve cost-effective emissions reduction and promote sustainable development in developing countries. It does so by encouraging investments in developing countries that achieve emission reductions additional to what would otherwise have occurred. CDM projects have so far generated more than 365 million certified emissions reductions (CERs) and are anticipated to generate more than 2.9 billion CERs within the first commitment period of the Kyoto Protocol (2008-2012). CDM has registered more than 2,500 projects.[28]

CDM provides a clear example of an international partnership between the global South and the industrialized North to achieve the twin objectives of promoting sustainable development and mitigating climate change. CDM is thus directly relevant to Millennium Development Goal 8 regarding global partnerships and technology transfer, as well as to the other Goals directly affected by climate change. In addition, a focus on CDM also raises issues concerning investments and resource flows, technology transfer, environmental integrity and the meaning and operationalization of a rights-based approach to development, all of which are central to effective and equitable climate change mitigation and to the attainment of the Millennium Development Goals. Ultimately, analysing CDM using the right to develop-

[26] A number of international organizations are actively engaged in administering and/or operating climate change funds, including UNDP, the United Nations Environment Programme (UNEP) and the United Nations International Strategy for Disaster Reduction. Similarly, a number of multilateral development banks have set up dedicated funds to address climate change. Further, several industrialized countries have established climate change funds to assist climate change mitigation and adaption in the developing world.

[27] Marcos Orellana, "Climate change and the Millennium Development Goals: the right to development, international cooperation and the clean development mechanism", *Sur–International Journal on Human Rights*, vol. 7, Issue 12 (June 2010). See also UNFCCC, Adaptation Fund, at http://unfccc.int/cooperation_and_support/financial_mechanism/adaptation_fund/items/3659.php. (The Adaptation Fund Board supervises and manages the Adaptation Fund and has 16 members and 16 alternates who meet no less than twice a year. In December 2008, the Parties to the Kyoto Protocol established rules of procedure, priorities, policies and guidelines for the Adaptation Fund.)

[28] CDM passed the 2,000th registered project milestone in January 2010, less than two years after its inception. For the list of registered projects, see http://cdm.unfccc.int/Projects/registered.html.

ment criteria exposes several flaws that limit its contribution to implementing the right to development.

This section first provides a brief background of CDM and its structure. It then analyses the mechanism's requirements, scope and actors. The last part addresses certain criticisms that have been levelled against CDM, concluding with an analysis of options for its improvement.

A. Background

Under the Kyoto Protocol, "industrialized Annex I Parties"[29] must reduce their net emissions of greenhouse gases by an average of 5 per cent below 1990 levels over a five-year reporting period, 2008-2012.[30] CDM is one of the three market-based mechanisms created by the Kyoto Protocol to assist industrialized Parties to meet their emissions reduction target.[31] Under CDM, Annex I Parties (or private entities from those countries) may fund activities in non-Annex I Parties that result in CERs. Industrialized countries are then able to apply CERs towards their emissions targets.

CDM has a twofold purpose. First, it aims at promoting sustainable development in developing countries. Accordingly, CDM is expected to lead investments into the developing world and to the transfer of environmentally safe and sound technology.[32] Second, CDM is critical to addressing greenhouse gas mitigation by assisting industrialized countries in achieving compliance with their quantified emission reduction commitments under the Kyoto Protocol. In this context, the main rationale behind CDM is cost-effectiveness, which means that CDM projects will take place where greenhouse gas emissions reductions are cheaper.[33]

[29] Annex I Parties includes States members of the Organisation for Economic Co-operation and Development (OECD) and countries undergoing the process of transition to a market economy.

[30] Kyoto Protocol, art. 3 (1).

[31] Ibid., art. 12. The two other mechanisms are joint implementation and emissions trading (ibid., arts. 4 and 17).

[32] See FCCC/CP/2001/13/Add.2 and Corr.1, decision 17/CP.7, "Modalities and procedures for a clean development mechanism as defined in article 12 of the Kyoto Protocol", adopted by the Conference of the Parties to UNFCCC at its seventh session, held in Marrakesh, Morocco, in 2001. (Decisions 2/CP.7-24/CP.7, contained in chapter II of the report of the Conference, are referred to as "The Marrakesh Accords", the rules that govern CDM, and are contained in documents FCCC/CP/2001/13/Adds.1-3 and corrigenda and addenda.) Attached to decision 17/CP.7 was a draft decision transmitted to the meeting of the Parties to the Kyoto Protocol for adoption at its first session, held in Montreal, Canada, in 2005. The draft decision was subsequently adopted as decision 3/CMP.1, contained in document FCCC/KP/CMP/2005/8/Add.1. Decision 3/CMP.1 has an annex, entitled "Modalities and procedures for a clean development mechanism", with four appendices: appendix A, "Standards for the accreditation of operational entities"; appendix B, "Project design document"; appendix C, "Terms of reference for establishing guidelines on baselines and monitoring methodologies"; and appendix D, "Clean development mechanism registry requirements".

[33] See Harro van Asselt and Joyeeta Gupta, "Stretching too far? Developing countries and the role of flexibility mechanisms beyond Kyoto", *Stanford Environmental Law Journal*, vol. 2, No. 2 (2009), p. 331.

B. Basic requirements of a clean development mechanism project

Under article 5 of the Kyoto Protocol, CDM projects have to fulfil three basic requirements:[34]

(a) *Voluntary participation by each Party*.[35] Written approval of voluntary participation is a requirement for validation;

(b) *Real, measurable and long-term mitigation of climate change*. CDM projects must lead to real, measurable reductions in greenhouse gas emissions, or lead to the measurable absorption (or "sequestration") of greenhouse gases in a developing country.[36] The "project boundary" defines the area within which emissions reductions occur;[37]

(c) *Additionality*. The "additionality" element requires emission reductions that are additional to any that would occur in the absence of a certified project activity.[38] Stated differently, "additionality" requires that greenhouse gas emissions from a CDM project activity must be reduced below those levels that would have occurred in the absence of the project.[39] In fact, it must be shown that the project would not have been implemented without CDM.

A CDM project should also contain a "sustainability" element. All CDM projects must contribute towards sustainable development in the host country and must also be implemented without any negative environmental impacts.[40] To ensure that these conditions are met, the host country determines whether the CDM project meets its sustainable development objectives and also decides whether an environmental assessment of the project is required.[41] The prerogative of the host country to define sustainable develop-

[34] Beyond these requirements, the Kyoto Protocol provides almost no guidance for operating CDM. To develop the necessary institutional framework to do so, the Parties have adopted a substantial body of decisions at meetings of the Parties. See Chris Wold, David Hunter and Melissa Powers, *Climate Change and the Law* (LexisNexis, 2009), p. 233.

[35] Decision 3/CMP.1, annex, para. 28: "Participation in a CDM project activity is voluntary."

[36] See "A user's guide to the CDM (clean development mechanism)", 2nd ed. (Pembina Institute for Appropriate Development, February 2003), pp. 4-5.

[37] See decision 3/CMP.1.

[38] Kyoto Protocol, art. 12 (5).

[39] Decision 3/CMP.1, annex, para 43: "A CDM project activity is additional if anthropogenic emissions of greenhouse gases by sources are reduced below those that would have occurred in the absence of the registered CDM project activity."

[40] See decision 3/CMP.1.

[41] See "A user's guide to the CDM".

ment has not been devoid of question, however, given the linkage between human rights and development and the need for external accountability of the State with respect to human rights issues.

C. Core actors of the clean development mechanism

CDM projects involve the following seven participants:

(a) *Project proponent*. This is the entity that develops and implements a CDM project;

(b) *CER purchaser*. This entity invests in the project and/or purchases the project's CERs;

(c) *Stakeholders*. These include the public, or any individuals, groups or communities affected, or likely to be affected, by the proposed CDM project activities;[42]

(d) *Host country*. This is the developing country in which the CDM project takes place. The host country approves the project prior to its implementation;

(e) *Executive Board*. The Board supervises implementation of CDM and reports to COP/CMP. It is comprised of 10 members representing Parties to the Kyoto Protocol. It also maintains the CDM registry for issuance of CERs, approves methodologies for measuring baselines and additionality, and accredits designated operational entities;

(f) *Designated national authority*. The designated national authority is established by the host country and decides whether the proposed CDM is consistent with the country's sustainable development goals. The authority serves as a focal point for consideration and approval of CDM project proposals;[43] it accepts or rejects the CDM component of particular projects;[44]

(g) *Designated operational entities*. These entities are accredited by the CDM Executive Board as such.[45] They have varying responsibilities during different stages of the CDM project cycle, including: reviewing and assessing the project design document; certifying the project's proposed methodology for measuring emissions reductions; validating project proposals; and verifying the emissions reductions resulting from the project that could be considered for issuance of CERs. There are two designated operational entities involved in the CDM process. The first one prepares a validation report evaluating the project design document against the requirements, which it submits to the Executive Board for registration.[46] The second one verifies and certifies the emissions reductions and provides a report to the Executive Board for issuance of CERs.

D. Stages in the clean development mechanism project cycle

Six steps must be taken to obtain CERs:[47]

(a) *Design and formulation of the proposed project participants*. Project proponents submit a project design document to the host country's designated national authority. The documents should include the technical and financial details of the project, including: the proposed baseline methodology for calculating emissions reductions; the project's estimated operational lifetime; a description of the additionality requirements; documentation of any environmental impacts; stakeholder comments; sources of funding; and a monitoring plan.[48]

(b) *Approval by the designated national authority*. The authority approves the development of the proposed CDM project. It also confirms whether a CDM project activity will contribute to the sustainable development of the host State;

[42] Decision 3/CMP.1, annex, para. 1 (e).
[43] Ibid., para. 29.
[44] UNDP, "The clean development mechanism: a user's guide' (New York, 2003).
[45] Decision 3/CMP.1, annex, para. 20. See also Wold, Hunter and Powers, *Climate Change and the Law*, p. 234.
[46] Mindy G. Nigoff, "Clean development mechanism: does the current structure facilitate Kyoto Protocol compliance?", *Georgia International Environmental Law Review*, vol. XVIII, No. 2 (2006), pp. 257-258. In small-scale projects the same designated operational entity can carry out both the validation (at project outset) and verification (during project operation), in order to avoid the expense of using two designated operational entities. See also UNDP, "The clean development mechanism".
[47] See Charlotte Streck and Jolene Lin, "Making markets work: a review of CDM performance and the need for reform," *European Journal of International Law*, vol. 19, No. 2 (2008).
[48] Decision 3/CMP.1, annex, appendix B. See also Wold, Hunter and Powers, *Climate Change and the Law*, p. 14.

(c) *Validation*. The project design, expressed in the project design documents, must be evaluated by the first designated operational authority against the requirements of CDM. Validation also includes assurance that the host country agrees to the following: that the project contributes to sustainable development; that any required environmental assessment has been carried out; and that there has been adequate opportunity for public comment on the project;

(d) *Registration*. The validated project must be formally accepted and registered by the Executive Board, based on the recommendations of the first designated operational entity;

(e) *Verification*. Once the CDM project is under way, the monitored emissions reductions that result from it must be reviewed periodically by the second designated operational entity;

(f) *Issuance of certification*. Upon written assurance provided by the second designated operational entity, the CDM Executive Board issues the CERs. The CERs are then assigned to the Annex I country where the CER purchaser is located.

E. Project types

CDM statistics as of January 2011[49] show more than 2,500 registered CDM projects, of which large-scale projects represent 56.46 per cent and small-scale projects represent 43.54 per cent.[50] Most CDM projects involve energy industries (renewable and non-renewable sources), energy efficiency, waste handling and disposal, agriculture, manufacturing industries, fugitive emissions from fuels (solid, oil and gas), chemical industries, afforestation and reforestation, and mining production, among others.[51] Brazil, China, India, Malaysia and Mexico are the major countries hosting CDM projects, accounting for approximately 80 per cent of the total number of projects.[52]

Although CDM does not have an explicit technology transfer mandate, it contributes to technology transfer by encouraging investments that use technologies currently not available in the host countries. According to a report on technology transfer in CDM projects prepared for the UNFCCC secretariat, technology transfer is more common for larger projects involving agriculture, energy efficiency, landfill gas, nitrogen dioxide (N_2O), HFCs and wind projects.[53] Also, technology transfer is more common for projects that involve foreign participants. The report concludes that the technology transferred mostly (over 70 per cent) originates from France, Germany, Japan, the United Kingdom and the United States. Although technology transfer from Non-Annex I Parties is less than 10 per cent of all technology transfer, Brazil, China, India, the Republic of Korea and Taiwan, Province of China, are the main sources of equipment (94 per cent) and knowledge (70 per cent) transfers from Non-Annex I sources.

F. Critiques of the clean development mechanism

Critiques of CDM in the scholarly literature[54] concern, inter alia, governance practices, environmental integrity and contribution to sustainable development.[55] They may be summarized in the following 10 arguments:

(a) *A rights-based approach to CDM*. The current emphasis of the clean development mechanism on emissions reductions does not ensure that its projects minimize impacts deleterious to the rights of people or conservation.[56] Measures and projects

[49] See http://cdm.unfccc.int/Statistics/Registration/RegisteredProjByScalePieChart.html. Editor's note: the figures at April 2012 show a total of more than 4,000 projects.

[50] The definition of small-scale projects is provided by COP/CMP as: (a) renewable energy project activities with a maximum output capacity equivalent of up to 15 megawatts; (b) energy efficiency improvement project activities which reduce energy consumption by up to the equivalent of 15 gigawatt hours per year; and (c) other project activities that both reduce anthropogenic emissions by sources and directly emit less than 15,000 kilotons of CO2 equivalent per year (decision 17/CP.7, para. 6 (c), amended by decision 1/CMP.2, para. 28, contained in document FCCC/KP/CMP/2006/10/Add.1). A project which is eligible to be considered as a small-scale CDM project activity can benefit from the simplified modalities and procedures (see decision 4/CMP.1, "Guidance relating to the clean development mechanism", annex II, contained in document FCCC/KP/CMP/2005/8/Add.1).

[51] See http://cdm.unfccc.int/Statistics/Registration/RegisteredProjByScopePieChart.html. The energy industries sector represents 60.31 per cent [editor's note: 68.77 per cent at April 2012] of the total projects registered under CDM.

[52] See UNFCCC, "Key findings of 'analysis of technology transfer in CDM: update 2008' study" (undated).

[53] See Stephen Seres, "Analysis of technology transfer in CDM projects", report prepared for the UNFCCC Sustainable Development Mechanisms Programme (CDM Registration and Issuance Unit, December 2008).

[54] This section is based on the scholarly debate; it does not purport to evaluate the merits of the various critiques.

[55] Charlotte Streck, "Expectations and reality of the clean development mechanism: a climate finance instrument between accusations and aspirations" in *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development*, Richard Stewart, Benedict Kingsbury and Bruce Rudyk, eds. (New York and London, New York University Press, 2009), p. 67.

[56] See Orellana, "A rights-based approach to climate change mitigation" (footnote 3).

adopted under CDM can have direct and indirect impacts on human communities and livelihoods. For example, dam projects may involve displacement of communities and cause irreversible environmental impacts;

(b) *No requirement of prior informed consent*. CDM requires only that affected communities be consulted, not that they give their prior informed consent (or free, prior and informed consent in the case of indigenous and tribal peoples). This can result in a direct violation of human rights;

(c) *No equitable geographical distribution*. There is a lack of equitable geographical distribution between the developing countries that are eligible and those that are favoured for project development. In other words, countries like Brazil, China and India are receiving the lion's share of project investment, while African countries, for instance, are languishing;[57]

(d) *Equity*. Market systems such as CDM seek technological solutions and efficiency. The inequitable distribution of access to technologies, however, reinforces power and wealth disparities.[58] In addition, market-based systems treat pollution as a commodity to be bought or sold, raising complex ethical issues;[59]

(e) *Failure to promote sustainable development or green technology transfer*. As a market mechanism, CDM searches for the cheapest emissions reductions. In that regard, while CDM has been effective in reducing mitigation costs, it has not been equally effective in contributing more broadly to sustainability.[60] The greatest amounts of CERs are being generated by projects with a low or negligible contribution to sustainable development. For example, most of the non-renewable energy projects that are now flooding the carbon market do not score high on certain sustainable development indicators.[61] Similarly, renewable energy, energy efficiency and transport project activities—smaller in scale and more diffuse by nature—are less competitive in the CDM market.[62]

(f) *Lack of access to remedies and jurisdiction*. There is no accountability mechanism at CDM, such as the World Bank Inspection Panel.[63] In addition, the CDM rules do not provide recourse to private parties to challenge Executive Board decisions. Instead, the Executive Board, as is the case with other international institutions, has immunity to enable it to exercise its functions or fulfil its purposes without the threat of litigation;[64]

(g) *Lengthy CDM process*. The bureaucratic CDM process significantly slows an already strained project pipeline. The steps along the pipeline substantially increase the transaction costs of moving from the design and formulation of a project to the issuance of CERs.[65] Moreover, the approval process is considered by some to be guided by political considerations rather than factual competence;[66]

(h) *Lack of transparency*. As they are composed of private consultants, a lack of transparency is associated with the role of the designated operational entities in verifying emissions reductions.[67] In addition, lack of transparency relates to failures of the regulatory process to guarantee the private sector's confidence in CDM;[68]

(i) *Additionality*. Most CDM projects are non-additional and therefore do not represent real emissions reductions. The

[57] According to UNEP, the number of CDM projects that are being planned or have been registered across the African region is increasing. UNEP reports that in July 2011, a total of 190 CDM projects in Africa were at different stages of validation or registration. This is an increase from 170 at the end of 2010, 90 in 2008 and just 53 in 2007. See www.grida.no/news/press/4814.aspx.

[58] Maxine Burkett, "Just solutions to climate change: a climate justice proposal for a domestic clean development mechanism", *Buffalo Law Review*, vol. 56, Issue 1 (2008), p. 234; Alice Kaswan, "Justice in a warming world," *The Environmental Forum*, vol. 26 (2009), pp. 50-51.

[59] Kaswan, "Justice in a warming world", pp. 50-51.

[60] See Streck, "Expectations and reality of the clean development mechanism" (see footnote 55).

[61] See Asselt and Gupta, "Stretching too far?" (footnote 33), p. 350.

[62] See Burkett, "Just solutions to climate change", p. 210.

[63] See, for example, Dana Clark, Jonathan Fox and Kay Treakle, eds., *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (Lanham, Maryland, Rowman and Littlefield, 2003).

[64] See Wold, Hunter and Powers, *Climate Change and the Law* (see footnote 34), p. 236, citing Ernestine E. Meijer, "The international institutions of clean development mechanism brought before national courts: limiting jurisdictional immunity to achieve access to justice", *New York University Journal of International Law and Politics*, vol. 39, No. 4 (2007), p. 873; see also Streck and Lin, "Making markets work" (footnote 47).

[65] Burkett, "Just solutions to climate change", p. 210.

[66] Streck, "Expectations and reality of the clean development mechanism", p. 71.

[67] Burkett, "Just solutions to climate change", p. 236.

[68] Streck, "Expectations and reality of the clean development mechanism", p. 71; see also Streck and Lin , "Making markets work" (footnote 47).

additionality screening is criticized for being imprecise and subjective, as well as for being unable to prevent non-additional projects from entering CDM;[69]

(j) *Limited use*. The use of CDM is limited to reducing emissions on a single-project basis; the mechanism is not designed to address whole sectors of the economy.

Despite the criticisms, CDM is mobilizing large amounts of money from the private sector for mitigation in developing countries. In addition, it can contribute to building institutional capacity and keeping developing countries engaged in the Kyoto Protocol process. CDM thus remains an important mechanism under the climate change regime for greenhouse gas mitigation and for promoting sustainable development and technology transfer. Therefore, one of the questions facing the climate change regime is how to reinvigorate and improve CDM, including enhancing its effectiveness and ensuring its social and environmental integrity. In this sense, there is room for enhancing the mechanism's role within the climate change regime, including post-2012.

G. Decisions of the Copenhagen Climate Change Conference relating to the clean development mechanism

The fifth session of the Conference of the Parties to UNFCCC serving as the meeting of the Parties to the Kyoto Protocol (CMP 5), held in Copenhagen in December 2009, provided further guidance relating to CDM, some elements of which are particularly important in informing an assessment of CDM under criteria pertaining to the right to development. CMP 5 set in motion a process of study of baseline and monitoring methodologies and additionality to increase the number of CDM projects in underrepresented project activity types or regions.[70] This is relevant to increasing investments in projects that may achieve significant sustainable development benefits and emissions reductions, as well as to channelling investments to more developing countries, including least developed countries, instead of just a few.

CMP 5 also addressed the need for a wider distribution of CDM projects in developing countries. It adopted several measures to encourage CDM projects in countries with minor CDM participation, including a request to the Executive Board to use interest accrued within the Trust Fund for the Clean Development Mechanisms (and any voluntary contributions) to provide loans to countries with fewer than 10 registered CDM projects to cover the costs of the development of project design documents, validation and the first verification of project activities.[71] In addition, CMP 5 took note of the work of the Designated National Authorities Forum, given its potential contribution to achieving broader participation in CDM, including through the sharing of information and experience, and encouraged the Executive Board to follow up on issues raised by the Forum.

VI. Assessing the clean development mechanism using right to development criteria

Assessing CDM using criteria pertaining to the right to development is helpful for evaluating proposals regarding CDM reform. The task force revised the right to development criteria at its sixth session in 2010 and organized them under the three attributes of the right to development, namely: comprehensive human-centred development; participatory human rights processes; and social justice in development (A/HRC/15/WG.2/TF/2/Add.1 and Corr.1). In addition, the task force identified operational clusters of criteria within each of the attributes (A/HRC/15/WG.2/TF/2/Add.2).

This section will focus on the three attributes and their cluster of criteria in regard to CDM. The first relates to the commitment of the high-level task force to a particular concept of development, the second to rules and principles and the third to distributional outcomes. The attributes were designed and firmly rooted in, inter alia, the Declaration on the Right to Development and other human rights instruments (ibid., para. 13). Special attention was given to the primary role of States in development, which, according to the Declaration, includes individual and collective action (art. 4) as well as the exercise of the right and the duty to formulate national development policies. In turn, development policies must aim at the constant improvement of the well-being of the people and of individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom (art. 2 (3)).

[69] See Barbara Haya, "Measuring emissions against an alternative future: fundamental flaws in the structure of the Kyoto's Protocol clean development mechanism", Energy and Resources Group Working Paper ERG09-001 (University of California, Berkeley, December 2009).

[70] The decisions adopted at CMP 5 are available at http://unfccc.int/meetings/copenhagen_dec_2009/session/6252/php/view/decisions.php. See in particular decision 2/CMP.5, "Further guidance relating to the clean development mechanism", paras. 23-24.

[71] Decision 2/CMP.5, paras. 48-51.

A. Comprehensive and human-centred development policy

The criteria that form human-centred development focus on the equitable distribution of the needs of the most vulnerable and marginalized segments of the international community. The attribute also promotes economic regulatory oversight to encourage competition and access to financial resources. In addition, the right to development encourages environmentally sustainable development and the use of natural resources.

As noted, most CDM projects are implemented in just a few developing countries. This situation is at odds with right to development criteria. Stressing a more equitable geographical distribution of CDM projects, in numbers and volume of investments, would enhance the mechanism's ability to contribute to the right to development and achieve right to development human-centred development policy. Similarly, the implementation of a sectoral CDM initiative, in addition to individual CDM projects, could enhance the ability of smaller developing countries to participate in CDM. As noted above, CMP 5 has taken certain steps in this direction.

Sustainable development is encouraged in the right to development, and CDM projects are intended to assist developing States in achieving sustainable development. However, the definition of sustainable development objectives is left in the hands of the host State, by design. The host State's designated national authority will determine whether a proposed CDM project contributes to its sustainable development or not. CDM regards this determination as an expression of the sovereignty of the host State, and it does not provide for international scrutiny of it. Therefore, CDM does not require that the designated national authority establish an open and participatory process when defining sustainable criteria, or when making determinations regarding the contribution of projects to sustainability. This feature of CDM hinders its ability to promote and ensure environmental sustainability, as called for by the right to development.

B. Participatory human rights processes

The right to development criteria concerning participatory human rights processes calls for particular attention to the principles of equality, non-discrimination, participation, transparency and accountability in the design of development strategies. With respect to CDM, these criteria call for attention to the ability of the mechanism to allow for participation, effective remedies and transparency. In particular, these criteria point to the mechanism's ability to define sustainable development objectives in an inclusive and participatory process, on the one hand, and on its ability to ensure that the rights of stakeholders are respected, on the other.

The question of the mechanism's ability to ensure that CDM projects respect the rights of stakeholders calls for analysis of the procedural safeguards in the CDM project cycle, in connection with the role of the Executive Board in that regard. Current CDM modalities and procedures already contain certain tools necessary to apply certain steps of a rights-based approach, although more could be done to ensure human rights protection.[72] Similarly, it remains possible that the CDM Executive Board will exercise its authority to supervise the mechanism to exact compliance with all terms of the CDM modalities and procedures, including the rules that can contribute to avoiding any negative social and environmental spillover from projects. In the exercise of this authority, the CDM Executive Board could conclude that no CERs shall be issued in connection with projects involving negative social and environmental spillovers, especially if such impacts involve infringements of rights.

A rights-based approach to CDM can be used to guarantee the twin principles of equality and non-discrimination, ensuring that people's rights will not be affected by CDM projects while safeguarding environmental and procedural integrity.[73] States are legally bound to observe their human rights obligations that stem from the sources of international human rights law, including global and regional human rights instruments. In the context of CDM, States have, inter alia, the obligations to:

- Guarantee the right to take part in the conduct of public affairs, directly or through freely chosen representatives,[74] at any level, without distinction as to race, colour, or national or ethnic origin;[75] language, religion, political or other opinion, national or social origin, property, birth or other status,[76] disability,[77] sex,[78] sexual orientation and gender identity[79]

[72] See Orellana, "A rights-based approach to climate change mitigation" (footnote 3), pp. 37-61.
[73] Ibid., pp. 12-13.
[74] International Covenant on Civil and Political Rights, art. 25 (a).
[75] International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (c).
[76] International Covenant on Civil and Political Rights, art. 2 (1).
[77] Convention on the Rights of Persons with Disabilities, art. 5 (2).
[78] Convention on the Elimination of All Forms of Discrimination against Women, arts. 1, 2 and 7 (b).
[79] Committee on Economic, Social and Cultural Rights, general comments No. 14 (2000), No. 15 (2002), No. 18 (2005); Committee on the Rights of the Child, general comment No. 4 (2003); Committee against Torture,

- Guarantee the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including the improvement of all aspects of environmental and industrial hygiene and the prevention, treatment and control of epidemic, endemic, occupational and other diseases[80]

- Guarantee the rights of the child to the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution, and the provision of information and education on hygiene and environmental sanitation to all segments of society[81]

- Take special measures to safeguard the environment of indigenous and tribal peoples[82] and provide for prior environmental impact studies of planned development activities within their territory,[83] conducted in cooperation and in accordance with the customs of the peoples concerned

- Protect indigenous lands[84] and resources,[85] and guarantee the rights of participation in decision-making[86] and to free, prior and informed consent[87]

- Ensure that no storage or disposal of hazardous materials takes place in the lands or territories of indigenous and tribal peoples without their free, prior and informed consent[88]

Other human rights obligations relevant to CDM are found in regional human rights instruments, which contain explicit obligations to guarantee a healthy and satisfactory environment.[89]

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) of 1998 further elaborates obligations regarding the procedural dimensions of the right to live in a healthy environment. In particular, it requires States parties to provide appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities. States shall also provide the opportunity to participate in decision-making processes relating to the environment. Moreover, States shall facilitate and encourage public awareness and participation by making environmental information widely available. Finally, States shall provide effective access to judicial and administrative proceedings, including redress and remedy.[90]

Almost all European States in Europe are parties to the Aarhus Convention, which was negotiated under the auspices of the United Nations Economic Commission for Europe, and thus are obliged to ensure public participation during the preparation of plans and programmes relating to the environment within a transparent and fair framework, having provided the necessary information to the public (art. 7). Moreover, States parties have the obligation to promote effective public participation in the adoption of executive regulations and applicable legally binding rules that may have a significant effect on the environment, at an appropriate stage. States must also ensure sufficient time frames, the availability of draft rules for the public and opportunities for the public to comment, and must finally take into account the result of public participation (art. 8).

In addition, at the national level, 140 States have incorporated explicit references to environmental rights and/or responsibilities in their national constitutions. This figure amounts to more than 70 per cent of the countries in the world.[91] Such development strengthens the argument for the recognition of the right to a healthy environment as a norm of customary law.

This compilation of human rights obligations relevant to CDM is far from exhaustive since other obligations of States regarding participatory processes in mitigation and adaptation efforts are evolving, as new political consensuses are reached and as the ongoing interpretative processes shed further light on the terms used in the treaties. Indeed, climate change has the potential to affect the vast range of

general comment No. 2 (2008); Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010).

[80] International Covenant on Economic, Social and Cultural Rights, art. 12, and Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000).

[81] Convention on the Rights of the Child, art. 24.

[82] ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 4.

[83] Ibid., art. 7 (3).

[84] United Nations Declaration on the Rights of Indigenous Peoples, arts. 10 and 25– 27.

[85] Ibid., arts. 23 and 26.

[86] Ibid., art. 18.

[87] Ibid., art. 19.

[88] Ibid., art. 29.

[89] African Charter on Human and Peoples' Rights, art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11; and Arab Charter on Human Rights, art. 38.

[90] Rio Declaration on Environment and Development, principle 10.

[91] "Analytical study on the relationship between human rights and the environment: report of the United Nations High Commissioner for Human Rights" (A/HRC/19/34 and Corr.1), para. 30.

rights recognized and protected in international human rights law.[92]

Finally, in September 2011, a group of international law and human rights scholars and practitioners from a broad range of backgrounds adopted the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.[93] Aware of the interconnection between the rights of individuals and the extraterritorial acts and omissions of States, the experts affirmed that extraterritorial obligations encompass the acts and omissions of a State within or beyond its territory in addition to those obligations established by the Charter of the United Nations. The Maastricht Principles elaborate the scope of jurisdiction and State responsibility within the framework of the obligations to respect, protect and fulfil human rights extraterritorially. The Principles also elaborate mechanisms for accountability.

Bearing the above-mentioned rights and standards in mind, a rights-based approach involves a series of steps oriented towards adequate consideration of the rights of individuals and communities that may be adversely affected by mitigation projects. In this respect, undertaking a situation analysis, providing adequate information on the project and ensuring the participation of rights holders and other stakeholders are initial steps that align CDM projects with the right to development and enable early identification of the rights and interests that may be affected by a project. In addition, a process for taking reasoned decisions would ensure that adequate consideration is given to the rights at issue, which is central to avoid interference with protected rights as well as to balance competing rights where necessary. Moreover, mechanisms for monitoring, evaluation and adequate enforcement are important for operationalizing the rights-based approach throughout the life of a project and for learning from the experience during implementation.

The human rights-based processes also promote good governance and respect for the rule of law at the national and international levels. The right to development criteria of rule of law and good governance call for attention to the national and international institutions active in CDM, including with respect to accountability, access to information and effective measures for redress.

At the national level, CDM can contribute to the host State's ability to establish institutional mechanisms to facilitate green investments and technology transfer. The creation of designated national authorities as a prerequisite for CDM projects reflects the mechanism's potential contribution to institutional improvement. To ensure that this contribution materializes, however, CDM must establish adequate tools to ensure the accountability of designated national authorities.

At the international level, CDM has been criticized for its inability to provide affected stakeholders with recourse where required procedures have not been properly followed. It has been noted that a grievance mechanism could allow the CDM project to address and remedy situations before disputes aggravate or entrench opposing positions or result in violence. A grievance mechanism available to the various actors participating in CDM could also lift the process to the level of an administrative procedure that meets due process standards, thereby enhancing good governance and the rule of law.[94]

With respect to CDM governance, there are no mechanisms established for affected individuals to challenge Executive Board decisions. It has been suggested that CDM administrative procedures must meet international due process standards, enhance the predictability of its decisions and promote private-sector confidence in the system. In this vein, it has been proposed that a review mechanism of the decisions of the Executive Board should be established in order to give project participants and stakeholders the right to obtain review of Executive Board decisions. In this regard, CMP 5 has requested the Executive Board, as its highest priority, to continue to significantly improve transparency, consistency and impartiality in its work, including through, inter alia, publishing detailed explanations of and the rationale for decisions taken and enhancing its communications with project participants and stakeholders.[95]

[92] See Dinah L. Shelton, "A rights-based approach to conservation", in *Conservation with Justice: A Rights-based Approach*, pp. 5-36. Relevant human rights have been classified into two categories: (a) substantive rights such as the right to life, non-discrimination and equal protection of the law, privacy and home life, property, an adequate standard of living (food, medicine, clothing, housing, water), health, privacy, self-determination of peoples, a certain quality of environment, safe and healthy working conditions, freedom of religion, freedom of movement and residence, freedom of assembly and expression/opinion, as well as prohibition of forced and child labour and protection of cultural and minority rights; and (b) procedural rights such as access to information, participation in decision-making, access to justice/judicial review, due process/fair hearing, substantive redress, non-interference with international petition.

[93] Available at www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf.

[94] Charlotte Streck and Thiago Chagas, "The future of the CDM in a post-Kyoto world", *Carbon and Climate Law Review*, vol. 1, Issue 1 (2007), pp. 53, 61-62.

[95] Decision 2/CMP-5, paras. 6-15.

C. Social justice in development

The criteria concerning social justice in development call for an evaluation of, inter alia, the fair distribution of development benefits and burdens, both within and among countries. The criteria also aim to eradicate social injustices through economic and social reforms (see A/HRC/15/WG.2/TF/2/Add.2, annex). As noted above, CDM is a market mechanism driven by investments in the cheapest opportunities for reducing emissions. Whether these projects also contribute to social justice in development depends on the extent of participation of developing countries in the mechanism and the degree to which the developing countries participating in CDM obtain benefits and a sharing of burdens.

In addition to the discussion above concerning a rights-based approach to the determination of sustainable development criteria and contributions, CDM does not explicitly require that human rights considerations be taken into account in relation to sustainable development determinations. As mentioned above, in the mechanism's design sustainable development determinations are the prerogative of the host State, which will thus determine whether and to what extent it considers human rights. While it could be argued that this design maximizes national policy space and autonomy, it is nevertheless in opposition to the notions that human rights issues are a matter of international concern and that they are directly and indirectly implicated in sustainable development. In this regard, the right to development criterion concerning social justice in development stresses that development policies should be determined in a manner that is consistent with realizing all human rights.[96]

D. Improving the attributes of the right to development

Improving the right to development attributes with climate change in mind would not only contribute to the effectiveness of global partnerships (Millennium Development Goal 8) but would also contribute to reinvigorating the developmental dimensions of the climate change regime, thereby enabling progress towards the achievement of the Goals generally. For example, a new criterion could be added regarding the scientific basis for decision-making, e.g., "adopt a science-based approach to decision-making, including application of the precautionary approach". The World Summit on Sustainable Development, held in Johannesburg, South Africa, in 2002, endorsed such an approach. Specifically, the Plan of Implementation of the World Summit establishes science-based decision-making as the preferred approach for making regulatory decisions.[97] Moreover, the World Summit, recalling principle 15 of the Rio Declaration on Environment and Development, explicitly noted that such an approach includes the application of the precautionary principle or approach, which states that the lack of full scientific certainty will not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[98] The application of a science-based approach to decision-making is particularly important with respect to climate change. In order to evaluate the effectiveness of international arrangements established to channel international cooperation to address climate change, this criterion enables the utilization of scientific evidence. It thus avoids subjective evaluations of effectiveness by focusing on whether the measures established in the climate change regime are capable, on account of the scientific evidence, of achieving the objective of UNFCCC (discussed above).[99]

Similarly, a new criterion could be added regarding common but differentiated responsibilities, e.g., "recognize common but differentiated responsibilities, in view of the different contributions to global environmental degradation". The principle of common but differentiated responsibilities is central to the climate change regime and affirms that all States have common responsibilities to protect the environment and promote sustainable development but with different burdens due to their different contributions to environmental degradation and to their varying financial and technological capabilities.[100]

On the one hand, adopting common but differentiated responsibilities as a criterion regarding the right to development would allow for an evaluation of existing and future climate change arrangements. Such inclusion would reaffirm the central importance of this principle in the climate change regime, including with respect to its sustainable development dimension, and reinvigorate the necessary financial and

[96] "Report of the high-level task force on the implementation of the right to development on its fifth session" (A/HRC/12/WG.2/TF/2), annex IV, criterion (k).

[97] Plan of Implementation of the World Summit on Sustainable Development (A/CONF.199/20 and Corr.1), chap. I, resolution 2, para. 109 (f).

[98] Rio Declaration on Environment and Development, principle 15. See also the Convention on Biological Diversity and its Cartagena Protocol on Biosafety.

[99] In this connection, the Copenhagen Accord agrees that "deep cuts in global emissions are required according to science." (para. 2). It further underlines that "to achieve the ultimate objective of the Convention" and "recognizing the scientific view that the increase in global temperature should be below 2 degrees Celsius," the Parties shall enhance cooperative action to combat climate change (para. 1).

[100] See David Hunter, James Zalman and Durwood Zaelke, *International Environmental Law and Policy*, 3rd ed. (West Publishing, 2006).

technological flows into developing countries. The principle has been identified by the Secretary-General as key elements of the global new deal required to address climate change and achieve the Millennium Development Goals (see A/64/665). On the other hand, right to development scholars continue to reflect on the challenges of establishing State responsibility to "undifferentiated State players of the global institutional order".[101] The use of a due diligence standard in situations where a single perpetrator cannot be identified has been recognized as a relevant tool to establish content for the obligations to cooperate.[102] In this connection, there is room for common but differentiated responsibilities and the due diligence standard to reinforce each other with the aim of tackling the diffuse responsibility to achieve sustainable development of the international community.

VII. Conclusion

This chapter has looked into certain linkages between climate change, the right to development and sustainable development, including the Millennium Development Goals. It has analysed how climate change directly impacts on the ability of the international community to implement the right to development and to achieve the Goals. In this light, international cooperation is critical both to tackling climate change and stimulating the transition towards sustainable development.

The linkages between the right to development, sustainable development and climate change are reflected in both the United Nations Framework Convention on Climate Change and the Kyoto Protocol. UNFCCC and its Kyoto Protocol stand out as the principal legal response by the international community to the climate change threat. They provide avenues through which international cooperation occurs, including financial and technology transfers. UNFCCC notes that the largest share of historical global emissions of greenhouse gases originates in industrialized countries and recognizes that the share of global emissions originating in developing countries will grow to meet their social and development needs. The Kyoto Protocol set targets for greenhouse gas emission reductions for industrialized countries (Annex I Parties), and created three market mechanisms, including the clean development mechanism, to reduce the costs of reducing emissions.

CDM is unique in view of its twofold objective: mitigating climate change and contributing to sustainable development. In this regard, CDM reflects a climate change partnership whereby investments from the North are channelled to the South in order to capture opportunities for the reduction of greenhouse gas emissions where they may be most cost-effective. CDM thus promotes financial flows and technology transfer into developing countries, which, as the Secretary-General has observed, are central to channelling resources towards investment in renewable energy and building resilience with respect to unavoidable climate changes.

When examined using right to development attributes, however, CDM reveals certain weaknesses that limit its contribution to the implementation of the right to development as well as to sustainable development. Key points include the following:

- The attribute pertaining to comprehensive and human-centred development policy calls for human rights considerations to be taken into account in relation to sustainable development determinations. The projects should promote constant improvement in socioeconomic well-being as well as ensuring access to financial resources, science and technology. Furthermore, CDM projects need to respect the rights of stakeholders, which calls for strengthened procedural safeguards and Executive Board authority to supervise the mechanism to ensure exact compliance with all the terms of its modalities and procedures. In this vein, a rights-based approach should be adopted to ensure that people's rights will not be affected by CDM projects

- The attribute pertaining to participatory human rights processes calls for CDM to ensure that the host State's determination of whether a proposed CDM project contributes to sustainable development follows an inclusive and participatory process. The projects should ensure non-discrimination, access to information, participation and effective remedies. At the national level, CDM lacks explicit tools to ensure accountability of designated national authorities, as this is an issue within the domain of the host State. At the international level, CDM has been criticized for its inability to provide affected stakeholders with recourse where required procedures have not been properly followed

[101] Margot E. Salomon, *Global Responsibility for Human Rights, World Poverty and the Development of International Law* (Oxford, Oxford University Press, 2007), p. 186.
[102] Ibid., pp. 186-189.

• The attribute pertaining to social justice in development calls for the eradication of social injustices through economic and social reforms. The right to development also requires that CDM projects provide fair access and sharing of the benefits and burdens of development. Currently, a few developing countries receive the lion's share of CDM investment. This situation is at odds with right to development criteria that stress equitable distribution of the benefits of sustainable development across the developing world, with particular attention to the needs of the most vulnerable and marginalized segments of the international community

The fifth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP 5), held in December 2009, adopted decisions that begin to address some of these issues by providing further guidance relating to CDM. CMP 5 requested the Executive Board, as its highest priority, to continue to significantly improve transparency, consistency and impartiality in its work. CMP 5 also set in motion a process to increase CDM projects in underrepresented project activity types or regions. Moreover, CMP 5 addressed the need for a wider distribution of CDM projects in developing countries and adopted several measures to encourage CDM projects in countries with minor CDM participation.

More generally, given the linkages between the right to development, sustainable development, the Millennium Development Goals and climate change, the design and experience of CDM in channelling investments and technology transfer to developing countries provide valuable lessons in structuring and improving global partnerships to address both climate change and sustainable development. In this regard, CDM is directly relevant to goal 8 regarding global partnerships and technology transfer, as well as to the other Goals directly affected by climate change.

The linkages explored in this chapter, coupled with the findings of the examination of CDM under right to development criteria, evidence the need for a rights-based approach to climate change, in order to ensure that climate change mitigation and adaptation does not compromise efforts directed at implementing the right to development and achieving the Millennium Development Goals, as well as to capture opportunities provided by the Goals in enhancing capacities needed to tackle climate change.

To conclude, the right to development is central to effectively addressing the climate change crisis. First, the right to development is central to development models that connect with and do not seek to replace the fundamental tenets of biology. Second, the right to development can help unlock UNFCCC negotiations by underscoring the need for a technology leap in the global and local economies, particularly in the developing world. And third, the right to development can provide the vital moral compass to guide the economic transformation required to effectively address climate change and achieve sustainable development through the integration of economic, environmental and human rights issues.

Climate change may perhaps be the most formidable test humanity has ever had to confront. Are we up to the challenge? We do not have another 25 years to figure it out.

PART FOUR

Implementing the right to development

monitoring, action and the way forward

introduction ⟩ ⟩ ⟩

Introduction

The final part of this book builds on the assumptions of the previous parts, namely, that the initial conceptualization reviewed in Part One can guide global development partnerships and national development policies; that these partnerships and policies can be pursued in accordance with the principles at the heart of the right to development examined in Part Two and that they can benefit from experience with the development goals considered in Part Three and further, on strengthened international cooperation and global partnership for development as a whole. Thus far, the chapters have focused on the progression from policy to principles. In Part Four the focus is on outcomes, both in the form of strategies to achieve social justice as envisaged by the right to development and in the form of refining tools that allow progress to be monitored and evaluated.

If and when genuine right to development policies and principles become reality, the real promise lies in the measurable social justice outcomes of the process, through the realization of the right to development. The 10 chapters in this part examine two approaches to achieving measurable progress in realizing the right to development. Some discuss tools for measuring outcomes relating both to goal 8 and to a broader range of norms contained in the Declaration on the Right to Development. Others explore the potential for further development of international law, politics and practice of the right to development in the hope that its next quarter century will see concrete achievements based on the high aspirations of the Declaration.

Nicolas Fasel discusses in chapter 24 the experience of OHCHR in adapting indicators used in the social sciences to the needs of human rights monitoring. Building on the conceptual and methodological framework of indicators for human rights as endorsed by the United Nations human rights treaty bodies in 2008, Fasel explains the process which proceeds from distilling core attributes of a particular human right and identifying structural, process and outcome indicators (see HR/PUB/12/5). He explains how attributes "anchor" indicators in the normative framework of human rights and how indicators "capture a linkage between commitments, efforts and results". Data-generating mechanisms, such as statistics, events-based data, surveys and expert judgements, have proved useful as human rights indicators; however, the right to development poses particular challenges in assessing features such as the realization of active, free and meaningful participation or States' obligations to create international conditions favourable to the right to development.

In chapter 25, Fateh Azzam examines how the right to development contributes to international cooperation in the context of goal 8. In order to give practical significance to this relationship, he proposes eight elements for inclusion in State reports on the Millennium Development Goals and related poverty-reduction programmes, such as the poverty reduction strategy papers and the United Nations Development Assistance Framework, in order to make them more conducive to the realization of human rights and the right to development in particular. He concludes by highlighting the significance of the approach

proposed for the transformations occurring in the Middle East and North Africa, which resulted from "frustration against unaccountable Government, ineffectual economic policies, rampant corruption and the exclusion of the intended beneficiaries of development from any participation in the debates on public policy".

A.K. Shiva Kumar identifies in chapter 26 several critical issues pertaining to right to development policy formulation, using examples from India of policy shifts that have been strongly influenced by human rights-based arguments. After examining six challenges to the realization of the Millennium Development Goals (resources, leadership, data collection, accountability, participation and a legal framework), he identifies ways of strengthening public action for promoting the right to development approach.

Moving to the regional level of implementation of the right to development, Obiora Chinedu Okafor provides a sociolegal analysis of article 22 of the African Charter of Human and Peoples' Rights in chapter 27. One of the most salient features of the history of the right to development is the adoption in 1981 of that treaty norm within the framework of the Organization of African Unity. The African Charter entered into force the same year that the Declaration on the Right to Development was adopted. Article 22 is, according to Okafor, "proof positive that this right transcends the realm of soft international human rights law". He outlines the normative properties, strengths and weaknesses of article 22, as well as what lessons the experience with this regional norm might have for a possible global treaty on the right to development. He concludes by proposing ways that the right to development might contribute to improving the lives of poor people through better development praxis.

The high-level task force and the Working Group on the Right to Development benefited from additional insights on criteria and indicators, principally by the authors of chapters 28 and 29. In chapter 28, Rajeev Malhotra provides a critical analysis of the criteria and monitoring framework developed by the task force and the Working Group. Focusing on the product of the task force's third session in 2007 (see A/HRC/4/WG.2/TF/2), Malhotra explains the value of identifying a limited number of attributes, and then specifying criteria and sub-criteria, which should be measured by structural, process and outcome indicators. Indeed, he makes a number of suggestions to "rationalize the criteria for overlapping content and redundancy". The attributes should be non-overlapping and exhaustive as far as possible, although some overlap is inevitable. The qualitative and quantitative indicators "could enable and support a periodic assessment of the progress being made in the implementation of the right".

A second major source of ideas for the task force's proposed criteria was the study entitled "Bringing theory into practice: framework and assessment criteria" (A/HRC/15/WG.2/TF/CRP.5), which was commissioned by OHCHR in 2009. The authors of that study, Maria Green and Susan Randolph, have prepared an abridged version of their report, which appears in chapter 29. The chapter takes a position on several key issues concerning duties and modes of implementation before proposing a formal definition of the right "in the form of a set of time-invariant core criteria for assessing implementation of the right". They also discuss "methodological issues involved in determining time-specific sub-criteria and indicators … suitable for monitoring implementation of the right to development". They proposed a comprehensive set of indicators in their full report, stressing that "the process of deciding on actual indicators would necessarily entail a broad-based consultative process involving both stakeholder participation and sectoral expertise in the various substantive development areas". Their approach is based on three types of obligations (collective action obligations, individual (or unilateral action) obligations with regard to those under a State's jurisdiction, and individual obligations with regard to those outside the State's jurisdiction) and specifies core criteria and sub-criteria for each type. The extensive work of Randolph and Green in arranging criteria by level of obligation reflected in this chapter is a rich source of ideas for specifying State obligations. Their suggested indicators—summarized as "exemplars" in this chapter—also provide an extensive basis for further development of measurement tools, supporting their conclusion that "the right to development is very much a workable tool and more than amenable to playing a tangible role in the complex sphere of human rights and development practice".

These contributions to the work of the task force from OHCHR, Malhotra, and Randolph and Green are essential background to understanding the final product, covered in chapter 30, in which Stephen Marks, the former Chair of the task force, presents the criteria that emerged from the sixth session. Recalling the early expression of need for such criteria and indictors (going back to 1979), this chapter summarizes the approach taken by the task force at its vari-

ous sessions, before explaining the rationale for and content of the core norm, and the attributes, criteria, sub-criteria and indicators proposed in 2010, which are listed at the end of the chapter. The chapter concludes by recalling the task force's "firm conviction that the right to development can be made concrete and applicable to development practice if and when there is the political will to do so".

Chapter 31 builds on the Expert Meeting organized by the Friedrich-Ebert Stiftung in Geneva from 4 to 6 January 2008. Chapters based on the proceedings of that meeting by Stephen Marks, Koen De Feyter, Beate Rudolf and Nicolaas Schrijver are summarized in order to present the various options for utilizing international law to advance the right to development. These contributions relate to the prospects for transforming the right to development criteria into "an international legal standard of a binding nature", the relationship of the right to development with existing treaty regimes, the potential value of a multi-stakeholder agreement, alternative pathways to a binding legal instrument and the conclusions of the authors.

Chapter 32 contains the consolidation of findings of the high-level task force, based on its final report to the Working Group on the Right to Development in 2010. It summarizes the main findings regarding the Millennium Development Goals, social impact assessments, and five areas of global partnership as defined in goal 8 (development aid, trade, access to essential medicines, debt sustainability, and transfer of technology), and then provides seven additional general conclusions and recommendations, including an appeal to States to balance the national and international dimensions of this right so that they complement rather than conflict.

Finally, in chapter 33 entitled "The right to development at 25: renewal and achievement of its potential", Ibrahim Salama looks back over what has been accomplished and what remains to be done. Looking at the past 25 years, Salama recalls that "the right to development seems to remain conceptually hostage to the cold war-influenced motivations for the 'two-track' approach to elaborating on the Universal Declaration of Human Rights" but now "has renewed relevance" to an integrated approach. He surveys the accomplishments of the right to development by considering its current value added, its symbiosis with existing human rights treaties and the special procedures of the Human Rights Council, and developments on the right in case law. In conclusion, he suggests possible ways forward. Among the latter, he proposes three options, namely, reconstitute the high-level task force to study all the Millennium Development Goals and develop guidelines based on the Declaration on the Right to Development; establish an ad hoc expert body made up of relevant intergovernmental organizations, mandate holders and treaty bodies to review the concerns of all stakeholders; and elaborate a framework convention, to be supplemented later with specific protocols.

The indicators framework of OHCHR applied to the right to development

*Nicolas Fasel**

I. Introduction

The human rights discourse and practice are increasingly looking at issues of implementation and accountability gaps. States and international and national human rights monitoring mechanisms are working to improve policy and monitoring frameworks to foster the implementation of universally accepted human rights standards. In this context, there has been an increasing demand for indicators, whether quantitative or qualitative, as tools for assessing progress in the implementation of human rights, formulating evidence-based human rights policies and making available relevant information to States, human rights monitoring mechanisms and civil society.

The interest in indicators is, however, not entirely new in the human rights arena. To some extent human rights actors have been using and compiling indicators for human rights, much as M. Jourdain, in Molière's *Le Bourgeois gentilhomme*, was "doing prose without knowing it". References to statistical indicators are explicitly made in international human rights treaties.[1] States Members of the United Nations have underlined the instrumental value of indicators to measure progress in the realization of human rights and guide the formulation of targeted policies.[2] The inclusion of legal provisions exclusively dedicated to the role of statistics and data collection to enforce the implementation and monitoring of rights in the Convention on the Rights of Persons with Disabilities, adopted in 2006 (art. 31), constituted a landmark from this perspective. In this context, it is not surprising that the Working Group on the Right to Development and its high-level task force on the implementation of the right to development started looking at indicators in their work on the articulation of criteria and sub-criteria for the operationalization of the right to development.

Despite the demand for indicators in human rights, their development and use have remained well below their potential. This can be explained by a combination of interrelated factors, including a lack of political will, limited resources in data collection and dissemination, denials of the right to information, knowledge gaps in human rights and statistical tools, and lack of trust in statistical information.[3] More importantly, insufficient conceptual and methodological considerations may have undermined

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[1] For instance, the Convention on the Elimination of All Forms of Discrimination against Women asks States parties to take measures to ensure the reduction of female student dropout rates in relation to the right to education (see article 10 (f)).

[2] See, for instance, the Vienna Declaration and Programme of Action, stating that "[t]o strengthen the enjoyment of economic, social and cultural rights, additional approaches should be examined, such as a system of indicators to measure progress in the realization of the rights set forth in the International Covenant on Economic, Social and Cultural Rights" (part II, para. 98). The outcome document of the Durban Review Conference held in 2009, available at www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf, also recommended the development of indicators to inform policies and other measures to eliminate racial discrimination (para. 103).

[3] Mistrust of statistics is sometimes fuelled by an excessive trust in or reliance on statistics by certain actors or the tendency of others (or sometimes the same people) to disparage statistics that do not support their positions. In the literature, mistrust of statistics is sometimes summed up—not without a touch of humour—by the saying "There are three kinds of lies: lies, damned lies, and statistics", a phrase popularized by Mark Twain who himself attributed it to the nineteenth century British Prime Minister Benjamin Disraeli.

progress and discussion on the development of indicators for human rights.[4]

Against this background, this chapter aims to inform the discussion and work on the development of indicators and other operational tools to foster the implementation of the right to development, drawing on the work on indicators for human rights undertaken by the Office of the United Nations High Commissioner for Human Rights (OHCHR) following requests of human rights monitoring mechanisms, in particular the treaty bodies.[5] More specifically, it draws on the conceptual and methodological framework on indicators for human rights that was endorsed by the international human rights treaty bodies in 2008, after two years of a validation process involving consultations and workshops with a range of national and international human rights, development and statistics actors.[6]

II. The notion of indicators for human rights

There is no universally agreed definition of the term "human rights indicator". Human rights actors, such as human rights and legal experts, policymakers, development practitioners as well as statisticians, tend to have different notions and perceptions of the term. For some, human rights indicators are seen as equivalent to questions to be considered when assessing a particular event or situation, whereas for others indicators are essentially synonymous with statistics.

In exploring the issue and surveying various initiatives dealing with indicators and human rights issues, OHCHR adopted a working definition of human rights indicators: "specific information on the state of an event, activity or an outcome that can be related to human rights norms and standards; that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights" (HRI/MC/2006/7, para. 7). Indicators such as the number of victims of arbitrary execution or forced eviction, the proportion of a population with a body mass index below a certain level and prison occupancy rates will meet the requirements of this definition. Moreover, this type of indicator has been used in different human rights assessment contexts, including by international human rights monitoring mechanisms.

In studying the notion of indicators and its articulation in the human rights, development, programming and statistical literature, we find frequent attempts to distinguish qualitative from quantitative indicators and subjective from objective indicators. It is instructive to distinguish between these different indicators as they are potentially useful in assessing the implementation of human rights.

A. Qualitative and quantitative indicators

In undertaking a comprehensive human rights assessment, there is a need to combine indicators of both a quantitative and a qualitative nature. The distinction is, however, not necessarily obvious, especially since qualitative aspects can be quantified and quantitative information needs to be qualified. For instance, quantitative indicators such as the proportion of primary education teachers who are fully qualified and trained, the youth and adult literacy rates and the ratio of girls to boys enrolled in education will be useful in assessing the quality of national education systems. At the same time, statistics will typically need to be further qualified or accompanied by qualitative information to facilitate interpretation. Taking the previous examples, when can a teacher be considered to be "fully qualified and trained"? What definition and criteria should be used to assess literacy? Also, analysing trends in terms of the number of complaints received and processed by a monitoring mechanism will typically require further information and investigation.

As qualitative and quantitative indicators are seen as useful tool for human rights, in the work of OHCHR on human rights indicators the need to distinguish between indicators expressed in quantitative form, such as numbers, percentages or indices, from those expressed in a narrative or text form has been pointed out. The latter are sometimes part of a set of questions, checklists or thematic criteria used to complement or elaborate on information—numerical or otherwise—related to the realization of human rights. This distinction between indicators is different from that between objective and subjective indicators.

[4] See, for instance, the report of the Turku Expert Meeting on Human Rights Indicators (Turku/Åbo, Finland, 10-13 March 2005), available at www.abo.fi/instut/imr/research/seminars/indicators/Report.doc.

[5] See OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (HR/PUB/12/5, available at www.ohchr.org/EN/Issues/Indicators/Pages/HRIndicatorsIndex.aspx) and also chapter 28 by Rajeev Malhotra.

[6] Using this framework and the identified illustrative indicators for human rights, a growing number of Governments, national and international human rights entities as well as civil society organizations initiated work on indicators in support of human rights implementation and assessments.

