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UN Declaration on the Right to Development 1986 - 2016, Ways to Promote Further Progress in Practice

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UN DECLARATION ON THE RIGHT TO DEVELOPMENT 1986 – 2016, WAYS TO PROMOTE FURTHER PROGRESS IN PRACTICE

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REVITALIZING THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW*

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ABBREVIATIONS

ACP *or* ACP States	African, Caribbean, and Pacific Group of States
G-77	Group of 77
GC	General Comment
IBSA	India Brazil South Africa Dialogue Forum
MDGs	Millennium Development Goals (UN General Assembly 2000)
NAM	Non-Aligned Movement
NIEO	New International Economic Order
OHCHR	Office of the High Commissioner for Human Rights
RTD	Right to Development
SDGs	Sustainable Development Goals (UN General Assembly 2015)
UN	United Nations
UNDRTD	UN Declaration on the Right to Development (General Assembly, December 1986)

1. INTRODUCTION

In December 2016, the United Nations Declaration on the Right to Development[1] will exist for thirty years. This Declaration is revered as the first international instrument to express the individual as well as the collective right to development at a global level. The importance of the Declaration, at present still, also lies in the fact that it provides one of the few structured approaches to addressing development issues in a rights-based manner. Thus, while being a soft law instrument (as will be addressed below), the UNDRTD takes State contributions to development policies and development work at large out of the realms of voluntariness and charity and into the spheres of rights and required international cooperation, or the duty to cooperate. Furthermore, according to the Declaration, the Right to Development focuses not only on equity and the indivisibility of human rights, but also on the importance of inclusive participation in development both as a means and as a goal. This is very much in line with what current conceptualizations of development, such as the 2015 Sustainable Development Goals, still emphasise today.[2]

Despite the significance of its content and approach, in practice the UNDRTD has not managed to inspire a lot of concrete implementation efforts. In fact, due to the great substantive and political divisions prevailing between − and within − the North and the South about the exact substance and implications of the Right to Development, relatively little explicit follow-up has occurred. The thirtieth anniversary of the UNDRTD thus coincides with the continued acuteness of undertaking efforts to bring about, and further stimulate, development efforts, and with the substantive resonance between the UNDRTD and contemporary articulations of development concerns and agendas. This coincidence provides ample reasons for exploring whether there is cause and space to revitalize the Right to Development in international law and, if so, how this could take shape.

Given the political controversies over the subject, in this contribution we consider the scope for revitalizing the RTD through existing international law, rather

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1 UN Doc. A/RES/41/128, adopted on 4 December 1986, for its text see <http://www.un.org/documents/ga/res/41/a41r128.htm>.

2 Ibid., Art. 1(1) and Art. 2(1). The 17 SDGs are part of the United Nations' '2030 Agenda for Sustainable Development', or 'Agenda 2030'. They were adopted by the UN General Assembly on 25 September 2015. The document explicitly states that Agenda 2030 has been informed by 'other instruments such as the Declaration on the Right to Development' and recognizes the need to build societies 'that are based on respect for human rights (including the right to development)'. See UN Doc. A/RES/70/1, 21 October 2015, Declaration, respectively p. 4, para. 10 and p. 9 para. 35. The SDGs took effect on 1 January 2016 (see SDG Declaration para. 21). The term 'participation' appears ten times in the 2030 Agenda for Sustainable Development: once in the Preamble, thrice in the Declaration (paras. 20, 27 and 44), thrice in the targets for the SDGs themselves (Goals 5.5, 6.b and 16.8) and thrice in the section on 'Means of Implementation' (paras. 70, 84 and 89). This does not at all imply, however, that the process of formulating Agenda 2030 has been sufficiently participatory. For critical accounts see e.g. Charis Enns et al., 'Indigenous Voices and the Making of the post-2015 Development Agenda: The Recurring Tyranny of Participation', 35 *Third World Quarterly* (2014) pp. 358-375, and Sascha Gabizon, 'Women's Movements' Engagement in the SDGs: Lessons Learned from the Women's Major Group', 24 *Gender & Development* (2016) pp. 99-110. The word 'inclusive' appears no less than forty times in Agenda 2030.

than by creating additional normative frameworks. After a short sketch of the historical evolution of the Right to Development, we will examine the nature, substance and implications of this Right as conceived in the UNDRTD. Then, in section 4, we will pursue the question how existing international law could be mobilised more explicitly for the sake of strengthening the position of the RTD in international law, and more in particular its implementation and actual realization in the future. This would be achieved, for example, by focusing more on the concept of international cooperation in international law, and especially on the obligations related to this concept. In addition, Agenda 2030, including the Sustainable Development Goals, provides major momentum for stepping up activities that are essential for working towards realizing the RTD. In order to help the process of paper commitments being turned into effective action on the ground, accountability and monitoring procedures are crucial. Procedures in international human rights law are especially relevant in this regard. Finally, the scope for contributions from regional and inter-regional understandings of the RTD − especially in the African Union system and in the relations between the European Union and the ACP − also will be examined. All of these are bound to raise some forward-looking thoughts and proposals for revitalizing the RTD, which will be synthesized at the very end of this paper.

2. THE HISTORICAL EVOLUTION OF THE RIGHT TO DEVELOPMENT

Adopted by the United Nations' General Assembly on 4 December 1986,[3] the UNDRTD proclaims that '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'.[4] At the time, its adoption was a major formal breakthrough in North-South relations, especially for the 'developing'[5] country members of the UN. After all, the convergence of human rights and development had only started to emerge following the

3 UNDRTD, *supra* n. 1.

4 Ibid., Art. 1(1).

5 For want of better terminology, this paper uses the broadly established terminology to refer to countries at opposite ends of the spectrum of levels of economic development. We note that the terms 'developing' and 'developed' might create false impressions, e.g. of human wellbeing and rights being looked after well in so-called developed countries and less well or hardly at all in so-called developing countries. In practice, there are also 'development' issues in the 'developed' world (also referred to as the North) and some 'developing' countries (also referred to as the South) manage relatively well within their circumstances. The Kids Rights Index, a worldwide annual ranking on how States parties to the UN Convention on the Rights of the Child are doing in terms of realizing children's rights, provides various examples of both categories. As we feel some level of uneasiness with the established terminology, in this paper we will use the terms in question in inverted commas. This matter is strongly acknowledged in the Sustainable Development Goals, *supra* n. 2, which, contrary to the preceding Millennium Development Goals, universally apply and 'involve the entire world, developed and developing countries alike' (ibid., p. 3, para. 5). This is a major break-through indeed.

political wind of decolonization. Especially newly independent African States articulated the Right to Development as a 'necessary companion of their newly acquired political emancipation'.[6] In their original conceptualization, reportedly the RTD was perhaps meant to cover solely, or at least primarily, a collective peoples' right (of *erga omnes* nature).[7] Thus, the claim was unconventional to the classical individualistic paradigm of human rights. However, the RTD soon became acknowledged as an individual human right as well. Accordingly, by positioning both 'every human person' and 'all peoples' as holders of the Right to Development, the UNDRTD presents this right as both a collective and individual notion.[8]

As stated in the introduction, the UNDRTD is a soft law instrument. While the members of the United Nations have agreed to implement the Declaration, the exact nature of the obligations involved and of the modes of implementation has been the subject of intense debate for at least the last thirty years. The implementation and operationalization of the RTD have been hindered a great deal by political controversy and political considerations. 'Developed' countries have largely refused interpretations of the RTD that legally require them to give development assistance to particular 'developing' countries, while 'developing' countries continue to insist on the need for more international cooperation, including development assistance and concessions, a fairer international trade climate, access to technology and debt relief from 'developed' counties. Thus, the RTD has largely remained elusive. However, as will gradually be elaborated in this paper, the UNDRTD is not the only legal instrument that is relevant for defining the substance and consequences of the RTD. Rather, despite the sketched controversies, various core elements of this right also appear in international legal instruments other than the UNDRTD and perhaps these should be drawn upon more.

The post-1960s debate on the RTD revolved around what Balakrishnan Rajagopal has identified as:

> [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; the lack of effective sovereignty over natural resources due to the aggressive interventionist policies of powerful countries; and the prevalence of structural conditions that prevented the state in the developing world from

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6 Noel G. Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm', 22 *Florida Journal of International Law* (2010) pp. 299-332, at pp. 229-300. See also Fantu Cheru, 'Developing Countries and the Right to Development: A Retrospective and Prospective African View', 37 *Third World Quarterly* (2016) pp. 1268-1283.

7 Villaroman, *supra* n. 6, at p. 300. The term *erga omnes* refers to international obligations (or, as in this context, a feature of a particular right) that are the concern of all States and that are held towards the international community at large. Accordingly, all States have a legitimate interest in upholding and enforcing such norms. See e.g. Jochen A. Frohwein, 'Obligations Erga Omnes', *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2015, accessed via <http://opil.ouplaw.com> (article last updated December 2008).

8 Villaroman, *supra* n. 6, at p. 300.

> performing a more robust function in economic policy formulation, coordination, and implementation.[9]

Because of these concerns, some prominent scholars from 'developing' countries and elsewhere also began to champion the call for change to these structural injustices.[10] The RTD has since been 'about correcting what is wrong in the global economic order [especially as from] its inception, it was meant to address the effects of the asymmetrical relationship between the developed and developing countries'.[11]

As Olav Stokke has noted, the situation in the late 1960s and 1970s was 'characterized by [yet] stronger, more determined, and more self-confident postures by Third World governments, manifest in their demand for [a New International Economic Order]'.[12] According to Villaroman, although the post-World War II period saw the West:

> trumpeting individual human rights guaranteed in the Universal Declaration of Human Rights and the two international human rights covenants, a significant number of developing countries were testing the waters […] by crafting a collective right to development to bolster their demand for fundamental changes in their economic relationship with the developed world.[13]

This resulted in several relevant pronouncements in the late 1960s and 1970s. Prominent was the endorsement of core elements of a RTD in the Charter of Algiers, adopted by the first ministerial meeting ever of the Group of 77 'developing' countries, at their October 1967 meeting.[14] The Charter stated among other things that:

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9 Balakrishnan Rajagopal, 'Right to Development and Global Governance: Old and New Challenges Twenty-Fiver Years On', 35 *Human Rights Quarterly* (2013) pp. 893-909 at p. 899.

10 The first attempt to formulate a right to development is often attributed to the eminent Senegalese lawyer Kéba M'baye. See Kéba M'baye, 'Le droit au développement comme un droit de l'homme', 5 *Revue des Droits de l'Homme* (1972) pp. 503-534. Selected other examples of relevant scholarship since include: Milan Bulajić, *Principles of International Development Law*, Dordrecht, Martinus Nijhoff Publishers, 1986; Subrata Roy Chowdhury, Erik M.G. Denters and Paul J.I.M. de Waart, *The Right to Development in International Law*, Calcutta/Dordrecht, Law Research Institute/Martinus Nijhoff Publishers, 1992; Tahmina Karimova, *Human Rights and Development in International Law*, London and New York, 2016 and work by Georges Abi-Saab, Philip Alston, Mohamed Bedjaoui, Sakiko Fukuda-Parr, Stephen Marks, Nico Schrijver, Arjun Sengupta and many others.

11 Noel Villaroman, 'Rescuing a Troubled Concept: An Alternative View of the Right to Development', 29 *Netherlands Quarterly of Human Rights* (2011) pp. 13-53, at p. 14.

12 Olav Stokke, *The UN and Development: From Aid to Cooperation*, Bloomington, Indiana University Press, 2009, at pp. 7-10.

13 Villaroman, *supra* n. 6, at p. 300.

14 Laurent Meillan, 'The Right to Development and the United Nations', 34 *Droit en Quart Monde* (2003) pp. 13-31. The G-77 was created in June 1964 by 77 'developing' country members of the United Nations. According to information available at <http://www.g77.org/doc>, the G-77 'provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South coopera-

> The international community has an obligation to rectify these unfavourable trends and to create conditions under which all nations can enjoy economic and social well-being, and have the means to develop their respective resources to enable their peoples to lead a life free from want and fear.[15]

In the same document, the G-77 at the time also expressed that 'the development of developing countries will benefit the developed countries as well', that the primary responsibility for their development rests on the developing countries and that developing countries were 'determined to contribute to one another's development'. In 1977 the next milestone occurred in the form of explicit recognition of the RTD by the United Nations Commission on Human Rights in a Resolution that explicitly recognized 'the Right to Development as a human right' and commissioned a study on the subject.[16] Two years later, the Commission on Human Rights repeated its recognition of the RTD and added 'that equality of opportunity for development is as much a prerogative of nations as of individuals within nations'.[17] Accordingly, after various studies and reports and much deliberation in the Commission on Human Rights and the UN General Assembly, the UNDRTD was formally adopted by the General Assembly in December 1986.

In the meantime, the RTD had also gained ground in some regional and interregional international legal instruments. As is discussed further in section 4.3 below, the most prominent expression at a regional level is Article 22 of the 1981 African Charter on Human and Peoples' Rights. To date, that Charter remains the only hard law document bestowing an individual and collective Right to Development with binding and enforceable obligations imposed on States.[18] In the Preamble to the

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tion for development'. Since 1964 the membership of the G-77 has grown to 134 'developing' countries. '[T]he original name was retained due to its historic significance.' Ibid.

15 Charter of Algiers, 10-25 October 1967, <http://www.g77.org/doc/algier~1.htm>, Part One, Section 3.

16 UN Commission on Human Rights, Res. 4 (XXXIII), 21 February 1977. For a more detailed overview of UN involvement in the recognition and definition of the Right to Development, see <http://www.ohchr.org/EN/Issues/Development/Pages/Backgroundrtd.aspx> and <http://legal.un.org/avl/pdf/ha/drd/drd_ph_e.pdf>.

17 UN Commission on Human Rights, Res. 5 (XXXV), 2 March 1979.

18 The African Charter on Human and Peoples' Rights, adopted in Nairobi on 27 June 1981, entered into force on 21 October 1986, <http://www.achpr.org/instruments/achpr>. All-Africa except South Sudan has ratified the Charter. For ratification details see <http://www.achpr.org/instruments/achpr/ratification>. The African Charter was drafted with the explicit intention of reflecting an African conceptualization of human rights. For in depth analyses, see e.g. Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, The Hague, Martinus Nijhoff Publishers, 2003 (originally published in French in 1993); Oji Umozurike, *The African Charter on Human and Peoples' Rights*, The Hague, Martinus Nijhoff Publishers, 1997; Rachel Murray, *Human Rights in Africa: From the OAU to the African Union*, Cambridge University Press, 2005; or Frans Viljoen, *International Human Rights Law in Africa*, Oxford University Press, 2nd ed., 2012. The second version of the Arab Charter on Human Rights, adopted on 15 September 2004, entry into force on 15 March 2008, <http://hrlibrary.umn.edu/instree/loas2005.html?msource=UNWDEC19001&tr=y&auid=3337655>, in Art. 37 also recognizes the RTD as 'a fundamental human right' and requires all States 'to establish the development policies and to take the measures needed to guarantee this right. They have a duty to give effect to the values of

African Charter, the African States involved stated their conviction that 'it is essential to pay a particular attention to the right to development'.[19] According to Article 22, all peoples 'shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind' and all States 'shall have the duty, individually or collectively, to ensure the exercise of the right to development'. Reportedly, the African Commission has dealt with seven complaint cases that are relevant to this provision. In response to a complaint that became known as the *Endorois* case the African Commission found (in November 2009) that the government of Kenya had violated Article 22. This case will be further explained in section 4.3 below.

Another example, from the inter-regional level, is that of the treaties that through the years have formed the basis for development cooperation relations between the ACP Group (nowadays consisting of 79 states in Africa, the Caribbean and the Pacific),[20] and the European Union. While the respective Lomé Conventions and the Cotonou Partnership Agreement, that have been in place consecutively since 1975, did not directly refer to the RTD, their approach, contents and basic general principles certainly came a long way towards operationalizing the RTD in a comprehensive manner. An example is the integral understanding of 'development' as an objective and process to be pursued, with economic, social, cultural, political and possibly other relevant dimensions. Another illustration is the contract approach, by which both the ACP and the EU States formally committed themselves, in binding legal instruments, to the principles, objectives, procedures and institutions for their development cooperation relations, and by which the EU bound itself to making available a specified set of resources in support of these relations. An additional main feature of the ACP-EU treaties that fits the outlook of the UNDRTD quite well is the central role they gradually assigned to human rights.[21]

At the global level, developments continued as well. The RTD was further reaffirmed in several international documents and fora, including at the World Confer-

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solidarity and cooperation among them and at the international level with a view to eradicating poverty and achieving economic, social, cultural and political development. By virtue of this right, every citizen has the right to participate in the realization of development and to enjoy the benefits and fruits thereof.' No concrete follow-up seems to have been given to this provision so far.

