

The future of the right to development

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I. Introduction

It may appear odd to place the human right to development on the “frontier” of research on human rights and development, as there has emerged over the past four decades a veritable library of books and articles on the subject.¹ The concept of “frontier” suggests

¹ The bibliography of the OHCHR publication *Realizing the Right to Development* covers some 30 pages, including nearly 150 entries on the historical context of the right. 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*, Geneva: OHCHR, 2013, 505-510. Among the major works are: Daniel Aguirre, *The Human Right to Development in a Globalized World*, Aldershot, England: Ashgate, 2008; Philip Alston, “Making Space for New Human Rights: the Case of the Right to Development,” *Harvard Human Rights Yearbook*, vol. 1 (1988), 3-40; Bård-Anders Andreassen, “On the Normative Core of the Right to Development,” *Forum for Development Studies*, No. 2 (1997), 179-194; Bård-Anders Andreassen and Stephen P. Marks, eds., *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd edition, Antwerp (Belgium), Oxford (UK), Portland, OR: Intersentia, 2010; Russel Barsh, “The Right to Development as a Human Right: Results of the Global Consultation,” *Human Rights Quarterly*, vol. 13 (1991), 322-338; Upendra Baxi, “The Development of the Right to Development,” in *Human Rights: New Dimensions and Challenges*, Janusz Symonides, ed. Dartmouth: Ashgate and Paris: UNESCO, 1998, 99-116; Mohammed Bedjaoui, “The Right to Development,” in *International Law: Achievements and Prospects*, Mohammed Bedjaoui, ed. UNESCO and Nijhoff, 1991, 1177-1203 [published in French as *Droit international: Bilan et perspectives*. Pédone and UNESCO, 1991, 1247-1271]; Mohamed Bennouna, *Droit international du développement: Tiers monde et interpellation du droit international*, Paris: Berger-Levrault, 1983; Ian Brownlie, *The Human Right to Development*, London: Commonwealth Secretariat Human Rights Unit, 1989; Isabella D. Bunn, “The Right to Development: Implications for International Economic Law,” *American University International Law Review*, vol. 15 (2000), 1425-1467; Juan Antonio Carrillo Salcedo, “El derecho al desarrollo como derecho de la persona humana,” *Revista Española de Derecho Internacional*, vol. 25 (1974), 119-125; Centre for Development and Human Rights. *The Right to Development: A Primer. With an introduction by Stephen P. Marks*, New Delhi and Thousand Oaks, CA: Sage Publications, 2004; Subrata Roy Chowdhury, Erik M.G. Denters and Paul J.I.M. de Waart, eds., *The Right to Development in International Law*, Dordrecht: Nijhoff, 1992; “Colloque de Dakar sur le Développement et les Droits de l’Homme,” *Revue Senegalaise de Droit*, 11^{ème} année, No. 22. Dakar: A.S.E.R.J, September 1978; René-Jean Dupuy, ed., *The Right to Development at the International Level: workshop, The Hague, 16-18 October 1979*. Alphen aan den Rijn: Sijthoff and Noordhoff, 1980; Héctor Gros Espiell, “The Right to Development as a Human Right,” *Texas International Law Journal*, vol. 16, No. 2 (1981), 189-205; Franciscans International, ed., *The Right to Development: Reflections on the First Four Reports of the Independent Expert on the Right to Development*, Geneva: Franciscans International, 2003; Yash Ghai and Y.R. Rao, *Whose Human Right to Development?*, London: Commonwealth Secretariat, 1989; Bonny Ibhawoh, “The Right to Development: The Politics and Polemics of Power and Resistance,” *Human Rights Quarterly* vol. 33 (2011), 76–104; Felix Kirchmeier, *The Right to Development – where do we stand?* FES Occasional Papers N° 23. Geneva: FES, 2006; Felix Kirchmeier, Monika Lüke, and Britt Kalla. *Towards the Implementation of the Right to*

that there will continue to be a research interest in exploring what is perhaps the most exhaustive linking of development and human rights, namely, defining development itself as a human right. To understand the context of the right to development, we need to evoke the emergence of the right through a contentious process of human rights diplomacy, and its negligible impact on development practice, as well as the persistent failure to the principal bodies where the matter is discussed, Human Rights Council (HRC) and the General Assembly (GA), to get beyond political posturing. After some remarks on that rather bleak picture of the right, we will address the prospects for breaking out of the current stalemate and the significance of this issue for the future of the relation between human rights and development. The interpretations we provide in this chapter draw on part from our direct experience, one as former chair of the High-level task force on the implementation of the right to development and the other as senior UN staff member dealing with indicators and the right to development.

II. Some historical milestones

A. Adoption of the Declaration on the right to development

The idea of a human right to development builds on a number of principles of international cooperation reaffirmed in UN documents since 1944.² Senegalese Judge Kéba M'Baye was the first to propose, in a lecture he delivered in 1972, that development be defined as a human right.³ In 1977, with Senegal as chair, the Commission on Human

Development – Fieldtesting and fine-tuning the UN Criteria on the Right to Development in the Kenyan-German Partnershi Geneva: FES and GTZ, 2007; Stephen P. Marks, “The Human Right to Development: Between Rhetoric and Reality,” *Harvard Human Rights Journal*, vol. 17 (2004), 137-168; Stephen P. Marks, ed., *Implementing the Right to Development: The Role of International Law*, Geneva: Friedrich Eber Stiftung; and Boston, M.A.: Harvard School of Public Health, 2008; Kéba Mbaye, “Le droit au développement comme un droit de l’homme,” *Revue des Droits de l’Homme*, vol. 51 (1972), 505-534; Kéba Mbaye, “Le Droit au Développement en Droit International,” in *Essays in International Law in Honour of Judge Manfred Lachs*, Jerzy Makarczyk, ed. The Hague: Martinus Nijhoff, 1984, 163-177; Karel de Vey Mestdagh, “The Right to Development,” *Netherlands International Law Review*, vol. 28, No. 1 (1981), 30-53; Ved P. Nanda, “The Right to Development under International Law – Challenges Ahead,” *California Western International Law Journal*, vol. 15 (1985), 431-440; James C.N. Paul, “The Human Right to Development: Its Meaning & Importance,” *John Marshall Law Review*, vol. 25 (1991), 235-266; Alain Pellet, “The Functions of the Right to Development: A Right to Self-Realization,” *Third World Legal Studies*, vol. 3, article 9 (1984), 129-139; Roland Rich, “The Right to Development: A Right of Peoples?,” in *The Rights of Peoples*, James Crawford, ed., New York: Oxford University Press, 1988, 39-54; Eibe Riedel, “Right to Development,” in *The United Nations: Law, Policies and Practice*, vol. II. München: Dordrecht, 1995, 1103-1110; Allan Rosas, “The Right to Development,” in *Economic, Social and Cultural Rights*, Asbjørn Eide, Catarina Krause & Allan Rosas, eds., Dordrecht: Nijhoff, 2001, 119-130; Holger Scharpenack, *Das "Recht auf Entwicklung": eine völkerrechtliche Untersuchung der konzeptionellen und normativen Strukturen eines Menschenrechts auf Entwicklung*, Frankfurt am Main; New York: P. Lang, 1996; Arjun Sengupta, “On the Theory and Practice of the Right to Development,” *Human Rights Quarterly*, vol. 24 (2002), 837-889; Arjun Sengupta, “The Human Right to Development,” *Oxford Development Studies*, vol. 32 (2004), 179-203; Theodor C. Van Boven, “The Right to Development and Human Rights,” *Review of the International Commission of Jurist*, vol. 28 (1982), 49-56; Christopher G. Weeramantry, “The Right to Development,” *Indian Journal of International Law*, vol. 25 (1985), 482-505.