B. Objective and subjective indicators

The distinction between objective and subjective indicators can be based on whether data collection methods or sources are considered reliable. It can also be seen, perhaps more usefully, in terms of the nature or content of the information collected by the indicator. Subjective indicators will therefore capture the opinions, perceptions or even judgements of individuals, such as the proportion of the population that feels "unsafe" walking alone at night, or their perception of the extent of corruption in public life. Objective indicators will relate rather to a narrative and factual description and aggregation of objects or events that can be more directly observed and verified, such as the ratification of an international human rights treaty, the number of corpses discovered in a mass grave and the literacy rates. Like qualitative and quantitative indicators, objective and subjective indicators are potentially useful in assessing the realization of human rights. It is worth noting that in the OHCHR working definition, quantitative indicators can be subjective and qualitative indicators can be objective.[7]

III. Conceptual considerations on indicators for human rights, including the right to development

In identifying potentially relevant indicators, methodological and conceptual considerations are of equal importance. The need for conceptual considerations is fuelled by the complex and evolving nature of the human rights normative framework and practical concerns that require the use of a structured approach to guide the identification of indicators. The following paragraphs outline some of the main features of the conceptual framework used by OHCHR in its work on indicators for human rights, highlight commonalities with the right to development, and suggest areas where there may be a specific need to develop indicators in the light of the national and international dimensions of the right to development.

In developing its conceptual and methodological approach on indicators, OHCHR has been guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive dialogue and cooperation aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings.[8] The conceptual and methodological frameworks described in the following sections seek to facilitate the identification of universal as well as contextually relevant indicators anchored in international human rights instruments. The proposed frameworks neither attempt to propose a common list of indicators to be applied across all countries irrespective of their social, political and economic development, nor to make a case for building a global measurement for cross-country comparisons of the realization of human rights. The outlined tools aim to support the development and use of indicators for human rights through participatory processes at the country level.

A. Indivisibility of human rights

One of the main features of the OHCHR conceptual framework is the adoption of a common approach on indicators for all civil, cultural, economic, political and social rights. By doing so, the approach strengthens the indivisibility, interdependence and interrelatedness of human rights and is consistent with the right to development as defined in the Declaration: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" (art. 1 (1)). The Declaration also proclaims that "[a]ll human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights" (art. 6 (2)).

In practice, a common framework for human rights indicators means that there may be a need to transcend traditional human rights assessment approaches that tend to look only at the negative obligations (e.g., the obligations to respect and protect) of civil and political rights and only at the positive obligations (e.g., the obligations to fulfil, promote and provide) for economic, social and cultural rights. It also means that different data-generating mechanisms, such as events-based data and socioeconomic statistics (see section IV below), should receive equal attention when identifying indicators on these human rights. For instance, while events-based data have traditionally been used in monitoring civil and

[7] For further practical guidance, see *Human Rights Indicators: A Guide to Measurement and Implementation*.

[8] See General Assembly resolution 60/251 establishing the Human Rights Council.

political rights, events-based data on the number of victims of forced labour or food contamination are equally relevant to the monitoring of rights in the International Covenant on Economic, Social and Cultural Rights, in this case the right to work, the right to fair conditions of work and the right to adequate food. On the other hand, socioeconomic statistics on the conditions of detention, such as the proportion of detained or imprisoned persons in accommodation meeting legally stipulated requirements (e.g., access to drinking water, minimum floor space, availability of heating) are relevant for assessing the realization of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Likewise, statistics on the proportion of women enrolled in university-level education or occupying elected or managerial positions in the public and private sectors are useful in assessing the realization of the right to participate in public affairs and the right to education.

B. Anchoring indicators in the normative framework of rights

1. Attributes of human rights

The link between potentially relevant indicators and the human rights normative framework needs to be established. The identification of attributes of the right(s) under consideration constitutes an important starting point towards this end and should precede the selection of indicators. Attributes of a right are a translation of the normative content of that right into a limited number of characteristics that are expected to capture the essence of the right. The identification of attributes should be based on an exhaustive reading of the human rights normative framework, including the international human rights treaties and related jurisprudence of human rights mechanisms. To the extent feasible, the attributes should not overlap in their scope. To give an illustration, in the work of OHCHR on indicators the identified attributes of the right to food were nutrition, food safety and consumer protection, food availability and food accessibility. Other examples of identified attributes of the right to education and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment are provided in tables 1 and 2 respectively in the annex.

A similar approach was used in elaborating criteria and sub-criteria for the operationalization of the right to development. Three overall attributes, namely comprehensive and human-centred development policy, participatory human rights processes and social justice in development, were identified and seen as the possible basic expectations of the right to development (see A/HRC/15/WG.2/TF/2/Add.2).[9]

2. Commitments, efforts and results

Following the identification of attributes, the OHCHR conceptual framework recommends the use of a configuration of indicators giving, inter alia, equal attention to the process as well as the outcome dimensions of policies. This is another example of consistency with the Declaration on the Right to Development, which proclaims that "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" (art. 2 (3)). The OHCHR conceptual framework adopts a configuration of structural, process and outcome indicators to bring to the fore an assessment of steps taken by States, from their acceptance of international human rights standards (structural indicators) to the realization of those standards on the ground through the implementation of related policy measures and programmes (process indicators), and on to the resulting outcomes of those efforts from the perspective of rights holders (outcome indicators). In other words, it seeks to capture a linkage between commitments, efforts and results, as follows:

- *Structural indicators* help in capturing States' acceptance of human rights in terms of the adopted legal, institutional and policy frameworks

- *Process indicators* help in assessing the implementation of those commitments by measuring how the policies and other measures actually work on the ground. This category of indicator may also help in assessing the extent to which populations can actively participate in related decision-making processes

- *Outcome indicators* help in assessing the results of States' efforts in furthering the enjoyment of human rights and the actual distribution of the resulting benefits for the human person

[9] See also chapter 28.

If we consider, for instance, the right to education, the adoption of a plan of action to implement free and compulsory primary education will be categorized as a structural indicator; primary enrolment ratios in primary education as process indicators; and youth (15-24 years) literacy rates as outcome indicators. Using this configuration of indicators, illustrative indicators for a number of rights were identified by OHCHR in consultation with a panel of experts and subjected to validation with national and international human rights stakeholders.[10]

3. Cross-cutting human rights norms or principles

Cross-cutting human rights norms or principles, such as non-discrimination and equality, participation, access to remedy and accountability, are relevant to the process of realizing all human rights. Given the transversal nature of these norms or principles, there is no unique way or indicator that can capture all aspects of their implementation, but a configuration of structural, process and outcome indicators can help in assessing how they are being realized in the implementation of a specific right. For instance, measuring non-discrimination and equality calls for a structural indicator such as the list of legally prohibited grounds of discrimination relevant to the realization of the right to education, and for process and outcome indicators disaggregated by the same categories, such as enrolment ratios in education and literacy rates disaggregated by sex. Process and outcome indicators on social transfers and income distribution will also be relevant to the assessment of the implementation of the right to development. Additional indicators will help in assessing how the process of implementing a right can be participatory, accountable, and provide access to remedy.

In the tables of illustrative indicators developed by OHCHR, efforts have been made to identify indicators that help to capture the realization of cross-cutting norms or principles. It is worth noting that the tables of indicators on the right to participate in public affairs and the right to a fair trial are also useful in assessing the implementation of the principles of participation and access to remedy. Moreover, cross-cutting principles, such as participation, should ideally guide the processes of identifying contextually relevant and country-owned indicators. In the work of OHCHR on indicators for human rights at country level, efforts have been made to support participatory initiatives and processes involving relevant human rights stakeholders, such as Government agencies, national human rights institutions, statistical offices and relevant civil society organizations.

IV. Methodological considerations and main data-generating mechanisms

The articulation of a methodological framework for the use of indicators in human rights monitoring requires that the different types of methods and sources for data generation considered be assessed for their specific relevance. In the context of the OHCHR work on indicators, following an extensive survey of initiatives,[11] four main data-generating mechanisms were identified and assessed for their practical relevance to human rights assessment:

- Socioeconomic and administrative statistics
- Events-based data
- Perception and opinion surveys
- Expert judgements

The first category, socioeconomic statistics, refers to information commonly compiled and disseminated by Government agencies through their administrative records, statistical surveys and censuses. From the perspective of States that have adopted international human rights instruments, statistics collected by line ministries and Government agencies can be seen as their primary and own source of information when reporting and assessing their effectiveness in translating their human rights commitments into policies and programmes and the impact of those policies and programmes on the targeted populations or beneficiaries. Socioeconomic statistics can potentially cover aspects of the realization of all civil, cultural, economic, political and social rights. The Millennium Development Goal indicators typically belong to this first category of data-generating mechanism.[12]

[10] Lists of illustrative indicators were developed by OHCHR on the right to life; the right to liberty and security of person; the right to participate in public affairs; the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; the right to the enjoyment of the highest attainable standard of physical and mental health; the right to adequate food; the right to adequate housing; the right to education; the right to freedom of opinion and expression; the right to a fair trial; the right to social security; the right to work; the right to non-discrimination and equality; and violence against women.

[11] R. Malhotra and N. Fasel, "Quantitative human rights indicators: A survey of major initiatives", paper presented at the Turku Expert Meeting on Human Rights Research. Available at http://web.abo.fi/instut/imr/research/seminars/indicators/.

[12] For more detailed assessments and examples of each data-generating mechanism, see the paper mentioned in the previous footnote.

Events-based data on human rights violations refer to qualitative or quantitative data that can be linked to alleged or confirmed human rights violations. The data are usually collected and processed by national or international human rights monitoring mechanisms or non-governmental organizations and based on testimonies of victims or witnesses or on information provided by the media. Quantitative indicators derived from events-based data typically record violations in terms of the number of victims (e.g., the number of reported victims of forced labour). Events-based data and socioeconomic statistics are the two main data-generating mechanisms that are usually used by international and national human rights monitoring entities.

Perception and opinion surveys collect representative samples of the personal views of individuals. The nature of the information collected is predominantly subjective and not directly observable. Coding methods are applied to transform the information into quantitative form.[13] For instance, indicators are compiled on the proportion of individuals declaring that they are generally satisfied with or endorse Government actions or policies, or the proportion of targeted populations reporting satisfactory involvement in the decision-making process affecting their enjoyment of certain human rights.

Expert judgements consist of data generated through combined assessments and scoring of a human rights situation by a limited number of experts, or "key informants". As with perception and opinion surveys, the information collected is subjective and needs also to be translated into a quantitative form using coding procedures. Unlike for surveys, respondents are not usually chosen on the basis of statistical sampling and therefore the selection of experts can sometimes be controversial. As the objective is often to summarize large amounts of information into a few indicators and indices, data based on expert judgements are frequently used for ranking across countries.

In keeping with the methods of work of international human rights monitoring mechanisms and given issues of reliability, the methodological framework for the indicators developed by OHCHR seeks first the availability of socioeconomic statistics and events-based data. Also, in identifying potentially relevant indicators, this methodological framework suggests that the following "RIGHTS" criteria[14] could be considered:

Relevant, robust and reliable[15]

Independent in their data collection methods[16] from the "monitored" subject

Globally (universally) meaningful but amenable to contextualization and disaggregation by prohibited grounds of discrimination

Human rights standards-centric and anchored in the normative framework of rights

Transparent in their methods, timely and time bound

Simple and specific

To conclude this brief outline of the OHCHR conceptual and methodological framework, the primary purpose of which is to support the development and use of indicators for implementing and measuring human rights, it is important to underline that the operationalization of the framework calls for the setting up of appropriate institutional and participatory processes at country level. In other words, there is a need for an operational framework to complement this conceptual and methodological framework to facilitate the formulation, collection and use of contextually relevant indicators and enhance their ownership by national stakeholders, including the civil society, Government agencies, statistics offices and human rights institutions. A growing number of countries and institutions in different regions of the world and with different socioeconomic and development contexts have been operationalizing the OHCHR framework on indicators for human rights. This operationalization has taken place in the context of national human rights action plans, integrating human rights into development plans or programmes for the achievement of the Millennium Development Goals, reporting and following up on recommendations of human rights mechanisms or, more generally, improving country-level systems for promoting and monitoring the implementation of human rights.[17]

[13] Coding is a procedure for converting verbal information into numbers, using a numerical scale to measure the responses to satisfaction survey questions, for instance (1) bad; (2) average; and (3) good.

[14] The proposal of a template of "RIGHTS" criteria is correlated to other templates commonly used in policy and programming management contexts, such as the SMART criteria (specific, measurable, achievable, realistic and time bound).

[15] The reliability of an indicator refers to consistency in the estimate or the value of an indicator if the data-generating mechanism employed for devising an indicator is repeated. For instance, if a question in a survey is posed to the same person a second time and the same response is received, then the indicator can be considered reliable.

[16] The collection, storage and dissemination of indicators should follow strict ethical and professional considerations and should conform, as applicable, to international statistical standards, including the Fundamental Principles of Official Statistics adopted by the Statistical Commission of the United Nations, available at http://unstats.un.org/unsd/dnss/gp/fundprinciples.aspx.

[17] For further information on the operationalization of the OHCHR framework at country level, see *Human Rights Indicators: A Guide to Measurement and Implementation.*

V. Towards indicators to capture the international and national dimensions of the right to development in an integrated manner

A prominent feature of the right to development is the equal attention given to the national and international dimensions of the realization of this composite right. In the preamble to the Declaration, States recognize that the human person is the central subject of the development process and that development policy should make the human being the main participant in and beneficiary of development. It also states that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States and that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order. Such considerations, in a world of interdependent economies, global crises as well as universal human rights aspirations, as revealed once again by the Arab Spring, may be one of the major values added of the Declaration in terms of the existing international human rights normative framework. In this respect, the recent financial and debt crisis has also demonstrated how national or even local decisions and behaviours, such as in the context of the subprime mortgage crisis, have worldwide repercussions and force us to look beyond national boundaries and to approach national and international human rights efforts in a new and integrated manner.

The conceptual and methodological framework and lists of illustrative indicators developed by OHCHR, derived from the Universal Declaration of Human Rights and the international human rights treaties, constitute tools consistent with and relevant for the implementation and assessment of the right to development. Article 6 (3) of the Declaration indeed proclaims that the realization of all human rights is integral to development: "States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights." The proposed identification of attributes, configurations of structural, process and outcome indicators and use of multiple sources of information in the OHCHR framework help in assessing important aspects of the right to development. Structural indicators relating to the adoption of specific national development policies and programmes, corresponding process indicators measuring their implementation on the ground from the perspective of the duty bearers, and outcome indicators measuring the distribution of the resulting benefits from a rights holder's perspective are particularly relevant to the right to development, which pays equal attention to the outcome as well as to the process of development.

There is, however, a critical lack of indicators for assessing important aspects of the implementation of the right to development. Further indicators are needed, for instance to enhance analysis of the realization of active, free and meaningful participation by the entire population and all individuals in the development process (arts. 2-8 of the Declaration), sovereignty over natural wealth and resources (art. 1) and efforts towards disarmament (art. 7). There is also a serious need to develop indicators to better capture the obligations of States to create not only national, but also international conditions favourable to the realization of the right (arts. 3-4). Indicators on global challenges and international obstacles impacting on the realization of human rights at country level, whether in developing or developed countries, are clearly lacking. Improving the development and use of such indicators is, however, a long-term process and calls for the involvement of and dialogue between a wide range of development, human rights as well as statistics actors. The concrete tools and indicators outlined in this publication, which can be reviewed and assessed with the help of the conceptual and methodological framework on indicators for human rights presented in this chapter, constitute a significant step forward in identifying steps to enhance the implementation of the right to development. They also help in bridging analytical and normative gaps in the development and human rights discourses. Finally, indicators are and will always remain tools for assessing complex realities and cannot be used as a substitute for more qualitative and comprehensive assessments, in particular evaluations by independent judicial or quasi-judicial human rights mechanisms.

Table 1: List of illustrative indicators on the right to education[a] (Universal Declaration of Human Rights, art. 26)

	Universal primary education	Accessibility of secondary and higher education	Curricula and educational resources	Educational opportunity and freedom
Structural	• International human rights treaties relevant to the right to education ratified by the State • Date of entry into force and coverage of the right to education in the constitution or other form of superior law • Date of entry into force and coverage of domestic laws for implementing the right to education, including prohibition of corporal punishment, discrimination in access to education, making educational institutions barrier free and inclusive (e.g., to children with disabilities, children in detention, migrant children, indigenous children) • Date of entry into force and coverage of domestic law on the freedom of individuals and groups (including minorities) to establish and direct educational institutions • Number of registered and/or active non-governmental organizations (per 100,000 persons) involved in the promotion and protection of the right to education			
	• Time frame and coverage of the plan of action adopted by the State party to implement the principle of compulsory primary education free of charge for all • Stipulated duration of compulsory education and minimum age for admission into school	• Time frame and coverage of national policy on education for all, including provision for temporary and special measures for target groups (e.g., working and street children) • Time frame and coverage of national policy on vocational and technical education • Date of entry into force and coverage of regulatory framework including standardized curricula for education at all levels • Proportion of education institutions at all levels teaching human rights/number of hours in curricula on human rights education • Proportion of education institutions with mechanisms for students to participate in matters affecting them (student council)		
Process	• Proportion of received complaints on the right to education investigated and adjudicated by the national human rights institution, human rights ombudsperson or other mechanisms and the proportion of these responded to effectively by the Government • Public expenditure on primary, secondary and higher education as a proportion of gross national income; net official development assistance for education received or provided as a proportion of public expenditure on education*			
	• Net primary enrolment ratio* by target groups, including children with disabilities • Drop-out rate for primary education by grade for target groups • Proportion of children enrolled in public primary education institutions • Proportion of students (by target group) covered under publicly supported additional financial programmes or incentives for primary education • Proportion of public schools with user charges for services other than tuition fees • Proportion of primary education teachers fully qualified and trained • Proportion of children getting education in their mother tongue • Proportion of students in grade 1 who attended pre-school	• Transition rate to secondary education by target group • Gross enrolment ratio for secondary and higher education by target group • Drop-out rate for secondary education by grade for target groups • Proportion of students enrolled in public secondary and higher education institutions • Share of annual household expenditure spent on education per child enrolled in public secondary or high school • Proportion of students (by target group) receiving public support or grant for secondary education • Proportion of secondary or higher education teachers fully qualified and trained • Proportion of students enrolled in vocational education programmes at secondary and post secondary level	• Proportion of schools or institutions conforming to stipulated national requirements on academic and physical education facilities • Periodicity of curricula revision at all levels • Number of education institutions by level recognized or de-recognized during the reporting period by relevant regulatory body • Average salary of schoolteachers as percentage of regulated minimum wage • Proportion of teachers at all levels completing mandatory in-service training during reporting period • Ratio of students to teaching staff, in primary, secondary, public and private education	• Proportion of education institutions engaged in "active learning" activities • Proportion of adult population covered under basic education programmes • Proportion of students, by level, enrolled under distance and continuing education programmes • Number of institutions of ethnic, linguistic minority and religious population groups recognized or extended public support • Proportion of labour force using retraining or skill-enhancement programmes at public or supported institutions • Proportion of higher learning institutions enjoying managerial and academic autonomy • Personal computers in use per 100 population*
Outcome	• Ratios of girls to boys in primary education* by grade for target groups • Proportion of students starting grade 1 who reach grade 5 (primary completion rate)* • Proportion of out-of-school children in primary education age group	• Ratio of girls to boys in secondary or higher education* by grade • Proportion of children completing secondary education (secondary completion rate) • Number of graduates (first level university degree) per 1,000 population	• (Improvement in) density of primary, secondary and higher education facilities in the reporting period	• Proportion of women and targeted population with professional or university qualification
	• Youth (15-24 years)* and adult (15+) literacy rates (i.e., reading, writing, calculating, problem-solving and other life skills)			
	[a] All indicators should be disaggregated by prohibited grounds of discrimination, as applicable and reflected in metadata sheets.			

* Indicators related to the Millennium Development Goals.

Table 2: List of illustrative indicators on the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment* (Universal Declaration of Human Rights, art. 5)

	Physical and mental integrity of detained or imprisoned persons	Conditions of detention	Use of force by law enforcement officials outside detention	Community and domestic violence
Structural	• International human rights treaties relevant to the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment ratified by the State • Date of entry into force and coverage of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the Constitution or other forms of superior law • Date of entry into force and coverage of domestic laws for implementing the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment including code of conduct on medical trials and scientific experimentation on human beings • Type of accreditation of national human rights institution by the rules of procedure of the International Coordinating Committee of National Institutions			
	• Date of entry into force of code of conduct for law enforcement officials, including on rules of conduct for interrogation of arrested, detained and imprisoned persons • Date of entry into force and coverage of formal procedure governing inspection of police cells, detention centres and prisons by independent inspection institutions • Legal maximum for incommunicado detention • Time frame and coverage of health policy for detention centres and prisons			• Date of entry into force and coverage of specific legislation on community and domestic violence • Number of rehabilitation centres for victims of domestic violence including women, partners and children
Process	• Proportion of received complaints on the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment investigated and adjudicated by the national human rights institution, human rights ombudsperson or other mechanisms and the proportion of these responded to effectively by Government • Proportion of communications sent by the Special Rapporteurs on the question of torture and on violence against women responded to effectively by Government in the reporting period • Proportion of law enforcement officials (including police, military, specialized investigation agencies and custodial staff) trained in rules of conduct concerning proportional use of force, arrest, detention, interrogation or punishment			
	• Proportion of detained or imprisoned persons in facilities inspected by an independent body in the reporting period • Proportion of custodial staff formally investigated for physical and non-physical abuse of or crimes against detained or imprisoned persons (including torture and disproportionate use of force) in the reporting period • Proportion of formal investigations of custodial staff resulting in disciplinary action or prosecution	• Actual prison occupancy as a proportion of prison capacity in accordance with relevant United Nations conventions on prison conditions • Proportion of detained and imprisoned persons in accommodation meeting legally stipulated requirements (e.g., drinking water, cubic content of air, minimum floor space, heating) • Number of custodial and other relevant staff per inmate • Proportion of detention centres and prisons with facilities to segregate persons in custody (by sex, age, accused, sentenced, criminal cases, mental health, immigration-related or other cases)	• Proportion of law enforcement officials formally investigated for physical and non-physical abuse or crime (including torture and disproportionate use of force) in the reporting period • Proportion of formal investigations of law enforcement officials resulting in disciplinary action or prosecution • Proportion of arrests and other acts of apprehending persons where a firearm was discharged by law enforcement officials	• Proportion of public social expenditure on campaigns to sensitize people on violence against women and children (e.g., violence by intimate partners, genital mutilation, rape) • Proportion of health care and community welfare professionals trained in handling domestic violence issues • Proportion of teaching staff trained not to use physical violence against children • Proportion of teaching staff subjected to disciplinary action/ prosecuted for physical and non-physical abuse of children • Proportion of women reporting forms of violence (physical, sexual or psychological) against herself or her children initiating legal action or seeking help from police or counselling centres • Number of persons arrested, tried, convicted or serving a sentence for violent crime (including homicide, rape, assault) per 100,000 population in the reporting period
Outcome	• Incidence and prevalence of death, physical injury and communicable and non-communicable diseases (e.g., HIV/AIDS, malaria and tuberculosis, mental impairment) in custody • Proportion of detained or imprisoned persons held incommunicado or in prolonged solitary confinement • Reported cases of inhuman methods of execution and treatment of persons sentenced to death/incarcerated in the reporting period • Proportion of detained or imprisoned persons with body mass index < 18.5		• Incidence of death and physical injury resulting from arrests or other acts of apprehending persons by law enforcement officials in the reporting period	• Proportion of children or pupils per 1,000 enrolled and patients who experienced corporal punishment in teaching and medical institutions • Incidence and prevalence of deaths and crimes related to community and domestic violence (including homicide, rape, assault) in the reporting period
	• Reported cases of torture or cruel, inhuman or degrading treatment or punishment perpetrated by an agent of the State or any other person acting under Government authority or with its complicity, tolerance or acquiescence, but without any or due judicial process (e.g., as reported to the Special Rapporteur on the question of torture/violence against women) in the reporting period • Proportion of victims of torture or cruel, inhuman or degrading treatment or punishment who received compensation and rehabilitation in the reporting period			

*All indicators should be disaggregated by prohibited grounds of discrimination, as applicable and reflected in meta-data sheets

The right to development and implementation of the Millennium Development Goals

*Fateh Azzam**

I. Introduction

This chapter begins by highlighting the relationship between human rights approaches to poverty reduction and the right to development. Section III demonstrates how the right to development contributes to international cooperation in the context of Millennium Development Goal 8. Section IV proposes elements to include in State reports on the Goals in order to make them more conducive to the realization of human rights and the right to development, which in turn will improve the chances for achievement of the Goals. The conclusion will underscore the significance of the approach proposed for the transformations occurring in the Middle East and North Africa.

II. Poverty reduction and the right to development

The draft guidelines on a human rights approach to poverty reduction define poverty as the lack of capability to enjoy a life of dignity: "people have inalienable rights to certain basic freedoms because without them a dignified human existence is not possible."[1]

Conversely, it can be said that the lack of enjoyment of human rights hampers the ability of individuals and communities to extract themselves from the grasp of poverty, thus ensuring its persistence. It is a vicious cycle that needs to be approached if long-term effective change is to be expected.

The Declaration on the Right to Development reaffirms international human rights standards and norms. Article 1 of the Declaration defines 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".

The second paragraph of article 1 reaffirms the right of peoples to self-determination and control of their own wealth and resources. This is generally understood to be a collective right affirmed in the post-colonial era and closely attached to the concept of sovereignty. However, the Declaration emphasizes "every human person and all peoples" in the first paragraph and that "[t]he human person is the central subject of development" in article 2 (1) and throughout. The enjoyment of human rights

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[1] Paul Hunt, Siddiq Osmani and Manfred Nowak, "Summary of the draft guidelines on a human rights approach to poverty reduction" (March 2004), para. 6. Available at www2.ohchr.org/english/issues/poverty/docs/SwissSummary1.doc. In 2004 OHCHR also issued Human Rights and Poverty Reduction: A Conceptual Framework (HR/PUB/04/1) as a complement to the draft guidelines. In 2006, the Office issued Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (HR/PUB/06/12), building on the previous publications and drawing on consultations with various stakeholders. These are available from the OHCHR website.

by each individual must therefore be understood as equally important to the collective right to self-determination, since the free individual is the subject of development who can contribute to his/her sovereign State and community.[2] This understanding of human rights, therefore, is tantamount to an individual right to self-determination without which the collective right of peoples to self-determination cannot be properly exercised, and vice versa. Thus, individual rights and those of the collective are another cycle, complementary rather than vicious, that needs attention in order to address the cycle of poverty and lack of freedom.

As article 1 of the Declaration asserts, the right to development embodies an entitlement to participate in and contribute to as well as to enjoy development. This necessitates the participation of the beneficiaries of development in the articulation of policies and in the implementation of development plans, thus empowering these beneficiaries at all levels. The participation of all sectors strengthens the political legitimacy of plans as well as the scope and effectiveness of implementation mechanisms.

The entitlements of rights holders require a corresponding duty to respect, protect and fulfil, which in turn brings the requirement of accountability of those involved in and responsible for implementation mechanisms. This implies the need for specific national and international mechanisms to ensure accountability of funders and development planners (both Government and civil society) to the beneficiaries themselves, or the rights holders. Consequently, participation in identifying mechanisms of accountability is also important. Participation at both national and international levels is a core entitlement of the right to development.

A fundamental aspect of a rights-based approach is the capacity of rights holders to claim those rights as entitlements, which in turn implies a duty on the part of States to guarantee and ensure the enjoyment thereof; States thus become duty bearers. The right to development framework perceives poverty reduction and the broader development agenda as a legal obligation drawn from commitment to international law and not a magnanimous act of Government. The human rights approach to development should be seen as implementing States' legal obligations under human rights law both in terms of human rights treaties that they have signed and ratified and in terms of commitments to international cooperation under the Charter, including the Declaration on the Right to Development, which provides in article 2 (2) that everyone is responsible and has a role, while nevertheless placing the primary responsibility on States to create "national and international conditions favourable to the realization of the right to development" (art. 3 (1)). Of central importance to the Millennium Development Goals is the matter of international cooperation, covered in detail under goal 8.

III. International cooperation (Millennium Development Goal 8) and the right to development

The Declaration on the Right to Development highlights the importance of international cooperation and, by implication, global partnership in the realization of the right to development.[3] This commitment is of course consistent with the Millennium Development Declaration and Goals, particularly goal 8. The application of human rights principles and those of the right to development to such partnerships may be difficult, however, given the "inherent asymmetrical power relations and divergent priorities, in particular between 'donors' … and aid-dependent or middle-income 'recipient' countries".[4] After outlining the constituent elements of global partnership as understood in Millennium Development Goal 8 in general, specific observations will be made regarding international financial institutions, multilateral donors and transnational corporations.

A. Constituent elements of global partnership

Previous studies on the question of development partnership have highlighted some constituent elements necessary to ensure the effectiveness of such partnerships in achieving the desired development goals. They note the need for a holistic approach that combines:

(a) A common set of objectives and shared values—thus the question of effective alignment at all levels of planning and agreement within countries and between donor and recipient countries;

[2] See also articles 2 (2) (participation, respect for human rights and duties to the community), 5 (eliminating massive violations of human rights), 6 (non-discrimination and respect for all human rights as indivisible and interdependent, including civil and political rights), 8 (equality of opportunity and participation, especially with regard to women) and 9 (1) (all the constitutive elements of the right to development need to be seen as a whole).

[3] See articles 3 (cooperation of States in the context of friendly relations in accordance with the Charter of the United Nations), 4 (individual and collective sustained action to assist developing countries), 7 (collective responsibility for international peace and security and disarmament in order to release resources for development).

[4] "The right to development: study on existing bilateral and multilateral programmes and policies for development partnerships" (E/CN.4/Sub.2/2004/15), annex, p. 6.

(b) Clearly differentiated and reciprocal responsibilities, necessitating in turn the presence of institutionalized mechanisms or frameworks for mutual accountability and review;

(c) Targeted and effective aid that goes where it is needed and is effectively utilized, presumably made more possible by effective participation;

(d) Good governance and the rule of law, without which national and international strategies cannot survive, thus confirming the indivisibility of civil, political, economic, social and cultural rights as well as the interdependence of development, human rights and democratic governance;

(e) Reliance on United Nations principles, with human rights as a basis for development plans and partnerships.[5]

In working to achieve the Millennium Development Goals benchmarks and specific targets, a rights-based approach requires that States guarantee in law and in practice the protection of all human rights and ensure equality and non-discrimination, participation, accountability mechanisms, good governance and the effective rule of law at all levels. These are the necessary elements of States' compliance with the requirement in the Declaration on the Right to Development to "ensure conditions favourable to the realization of the right to development" (art. 3 (1)).

When reading national and donor reports on the Millennium Development Goals, a perception emerges that adhering to the requirements of goal 8 is primarily the responsibility of donor countries. Indeed, the actual decision-making on aid, tariffs and debt relief perforce lies with the donor countries. However, the right to development framework stipulates that aid activities are most effective when undertaken collaboratively with recipient countries in the context of a comprehensive global strategy that pays due regard to human rights, good governance, national priorities set in the poverty reduction strategy papers (PRSPs) and accountable means of monitoring and assessment. This is given tangible form in the United Nations Millennium Declaration[6] with specific actions to undertake and targets to meet as outlined in goal 8.

Donors have made public commitments through numerous international meetings and processes to harmonize and align their activities with the priorities and needs of recipient countries.[7] Beyond iterations of commitment and the evident spirit of cooperation, few actual mechanisms have been developed to give effect and meaning to the "shared values" of development or shared decision-making on priorities. In other words, directions and goals of development aid and of tariff and trade policies in the developed countries continue to be decided by donor countries, albeit with some regard to recipient countries' priorities. Whether the rights-based approach that requires participation in the setting of agendas can actually be met in this regard is not evident.

The Declaration on the Right to Development makes clear in article 7 that, as part of the responsibility to promote international peace and security, a direct connection needs to be made between disarmament and development, and encourages States to ensure that "the resources released by effective disarmament measures are used for comprehensive development …" This directive is rarely mentioned in Millennium Development Goal reports, save for references to the European Union's Everything But Arms (EBA) initiative relating to European trade with other countries;[8] there is no mention of donor countries' own arms expenditure vis-à-vis development aid. The same holds true for developing countries' reports, which make no mention of their own arms expenditure as compared to budget percentages of national resources put towards the progressive realization of rights or implementation of the Millennium Development Goals.

Nevertheless, the principle role in realizing goal 8 falls to international financial institutions, multilateral donors and transnational corporations.

B. The role of financial institutions, multilateral donors and transnational corporations

International financial institutions like the World Bank and the International Monetary Fund (IMF) play a significant role in international development cooperation through policies determined by States with quite effective financial clout. Yet Millennium

[5] Ibid. See also references therein to a number of other relevant studies.
[6] General Assembly resolution 55/2.
[7] See, for example, the Rome Declaration on Harmonization (February 2003) and the follow-up meetings of the High-Level Task Force in Marrakech (February 2004) and Paris (March 2005), the World Summit on the Information Society (Geneva, December 2003) and others.
[8] See the Millennium Development Goal reports on goal 8 of the Netherlands and Sweden, available at www.undp.org/mdg/donors.shtml.

Development Goal reports contain very little information on these institutions, the important role they play and the financial assistance and investment that they provide to developing countries as a percentage of overall aid. While investigating such information was beyond the scope of this study, it would be important to point out that these institutions operate almost as parastatal entities whose accountability is strictly to their own corporate governance structures, despite the major role they play in international development and despite the palpable influence their studies have on national and global development policies.[9]

IMF, the World Bank and regional development banks are directly accountable to their executive committees and to the States which set their policies. They are by definition accountable under human rights law only insofar as the Governments that set their policies are. Whether States "pass on" their duties/accountability to those institutions through regulation is another question. Yet, these organizations play a significant role in financing development through outright grants and loans to Governments and in direct project support. Some of their past practices have come under scrutiny and criticism, especially with respect to the failed structural adjustment policies.[10] These institutions were of different views with respect to adopting the right to development framework when presented by the Independent Expert on the right to development.[11]

It would be important to assess the activities of financial institutions where they have a direct effect on strategies to achieve the Millennium Development Goals and on broader donor responsibility and accountability in doing so. One possibility may be for individual country reports to include such information, possibly under a heading like "Cooperation with international financial institutions", giving due consideration to the use or lack of participatory mechanisms and due regard for human rights in their dealings with these institutions. Another mechanism may be to require these institutions to make brief reports to be appended to national reports or to be presented as independent contributions towards public discussions of international cooperation and support for PRSPs and the implementation of Millennium Development Goal strategies. Further study is needed to assess the unique position these organizations hold and their role in and effect on development strategies.

In today's global economy, transnational corporations (TNCs) also have a very direct and major effect on the economies and development efforts in the countries where they work. They are significant players in flows of money to and from developing economies. Development discussions need to take up the activities and effects of TNCs on, for example, employment practices, the environment and general effects on the economies of host countries as well as on total inflows and outflows of currency and funds. Yet there is insufficient discussion of their role (again, positive or negative) in the context of international cooperation to implement the Millennium Development Goals. This is another gap in knowledge that needs to be filled.

TNCs are regulated under the laws of their countries of origin and those of their host States, as well as under international law, and while States of origin and host States both have responsibilities to ensure that they operate in a manner consistent with international human rights obligations, the accountability of TNCs is at times lost. There is a growing discussion in the general literature on the issue of corporate responsibility, and some of those companies are incorporating grant-making in their "social" activities. Donors' and recipients' Millennium Development Goal reports may also include information on the effects of activities of TNCs on the economy in general, on poverty reduction strategies and on the global partnership for development, especially where such activities have a particular positive or negative effect on the enjoyment of human rights in that country.

Broad plans such as PRSPs and United Nations Development Assistance Frameworks, articulated by national Governments in cooperation with United Nations agencies and sometimes with developed/donor countries, often exclude the voices of rights bearers and mechanisms to ensure their participation are rarely put in place. It may be useful to consider, at a national level, smaller-scale plans built around specific themes or goals, or articulated subregionally, which can be important cooperative ventures that voice the concerns of grass-roots communities and ensure their participation.

[9] The issue was clear in the meetings of the Independent Expert on the right to development, Arjun Sengupta, with the World Bank, the International Monetary Fund and others, with different results. See the addendum to the fourth report of the independent expert (E/CN.4/2002/WG.18/2/Add.1), para. 48.

[10] See "Study on policies for development in a globalizing world: what can the human rights approach contribute?" (E/CN.4/Sub.2/2004/18), prepared by S.R. Osmani for the high-level seminar on the right to development (Geneva, February 2004).

[11] IMF expressed doubts about the feasibility of a rights-based approach and accepted no accountability except to its Board of Directors, while the World Bank was already incorporating human rights elements into its work, although not in a comprehensive or systematic fashion. See the fourth report of the Independent Expert on the right to development (E/CN.4/2002/WG.18/2), paras. 16-35.

Such plans can bring into the effort the thousands of smaller donor agencies in the private sector or the international philanthropic community which often work with grass-roots communities and can marshal smaller funds for smaller projects. Small-scale plans can go a long way towards bringing together civil society organizations around the globe in global cooperation for implementing the Millennium Development Goals. Moreover, small-scale plans may well be components of the larger PRSPs, but both macro and micro levels need to be cognizant of human rights principles and the right to development. Donor agencies are well placed to bring a particular focus to participatory planning approaches, equity and non-discrimination. More importantly, the issue of accountability to the beneficiaries (rather than to Government) by private, non-governmental donor agencies can be broached as well. A critical vehicle in this regard is the Millennium Development Goals reporting by States, which could be considerably improved from the right to development perspective.

IV. Millennium Development Goals reports and the right to development

Using the right to development as a framework for poverty reduction and development strategies will necessarily require going beyond the traditional economic and social programme planning processes, which focus primarily on macroeconomic data that seem to serve a needs-based approach to development. It adds the idea that human rights are a matter of entitlements requiring a corresponding duty and legal obligation.

To do this would require policy decisions at the national and international levels. Programmes and plans need to be framed with added use of human rights language and the articulation of specific implementation mechanisms. Reporting on progress can also be crucial, not only in articulating approaches to the plans and monitoring systems, but also for enhancing knowledge of rights-based aspects and making them operational as part and parcel of the development process. The eight recommendations given below should be seen in that light: as proposals focusing primarily on the Millennium Development Goal reports as a mechanism not only to improve accountability, but also to push in the direction of incrementally strengthening the rights-based approach to implementing the Goals.

State reports on measures taken and obstacles encountered in realizing the Goals would benefit from introducing a human rights perspective, both in general and specifically relating to the right to development. Eight specific elements of such reporting are proposed below.

A. Making an explicit commitment

Specific references to human rights standards, principles and treaty commitments, including the right to development, need to be included in the Millennium Development Goal reports. By adopting the Declaration on the Right to Development, States have committed themselves, at least in principle if not in law, to implement development programmes in accordance with the human rights standards and norms referenced in the Declaration. This should also include information from States' outcomes of the Human Rights Council's universal periodic review process as well as the review of reports to human rights treaty bodies.

An important first step is that national and international parties involved in programmes and plans to achieve the Millennium Development Goals need to make an explicit commitment to a rights-based approach consistent with States' commitments under human rights law, and in promotion of the right to development. An explicit commitment would add specific procedures and mechanisms to ensure adherence to human rights principles and put into motion the necessary requirements for reviewing legislation, administrative procedures, accountability mechanisms and recourse. Explicit recognition of a right to development framework would also be invaluable in the arena of international cooperation, within which donor and recipient countries together articulate the mechanisms and procedures necessary for more effective action towards achieving the Goals.

One expression of commitment would be to finalize and disseminate widely the draft guidelines on a human rights approach to poverty reduction, which are specifically designed to aid States in using a human rights framework in development efforts and, in particular, achievement of the Millennium Development Goals. These guidelines need to be implemented whenever PRSPs or international development cooperation plans are conceived and reviewed. The preparation of reports should refer to and follow the draft guidelines as specifically as possible and the structure of Millennium Development Goal reports

should be amended accordingly in order to evaluate States' commitments to their implementation.

As the draft guidelines propose, adopting a rights-based approach would ensure total societal and international commitment to development. It would ease the implementation burden on Government to a significant extent by distributing responsibility for needed efforts between Government, civil society and international cooperation, and consequently also distribute accountability between them. A holistic approach to development is potentially much more successful with the full participation of all sectors.

B. Incorporating rights-based information

To make a rights-based approach operational, it would be important to encourage States to add a legal section to their reports. This can either take the form of describing the specific legal developments relevant to each of the Goals, or of a separate legal section that provides a comprehensive view of the legal environment. The latter approach would be more useful in making the connections between the enjoyment of social and economic rights on the one hand, and developments in civil and political rights legislation that enable or hinder efforts to implement the development goals on the other.

Such a section should include the country's treaty commitments and their effect on national legislation and practice,[12] but could also include information on prioritization of rights and perceived necessary trade-offs. The literature recognizes that despite the indivisibility and interdependence of rights, some trade-offs and prioritization are at times necessary. However, the draft guidelines remind us that care needs to be taken that progress achieved to date in the achievement of any of the rights should not be rolled back in favour of a particular—even temporary—strategy of increased allocations of resources or legislative focus on another right. Such temporary prioritization can be acceptable if it comes out of participatory processes as described above and if articulated consciously, with time limitations and a future-oriented outlook.

Requiring the inclusion of rights-related information in the reporting on progress in achieving the Millennium Development Goals, including goal 8, would also have the added benefit of necessitating incremental changes in policies in the programmes and strategies themselves by both recipient and donor countries. A helpful chart was suggested by Phillip Alston, showing that each of the Goals was placed firmly within the relevant provisions of the International Covenant on Economic, Social and Cultural Rights.[13] However, the reports themselves would need to take such a chart a step further and provide information on efforts made that combine the legal commitment to these provisions and the specific programmes and plans to implement the Goals.

C. Referring specifically to international human rights obligations and commitments

Assessing the progressive realization of economic, social and cultural rights is inseparable from assessing progress on civil and political rights. This connection is mandated by the Declaration on the Right to Development and human rights law generally, as well as the United Nations Millennium Declaration, and is part and parcel of the indivisibility of all rights and of States' obligation to respect, protect and fulfil all human rights. Bolstering a rights-based approach to achieving the Millennium Development Goals would require reference to the country's human rights treaty commitments and obligations in the Millennium Development Goal reports and information on significant developments in human rights practices in the country, not only those that have a direct bearing on the implementation of the Goals but more broadly as well. For example, societal participation in planning, implementing and evaluating development plans cannot take place without freedom of expression, association and participation in the conduct of public affairs, and ensuring equal and non-discriminatory access to health and education requires equal access to justice and due process of law.[14]

A further element of human rights information in the reports is the inclusion of references to equality and non-discrimination, including information and data on disparities and unequal enjoyment of services and rights. The importance of disaggregating data cannot be overemphasized as an indicator to help assess

[12] See, for example, "UN common country assessment: embracing the spirit of the Millennium Declaration" (United Nations Egypt, 2005). The CCA for Egypt includes at pages 11 and 12 a helpful chart that defines Egypt's commitments under international human rights conventions within each of the Millennium Development Goals.

[13] Philip Alston, "A human rights perspective on the Millennium Development Goals", paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development, p. 31. Available at www2.ohchr.org/english/issues/millenium-development/docs/alston.doc.

[14] The events in Egypt, Libya, Tunisia and much of the Arab region in early 2011 vividly illustrate the point. Years of non-participatory economic policies and severe restrictions on civil and political rights resulted in the popular revolts that have unseated rulers and Governments and shaken the region from Morocco to Oman.

compliance with the overriding principle of equality and non-discrimination. However, it is insufficient to review data and point to clear disparities without reference to efforts to identify the causes of and barriers to overcoming those disparities. In this context, more specific information is required on the structures of discrimination that generate and sustain poverty, including laws and discriminatory procedures and efforts or plans to counter such discrimination, including legal and administrative reform, and, perhaps more importantly, enforcement measures for existing legislation to guarantee equality and prohibit discrimination.

D. Defining the nature of States' legal obligations and making them operational

A rights-based approach would require thorough review of relevant laws and their implementing procedures to make possible an adequate human rights assessment of the legal framework governing development efforts as a whole as well as progress on each of the Millennium Development Goals.

Human rights obligations are generally understood to be threefold: to respect, protect and fulfil. Analysis of these three types of obligation is abundant elsewhere, but in legal terms, the most difficult to quantify and concretize is the area of economic, social and cultural rights and, by extension, the right to development. We are aided in clarifying this by the International Law Commission which defined this type of legal responsibility as an "obligation of conduct", a concept that may serve as an effective measure of States' fulfilment of their responsibility to do everything possible within available resources to implement the Goals.[15] Under what is understood as an obligation of conduct, States would have to show that they are in fact working progressively towards the realization of economic, social and cultural rights, defined not only by relevant instruments of a legally binding nature but also by the Declaration on the Right to Development and by the clear benchmarks and targets provided by the Millennium Development Goals. Awareness of this concept and its inclusion as a measure for evaluating progress on the right to development in the achievement of the Goals—regardless of its legal import at this point—is directly relevant to accountability; it provides a focus for evaluation processes and strengthens future reports.

[15] "Obligations of conduct" and "obligations of result" were proposed by the International Law Commission in articles 20-21 of the Draft Articles on State Responsibility. See *Yearbook of the International Law Commission 1977*, vol. II (Part One) (United Nations publication, Sales No. E.78.V.2 (Part I)).

An obligation of conduct assumes the existence of monitoring mechanisms that constantly check results against plans and programmes, reviews plan adjustments to gauge the "effort" as needed and keeps track of results from one point in time to another. The capacities for monitoring and evaluation are already developed, but the legal obligation approach would require adding an element of accountability, or a judgement of "conduct" defined as efforts made by the State, whether by commission or omission, towards achieving development results in the various sectors.

Fulfilling the legal obligation of conduct would also require a progressive increase in and effective allocation of resources, an element already subsumed in human rights law and discussed under section F below. Here it would be extremely useful to add to the reports more specific information that tracks changing budget allocations over time, describing or justifying the rationale behind increasing or decreasing budget allocations for any particular programme or target. Such a budget analysis approach is relevant for both recipient countries and donor countries alike. For the former, the tracking over time of percentages of State budgets going towards the implementation of a Millennium Development Goal target, whether increasing or compared to military spending, for example, would be a clear indicator and basis for assessing that State's legal obligation of conduct.

E. Reporting on participatory mechanisms

Millennium Development Goal reports should also contain information on the participation by civil society organizations, academics and other stakeholders in the development and implementation of strategies and plans to achieve the Goal and whether any institutional mechanisms are in place to ensure such participation.

States would need to report on the participatory mechanisms employed to ensure that the widest possible sectors of their populations were represented and contributed to the articulation and implementation of plans and projects designed to achieve development. This would enhance the political legitimacy of these plans, nationally and internationally, and ensure a nexus of efforts from all sectors to achieve results. Similarly, the process of monitoring and evaluating progress needs to be as participatory as possible. Such mechanisms were indeed used in several countries to varying degrees, and may include:

Subregional and local meetings, of a public nature or in committees, with target populations and beneficiaries of development efforts under the various Goals, with special consideration given to including marginalized populations and empowering them to participate as effectively and fully as possible. Internet technology has also created new possibilities for inclusion.[16]

- Reliance on academic and research centres to undertake the necessary baseline research to inform such plans and to take part in the monitoring and assessment thereof

- Reliance on non-governmental and civil society organizations to provide input to plans, encouraging them to share their experiences in working directly with target populations and beneficiaries "on the ground", and as implementing partners for State-sponsored or internationally supported projects as well as monitors of progress

F. Reviewing international cooperation and making it more effective through budget lines

Millennium Development Goal reports should also contain information on efforts to progressively realize the right to development and economic, social and cultural rights through the allocation of resources. Human rights law recognizes that the realization of most economic and social rights can take place progressively and within available resources. State policies need to be demonstrated through legislation and comprehensive programmes bolstered by steadily increasing and targeted allocation of resources.

For international cooperation more generally, the United Nations Millennium Project found that if the previous commitment of rich countries to allocate 0.7 per cent of their gross national income (GNI) to official development assistance were fulfilled, the total would "provide enough resources to meet Millennium Development Goals".[17] The 0.7 per cent target is already serving as a guideline for development cooperation, despite generally poor adherence. Comparative global budget analyses even within this target can also be made. See, for example, Oxfam's assessment in 2000 that an added $8 billion annually would ensure universal primary education, a figure that is equal to only four days of global military spending.[18] To encourage countries to reach this target, it may be useful to add a specific budgetary element to the Millennium Development Goal reports showing developments over time in terms of amounts of support going to different Goal-implementation programmes. This could be done in tabular format under each of the Goals, for example, or appear in the body of the analytical text under the section "Supportive environment". Such a presentation within the reports would facilitate a budget analysis approach to efforts made by Governments together with the international community in the context of development partnerships. However, more specific and pointed information would be needed in order to meet the requirement of article 7 of the Declaration on the Right to Development, which says that States should do their utmost to achieve disarmament and consequently release resources for comprehensive development. This could be achieved by ensuring the inclusion of information on shifting resources over time from armament to development in the budget allocations of developed and developing countries.

G. Including information on refugees, internally displaced persons and other vulnerable populations

According to the Office of the United Nations High Commissioner for Refugees (OHCHR), in 2009 "developing countries hosted 8.3 million refugees, or 80 per cent of the global refugee population. The 49 least developed countries provided asylum to 1.9 million refugees".[19] Many of these countries are included in the list of Heavily Indebted Poor Countries (HIPCs), where those vulnerable groups have the greatest impact in terms of effect on local economies. With a human rights framework, these populations must benefit from any development efforts aimed at poverty reduction and the guarantee of basic human rights, and should be seen as potential contributors to their host economies as well as beneficiaries of international aid. It is strongly suggested here that information on vulnerable populations, especially refugees, internally displaced persons and migrants, be included in the Millennium Development Goal reports and in national and international poverty reduction strategies.

[16] For a discussion on the principles and elements of effective inclusion, see E/CN.4/Sub.2/2004/18.

[17] United Nations Millennium Project, "The 0.7% target: an in-depth look". Available at www.unmillenniumproject.org/press/07.htm.

[18] Lewis Machipisa, "Education-Africa: calls for global campaign to abolish primary school fees", *Inter Press Service*, 6 December 2000. For more comparative figures, see the chart "Worlds apart", in *Duties sans Frontières: Human Rights and Global Social Justice* (Versoix, Switzerland, International Council on Human Rights Policy, 2003) p. 5. Available at www.ichrp.org/files/reports/43/108_report_en.pdf.

[19] Office of the United Nations High Commissioner for Refugees, *Statistical Yearbook 2009: Trends in Displacement, Protection and Solutions* (Geneva, 2010), p. 20.

H. Insisting on good governance, anti-corruption measures and strengthened accountability

Finally, the Millennium Development Goal reports would benefit and would contribute to realization of the right to development if they contained information on anti-corruption and accountability measures. "Keeping the promise: united to achieve the Millennium Development Goals", the outcome document of the High-level Plenary Meeting of the General Assembly on the Millennium Development Goals at its sixty-fifth session (the "Millennium Summit"), held in September 2010, stresses that "fighting corruption at both the national and international levels is a priority and that corruption is a serious barrier to effective resource mobilization and allocation and diverts resources away from activities that are vital for poverty eradication, the fight against hunger and sustainable development". The document further stresses that "urgent and decisive steps are needed to continue to combat corruption in all of its manifestations, which requires strong institutions at all levels".[20] One of the ways anti-corruption measures can be promoted is for donor and recipient country reports on goal 8 in particular to be more forthcoming in providing information on promoting the implementation of legal reforms that strengthen good governance in the interest of achieving the Millennium Development Goals. While this may raise the spectre of "conditionality", which has long been debatable as a criterion for aid, the right to development framework with its provisions on mutual responsibilities would go a long way towards strengthening such reforms. State reporting under the Goals should also take into account reports provided by civil society and human rights organizations on legal, constitutional and political reforms and practices that have a direct bearing on human rights in all arenas. Information provided in these reports and in State and shadow periodic reports submitted to human rights treaty bodies would be extremely useful. The universal periodic review of the Human Rights Council also offers an excellent platform to report on the nexus and interdependence of governance, development and human rights and, in particular, the battle against corruption.

In addition, the Millennium Development Goal reports should contain information on the existence and effective use of accountability mechanisms. By broadening the scope of participation and discussion, the reports would make possible public accountability as well as the political legitimacy of the programmes and plans. The draft guidelines include accountability as "the most important source of added value" and consider it "an intrinsic feature of the human rights approach that appropriate judicial and non-judicial mechanisms for ensuring accountability are made use of and built into any poverty reduction strategy".[21] Specific accountability mechanisms, however, are difficult to articulate in the process of achieving the Millennium Development Goals, given the number of actors and the variety of requirements and roles that they must fulfil. Therefore, accountability has to be disaggregated in the same way as development indicators so that responsibility for smaller pieces of the development puzzle can be defined and clarified. The purpose of accountability is twofold: to allow for periodic review of plans and strategies and their implementation, and to hold those responsible to account for failure or success in executing their responsibilities. The draft guidelines go on to define four categories of accountability mechanisms: judicial, quasi-judicial, administrative and political.[22] The Millennium Development Goal reports themselves are a form of accountability in that they allow public discussion and evaluation of the efficacy of their strategies and actions, as well as an opportunity for corrective action.

At the national level, civil society groups and individuals may choose to pursue accountability through the judicial system and the courts, particularly on specific human rights and where issues of discrimination in development policies are concerned. Quasi-judicial institutions such as national human rights institutions, ombudsmen or similar bodies of a semi-official or public nature may also be important addresses for directing complaints and demanding public accountability at the national level. It is more difficult, however, to gauge the accountability of donor countries under a right to development framework. Donor countries are accountable at three levels: (a) to their parliaments, taxpayers and national priorities; (b) to global development efforts and international agreements they make in the context of international cooperation arrangements such as the Millennium Development Goals; and (c) to bilateral agreements they make with specific recipient countries. Those three levels of accountability certainly intersect, but it is important to ensure that accountability under one level does not serve as an excuse to evade accountability under another.

[20] General Assembly resolution 65/1, para. 52.

[21] Draft guidelines, para. 31.

[22] OHCHR, *Principles and Guidelines*, para. 76.

Accountability becomes critical when considering the requirement of participatory mechanisms for empowering recipient countries to articulate their own priorities for development. While bilateral development aid is perhaps more amenable to joint planning between donor and recipient States than multilateral arrangements, donor Governments' accountability to their own taxpayers may preclude the surrendering of decisions on the disposition of development aid to a committee process that may include non-citizens. States' international commitments over the past two decades, including at the Millennium Summit and subsequent international meetings, have gone a long way towards softening sovereign decision-making in favour of global cooperation. The Declaration on the Right to Development, with its sets of complementary responsibilities and duties, can serve to further soften the asymmetrical power relationship in this regard.

The question of accountability becomes even more complicated when we consider the role and effect of multilateral international organizations like the United Nations agencies, funds and programmes and international financial institutions like the World Bank, the International Monetary Fund and regional development banks. In addition, non-governmental and quasi-governmental philanthropic organizations act as both independent donors and as conduits for governmental aid that bypasses bilateral and even multilateral political processes to some extent. All those entities need to be accountable under a rights-based approach, but the mechanisms for doing so are less direct and more complicated.

The Charter of the United Nations mandates respect for human rights, and United Nations agencies, funds and programmes are in fact expected to adopt a rights-based approach to development and to mainstream human rights in all their work. Their accountability mechanisms are internal and public at the same time, and one may assume that the participation of the United Nations country teams in working with Governments on their poverty reduction strategies and in reporting on progress made constitutes one arena where accountability can be measured.

V. Concluding remarks

The practical strategy proposed in this chapter is to incorporate the above elements, drawn from the Declaration on the Right to Development and human rights requirements, into the required reporting by States on implementation of the Millennium Development Goals. The purpose, however, is not the reports in and of themselves. Rather, it is to encourage the adoption of economic, social and political strategies that the human rights framework has ascertained to be necessary for the success of any development goal.

All policies at both the global and national levels have social, economic and political impact, positive or negative. Global wisdom has concluded and continues to conclude that the adoption of a right to development framework is much more likely than not to achieve the desired positive impact.

The popular revolts that rocked North Africa and the Middle East in early 2011 have driven this point home to great effect. People revolted in frustration against unaccountable Government, ineffectual economic policies, rampant corruption and the exclusion of the intended beneficiaries of development from any participation in the debates on public policy. Their frustration was sharply exacerbated by poor governance records and severe restrictions on the exercise of civil and political rights by the population. Those protests spoke much louder than any study on the need to incorporate a rights-based approach in development policies and on the intricate interweave of economic, social, cultural, civil and political rights. They demonstrated the stark reality of the dangers of not adopting a people-centred development framework, as the Declaration on the Right to Development stipulates.