19 Ibid., Preamble para. 8.

20 For more information on history and composition of the ACP Group, see <http://www.acp.int/content/secretariat-acp>.

21 See e.g. Karin Arts, 'Implementing the Right to Development? An Assessment of European Community Development Cooperation' in P. Baehr et al. (eds.), *Human Rights in Developing Countries Yearbook 1996*, The Hague/Oslo, Kluwer Law International/Nordic Human Rights Publications, 1996, pp. 37-71; Martin Holland, *The European Union and the Third World*, Basingstoke, Palgrave, 2002; Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford University Press, 2005; or Karin Arts, 'The European Community's Contribution to the Fight Against Poverty in Developing Countries: Normative and Real?', 51 *German Yearbook of International Law* (2008) pp. 217-250. For a relatively recent overview of the state of affairs in EU-ACP relations see Advisory Council of International Affairs, *ACP-EU Cooperation after 2020: Towards a New Partnership?* Advisory Report no. 93, The Hague, 31 August 2015, <http://aiv-advies.nl/84h>.

ence on Human Rights held in Vienna in 1993. The Vienna Declaration and Programme of Action contained more than ten references to the Right to Development and/or the UNDRTD.[22] In a follow-up to the World Conference, in 1993 as well, the UN General Assembly established the post of High Commissioner for Human Rights. The Preamble to the Resolution involved reaffirmed 'that the right to development is a universal and inalienable right which is a fundamental part of the rights of the human person'.[23] Among the responsibilities that the UN General Assembly assigned to the High Commissioner in the same Resolution was (and still is) the task to 'promote and protect the realization of the right to development and to enhance support from relevant bodies of the United Nations system for this purpose'.[24] The Office of the High Commissioner for Human Rights has since pursued this goal, among other things by initiating and supporting attempts to clarify and advocate for the Right to Development. Several bodies were created in the process, and then serviced by the OHCHR. These included various Intergovernmental Working Groups on the Right to Development as of 1993,[25] a UN Independent Expert on the Right to Development (1999-2004),[26] and a High-level Task Force on the Implementation of the Right to Development (2004-2010).[27]

World leaders attending the September 2000 UN Millennium Summit − which adopted the Millennium Development Goals (MDGs) that subsequently would be in place until 2015 − also pledged the realization of the RTD. In particular, the Heads of State and Government expressed their commitment 'to making the right to development a reality for everyone and to freeing the entire human race from want'.[28]

As was already indicated at the start of this contribution, the recently endorsed UN Sustainable Development Goals also emphasize core elements of the RTD. Goals 16 and 17 are especially relevant. SDG 16, among other things, focuses on promoting 'peaceful and inclusive societies for sustainable development', providing 'access to justice for all', and building 'effective, accountable and inclusive institutions at all levels'. SDG 17 highlights the needs to strengthen the means of implementation (finance, technology, capacity building, trade, systemic issues) and to revitalize the Global Partnership for Sustainable Development.[29] The interconnections between the SDGs and the Right to Development are evident. This was recently reiterated by Martin Khor, Executive Director of the South Centre, at the Human Rights Council meeting held in commemoration of the 30th anniversary

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22 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993.

23 UN Doc. A/RES/48/141, 20 December 1993, <http://www.un.org/documents/ga/res/48/a48r141.htm>.

24 Ibid.

25 <http://www.ohchr.org/EN/Issues/Development/Pages/Documents.aspx>.

26 Appointed by the Commission on Human Rights, held by Arjun K. Sengupta from India between 1999 and 2004. See <http://www.ohchr.org/EN/Issues/Poverty/Pages/ASengupta.aspx>.

27 <http://www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForce.aspx>.

28 UN General Assembly, 'United Nations Millennium Declaration', UN Doc. A/RES/55/2, 18 September 2000, para. 11; for general information on the Millennium Summit see e.g. <http://www.un.org/en/events/pastevents/millennium_summit.shtml>.

29 *Supra* n. 2.

of the UNDRTD.[30] According to Khor, '[t]here is a close connection between the Right to Development and the SDGs. Fulfilling the SDGs would go a long way to realizing the right to development'.[31] And,

> [the] approach and instruments of the right to development would be useful to apply when implementing the SDGs. In turn the fulfilment of the SDGs would be helpful for the realization of the right to development. At the same time we should be mindful that there are limitations to the set of SDGs and to the SDG approach. This should be supplemented by other instruments and approaches that are needed for a comprehensive understanding of the dynamics of development and thus of the right to development.[32]

This outlook on the continued relevance of the Right to Development is shared by others. For instance, Martin Khor's reference to 'other instruments and approaches' could be interpreted as applying to human rights instruments and human rights-based approaches. While the SDGs show more reflections of these than their predecessors − the MDGs − did, a call in support of human rights-based approaches to development certainly still is important as the impressive progressive evolution of international human rights law and the ratification records of international human rights law instruments that the world has witnessed have not yet generated sufficient progress on the ground. Concern for human rights drove Sakiko Fukuda-Parr to the statement that the RTD remains 'highly relevant to the real and concrete challenges to human rights in an increasingly integrated and unequal world of the twenty-first century'. According to Fukuda-Parr, its 'core claim to a socially just economic system, governed by rules and principles that protect human rights, is even more important in the twenty-first century as globalization proceeds at a rapid pace'.[33] Fukuda-Parr also clarified that the UNDRTD is 'the only international human rights instrument that addresses the need for joint international action to address the human rights consequences of global economic arrangements'.[34]

The above has traced the evolution and the continued relevance of the concept of the RTD and has pointed at the usefulness of involving the various hard and soft law international instruments that are currently available in addition to the UN Declaration. Especially selected global international human rights instruments, regional and inter-regional instruments, and the Sustainable Development Goals have potentially strong contributions to make, as will be further explored in section 4. Proceeding from this background, we now first move to the substance and implications of the RTD as conceived in the UNDRTD.

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30 For a press release on this meeting see <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20108&LangID=E>.

31 South Centre, 'The Right to Development at 30: Looking Back and Forward,' *South News*, No. 107, 17 June 2016, <http://us5.campaign-archive2.com/?u=fa9cf38799136b5660f367ba6&id=3a9a00a980>, p. 6.

32 Ibid., at pp. 7-8.

33 Sakiko Fukuda-Parr, 'The Right to Development: Reframing a New Discourse for the Twenty-First Century', 79 *Social Research: An International Quarterly* (2012) pp. 839-864, at p. 840.

34 Ibid.

3. THE RIGHT TO DEVELOPMENT: SUBSTANCE AND IMPLICATIONS AS CONCEIVED IN THE UN DECLARATION

In 1986 the UNDRTD was adopted with 146 votes in favour, only one opposing vote and eight abstentions.[35] As is already clear from the earlier sections of our contribution, despite this relatively favourable voting record on the Declaration, the Right to Development always has been, and remains, controversial. In the words of Sakiko Fukuda-Parr, the UNDRTD:

> has been widely criticized as too poorly written, containing too much ambiguity over basic issues, such as whether this is a collective or an individual right, to provide a basis for defining a conceptually robust human right that would have significant meaning for improving human welfare.[36]

In this light, it is important now to review the content of the UNDRTD, in particular as regards the nature and substance of the RTD and in terms of the implementation obligations specified. The next two sub-sections of this paper present the findings of a close analysis of the full text of the UN Declaration. They broadly portray all the UNDRTD provisions that are relevant for understanding the nature, content and the implementation framework of the RTD, as originally envisaged. This amounts to an analysis of nearly all of the text of the Declaration.

3.1 **The nature and content of the RTD according to the UN Declaration**

The Preamble of the UNDRTD clarifies right at the start that the document did not emerge out of the blue but that it already had a clear basis in existing international law at the time of its adoption. This was done through the inclusion of formal cross references to the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, and to:

> 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 co-operation among States in accordance with the Charter.[37]

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35 The opposing vote came from the United States of America, while Denmark, the Federal Republic of Germany, Finland, Iceland, Israel, Japan, Sweden and the United Kingdom abstained.

36 Fukuda-Parr, *supra* n. 33, at p. 845. See also e.g. Bonny Ibhawoh, 'The Right to Development: The Politics and Polemics of Power and Resistance', 33 *Human Rights Quarterly* (2011) pp. 76-104.

37 UNDRTD, *supra* n. 1, Preamble, para. 5, for the other cross-references see paras. 1, 3, 4 and 8, and Arts. 3(2) and 9(2).

The Preamble of the UNDRTD defines the term 'development' fairly comprehensively, as follows:

> 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.[38]

Article 1 of the Declaration squarely qualifies the Right to Development as 'an inalienable human right' and formulates an entitlement for humans 'to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights […] can be fully realized'. Overall, the Declaration clearly has an anthropocentric outlook. This is expressed *inter alia* in that the Declaration recognizes respectively 'the human person as the central subject of development', the human being as 'the main participant and beneficiary of development' and 'the active participant and beneficiary of the right to development'.[39] This might explain why, despite the fact that the development of international environmental law was well on its way by 1986, the UNDRTD pays no attention to ecological or sustainability concerns at all. However, entirely in line with current international development priorities, the Declaration does explicitly pursue development as an inclusive notion, by emphasizing non-discrimination and equality of opportunity for all, which are to be enjoyed by 'every human person and all peoples'.[40]

According to the latter, both every human person and all peoples are the holders of the Right to Development. The duty-bearers are a diffuse set of actors. All human beings 'have a responsibility for development'.[41] States, however, clearly have '*the primary responsibility for the creation of national and international conditions favourable*' to the RTD[42] and are required 'to take steps, individually and collectively'.[43]

All in all, the substantive picture of the nature and content of the RTD that emerges from the UN Declaration still is rather abstract and not necessarily translates easily into concrete implementation obligations. This is perhaps exacerbated by the penultimate provision of the Declaration which stipulates that '[a]ll the

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38 UNDRTD, *supra* n. 1, Preamble, para. 5, for the other cross-references see paras. 1, 3, 4 and 8, and Arts. 3(2) and 9(2).

39 Ibid., Preamble, para. 2.

40 Ibid., Art. 1(1). The UNDRTD Preamble, para. 8, refers to respect for human rights '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'. According to para. 16: 'equality of opportunity for development is a prerogative both of nations and of individuals who make up nations'. Art. 8(1) provides that in their national implementation measures, States '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 taken to ensure that women have an active role in the development process'.

41 Ibid., Art. 2(2).

42 Ibid., Art. 3(1). Emphasis added.

43 Ibid., Art. 4(1).

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'. While not all details concerning the individual and collective dimensions of the RTD may be entirely clear, it is nevertheless a fact that the UNDRTD posits development unequivocally as a human right. This makes it pertinent to now explore the vision of the UNDRTD on the possible implications of this right in terms of concrete implementation obligations. According to former Independent Expert on the Right to Development, Arjun Sengupta, this requires a '[yet] more nuanced explanation'.[44]

3.2 The obligations to implement formulated in the UN Declaration

The most general vision on the action perspective that emerges from the existence of the RTD is provided in the closing provision of the UNDRTD: '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'.[45] This formulation reinforces the idea that States are the primary duty-bearers in relation to the RTD as policy-making, law-making and the adoption of other measures are largely, if not exclusively, within the domain of the State. The only implementation obligation specified for individuals is that all human beings should 'promote and protect an appropriate political, social and economic order for development'.[46] This is no small task indeed and it is even questionable whether this is doable at all. While the role of individual human beings as duty-bearers is not developed further, the UN Declaration provides some more concrete leads as to the implementation obligations of States. Accordingly, States have the duty to:

- 'formulate appropriate national development policies';[47]
- 'undertake, at the national level, all necessary measures for the realization of the right to development';[48]
- 'take steps, individually and collectively, to formulate international development policies'[49] that pursue the full realization of the Right to Development;

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44 Arjun K. Sengupta, 'Conceptualizing the Right to Development for the Twenty-first Century', in Office of the High Commissioner for Human Rights, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, New York and Geneva, United Nations, 2013, HR/PUB/12/4, Chapter 4, pp. 67-87, at p. 67.

45 UNDRTD, *supra* n. 1, Art. 10.

46 Ibid., Art. 2(2). The same provision also refers to the 'human rights and fundamental freedoms' of individuals, and 'their duties to the community'. The latter is another illustration of the fact that the intellectual minds behind the UN Declaration were interested in balancing individual and collective notions of human rights, and of development, more than had been (and still is) done in traditional international human rights law with its predominantly individualistic focus.

47 Ibid., Art. 2(3).

48 Ibid., Art. 8(1).

49 Ibid., Art. 4(1).

– encourage 'the observance and realization of human rights' and to cooperate for this purpose;[50]
– 'take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights';[51] and
– 'encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights'.[52]

This list embodies a combination of national and international implementation obligations. These were not made strongly dependent on one another, although Article 4(2) of the UNDRTD refers to effective international cooperation as a 'complement to the efforts of developing countries'. In addition − according to Article 9(1) of the UNDRTD mentioned earlier – national and international implementation obligations are to be seen as 'indivisible and interdependent' and to be considered 'in the context of the whole' Declaration. Obviously, the notion of solidarity, translating into a duty to cooperate and to actively engage in international cooperation and assistance for development, forms another core implementation obligation concerning the Right to Development. Article 3(1) of the UN Declaration proclaims that: 'States have the responsibility for the creation of national and international conditions favourable to the realization of the right to development'. This entails that they 'have the duty to cooperate with each other in ensuring development and eliminating obstacles to development'.[53]

As briefly stated already in the introduction to this paper, the duty to formulate appropriate international development policies and to provide effective international cooperation are among the most controversial elements of the UNDRTD.[54] From one perspective the level of controversy perhaps is understandable, given the fact that 'developed' countries would need to invest significantly in order to reach to the required level of effort. From other perspectives this is less the case. For example, for a long time the same 'developed' countries have controlled the terms of international trade resulting among other things in a World Trade Organization regime that does not fully look after the trade interests of developing States, to put it mildly. The Doha Round, a negotiation process that was launched in November 2001 and that is also referred to as the Doha Development Agenda, could possibly remedy this (if only to some extent) as its 'fundamental objective is to improve the trading prospects of developing countries'.[55] The Round is still on-going, however, if not in a deadlock.

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50 Ibid., Arts. 3(3) and 6(1).
51 Ibid., Art. 6(3).
52 Ibid., Art. 8(1).
53 Ibid., Art. 3(3).
54 See e.g. Laure-Hélène Piron, 'The Right to Development, A Review of the Current State of the Debate for the Department for International Development', April 2002, at p. 11, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2317.pdf>.
55 World Trade Organization, 'The Doha Round', <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm>. See also e.g. James Scott and Sophie Harnam, 'Beyond TRIPS: Why the WTO's

In addition, the duty to cooperate in pursuit of the objectives of the Right to Development is nothing new at all. At the time of adoption of the UNDRTD, the concept already had been expressed in several international instruments, most notably in the United Nations Charter. The latter lists achieving 'international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights' among the purposes of the UN.[56] By UN Charter articles 55 and 56 all UN member states pledged 'to take joint and separate action' to achieve:

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: […]
c. universal respect for, and observance of, human rights […].

In a nutshell, this amounts to the core of the Right to Development as conceived in the UNDRTD as well.[57] Nevertheless, among 'developed' States there hardly has been any formally acknowledged progress in the recognition and application of these aspects of the RTD. Instead, the ideological divide over the matter continues to cause tension between 'developing' and 'developed' countries.[58] As is addressed in greater detail in the paper by Koen de Feyter, out of their belief in the core content of the Right to Development and/or frustration about the lack of progress in practice, many 'developing' countries advocate the adoption of a treaty that would codify the RTD in a global hard law instrument setting out both the substance and implementation requirements of this right. Many 'developed' countries maintain the position, however, that the RTD is 'just' a combination of other existing rights and does not incur new legally-binding obligations, or that the RTD represents merely an aspiration and not a right at all. A significant number of scholars has attempted to either justify or discount the legal basis for enforceable external obligations on the part of rich countries regarding international cooperation between such rich countries and poorer countries in the pursuit of the realiza-

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Doha Round Is Unhealthy', 34 *Third World Quarterly* (2013) pp. 1361-1376; and Cheru, *supra* n. 6, at pp. 1278-1279.

56 Charter of the United Nations, adopted in San Francisco, 26 June 1945, Art. 1(3).

57 Subsequently, a host of UN resolutions built on this UN Charter mandate. Examples include the following UN General Assembly resolutions: (1) 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625, 24 October 1970; (2) 'Declaration on the Establishment of a New International Economic Order', UN Doc. A/RES/S-6/3201, 1 May 1974; (3) 'Programme of Action on the Establishment of a New International Economic Order', UN Doc. A/RES/S-6/3202, 1 May 1974; and (4) 'Charter of Economic Rights and Duties of States', UN Doc. A/RES/29/3281, 12 December 1974.

58 See e.g. the position forwarded in the submission of Egypt on behalf of the Non-Aligned Movement in the follow-up to Human Rights Council resolution 25/15, UN Doc. A/HRC/RES/15/25, 7 October 2010, available at <http://www.ohchr.org/Documents/Issues/Development/Session12/NAM.pdf>. For some background information on the NAM, see e.g. <htttp://www.nti.org/learn/treaties-and-regimes/non-aligned-movement-nam/>.

tion of the RTD.[59] In section 4.1 below we will present more details of the substance of the duty to cooperate in the context of the Right to Development.