² The documents supporting these principles are reviewed in “Annotations to the Declaration on the Right to Development and related United Nations System Instruments, Resolutions and Reports,” [Background paper to Global Consultation of 1990] UN Doc. HR/RD/1990/CONF.1.

³ Kéba M'Baye, “Le Droit au Développement Comme un Droit de L’Homme [The Right to Development as a Human Right], Leçon inaugurale de la Troisième Session d’enseignement de l’Institut International des droits de l’Homme [Inaugural Address of the Third Teaching Session of the International Institute of Human Rights] (July 3, 1972), in *Revue des droits de l’homme*, vol. 5 (1972), 503.

Rights requested a study on “the international dimensions of the right to development,”⁴ using the expression for the first time as though it were already recognized. Pursuant to that request, the UN secretariat produced in 1979 a 161-page study⁵ providing the basis for what became the UN Declaration on the Right to Development, adopted eight years later by the UN General Assembly. It also anticipated the major issues that remain contentious today. Significantly, the study identified the biggest challenge, which was and is to translate the concept of this right “into a notion capable of providing practical guidance and inspiration, based on international human rights standards, in the context of development activities.”⁶

When the first working group began formulating the right to development in the late 1970s, the political climate had become highly charged with ideological positioning on practically every issue. The socialist bloc favoured initiatives on peace and disarmament; former colonies pushed for attention to development, non-discrimination and the struggle against apartheid South Africa; Western countries focused on violations of civil and political rights. Frustrated with the East-West rivalry dominating debates, developing countries supported Senegal’s initiative to have the UN declare development itself a human right. By then the proposals relating to the establishment of a New International Economic Order were not affecting real power relations although development countries, belonging to the Non-Aligned Movement (NAM), sought to use their majority in the GA to establish the normative basis and the blueprint for the creation of a more just international economic order. Their intention was to use the human rights framework through the declaration on the right to development to oblige those countries that dominate the international economy to accept greater responsibility for eliminating the causes of poverty, to pay more for raw materials extracted from developing countries, to provide more aid, and to improve the terms of trade in favour of developing countries.

However, by the time the drafting got started in 1981, Ronald Reagan was in the White House and Margaret Thatcher was in 10 Downing Street, heralding a strong shift to the right in domestic and international affairs. Their delegations and other Western members of the drafting committee agreed that, while a general moral (not legal) commitment to human development was acceptable, under no circumstances would they allow a text to come out of the committee that would either affirm any legal obligation to transfer resources from North to South or codify any specifics regarding any of the issues contained in the declaration. Thus from the beginning the North American and European delegations resisted using the human rights institutions to restrain the dominant economic powers in the global economy and especially to impose any legal obligations, which NAM countries favoured. This tension continues today.

The human right to development was finally proclaimed by the UN General Assembly on 4 December 1986 in the Declaration on the Right to Development,⁷ by a recorded vote of 146 in favour, 1 against (United States) and 8 abstentions (Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the United Kingdom). Being a resolution of the General Assembly, the Declaration does not create any

⁴ Commission on Human Rights resolution 4 (XXXIII), adopted without a vote on 21 February 1977.

⁵ *The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirement of the New International Economic Order and the fundamental human needs: report of the Secretary-General*, UN Doc E.CN.4/1334, 2 January 1979. This report is summarized in OHCHR, *Realizing the Right to Development*, 7-16. The author was Philip Alston.

⁶ *Ibid.*, para. 315.

⁷ UN General Assembly resolution 41/128, Declaration on the Right to Development, 4 December 1986.

legal obligations, although it has the potential for carrying the weight of moral and political obligations.⁸ It was a compromise document of 16 preambular paragraphs and ten articles setting out a core definition; an enumeration of rights and duties of individuals and states; a commitment to the elimination of massive human rights violations and to international peace and security, a reiteration of the principles of non-discrimination, interrelatedness of rights, and participation; and an enumeration of steps states should take at the national and international levels to realize this right. The Declaration defined the right to development as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁹ A considerable body of commentary has appeared in support of the Declaration, mainly in human rights publications, but critical and skeptical views have also emerged in legal and political writings.¹⁰

B. Working groups on implementing the Declaration

Several working groups on the implementation of the right to development were set up the 1980s and 1990s without accomplishing much to meet the challenge of the 1979 report to translate the concept of this right “into a notion capable of providing practical guidance and inspiration, based on international human rights standards, in the context of development activities.” One of the bright spots in this disappointing record was the Global Consultation on the Realisation of the Right to Development, organized at the UN office in Geneva on 8 to 12 January 1990, pursuant to resolutions of the Commission,¹¹ ECOSOC,¹² and the General Assembly.¹³ Development and human rights NGOs, representative of specialized agencies and programs, international financial institutions, and leading scholars participated. Some 48 papers were presented, including by such luminaries as Asbjørn Eide, Alain Pellet, Russel Barsh, Danilo Turk, Samir Amin, Antonio A. Conçado Trindade, and Upendra Baxi. Some 40 NGOs were represented and 32 speakers took the floor. Numerous insightful and well-informed conclusions were reached, which continue to be valid over twenty years later. The recommendations for action echo the shortcoming of the right to development 25 years later, including the need for action by States to make explicit provision for the right to development in national policy and development plans, to provide greater access to justice by the poor and other vulnerable and disadvantaged groups, to ensure that corporations do not violate this right, to “cooperate in creating an international economic and political environment conducive to the realization of the right to development, in particular through the democratization of decision-making in

⁸ On the nature of the obligations contained in the Declaration, see Stephen P. Marks, “Obligations to Implement the Right to Development: Political, Legal, and Philosophical Rationales,” in Bård Anders Andreassen and Stephen P. Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, revised and updated in second edition, Brussels: Intersentia, 2010, 73-100.

⁹ Declaration on the Right to Development, art. 1.

¹⁰ Illustrative of this controversy is the exchange of views in Jack Donnelly, “The ‘right to development’: How not to link human rights and development,” in *Human Rights and Development in Africa*. Claude E. Welch and Ronald I. Meltzer, eds. Albany: State University of New York Press, 1984; Jack Donnelly, “In search of the unicorn: the jurisprudence and politics of the right to development,” *California Western International Law Journal*, vol. 15, No. 3 (1985); Philip Alston, “The shortcomings of a ‘Garfield the cat’ approach to the right to development,” *California Western International Law Journal*, vol. 15 (1985). Jack Donnelly, “Theology of the right to development: a reply to Alston,” *California Western International Law Journal*, vol. 15, No. 3 (1985); Dinah Shelton, Response to Donnelly and Alston. *California Western International Law Journal*, vol. 15, No. 3 (1985).

