**Response by the Caribbean Court of Justice**

**to the Call for Comments and Textual Suggestions**

**on the**

**Revised Draft Convention on the Right to Development**

**by the Chair-Rapporteur of the Intergovernmental Working Group on the Right to Development**

*At the invitation of the United Nations Office of the High Commissioner for Human Rights (OHCHR), on the request of the Chair-Rapporteur of the Intergovernmental Working Group on the Right to Development, the Caribbean Court of Justice (‘the CCJ’ or ‘the Court’) presents for consideration its written comments and textual suggestions on the Revised Draft Convention on the Right to Development and accompanying commentary. The CCJ’s comments are submitted with the request that they be treated as confidential and that the Court not be listed on the website or other public forum. Further, the CCJ wishes to note that the observations and comments made below do not necessarily indicate the Court’s definitive position as regards the future interpretation or application of the provisions of the Treaty should same be incorporated into the domestic law of any of the Member States that fall under the Court’s appellate or original jurisdiction.*

*The CCJ expresses its appreciation to the OHCHR for the opportunity to be involved in this exercise.*

**Comments**

***Preamble***

1. The CCJ appreciates the approach taken by the Expert Drafting Group in drafting the Preamble. Overall, we find that the Preamble is informative and provides much context. It achieves its objective in reflecting the spirit and aims of the treaty. As such, we only have a few comments at this juncture which are expressed below.
2. The CCJ has both an appellate and an original jurisdiction. In its appellate jurisdiction it functions as the final court of appeal (a Supreme Court) for various states of the Caribbean. In its original jurisdiction, it is a regional court for the states of the Caribbean Community (CARICOM) and has compulsory and exclusive jurisdiction to interpret and apply the Revised Treaty of Chaguaramas Establishing the Caribbean Community and the CARICOM Single Market and Economy (CSME). As such, we appreciate the references made in the Preamble to the Draft Convention on the Right to Development (‘the Draft Convention’) to regional treaties and regional obligations. However, we would suggest that reference to ‘national effort and international cooperation,’ in the at the 3rd preambular paragraph be substituted for ‘national effort, ***regional effort*** and international cooperation’. This change should be effected throughout the Draft Convention as is required. The inclusion of ‘regional efforts’ in that paragraph covers the development of regional initiatives, instruments, and jurisprudence as well as the promotion of regional integration.
3. According to the Right to Education Initiative, ‘regional human rights systems strengthen the protection and enjoyment of human rights by taking into account regional considerations, such as shared regional customs, values, culture, and practices’. The CCJ, as a regional court has an imperative role to play in the adjudication of human rights issues within the Caribbean region and has been doing so in its decisions .
4. Further the CCJ suggests that the 15th preambular paragraph be moved above the 14th preambular paragraph. The 15th preambular paragraph underscores the fact that human rights are universal and inalienable, i.e. all people everywhere in the world are entitled to them as espoused in Article 1 of the *Universal Declaration of Human Rights*. It is suggested that there is a common thread between paragraphs 13 and 15 of the Preamble and so the 15th preambular paragraph should become the 14th. This change may promote readability.
5. The CCJ suggests that the 17th preambular paragraph be edited to read as follows so as to reflect the description of development in the Declaration on the Right to Development:

*‘Acknowledging* that development is understood not simply in terms of economic growth, but also as a **comprehensive economic, social, cultural, civil and political process and** a means to widening people’s choices **and promoting the constant improvement of their wellbeing** to achieve a more satisfactory intellectual, emotional, moral and spiritual existence rooted in the cultural identity and the cultural diversity of peoples **while facilitating active, free and meaningful participation in development and in the fair and equitable distribution of benefits resulting therefrom.’**

This change is suggested as it is evident throughout the Commentary that the Draft Convention should be consistent with the Declaration on the Right to Development.

1. The CCJ suggests that ‘regional’ be included in the 25th preambular paragraph as follows:

‘*Recognizing* that every organ of society at the national, **regional** or international level has a duty to respect the human rights of all, including the right to development.’

***Article 1 – Object and Purpose***

1. The CCJ suggests that ‘regional’ be included as follows:

‘The object and purpose of the present Convention is to promote and ensure the full, equal and meaningful enjoyment of the right to development by every human person and all peoples everywhere and to guarantee its effective operationalization and full implementation at the national, ***regional*** and international levels.’