A last set of implementation obligations that emerges from the UNDRTD relates to the structural nature of the development agenda. It relates to the obstacles encountered in realizing this agenda and is expressed in various references to the need to establish 'a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States'.[60] According to the UNDRTD's Article 4(2):

> Sustained action is required to promote more rapid development of developing countries. 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.

Article 5 refers to the need to eliminate the human rights violations:

> 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 7 of the UN Declaration adds another realm by raising the importance of action for international peace and security and for achieving disarmament. In the context of the national implementation measures to be taken, Article 8(1) of the UNDRTD prescribes that '[a]ppropriate economic and social reforms should be carried out with a view to eradicating all social injustices'. It is no surprise that on these structural elements of the UNDRTD, which so directly raise current economic structures and interests, progress is most hard to find of all.

So what then, overall, is the significance of the UNDRTD? Elements of an answer to this question can be derived from the following statement by former UN High Commissioner for Human Rights Navi Pillay − who has been a great advocate for the Right to Development – in her foreword to a book published on the occasion of the 25th anniversary of the UNDRTD, addressing the course of affairs since the adoption of the Declaration:

> 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 govern-

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59 For a cluster of arguments see e.g. Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford University Press, 2007; Philip Alston, 'Making Space for New Human Rights: The Case of the Right to Development', 1 *Harvard Human Rights Yearbook* (1988) pp. 3-40; Arne Vandenbogaerde, 'The Right to Development in International Human Rights Law: A Call for Its Dissolution', 31 *Netherlands Quarterly of Human Rights* (2013) pp. 187-209.

60 UNDRTD, *supra* n. 1, Art. 3(3). See also Preamble, para. 15.

> ance, at both the global and national levels, have been at best negligent, and at times complicit, in this onslaught. […] This was not the vision of […] the Declaration on the Right to Development […]. 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.[61]

In other words, an important substantive vision has been developed in the form of the RTD, but concrete follow-up action is still wanting. In this context, we also agree with, a slightly adjusted version of, Fukuda-Parr's follow-up remark to her above assessment of the UN Declaration: '[i]ts instrumental value lies in introducing human rights norms and standards into global governance, and [in calling for] effecting reforms in national and international policies'.[62]

In light of the fierce political controversy over certain key aspects of the RTD, as outlined above, and the urgent need to make headway, we advocate a pragmatic approach for revitalizing its implementation. Rather than seeking recourse to the creation of new legal instruments, such as a treaty or framework convention on the RTD, in our view the most promising – though difficult − way forward is through mobilizing existing international law. This entails drawing firmer attention to relevant provisions in already existing instruments, (re-)interpreting such instruments where appropriate and feasible, finding new momentum for example in the Sustainable Development Goals, and creating at least rudimentary accountability through conducting international monitoring processes or using regional and inter-regional mechanisms where available. Some aspects of this suggestion will be examined below.

4. REVITALIZING THE IMPLEMENTATION OF THE RIGHT TO DEVELOPMENT BY MOBILISING EXISTING INTERNATIONAL LAW AND BUILDING ON THE MOMENTUM OF THE SDGS

This contribution so far has indicated that there is quite a bit of ground to build on in international law relevant to the Right to Development, contested as it is. Nevertheless, seventy years after the adoption of the UN Charter and thirty years after the adoption of the UNDRTD, still very little real RTD implementation practice has been achieved. This does not mean, however, that no progress at all has been made on tackling development issues. On the contrary, in relation to certain persistent problems such as for example under-five child mortality − which halved in the last decades − and child poverty, tremendous achievements can be noted.

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61 See Navi Pillay, 'Foreword', in Office of the High Commissioner for Human Rights, *supra* n. 44, pp. iii-v, at p. iii.

62 Fukuda-Parr, *supra* n. 33, at p. 857.

According to UNICEF's report The State of the World's Children 2016: A Fair Chance for Every Child, children born today 'are over 40 per cent. more likely to survive to their fifth birthday and more likely to be in school'[63] than was the case in the year 2000. Even on child poverty and child mortality, however, according to UNICEF much more action still is badly needed, if only because:

> […] in the midst of progress, millions of children continue to live – and die – in unconscionable conditions. In 2015, an estimated 5.9 million children died before reaching age 5, mostly as a result of diseases that can be readily and affordably prevented and treated. Millions more children are still denied access to education simply because their parents are poor or from a stigmatized group, because they were born female, or because they are growing up in countries affected by conflict or chronic crises. And even though poverty is falling globally, nearly half of the world's extreme poor are children, and many more experience multiple dimensions of poverty in their lives.[64]

Clearly, the Millennium Development Goals have played a positive role in the realization of the abovementioned successes in combatting poverty and under-five child mortality. They certainly have managed to bring about renewed momentum for development goals and targets, even though they grossly restricted the agenda to eight crucial, but not all-encompassing Goals. In addition to the existing hard law in the UN Convention on the Rights of the Child, no less than four out of the eight MDGs specifically addressed issues concerning poverty or child mortality. This may be a basis for explaining the relatively positive changes for children since the year 2000.[65] In other words, the MDG example suggests that old/existing law can get an impetus from new political mobilization and momentum. This sparks hope in terms of the to-be-expected impact of the − more comprehensive, and more rights oriented − SDGs.[66]

If one analyses the existing law relevant to the Right to Development, including the hard and soft law that was already reviewed in this contribution, then three common substantive orientations emerge that are crucial for improving the imple-

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63 UNICEF, *The State of the World's Children 2016: A Fair Chance for Every Child*, New York, June 2016, <http://www.unicef.org/sowc2016/>, p. 3.

64 Ibid.

65 These were, respectively, MDG 1 on eradicating extreme poverty and hunger, MGD 4 on reducing child mortality, MDG 5 on improving maternal health and MDG 6 on combatting HIV/AIDS, malaria and other diseases. Another explicitly child-related MDG was MDG2, focusing on achieving universal primary education. See e.g. <http://www.un.org/millenniumgoals/>.

66 As our introduction already revealed, *supra* n. 2, paras. 10 and 35, Agenda 2030 was 'informed by […] the Declaration on the Right to Development' and sees societies that 'are based on respect for human rights (including the right to development)' as a necessity for realizing sustainable development. Although Agenda 2030 overall contains a good number of references to human rights, the Goals and Targets themselves hardly contain any rights language. This is an opportunity lost to truly reconcile the three dimensions of sustainable development (economic, social and environmental) that Agenda 2030 seeks to integrate and balance. Ibid., Preamble para. 4; Declaration paras. 2 and 5; Follow-up and Review section para. 74(c). See also Shahra Razavi, 'The 2030 Agenda: Challenges of Implementation to Attain Gender Equality and Women's Rights', 24 *Gender & Development* (2016) pp. 24-41.

mentation record. Firstly, across older and newer instruments, including the SDGs,[67] a strong call for inclusive development appears. This element has evolved most strongly of the three orientations presented here. It entails *inter alia* that development objectives, targets and interventions should be non-discriminatory. The non-discrimination principle has a strong status both in international and national law. It has found its place in international human rights law but also in international trade law.[68] Pursuing inclusive, non-discriminatory development and/or equal development opportunities implies special attention for the position, needs and rights of vulnerable, marginalised and/or discriminated people. These often will include women, children, persons with disabilities, indigenous people(s) and rural populations. The non-discrimination principle is a core element of human rights-based approaches to development and, as such, has gained more prominence in development practice than in the past. It is a crucial key to bringing home development for all.

Secondly, there is a strong need for comprehensive and coherent approaches that seek to integrate, and possibly balance, the various interests, needs and rights that come together in the concept of sustainable development and the associated implementation agenda. This entails adequately looking after economic, social, cultural, political and other relevant dimensions and manifestations of development. This also involves considering both human and ecological needs, and looking for normative and policy coherence. As observed before, the UNDRTD does not contain any environmental provisions. Consequently, in that respect it is incomplete and/or out of date. The SDGs are more progressive as far as this is concerned and explicitly seek to integrate and balance the economic, social and environmental dimensions of sustainable development.[69] This SDG consensus should be built upon in the future.

Thirdly, to really structurally advance the Right to Development, a new international order has to be pursued which would redress the current injustices in international economic and trade law, and allow for more forceful action on global challenges such as climate change and concerning financing development. This has been the elephant in too many relevant rooms for too long though, both at international and national levels. As described in section 3.2., this element of the

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67 See e.g. Razavi, *supra* n. 66, at p. 27.

68 Most of the global UN human rights treaties contain non-discrimination clauses. One of the more recent ones is Art. 5 of the Convention on the Rights of People with Disabilities. This provision synthesizes the current consensus on the meaning and implications of the non-discrimination principle in international human rights law as follows. According to para. 1 'all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law'. According to para. 2 'States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.' According to para. 4: 'Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination.' An example from international trade law is the most favoured nations clause by which, according to the World Trade Organization, '[u]nder the WTO agreements, countries cannot normally discriminate between their trading partners', see <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm 1>.

69 See Razavi, *supra* n. 66, at p. 29 for details.

RTD has received little follow-up. Hence is it no surprise that MDG 8, on the Global Partnership for Development,[70] also has been labelled 'the most neglected of all MDGs'.[71] Progress in this area has been very difficult and slow and there is not much reason to believe that this picture will change drastically in the near future.

In the next section we will nevertheless review the scope for revitalizing the implementation of the Right to Development. In doing so we will focus on three concrete means of implementation for which we believe there to be sufficient leads for seeing at least some prospect for positive change. These means are: international cooperation, accountability mechanisms and regional and inter-regional instruments and procedures.

4.1 Advancing international cooperation

As explained in section 3.2, the duty to cooperate for international development is a long-standing element of international law. More in particular, it is a standing feature of various global and widely ratified UN human rights instruments. For example, the general implementation article of the 1966 International Covenant on Economic, Social and Cultural Rights already specified that States parties to that Covenant shall 'take steps, individually and through international assistance and cooperation, especially economic and technical' to realize the Covenant.[72] While 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 Torture and the Migrant Workers Convention all lack such an international cooperation provision, some other global UN human rights instruments have ever more elaborate stipulations on this aspect.

Accordingly, the general implementation article of the 1989 UN Convention on the Rights of the Child (Art. 4) provides that '[w]ith regard to economic, social and cultural rights, States Parties shall undertake such [implementation] measures

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70 This Global Partnership entailed: (1) developing 'an open, rule-based, predictable, non-discriminatory trading and financial system' (Target 8.A); (2) addressing 'the special needs of least developed countries' (Target 8.B); (3) dealing 'comprehensively with the debt problems of developing countries' (Target 8.D.); (4) providing '[i]n cooperation with pharmaceutical companies, […] access to affordable essential drugs in developing countries' (Target 8.E); and (5) making available, '[i]n cooperation with the private sector, […] benefits of new technologies, especially information and communications' (Target 8.F). See <http://www.un.org/millenniumgoals/global.shtml>.

71 Razavi, *supra* n. 66, at p. 27. See also Meredeth Turshen, 'A Global Partnership for Development and Other Unfulfilled Promises of the Millennium Project', 35 *Third World Quarterly* (2014) pp. 345-357.

72 International Covenant on Economic, Social and Cultural Rights, Art. 2(1), adopted 16 December 1966, entry into force 3 January 1976, 164 States parties on 1 July 2016 according to <https://treaties.un.org>. Art. 11 introduced international cooperation obligations in relation to realizing the right to food and Art. 15 recognized 'the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields'.

[…] where needed, within the framework of international co-operation'. More specific aspects are highlighted in references to undertakings to cooperate internationally on: the production, exchange and dissemination of information and material of social and cultural benefit to the child;[73] protecting and assisting refugee children;[74] preventive health care and treatment of children with disabilities;[75] health;[76] and education.[77] Article 45 explains the mandate of the UN Committee on the Rights of the Child to encourage international cooperation by liaising between various relevant actors.

The Convention on the Rights of Persons with Disabilities has a similar general implementation provision as the Convention on the Rights of the Child,[78] and brings the matter even to a higher level by featuring a lengthy separate article on international cooperation in general terms. This article precedes the one on national implementation and monitoring.[79] Likewise, the mandate of the Committee on the Rights of Persons with Disabilities also explicitly extends to encouraging international cooperation.[80]

Due to the nature of the topic covered, it is not unexpected that the International Convention for the Protection of All Persons Against Enforced Disappearance, in its Article 15, contains 'only' a rather specific and modest international cooperation obligation:

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73 Convention on the Rights of the Child, Art. 17(a) and (b), adopted 20 November 1989, entry into force September 1990, 196 States Parties on 1 July 2016 according to <https://treaties.un.org>.

74 Ibid., Art. 22(2).

75 Ibid., Art. 23(4) clarifies that 'States shall promote, in the spirit of international cooperation, the exchange of appropriate information […] including dissemination of and access to information concerning methods of rehabilitation, education and vocational services. […] particular account shall be taken of the needs of developing countries.'

76 Ibid., Art. 24(4), which demands particular account to be taken of the needs of developing countries.

77 Ibid., Art. 28(4) and see n. 76 *supra*.

78 Convention on the Rights of Persons with Disabilities, adopted 13 December 2006 and entered into force on 3 May 2008; 195 States Parties on 1 July 2016 according to <https://treaties.un.org>. See general implementation Art. 4 which formulates international cooperation obligations where needed in relation to economic, social and cultural rights.

79 Ibid. This (very interesting) Art. 32 reads as follows: '1. 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 measures could include, inter alia: (a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities; (b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices; (c) Facilitating cooperation in research and access to scientific and technical knowledge; (d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies. 2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.'

80 Ibid., Arts. 37 and 38.

> States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.[81]

All in all, the various UN human rights treaties presented above − covering a wide range of important issues relating to economic, social and cultural rights, children's rights, persons with disabilities and the phenomenon of enforced disappearance − provide a solid and concrete legal basis and reason for further operationalizing international cooperation for development. The UN treaty bodies involved have already acted upon this to some extent by referring to international cooperation and/or assistance in quite a few of their General Comments.[82] In doing so, the Committee on Economic, Social and Cultural Rights has not only referred several times to the obligations of States to contribute to international cooperation, but also indicated that States parties who lack national resources for achieving progressive realization of economic, social and cultural rights 'have an obligation to seek international cooperation and assistance'.[83] In this way, at least in legal terms, the circle of the duty to cooperate has been closed.

A feasible way forward in terms of RTD implementation action would be for the treaty bodies involved to pay more attention to relevant aspects of the duty to cooperate for human rights and development in the state reporting procedures that they conduct. This would entail that they enquire more frequently and more explicitly than currently is the case whether governments sufficiently provide or request international cooperation and assistance, according to what applies in the particular case. A further impetus could be found in the SDGs. After all, when endorsing the SDGs, the UN member States referred to the goal of achieving the SDGs as a

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81 International Convention for the Protection of All Persons Against Enforced Disappearance, adopted 20 December 2009, entry into force 23 December 2010. According to this Convention, enforced disappearance is brought about by 'agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State'. Ibid., Art. 2. It follows that this is a rather sensitive matter, which perhaps makes intergovernmental cooperation rather complex.

82 In a General Comment (GC) a treaty body publishes its interpretation of the content of the human rights treaty that it has under its wing. Since 1989, the Committee on Economic, Social and Cultural Rights has adopted 23 GCs. Only four of these lack references to international cooperation/assistance (GC no. 7 (1997) on forced evictions, GC no. 9 (1998) on the domestic application of the Covenant, GC no. 10 (1998) on the role of national human rights institutions and GC no. 16 (2005) on the equal right of men and women to the enjoyment of economic, social and cultural rights). Since 2001 the Committee on the Rights of the Child has issued 17 GCs. All except two of these refer (succinctly or elaborately) to international cooperation and/or assistance. The exceptions are GCs no. 10 (2007) on juvenile justice, and 12 (2009) on the right to be heard. Until now, the Committee on the Rights of Persons With Disabilities adopted two GCs. The second one, adopted in 2014 and addressing accessibility, contains multiple references to international cooperation.

83 This statement was made in relation to the right to just and favourable conditions of work. Committee on Economic, Social and Cultural Rights, 'General Comment No. 23 (2016) on the Right to Just and Favourable Conditions of Work (Art. 7 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/23, 27 April 2016, para. 52.

'collective journey'.[84] They also expressed their determination 'to mobilize the means required to implement this Agenda through a revitalized Global Partnership for Sustainable Development, based on a spirit of strengthened global solidarity'.[85] Another interesting dimension could be that of stepping up South-South international cooperation, although for the time being this could only complement – and not replace – North-South cooperation. A current example is that of the India Brazil South Africa Dialogue Forum. This Forum was established in June 2003 because of 'the necessity of a process of dialogue among developing nations and countries of the South to counter their marginalisation'.[86] The three States involved collaborate in IBSA because they are determined to: contribute to the construction of a new international architecture; bring their voices together on global issues; and deepen their ties in various areas. They also conduct 'concrete projects of cooperation and partnership with less developed countries'.[87] While thus a potentially promising start has been made, this seems not yet to have generated an all-encompassing policy practice. For example, there are reports that the foreign economic policies of IBSA States 'deliberately but also unintentionally create sub-optimal conditions for the development of some of their Southern neighbours'.[88]

4.2 Strengthening accountability

Another vital element in pushing for more implementation action concerning the RTD is that of assigning more concrete responsibilities to both rights holders and duty bearers. The more vigilant role for the UN human rights treaty bodies that we proposed in the previous section could also contribute to processes of assigning such specific responsibilities. Obviously, monitoring the extent to which States actually perform their RTD obligations – for example in relation to making available or demanding international assistance − then would become more useful and so perhaps more achievable. In this way the state reporting procedures concerning the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on Persons With Disabilities, and to a lesser extent the International Convention on the Protection of All Persons from Enforced Disappearance, could turn into monitoring possibilities for the specific RTD elements that are relevant to the human rights treaty involved. Once such practice took off, over time this could perhaps even inspire greater attention for RTD issues in the work of the Human Rights Council,[89] more in particular in

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84 Agenda 2030, Preamble, *supra* n. 2, at p. 1.