¹¹ Commission resolution 1989/45 of 6 March 1989.

¹² Economic and Social Council Resolution 1989/141 of 24 May 1989.

¹³ GA Resolution 44/62 of 8 December 1989.

intergovernmental bodies and institutions that deal with trade, monetary policy, and development assistance...”, and to ensure greater transparency in negotiations and agreements.¹⁴

Among the recommendation of the Global Consultation was that the Secretary-General appoint “a high level committee of independent experts,” including giving “priority to the formulation of criteria for the assessment of progress in the realization of the right to development” and implementing a programme of development education reaching grassroots organizations; the “design of appropriate indicators of progress” by regional economic commissions; all UN system assistance and cooperation to facilitate the monitoring, coordination and implementation of RTD; to provide for direct and indirect participation of representatives of people and groups at all levels of decision-making in UN assistance programmes; to hold regional consultations; to disseminate the Declaration on RTD in local languages; and to place the implementation of the RTD as a human right on the agenda of the relevant ECOSOC and GA committees on an annual basis and periodically at the plenary of the GA.¹⁵ The excellent papers of the Global Consultation as well as its report appear remain a source of reflection on the potential of the right to development.¹⁶

Other noteworthy developments in the 1990s include the reference in the 1993 Vienna Declaration and Programme of Action to the right to development as “a universal and inalienable right and an integral part of fundamental human rights,”¹⁷ the prominence given to this right in the mandate of the High Commissioner for Human Rights¹⁸ and the General Assembly calling on the High Commissioner to establish “a new branch whose primary responsibilities would include the promotion and protection of the right to development.”¹⁹ In 1993 the Commission established a new Working Group for an initial period of three years composed of 15 experts nominated by governments “(a) to identify obstacles to the implementations and realization of the Declaration...on the basis of information furnished by member states and other appropriate sources; (b) to recommend ways and means toward the realization of the right to development by all States.”²⁰ This second Working Group, which met from 1993 to 1995, was asked to look at obstacles to implementation and in 1994 submitted preliminary guidelines and a checklist.²¹ The aim of the checklist was to facilitate discussion between the Working Group and governments and international bodies on issues pertaining to the role and function of the right to development in policies and programs relating to development. A further attempt was made in 1996 to 1998 with the Intergovernmental Working Group of Experts charged with elaborating an implementation strategy for the right to development.²² At the 1996 Commission, the resolution on the right to development was passed by consensus for the first time. This resolution established an intergovernmental group of ten experts with a two-

¹⁴ Ibid., paras. 181-188.

¹⁵ Ibid., paras. 189-205.

¹⁶ Most of the report of the Global Consultation appears in OHCHR, *Realizing the Right to Development*, 49-65.

¹⁷ Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (1993), para. 10. [hereinafter Vienna Declaration].

¹⁸ G.A. Res. 48/141 (1993).

¹⁹ G.A. Res. 50/214 (1995).

²⁰ Commission on Human Rights Resolution 1993/22, adopted on 4 March 1993 by a roll-call vote of 36 to 1, with 13 abstentions.

²¹ The guidelines are contained in annex 1 to the report of the Working Group on the Right to Development on its first session, UN doc. E/CN.4/1994/21 and Corr.1.

²² Report of the Intergovernmental Group of Experts on the Right to Development on its second session, Geneva, 1997, UN doc. E/CN.4/1998/29.

year mandate to elaborate a strategy for implementing the Declaration on the right to development.²³

C. The Independent Expert and the high-level task force

Finally in 1998 a breakthrough occurred when the Commission on Human Rights adopted by consensus a resolution, recommending to the Economic and Social Council the establishment of a follow-up mechanism consisting of an open-ended working group (OEWG) and an Independent Expert (IE). The Open Ended Working Group was mandated “To monitor and review progress made in the promotion and implementation of the right to development as elaborated in the Declaration on the Right to Development, at the national and international levels, providing recommendations thereon and further analysing obstacles to its full enjoyment, focusing each year on specific commitments in the Declaration...” and the IE was mandated “to present to the working group at each of its sessions a study on the current state of progress in the implementation of the right to development as a basis for a focused discussion, taking into account, inter alia, the deliberations and suggestions of the working group.”²⁴ The OEWG held its first session in 2000²⁵ and Dr. Arjun K. Sengupta, a prominent Indian economist, was appointed Independent Expert. By 2004 Sengupta had produced eight reports.²⁶ He went on to be the Independent Expert on Human Rights and Extreme Poverty and then was elected to chair the OEWG until his demise in 2010. Having worked closely with him, we consider that he brought a fresh approach to understanding to RTD, which he defined as “the right to a process that expands the capabilities or freedom of individuals to improve their well-being and to realize what they value.”²⁷

On a parallel track, the Commission decided in 2003 to request its Sub-Commission on the Promotion and Protection of Human Rights “to prepare a concept document establishing options for the implementation of the right to development and their feasibility, inter alia an international legal standard of a binding nature, guidelines on the implementation of the right to development and principles for development partnership, based on the Declaration on the Right to Development, including issues which any such instrument might address.”²⁸ When the Sub-Commission failed to produce this concept paper, the Commission noted this fact with concern and requested the Sub-Commission, “without further delay, to submit the concept document” at the 62nd session (2006) of the Commission.²⁹ The author of the report that was finally submitted sidestepped the issue of

²³ Commission on Human Rights Resolution 1996/15.

²⁴ Commission on Human Rights Resolution 1998/72 of 22 April 1998, adopted without a vote, para. 10. The Economic and Social Council endorsed this resolution in its decision 1998/269.

²⁵ Report of the Open-Ended Working Group on the Right to Development E/CN.4/2001/26, 20 March 2001.

²⁶ First Report: E/CN.4/1999/WG.18/2, July 27, 1999; Second Report: A/55/306, August 17, 2000; Third Report: E/CN.4/2001/WG.18/2, January 2, 2001; Fourth Report: E/CN.4/2002/WG.18/2, December 20, 2001; Fourth report of the independent expert on the right to development—Mission, E/CN.4/2002/WG.18/2/Add.1, March 5, 2002; Fifth report: E/CN.4/2002/WG.18/6, Sept. 16, 2002 and E/CN.4/2002/WG.18/6/Add.1, December 30, 2002; Preliminary study of the independent expert on the right to development on the impact to international economic and financial issues on the enjoyment of human rights, E/CN.4/2003/WG.18/2, January 27, 2003; Review of progress and obstacles in the promotion, implementation, operationalization, and enjoyment of the right to development, E/CN.4/2004/WG.18/2, February 17, 2004.

²⁷ Report of the independent expert on the right to development, Arjun Sengupta, A/55/306, 17 August 2000, para. 22.

²⁸ Commission on Human Rights Res. 2003/83 (2003). Forty-seven countries voted in favour of the resolution; the United States, together with Australia and Japan, cast the only negative votes, and three countries abstained.