National experience with the right to development

*A.K. Shiva Kumar**

I. Introduction

The widespread acceptance and pursuit of the Millennium Development Goals represent a major consensus by the development community to eliminate poverty and accelerate human development. Two streams of thought have strongly influenced global and national strategies: the human development approach and the right to development approach. Defined broadly as an enhancement of capabilities, a widening of choices and an expansion of freedoms, human development calls on policymakers to focus on people and what they cherish and value in life.[1] In the human development framework, human poverty is viewed as a denial of freedoms—economic, social, cultural and political. Such denials are traced to inadequacies and inequalities in the distribution of opportunities between women and men, across regions, between rural and urban areas and within communities. The exercise of tracking progress extends beyond merely monitoring trends in economic variables (which are no doubt important) to assessing changes in the quality of people's lives. The focus shifts from an emphasis on economic growth to examining whether the benefits of growth are contributing equitably to tangible improvements in the lives of people.

The idea of human development has been substantially enriched by the human rights discourse. Human rights and human development "share a common vision and a common purpose—to secure the freedom, well-being and dignity of all people everywhere".[2] The human rights arguments draw attention to fairness and justice in processes, not simply outcomes. Amartya Sen explains the complementarities between the two streams of thought:

> [F]reedoms depend also on other determinants, such as social and economic arrangements (for example, facilities for education and health care) as well as political and civil rights (for example, the liberty to participate in public discussion and scrutiny)… Viewing development in terms of expanding substantive freedoms directs attention to the ends that make development important, rather than merely to some of the means that, inter alia, play a prominent role in the process.[3]

From a rights perspective, the persistence of human poverty is the result of a denial of basic entitlements to education, health, nutrition and other constituents of decent living.[4] The ending of human

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[1] For a set of papers on human development, see Sakiko Fukuda-Parr and A.K. Shiva Kumar, *Handbook of Human Development Concepts, Measures, and Policies* (New Delhi, Oxford University Press, 2009).

[2] United Nations Development Programme (UNDP), *Human Development Report 2000: Human Rights and Human Development* (New York, Oxford University Press, 2000), p. 1. See also *Human Development Report 1998: Consumption for Human Development*.

[3] See Amartya Sen, *Development as Freedom* (New Delhi, Oxford University Press, 1999), p. 3. See also Sen, "Population policy: authoritarianism versus cooperation", International Lecture Series on Population Issues (John D. and Catherine T. MacArthur Foundation, New Delhi, 1995) and "Wrongs and rights in development", *Prospect*, 20 October 1995. Available at www.prospectmagazine.co.uk/1995/10/wrongsandrightsindevelopment/.

[4] For a comprehensive discussion see, in particular, *Human Development Report 2000*; Commonwealth Human Rights Initiative, *Human Rights and Poverty Eradication: A Talisman for the Commonwealth* (New Delhi, 2001); Centre for Development and Human Rights, *The Right to Development: A Primer* (New Delhi, Sage Publications, 2004); and Arjun Sengupta, "The human right to development", *Oxford Development Studies*, vol. 32, No. 2 (June 2004).

poverty, therefore, calls for an assurance of basic entitlements as rights of citizens. The State is principally obligated to ensure universal access to basic social and other services and to create an enabling environment for the assurance of human rights. The right to development approach has the force of being based on both moral consensus and legal obligations. It is a practical means for policy setting that enables policymakers to choose appropriate processes and create and reorient public structures. By emphasizing accountability, transparency and rule of law, it demands the adoption of democratic methods of implementation and gives primacy to participation, protection and empowerment of the poor.

Against this background, section II discusses critical issues in the adoption of a right to development approach to policy formulation. Section III describes some of the recent policy shifts in India that have been strongly influenced by rights-based arguments. Section IV discusses the challenges faced by policymakers. The concluding section V identifies ways of strengthening public action for promoting the right to development approach.

II. Issues

Several issues, some more resolved than others, continue to dominate policy discussions surrounding human rights and development. The first has to do with the universalism of human rights. The idea that a "universal" set of rights enjoys validity across different religions, traditions and customs has often been questioned by some policymakers and practitioners. Debates tend to become polarized, for instance, when religious leaders or cultural experts call for preserving the social sanctity and identity of local cultures. Some go to the extent of arguing that a Western notion (or ideal) of equality and justice has little relevance or applicability in other cultural contexts. Similar opposition is encountered when advocacy for women's rights or sexual rights begins to question many age-old beliefs and practices that deny women and others equal opportunities. Sometimes even the non-threatening notion of child rights has been questioned: do children really have rights? Can a six-year-old decide whether to go to school or not? The intensity of such opposition has, however, declined significantly over the years. Yet it still persists among those who tend to justify violation of rights and denial of freedoms on the grounds that such social practices and cultural traditions have the approval of society.

A second issue has to do with prioritization of rights. Do some rights have precedence over other rights? Can the rights of some groups (the poor) have precedence over the rights of the non-poor? While it is true that rights are indivisible and no one set of rights is superior to another, practitioners point out that it is only in exceptional cases that we can find win-win situations where all stakeholders benefit. By and large, with most interventions there are bound to be winners and losers. Policymakers are typically confronted with having to choose between rights (and define priorities). When this happens, it is likely that one group's rights would be overridden by another's. This occurs when limited financial resources have to be allocated for the fulfilment of competing rights. A third issue has to do with collective responsibility for assurance of rights. Fulfilment of rights calls for effective partnerships to find collaborative, constructive and creative solutions. From a practical viewpoint, however, collective responsibility very soon becomes nobody's responsibility. Coordination and convergence become critical for successful implementation, but in reality both are difficult to guarantee. Who is to be held responsible for effective implementation and accountability? The State might be required to ensure coordination between different stakeholders; however, this is easier said than done.

A fourth issue has to do with the emphasis on processes. In the right to development approach, processes adopted for formulating policies or implementing programmes should not violate the rights of individuals, especially of the poor and the voiceless in society. Processes should respect the dignity of human beings. The challenge, however, is to assess whether or not the process adopted has been fair and just. Many countries find themselves confronted with difficult situations. For instance, a State might have to decide whether or not it should extend modern medicine and modern health care to primitive tribal communities. Some might argue that this decision should be left to the communities themselves since they are best placed to calibrate the pace and manner of their modernization. On the other hand, others might argue that it is not morally right to deny access to primary health care and education to children in such communities. Easy answers to these sensitive questions are difficult to find. However, this cannot be the reason for not thinking through the validity of processes using the principles of human rights and justice. Effective and practical solutions to some of these issues can be found through public discussion and dialogue with multiple stakeholders.

III. The experience of India

Experience in India suggests that public debates and discussions centred around the right to development can contribute significantly to the formulation of new laws and policies that are particularly beneficial to the poor. Some of these initiatives are described below.

National Population Policy 2000. The formulation of the National Population Policy 2000 was strongly influenced by a network of civil society organizations, prominent citizens and social activists who advocated successfully to keep coercion, penalties and disincentives out of India's family planning programmes. The network campaigned to highlight the importance of women's empowerment and a rights-based approach. It advocated that population stabilization is best achieved by seeking the cooperation of people, by treating women with respect and by recognizing the human rights of individuals.[5] Such a campaign and the public debates it generated had a positive effect in keeping at bay the views of those who supported population "control" and called for limiting the number of children a family (or woman) could have. The network used evidence to argue why enforcing a one-child norm like China, or even a two-child norm, is impractical, unnecessary and undesirable. In countries of South Asia and China, with a strong son preference, such restrictions on family size inevitably promote discrimination against girl children. Imposing penalties makes little sense when most people, even the poorest, those living in rural areas and those belonging to socially disadvantaged communities, want to have fewer children. Moreover, any attempt to impose penalties is biased against the poor, the illiterate and socially disadvantaged groups in society, the same groups that have historically faced discrimination and neglect.[6] The network's efforts paid off. India's National Population Policy 2000 affirms the commitment of Government to "voluntary and informed choice and consent of citizens while availing of reproductive health care services, and continuation of the target free approach in administering family planning services".

Right to Food Campaign. The Right to Food Campaign is an informal network of organizations and individuals committed to the realization of the right to food in India. It was formally launched when a writ petition was submitted to the Supreme Court in April 2001 by the People's Union for Civil Liberties, Rajasthan, demanding that the country's huge food stocks should be used without delay to protect people from hunger and starvation. The Campaign believes that the primary responsibility for guaranteeing basic entitlements rests with the State. Realizing this right requires not only equitable and sustainable food systems, but also entitlements relating to livelihood security such as the right to work, land reform and social security.[7] In addition to generating strong evidence for advocacy, the Campaign has also used the judiciary to extract several benefits for the poor. The petition filed in April 2001 led to prolonged public interest litigation. Supreme Court hearings were held at regular intervals and several "interim orders" have been issued from time to time. However, it soon became clear that the legal process alone would be insufficient. This motivated the Campaign to build stronger public support and a wider coalition for the right to food. It initiated a wide range of activities including public hearings, rallies, protest marches, conventions, action-oriented research, media advocacy and lobbying with Members of Parliament to further the demands. The Campaign has had a strong influence on many matters besides the right to food. The Campaign made a significant contribution to the new initiative to introduce cooked midday meals in all primary schools following a Supreme Court order of April 2004 and in influencing the Indian Parliament to enact the Mahatma Gandhi National Rural Employment Guarantee Act in August 2005. The Campaign continues to play an important role in shaping a National Food Security Bill under consideration by the Government of India. Other areas of its contribution include the universalization of the Integrated Child Development Services for children under the age of 6, the revival and universalization of the public distribution system, social security arrangements for those who are not able to work and equitable land rights and forest rights.

Right to Information Act 2005. Founded in 1996, the National Campaign for Peoples' Right to Information, a platform of over 350 individuals and organizations, has played, and continues to play, a critical role in promoting the right to information. This is a major part of the Campaign's commitment to

[5] Sen, in "Population policy", presents several philosophical and other arguments denouncing the use of coercion and arguing in favour of cooperation as the preferred and only way to achieve rapid population stabilization. Also see A.K. Shiva Kumar, "Population stabilization: the case for a rights-based approach", *Journal of the National Human Rights Commission* (India), vol. 2 (2003).

[6] See the arguments in A.K. Shiva Kumar, "Population and human development: contemporary concerns", in *Handbook of Population and Development in India*, Pradeep Panda, Rajani Ved and A.K. Shiva Kumar, eds. (New Delhi, Oxford University Press, 2010).

[7] See the Campaign's website, www.righttofoodindia.org/.

make the Government and society more transparent and accountable. In the beginning, the Campaign's primary objective was to bring in a national law facilitating the exercise of the fundamental right to information. As a first step, in 1996, the Campaign and the Press Council of India formulated and submitted to the Government an initial draft of a right to information law. In response, following years of advocacy and public discussion, the Government introduced the Freedom of Information Bill in Parliament in 2002, a watered-down version of the 1996 bill drafted by the Campaign and others. In August 2004, based on extensive discussions with civil society groups, the Campaign forwarded to the National Advisory Council a set of suggested amendments to the Freedom of Information Act 2002. The Council endorsed most of the suggested amendments and recommended them to the Prime Minister of India for further action. These formed the basis of the subsequent Right to Information Bill introduced in Parliament in December 2004. However, this bill, as introduced in Parliament, had many weaknesses. Most significantly, it did not apply to the whole country but only to the Union Government. The public outrage as well as the sustained efforts of the Campaign forced the Government to review its stance and ultimately endorse the stand taken by the Campaign in most matters. During the next session of Parliament, the bill was passed after more than 100 amendments had been introduced by the Government to accommodate the recommendations of the Parliamentary Committee and the Group of Ministers. Most significantly, the jurisdiction of the bill was extended to cover the whole of India. The Right to Information Act came into effect all over India in October 2005. Since then, the Campaign has been a driving force behind the enactment and proper implementation of the Act.[8]

National Commission for the Protection of Child Rights 2007. Strong advocacy for child rights by several non-governmental organizations, national and international, led India, through an Act of Parliament, to set up the National Commission for Protection of Child Rights in March 2007. The Commission's mandate is to ensure that all laws, policies, programmes and administrative mechanisms are in consonance with a child rights perspective as enshrined in the Constitution of India and also in the Convention on the Rights of the Child. The Commission adopts a rights-based perspective to:[9]

- Guide public awareness, protect children's rights and create a moral force to stand by children
- Identify gaps in policy and legal frameworks and make recommendations to ensure adherence to rights-based perspectives
- Take up specific complaints that come up before it for redressal of grievances
- Take up *suo moto* cases, summon the violators of child rights, present them before the Commission and recommend to the Government or the judiciary action based on an inquiry
- Undertake research and documentation to generate evidence to ensure protection and promotion of child rights

The Commission has become a strong voice for the protection of child rights. Following the lead of the Government of India, many state governments are also setting up state commissions for the protection of child rights.

Right of Children to Free and Compulsory Education Act 2010. Another landmark achievement of sustained campaigning by a number of civil society organizations has been the eighty-sixth amendment to the Constitution of India making education a fundamental right of children. Enacted on 1 April 2010, this law provides for free and compulsory education to all children between 6 and 14 years. Every child in this age group is to be provided eight years of elementary education in an age-appropriate classroom in the vicinity of his or her neighbourhood. All costs that might prevent a child from accessing school will be borne by the State, which shall have the responsibility of enrolling the child as well as ensuring attendance and completion of eight years of schooling. No child shall be denied admission for want of documents; no child shall be turned away if the admission cycle in the school is over; and no child shall be asked to take an admission test. Children with disabilities will also be educated in mainstream schools. All private schools shall be required to enrol children from weaker sections and disadvantaged communities in their incoming class to the extent of 25 per cent of their enrolment by simple random selection. No seats in this quota can be left vacant. These children are to be treated on a par with all the other children in the school and will be subsidized by the State. All schools are required to adhere to prescribed norms and standards laid out in the Act. Schools that do not fulfil these

[8] See the Campaign website at http://righttoinformation.info.
[9] See the Commission website at http://ncpcr.gov.in.

standards within three years will not be allowed to function. All private schools are required to apply for recognition. Norms and standards of teacher qualification and training have been laid down. Teachers in all schools will have to subscribe to these norms within five years.[10]

Several features characterize the acceptance and adoption of rights-based policies and laws in India. Most striking is the role of strong networks and campaigns in championing such policies and legislation. The campaigns have invested resources in building a strong coalition of support by generating evidence in support of their arguments, disseminating the findings, generating public discussion and communicating more widely with a broad audience. Such efforts have been backed by strategic forms of protest that have attracted the media to highlight and keep alive the issues in the public agenda. The campaigns have also had to resort to judicial interventions, for instance, in matters relating to enforcement of the right to food where the Supreme Court has played a key role in guaranteeing rights to children. Several more laws that recognize the human rights and dignity of people are under consideration in India. These include the Right to Health Bill, the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill, the National Food Security Bill as well as the Domestic Workers (Registration, Social Security and Welfare) Act. These bills have been the subject of intense public discussions and debate largely due to the advocacy and backing they have from organized networks. While support for rights-based approaches to policy is gaining momentum, there are several practical challenges faced by both the State and human rights activists.

IV. Challenges

The first real challenge has to do with resources. The State needs sufficient financial and other resources as a prerequisite for the fulfilment of the fundamental rights of every citizen. No country, for example, can assure good quality education for every child, maternal benefits for every mother, safe drinking water, adequate nutrition or health care for all without adequate resources. Dealing with the issue of financial resources is as much a matter of political priorities as it is of economics. Several steps are involved in ensuring adequacy of resources. Effective economic policies are needed to generate adequate growth. These ought to be accompanied by effective tax policies in order to mobilize adequate financial resources for investment in development. Major opposition to raising taxes or introducing new taxes often comes from prosperous business groups, property owners and high-income earners. Political opposition is also common when it comes to withdrawal of "perverse" subsidies or even rationalizing of bus fares, water and electricity tariffs. These seemingly straightforward economic decisions take on political overtones as a result of which economic rationality is often compromised. Once resources have been mobilized, an equally serious challenge is to ensure adequate allocations to the appropriate sectors. Powerful vested interests and influential lobbies often make it difficult for the voices of the poor to be heard; this typically distorts patterns of public investment and expenditure. Correcting such distortions involves taking firm political decisions. The strong lobby behind military spending in both developed and developing countries often prevents even minor reallocations from defence to the social sectors. Public finance decisions should be guided by economic reasoning and not by political opportunism. Another important challenge has to do with assessing how the money is spent, where it goes and on whom it is spent. No poor country can "afford" waste, leakage and inefficiency. Ultimately, what is needed most is strong political determination to end corruption and malpractice.

The second challenge has to do with effective leadership. Political commitment and strong leadership among different stakeholders are essential for building a consensus and for mobilizing public support for a right to development approach. Such leadership is sadly lacking in many bureaucracies, in the judiciary, in local governments and in the private sector, especially when it comes to pro-poor reforms. Many nations, including India, tend to exhibit impressive leadership (and concern) for economic reforms. This is evident, for instance, from the recent discussions surrounding the global recession, disinvestment, liberalization and globalization. But the same kind of intellectual energy is sorely missing when it comes to health, education or social protection for the poor. Few Governments, for example, have taken seriously their constitutional pledge, as well as the ratification of several international instruments, to assure basic rights to citizens. The Declaration of Alma-Ata, adopted in 1978 by the International Conference on Primary Health Care, called for health for all by the year 2000. The year has come and gone and many developing countries are nowhere close to attaining the goal. Nations pledged in 1990 at the World Sum-

[10] For details, see www.icbse.com/2010/education-rte-act-2009/.

mit for Children to fulfil many goals to ensure the survival, protection and development of children. Once again, these goals have not been met. Similarly, many leaders have failed to generate much-needed public support for the Millennium Development Goals and deliver on the promises made to people.

Deficiencies in assessment and evaluation pose yet another challenge to adopting a right to development approach. Little effort is made to gather specialized data on many vital dimensions of human rights and progress. For instance, in the field of education, many developing countries have failed to put in place systematic ways of assessing the learning achievements of children. As a result, it becomes difficult to judge the usefulness of many educational interventions such as improved teaching methods, revising the curriculum or increasing the number of teachers and classrooms. Similarly, while States put out data on access to safe drinking water, there is no systematic way of assessing the quality and safety of drinking water. Specialized and systematic data are seldom gathered on health. Data disaggregated by gender, location, ethnicity and so on are also not readily available in most countries. Issues relating to standardization of definitions and methodology, timing and quality of data need to be addressed as well. At the same time, it is important to move beyond reporting of numbers to evaluating progress by shifting attention away from geographical regions (rural-urban, provinces and districts) to concentrating on the well-being of people. This would require gathering information on progress made by different segments of society: women and men, children living in different regions, communities belonging to socially backward or disadvantaged groups and so on. Evaluations should focus on learning, non-discrimination and accountability. This calls for new and improved evaluation methodologies and instruments for assessing the complex realities of development.

The fourth challenge has to do with accountability and learning. Accountability, and therefore responsibility, lies at the heart of a right to development approach. Traditionally, accountability has been associated with financial accounting, reporting and audit. From a human rights perspective, accountability is to people, not to financial institutions and donors. Accountability is intended to promote awareness, transparency and learning. The stakeholder is required to reflect on why an intervention succeeded or didn't. Did the agency fulfil the role and responsibility assigned to it? Was the failure due to lack of commitment, shortage of human resources, lack of capacity, or plain negligence? Has the agency given sufficient "voice" to the poor and underrepresented? Did the agency provide any early warning signals in the event of a "failure"? Did the agency initiate adequate steps to prevent mismanagement or collapse of the programme? Unfortunately, the culture of systematic development evaluation has yet to permeate many societies.

A fifth challenge has to do with partnerships and participation. Involving stakeholders at all levels—political, administrative and, particularly, the community level—is crucial to the success of pro-poor interventions. It is especially important to emphasize the participation of women. Active engagement and participation of women in decision-making has much to do with the way society views women's contribution, i.e., as marginal and not quite as meaningful as men's contribution. However, there are several issues that arise when the idea of participation is put into practice. Despite the well-established agency of women, there are far too few women involved in addressing issues of human development and resolving conflicts. It is easy to argue that processes must prevent both "unfair inclusion" and "unjust exclusion". It is also easy to emphasize that the consultation process must include non-governmental organizations (NGOs), civil society organizations, academia, the private sector, parliamentarians and others who have a role to play in the attainment of the Millennium Development Goals. It is equally important to argue for an open process of consultation with the intention of mobilizing the support of Government, civil society organizations and others in accelerating actions towards the Goals. However, in most cases, the responsibility for soliciting such participation and managing the process rests with the Government. And this is where some of the problems arise. Many Government officials have limited contacts with civil society movements that are typically seen as being adversarial to State policies and programmes. Few have the motivation to include NGOs openly and willingly in the policy formulation exercise. Nor do many Government officials have the necessary skills to resolve conflicts and offer leadership when such partnership is encouraged.

A last challenge has to do with weaknesses in legal frameworks. A major platform of the right to development is the legal backing for essential entitlements and access to remedy when these entitle-

ments are violated. However, in many countries, laws themselves are weak and even outdated.[11] For example, discriminatory personal law governs legal relations in matters such as marriage, divorce, maintenance, child custody and inheritance. In many African countries, it is customary property law that denies women equal access to property. Similarly, domestic violence and child sexual abuse are not explicitly seen as "legal" issues that require the law to offer protection to citizens. Laws relating to violence themselves constitute the greatest barrier to justice for women. In India, for instance, the definition of rape excludes all forms of sexual assault other than penetrative intercourse. The age of consent is defined as 15 years, contradicting the definition of an adult woman as one who is above 18 years of age. Rape by the husband is not considered an offence unless the "wife" is under 12 years of age, even though marriage with a minor is itself a crime. And women who cannot show physical proof of having resisted rape, in the form of injuries, are generally assumed to have consented. Also, the low conviction rates, apart from reflecting gross inefficiencies in the capacity of investigative agencies, tend to highlight other gaps in the system. Most citizens, and especially the poor, have very limited access to justice and legal aid in many countries. The thought of hiring a lawyer to get justice is frightening, if not prohibitively expensive for most citizens. An even more serious problem has to do with the mindsets and beliefs of lawyers and judges themselves who do not see injustices in the patterns of social arrangements governing the lives of ordinary people. They bring their own prejudices into decision-making. Compounding all this is the weak machinery for enforcement of legislation, which contributes to inordinate delays in the delivery—and thus denial—of justice, especially to the poor.

[11] See, for instance, the discussion on women's rights in *Human Rights of Women: National and International Perspectives*, Rebecca Cook, ed. (Philadelphia, University of Pennsylvania Press, 1994) and Kirti Singh, "Obstacles to women's rights in India" (ibid.), for a comment on legal obstacles facing the implementation of legal rights in India.

V. Concluding remarks

The right to development approach offers valuable insights to policy formulation needed to attain the Millennium Development Goals. This concluding section identifies a few areas where strengthened actions are likely to further advance the rights agenda.

To begin with, it is extremely important to create a culture in society where human rights are recognized, respected and promoted. It is equally important to spell out a theory of change and visualize the process of social transformation in a right to development approach. This exercise needs to begin by generating public awareness of and support for the universal values and principles governing human rights. The United Nations Millennium Declaration,[12] for instance, asserts the importance of six fundamental values: freedom, equality, solidarity, tolerance, respect for nature and shared responsibility. These values need to become a part of the public discourse. At the same time, efforts must be made to highlight instances of violations of human rights, especially when they are silent and invisible. More appropriate research, analysis, assessment, documentation and public debates are needed to educate policymakers and society on the nature of violations and the types of interventions that could yield desired outcomes. Realizing the Millennium Development Goals will also depend, to a large extent, on the fulfilment of goal 8, the commitments by rich nations to devote financial resources to realizing the Goals. It is necessary to build public pressure on "rich" countries to meet their commitments to end global poverty. Finally, achieving the Goals requires that policy discussions take place not in the confines of Government offices or academic institutions, but in open public spaces. Public reasoning and public support strengthen the hands of politicians and policymakers to take tough decisions. Building effective public pressure and public vigilance, which lie at the heart of the right to development approach, should become central to public action.

[12] General Assembly resolution 55/2.

A regional perspective: article 22 of the African Charter on Human and Peoples' Rights

*Obiora Chinedu Okafor**

> The issue central to each of these [developing] countries, and dominant in their posture towards the industrialized nations, is development … It is the most critical of the myriad mix of fibres that form the fabric of international relations. Unless wise policies replace the often short-sighted activities that are now all too often evident in countries both North and South, humankind faces an increasingly bleak future. The preferred policy mix, unquestionably, *must include an element of law.*
>
> Ivan Leigh Head[1]

> 1. 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.
>
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.
>
> Article 22 of the African Charter of Human and Peoples' Rights[2]

I. Introduction

This chapter is framed by three principal objectives. The first is to analyse (from a globally contextualized sociolegal perspective) the normative properties, strengths and weaknesses of article 22 of the African Charter of Human and Peoples' Rights, one of the precious few hard law guarantees of a right to development that currently exist in the realm of international human rights. The second major objective of the chapter is to tease out and articulate what, if anything at all, can be learned from an understanding of this region-specific provision by those who have been tasked with imagining what a possible global treaty on the right to development might look like. Entailed by these first two goals of this chapter is an attempt at the "implementation" of the right to development as it is articulated under article 22; an attempt to develop ways of making the right to development "right", not just by strengthening its capacity to function as a legal norm, but also by enhancing its capacity to contribute to "good" development praxis.

The partial "from-Africa-toward-the-globe" gaze of this analysis is only fitting given the highly significant African roots of the specific version of the idea of the right to development that has become ascendant.[3] As is now fairly well known, the con-

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[1] Ivan Head, "The contribution of international law to development", *Canadian Yearbook of International Law*, vol. 25 (1987), p. 30. Emphasis added.

[2] See also article 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which provides for a right of African women to "sustainable development" (art. 19). In a similar vein, article 20 of the Lomé IV Convention of 1989 does provide for a limited right to development, but that document is not an international human rights treaty. Editor's note: the so-called "Lomé I-IV" agreements between the African, Caribbean and Pacific States and the European Union, were superseded by the Cotonou Agreement of 2000; see chapter 19 of the present publication.

[3] Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff, 2003), pp. 298-299. See also T. Akinola Aguda, "Human rights and the right to development in Africa", Lecture Series No. 55 (Nigerian Institute of International Affairs, 1989); Joseph Oloka-Onyango, "Human rights and sustainable development in contemporary Africa: a new dawn, or retreating horizons?", *Buffalo Human Rights Law Review*, vol. 6 (2000), p. 59; and the Declaration on the Right to Development.

cept of the right to development is thought to be originally African, as it was first stated as such by Doudou Thiam, Minister of Foreign Affairs of Senegal, in Algiers in 1967. The then minister referred to the right to development as a right that must be proclaimed "loud and clear for the Nations of the Third World".[4] The topic began to attract interest after Kéba M'Baye, Chief Justice of the Supreme Court of Senegal, lectured on the topic at the International Institute of Human Rights in Strasbourg, France, in 1972. Justice M'Baye, argued that "in the name of justice and peace, it is necessary to double efforts to re-encounter the true foundations and sources of the inalienable right that every human being has–and that all human beings collectively have–to live and to live better, that is, to equally benefit from the goods and services produced by the international or national community they belong to".[5] In this connection, it is also worth noting the contribution of the Algerian scholar Mohammed Bedjaoui on the international dimension of the right to development, declaring the real obligation of the advanced countries for the development of the less economically advanced ones within the framework of a new international law. It is also worth noting the concomitant call for an international social law that acknowledges the proletarian position of some nations within the international community.[6]

This germinal African contribution to what Upendra Baxi has referred to as "the development of the right to development"[7] is traceable in part to the historical experience of exploitation and underdevelopment that has been widely and intensely experienced by Africans, and to the conviction among not a few African legal thinkers and political leaders (reflected even in global documents) that international law must play an important role in the struggle to ameliorate those circumstances.[8]

The widespread affirmation of the right to development among African thinkers and leaders did not, however, mean that the kind of effusive enthusiasm for the recognition of a right to development that was expressed by prominent Africans such as Mohammed Bedjaoui was warmly received in all circles.[9] As Baxi has noted, positive responses to the recognition of this right, such as Judge Bedjaoui's famous valorization of the right as "the alpha and omega of human rights",[10] have frequently been met with deep scepticism among scholars like Yash Ghai, who view any attempt to recognize or protect the right to development as diversionary and as capable of providing increasing resources and support for State manipulation and repression of civil society.[11]

In any case, ever since the conclusion of the World Conference on Human Rights, held in Vienna in 2003, it has been clear to the discerning observer that, even on the global plane, what Baxi has referred to as the "jurispotency" of the right to development can no longer be in doubt. Part I, paragraph 10, of the Vienna Declaration and Programme of Action (which was adopted by 171 countries, including the United States of America and every Western State) declared quite clearly that the right to development is a universal and inalienable right and an integral part of the corpus of fundamental human rights.[12] What is more, the existence of article 22 of the African Charter is proof positive that this right transcends the realm of soft international human rights law, albeit only at a regional, African level. As interesting in this connection is the fact that, whatever its formal legal status, the right to development has certainly exhibited what I have long referred to elsewhere as the tripartite properties of law generation (helping to catalyse new norms); law regulation (shaping the meaning and limits of already existing and new norms); and law (de)legitimation (helping render existing or proposed norms untenable in the popular and/or State consciousness).

Nevertheless, the fact remains that despite the important–if admittedly limited—value that hard law norms can add to the development struggle, no global treaty exists as yet to frame and regulate, as much as is possible, the relations in this regard between the States of the North (who by and large control the means of development) and the States of the South (who by and large require the infusion of

[4] Ouguergouz, *The African Charter,* p. 298.
[5] Kéba M'Baye, "*Le droit au développment en droit international*", in Études de droit international en l'honneur du juge Manfred Lachs, Jerzy Makarczyk, ed. (Martinus Nijhoff , 1983), p. 165, non-official translation. Justice M'Baye made reference here to J.M. Domenach, *Aide au développment*, obligation morale?, and Roger Garaudy on the definition of community in Islam.
[6] Mohammed Bedjaoui, "The right to development", in *International Law: Achievements and Prospects*, Mohammed Bedjaoui, ed. (Dordrecht, Martinus Nijhoff and UNESCO, 1991), p. 1178.
[7] Upendra Baxi, "The development of the right to development", in *Human Rights in a Post Human World: Critical Essays* (Oxford University Press, 2007), p. 124.
[8] "An agenda for development: report of the Secretary-General" (A/48/935), para. 3, and Anselm Chidi Odinkalu, "Analysis of paralysis or paralysis by analysis? implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights", *Human Rights Quarterly*, vol. 23, No. 2 (May 2001), p. 347.
[9] Bedjaoui, "The Right to Development", pp. 1177 and 1182.
[10] Ibid. See also Baxi, "The development of the right to development", p. 124.
[11] Yash Ghai, "Whose human right to development?", Human Rights Unit occasional paper (Commonwealth Secretariat, 1989).
[12] Obiora Chinedu Okafor, "The status and effect of the right to development in contemporary international law: towards a South-North 'entente'", *African Journal of International and Comparative Law*, vol. 7 (1995), p. 878.

those resources). It is against this background, i.e., within the context of the existence of a normative gap, that this globally contextualized analysis of article 22 of the African Charter (a region-specific treaty), and of the lessons for global norm-making that might be learned from its particular normative character, makes sense.

In order to accomplish its two major objectives, this chapter is organized into six main sections (this introduction included). In section II, I will attempt—as much as is possible—to tease out and develop the nature of the concept of development that animates article 22. This exercise of necessity draws from the surrounding international discourse on the concept of development. Section III is devoted to understanding the identity and nature of the rights holders; the "peoples" upon whom the right to development has been explicitly conferred by article 22. In section IV, I consider the question of the identity and nature of the duty bearers; those actors on whose shoulders article 22 has rested the weighty responsibility of ensuring that all peoples enjoy their right to development. Section V focuses on the nature of the legal obligation that these duty bearers must bear under article 22. For example, is this duty to be discharged immediately or is its discharge to be progressive? Section VI concludes the chapter, and proposes an African Charter-informed sociolegal agenda that might help frame the character of a possible global treaty on the right to development.

II. The concept of development in article 22

Despite the fact that the character of the particular conception or model of development that is adopted (neoliberal or social democratic) is key to the success or failure of the effort to secure the enjoyment of the right to development,[13] article 22 and the other documents that recognize and articulate that right are hardly clear as to the identity of their preferred development conceptions or models.[14]

However, certain conceptual guideposts are available to inform our understanding of the meaning of development. These are so relatively well established as not to require lengthy discussion in this short chapter. They are that development should no longer be conceived solely in terms of economic growth;[15] that development at its core involves the fostering of equity within and among States;[16] that gender interests must be "mainstreamed" into the development design and practice;[17] that participatory development is to be much favoured over the top-down model;[18] and that a rights-based approach is useful.[19] In addition, article 22 explicitly disaggregates its concept of development into economic, social and cultural components.

Given the above *tour d'horizon*, which identified the key cornerstones that seek to demarcate and distinguish "good" from "bad" development praxis, what then might one offer as a working definition of the concept of development as a widely accepted and proper understanding of that term? In my own view, the United Nations Development Programme (UNDP) has quite correctly conceived of development in terms of "human development". It has in turn viewed the concept of human development itself as denoting the creation of "an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests".[20] If this is what development means, or ought to mean, in our time, then the right to development should in turn mean the right to that kind of development; the right to the creation of the stated type of environment. To build upon the work of Arjun Sengupta, this can be viewed as encompassing three main aspects: the right to the means of creating that environment; the right to a process of creating that environment; and the right to the benefits that flow from the creation of such an environment.[21]

The foregoing analysis begs the question whether this is the particular conception of development (suitably limited by the so-called development "dos and don'ts") that has found expression in article 22. The jurisprudence of the African Commission has gradually evolved over time and does currently offer considerable insight into the character of the conception

[13] Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Oxford, Hart, 2005), pp. 263-264.
[14] Ouguergouz, *The African Charter*, p. 307.
[15] Banda, *Woman, Law and Human Rights,* p. 264, and Aguda, "Human Rights" p. 19.
[16] See, for example, World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (New York and Washington, Oxford University Press, 2005), p. 7 and Simeon Ilesanmi, "Leave no poor behind: globalization and the imperative of socio-economic and development rights from an African perspective", *Journal of Religious Ethics*, vol. 32, No. 1 (2004), p. 72.
[17] Nsongurua Udombana, "The third world and the right to development: an agenda for the next millennium", *Human Rights Quarterly*, vol. 22, No. 3 (August 2000), p. 767, and Banda, *Woman, Law and Human Rights,* pp. 265 and 269-285.
[18] A/48/935, para. 220.
[19] Kofi Quashigah, "Human rights and African economic integration", *Proceedings of the African Society of International and Comparative Law*, vol. 8 (1996), p. 218. See also Andrea Cornwall and Celestine Nyamu-Musembi, "Putting the 'rights-based approach' to development in perspective", *Third World Quarterly*, vol. 25, No. 8 (2004), p. 1415.
[20] See http://hdr.undp.org/en/humandev/.
[21] Arjun Sengupta, "The human right to development", *Oxford Development Studies*, vol. 32, Issue 2 (2004), pp. 183 and 192.

of development that animates article 22. On the one hand, in the *Bakweri Land Claims* case, possibly the first case where the African Commission was seized with a communication that was explicitly grounded in article 22, the complainants framed their main grievance, namely the concentration of their historic lands in non-native hands, in terms of the violation of their right to development under article 22.[22] As the matter did not get past the admissibility stage, the Commission did not get a chance to pronounce on this issue.

The opportunity to make such a pronouncement nevertheless materialized when the Commission considered the case of *Kevin Mgwanga Gumne, et al.* v. *Cameroon,*[23] which is also known as the "*Southern Cameroon"* case. The complainants alleged economic marginalization by the Government of Cameroon as well as denial of economic infrastructure. They contended that their lack of infrastructure, and in particular the relocation of an important sea port from their region, constituted a violation of their right to development under article 22 of the African Charter. The Commission's decision places considerable value on the discretion of States parties to decide on how scarce economic resources are to be allocated. It held that the respondent State was "under obligation to invest its resources in the best way possible to attain the progressive realization of the right to development …"[24] While agreeing that "this may not reach all parts of its territory to the satisfaction of all individuals and peoples, hence generating grievances",[25] yet that alone, in the Commission's judgement, could not be a basis to find a violation of article 22. It could be seen that not only did this decision prioritize political discretion; it also consigned the right to development to the conundrum of "progressive realization", a limitation more popular with the better-established kinds of economic, social and cultural rights.

But the Commission rendered what would perhaps be its most authoritative decision on article 22 in the case *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council* v. *The Republic of Kenya,* otherwise known as the *Endorois* case.[26] This is also the first complaint of its kind in which the Commission found a violation of article 22. The main grievance of the Endorois community was that the Government of Kenya had failed to adequately involve them in the development process. Specifically, they claimed that they were neither consulted before a major developmental project that impacted their lifestyle was embarked upon nor were they compensated for its adverse consequences on that lifestyle. The project in question was the conversion into governmental game reserves of the lands around Lake Bogoria on which the pastoral Endorois community grazed livestock as well as performed religious ceremonies.

The Commission, in broad terms, placed the burden of "creating conditions favourable to a people's development"[27] on the Government. It held that it was not the responsibility of the Endorois community to find alternative places to graze their cattle or partake in religious ceremonies. Continuing, it held:

> The Respondent State [Kenya] … is obligated to ensure that the Endorois are not left out of the development process or [its] benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. *It finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter.*[28]

There is much to commend in the position of the Commission in this case. In addition to its satisfactory decision on behalf of the Endorois community, the Commission quite significantly developed what it describes as a two-part test for the right to development. It held that the right enshrined in article 22 of the African Charter "is both *constitutive* and *instrumental*, or useful as both a means and an end".[29] According to the Commission:

> A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognizing the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.[30]

Yet this decision did not quite answer all the questions regarding the proper dimensions of the right to development under the African Charter. One such question that stands out in the estimation of some schol-

[22] African Commission on Human and Peoples' Rights, *Bakweri Land Claims Committee* v. *Cameroon*, communication No. 260/2002, *African Human Rights Law Reports* (2004), p. 43.
[23] African Commission on Human and Peoples' Rights, communication No. 266/2003, available at http://caselaw.ihrda.org/doc/266.03/view/.
[24] Ibid., para. 206.
[25] Ibid.
[26] African Commission on Human and Peoples' Rights, communication No. 276/2003, available at http://caselaw.ihrda.org/doc/276.03/view/.
[27] Ibid., para. 298.
[28] Ibid. (Commission's emphasis).
[29] Ibid., para. 277 (Commission's emphases).
[30] Ibid. Editor's note: for further discussion on this case, see chapter 12 of the present publication.

ars is that the African Commission did not "outline the contours of a development process … which runs counter to the state's aspirations of modernization and economic development".[31] The authors argue, however, that the Endorois community's insistence on the procedural rights of participation and consultation, as well as their emphasis on equity, is intended to provide space for such a developmental paradigm.[32]

As important in this regard is the treatment that the Commission had earlier given to the *Ogoni* case, which emanated from Nigeria.[33] Although this particular communication did not explicitly allege any violation of article 22, the Commission, while finding that conduct of the Government of Nigeria towards the Ogoni people of the Niger Delta had violated articles 16 (right to health) and 24 (right to environment) of the African Charter, declared that:

> Undoubtedly and admittedly, the government of Nigeria, through the [Nigerian National Petroleum Company], has the right to produce oil [Nigeria's principal developmental resource], the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken … which would have protected the rights of the victims of the violations complained of was not taken.[34]

This quotation suggests a reading of the relevant provisions that subscribes to a rights-based and rights-framed model of development, one in which the goal of development activities is imagined, at least in part, as the fulfilment of the economic and social rights of a people. It also suggests that the Commission is of the view that the people of Nigeria as a whole (through their Government) must have a right to the means, processes and outcomes of development. In another part of the decision, in which it found that the Nigeria had violated article 21 of the African Charter (the right of all peoples to freely dispose of their wealth and natural resources in their own interest), the Commission explicitly adopted the language of the complainant in chiding Nigeria's development praxis and condemning the fact that the Government "did not involve the Ogoni communities in the decisions that affected the development of Ogoniland".[35] Further down in its decision, the Commission argued that article 21 was designed to ensure "cooperative economic development" in Africa.[36] This was a clear endorsement of the participatory development imperative. If the African Commission could endorse that imperative in relation to article 21, there is no reason to suppose that it will not do the same in regard to article 22. Such holistic ways of reading the African Charter and the Commission's interpretations of that document are appropriate since, as Chidi Odinkalu has noted, one must take account of the interconnectedness and seamlessness of the rights contained in the African Charter.[37] Thus, although the above insights are gleaned from reading a case in which the list of provisions that were explicitly interpreted did not include article 22, the insights into the concept of development that were thereby gleaned are nevertheless useful as a reflection of the thinking of the African Commission on the very same kinds of concepts that also animate article 22.

Furthermore, although not an authoritative source of African Charter meaning, the view of Professor Oji Umozurike, a one-time chair and member of the African Commission and an eminent human rights scholar, is persuasive as to the conception of development that animates article 22. After all, does not international law recognize the opinions of the most highly qualified jurists as a source of legal meaning? Umozurike seems to think that the "participatory development" and "equitable distribution" imperatives that are required by the Declaration on the Right to Development form part of the "right" conception of the developmental right. As such, it is not far-fetched to infer that article 22 may be viewed in this way by at least some members of the African Commission. In any case, the discussion in the immediately preceding paragraph corroborates Umozurike's views, at least with regard to the African Commission's subscription to the participatory development imperative.

On the whole, therefore, given the nature of the emergent international consensus on the "dos and don'ts" of development praxis and the evidence canvassed above with regard to the specific case decided by the African Commission under the African Charter, it seems fairly clear that, while much remains obscure as to the nature of the concept of development in article 22 and no detailed developmental programme can be deciphered from a reading of that provision, certain cornerstones have been laid that reveal its likely broad characteristics. Thus, any conception of development under article 22 must, at a minimum: (a) frame the process and goals of development as constituted in part by the enjoyment of peace; (b) envision

[31] A. Korir Sing' Oei and Jared Shepherd, "'In land we trust': the Endorois' communication and the quest for indigenous peoples' rights in Africa", *Buffalo Human Rights Law Review*, vol. 16 (2010), p. 81.
[32] Ibid.
[33] African Commission on Human and Peoples' Rights. *Social and Economic Rights Action Center and Center for Economic and Social Rights* v. *Nigeria*, communication No. 155/1996, available at http://caselaw.ihrda.org/doc/155.96/view.
[34] Ibid., para. 54.
[35] Ibid., para. 55.
[36] Ibid., para. 56
[37] Odinkalu, "Analysis of paralysis" (see footnote 8), p. 341.

the process and ends of development in part through a human rights optic; (c) view the gender, ethnic and other such inequities that exist in the distribution of developmental benefits as a lack of development; (d) imagine the people's participation in their own development as an irreducible minimum; and (e) imagine the right to development as inclusive of the rights to the means, processes and outcomes of development. Perhaps any anticipated global treaty on the right to development ought to take a cue from this list.

III. Who are the right holders contemplated by article 22?

According to article 22, the right to development is to be claimed and enjoyed by "all peoples". Under that provision, therefore, "peoples" are the relevant right holders. Yet, although the term "peoples" appears as well in a number of other provisions of the African Charter, it is nowhere defined in that treaty. As Richard Kiwanuka's influential work on this issue has taught us, this definitional gap was the product of a deliberate and calculated attempt by the drafters of the African Charter to avoid what they saw as a difficult discussion over the precise meaning of that term.[38]

It is little wonder then that there remains significant division, even today, as to the meaning of the extant term among the most prominent commentators on article 22 (or similar provisions). One important scholarly debate concerns whether or not the term "peoples" includes individual citizens of a given State; whether an individual could claim a right to development under article 22. Certainly, ambiguity does exist on the international plane regarding this question.[39] Indeed, the Declaration on the Right to Development does state that the right to development is both an individual human right and a right of peoples.[40] Yet, as Ouguergouz has recognized, given the guarantees of economic and social rights that are now present in all the main regional and global human rights regimes, viewed strictly as an individual right, the right to development does not add a great deal to the concept of human rights. Although its benefits can of course be enjoyed individually, the developmental right tends to make more practical sense as a collectively claimed right.[41] In any event, the ambiguity that exists at the international level is not reproduced at the African level. Article 22 is crystal clear in its identification of "peoples" (as opposed to individuals) as the subjects/holders of the right to development that it guarantees. But this does not mean that the meaning of the concept of "peoples" in article 22 is as clearly stated.

As such, a related and increasingly important debate is whether or not the term "peoples" includes sub-State groups (such as so-called ethnic groups and national/regional minorities) or enures exclusively to States as the representatives of the entire populations of their countries. Just as there is little doubt today that sub-State groups, such as ethnic minorities, can hold rights under international law,[42] as we shall see later on in this section, the African Commission has declared as well that these groups are among the rights holders envisaged by article 22. This appears to lay to rest the previous debate around this question. On one side of this now *ancien* debate is Judge Ouguergouz, who has concluded that "the 'people-state' [that is, the entire population of a State], like the 'people-ethnic group' are the subjects of the right to development, but to varying degrees".[43] This view is supported by Wolfgang Benedek's declaration that the concept of "people" in the African Charter is broad enough to include ethnic groups and minorities,[44] and by Evelyn Ankumah's conclusion that the chances of success of a right to development claim can be strengthened if the group concerned can show that it is a minority or oppressed group which is experiencing discrimination.[45] On the other side of the conceptual fence sits Kiwanuka who, while conceding that the term "peoples" (as used in the African Charter) could under certain circumstances include sub-State groups,[46] argues nevertheless that we must "equate 'peoples' with the state where the right to development [under article 22] is concerned" since in his view "an entity less than the state cannot effectively contest the right to development in the international arena".[47] Joseph Oloka-Onyango is of the view that this is the

[38] Richard Kiwanuka, "The meaning of 'people' in the African Charter on Human and Peoples' Rights", *American Journal of International Law*, vol. 82 (1988), p. 82. The African Commission restated the difficulty in defining the term "peoples" in the *Endorois* case when it found that "[t]he relationships between indigenous peoples and dominant or mainstream groups in society vary from country to country. The same is true of the concept of 'peoples'. The African Commission is thus aware of the political connotation that these concepts carry. Those controversies led the drafters of the African Charter to deliberately refrain from proposing any definitions for the notion of 'people(s)'" (*Endorois* case, para. 147).

[39] Ouguergouz, *The African Charter* (see footnote 3), pp. 299-300.

[40] Art. 1. See also Ouguergouz, *The African Charter* (footnote 3), p. 301.

[41] Sengupta, "The human right to development" (see footnote 21), p. 191.

[42] Kiwanuka, "The meaning of 'people'", p. 84.

[43] Ouguergouz, *The African Charter* (see footnote 3), p. 320.

[44] W. Benedek, *Human Rights in a Multi-Cultural Perspective: The African Charter and the Human Right to Development*, cited in Ouguergouz, *The African Charter* (see footnote 3), p. 320.

[45] Evelyn A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (The Hague, Martius Nijhoff, 1996), p. 167.

[46] Kiwanuka, "The meaning of 'people'" (see footnote 38), pp. 8-95.

[47] Ibid., p. 96.

very sense in which the term was understood by African leaders at the time of the adoption of the African Charter.[48] Given that almost every expert would agree that the human person is the central subject of development,[49] seen in their best light, the arguments put forward by scholars like Kiwanuka ought to be viewed as suggesting that the right to development under article 22 should be conceived of as the right of the entire population of the relevant State.[50] As such, Sengupta is right to suggest that when States claim that right, that claim can at best be on behalf of their entire population, and not in favour of the State qua State.[51]

What is more, at a minimum, Kiwanuka's argument that sub-State groups cannot effectively contest the right to development in the international arena incorrectly assumes that the international arena is the sole site of struggle for the realization of the right to development, thus discounting the domestic dimension of the right—a dimension that must in fact loom large in the context of a regional treaty such as the African Charter (which does not admit of the participation of any of the rich industrialized States against which the right to development can be claimed by African States). Within the domestic arena, there is no reason why a sub-State group, as a "people", cannot effectively contest the right to development against their own State. Have not peoples like the Ogoni of Nigeria or the Bakweri of Cameroon famously launched such claims?

In any case, as was suggested earlier, this debate is now somewhat passé. In my view, the African Commission—a pre-eminent interpretive agency in the present connection—has all but settled the debate. The Commission does in fact treat sub-State groups, especially ethnic groups, as the subjects of the peoples' rights that are protected in the African Charter. In the *Bakweri Land Claims Committee* case, although the matter ended at the admissibility stage because the complainants (a minority people within Cameroon) had not first exhausted domestic remedies before approaching the African Commission, the Commission did impliedly treat the Bakweri as a "people" under the African Charter. What is more, neither Cameroon nor the Commission raised the possible objection to the admissibility of this communication on the ground that it was not brought on behalf of "a people" within the meaning of article 22 of the African Charter, and that it was as such "incompatible" with that treaty. Since a matter that is grounded in article 22 can only be brought to the Commission by "peoples", the failure to dismiss the communication on that basis is at least implied evidence that this was not a significant concern to either the opposing party (which had a huge incentive to make all plausible arguments to secure the dismissal of the communication) or the African Commission. Furthermore, in the so-called *Ogoni* case, the African Commission found that Nigeria had violated the rights of the Ogoni people under a "sister" provision, the guarantee in article 21 that "all peoples shall freely dispose of their wealth and natural resources".[52] Clearly, the Ogoni, who are an "ethnic" minority group within Nigeria, were viewed by the Commission as a "people" within the meaning of article 21. Logic alone suggests that, had the Commission not viewed the Ogoni in this way, it could not have possibly come to the conclusion that their rights under article 21 had been violated by Nigeria. They would simply have had no rights under that provision! In any case, the Commission did make bold to make explicit reference in the concluding portions of its decision to "the Ogoni people" and "the situation of the people of Ogoniland".[53] All this will, of course, not be surprising to a keen student of that body's jurisprudence, given the Commission's earlier decisions in the now celebrated *Katanga* case,[54] as well as in the so-called *Mauritania* case.[55] In the earlier case, the African Commission clearly treated the people of Katanga Province (a sub-State group) in the former Zaire as a people within the meaning of at least one other provision of the African Charter.[56] In the latter matter, it had no difficulty in treating the ethnic black population of Mauritania as a people within the meaning of another provision of the same treaty.[57] The logic of these decisions is applicable by analogy to article 22.

And if any doubt still remains, suffice it to point out that the Commission's decision in the *Endorois* case was even more pointed in addressing the principal aspects of the debate, particularly in relation to article 22. Here, the Commission reiterated its inclination towards a normative view of the African

[48] Oloka-Onyango, "Human rights and sustainable development" (see footnote 3), pp. 59-60.
[49] Ouguergouz, *The African Charter* (see footnote 3), p. 302.
[50] Udombana, "The third world" (see footnote 17), pp. 768-770.
[51] Sengupta, "The human right to development" (see footnote 21), p. 191.
[52] *Ogoni* case (see footnote 33), paras. 55 and 58.
[53] Ibid., paras. 62 and 69.
[54] African Commission on Human and Peoples' Rights. *Katangese Peoples' Congress* v. *Zaire*, communication No. 75/1992, available at www.achpr.org/english/Decison_Communication/DRC/Comm.%2075-92.pdf.
[55] African Commission on Human and Peoples' Rights. *Malawi African Association* v. *Mauritania*, communication No. 54/1991, available at www.achpr.org/english/activity_reports/activity13_en.pdf.
[56] Obiora Chinedu Okafor, "Entitlement, process, and legitimacy in the emerging international law of secession", *International Journal on Minority and Group Rights*, vol. 9 (2001), p. 41.
[57] Odinkalu, "Analysis of paralysis" (see footnote 8), p. 346.

Charter as "an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of 'peoples'".[58] It also rendered the guarantees of article 22 claimable by sub-State entities like the Endorois community when it held:

> The African Commission, nevertheless, notes that while the terms "peoples" and "indigenous community" arouse emotive debates, some marginalized and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimized by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalized in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.[59]

Thus, not only is the African Commission's interpretation of the term "peoples" within articles 21, 22 and other similar provisions (as admitting of claims made by sub-State groups) legally sound, it is also sociologically and politically appropriate. This is so because, as suggested in the *Endorois* case and as Odinkalu has correctly pointed out, "in most African countries where the state is nowhere near as strong as it is in Europe and North America, the community often insures the individual against the excesses of unaccountable state power".[60] Such communities include the very kinds of sub-State groups that have been of concern in this chapter. As such, these sub-State groups are, at a minimum, as effective as the relevant States as the mechanisms for the economic and social development of the populations that constitute them. As witness the *Ogoni*, *Bakweri Land Claims* and *Endorois* cases, these sub-State groups are often forced by circumstances to struggle against their own States for the development of their communities. Thus, to deny these sub-State groups the normative resource provided by article 22 may, in many cases, amount to seriously impairing rather than advancing the development of their populations.

IV. Who are the duty bearers envisaged by article 22?

Following Judge Ouguergouz's work, and the basic tenets of *pacta sunt servanda*, I am of the view that article 22 of the African Charter ought to be read to impose the primary duty to ensure the exercise of the right to development on African States, the only States that are parties to that treaty.[61] Every African State therefore does have the primary duty to ensure the realization of the right to development of all the peoples within its territory. The African Commission said as much in the *Endorois* case when holding that States parties shoulder the "burden for creating conditions favourable to a people's development".[62] These same African States also bear the primary obligation of intervening internationally on behalf of all of their peoples in order to ensure their enjoyment of the right to development. These points are hardly controversial.

Much more controversial are arguments that posit that similar legal obligations are borne by, or ought to be imposed upon, such entities as the federating units within a federal State (such as Nigeria); the rich industrialized States and their development aid agencies; the United Nations; the international financial institutions (such as the International Monetary Fund and the World Bank); the World Trade Organization; transnational corporations (TNCs), and even international creditors (such as the members of the so-called Paris Club).

With regard to the legal position under the African Charter, as the *Ogoni* case demonstrates fairly clearly, it is of course not technically viable for any African people to bring a claim alleging the violation by any of the above-mentioned actors of its right to development under article 22 (or, for that matter, under any other provision of the African Charter), since none of those actors is a party to the African Charter. In the *Ogoni* case, the African Commission was technically unable to focus its formal attribution of fault in its decision on the Shell Petroleum Development Corporation, despite the very serious infractions by that TNC of the African Charter that had been alleged by the complainants and explicitly admitted by the new democratic Government of Nigeria.[63] And despite the Commission's firm finding that this TNC was heavily implicated in the violations of the rights of the Ogoni people, it was forced by the controlling technical legal logic to limit itself to the next best thing: holding the Nigerian State exclusively responsible for the combined actions of Nigeria and Shell, on the basis that Nigeria had an international legal responsibility to control the pernicious activities of private entities operating on its territory which are likely to seriously violate the rights of its citizens.[64] Although the Commission's reasoning is understandable, the

[58] *Endorois* case (see footnote 26), para. 149.
[59] Ibid., para. 148.
[60] Odinkalu, "Analysis of paralysis" (see footnote 8), p. 344.
[61] Ibid., pp. 308-320.
[62] *Endorois* case (see footnote 26), para. 298.
[63] *Ogoni* case (see footnote 33), para. 42.
[64] Ibid., paras. 57-58.

rather tortured nature of this sort of logic is all too evident.

Nevertheless, it is useful to consider, albeit briefly, whether the prevailing situation ought to be changed. Ought the rich industrialized States and their development aid agencies, the United Nations and the other non-State actors listed above bear legally enforceable development duties under provisions like article 22, or under a possible global treaty on the right to development? As to the possibility of the federating units within a federal State being construed as bearers of legal duties under article 22, or under any other similar legal provision, the experiences of the various Niger Delta peoples of Nigeria between 1999 and 2007 are instructive. During this period, the relatively well- endowed democratically elected governments of their own federating units did precious little to advance the right to development of their peoples while relentlessly blaming the federal Government for not improving the living standards of these same peoples. This suggests that such federating units ought to bear international legal obligations under provisions like article 22. After all, are not many of the Niger Delta federating units thought to be richer and much better economically endowed than many of the African countries which are parties to the African Charter? Yet, as these federating units are not parties to the African Charter and similar texts, and are in general not viewed as subjects of international law, it is difficult to see how this can be achieved in legal practice without a fundamental reconception of the norms of treaty-making and -implementation.

Regarding the question of the United Nations as a duty bearer of the developmental right, the United Nations report "An agenda for development" states that ´while national Governments bear the major responsibility for development, the United Nations has been entrusted with important mandates for assisting in this task" (A/48/945, paras. 12 and 139). Given how implicated the United Nations is in development praxis in Africa, ought that august organization be allowed to continue to exercise as much power as it does in Africa with little autonomously African hard legal regulation? Should the article 22 legal obligations be imposed on the United Nations by, for instance, inviting it to accede to the African Charter, or through the conclusion of a new protocol to that treaty? Article 1 of the African Charter seems to preclude this possibility, since it clearly states that it is the member States of the African Union that shall recognize the rights and duties enshrined in the treaty. Can this problem be addressed through the conclusion of a new global treaty on the right to development to which the United Nations shall subscribe in its own right, or which shall impose specific developmental obligations on the United Nations?