85 Ibid., at p. 2.

86 As stated at IBSA members site, <http://www.ibsa-trilateral.org/>.

87 Ibid., <http://www.ibsa-trilateral.org/about-ibsa/background>. For more information see South Centre, 'South-South Cooperation Dialogue Held in the UN, Geneva', *Southnews*, no. 111, 4 July 2016.

88 Philip Nel and Ian Taylor, 'Bugger Thy Neighbour? IBSA and South-South Solidarity', 34 *Third World Quarterly* (2013) pp. 1091-1110, at p. 1091.

89 At the moment the Human Rights Council annually receives a report from the Intergovernmental Working Group on the Right to Development as regards implementation aspects of the right to development, see <http://www.ohchr.org/EN/Issues/Development/Pages/WGRight

the Universal Periodic Review process by which the Council reviews the overall human rights records of all UN member states.

On the one hand the suggestions above might seem idealistic and/or naïve. After all, most of the global efforts to further specify the implications of the RTD have stranded. One of the more recent examples is the work of the High Level Task Force on the Right to Development. The set of operational criteria and list of indicators for the implementation of the RTD that the Task Force developed reportedly appear 'to have brought the political divisions to a head'.[90] On the other hand, there might be a new straw to seize, in that the process around the formulation of the SDGs has clearly generated a renewed emphasis on concrete targets, on data as a basis for evidence-based monitoring and on the development of concrete sustainable development indicators.[91] It remains to be seen, however, how strong or weak this straw will turn out to be. While the 'Follow-Up and Review' section of Agenda 2030 as such is relatively elaborate and comprehensive, it is utterly disappointing that the review process is stated to be an entirely 'voluntary and country-led' process and that 'the global review will be based primarily on national official data sources'.[92] According to Shahra Razavi, Chief of Research and Data of UN Women since mid-2013, 'there was complete consensus' among the UN member States about keeping the review process voluntary, 'regardless of their regional, political, or ideological differences on other issues'.[93] We fully agree with her that, 'given the explicit human rights anchoring of the new Agenda, it is doubly disappointing that Member States did not break any new ground in subjecting themselves' to more robust monitoring systems.[94]

4.3 Using regional and inter-regional understandings of the RTD

As outlined in section 2 above, some binding regional and inter-regional instruments also have incorporated RTD content or inspired RTD implementation efforts. These might provide leads for revitalizing the RTD as well. The most direct and prominent example of such an instrument is Article 22 of the African Charter on

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ToDevelopment.aspx> and *supra* n. 25. Sometimes concrete follow-up action is requested. For an overview of Human Rights Council involvement so far, see Human Rights Council, 'Report of the Working Group on the Right to Development on its sixteenth session (Geneva, 27 April, 1-4 September 2015)', UN Doc. A/HRC/30/71, 28 October 2015, pp. 3-4.

90 Sakiko Fukuda-Parr, *supra* n. 33, at p. 847. For the contents of the criteria and indicators, see Human Rights Council, 'Report of the High-Level Task Force on the Implementation of the Right to Development on its Sixth Session', UN Doc. A/HRC/15/WG.2/TF/2/Add.2, 8 March 2010.

91 See Agenda 2030, *supra* n. 2, Declaration paras. 48 and 57 and SDG Targets 17.18 and 17.19; and Statistical Commission, 'Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators: Note by the Secretary-General', UN Doc. E/CN.3/2016/2/Rev.1, 19 February 2016.

92 Agenda 2030, Declaration para. 74(a).

93 Razavi, *supra* n. 66, at p. 38.

94 Ibid., partly quoting Sanjay G. Reddy and Ingrid H. Kvangraven, 'Global Development Goals: If at All, Why, When and How?', 2015, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2666321>, at p. 13.

Human and Peoples' Rights. Former Prince Claus Chair Holder in Development and Equity Olajumoke Oduwole, who during her tenure of this Chair focussed her work on the RTD, has noted that this Article is understudied. She also observed that:

> the relevance of this regional right to analysis of the universal RTD lies in its contextual guidance regarding the original intent of the African developing country players who initiated this right at the regional level, as well as the continent's contribution in the area of jurisprudence on the RTD so far.[95]

It is in this regard indeed that the African perspective on the RTD could be an inspiration for the revitalization or operationalization of the RTD at the global level.

Important developments have been recorded at the African regional human rights system regarding both the conceptual and operational understanding of the RTD. The African Charter on Human and Peoples' Rights, referred to in short as the Banjul Charter, remains the only tested international instrument on the RTD with an emerging quasi-jurisprudence on the subject. Reportedly, at least seven of the over 229 decisions that had been rendered by the African Commission until June 2016 carry relevance for the RTD. These cases either explicitly involved the RTD, or are strongly relevant to it, for example because they address pertinent economic, social and cultural aspects of development.[96] As stated in section 2 above already, Article 22 of the African Charter stipulates that, '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind' and that 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development'.[97] Although Obiora Okafor has noted that the content of Article 22 'remains obscure as to the nature of the concept of development […] [especially as] no detailed developmental programme can be deciphered from [its] reading', implementation practice under this clause could provide

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95 Olajumoke O. Oduwole, 'International Law and the Right to Development: A Pragmatic Approach for Africa', Inaugural Lecture as Professor to the Prince Claus Chair in Development and Equity 2013/2015, delivered on 20 May 2014 at the International Institute of Social Studies, The Hague, <http://www.iss.nl/fileadmin/ASSETS/iss/Documents/Academic_publications/PCC_Inaugural_Lecture_20May2014.pdf>, at p. 4. For information on the Prince Claus Chair see <http://princeclauschair.nl/>.

96 Ibid., at p. 17. For further analysis on the Decisions of the African Commission, see African Human Rights Case Law Analyser, accessible via <http://caselaw.ihrda.org/body/acmhpr/>. The term quasi-jurisprudence refers to the fact that the complaints procedure involved generates recommendations which 'are not in themselves legally binding on the States concerned'. These recommendations are included, however, in the Commissioner's Annual Activity Reports that are sent to the OAU Assembly of Heads of State and Government, which, under certain circumstances, e.g. could request a further study of the case(s) involved. According to Oduwole, ibid., n. 141 at p. 29, the African Commission's findings are 'persuasive and generally well-respected'. See Arts. 55-58 of the Banjul Charter and, for more background, <http://www.achpr.org/communications/procedure/>.

97 *Supra* n. 18.

a useful perspective on potential options for revitalizing the RTD in international law.[98] Okafor thought so too and in a 2013 publication already advocated that a 'globally contextualized analysis of article 22' of the African Charter might even hold important lessons for 'any anticipated global treaty on the right to development'.[99] According to Okafor, the developments in the African regional human rights system have established that:

> 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 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.[100]

For our purposes, it is indeed most important to consider how the African Commission has interpreted and given meaning to Article 22. So far, the African Commission's most well-known decision regarding a violation of Article 22 of the African Charter is that in the Endorois case. This case involved the forced removal in the 1970s of the Endorois (a pastoralist group) from their ancestral land on which they had lived for centuries, to set up a national game reserve and tourist facilities.[101] The complainants in this case raised several violations of their rights under the African Charter, including their Right to Development under Article 22. In the 2009 decision in this case, the African Commission found that the Kenyan government had indeed violated Article 22. It clarified the content of the RTD by 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 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, overarching themes in the right to development.

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98 See generally Obiora C. Okafor, 'A Regional Perspective: Article 22 of the African Charter on Human and Peoples' Rights', in OHCHR*, Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, New York/Geneva, United Nations, 2013, pp. 373-384.

99 Ibid., at p. 378.

100 Ibid.

101 African Commission on Human and Peoples' Rights, *Case Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council* v. *The Republic of Kenya*, Communication No. 276/2003, 25 November 2009, <http://www.achpr.org/communications/decision/276.03/>.

> In that regard it takes note of the report of the UN Independent Expert who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states '… the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available'. Freedom of choice must be present as a part of the right to development.[102]

In the earlier case of Democratic Republic of the Congo v. Burundi, Rwanda and Uganda the African Commission had already shed light on the meaning of the RTD as well as the entitlements and duties that follow.[103] In adjudicating this case, that concerned regional military interference in the Democratic Republic of the Congo, the African Commission noted that:

> The deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation – their right to their economic, social and cultural development and of the general duty of states to individually or collectively ensure the exercise of the right to development, guaranteed under article 22 of the African Charter.[104]

This specific interpretation of the RTD in a growing body of quasi-jurisprudence by the African Commission contrasts with, and could usefully complement, the more abstract current debates at the global level.

Article 22 of the Banjul Charter as interpreted by the African Commission is instrumental in at least two ways. Firstly, at the conceptual level, it offers a more detailed understanding of the RTD. Secondly, at the enforcement level, the African system might hold clues for those who advocate similar accountability or enforcement structures at the global level. The African model, its achievements, effectiveness and challenges could provide some critical thoughts, for example for those supporting a global treaty on the RTD, and thereby it would be useful to analyse and publicise these more than has been the case so far.

The other example of a treaty operating at the inter-regional level and relevant for RTD debates that was presented in section 2 above is the ACP-EU Cotonou Agreement. The current version of this treaty, that provides the framework for international development cooperation between in total 107 States in Europe, Africa, the Caribbean and the Pacific, will expire in 2020. While this treaty does not refer to the RTD as such, its implementation practice shows several highly relevant features.[105] In the run-up to the start of the renegotiations on terms of collaboration between the ACP and the EU, there are signs that several of the achievements established in the past may be at risk. This extends for example to the principle of

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102 Ibid., paras. 277-278, emphasis as in original.

103 *Democratic Republic of the Congo* v. *Burundi, Rwanda and Uganda*, Communication 227/99, 29 May 2003, <http://www.achpr.org/communications/decision/227.99/>.

104 Ibid., at para. 95.

105 Section 2 *supra*, main text between n. 20 and 21.

joint management of the cooperation activities and the relationship as such. Some EU member States as well as some forces in the European Commission would not mind doing away with this aspect and returning to a more unilaterally directed basis for ACP-EU relations.[106] This would seriously affect participation of the ACP states in the process and so cut back on an important aspect of the RTD. There might be space, however, for curbing such tendencies, should they materialise as official positions later on in the formal negotiation process. This space might be found in the EU Action Plan on Human Rights and Democracy 2015-2019, in which the Union has committed itself 'to move towards a rights based approach to development cooperation, encompassing all human rights by pursuing its full concrete integration into all EU development instruments and activities' and 'to contribute to discussions on the right to development'.[107] Renegotiating the terms of ACP-EU collaboration will become an important litmus test for the EU's commitment to its self-imposed policy priorities.

5. CONCLUSION

This paper has explored the scope for revitalizing the RTD through existing international law, rather than by creating additional normative frameworks. In analysing the state of the Right to Development thirty years after the adoption of the UNDRTD, we found a mixed picture. On the one hand, the protracted debate and controversy over the RTD have more or less ended up in a stalemate at the global level, with the exception of selected UN human rights treaties and the SDGs process that we have discussed. While Agenda 2030 is directly inspired by rights-based approaches to development and the RTD, however, the possible hope that this may generate for revitalizing the RTD is tempered by the fact that the SDGs themselves and the attached Targets do not represent a firm rights orientation. Accordingly, we have pointed out modest potential (and partly alternative) spaces for revitalizing the RTD and its implementation efforts on the basis of, respectively:

- progressive developments concerning the law on international cooperation, especially as (to be further) taken up by UN human rights treaty bodies;
- creating accountability processes, which include monitoring the extent to which States actually perform their RTD obligations; and
- learning from regional experiences on concretising the RTD such as the ones thus far gained most notably in the African regional system.

Though not exclusive of other elements, in our view these three aspects certainly are germane to future understandings of the RTD and to the potential realization

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106 For an overview of achievements and challenges of the ACP-EU partnership in light of the expiration of the Cotonou Agreement, see Advisory Council of International Affairs, *supra* n. 21.

107 EU Action Plan on Human Rights and Democracy 2015-2019, 10897/15, Brussels 20 July 2015, adopted para. 27(a) and (c).

of this right in the coming period. In particular, they reinforce the argument that, notwithstanding current contestations, the core elements of the RTD already exist firmly in international law. As Fantu Cheru has stated: 'the UN Charter and the accompanying two human rights covenants establish the foundations for an ethical system of global governance'.[108] While we acknowledge that RTD practice is scattered at best, and insufficient overall − and that this is due to the differences in persistent economic, political and ideological interests of 'developed' and 'developing' states − we also note that at the regional level the African human rights system is in the process of producing a fuller understanding of the RTD that supports its further definition (both in terms of substance and implementation obligations) and its enforceability. States across the globe would do well to take up the challenges of operationalizing and practising the RTD now, through both national and international means and measures. Besides serving to fulfil the RTD, this also would be a tremendous step forward in tackling current global problems relating to structural poverty and inequalities, contagious diseases, climate change and mass migration.

6. PROPOSITIONS AND POINTS FOR DISCUSSION

1. The Right to Development has a firm basis in existing international law and should be acted upon accordingly.

   This paper has explained this firm basis in international law, consisting of a combination of hard and soft law instruments. At the same time, we have shown that the substantive and political divisions prevailing between − and within − the North and the South about the exact substance and implications of the RTD remain enormous. Recent efforts, e.g. relating to the development of a (framework) treaty on the RTD or work on operational criteria and indicators for the implementation of the RTD, have not generated new openings for strengthening the position of the RTD in international law. It is appropriate, therefore, to bring the RTD back to its basis in international law and to work through the existing normative framework.

2. The duty to cooperate for development should be invoked and acted upon more explicitly in relevant international and national fora.

   An important cluster of issues behind the controversies referred to in point 1 has to do with the division of responsibilities for actually implementing the RTD. The meaning and concrete implications of the duty to cooperate are tough bones of contention. At the same time it must be recognized that international cooperation and assistance is at the core of the UN Charter, selected global UN human rights treaties and other relevant instruments (including environmental treaties and the SDGs). This means that the duty to cooperate for development

[108] Cheru, *supra* n. 6, at pp. 1277-1278.

is an established norm in international law that should be invoked more explicitly and acted upon more frequently. Some of the UN human rights treaty bodies and the Human Rights Council could contribute to this objective by paying more attention to RTD issues in their work. Recent initiatives in stepping up South-South cooperation should be warmly welcomed, but as complementary initiatives only as they cannot replace North-South cooperation.

3. The substantive vision of the UNDRTD remains fully relevant today. Translating this into a concrete framework for implementation requires priority now.

   The UNDRTD provides one of the few structured approaches to addressing development issues in a rights-based manner. This has only gained relevance and attraction since its adoption, as is proven by the content of recently adopted international instruments including Agenda 2030 and its SDGs. At the time of its adoption, the UNDRTD represented a milestone achievement to underpin calls addressing the structural injustices that still mar the international economic system. As the UN and the world are about to witness the 30th anniversary of this Declaration, it still remains to be seen how its implementation for the benefits of right holders could be stepped up. Action on this front is long overdue.

4. Accountability is key.

   A key element of the UNDRTD is equity and participation. Also in light of the required emphasis on implementation that has been presented in point 3, there definitely is a need for more accountability in relation to development matters, policies and practices. The process of formulating the SDGs has clearly generated a renewed emphasis on concrete targets, on data as a basis for evidence-based monitoring and on the development of concrete sustainable development indicators. It remains to be seen, however, how strong or weak this potential new space for action will turn out to be, and how helpful this could be towards the revitalization of the RTD. In this respect too, some of the UN human rights treaty bodies and the Human Rights Council could help to introduce more accountability features, by incorporating RTD issues more straightforwardly in their human rights monitoring work.

5. Developments at the regional level, such as in the African human rights system, provide useful information for global efforts on the RTD.

   The past and current work done on further detailing the meaning and implications of the RTD in the African regional human rights system, most notably in the form of the complaints handled by the African Commission and ensuing quasi-jurisprudence, are a valuable source of information for those interested in finding ways to revitalize RTD efforts, including enhancing accountability and enforcement structures, at the global level.