1. The CCJ appreciates that the Expert Drafting Group wishes to ensure consistency with the Declaration on the Right to Development but agrees with the recommendation of The Centre for Human Rights, University of Pretoria, to add the words ‘through inter alia eradication of the barriers to the right including poverty, inequality, colonialism, imperialism, cultural and traditional norms inconsistent with international human rights standards’ at the end of the object and purpose. The CCJ also suggests that ‘corruption’ be included in the list of barriers to the right to development and that this list be identified as being non-exhaustive. This suggestion is made on the basis that the Draft Convention’s stated object and purpose - to promote and ensure the full, equal and meaningful enjoyment of the right to development - cannot be achieved without the eradication of the barriers to development. The CCJ appreciates that these barriers may be considered throughout the Convention but submits that in its very object and purpose, there should be mention of the eradication of the barriers to development as this is necessary *to promote* the realization of the right to development which is recognized as the object and purpose of the present Convention.

***Article 3 – General Principles***

1. ***Article 3(b)* –** The CCJ notes that in paragraph 3 of the commentary on Article 3(b), it is stated that ‘the drafting group agreed that the principles of “transparency”, “inclusion” and “accessibility” should be added to this provision.’ The CCJ agrees with this position but notices that the words ‘inclusion’ or ‘inclusivity’ has been omitted in Article 3(b) of the Revised Draft Convention. It is the Court’s view that these words be inserted.
2. ***Article 3(c)****-* The Court notes with appreciation the proposal of the International Human Rights Association of American Minorities for a new paragraph, (c), as follows: *‘international humanitarian-law based approach to development: colonialism and foreign occupation must be realized consistent with international humanitarian law for the restoration and reparation of exploited peoples and countries.’* The CCJ also notes that the Expert Drafting Group’s position in relation to this suggestion.
3. The CCJ agrees with the International Human Rights Association of American Minorities and submits that the principles of international humanitarian law, which is an important arm of public international law, have been realized as consistent with foreign occupation but not to colonialism. This gives rise to some concern as both foreign occupation and colonialism have the potential to infringe on the right to development and contravene the object and purpose of the present Convention. Whilst the CCJ understands that the Expert Drafting Group is constrained by the principles of international humanitarian law, it is submitted that the Draft Convention should make provision and ensure that an approach is taken to adequately protect States, particularly developing States s and vulnerable States from colonialism.
4. According to the International Committee of the Red Cross, international humanitarian law seeks to protect people who are not or are no longer participating in hostilities and restricts the means and methods of warfare. Colonization has been described as an act of ‘state-sanctioned violence’ whereby ‘liberal regimes pacified native peoples who resisted colonization and who were ruled by a set of coercive practices that violated their own democratic values’.[[1]](#footnote-2)
5. The CCJ opines that colonialism by its very nature should be considered as a most serious impediment to development . Colonial rule in the Caribbean normalized, legalized and naturalized violence, genocide, slavery, torture and dispossession and Caribbean regions suffer the consequences to this day.[[2]](#footnote-3) These consequences include environmental degradation, the spread of disease, economic instability, ethnic rivalries, and human rights violation which are issues that can long outlast colonial rule and which have direct bearing on the realization of the right to development and achievement of the sustainable development goals. The Caribbean region continues to face these consequences to date.. It is on this basis that the CCJ agrees with the International Human Rights Association of American Minorities.
6. ***Article 3(i) -*** The CCJ submits that ‘national and international’ be changed to ‘national, regional and international’ for the reasons outlined in the suggestions for the preamble. Regional integration promotes cooperation amongst States and Article 3(i) speaks specifically to this. It is therefore recommended that Article 3(i) be redrafted to read as follows:

National, **regional** and international solidarity: the realization of the right to development requires an enabling national, **regional** and international environment created through a spirit of cooperation and unity among individuals, peoples, States, regional bodies and international organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to promote the realization of the right to development. This principle includes the duty to cooperate.

1. ***Article 3(j)*** – The CCJ appreciates the inclusion of this Article on South-South cooperation as this may promote realization of the right to development in developing nations.
2. ***Article 3(l)* -** The CCJ suggests that there be insertion of the word ‘regional’ where this Article reads ‘national, **regional** and international levels’.