The other international actors listed above (such as the rich industrialized States and their development aid agencies,[65] the international financial institutions,[66] the World Trade Organization,[67] transnational corporations,[68] and even international creditors such as the so-called Paris Club)[69] are in a similar situation: they all tend to exercise enormous power with respect to the living developmental praxis of virtually every African country, without being constrained nearly enough by a corresponding degree of autonomously African hard legal regulation. None of them is a party to, or can possibly be held accountable under, the African Charter, at least not as that treaty is presently constituted. Whether or not this situation can in fact be remedied by the adoption of a new global treaty on the right to development is another question.

V. What manner of legal obligation is imposed by article 22?

Under article 1 of the African Charter, States assume the obligation to "adopt legislative or other measures to give effect" to the rights protected under that treaty. Read in consonance with the working definition of the conception of "development" adopted earlier in this chapter, States are therefore required to enact laws that support the creation of an environment in which people can develop their full potential and lead productive, creative lives in accordance with their needs and interests. Such laws must advance the ability of the relevant State properly to acquire and manage the means (resources) through which that environment can be created, support the process of creating that environment and help ensure the equitable enjoyment of the benefits that flow from that environment. One good example of a law that would accomplish most of these goals would be one

[65] See Cornwall and Nyamu-Musembi, "Putting the 'rights-based approach' to development in perspective" (footnote 19), p. 1433 (pointing out that despite their increasing use of rights-based development language, these largely Western donor agencies do not intend to be bound by any rights held by people in Africa and the rest of the South).

[66] See C. Weaver and S. Park, "The role of the World Bank in poverty alleviation and human development in the twenty-first century: an introduction", *Global Governance*, vol. 13, No. 4 (2007), pp. 461-462.

[67] A/48/935, para. 54 (arguing that difficult access to the world trading system is an enormous obstacle to development).

[68] Baxi, "The development of the right to development" (see footnote 7), p. 129 and pp. 141-142.

[69] A/48/935, para. 61.

that promoted greater public participation in the budgeting and revenue allocation process. Whatever "other measures" States take to ensure the enjoyment of the right to development by their peoples must also perform these same functions. These other measures could include the creation of dedicated poverty alleviation agencies, such as Nigeria's National Poverty Elimination Programme, or the establishment of special commissions which focus on the development of a historically disadvantaged group or on the "righting" of some development inequity or the other, such as Nigeria's Niger Delta Development Commission.

In addition to the above, the African Commission in the *Endorois* case developed the standard by which a State's fulfilment of its obligations under article 22 could be judged. In the first instance, the Commission accepted the recommendation of the United Nations Independent Expert on the right to development that "development is not simply the state of providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live".[70] Thereafter, the Commission identified other specific contents of the right to include consultation in development planning where such consultation must be conducted for the community concerned not by illiterates but by those with the ability to "understand documents produced"[71] by the State involved. Where the community in question has been moved from its land, the members should be adequately compensated as well as share the benefits of the development activity.

Equally important is the avoidance in the African Charter (save with respect to its provision on the right to health) of what Odinkalu has accurately referred to as "the incremental language of progressive realization".[72] As such, all of the rights protected by that treaty, including the right to development under article 22, are immediately applicable. This is a significant departure from the tendency to constrain human rights provisions of a deeply economic and social character by attaching to them the requirement that they be realized progressively. It also poses a serious challenge to most African States to find ways of fulfilling their obligations under provisions like article 22 in circumstances of generally severe resource scarcity. After all, the fulfilment of the guarantee in article 22 of the right to development of all peoples in Africa will more often than not require the deployment of significant socioeconomic resources. And, in any case, certain elements of the right may be immediately applicable, even if not all of them are. For example, the consultation and participation of peoples in the decision-making process can be immediately applicable, even when the equitable distribution of resources or investments may not be. But what does it really mean to ask a poor country in Africa (or elsewhere) to realize the right to development of all its peoples immediately (rather than progressively)? Surely, even under the best circumstances, it will take some time (not to mention far less short-sightedness) for the domestic and international obstacles that militate against the proper acquisition and management of the means of development by such a country to be surmounted, as it will take time for the process of creating the appropriate environment to unfold to a significant extent and for the effort to ensure the equitable enjoyment of the benefits that flow from development to bear significant fruit. Development is, of course, not a one-time event and cannot simply happen. Thus, the "immediate application" requirement in the African Charter is based on an understanding of the actual, concrete developmental obligation as somewhat protean, varying across space and time and dependent on the extent of available resources in a particular country at any specific historical moment. And so, when once a State is shown to have done all it possibly could within its means to advance the right to development of all its peoples, then that State cannot possibly be viewed as in violation of its obligation under article 22, whether or not significant poverty remains among its people.

When the immediate applicability of the right to development in article 22 is understood in this way, the lack of a general derogation clause in the African Charter becomes far less worrying. Further, the African Commission's interpretation of the absence of this clause to mean that attempts to limit any of the rights guaranteed in the Charter cannot be justified by emergencies or special circumstances enhances this position. Given the harsh economic circumstances that confront far too many States in Africa, it would seem realistic and practical to read into that provision the "available resources" limitation, without making special economic circumstances a grounds for derogating from article 22.

To conclude this part of the chapter, it must be pointed out that, contrary to the impression that might have been created by the focus in the earlier parts of this section on the availability of the resources that must drive the development engine, the exercise of the right to development as guaranteed by article 22

[70] *Endorois* case (see footnote 26), para. 278.
[71] Ibid., para. 292.
[72] Odinkalu, "Analysis of paralysis" (see footnote 8), p. 349.

need not always entail the infusion of resources (i.e., positive obligations). The obligation to ensure the exercise of this right does encompass negative obligations. Writing in another context, Odinkalu has offered a very good example of the kind of negative obligations that are encompassed by this developmental obligation, namely, the implied duty not to subject a poor people to forced evictions from their farmlands or settlements in order to redevelop those lands as up-market enclaves or oil refineries while denying the relevant people an alternative settlement or farmland, or adequate compensation in order to facilitate their resettlement. As Paul Ocheje has shown, this kind of forced displacement is far too common in Africa, as elsewhere.[73] Yet, any reasonable interpretation of article 22 must lead to a requirement that the existing state of development attainment of any poor or disadvantaged people be protected, and that what these poor people already have ought not to be taken away from them without adequate compensation.

VI. Conclusion

This chapter set out to do two main things: to analyse (from a globally contextualized sociolegal perspective) the normative strengths and weaknesses of the guarantee of the right to development under article 22 of the African Charter on Human and Peoples' Rights and to consider its global potential or generalizability. In section II, the character of the concept of development that animates article 22 was teased out. This exercise drew deeply from the surrounding global discourse on the concept of development. Development was understood in human development terms: as the creation of an environment in which people can develop their full potential and lead productive and creative lives, and as framed by key cornerstone imperatives such as participation, gender and ethnic equity, the existence of peace and a rights-based approach. In section III, it was argued that, although it is not clearly defined in the African Charter, the term "peoples" on whom the right to development is explicitly conferred by article 22 must be read to include sub-State groups. In section IV, the argument was made that, while African States are clearly the primary bearers of the legal obligation to ensure the exercise of the right to development under article 22, the current situation, which does not admit of the possibility of holding other key development actors legally accountable for their activities in Africa, is problematic. Section V pointed out that States are required by the African Charter (a) to bear immediately applicable rather than progressively realized development duties that cannot be derogated from in an emergency; (b) to take legislative and other measures to ensure the exercise of the right to development; and (c) to bear positive as well as negative developmental duties. It was also argued that given the harsh economic circumstances that currently confront most African States, the obligations that they assume under article 22 must—as immediately applicable as they still are—be read as only requiring each African State to implement article 22 to the extent of its available resources.

In this concluding section, I want to propose—albeit rather briefly—a sociolegal agenda derived from the foregoing analysis of article 22 that might help frame the character of any proposed global treaty on the right to development. First and foremost, any such treaty must be as clear as any treaty can possibly be as to how the basic concepts that must ground its normative content are to be understood. It must therefore define as clearly as possible the rights holders and duty bearers of the right to development that it guarantees. In my view, and for the reasons already offered, such rights holders must, at the very least, include sub-State groups (such as the Ogoni, Native Americans or black Mauritanians). As has also been argued, the bearers of the developmental obligations under such a treaty must also go well beyond developing countries to include some of the federating units within federal States (especially in Africa), the rich industrialized States, the United Nations, the international financial institutions, transnational corporations and all the other powerful actors who, for good or for ill, exert a highly significant effect on the state of development of the countries of the geopolitical South.

In accordance with this necessity for much greater conceptual clarity, I am of the view that while any such treaty cannot possibly specify with much precision and for all time the concept and model of development that animates its normative content and programmatic ambition, it will still be short on clarity and on the "specification of policy and programmatic ways and means" of achieving its objectives if it uncritically mirrors the gaps in these respects in texts such as the African Charter and the Declaration on the Right to Development.[74] For one thing, the possible treaty can definitely help ensure a

[73] Paul Ocheje, "'In the public interest': forced evictions, land rights and human development in Africa", *Journal of African Law*, vol. 51, Issue 2 (October 2007) pp. 191-192.

[74] Baxi, "The development of the right to development" (see footnote 7), p. 149.

minimum content of good development praxis by laying down key cornerstones that will guide understandings of its conception of development. Specifically, such a treaty must reflect the economic, social and cultural dimensions of development; understand development in human development terms; treat the ethnic, gender, environmental and other equity dimensions of development as key; recognize the participatory development imperative (especially the necessity of allowing the peoples most affected by development to participate far more meaningfully in the determination of the very conception or model of development that will affect their lives, and not merely in the process of development); understand development as, at the very least, a collective human right (bearing in mind the limits of "rights talk"); factor in the relationships between the creation of peace and development; and imagine the right to development as inclusive of the rights to the means, processes and benefits of development. This will not of course dispose of the ideological divisions that exist over the best processes and goals of development, but will at least limit and reduce the zone of disagreement.

This question of (largely) North-South ideological difference brings to mind the fact that, as imperative as the utilization of human rights norms of a legal nature seems to be in the struggle to improve the lives of poor people in the third world and elsewhere through the application of more enlightened development praxis, the mere deployment of human rights law norms does not really address one of the most important global obstacles to the attainment of this goal in our own time: the ascendance of a dominant socio-economic ideology that has dealt most inadequately with the developmental yearnings of the world's poor. This is why, as Baxi has noted, any effort to affirm or advance the right to development too often "presents an irritating moral nuisance" to ascendant global neoliberalism.[75] This is the chief reason why even a well-crafted treaty or other document on the right to development may yet be stillborn.

Although other scholars and States have also made invaluable contributions to the "universalization" in our time of the right to development, including through the adoption of the 1986 Declaration and the current efforts at the United Nations to adopt a binding instrument at the international level, the avatar-like character of the African Charter and of the relevant jurisprudence of the African Commission, coupled with the pioneering efforts of African scholars such as Kéba M'Baye, Mohammed Bedjaoui and Georges Abi-Saab[76] and complemented by the politico-legal strivings of many African States have in these cases made the critical difference. The official records of the Third Committee of the General Assembly, where the draft of the Declaration was discussed, reveal the permanent voice and vote of the African States in favour of the Declaration.[77] Without their innovation, commitment and persistence, article 22 of the African Charter would likely not have emerged in its present pioneering form, and the jurisprudence of the African Commission on the right to development would likely not have become as rich and cutting edge as it currently is. Agency, indeed African agency, made the difference in the past, and may do the same in future.

This is one good reason why hope must spring eternal.

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[75] Ibid., pp. 129-130.
[76] Georges Abi-Saab, "The legal formulation of a right to development", in *The Right to Development at the International Level*, René-Jean Dupuy, ed. (The Hague Academy of International Law, 1980), pp. 159-182.
[77] See A/C.3/41/SR.61 and A/41/925 and Corr.1.

Towards operational criteria and a monitoring framework

*Rajeev Malhotra**

I. Overview

This chapter seeks to critically examine the work undertaken by the Human Rights Council's Working Group on the Right to Development (Working Group) and its high-level task force on the implementation of the right to development (task force) in operationalizing the right. More specifically, it analyses the right to development criteria outlined by the task force at its third session, in 2007 (see A/HRC/4/WG.2/TF/2) for its conceptual adequacy and the ease of operational practice, with a view to promoting the implementation of the right. In presenting the analysis, the chapter builds on an earlier paper on this subject (A/HRC/12/WG.2/TF/CRP.6) presented by the author to the task force at its fifth session, in 2009, and discussions at that meeting (see A/HRC/12/WG.2/TF/2 and Corr.1). It also draws on parallel work undertaken by the author for the Office of the United Nations High Commissioner for Human Rights (OHCHR) in developing the framework to identify indicators for promoting and monitoring the implementation of human rights, in general.[1]

The criteria suggested by the task force were developed in the context of an analysis of Millennium Development Goal 8 on the global partnership for development from a right to development perspective. These were subsequently reviewed by the task force at its fourth session, in 2008 (see A/HRC/8/WG.2/TF/2) with a view to making them more comprehensive in reflecting the scope of the right as elaborated in the Declaration on the Right to Development. While agreeing on the criteria, the Working Group was of the view that a pilot assessment of some selected global development partnerships for their relevance in promoting the implementation of the right to development would help in the review and progressive refinement of the suggested criteria. The implicit assumption being that such an exercise would contribute to clarifying the content and the policy focus required in implementing the right to development for improving universal enjoyment of rights and human well-being. Some results from this exercise have been presented in this book. It appears that the exercise may have fallen short in enhancing the much-needed unique operational perspective on the right to development that could appeal equally to the human rights community as well as to development practitioners.

The present chapter suggests that in order to address this concern for clarifying the content of the right to development, through the selection and modification of its operative criteria, it is important to have a comprehensive set that go beyond the suggestions

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[1] See OHCHR, *Human Rights Indicators: A Guide to Implementation and Measurement* (HR/PUB/12/5); see also chapter 24 of the present publication.

made at the fourth session of the task force and are explicitly anchored in the normative basis of the right.[2] It is also important to highlight the potential relevance of the right to development to extant governance and development practices in furthering the realization of human rights. Such an approach could help in developing a set of operational tools (including indicators), guidelines or elements of an international legal instrument on the right and support a periodic assessment of its progress.

Several concerns need to be addressed in this context. First of all, it is important to outline a framework that lays down the logic of the selection of right to development criteria. In the absence of such a framework, any exercise that seeks to put together these criteria could be reduced to a random listing of different formulations, creating ambiguity rather than clarity on the operational content of the right. Secondly, it is equally important to ensure that the elaborated criteria are either manifestly operational or are supported by tools (indicators), quantitative as well as qualitative, that make explicit the practical dimension of the selected criteria. A third concern is to ensure a reasonably exhaustive reflection of the normative basis of the right in the elaborated criteria. This is particularly relevant if the criteria under review have to clarify the content of the right to development and help in taking forward the measures seen as being useful to further its implementation. Moreover, among the elaborated criteria, some would be more relevant for implementing the right at the international level, such as those for assessing global partnerships for development from a right to development perspective. At the same time, there would be other criteria that could better reflect the progress in country strategies for the implementation of the right. A disproportionate focus on one or the other set of criteria could end up compromising the relevance of the right in informing development and governance processes for realizing human rights. Indeed, in a globalized world the national and the international dimensions of the right cannot be viewed in isolation from each other.

This chapter addresses some of these concerns by putting together a conceptual and methodological approach to support a comprehensive framework for operationalizing the right to development. With that objective in mind, section II revisits the notion of human rights and the right to development as laid out in the Declaration and outlines the OHCHR indicator framework for operationalizing human rights standards and obligations. Section III analyses the right to development normative framework and its interpretation by the human rights mechanisms, including the Working Group and the task force, the work undertaken by the first Independent Expert on the right to development and some other relevant literature. This helps in pinning down the essential elements or the content of the right for anchoring the criteria. Section IV uses the articulated normative content of the right from the earlier section to review and modify the task force criteria. It uses the revised criteria to identify the requisite tools, quantitative as well as qualitative, that help make them more operational. This approach places the operationalization of the right to development in the larger context of the work being undertaken by OHCHR, at the request of the treaty bodies, to identify indicators for promoting and monitoring the implementation of human rights. The concluding section V outlines some suggestions that could help in setting the future agenda for the work on the right to development in the United Nations human rights mechanisms.

II. Human rights and the notion of the right to development

Human rights are universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.[3] Further, human rights are inalienable, interrelated, interdependent and indivisible.[4] The underlying feature of any right is that it

[2] This suggestion was considered and adopted by the task force when the author made a presentation at its fifth session in April 2009. The task force went on to adopt the framework that the author had outlined in document A/HRC/12/WG.2/TF/CRP.6. The present chapter, a revision of that paper, besides explaining the rationale for the framework adopted by the task force puts some related issues in a larger perspective to help guide future work on furthering the implementation of the right to development. In certain respects this chapter goes beyond the original suggestions presented to the task force.

[3] See, for instance, OHCHR, *Frequently Asked Questions on a Human Rights Based Approach to Development Cooperation* (New York and Geneva, 2006), p. 1.

[4] Irrespective of the nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status, human rights are inherent to all human beings. Moreover, human rights are inalienable and are to be enjoyed universally. They cannot be taken away, except in specific situations and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law, or certain fundamental human freedoms may be temporarily suspended in times of national emergencies. Further, human rights, whether they are civil and political rights such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education; or collective rights, such as the rights to development and self-determination, are all interrelated, interdependent and indivisible. Interrelatedness of human rights implies that an improvement in the realization of any one human right is a function of realization of all, or some, or at least one, of the other human rights. Any two rights are interdependent if the level of enjoyment of one is dependent on the level of realization of the other. The notion of indivisibility of human rights requires that improvement in the enjoyment of any human right cannot take place at the expense of violation or retrogression in the outcomes associated with the realization of any other right.

identifies right holders who, by virtue of being human, have a claim over certain entitlements; and there are duty bearers, who are legally bound to respect, protect and fulfil the entitlements associated with those claims.[5] Human rights law obliges the State and other duty bearers to do certain things and prevent themselves and others from taking such actions that infringe on or compromise the fundamental freedoms and rights of people. In invoking rights, it is not only important to identify the entitlements, but it is equally important to specify the agents who have the duty to bring about the enjoyment of those entitlements.[6] Thus, there are rights of individuals and peoples (group rights such as the right to development or the rights of indigenous peoples) and there are correlate obligations, primarily for States—individually and collectively—and their institutions.[7]

It is universally accepted that these entitlements encompass the complete scope of human engagement from its economic, social and cultural aspects to the civil and political dimensions of an individual's life. Standards have been established and their normative basis elaborated in various instruments including the Universal Declaration of Human Rights and the core international human rights treaties.[8] However, there is not as much clarity and agreement on what the responsibilities and obligations of the duty bearer are and, more specifically, how they have to be assessed. Indeed, in real life it is difficult to identify the policies and the measures that could uniquely define these obligations. While a loose causal link can easily be identified, it is almost impossible to establish a one-to-one correspondence between a policy instrument and the extent of its impact on a desirable human outcome. It is more likely that a desired social outcome is influenced by more than one policy measure and, at the same time, a policy measure may have an impact on multiple outcomes.

In most instances, one has to be satisfied with the identification of a set of policies and the corresponding instruments that correlate with a set of desired social outcomes. In the case of the right to development, the problem is further compounded by the fact that unlike other human rights it derives its legitimacy from the Declaration on the Right to Development—an all- encompassing "political document"—and not a legally binding instrument. For any legally binding instrument, even when the link between measures expected of States parties in fulfilling their obligations and the corresponding desired social outcomes is not all that obvious, such measures are likely to enjoy better acceptance and commitment by the duty bearers to the extent that they are seen as an extension of an international treaty. Moreover, from the perspective of a development practitioner, the elaborated normative standards on rights, as well as the narrative on correlate duties, suffer from a certain lack of concreteness that makes it difficult to identify tools and a methodology that establish the added value of human rights concepts in development policy.

The human rights framework also identifies certain cross-cutting norms or principles such as participation, empowerment, non-discrimination and equality, transparency and accountability, including the rule of law and good governance, at the national and international levels, which are expected to guide the duty bearers in the conduct of the process to secure human rights.[9] In the event of violation or denial of rights, the approach emphasizes availability of appropriate means to seek redress.

A. Right to development

The Declaration on the Right to Development, adopted by the General Assembly in 1986,[10] in

[5] In the human rights literature, these are referred to as the "Maastricht principles", which define the scope of State obligations, generally in the national context, but which could well be applied to describe the nature of State obligations at the international level (Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997 (see E/C.12/2000/13)).

[6] See, for instance, Amartya Sen, *Development as Freedom* (Oxford, Oxford University Press, 1999), pp. 227-231 for a development perspective on human rights.

[7] Further, these obligations, as Sen (ibid.) points out, could be "perfect obligations" or "imperfect obligations". The former relate to immediate obligations (principally to civil and political rights) such as the obligation to respect (States must not deny enjoyment of a right) or the obligation to protect (States must prevent private actors/third parties from violating a right), where the method for meeting the obligation by the duty bearer is known and well defined and can be enforced through a judicial process. In the latter case, it may be difficult to accurately identify the action required by the duty bearer to meet its obligations. It typically includes the obligation to promote (creating the policy framework to support the enjoyment of rights) and to provide (allocation of public resources to ensure that people realize and enjoy their rights). The claims in this case relate to implementation of the duty bearer's commitments to pursue certain policies for achieving a set of desired results. Often, the imperfect obligations are not justiciable (they relate principally to economic and social rights) and, due to resource constraints, the duty bearer may take a progressive approach in fulfilling them. However, this distinction is not overtly supported in contemporary human rights discourse, where the emphasis is on indivisibility and a symmetric treatment of all human rights.

[8] Alternatively, the International Bill of Human Rights, which mainly comprises the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The other instruments designed to address the situation of special groups and regions in the promotion and protection of human rights are the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[9] These cross-cutting norms or principles have also been reiterated by the Working Group at its various sessions as being relevant for the implementation of the right to development.

[10] See also resolution 41/133 on the right to development.

its article 1 states that "[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized". Such a broad-based notion of development in terms of economic, social, cultural and political advancement directed at the full realization of all human rights and fundamental freedoms transformed the right to development from a mere claim for a supportive international economic order, rooted in the period of decolonization, to a multifaceted and a cross-cutting human right.[11]

It is important to recognize a salient feature of the right, which makes it somewhat distinct from other substantive and procedural human rights,[12] as well as from the more commonly used concept and terminology of rights-based approaches (to development).[13] This relates to the intrinsic complementarity between the national and the international dimension of the right, with a relative emphasis on the latter. It can be explained partly by the historical moorings of the right to development in the decolonization era and partly by the very nature of the right as an integrated framework of rights, or as an "umbrella right". The international human rights standards recognize the universality of State obligations—individually and collectively—and the importance of international cooperation in the realization of rights. However, when we consider a human right in isolation from other rights it is easy to downplay the importance of international cooperation and the obligations of the international community in realizing that right. In such a case it can always be argued that if a particular right has to be realized, all that the State has to do is to realign its public allocations and policy emphasis in favour of that right. But this argument does not carry weight when we consider the right to development, where the co-realization of the constituent rights may require international support and cooperation; hence the importance of the international dimension in the normative basis and in the implementation of the right to development.

The notion of the right to development as it has evolved in the international human rights discourse and in the work of the United Nations human rights bodies can be seen as bringing a new approach to development thinking, policymaking and, in particular, to development cooperation. Indeed, unlike other human rights, the right to development by its very definition may have a more significant contribution to make in the conduct of international cooperation for the universal realization of all human rights. Before analysing the normative standard on the right to development to pin down the attributes or the content of the right, it is useful to take note of the OHCHR framework for identifying indicators in operationalizing human rights standards.

B. Operationalizing human rights: the OHCHR framework on indicators

The complex and evolving nature of human rights standards makes it necessary to have a well-structured framework to identify criteria and their operative indicators to assist in interpreting the normative standards, promoting implementation and assessing the duty bearer's compliance. The framework adopted by OHCHR builds a common approach to identifying indicators for promoting and monitoring civil and political rights, as well as economic, social and cultural rights. In ensuring that the framework is workable, it focuses on using information and data sets that are commonly available and based on standardized data-generating mechanisms, which most States parties would find acceptable and administratively feasible to compile and follow.[14] The framework involves a two-part approach that includes identifying the attributes of a human right, followed by a cluster of indicators that unpack specific aspects of implementing the standard associated with that right.

[11] In its early conception in the 1970s and early 1980s, within the confines of the international arena, the right to development was seen as a right of communities, States and peoples subjugated by colonial domination and exploitation. It was a collective right whose claim holders were the juridical persons at various levels of groupings such as States, regions, provinces, municipalities or towns and the duty holders were the State, the developed countries and the international community. It was not until later that the right was also conceptualized in municipal law in addition to international law. See Rajeev Malhotra, "Right to development: where are we today?", in *Reflections on the Right to Development*, Arjun K. Sengupta and others, eds., Centre for Development and Human Rights (New Delhi, Sage Publications, 2005) for further details.

[12] It is sometimes useful to make a distinction between a substantive human right such as the right to education (Universal Declaration, art. 26) or the right to life (ibid., art. 3) and a procedural right such as the right to a fair trial (ibid., arts. 10-11).

[13] These concepts have come into vogue with the United Nations system-wide objective of mainstreaming human rights in the work of all agencies and programmes and are often defined in a broad or even loose manner. It is useful to remember that unlike the rights-based approaches which essentially apply the human rights standards and the cross-cutting norms to address issues of development and social change, the right to development is a fundamental human right, backed by customary international law, and has all the features of a right, including right holders and the duty bearers. It does not enjoy an international legal status, in the sense that there is no international treaty explicitly recognizing the right, even though its constitutive elements, viz. economic, social and cultural rights, as well as civil and political rights, represent internationally recognized human rights law. While the right continues to be sustained by the Declaration, for legal support at the international level it also draws on references in a number of international instruments, including declarations and conventions. Among these an important one is the United Nations Millennium Declaration (General Assembly resolution 55/2).

[14] See OHCHR, *Human Rights Indicators* (footnote 1).

The enumeration of human right standards in the treaty provisions and their elaboration by human rights mechanisms, including the United Nations treaty bodies, may remain at a general level. Many human rights provisions overlap and are not quite amenable to a direct identification of appropriate criteria and corresponding indicator(s). As a starting point, it is therefore important that the narrative on the normative standard of a human right is transcribed into a limited number of characteristic attributes of that right. By identifying the attributes of a right, the process of selecting and developing suitable criteria or clusters of operative indicators is facilitated as one arrives at a categorization that is clear, concrete and, perhaps, even "tangible" in facilitating the selection of criteria and the indicators. Indeed, the notion of attributes of a right helps in concretizing the content of a right and makes explicit the link between identified criteria and indicators of a right on one hand, and the normative standards of that right on the other.

There are at least two considerations that guide the process of identifying the attributes of a human right. First, to the extent feasible the attributes should not overlap in their scope. In other words, in reflecting the normative content of a human right standard, the selected attributes should be mutually exclusive. Second, to the extent feasible attributes should be based on an exhaustive reading of the standard so that no part of the standard is overlooked either in the choice of the attributes of a human right or in identifying the criteria or indicators for that right.[15] Ultimately, the choice of attributes of a human right has to be such that collectively they should reflect the essence of the normative content of that right and their articulation should help in the formulation of criteria and in the identification of the relevant indicators.

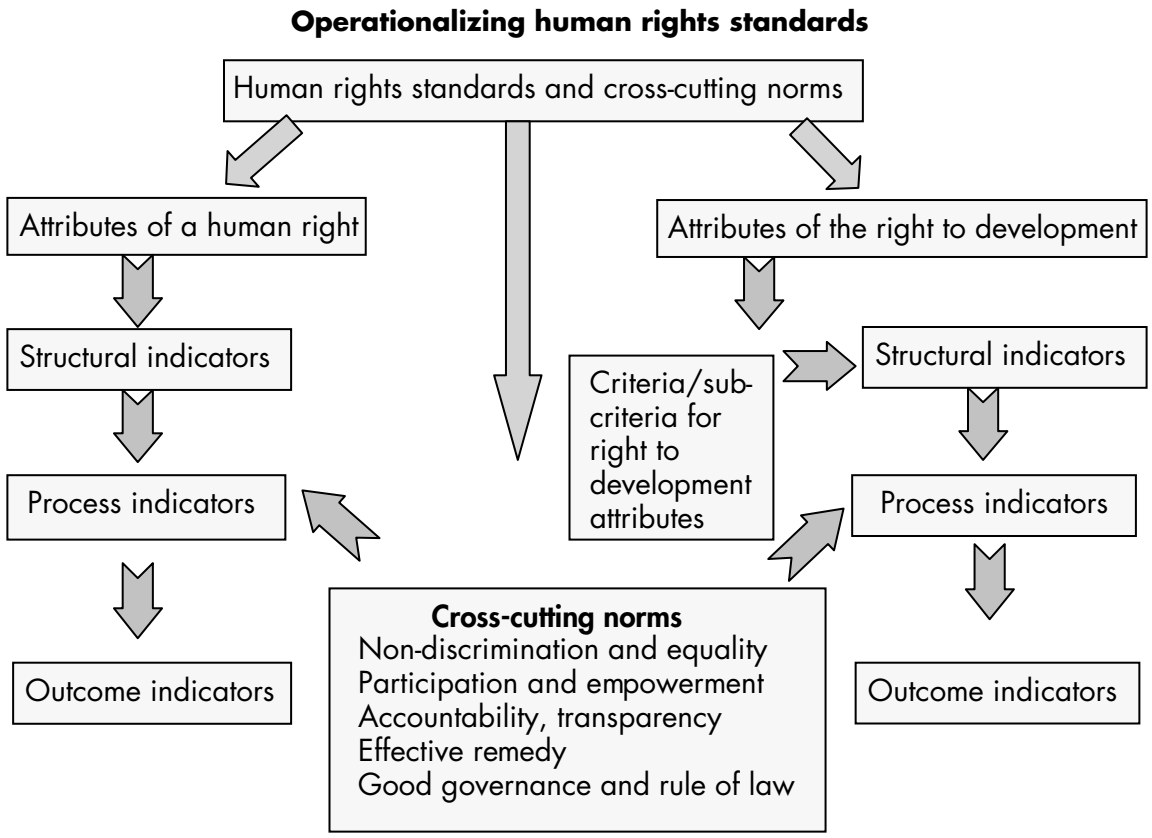
Having identified the attributes of a human right, the next step is to have a consistent approach to articulating criteria or sub-criteria and identifying the corresponding indicators for those attributes and the relevant cross-cutting norms. This step requires considering different kinds of indicator types to help capture the different facets of human rights implementation.

Realization of human rights requires continuous efforts on the part of the concerned duty bearers to protect and promote rights. It also requires the right holders to raise claims to those rights and to have access to redress when those claims are violated or denied. In monitoring the implementation of human rights it is therefore vital to assess, at a given point of time, the identified outcomes that correspond to the realization of human rights. It is equally vital to assess the conduct of the processes underpinning those outcomes for conformity to relevant human rights standards and cross-cutting norms.[16] Further, there is also a case for measuring the acceptance and the commitment of the States who are party to human rights treaties in meeting their human rights obligations. Thus, in order to measure all these aspects (the intent and commitments of a duty bearer to human rights standards, the efforts that are required to make those commitments a reality and the results of those efforts in terms of enjoyment of rights over time), the OHCHR framework uses a configuration of indicators that have been categorized as structural, process and outcome indicators. Each of these categories of indicators, through their respective information sets, brings to the fore an assessment of the steps taken by States in meeting their human rights obligations, be they to respect, protect or fulfil a right. The use of such a configuration of indicators not only simplifies the process of selection and development of indicators for human rights, but also encourages the use of contextually relevant, available and potentially quantifiable information for populating the chosen indicators.

The following figure shows how the OHCHR framework for identifying indicators has been used to arrive at the attributes of the right to development, the criteria and the sub-criteria and the corresponding indicators for promoting the implementation of the right. The nature of the right to development as a composite of all human rights makes it necessary to modify the framework for identifying the indicators. The human rights cross-cutting norms and principles, including the ones recognized specifically for the right to development in the Working Group's discussions, are also reflected in the choice of criteria and indicators in this framework.

[15] In the case of human rights where illustrative indicators have been identified, it can be seen that on average about four attributes are able to capture reasonably the essence of the normative content of those rights (ibid.).

[16] This necessity of monitoring the outcomes, as well as the underlying processes, in undertaking human rights assessments is, perhaps, not equally recognized in the case of the two sets of human rights; it is more obvious to accept it for economic, social and cultural rights. In many instances, particularly in the context of developing countries, these rights can be realized only progressively because of the resource constraints. In such cases it is logical to monitor the process of progressive realization of the concerned human right. However, even civil and political rights, which, once ratified and guaranteed by the concerned State, can in principle be immediately enjoyed, have to be protected ad infinitum. It is also true, and now recognized in the literature, that implementation and realization of civil and political rights requires both resources as well as time, for instance to set up the requisite judicial and executive institutions and to frame policy, and regulatory and enforcement frameworks to protect these rights. In other words, in monitoring the realization of civil and political rights as well, it is equally important to assess the conduct of the process that supports the protection of such rights.



III. Identifying the attributes of the right to development

The task of identifying attributes involves selecting the salient aspects that collectively reflect the normative standard on the right. Foremost, the Declaration on the Right to Development paved the way to bridge the separation between civil and political rights and economic, social and cultural rights that had resulted from the adoption of two separate covenants in 1966. The right to development, thus, formalized the notion of "indivisibility of human rights". The implication of this aspect of the right requires that the policy and the focus of the implementation strategy necessarily has to be on a holistic development process. The relevant standards on civil and political rights and economic social and cultural rights have to be seen as an integrated whole and recognized in the criteria articulated for furthering the implementation of the right to development. The first attribute of the right to development should, therefore, focus on holistic human-centred development.

A. Holistic human-centred development[17]

Based on the Declaration, in operationalizing the notion of holistic human-centred development (arts. 2 (1) and 1 (1)) it could be argued that a focus is required on: (a) an integrated strategy for the implementation of all human rights (arts. 1 (1), 6 (2) and 9 (1) refer to this aspect) that respects and promotes indivisibility and interdependence of rights; (b) not only the outcomes of the development process, which can be identified with the realization of all human rights, but also on the process of their realization (arts. 1 (1), 2 (1)-2 (3) and 8 (2)); and (c) a sustainable development process that promotes growth with equity (art. 2 (3)).

Human rights are indivisible, interdependent and complementary.[18] Complementarity of rights implies interdependence or mutual reinforcement and a sense of completeness, which is attained when parts come together to form a whole. Thus, improvement in realization of economic and social rights cannot take place at the expense of enjoyment of civil and political rights. Indeed, the two sets of rights complement each other. These characteristics of rights make it imperative that enjoyment of human rights involves a process of co-realization of all rights. The right to development has to be seen as a composite right wherein all rights, because of their interdependence, indivisibility and complementarity, are realized together. The integrity

[17] The task force in 2009 named this attribute "comprehensive human-centred development" (A/HRC/12/WG.2/TF/2, para. 102).

[18] Complementarity is a term normally not seen in human rights literature. However, different human rights complement each other in influencing human well-being. See OHCHR, *Human Rights Indicators* (footnote 1).

of the right implies that if any one constituent right is violated (or subjected to retrogression) the composite right to development is also violated.[19]

The Declaration on the Right to Development highlights the importance of the process as well as the desired outcomes in the realization of the right to development. It defines the right to development as a right to participate in, contribute to and enjoy the fruits of multifaceted development. The process in realizing the right is important for instrumental reasons as well as for its intrinsic merit in terms of human well-being. Thus, for instance, in the case of the right to education, access to education (as a public good) is as important as being able to benefit from education in a non-discriminatory manner. This focus on the conduct of the process in conformity with human rights standards and cross-cutting norms, including the effective participation of all stakeholders, has to be reflected in the choice of criteria, sub-criteria and operative indicators for the right to development.

The first Independent Expert on the right to development, Arjun Sengupta, reiterated this when he defined the right to development as a right to a particular process of development in which all human rights and fundamental freedoms can be fully realized in their totality as an integrated whole.[20] The right to development is a right of the people to outcomes, which are improved realization of different human rights. It is also a right to the process of realizing these outcomes facilitated by the concerned duty holders through policies and interventions that conform to the human right standards and the cross-cutting norms. Similarly, S.R. Osmani[21] suggested that "the right to development is the right of everyone to enjoy the full array of socio-economic-cultural rights as well as civil-political rights equitably and sustainably and through a process that satisfies the principles of participation, non-discrimination, transparency, and accountability".

In his interpretation, Sengupta attached significant importance to economic growth in defining the content of the right to development. He saw a role for economic growth in relaxing the resource constraints for the realization of the right (see E/CN.4/2002/WG.18/6, para. 11 and also para. 9). This growth had to be sustainable and, at the same time, inclusive to promote equity in the distribution of returns from growth. The importance of economic growth is critical when the concern is to co-realize all human rights, without retrogression in the enjoyment of any right, and when the pace of securing the rights is also an issue. Some rights, namely economic, social and cultural rights, or rather some aspects of rights, can be realized only progressively due to resource constraints (particularly in developing countries) and when the prevalent level of enjoyment of those rights falls considerably short of the possibility of fuller realization. There are other human rights, mainly civil and political rights, which may be realized more directly and immediately, as they do not require significant levels of resources for their fulfilment.[22] In Sengupta's formulation, economic growth is not only instrumentally relevant, but it is also sufficiently critical for the realization of the right to development to be an end in itself.[23]

B. An enabling environment

The second attribute of the right to development follows from the importance placed in the Declaration

[19] The Independent Expert, in his fifth report, described this in terms of an improvement of a "vector" of human rights, which is composed of different rights that constitute the right to development. The realization of the right to development implies an improvement of this vector, such that there is improvement of some or at least one of these rights without any other right being violated. It relates directly to the principle of non-retrogression, which, put simply, implies that no one should suffer an absolute decline in the enjoyment of any rights at any point in time. S.R. Osmani, in "Study on policies for development in a globalizing world: what can the human rights approach contribute?" (E/CN.4/Sub.2/2004/18) and "An essay on the human rights approach to development", in *Reflections on the Right to Development*, pp. 109-125, argues that the human rights approach (which could also be read as "right to development") necessarily requires sectoral integration at the level of policymaking because of the interdependence and complementarity of rights. Indeed, interdependence and complementarities exist among rights within the category of economic, social and cultural rights and between economic, social and cultural rights and civil and political rights.

[20] The reports of the Independent Expert are as follows: first report (E/CN.4/1999/WG.18/2); second report: (A/55/306); third report (E/CN.4/2001/WG.18/2); fourth report E/CN.4/2002/WG.18/2 and Add.1); fifth report (E/CN.4/2002/WG.18/6 and Add.1); sixth report (E/CN.4/2004/WG.18/2); country studies on Argentina, Chile and Brazil (E/CN.4/2004/WG.18/3); and the preliminary study on the impact of international economic and financial issues on the enjoyment of human rights (E/CN.4/2003/WG.18/2).

[21] "Some thoughts on the right to development", in *The Right to Development: Reflections on the First Four Reports of the Independent Expert on the Right to Development*, Franciscans International, ed. (Geneva, Franciscans International, 2003), pp. 34-45.

[22] It could be argued that for securing civil and political rights as well as economic, social and cultural rights, the resource requirements may be considerable when it comes to establishing an adequate human rights protection system in the country. Thus, there may be an element of progressive realization in both sets of rights. At the same time, irrespective of resource availability, there are some immediate obligations in the fulfilment of economic rights, such as non-discrimination in accessing public education or health services that have to be met by the duty bearer.

[23] Sengupta had suggested that it has to be an element of the vector that defines the composite right to development in any context. The issue of whether economic growth has instrumental importance or also has a constitutive relevance in the notion of the right to development could be debated. It could well be argued that a certain kind of economic growth, when seen in terms of the opportunities that it generates for the people to be productively employed and have a life of dignity and self-esteem, may also have a constitutive role in the notion of the right to development. However, to the extent that these desired aspects of growth can be reflected in the process and the other outcomes comprising the right to development, it may not be tenable to argue for a "right to economic growth" and reflect it accordingly in the notion of the right to development.

on the enabling environment in the implementation of the right (art. 3 (1)-3 (3)). The Declaration points out that States have the duty to take steps—individually and collectively—to create the enabling environment, internationally and nationally, for the full realization of the right. In doing so, it suggests that States have to take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights (art. 6 (3)). A related aspect of this feature is that while acknowledging the State as the primary duty bearer of the right to development, the Declaration emphasizes the importance of international cooperation in the realization of the right (art. 4 (2)). Thus, in terms of reflecting this aspect of the right to development in criteria for its implementation, it would be necessary to identify a few vital elements of an enabling environment and the critical obstacles to development at the international and national levels.

The development literature identifies at least four categories of obstacle (or, alternatively, the enabling factors), which may be difficult to address with the extant national capacity, particularly in developing countries, and therefore may require international support or cooperation.[24] These are: (a) the issue of resource constraints, which includes the need for aid, debt relief, technology flows and labour (human resource) mobility; (b) an international policy regime (the trade regime, instability in financial markets) that may not be entirely supportive of the development process in developing countries, for example by denying them adequate access to markets in developed countries; (c) asymmetries in global governance, or what has also been described as a "democratic deficit" in multilateral organizations; and (d) the issues related to ensuring peace, security (conflict management) and disarmament (article 7 of the Declaration). Indeed, as Sakiko Fakuda-Parr suggests,[25] the international responsibilities relate to addressing obstacles that a State is unable to tackle on its own. To address such obstacles, there would be a need for international cooperation that recognizes mutual and reciprocal responsibilities between States, taking into account their respective capacities and resources and subject to effective accountability mechanisms. On the national level, the three major concerns in terms of an enabling environment for the implementation of the right to development relate to: (e) the issue of country ownership of the development plans, strategies and programmes; (f) the issue of policy space; and (g) the issue of good governance, rule of law and democracy. Therefore, in operationalizing the second attribute of the right to development, there is a need for criteria/sub-criteria or indicators that reflect each of the seven elements identified here as constituting the notion of an enabling environment or, inversely, the obstacles to development.[26]

In the discussion on the role of an enabling environment in the implementation of the right to development, the issue of loss of "policy space" or "policy autonomy" in the developing countries and how it could potentially affect the capacity of these countries in meeting their human rights obligations is a relevant one. It is particularly so in times of crisis and economic stress. In the present phase of globalization, with its attendant requirements for building global policy regimes, ensuring policy coherence and market access across countries (such as the trade agreements pursued by the World Trade Organizations (WTO), or caps on fiscal deficits as a part of financing conditionality by international financial institutions, or in the case of economic unions) may in fact restrict the flexibility of developing countries in the use of certain policy instruments (such as raising resources for social development programmes through indirect taxes/customs duties in countries where the direct tax base is narrow, or property rights restrictions on the manufacture of generic drugs, or use of other technologies) that the currently developed countries may have enjoyed at the comparable stage of their development. This may necessitate the use of temporary special measures (such as in WTO) until such time that the development gap is sufficiently bridged and the special measures are no longer required.[27]

C. Social justice and equity

Finally, the third attribute of the right to development follows from the emphasis placed on eradication of all social injustices in the Declaration (arts. 5 and 6 (1)). Pursuit of social justice is a vital aspect of the right to development normative framework. It emphasizes the moral imperative of eliminat-

[24] See, for instance, chapter 15 of this publication.
[25] Ibid.
[26] The task force grouped these seven elements of the attribute "enabling environment" into five categories, namely "international cooperation and assistance", "national policy space and autonomy", "rule of law and good governance" and "peace, security and disarmament". See A/HRC/12/WG.2/TF/2.
[27] In his study on globalization (E/CN.4/2004/WG.18/2), Sengupta identified the issue of loss of policy autonomy, constraints on institutional capacity, the speed of adjustments and required policy responses, as well as the need for coordination of policies as factors influenced by the ongoing processes of globalization that have had a bearing on the implementation of the right to development in developing countries. He also analysed the issue of technology transfer between the technology producers and the technology recipients and the implications that had for implementing the right to development. The criteria to assist in the implementation and assessment of the right to development may have to reflect these concerns.

ing inequalities between people. More specifically, it seeks to dismantle the institutional structures and practices, involving acts of omission as well as commission of the principal duty bearer, which help perpetuate those inequalities at the national and international levels. Ultimately, the realization of the right to development "shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income" (art. 8 (1) of the Declaration).

There are at least three elements that may have to be captured in criteria on this attribute of the right to development. These are: (a) a focus on non-discrimination (following article 5) and inclusion, inter alia, of all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, unity and territorial integrity; (b) gender equality and rights of women in development (art. 8 (1)); and (c) the importance of social safety nets in mitigating hardships and dislocative effects during times of economic crisis, stress or natural disasters.[28]

Let us now briefly consider what some other literature on the right to development has to offer by way of elaboration on some of the elements listed under the three attributes of the right to development identified in this chapter (and its earlier version, document A/HRC/12/WG.2/TF/CRP.6) and adopted by the task force in 2009.

After the adoption of the Declaration on the Right to Development in 1986, significant clarification on the content and the implementation of this right was provided by the Global Consultation on the Right to Development as a Human Right held in Geneva in 1990.[29] With reference to the content of the right, it was observed that the right to development included the right to effective participation in all aspects of development and at all stages of the decision-making process; the right to equal opportunity and access to resources; the right to fair distribution of the benefits of development; the right to respect for civil, political, economic, social and cultural rights; and the right to an international environment in which all these rights can be fully realized. The human person was seen as the central subject, rather than a mere object, of the right to development and the concept of participation was seen as being central to the realization of the right. Participation was to be viewed as a means to an end as well as an end in itself. It was the principal means by which individuals and peoples collectively determined their needs and priorities to ensure protection and advancement of their rights and interests. For participation to be effective in mobilizing human and natural resources and in combating inequalities, discrimination, poverty and exclusion, genuine ownership or control of productive resources, including land, financial capital and technology, was seen as necessary.

The Global Consultation favoured a development strategy that addressed the issue of not only economic growth compliant with the cross-cutting human rights norms but of achieving social justice and the realization of all human rights. A role was foreseen for affirmative action, or temporary special measures, in the development strategy, both at the national level in favour of disadvantaged groups and at the international level in terms of development assistance to countries constrained by limited availability of resources and technical capacities. The removal of barriers to economic activity, such as trade liberalization, was not seen as sufficient in itself. There was recognition of the interdependence between peace, development and human rights as the framework for supporting an enabling environment for realizing the right to development.

Among the possible criteria for measuring progress towards the realization of the right to development, the Global Consultation identified a number of categories, including: conditions of life (basic material needs such as food, health, shelter, education, leisure and a safe and healthy environment, as well as personal freedom and security); conditions of work (employment, extent of sharing in the benefits of work, income and its equitable distribution and degree of participation in management); equality of access to resources (access to resources needed for basic needs and equality of opportunity); and participation. Since participation was the right through which all other rights in the Declaration were to be exercised and protected, indicators on participation were critical in measuring progress in the realization of the right to development. Indicators to measure participation needed to capture the form, quality, democratic nature and effectiveness of participatory processes, mechanisms and institutions. At the international level, this included assessing the "democratic deficit" in intergovernmental bodies. Moreover, it was concluded that in assessing participation there was

[28] The task force rephrased this element as "sharing the benefits of development". See A/HRC/12/WG.2/TF/2.

[29] See chapter 3 of the present publication.

a need to include public access to information and responsiveness of decision makers to public opinion.

In his reports Sengupta also presented the concept of a "development compact", with a view to outlining a programme of specific policies of national action and international cooperation for implementing the right to development. He viewed the compact as a mechanism for bringing together various stakeholders in an operational framework based on the notion of the "mutuality of obligations" or "shared responsibilities". The logic of the proposal rested on the acceptance and a legal commitment by States to pursue, individually and collectively, the universal realization of all human rights. He argued that if the developing countries were committed to the realization of human rights and undertook steps to implement a rights-based development process, then their efforts should be matched by the implementation of the reciprocal obligations by the international community. This could take the form of support and cooperation in the implementation of the agreed programmes through direct assistance and such other measures that improved the prospects of the developing countries in mobilizing the required resources to fund their efforts to meet their human rights obligations. The concept of the compact, particularly the idea of mutuality of obligations, though not explicit in the Declaration, helps capture the essence of the right for its implementation. Indeed, as policies underpinning international cooperation have not been anchored in this concept of mutuality of obligations, the concept becomes a natural candidate for inclusion in the set of criteria for assessing development partnerships for compliance with the right to development.[30]

The distinction between the national and the international dimensions of the right to development, often favoured in the human rights discourse, has somehow reinforced an impression that the two could, perhaps, be studied and analysed separately in evolving strategies for furthering the implementation of the right to development. However, the recent phase of globalization, because of its pace, spread and the depth of integration across countries, has exposed the limitation of making this differentiation between the two dimensions of the right to development. This is particularly evident when one considers the fallout from the recent global financial sector meltdown that has affected almost all countries, directly or indirectly, irrespective of their level of involvement in the international (rather, United States) financial markets where the crisis erupted in mid-September 2008. In reality, the national and the international dimensions of the right to development are closely entwined. Impediments to national development, commonly identified at the international level, necessarily require corresponding commitments at the national level. Similarly, the issue of governance is cross-cutting and relates as much to the effective and efficient functioning of national institutions as to the role and operations of international organizations/institutions. It is also true that in many developing countries the gap between the present enjoyment of human rights and a fuller realization of human rights has to be visibly bridged in a reasonable period of time. This requires renewed effort at identifying effective national policies and backing them up with suitable international cooperation and development assistance. Therefore, it is desirable that in identifying policies and strategies for the realization of the right to development, the national and the international dimensions be viewed in an integrated manner.

Having identified the attributes of the right to development and their respective operational elements, the challenge now is to reflect them in concrete criteria and corresponding qualitative and quantitative indicators that will facilitate the operationalization of the right and its implementation. Indeed, the three attributes represent a significant step in concretizing the content of the right. One often finds—and this is true of most human rights—that the enumeration of standards on a right in the articles (i.e., treaty provisions) and their elaboration in relevant instruments (including general comments by the relevant treaty bodies in the case of the legal instruments) are quite general and even overlapping, and not quite amenable to the process of identifying operational criteria or sub-criteria. By selecting the attributes of a right, the process of identifying suitable criteria or appropriate quantitative measures is considerably facilitated.

IV. Review of the task force criteria: issues and options

A critical examination of the right to development criteria for assessing global partnerships for development from a right to development perspective suggested by the task force at its fourth session in 2008 raises several issues, both conceptual and methodological. The issues become somewhat complex as one looks beyond the objective for which

[30] The idea of a "compact" was first proposed by T. Stoltenberg in the late 1980s and was elaborated in the *Human Development Report 2003*. Osmani has also suggested that the concept of a development compact may be useful for implementing the right to development (see footnote 21).

the suggested criteria were initially articulated and applied. First and foremost, we could have criteria that merely assist in the identification of aspects of global partnerships for development that conform to the right to development framework; alternatively, we could develop a set of validated criteria as a means to clarify the content of the right to development and thereby further its operationalization with the help of clear, measurable tools (qualitative and quantitative indicators). These tools, in turn, could enable and support a periodic assessment of the progress being made in the implementation of the right. The issue is essentially one of the scope and coverage of criteria that have already been articulated or could potentially be identified. Clearly, the right to development and its implementation entails much more than implementing a well-conceived partnership for development.

Therefore, the content and focus of the criteria will differ depending on what the objectives for identifying the right to development criteria are. In the first instance, the criteria will have to reflect and emphasize the instrumental aspect of the right, focusing on the process and procedural aspects (cross-cutting norms) that the right to development framework can contribute to in making development partnerships more effective. For this, the formulation of criteria could be more generic, since reference to the human rights standards will be minimal and the acceptance of the suggested criteria would depend largely on the perceived appeal of the criteria to the stakeholders in the development partnership. This appeal, in turn, will be based on the assessment of the concerned stakeholders of the potential contribution of the criteria to the intended results of their partnership. In the second instance, a starting point is to review the suggested criteria for their comprehensiveness in reflecting the right to development normative framework. The criteria in this case will have to cover exhaustively the human rights standards and the cross-cutting norms as applicable to the right to development.

Second, at a purely functional level, in the real-life context there isn't as yet a partnership for development at the global, regional or bilateral level that could be described as being uniquely designed for and anchored in the right to development normative framework. Therefore, the set of criteria that were applied to study the global partnerships for development need not be exhaustive. Third, to continue the argument, if all we need are generic criteria that allow us to assess the extent of congruence between the existing/ongoing development partnerships and the right to development, there may not be any need to develop sub-criteria or additional criteria that are particularly useful for analysing thematically focused, specific development partnerships such as those on trade, or technology transfers, or simply aid, debt and concessional flows, as was intended and reflected in the task force discussions (at the third and fourth sessions).[31] For in that case, as argued earlier, the specific objectives of the existing/ongoing partnerships are not as important as the manner in which the partnerships are being conducted. Therefore, the partnerships may as well be following a rights-based approach as against a right to development normative framework.[32]

Fourth, the ex-post categorization of criteria into structural/institutional, process and outcome after the criteria had already been articulated[33] may not be appropriate; it seems an afterthought, not adding any real value to the suggested criteria.[34] Indeed, as described earlier in section II, such a categorization has been used in the context of the work by OHCHR on the identification of quantitative measures to promote and monitor the implementation of human rights undertaken for the international human rights treaty bodies.[35] In that work, an ex-ante use of this categorization helped in transcribing the narrative on the normative content of the different human rights into a consistent and comprehensive set of quantitative and qualitative indicators. Moreover, the configuration of structural-process-outcome indicators helped in identifying indicators that could reflect the commitment-effort-results aspect of the realization of human rights through available quantifiable information. It has been suggested that an objective assessment of this relationship forms the bedrock of human rights assessment. The use of the structural-process-outcome categorization may therefore be more useful in identifying the quantitative measures or indicators corresponding to the right to development criteria rather than in categorizing the criteria themselves.

The fifth concern relates to the overlapping scope of many of the proposed criteria (which was eventually addressed at the fifth session of the task force). For operational ease and effective application

[31] This line of thinking to take the work forward was rejected by the task force at its meeting in April 2009.

[32] In contrast to a rights-based approach, which emphasizes the application of human rights cross-cutting norms and principals such as participation or non-discrimination and equality, the operationalization of the right to development, or for that matter any substantive human right, requires in addition the specific standards of that right to be respected, protected and fulfilled by the duty bearer concerned.

[33] See A/HRC/4/WG.2/TF/2.

[34] In fact, the categorization of criteria as structural, process or outcome is not consistent and is open to question.

[35] See OHCHR, *Human Rights Indicators* (footnote 1).

of the criteria (or sub-criteria), it may be necessary to review the criteria and make them, as far as possible, mutually exclusive in the scope of their content. This is an issue that has also been highlighted in the papers commissioned by OHCHR on the analysis of different global partnerships for development.[36] There is also the related concern of restricting the overall number of criteria and/or sub-criteria. At the same time, it would be desirable that the identified attributes of the right and the selected criterion, when considered together, present, as far as feasible, an exhaustive understanding of the normative content of the right to development.

Therefore, on balance, it may be desirable to work towards a comprehensive set of criteria that help in concretizing the normative framework on the right to development and thereby facilitate progress in its implementation. Thus, beginning with the identification of the attributes of the right to development and articulating their scope, followed by criteria and then sub-criteria, quantitative and qualitative measures will be required as outlined in the earlier section. Such an approach is consistent with the work undertaken by OHCHR for the United Nations human rights treaty bodies in identifying indicators for selected substantive and procedural human rights in the Universal Declaration of Human Rights, covering both civil and political rights and economic, social and cultural rights.

A. Rationalization of the task force criteria

Accordingly, as a first step in the review of the task force criteria,[37] there is a need to rationalize the criteria for overlapping content and redundancy. Of the 17 criteria suggested by the task force, 7 could be dropped altogether without compromising content or absorbed into others by suitably modifying the remaining criteria. Also with a view to ensuring that the criteria reflect the normative framework of the right comprehensively, some criteria need to be added or framed differently. The proposed revised criteria, devoid of categorization as structural/institutional, process or outcome, for reasons explained earlier, are as follows.