THE RIGHT TO DEVELOPMENT: A TREATY AND ITS DISCONTENTS*

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ABBREVIATIONS

CHR	Commission on Human Rights
ECFR	European Council on Foreign Relations
ECtHR	European Court of Human Rights
EU	European Union
FDI	Foreign direct investment
GA	General Assembly of the United Nations
HLTF	High-Level Task Force
HRBA	human rights based approach
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ILO	International Labour Organization
NAM	Non-Aligned Movement
NGO	Non-governmental organization
NIEO	New International Economic Order
OECD	Organization for Economic Co-operation and Development
Rio+20	United Nations Conference on Sustainable Development, Rio de Janeiro, June 2012
UN	United Nations
UN-REDD	United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation
UNCITRAL	United Nations Commission on International Trade Law
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

1. INTRODUCTION

On 4 December 1986, the United Nations General Assembly adopted the Declaration on the Right to Development by a majority of 146 to 1 with 8 abstentions.[1]

The Declaration did not lead to the adoption of a treaty. Further codification of the right to development was debated at length at the UN Commission on Human Rights, then at the Human Rights Council.[2] The current Working Group on the right to development has met since 1998,[3] and was assisted at first by an Independent Expert[4] (1998-2004) and later by a High-Level Task Force[5] (2004-2010). Filibustering continues.

Human Rights Council resolution 4/4 sets the framework for the talks. The resolution was adopted by consensus in 2007, at the height of political support within the Council for the work of the High-Level Task Force. The resolution contains a programme of work that should 'lead to raising the right to development […] to the same level and on a par with all other human rights and fundamental freedoms'.[6] The programme of work provides that criteria for the periodic evaluation of global partnerships should be prepared. These were to be used 'as appropriate' in the elaboration of a comprehensive and coherent set of standards for the implementation of the right to development, and

> upon completion of the above phases, the Working Group will take 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.[7]

The High-Level Task Force subsequently proposed a '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 environment conducive to just, equitable, participatory and human-centred development respectful of all human

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1 UN General Assembly resolution 41/128, UN Doc. A/RES/41/128, 4 December 1986. Against: United States of America; abstentions: Denmark, Finland, Federal Republic of Germany, Iceland, Israel, Japan, Sweden and United Kingdom. For a reference book on the history of the right to development and on the adoption and implementation of the Declaration: *UN Office of the High Commissioner for Human Rights (Ed.), Realising the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, New York, United Nations, 2013, also available on-line from the OHCHR website.

2 For a brief history, see Stephen P. Marks, *The Politics of the Possible. The Way Ahead for the Right to Development*, Berlin, Friedrich Ebert Stiftung, 2011.

3 CHR resolution 1998/72, 22 April 1998, para. 10(a). The Working Group was preceded by a fifteen-member working group of governmental experts on the right to development, set up in CHR resolution 1993/22, 4 March 1993.

4 CHR resolution 1998/72, 22 April 1998, para. 10(b).

5 CHR resolution 2004/7, 13 April 2004.

6 HRC resolution 4/4, 30 March 2007, para. 2(a).

7 Ibid., para. 2(d).

rights'.[8] The proposed core norm had three attributes: a comprehensive and human-centred development policy, participatory human rights processes and social justice in development. For each of the attributes, the HLTF drew up a table of criteria, sub-criteria and indicators that related to both domestic development policies and global responsibilities.[9] The HLTF final report was not well received. The Non-Aligned Movement argued that the HLTF had overemphasized national responsibilities, while neglecting the basic notion of international cooperation.[10] The NAM reiterated that the right to development should be translated into an international legal framework on a par with other human rights. The European Union responded that it did not favour an international legal standard of a binding nature. Instead, the EU preferred implementation of the right to development through the elaboration of benchmarks and indicators for States to empower individuals as active agents in the development process.

The Human Rights Council deemed it wise not to extend the mandate of the High-Level Task Force. Instead, the Working Group itself embarked on drafting 'criteria and corresponding operational sub-criteria', a hazardous task that is has yet to complete. In 2015, the Human Rights Council mandated the Chair of the Working Group (by a majority vote, not by consensus) to prepare a document containing a set of standards, 'without prejudice to the on-going discussion on criteria and operational sub-criteria'.[11] The Chair duly delivered his report containing four 'consensual and non-controversial standards' that were to constitute 'the beginning of a journey' towards the full implementation of the right to development.[12] No irony was intended.

The current paper discusses the merits of a global treaty on the right to development from the perspective of general international law, and of international human rights law in particular.

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8 'Right to development criteria and operational sub-criteria', Addendum to the Report of the high-level task force on the implementation of the right to development on its sixth session, UN Doc. A/HRC/15/WG.2/TF/2/Add.2, 8 March 2010, at p. 8.

9 Consolidation of findings of the high-level task force on the implementation of the right to development, UN Doc. A/HRC/15/WG.2/TF/2/Add.1, 25 March 2010, paras. 81-82; Addendum, *supra* n. 8, paras. 16-18.

10 Submissions in follow-up to HRC resolution 25/15 'The Right to development', by Egypt on behalf of the NAM, and by the EU, on file with the author. A compilation of submissions is found in UN Doc. A/HRC/WG.2/12/2, 29 July 2011.

11 HRC resolution 30/28, 20 October 2015, UN Doc. A/HRC/30/L.12, paras. 10-11. Resolution adopted by a 33-10-4 vote.

12 'Standards for the implementation of the right to development', Report of the Chair-Rapporteur of the Working Group on the Right to Development, UN Doc. A/HRC/WG.2/17/2, 16 March 2016, para. 45.

2. A CONTEMPORARY UNDERSTANDING OF THE RIGHT TO DEVELOPMENT

The right to development is a composite right that includes various rights holders and duty bearers; the right also has both domestic and transboundary dimensions.[13] The different aspects of the right are interconnected. The ambition is to deal with the relationship between human rights and development in a comprehensive manner. Considered separately, some elements of the right are already reflected to varying degrees in current global human rights law; others are not.

Both individuals and peoples hold the right to development. The right to development is a human right, not a right held by States. Peoples include whole populations of States, as well as peoples within States (see *infra* n.14).

International human rights law deals primarily with the relationship between the domestic State and the rights holders within its jurisdiction. The domestic dimension of the right to development also deals with this relationship. Both individuals and peoples have a right of participation and benefit-sharing in development that they can claim from their own government. The implementation of the right to development is not an issue of purely domestic concern. Other actors (States) are entitled to monitor and criticize the domestic government's compliance record.

Next to the domestic dimension, the right to development also includes a transboundary dimension. Third States and other actors bear a concurrent responsibility for the realization of the right. Although the UN Declaration on the Right to Development focuses on the obligations of third States, the realization of the right to development is an objective for the international community as a whole, and therefore also for non-State actors, including intergovernmental organizations and private actors.[14] Third States should abstain from activities that harm rights holders

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13 The terminology used to identify the different dimensions of the right to development has varied over time. The Office of the High Commissioner on Human Rights recently produced a Frequently Asked Questions fact sheet that, building on the work of the HLTF, suggests the use of the following terms to describe State obligations pertaining to the right to development: 'States thus have obligations at three levels: (a) internally, through the formulation of national development policies and programmes affecting persons within their jurisdictions; (b) internationally, through the adoption and implementation of policies extending beyond their jurisdictions; and (c) collectively, through global and regional partnerships.' See UNOHCR, Frequently Asked Questions on the Right to Development. Fact Sheet No. 37, Geneva, United Nations, 2016, at p. 4, available at <http://www.ohchr.org/Documents/Publications/FSheet37_RtD_EN.pdf>.

14 When the idea of a human right to development was originally launched in the seventies, Karel Vasak and Keba M'Baye emphasized the need for the involvement of a variety of actors in the realization of the right to development. In Vasak's view, the active holders of the right to development were individuals, States and also sub-national groups such as local collectivities and national, ethnic and linguistic communities. The duty bearers included not only territorially responsible States but also the international community as a whole. The desired effect was to humanize the international economic order. Only if all actors on the social scene participated both as holders and duty bearers would the objective be realized. See K. Vasak, 'Le droit international des droits de l'homme', 51 *Revue des droits de l'homme* (1972) pp. 43-51; Kéba M'Baye, 'Le droit au développement comme un droit de l'homme', 5 *Revue des Droits de l'Homme* (1972) pp. 503-534.

elsewhere. They should assist in the realization of the right, e.g. through official development assistance. The human rights based approach to development, extra-territorial obligations of States, State duties to protect against abuse by private actors and the human rights responsibility of non-State actors all speak to elements of the transboundary dimension of the right to development.

In addition, the domestic State and other actors share a duty to cooperate for the realization of the right to development. Joint commitments are an expression of shared responsibility. They may take the form of treaties between States or of agreements between a variety of State and non-State actors. In a right to development approach, not only should such agreements be geared towards the realization of the right to development; they should also include joint accountability of the parties to the rights holders, and a mechanism enabling the rights holders to establish non-compliance.

3. THE ALTERNATIVES TO A TREATY

Legal scholars have brought forward various arguments in favour or against a global treaty on the right to development. Supporters are convinced that such a treaty would add value to the current global human rights treaty system. Opponents argue that the objectives of the UN Declaration on the Right to Development can be met without a treaty.[15] The arguments are reviewed below.

The most principled opposition to the right to development rests on the view that only individuals can hold human rights. As all global and regional manifestations of the right include a collective dimension, the right to development cannot be a human right at all, so neither soft nor hard law documents on a human right to development are desirable. Proponents of this view find no merit in engaging in the debate on whether a further codification of the right to development is useful. In discussions at the HRC Working Group, the principled opposition to the right to development as a human right has remained at the heart of interventions by the United States. From a political perspective, progress on codification at the Working Group thus depends primarily on whether a consensus can be reached between the Non-Aligned Movement and European States.

3.1 **The Declaration suffices**

The Declaration on the Right to Development is a non-binding UN General Assembly resolution. Soft law instruments may nevertheless have a significant impact on

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15 Consider Arne Vandenbogaerde, 'The Right to Development in International Human Rights Law: A Call for Its Dissolution', 31/2 *Netherlands Quarterly of Human Rights* (2013) pp. 187-209, who takes the view that the right to development has no added value if economic, social and cultural rights are interpreted properly. For the opposite position, see Daniel Aguirre, *The Human Right to Development in a Globalized World*, Farnham, Ashgate, 2008, Isabella D. Bunn, *The Right to Development and International Economic Law. Legal and Moral Dimensions*, Oxford, Hart Publishing, 2012, Margot E. Salomon, *Global Responsibility for Human Rights*, Oxford University Press, 2007.

the behaviour of States and of other actors. They are not necessarily complied with less than hard law.[16]

Arguably, the adoption of the Declaration has fostered the integration of human rights into the development activities of many UN bodies and specialized agencies. Similarly, the right to development has become part and parcel of the global human rights debate, and thus even States that do not support upgrading the legal status of the right to development are under some pressure to demonstrate that they are making efforts to ensure its implementation.[17]

The provisions in the Declaration that go beyond current human rights treaty law are couched in open, often ambiguous language that does not lend itself easily to justiciability. The strength of the Declaration, so the argument goes, lies in giving direction to debates on human rights and development: the primary responsibility of the domestic State, the duty of cooperation of the international community, the need to discuss an international economic order that facilitates the realization of human rights, the fallacy of the argument that development comes first and human rights afterwards…; all of these provisions in the Declaration set a framework for the global debate. Soft law is ideally suited for this purpose: 'From this point of view, soft law should be embraced as a phenomenon that benevolently pushes the development of international law while circumventing the drawbacks of traditional modes of law-making.'[18] On the other hand, soft law also has been criticized for sacrificing consent as a foundation for international law, and replacing it by effectiveness.[19] In this context, it is a drawback that support for the Declaration, even as a non-binding text, was not unanimous.

Within general international law, hard law and soft law interact to a certain degree. Soft law instruments can be 'used as mechanisms for authoritative interpretation or amplification of the terms of a treaty, and to that extent must be taken into account'.[20] Martin Scheinin argues that it is viable 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 is given to the treaties in question.[21]

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16 Compare Dinah L. Shelton, 'Introduction', in Dinah L. Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 2000, pp. 1-18, at pp. 13-17.

17 The EU Action Plan on Human Rights and Democracy 2015-2019, attached to Council Conclusions of the Foreign Affairs Council of 25 July 2015, commits the EU to 'contribute to discussions on the right to development' (para. 27(c)). These documents are available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A1301_1>.

18 Ingo Venzke, *How Interpretation Makes International Law*, Oxford University Press, 2012, at p. 227.

19 Ibid., at pp. 228-230.

20 Alan E. Boyle and Christine Chinkin, *The Making of International Law*, Oxford University Press, at p. 216.

21 See Martin Scheinin, 'Advocating the Right to Development through Complaint Procedures under Human Rights Treaties', in Bård Andreassen and Stephen Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, Antwerp/Cambridge, Intersentia, 2010, pp. 339-352.

It is not self-evident, however, that the Declaration qualifies as a 'mechanism for authoritative treaty interpretation'. The Vienna Convention on the Law of Treaties lays down rules on the interpretation of treaties.[22] Article 31(3) sets the relevant standard:

> There shall be taken into account, together with the context:
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties.

At the occasion of the 25th anniversary of the Declaration, the Chairpersons of the UN Treaty Bodies issued a Statement, declaring their resolve to:

> make a concerted effort to promote a development-informed and interdependence-based reading of all human rights treaties, so as to highlight and emphasize the relevance and importance of the right to development in interpreting and applying human rights treaty provisions and in monitoring compliance with these provisions.[23]

Clearly, the Joint Statement does not equal a 'subsequent agreement' or 'practice' of the parties to current human rights treaties as required by Article 31(3)(a) of the Vienna Convention.[24] Ultimately, whether 'a development-informed and interdependence-based reading' is given, hinges on the willingness and expertise[25] of the monitoring bodies, and on the willingness of State parties to abide by the monitoring bodies' interpretation.

Also, not all elements of the right to development can easily be covered by a development-informed reading of the human rights treaties. Perhaps the individual right to development, at least in as far as it relates to the domestic State, lends itself most easily to such an approach. Extraterritorial State obligations are already more

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22 Vienna Convention on the Law of Treaties, 23 May 1969.

23 'The 25th anniversary of the Declaration on the Right to Development', Joint Statement of Chairpersons of the UN Treaty Bodies, 29 June 2011, available at: <http://www.fes-globalization.org/geneva/documents/29June2011_JointStatChairUNTB_25AnniversaryRtD.pdf>. See also a Statement by the UN Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/2011/2, 20 May 2011, emphasizing the close relationship and the complementarity between the International Covenant on Economic, Social and Cultural Rights and the Declaration on the Right to Development.

24 Boyle and Chinkin suggest with regard to General Comments that these might be understood as a form of 'delegated soft law' accepted by States. Boyle and Chinkin, *supra* n. 20, at p. 217.

25 In an analysis of the Convention on the Rights of Persons with Disabilities, Stein and Lord invoke 'historic lack of enforcement and the attendant lack of expertise of monitoring bodies' of rights of persons with disabilities as one of the central motivations for the making of a specialized treaty. See Michael Stein and Janet Lord, 'The Normative Value of a Treaty as Opposed to a Declaration: Reflections from the Convention on the Rights of Persons with Disabilities', in Stephen P. Marks (ed.), *Implementing the Right to Development. The Role of International Law*, Berlin, Friedrich Ebert Stiftung, 2008, pp. 27-32, at p. 28.

controversial: given the resistance of States, monitoring bodies tend to exercise caution in insisting on compliance.[26] On joint responsibilities of States the treaties have little to offer. Direct obligations of non-State actors are difficult to construct under treaties that are not open to them. As to the peoples' right dimension, a development-informed interpretation of the right to self-determination might be attempted, but so far the practice of the monitoring bodies in dealing with the right to self-determination has been scarce. In conclusion, the right to development can only be partially constructed through interpretation of existing human rights treaties.

The African Commission has interpreted the African Charter on Human and Peoples' Rights[27] in the light of the UN Declaration.[28] Differently from international human rights treaties, the African Charter includes a peoples' right to development.[29] In its assessment of whether the Endorois had participated sufficiently in decision making affecting their lands, the African Commission used the standard contained in Article 2(3) of the UN Declaration on the Right to Development, namely whether participation had been 'active, free and meaningful'. The African Commission found that it had not, and found Kenya responsible for a violation of the right to development.[30]

Moving outside of the realm of human rights law, it becomes even more difficult to use the Declaration for the purposes of treaty interpretation, e.g. in the case of a treaty dealing with trade or investment issues. The key provision in this instance is Article 31(3)(c) (see p. [6] above). Could the UN Declaration on the Right to Development be considered a 'rule applicable in the relations between the parties'?

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26 The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 28 September 2011, suggest that extraterritorial responsibility is incurred in situations in which a State's acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, outside its territory and in situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law (see Art. 9(b) and Art. 9(c)). There is not yet any case law in this area, however.

27 African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/673 rev. 5, available at <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf>.

28 African Commission on Human and Peoples' Rights, *Case Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. The Republic of Kenya*, Communication No. 276/2003, 25 November 2009, available at <http://www.achpr.org/communications/decision/276.03/>. In its decision the African Commission uses the UN Declaration on the Right to Development as well as the Declaration on Indigenous Rights, both soft law instruments, to shed light on Art. 22 of the Charter. On the *Endorois* case, see also Serges A.D. Kamga, 'The Right to Development in the African Human Rights System: The *Endorois* case', 23 *De Jure Law Journal* (2011) pp. 381-391, available on line at: <http://www.saflii.org/za/journals/DEJURE/2011/23.pdf>.