²⁹ Commission on Human Rights Resolution 2005/4, adopted on April 12, 2005, by vote of 48 to 2, with 2

a binding legal instrument. After noting “strong differences of opinion among legal luminaries as to whether the right to development can be placed within a legally binding framework,”³⁰ she said, “In view of the ongoing discussions among duty bearers, partners and stakeholders, I am of the view that the successful identification of ways to infuse human rights values and principles into the development process would better serve the realization of the right”³¹ and concluded that “that the development of binding legal standards is premature at this time.”³² The Sub-Commission asked her to continue her work³³ but did not mention the “international legal standard of a binding nature,” presumably having concluded, as had the author, that the political will was lacking to pursue the idea further, however important it was to the NAM.

On completion of Dr. Sengupta’s mandate, the OEWG decided to recommend (and the Commission and ECOSOC accepted) a new mechanism in the form of a high level task force, which began functioning in 2004.³⁴ The Working Group requested in 2004 that the task force examine (a) the obstacles and challenges to the implementation of the Millennium Development Goals in relation to the right to development; (b) social impact assessments in the areas of trade and development at the national and international levels; and (c) best practices in the implementation of the right to development.³⁵ The task force folded the issue of best practices into the scope of the other two mandated themes. The WG modified this mandate in 2005 to focus on Millennium Development Goal 8, on a global partnership for development, and to suggest criteria for its periodic evaluation with the aim of improving the effectiveness of global partnerships with regard to the realization of the right to development.³⁶ The next step was in 2006, when the Working Group adopted the right to development criteria and requested the task force to apply them, on a pilot basis, to selected partnerships, with a view to their operationalization and progressive development, and thus contributing to mainstreaming the right to development in policies and operational activities of relevant actors at the national, regional and international levels, including multilateral financial, trade and development institutions.³⁷

Application of the criteria continued for the period 2007–2009.³⁸ Thus, in 2006, 2007 and 2008, the task force applied the criteria to various global partnerships and refined them in the light of that experience. The Working Group requested the task force to review the structure of the criteria, their coverage of aspects of international cooperation and the methodology for their application with a view to enhancing their effectiveness as a practical tool for evaluating global partnerships, and specifically providing a consistent mapping of the criteria and relevant checklists, viewing the latter as operational sub-criteria. In 2009, the task force embarked upon a more systematic process of structuring criteria around attributes and attaching illustrative indicators. The first step was to commission a

abstentions.

³⁰ Concept Document on the Right to Development. Working paper submitted by Florizelle O’Connor, UN Doc.E/CN.4/Sub.2/2005/23, June 24, 2005, para. 14.

³¹ Ibid., para. 18.

³² Ibid., para. 69.

³³ Sub-Commission on the Promotion and Protection of Human Rights, Resolution 2005/17. UN Doc. E/CN.4/2006/2 and E/CN.4/Sub.2/2005/44, October 17, 2005, 33.

³⁴ Commission on Human Rights in its resolution 2004/7 as endorsed by the Economic and Social Council in its decision 2004/249. The terms of reference for the TF were set out in Report of the Working Group on the Right to Development on its fifth session (Geneva, 11-20 February 2004), E/CN.4/2004/23, 18 March 2004, paras. 44-51.

³⁵ E/CN.4/2004/23, para. 49.

³⁶ E/CN.4/2005/25, para. 54 (i).

³⁷ E/CN.4/2006/26, para. 77.

³⁸ A/HRC/4/47, para. 53; A/HRC/9/17, para. 41 and A/HRC/12/28, para. 46.

substantive paper,³⁹ and other background materials,⁴⁰ and to convene an international meeting of experts.⁴¹ Based on this work, the task force developed preliminary attributes and criteria. A progress report was shared with the Working Group at its tenth session, in 2009, drawing attention to the imperative of placing the identified criteria on a rigorous analytical foundation, both conceptually and methodologically.⁴² The report also highlighted the fact that the criteria, sub-criteria and indicators are based on an exhaustive reading of the human rights instruments from which the core components can be identified; and that attributes (components) must be mutually exclusive to the extent possible.

On this basis, the task force proposed three components for review by the Working Group before proceeding with the identification of criteria and sub-criteria. In the final phase of its work the task force refined the methodology and structure of the criteria further on the basis of three components of the right to development (comprehensive human centred development, enabling environment, social justice and equity), which had the support of the OEWG and were reflected in the criteria, although the task force took into account the numerous suggestions made regarding specific criteria, as it continued in 2009 and 2010 to develop a full set of attributes, criteria, sub-criteria and indicators. To draw on specialized expertise further, the OHCHR convened an expert consultation in December 2009, and, at its sixth session, in January 2010, the task force considered the consultants' study and the report of the expert consultation,⁴³ together with preliminary observations made by Member States and observers from concerned institutions and non-governmental organizations.⁴⁴ On 26 April 2010, the chair presented the outcome of the task force's efforts to the OEWG on behalf of the five expert and six institutional members of the task force in the form of three documents:

1. Main report (A/HRC/15/WG.2/TF/2), containing, in the recommendations, the task force's suggestions for further work.
2. The consolidation of findings (A/HRC/15/WG.2/TF/2, Add. 1), including conclusions expressed as honestly as possible as regards the obstacles to realizing this right.
3. Right to development criteria and operational sub-criteria (A/HRC/15/WG.2/TF/2., Add. 2), containing criteria and sub-criteria as well as a core norm, three attributes, and illustrative indicators.

The politics shifted as a result of the debate over the report. Whereas it used to be the case that developing countries supported the proposals of the task force with reluctant acquiescence or opposition from OECD countries, the work of the task force in 2010 was viewed favourably by the latter and negatively by the former, although the task force had continued to favour the interests of developing countries against excessive advantages for richer countries. In fact, the political landscape in the UN now reflects a shift in economic power toward certain emerging markets among the BRICS and countries that used to be active in promoting RTD and have become silent as they grow at a rapid pace. The dividing line is only superficially between EU (with other OECD countries) and NAM (with OIC and the Africa Group), although voting tends to divide along these lines. When it comes to the RTD, it is not accurate to see the interests as following a dichotomy between rich and

³⁹ Implementing the right to development: a review of the task force criteria and some options, by Rajeev Malhotra (A/HRC/12/WG.2/TF/CRP.6).

⁴⁰ Methodological issues of qualitative and quantitative tools for measuring compliance with the right to development, selected bibliography (A/HRC/12/WG.2/TF/CRP.7/Add.1).

⁴¹ See A/HRC/12/WG.2/TF/CRP.7.

⁴² A/HRC/12/WG.2/TF/2, annex IV.

⁴³ A/HRC/15/WG.2/TF/CRP.4.

⁴⁴ A/HRC/15/WG.2/TF/2, paras. 67–69.

poor, North and South, developed and developing countries. Poverty is a reality in so-called developed countries as inequality increases⁴⁵ and the pace of growth and development in several so-called developing countries far exceed that of Europe and North America. The politics of RTD is complicated within those groups and among states not always identified with those groups. In sum, the political assessment of RTD in the UN cannot be reduced to old North/South or Developed/Developing divisions. The discussion in 2010 and the written responses give the impression that EU and OECD are more favourable to the proposals of the TF than NAM, which seems odd in light the pro-development preferences of the TF.