The implementation of the right to development requires conformity with and implementation of policies and initiatives by all relevant stakeholders that:

(a) Draw on all relevant international human rights standards, including those relating to the right to development, in elaborating the content of development strategies/partnerships and tools for monitoring and evaluating their implementation;

(b) Follow a human rights-based approach to development and integrates the principles of equality, non-discrimination, participation, transparency and accountability in their development strategies;

(c) Provide for the meaningful consultation and partnership of all stakeholders, including by ensuring free flow of relevant information in elaborating, implementing and evaluating development policies, programmes and projects;

(d) Contribute to creating an enabling environment for sustainable, equitable development that enables the realization of all human rights;

(e) Recognize mutual and reciprocal responsibilities among the development stakeholders/partners, supported by institutionalized accountability mechanisms, taking into account their respective capacities and resources;

(f) Respect the right of each State to determine its own development policies in accordance with international law and the role of national parliaments to review and approve such policies;

(g) Promote good governance, democracy and the rule of law and effective anti-corruption measures at the national and international levels;

(h) Establish policy priorities that are responsive to the needs of the most vulnerable and marginalized segments of the population, with positive measures to realize their human rights;

(i) Promote gender equality and the rights of women; and

(j) Establish safety nets to provide for the needs of vulnerable populations in time of natural, financial or other crisis.

[36] See, for instance A/HRC/8/WG.2/TF/CRP.5, which highlights the need to revise the criteria with a view to making them more focused (see also chapter 16 of this publication), or the reports of the technical missions of the task force (see part two of the Selected Bibliography).

[37] See A/HRC/8/WG.2/TF/2.

It can be seen that these criteria unpack the three attributes of the right to development identified in this chapter.[38] Thus, criteria (a) to (c) relate to holistic human-centred development, criteria (d) to (g) to an enabling environment and criteria (h) to (j) to social justice and equity.

B. Mapping criteria and indicators to right to development attributes

The table at the end of the chapter presents a possible mapping of the proposed revised criteria with the identified attributes of the right to development and their operational indicators. It can be seen that there are several gaps in the table where, first of all, no criterion has been identified for a specific operational element of an attribute, and occasionally no quantitative measure or indicator has been identified for an existing criterion.[39] The intention has been to merely illustrate the concept and methodology for developing an operational framework for implementing the right to development without being exhaustive. Secondly, as can be noted from the table format, a way has been found to develop further criteria that, for instance, relate to specific thematic partnerships for development, such as on trade, without rewriting some of the agreed criteria. At the same time, the link between a criterion and the normative content of the right continues to be explicit. Thirdly, following the approach outlined earlier, the table shows that it may be possible, or even desirable, to use the categorization of structure-process-outcome indicators in selecting the quantitative and qualitative measures for tracking the implementation of the criteria. Finally, though the national and the international dimensions have deliberately not been highlighted in reviewing/formulating the criteria, it is necessary to keep the two dimensions of the right to development in view in selecting the quantitative and qualitative measures for operationalizing and tracking the implementation of the right to development.

V. Conclusions and the way forward

In order to make progress in the implementation of the right to development, it is essential that while the conceptual basis of the criteria is strengthened, the identified criteria and their qualitative and quantitative measures are also validated empirically. This may require the task force to study additional partnerships at the international level, but also to analyse and document some national-level development experiences. The former would help in sensitizing the global development partnerships to the right to development perspective, particularly its international dimension. The latter would help in putting together some context-specific indicators and monitoring methodologies along with best practices that have contributed to the implementation of the right to development.

The operationalization of the right to development requires bridging of the human rights and development discourses, which can be aided by an approach such as the one presented in this chapter. One specific task, in taking this work forward, would be to elaborate additional suitable quantitative measures within the framework presented here, and build a broad-based consensus on their use by engaging various stakeholders at the national and international levels. The outcomes of such an exercise could help in the development of a set of operational methodologies (including an indicators-monitoring framework at national level that could also be used for international assessment of development partnerships[40]) and the identification of successful policies and public initiatives that could be incorporated as guidelines (or subsequently even elements of an international legal instrument) to further the implementation of the right and support a periodic assessment of its progress.

It has to be recognized that having suitable indicators to facilitate the implementation of the right to development is just one element, though perhaps a critical one, in the realization of the right. The other, equally important, element is to use indicators and other relevant information and methodologies to formulate the required policies and programmes to implement human rights. This chapter does not enter into an explicit discussion about the nature of policies and programmes that could help in the implementation of the right to development. While appropriate indicators may help in identifying development outcomes/goals that embody the normative human rights concerns and correspond to the realization of the

[38] The task force at its fifth session further refined these criteria to make them more comprehensive.

[39] It is possible to fill some of these gaps with sub-criteria (narratives) or context-appropriate indicators. The illustrative tables of indicators developed by OHCHR (see *Human Rights Indicators*) (footnote 1) provide a number of human rights quantitative and qualitative measures covering both civil and political rights as well as economic social and cultural rights that can be introduced in the right to development table, depending on the context, be it at the national level or, for global/regional development partnerships, at the international level.

[40] An institutional framework for undertaking human-rights based monitoring is discussed in Rajeev Malhotra, "Towards implementing the right to development: a framework for indicators and monitoring methods", in *Development as a Human Right*, Bård A. Andreassen and Stephen P. Marks, eds. (Boston, Harvard University Press, 2006) and A/HRC/12/WG.2/TF/CRP.6.

right to development, the policies that could help in reaching such goals and outcomes still need to be identified and tested. In general, while it is true that there is no unique model for the implementation of the right to development, as it is largely context-determined, there is considerable scope in analysing the development experience of both the developed and developing countries[41] to identify elements that can facilitate the implementation of the right to development.

[41] The Government of India has adopted a strategy for inclusive development, wherein the creation of entitlements backed by legal guarantees on aspects of life that are vital for an individual's well-being and inclusion in the economic and social mainstream of the society are an important element. In the recent past, the Government has worked towards realizing an individual's rights to information and to his/her work. This has been followed up with the enactment of the right to education in 2009/2010. As the next step, the Government is working on a Food Security Bill which would represent a significant step in guaranteeing the right to food. See Union Finance Minister's Budget Speeches 2009-2012, Government of India, available from http://finmin.nic.in.

Mapping proposed revised criteria to right to development attributes

Attributes and corresponding operational elements	Proposed revised criteria	Illustrative quantitative indicators
I. Holistic human-centred development 1. Integrated strategy for interdependence and indivisibility of all rights 2. Complementarity of process and outcomes 3. Sustainable development promoting growth with equity	➢ Draws on all relevant international human rights standards, including those relating to the right to development, in elaborating the content of development strategies /partnerships and tools for monitoring and evaluating their implementation ➢ Follows a human rights-based approach to development and integrates the principles of equality, non-discrimination, participation, transparency and accountability in its development strategies ➢ Provides for the meaningful consultation and partnership of all stakeholders, including by ensuring free flow of relevant information in elaborating, implementing and evaluating development policies, programmes and projects	➢ International human rights treaties ratified by the State in case of a development partnership, referred to in partnership document ➢ Number of CCAs and UNDAFs prepared internationally and for specific countries ➢ Date of entry into force and coverage of legislation on the right (access) to information ➢ Proportion of complaints investigated and/or adjudicated by an independent public accountability mechanism/ombudsperson/autonomous oversight body for anti-corruption and public grievances ➢ Existence of an institutionalized consultation process for policy planning and proportion of occasions when it was bypassed ➢ Quota, time frame and coverage of temporary and special measures for targeted populations in legislative, executive, judicial and appointed bodies ➢ Gini coefficient of income/consumption or by quintiles ➢ Unemployment rates, by sex, target groups and level of education
II. Enabling environment 1. Adequate resources ➢ Aid ➢ Debt ➢ Technology flows ➢ Labour mobility 2. Supportive trade regime 3. Asymmetries in global governance 4. Peace, security and disarmament 5. Country ownership of development plans 6. Policy space and autonomy 7. Good governance & rule of law	➢ Contributes to creating an enabling environment for sustainable, equitable development that enables the realization of all human rights ➢ Recognizes mutual and reciprocal responsibilities among the development stakeholders/partners, supported by institutionalized accountability mechanisms, taking into account their respective capacities and resources ➢ Respects the right of each State to determine its own development policies in accordance with international law and the role of national parliaments to review and approve such policies ➢ Promotes good governance, democracy and the rule of law and effective anti-corruption measures at the national and international levels;	➢ ODA as percentage of GDP/share of net ODA in national development expenditure* ➢ Number of countries where more than 25% of budget spending is dependent on ODA ➢ Debt service ratio of the country* (as percentage of exports) ➢ External and within country repatriation of money by workers ➢ International, regional and bilateral arrangements that facilitate transfer of technology for social development to the least developed and developing countries ➢ Foreign trade as a proportion of GDP ➢ Proportions of total developed country imports (by value and excluding arms) from developing countries and least developed countries, admitted free of duty* ➢ Average tariffs imposed by developed countries on agricultural products and textiles and clothing from developing countries* ➢ Preferential/Special temporary measures under WTO ➢ Proportion of public expenditure on armed forces & arms ➢ International organizations that follow a representative/equitable system of decision-making ➢ Conviction rates by type of adjudicated crimes ➢ Reported cases of arbitrary detentions in the reporting period

Attributes and corresponding operational elements	Proposed revised criteria	Illustrative quantitative indicators
III. Social justice and equity 1. Non-discrimination and inclusion 2. Gender equality and rights of women 3. Social safety nets	➢ Establishes policy priorities that are responsive to the needs of the most vulnerable and marginalized segments of the population, with positive measures to realize their human rights ➢ Promotes gender equality and the rights of women ➢ Establishes, as needed, safety nets to provide for the needs of vulnerable populations in time of natural, financial or other crisis	➢ Reported cases of denial of access to public service or position on account of discrimination ➢ Proportion of seats in parliament, elected and appointed bodies/public service at higher level at subnational and local level held by women and target groups ➢ Quota, time frame and coverage of temporary and special measures for targeted populations in legislative, executive, judicial and appointed bodies ➢ GEM, HDI ➢ Proportion of public social expenditure on campaigns to sensitize people on violence against women and children ➢ Share of poorest quintile in national consumption* ➢ Proportion of population living on less than $1 (PPP) per day* ➢ Employment to population ratio* ➢ Public expenditures for targeted social assistance schemes per beneficiary ➢ Proportion of population covered by health insurance (public or private) ➢ Proportion of workers covered under social security who availed themselves of and received stipulated social security benefits in the reporting period ➢ Share of poorest quintile in national consumption*

Note: * denotes Millennium Development Goals indicator.

Theory into practice: a new framework and proposed assessment criteria

*Susan Randolph and Maria Green**

I. Introduction

The theory and practice of both international development and international human rights have changed dramatically since the General Assembly adopted the Declaration on the Right to Development in its resolution 41/128 in 1986. On the development side, there has been an evolution and expansion of global institutions, a transformation of relevant technologies and a significantly changing natural environment. On the human rights side, global standards and institutions have expanded; the understanding and practice of economic, social and cultural rights in particular has deepened; there has been universal reaffirmation of the interconnectedness of all human rights, including the right to development; and the United Nations and other institutions have created a growing set of tools and concepts for integrating economic, social, cultural, civil and political rights into development and anti-poverty policies and processes.

Throughout this time, even as the right to development has grown in standing as an international human rights norm, it has rarely been used operationally to guide or assess the actions of development actors. This lack of implementation may be attributed in part to the absence of a sufficiently specific and widely accepted understanding of what actions or outcomes its content is meant to prescribe. It is in response to this absence that, in recent years, substantial attention has been paid to deepening our understanding of the right to development. Since 2005, in particular, the Human Rights Council Working Group on the Right to Development (hereinafter "Working Group"), with the assistance of its high-level task force on the implementation of the right to development (hereinafter "task force"), has undertaken a process of creating and refining a set of criteria for determining whether or not the right to development was in fact being implemented.

This chapter is adapted from a study that we prepared in conjunction with that process. In late 2009, the Office of the United Nations High Commissioner for Human Rights (OHCHR), on behalf of the task force, commissioned us to propose a set of tools for measuring implementation of the right to development as part of contemporary global and national practice. Our charge was to build on the earlier work of the Working Group and the task force and to undertake further research and interdisciplinary discussion to devise a set of right to development criteria, sub-criteria and operational sub-criteria (indicators) that could be used by international organizations, Governments and civil society to define and measure implementation of the right in the current development and human rights environment. We were asked specifically to offer the criteria and indicators in a framework that could

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eventually serve as the basis for the elaboration by the Working Group of formal guidelines for implementing the Declaration on the Right to Development and/or of a legally binding right to development instrument. This chapter is an abridged version of the resulting report (A/HRC/15/WG.2/TF/CRP.5).[1]

There was an extensive body of existing work to build on when we began this process.[2] At the same time, however, there remained a considerable number of conceptual and methodological questions that needed to be addressed before criteria and indicators could be proposed. The sections that follow undertake three separate tasks in answering those questions and providing the criteria and indicators themselves. Section II focuses on establishing the normative content of the right to development. It identifies, and takes a position on, a number of key unanswered questions about the duties the right entails and the modes in which it might be implemented. It then proposes a formal definition of the right and its main elements in the form of a set of time-invariant core criteria for assessing implementation of the right. The subsequent section sets out methodological issues involved in determining time-specific sub-criteria and indicators that reflect current development contexts, and proposes a set of critical guidelines for this process. Finally, section IV provides three exemplars, the first showing how one applies our framework and methodology to define indicators suitable for monitoring implementation of the right to development with regard to a particular pressing current development challenge; the second adapting the primary sub-criteria to the different types of State obligations; and the third applying the full framework and methodology to develop a comprehensive set of indicators for assessing implementation of States' collective obligations under the right to development. Note that both the full set of initial indicators we have proposed, and which can be found in our full report, and the far smaller set of exemplars offered here are provided in order to demonstrate that relevant indicators can indeed be identified and implemented in a right to development context. The process of deciding on actual indicators would necessarily entail a broad-based consultative process involving both stakeholder participation and sectoral expertise in the various substantive development areas.[3]

Three points should be emphasized at the outset. First, our approaches and solutions sought to address the essential features of the right to development as defined by the Declaration on the Right to Development and further elaborated to date by the Working Group, the Independent Expert on the right to development and the task force, while taking into account at the appropriate places the priority concerns of the international community, particularly those expressed by the Working Group at its earlier sessions. Second, we sought to firmly anchor our approaches and solutions simultaneously in contemporary international human rights law, theory and practice on the one hand, and in contemporary development theory and practice on the other. Finally, we sought to ensure that the proposed criteria, sub-criteria and indicators would serve as practical tools that stakeholders at various levels—international organizations, Government officials and civil society—could readily use to evaluate compliance of their policies and initiatives with the right to development.

II. Contours of the right to development

The right to development does not slot in easily beside other internationally recognized human rights; it covers a broader territory than most other human rights, and the text of the Declaration raises a tangle of conceptual and practical questions about implementation as well as content. Considerable work, both before and after the adoption of the Declaration itself, has been put into defining the normative content of the right.[4] In recent years, the United Nations sys-

[1] An earlier version of the study served as the basis of discussion for the expert consultation on the elaboration of criteria and operational sub-criteria for the implementation of the right to development held at Cambridge, Massachusetts, United States, on 17 and 18 December 2009 (see A/HRC/15/WG.2TF/CRP.4). The final report was subsequently presented and discussed at the sixth session of the task force, in 2010 (see A/HRC/15/WG.2/TF/2, sect. IV.D).

[2] Of particular note here is the work of the Independent Expert on the right to development, Arjun Sengupta; other studies commissioned to support the work of the task force, most particularly "Implementing the right to development: a review of the task force criteria and some options" by Rajeev Malhotra (A/HRC/12/WG.1/TF/CRP.6), which appears, updated, as chapter 28 of this publication; existing United Nations work on human rights indicators, most particularly the "Report on indicators for promoting and monitoring the implementation of human rights" (HRI/MC/2008/3) prepared by OHCHR (editor's note: that report provided the basis for the publication *Human Rights Indicators: A Guide to Measurement and Implementation* (HR/PUB/12/5), issued in 2012); and parallel contributions by academia and civil society, including the compilation of essays edited by Bård A. Andreassen and Stephen P. Marks titled *Development as a Human Right: Legal, Political, and Economic Dimensions* (Cambridge, Massachusetts, Harvard University Press, 2006). Further background bibliography can be found in the full report.

[3] The preliminary indicators proposed in this chapter benefited from the expert consultation sponsored jointly by OHCHR; the Program on Human Rights in Development, Harvard School of Public Health; and the Measurement and Human Rights Program, Harvard Kennedy School. A subsequent discussion at the Faculty Colloquium of the Program on Human Rights and the Global Economy at Northeastern School of Law in Boston also provided valuable commentary.

[4] See, for example, "The international dimensions of the right to development as a human right in relation to other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs: report of the Secretary General" (E/CN.4/1334) (1979);

tem in particular has undertaken a concerted attempt to bring the content of the right to development to the kind of clarity that would enable Member States, United Nations agencies and other international institutions and actors to integrate the standard effectively into their arrangements and practices. Among the steps taken are the appointment by the Commission on Human Rights, precursor to the Human Rights Council, of an Independent Expert on the right to development and the creation of the Working Group on the Right to Development and the high-level task force on the implementation of the right to development, made up of independent experts, to assist the Working Group in clarifying and making operational the norms contained in the Declaration. Between them, and with additional contributions from academia, civil society and the United Nations Secretariat, the world community has taken sizeable strides in delineating the elements of the right and what it means to implement those elements at the national and international levels.

Despite these advances, however, the right to development is in many ways still in a formative stage, with no established consensus on the meanings and practical implications of some of its constituent elements. Prior to proposing practical means of measuring implementation of the right to development, we needed to settle a number of practical and conceptual questions about the right. At the most basic level, there is a lack of clarity as to the nature and scope of the duties laid out in the Declaration. But there are also other key conceptual questions, starting with who holds the right and whose obligation it is to fulfil the right. In developing criteria, sub-criteria and indicators for assessing implementation of the right, we needed to identify and clarify a number of issues around which there might be confusion and to take a position on those issues that were not yet settled. This, in turn, meant first exploring, at a fundamental level, what the right to development adds, normatively and conceptually, to the landscape of both development and human rights practice, as that necessarily informs the positions taken when there are multiple options available.

In what follows, we discuss the value-added concepts that shaped our thinking and then define the contours of the right to development on two planes: general principles of implementation, which address underlying practical and conceptual questions that must be answered before implementation can be assessed; and specific normative content, which delineates the substantive elements of the right.

"The realization of the right to development: Global Consultation on the Right to Development as a Human Right: report of the Secretary-General" (E/CN.4/1990/9/Rev.1); "Implementing the right to development in the current global context", sixth report of the Independent Expert (E/CN.4/2004/WG.18/2); and Andreassen and Marks, *Development as a Human Right.*

A. What the right to development adds

The ways in which one interprets the right to development are necessarily influenced by, even predicated on, what one understands the value of the right to be; that is, what one understands the right to offer in the larger landscape of development and human rights standards and practice. In this section we make explicit the understandings of this value that shape our later decisions concerning the contents of the right and how their implementation is best to be measured.

There are a number of different ways in which we think the right to development, when more fully operationalized through projects like creating assessment tools, could contribute to international development practice and accordingly foster more rapid gains in global development and/or contribute to international human rights practice and the realization of the internationally recognized rights of all. We identified four in particular that helped us to conceptualize measuring the implementation of the right. These are:

1. *Collective obligations.* The right to development's focus on collective obligations begins to loosen the link between the level of human rights or development enjoyed by a person and the resources of the State in which he or she resides. The collective obligation does this in a couple of ways. First, it requires that States take into account, when acting together, the impact of their collective policies and actions on the development prospects of other States, especially those States with relatively few resources per capita. Second, it provides a normative standard against which to assess the processes, policies and programmes of the international institutions that are collectively controlled by States; that standard is the extent to which they foster the different elements of the right to development. Thus, staff members at multilateral institutions whose activities have an important bearing on development, such as the Bretton Woods institutions, regional development banks, the World Trade Organization (WTO) and United Nations institutions, can legitimately understand that their mandates are to be interpreted in the light of the right to development and, accordingly, that their policies and processes are legitimately to be assessed by the extent

to which they reflect the different elements of the right. Similarly, member States and civil society have a legitimate basis to examine the institutions in the light of the standard and to seek change when the standard is not being met.[5]

2. *Equity*. A second contribution of the right to development is that it obligates States to take more explicit account of equity at both the international and national levels. Although other existing international human rights instruments are strong with regard to non-discrimination, they are generally less forceful on the notion of equity, particularly at the international level. The right to development's focus on equity goes beyond protecting the rights of the most vulnerable, which is a central feature of the wider body of international human rights law. The emphasis in the Declaration on the Right to Development on international cooperation to remove obstacles to development and share benefits of development requires that international decisions take into account their impact on all people, not just the well-being of those people living in the most powerful and wealthy States. While the text of the Declaration is not entirely explicit with regard to equity, the jurisprudence that has developed around the right, including the reports of the Independent Expert and the criteria already adopted by the task force, suggest that it offers a basis for a legitimate claim not only for equal treatment as consistent with non-discrimination, but also for international and national decisions to be consistent with global social justice.

3. *Human rights-based approaches to development*. A third major contribution of the right to development is that it affirms that human rights goals and processes are to be integrated into the entire development endeavour. The right to development thus not only lends normative weight to the growing set of conceptual and practical tools for integrating human rights into development—a collection of tools that is generally subsumed under the term "human rights-based approaches to development" or "rights-based approaches to development"—but also brings these tools to a wider range of institutions and systems, both nationally and internationally.[6] The fact that the human rights-based approach has been developing for a number of years, most particularly in the United Nations system since the Secretary-General's directive concerning mainstreaming of human rights and the adoption in 2003 of the United Nations "Statement of common understanding on human rights-based approaches to development cooperation and programming",[7] also means that there is already a well-established series of modalities for thinking about the role of human rights in development on which any right to development measurement tools can readily build. A core concept is that human rights goals and cross-cutting human rights principles (non-discrimination, participation, access to information and means of effective complaint and remedy) are relevant at all stages—assessment, planning, implementation, monitoring and evaluation—of development-related policies and programmes.

4. *Bringing human rights into the discourse of mainstream economics*. Finally, the right to development provides additional normative support for integrating the human development approach into mainstream economics at both national and international levels. That is, rather than focusing nearly exclusively on growth, as economists commonly do, the right to development legitimizes a more direct focus on how the processes affect people's lives. The promotion of per capita income growth, although remaining critical, becomes subservient to improving human well-being.

With these four major contributions of the right to development to development and human rights practice in mind, we then turned to some open questions that we knew needed to be resolved in order to sort out a working set of contents of the right itself. These questions and our solutions are set out below.

B. General principles of implementation

Implementation of the right to development has been hindered by lack of clarity around core aspects of the right, e.g., is it like any other human right, in which the duty holders are national Governments and the right holders are individuals or groups? Or is it anomalous, implicating different rights bearers and different duty holders? In determining criteria, sub-criteria and indicators for assessing implementation of the right we needed to identify potential points of confusion and, where the answer was unfixed, to take a position one way or the other. Our framework pro-

[5] Note that a collective obligations approach to human rights and multilateral institutions continues to place the ultimate responsibility under the right on the member States; that is, it does not suggest that the multilateral institutions themselves are direct duty holders under the right to development. It thus fits well into the standard human rights paradigm in which States are the principal duty holders.

[6] The human rights-based approach has been well grounded in the Universal Declaration of Human Rights and in the core human rights treaties, but the right to development also provides a suitable normative location. For the extensive collection of human rights-based tools, see http://hrbaportal.org/.

[7] Available from http://hrbaportal.org/.

poses seven principles of implementation. They are listed and discussed in turn below. All of these principles are either explicit in, or consistent with, the text of the Declaration.

> *Principle 1*. The right is a right of peoples and of individuals. There is a rebuttable presumption that in international transactions and contexts, States represent the collective rights of the peoples and individuals under their jurisdiction.

Given that so much of development involves action among States (trade agreements, international assistance, etc.) it is important to address how the right to development's right holders, who are not States, are represented in international arenas. The principle adopted here is that in the State-driven world of international development practice, it is logical for States to be presumed to represent the collective rights of those under their jurisdiction. However, this presumption can be challenged in the rare situations where there is overwhelming evidence that State representatives are unwilling or unable to fulfil the core functions of Government.[8]

> *Principle 2*. Three kinds of State obligations are implicit in the right to development: obligations of collective action at the regional and global levels; obligations of individual action with regard to peoples and individuals outside a State's jurisdiction; and obligations of individual action with regard to peoples and individuals within a State's jurisdiction.

This principle recognizes the different forms of obligations addressed in the Declaration. Three classes of obligations are indicated in the Declaration: collective obligations of States; external obligations of individual States; and internal obligations of individual States. Each of these entails a different system of implementation and assessment.

The Declaration explicitly addresses the collective actions of States; and indeed, institutions and policies created by States acting collectively, e.g., global and regional financial, trade and development institutions, have a profound impact on development. To ignore the impact of collective institutions and policies is to ignore key drivers and, in some cases, key impediments to the development of many countries. While individual States can influence international institutions and policies through, for example, their voting practices in such institutions, in practice an individual State's influence may be limited in these contexts. Assessing the collective implementation of the right to development requires specifically measuring the extent to which international policies, institutions, processes and programmes that are under the collective control of States serve to further the undertakings set out in the Declaration. It also spotlights gaps in the international architecture that impede the undertakings set out in the Declaration.

In other words, assessment of the collective obligations of States looks not to the actions of any given State, but rather to the adequacy and processes of international institutions themselves. Criteria and indicators relevant to assessing this type of obligation can be used by the governing bodies and Secretariats of these international bodies to assess the adequacy of their development-related processes and practices, as well as by other stakeholders. For instance, if the right to development requires that States collectively undertake to ensure that development processes are congruent with human rights norms like transparency and means of remedy, then staff members at international institutions such as the World Bank or the International Monetary Fund (IMF) could use right to development criteria and indicators to assess the adequacy of their own institution's policies around transparency or around mechanisms for stakeholders to access remedies. Along these lines, adoption of the human rights-based approach to development in the United Nations system has provided its agencies with occasions to consider principles of transparency, accountability and so forth in their own work and products.[9] Right to development criteria relevant to assessing States' collective obligations can also be used by other stakeholders and advocacy groups to design and inspire changes in programmes, policies and practices of regional and global institutions that better ensure the right to development. Finally, criteria and indicators relevant to assessing the collective obligations of States also provide a way for the global community to assess outcomes with an eye to learning whether the global architecture and processes in place effectively foster human development.

The Declaration addresses both national and international processes and thus is concerned with both how each State acts individually with regard to those under its jurisdiction as well as individually with regard to peoples and individuals in other countries. The relevance of a country's actions to the well-being of its own citizens is obvious and need not be dwelled

[8] This is analogous to proposals for determining circumstances that might trigger a "responsibility to protect" standard in the case of natural or man-made disasters.

[9] For a practical example of a process for integrating human rights into an international organization's development tools, see Maria Green, "Applying a human rights based approach to UNDP's MDG needs assessment models", guidance note prepared for the Poverty Reduction Group and the Democratic Governance Group of the United Nations Development Programme, 2008.

upon. The actions of each State towards those in other countries are also straightforwardly included in the Declaration because the actions of a given State can profoundly impact development processes beyond its own borders through, for example, its votes in international organizations, or via decisions regarding, for example, trade or aid policies. Furthermore, some formally domestic actions by States, such as interest rate decisions or subsidies for domestic industries, have sizeable implications for individuals, groups of individuals or peoples in other countries, even to a global level. Roles of Governments with regard to the extraterritorial activities of businesses domiciled in their jurisdiction can also fall into this category.[10]

The nature of the two kinds of individual obligations differs. States have highly developed duties under international human rights standards towards those under their jurisdiction while their duties towards those not under their jurisdiction are less clearly developed, and there remain ambiguities regarding State obligations when domestic and external interests conflict. Although the Declaration does not specify the emphasis to be placed on a State's internal obligations relative to its external obligations when they conflict, one might readily argue that when an action has limited benefit for those under a State's jurisdiction or only benefits those best off within the State, but the action has pronounced adverse consequences for individuals or peoples, especially those worst off, residing in other States, the State should refrain from taking such an action. Even though the relative weight to be placed on the two types of obligations remains unclear, the obligation to take into account the interests of both those individuals and peoples within and outside a State's jurisdiction is clearly specified in the Declaration and further elaborated in the right to development literature.

> *Principle 3.* Implementation of the right includes not only establishing and implementing formal structures for the improvement of well-being, but also choices of action within those structures. That is to say, the right to development involves not just the rules of the game, but also the practice on the field.

This principle speaks to a concern sometimes raised that human rights advocates or specialists working on development institutions are prone to focus on formal structures to the exclusion of informal systems of decision-making.[11] For instance, the equity issue in a trade dispute between a powerful country and a weaker trading partner might not lie in the formal content of the trade standard involved or in the formal rules determining access to dispute resolution mechanisms, but rather in the choices of the more powerful country about when to make use of available mechanisms and why.

> *Principle 4.* The right entails obligations on all States, regardless of their level of development.

This principle speaks not only to the obligations of all States to the peoples and individuals under their jurisdiction, but also to the external obligations of all States. That is, it asserts that under the right to development, all States, whatever their level of development, have internal obligations; and that international obligations apply not only to wealthier States but also, for instance, to middle- and low-income countries in relation to each other. This reflects the straightforward fact that decisions by a middle-income country on, for example, textiles policy can have deep impacts on the well-being of people in a relevant low-income country.

> *Principle 5.* Implementation of the right is properly assessed through examination both of conduct and of result.

This is consistent with how implementation of other human rights instruments is currently assessed. For example, the general comments issued by the Committee on Economic, Social and Cultural Rights, which is charged with monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights, clearly direct States to put plans, measures and processes in place that respect, protect and promote economic, social and cultural rights and also hold States accountable to reach outcomes by progressively realizing the rights guaranteed in the Covenant.[12]

> *Principle 6.* The right does not exist in isolation either from other aspects of international human rights law and practice or from international consensuses around effective development policy and practice; and implementation at any given time is appropriately shaped by current developments in both.

Existing human rights principles assert all human rights to be indivisible, interdependent and interrelated. There is no reason to exclude the right to development in this regard, and in fact a key aspect of

[10] See "Guiding Principles on Business and Human Rights: implementing the United Nations 'protect, respect and remedy' framework": report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (A/HRC/17/31, annex). The Human Rights Council, at its seventeenth session in 2011, endorsed the Guiding Principles in its resolution 17/4.

[11] See, for example, Andrew T. Lang, "Rethinking trade and human rights", bepress Legal Series, paper 1685 (2006). Available from http://law.bepress.com/cgi/viewcontent.cgi?article=7916&context=expresso.

[12] See, for example, general comment No. 3 (1990): The nature of States parties' obligations (art. 2, para. 1, of the Covenant).

the right to development is that it holistically addresses many of the rights enunciated in multiple treaties and other instruments forming the corpus of international human rights law. The body of international human rights law continues to grow and with it specific codification and clarification of various rights issues that are relevant to the right to development.

International consensuses around effective development policy and practice also change as development theory evolves in response to evidence-based studies. For example, it was long held that growing inequality within countries was functional to growth in the early stages of development given the necessity of amassing savings to get growth under way, but that inequality would quite automatically decrease in later stages of growth.[13] However, this consensus has now been turned on its head: it is now widely agreed that equality facilitates growth and promotes other aspects of human well-being at the national level.[14] And there is an emerging consensus that inequality induces global financial instability.[15] Effective sub-criteria and indicators for assessing implementation of the right to development at any given time must reflect current consensuses about the factors that promote and impede human development at both the national and international levels.

> *Principle 7.* Particular focus areas for assessment of the implementation of the right will vary from time to time in accordance with changing priority areas of concern at the national and international levels.

The factors that promote and impede development cannot easily be enumerated. Some development challenges persist through the ages and manifest themselves in the same manner over time. Other challenges persist, but manifest themselves in different forms. For example, the challenge of poverty has persisted throughout time and has always manifested itself in excess morbidity and mortality. Global economic instability has proven to be a recurrent obstacle to development, but this instability has expressed itself principally as a global financial crisis in some periods and a global food crisis in others. Further, new challenges will likely emerge over time. We are only now beginning to fully understand the challenge that climate change poses to development. It is not feasible or reasonable to try to assess the extent to which all potential obstacles to development are being addressed by States or the extent to which States have collectively and individually taken all measures and put into place all policies that might promote development. Assessment of the implementation of the right to development must necessarily focus on those development challenges that are most pressing at any given time.

The above principles are reflected in the following sections of the chapter, which address, respectively, the normative contours of the right and the use of criteria and indicators to measure its implementation.

C. Specific normative content of the right to development

A number of different definitions of the right to development have been proposed, and there is at this point no single settled definition in international human rights practice.[16] As it is, however, impossible to measure implementation of the right without defining the content of the right, this section sets out the framework that we devised to shape the choice of measurement tools and explains the reasoning behind it.

1. Goals of the framework

In seeking to establish a framework that would elaborate the content of the right in the context of criteria for assessing implementation, we were looking for three elements:

(a) Definitional language that would:

(i) Provide an overarching principle that could serve as a steady reference point for resolving ambiguities in the text, similar to the way in which the principle of "human dignity" serves as a steady reference point for the Universal Declaration of Human Rights;

[13] Simon Kuznets first posited that inequality would initially rise but subsequently fall in the course of secular income growth in "Economic growth and income inequality", *The American Economic Review*, vol. 45, No. 1 (March 1955), pp. 1-28. Theoretical models of the factors that could initiate and sustain growth at the time, such as that posited by Arthur Lewis in "Economic development with unlimited supplies of labour", *The Manchester School*, vol. 22, Issue 2 (May 1954), pp. 139-191 supported this conjecture.

[14] See, for example, P. Aghion, E. Caroli and C. García-Peñalosa, "Inequality and economic growth: the perspective of new growth theories", *Journal of Economic Literature*, vol. 37, No. 4 (1999), pp. 1615-1660.

[15] Inequality was singled out at the 2011 World Economic Forum in Davos, Switzerland, as a key source of the asset bubbles that triggered the recent global financial crisis. See, for example, Phillip Aldrich, "Davos WEF 2011: wealth inequality is the 'most serious challenge for the world'", *The Telegraph* (London), 26 January 2011.

[16] See, for example, Andreassen and Marks, *Development as a Human Right* (footnote 2).

(ii) Break the right down into several distinct components and sub-components that would provide coherent categories by which to group specific obligations, in order to help States and other actors to clearly understand the nature and scope of the duties involved; and

(iii) Clarify the relationship of the right to other international human rights, as this is a regular source of confusion with regard to implementation;

(b) Clear organizational categories that would draw a distinction between:

(i) The fundamental elements of the right, which do not change; and

(ii) The particular ways in which those elements play out under the prevailing circumstances, priorities and theory at any given time;

(c) Explicitly identified areas of action that could give rise to specific measurement tools that would help Government officials, staff at international organizations and members of civil society to implement the right to development in practical ways during the day-to-day planning, implementation, monitoring and evaluation of development policies and programmes.

The reasons for this approach are fundamentally practical: the operational space covered by the Declaration on the Right to Development is vast, potentially encompassing all of national and international economic and social policy on the one hand and all of international human rights standards and practices on the other. Any attempt simply to catalogue the individual actions implied by the right, one after the next, would yield a document that was as impractical as it was long. At the same time, given that development theory and practice are moving targets, there needs to be a generative process by which constant normative standards give rise to measurement tools that are appropriate for the time that the measurement takes place. These measurement tools in turn need to be useful to practitioners in their everyday work. The goals of the measurement tools are set out in more detail in section III below, but it is worth noting here that we were not seeking to craft tools that would be used to rank countries comparatively (as, for instance, the Human Development Index does). Rather, the specific measurement tools are meant to help all of the different actors to assess their own and other's actions through a commonly agreed-upon set of relevant metrics.

In pursuing this approach, we sought as far as possible to build upon definitions, categories and vocabulary that had already been adopted by the Working Group or the task force. In particular, the terms "criteria" and "sub-criteria" and "operational sub-criteria" were already in play, and we maintained that terminology while exploring the categories that the Working Group and task force had considered to that point. In our work "core criteria" refer to the timeless, broad objectives against which implementation of the right to development is to be assessed, while the "primary sub-criteria" under each criterion identify the major elements of that criterion. "Lower-level sub-criteria" concretize the primary sub-criteria with regard to the current historical context and are subject to change over time. "Operational sub-criteria" effectively translate into quantitative and qualitative structural, process and outcome indicators.

In order to build a framework that accomplished the goals set out above, we developed a hierarchy of criteria and sub-criteria along two separate but interrelated dimensions.[17] First, we turned to the analysis of the right to development that the Working Group had recently adopted. The Working Group divided the right to development into three primary components—"enabling environment," "comprehensive development" and "equity and social justice"—and specified some 20 associated criteria that had been proposed by the task force (see A/HRC/12/WG.2/TF/2, annex IV). Second, we turned to the pressing development concerns identified by the Working Group along with those reflected in Millennium Development Goal 8 and identified the broad categories of overarching development issues they fell within. We then grouped together, under each of the broad categories, the relevant pressing current concerns identified by the Working Group and as part of Millennium Development Goal 8 along with pressing development concerns of past decades and additional development concerns we could anticipate might emerge as particularly pressing in the future.

Our working understanding of the substantive content of the right to development weaves together

[17] Our thinking in this context was shaped greatly by Rajeev Malhotra's paper, "Implementing the right to development: a review of the task force criteria and some options" (A/HRC/12/WG.2/TF/CRP.6).

the criteria and sub-criteria that emerged in these two dimensions. Its foundation is the text of the Declaration itself; and on those aspects where the Declaration is unclear, it looks to the ideas and principles set forth in sections A and B above. In structuring our working understanding of the substantive content of the right to development, we sought to characterize the contours in terms of obligations as well as outcomes. While it was relatively straightforward to sort out the three types of obligations—collective, individual-external and individual-internal—for the second two of the primary criteria for the right to development identified by the Working Group, it was difficult to do so for the first, "enabling environment", as this criterion is cross-cutting and characterizes a general obligation that subsumes the other two rather than running parallel to them. We reorganized to reflect this, and the result is that our proposed set of specific contents of the right to development specifies an overarching principle, a general obligation and three core criteria. Taken together, they still reflect the essential content of the three categories already adopted by the Working Group.

Underneath the core criteria are primary sub-criteria, which are narrower criteria that specify the major elements of the core criteria. Together, the core criteria and primary sub-criteria incorporate the 20 task force criteria adopted by the Working Group. States have collective, individual-external and individual-internal obligations under each of the core criteria and primary sub-criteria, although some of the primary sub-criteria are more relevant to one type of State obligation than another. The citations referenced in laying out the overarching principle, general obligation and core criteria and primary sub-criteria below, are to the supporting provisions in the Declaration itself and the 20 task force criteria adopted by the Working Group.

2. Content of the right to development

Overarching principle. States Members of the United Nations, in agreeing to implement the Declaration on the Right to Development, undertake to act individually and collectively to ensure continual improvement in the well-being of peoples and individuals.[18]

General obligation. To this end, they undertake to ensure, at both international and national levels, an enabling environment that, by removing obstacles and creating opportunities, fosters the ongoing, sustainable and equitable development of individuals and peoples in an environment of peace and security, and in accordance with internationally recognized human rights standards.[19]

Core criteria. Specifically, they agree to establish, promote and sustain national and international arrangements, including economic, social, political and cultural policies, institutions, systems and processes, that:

(a) Promote and ensure sustainable, comprehensive human development in an environment of peace and security;[20]

(b) Are shaped by, and act in accordance with, the full range of international human rights standards, while also promoting good governance and the rule of law;[21]

(c) Adopt and implement equitable approaches to sharing the benefits of development and to distributing the environmental, economic and other burdens that can arise as a result of development.[22]

Primary sub-criteria. For each of these core criteria, we set out major elements, or primary sub-criteria, that are likely to remain stable over time. These are as follows:

(a) Major elements of ensuring sustainable, comprehensive human development in an environment of peace and security include ensuring, at both national and international levels, the following:

(i) A stable economic and financial system;[23]

(ii) A rule-based, open, predictable and non-discriminatory trading system;[24]

(iii) Access to adequate human and financial resources;[25]

[18] Declaration on the Right to Development, preamble, arts. 1 (1), 2 (2), 2 (3), 4 and 10.

[19] Working Group broad criteria; Declaration, arts. 2 (2), 2 (3) and 7; task force criterion (f).

[20] Task force broad criteria; Declaration, arts. 2 (2), 2 (3), 4, 7 and 8; task force criteria (f), (n) and (p).

[21] Declaration, arts. 2, 3 (3), 6 and 9 (1); task force criteria (k), (l) and (m).

[22] Declaration, arts. 2 and 8 (1); task force criteria (f), (h), (i), (o), (r), (s), (t) and (u).

[23] Task force criterion (j).

[24] Task force criterion (h).

[25] Declaration, arts. 3 (3), 4 and 6; task force criterion (g).

(iv) An environment of peace and security (including in the contexts of armed conflict, post-conflict situations, and personal security from gender-based violence and other forms of violent crime);[26]

(v) Access to the benefits of science and technology;[27]

(vi) Environmental sustainability and sustainable energy policies and practices;[28]

(vii) Constant improvement in economic and social well-being;[29]

(viii) The creation and monitoring of development strategies;[30]

(b) Major elements of ensuring that policies, institutions and processes are shaped by, and act in accordance with, the full range of international human rights standards at both national and international levels and promote good governance and law include:

(i) Ensuring that the goals of development-related policies and strategies are shaped by international human rights standards;[31]

(ii) Ensuring the integration of the cross-cutting norms of non-discrimination, participation, access to information and access to means of effective complaint and remedy into development-related policies, institutions and processes, noting that they should be reflected in all stages—assessment, planning, implementation, monitoring and evaluation—of development-related policy and programming;[32]

(iii) Attention to rule of law and anti-corruption measures;[33]

(c) Major elements of adopting and implementing equitable approaches to sharing the benefits of development and to distributing the environmental, economic and other burdens that can arise as a result of development include the following:

(i) Ensuring that the benefits stemming from trade, economic growth, scientific advancement, etc. do not accrue purely in proportion to the political or economic bargaining power of particular parties or groups;[34]

(ii) Ensuring that any burdens caused by development, including environmental and other damages and costs of economic transformations, are equitably distributed;[35]

(iii) Ensuring attention to and care for the needs of the most vulnerable or marginalized individuals or groups.[36]

The above framework represents the normative space and the substantive categories that we understand to make up the right to development. It, in turn, is the basis for determining specific measurement tools—lower-level sub-criteria and indicators—that reflect the particular circumstances of the world and of nations at any given time. Those are presented below.

3. Lower-level sub-criteria and indicators

A hierarchical set of lower-level sub-criteria translates the above core criteria and their major elements (primary sub-criteria) into processes and outcomes that are measurable and can be used to assess implementation of the right to development for each of the States' three types of obligations: collective obligations of States, internal obligations of individual States and external obligations of individual States. Unlike the core criteria and primary sub-criteria specified above, however, the relevance of the various lower-level sub-criteria is expected to

[26] Declaration, art. 7; task force criteria (n), (o) and (p).
[27] Declaration, arts. 3 (3), 4 and 6; task force criterion (g).
[28] Task force criterion (f).
[29] Declaration, art. 2 (3).
[30] National level only—Declaration, arts. 2 (3) and 10; task force criteria (k) and (m); economic, social and cultural rights jurisprudence.
[31] Declaration, arts. 1, 3 (3), 6 and 9 (2); task force criteria (a), (b) and (c).
[32] Declaration, arts. 3 (3), 6 and 9; task force criteria (a), (b), (c), (d), (i) and (m).
[33] Declaration, arts. 2, 3 and 10 per the task force criteria; task force criteria (l) and (m).
[34] Declaration, arts. 2 and 8 (1); task force criteria (f), (h), (i), (o), (r), (s), (t) and (u).
[35] Ibid.
[36] Ibid.

vary over time, and so too will the relevance of indicators monitoring the implementation of the specific aspects of the right to development that these sub-criteria embody.

This is because, as noted earlier, while some development challenges have persisted over time (poverty), others are met (eradication of smallpox) and new challenges emerge (mitigating climate change). Our understanding of the interrelationships between the political, economic and social factors that impinge on development at both the global and national levels continues to evolve, and indeed those relationships themselves can change. For example, although climate perturbations have long influenced food security, the current global food crisis is in part a consequence of efforts to address climate change by developing biofuels; competition between food production and fuel production was not an issue in the past.

The global architecture has also evolved over time. There has been a blossoming of development partnerships since the birth of the United Nations and the Bretton Woods institutions, and these institutions have evolved in their focus and complexity as well. The international development architecture will continue to evolve to meet current and future development challenges.

For these reasons, the lower-level sub-criteria and indicators used to assess compliance with the right to development must be specific to the current development context, even as the core criteria and primary sub-criteria remain constant. In addition, the lower-level sub-criteria and indicators must effectively translate the core criteria and primary sub-criteria into measurement tools that are relevant for each of the three different obligations of States (collective, individual-internal and individual-external).

Once the decision has been made to translate constant norms into time- and context-specific lower-level sub-criteria and indicators, a number of normative and technical questions arise as to how the specific sub-criteria and indicators are to be determined. These questions are explored in section III below, along with the approaches that we adopted towards them. In section III we provide examples of lower-level sub-criteria and indicators that reflect those approaches.

III. Methodological issues in determining lower-level sub-criteria and indicators for measuring implementation of the right to development

This section addresses three questions: first, the goals of measurement and how they are reflected in the choice of measurement tools; second, technical issues involved in determining appropriate measurement tools; and finally, process issues involved in determining which tools to adopt in national and international mechanisms or systems concerning the right to development.

A. Three goals for measurement tools

The choice of measurement tools for assessing implementation of the right to development is not something to be undertaken lightly. Experience tells us that the decision of what to measure has real impacts on action. Efforts directed at assessing implementation of the right to development serve three main purposes. The first is to clarify State obligations under the right to development, the second is to assess compliance with those obligations, and the third is to assess the adequacy of the current international architecture with regard to fulfilling the right to development. The first purpose, clarifying State obligations, requires prescriptive or forward-looking indicators. The second and third, assessing compliance and the adequacy of the international architecture, require outcome-focused, or backward-looking, indicators.

Consider the issue of sharing the benefits of international trade more equitably. Tracking indicators such as "the ratio of tariff revenues received by a given country from countries with lower per capita income levels to tariff revenues received from countries with higher per capita income levels" can tell us whether that country has adopted trade policies that remove obstacles to poorer countries' exports, thus enhancing their opportunities for development. Tracking the average of this ratio across countries can tell whether the full set of global institutions governing trade flows is leading to a distribution of the benefits from trade that favours less developed countries and thus promotes global equity. These backward-looking indicators are the sorts of indicators that assess the outcome or results of efforts to implement the right to development. One might argue that outcome indicators are redundant since other

monitoring programmes in place, with a narrower focus, can provide a richer set of indicators for the specific aspect of global development performance within their narrow mandate. However, there are outcomes of concern to the right to development that are not monitored under other instruments, and some outcomes relevant to the right to development are the result of multiple actions on multiple fronts. If the outcomes are not tracked, the complementarities or synergies between policies and practices would be ignored in assessing the implementation of the right to development. Without considering the full range of issues relevant to the right to development, it is difficult to discern whether changes in the global architecture might better ensure realization of the right and, if so, the sorts of changes most likely to further achievement of the right.

At the same time, backward-looking indicators are often silent when it comes to specifying the actions that States in their various capacities should undertake to implement the right to development. Human rights lawyers tend to favour indicators that specify such actions. When it comes to assessing whether the policies, processes and measures undertaken by global institutions governing trade, such as WTO, are consistent with the right to development, they might suggest an indicator such as, "Has the WTO Secretariat produced and made publicly available a plan for improving informed participation by less wealthy countries in trade negotiations?" Although an indicator of this sort tells us nothing about the quality of the plan it addresses, it provides a point of entry for requesting that WTO provide and make public such a plan and for calling forth public debate regarding its adequacy.

Backward-looking (outcome) and forward-looking (prescriptive) indicators both have an important role to play in assessing implementation of the right to development. Forward-looking indicators specify the kinds of action that States need to take individually and the kinds of action they need to promote through their involvement in international organizations. Backward-looking indicators assess whether the actions taken have led to the desired outcomes, and indeed whether global partnerships and the international infrastructure as a whole meet the dictates of the right to development. Furthermore, the two sorts of indicators are mutually reinforcing. Changes in outcomes feed back into defining the nature of the actions needed. Our scheme therefore accepts a role for both forward-looking and backward-looking indicators.

B. Technical issues in defining measures for assessing implementation of the right to development

As mentioned earlier, the potential terrain covered by the right to development is enormous. Virtually any programme or policy a State or international body undertakes can impact the development prospects of some person, somewhere. Indicators to monitor it could in principle encompass not only the existing tools for monitoring all existing international human rights standards as they are relevant to development contexts (including all of the oversight tools established by the United Nations human rights treaty bodies, the universal periodic review process of the Human Rights Council and regional human rights oversight mechanisms), but also all the existing tools available for monitoring economic and social policies and practices at the national and international levels (including both systems established for monitoring global commitments, such as the Millennium Development Goals or Education for All, and narrower reporting regimes established through, e.g., environmental treaties). That is clearly neither desirable nor practical. In this section we set out the technical issues that we considered in deciding what indicators were appropriate to measure the right to development, along with the approaches that we adopted on these issues and the reasoning behind them.

Identifying measures to assess compliance with the right to development required that we narrow the range of our focus to the most pertinent development challenges. Identifying lower-level sub-criteria and indicators required that we illuminate the context of those development challenges. In many cases, there exist many different indicators that one might adopt to assess implementation of some aspect of the right to development. In these cases, it was necessary to decide on the specific aspects of implementation that assessment should focus on (i.e., lower-level sub-criteria of the right to development) and, having done so, to specify criteria for indicator selection within that aspect. Each of these issues is discussed in turn below. In other cases, no ready indicator exists to assess implementation of an aspect of development which we argue assessment should focus on. The indicators framework we propose thus also highlights those areas where assessment is needed but where indicators are lacking, shining a light on those areas where indicator development is urgently needed. In the rest of this section we set out the theoretical framework we propose for selecting indicators; in section IV we illustrate how the framework plays out in practice.

1. Identifying the development context of priority concerns

Our mandate from the task force required that in addition to addressing the essential features of the right to development as reflected in the Declaration itself, we take into account the six components of Millennium Development Goal 8—establishing a global partnership for development[37]—and the priority concerns of the international community, including especially those expressed by the Working Group. Many of the pressing development challenges identified by the Working Group are transient in their particulars, as are many of the factors precipitating those challenges, and needed to be understood within their broader context.

In deciding how best to narrow the range of our focus while remaining true to the broad agenda of the Declaration on the Right to Development, we first framed the priority concerns of the international community within the context of development problems that have persisted throughout the ages and are likely to persist into the distant future. Specifically, we organized the pressing development concerns into overarching topics and then drew on the broader development literature to elucidate two issues. First, we sought to determine the extent to which and the ways in which current pressing development challenges and obstacles were related to broader development issues and to each other and second, we sought to isolate the particular factors contributing to today's pressing development challenges as well as possible solutions to those challenges. For example, our examination of the global food crisis suggested that if the current food crisis is to be surmounted and future crises prevented, action on several fronts is required ranging from actions to prevent destabilizing price speculation to actions to ensure adequate food production and stocks, to actions to slow climate change. This analysis enabled us to identify the factors that States, acting collectively and individually (both internally and externally) need to be concerned with in their efforts to implement the right to development. By enabling us to identify these factors as relevant to each of the three types of State obligation, the analysis also allowed us to identify the kinds of forward-looking (prescriptive) and backward-looking (outcome) indicators that might be used to assess implementation of the right to development.

2. Specifying indicator categories

Several other indicator classifications, some of them overlapping the forward-looking/backward-looking divide, needed to be decided on as well. First, we sought indicator categories that would capture the tri-fold obligation of duty bearers to respect, protect and fulfil the rights articulated in the Declaration, in accordance with standard human rights understandings of the different kinds of State obligations that exist. Second, we needed to decide on the balance between universally relevant and contextually or culturally specific indicators.

We have followed the approach that is widely applied in the United Nations human rights world by identifying three kinds of indicators—structural, process and outcome indicators—to monitor the tri-fold obligation of States to respect, protect and fulfil human rights, for the reasons articulated in the United Nations "Report on indicators for promoting and monitoring the implementation of human rights" (HRI/MC/2008/3). Structural indicators track whether treaty commitments and domestic laws are in place that hold States (acting individually and collectively in regard to the right to development) accountable for implementing various aspects of the right, as well as whether the basic institutional mechanisms and policy frameworks are in place to facilitate realization of different aspects of the right. In this way, structural indicators measure a State's commitment to implementing particular aspects of the right to development. Process indicators meter the efforts undertaken to make a State's commitment a reality. They include indicators reflecting the extensiveness of programmes and projects put in place to implement the right as well as indicators reflecting the financial and human resources devoted to implementing the right. Finally, outcome indicators reflect the results of a State's efforts as consolidated over time. As related to the right to development, they are summary indicators that track progress in realizing the different aspects of the right to development and, accordingly, people's enjoyment of the different aspects of the right.[38]

[37] The six targets under Millennium Goal 8 are: "1. Develop further an open, rule-based, predictable, non-discriminatory trading system. 2. Address the special needs of the least developed countries. 3. Address the special needs of landlocked developing countries and small island developing States. 4. Deal comprehensively with the debt problems of developing countries. 5. In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries. 6. In cooperation with the private sector, make available the benefits of new technologies, especially information and communications." Available at www.undp.org/content/undp/en/home/mdgoverview.html.

[38] It is useful to briefly distinguish here between the respective roles of development indicators, human rights indicators generally and right to development indicators specifically. Development indicators tend to focus on development outcomes and do not concern themselves with the actions of particular actors. Human rights indicators focus on the extent to which internationally recognized human rights are being enjoyed by rights holders or are being respected, protected or fulfilled by duty bearers. In the case

It is clear that the substantive components of the right to development are constant across countries and regardless of whether countries are acting individually or collectively. However, development contexts differ across countries. Cultural preferences also shape development objectives, reflecting heterogeneous values, and preferences are also endogenous and so can change over time. A balance needs to be struck between universally relevant indicators and contextually or culturally specific indicators, especially when it comes to monitoring implementation of the right to development with regard to States acting individually with regard to domestic development (the individual-internal component of the right to development). Our mandate emphasized specifying universally relevant indicators and, accordingly, the balance struck stressed universally relevant over culturally specific indicators, although with regard to national-level development outcomes, where relevant, our full report specifies separate indicators for high- and low-income countries. This is not to relegate locally and culturally specific indicators to a lower priority, but rather to leave extensive space for country participation in specifying international benchmarks by region or other country category and in specifying indicators and benchmarks relevant to assessing implementation of the right to development with regard to States' individual-internal obligations.

3. Criteria for indicator selection

A number of additional criteria guided our selection of proposed indicators, including their validity, reliability, availability, and international and inter-temporal comparability. Validity refers to how well an indicator reflects what one desires to measure, while reliability refers to whether the value of an indicator is consistently estimated in repeated samples or, practically speaking, whether it can be trusted. Collecting data is far from costless and some indicators cost more than others to collect. Whenever possible, we proposed indicators that are currently widely available, are currently being collected as part of other monitoring initiatives or are inexpensive to collect and construct, such as indicators drawing on regularly collected administrative data. As it is not possible to monitor progress across countries unless indicators are internationally comparable, and in order to monitor progress over time, we decided that the indicators we proposed must also be inter-temporally comparable.

In order to monitor the right to development as it pertains to vulnerable groups, especially vulnerable groups within countries, it must be possible to disaggregate (or decompose) indicators by the population subgroup of concern. Thus, we propose indicators that can be disaggregated or decomposed in principle, although in most cases current data initiatives will need to be strengthened in order to provide the disaggregated data essential to assessing the situation of vulnerable groups.

An additional factor that guided our selection of quantitative indicators, in particular, is the methodology used to collect the data that directly constitute indicators or are used to construct indicators. Specifically, the quantitative indicators proposed use an objective data-generating method and a transparent methodology. So far as is reasonable, the quantitative indicators proposed are derived from socioeconomic and other administrative statistics. These sorts of data are collected through administrative records and statistical surveys. National statistical institutes or international organizations with high professional standards compile most socioeconomic data using standardized methodologies. As such, socioeconomic data tend to have high validity and reliability. National statistical institutes are expected to be impartial, neutral and objective and tend to follow guidelines set by international statistical organizations. As a result, socioeconomic statistics are generally comparable across countries and over time.

To the extent possible, we avoided using quantitative indicators derived from events-based data. Although much of this type of information is increasingly recorded in standardized format, events-based data on human rights violations tend to underestimate violations and are seldom comparable across countries or even over time within a country. Similarly, we avoided basing quantitative indicators on household perception and opinion surveys since the subjectivity inherent in this sort of data leads to low reliability and validity scores and poses international and inter-temporal comparability problems. The methodology and data-generating method used to construct data based on expert judgement is generally opaque; thus, we avoided data based on expert judgement unless the methodology was transparent and the data-generating method was objective.

of international economic, social and cultural rights, the level of enjoyment is properly assessed in the light of the Government's maximum available resources under the principle of "progressive realization". As such, it cannot be gauged from development indicators metering rights enjoyment alone (although development indicators can be used in limited ways to help measure enjoyment or, when disaggregated, to help identify areas of discriminatory outcomes). Human rights indicators in turn overlap with right to development indicators, but comprise only a subset of what is relevant to assessing implementation of the right to development. The right to development both explicitly incorporates other human rights standards and adds additional dimensions, in particular with regard to equity and the collective and external obligations of States as discussed in section II.A above.