29 Art. 22 of the African Charter on Human and Peoples' Rights, *supra* n. 27, 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.'

30 *Endorois* case, *supra* n. 28, at para. 283.

The International Court of Justice in Oil Platforms interpreted the Iran-US Treaty of Amity (which was at the heart of the dispute) in light of the rules of international law on the use of force. According to the Court, the application of the relevant rules of international law formed an integral part of the task of interpretation entrusted to it by the Treaty of Amity.[31] The UN Declaration on the Right to Development by no means enjoys the legal status that the rules on the use of force enjoy, however. It remains contested whether a non-binding text, the content of which has not developed into customary law, could be considered as 'a rule applicable between the parties'.[32] It may be acceptable (but certainly not obligatory) to take inspiration from non-binding texts– and even then probably only among parties that voted in favour of the Declaration. It remains highly unlikely that an investment tribunal, when confronted with a dispute on the human rights impact of an investment treaty, would be willing to take into consideration the UN Declaration on the Right to Development.

If the right to development were part of a global hard law instrument, chances of its use in the context of Article 31(3)(c) increase. Boyle and Chinkin, commenting on the Framework Convention on Tobacco Control, explain that the decision to negotiate a treaty on tobacco control rather than mere soft law was 'because it ensured that whatever was agreed would, once in force for most States, over-ride any inconsistent commitments of a more general kind undertaken by States'.[33] As the law stands today, a conflicting treaty in the area of international economic law will prevail over the right to development.

Similarly, the impact of treaty law on domestic legal systems is more significant. Treaties potentially restrain domestic law-making, while soft law does not. Treaty obligations may override contradictory domestic laws. Claims based on the right to development, as any other human rights claim, emerge locally, and are addressed first and foremost within the framework of the domestic legal system. Such claims can be based on treaties (if the domestic legal system on the incorporation of international law so allows), but not on soft law.

3.2 More soft law is useful

Nico Schrijver, an erstwhile member of the HLTF, argues that the realization of the right to development is better served by the adoption of additional guidelines or recommendations on implementation than by embarking on a treaty-making process.[34] He points out that guidelines or recommendations allow addressing

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31 International Court of Justice, *Oil Platforms, Islamic Republic of Iran v. United States*, Judgment of 6 November 2003, para. 41, available at <http://www.icj-cij.org/docket/files/90/9715.pdf>.

32 For an argument supporting this approach, see Dirk M. Broekhuijsen, 'A Modern Understanding of Article 31(3)(c) of the Vienna Convention (1969): A New Haunt for the Commentaries to the OECD Model?', 67/9 *Bulletin for International Taxation* (2013), available via <http://www.ibfd.org/IBFD-Products/Bulletin-International-Taxation-All-Articles>.

33 Boyle and Chinkin, *supra* n. 20, at p. 129.

34 Nico J. Schrijver, 'Many Roads Lead to Rome. How to Arrive at a Legally Binding Instrument on the Right to Development?', in Marks (ed.), *supra* n. 25, pp. 127-129.

States and non-State actors alike, and quotes OECD efforts in regulating foreign investment and ILO labour norms as useful precedents. Within the UN Working Group on the Right to Development arguably the sentiment prevails that guidelines, recommendations or standards offer a higher chance of generating consensus than a treaty, even if progress has been minimal.

Whether an additional soft law document will advance the right to development remains to be seen. If the purpose is to offer guidance on the implementation of the Declaration on the right to development, the scope of the document will be constrained by the Declaration itself. It may (or may not) be feasible to deal flexibly with the relationship between the Declaration and the guidelines, and to address contemporary issues that are not or only implicitly covered in the original Declaration. The human rights treaty monitoring bodies have sometimes ventured into this territory[35] albeit at the expense of State party criticism. A dissimilarity with the general comments is, however, that what is envisaged here are soft law guidelines on a prior soft law text. As Dinah Shelton has suggested:

> […] soft law adopted pursuant to a widely-accepted hard law agreement will reflect greater commitment and therefore better compliance than a new norm in soft law form chosen because there was no agreement on a hard law text.[36]

The idea of tackling lack of compliance with a soft law text through the adoption of a soft law commentary on the same text does not immediately appeal to the imagination. One could disconnect the additional document from the Declaration, and approach the instrument as a stand-alone text offering guidance on how law-making efforts and practices of a variety of actors could contribute to the realization of the right to development. Such a text could, however, also take the form of an expert report – the nature of which would not differ all that much from earlier valuable work by the Independent Expert and the HLTF.

Finally, it is improbable that an additional soft law instrument will put an end to the debate on a legally binding standard. HRC resolution 4/4 already anticipates that any guidelines adopted may evolve into a binding standard. The majority in the Human Rights Council will perceive of guidelines as a stop rather than a final destination. The HRC debate on corporate human rights responsibilities serves as warning. The adoption by consensus of the Guiding Principles on Business and Human Rights did not prevent the subsequent creation of an open-ended intergovernmental working group, mandated to elaborate an international legally binding instrument to regulate corporate responsibility for human rights.[37]

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35 For an example, see UN Committee on Economic, Social and Cultural Rights, General Comment 15, 'The right to water', UN Doc. E/C.12/2002/11, 20 January 2003, available at <http://www.unhcr.org/en-us/publications/operations/49d095742/committee-economic-social-cultural-rights-general-comment-15-2002-right.html>.

36 Shelton (ed.), *supra* n. 16, at p. 14.

37 See e.g. the 'Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument', UN Doc. A/HRC/31/50, 5 February 2016.

3.3 **A customary law norm in the making**

HRC resolution 4/4 refers to an 'international legal standard of a binding nature', not to a 'treaty'. Is it conceivable that the right to development could gradually evolve into a customary law norm, even without the adoption of a treaty?

Some significant soft law instruments, such as the Vienna World Conference on Human Rights Declaration,[38] the Millennium Declaration[39] and the Rio+20 Outcome Document include the right to development.[40] In the 2030 Agenda for Sustainable Development[41] the right to development appears twice. The Agenda is 'informed' by the Declaration on the Right to Development[42] and the parties acknowledge the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on 'respect for human rights (including the right to development)'.[43]

The listed declarations were adopted by consensus. Nevertheless, they do not provide evidence of a genuine legal conviction (*opinio juris*) that the right to development is a legally binding right in general international law. The declarations deal with a huge number of issues. States opposing a legally binding right to development accept references to the right to development in omnibus texts for the sake of reaching a consensus, and in full awareness of the non-binding character of the instrument. The adoption by consensus of the declarations has not affected their persistent objection or abstention on resolutions dealing specifically with the right to development. States have widely diverging legal convictions on the right to development as a legally binding norm, and in general their conduct has not been consistent with the various dimensions of the right to development.

Perhaps the customary law test is no longer appropriate for determining the content of general international law. Onuma argues that today General Assembly resolutions adopted by unanimity or consensus constitute a more legitimate source of general prescriptive[44] norms of conduct than customary law. The process of

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38 World Conference on Human Rights, 'Vienna Declaration and Programme of Action', UN Doc. A/CONF.157/23, 25 June 1993, para. 10.

39 UN General Assembly resolution 55/2, 8 September 2000, UN Doc. A/RES/55/2, 18 September 2000, para. 11: 'We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.'

40 Rio+20 UN Conference on Sustainable Development Outcome Document, UN Doc. A/CONF. 216/L.1, 19 June 2012, para. 8: 'We also reaffirm the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality, the empowerment of women and the overall commitment to just and democratic societies for development.' Available at < http://www.un.org/disabilities/documents/rio20_outcome_document_complete.pdf>.

41 UN General Assembly resolution 70/1, 25 September 2015, 'Transforming Our World: The 2030 Agenda for Sustainable Development', UN Doc. A/RES/70/1, 21 October 2015.

42 Ibid., para. 10.

43 Ibid., para. 35.

44 Onuma distinguishes between prescriptive and adjudicative norms. Adjudicative norms are norms that can be used in judicial decision making. See Yasuaki Onuma, *A Transcivilizational Perspective on International Law*, Leiden, Martinus Nijhoff, 2010, at pp. 230-231.

adoption of General Assembly resolutions allows input by non-State actors that are excluded from contributing to the formation of customary law. He argues that a limited number of important UN General Assembly resolutions should be relied on as a cognitive basis for identifying the norms of general international law, when their wording and voting patterns so allow.[45] From this perspective, the body of declarations referred to above arguably could suffice to establish the existence of the right to development as a non-adjudicative prescriptive norm of conduct.

3.4 The right to development can be realized through the human rights based approach to development

The human rights based approach to development aims at ensuring that international development cooperation, and development programming in particular, is directed at the realization of human rights. The Stamford Common Understanding on the human rights based approach to development cooperation adopted by UN agencies, funds and programmes in May 2003[46] sets out the main features of the approach:

- All programmes of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
- Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
- Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.

The human rights based approach refers to all human rights, including the right to development. As such, the HRBA can be perceived as a potential tool for the realization of the right to development.[47] Article 4(4) of the Declaration provides for a duty of States to collectively take steps to formulate international development policies that facilitate the realization of the right to development. An HRBA-based official development policy could constitute one such step.

In practice, however, the right to development is largely ignored in donor's human rights based approaches to development cooperation. Donor countries primarily use HRBA to strengthen the capacity both of government agencies, with a view to assisting them in complying with their treaty obligations, and of human

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45 Ibid., at p. 241.

46 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies', available at: <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>.

47 Compare the view expressed by Germany in the Report of the UN High Commissioner for Human Rights, 'Realization and implementation of the right to development', UN Doc. A/HRC/WG.2/17/3, 17 March 2016, para. 18.

rights civil society organizations, so as to enable them to develop human rights activities in resource-scarce and/or politically hostile environments. Donors tend to perceive of HRBA as a best practice, not as a duty. They are reluctant to apply a human rights based approach to all their international relations, including trade and investment. In HRBA, donors tend not to engage either with the peoples' right dimension of the right to development, or with the human rights impact of the international economic order. In practice, the match between HRBA and the right to development is limited.

3.5 International human rights law already covers the domestic dimension of the individual right to development

The domestic dimension of the right to development tackles the relationship commonly dealt with in human rights law, i.e. the relation between the State and the rights holders within its jurisdiction. Individual human rights apply to any field of government policy. What applies to all State policies, inevitably applies to the State's development policy too. The Declaration and existing human rights treaties thus cover similar ground. They require that there should be active, free and meaningful participation by rights holders in development and in the fair distribution of the benefits resulting therefrom (Articles 3(3) and 8(2)), that States should not practise discrimination (Article 6(1)), that rights are indivisible and interdependent (Article 6(2)) and that States should provide access to basic resources and eradicate social injustice (Article 8(1)). Perhaps an argument could be attempted that development is a broader concept than human rights, and that therefore the individual right to development in the domestic context goes beyond the realization of civil, cultural, economic, political and social rights.

Nevertheless, Article 6(3) of the UN Declaration on the Right to Development on the need to eliminate obstacles to development resulting from the failure to observe human rights served as a strong rebuttal to the argument of authoritarian States that economic development came first, and human rights later. In any case, in the context of a global declaration or a treaty on the right to development, the reaffirmation of the domestic dimension of the individual right to development is inevitable, because the domestic and international dimensions of the right are intertwined. The obligation of the domestic State to exercise its sovereignty responsibly goes hand in hand with the duty of other States and other actors to contribute to the realization of the right to development.

Some further work could still be done on clarifying the domestic dimension of the right to development. The domestic State's obligation to protect the right holders against abuses by third parties in particular deserves more emphasis. Included in this obligation is a duty to shield domestic right holders from the potentially adverse development impacts by external actors, including foreign States, intergovernmental organizations and private actors.[48]

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[48] See Koen De Feyter, 'The Right to Development in Africa', in Eva Brems, Christophe Van der Beken and Solomon A. Yimer (eds.), *Human Rights and Development*, Leiden, Brill/Nijhoff, 2015, pp. 23-50.

Particular attention also could be given to the need for the State to collect disaggregated poverty data allowing determination of poverty levels of different groups within society. Raising awareness and ensuring transparency of domestic development data, issues and decisions is a necessary precondition for the exercise of the right to development by those marginalized within society. Legislation on the disclosure of public information, on the organization of public hearings among affected populations, etcetera, is crucial for the effective realization of the domestic dimension of the right to development.

3.6 The politics of the barely possible

Some political arguments speak against attempting a treaty on the right to development. Wanton debates among a shrinking circle of intimae have drained the HRC Working Group on the Right to Development of norm-making energy. Ibhawoh convincingly argues that discussions on the right to development demonstrate how the legitimizing language of human rights is used to press goals that have more to do with the international politics of power and resistance and with the interests of regimes than with welfare and empowerment of ordinary citizens.[49] Given this history, Upendra Baxi warns that dissensus is such that to embark on a treaty-making exercise may imperil the originary vision and values of the Declaration on the Right to Development.[50]

Political arguments also can be mobilized, however, to support the opposite view. At the United Nations General Assembly and at the Human Rights Council, ideological divisions on human rights between North and South 'resemble to a great extent the ideological disputes […] at the end of the Cold War'.[51] The division of opinion between the Non-Aligned Movement and the European Union not only affects the debate on the right to development, it also extends to many other thematic and country specific issues at the Human Rights Council. For years the European Council on Foreign Relations, in its annual reports on the EU and human rights at the UN, has found that 'there has been a gradual erosion of support for the EU's positions in votes on human rights issues'.[52] From an EU perspective, it is essential to forge coalitions at the Human Rights Council with non-Western States on issues prioritized in the EU's external human rights action. Theodor Rathgeber argues that, in order to move beyond the bloc voting practice that is

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49 Bonny Ibhawoh, 'The Right to Development: The Polemics of Power and Resistance', 33 *Human Rights Quarterly* (2011) pp. 76-104.

50 Upendra Baxi, 'Normative Content of a Treaty as opposed to the Declaration on the Right to Development', in Marks (ed.), *supra* n. 25, pp. 47-51, at p. 48.

51 Manfred Nowak, Moritz Birk, Tiphanie Crittin and Julia Kozma, 'UN Human Rights Council in Crisis: Proposals to Enhance the Effectiveness of the Council', in Wolfgang Benedek, Florence Benoît-Rohmer, Wolfram Karl and Manfred Nowak (eds.), *European Yearbook on Human Rights 2011*, Vienna, NWV Verlag, 2011, pp. 41-84, at p. 58.

52 Richard Gowan and Franziska Branter, 'The EU and Human Rights at the UN: 2011 Review', London, ECFR, 2011, available at <http://www.ecfr.eu/page/-/ECFR39_UN_U PDATE_2011_MEMO_AW.pdf>. See also Richard Gowan, 'Who Is Winning on Human Rights at the UN?', London, ECFR, 2012, available at <http://www.ecfr.eu/article/commentary_who_is_winning_on_human_rights_at_the_un>.

detrimental to the EU external human rights policy, the EU needs to revise its policies in addressing some of the main concerns of countries from the Global South at the Human Rights Council.[53]

A position on the right to development that allows enhancing its legal status does not come at a high cost for the European Union. The shift would create a new momentum in human rights discussions, however, that will be helpful to the EU in forging 'fluctuating coalitions that are cross-regional in scope'[54] on issues that are at the heart of its external human rights action.

More fundamentally, the perception that a legally binding right to development would only impose additional burdens on European States vis-à-vis populations for which they are not legally responsible, is inaccurate. The 2030 Agenda for Sustainable Development is an agenda 'applicable to all', 'setting universal goals and targets which involve the entire world, developed and developing countries alike'.[55] Europeans may well need the protection that the right to development offers them. In a changing global economic environment, a duty to shield domestic right holders from the potentially adverse development impacts by external actors, including foreign States, intergovernmental organizations, and private actors, may prove to be important.

In a completely different approach, States supportive of an enhanced legal status of the right to development may choose to conclude a treaty among themselves. A political majority in support of a treaty is most probably available at the UN General Assembly. Countries from the Global North may opt out, but as the inclusion of the right to development in the African Charter demonstrates, it still may be valuable to achieve agreement within the Global South. The duty to cooperate as a dimension of the right to development could be usefully explored in a South-South context as well, given the increasing disparity of human development levels within the South. The treaty would certainly test the boundaries of South-South (and even intra-regional) solidarity. On the other hand, it is unlikely that a South-South coalition would support a strong domestic protection of both individuals and peoples as holders of the right, unless civil society in the South can leave a mark on the drafting process.

3.7 **On a par with other human rights**

In HRC resolution 4/4, the Human Rights Council agreed:

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53 Apart from the right to development, Rathgeber lists racism and discrimination, migrants, climate change, the impact of globalization as well as of the international financial institutions in terms of human rights, and the equality of economic, social and cultural rights as compared to civil and political rights. See Theodor Rathgeber, 'Dialogues as a Challenge: The EU in the Human Rights Council 2007 and 2008', in Wolfgang Benedek, Wolfram Karl, Anja Mihr and Manfred Nowak (eds.), *European Yearbook on Human Rights 2009*, Vienna, NWV Verlag, 2009, pp. 147-158, at p. 156.