Since the task force completed its work, the Council and the GA have adopted a series of resolutions calling for further study and refinement of the criteria. In the meantime, the Office of the High Commissioner published the 553-page compendium of essays and analyses under the title *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*. In a remarkably frank assessment the previous High Commissioner herself stated,

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

In 2016 the Chair-Rapporteur of the OEWG, Zamir Akram from Pakistan, submitted, at the request of OEWG, a set of four “standards for the implementation of the right to development.” While acknowledging that the report of the task force was “also relevant” to the preparation of standards, Ambassador Akram utilized a different methodology from the policy-process-outcome employed by the task force. His standards relate to 1) political will,⁴⁶ 2) States cooperation “to create the political, economic and social environment necessary to allow the implementation of the right to development,”⁴⁷ 3) focus on the individual and national level “comprehensive and inclusive approach based on good, responsible governance,”⁴⁸ and 4) “the most basic or core human needs ...: poverty, the right to food, water and sanitation, health, education, housing and gender equality.”⁴⁹

Also in 2016, the General Assembly instructed the Working Group to “finalize consideration of the criteria and operational subcriteria, preferably no later than the nineteenth session of the Working Group [2018],” and appointed a Special Rapporteur on the right to development.⁵⁰ It is unclear whether this appointment, the standards drafted by the chair-rapporteur and the instructions to the OEWG will advance the effort since 2010 to move the right to development from political rhetoric to development practice.

⁴⁵ Wiemer Salverda, Brian Nolan, Daniele Checchi, Ive Marx, Abigail McKnight, István György Tóth, Herman van de Werfhorst, eds., *Changing Inequalities in Rich Countries: Analytical and Comparative Perspectives*, Oxford: Oxford University Press, 2014.

⁴⁶ *Report of the Chair-Rapporteur of the Working Group on the Right to Development, Standards for the implementation of the right to development*, UN Doc. A/HRC/WG.2/17/2, 16 March 2016, para. 28

⁴⁷ *Id.*, para. 29.

⁴⁸ *Id.*, para. 30.

⁴⁹ *Id.*, para. 37.

⁵⁰ Human Rights Council Resolution 33/14, The right to development, adopted 29 September 2016. paras. 13 and 14.

III. Moving the right to development from “political theatre” to development practice

In order to assess the future of the right to development, we will offer some reflections on the obstacles to the implementation of this right. While only Member States can move the right to development from political commitment (or “political theatre,” to use the High Commissioner’s phrase) to development practice, we need to distinguish genuine political tensions that no amount of human rights diplomacy can overcome, from others obstacles, which are artificial and can be overcome with a minimum of political will. The former category relates to structural impediments to economic justice, the resistance to addressing trade and lending from a right to development perspective, and the lack of policy coherence within governments. The second groups of obstacles that could be surmounted relate to indeterminacy of the norm, measurement tools and the application of international treaty law.

A. *Deep-rooted obstacles to implementing the right to development*

Beyond the “political theatre” of positions taken by delegates at the UN, there remain real tensions in the global political economy, which cannot be willed away for changing votes, and that relate to structural impediments to economic justice. The right to development suffers profoundly from the entrenched positions of parties to negotiations on development agendas. Formal commitment to the right to development cannot by itself move these negotiations to a mutually beneficial outcome.

One of the areas where structural issues prevent progress on the right to development is aid effectiveness. The Paris Declaration on Aid Effectiveness and follow-up documents have underscored these issues. The Paris Declaration is a non-binding document adopted in 2005 and enumerating five central pillars to improve aid effectiveness, namely, ownership, alignment, harmonisation, managing for results and mutual accountability, to which the Accra Agenda for Action (2008) added more ownership, inclusive partnerships, delivering results, and capacity development.⁵¹ Currently 138 countries and 29 international organizations adhere to these documents.⁵²

Unlike the Paris Declaration on Aid Effectiveness, which was silent on human rights, the Accra Agenda for Action acknowledged that

“gender equality, respect for human rights, and environmental sustainability are cornerstones for achieving enduring impact on the lives and potential of poor women, men, and children. It is vital that all our policies address these issues in a more systematic and coherent way”.⁵³

The Fourth High Level Forum on Aid Effectiveness, held in 2011 in Busan, Republic of Korea, adopted the Busan Partnership for Effective Development Cooperation which refers to “our agreed international commitments on human rights, decent work, gender equality, environmental sustainability and disability” (para. 11) and to rights-based approaches of civil society organizations (CSOs), which “play a vital role in enabling

⁵¹ OECD, Paris Declaration and Accra Agenda for Action,

<http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm>

⁵² OECD, Countries, Territories and Organisations Adhering to the Paris Declaration and AAA,

<http://www.oecd.org/dac/effectiveness/countriesterritoriesandorganisationsadheringtotheparisdeclarationandaaa.htm>

⁵³ Third High Level Forum on Aid Effectiveness, *Accra Agenda for Action*, 4 September 2008, para. 3.

Available at <http://siteresources.worldbank.org/ACCRAEXT/Resources/4700790-1217425866038/AAA-4-SEPTEMBER-FINAL-16h00.pdf>.

people to claim their rights” (para. 22), but does not add to the human rights content of the Accra Agenda for Action nor make explicit reference to the right to development. It called for a ‘new, inclusive and representative Global Partnership for Effective Development Cooperation [GPEDC] to support and ensure accountability for the implementation of commitments at the political level’.⁵⁴ This GPEDC has since convened for two high level meetings, 2014 in Mexico City and 2016 in Nairobi. At the Nairobi meeting—the first high level meeting since the 2030 development agenda was adopted—the GPEDC did not go beyond reiterating ‘agreed international commitments on environmental sustainability, human rights, decent work, gender equality and the elimination of all forms of discrimination’.⁵⁵ In contrast, civil society partners participating in Nairobi committed to ‘respect and promote human rights and social justice’ and ‘to develop and implement strategies, activities and practices that promote individual and collective human rights, including the right to development’.⁵⁶

Realizing the right to development requires a systematic rethinking of aid effectiveness in the light of all policy implications of that statement. Aid is a relatively small part of development; it has not placed recipient societies on a sustainable path of development and some even argue that it has done more harm than good.⁵⁷ The reference in the Declaration on the Right to Development to providing developing countries with appropriate means and facilities to foster their comprehensive development (art. 4) strongly supports the argument for increased aid. The Declaration makes an important clarification of the concept of country ownership. While States have the right and the duty to formulate their national development policies, the Declaration requires that they be those “that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.” (art. 2). Furthermore, “States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights” (art. 6). The implications of these norms for country ownership and “policy space” have not been adequately explored. They mean, at least, that a high level of responsibility falls on developing countries to ensure that they pursue policies consistent with the right to development and that they should be entitled to more international cooperation and assistance to the extent that their policies and practices reflect that responsibility. This interpretation should not be misconstrued as favouring “conditionality”, but that progress in implementing this right depends on shared responsibilities by donor and developing countries.