The process of identifying indicators involved searching through indicators on dozens of subjects and from dozens of data sources to identify those that met the criteria specified above and had wide country coverage, and then from among them choosing the best for the purposes at hand. The initial set of indicators that we proposed in sections IV-VI of our original report, and that are excerpted below in section IV, were chosen following the methodological and technical approaches outlined above. A final choice of indicators, however, would need to follow a longer and participatory decision-making process.

C. Process issues around determining final right to development indicators

The technical approaches laid out in the sections above are relevant to any choice of indicators monitoring implementation of any aspect of the right to development. In section IV below, we set out some examples of right to development indicators from a comprehensive set that we arrived at using that process. As mentioned above, however, the purpose of these indicators (both the examples given below and the larger set in our original report) is to demonstrate that indicators are in fact available and that setting out to measure implementation of the right to development is not infeasible. Ultimately, given the substantive range of the right to development and the normative aspects of deciding on precise indicators, the decision of what actual indicators to use cannot and should not be made by two people working together over a four-month period, as was our initial set of exemplary indicators. Within the framework that we have proposed, the final choice of indicators involves both science-based and normative decisions concerning areas of focus (lower-level sub-criteria) and the choice of indicators among the possibilities that meet the technical standards established above. An effective decision-making process would involve both of the following: (a) contributions of persons with extensive sectoral expertise in each of the major elements (primary sub-criteria) of the core criteria of the right to development; and (b) stakeholder participation and consultation on the normative issues involved in deciding areas of priority for measurement purposes.

In the case of a set of formal guidelines on the right to development or of a legally binding instrument, we would recommend establishing a fixed normative framework including core criteria and primary sub-criteria, as in the framework we have proposed, and then an oversight system that gives extensive room for periodic updating of lower-level sub-criteria and associated indicators based on the contemporaneous development context and priorities. For the measurement and oversight system to be most effective, both the initial set of sub-criteria and indicators and the periodic updates would need to be determined through consultative processes that involved the elements mentioned above, i.e., technical expertise in relevant sectors and discussion with a wide range of stakeholders from Government, the international civil service and civil society, among others; such a process has already been put in motion to determine human rights indicators.[39]

In addition, we recommend that there be separate and overlapping processes for determining lower-level sub-criteria and indicators for each of the three kinds of obligation (collective, individual-internal and individual-external). Each of the primary sub-criteria plays out slightly differently depending on whether it is being applied to collective, internal or external obligations of States. (In table 5 below, we "interpret" the primary sub-criteria for each of the three levels in order to determine appropriate lower-level sub-criteria; such interpretations could be occasionally revisited, as with the current general comments system of the human rights treaty bodies.) Within such interpretations, determination of measurement tools for collective obligations would clearly need to be made at a global level. Decisions on national-level lower-level sub-criteria and indicators, however, might best be made largely at the national or regional level, so long as they are published to the international community and made a subject of discussion in international forums, where other States (particularly those affected by national-external policies and practices) could discuss them. This would leave room for national-level setting of development priorities and policy choices while maintaining a mutually beneficial dialogue among States.

IV. Exemplary sets of lower-level sub-criteria and indicators

Ultimately, we proposed over 200 indicators for monitoring implementation of the right to development. The full set of lower-level sub-criteria and indicators is provided in the unabridged version of our report. Here we give an abbreviated set.

[39] See HRI/MC/2008/3 and OHCHR, *Human Rights Indicators* (footnote 2).

The tables that we present below are intended to serve two goals: first, to demonstrate that it is indeed feasible to determine right to development indicators that effectively measure implementation of the right to development as set forth in our framework and that meet the standards discussed in section III above; the second is to jump-start the full consultative process of determining appropriate lower-level sub-criteria and indicators by providing a sample as a basis for discussion.

To serve this purpose we offer three exemplary sets. The first focuses on one particular pressing development concern identified by the Working Group and guides the reader through the process of moving from a core criterion to a relevant primary sub-criterion to determining appropriate lower-level sub-criteria and indicators for the collective obligations aspect of the right in the context of that specific concern. The second set shows how the primary sub-criteria under each of the core criteria can be adapted to the different types of State obligations and give rise to specific lower-level sub-criteria for each of the three types of obligation. The third set is meant to illustrate the collaborative process by which right to development sub-criteria and indicators might be achieved. Taking the international and interdisciplinary expert consultation on the elaboration of criteria and operational sub-criteria for the implementation of the right to development, held at Harvard on 17 and 18 December 2009, as representing a first step in the collaborative process necessary to fix the set of core criteria and primary sub-criteria and reach consensus on the lower-level sub-criteria and associated indicators most relevant to the current global priorities and development context, it shows the results that emerged after discussion of our initial proposals with regard to States' collective obligations.

A. Exemplary set I

Here we demonstrate the indicators framework and methodology we have proposed by applying them to one of the pressing current development challenges identified by the Working Group: the food crisis.

As elaborated in our discussion of the contours of the right to development, States have three kinds of obligations when it comes to fulfilling the right to development: collective-action obligations, individual (or unilateral action) obligations with regard to those under their jurisdiction, and individual obligations with regard to those outside their jurisdiction. There are also three core criteria, in brief: to promote sustainable development; to operate in accordance with the full range of international human rights standards; and to adopt and implement equitable approaches. The resultant 3 by 3 matrix is the first level of our framework and is shown below as table 1.

Table 1: **Framework core criteria by type of State obligation**

Are States taking steps to establish, promote and sustain national and international arrangements that:	**Collectively**	**Individually-internally**	**Individually-externally**
Core criterion 1— Promote and ensure sustainable, comprehensive human development in an environment of peace and security	1.C	1.I-I	1.I-E
Core criterion 2—Operate in accordance with the full range of international human rights standards, including civil, cultural, economic, political and social rights, with due attention to the rights to self-determination and participation, while also promoting good governance and the rule of law	2.C	2.I-I	2.I-E
Core criterion 3—Adopt and implement equitable approaches to sharing the benefits and burdens of development	3.C	3.I-I	3.I-E

A series of primary sub-criteria are then defined for each of the nine cells in table 1.[40] For example, with regard to cell 1.C—collective obligations with regard to sustainable, comprehensive human development—there are seven primary sub-criteria, as shown in table 2.

Digging deeper, under each one of the primary sub-criteria is a set of lower-level sub-criteria. So, for example, if we look under the first primary sub-criterion in table 2—a stable global economic and financial system—two lower-level sub-criteria emerge: (a) reducing the risk of international economic and financial crises; and (b) protecting against the volatility of commodity prices. Under each of these are still lower-level sub-criteria, four in the case of "reducing the risk of international economic and financial crises" and two in the case of "protecting against the volatility of commodity prices", as are shown in table 3.

[40] Table 5 below lays out these primary sub-criteria for each of the nine cells in our framework.

Table 2: **Framework primary sub-criteria**

	Collective: primary sub-criteria Do international systems, policies, etc. promote and ensure:
Core criterion 1— Sustainable, comprehensive human development	1. A stable global economic and financial system?
	2. A rule-based, open, predictable, non-discriminatory international trading system?
	3. Access to adequate human and financial resources?
	4. Access to the benefits of science and technology?
	5. An environment of peace and security conducive to development?
	6. Environmental sustainability and sustainable use of national resources?
	7. Constant improvement in social and economic well-being?

Table 3: **Framework lower-level sub-criteria**

Core criterion 1— Sustainable, comprehensive human development	**Primary sub-criterion: stable global and economic financial system**
Collective obligations	Reducing the risk of international economic and financial crises. • Macro policy coordination • Counter-cyclical official financial flows • Stability of private capital flows • Global liquidity
	Protecting against the volatility of commodity prices. • Agricultural commodity prices • Non-agricultural commodity prices

Indicators are then defined under each of the lowest-level sub-criteria identified for each of the nine cells comprising the 3 by 3 matrix shown as table 1. Indicators relevant to monitoring the recent food crises that are relevant to the collective obligations of States fall under the lowest-level sub-criterion of the matrix "agricultural commodity prices". Table 4 below shows three indicators proposed to monitor implementation of the right to development with regard to States' collective obligation to protect against the volatility of agricultural commodity prices, which is one component of their broader collective obligation to "promote and ensure sustainable, comprehensive human development in an environment of peace and security". The first indicator listed is a prescriptive (forward-looking) indicator. It instructs States to collectively ensure that there is a system or set of institutions in place to mediate swings in food prices. At the same time, this indicator is a structural indicator. The second indicator listed is a process indicator. It is intended to assess whether the effort made collectively by States to limit food price swings is expected to be sufficient to prevent food crises. Agreement on the benchmark value of this indicator would need to be sought if indeed the maintenance of staple food buffer stocks is the primary institutional mechanism put in place to mediate food price swings. The third indicator listed is an outcome indicator that shows how much the current year's food prices have changed relative to the average price over the previous five years. In the absence of food price swings, this ratio will be equal to one. Note that the proposed indicators, while meeting the criteria set forth in our methodological section, are not the only ones that might be selected to implement this aspect of the right to development. They are intended to demonstrate the feasibility of assessing implementation of this aspect of the right to development and to call forth a global dialogue to agree upon a set of indicators to assess this aspect of the right to development.

Table 4: **Proposed indicators**

Lower-level sub-criteria under framework primary sub-criterion "promote and ensure a stable global economic and financial system"	**Agricultural commodity prices**
Protecting against volatility of commodity prices	1. Existence of global or globally coordinated institutions or systems capable of mediating price swings on key staple foods (corn, oilseed, soybeans, rice, wheat), e.g., by operating a global physical or virtual buffer stock system of key staples
	2. Size of global physical (or virtual) key staple food buffer stock relative to global food consumption
	3. Ratio of the annual value of FAO food price index to the average value of FAO food price index over the previous five years

B. Exemplary set II

Exemplary set II opens the lens wider and offers a complete set of primary sub-criteria and possible lower-level sub-criteria for all three types of State obligation under all three of the core criteria. The primary sub-criteria are constant across types of State obligations in their essence; but to be most practical, the primary sub-criteria need to be tailored to (that is, interpreted in the context of) the different types of State obligations, so as to give rise to appropriate lower-level sub-criteria and indicators for that type of obligation. That is, the primary sub-criteria, lower-level sub-criteria as well as indicators for a particular core criterion will often differ when it comes to measuring implementation of the different types of State obligation—collective, individual-internal and individual-external. Table 5 sets out versions of the primary sub-criteria for each of the three core criteria that are tailored to each of the three types of State obligations, along with a set of possible lower-level sub-criteria deriving from them.

Table 5: **Framework core criteria and primary sub-criteria by type of State obligation**

	Collective	Individual-internal	Individual-external
Criterion 1– Promote and ensure sustainable, comprehensive human development in an environment of peace and security by	Promoting and ensuring: 1. A stable global economic and financial system a. Reducing the risks and mitigating the impacts of international economic and financial crises *i. Macro policy coordination* *ii. Counter-cyclical official financial flows* *iii. Stability of private capital flows* *iv. Global liquidity* b. Protecting against volatility of commodity prices *i. Agricultural commodity prices* *ii. Non-agricultural commodity prices* 2. A rule-based, open, predictable and non-discriminatory international trading system a. Market access b. Movement of persons 3. Access to adequate human and financial resources a. Magnitude and terms of official bilateral capital flows b. Magnitude and terms of official multilateral capital flows c. Debt sustainability 4. Access to the benefits of science and technology a. Agricultural technology b. Manufacturing technology c. Green technology d. Health technology e. Information technology 5. An environment of peace and security conducive to development a. Preventing conflict, including over natural resources b. Protection of the vulnerable during conflict c. Securing the post-conflict period	1. Implementing a legal framework supportive of sustainable, comprehensive domestic human development, including a. Ratifying international conventions supporting sustainable, comprehensive domestic human development b. Putting in place national legal protections supportive of sustainable, comprehensive domestic human development 2. Introducing a comprehensive national development strategy and plan of action that is devised, and is periodically reviewed, on the basis of a participatory and transparent process 3. Maintaining a stable economic and financial system, to the extent that it falls within the domestic domain by a. Reducing the risks of domestic financial crises by implementing *i. Ensuring an appropriate regulatory framework in place* *ii. Maintaining domestic price stability* *iii. Maintaining stable country investment* *iv. Ensuring stability of global capital flows* b. Protecting against volatility of commodity prices c. Reducing risks of external macro imbalance 4. Promoting an economic regulatory and oversight system to manage risk and to encourage competition, including a. A clear and consistent system of property rights and contract enforcement b. Policies and regulations promoting private sector development 5. Promoting access to adequate human and financial resources at national and subnational levels	Promoting and ensuring: 1. A stable global financial system a. Reducing the risks of international financial crises b. Providing against volatility of commodity prices 2. A rule-based, open, predictable and non-discriminatory international trading system that provides for a. Market access b. Movement of persons 3. Access to adequate human and financial resources a. Financial resources b. Human resources 4. Access to the benefits of science and technology, including a. Agricultural technology b. Manufacturing technology c. Green technology d. Health technology e. Information technology 5. Development in an environment of peace and security by a. Preventing conflict, including over natural resources and peacekeeping b. Providing for refugees and asylum seekers c. Securing the post-conflict period

	Collective	Individual-internal	Individual-external
	6. Environmental sustainability and the sustainable use of natural resources a. Access to natural resources b. Sustainable energy policies and practices c. Enabling mitigation of and adaptation to negative impacts of climate change d. Ensuring globalization promotes environmental sustainability 7. Constant improvement in social and economic well-being a. Health b. Education c. Housing/water d. Work/social security e. Food	6. Promoting universal access to the benefits of science and technology, including a. Pro-poor technology b. Agricultural technology c. Manufacturing technology d. Technology diffusion e. Technological capacity 7. Promoting an environment of peace and security conducive to development a. Preventing conflict, including conflict over natural resources b. Protection of the vulnerable during conflict c. Securing the post-conflict period d. Ensuring personal security in times of peace 8. Promoting environmental sustainability and sustainable use of natural resources, including a. Preventing environmental degradation and resource depletion b. Enabling mitigation of and adaptation to negative impacts of climate change c. Implementing sustainable energy policies and practices d. Preventing environmental degradation and resource depletion 9. Promoting improvement in social and economic well-being a. Health b. Education c. Housing/water d. Social security e. Food f. Work	6. Environmental sustainability, including sustainable energy policies and practices by a. Preventing environmental degradation and resource depletion, and enabling mitigation of and adaptation to negative impacts of climate change b. Promoting and participating in global negotiations concerning global environmental sustainability

	Collective	Individual-internal	Individual-external
Criterion 2– Operate in accordance with the full range of international human rights standards, including the right to self-determination, as well as principles of good governance, i.e.:	1. Drawing on all relevant international human rights instruments in elaborating development goals 2. Integrating the cross-cutting norms of non-discrimination, participation, access to information and access to means of effective complaint and remedy into development-related policies, institutions and processes, noting that they should be reflected in all stages — assessment, planning, implementation, monitoring and evaluation — of development-related policy and programming 3. Promoting good governance at the international level, including promoting the democratization of the system of international governance and promoting effective participation of all countries in international decision-making, including a. Incorporating aid recipients' voices in aid programming, including evaluation b. Promoting and ensuring participation at the global level c. Implementing effective anti-corruption measures	1. Draw on all relevant international human rights instruments in elaborating the content of national development goals and strategies a. Respecting, protecting and fulfilling the full range of human rights as part of the process of national development, including *i. Economic, social and cultural rights, progressively, to the maximum of available resources* *ii. Civil and political rights* b. Assessing and taking into account the domestic human rights impact of international agreements 2. Integrating cross-cutting norms of participation, access to information, means of complaint and effective remedy and non-discrimination into all stages of development-related policy and programming, including assessment, planning, implementation, monitoring and evaluation a. Ensuring free, meaningful and active participation in development-related decisions by persons affected by those decisions b. Ensuring availability and accessibility of relevant substantive and procedural information concerning development-related policies and programmes c. Ensuring access to legal, administrative or other forms of effective remedy for violations of human rights or domestic standards in development-related policies and programmes d. Ensuring non-discrimination, equal treatment under the law and attention to the needs of members of vulnerable groups 3. Promoting good governance, rule of law and anti-corruption measures	1. Ensuring that trade ministries are informed by human rights standards when drafting and negotiating bilateral treaties, including investment treaties 2. Ensuring that trade ministries are informed by human rights standards when considering bringing complaints before trade-related dispute-resolution bodies 3. Regulation of extraterritorial actions of its citizens and of business enterprises incorporated under its jurisdiction 4. Using voting power in the governance of multilateral institutions to ensure that those institutions operate in accordance with the full range of international human rights, including a. Promoting the adoption of an explicitly rights-based approach in multilateral development institutions

	Collective	Individual-internal	Individual-external
Criterion 3– Adopt and implement equitable approaches to sharing the benefits of development and to distributing the environmental, economic and other burdens that can arise as a result of development by:	1. Promoting the fair and equitable distribution of the benefits of development by ensuring (and helping partners to ensure) that the benefits of development are shared in an equitable fashion among individuals, groups of individuals and peoples, including special attention to the needs of vulnerable or marginalized groups or peoples (including least developed, small island, land-locked and post-conflict countries) a. Equitably meeting needs of vulnerable countries b. Equitably meeting the needs of marginalized peoples, groups and individuals 2. Promoting the fair and equitable distribution of the burdens of development by ensuring (and helping partners to ensure) that the burdens caused by development advances, including environmental burdens and shocks caused by economic or industrial transitions, are shared in an equitable fashion among peoples and individuals and address the needs of vulnerable and or marginalized individuals, groups of individuals and peoples a. Mitigating differential bargaining and adjustment costs of trade liberalization b. Equitably sharing the environmental burden of development	1. Providing for a fair and equitable distribution of the benefits of development at the national level by ensuring that the benefits are shared in an equitable fashion among individuals, groups of individuals and peoples, including special attention to the needs of marginalized groups or peoples, to include a. Access to resources and public goods b. Equitable human development outcomes 2. Promoting the fair and equitable distribution of the burdens of development by ensuring that the burdens caused by development advances, including environmental burdens and shocks caused by economic or industrial transitions, are shared in an equitable fashion among peoples and individuals and address the needs of vulnerable and/or marginalized individuals, groups of individuals and people a. Fair sharing of benefits and burdens of economic adjustment	Promoting and ensuring: 1. A fair trading regime 2.The movement of persons 3. Protection of indigenous groups

C. Exemplary set III

Tables 6 through 8 below set out a complete complement of possible lower-level sub-criteria and indicators for States' collective obligations under the right to development for core criteria 1, 2 and 3, respectively. The source for each indicator is referenced with a letter in parentheses; table 9 provides the key to the indicator sources.

Together, tables 6, 7 and 8 extend the framework set out in table 5 to the indicator level with regard to States' collective obligations. The selected indicators are those the Harvard consultation identified as most promising from among those we identified in our original report. Note that analogous tables for States' internal and external obligations, along with indicators selected as most promising for measuring each of the lower-level sub-criteria in each of the tables, can be found in section VI of the original report.

Table 6: **Collective obligations: core criterion 1, primary sub-criteria, lower-level sub-criteria and indicators**

Obligations of collective action at regional and global levels	
Criteria and sub-criteria	**Indicators for monitoring implementation (source)***
Core criterion 1—Promote and ensure sustainable, comprehensive human development in an environment of peace and security	
1. A stable global economic and financial system	
Reducing the risks and mitigating the impacts of international economic and financial crises	
Macro policy coordination	(↑) Percentage of coordinated macro policy decisions by G-8 and G-20 countries (separately) that incorporate analysis of their human development impact (a)
Counter-cyclical official financial flows	(-↑) Year-to-year percentage change in total IMF credit and loans disbursed (net transfer IBRD and IDA loans outstanding, official net transfer) in proportion to percentage change in GNI growth rate, averaged across developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries (b)
Stability of private capital flows	(1) Ratio of current year net transfer private non-publicly guaranteed external debt to average over previous 5 years' net transfer, for all (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries (b) (1) Ratio of current year portfolio equity flows as percentage of GNI to average of previous 5 years' portfolio equity flow as percentage of GNI, for all (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries (b)
Global liquidity	(>0, b) Ratio of value of Special Drawing Rights (US$) to GNI, averaged across all (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries (c),(d)
Protecting against the volatility of commodity prices	
Agricultural commodity prices	(y) Existence of global or globally coordinated institutions or systems capable of mediating price swings on key staple foods (corn, oilseed, soybeans, rice, wheat), e.g., by operating a global physical or virtual buffer stock system of key staples (>0,b) Size of global physical (or virtual) key staple food buffer stock relative to global food consumption (e) (1) Ratio of annual value of FAO food price index to the average value of FAO food price index over the previous 5 years (f)
Non-agricultural commodity prices	(1) Ratio of highest value price index for non-agricultural raw materials (minerals, ores and metals, crude petroleum) in previous 12 months to lowest value of the same price index in previous 12 months (g) (1) Ratio of average value price index for non-agricultural raw materials (minerals, ores and metals, crude petroleum) in current year to average value of the same price index over the previous 5 years (g)

Obligations of collective action at regional and global levels	
Criteria and sub-criteria	**Indicators for monitoring implementation (source)***
Core criterion 1—Promote and ensure sustainable, comprehensive human development in an environment of peace and security	
2. A rule-based, open, predictable and non-discriminatory international trading system	(↑) Percentage of all (least developed, landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries that are members of one or more trading arrangements that are conducive to the right to development
Market access	(↑) Value of exports as a percentage of all (least developed, landlocked countries, small island developing, post-conflict, low-income, middle-income, high-income) countries' global trade (i) (↓) Value of agricultural (cotton) support estimate for OECD countries as percentage of the value of OECD agricultural (cotton) output (h) (↑) Value of agricultural imports from developing (least developed, landlocked, small island developing, low-income, middle-income) countries as a percentage of value of agricultural consumption in OECD countries (i),(j) (↓) Average tariff rate on manufactured goods in OECD (low-income, middle-income) countries (i) (↓) Average across all countries of tariff rate on manufactured imports from countries with lower per capita income levels (i),(d) (↓) Average across all countries of tariff rate imposed on imports from countries with lower per capita income levels (i),(d) (↓) Number of manufactured products subject to tariff peaks in some OECD countries (i),(k) (↑) Average across developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries of the share of manufactured exports (value) of value of total merchandise exports (i)
Movement of persons	(↑) Percentage of countries with net in-migration (net out-migration) that have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (m) (↑) Average value across OECD (high-income) countries of the Center for Global Development's "migration index" (n)
3. Access to adequate human and financial resources	
Magnitude and terms of official bilateral capital flows	(↑) Net ODA total as percentage of OECD/DAC donors' GNI—Millennium Development Goal indicator 8.1 (o) (↑) Net ODA to developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries as percentage of recipient countries' GNI (b) (↑) Percentage of aid provided as programme-based approaches and accordingly using common arrangements or procedures in developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries—Paris Declaration on Aid Effectiveness indicator 9 (p) (↑) Center for Global Development indicator: ratio across rich countries of quality-adjusted official and quality-adjusted policy-induced charitable giving to rich country GNI (n) (↑) Proportion of total bilateral, sector-allocable ODA of OECD/DAC donors to basic social services (basic education, primary health care, nutrition, safe water and sanitation)—Millennium Development Goal indicator 8.2 (o) (↑) Number of times that innovative proposals for financing (e.g., Tobin tax, airline tax) feature on the agenda of intergovernmental institutions (q) (↑) Total IMF credit under the Flexible Credit Line (pre-approval) as a percentage of total Fund credit and loans outstanding for developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries (b),(q)
Magnitude and terms of official multilateral capital flows	
Debt sustainability	(↓) Ratio of debt to exports for developing (least developed, small island developing, landlocked, post-conflict, low-income) countries—simple average of ratios (b)
4. Access to the benefits of science and technology.	(↓) Percentage of bilateral trade agreements and regional trade agreements that include "TRIPS-plus" conditions (conditions enhancing intellectual property rights protection beyond the agreed levels of the TRIPS Agreement) (q)
Agricultural technology	(↓) Share of ODA dedicated to agricultural development (j)

Obligations of collective action at regional and global levels	
Criteria and sub-criteria	**Indicators for monitoring implementation (source)***
Core criterion 1—Promote and ensure sustainable, comprehensive human development in an environment of peace and security	
Manufacturing technology	(🡻) Percentage of bilateral trade agreements and regional trade agreements that include TRIMs, which prohibit developing countries from using performance criteria (local content requirements, technology transfer requirements, local employment requirements, research and development requirements, etc.) to maximize the benefit of direct foreign investment (q)
Green energy technology	(🡹) Share of ODA dedicated to promoting green technologies (j) (🡹) Number of countries that have utilized TRIPS flexibilities to acquire green technologies (q)
Health technology	(🡹) Share of ODA dedicated to health technologies (j) (🡹) Percentage of WTO member States that have ratified the amendment to the TRIPS Agreement allowing WTO members to issue compulsory licences to export generic versions of patented medicines to countries with insufficient or no manufacturing capacity in the pharmaceutical sector (r) (🡹) Proportion of global population with advanced HIV infection with access to antiretroviral drugs—Millennium Development Goal indicator 6.5 (o)
Information technology	(🡹)Telephone lines per 100 population plus cellular subscribers per 100 population in developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries—sum of Millennium Development Goals indicators 8.14 and 8.15 (o) (🡹) Internet users per 100 population in developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries—Millennium Development Goals indicator 8.16 (o)
5. Development in an environment of peace and security	
Preventing conflict, including over natural resources	(y) Creation and entry into force of an international legal standard addressing trade in arms, e.g., the planned arms trade treaty (m) (🡹) Percentage of countries committing to private or public international legal regimes or certification schemes to restrict consumer access to products that are sources of, or provide financing for, armed conflict, e.g., the Kimberley Process for so-called "blood diamonds", or of a single overarching regime for this purpose (e.g.,(s))
Protection of the vulnerable during conflict	(🡹) Percentage of States Members of the United Nations that have adopted a national action plan on Security Council resolution 1325 (2000) regarding participation of women in decision-making and peace processes (q)
Post-conflict	(🡹) Percentage of total annual DAC ODA for disarmament, rehabilitation and reintegration directed specifically at issues affecting women (j) (🡹) Percentage of post-conflict countries receiving aid for which there exists a two-sided aid monitoring system encompassing regular meetings by donors to monitor spending of reconstruction funds and regular reporting by donors of their fulfilment of their funding pledges (q)
6. Environmental sustainability, including sustainable energy policies and practices	
Access to natural resources	(🡹) Value of natural capital (natural capital includes energy resources, mineral resources, timber resources, non-timber forest resources, cropland, pastureland and protected areas) per capita among all (developing, least developed, landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries (u)
Sustainable energy policies and practices	(🡹) Share of renewable energy supply in total primary energy supply among all (developing, least developed, landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries (d)
Enabling mitigation of and adaptation to negative impacts of climate change	(🡻) Global CO_2 emissions (d) (🡻) Average (population weighted) CO_2 emissions, kg per US$ 1000 (2005 PPP) of GDP, among all (developing, least developed, landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries (d) (>0,b) Average annual change in the percentage of forested area over previous 5 years (d)

Obligations of collective action at regional and global levels	
Criteria and sub-criteria	**Indicators for monitoring implementation (source)***
Core criterion 1—Promote and ensure sustainable, comprehensive human development in an environment of peace and security	
Ensuring globalization promotes environmental sustainability	(🡻) Ratio of CO_2 emissions from foreign-invested enterprises to domestic enterprises averaged across all (developing, least developed, landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries
7. Constant improvement in social and economic well-being	
Health	(🡻) Global under-5 mortality rate and separately as a population-weighted average for least developed (landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries (d) (🡻) Global HIV prevalence rate among population 15-24 years and separately as population-weighted average for least developed (landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries—Millennium Development Indicator Goal indicator 6.1 (o)
Education	(🡹) Global net secondary school enrolment rate and separately as population-weighted average for least developed (landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries (o)
Housing/water	(🡹) Global percentage of population with access to improved drinking water and separately as population-weighted average for least developed (landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries (d)
Work/social security	(🡻) Global percentage of population living on less than US$ 1.25 (2005 PPP) per day and separately as population-weighted average for least developed (landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries—Millennium Development Goals indicator 1.1 (o)
Food	(🡻) Global percentage of children under 5 that are low height for age and separately as population-weighted average for least developed (landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries (d)
8. Establishment and monitoring of global and regional human development benchmarks	(y) Applies to all of the selected indicators for the sub-criteria specified above

*Direction showing improvement in indicator value: (🡹)—higher is better; (🡻)—lower is better; (-🡹)—larger negative value is better; (-🡻)—smaller negative value is better; (1)—value closer to 1 is better; (>1)—value equal to 1 or more is better; (<1)—value equal to 1 or less is better; (>0,b)—positive value but specific benchmark needs to be set; (<0,b)—negative value but specific benchmark needs to be set; (y)—yes is better.
Source: The full source reference for each indicator is provided in table 9. The lower-case letters in parentheses following each indicator are referenced to the same lower-case letter in table 9.

Table 7: **Collective obligations: core criterion 2, primary sub-criteria, lower-level sub-criteria and indicators**

Obligations of collective action at regional and global levels	
Criteria and sub-criteria	**Indicators for monitoring implementation (source)***
Core criterion 2—Operate in accordance with the full range of international human rights standards, including civil, cultural, economic, political, and social rights, with due attention to the rights to self-determination and participation, while also promoting good governance and the rule of law	
1. Drawing on all relevant international human rights instruments in elaborating development goals	(y) For each multilateral development institution: does the institution explicitly take a rights-based approach to its work? (q) (y) Creation by States of a clear international standard concerning States' duties with regard to regulation of extraterritorial infringement of human rights by business enterprises incorporated under their jurisdiction, e.g., adopting the Guiding Principles on Business and Human Rights (↑) Percentage of all (least developed, landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries party to the WTO Agreement for which the WTO Secretariat has undertaken human rights impact assessments of WTO proposals on the table (agreements reached) (↑) Percentage of stabilization loan proposals (agreements reached) for which IMF has undertaken a prior (post-completion) human rights impact assessment (q) (↑) Percentage of World Bank structural adjustment (project) loans for which the World Bank has undertaken a prior (post-completion) human rights impact assessment (q)
2. Integrating cross-cutting norms of non-discrimination, participation, access to information, and effective complaint and remedy into their policies, systems and programming, including into project assessment, planning, implementation and evaluation	(↑) Percentage of human rights impact assessments of WTO (other regional arrangements, bilateral arrangements) proposals on the table (trade agreements) that are made publicly available via the Web (q) (↑) Percentage of stabilization loan proposals (agreements reached) for which IMF has undertaken a prior (post-completion) human rights impact assessment that are publicly accessible via the Web (q) (↑) Percentage of World Bank structural adjustment (project) loans for which the World Bank has undertaken a prior (post-completion) human rights impact assessment that is made publicly available via the Web (q) (↑) Percentage of aid flows recorded in country budgets of developing (least developed, small island developing, landlocked, post-conflict, low-income, middle-income) countries—Paris Declaration on Aid Effectiveness indicator 3 (p) (↑) Percentage of aid channelled through recipient public financial management system in developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries—Paris Declaration on Aid Effectiveness indicator 5a (p) (y) Existence (for each institution as relevant) of a formal system of complaint and remedy for stakeholders concerning violation of the institution's internal policies (q)
3. Promoting good governance at the international level, including promoting the democratization of the system of international governance and promoting effective participation of all countries in international decision-making	
Incorporating aid recipients' voice in aid programming and evaluation	(↑) Percentage of donor capacity-development support provided through coordinated programmes consistent with partners' national development strategies for developing (least developed, small island developing, landlocked, post-conflict, low-income, middle-income) countries—Paris Declaration on Aid Effectiveness indicator 4 (p) (↑) Percentage of country analytic work, including diagnostic reviews on aid, that is done jointly in developing (least developed, small island developing, landlocked, post-conflict, low-income, middle-income) countries—Paris Declaration on Aid Effectiveness indicator 10b (p)

Obligations of collective action at regional and global levels	
Criteria and sub-criteria	**Indicators for monitoring implementation (source)***
Core criterion 2—Operate in accordance with the full range of international human rights standards, including civil, cultural, economic, political, and social rights, with due attention to the rights to self-determination and participation, while also promoting good governance and the rule of law	
Participation at global level	(↑) Ratio of the percentage of IMF quotas developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries have to their percentage share of global trade (v) (↑) Ratio of the average number of WTO representatives per developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) country that is party to the WTO Agreement to the average number of WTO representatives per high-income country that is party to the Agreement (q) (↑) Ratio of the percentage of World Bank votes of developing (least developed, landlocked, small island developing, post-conflict, low-income, middle-income) countries to the share of votes of high-income countries(w) (↑ to 50%) Percentage of IMF (World Bank) staff that is female (q)
Effective anti-corruption measures	Percentage of all (least developed, landlocked, small island developing, post-conflict, low-income, middle-income, high-income) countries that have ratified the United Nations Convention against Corruption (m)

*Direction showing improvement in indicator value: (↓)—higher is better, (↑)—lower is better; (-↓)—larger negative value is better; (-↑)—smaller negative value is better; (1)—value closer to 1 is better; (>1)—value equal to 1 or more is better; (<1)—value equal to 1 or less is better; (>0,b)—positive value but specific benchmark needs to be set; (<0,b)—negative value but specific benchmark needs to be set; (y)—yes is better.
Source: The full source reference for each indicator is provided in table 9. The lower-case letters in parentheses following each indicator are referenced to the same lower-case letter in table 9.

Table 8: **Collective obligations: core criterion 3, primary sub-criteria, lower-level sub-criteria and indicators**

Obligations of collective action at regional and global levels	
Criteria and sub-criteria	**Indicators for monitoring implementation (source)***
Core criterion 3— Adopting and implementing equitable approaches to sharing the benefits of development and to distributing the environmental, economic and other burdens that can arise as a result of development by:	
1. Providing for a fair and equitable distribution of benefits of development by ensuring (and helping partners to ensure) that the benefits of development are shared in an equitable fashion among individuals, groups of individuals and peoples, including special attention to the needs of vulnerable or marginalized groups or peoples (including least developed countries, small island countries, landlocked countries and post-conflict countries)	
Equitably meeting needs of vulnerable countries	(>1) Ratio of average per capita GDP growth rate of the poorest quintile of countries to the average per capita GDP growth rate of the wealthiest quintile of countries (d) (🡻) Ratio of the under-5 mortality rate averaged (population weighted) across least developed, landlocked and small island developing countries to the under-5 mortality rate averaged across all countries (d) (🡹) Ratio of the net secondary school enrolment rate averaged (population weighted) across least developed, landlocked and small island developing countries to the average net secondary school enrolment rate averaged across all countries (d) (🡹 to 1) Ratio of the percentage of the population with access to improved drinking water averaged (population weighted) across least developed, landlocked and small island developing countries to the percentage of the population with access to improved drinking water averaged across all countries (d) (🡻 to 1) Ratio of the percentage of children under 5 that are low height for age averaged (population weighted) across least developed, landlocked and small island developing countries to the percentage of children under 5 that are low height for age averaged across all countries (d) (🡻 to 1) Ratio of the percentage of the population living on less than US$ 1.25 (2005 PPP) per day averaged (population weighted) across least developed, landlocked and small island developing countries to the percentage of the population living on less than US$ 1.25 (2005 PPP) per day averaged across all countries (d) (🡹 to 1) Ratio of the percentage of HIV/AIDS sufferers being treated with effective drugs averaged (population weighted) across least developed, landlocked and small island developing countries to the percentage of HIV/AIDS sufferers being treated with effective drugs averaged across all countries (o) (🡹 to 1) Ratio of the percentage of malaria suffers being treated with effective drugs averaged (population weighted) across least developed, landlocked and small island developing countries with endemic malaria to the percentage of malaria sufferers being treated with effective drugs averaged across all countries with endemic malaria (o)

Obligations of collective action at regional and global levels	
Criteria and sub-criteria	**Indicators for monitoring implementation (source)***
Core criterion 3— Adopting and implementing equitable approaches to sharing the benefits of development and to distributing the environmental, economic and other burdens that can arise as a result of development by:	
Equitably meeting the needs of marginalized groups and individuals:	(↑ to 1) Ratio of the global under-5 mortality rate for females to the under-5 mortality rate for males (d) (↑ to 1) Ratio of the global net secondary school enrolment rate for females to the global net secondary school enrolment rate for males (d) (↓ to 1) Ratio of the global percentage of female children under 5 that are low height for age to male children that are low height for age (d) (↑ to 1) Ratio of the percentage of female HIV/AIDS sufferers being treated with effective drugs to the percentage of male HIV/AIDS sufferers being treated with effective drugs (o) (↑) Percentage of countries that have ratified the Convention on Biological Diversity according knowledge property rights protection (m) (↑) Percentage (in value terms) of OECD agricultural imports sourced from smallholders (data not currently collected)
2. Promoting the fair and equitable distribution of the burdens of development by ensuring (and helping partners to ensure) that the burdens caused by development advances, including environmental burdens and shocks caused by economic or industrial transitions, are shared in an equitable fashion among peoples and individuals and address the needs of vulnerable and or marginalized individuals, groups of individuals and peoples	
Mitigating differential bargaining and adjustment costs of trade liberalization	(↑) Percentage of least developed (landlocked, small island developing, post-conflict, low-income) countries party to the WTO Agreement for which the WTO Secretariat has undertaken and made accessible human development impact assessments of WTO proposals on the table (agreements reached) (q) (↑) Proportion of total OECD country imports (by value and excluding arms) from least developed (landlocked, small island developing, post-conflict, low-income) countries admitted free of duty—tracks Millennium Development Goals indicator 8.6 (o) (↑) Percentage of regional and bilateral trade arrangements involving a developing country that permit developing countries to restrict market access for agricultural products when import levels threaten food security and rural livelihood (q) (↑) Time period permitted by WTO for implementation of liberalization measures by developing (low-income, middle-income) countries upon joining WTO (q) (↓) Percentage of developing countries that are involved in a regional or bilateral trading agreement that fail to provide any scope for the implementation of industrial policy (q) (↑) Average time period permitted for implementation of liberalization measures by developing (low-income, middle-income) countries upon joining other regional (bilateral) trade arrangements (q)

Obligations of collective action at regional and global levels	
Criteria and sub-criteria	**Indicators for monitoring implementation (source)***
Core criterion 3— Adopting and implementing equitable approaches to sharing the benefits of development and to distributing the environmental, economic and other burdens that can arise as a result of development by:	
Equitably sharing environmental burdens of development	(↑) Value of the global funds (sum of ODA and private contributions) as a percentage of global GNI made available to developing countries for activities mitigating the effects of climate change (x),(d) (↑) Average across all countries of the percentage of major environmental treaties ratified (e.g., Cartagena Protocol on Biosafety to the Convention on Biological Diversity; United Nations Framework Convention on Climate Change and its Kyoto Protocol; Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer; Stockholm Convention on Persistent Organic Pollutants; United Nations Convention on the Law of the Sea; United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa) (m) (↓) Ratio of per capita CO_2 emissions of high-income countries to per capita CO_2 emissions of developing (least developed, landlocked, small island developing, low-income, middle-income) countries (d)

*Direction showing improvement in indicator value: (↑)—higher is better, (↓)—lower is better; (-↑)—larger negative value is better; (-↓)—smaller negative value is better; (1)—value closer to 1 is better; (>1)—value equal to 1 or more is better; (<1)—value equal to 1 or less is better; (>0,b)—positive value but specific benchmark needs to be set; (<0,b)—negative value but specific benchmark needs to be set; (y)—yes is better.
Source: The full source reference for each indicator is provided in table 9. The lower-case letters in parentheses following each indicator are referenced to the same lower-case letter in table 9.

Table 9: **Data source references for indicators in tables 6, 7, and 8**

The indicators referenced in tables 6, 7, and 8 are either directly available from the specified data source or can be computed from the data sources specified in parentheses at the end of each indicator. The source reference for each letter so indicated is shown below.

(a) Minutes and background reports of G8 and G20 meetings

(b) *Global Development Finance Online* data set, available at http://databank.worldbank.org/ddp/home.do?Step=2&id=4&hActiveDimensionId=WDI_Series

(c) IMF Special Drawing Rights, available at www.imf.org/external/np/exr/facts/sdr.htm

(d) *World Development Indicators Online* data set, available at http://databank.worldbank.org/ddp/home.do?Step=2&id=4&hActiveDimensionId=WDI_Series

(e) United States Department of Agriculture Foreign Agricultural Service data sets: www.fas.usda.gov/psdonline

(f) FAO Food Price Index: www.fao.org/worldfoodsituation/wfs-home/foodpricesindex/en/

(g) UNCTADstat data dissemination system: www.unctad.org/Templates/Page.asp?intItemID=1584&lang=1

(h) OECD, Producer and Consumer Support Estimates Database, 2009 cited in OECD, *Agricultural Policies in OECD Countries: Monitoring and Evaluation 2009*, available at www.oecd.org/dataoecd/37/16/43239979.pdf.

(i) UNCTAD Trade Analysis and Information System (TRAINS) database: http://r0.unctad.org/trains_new/index.shtm

(j) OECD Statistics: www.oecd-ilibrary.org/statistics

(k) World Integrated Trade Solution database: http://wits.worldbank.org/witsweb/FAO/Basics.aspx

(l) United Nations Statistics Division Comtrade database: http://comtrade.un.org/db/

(m) United Nations Treaty Body Database: www.unhchr.ch/tbs/doc.nsf

(n) Center for Global Development Commitment to Development Index: www.cgdev.org/section/initiatives/_active/cdi/

(o) United Nations Statistics Division, Millennium Development Goals Indicators website: http://mdgs.un.org/unsd/mdg/Default.aspx

(p) OECD, 2008 Survey on Monitoring the Paris Declaration: Effective Aid by 2010? What will it Take, vol. 1, Overview: http://siteresources.worldbank.org/ACCRAEXT/Resources/Full-2008-Survey-EN.pdf

(q) Administrative data from relevant organizations (e.g., IMF, World Bank, United Nations agencies, etc.)

(r) WTO members accepting amendment of the TRIPS Agreement: www.wto.org/english/tratop_e/trips_e/amendment_e.htm

(s) www.kimberleyprocess.com/structure/participants_world_map_en.html

(t) World Bank CO2 emissions data: http://data.worldbank.org/indicator/EN.ATM.CO2E.PC

(u) Changing Wealth of Nations Database: http://data.worldbank.org/data-catalog/wealth-of-nations

(v) IMF members' quota and voting power: www.imf.org/external/np/sec/memdir/members.htm

(w) http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDCountryVotingTable.pdf

(x) Global Environment Facility Trust Funds: www.thegef.org/gef/node/2042

IV. Concluding words

The Declaration on the Right to Development has the potential to provide normative energy to core issues in development, from concepts of equity within and among States to integrating human rights in both collective and national development processes. Determining how to measure implementation of the right is inextricably linked to determining what the right itself involves, and thus is a normative practice as well as a technical one. The process of creating a measurement system will work best if it is inclusive of representatives of a wide range of interests and of a broad set of substantive knowledge in the many different social, political and economic spheres that the right to development encompasses.

The framework that we have proposed is intended to provide an interdisciplinary template for further work in this direction. To the extent that it assists stakeholders to determine both the content of the right and the specific elements that are worthy of measurement, and the tools by which they are best to be measured, it will serve its purpose. Ultimately, what we wanted to show, and what we believe the proposed framework and initial set of indicators demonstrate, is that the right to development is very much a workable tool and more than amenable to playing a tangible role in the complex sphere of human rights and development practice.

The high-level task force criteria[1]

*Stephen P. Marks**

I. Background to the elaboration of criteria

From the earliest formulations of the right to development, the value of indicators or criteria for measuring progress has been recognized. The Secretary-General mentioned indicators in his 1979 report (E/CN.4/1334)[2] and the 1990 Global Consultation on the Right to Development as a Human Right stressed "the need for criteria or indicators for evaluating progress" (E/CN.4/1990/9/Rev.1, para. 133), stating clearly that "[t]he 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" (ibid., para. 171). It even proposed a set of criteria grouped around conditions of life, conditions of work, equality of access to resources, and participation (ibid., paras. 172-180). It recommended that a "high-level committee of experts should give priority to the formulation of criteria for the assessment of progress in the realization of the right to development" and that "the design of appropriate indicators of progress should also be undertaken by the regional economic commissions, on the basis of national experience", in cooperation with relevant United Nations bodies and national universities (ibid., paras. 195-196). The Independent Expert on the right to development devoted his preliminary study on the impact of international economic and financial issues on the enjoyment of human rights (E/CN.4/2003/WG.18/2) to this issue and the task force expressed the view at its first session in 2004 that, in order to implement the policy frameworks supporting the Millennium Development Goals and further the implementation of the right to development, it was necessary to develop practical tools, including guidelines and objective indicators, which help in translating the human rights norms and principles into parameters accessible to policymakers and development practitioners (E/CN.4/2005/WG.18/2, para. 46).

In 2005, the Working Group requested the task force to examine Millennium Development Goal 8, on global partnership for development, and suggest criteria for its periodic evaluation (E/CN.4/2005/25, para. 54 (i)). Accordingly, the task force considered at its second session, in 2005, a study[3] commissioned by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and adopted a preliminary set of 13 criteria (E/CN.4/2005/WG.18/TF/3, para. 82). In recommending the criteria to the Working Group, the task force stressed that all existing accountability mechanisms relating to aid, trade, debt, technology transfer, the private sector and global governance, within the context of their specific

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[1] This chapter is based on the report of the high-level task force on the implementation of the right to development (hereinafter "task force") of the Working Group on the Right to Development (hereinafter "Working Group") on its sixth session, in 2010 (A/HRC/15/WG.2/TF/2 and addenda and corrigenda) and is a condensation of the addendum to that report titled "Right to development criteria and operational sub-criteria" (A/HRC/15/WG.2/TF/2/Add.2).

[2] See also chapter 1 of the present publication.

[3] "Millennium Development Goal 8: indicators for monitoring implementation", by Sakiko Fukuda-Parr (E/CN.4/2005/WG.18/TF/CRP.2), subsequently published as "Millennium Development Goal 8: international human rights obligations?", *Human Rights Quarterly*, vol. 28, No. 4 (November 2006). This study is updated in chapter 15 of the present publication.

mandates, could improve overall accountability in the implementation of goal 8, as they are the principal source of relevant information for the periodic evaluation of goal 8 with a view to implementing the right to development. In the task force's view, however, the existing monitoring tends to neglect critical human rights aspects, such as those reflected in its criteria, and would need to be carefully and critically scrutinized in order to be useful for the purposes of the right to development.

As a prerequisite for the effective monitoring of the above criteria, the task force urged these monitoring mechanisms to integrate relevant and measurable human rights indicators based on solid research and data, including those that demonstrate links between the promotion and protection of human rights and positive development outcomes. Furthermore, the task force considered that it would be valuable to monitoring progress in realizing the right to development if the Working Group were to receive periodically the elements of existing monitoring mechanisms most relevant to the criteria proposed by the task force, and thus facilitate its work in undertaking a periodic review of the global partnerships for the realization of the right to development. Its main recommendation was that the Working Group should undertake such a periodic evaluation (ibid., para. 84).

In 2006, 2007 and 2008, the task force applied the criteria to various global partnerships and refined them in the light of that experience. The Working Group requested the task force to review the structure of the criteria, their coverage of aspects of international cooperation and the methodology for their application with a view to enhancing their effectiveness as a practical tool for evaluating global partnerships, and to provide a consistent mapping of the criteria and relevant checklists, viewing the latter as operational sub-criteria. The Working Group saw this process eventually leading to the elaboration and implementation of a comprehensive and coherent set of standards. The task force was therefore particularly attentive to the request of the Working Group that it progressively develop and further refine the criteria, based on actual practice (A/HRC/4/47, paras. 51, 52 and 55).

The constant concern of the task force for the quality of the criteria was echoed by its institutional members and Member States, as well as the agencies responsible for the partnerships reviewed. It therefore drafted a revised set as a progressive development of the criteria, which maintained essentially the same content, while reordering, clarifying and developing them on the basis of lessons learned from applying the criteria to date, and submitted that list as an intermediary stage for use in phase II of its work, in 2008 (A/HRC/8/WG.2/TF/2, annex II). Significantly, the task force drew the attention of the Working Group to its commitment to achieve the desired level of quality of the criteria by ensuring that they (a) are analytically and methodologically rigorous; (b) provide empirically oriented tools to those involved in implementing development partnerships that can improve the outcome of their work in the light of their respective mandates; (c) integrate analytical work done by expert groups at the World Bank, the Organisation for Economic Co-operation and Development (OECD), the United Nations Development Programme (UNDP), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Children's Fund (UNICEF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Department of Economic and Social Affairs, OHCHR and others, as well as academic research centres; and (d) provide guidance so that global partnerships for development are able to respond better to the broader objectives of the right to development, proposing for that purpose an expert consultation (ibid., paras. 69-70).

In 2009, the task force embarked upon a more systematic process of structuring criteria around attributes and attaching illustrative indicators. The first step was to commission a substantive paper[4] and other background materials,[5] and to convene an international meeting of experts (see A/HRC/12/WG.2/TF/CRP.7). Based on this work, the task force developed preliminary attributes and criteria. A progress report was shared with the Working Group at its tenth session, in 2009, in order to benefit from the considered views of Member States before continuing its work and in anticipation of submitting revised proposals in 2010 (see A/HRC/12/WG.2/TF/2). In the report, the task force drew attention to the imperative of placing the identified criteria on a rigorous analytical foundation, both conceptually and methodologically. This foundation must exclude any arbitrariness or political bias in the selection of criteria. In addition, the criteria must be sufficiently operational so that they can be meaningful to the various stakeholders, and in particular to the development community, to apply in their respective domains of work. The report also high-

[4] "Implementing the right to development: a review of the task force criteria and some options" by Rajeev Malhotra (A/HRC/12/WG.2/TF/CRP.6).

[5] "Methodological issues of qualitative and quantitative tools for measuring compliance with the right to development: selected bibliography" (A/HRC/12/WG.2/TF/CRP.7/Add.1).

lighted the fact that the criteria, sub-criteria and indicators are based on an exhaustive reading of the human rights instruments from which the core components can be identified, and that attributes (components) must be mutually exclusive to the extent possible. On this basis, the task force proposed three components for review by the Working Group (comprehensive human-centred development, enabling environment, social justice and equity) before proceeding with the identification of criteria and sub-criteria.

The Working Group, despite the differences in emphasis of various delegations, expressed general support for the approach of the task force to reflect both the national and international dimensions of the right to development in the elaboration of criteria and to apply a holistic approach to human rights in their refinement (A/HRC/12/28, para. 34). There was also general support for the three components of the right to development reflected in the criteria, with particularly strong support for the attribute relating to social justice and equity. Some delegates attached more importance to the comprehensive human-centred approach to development component, others to the enabling environment element. With regard to the coherence and pertinence of criteria, several delegates expressed their views and offered suggestions on specific criteria. Some concern was expressed about the very ambitious nature of some criteria and whether corresponding sub-criteria could be designed for them. Some suggested that the criteria should be streamlined and that duplication be avoided, while others considered that one of the components should contain more criteria than in the preliminary draft. Numerous suggestions were made regarding specific criteria, which were noted and used by the task force in the final phase of its work (ibid., para. 35).

Following the feedback from the Working Group, the task force continued in 2009 and 2010 to develop a full set of attributes, criteria, sub-criteria and indicators. In conformity with the Working Group's recommendation that it draw on specialized expertise, including from academic and research institutions and relevant United Nations agencies and other relevant global organizations (ibid., para. 46 (a)), OHCHR commissioned a study[6] from two consultants, one with expertise in international human rights law, the other in development economics. The purpose of the study was to research comprehensively: (a) the normative content of the right to development in the context of international human rights law and practice in order to define its core attributes and criteria for assessing progress towards its realization; (b) the most relevant development challenges that needed to receive priority attention in order to identify the criteria and sub-criteria; and (c) the availability of methodologically robust measures and reliable data sets that would be appropriate for indicators. A further purpose of the study was to propose refinements in the list of attributes with corresponding criteria as elaborated by the task force and complement them with operational sub-criteria and indicators. To draw on specialized expertise further, the study was reviewed at an expert consultation convened by OHCHR in December 2009 (see A/HRC/15/WG.2/TF/CRP.4). Finally, at its sixth session, in January 2010, the task force considered the consultants' study and the report of the expert consultation, together with preliminary observations made by Member States and observers from concerned institutions and non-governmental organizations (see A/HRC/15/WG.2/TF/2).

II. General considerations underlying the framework of attributes, criteria, sub-criteria and indicators

The core norm, attributes, criteria, sub-criteria and indicators were chosen out of concern for conformity with agreed principles and their potential for operationalizing the right to development, taking into account also the need to differentiate standards that are general and lasting from those that are context-specific and subject to change. With respect to conformity to agreed principles, care was taken to ensure that all standards (attributes, criteria and sub-criteria) were firmly anchored in (a) the Declaration on the Right to Development; (b) criteria already examined and found useful by the Working Group; (c) analyses by United Nations bodies or agencies, leading scholars and practitioners; (d) other international human rights laws, standards, theories and practices; and (e) prevailing international development standards, theories and practices. With regard to operationalizing the right to development, the standards are intended to provide clear, action-oriented guidance as to the responsibilities of decision-makers in States, international institutions and civil society as they plan, implement, monitor and assess development-related policies, projects and processes. The criteria and sub-criteria should be relatively long-lasting and suit-

[6] "Bringing theory into practice: operational criteria for assessing implementation of the international right to development", by Maria Green and Susan Randolph (A/HRC/15/WG.2/TF/CRP.5). This study is summarized and updated in chapter 29 of the present publication.

able for inclusion in a set of guidelines or a legally binding instrument that development actors may use over the long term when assessing whether their own responsibilities or those of others are being met. The indicators, on the other hand, were intended to help in assessing compliance with the criteria and sub-criteria, and are therefore context-specific and subject to change over time.

One may legitimately ask to whom the standards are addressed. The answer is found in article 3 of the Declaration: "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development." When considering what is required to create such an enabling environment, many would have in mind international regimes and institutions that make the rules and allocate the resources. They are the products of States acting collectively, as are their policies and programmes. In this sense, the right to development is the responsibility of States acting collectively in global and regional partnerships. This responsibility may also be addressed as belonging to the legal entity of an international institution. While international institutions, as legal persons, have rights and duties, the task force preferred to draw from the above-mentioned article 3 the concept of responsibility of States acting collectively. The second level of responsibility is that of States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction, such as the beneficiaries of aid programmes and persons gaining access to medicines made available through the use of flexibilities in trade agreements or through internationally agreed programmes. These collective and international actions are reflected in article 4 of the Declaration: "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."

Finally, article 2 of the Declaration makes it clear that: "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." Thus, the creation of national conditions relates to policies and programmes at the national level affecting persons within a State's jurisdiction.

The standards presented in the list in section III could be structured according to the responsibilities of States acting internally, externally and collectively, or indicate for each sub-criterion the appropriate level of State responsibility. The task force found that such an arrangement would create redundancy since most of the sub-criteria involved responsibilities to act internally, externally and collectively, or were by definition limited to one level (such as influencing international institutions).

A. The core norm and attributes[7]

The core norm was included in the report of the task force in an effort to respond to the criticism from certain delegations that the concept of the right to development is vague and has never been defined in a way that is coherent or has gained consensus. By proposing the core norm quoted at the beginning of section III below, the task force sought to condense into 40 words the essential concepts, not as a justiciable right, but rather as a standard of achievement, reflecting what has been agreed as the essence of the right in the Declaration and balancing the main concerns of various geopolitical groups regarding prioritization of the national or the international dimension of this right. The specific content of the right is further clarified by attributes and criteria. The task force had been careful to include in the core norm only concepts contained in the Declaration. The attributes and criteria reflect all 10 articles of the Declaration, as well as developments since 1986, such as climate change and sustainable development, based on summits and other international conferences.

The three attributes correspond to the concepts of policy, process and outcome. What policy must be advanced to realize the right to development? The answer in attribute 1 is a "comprehensive and human-centred development policy". How should this right be advanced? The answer, given in attribute 2, is through "participatory human rights processes". What should be the outcome of action to realize this right? The answer, in attribute 3, is "social justice in development". It should be recalled that "an enabling international environment", which was an attribute in the previous version submitted to the Working Group, has been raised to the level of the core norm and applies to all three attributes. In other words, the principal distinguishing feature is that the first attribute relates to commitment (to a particular concept of development), the second to rules and principles (human rights, participation, accountability and transparency) and the

[7] This section draws on Stephen P. Marks, *The Politics of the Possible: The Way Ahead for the Right to Development*, International Policy Analysis (Berlin, Friedrich-Ebert-Stiftung, 2011), pp. 11-12.

third to distributional outcomes (fair distribution of the benefits and burdens of development). They are mutually exclusive to the extent possible, but necessarily overlap, for example, with regard to non-discrimination and continuous improvement of well-being. Overlapping criteria are considered matters of policy in the first, matters of respect for rules and principles in the second, and of achievement of social justice in the third.