54 Jan Wouters en Katrien Meuwissen, *The European Union at the UN Human Rights Council. Multilateral Human Rights Protection Coming of Age?* Leuven, Centre for Global Governance, Working Paper 126, 2013, at p. 23.

55 UN General Assembly resolution 70/1, *supra* n. 41, para. 5.

> […] on a programme of work that will lead to raising the right to development, as set out in paragraphs 5 and 10 of the Vienna Declaration and Programme of Action, to the same level and on a par with all other human rights and fundamental freedoms;[56]

The phrase 'all other human rights and fundamental freedoms' refers to rights currently included in international human rights treaties. It is difficult to see how the right to development can be raised 'to the same level and on a par' with other human rights unless legal obligations pertain to the right. As the Universal Declaration on Human Rights provides, human rights may well derive from human dignity, but they are not specific about the agents that are required to realize them until the obligations of these agents are spelled out. What is crucial for all human rights, is crucial for the right to development as well: that the duty bearers have legal obligations; that a mechanism is available that can specify the nature and extent of these obligations by giving authoritative interpretations; that rights holders are capable of inducing compliance, and that they have access to a remedy.

Regional human rights bodies have consistently held that human rights law must be interpreted in such a way that it results in real protection. The European Court of Human Rights stated that the European Convention on Human Rights should be interpreted in a manner which renders the rights not 'theoretical or illusory but […] practical and effective'.[57] The Inter-American Court of Human Rights added that 'human rights treaties are live instruments whose interpretation must adapt to the evolution of the times, and, specifically, to current living conditions'.[58]

The effective protection criterion can also be used to assess the need for further normative development in human rights law. Human rights are instruments aimed at safeguarding the dignity of all human persons. If existing human rights treaties are normatively inadequate to provide protection to the many in the world population who are currently deprived, then the need for the further normative development of human rights is established.

4. THE ADDED VALUE OF A TREATY

4.1 **The importance of being inclusive**

The historical development of general international law and of international human rights law provides the backdrop to contemporary debates on the right to development.

Current public international law originated in Europe, and aimed at regulating the relationship between European sovereign States.[59] As members of the interna-

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56 HRC Resolution 4/4, *supra* n. 6, para. 2(a).

57 ECtHR, *Artico v. Italy*, 13 May 1980, 3 EHRR 1 (1981), para. 33.

58 IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, C/79, para. 146. See similarly ECtHR, *Tyrer v. United Kingdom*, 25 April 1978, 2 EHRR 1 (1978), para. 31.

59 This sub-section reflects findings in Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2005.

tional society, European sovereigns were bound by what they agreed to, and by unwritten laws that they observed in practice. European societies were sufficiently alike for principles that regulated their behaviour to be discovered and agreed.

International law was universalized in the wake of imperial expansion during the 19th century. In the relations between European and non-European societies, however, different rules applied. Non-European societies had laws that were deemed so alien in character that reciprocal relationships could not be established. The legal practices of non-European societies were not a source of international law. Non-European societies were not considered to be members of the international society: with some exceptions the forms of political organization of these uncivilized societies did not meet the criteria of sovereign States. It followed that European States had a right to enter these territories, establish commerce, and assume sovereignty until the societies had reached the state of advancement (or: the 'standard of civilization', i.e. compliance with European standards)[60] that would allow them to achieve recognition as a sovereign State.

According to Anghie, international law still operates within the framework inherited from the 19th century:

> It is doubtful whether a discipline whose fundamental concepts 'sovereignty' and 'law' had been so explicitly and clearly formulated in ways which furthered colonialism could be readily reformed by the simple expedient of excising or reformulating the offending terminology.[61]

Certainly, the history of exclusion of non-European law that was a feature of public international law when it expanded its reach to non-European societies has contributed to the lingering perception in the Global South that international law is an instrument for the universalization of foreign norms. International human rights law is part and parcel of public international law. Human rights law too has a European pedigree.

On the other hand, human rights is the language the international community uses when it seeks to protect human dignity. But if the concept is to resonate with users in the Global South, the input from non-European law and non-European societies is crucial. As Onuma puts it:

> For human rights to be accepted by people all over the world and become truly universal, it must overcome its peculiarities stemming from its historicity. […] [H]uman rights must be re-conceptualized, responding to diverse cultures, religions and civilizations, which do not necessarily share characteristic features of modern European civilizations.[62]

The cognitive basis of global human rights must expand beyond what is required in Europe (or in the Global North) to protect human dignity. Human rights

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60 Ibid., at p. 84.
61 Ibid., at p. 111.
62 Onuma, *supra* n. 44, at p. 387.

conceptualizations in the Global South that genuinely address human rights needs in those societies should be incorporated in global human rights law. These conceptualizations may occur in social practices (e.g. within local groups), in texts of resistance drafted by social movements,[63] in human rights scholarship by authors from the Global South, in regional treaties and instruments or in constitutional and other domestic laws of countries in the Global South.

Onuma correctly argues that the individual-centrism of human rights has 'worked against taking up the suppression of various types of people' as a human rights problem.[64] It has also made it difficult to acknowledge the extent to which individuals rely on their membership of groups for human rights protection, and has arguably contributed to a too anthropocentric view on the value of nature.[65] The State-centrism of human rights has impaired its capacity to deal with suffering that is caused by global inequality.

The challenge of including all human rights traditions into the global concept of human rights and of increasing the responsiveness of human rights to threats to human dignity in the Global South cannot be met by enhancing the legal status of the right to development only. But the impact of the debate on the right to development on the global legitimacy of human rights should not be underestimated. Here is a human rights concept that emerged in the Global South; that has been examined carefully in high quality legal scholarship from the Global South, and that has been incorporated as a legally binding and justiciable right in the African Charter on Human and Peoples' Rights. The right to development speaks to a host of real human rights issues in the Global South: the history of exclusion through colonialism and the many inequalities that history left behind; the lack of global solidarity for the realization of human rights, and the importance of protecting groups on which people rely for human rights protection against adverse interventions from the domestic State.

The acceptance and effectiveness of human rights law as global law will benefit from the inclusion of the right to development on a par with other human rights.

4.2 The form of the treaty

If soft law instruments are significant because 'they are the first step in a process of negotiation eventually leading to the conclusion of a multilateral treaty',[66] one option is to draft a treaty that remains close to the Declaration. Such an instrument would resemble existing human rights treaties. It would be open for ratification by States and would contain State obligations that primarily apply domestically. Its observance would be monitored by a treaty body. The treaty would incorporate developments in international law that have taken place since the adoption of the Declaration (see p. 57 *infra*).

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63 Balakrishnan Rajagopal, *International Law from Below*, Cambridge University Press, 2004, at pp. 235-236.

64 Onuma, *supra* n. 44, at p. 429.

65 Compare Jan G. Laitos, *The Right of Nonuse*, Oxford University Press, 2012.

66 Boyle and Chinkin, *supra* n. 20, at p. 216.

It would be difficult, however, for such an instrument to cope with the myriad of relationships covered by the right to development.[67] The realization of the right to development depends in part on joint commitments between States. Joint commitments imply mutual accountability. Mutual State accountability is a core pillar of cooperation in the OECD Paris Declaration on Aid Effectiveness.[68] In the Paris Declaration, mutual accountability signals a move away from one-way recipient to donor accountability towards a contractual approach, where each party is understood to have obligations towards the other, and where mutual progress is jointly assessed within an institutional set-up created for this purpose.[69] Mutual accountability also has a broader significance, as

> a process through which commitment to, and ownership of, shared agendas is created and reinforced by: building trust and understanding; shifting incentives towards results in achievement of shared objectives; embedding common values; deepening responsibilities and strengthening partnership; and openness to external scrutiny for assessing results in relation to goals.[70]

In public international law, commitments between States are dealt with in 'ordinary' reciprocal treaties. Human rights treaties, however, are based less on an exchange of State obligations than on the obligations of each State vis-à-vis the rights holders within its jurisdiction.[71] Thus, a prospective treaty on the right to development dealing with both separate and joint State obligations ideally should be a hybrid between a standard international treaty and a human rights treaty.

To the notion of mutual inter-state accountability for development, the right to development adds an essential human rights element: the requirement that the duty holders are accountable to the rights holders, i.e. to individuals and peoples. In a right to development treaty, the States that mutually commit, would not only be

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67 The new instrument could usefully deal with the right to development as a common concern of humanity – a terminology already used in numerous international treaties and standards. See Koen De Feyter, 'Introduction', in Wolfgang Benedek, Koen De Feyter, Matthias C. Kettemann and Christina Voigt. (eds.), *The Common Interest in International Law*, Antwerp, Intersentia, 2014, pp. 1-7. Koen De Feyter (ed.), *Globalization and Common Responsibilities of States*, Farnham, Ashgate, 2013.

68 Paris Declaration on Aid Effectiveness, 2 March 2005, paras. 47-50, available at <http://www.oecd.org/dac/effectiveness/34428351.pdf>.

69 In the aftermath of the 2030 Agenda for Sustainable Development, partnerships for the realization of the right to development may be concluded between developing and developed countries, but not necessarily. Taking into account the changing relative capacities of States, it may just as well include partnerships between countries from the Global South.

70 James Droop, Paul Isenman and Baki Mlalazi, *Paris Declaration on Aid Effectiveness: Study of Existing Mechanisms to Promote Mutual Accountability (MA) between Donors and Partner Countries at the International Level. Final Report*, Oxford Policy Management, 2008, at p. 10, available at <http://www.oecd.org/dac/effectiveness/43163465.pdf>.

71 See ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory Opinion of 28 May 1951, 1951 ICJ Reports 23, available at <http://www.icj-cij.org/docket/files/12/4283.pdf>. See also Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', 11 *European Journal of International Law* (2000) pp. 489-519, available at <http://www.ejil.org/pdfs/11/3/540.pdf>.

accountable to each other for the fulfilment of their commitments, but also to the rights holders affected by their actions.

Elsewhere, I have argued that a right to development treaty might usefully take the form of a framework convention.[72] A framework convention contains principles rather than significant commitments. At the same time, a framework convention offers a forum for negotiations, and serves as a focal point for exchanges with non-State actors, allowing time for consensus to grow on the adoption of more specific commitments (e.g. in protocols to the convention). Arguably, current intergovernmental debates on the right to development demonstrate that the large majority of States agrees on the need to further clarify the domestic and international dimensions of the right to development. It may be possible to adopt a number of principles that give direction to further normative developments, even if there is no agreement on the specific obligations that attach to the right in general. Other characteristics of the framework convention/protocol approach appear to suit the right to development well. There is a need for a holistic rather than a piecemeal approach to the relationship between human rights and development. At the same time, a degree of scientific uncertainty remains about the impact of economic globalization on the domestic capacity of States to realize human rights, and how concepts such as 'the use of adequate resources' and 'States in a position to assist' can reasonably be defined from a political economy perspective.[73] Scientific expertise can help in clarifying reasonable expectations.

Similar to existing framework conventions, the treaty would feature a Conference of the Parties (in lieu of the HRC Working Group on the Right to Development), a Scientific Committee advising the Conference, and a Compliance Committee. Along the lines of the committee set up to monitor compliance with the Kyoto Protocol[74] one could envisage a compliance committee with two branches. The facilitative branch assists States in the implementation of the treaty, either at the State's own request, or on a recommendation of the Conference of the Parties

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72 Koen De Feyter, *Towards a Framework Convention on the Right to Development*, Geneva, Friedrich Ebert Stiftung, 2013. According to Matz-Lück, '[…] one might say that the specific characteristic of a "typical" framework convention is the formulation of the objectives of the regime, the establishment of broad commitments for its parties and a general system of governance, while leaving more detailed rules and the setting of specific targets either to parallel or subsequent agreements between the parties.' Nele Matz-Lück, 'Framework Conventions as a Regulatory Tool', 1 *Goettingen Journal of International Law* (2009) pp. 439-458, at p. 446. Van Genugten et al. write: 'Such a convention tries to combine the benefits of legal bindingness with the flexibility and "stepping-stone character" of successful soft law documents.' Willem J.M. van Genugten, Marc S. Groenhuijsen, Rob A.J. van Gestel and Rianne M. Letschert, 'Loopholes, Risks and Ambivalences in International Lawmaking: The Case of a Framework Convention on Victim's Rights', 37 *Netherlands Yearbook of International Law* (2006) pp. 109-154, at p. 153.

73 See Koen De Feyter, 'The Common Interest in International Law: Implications for Human Rights', in Wouter Vandenhole (ed.), *Challenging Territoriality in Human Rights Law*, London, Routledge, 2015, pp. 158-187, at pp. 164-177.

74 See <http://unfccc.int/bodies/body/6432.php>. See also Sebastian Oberthür, 'Options for a Compliance Mechanism in a 2015 Climate Agreement', Vrije Universiteit Brussel, Institute for European Studies, Working Paper, available at <http://act2015.org/ACT%202015_Options For%20Compliance.pdf>.

and its scientific committee. The enforcement branch decides on non-compliance, with the possibility of an appeal to the Conference of the Parties. In a right to development context, individuals and peoples should have the opportunity to petition the enforcement branch of the compliance committee, also in order to question the impact of joint commitments undertaken by States (e.g. in the area of international economic law) on the right to development. If non-compliance were to be established, the States involved could agree on an *ad hoc* basis on the remedy to be provided. The compliance committee should be composed of individual experts.

A further, perhaps complementary option is to conceive of a multi-duty bearer agreement[75] that is open to a variety of State and non-State actors. Adequate human rights protection in a context of economic globalization requires that 'every organ of society' accepts human rights accountability – an idea that can be traced back to the preamble of the Universal Declaration of Human Rights. From a somewhat different perspective, it has been argued that the legitimacy of international law can be enhanced through progressively opening up law-making processes to non-State actors. Wolfgang Benedek has suggested a number of principles that should apply to multi-stakeholder initiatives:

> […] the principle of inclusiveness, i.e. to involve all relevant stakeholders, taking their interests into account, of transparency and participation to ensure that all stakeholders are informed about the structure and dynamics of the multi-stakeholder partnership and can participate in the decisions made, of internal and external accountability, i.e. both to the members of the multi-stakeholder partnership and the public at large, who might be […affected] by the multi-stakeholder partnership.[76]

Article 3 of the Vienna Convention on the Law of Treaties does not preclude the conclusion of binding multi-stakeholder agreements under international law.[77] The parties determine whether an 'agreement' is governed by international law. When the parties do not express themselves on the binding nature of the instrument, their intention can be derived from the terms of the instrument and the circumstances of its conclusion.

The instruments adopted in the wake of the Rana Plaza disaster set an interesting precedent. The Rana Plaza building in Savar, Bangladesh, housed several garment factories producing for global brands. Its collapse on 24 April 2013 killed

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75 Yet another alternative is co-regulation. Co-regulation consists of State measures that are accompanied by self-regulation by non-State actors. Self- regulation is to ensure that the measures adopted by States are carried out by the non-State actors. For an example of this approach, see Christopher T. Marsden, *Internet Co-Regulation. European Law, Regulatory Governance and Legitimacy in Cyberspace*, Cambridge University Press, 2011.

76 Wolfgang Benedek, 'Multi-Stakeholderism in the Development of International Law', in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds.), *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma*, Oxford University Press, 2011, at pp. 209-210.

77 Art. 3 VCLT states: 'The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect: (a) the legal force of such agreements [...].'

over 1100 people, mostly women. The man-made disaster caused an international outcry. A variety of actors improvised a legal response and adopted a number of multi duty-stakeholder instruments: the Bangladesh Sustainability Compact (8 July 2013), a soft law instrument concluded by Bangladesh, the ILO, the EU and the United States of America; the Accord on Fire and Building Safety in Bangladesh (13 May 2013), agreed to by a number of trade unions and companies, with the participation of the ILO and NGOs; and the Alliance for Bangladesh Worker Safety (10 July 2013), a US corporate self-regulation instrument binding under US law.[78]

For our purposes, the Accord is of particular interest. Apparel corporations from over twenty countries, two global trade unions and several Bangladeshi trade unions signed the text. A steering committee oversees implementation. Companies and trade unions are equally represented. The ILO holds the chair. Governments and NGOs sit on an advisory board. The objective of the Accord is to finance and organize inspections on fire and building safety during a five-year period.

The Accord contains no language on its legal nature. The Accord website, however, leaves no doubt as to the intention of the parties to create 'an independent, legally binding agreement between brands and trade unions'.[79] The dispute resolution procedure included in the Accord testifies to this intention. A party to a dispute that is not satisfied with the steering committee's decision can appeal to 'a final and binding arbitration process' under the UNCITRAL Model Law on International Commercial Arbitration. The award is enforceable in a court of law of the domicile of the party against whom enforcement is sought. Only the parties to the Accord have access to arbitration. The workers have access merely to a complaint procedure at the level of the supplying factories.