Ownership is often a code word for opposition to international scrutiny over national policies and practices. The Declaration is clear that both the national and international dimensions are part of this right and essential. There is little hope for the right

⁵⁴ Ibid, para. 36.

⁵⁵ Nairobi Outcome Document, 1 December 2016, para. 4, available at <<http://effectivecooperation.org/wp-content/uploads/2016/12/Global-Partnership-Nairobi-Outcome-Documents-FINAL-1-December-2016.pdf>>

⁵⁶ Ibid, para. 67 (c).

⁵⁷ See Dambisa Moyo, *Dead Aid: Why Aid is Not Working and How There is a Better Way for Africa*, Farrar, Straus and Giroux, New York, 2009; William Easterly, *The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good*, Penguin Press, New York, 2006. Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It*, Oxford University Press, Oxford/New York, 2007.

to development if these dimensions are seen as conflicting rather than complementary. As the task force itself concluded,

Those with political reasons for favouring the international dimension and a collective understanding of the right must seek adjustments in their national policies and take the individual rights involved seriously. Similarly, those that stress, through human rights-based national policies, that this right is essentially a right of individuals must do their part to ensure greater justice in the global political economy by agreeing to and achieving outcomes of the various development agendas consistent with the affirmation in the Declaration that, “as a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development”.⁵⁸

National policies must be supportive of human rights in development and of redressing social injustice nationally and internationally. Equally, the failure of many nations, especially in Africa, to benefit from significant increases in the well-being of their populations is due to the unjust structures of the global economy that must be addressed through genuine development agendas, that is, negotiated and agreed modifications in terms of trade, investment and aid allowing developing countries to overcome the disadvantages of history and draw the full benefit of their natural and human resources.

The greatest challenge that lies ahead in bringing the right to development into the realm of practice is for all States to embrace the indivisibility and interdependence of “all the aspects of the right to development” as set forth in article 9 of the Declaration. This obstacle is sometimes expressed in terms of a choice between a “human rights-based approach to development” and a “development approach to human rights.” Exemplifying this view is the statement by NAM that the right to development is not “about mainstreaming all human rights into the development process. Instead, it is about mainstreaming and implementing development-oriented policies at all levels, in order to further improve the capacity of States to ensure the full enjoyment of all human rights.”⁵⁹ Behind this statement is the perception that the realization of the right to development—meaning economic prosperity—will place low-income states in a position to ensure the respect of all the human rights of their citizens. While it is true that expanding opportunities through economic development enhances the capacity to ensure human rights, this truism should not be interpreted to mean that problems of development constitute a pretext for failure to fulfill human rights obligations. Such an approach would contradict the right to development since – in the words of the Vienna Declaration and Programme of Action– “the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.”⁶⁰ Article 6 of the Declaration on the Right to Development is clear on this point: “States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.” The politics involved has been described by one scholar as the “paradox of the right to development talk coming from the South” by which he means that

⁵⁸ High-level task force on the implementation of the right to development, “The right to development in practice: provisional lessons learned,” in OHCHR *Realizing the Right to Development*, 484.

⁵⁹ Submission in follow-up to HRC resolution 15/25 “The Right to development.” Statement by Egypt on behalf of the Non-Aligned Movement (NAM). available at <http://www.ohchr.org/Documents/Issues/Development/Session12/NAM.pdf>.

⁶⁰ Vienna Declaration, para. 10.

“it is at once deployed to demand radical change in the international economic order and to resist change in the national political order.”⁶¹

A second problematic issue is the resistance to addressing core international economic issues, such as trade and debt, from a human rights perspective. It is in the nature of the right to development that the issues addressed touch on all aspects of the global economy and domestic policy that affect development and the constant improvement of the well-being of the entire population and of all individuals. Resistance is inevitable from global and regional institutions created for purposes other than human rights, and from Governments constituting those institutions. The experience of the task force reflected these tensions. It had identified the WTO, the Inter-American Development Bank, the Cotonou Agreement and economic partnership agreements (EPAs) between the European Union and the African, Caribbean and Pacific (ACP) countries, and the Common Market of the South (MERCOSUR) as relevant to the implementation of the right to development but the governments in the OEWG, after some initial exploratory study had been completed on the Cotonou Agreement, did not continue the mandate of the task force to review those trade-related development processes from the right to development standpoint. Similarly, on the issue of debt, the task force review had to be limited to a special meeting on debt⁶² with the purpose of collecting information but not to pilot-test criteria. On the other hand, the World Bank suggested, but the OEWG did not accept, that the task force evaluate the Africa Action Plan, a comprehensive strategic framework addressing aid, trade, debt relief and role of non-State actors supporting the development of the continent’s poorest countries⁶³.

As a result, trade and international financial institutions were not involved beyond minimal sharing of information. Part of the explanation lies in the legal constraints limiting potential for deeper involvement from these institutions. The deeper explanation is that the logic of trade and financial institutions is to promote free trade, liberalize markets, and promote growth. Human rights in general and the right to development in particular pursue a different logic, that of realizing the full human potential for all human beings, including resistance to trade and investments practices aimed at increasing profits but that generate inequality and harm people.

A third series of obstacles to the right to development results from the lack of policy coherence and incentives to move from commitment to practice. States have not translated their commitment to this right into their decision-making where it matters. It is therefore difficult to expect them to introduce right to development considerations as such in their policies and programmes.

The motivation to introduce right to development concerns cannot be generated without incentives. Other strategies for development provide incentives for states to take far-reaching measures often resulting in targeted funding or debt forgiveness. For example, compliance with Poverty Reduction Strategies on the basis of the Economic Development Documents required by the IMF will result in an Extended Credit Facility (ECF) arrangement or the Policy Support Instrument (PSI). Adopting laws protecting intellectual property will bring the advantages of the TRIPS agreement. The right to development can only be compelling for those who find the principles on which it is based to be compelling. The ultimate advantage of respecting this right is a more just global and national

⁶¹ Bonny Ibhawoh, *The Right to Development: The Politics and Polemics of Power and Resistance*, *Human Rights Quarterly* vol. 33 (2011), 78.

⁶² A/HRC/15/WG.2/TF/2, paras. 49–64.

⁶³ A/HRC/4/47, para. 27 and A/HRC/4/WG.2/TF/2, paras. 86–87.

environment to ensure constant improvement of the well-being of all. However, the behaviour of decision-makers in development is rarely determined by the compelling long-term value of an abstract idea. Governments tend to commit on paper only to such visionary ideas but in practice pursue short-term economic or political gains. To date the right to development has provided only the former.

Where there is a legal commitment, such as in Africa, States parties have, generally, not acted in any significant way nor have treaty bodies reported in detail on the fulfilment of legal obligations. African Governments do take their commitment to the right to development seriously, as evidenced by the inclusion of article 22 in the African Charter of Human and Peoples Rights. However, the African Commission on Human and People's Rights has not taken any significant steps to monitor this right and hold States parties accountable, with the notable exception of one landmark decision concerning the violation by Kenya of the right to development as a result of an eviction of an indigenous group from a wildlife reserve⁶⁴ and the violation by the Republic of Sudan as a result of attacks and forced displacement of the Darfurian people.⁶⁵

Beyond the power of the concept of an international (moral or legal) obligation to pursue development that is comprehensive, human-centred and respectful of human rights, which is the essence of the right to development, the incentive to take this right seriously should be based on evidence, on the demonstrated advantage to be gained by making explicit reference to it in specific development actions and policies. In spite of the task force urging the Working Group to consider applying the criteria through context-specific reporting templates and to collect evidence of the difference, if any, of pro-right to development actions,⁶⁶ such evidence has not been collected, beyond the consolidated findings of the task force.