B. Criteria, sub-criteria and indicators

The criteria and sub-criteria were written to be relatively long-lasting (between attributes and indicators as regards their lasting value) and suitable for inclusion in a set of guidelines or a legally binding instrument that development actors may use over the long term when assessing whether their own responsibilities or those of others are being met. The task force understood the term "operational sub-criteria" as used by the Working Group to refer to measurable sub-elements of broader criteria, that is, indicators. The task force tried to reassure Governments on the matter in its report on the criteria (A/HRC/15/WG.2/TF/2/Add.1, para. 73), explaining that the indicators did not aim at "ranking or even judging countries, but rather in providing to the Working Group operational sub-criteria"; however, that effort apparently did not allay the misgivings of some groups of States, which considered that the task force had exceeded its mandate by including them, although others offered constructive suggestions for improving the indicators. Under the circumstances, the Working Group did not appear ready to find consensus on this matter and, therefore, the list does not include indicators. It begins with the core norm and is structured around the three attributes of comprehensive and human-centred development policy, participatory human rights processes and social justice. The sub-criteria in the second column indicate the major areas in which progress can be measured, using the indicators contained in addendum 2 to the report of the task force on its sixth session, which are discussed in other chapters of this publication.[8] As they stand, the criteria and sub-criteria seek to be as comprehensive and coherent as possible, in accordance with the request of the Working Group.

The United Nations and academic and research centres have made considerable advances in recent years in developing indicators to measure human rights. In particular, the task force considered the work on indicators used by treaty bodies, which proceeds from distilling core attributes of a particular human right and identifying indicators in three dimensions: structural, process and outcome.[9] The task force decided to apply these concepts in its work on the right to development, as reflected in the principles of the indicators selected for inclusion in the report on its sixth session in 2010. The task force made it clear that the indicators had been selected from among a much larger set of relevant structural, process and outcome indicators.[10] The principal concern in selecting the illustrative quantitative and qualitative indicators was their validity, reliability and inter-temporal and international comparability. Preference was given to indicators that were likely to show variations among countries and over time, and thus illustrate changes in human well-being. The task force pointed out that others could have been chosen from the thousands of potentially relevant indicators, and new ones would emerge. They reflected pressing contemporary concerns and established tools of measurement and data collection, as identified by international institutions, used to measure progress in meeting commitments arising from international agreements and conferences dealing with human rights and such matters as debt, trade, poverty reduction, financing of development and climate change. They also reflected wide consensus among development scholars and practitioners, as well as prevailing theories about the most effective means of addressing issues of underdevelopment or disparity at subnational and national levels. An effort was made to take into account the current capacities of Governments and international institutions to gather additional data.

The Working Group discussed the criteria at its eleventh, twelfth and thirteenth sessions, held in Geneva in April 2010, November 2011 and May 2012, respectively, and "considered that further work should be undertaken at the intergovernmental level to adequately reflect both the national and international dimensions" and "that additional time was necessary, at this stage, for consideration and pronouncement by Governments on the substance of the work of the high-level task force" (A/HRC/15/23, paras. 43-44). Twelve Governments, 14 other stakeholders and 2 regional groups formulated their views on these cri-

[8] See in particular the chapters by Nicolas Fasel, Sakiko Fukuda-Parr, Rajeev Malhotra, and Maria Green and Susan Randolph.

[9] See "Report on indicators for promoting and monitoring the implementation of human rights" (HRI/MC/2008/3). Editor's note: this report provided the basis for the publication *Human Rights Indicators: A Guide for Measurement and Implementation* (HRI/PUB/12/5), issued by OHCHR in 2012.

[10] The task force followed the methodology in document HRI/MC/2008/3 and in the study by Susan Randolph and Maria Green.

teria,[11] acknowledged the need to further consider, revise and refine the right to development criteria and operational sub-criteria contained in document A/HRC/15/WG.2.TF/2/Add.2 and invited the Chairperson-Rapporteur to hold informal consultations with Governments, groups of Governments, regional groups and relevant stakeholders (A/HRC/19/52, para. 31). At its thirteenth session, the Working Group produced two conference room papers reflecting comments and views submitted during the session by Governments, groups of Governments and regional groups, as well as by other relevant stakeholders (A/HRC/WG.2/13/CRP.1 and 2). At its twenty-first session in 2012, the Human Rights Council acknowledged the need to "further consider, revise and refine the draft criteria and operational sub-criteria", and reiterated its position that they should eventually be used "in the elaboration of a comprehensive and coherent set of standards for the implementation of the right to development" and that these standards could take the form of guidelines "and evolve into a basis for consideration of an international legal standard of a binding nature through a collaborative process of engagement".[12] In the same resolution, the Council also endorsed the recommendations of the Working Group (A/HRC/21/19, para. 47), including the recommendation that the Working Group pursue, at its fourteenth session, its work on the consideration of the draft operational sub-criteria, assisted by documents containing all the comments and views expressed, the results of informal consultations, as well as all the conclusions and recommendations of the Working Group since its establishment in 1998.

These task force criteria constitute the culmination of efforts by experts to provide tools to policymakers to introduce the right to development into development practice, on the basis of a set of attributes, criteria and sub-criteria listed below. They should be seen in the context of the task force's proposals to have them tested in context-specific settings, consistent with its firm conviction that the right to development can be made concrete and applicable to development practice if and when there is the political will to do so.

III. Core norm, attributes, criteria, and sub-criteria of the right to development[13]

Core norm—The right to development is the right of peoples and individuals to the constant improvement of their well-being and to a national and global enabling environment conducive to just, equitable, participatory and human-centred development respectful of all human rights.

[11] See www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForceWrittenContributions.aspx.

[12] Resolution 21/32.

[13] This list is presented without the illustrative indicators, which may be examined in the annex to A/HRC/15/WG.2/TF/2/Add.2.

Attribute 1. Comprehensive and human-centred development policy

Criteria	Sub-criteria
1 (a) To promote constant improvement in socioeconomic well-being[1]	1 (a) (i) Health 1 (a) (ii) Education 1 (a) (iii) Housing and water 1 (a) (iv) Work and social security 1 (a) (v) Food security and nutrition
1 (b) To maintain stable national and global economic and financial systems[2]	1 (b) (i) Reducing risks of domestic financial crises 1 (b) (ii) Providing against volatility of national commodity prices 1 (b) (iii) Reducing risks of external macro imbalances 1 (b) (iv) Reducing and mitigating impacts of international financial and economic crises 1 (b) (v) Protecting against volatility of international commodity prices
1 (c) To adopt national and international policy strategies supportive of the right to development[3]	1 (c) (i) Right to development priorities reflected in national development plans and programmes 1 (c) (ii) Right to development priorities reflected in policies and programmes of IMF, World Bank, WTO and other international institutions
1 (d) To establish an economic regulatory and oversight system to manage risk and encourage competition[4]	1 (d) (i) System of property rights and contract enforcement 1 (d) (ii) Policies and regulations promoting private investment
1 (e) To create an equitable, rule-based, predictable and non-discriminatory international trading system[5]	1 (e) (i) Bilateral, regional and multilateral trade rules conducive to the right to development 1 (e) (ii) Market access (share of global trade) 1 (e) (iii) Movement of persons
1 (f) To promote and ensure access to adequate financial resources[6]	1 (f) (i) Domestic resource mobilization 1 (f) (ii) Magnitude and terms of bilateral official capital flows 1 (f) (iii) Magnitude and terms of multilateral official capital flows 1 (f) (iv) Debt sustainability
1 (g) To promote and ensure access to the benefits of science and technology[7]	1 (g) (i) Pro-poor technology development strategy 1 (g) (ii) Agricultural technology 1 (g) (iii) Manufacturing technology 1 (g) (iv) Technology transfer, access and national capacity 1 (g) (v) Green energy technology 1 (g) (vi) Health technology 1 (g) (vii) Information technology
1 (h) To promote and ensure environmental sustainability and sustainable use of natural resources[8]	1 (h) (i) Prevent environmental degradation and resource depletion 1 (h) (ii) Access to natural resources 1 (h) (iii) Sustainable energy policies and practices
1 (i) To contribute to an environment of peace and security[9]	1 (i) (i) Reduce conflict risks 1 (i) (ii) Protecting the vulnerable during conflict 1 (i) (iii) Post-conflict peacebuilding and development 1 (i) (iv) Refugees and asylum seekers 1 (i) (v) Personal security in times and zones of armed conflict
1 (j) To adopt and periodically review national development strategies and plans of action on the basis of a participatory and transparent process[10]	1 (j) (i) Collection and public access to key socioeconomic data disaggregated by population groups 1 (j) (ii) Plan of action with monitoring and evaluation systems 1 (j) (iii) Political and financial support for participatory process

[1] See Declaration on the Right to Development (General Assembly resolution 41/128, annex), second preambular paragraph and art. 2 (3).

[2] Ibid., fourteenth and fifteenth preambular paragraphs and arts. 2 (2), 2 (3), 3 (1), 3 (3) and 10.

[3] Ibid., third preambular paragraph and arts. 2 (3), 3 (1), 4 and 10. See also *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (A/CONF.198/11), chap. I, resolution 1, annex, Monterrey Consensus of the International Conference on Financing for Development (hereinafter "Monterrey Consensus"), para. 11.

[4] Declaration on the Right to Development, fourteenth preambular paragraph and arts. 2 (2), 2 (3) and 3 (1); Outcome of the Conference on the World Financial and Economic Crisis and its Impact on Development (General Assembly resolution 63/303, annex), para. 37; and Monterrey Consensus, paras. 20–21.

[5] Declaration on the Right to Development, fifteenth preambular paragraph and arts. 3 (3) and 4; General Assembly resolution 64/172 on the right to development, ninth preambular paragraph and para. 26; and Human Rights Council resolution S-10/1, para. 7.

[6] Declaration on the Right to Development, fourteenth and fifteenth preambular paragraphs and arts. 4 (2) and 8; Outcome of the Conference on the World Financial and Economic Crisis and its Impact on Development, paras.10, 11 and 14; and Monterrey Consensus, para. 15.

[7] Declaration on the Right to Development, third, tenth and sixteenth preambular paragraphs and articles 2 (3), 3 (3) and 4; United Nations Millennium Declaration (General Assembly resolution 55/2), para. 20; and 2005 World Summit Outcome (General Assembly resolution 60/1), para. 60.

[8] Declaration on the Right to Development, arts. 1 (2) and 3 (1); 2005 World Summit Outcome, para.10; and Monterrey Consensus, paras. 3 and 23.

[9] Declaration on the Right to Development, ninth, eleventh and twelfth preambular paragraphs and arts. 3 (2) and 7; and 2005 World Summit Outcome, paras. 5 and 69–118.

[10] Declaration on the Right to Development, second preambular paragraph and arts. 1 (1), 2 (3), 3 (1) and 8 (2).

Attribute 2. Participatory human rights processes

Criteria	Sub-criteria
2 (a) To establish a legal framework supportive of sustainable human-centred development[1]	2 (a) (i) Ratification of relevant international conventions 2 (a) (ii) Responsiveness to international monitoring and review procedures 2 (a) (iii) National legal protection of human rights
2 (b) To draw on relevant international human rights instruments in elaborating development strategies[2]	2 (b) (i) Human rights-based approach in national development strategies 2 (b) (ii) Human rights-based approach in policy of bilateral and multilateral institutions/agencies
2 (c) To ensure non-discrimination, access to information, participation and effective remedies[3]	2 (c) (i) Establishment of a framework providing remedies for violations 2 (c) (ii) Establishment of a framework to facilitate participation 2 (c) (iii) Procedures facilitating participation in social and economic decision-making 2 (c) (iv) Establishment of a legal framework supportive of non-discrimination 2 (c) (v) Establishment of assessment and evaluation system supportive of non-discrimination 2 (c) (vi) Indicators reflecting likelihood of differential treatment of marginalized groups 2 (c) (vii) Mechanisms for transparency and accountability
2 (d) To promote good governance at the international level and effective participation of all countries in international decision-making[4]	2 (d) (i) Mechanisms for incorporating aid recipients' voice in aid programming and evaluation 2 (d) (ii) Genuine participation of all concerned in international consultation and decision-making
2 (e) To promote good governance and respect for rule of law at the national level[5]	2 (e) (i) Government effectiveness 2 (e) (ii) Control of corruption 2 (e) (iii) Rule of law

[1] Ibid., fifth, eighth and thirteenth preambular paragraphs and arts. 1 (1), 2 (1) and 10.

[2] Ibid., eighth and tenth preambular paragraphs and arts. 3 (3), 6 and 9 (2); and General Assembly resolution 64/172, para. 9.

[3] Declaration on the Right to Development, second and eighth preambular paragraphs and arts. 1 (1), 5, 6 and 8 (2); and General Assembly resolution 64/172, paras. 9 and 29.

[4] Declaration on the Right to Development, arts. 3 and 10; General Assembly resolution 64/172, para.10 (a); Monterrey Consensus, paras.7, 38, 53, 57, 62 and 63; and Human Rights Council resolution S-10/1, para. 3.

[5] Declaration on the Right to Development, arts.1 (1), 2 (3), 3 (1), 6 (3), 8 (1) and 10; and General Assembly resolution 64/172, paras. 9, 10 (e), 27 and 28.

Attribute 3. Social justice in development

Criteria	Sub-criteria
3 (a) To provide for fair access to and sharing of the benefits of development[1]	3 (a) (i) Equality of opportunity in education, health, housing, employment and incomes 3 (a) (ii) Equality of access to resources and public goods 3 (a) (iii) Reducing marginalization of least developed and vulnerable countries 3 (a) (iv) Ease of immigration for education, work and revenue transfers
3 (b) To provide for fair sharing of the burdens of development[2]	3 (b) (i) Equitably sharing environmental burdens of development 3 (b) (ii) Just compensation for negative impacts of development investments and policies 3 (b) (iii) Establishing safety nets to provide for the needs of vulnerable populations in times of natural, financial or other crisis
3 (c) To eradicate social injustices through economic and social reforms[3]	3 (c) (i) Policies aimed at decent work which provide for work that is productive and delivers a fair income, security in the workplace and social protection for families 3 (c) (ii) Elimination of sexual exploitation and human trafficking 3 (c) (iii) Elimination of child labour 3 (c) (iv) Eliminate slum housing conditions 3 (c) (v) Land reform

[1] Declaration on the Right to Development, first and second preambular paragraphs and arts.1 (1), 2 (3) and 8.
[2] Ibid., arts. 2 (2) and 8 (1); and Human Rights Council resolution S-10/1, para. 5.
[3] Declaration on the Right to Development, art. 8; and Monterrey Consensus, para. 16.

The role of international law

Stephen P. Marks, Beate Rudolf,** Koen De Feyter*** and Nicolaas Schrijver*****

I. Introduction[1]

While there is a fairly broad consensus on the underlying principles of the right to development, the most intense political division is between, on the one hand, the Non-Aligned Movement, whose Heads of State and Government have called for the United Nations to draft a convention on the right to development,[2] and, on the other, the European Union, the United States, Canada, Japan and others, which have strongly opposed this idea. The Working Group on the Right to Development has been able to achieve consensus by keeping a legally binding instrument among the possible outcomes of the process, without establishing that the process must automatically lead there. The key language in this regard is that the process "could evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement".[3]

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

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

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

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

[4] See footnote 1 above.

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

II. Transforming criteria into treaty norms: a thought experiment[6]

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

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

[6] This section is based on chapter 7 in the work referred to in footnote 1.

A. Obstacles to transforming the revised criteria into treaty obligations

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

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

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

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

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

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

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

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

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

[8] It is estimated that there are some 300 regional trade agreements. See http://www.wto.org/english/tratop_e/region_e/regfac_e.htm.

[9] BRICS is a group of regional power brokers consisting of Brazil, Russian Federation, India, China and, as of April 2011, South Africa, which account for 40 per cent of the world's population and have "recently shown a desire to use their combined size and economic might to counter the West's global dominion … [and] to reform such institutions as the UN Security Council and the World Bank". See "All over the place. South Africa is joining the BRICs without much straw", *The Economist*, 26 March 2011, p. 56.

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

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

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

> It is important to see that in linking human rights to both perfect and imperfect obligations, there is no suggestion that the right-duty correspondence be denied. Indeed, the binary relation between rights and obligations can be quite important, and it is precisely this binary relation that separates out human rights from the general valuing of freedom (without a correlated obligation of others to help bring about a greater realization of human freedom). The question that remains is whether it is adequate for this binary relation to allow imperfect obligations to correspond to human rights without demanding an exact specification of who will have to do what, as in the case of legal rights and specified perfect obligations.[10]

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

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

[10] Amartya Sen, "Consequential evaluation and practical reason", *The Journal of Philosophy*, vol. XCVII, No. 9 (September 2000), pp. 495.
[11] Ibid.
[12] Ibid., p. 496.
[13] Ibid., p. 497.
[14] Martin Scheinin, "Advocating the right to development through complaint procedures under human rights treaties", in *Development as a Human Right: Legal, Political and Economic Dimensions,* 2nd ed., Bård A. Andreassen and Stephen P. Marks, eds. (Antwerp, Intersentia, 2010), pp. 339-352.

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

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

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

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

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

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

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

1. Provisions relating to policy

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

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

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

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

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

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

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

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

2. Provisions relating to process

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

> The States Parties to the present Convention agree, where they have not already done so, to give priority to the ratification of treaties relating to human rights and anti-corruption measures.

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

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

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

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

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

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

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

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

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

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

> States Parties belonging to the donor community agree to base their overall support, as expressed in country strategies, policy dialogues and development cooperation programmes, on partners' national development strategies and periodic reviews of progress in implementing these strategies, and to link funding to a single framework of conditions and/or a manageable set of indicators derived from the national development strategy.
>
> States Parties benefiting from development cooperation shall exercise leadership in developing and implementing their national development strategies through broad consultative processes and translating these national development strategies into prioritized results-oriented operational programmes as expressed in medium-term expenditure frameworks and annual budgets.

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

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

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

> States Parties benefiting from development cooperation shall facilitate parliamentary oversight by implementing greater transparency in public financial management, including public disclosure of revenues, budgets, expenditures, procurement and audits.
>
> States Parties belonging to the donor community agree to publicly disclose regular, detailed and timely information on volume, allocation and, when available, results of development expenditure to enable more accurate budget, accounting and audit by developing countries.

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

3. Provisions relating to outcomes

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

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

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

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

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

> States Parties agree that adequate compensation must be provided to all who suffer from negative impacts of development investments and policies, such as hazardous industries, dams causing displacement of populations, natural resource concessions that do not adequately benefit the local population, granting of patents that infringe on ownership of traditional knowledge and similar activities, on the basis of an equitable sharing of responsibility between the international entity carrying out the activity and the national agency authorizing it.
>
> States Parties agree to ensure, through the United Nations Framework Convention on Climate Change and related instruments, that developing countries have the resources and technology to carry out nationally appropriate mitigation actions to reduce emissions and adapt to climate change, in accordance with the principle of common but differentiated responsibilities and respective capabilities, and taking into account social and economic conditions and other relevant factors.

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

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

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

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

This exercise reveals several problems with the drafting of a convention based on the criteria. The first is that the norms are either too vague to be of much value, or unlikely to be acceptable to most Governments (although perhaps desirable from the perspective of an ideal right to development). Terms like "participation" and "equity" may be acceptable in a political declaration, but in a treaty that would be enforceable, these terms and many others would require definition and clarification. It would probably take several years before a formulation could be found that is acceptable to an intergovernmental drafting conference. However, the level of generality in the criteria developed by the task force is not much greater than that in many other human rights treaties. Additionally, drafters could provide more specificity if they felt there was a good-faith effort on all sides to find a common ground. The polarized political climate that results in 53 negative votes (see below) at the mere mention of a convention is not conducive to the fleshing out of specific treaty norms expanding on the criteria, perhaps in any possible formulation. A related problem is that many of the proposed treaty obligations are at least in part duplicative of treaty obligations already assumed. It would be necessary to ensure (a) that there is compatibility among similar norms; and (b) that there is sufficient novel substance matter to justify a new treaty. The more precise the treaty obligation the more likely it is to reveal the tension between a general commitment to the right to development and the willingness to change practices.

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

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

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

III. Relationship of the right to development to existing substantive treaty regimes[19]

A. Relationship to human rights treaties

1. Substantive overlaps and lacunae

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

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

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

[19] This section is based on chapter 11 in the work referred to in footnote 1.

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

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

2. Duty bearers and right bearers

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

The uncontested extraterritorial reach of human rights treaties is rather limited: the International Covenant on Civil and Political Rights presupposes that a person is "within [the] territory and subject to [the] jurisdiction" of a State to engage that State's responsibility. Although the Human Rights Committee does not understand "jurisdiction" as being limited to the State's own territory, it requires a physical contact of a State (through the actions of its agents) with the territory of another State to trigger the duty to respect, protect and fulfil the rights guaranteed.[22] The provisions of the International Covenant on Economic, Social and Cultural Rights concerning international cooperation, in particular article 2 (1), do not create an enforceable claim to cooperation for one State against others.[23] In contrast, the right to development as recognized by the Vienna Declaration and Programme of Action contains a recommendation addressed to third States to cooperate to the best of their abilities and available resources. This recommendation neither permits less developed States to claim financial aid, nor does it give third States carte blanche to deny assistance. Instead, it compels third States and the international community to justify a denial of support. In the same vein, the international community would be obliged to justify itself if it did not step in to support development by eliminating the worst obstacles to development in cases where States were extremely weak or failing. This aspect of a legally binding right to development would link with the preventive dimension of the responsibility to protect as recognized by the international community in the World Summit Outcome adopted in 2005.[24] It would help shift the (wrong) focus that scholars and practitioners apply when discussing the responsibility to protect from military measures (responsibility to react) to development (responsibility to prevent).[25]

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

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

[21] Other yardsticks are the realization of fundamental human rights and the fulfilment of the State's "responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (General Assembly resolution 60/1, para. 138).

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

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

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

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

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

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

3. Mechanisms for implementation

The last important point in the comparison concerns mechanisms for implementation. The legal debate in this field tends to focus on individual complaints mechanisms under human rights treaties. Yet, such a mechanism for the right to development would be highly problematic and, at the same time, of little relevance since there is little that an individual complaints mechanism for the right to development could achieve that is not achievable through existing human rights complaints procedures. Most aspects of the right to development concern either structural requirements (process dimension) or the realization of human rights (result dimension). Moreover, the procedural aspects of the right to development do not lend themselves easily to an individualized violations approach. Under which conditions should a complaint be admissible and successful if, for instance, the acts of the administration cannot be challenged in an independent court? An individual complaints procedure would, in reality, be a barely disguised *actio popularis*. For this reason, a complaints mechanism for the right to development should focus more appropriately on the collective dimension of the right. Within this dimension, it should focus especially on the question of who shall have standing to bring a claim for a population. One might think, for example, of collectivities that have representations under municipal law, such as the states within a federation or groups that enjoy autonomy, and, in the absence of these, independent bodies, such as national human rights institutions that fulfil the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles),[27] could be empowered.

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

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

[27] General Assembly resolution 48/134, annex.
[28] Scheinin, "Advocating" (see footnote 14), p. 340.
[29] See section IV below.

B. Relationship to development cooperation treaties

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

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

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

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

[30] For a detailed discussion of the Cotonou Agreement, see chapter 19 of the present publication.

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

[32] "[S]ustainable and equitable development involving, inter alia, access to productive resources, essential services and justice …"

[33] Evidently, the Agreement itself is an example of cooperation, yet on a purely voluntary basis.

[34] "The ACP States shall determine the development principles, strategies and models of their economies and societies in all sovereignty."

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

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

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

C. Relationship to international economic law

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

Since the late 1980s, good governance has become a yardstick in the World Bank's loan-granting process, as bad governance was considered the main reason for the ineffectiveness of loans.[36] An analysis of the World Bank's concept of good governance reveals large overlaps with the substantive content of the right to development. According to the World Bank, good governance encompasses four elements: (a) accountability in the sense of disciplinary and criminal responsibility of public officials; (b) participation; (c) transparency; and (d) the supremacy of law, i.e., the rule of law.[37] As was shown earlier, the three last-mentioned elements are features of the procedural dimension of the right to development. The decisive difference between the right to development and the good governance approach, however, is that the World Bank considers the elements of the latter only to be means of enhancing the effectiveness of loans; unlike the right to development, they are not an end in themselves.

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

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

[36] World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington, D.C., 1989), pp. 60-61, and *Governance: The World Bank's Experience* (Washington, D.C., 1994), pp. 17-18. For an account of this development see, e.g., Adrian Leftwich, "Governance, the State and the politics of development", *Development and Change*, vol. 25, Issue 2 (April 1994), p. 363; Mette Kjær and Klaus Kinnerup, "Good governance – How does it relate to human rights?", in *Human Rights and Good Governance: Building Bridges*, Hans-Otto Sano and Gudmundur Alfredsson, eds. (Springer, 2002), pp. 4-7; and David Gillies, "Human rights, democracy and good governance: stretching the World Bank's policy frontiers", in *The World Bank: Lending on a Global Scale (Rethinking Bretton Woods)*, Jo Marie Griesgraber and Bernhard G. Gunter, eds. (London, Pluto, 1996), pp. 101 and 116.

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

[38] Such provisions may be found in articles XVIII and XXXVI (8) of the General Agreement on Tariffs and Trade.

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

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

D. Relationship to international environmental law

Again, the lack of a comprehensive international agreement in the area of international environmental law prevents a general comparison of the right to development with treaty arrangements. Instead, one notes seemingly contradictory approaches of the right to development and environmental law to the relationship between development and sustainability, and to a possibility of harmonizing them. Note the decisive difference between the Rio Declaration on Environment and Development of 1992, which puts development and sustainability on an equal footing,[40] and the Vienna Declaration and Programme of Action, adopted one year later, which reduces sustainability to one of several recommended approaches. Although the conflict can be mitigated by a restrictive interpretation, allowing States to prefer development over sustainability only under extreme circumstances, the fact remains that the right to development under the Vienna Declaration and Programme of Action gives precedence to development over sustainability, whereas the Rio Declaration creates no hierarchy between the two concepts. In a similar vein, the United Nations Framework Convention on Climate Change of 1992 uses the right to development to limit the environmental obligations of States that serve the aim of sustainability.[41]

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

E. Final observations on existing treaty regimes

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

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

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

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

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

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

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

IV. Advantages of a multi-stakeholder agreement on the right to development[44]

This section contains a proposal for a multi-stakeholder agreement on the right to development, which would bring together a coalition of public and private actors who are willing to commit to the right to development by establishing best practices that demonstrate that it can be implemented in a meaningful way. The discussion will focus on (a) the potential added value of such a binding agreement; and (b) its possible content in the light of the decision of the Human Rights Council that the Working Group on the Right to Development should move gradually towards "consideration of an international legal standard of a binding nature".[45]

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

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

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

[44] This section is based on chapter 10 in the work referred to in footnote 1.

[45] Resolution 4/4, para. 2 (d).

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

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

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

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

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

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

B. Existing multi-stakeholder agreements

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

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

[49] Scheinin, "Advocating" (see footnote 14), p. 340.

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

[51] Compare Magdalena Sepúlveda, "Obligations of 'international assistance and cooperation' in an optional protocol to the International Covenant on Economic, Social and Cultural Rights", *Netherlands Quarterly of Human Rights*, vol. 24, No. 2 (2006), pp. 271–303.

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

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

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

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

The Voluntary Principles on Security and Human Rights (2000) are a multi-stakeholder initiative established in 2000 that introduced a set of principles to guide extractive companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms. The participants in the Voluntary Principles include four Governments[55] and a number of multinational corporations and international human rights NGOs.[56] Under the scheme[57] all participants agree to meet a set of criteria and are permitted to raise concerns about another participant's lack of effort to implement the Voluntary Principles. If concerns persist, participants agree to engage in consultations facilitated by the organs established in the Voluntary Principles, namely, the Steering Committee and the Plenary. The expulsion of a participant requires a unanimous decision of the Plenary, but recommendations can be adopted by a special majority consisting of 66 per cent of the Government vote, 51 per cent of the NGO vote and 51 per cent of the company vote. The Voluntary Principles do not create legally binding standards, and participants explicitly agree that alleged failures to abide by the Principles shall not be used in legal or administrative proceedings. This does not mean, however, that the Voluntary Principles do not have any external impact. In the context of the review of its social and environmental performance standards,[58] the International Finance Corporation (IFC) built on the Voluntary Principles. As a result, any extractive industry project wishing to secure Multilateral Investment Guarantee Agency (MIGA)-IFC support must now implement not only the Corporation's own standards, but also operate consistently with the Voluntary Principles. The voluntary character of the Principles has thus hardened into a MIGA-IFC conditionality.

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

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

[54] For a full discussion of these instruments, see chapter 17 of the present publication.

[55] The Netherlands, Norway, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

[56] The International Committee of the Red Cross, the International Council on Mining and Metals and the International Petroleum Industry Environmental Conservation Association are observers.

[57] See participation criteria and mechanisms, adopted in 2007, at www.voluntaryprinciples.org.

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

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

[60] In practice, mostly members of the United Nations system and intergovernmental organizations.

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

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

The Global Fund to Fight AIDS, Tuberculosis and Malaria is a public-private partnership that mobilizes resources to develop and implement effective, evidence-based programmes to respond to the three diseases. The Fund is a financial instrument, not an implementing agency. The focus is on funding best practices that can be scaled up and on strengthening high-level commitment to allocate resources. Participation of communities affected by the three diseases in the development of proposals to the Fund is particularly encouraged. It has committed some $25 billion in over 150 countries.[65] Originally incorporated as a non-profit foundation under Swiss law on 22 January 2002, the Fund is considered a non-governmental organization and benefits from privileges and immunities similar to those of an intergovernmental organization under agreements with the Government of Switzerland. It had signed an administrative services agreement with the World Health Organization, which was discontinued as of 1 January 2009 when the Fund became autonomous. The international structure of the Fund includes a Foundation Board (with voting representatives from developing countries, donors, civil society and the private sector), a Partnership Forum (open to a wide range of stakeholders), chairpersons, the secretariat and the Technical Review Panel (independent experts who review applications and make recommendations). At country level there are a country coordinating mechanism, the principal recipient and a local Fund agent. The World Bank manages the Fund's resources as trustee. The Board decides by consensus if possible, or by voting (motions require a two-thirds majority of those present, of both the group encompassing the eight donor seats and the two private sector seats and of the group encompassing the seven developing country seats and the three NGO representatives).

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

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

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

[62] An example of a WFP-NGO cooperation agreement is the Memorandum of Understanding between WFP and Islamic Relief (December 2006).

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

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

[65] See http://portfolio.theglobalfund.org/?lang=en. Data as of June 2012.

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

[67] The European Community signed the Convention on 30 March 2007.

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

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

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

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

(a) *Commitment to the right to development.* The commitment would simply reaffirm the right to development as a human right formulated in general terms, as in the Declaration or, as suggested above, in a formulation that takes into account subsequent developments with regard to the ecological and democratic aspects of the right. The commitment serves to establish the realization of the right to development as the object and purpose of the agreement;

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

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

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

[70] General Assembly resolution 55/2, para. 5.

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

[72] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), art. 19.

[73] Convention on the Rights of the Child (1989), art. 6, para. 2.

[74] ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989), art. 7, para. 1.

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

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

(b) *Right to development partnership agreements*. In this model, partnership contracts between parties adhering to the agreement and relevant communities, focusing on assistance to the community whose human rights are affected as a consequence of both internal and external factors, would be presented to a multi-stakeholder board (assisted by an independent review panel)[75] for registration as a right to development partnership. For the purposes of registration, use could be made of the criteria and indicators developed by the high-level task force on the implementation of the right to development. It could also be provided that any partnership contract approved under the agreement should provide human rights recourse for the affected community with regard to any of the parties involved in the partnership contract. Actors involved in right to development contracts would be expected to report on implementation of the projects to the agreement's institutions;

(c) *Participation in a forum for policy discussions.* The forum would be a plenary body of all parties to the agreement. The primary function of the forum would be to review and appraise the practice built up under the agreement in operationalizing the right to development. The purpose of the review would be to identify the best practices that can be scaled up and to strengthen high-level commitment to the right to development. The forum could make a special effort to invite independent experts from the countries where the practice under the agreement has been built up to participate in its policy discussions. In addition, the forum could also be used as a venue for organizing a dialogue on presentations by adhering parties on their policies (in general) with regard to, or affecting, the right to development;

(d) *Commitment to engage in conciliation and dispute settlement.* The parties to the agreement would commit to engage in conciliation and international dispute settlement with regard to any aspect of the agreement. One option would be to include a provision in the agreement referring disputes to the Permanent Court of Arbitration in The Hague. The Permanent Court currently provides rules for arbitrating disputes involving a variety of actors and guidelines for adapting these rules for disputes arising under multiparty contracts.[76]

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

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

V. Many roads lead to Rome: how to arrive at a legally binding instrument on the right to development?[77]

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

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

(a) *Consolidating, updating and enhancing the status of the Declaration on the Right to Development*. It is gratifying to note that the Declaration enjoys considerable support in the United Nations, as became especially evident during the World Conference on Human Rights in Vienna in 1993. Moreover, the Declaration is perceived as a living document which is capable of responding to and incorporating major strategic priorities of poverty reduction, good governance and sustainability, as defined at the global conferences and summits and resulting strategy documents, including the Millennium Development Goals. The examples of the Universal Declaration of Human Rights (1948), the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (1970) and the United Nations Millennium Declaration demonstrate that declarations can have considerable legal effect beyond their formally non-binding legal status and can at times be a more effective technique in generating consensus, and subsequently compliance, than the instrument of a formal treaty;

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

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

[77] This section is based on chapter 13 of the work referred to in footnote 1.
[78] It is to be noted that paragraph 2 (d) of Human Rights Council resolution 4/4 refers to "a collaborative process of engagement", "guidelines" and a "legal standard of a binding nature".

(d) *Enhancing the institutional status of the right to development within the United Nations system*. Currently, the right to development is addressed in a variety of organs and none of them is particularly in the lead. The Third Committee of the General Assembly tends to pay considerable attention to it. The Working Group and its high-level task force operated under the auspices of the Human Rights Council (a subsidiary body of the Assembly). Furthermore, the various human rights treaty bodies also touch on the right to development, both in concrete cases and in general comments. One may well consider upgrading the Working Group to a standing commission, establishing a fund (compare the example of the Global Fund to Fight AIDS, Tuberculosis and Malaria, discussed above) and mainstreaming concerns around the right to development into the universal periodic review, in due course, as complementary ways to enhance the status of the right within the United Nations system;

(e) *Concluding development compacts*. Increasingly, development treaties between developed and developing countries, or multi-stakeholder agreements involving international organizations, enterprises, commercial banks and civil society organizations are being concluded. Some of them contain references to human rights in their development-related provisions. Such legal instruments could usefully incorporate best practices and guidelines and recommendations based on such practices. This may well be a relevant complementary method of implementing the right to development and enhancing its status;

(f) *Mainstreaming the Declaration into regional and interregional agreements*. Similarly, treaties concluded in the context of regional associations (African Union, European Union, ASEAN, NAFTA, MERCOSUR) and interregional agreements, such as the Cotonou Agreement, could refer to the right to development and incorporate the core of its content as well as best practices and guidelines and recommendations based thereon. A number of multilateral treaties already contain explicit or implicit references to the key dimensions of the right to development, especially in the areas of development, human rights, the environment and trade;

(g) *Drafting a new human rights treaty on the right to development*. Finally, a new human rights treaty could be drafted (either a specific right to development treaty or a general framework treaty), to be followed up by one or more specific protocols or a set of guidelines for implementation. This method has often been employed, including in areas which, in the view of many States, were not yet sufficiently crystallized so as to lend themselves to codification. However, the treaty instrument has often been employed to foster the progressive development of international law, including in the field of human rights, labour norms and environmental protection. Furthermore, the potential of a treaty to raise awareness, stimulate national legislation and promote action at the national and regional levels is not to be underestimated.

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

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

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

> We, twenty-four experts, coming from all continents and acting in our personal capacity, met near Geneva on 4–6 January 2008 to exchange views on the legal issues involved in improving the implementation of the right to development, including the problems and prospects of a legal standard of a binding nature on this right. Our meeting was not premised on any political preference for or against the elaboration of a convention but sought to provide clarity regarding the legal problems to be addressed in furthering efforts to move the right to development from political aspiration to development practice. The specific context of the meeting was the implementation, by the United Nations high-level task force on the implementation of the right to development, of its mandate in light of Human Rights Council resolution 4/4, adopted on 30 March 2007, by consensus, and General Assembly resolution 62/161, adopted on 18 December 2007 by a vote of 135 to 53.
>
> While we were acutely aware of the political context and the support of many countries for a UN treaty on the right to development, our deliberations focused on the merits and problems of various techniques of international law independently of the current political climate. The following summary can only highlight the themes discussed and cannot do justice to the thorough and innovative presentations and the insightful and constructive discussion, which we hope will be made available in the published proceedings of the workshop.
>
> Under the first theme on the right to development as a legal norm, we considered the nature and scope of the right to development in international law. We agreed that the right to development, like the right to self-determination, had both an external and an internal dimension, the former referring to the obligations to contribute to rectifying the disparities and injustices of the international political economy and to reduce resource constraints on developing countries, while the latter referred to the duty of each country to ensure that its development policy is one in which all human rights and fundamental freedoms can be fully realized, as required by the Declaration on the Right to Development of 1986. The content of the legal norm of the right to development has evolved since 1986 to incorporate major strategic priorities of poverty reduction, good governance and sustainability, as defined in the global conferences and summits and resulting strategy documents, including the Millennium Development Goals.
>
> We then addressed the normative content of a treaty as opposed to a declaration on the right to development and specifically how a treaty would differ from the Declaration of 1986. We noted that there was a vast grey area between "soft law" and "hard law" and that the shift from the first to the second was contingent on the clarity of the obligations to be assumed by the parties, the degree of political consensus on the need for a treaty, and the feasibility of a treaty regime in terms of ratification and follow-up procedures.
>
> We compared the potential for a treaty on the right to development with the experience in drafting the Convention on the Rights of Persons with Disabilities (CRPD) and noted similarity in terms of the integration of rights of various categories, the enhanced status of the subject of the rights involved, and the potential of a treaty to raise awareness, stimulate legislation and promote national action. The CRPD also contains certain innovations, which might be relevant to an eventual right to development instrument, such as the capacity of a treaty monitoring body to receive collective complaints, to draw upon the expertise and inputs of NGOs and UN bodies, and to conduct proactive inquiries; the requirement that technical assistance and development and humanitarian aid be in conformity with the treaty; and the opening to accession by regional international organizations. However, the transition from a declaration to a treaty took 30 years in the less controversial case of the CRPD. Therefore, we felt that more time was needed before the conditions could be met for a successful treaty-drafting process on the right to development, so that a better understanding could be acquired of the appropriate institutional setting for effective implementation and financial implications could be worked out. However desirable an eventual treaty might be, we considered it preferable to give priority to the implementation of the right to development through a process of establishing, refining and applying guidelines as requested by the Human Rights Council.
>
> We considered alternatives to a treaty, such as a compact for development involving both human rights and trade cooperation, a multi-stakeholder international agreement and other ideas without reaching any definitive conclusion on them. Further, it was noted that a non-binding document, such as the Universal Declaration of Human Rights, the Millennium Declaration and the Millennium Development Goals or the Declaration on the Right to Development itself can sometimes be more effective in generating compliance than a formal treaty. We also explored the advantages and disadvantages of various options for a global mechanism, inside or outside the UN, along the lines of the Global Fund to Fight AIDS, Tuberculosis and Malaria. The emergence of related customary norms of international law was also seen as a form of entrenchment of the right to development in international law.
>
> The second theme we addressed was the experience with existing treaty norms relating to the right to development. These relate both to substantive treaty regimes and regional cooperation treaties containing explicit or implicit references to the right to development. Numerous treaties were mentioned in the areas of development, the environment, trade and indeed human rights, which covered key dimensions of the right to development but without covering the shared responsibilities and multiplicity of duty holders implied by the right to development. Regarding regional treaties, we examined the content and case law of article 22 of the African Charter on Human and Peoples' Rights, article 19 of its

[79] Georges Abi-Saab, Koen De Feyter, Asbjorn Eide, Shadrak Gutto, Emma Hannay, Daniela Hinze, Britt Kalla, Türkan Karakurt, Felix Kirchmeier, Stephen P. Marks, Susan Mathews, Christiana Mutiu, Dante Negro, Obiora Chinedu Okafor, Beate Rudolf, Ibrahim Salama, Margot Salomon, Sabine von Schorlemer, Nicolaas J. Schrijver, Margaret Sekaggya, Arjun K. Sengupta, Michael Stein, Wang Xigen and Abdulqawi A. Yusuf.

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

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

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

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

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

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

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

The right to development in practice: provisional lessons learned

High-level task force on the implementation of the right to development

I. Introduction

This chapter is based on the "Consolidation of findings of the high-level task force on the implementation of the right to development" (A/HRC/15/WG.2/TF/2/Add.1) submitted by the task force to the Working Group on the Right to Development at the conclusion of its mandate in 2010, pursuant to the Group's recommendation (A/HRC/12/28, para. 44). The Working Group decided in 2012 to "pursue, at its fourteenth session (2013), its work on the consideration of the draft operational sub-criteria" (A/HRC/21/19, para. 47). The consolidation of findings summarizes the main conclusions of the task force regarding the Millennium Development Goals, social impact assessments and five areas of global partnership as defined in goal 8 (development aid, trade, access to essential medicines, debt sustainability and transfer of technology), and then makes seven more general conclusions and recommendations.

II. Assessing global partnerships for development

After five years of applying the development framework implied by the Declaration on the Right to Development and responding to the requests of the Working Group, the task force became aware that the greatest challenge for the implementation of the right to development, in theory and practice, is to reconcile the conceptual approaches of human rights and economics; in other words, how to maintain a holistic vision of human rights, implying indivisible and interdependent norms aimed at maximizing the well-being of all individuals and peoples, while introducing the concerns of development based on sound economic policies that foster growth with equity.

It is easier to assert the principle, reaffirmed in numerous United Nations resolutions, that the two areas are mutually reinforcing than to apply it to decisions on policy and resource allocation, the latter being the purview of planners and implementers for whom "development" implies establishing priorities and making trade-offs in terms of resource allocations and benefits. The overarching lesson of the experience is that the right to development requires that priorities be consistent with human rights, in terms of policy, processes and outcomes. In an increasingly interdependent world, States and non-State actors help to shape these priorities and trade-offs, with the primary responsibility for meeting priorities and ensuring enjoyment of human rights remaining with States, by means of national policy and commitments under international arrangements. These broad concepts emerge from (a) the Millennium Development Goals; (b) social impact assessments; and (c) the global partnership, as understood in goal 8.

A. A right to development perspective on the Millennium Development Goals

The Millennium Development Goals represent a measurable set of human development milestones, the attainment of which is critical to building a more humane, inclusive, equitable and sustainable world,

as envisaged in the United Nations Millennium Declaration.[1] The achievement of the Goals has been variously constrained by threats to peace and security, environmental degradation, policy inadequacies and poor governance, and lack of an external environment supportive of the improvement of conditions for developing countries in terms of international trade, debt sustainability and internationally agreed levels of aid.

Four distinctive features of human rights, including the right to development, pose challenges to the implementation of the Goals: (a) specific and explicit inclusion of universally recognized and legally binding human rights standards in strategies for meeting the Goals; (b) indivisibility and interdependence of all human rights in formulating coherent policies and holistic development strategies in addressing the Goals; (c) clearly defined accountability mechanisms through judicial or other means at the national and international levels which are participatory, accessible, transparent and effective; and (d) mobilization of civil society to use the human rights framework in participating in and monitoring development efforts towards achieving the Goals in a rights-based manner.

Policymakers and development practitioners need a clear and rigorous mapping of the Goals against relevant international human rights instruments in order to mobilize, strengthen and sustain efforts to implement them at the national and international levels, taking into account the evolving understanding of extraterritorial human rights obligations.[2] The High Commissioner for Human Rights has focused attention on the relationship between the Millennium Development Goals and human rights by disseminating charts on the intersection of human rights and the Millennium Development Goals and has published a fairly exhaustive analysis of how human rights can contribute to the achievement of the Goals,[3] as have the United Nations Development Programme (UNDP)[4] and national development agencies.[5] Significant advances in realizing the Goals and the right to development require effective action at both national and international levels to strengthen institutional capacities, bridge information gaps, address accountability failures and give them local content and national ownership.

Beyond mapping human rights obligations with the Goals, policymakers and development practitioners need practical tools, including guidelines and objective indicators, to help translate human rights norms and principles into processes like social impact assessments. In 2005, the task force examined a paper on indicators for assessing international obligations in the context of goal 8[6] by Sakiko Fukuda-Parr (who later joined the task force) and shared her view that the framework to monitor that goal was inadequate from the perspective of the right to development because it lacked quantitative indicators, time-bound targets, appropriate measures to address current policy challenges and ownership of the development process. A conceptual framework on indicators of human rights was needed to fill the gap, which should lead to research and advocacy groups applying human rights principles and a gender dimension to development, thereby informing and participating in the formulation and implementation of the Millennium Development Goals in the context of country development strategies, including poverty reduction strategy papers (PRSPs). The task force also encouraged a participatory approach in the allocation of social sector expenditures in public budgets.

The task force also addressed the impact of unexpected shocks on poor and vulnerable populations. In order to achieve the Goals, temporary institutional measures encompassing social safety nets, such as well-targeted transfers and subsidies, are needed. From a right to development perspective, the issue of institutional and financial capacity to support social safety nets, particularly in the context of addressing effects of external shocks on the well-being of people,

[1] General Assembly resolution 55/2.

[2] On extraterritorial obligations, see, for example, Mark Gibney and Sigrun Skogly, eds., *Universal Human Rights and Extraterritorial Obligations* (Philadelphia, University of Pennsylvania Press, 2010) and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 2011, available at www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf.

[3] *Claiming the Millennium Development Goals: A Human Rights Approach* (United Nations publication, Sales No. E.08.XIV.6).

[4] In 2007 the UNDP Oslo Governance Centre published a primer, *Human Rights and the Millennium Development Goals: Making the Link*, as a follow-up to a 2006 e-discussion on linking human rights and the Goals and a working group meeting on the theoretical and practical implications of linking human rights and the Millennium Development Goals.

[5] See, for example, Swedish International Development Agency (SIDA), *A Democracy and Human Rights-Based Approach to Development Cooperation* (Stockholm, 2001); United Kingdom Department for International Development (DFID), *A Practical Guide to Assessing and Monitoring Human Rights in Country Programmes* (London, September 2009); German Federal Ministry for Economic Cooperation and Development (BMZ), *Human Rights in German Development Policy*, Strategy Paper 4/2011; United States Millennium Challenge Corporation (MCC), "MCC and the Millennium Development Goals", available at www.mcc.gov/pages/activities/activity/mdgs and "Voice and accountability indicator", available at www.mcc.gov/pages/selection/indicator/voice-and-accountability-indicator; United States Agency for International Development (USAID), *USAID Policy Framework 2011-2015* (Washington, D.C., 2011); Government of Canada, Official Development Assistance Accountability Act, in force since 28 June 2008, requiring official development assistance to contribute to poverty reduction, take into account the perspectives of the poor and be consistent with international human rights standards; Danish International Development Agency (DANIDA), "The Millennium Development Goals", available at http://um.dk/en/danida-en/goals/mdg/.

[6] "Millennium Development Goal 8: indicators for monitoring implementation" (E/CN.4/2005/WG.18/TF/CRP.2).

entails an international dimension. In such situations, the multilateral trade and development institutions should take steps to support national efforts to facilitate and sustain such measures.

Social safety nets correspond to the right to an adequate standard of living, including social security, as defined in the International Covenant on Economic, Social and Cultural Rights and the relevant instruments of the International Labour Organization (ILO). In times of crisis and in the context of chronic poverty, States must ensure, with the help of international cooperation when necessary, that everyone enjoys economic, social and cultural rights. Failure to do so would be detrimental to attaining the Goals and implementing the right to development. Although the task force formulated this conclusion in December 2004,[7] it became even more relevant in the wake of the global financial crisis of 2008.

B. Social impact assessments as a right to development tool

The high-level seminar on the right to development, held in 2004, stressed the need for social impact assessments in informing policy decisions and addressing the dislocative impact of new policies.[8] As a tool for implementing the right to development at the national and international levels, the task force considered broadening the concept and methodology of these assessments to explicitly include human rights and to identify possible complementary policies for implementing the right to development in the global context.[9]

Such assessments provide important methodological tools to promote evidence-based policy formulation by including distributional and social effects in the ex ante analysis of policy reforms and agreements. It is potentially useful in bringing about policy coherence at both the national and international levels and in promoting adherence to human rights standards, as required by the right to development.

Impact assessments are still evolving as a means of determining the consequences of specific interventions in a society and have only recently been extended to examine the impact of trade agreements on people's well-being. Caution is required in undertaking such assessments, as the complex dynamics of economic transactions do not always lend themselves to clearly defined causation analysis.

Policymakers and development practitioners can only benefit from social impact assessments that have integrated human rights standards and principles into their normative framework and methodology. While several institutions have initiated work on social impact assessment methodologies, the approach of the Organisation for Economic Co-operation and Development (OECD) and the World Bank has provided a useful analytical framework, including indicators for measuring empowerment, which take human rights into account.[10] Assessments can only be effective if there is genuine demand, ownership and availability of appropriate quantitative data and the will of the authorities to apply the findings of relevant analysis.

From the right to development perspective, social impact assessments should identify the dislocative effects of adopted policies on the poor and most vulnerable and provide useful data to find corresponding remedial measures. States should be encouraged to undertake independent assessments of the impact of trade and investment agreements on poverty, human rights and other social aspects, and these assessments should be taken into account in the context of the Trade Policy Review Mechanism process and future trade negotiations. The appropriateness of such assessments for the World Trade Organization (WTO) is clear from the preamble to the Marrakesh Declaration establishing the WTO, which refers to the "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". Despite the limited experience, human rights impact assessment would add further value, given the normative content of the right to development.[11] States should also consider special and differential treatment provisions under the WTO agreements with a view to enhancing

[7] "Report of the high-level task force on the implementation of the right to development (Geneva, 13-17 December 2004)" (E/CN.4/2005/WG.18/2), paras. 38-39.

[8] See "High-level seminar on the right to development: global partnership for development (Geneva, 9-10 February 2004)" (E/CN.4/2004/23/Add.1).

[9] "Report of the high-level task force on the implementation of the right to development (Geneva, 13-17 December 2004)" (E/CN.4/2005/WG.18/2), paras. 23-24.

[10] See OECD, *Promoting Pro-Poor Growth: Practical Guide to* Ex Ante *Poverty Impact Assessment* (Paris, 2007); World Bank, *A User's Guide to Poverty and Social Impact Analysis* (Washington, D.C., 2003); and World Bank, *Social Analysis Sourcebook: Incorporating Social Dimensions into Bank-Supported Projects* (Washington, D.C., 2003).

[11] "The right to development is clearly also relevant in this context, but has not been the subject of any discussion in the context of impact assessment, possibly because of a lack of clarity on how to define its substantive content." (James Harrison and Alessa Goller, "Trade and human rights: what does 'impact assessment' have to offer?", *Human Rights Law Review*, vol. 8, No. 4 (2008), pp. 587–615).

their effectiveness as instruments to harmonize human rights and multilateral trade requirements. Since the task force considered this issue, human rights impact assessments have been recommended by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises and the International Association of Impact Assessment and incorporated into several trade agreements.[12]

C. Five critical areas of the global partnership

Millennium Development Goal 8, with its focus on international cooperation, is a framework consistent with international responsibilities outlined in articles 3, 4 and 6 of the Declaration on the Right to Development. Following the Working Group's recommendations, the task force engaged in constructive dialogue and collaboration with multilateral institutions responsible for development aid, trade, access to medicines, debt sustainability and transfer of technology.

1. Development aid

(a) *Mutual Review of Development Effectiveness in the context of the New Partnership for Africa's Development*

Development aid figures prominently among the means essential to attaining the Millennium Development Goals, particularly for many developing countries, and in related commitments made at the Doha Round of negotiations in 2001, the International Conference on Financing for Development (which adopted the Monterrey Consensus) in 2002, the Gleneagles Group of Eight (G8) summit held in 2005 and the London Group of Twenty (G20) summit in 2009.

The Mutual Review of Development Effectiveness in the context of the New Partnership for Africa's Development (NEPAD), undertaken jointly by the Economic Commission for Africa (ECA) and the OECD Development Assistance Committee (OECD-DAC) broadly complies with several right to development criteria, especially regarding national ownership, accountability and sustainability, and can build upon and elaborate related processes in the context of the Cotonou Agreement between the European Union and African, Caribbean and Pacific (ACP) countries, the African Peer Review Mechanism (APRM) and Bretton Woods processes such as PRSPs.[13] The task force shared an independent assessment that the key challenges for African partners included lack of peace and security and economic growth, corruption, which continued to undermine socioeconomic growth and development, and capacity gaps in governance institutions.[14]

There is less congruence with criteria relating to the incorporation of human rights in national and international development policies. The governance component of the Mutual Review is a useful entry point, and the process should integrate regionally determined and owned human rights standard-setting instruments (African Charter on Human and Peoples' Rights and protocols thereto) and the OECD Action-Oriented Policy Paper on Human Rights and Development.[15] The Mutual Review should complement APRM.[16] It is necessary to make clear references to human rights instruments and cover all human rights, as recommended by the OECD action-oriented policy.

The process of preparing Mutual Review reports provided opportunities to improve the framework and integrate concepts derived from the right to development and rights-based approaches to development. The task force accepted the independent assessment that "action frontiers" and "performance benchmarks" should be more specific, useful to policymakers and

[12] See Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex), principles 18-19. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4. The International Association of Impact Assessment has included among its values "Respect for human rights and human dignity should underpin all assessments" (available at www.iaia.org/about/mission-vision-values.aspx). Many examples may be found in Susan Ariel Aaronson, "Human rights" in *Preferential Trade Agreements Policies for Development: A Handbook*, J.-P. Chauffour and J.-C. Maur, eds. (Washington, D.C., World Bank, April 2011); Isolda Agazzi, "Human rights impact assessments in free-trade agreements", paper presented at the United Nations Conference on Trade and Development (UNCTAD) policy dialogue "Redefining the role of the Government in tomorrow's international trade," 26–27 March 2012; Harrison and Goller, pp. 587-615; Simon Walker, "Human rights impact assessments of trade-related policies", in *Sustainable Development in World Trade Law,* Markus E. Gehring and Marie-Claire Cordonier Segger, eds. (The Hague, Kluwer Law International, 2005); Gillian MacNaughton and Paul Hunt, "Health impact assessment: the contribution of the right to the highest attainable standard of health", *Public Health*, vol. 123, No. 4 (April 2009), pp. 302-305. For an example of human rights impact assessments in free trade agreements, see the Canada-Colombia Free Trade Agreement of 2010: International Centre for Trade and Sustainable Development, "Canada–Colombia FTA gets human rights amendment", available at http://ictsd.org/i/news/bridgesweekly/73372/.

[13] "Report of the high-level task force on the implementation of the right to development on its third session" (A/HRC/4/WG.2/TF/2), para. 64.

[14] "Report of the high-level task force on the implementation of the right to development on its second session" (E/CN.4/2005/WG.18/TF/3), para. 31.

[15] *DAC Action-Oriented Policy Paper on Human Rights and Development* (Paris, OECD, 2007). See also A/HRC/4/WG.2/TF/2, para. 64.

[16] See "Report of the high-level task force on the right to development: technical mission: ECA/OECD-DAC Mutual Review of Development Effectiveness (A/HRC/8/WG.2/TF/CRP.2), para. 14 (d). Subsequently, OECD published *The Development Dimension: Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges* (Paris, 2006).

clearly connected to existing commitments. The inclusion of benchmarks informed by human rights and other treaties could strengthen the Review's contribution to the right to development. Often, the Mutual Review framework does not appear to be informed by existing standards in the field.[17]

The Mutual Review could undertake evaluations of the extent to which OECD and African countries have lived up to specific commitments in each area, summarizing and providing an analysis of the existing monitoring work rather than seeking to replicate it. The Mechanism does not focus specifically on the poor and most marginalized. This defect should be remedied by integrating into its questions the Millennium Development Goals and concerns about non-discrimination and vulnerable groups, especially in disadvantaged regions and non-dominant ethnic groups, as well as rural populations, women, children and the disabled.[18]

The value of the Mutual Review for the right to development lies in the effectiveness of the accountability mechanism and in enhancing the negotiating position of African countries with regard to aid effectiveness. The task force remained concerned that many dimensions of the right to development, such as explicit reference to human rights, a focus on gender and priority for vulnerable and marginalized populations, were not adequately addressed. The task force also concluded that policy priorities should be revised in the light of the increased needs of African countries owing to the failure of the Doha Round and the current financial crisis.[19]

(b) *Paris Declaration on Aid Effectiveness*

The Paris Declaration on Aid Effectiveness, a non-binding document adopted in 2005 on ways to disburse and manage official development assistance more effectively, did not establish a formal global partnership, but rather created a framework for bilateral partnerships between donors and creditors, and individual aid recipient countries. It is thus indirectly relevant to goal 8. The Working Party on Aid Effectiveness, housed in and administered by OECD-DAC and supported by the World Bank, has sought to provide a mechanism to address asymmetries in power and to give more voice to developing countries and civil society representatives since the Third and Fourth High-Level Forum on Aid Effectiveness, held in Accra and Busan in 2008 and 2011.