The Accord offers an interesting model of a legally binding multi-stakeholder agreement that was adopted in response to gross violations of labour rights and standards. The Accord is an *ad hoc* crisis response instrument, and it remains to be seen whether it would be politically feasible to replicate it in other circumstances. The right to development does not appear in the text, but many of the features of the Accord certainly fit. Although the parties are mutually accountable, they are not accountable to the rights holders. A mechanism open to the rights holders that would enable them to test the implementation of the Accord against applicable international legal standards would be a crucial addition from a right to development perspective.

4.3 The substance of the treaty

As indicated above, a major substantive contribution of a new instrument on the right to development would be to carve out joint responsibilities of duty bearers.

A new instrument further offers the opportunity to 'update' the Declaration.

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78 On these instruments, see Beryl ter Haar and Maarten Keune, 'One Step Forward or More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh', 30(1) *International Journal of Comparative Labour Law and Industrial Relations* (2014) pp. 5-25.

79 See the home page of the Accord, <http://bangladeshaccord.org/>.

International law has progressed on the concept of development, particularly in the areas of environmental protection and gender equality, and progress should be reflected in any successor document to the Declaration. The 1992 Rio Declaration on Environment and Development clarified that environmental protection is an integral part of the development process.[80] The Rio Declaration also added an intergenerational aspect to the right to development.[81] The current United Nations commitment is to achieve 'sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner'.[82] A new instrument would need to fully project this view. In line with Article 6(3) of the Declaration, States could be required to take steps to eliminate obstacles to development resulting from the failure to respect environmental commitments. As Orellana writes, the right to development is not a right to pollute, as it was sometimes construed in climate change discussions.[83] Instead, a right to development perspective can highlight the need for technology transfers that 'can bypass the destructive environmental impacts of industrialization'.[84] Gender equality is now a more significant priority of the international community than the single reference to women in Article 8(1) of the Declaration on the Right to Development suggests.[85] Cognizance should be taken of the work by UN human rights treaty and expert bodies on the implications of gender equality and gender mainstreaming in development policies.[86] Gender equality and empowerment of women and girls is a stand-alone goal in the 2030 Agenda for Sustainable Development (Goal 5). Article 19 of the Protocol to the African Charter on Human and Peoples' Rights on the

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80 'Rio Declaration on Environment and Development', 14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, Principle 4, available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

81 Ibid., Principle 3.

82 UN General Assembly resolution 70/1, *supra* n. 41, para. 2.

83 In the Climate Change Framework Convention, the right to development makes an unhelpful appearance as a right of 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 for 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'. Art. 3(4) UN Framework Convention on Climate Change, 9 May 1992, available at <https://unfccc.int/resource/docs/convkp/conveng.pdf>. The final sentence of the article may be invoked by States to construe an argument that they are entitled to postpone climate change measures until after economic development has been attained. Such a reading of the article is not compatible with the balanced approach advocated in the Rio+20 Outcome Document, *supra* n. 40, and care should be taken that the right to development is not used for this purpose.

84 Marcos A. Orellana, 'Climate Change and the Right to Development', Berlin, Center for International Environmental Law (2011) at p. 4, available at <http://www.ciel.org/Publications/CC_RightDev_Feb11.pdf>.

85 See e.g. UN General Assembly resolution 70/219, 'Women in Development', 22 December 2015, UN Doc. A/RES/70/219, 15 February 2016, available at < http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/219>.

86 See e.g. the 'Report of the Working Group on the issue of discrimination against women in law and practice', UN Doc. A/HRC/26/39, 1 April 2014, which addressed discrimination against women in economic and social life, with a focus on economic crisis. This HRC report is available at <http://www.ohchr.org/Documents/Issues/Women/WG/ESL/A-HRC-26-39_en.doc>.

Rights of Women in Africa[87] already sets out a woman's right to sustainable development.[88]

In interpreting the concept of peoples as holders of the right to development, innovations in the area of the international recognition of indigenous rights,[89] in environmental treaties dealing both with indigenous and local communities, and in the case-law of the African Commission on Human and Peoples' Rights on the concept of 'people' should be fully taken into account.

As Arjun Sengupta, the former Independent Expert on the right to development explains,[90] the people's right to development in the Declaration aimed at stressing the need to move from an economic to a people-centred analysis. Development as a process aimed at raising the living standards of the majority of the population in developing countries who were poor and deprived. The emphasis was on improving the well-being of entire populations. Entitlements of sub-national groups within States to specific development policies reflecting their separate identity were not considered. The Declaration does not refer to indigenous peoples.

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87 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003, available at <http://www.achpr.org/instruments/women-protocol/>.

88 An information note by the Office of the High Commissioner for Human Rights on the right to development and gender perceives the right to development as 'a holistic concept, involving not just economic development, but also: improvement in the well-being of all women, including the realisation of human rights and promotion of gender equality more broadly; absence of violence against women (all forms of violence, including structural and economic); and inclusion and participation of women in all aspects of the development process from planning to outcome.' See OHCHR, 'The Right to Development and Gender', Information Note, 2011, at p. 1, available at <http://www.ohchr.org/Documents/Issues/Development/Infonote_RtD_and_Gender.pdf>.

89 Consider a string of judgments by the Inter-American Court of Human Rights that are not based on the right to development, but that recognize extensive rights of indigenous peoples with regard to development, such as *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* n. 58, *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, C/125 and *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006, C/146. Consider also *Moiwana Community v. Suriname*, 15 June 2005, C/124. See also Art. 7(1) ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, providing that 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.' And see Art. 23 of the United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, UN Doc. A/RES/61/295, 13 September 2007: '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.' According to this Declaration, the State is under a duty to obtain the free, prior and informed consent of the representative institutions of the indigenous people before adopting and implementing legislative and administrative measures that may affect them (Art. 19). This duty applies to the development or use of indigenous lands, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Art. 32).

90 Arjun K. Sengupta, 'On the Theory and Practice of the Right to Development', 24/4 *Human Rights Quarterly* (2002) pp. 837-889, at pp. 848 et seq.

The African Commission on Human and Peoples' Rights meanwhile took the opportunity to clarify that in the African Charter peoples include sub-national groups. In *Endorois*[91] the plaintiffs alleged *inter alia* a violation of their right to development due to their displacement from ancestral lands. In the context of the African Charter, the African Commission found, peoples are not to be equated with entire populations of States. There is a need to protect 'marginalized and vulnerable groups in Africa', that have not been accommodated by dominating development paradigms, leading to mainstream development policies that violated their human rights.[92] On the basis of a review of factual evidence, the Commission held 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.[93]

Indigenous peoples are only one category of peoples that can claim collective rights under the African Charter. Other peoples that are marginalized and vulnerable equally deserve protection. The *Southern Cameroon* decision[94] is particularly informative. The people of South Cameroon are Anglophone, while North Cameroonians are Francophone. The linguistic difference is a direct result of the colonial era. The people of Southern Cameroon are not an indigenous community, but they are nevertheless a people under the African Charter, because 'they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. More importantly they identified themselves as a people with a separate and distinct identity.'[95] A number of global legal instruments already treat indigenous peoples and local communities equally. One example is in the UN-REDD programme. The programme seeks to help ensure the protection of the rights of indigenous and forest-dwelling people and the active involvement of local communities and relevant institutions in the design and implementation of REDD plans.

In a contemporary interpretation of the global right to development, both indigenous peoples and local communities[96] that are not accommodated by dominant development paradigms and are victimized by mainstream development policies should be considered holders of the right. They should enjoy the right provided for in Article 2(3) of the UN Declaration to active, free and meaningful participation in development and to the fair distribution of the benefits resulting there from. It

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91 *Endorois* case, *supra*, n. 28.

92 Ibid., para. 148.

93 Ibid., paras. 151-162. See also Jeremie Gilbert, 'Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights', 60/1 *International and Comparative Law Quarterly* (2011) pp. 245-270.

94 African Commission on Human and Peoples' Rights, *Kevin Mgwanga Gunme et al v. Cameroon*, Communication No. 266/03, 27 May 2009, available at <http://www.achpr.org/communications/decision/266.03/>.

95 Ibid., para. 179. Note that Art. 22 of the African Charter on Human and Peoples' Rights, *supra* n. 27, refers to the need to ensure that development respects the identity of a people.

96 Local communities could be understood as sub-state groups that share 'particular values': they come together by a concept of common good and are structured in some way, in the sense that they are isolated from other communities that share similar values. Taken from Dwight Newman, *Community and Collective Rights, A Theoretical Framework for Rights held by Groups*, Oxford, Hart Publishing, 2011, at p. 44.

may well be that under other sources of international law indigenous peoples (but not local communities) enjoy the broader right to free, prior and informed consent.

Endorois further suggests that there is a particular need to protect vulnerable and marginalized groups under the right to development. The Rio+20 Outcome Document also promotes support for developing countries 'in their efforts to eradicate poverty and promote empowerment of the poor and people in vulnerable situations'.[97] Circumstances of vulnerability or marginalization establish a priority: the likelihood of violations of the right to development of peoples in vulnerable situations is higher. As Okafor has argued, such sub-state groups are 'often forced by circumstances' to struggle against their own state for the development of their communities.[98]

Finally, the inclusion of indigenous peoples and local communities as rights holders may require spelling out the matching duties of sub-national authorities. Local authorities include local governments and their administration, lawmakers (on the assumption that a degree of regulatory power was devolved), judges and human rights institutions. In principle (although not necessarily in practice), local public authorities are ideally placed to act as brokers between local human rights claimants and the international human rights regime. The Rio+20 Outcome document reaffirms

> […] the key role of all levels of government and legislative bodies in promoting sustainable development. We further acknowledge efforts and progress made at the local and sub-national levels, and recognize the important role that such authorities and communities can play in implementing sustainable development, including by engaging citizens and stakeholders and providing them with relevant information, as appropriate, on the three dimensions of sustainable development. We further acknowledge the importance of involving all relevant decision makers in the planning and implementation of sustainable development policies.[99]

4.4 What a treaty will not do

Over the years, governments in the Global South have lamented the lack of an international environment that is conducive to the realization of the right to development. Historically, their demands build on the reference in Article 3(3) of the Declaration on the Right to Development to a new international economic order. The UN General Assembly first[100] recognized the right to development as a human right only five years after the adoption of the Declaration on the Establishment of

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97 Rio+20 Outcome Document, *supra* n. 40, para. 23.

98 Obiora Chinedu Okafor, ''Righting' the right to development: a socio-legal analysis of Article 22 of the African Charter on Human and Peoples' Rights', in Marks (ed.), *supra* n. 25, pp. 52-63, at p. 58.

99 UN General Assembly resolution 66/288, 27 July 2012, UN Doc. A/RES/66/288, 11 September 2012, endorsing the Rio+20 Outcome Document, *supra* n. 40, para. 42.

100 See Art. 8 of UN General Assembly resolution 34/46, 23 November 1979, UN Doc. A/RES/34/46. References to the need to create a global enabling environment for human rights predate the new international economic order, as is evident from Art. 28 of the Universal Declaration of Human Rights, UN General Assembly resolution 217 A (III), UN Doc.

a New International Economic Order.[101] Although the NIEO Declaration was adopted by consensus, its provisions 'were never fully accepted or implemented by developed nations',[102] and the terminology of the new international economic order fell into disuse.

Arguments on global obstacles beyond the grasp of developing countries have remained, however. The Guiding principles on foreign debt and human rights[103] reflect current concerns of governments in the Global South. The text stresses the need to:

- Create an equitable, rule-based, predictable and non-discriminatory international trading system;
- A more fair and just system governing trade, FDI, migration, intellectual property, flow of capital and labour;
- Analyse policies and programs, including those relating to external debt, macroeconomic stability, structural reform and investment with respect to their impact on poverty and inequality, social development and the enjoyment of human rights, as well as their gender implications, and adjust them, as appropriate, to promote a more equitable and non-discriminatory distribution of the benefits of growth and services.

UN General Assembly resolutions on the right to development endorse the analysis:

> […] while globalization offers both opportunities and challenges, the process of globalization remains deficient in achieving the objectives of integrating all countries into a globalized world, stresses the need for policies and measures at the national and global levels to respond to the challenges and opportunities of globalization if this process is to be made fully inclusive and equitable, recognizes that globalization has brought disparities between and within countries and that issues such as trade and trade liberalization, transfer of technology, infrastructure development and market access should be managed effectively in order to mitigate the challenges of poverty and underdevelopment and to make the right to development a reality for everyone;[104]

A/RES/3/217A, 10 December 1948: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'

101 UN General Assembly resolution 3201 (S-VI), 1 May 1974, UN Doc. A/RES/S-6/3201.

102 Rumu Sarkar, *International Development Law*, Oxford University Press, 2009, at p. 214.

103 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, 'Guiding principles on foreign debt and human rights', UN Doc. A/HRC/20/23, 10 April 2011, at pp. 9-20. The Guiding Principles were endorsed by the Human Rights Council, but opposed by developed States, see Human Rights Council resolution 20/10, 5 July 2012, UN Doc. A/67/53, September 2012, at pp. 157-161, adopted by a recorded vote of 31 to 11, with five abstentions.

104 UN General Assembly resolution 50/155, 17 December 2015, UN Doc. A/RES/70/155, 18 February 2016, para. 23.

Although a treaty on the right to development could potentially act as a countervailing force to conflicting treaties that aggravate poverty and underdevelopment, no single treaty in and of itself can create an enabling international environment for the realization of the right to development. The pursuit of sustainable development as a principle of international law,[105] or of the principle of integration as the backbone of sustainable development[106] open up more promising avenues. The principle of integration reflects the 'interdependence of social, economic, financial, and environmental and human rights aspects of rules of international law'.[107] As Voigt explains, for international law to address the problem of fragmentation and regulatory overlap and gaps, reliance on general principles is important.[108] The principle of sustainable development requires States and dispute settlement bodies to address issues 'in a broader context rather than isolating a narrow legal issue from the mass of other concerns'.[109] Systematic use of sustainable development as a general principle in law and policy would contribute significantly to an international environment conducive to the realization of the right to development.

A treaty on the right to development may also have little immediate impact on the living conditions of poor or marginalized people. Human rights can only provide effective protection if the rights holders appeal to the right when they feel that their human dignity is under threat. So far, there is little evidence of a practice of the right to development by poor or marginalized communities. Even in Africa, where the right to development enjoys a legal status equal to all other human rights, the potential of the right to development as an instrument to protect the well-being of the population or of groups within society has remained largely unexplored.[110]

Vulnerable or marginalized people faced with an immediate threat gain little from an appeal to a contested soft law document. If the right to development were to be part of a global treaty, its most immediate impact probably would be to strengthen the position of groups within States that have not been accommodated by the dominant development paradigm. Other aspects of the right to development – particularly those dealing with joint responsibilities and the international economic order – are by their very nature somewhat removed from the urgent needs of poor people. They aim at structural change in how the international community addresses global inequality. The impact of change in this respect will only be felt on the ground in the long term.

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105 Christina Voigt, *Sustainable Development as a Principle of International Law*, Leiden, Martinus Nijhoff, 2009.

106 Elisabeth Bürgi Bonanomi, *Sustainable Development in International Law Making and Trade*, Cheltenham, Edward Elgar, 2015, at p. 130.

107 Ibid., at p. 130.

108 Voigt, *supra*, n. 105, at p. 152.

109 Ibid., at p. 170.

110 De Feyter, *supra* n. 48.

5. CONCLUSION

This paper discussed the merits of a prospective treaty on the right to development in light of general public international law, including international human rights law.

The composite nature of the right to development does not facilitate the drafting of a treaty. From the start, the right to development was about the grand design of comprehensively integrating human rights and development. Keba M'Baye and Karel Vasak wrote about the need to humanize the international economic order, and about the architecture of global human rights law. Also in its contemporary understanding, the right to development cuts across a variety of issues. The right to development aims at establishing:

- the responsibility of the domestic State for the impact of its development policies on rights holders;
- the recognition of group rights in development;
- concurrent responsibilities of other actors than the domestic State; and
- joint commitments among States and among States and non-State actors that include accountability to rights holders.

Pragmatists may prefer to deal with the issues separately. Different coalitions of actors support the various issues. Current human rights law engages with the various issues to a varying degree. Separate strategies on the different aspects of the right to development may yield faster results.

Substantively, however, a multi-level and multi-actor approach to human rights and development is required. Domestic, extraterritorial and global action are inherently complementary, and should be coordinated. Actors need to adjust the performance of their duties to one another. A forum is required where this dialogue can take place, and where duty bearers are accountable to rights holders. Issues of balancing will inevitably arise, which it makes it all the more important to consider issues together. Even in the face of thirty years of adversity, the grand design should not be abandoned.

6. PROPOSITIONS AND POINTS FOR DISCUSSION

1. The right to development should be raised to the same level and on a par with all other human rights and fundamental freedoms.

2. The obligation of the domestic State to exercise its sovereignty responsibly goes hand in hand with the duty of other States and other actors to contribute to the realization of the right to development.

3. If human rights are to resonate with users in the Global South, the input from non-European law and non-European societies is crucial. The cognitive basis

of global human rights must expand beyond what is required in Europe to protect human dignity.

4. A future right to development treaty should include both reciprocal State obligations and accountability to rights holders.

5. 'Peoples' as holders of the right to development should be taken to include marginalized and vulnerable groups that have not been accommodated by dominant development paradigms.