B. Superficial obstacles to implementing the right to development

While the obstacles discussed above make it difficult to envisage a bright future for the right to development, there are several other obstacles that are hotly debated in human rights bodies and in government statements but may, in fact, be a smoke screen for the deeper obstacles. These relate to the claimed imprecision of the right, the use of indicators, and the possible elaboration of a treaty norm.

The first obstacle is the assertion that the right to development as formulated in the 1986 Declaration is too vague to be useful. A leading scholar put it this way:

“the Declaration on the Right to Development was, from its inception onward, politically very weak. It was politically engineered as bad law: vague, internally contradictory, duplicative of other already clearly codified rights, and devoid of identifiable parties bearing clear obligations... [it was] so watered down that it became meaningless” and “has been devoid of any real impact.”⁶⁷

⁶⁴ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, decision 276/2003 of the African Commission on Human and Peoples' Rights, February 2010, available from www.minorityrights.org/download.php?id=748. In May 2009, the Commission found the Government of Kenya guilty of violating the rights of the Endorois, an indigenous community, including their right to development, by evicting them from their lands to make way for a wildlife reserve. The African Union approved of the decision at its January 2010 meeting in Addis Ababa.

⁶⁵ *Sudan Human Rights Organisation (SHRO) v. Sudan* (decision 279/03) and, *Centre on Housing Rights and Evictions (COHRE) v. Sudan* (decision 296/05), ACmHPR, holding of violation of Article 22 on May 27, 2009, available at <http://caselaw.ihrrda.org/doc/279.03-296.05/pdf/en/>.

⁶⁶ See A/HRC/15/WG.2/TF/2, *supra*, note 45, para 73.

⁶⁷ Peter Uvin, *Human Rights and Development*, Bloomfield, CT: Kumarian Press, Inc., 2004, 43.

The US delegation voting against the right to development resolution in 2003, stated, “there is no internationally accepted definition of such a right.”⁶⁸ The indeterminacy of the right as expressed in the 1986 Declaration would be problematic if the definitions were part of legislation to be enforced by national institution. However, international human rights instruments—even binding treaties—contain general pronouncements, which subsequent implementation experience, duly monitored, can clarify. Certainly, the right of “[a]ll persons deprived of their liberty [to be] be treated with humanity and with respect for the inherent dignity of the human person.” (ICCPR, art. 10) is conceptually no less vague than the right “to participate in, contribute to, and enjoy economic, social, cultural and political development.” (Declaration on the Right to Development, art. 1) In order to distill the entire declaration into a core norm, the task force proposed:

“the right of peoples and individuals to the constant improvement of their well being and to a national and global enabling environment conducive to just, equitable, participatory and human-centred development respectful of all human rights.”

To clarify further, it proposed three attributes, which correspond to the concepts of policy, process, and outcome. What *policy* must be advanced to realize the right to development? The answer in Attribute 1 is a “comprehensive and human-centred development policy.” *How* should this right be advanced? The answer, given in Attribute 2, is through “participatory human rights processes.” What should be the *outcome* of action to realize this right? The answer, in Attribute 3, is “social justice in development.”

Furthermore, each attribute is elaborated through 18 criteria, each of which is based on specific provisions of the Declaration on the Right to Development or on major resolutions of the General Assembly or Summit declarations of major international conferences, referenced in the task force’s report. The criteria were further elaborated upon by sub-criteria. Finally, indicators are provided for each of the sub-criteria, thus illustrating what is expected for measuring compliance.

Should the political will be found to transform the core norm, attributes and criteria into a set of guidelines or framework instrument, the lack of definitional specifics at this stage does not seem to pose a real obstacle.

The second objection to the right as formulated by the task force relates to the inclusion of these indicators. Some Governments are apprehensive about “indicators”, presumably concerned that domestic actions, which are the prerogative of the State, will be judged by others, even though the task force went to great pains to explain that the development of indicators was not an exercise in ranking or even judging countries, but rather in providing to the OEWG with operational sub-criteria in the form of a set of methodologically rigorous tools that can be used in determining where progress is occurring or stalling, and the next steps for promoting implementation of the right to development.⁶⁹ Indeed, NAM expressed “great concerns on the elaboration of indicators,” which the NAM explained, “was not part of the mandate of the taskforce.... Those indicators seem to represent a tool to assess the performance of governments at national level in the realization of political, economic, social and cultural rights, overlooking the

⁶⁸ Statement by Joel Danies, U.S. Representative to the U.N. Human Rights Commission, Comment on the Working Group on the Right to Development, 59th Sess. (2003), available at <http://www.humanrightsusa.net/statements/0425RtoD.htm> (last visited Feb. 16, 2003).

⁶⁹ *The right to development criteria and operational sub-criteria*, UN Doc. A/HRC/15/WG.2/TF/2/Add.2, 2 February 2010, para. 78.

role of international community. As such, use of indicators would further marginalize developing countries by emphasizing national responsibilities while not guaranteeing fulfillment of international obligations and a proper enabling environment.”⁷⁰

The premise of the indicators is that the right to development cannot be useful to alter development practice unless and until the actions of those responsible for development are assessed using professionally crafted tools of measurement. They provide a response to the legitimate question from development practitioners: “What do you want us to do differently?” The criteria and sub-criteria were written to be relatively long-lasting (between attributes and indicators as regards their lasting value) and suitable for inclusion in a set of guidelines or a legally binding instrument that development actors may use over the long term when assessing whether their own responsibilities or those of others are being met. The task force understood the term »operational sub-criteria« as used by the OEWG to refer to measurable sub-elements of broader criteria, that is, indicators. The importance of indicators was noted in the Secretariat report of 1979⁷¹ and the Global Consultation of 1990 stated in its conclusion that “the formulation of criteria for measuring progress in the realization of the right to development will be essential for the success of future efforts to implement that right. Such criteria must address the process of development as well as its results; quality as well as quantity; the individual as well as social dimension of human needs; and material as well as intellectual and cultural needs.”⁷² The task force mentioned them at its first session in 2004 and tried to reassure governments on the matter in its report on the criteria.⁶⁵ One of the present authors, who was responsible for the development of indicators in OHCHR, has outlined in detail the rationale and difficulties of indicators for the right to development.⁷³ The misgivings of some states, in particular NAM, which considered that the task force had exceeded its mandate by including indicators, should be overcome as they consider that any meaningful monitoring of the implementation of any human right, including the right to development, will need them.