***Article 5 - Relationship with the right of peoples to self-determination***

1. ***Article 5(1)* –** The CCJ understands China’s recommendation to add the words ‘and to choose their own development, concepts, models and path in accordance with their national conditions and based on their economic development levels, development stages and priorities’ to this Article at paragraph 1 of the commentary. We aconsider that this recommendation seeks to ensure that States can mould and implement systems to promote the realization of the right to development based on their singular experience. The CCJ is of the view that this position is favourable to the developing nations of the Caribbean region but also understands the opinion of the Expert Drafting Group that this will leave too much room for human rights violations. It is suggested that the proposed phrase be added with a proviso which mandates compliance with human rights obligations as follows:

The right to development implies the full realization of the right of all peoples to self-determination **and to choose their own development concepts, models and path in accordance with their national conditions and based on their economic development levels, development stages and priorities** ***while ensuring full compliance with the rule of law, all human rights obligations and also ensuring that the measures implemented by any State do not undermine the right to development of any entity afforded the right and also does not undermine the duty to cooperate.***

1. ***Article 5(2)* –** The CCJ is of the opinion that the specification of political status in this paragraph is a limited expression of the scope of the right to self-determination. It is suggested that the language of Article 1 of the International Covenant on Economic, Social and Cultural Rights be adopted. Article 1 reads ‘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’. It is recommended that the expression of the right to self-determination be expanded to reflect its scope. Thus, it is suggested that consideration be given to amending Article 5(2) to read as follows:

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 and the realization of their right to development.

1. ***Article 5(5)*** *–* The CCJ agrees with paragraph 5 of the commentary on this Article which suggests that the provision be amended to reflect that all human rights violations be eliminated and not just those which are considered to be massive and flagrant. Every person is entitled to protection of their right to development and massive and flagrant breaches of human rights are usually collective (and cumulative) in nature. For example, those specified in Article 5(5). The CCJ appreciates that the objective is not to exclude lesser forms of violations of human rights but is of the view that every effort should be taken to protect human rights violations of any person and of all persons.

***Article 7 – Relationship with the responsibility of everyone to respect human rights under international law***

1. The CCJ has no difficulty with the drafting of this Article and finds the commentary to be quite thorough in determining whether human rights duties are restricted to States. The CCJ agrees with the definition of ‘legal person’ as set out at paragraph 9 of the commentary and agrees that human rights obligations can be imposed on legal persons including businesses as discussed in paragraph 16 of the commentary. The CCJ is of the opinion that the drafting of this Article is well-justified.

***Article 8 – General Obligations of State Parties***

1. ***Article 8(1) –*** The CCJ understands the Expert Drafting Group’s position in relation to the ‘deeply contested status’ of gender, gender identity and sexual orientation as grounds of discrimination in international human rights law. However, the CCJ respectfully submits that these grounds should be explicitly included as discrimination on these bases is prevalent and constitutes a breach of fundamental human rights and freedoms. The CCJ also understands that ‘other status’ will cover these grounds and ensures that the list is non-exhaustive. It is helpful as it leaves room for the evolution of international law and human rights obligations.

***Article 11 – Obligation to protect***

1. As regards to Article 11(c), the CCJ wishes to highlight that many states of the Caribbean region may be unable to implement this article as required given the human and economic resource constraints.

***Article 12 – Obligation to fulfil***

1. Further, the CCJ agrees with the recommendation of the Legal Resources Centre on the inclusion of an encouragement or recommendation for the adoption of regional measures which contribute to the progressive enhancement of the right to development. In the Caribbean context, the region comprises developing states, the majority of which form part of CARICOM. An encouragement of regional assistance and cooperation will be beneficial for Member States and states which are not part of CARICOM.

***Article 13 – Duty to Cooperate***

1. The CCJ observes the inclusion and acknowledgment of ‘developing countries’ and/or ‘least developed countries’ and/or ‘small island developing States’ in multiple clauses of this Article. The explicit inclusion of these terms not only impresses upon Caribbean states (which are classed as developing or least developed countries and/or small island developing states) their obligations under the Convention but also emphasizes to developed countries their duty to cooperate and assist such countries, including those within the Caribbean region, in fulfilling their obligations.