Although human rights are not mentioned in the Paris Declaration, they are referred to twice in the Accra Agenda for Action, and some of its principles are consistent with the right to development support for ownership and accountability. However, several of the Declaration's indicators and targets prior to the Third High-Level Forum appeared to work against the right to development and erode national democratic processes. The task force welcomed the willingness of OECD to adjust these deficiencies. Human rights, including the right to development, should be explicitly included as goals in the Paris Declaration and ministerial declarations of the High-Level Forum. An additional review and evaluation framework with corresponding targets and indicators should be included, to assess the results of the Declaration in terms of its impact on the right to development, human rights and the Millennium Development Goals.[20]

The Paris Declaration focuses on aid effectiveness and not explicitly on development outcomes. It is therefore less useful as a framework for enhanced development effectiveness, human rights realization, gender equality and environmental sustainability.[21] The main causes of ineffective aid (that is, tied aid and unpredictability of aid income) are not properly addressed and pose a significant problem from a right to development perspective, particularly in the light of the ownership of partner countries and policy coherence.[22] Progress has been made, however, in untying aid of OECD-DAC donors since the Paris Declaration. Right to development criteria and human rights precepts and practice could reinforce the Declaration's principles of ownership and mutual accountability, to which more importance was attached by the Accra Agenda for Action. Progress in improving the predictability of aid flows (albeit considerably less than in untying aid) also deserves attention. Several major donors have recently moved to medium-term programming of their aid programmes with priority partner countries, thereby enhancing the medium-term

[17] Bronwen Manby, "Application of the criteria for periodic evaluation of global development partnerships, as defined in Millennium Development Goal 8, from the right to development perspective: further analysis of the African Peer Review Mechanism and the ECA/OECD-DAC Mutual Review of Development Effectiveness in the context of NEPAD" (A/HRC/8/WG.2/TF/CRP.5), para. 53.

[18] Ibid., paras. 55-56.

[19] "Report of the high-level task force on the implementation of the right to development on its fifth session" (A/HRC/12/WG.2/TF/2), para. 64.

[20] Roberto Bissio, "Application of the criteria for periodic evaluation of global development partnerships–as defined in Millennium Development Goal 8–from the right to development perspective: the Paris Declaration on Aid Effectiveness" (A/HRC/8/WG.2/TF/CRP.7), paras. 86–87.

[21] "High-level task force on the right to development: technical mission report: Paris Declaration on Aid Effectiveness" (A/HRC/8/WG.2/TF/CRP.1), para. 14.

[22] A/HRC/4/WG.2/TF/2, para. 66.

predictability of aid commitments. Similar progress is required in the predictability of aid disbursements.

The right to development can add value to aid effectiveness by framing the debate without overemphasizing aid efficiency or introducing conditionality language.[23] There is considerable congruence between the principles of aid effectiveness and those underlying the right to development. By focusing on ownership and commitment, ensuring the removal of resource constraints and aid conditionalities and providing an enabling environment, the right to development helps developing countries to integrate human rights into development policies. While there is synergy between the principles of country ownership and mutual accountability and the right to development, their implementation and assessment could result in a disregard for other principles of the right to development without providing a complaint mechanism or other means of redress.[24]

The focus of right to development principles resonates in the Paris Declaration and increases the relevance of applying the right to development criteria to the evaluation of global partnerships. While ownership is a key principle in the Declaration, country experiences indicate the need for more progress towards aligning aid with national priorities, ensuring that aid is untied and using country systems for procurement and financial management.[25] The Accra Agenda took steps to remedy certain shortcomings of existing development cooperation partnerships by stressing country ownership, encouraging developing country Governments to take stronger leadership on their own development policies and to engage with their parliaments and citizens in shaping those policies. The Agenda creates space for domestic procedures and processes and is intended to reduce reliance on donor-driven systems that undermine domestic accountability in recipient countries.

(c) *African Peer Review Mechanism*

The task force considered that article 22 of the African Charter of Human and Peoples' Rights, the only legally binding instrument on the right to development, could provide the basis for the APRM and non-APRM countries to assess periodically the realization of the right to development in the African context.[26]

APRM is a unique process that enables the assessment and review of African governance through a South-South partnership. It preserves the autonomy of States and opens them to scrutiny, introducing benefits and incentives that can strengthen domestic accountability. It can provide implementable criteria for measuring development progress and considerable space for participation by civil society.

The task force acknowledged proposals to revise the Mechanism's questionnaire guiding country self-assessments and the process of reviewing reports. Such revision should aim at downsizing and making it a more efficient tool for assessment; harmonizing with other processes such as PRSPs; and explicitly incorporating human rights criteria.

The Mechanism's process could also be improved with regard to follow-up and implementation of the programme of action. The focus on making recommendations to African States and ensuring their implementation is an entry point to introduce elements of the right to development, while developing clear prioritization, measurable indicators, better integration into existing development plans, broad-based policy review and monitoring of development progress.

As part of reforms of African Union structures, more collaboration between APRM, NEPAD and the African Union would enhance policy coherence and the effective integration of work under the Mechanism with African human rights institutions, particularly the African Commission on Human and Peoples' Rights, thereby supporting the realization of the right to development under article 22 of the African Charter on Human and Peoples Rights.[27]

2. Trade: the Cotonou Agreement

The Cotonou Agreement[28] contains mechanisms for both positive (incentives, additional assistance) and negative (sanctions, suspending aid) measures for achieving respect for human rights within the economic partnership between the European Union and ACP States. The right to development is not mentioned explicitly in the Agreement, nor in subsequent economic partnership agreements between the European Union and regional groupings among ACP countries.

[23] A/HRC/8/WG.2/TF/CRP.1, para. 19.
[24] A/HRC/8/WG.2/TF/CRP.7, para. 85.
[25] A/HRC/8/WG.2/TF/CRP.1, para. 20.
[26] E/CN.4/2005/WG.18/TF/3, para. 79.
[27] "Report of the high-level task force on the implementation of the right to development on its fourth session" (A/HRC/8/WG.2/TF/2), para. 54.
[28] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part" signed at Cotonou in June 2000, revised in 2005 and 2010.

The task force suggested that more attention should be paid to the mutually reinforcing obligations of the Cotonou Agreement and right to development criteria, and favoured monitoring benchmarks in economic partnership agreements in the process of being concluded. Continued special and differential treatment of ACP countries, and recognition of the need for country-specific adjustment, compensation and additional resources for trade capacity-building, independent monitoring and evaluation were also favoured.[29] Non-tariff barriers to trade, such as overly restrictive sanitary and phytosanitary measures, technical barriers and rules of origin procedures, were a matter of concern. Although the human rights clauses of the Agreement are increasingly viewed as conditionalities, punitive measures, such as the withdrawal of trade preferences, may at times be justified in response to human rights violations. A positive approach may, however, contribute structurally to realizing the right to development. Positive measures to create an enabling environment could include trade diversification, aid for trade, support for trade unions and institutional capacity-building. Even without specific provisions in individual economic partnership agreements, human rights are part of economic partnership agreements owing to the overall applicability of such provisions in the Cotonou Agreement.[30]

The conclusion and ratification of economic partnership agreements and the further revisions of the Cotonou Agreement should be transparent and involve parliamentary scrutiny and consultation with civil society.[31] Future reviews of the Agreement will present an opportunity to appraise its human rights provisions and consider proposals consistent with right to development criteria. The task force was concerned that regionalization through the economic partnership agreement risked eroding the general negotiating position of the weaker trading partners; supporting their development efforts should therefore be a priority.[32]

The task force noted problems of coherence among the various complex European Union and European Commission policies, particularly with regard to how to deal with human rights and transparency in the context of the political dialogue under article 8 of the Cotonou Agreement and in the conclusion of economic partnership agreements. The general human rights provisions in the Agreement should in practice be broadened to reflect the indivisibility of human rights by extending coverage to economic, social and cultural rights, as provided in its preamble.

The Cotonou Agreement provides for impact assessments. These should ideally take into account human rights, including right to development considerations and criteria both in trade and development cooperation, thus enhancing space for development monitoring benchmarks, as suggested by ACP countries and also voiced by members of the European Parliament.[33] In 2010 the European Parliament requested the Commission to carry out impact studies on human rights, in addition to those on sustainable development, with comprehensible trade indicators based on human rights and on environmental and social standards.[34]

3. Access to essential medicines

(a) *Intergovernmental Working Group on Public Health, Innovation and Intellectual Property*

The Intergovernmental Working Group on Public Health, Innovation and Intellectual Property was established by the World Health Organization (WHO) World Health Assembly (resolution WHA59.24) in 2006 to develop a global strategy and plan of action for needs-driven, essential health research and development relevant to diseases that disproportionately affect developing countries, promote innovation, build capacity, improve access and mobilize resources. It is specifically concerned with target 8.E, access to affordable drugs in development countries, of Millennium Development Goal 8. Through the global strategy and plan of action adopted by the World Health Assembly (resolution WHA61.21, annex) in 2008, it seeks to facilitate access by the poor to essential medicines and promote innovation in health products and medical devices. The incentive schemes aim to delink price from research and make health products cheaper and more easily available.[35]

The task force stressed the potential synergy between the global strategy and plan of action and

[29] A/HRC/8/WG.2/TF/2, para. 64.
[30] A/HRC/12/WG.2/TF/2, para. 23.
[31] Ibid., para. 66.
[32] "High-level task force on the right to development: technical mission report: continued dialogue with the selected global partnerships which were reviewed at previous sessions" (A/HRC/12/WG.2/TF/CRP.2), para. 35.
[33] See A/HRC/12/WG.2/TF/2, paras. 66-70.
[34] European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements (2009/2219(INI)) para. 19 (b). Available at www.europarl.europa.eu/document/activities/cont/201011/20101129ATT02490/20101129ATT02490EN.pdf.
[35] A/HRC/12/WG.2/TF/2, para. 26.

the right to development.[36] Although these documents could not be amended, there is leeway to introduce right to development principles in the interpretation of the principles, elements and implementation of the strategy and plan.[37] The task force found congruence between the eight elements designed to promote innovation, build capacity, improve access, mobilize resources and monitor and evaluate implementation of the strategy itself, and the duty of States to take all necessary measures to ensure equality of opportunity for all in access to health services, pursuant to article 8 (1) of the Declaration on the Right to Development.

The task force acknowledged the reference in the global strategy and plan of action to the constitutional commitment of WHO to the right to health, but regretted that reference to article 12 of the International Covenant on Economic, Social and Cultural Rights had been deleted. It was noted with concern that the strategy and plan do not caution against adoption of Trade-Related Aspects of Intellectual Property Rights (TRIPS)-plus protection in bilateral trade agreements, or refer to the impact of bilateral or regional trade agreements on access to medicines. Nevertheless, these documents contain elements of accessibility, affordability and quality of medicines in developing countries, corresponding to the normative content of the right to health. In accordance with general comment No. 17 (2005) of the Committee on Economic, Social and Cultural Rights, States parties should ensure that their legal or other regimes protecting intellectual property do not impede their ability to comply with their core obligations under the rights to food, health and education.[38] Regarding accountability, the systems for monitoring, evaluation and reporting of actions of Governments, as primary duty holders, and of industry were consistent with right to development criteria, although improvements could be made to the indicators. Regarding the role of the pharmaceutical industry, the task force and WHO saw the potential of exploring with stakeholders the Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines[39] and the right to health. On participation, provisions for web-based hearings, regional and intercountry consultations, direct participation of non-governmental organizations and experts, and funding to enable attendance of least developed countries were commended.

(b) *Special Programme for Research and Training in Tropical Diseases*

While not explicit in its vision, the WHO Special Programme for Research and Training in Tropical Diseases has an implicit commitment to human rights and the Millennium Development Goals. Its overall aim is to deliver research and implement practical solutions to many of the world's neglected diseases. Consistent with right to development criteria, recent projects are community-driven in that communities decide how a particular medicine will be used and distributed, check compliance with quality and quantity standards, and ensure record-keeping. These community-driven interventions increase the distribution of some drugs, lead to better public services and contribute to political empowerment and democratization, all contributing to the realization of the right to development.[40]

The impact of the programme on innovation through research and development regarding infectious diseases has been limited owing to underfunding and the high price of medicines.[41] Concurrently, the governance structures of newer private foundations and non-governmental organizations do not provide for accountability to the public at large. It is of concern that global efforts for financing initiatives to fight diseases of the poor depend heavily on sources outside public institutions and public accountability systems.

The task force concluded that the strategy of the Special Programme is rights-based as its core feature is empowerment of developing countries and meeting needs of the most vulnerable. Transparency and accountability could be strengthened, particularly as concerns contractual agreements with pharmaceutical companies regarding pricing and access to medicines, broadening the scope of independent reviews for mutual accountability. The Programme's efforts to design and implement relevant programmes in ways that reflect right to development principles and explicitly use a right to health framework were welcomed.

(c) *Global Fund to Fight AIDS, Tuberculosis and Malaria*

The Special Programme and the Global Fund to Fight AIDS, Tuberculosis and Malaria share a

[36] Ibid., para. 27.
[37] "Technical mission to the World Health Organization, the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property, the Special Programme on Research and Training in Tropical Diseases and the Global Fund to Fight AIDS, Tuberculosis and Malaria" (A/HRC/15/WG.2/TF/CRP.2), para. 11.
[38] E/CN.4/2005/WG.18/TF/3, para. 67; A/HRC/12/WG.2/TF/2, para. 74.
[39] "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (A/63/263, annex).
[40] "High-level task force on the right to development—technical mission report: global partnerships on access to essential medicines" (A/HRC/12/WG.2/TF/CRP.1), para. 25.
[41] A/HRC/12/WG.2/TF/2, para. 79.

common objective: to fight major diseases afflicting the world's poorest people. Both attempt to improve access to health and equitable development, and their procedures are generally participatory and empowering. Elements in the right to development criteria, which the task force considered particularly relevant to the work of the Global Fund, include equity, meaningful and active participation and the special needs of vulnerable and marginalized groups.[42]

The impact of the Global Fund on national capacity to control the three diseases was especially relevant to the context of goal 8. Transparency, commitment to good governance and sensitivity to human rights concerns were emphasized as characteristics of the Global Fund, albeit with some limitations in its programming.

The Global Fund programmes are generally consistent with right to development principles, although it does not take an explicit rights-based approach. The task force also noted the challenges of monitoring mechanisms for mutual accountability. The Fund has a vital role to play in developing a more enabling international environment for both health and development and in contributing to the policy agenda for promoting public-health, human rights and development.

4. Debt sustainability

Borrowing under conditions of sustainable debt is an important form of international cooperation through which developing countries acquire appropriate means and facilities to foster their comprehensive development, pursuant to article 4 of the Declaration on the Right to Development. Target 8.D of goal 8 calls for the international community to deal comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term.

The task force observed that the poverty afflicting the least developed countries is exacerbated by an unsustainable debt burden and that the payment of billions of dollars in servicing debt obligations diverts a large part of scarce resources from crucial programmes of education, health and infrastructure, severely limiting prospects for realizing the right to development.[43] A State's obligation to service national debt must balance national human development and poverty reduction priorities consistent with its human rights obligations and the need to maintain the sanctity of contracts in the financing system.[44]

Heavy debt burdens pose major obstacles for a few low-income developing countries in achieving the Goals and meeting obligations on economic, social and cultural rights. While debt-relief initiatives contribute to the right to development, debt cancellation alone is insufficient, and must be accompanied by enhanced State capacity, governance, respect for human rights, promotion of equitable growth and sharing the benefits thereof.[45]

Debt relief provided by the Heavily Indebted Poor Countries Initiative and the Multilateral Debt Relief Initiative have resulted in the writing-off of more than $117 billion of unpayable debt, which clearly contributes to realizing the right to development, particularly articles 2 (3), 4 and 8 of the Declaration, by allowing debt service payments to be reallocated to stimulate and invest in infrastructure and a range of social purposes, assuming required resources are generated domestically or through international cooperation.[46] Further consideration should be given to how the right to development can be incorporated into development financing mechanisms, in particular through increased attention by both lender and borrower to the principles of participation, inclusion, transparency, accountability, rule of law, equality and non-discrimination. The task force agreed with the Bretton Woods institutions that, while debt relief frees up resources that can be used for development objectives, it needs to be complemented by additional financing if the Millennium Development Goals are to be reached.[47]

Giving developing countries greater voice and representation and improving democratization, transparency and accountability of international financial institutions would help realize the right to development. Policies of these institutions are determined by the same States that have committed elsewhere to the right to development (as well as to legally binding obligations on economic, social and cultural rights) and therefore have shared responsibility for acting in the global financial system in accordance with the right to development.[48]

[42] A/HRC/12/WG.2/TF/CRP.1, para. 20.
[43] A/HRC/12/WG.2/TF/2, para. 87.
[44] E/CN.4/2005/WG.18/TF/3, para. 63.
[45] A/HRC/12/WG.2/TF/2, para. 88.
[46] Ibid., para. 89.
[47] A/HRC/15/WG.2/TF/2/Add.1 and Corr.1, para. 55.
[48] Ibid., para. 56.

5. Transfer of technology

(a) *Development Agenda of the World Intellectual Property Organization*

The assessment of the Development Agenda adopted in 2007 by the General Assembly of the World Intellectual Property Organization (WIPO)[49] highlighted the significant connections between intellectual property rights and the right to development. Comprising 45 recommendations, the Agenda is a key contemporary global initiative towards realizing the right to development. Intellectual property is a policy tool serving the important public and developmental purpose of providing incentives for investing in new technology. But it can also have a negative consequence on the diffusion of technology, since the temporary monopoly it creates can restrict the sharing of the benefits of technology. The Development Agenda does not include any reference to human rights or the right to development, but contains many provisions that could respond to the imperatives of this right. The task force supported the Agenda recommendations that intellectual property policies be considered within the context of national economic and social development priorities; that close cooperation be sought with other United Nations agencies involved in the development dimensions of intellectual property (in particular UNCTAD, the United Nations Environment Programme (UNEP), WHO, the United Nations Industrial Development Organization (UNIDO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and other relevant international organizations, especially WTO); and that advice be provided on the use of flexibilities in the Agreement on TRIPS. These factors are crucial to a comprehensive and human-centred development approach. The Agenda also includes provisions for the protection of traditional knowledge and folklore, transparency, participation and accountability.

Implementation of the Development Agenda has advanced since the task force examined it. For example, WIPO developed a macro-level conceptual Framework for Designing National Intellectual Property Strategies for Development ("IP Strategies Framework"). This project is being implemented in order to provide development-related technical assistance to WIPO member States—in particular developing and least developed countries—to design national intellectual property strategies that meet their specific development needs and priorities in six sectors (public-health, agriculture and rural development, industry development and trade, environment and energy, education and science, and culture).[50] This trend appears to be consistent with the task force recommendation that, in order to favour implementation consistent with the right to development, greater attention should be given to policy research; to developing innovative approaches to mainstreaming development objectives into intellectual property policy rather than simple transfer of intellectual property systems to developing countries; to greater collaboration with development agencies, especially those of the United Nations system and civil society; and to the development of a monitoring and evaluation system. The task force reiterated the importance of the implementation of article 66.2 of the TRIPS Agreement, which is one of the few legal obligations on developed countries to establish incentives for technology transfer to least developed countries.[51]

(b) *Clean development mechanism*

The task force recognized the value of the clean development mechanism (CDM) under the Kyoto Protocol to the United Nations Framework Convention on Climate Change to the climate change dimension of the right to development and for target 8.F of goal 8 insofar as the transfer of green technology could enhance the prospects for sustainable development in developing countries. Although there is no specific reference to human rights in this mechanism, from a rights-based approach, it includes elements of equity, participation, empowerment and sustainability, which all underscore its relevance to promoting the right to development and the importance of close monitoring of these elements to ensure that it makes a positive contribution to the right.[52]

The criticisms levelled against CDM in the literature include its emphasis on emissions reductions without preventing or minimizing the negative impact on the human rights of peoples and communities and the inequitable distribution of mechanism projects to only a few developing countries such as Brazil, China and India, reflecting the direction of foreign direct investment flows.[53] The decision on the mechanism made at the meeting of the Parties to the Kyoto Protocol held in Copenhagen in 2009 also introduced steps to pro-

[49] Available at www.wipo.int/ip-development/en/agenda/recommendations.html.

[50] See WIPO Committee on Development and Intellectual Property (CDIP), ninth session, "Management response to the external review of WIPO technical assistance in the area of cooperation for development", document CDIP/9/14 (14 March 2012).

[51] A/HRC/12/WG.2/TF/2, paras. 37 and 81-82.

[52] Ibid., paras. 83 and 85.

[53] A/HRC/15/WG.2/TF/2 and Corr.1, para. 39.

mote equitable distribution, although further training and capacity-building activities in developing countries are required. Some CDM projects do not generate real emissions reductions. Other shortcomings from the right to development perspective include increasing delays in the rigorous approval process and lack of transparency, equity, non-discrimination, participation and accountability, although several measures have recently been taken to improve the methodology and approval process, including steps to enhance transparency. As a market mechanism, CDM has been more effective in reducing mitigation costs than contributing to sustainable development and green technology transfer.

Some human rights concerns could be addressed when adopting greenhouse gas mitigation and climate change adaptation measures, for example, through environmental and social impact assessments on outcomes of CDM projects in addition to a more transparent and participatory process through better communication with stakeholders and by providing affected stakeholders with the possibility of recourse where required procedures have not been properly followed or outcomes violate the human rights of communities.

Despite the criticisms, the Mechanism remains important for greenhouse gas mitigation and promoting sustainable development and technology transfer. It should be reinforced by enhancing its effectiveness, ensuring its social and environmental integrity and incorporating a right to development perspective. Future negotiations for a new climate change agreement will provide an opportunity to include such right to development components into the clean development mechanism.

III. Lessons learned on moving the right to development from political commitment to development practice

While only States can move the right to development from political commitment to development practice, the task force, in its capacity as experts, was able to draw lessons for the international community from detailed examination of how this right was considered by numerous actors and processes of development. The lessons drawn relate to the strengths and weaknesses of the Millennium Development Goals, structural impediments to economic justice, the resistance to addressing trade and lending from a right to development perspective, the imperative and pitfalls of measurement tools, the ambiguity of "global partnership", the lack of policy coherence and incentives to move from commitment to practice, and the necessary balance between national and international responsibilities. These reflections provide the rationale for the suggestions for future work contained in the report on the sixth session of the task force.[54]

A. Strengths and weaknesses of the Millennium Development Goals

It has frequently been noted that, even before the global financial crisis that began in 2008, the Millennium Development Goals were not likely to be realized, especially in sub-Saharan Africa. Nevertheless, from the right to development perspective, the mobilization of resources and the political commitment of United Nations agencies and Governments were positive developments in priority-setting, indirectly relevant to the right to development but formally delinked from the Millennium Summit commitment to "making the right to development a reality for all". It can be argued that the existence of poverty on the scale we know it today is a flagrant violation of the right to development. A breakdown of the Goals into sectoral targets is consistent with the underlying approach of the right to development which acknowledges that poverty is a concept broader than not having enough income and requires, as stated in article 8 of the Declaration on the Right to Development, "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income".

The task force was also aware that the Goals are divorced from a human rights framework. The High Commissioner for Human Rights has drawn attention to this gap and focused on their interrelationship by disseminating charts on the intersection and publishing an exhaustive analysis on how human rights can contribute to the Goals,[55] as has UNDP.[56] The task force completed its task as Member States and international agencies were reviewing the entire architecture of the Goals, specifically at the High-level Plenary Meeting of the General Assembly in September 2010 to review progress towards achieving them as well as other international development goals. The task force considered the summit a propitious occasion for the Governments attending the Working Group to

[54] Ibid., paras. 71-85.
[55] See footnote 3 above.
[56] See footnote 4 above.

introduce at the High-level Plenary Meeting the concerns expressed by the task force and ensure that the new structure for the Millennium Development Goals was more consistent with the right to development. The High Commissioner issued a strong call for the summit to include human rights in its review of the Goals.[57] The resolution adopted at the close of the summit did make numerous references to human rights, including recognizing that successful policies and approaches in implementing the Millennium Development Goals "could be replicated and scaled up for accelerating progress, including by … respecting, promoting and protecting all human rights, including the right to development"[58] and that "the respect for and promotion and protection of human rights is an integral part of effective work towards achieving the Millennium Development Goals".[59]

However, the tension between macroeconomic goals and human rights cannot be resolved by a general commitment to moderating certain policies; it requires a partnership of the type envisaged by goal 8. The task force shared the view "that slow action on key initiatives in the areas of aid, trade and debt will seriously reduce the likelihood of achieving the MDGs by 2015" and that "continued inaction in these crucial areas of MDG 8 which impact on the possibility of achieving the other seven MDGs for most developing countries also casts doubt on the seriousness with which developed nations are addressing the global partnership embodied in MDG 8 and its inherent notion of mutual accountability and joint responsibility".[60] Mutual accountability and joint responsibility are at the heart of the right to development, and the shortcomings in the Goals from the right to development perspective should be addressed in the new architecture to emerge after 2015.

B. Structural impediments to economic justice

The concern of the right to development with structural impediments to equitable development on the global scale is frequently interpreted as a push from the South for the transfer of resources from the North, often as aid flows. Failure to meet the objective for developed countries of devoting 0.7 per cent of gross national income to official development assistance is frequently a proxy for failure to realize the right to development. These perceptions are misguided. First, OECD countries are concerned about structural impediments to development in the context of negotiated modifications of the rules governing trade, foreign direct investment, migration and intellectual property, as well as in decisions affecting the flow of capital and labour. Their active participation in "development agendas" bears witness to this shared concern. However, the stalemate of the Doha "development" round of trade negotiations is also evidence of the limits of this commitment. The right to development suffers profoundly from the entrenched positions of parties to negotiations on development agendas. Formal commitment to the right to development cannot, by itself, move these negotiations to a mutually beneficial outcome.

Along with shared commitment, the promise of the right to development depends on an honest assessment of the approach taken to aid effectiveness. The task force welcomed the statement in the Accra Agenda for Action that "gender equality, respect for human rights, and environmental sustainability are cornerstones for achieving enduring impact on the lives and potential of poor women, men, and children. It is vital that all our policies address these issues in a more systematic and coherent way" (para. 3).[61] The Fourth High Level Forum on Aid Effectiveness, held in 2011 in Busan, Republic of Korea, adopted the Busan Partnership for Effective Development Cooperation, which refers to "our agreed international commitments on human rights, decent work, gender equality, environmental sustainability and disability" (para. 11) and to rights-based approaches of civil society organizations, which "play a vital role in enabling people to claim their rights" (para. 22), but does not add to the human rights content of the Accra Agenda for Action or make explicit reference to the right to development. Realizing the right to development requires a systematic rethinking of aid effectiveness in the light of all the policy implications of the statement in the Accra Agenda that aid policies must address human rights "in a more systematic and coherent way" (para. 3).

Aid is a relatively small part of development; it has not placed recipient societies on a sustainable path of development and some even argue that it has done more harm than good.[62] Among the targets for

[57] Office of the United Nations High Commissioner for Human Rights, "Human rights: key to keeping the MDG promise of 2015: key human rights messages for the MDGs review summit", available at www.ohchr.org/Documents/Issues/MDGs/Key_messages_Human_RightsMDGs.pdf.
[58] Resolution 65/1, para. 23 (j).
[59] Ibid., para. 53.
[60] Jan Vandemoortele, Kamal Malhotra and Joseph Anthony Lim, "Is MDG 8 on track as a global deal for human development?" (UNDP, 2003), pp. 14–15.
[61] Documents relating to aid effectiveness are available from the OECD website (www.oecd.org).
[62] See Dambisa Moyo, *Dead Aid: Why Aid is Not Working and How There is a Better Way for Africa* (New York, Farrar, Straus and Giroux, 2009); William Easterly, *The White Man's Burden: Why the West's Efforts to Aid*

goal 8 is the call for "more generous official development assistance for countries committed to poverty reduction", echoed by the United Nations Millennium Project[63] and the Gap Task Force.[64] The reference in the Declaration on the Right to Development to providing developing countries with appropriate means and facilities to foster their comprehensive development (art. 4) strongly supports the argument for increased aid. While acknowledging the limitations of aid, the task force stressed the importance of donor States keeping their commitments made in the Doha Round, the Monterrey Consensus, the Gleneagles G8 summit and the London G20 summit to increase assistance. The task force shared the conviction of the Third and Fourth High Level Forums on Aid Effectiveness that country ownership is a key factor. The Declaration on the Right to Development defines the appropriate national development policies, which States have the right and the duty to formulate, as those "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" (art. 2). Furthermore, "States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights" (art. 6). The implications of these norms for country ownership and "policy space" have not been adequately explored. They mean, at least, that a high level of responsibility falls on developing countries to ensure that they pursue policies consistent with the right to development and that they should be entitled to more international cooperation and assistance to the extent that their policies and practices reflect that responsibility. This interpretation should not be misconstrued as favouring "conditionality"; rather, progress in implementing this right depends on responsibilities being shared by donor and developing countries, as discussed in section G below.

C. Resistance to addressing trade and debt from a human rights perspective

The task force was not asked to examine the principal institutional framework for an open trading system, namely WTO itself. Furthermore, the encouragement offered by the European Commission to the task force to examine the Cotonou Agreement and economic partnership agreements was not sustained, and the initial interest of countries in the Common Market of the South (MERCOSUR) was not followed by a formal invitation to the task force to review that partnership from the right to development standpoint. Similarly, on the issue of debt, the review by the task force had to be limited to a special meeting on debt[65] with the purpose of collecting information, but not to pilot-test criteria. On the other hand, the World Bank suggested—but the Working Group did not agree—that the task force should evaluate the Bank's Africa Action Plan, a comprehensive strategic framework addressing aid, trade, debt relief and the role of non-State actors supporting the development of the continent's poorest countries.[66] Similarly, the task force considered the Inter-American Development Bank, which also deals with debt, regional integration, human development and the environment; however, no explicit tasks were assigned.

There are no doubt good reasons for European Community and ACP countries, MERCOSUR countries, the Inter-American Development Bank, WTO and international financial institutions to assist the task force in ways other than a dialogue on the application of right to development criteria to their own policies. The task force was frequently reminded of the legal constraints limiting potential for deeper involvement from these institutions. Such resistance did not arise with the questions of access to medicines and transfer of technology institutions.

It is in the nature of the right to development that the issues addressed touch on all aspects of the global economy and domestic policy that affect development and the constant improvement of the well-being of the entire population and of all individuals. This imperative is not without tension, and resistance is inevitable from global and regional institutions created for purposes other than human rights, and the Governments constituting those institutions. The Working Group will have to deal with this reality in its effort to ensure that the right to development has an impact on development practice. Whether in the form of guidelines or a binding international legal document, monitoring is essential and resistance (apart from some exceptions) will be an obstruction to implementation mechanisms for the right to development.

the Rest Have Done So Much Ill and So Little Good (New York, Penguin Press, 2006); Paul Collier, *The Bottom billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford and New York, Oxford University Press, 2007).

[63] See United Nations Millennium Development Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (New York, UNDP, 2005).

[64] See United Nations, *Millennium Development Goal 8: Strengthening the Global Partnership for Development in a Time of Crisis: MDG Gap Task Force Report 2009* (New York, 2009).

[65] A/HRC/15/WG.2/TF/2 and Corr.1, paras. 48–61.

[66] A/HRC/4/47, para. 27; A/HRC/4/WG.2/TF/2, paras. 86-87.

D. Imperative and pitfalls of measurement of progress

In its report on right to development criteria and operational sub-criteria (A/HRC/15/WG.2/TF/2/Add.2), the task force explained the evolution of its efforts to develop tools for the qualitative and quantitative evaluation of progress in implementing the right to development. Some Governments are apprehensive about "indicators", presumably concerned that domestic actions, which are the prerogative of the State, will be judged by others. As explained, the development of indicators was not an exercise in ranking or even judging countries, but rather in providing to the Working Group operational sub-criteria in the form of a set of methodologically rigorous tools that can be used in determining where progress is occurring or stalling, and the next steps for promoting implementation of the right to development.

It is also important to underscore the limits of measurement. Undue expectations must not be placed on indicators and benchmarks, especially if they are to lead to guidelines or a legally binding standard. Any use of such indicators must be rigorous and strike a balance between selectivity and comprehensiveness, usability and attaining a complete representation of all obligations inherent in the right to development. The task force did not purport to provide a complete description of all obligations and entitlements entailed by this right, but rather an illustrative set of examples on which the Working Group could build.

The tools of measurement serve two major purposes. First, they open the way for a monitoring mechanism, informal or treaty-based. The decision regarding the preferred basis for monitoring depends on the political decisions of Governments. However, the right to development cannot be useful in altering approaches to development unless and until the actions of those responsible for development are assessed using professionally crafted tools of measurement. This is true for all development parameters, and having tools is the first step when responding to the legitimate question from development practitioners, "What do you want us to do differently?" Unless criteria and sub-criteria answer that question, the right to development is not likely to advance in the field. Second, Governments have affirmed that the right to development must be treated on a par with other human rights. Other human rights, in the practice of the treaty bodies monitoring them, are assessed using indicators. Unless the right to development is also subject to assessment using indicators, it will not be on a par with other human rights. A similar argument applies to including this right in the universal periodic review mechanism of the Human Rights Council.

E. Ambiguity of "global partnership"

The Working Group requested the task force to focus mostly on the global partnership for development as used in goal 8, which is an ambiguous concept. The task force interpreted it to mean treaty regimes, arrangements and commitments, multi-stakeholder strategies and mechanisms, and multilateral institutions that epitomize global or regional efforts to address goal 8 issues. None of these was established as a direct consequence of commitment to goal 8, but they tend to see themselves as contributing to that goal. None has a mandate to promote the right to development. Nevertheless, they are among the array of right to development stakeholders and have sometimes acknowledged that this right is pertinent, but have more commonly considered it a matter of inter-agency information-sharing rather than policy guidance.

The 10 partnerships reviewed in section II.C above were selected as the result of the Working Group having requested the task force to focus on goal 8. The task force also considered other regional instruments that might be examined, such as the Charter of the Association of Southeast Asian Nations of 2007 and the Arab Charter on Human Rights, adopted in 1994 and revised in 2004 (which contains an explicit article on the right to development), but the States concerned considered this to be premature.[67] If the full range of pertinent duty bearers were to be considered, the Working Group would need to identify meaningful ways to have States confront their responsibilities towards their own people, persons in other countries affected by their policies, and multilateral institutions whose mandates and programmes depend on the decisions of their States members. The task force sought to clarify the diverse responsibilities of partnerships thus understood in order to engage with stakeholders not hitherto part of the dialogue.

F. Lack of policy coherence and incentives to move from commitment to practice

Responsibility for the right to development is further complicated by the fact that States have not translated their commitment to this right into their deci-

[67] A/HRC/8/WG.2/TF/2, para. 82.

sion-making in these partnerships. Of all 10 partnerships examined at the request of the Working Group, and all others considered without an explicit mandate, none referred to the right to development in its resolutions or founding documents. It is therefore difficult to expect them to introduce right to development considerations as such in their policies and programmes.

The motivation to introduce right to development concerns cannot be generated without incentives. The right may be contrasted with most other strategies for development by the lack of incentives to take far-reaching measures based on political and legal commitments to it. Where there is a legal commitment, such as in Africa, States parties have, generally, not acted in any significant way, nor have treaty bodies reported in detail on the fulfilment of legal obligations. African Governments do take their commitment to the right to development seriously. However, the African Commission on Human and Peoples' Rights has not taken any significant steps to monitor this right and hold States parties accountable, with the notable exception of one landmark decision concerning the violation of the right to development as a result of an eviction of an indigenous group from a wildlife reserve.[68] Institutions with a stake in promoting international cooperation in accordance with the right to development have not been able to modify their policies or the behaviour of their stakeholders based on an explicit invocation of the right. Many of their policies, such as those relating to gender equality and action on behalf of vulnerable populations, contribute to the realization of the right, but its value alone cannot be considered the motivation for such policies and programmes. In other development strategies, such as PRSPs, there are clear incentives to comply with standards and procedures, often resulting in targeted funding or debt forgiveness. The right to development can only be compelling for those who find the principles on which it is based to be compelling. The ultimate advantage of respecting this right is a more just global and national environment to ensure constant improvement of the well-being of all. However, the behaviour of development decision makers is rarely determined by the compelling long-term value of an idea. This too is a matter that the Working Group should consider when determining how to move forward.

Beyond the power of the concept of an international (moral or legal) obligation to pursue development that is comprehensive, human-centred and respectful of human rights, the incentive to take this right seriously should be based on evidence and on the demonstrated advantage to be gained by making explicit reference to it in specific development actions and policies. The activities reviewed in the consolidated findings above have made the first step towards generating such evidence. The task force was firmly convinced that, in spite of benign tolerance and even resistance to seeing this right as useful in development practice, the more common reaction has been to acknowledge the congruence between the objectives of development policies and the normative content of the right to development. The next step is to generate evidence that policies altered in acknowledgement of the right to development make a positive difference. The task force therefore urged the Working Group to consider applying the criteria by means of context-specific reporting templates and to collect evidence of the difference, if any, of pro-right to development actions, as recommended in the main report of the task force on its sixth session.[69]

G. Necessary balance between national and international responsibilities for the right to development

The final issue the task force wished to address bordered on the political, which was not its purview as an expert body. However, it had examined the history of efforts to bring clarity to the concept of the right to development and was acutely aware that balancing the national and international dimensions of this right has been at the forefront, because each dimension reflects the preference of different groups of States and because the Declaration is clear that both dimensions are essential. It was the ardent hope of the task force that these dimensions could be seen as complementary rather than conflicting. National policies must be supportive of human rights in development and of redressing social injustice nationally and internationally. Equally, the failure of many nations, especially in Africa, to benefit from significant increases in the well-being of their populations is due to the unjust structures of the global economy that must be addressed through genuine development agendas, that is, negotiated and agreed modifications in terms of trade, investment and aid allowing developing countries to overcome the disadvantages of history and draw the full benefit of their natural and human resources.

The greatest challenge that lies ahead in bringing the right to development into the realm of practice

[68] The *Endorois* case, discussed elsewhere in this publication. See also the *Gumne* case before the African Commission.

[69] A/HRC/15/WG.2/TF/2/Add.1, para. 80.

is for all States to embrace the indivisibility and interdependence of "all the aspects of the right to development" as set forth in article 9 of the Declaration on the Right to Development. Those with political reasons for favouring the international dimension and a collective understanding of the right must seek adjustments in their national policies and take the individual rights involved seriously. Similarly, those that stress, through human rights-based national policies, that this right is essentially a right of individuals must do their part to ensure greater justice in the global political economy by agreeing to and achieving outcomes of the various development agendas consistent with the affirmation in the Declaration that, "as a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development".

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

*Ibrahim Salama**

I. Introduction

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

Twenty-five years into its evolution, the right to development seems to remain conceptually hostage to the cold war-influenced motivations for the "two-track" approach to elaborating on the Universal Declaration of Human Rights. With the growth in the number of human rights treaty bodies from 6 to 10 within six years, and with more treaties expected, the right to development now has renewed relevance in ensuring that "all human rights are universal, indivisible and interdependent and interrelated" and that "the international community … [treats] human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".[2]

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

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

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

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

mechanisms and explores options for further clarification and operationalization of the right to development framework, using as its starting point the important methodological consensus reached by the Working Group in 2007, a milestone in the evolution of the right to development. It was the consensus of the Working Group that the "work of the task force constitutes a process of progressively identifying and refining right-to-development standards". This, the Working Group noted, "could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement".[3]

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

II. Added value of the right to development

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

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

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

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

[3] "Report of the Working Group on the Right to Development on its eighth session" (A/HRC/4/47), para. 52.
[4] Amartya Sen, *Development as Freedom* (New York, Alfred A. Knopf, 1999), pp. 227-231.
[5] Arjun Sengupta, "On the theory and practice of the right to development", *Human Rights Quarterly*, vol. 24, No. 4 (November 2002) pp. 269-270.
[6] Gerald L. Neuman, "Human rights and constitutional rights: harmony and dissonance", *Stanford Law Review*, vol. 55 (2003), pp. 1863 ff.
[7] See the reports of the Working Group on the Right to Development on its fifth session (E/CN.4/2004/23 and Corr.1), para. 43 (a); sixth session (E/CN.4/2005/25), para. 42; and seventh session (E/CN.4/2006/26), paras. 31, 40, 46 and 67 (g).
[8] E/CN.4/2005/25, para. 42.

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

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

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

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

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

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

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

Abbreviations:

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

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

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

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

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

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

Further prominent examples include: (a) article 14 of the Convention on the Elimination of All Forms of Discrimination against Women, which refers to the right of rural women to equal access to and equal benefits from development processes; and (b) articles 6, 8, 2 (1), 22 (4) and 30 (1) of the Convention on the Rights of the Child,[12] in relation to which the Committee on the Rights of the Child has emphasized that the right to development is essential for ensuring that the circumstances of families, including single-parent families or those with limited capacities, are taken fully into account in the programming of economic strategies. Considerations such as labour deregulation and flexibility should be incorporated in such strategies so as to facilitate the provision of adequate care for the child. Moreover, the adequacy of financial and other support for the family should be promoted to ensure children's well-being and development. The Committee on the Rights of the Child has also underscored the importance of the right to development for ensuring that children in vulnerable or marginalized situations are provided with resources, conditions and opportunities on an equitable basis with other children.[13]

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

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

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

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

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

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

The Independent Expert on human rights and international solidarity has also (a) underscored and expanded on the conclusions and recommendations of the Working Group on aspects of international cooperation identified under goal 8 of the Millennium Development Goals;[16] and (b) emphasized that "the obligations of international assistance and cooperation are complementary to the primary responsibility of States to meet their national human rights obligations. International cooperation rests on the premise that some members of the international community may not possess the resources necessary for the full realization of rights set forth in conventions" and that "in the context of the right to development, the open-ended Working Group on the Right to Development underlined that, in the international economic, commercial and financial spheres, core principles, such as equality, equity, non-discrimination, transparency, accountability, participation and international co-operation, including partnership and commitments, are important for the realization of the right to development". He further underscored that "studies reflecting on the international dimension of the right to development have identified different levels of responsibility for development, for instance that of corporations at the microlevel, States at the macrolevel and the international community at the mesolevel".[17]

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

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

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

[16] A/HRC/4/47, para. 54.

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

[18] E/CN.4/2006/26, para. 56.

[19] Ibid.

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

All this demonstrates that it "might be a viable option to strive for the realization of the right to development also under existing human rights treaties and through their monitoring mechanisms, provided that an interdependence-based and development-informed reading can be given to the treaties in question".[21] On the other hand, no single treaty body can provide the global vision or the policy tools and guidelines. This affirms the value added of the mandate of the Working Group. As mentioned above, its high-level task force provided a promising prototype,[22] the first operational right to development policy guidance tool. Without such an incremental and pragmatic approach, the right to development discussion faces the risk of sliding back to an irresolvable politicized debate.

IV. Justiciability of the right to development

Further building on the pre-existence of an operational—albeit as yet unconsolidated[23]—definition of the right to development, two further points are pertinent here.

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

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

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

[20] Human Rights Council resolution 4/4, para. 2 (d).
[21] Scheinin, "Advocating", p. 340.
[22] See paragraph 67 in the report of the Working Group on the Right to Development on its seventh session (E/CN.4/2006/26), which garnered consensus among the members of the Working Group, and the addendum to the report of the high-level task force on the implementation of the right to development on its sixth session: right to development criteria and operational sub-criteria (A/HRC/15/WG.2/TF/2/Add.2) which, while not the subject of consensus among the members of the Working Group, contained some elements that could nonetheless be taken into consideration in the further work of the Working Group.
[23] The Working Group may indeed wish to consider this further.
[24] African Commission on Human and Peoples' Rights, communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, para. 277.
[25] Ibid., citing Arjun Sengupta, "Development cooperation and the right to development", François-Xavier Bagnoud Centre for Health and Human Rights, Harvard School of Public Health, Working Paper No. 12 (2003), and the Declaration on the Right to Development, art. 2 (3).

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

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

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

The evaluation of decision-making structures in the context of national and international financial institutions could be a further context in which to build on the criteria developed by the African Commission in the *Endorois* case to assess political participation. This approach could, for example, consider options for improved processes of dialogue in the preparation of decision-making and the contribution that civil society could make to such processes.

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

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

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

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

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

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

[26] A/HRC/15/WG.2/TF/2/Add.2, para. 13 and annex.
[27] Margot Solomon, open background paper presented at the expert meeting, "25 Years of the Right to Development: Achievements and Challenges".
[28] Ibid.

A. Pursuing the methodological consensus of 2007

The promising, incremental and collaborative approach which the methodological consensus achieved at the eighth session of the Working Group in 2007[29] represents ought to be continued and implemented through the high-level task force. In particular, it is vital not to lose this arduously achieved, narrow but genuine ground of convergence which could be broadened by systematically undertaking an incremental process of progressively identifying and refining right to development standards in a manner customized to their specific sectors of application. The mandate of the high-level task force was limited to Millennium Development Goal 8; it would be both logical and useful to extend it to cover all of the Goals. That would also create a natural time frame to accompany the Millennium Development Goals process leading up to 2015, as well as to the thirtieth anniversary of the right to development. A work programme incorporating all the Millennium Development Goals would also strengthen the human rights dimension of the Goals.

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

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

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

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

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

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

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

[29] A/HRC/4/47, para. 52.

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

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

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

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

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

A framework agreement for the right to development could be considered as another option. Such an agreement should not be difficult to conclude as it would contain a number of principles derived from the conclusions and recommendations agreed by consensus in the Working Group over the past years.[32] At its inceptive stage, the framework agreement would create a basis for further technical discussion, conducted either directly among interested States or within an expert component of the Working Group in accordance with the second option proposed above. Learning from the experience of international development assistance frameworks such as the Cotonou Agreement, and reserving a role for the evaluation of progress by an independent expert, could indeed facilitate the realization of assistance agreements with a view to ensuring that they benefit all parties involved. The technical discussions could then form the basis for negotiating more specific obligations, in the form of protocols, among the contracting parties. It would also be possible to establish a database of different types of agreements (regional, bilateral, multi-stakeholder) that satisfy the right to development criteria and could thus be labelled "right to development compacts", which would serve as evolving models for subsequent forms of partnerships for development within a right to development framework.

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

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

VI. Final thoughts

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

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

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

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

The essence of the right to development is simple: it is the right to a national and international environment conducive to the enjoyment by individuals and peoples of their basic human rights and fundamental freedoms, an environment that is free from structural inconsistencies and inequitable obstacles that hinder equal access to development by everyone.

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

Realizing the right to development and a new development agenda

This book annotates, elucidates and celebrates the right to development, its evolution, multiple dimensions and usefulness as a development paradigm for our globalized future. It provides the reader with a wealth of resources, including for the actual application of this right in development practice and for monitoring, action and progress.

The alternative vision for development policy and global partnership that was enshrined in the Declaration on the Right to Development, in 1986, an era of decolonization, carried the potential to bring about a paradigm shift that promised to advance human rights, development, and peace and security. Unfortunately, the years that followed saw the continuation of the predominant model of economic development, which despite leading to considerable progress, neglected social concerns, including human rights. Globalization, fostered and facilitated by advances in information, communications and technology, provided the context and overarching philosophy of development and brought many benefits. However, those benefits were, and continue to be, overwhelmingly concentrated among the already privileged: nations and populations alike. The interdependence and interconnectedness that globalization reinforced also meant that the negative impacts of such development crossed national boundaries with increased speed and ease, resulting in global economic, financial, food, energy, climate and other challenges. These, exacerbated by a lack or poor implementation of regulations, culminated in multiple crises.

It is now widely recognized that reliance on market forces as the sole engine and framework for development has failed. In the wake of these failures, it is time to end the political polarization that has stifled the right to development. Instead we must reinvigorate it if we are to surmount the challenges to our common future, including poverty, inequality, hunger, unemployment, lack of access to clean water and sanitation, and limited sources of energy and natural resources. Doing so is a human rights imperative of the first order.

The normative content of the right to development reflects principles that should guide and shape policies and practices in a new development agenda for the future. All the present crises, most notably the climate crisis, have demonstrated that development itself has limits. We must rethink how we can achieve a kind of development that is not aimed exclusively at creating and distributing material wealth, with its pressures on the environmental resources of our shared planet, but takes into account human rights and respect for the individual and for peoples in all countries.

The international community has agreed on the need for sustainable, inclusive and equitable development. This must take place against the backdrop of the changing contours of geopolitical and socio-economic realities in an increasingly multipolar world. The fundamental changes taking place around us, including the resounding worldwide calls for democracy, human rights and responsible governance and institutions, will in all likelihood continue to shift the ground beneath our feet. Whereas laws and policies concerning development issues and those relating to human rights and the environment have been evolving in their separate compartments, the multidimensional right to development can promote coherence in the

policies emerging from the new ways of thinking that this paradigm demands.

The concept of an enabling environment for development which supports the enjoyment of all human rights by all lies at the heart of the Declaration. The right to development offers a framework in which to address gaps and failures in responsibility, accountability and regulation in both national and global governance. This right is strong in its emphasis on duties, especially the duty of the international community to cooperate, which is particularly consonant with multi-stakeholder involvement in contemporary governance at all levels, and the emergence of a multiplicity of actors and forms of global partnership. The multiple crises of recent years further affirm the call of the Declaration on the Right to Development for meaningful reform in global governance most notably in the economic arena, to ensure equality, democracy and accountability in line with human rights standards.

Making the right to development a living reality for all people everywhere calls for coherent policy, convergent practice and collective action supportive of all civil, political, economic, social and cultural rights, development and peace both within and between countries. Realizing the right to development will serve to renew, strengthen and revitalize the global partnership for development, bringing to it a focus on human dignity and the human rights-based approach to development, and a vibrant sense of community and humanity, participation and mutual understanding, solidarity and shared responsibilities. Real development far surpasses economic growth, and is premised on the values of human well-being and dignity as envisioned in the Declaration on the Right to Development. This can therefore inform our search for responses to the multiple crises, for sustainable development and for a transformative Post-2015 Development Agenda.

ANNEX I

Declaration on the Right to Development

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and cooperation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neocolonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the Right to Development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. 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.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations.

3. States have the duty to cooperate 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 cooperation among all States, as well as to encourage the observance and realization of human rights.

Article 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.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

1. All States should cooperate 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.

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any

activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10

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.

*Adopted by the United Nations General Assembly in its resolution 41/128 of 4 December 1986.**

* This resolution was adopted by a recorded vote of 146 in favour, 1 against (United States) and 8 abstentions (Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the United Kingdom). The right to development has since been reaffirmed in the 1992 Rio Declaration on Environment and Development, the 1993 Vienna Declaration and Programme of Action (which by consensus reaffirmed the right to development as a universal and inalienable right, and an integral part of fundamental human rights), the United Nations Millennium Declaration, the 2002 Monterrey Consensus of the International Conference on Financing for Development, the 2005 World Summit Outcome, the 2007 United Nations Declaration on the Rights of Indigenous Peoples, the 2010 outcome document of the High-level Plenary Meeting of the General Assembly on the Millennium Development Goals, the 2011 Istanbul Programme of Action for the Least Developed Countries for the Decade 2011-2020, the 2012 outcome document of the thirteenth session of the United Nations Conference on Trade and Development, and 'The Future We Want', the outcome document of the United Nations Conference on Sustainable Development in 2012 ("Rio+20").

ANNEX II

Overview of United Nations mechanisms on the right to development

The United Nations has played a key role throughout in the emergence and progressive development of the right to development both prior to and following the adoption of the Declaration on the Right to Development. It has supported a series of expert mechanisms: the Working Group of Governmental Experts on the Right to Development (1981-1989), with a mandate to study the scope and content of the right to development and the most effective means to ensure the realization of economic, social and cultural rights (during its first nine sessions the Working Group played an active role in drafting the Declaration, which was eventually amended and adopted by the General Assembly); the open-ended Working Group of Governmental Experts on the Right to Development (1993-1995), with a mandate to identify obstacles to the implementation and realization of the Declaration and to recommend ways and means towards the realization of the right to development by all States; and the Intergovernmental Group of Experts on the Right to Development (1996-1997), with a mandate, inter alia, to elaborate a strategy for the implementation and promotion of the right to development and to elaborate concrete and practical measures for the implementation and promotion of the right to development. In 1998, the Commission established two mechanisms: a new open-ended intergovernmental Working Group on the Right to Development (1998-) and an Independent Expert on the right to development (1998-2003).[a] In 2004 that Working Group recommended the creation of a high-level task force on the implementation of the right to development (2004-2010) with a mandate to provide the necessary expertise to the working group.[b]

The mandate of the Working Group on the Right to Development is to monitor and review progress made in the promotion and implementation of the right to development, as elaborated in the Declaration on the Right to Development, at the national and international levels, providing recommendations thereon and further analysing obstacles to its full enjoyment, focusing each year on specific commitments in the Declaration; to review reports and any other information submitted by States, United Nations agencies, other relevant international organizations and non-governmental organizations on the relationship between their activities and the right to development; and to present for the consideration of the Human Rights Council a sessional report on its deliberations, including advice to the Office of the United Nations High Commissioner for Human Rights with regard to the implementation of the right to development and suggesting possible programmes of technical assistance, at the request of interested countries, with the aim of promoting the implementation of the right to development. The Working Group meets once a year in Geneva for five working days and submits its report to both the Council and the General Assembly.

The General Assembly and the Human Rights Council entrusted the High Commissioner for Human Rights with a mandate to "promote and protect the realization of the right to development and to enhance support from relevant bodies of

[a] Commission resolution 1998/72, endorsed by decision 1998/269 of the Economic and Social Council.

[b] Commission resolution 2004/7, endorsed by decision 2004/249 of the Economic and Social Council.

the United Nations system for this purpose";[c] to mainstream the right to development and "undertake effectively activities aimed at strengthening the global partnership for development among Member States, development agencies and the international development, financial and trade institutions";[d] and to ensure "inter-agency coordination within the United Nations system with regard to the promotion and realization of the right to development".[e] Both the Secretary-General and the High Commissioner report annually to the General Assembly and to the Council on the promotion and protection of the right to development.

The reports of all the mechanisms are cited in the Selected Bibliography, Part Two – United Nations.

[c] General Assembly resolution 48/141.
[d] General Assembly resolution 66/155.
[e] Human Rights Council resolution 19/34.

Selected bibliography on the right to development

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Part Two – United Nations

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In commemoration of the twenty-fifth anniversary of the United Nations Declaration on the Right to Development, this United Nations publication presents for the first time a wide range of in-depth analytical studies by more than 30 international experts covering the context, meaning and application of this right and its potential to shape human rights and development policy and practice. Together they support the concept of an enabling environment for development that would ensure freedom from want and freedom from fear for all people.

Built around the themes of Situating – Understanding – Cooperating for – and Implementing the right to development, the contributions to this volume not only clarify the meaning and status of this right but survey the most salient challenges—based on actual development practice—to its transformative potential. These studies give specific attention to the context in which this right emerged and the principles underlying it, including active, free and meaningful participation in development and fair distribution of its benefits; equity, equality and non-discrimination; self-determination of peoples and full sovereignty over natural wealth and resources; democratic governance and human rights-based approaches to development; international solidarity and global governance; and social justice, especially with regard to poverty, women and indigenous peoples. Further, these principles are examined as they are applied to the issues of aid, debt, trade, technology transfer, intellectual property, access to medicines, climate change and sustainable development in the context of international cooperation, Millennium Development Goal 8 and the global partnership for development, including South-South cooperation. Finally, with regard to monitoring, action and the way forward, the concluding chapters consider the role of international law and national and regional experiences and perspectives as well as provisional lessons learned and thoughts for renewal, and review the proposals to monitor progress and enhance institutional support for implementing the right to development in practice.

Taken together, the contributions to this publication illustrate the far-reaching potential of the right to development and its relevance more than 25 years after the adoption of the Declaration. They make the case for reinvigorating this right in order to realize its added value to advancing human rights, development, and peace and security in an increasingly interdependent, fragile and changing world, including in the post-2015 agenda for sustainable development.

Declaration on the Right to Development at 25

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