The third matter on which countries have been strongly divided since the earliest discussions in the 1970s is whether it is appropriate to move towards a legally-binding instrument on the right to development. On this issue, the position of Western countries mentioned above runs head-on into the NAM position, formulated at each Summit of Heads of State and Government of the Non-Aligned Movement, in Malaysia in 2003, in Cuba in 2006, in Egypt in 2009, Iran in 2012 and Venezuela in 2016. In addition to numerous reference to the right to development, the heads of state agreed to “Urge the UN human rights machinery to ensure the operationalization of the right to development as a priority, including through the elaboration of a Convention on the Right to Development by the relevant machinery, taking into account the recommendations of relevant initiatives. [and to] Propose and work towards the convening of a United Nations-sponsored High-Level International Conference on the Right to Development.”⁷⁴

⁷⁰ “Submission in follow-up to HRC resolution 15/25 ‘The Right to development.’ Egypt on behalf of the Non-Aligned Movement (NAM),” available at <http://www.ohchr.org/Documents/Issues/Development/Session12/NAM.pdf>

⁷¹ “The emergence of the right to development,” in OHCHR, *Realizing the Right to Development*, 7, 11.

⁷² The Realization of the Right to Development: Global Consultation on the Right to Development as a Human Rights, HR/PUB/91/2, para. 171.

⁷³ Rajeev Malhotra, “Toward Implementing the Right to Development: A Framework for Indicators and Monitoring Methods,” in Bård Anders Andreassen and Stephen P. Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, revised and updated in second edition, Brussels: Intersentia, 2010, 245-272.

⁷⁴ 17th Summit of Heads of State or Government of the Non-Aligned Movement, Island of Margarita, Bolivarian Republic of Venezuela 17 - 18 September 2016, *Final Document*, 18 September 2016, NAM

The EU, the US, Canada, Japan and others numbering 50 who have opposed resolutions mentioning a treaty, have been consistently and strongly opposed to any commitment beyond the vague language of Council resolutions stating that the process “could evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement.”⁷⁵

The debate is unnecessarily polarized by the unproductive confining it to the Manichaean choice between a legally binding treaty or no treaty. In fact, existing treaty regimes already accommodate right to development issues within their legal and institutional settings. Other norm-setting instrument are used in the United Nations system, such as guidelines, codes of conduct or practice notes, which could be used to alter proactive to conform to the right to development. A range of international instruments could reinforce the commitments to the right to development, such as multi-stakeholder agreements and a framework convention.⁷⁶ Language for a general treaty has been proposed.⁷⁷ The task force did not take a position on how best to put into practice a comprehensive and coherent set of standards, as it was acutely aware of the political obstacles to any conclusion regarding a legally binding instrument. Its members did join a group of prominent international lawyers to assess the advantages and disadvantages of the full range of international legal processes that could be employed.⁷⁸

The NAM position insisting on a treaty appears to be a proxy for a desire to achieve progress in “greater acceptance, operationalization and realisation of the right to development at the international level.”⁷⁹ If the treaty route toward that objective were followed and the text balanced that national and international dimensions, it is not certain how many NAM countries would ratify. The debate is polarized but the underlying need for the international community to adopt ways and means of escaping from “political theatre” and affecting practice does not depend on the adoption of a formal treaty.

2016/CoB/DOC.1. Corr.1, para. 753.15 and 753.16, available at http://cns.miiis.edu/nam/documents/Official_Document/XVII-NAM-Summit-Final-Outcome-Documents-ENG.pdf; 16th Summit of Heads of State or Government of the Non-Aligned Movement, Tehran, Islamic Republic of Iran, 26-31 August 2012, *Final Document*, 31 August 2012, NAM 2012/Doc.1/Rev.2, paras. 577.13 and 577.14 available at <http://www.mea.gov.in/Images/pdf/final-document-of-xvi-nam-summit.pdf>. Similar statements had been adopted at the NAM summits in Kuala Lumpur, Malaysia, in February 2003, XIII Conference of Heads of State or Government of the Non-Aligned Movement Kuala Lumpur, February 24–25, 2003, *Final Document*, para. 345, available at www.bernama.com/cgibin/events/nam2003/speechnew_read.cgi?declare/dc2502_final; in Havana, Cuba, in September 2006, 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement, Havana, Cuba, 11th to 16th of September, 2006, *Final Document*, NAM 2006/Doc.1/Rev.3, Havana, Cuba, 16 September 2006, para. 235.10; and in Sharm el Sheikh, Egypt, XVth Summit of Heads of State and Government of the Non-Aligned Movement, Sharm el Sheikh, Egypt, 11th to 16th of July 2009, NAM2009/FD/Doc.1, para. 421.13.

⁷⁵ General Assembly resolution 64/172, para. 8. Human Rights Council resolutions occasionally omit the second “could” before “evolve”, which creates an unnecessary ambiguity: “3. Decides: ... (h) That the Working Group shall take appropriate steps to ensure respect for and practical application of the above-mentioned standards, which could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature through a collaborative process of engagement.” Human Rights Council resolution 15/25, para. 3(h).

⁷⁶ On a framework convention, see Koen De Feyter, *Towards a Framework Convention on the Right to Development*, Geneva: The Friedrich-Ebert-Stiftung, April 2013.

⁷⁷ Stephen P. Marks, Beate Rudolf, Koen De Feyter and Nicolaas Schrijver, “The role of international law,” in OHCHR, *Realizing the Right to Development*, 449-452

⁷⁸ Stephen P. Marks, ed., *Implementing the Right to Development: The Role of International Law*, Geneva: Friedrich Eber Stiftung; and Boston, M.A.: Harvard School of Public Health, 2008.

⁷⁹ 16th NAM, *Final Document*, Para. 577.12.

IV. Conclusion: Prospects for the future

The emergence of the right to development in human rights diplomacy, as we hope the review of the drafting of the Declaration and subsequent negotiations has shown, offers lessons in the law and politics of human rights and development. All governments accept that these two goals of international order are interrelated and most see the right to development as a conceptual and even practical tool for clarifying that interrelationship. As the articulation of mutual obligations moves from the abstract to the specific—notably through the efforts of the Independent Expert and the High level task force—the obstacles to progress in terms of impact on development practice become apparent.

We explored three structural and three superficial obstacles. The deeper political divisions we reviewed relate to aid effectiveness and national ownership, trade and investment, and lack of policy coherence and incentives to take practical steps. The superficial obstacles are the claimed indeterminacy of the norm, the denunciation of indicators, and the clamoring for a treaty.

The prospects for breaking out of the current stalemate are bleak, at least in the short term and the significance of this issue for the future of the relation between human rights and development. It is easier to affirm their mutually reinforcing nature in principle, as reaffirmed in numerous UN resolutions, than to apply this principle to decisions of policy and resource allocation, which is the purview of planners and implementers for whom development implies establishing policy priorities and addressing trade-offs in resource allocations and benefits, intra- and inter-temporally. Thus, the overarching lesson of this experience is that the right to development requires that these priorities be consistent with human rights, in policy, processes and outcomes. In an increasingly interdependent world, States and non-State actors help to shape these priorities and trade-offs, with the primary responsibility of meeting priorities and ensuring enjoyment of human rights remaining with States, through national policy and commitments under international arrangements.