***Article 15 – Specific and Remedial Measures***

1. Regarding Article 15(2), the CCJ appreciates the recognition of the various disadvantages faced by developing and least developed countries and the vulnerabilities that exist as a result. This Article and the measures stated therein are therefore of great importance to ensuring that the right to development is promoted and ensured. The CCJ suggests the inclusion of ‘small island developing states’ after ‘least developed countries’. Small island developing states are a distinct group of developing countries facing specific social, economic and environmental vulnerabilities.[[3]](#footnote-4)

***Article 16 – Equality between men and women***

1. In Article 16(1), the CCJ suggests including ‘legislation and’ before ‘temporary special measures’. This is in line with the obligation of State Parties under Article 3 of the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW) which gives positive affirmation to the principle of equality and requires State Parties to take ‘all appropriate measures including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.’ This inclusion will also strengthen the text.
2. In Article 16(2)(b), the measure is to ensure women’s full, equal, effective and meaningful participation and equal opportunities for leadership ‘at all levels.’ The assumption is that this means participation and equal opportunity for leadership at all levels of government, public sector and society as a whole within State parties. The question is whether this also applies to the women’s participation and leadership opportunities at the international level. It is suggested to replace ‘at all levels’ with ‘national, regional and international levels’ in the provision.
3. The CCJ further suggests the addition of ‘social’ before ‘cultural’ to expand the various spheres of life which require women’s participation and influence and strengthen the text. The addition of ‘social’ will also be in conformity with Article 3 of the CEDAW.

***Article 17 – Indigenous Peoples***

1. The CCJ appreciates the inclusion of an article specifically addressing indigenous peoples’ right to development. Various indigenous groups live across different jurisdictions within the Caribbean, and it is vital that their right to development is exercised in accordance with their own needs and interests. With respect to Article 17(1), the CCJ suggests the inclusion of ‘aspirations’ before ‘needs’.
2. It is commendable that the requirement for State Parties to obtain free, prior and informed consent before adoption and implementation of legislative or administrative measures has been explicitly stated in the provision, as this is in line with international law.
3. One consideration to further encourage the active involvement of indigenous peoples in the measures for exercising their right to development and help foster the relationship between the State and representative institutions is to include reference to an obligation for the State to establish government liaisons with these representative institutions or other suitable mechanisms.

***Article 18 – Prevention and suppression of corruption***

1. Corruption continues to stymie development of Member States and the Caribbean region as a whole. The 2021 Corruption Perceptions Index (CPI)[[4]](#footnote-5) shows that despite legislation and a regional commitment to control corruption, corruption in the Americas (of which the Caribbean is part) continues to undermine democracy and human rights.[[5]](#footnote-6)
2. In the June 2021 UN General Assembly political declaration[[6]](#footnote-7), Governments pledged to include anti-corruption safeguards in public procurement. While the Article does include the promotion of this at (c), it is suggested that a more explicit reference to the taking of actual measures such as implementing anti-corruption safeguards in public procurement and ensuring transparency in public spending be included.

*27/06/2022*

1. Alice L. Conklin, ‘Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1895-1914’ (1998) 103(2) The American Historical Review 419. [↑](#footnote-ref-2)
2. Jose Atiles-Osoria, “Colonial State Crimes and the CARICOM Mobilization for Reparation and Justice” (2018) 7(2) State Crime Journal 349. [↑](#footnote-ref-3)
3. United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, About Small Island Developing States <<https://www.un.org/ohrlls/content/about-small-island-developing-states>> accessed 25 June 2022. [↑](#footnote-ref-4)
4. Transparency International, Corruption Perceptions Index 2021 < <https://www.transparency.org/en/cpi/2021>> accessed 22 June 2022. [↑](#footnote-ref-5)
5. Transparency International, CPI 2021 For The Americas: A Region In Crisis <<https://www.transparency.org/en/news/cpi-2021-americas-a-region-in-crisis>> accessed 22 June 2022. [↑](#footnote-ref-6)
6. UNGA Res S-32/1 (2 June 2021) UN Doc A/RES/S-32/1. [↑](#footnote-ref-7)